13 Drug-Related Crime and Criminal Justice Issues in Malta.*

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When I was first approached some three weeks ago to deliver this paper, I was, I must admit, a bit sceptical about the whole idea of participating in this conference. First of all as a judge I am naturally a bit wary of talking in public about matters which, directly or indirectly, fall within the competence of one or more of the courts to which I am ordinarily assigned by the Head of State. A judge – at least a judge of the 'English' or 'Scottish' mould to which Maltese judges have generally looked for inspiration and emulation as to ethical behaviour – is trained to speak his mind on important issues only in the judgements he delivers, and then only to the extent that may be necessary for the determination of the issue or issues in the case and/or to the extent that the judgement in question would benefit from the expression of such views. On the other hand, as a university lecturer, I am occasionally asked some searching question by the unusually bright student which calls for more than just a statement of what the law is. In that case I usually very readily subscribe, at least temporarily, to the 'continental' model of the judge – on the continent judges are less inhibited when it comes to expressing their views in public and out of court (and in some countries, teaching in universities is the only 'other activity' in which a judge may lawfully and ethically indulge).

The second reason why I was sceptical is that so much has been said, and is still being said, about the 'drugs problem' in Malta that I was doubtful whether I could really contribute anything new to the discussion. Much has been said and written over the last fifteen or twenty years in connection with this problem, and much has also been done, both by Government agencies and voluntary agencies by way of attempting to find 'solutions'. On the other hand, and upon further reflection, I realized that much of what the general public knows about the criminal justice system in general, and with regard to the 'drugs problem' in particular, is, of course, mediated through newspapers and radio and television reports and programmes, and not as a result of first hand experience. This often leads to a distorted picture or, perhaps I should say, to 'distorted pictures' (in the plural) of what goes on in court. Judgements, the conduct of the prosecution in a particular case, the conduct of defence counsel, the law itself – all these are criticized even though the person writing in the newspaper or reporting on the radio or TV station in the majority of cases does not have all the facts of the case before him. He is usually more interested in the unusual, in the sensational: after all it is the unusual and the sensational that will attract the reader, the listener or the viewer, that will raise sales or viewership or listenership. Needless to say, it is very easy to criticize, especially when one does not have the responsibility of deciding on the fate of a fellow citizen while at the same time keeping in mind the legitimate interests of society as a whole; it is easy to criticize when one does not have the difficult task of marshalling the evidence for the prosecution, or when one does not have the often unenviable task of testing the prosecution evidence on behalf of the accused. I must admit that I know very few people who work in the media who subscribe to Matthew Arnold's definition of criticism: 'a disinterested endeavour to learn and propagate the best that is known and thought in the world'. What is more, politicians periodically hijack the 'drugs problem'; each one of our two major political parties attempts to outdo and outshine the other as to what is being done to fight the scourge of our times; statistics are thrown about with gay abandon, unmindful of the statistician's first canon of faith, namely 'that there are three types of lies: lies, damned lies and statistics'. Of course, lip service is paid to the proposition that the 'drugs problem' should not be politicized, but make no mistake about it, the 'drugs problem' is a vote catcher or vote loser and a hot potato in political circles: suffice it to remember that in the recent past two ministers of justice have had their ministerial career upset because of what was regarded as 'politically inappropriate' behaviour in administratively handling certain matters related to drug offenders.

What I propose to do in the time allotted to me is to share with you some views on how the law relating to drug abuse

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has evolved over the years in Malta, how it has attempted to deal with the upsurge in drug abuse since the early seventies; and to identify some of the practical difficulties which judges and magistrates in the main, but also prosecutors and defence counsel, encounter in the application of the relevant laws. To some of you what I have to say may not be new, in which case I crave your indulgence and ask you to be patient for the next thirty minutes. I do not expect any of you to agree with opinions that I may express; and, indeed, after I deliver this paper I would be very pleased to have some reaction, especially by way of criticism, to some of the views I will be expressing. I will also be very happy to answer any question on matters which I will not be covering but which are related to the general title of this plenary.

The first thing to bear in mind is that in reality there is not just 'one' law dealing with the fight against drug abuse. Although undoubtedly the most commonly known – I hesitate to use the phrase 'the most popular' – is the Dangerous Drugs Ordinance, there are in reality a number of other laws which are applied, often contemporaneously, in connection with any one particular case: the Criminal Code, the Customs Ordinance, the Medical and Kindred Professions Ordinance, the Probation of Offenders Act, The Prevention of Money Laundering Act are perhaps the most important statutes that generally go, in various permutations or combinations, into the equation. Of course the laws which criminalize certain forms of drug possession, drug taking or drug trafficking are the Dangerous Drugs Ordinance and the Medical and Kindred Professions Ordinance (together, of course, with the subsidiary legislation made pursuant to these two main, or parent, laws). The latter law was promulgated a hundred years ago – in 1901. This law, as the title implies, was never intended to be a weapon in the arsenal for the fight against drug abuse; in 1901 research on drug addiction by the medical profession was still in its infancy. Only years before (in the 1890s), the German scientist Heinrich Dreser had commercialized diacetylmorphine (today known as diamorphine) and called it 'heroin': it was really a trademark to mean powerful or heroic. Its use was advocated as a non-addictive treatment for coughs and chest and lung ailments; and the Bayer company advertised heroin in the same way as it did aspirin and other products until the addictive properties of heroin became apparent. The Medical and Kindred Professions Ordinance was originally intended only to organize or regulate the medical profession in Malta, as well as professions such as those of veterinary surgeon, apothecary, midwife, dentist and so on. This law got dragged into the fight against drug abuse simply because some of its provisions, quite incidentally, happened to deal with the sale and prescription of certain drugs. In fact it was quite late in the day – in the mid-1980s – with the Drugs Control Regulations of 1985, made pursuant to this Medical and Kindred Professions Ordinance, that this law was finally utilized to full effect to try and stem the abuse with the so-called psychotropic drugs, these being in turn subdivided into restricted and specified drugs. It was also in 1985 that some of the provisions of the Dangerous Drugs Ordinance, such as the provision distinguishing between prosecution before the Magistrates' Court and prosecution before the Criminal Court, began to be translated into the Medical and Kindred Professions Ordinance. The result is that to-day we have two separate laws, in many respects with identical provisions (some of which are applied merely by way of cross reference), one of which deals with such drugs as cannabis, heroin and cocaine and the other with drugs such as – to mention the most popular – 'ecstasy' (MDMA) and 'angel dust' (phencyclidine). Over the years the various amendments to the Medical and Kindred Professions Ordinance in that part dealing with drug abuse and the fight against drug trafficking – with its 'freezing orders', 'investigation orders' and 'attachment orders' – have made this law more complicated than the Dangerous Drugs Ordinance. Perhaps it is time that these two laws be consolidated into one, at least as far as drug abuse is concerned, which would do away with unnecessary repetition and cross references. Allow me, however, to concentrate on the Dangerous Drugs Ordinance which is still regarded, and perhaps rightly so, as the main law in connection with the fight against drug abuse.

This law was enacted just before the outbreak of the Second World War, in 1939, and was intended in large measure to give effect to three international conventions which by that time had been signed by the imperial government, namely the Hague Convention of 1912, and the First and Second Geneva Conventions which had been signed on behalf of His Majesty's Government in February 1925 and in July 1931 respectively. For over thirty years this law remained unchanged. No only that, but it was a law with which most lawyers, including criminal lawyers, were totally unfamiliar. When I was a law student at the University here in Malta – and I assure you that that was not in the days of the Boer War but between 1970 and 1975 – none of our lecturers ever even mentioned this law. The reason was, of course, that till that time drug taking or drug abuse was not, or was not perceived as, a social problem. As a student, my perception of illicit drug taking was the smoking of marijuana by American GIs in Vietnam, about which one occasionally heard on the radio and on television. To be honest, I did not even know that marijuana was cannabis, and if anyone asked me what '*qanneb*' was, I would immediately refer him to that stuff which the plumber used to seal the joints of water pipes!

As I am sure most of you know, one of the unusual features of our drugs legislation is the discretion enjoyed by the Attorney General in deciding whether a person is to be tried

before the Court of Magistrates as a Court of Criminal Judicature or before the Criminal Court. Depending on this decision, a person may, for the same offence — for example, trafficking in cannabis — be liable either to life imprisonment (if he is tried before the Criminal Court) or to a maximum of ten years imprisonment (if he is tried before the Inferior Court). This feature is to-day found in both the Dangerous Drugs Ordinance and in the Medical and Kindred Professions Ordinance, but owes its origin to the former law. Let me make it quite clear from the outset that our Constitutional Court some years ago (in 1990) ruled that the existence of this discretion did not *per se* violate the provisions of the Constitution or of the European Convention on Human Rights guaranteeing the right to a fair trial and the right to freedom from discrimination. Even before the first amendment to the Dangerous Drugs Ordinance was effected in 1975, the possibility of trying an individual for the same offence either before the Criminal Court or before the Court of Magistrates existed, but the wording of the relevant provision (it was then subsection (3) of Section 22) was such that it was quite clear that the rule was that a person was to be tried before the Magistrates' Court; only if the Governor certified that it was desirable that that person be tried before the Criminal Court (and therefore liable to the higher punishment) was he to be so tried before that Superior Court. Recourse to the Governor (later the Governor General and the President) was in itself an exceptional measure, and therefore one was justified in arguing that only in exceptional circumstances was a person to be tried before the Criminal Court. And, indeed, the Constitutional Court, in the 1990 judgement I have just mentioned, stated that this discretion is in the nature of a quasi-judicial discretion, and that implicit in this discretion is the understanding that the Attorney General is to bring the more serious cases before the Criminal Court and the less serious ones before the Magistrates' Court. Of course, the gravity of any given offence must be assessed taking into consideration all the circumstances of the case; the gravity of a case cannot be assessed simply by looking at the quantity or the nature of the drug involved, although undoubtedly the quantity and, to a lesser extent, the nature, are prime considerations. What the Constitutional Court seems to be saying is that it would not be correct for the Attorney General to send a person to be tried by the Criminal Court and, for the same or identical facts to send another person to be tried before the Inferior Court.

The first amendment in 1975 merely introduced a distinction, as far as trial before the Magistrates' Court was concerned, between a first conviction and a second or subsequent conviction, making, of course the latter liable to a higher punishment. No distinction was, at this stage, made between what I would call the 'simple addict' – that is the person who is in possession of a drug for his own personal use – and the drug trafficker. The first and substantial change in the law came in 1980. Act XXIII of that year did a number of things. First of all it increased substantially the list of drugs to which the Ordinance applied – these were added in the form of a schedule – the First Schedule – to the Ordinance. Secondly, the punishment in the case of trial before the Criminal Court was increased from a maximum of ten years to a maximum of twenty years (in 1980 twenty five years was the maximum determinate sentence of imprisonment that was possible under the Criminal Code). Thirdly, the discretion which had hitherto been exercised by the Head of State as to the choice of court was transferred to the Attorney General. Finally in 1980 we also have the first attempt to distinguish between the 'simple addict' and the 'trafficker': in fact, although the law provided that the Attorney General was now to direct whether a person was to be tried before the Superior Court or the Inferior Court – with the consequent difference in the punishment to which he was liable – the law also provided that, and I quote:

> ...where the Attorney General or the Court, as the case may be, is satisfied that the offender is not a person who cultivates, produces, sells, or otherwise deals in any drug, and the offence consists only in the possession of a dangerous drug for the exclusive use of the offender, or of utensils for that purpose, or consists in the taking of any such drug (i) any such person shall not be tried before the Criminal Court and shall not be liable to imprisonment and (ii) where any such person as aforesaid is, on the date on which the offence is discovered, registered as a person who is under treatment for addiction to drugs, in such manner and in accordance with such arrangements as may have been made by the Minister responsible for health, and, is certified under those arrangements to be following the treatment prescribed to him, such person shall be exempt from any punishment in respect of any of the said offences committed while he was registered as aforesaid.

Moreover this same amending act, in subsection (8) of Section 22, provided that:

> Where it results to the Court, that the offender, not being a person who cultivates, produces, sells or otherwise deals in any drug, is in need of medical care and assistance for his rehabilitation, the court may, instead of applying any of the punishments provided for in the foregoing subsections, order that the offender be remitted to an institution designated for the purpose by the Minister responsible for health in order that he may be given the necessary treatment. The Court shall cause such order to be forthwith conveyed to the Minister responsible for health, who will give such directives as he may deem fit for the care and treatment of any such person.

Here we have the first indirect admission and recognition by the legislature that the drugs problem, at least in the form represented by the 'simple addict', is in reality not a criminal

justice issue or problem, but a public health issue. The 'simple addict' was not to be tried before the Criminal Court but only before the Magistrates' Court; he was not liable to imprisonment but only to pecuniary punishments; if he was a registered addict and following treatment, he was not to be subjected to any punishment; and, in any case, if he was in need of medical care and assistance for his rehabilitation, the court could, instead of fining him, commit him to an institution designated by the Minister of Health for the purpose, and the Minister of Health would in effect take over by giving the necessary directives as he thought fit for the care and treatment of such person.

This amendment sounded like a perfect solution. In fact it had two fundamental flaws. The first flaw is that 'public health issues' and 'criminal justice issues' do not quite mix with the same ease of gin and tonic – in fact I would say that they do not mix at all. The primary role of the criminal justice system is not to rehabilitate or cure or provide treatment: neither its procedures nor its methods are intended or suited for that purpose. The primary role of the criminal justice system, with its more or less rigid, judgmental attitudes based on concepts or morality, of what is right and of what is wrong, is to protect society by repressing, with its array of punishments, behaviour which is regarded as dangerous to that society. To deter and to put away if necessary remain, in spite of all that is said and written about the rehabilitation of offenders, the primary response of the criminal justice system. 'Public health', on the other hand, is not concerned with assigning guilt or with punishing, but with the prevention of the spread of disease. If the 'simple addict' was a public health issue, he should under no circumstance have been arraigned before the courts of criminal justice, and the matter should have been taken in hand straight away by the Minister of Health without the courts of criminal justice having to intervene. After all it sounds, and I would venture to say it is, inhumane to punish someone simply because he is sick – and health issues imply sickness . Moreover I am sure that those of you who are members of the medical profession will agree with me when I say that lawyers, including judges and magistrates, are among the least competent persons to deal with public health issues (a lawyer and a doctor in court, especially when the latter is being savaged in the course of examination or cross examination, are like the proverbial *diavolo* and *acqua santa*!) But there was another, more practical problem, to the solution proposed in 1980. The line of demarcation between the 'simple addict' and the person who deals in drugs is a very fine one indeed, and very often the one figure merges into the other. We have all come across the person who, in order to support his addiction, resorts to peddling the drug himself, or the drug addict who 'shares' his wares with others who are similarly inclined or equally addicted. And that, as we know, amounts to 'trafficking'. The law did not make, and still does not make, and possibly cannot make, a clear-cut distinction between the trafficker who is primarily an addict and the trafficker whose addiction is only secondary to trafficking. I will, however, later on argue that it may be possible to isolate for practical purposes the 'simple addict'.

But allow me to return to the Dangerous Drugs Ordinance. The next major amendment to this law came in 1986. This amendment was intended to hit hard the 'trafficker', including, of course, the trafficker who was a drug addict. The crime of 'conspiracy for the purpose of selling or dealing in a drug' was introduced; the law also extended its extra-territorial arm and made it a criminal offence for any citizen of Malta or permanent resident of Malta to do any act outside Malta which, if committed in Malta, would amount to the offence of selling or dealing in a drug or to the offence of conspiracy for the purpose of selling or dealing in such drug. As for punishment, the law began to distinguish between trafficking and conspiracy to traffic on the one hand, and most other offences on the other hand, the former being, of course punished more severely by raising the minimum punishment which could be applied. The 1986 amendment did not alter the legal situation as far as the 'simple addict' was concerned: he was still not to be tried before the Criminal Court and was not liable to imprisonment; if he was a registered addict and receiving treatment he was not liable to punishment at all; and if the court was satisfied that he needed 'care and assistance for his rehabilitation', it could, as I have already said, instead of imposing a pecuniary punishment, send him off to be cared for by the Minister of Health in an institution designated for the purpose. To be quite honest, I do not recall from my days in the Attorney General's Office whether any institution was ever designated for the purposes of subsection (8) of Section 22. One other feature of the 1986 amendments was the provision for a diminution of punishment in the case of a person who has helped the police to apprehend the person or persons who supplied him with the drugs. While one can understand the *raison d'être* of this provision, one cannot help feel, in a number of cases that come before the courts, that the accused or the person being interrogated by the police will readily mention anyone as the supplier of the drug in the hope of obtaining a reduction of punishment. It is true that the law requires that the accused should have actually helped the police to apprehend the supplier, and not merely indicated any person who, perhaps, cannot even be traced by the police; it is also true that the courts have generally interpreted the expression 'apprehended by the Police' to mean that the police or, as the case may be, the court is reasonably convinced on a balance of probabilities that the person indicated as the supplier and who has been arrested by the police is in fact the supplier; this provision is, in any case, one that has to be applied with

the greatest caution and circumspection by the police and by the courts – miscarriages of justice in Italy due to the so-called '*pentiti*' are all too familiar to us.

The year 1994 marks an important turning point. Act VI of that year, which amended the Dangerous Drugs Ordinance, did away completely with the idea that the 'simple addict' was not liable to imprisonment. Henceforth, even the 'simple addict' could be imprisoned from a minimum of twelve months to a maximum of ten years if tried and convicted before the Criminal Court or from a minimum of three months to a maximum of twelve months if tried and convicted before the Magistrates' Court. The law no longer stipulated, as it had done until then, that the 'simple addict' was not to be tried before the Criminal Court – though it must be said, and this is a credit to the way the Attorney General has managed the law up to now, that I know of no case where a 'simple addict' was ever tried before the criminal court except in cases where the charge of possession was brought together with charges of other crimes (for example, theft, fraud, living on the earnings of prostitution and so on) which fall to be tried by the said Criminal Court. The 1994 amendments, however, provided that in the case of the 'simple addict', if the court was of the view that the person convicted was 'in need of care and assistance for his rehabilitation from dependence on any dangerous drug' the court could (notice the optional nature of the provision) instead of applying any of the punishments prescribed, place him on probation under the provisions of the Probation of Offenders Act. With regard to the 'trafficker' (irrespective of whether or not he is also an addict) the 1994 amendments expressly ruled out (in subsection (9) of Section 22) the possibility of either a Probation Order or a suspended sentence of imprisonment. However, recognizing that also the 'trafficker' may be 'in need of treatment for his rehabilitation form dependence' on a dangerous drug, the legislator, in subsections (10) to (14), introduced a complicated procedure whereby a so-called 'order for treatment' can be made. To date, I have not seen one such order, and although I have not had the time to research the matter properly, I very much suspect that no such 'treatment order' has in fact ever been made by any of the courts of criminal justice. Basically, the treatment order which may be made with regard to a 'trafficker' involves

1. the written certification by the Minister responsible for public health that such treatment may be given in prison,
2. the person convicted agrees to submit to such treatment,
3. the punishment of imprisonment is reduced by one third and
4. the order must also specify the 'treatment period'.

If the court which made such order is satisfied, upon an application by the Attorney General, that the person in question has, without valid reason, either refused the treatment, or has conducted himself in a manner as to make his treatment, or that of other prisoners, difficult or ineffective, the court will revoke the 'treatment order' and the prisoner looses the benefit of the one third reduction in his prison sentence (that is the original period of imprisonment will have to be served). The order may even be revoked at the request of the prisoner himself, in which case also the original period of imprisonment will have to be served.

Finally, in 1996, in a move clearly designed to send the necessary signals to drug traffickers, Parliament increased the maximum punishment which can be awarded by the Criminal Court to life imprisonment. Life imprisonment is applicable, among other situations, to the following:

1. those who cultivate the opium poppy (the *Papver somniferum*) or the coca plant (*Erythloxylum coca*),
2. those who cultivate the plant cannabis,
3. those who sell or deal in a drug contrary to the provisions of the Ordinance,
4. those who conspire for the purpose of selling or dealing, and
5. those found in possession of a drug under such circumstances that that the Court is satisfied that such possession was not for the exclusive use of the person in whose possession that drug is found.

All these are liable to the punishment of life imprisonment if tried before the Criminal Court. The Criminal Court, however, is authorized (that is may not apply, not must not apply) not to apply the punishment of life imprisonment and to apply instead the punishment of imprisonment from a minimum of four years to a maximum of thirty years in either of these two circumstances:

i. if it is of the opinion, taking into account the age of the offender, his previous conduct, and the quantity of the drug concerned, that the punishment of imprisonment for life would not be appropriate, or (the second circumstance)
ii. if the verdict of the jury is not unanimous.

This second circumstance was clearly intended to mirror a provision in the Criminal Code which provides that in the case of those offences which, as a rule, carry the mandatory sentence of imprisonment for life (for example, wilful homicide, arson endangering life, or if you set fire to a vessel of war, a public dock or an artillery park) a determinate sentence of imprisonment may instead be awarded by the court if the jury is not unanimous in its verdict of guilt (in other words if they return a majority verdict). The first exception (or circumstance) to the life imprisonment rule for 'traffickers' was clearly dictated by the wide definition of the word 'trafficking' or, to be more precise, the word 'dealing' (we generally use the word 'trafficking' because the Maltese rendering of the word 'dealing' is '*jitraffika*'). By an express provision in the Dangerous

Drugs Ordinance, the word 'dealing' with reference to dealing in a drug, includes cultivation of that drug, its importation into Malta in such circumstances that the court is satisfied that such importation was not for the exclusive use of the offender, the manufacture of a drug, its exportation, distribution, production, administration, supply, the offer to do any of these acts (for example, the offer to supply) and – something which is not very widely known – even the giving of information intended to lead to the purchase of such a drug contrary to the provisions of the Ordinance amounts to 'dealing' or 'trafficking'. Let us take this hypothetical scenario: a person – we shall call him John – is a drug addict and, let us say, has been addicted to heroin for a number of years. He has never shared his heroin with anyone, never sold it, and always had in his possession just enough to satisfy his personal needs for that day and for the immediate future. One fine day, however, he tells another person from where he is buying the heroin because that other person wants to buy the stuff himself, and clearly intending that that other person should avail himself of the same source of the drug. If John is tried before the Criminal Court – let us say because the charge of trafficking is brought together with a charge of theft – John is liable to a punishment from a minimum of four years to a maximum of life imprisonment – although one would assume in such a case that the Court will apply the exception and award not life but a determinate prison sentence. The court cannot put John on probation; nor can it award a suspended sentence of imprisonment; nor can it go below the minimum of four years unless it can be ascertained that John has in fact helped the police to apprehend the person who was supplying him with the drug – who could well be another addict! Moreover the Criminal Court must also impose a fine ranging from a minimum of one thousand Malta Liri to a maximum of fifty thousand Malta Liri. Now, what is clear is that what John is most in need of is to help him to part with his drug habit. But faced with such a charge, and aware of the punishment which he could be awarded, even if in its minimum, he is unlikely to plead guilty at the start of committal proceedings. The compilation of evidence commences, and it may be months before the Attorney General files the Bill of Indictment in the Criminal Court. By the time this indictment has been filed, John is undergoing a rehabilitation programme. The question is often asked – did John have to wait until he was caught and arraigned in court to commence such a programme? Is this not just a defence ploy to try and get the court to be as lenient as possible at the sentencing stage? It is here that a judge or magistrate must exercise considerable caution. Undoubtedly there will be cases where the programme is undertaken for improper motives; but one must not forget that very often in a person's life, especially a person whose life is dominated by some form of addiction – be it to drugs, alcohol, cigarettes or gambling – it takes a dramatic turn of events to get that person to change into a different gear and to really start doing something about the problem. From my own experience as a judge, I can tell you that nothing gives me more satisfaction than to see someone whose life was in shambles picking up those pieces with the help of others and putting some order into his life – and I must here pay tribute to the professionalism and dedication of our probation officers without whose help a judge or magistrate is, in some cases, lost when he comes to the sentencing stage in cases similar to John's.

To get back to our John, by the time his case comes up for trial before the Criminal Court, he has successfully completed the rehabilitation programme; he is, perhaps for the first time in his life, gainfully employed: yet the nature of the drugs charge makes it mandatory for the Criminal Court to impose at least a four year prison sentence and a minimum fine of a thousand Malta Liri (convertible into another three months imprisonment if not paid according to law). Even if John were to be tried before the Magistrates Court, he would have to be sentenced at least to the mandatory six months imprisonment and a fine of not less than two hundred Malta Liri. I have chosen an extreme example precisely to illustrate the core problem in the application of the Dangerous Drugs Ordinance. More or less the same could be said to arise as far as the Medical and Kindred Professions Ordinance is concerned. The core problem is: how is the court to deal with the addict? Should the addict be a problem with which the criminal justice system is concerned?

Persons who are charged under the Dangerous Drugs Ordinance could be classified, broadly speaking, into five categories:

There is first of all what I have chosen to call earlier on the 'simple addict'. He is the person who is dependent of drugs, buys drugs for his own personal use and never has more in his possession than he actually needs for that day or the immediate future. He does not 'share' the drug with others nor peddles it in any way. Should the 'simple addict' be the concern of the criminal justice system, or should he be dealt with as a public health issue? On this particular point Avram Goldstein, Professor Emeritus of Pharmacology at Stanford University in the United States, makes the following suggestion in his book *Addiction: From Biology to Drug Policy*: 'Drugs policies,' he says, 'have too often been driven by public panic and media hysteria, to which politicians respond by whatever actions they think will be reassuring in the immediate crisis. This pattern does not address the real need. It is time to return the drug problem to the domain of medicine and public health, where it belongs. For many reasons it is logical to approach drug addiction as if it were an infectious disease. Such concepts as incidence, prevalence, relative immunity and genetic and environmental influences on susceptibility can be applied

to both. Attempts at prevention, eradication, education, treatment, relapse prevention and containment are comparable. And important for preventing the spread of drug addiction is the fact that – as with infectious diseases – it is primarily the newly infected who transmit the condition to their peers. Quarantine, which has sometimes been used in severe and life-threatening epidemics, can be an effective tool... but it always raises ethical and legal issues concerning the degree to which it is permissible to restrict the personal liberties of those who are infected in order to protect those who are not' (p. 308). What I ask you to consider, ladies and gentlemen, is whether the 'simple addict' should remain the concern of the criminal justice system, or whether he should be dealt with by the public health authorities in the same way that they deal with infectious diseases and without reference to the courts of criminal justice. Of course, when referring to the 'simple addict' as the person who may be in possession of a drug for that day's need and for his immediate future, the question invariably arises: but of how much drug are we talking in terms of quantity? This is one of the most difficult questions that judges and magistrates have to address in connection with the offence of possession of a drug in such circumstances which indicate that that drug was not for the exclusive use of the possessor. Possession in such circumstances is equated under our law with trafficking as far as punishment is concerned, whether the person is tried before the Criminal Court or the Inferior Court. The same problem is encountered by English courts with the analogous offence of possession with intent to supply under Section 5(3) of the (English) Misuse of Drugs Act, 1971. How much is a person's requirement for a day or two days is always something very difficult to gauge; in practice I have found that even experts, whether analysts or medical doctors, are often unwilling – or, perhaps, in reality, unable – to give evidence of a person's daily requirement of a drug because of the variables of tolerance and dependence. If, however, the 'simple addict' is to be siphoned off from the criminal justice system, it would be necessary for the legislator to determine the minimum amount of each drug that would indicate possession for one's exclusive use.

The second category is the addict who traffics to maintain his habit. He clearly poses a threat to society, and one can legitimately argue that the criminal justice system should continue to deter his behaviour by its system of punishments. In the case of this person, however, I believe it is important to ensure that once the courts have passed judgement and awarded punishment it should be able for him, either contemporaneously with or after the expiration of the punishment, to undertake the necessary rehabilitation programme. This means that the criminal justice system should not, of itself, be an obstacle to such a programme and to the possibility that he be reintegrated into society. It is highly desirable in the case of people falling into this category that their case be dealt with by the criminal justice system as expeditiously as possible – perhaps a 'fast track' system could be devised for these persons, at least before the Magistrates' Court. A person in this category should also be arraigned in Court as quickly as possible after he is caught, and not months or years after (though, as a former prosecutor, I appreciate that there could be problems with the staggering of cases, so that those whose case has been decided can give evidence in someone else's case) The system should also ensure that if the person has several cases of the same kind pending, these should be joined into one case so that he can benefit from the rules governing concurrence of punishments; this would also ensure that after the person has served time, he will not, instead of picking up his life, have to face further court proceedings. Moreover, in the case of persons in this category, there should be minimal use of fines. According to law, a fine has to be paid upon completion of the more severe type of punishment, that is after serving the period of imprisonment. If, after serving a term of imprisonment, with possibly some progress by way of rehabilitation having been made, the person concerned is faced with a substantial fine which he either cannot pay and therefore has to serve time in lieu, or which will push him into financial debt, it may well be that further progress with his rehabilitation will be impossible.

The third and fourth categories comprise the trafficker who happens to be an addict, and the trafficker who is not an addict. These persons present a law enforcement problem: they are generally the 'big fish' who are not easily caught. Unfortunately it is quite tempting for the police to go after persons in categories one and two to inflate police statistics; to apprehend persons in categories three and four usually requires long term planning, surveillance, the use of precious resources. It is for persons in these two categories that that the legislator has generally kept increasing punishments up to the present life imprisonment.

Finally there are those who 'experiment' with drugs without being either addicts or traffickers. This seems to be particularly the case with young people using designer drugs such as ecstasy. Some people argue that youngsters experimenting with drugs need only a firm slap on the wrist and not criminal sanctions or treatment. I beg to differ. Here we are dealing with a drug (I am referring to ecstasy) which, as most of you know, is particularly dangerous because it gives the appearance of being innocuous – possibly because it does not lead to physical dependence – when in reality it is extremely dangerous because of its unpredictability and the damage it causes to certain brain neurons even in minor doses. If social constraints and the education system have failed to keep youngsters away from this type of drug taking, the short, sharp, shock 'treatment' of moderate fining and/or short terms of

imprisonment could perhaps bring some of these youngsters to their senses. I was particularly disturbed earlier this year when presiding over a trail by jury of a person who was charged, among other things, with the involuntary homicide of his friend after he had supplied him with just one ecstasy pill. What disturbed me was not so much the death itself, as the ease, the nonchalant way, with which the various witnesses, who were friends both of the victim and of the accused, took this drug much in the same way as you or I would consume things like Rowntree's Fruit Pastilles! Clearly something is wrong in the State of Denmark if so many of our youngsters are prepared to play Russian roulette!

Of course, drug related crime includes not only drug taking and drug-pushing; in Malta over the years we have also seen a considerable amount of crimes against property, largely petty thieving, to finance drug taking. Persons charged with these crimes, who also happen to be addicts and where the crime is somehow related to the addiction, should be treated in the same way as those addicts falling into category two.

Ladies and gentlemen, I would have liked to say much more – never let it be said that a lawyer is at a loss for words – but I am sure I have said enough. I hope I have given you a little bit of food for thought. If I have not, I apologize for wasting your time. Thank you.