# PUNISHING A RECIDIVIST

*Magistrate Consuelo Scerri Herrera*

The punishment of repeat offenders should in principle be harsher than the punishment of first-time offenders. However it is the opinion of the writer that this asymmetry is obviously just a rough structure. It leaves a lot of room for interpretation.

I shall be treating the topic under examination from three dimensions. I shall first start with a brief outline on the general importance of punishment in Criminal Law. Then, I shall proceed to explain the definition of recidivism and the way it is dealt with in our Criminal Code. Finally, I will touch on the fact as to whether our local courts have any restrictions on sentencing a recidivist in other words if there are any types of punishments that cannot be meted out to recidivists, in particular the applicability of the suspended sentence.

To be able to understand the significance of punishment in Criminal Law, one must first try and analyse the scope and nature of Criminal Law in general. Criminal Law is a public law which is aimed at keeping order and peace in a civilised society. It is perhaps the government's weapon to enforce the positive law of the state. Had there been no such law there would be no harmony, for laws would be broken casually and people will have to rely a lot on self-help as happened in very primitive societies.

As Criminal Law gradually evolved and developed through the ages, so did the significance of punishment. Historically, the punishment that was to be meted out was to serve as a deterrent and at times a form of retribution. In fact certain famous historians, like Cesare Beccaria in Italy, Jeremy Bentham in England, and PJA von Feuerbach in Germany, three classical exponents in the field of Criminology, based their theory of punishing crimes by deterring the wrong doer. In fact, as was illustrated by Johannes Andenas, the Encyclopaedia of Crime and Justice under the sub heading of Deterrence states the following:

> The central idea was that the threat of punishment should be specified in the mind of the potential law breaker, the fear of punishment should be

> specified so that in the temptation to commit the crime. The penalty would outweigh the temptation to commit the crime. The penalty should be fixed by law in proportion to the gravity of the case.

These studious personalities however rarely considered the moral aspect of Criminal Law, when in reality this aspect is the prevailing aspect, since Criminal Law does not only consist of a scale of crimes and punishments in an abstract fashion but it is essentially an expression of society's disapproval to a pattern of behaviour.

During the last century, and undoubtedly in the current one, the treatment and rehabilitation of the wrong doer is of paramount importance. However, during this process unfortunately there are those who believe that the concept of deterrence is non effective even though this concept was never abandoned. In fact, today this concept is again being studied and researched and hence the neo classical school of Criminology which still gives importance to this concept, although it has never been accepted that a judge should meet out an exemplary judgement with the purpose to act as a deterrent to the potential wrong doer rather than to punish the wrong doer for his wrongful act. This type of judgement would undoubtedly be considered as excessive since its sole purpose would be to serve as an example to others.

In reality, the severity of punishment from the point of view of deterrence is envisaged in the parameters that the legislator lays out when enacting the law. In other words, the law itself establishes the minimum and maximum that can be awarded and it is this parameter that enables the court to establish, which is the appropriate punishment that it should meet out to a wrong doer, naturally coupled up with its own judgement, taking into consideration the particular circumstances of the case, the circumstances relating to the wrong doer himself including his antecedent behaviour, and other facts relating to general principles of criminology. This is what the court looks into when punishing a wrong doer. Punishment should not be measured by the fact that the punishment to be awarded should be greater simply to serve as an example or a guidelines for others.

In the past, society was far too young to recognise and appreciate different sanctions at law. In fact criminals were often stoned to death, hanged, beheaded, mutilated, branded, whipped, or otherwise corporally abused, then punishment clearly entailed the infliction of some kind of physical suffering. The law was far from humane. But from the nineteenth century onwards, such physical suffering has increasingly come to be regarded as unsuitable in a developed western society. Today, therefore, the principle sanctions for criminal behaviour are expressed as terms of imprisonment or monetary penalties. There are more anodyne alternatives available too, which include probation orders, community service orders and awards of compensation to victims.

In Malta, 1975 saw the introduction of the Probation of Offenders Act being introduced as Chapter 152, today known as Chapter 466 of the Laws of Malta. Later on in the year 1990 the application of a suspended sentence was introduced as article

28A in our Criminal Code applicable in certain situations as specified in the law itself. It is to be noted that today importance is being given to restorative punishment where this is possible considering the circumstances of the case and the antecedent of the wrong doer, with a view to carry out a reconciliation between the victim and the wrongdoer in that as much as possible the victim is compensated by the wrong doer for the harm he has suffered by the wrongful acts committed by the same wrong doer.

The scope of punishment was well defined in the judgment given in the names **Repubblika ta Malta vs Nazzareno Micallef**:

> *Il-piena għandha diversi skopijiet. Wieħed minnhom huwa sabiex jiġi ripristinat it-tessut soċjali li jkun gie mcarrat bil-għemil kriminali ta' dak li jkun. Taħt dan l-aspett jassumu importanza, fost affarijiet oħra, kemm ir-riżarċiment tad-dannu da parti tal-ħati kif ukoll irriforma tal-istess ħati. Skop ieħor tal-piena huwa dak li tiġi protetta s-soċjeta`. Dan l-iskop jitwettaq kemm billi fil-każ ta' persuni li b'għemilhom juru li huma ta' minaccja għas-soċjeta` dawn jinżammu inkarċerati u għalhekk barra miċ-ċirkolazzjoni, kif ukoll billi, fil-każ ta' reati gravi, is-sentenza tibgħat messaġġ ċar li jservi ta' deterrent ġenerali. Il-Qrati ta' ġustizzja kriminali dejjem iridu jippruvaw isibu l-bilanċ ġust bejn dawn u diversi skopijiet oħra tal-piena.*[1]

In order to examine the dimension to which the recidivism component dominates sentencing policy, the first problem that needs to be addressed relates to the definition of the recidivism factor. The argument to be grappled with here is how to go about defining who is a 'recidivist'.

Reference is being made to the term recidivism in our Criminal Code in particular in article 49 which provides the following: 'A person is deemed to be a recidivist, if after being sentenced for any offence by a judgement which has become absolute he commits another offence.' Article 50 of the same code goes on to explain the effects of a previous conviction for crime. This section states the following:

> Where a person sentenced for a crime shall, within ten years from the date of the expiration or remission of the punishment, if the term of such punishment be over five years, or within five years, in all other cases, commit another crime, he may be sentenced to a punishment higher by one degree than the punishment established for such other crime.

Hence one will immediately note that punishing a recidivist with a harder punishment by applying an increase of one degree is not obligatory, and is in fact left to the discretion of the person judging the wrong doer. In increasing the punishment by one degree a look has to be taken at article 31 of the same Criminal Code to see the

[1] 18/2002 Ir-Repubblika Ta' Malta vs Rene Sive Nazzareno [Criminal Appeal Superior] 28 November 2006.

scale of punishment. It is important to point out that a person's criminal history follows them around like a shadow.

We also come across another reference to the punishment to be awarded to recidivists when found guilty of the crime of theft. Article 289(1) of the Criminal Code provides for punishment in case of a second or subsequent conviction for theft:

> In the case of a second or subsequent conviction for any offence referred to in this sub title, the punishment may be increased, in the case of a second conviction, by one or two degrees, and in the case of a third or subsequent conviction by one to three degrees.

Thus, it transpires that even in the cases of recidivism on crimes of theft the increase in punishment is also not obligatory. The legislator thus leaves the question of punishing a recidivist with a harder punishment in the better decision of the judge or magistrate who is delivering judgement. This is done so that he will use his discretion considering all other important factors, for example, if the second conviction is of a serious crime, if the first crime was of little importance, if the victim was compensated, if there were any aggravations, the age of the wrong doer, his criminal past, if the wrong doer made an admission of guilt early in the proceedings, and his behaviour in society. All these factors together with others are taken into consideration when punishing a wrong doer.

We also come across a provision relating to recidivism with regards to contraventions. In this regards article 53 provides the following:

> Where a person sentenced for a contravention shall, within three months from the date of the expiration or remission of the punishment, commit another contravention, he may be sentenced to detention for a term not exceeding two months, or to a fine (multa), or to imprisonment for a term not exceeding one month.

There are also a number of other special legislations like the Traffic Ordinance, The Motor Vehicle Insurance Act, The Arms Ordinance, and others which provide for an obligatory increase in punishment once the wrong doer is found guilty of being a recidivist. In these instances the court will have no discretion but to impose the specific increased punishment mentioned in that particular law.

It is the view of the general public that once a wrong doer has committed another crime than automatically punishment should be more severe. However, this should not be the case because each time a wrong doer is punished, he is punished for the wrongful act itself and the second crime committed might be of small importance, in which case the court might not wish to increase the prescribed punishment by any degree, and consequently not deal with the recidivist as such.

In fact, reference is here being made to **Repubblika ta' Malta vs Nazzareno Micallef** wherein it was held that:

*Il-piena għandha diversi skopijiet. Wieħed minnhom huwa sabiex jiġi ripristinat it-tessut soċjali li jkun ġie imċarrat bil-għemil kriminali ta' dak li jkun. Taħt dan l-aspett jassumu importanza, fost affarijiet oħra, kemm ir-riżarċiment tad-dannu da parti tal-ħati kif ukoll ir-riforma tal-istess hati. Skop ieħor tal-piena huwa dak li tigi protetta s-soċjeta. Dan l-iskop jitwettaq kemm billi fil-każ ta' persuni li b'għemilhom juru li huma ta' minaccja għas-soċjeta dawn jinżammu inkarċerati u għalhekk barra miċ-ċirkolazzjoni, kif ukoll billi fil-każ ta reati gravi, is-sentenza tibgħat messaġġ ċar li jservi ta' deterrent ġenerali. Il-Qrati ta' ġustizzja kriminali dejjem iridu jipprovaw isibu bilanċ ġust bejn dawn u diversi skopijiet oħra tal-piena.*

It is to be noted that the fact that the prosecution exhibits the conviction sheet of an accused person in court in his proceedings, wherein it transpires that the accused person has already got a number of convictions registered on it does not *per se* mean, that the accused person, if found guilty of the charges brought forward against him, is also found guilty of being a recidivist. The prosecution has to prove such a charge like all other charges. The accused is not obliged to prove anything - it is the prosecution who has to prove its case beyond reasonable doubt. Hence, the prosecution has to first exhibit a true legal copy of the previous judgement of the accused, then has to summon the prosecuting officer involved in that same case to confirm the identity of the current accused in relation to such judgement unless the identity of the wrong doer is already written in the first judgment.[2] It is only when this is done that the court can find the accused guilty of the charge of recidivism – which incidentally is a charge *per se*.

In fact the learned Judge in the case in the names **Il-Pulizija vs Abela Paul**[3] held that:

*Bħal ma dejjem ġie ritenut, l-aħjar prova sabiex tiġi ppruvata xi akkuża ta' reċidivita` hi li tiġi esebita kopja uffiċjali tas-sentenza relattiva, u wara ssir il-prova ta' l-identita.` L-obbligu tal-prosekuzzjoni li tesebixxi dawk is-sentenzi jibqa' dejjem, minkejja l-esenzjoni mogħtija mill-akkużat li tipproduċi prova ta' l-identita`. Jekk ma tiġix esebita jew prodotta tali prova permezz tal-kopja uffiċjali tas-sentenza li tissemma fl-akkuża, allura wieħed ma jistax jgħid li saret l-aħjar prova dwar jekk*

[2] *Vide* 332/2011 Il-Pulizija vs Darmanin Joseph [Criminal Appeal Inferior] 9 July 2012 Judge Lawrence Quintano: *Għalkemm il-fedina penali tista' tittieħed in konsiderazzjoni mill-Qrati ta' Ġustizzja Kriminali biex ikunu jistgħu jikkalibraw il-piena, l-imputazzjoni tar-reċidiva dejjem tinneċessita li ssir il-prova tal-kundanna jew kundanni preċedenti.' Vide* LXXXXIX.iv.287 Il-Pulizija vs Carmelo Fenech [Criminal Appeal] 8 February 2005: *Ma' din is-silta mis-sentenza li għaliha saret riferenza l-Qorti qed iżżid li l-prova tar-reċidiva, barra mill-ammissjoni tal-imputat innifus, tista' ssir ukoll billi tkun prodotta kopja tas-sentenza li jkun hemm indikat fiha n-numru talidentita'.Dan in-numru jkun jista' jitqabbel ma' dak li jkollu l-imputat jew l-akkużat. Ma jistax ikun hawn żewġ persuni li jkollhom l-istess nurmu tal-identita'.*

[3] 87/2004 Il-Pulizija vs Abela Paul [Criminal Appeal Inferior] 10 September 2004 Judge David Sciculna.

*verament prċcedentement l-appellant kienx ikkommetta xi reat ieħor li tiegħu ġie misjub ħati.*

*Għalkemm il-fedina penali tista' tittieħed in konsiderazzjoni mill-Qrati ta' Ġustizzja Kriminali biex ikunu jistgħu jikkalibraw il-piena, l-imputazzjoni tar-recidiva dejjem tinneċessita li ssir il-prova tal-kundanna jew kundanni preċedenti; tali prova ssir permezz ta' kopja legali tas-sentenza jew sentenzi preċedenti kif ukoll billi jiġi ppruvat a sodisfazzjoni tal-qorti - permezz ta' xhieda jew minn eżami tal-istess sentenza jew sentenzi (jekk din jew dawn ikunu jagħtu l-konnotati meħtieġa tal-persuna kkundannata) jew minn eżami tal-atti tal-kawża ta' dik is-sentenza jew ta' dawk is-sentenzi preċedenti - li dawk is-sentenzi jirreferu għall-persuna li tkun qed tigi akkużata bir-reċidiva.*

As has been indicated earlier on, there are various types of punishments that can be given out once guilt is established. Apart from incarceration there are instances as specified by the law itself where a monetary punishment can be delivered instead of imprisonment. Incarceration can be immediate or suspended for a period of time not exceeding four years. However, a suspended sentence cannot always be given. Its applicability is restricted solely in those instances where the sentence of imprisonment is for a term of not more than two years, in which case the sentence can be suspended according to article 28A of the Criminal Code for a term of not more than four years and not less than one year, provided the wrong doer does not commit another offence punishable with imprisonment.

Article 28A (7) of the Criminal Code however provides instances wherein the prison sentence cannot be suspended, in particular (a) where the person sentenced is already serving a sentence of imprisonment (b) where the person sentenced is a recidivist within the terms of Article 50 and (c) where the offence has been committed during a period of probation or of conditional discharge under the Probation of Offenders Act.[4]

Thus it clearly results that where the prosecution has managed to prove to the satisfaction of the courts that the accused person is guilty of being a recidivist in terms of article 50 of the Criminal Code, he cannot be given a suspended sentence. So

[4] 96/2004 Il-Pulizija vs James Martin [Criminal Appeal Inferior] 27 May 2004 Judge Joe Galea Debono: *Illi ma hemmx kwistjoni li f'dan il-kaz l-appellat kien gie akkuzat ukoll bir-recidiva , ammetta l-akkuzi kollha w l-addebitu tar-recidiva w fil-fatt l-Ewwel Qorti fis-sentenza appellata ccitat l-artikolu 50 li jittratta dwar ir-recidiva, fost l-artikoli minnha konsidrati u li taghhom instab hati.*
*Illi ghalhekk l-Ewwel Qorti jidher li kienet prekluza milli taghti sentenza ta' prigunerija sospiza f'dan il-kaz u kienet marbuta li una volta iddecidiet li tinfliggi l-piena karcerarja applikabbli ghar-reati li l-appellat kien ammetta l-htija taghhom w li kien instab hati taghhom, din ma setghetx tkun sospiza .*
*Konsegwentement l-appell tal-Avukat Generali jidher gustifikat skond il-ligi.*

in these cases the courts discretion of sentencing is tampered with by the legislator when he enacted this law.

The court however can, as an alternative punishment to imprisonment, give a probation order in terms of article 7(1) of Chapter 446. In this case it will subject the accused person to a Probation Order for a period of time which cannot exceed three years. This is usually done bearing in mind the possibility that the wrong doer will be brought back on the right road with the supervision of the Probation Officers who are generally very ably officers who take great pride and a big interest in their assigned work, and more often than not carry out miracles with the wrong doers. The Probation order is generally seen as an alternative to imprisonment if the court is of the opinion that the accused can benefit from such an order and the community will not suffer any prejudice. The court can also include in the probation order certain directives such as ordering the wrongdoer to compensate the victim, ordering that the probationer does not stay around a particular group of friends, or ordering that the probationer follows a rehabilitation programme addressing his problem of drug or alcohol abuse. Thus the probation officer will act as the *lungus manus* of the court and will monitor closely the probationer with a view to rehabilitate him and reintegrate him into society.

The court can alternatively discharge the accused conditionally or unconditionally in terms of article 22 of Chapter 446 of the Laws of Malta. It is interesting to note that a recidivist can also be given a probation order or an unconditional discharge contrary to a suspended sentence. It could be considered odd but in delivering judgement the court is often keen on finding an alternative punishment to imprisonment. For example in cases where a recidivist is found guilty of theft and the court does not think that a prison judgement is warranted a probation order is given, due to the fact that a suspended sentence cannot be given and generally, since the guilty person does not have finances, condemning him to the payment of a fine would only mean that the court would be encouraging the guilty person to go out and steal again to pay his fine.

Even in the case of **Il Pulizija vs Anton Vassallo** who was a recidivist the court thought it was opportune to appoint a probation officer to guide him and also ordered him to do community service. It held that:

> *Din il-Qorti hi tal-fehma li fil-każ in ezami jidher illi l-appellant/ l-appellat qiegħed fit-triq it-tajba u qiegħed jagħmel l-isforzi meħtieġa biex iżomm in lineja mar-responsabbiltajiet tiegħu. Is-soċjeta` għalhekk ma tistax tiġi protetta bl-inkarċerazzjoni tiegħu iżda billi, bl-għajnuna ta' uffiċjal tal-probation, ikompli jirresponsabbilizza ruħu, u dan anke billi jagħmel il-pagamenti opportuni lill-vittmi tiegħu kif ukoll billi jrodd xi ħaġa lis-soċjeta` permezz ta' servizz fil-kommunita`. Għalhekk huwa l-kaz illi, minbarra ordni ta' kumpens, l-appellant/l-appellat accettanti, jitqiegħed taħt ordni ta' probation u servizz sabiex ikun hemm ammont ta' superviżjoni minn uffiċjal tal-probation filwaqt illi l-ħati, permezz tal-*

> *ħidma tiegħu, ikun qiegħed irodd lis-soċjeta` offiża dak is-sodisfazzjon li hija tippretendi li għandu jkollha minħabba l-aġir kriminuż tiegħu.*

In fact in this regard David Thomas states that;-

> The Probation order is clearly the most important individualized measure available to a sentencer. It is not limited to any one group of offenders [...] probation is used to deal with recidivists of mature age as well as the young and those of good character.[5]

This type of punishment is recommended by the court when it is convinced that the accused person is making an effort to change his ways. In the case in the names **Il-Pulizija vs George Farrugia**[6] the court held that, *'anke fil-każ ta persuna ta eta mhux żgħira u li forsi hu reċidiv tista titfaċċa fil-ħajja ta' dik il-persuna "a window of opportunity" li permezz tagħha jkun jista jinkiser iċ-ċiklu ta' kundanni u priġunerija'.*

Even in cases where the accused is a recidivist the court may consider the application of a probation order as beneficial to the accused. In fact in the judgment in the names **Il Pulizija vs Alessio Micallef**[7] the court held the following:

> *Issa, mill-atti jirriżulta l-ewwelnett illi l-appellat ikkoopera mal-Pulizija u għamel ammissjoni bikrija ta' l-imputazzjonijiet dedotti kontra tiegħu. Mill-istqarrija tiegħu jirriżulta illi huwa wettaq ir-reati in kwistjoni biex jassisti persuna waħda. Mill-fedina penali jirriżulta, almenu prima facie, sensiela ta' kundanni minħabba nuqqas ta' ħlas ta' manteniment lil martu. Fil-fehma ta' din il-Qorti l-appellat huwa kandidat idoneju għall-probation peress illi dan il-mezz ta' trattament huwa 'piena' li tista' tiġi applikata skond il-liġi u huwa mezz ta' kif l-appellat ikollu ssuperviżjoni u l-għajnuna meħtieġa sabiex ma jwettaqx reati oħra.*

It is to be noted that when a person is given a probation order or an unconditional or conditional discharge they are not to be considered as recidivists if arraigned again on other charges, since orders given under the Probation of Offenders Act are not considered as punishments in terms of article 50 of the Criminal Code.

This line of thought was ascertained in the judgment in the names **Il-Pulizija vs George Desira**[8] wherein the Court of Appeal contrary to the Courts of Magistrates held that:

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[5] David Thomas, *Principles of Sentencing* (Heinneman 1979) 23.
[6] 245/2000/T1 Il-Pulizija vs Farrugia George [Criminal Appeal Inferior] 18 January 2001 Judge Vincent De Gaetano.
[7] 464/2011 Il-Pulizija vs Micallef Alessio [Criminal Appeal Inferior] 31 July 2012 Judge David Scicluna.

> *Dwar it-tieni imputazzjoni din il-Qorti ma tistax ma tosservax illi l-ewwel Qorti ma setgħet qatt issib illi jirriżulta l-addebitu tar-reċidiva peress illi s-sentenza in kwistjoni kienet waħda fejn l-appellant kien ingħata conditional discharge skond il-Kap. 446 tal-Liġijiet ta' Malta u kif dejjem gie puntwaliżżat minn din il-Qorti, persuna ma tistax titqies reċidiva fir-rigward tal-mezzi ta' trattament kontemplati f'dik il-liġi.*

It is important to point out that according to article 52 of the Criminal Code for the purposes of recidivism, any sentence in respect of any crime committed through imprudence or negligence, or through unskilfulness in the exercise of any art or profession, or through non-observance of regulations, shall not be taken into account in awarding punishment for any other crime, and vice versa.

In fact the Court of Appeal in the case in the names **Il Pulizija vs Joswil Galea**[9] held that**:**

> *Pero' f' dan il-każ, stante li issa in forza ta' din is-sentenza l-appellant qed jinstab ħati ta' offiża gravi involontarja fuq il-persuna ta' Fiona Bickle, u cioe' ta' reat magħmul b' nuqqas ta' ħsieb, jew bi traskuraġni jew minħabba nuqqas ta' tħaris tar-regolamenti, skond l-artikolu 52 tal-Kodiċi Kriminali, tali reat m' għandux jitqies għall-fini tar-reċidiva kontemplat fl-artikoli 49 u 50 tal-istess Kodiċi. Għalhekk ma għandu jkun hemm ebda żieda fil-piena komminata għar-reat kontemplat fl-art. 226 (1) (b), minnħabba rreċidiva.*

Also it is interesting to point out that a person sentenced shall continue to be considered as such for the purpose of the provision concerning recidivism notwithstanding any pardon commuting the punishment lawfully awarded to him.[10]

To conclude perhaps on a personal level, today more than ever the courts are feeling that in order to control certain crimes which seem to prevail over others in society, it is important that a thorough consideration of the human conduct is made since such crimes seem to be presenting an eminent threat to social welfare. In those cases where society seems to be alarmed by the repetition of similar crimes the courts are taking the attitude that offenders committing those crimes must be punished more severely thus setting an example to others who would venture to commit them, this to serve as a deterrent, even if the particular offender is not a hardened criminal and may have committed a crime only once in his life.

I honestly think that the courts in delivering judgements look at the case as a whole in its entirety, in that it considers the gravity of the crime *per se*, the harm

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[8] 405/2012 Il-Pulizija vs Desira George [Criminal Appeal Inferior] 9 January 2001 Judge David Scicluna. *Vide* 306/3006 Il-Pulizija vs Zahra Stephen [Criminal Appeal Inferior] 30 April 2008 Judge David Scicluna.

[9] 58/2007 Il-Pulizija vs Galea Joswil [Criminal Appeal Inferior] 26 April 2007 Judge Joseph Galea Debono.

[10] Criminal Code, Chapter 9 of the Laws of Malta, article 54.

caused to society, the past of the accused, the circumstances of the case, and whether the victim has forgiven the wrong doer or has been compensated. This was confirmed in the judgment in the names **Il-Pulizija vs Brian Agius Ommisses**[11] wherein the Court held that, '*Fl-ikkalibrar tal-piena il-Qorti trid tara l-fattispeċji tal-każ li jkun u ftit li xejn tista' tiġi gwidata minn dak li jkun ġie deċiż minn Qrati oħra f' każijiet fejn il-fattispeċji jkunu differenti*'. Consequently, the fact that a wrong doer is a recidivist *per se* is not the most worrying of factors.

[11] 446/2009 Il-Pulizija vs Agius Brian [Criminal Appeal Inferior] 21 January 2010 Judge Joseph Galea Debono.