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From one adventure to another

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Photo: Matthew Mirabelli

From the public roles and private lives of the judiciary to imprisoned minors and court delays, Chief Justice Vincent DeGaetano talks on the eve of his last sitting before leaving for the European Court of Human Rights.

You started your term at a time when the reputation of the judiciary was badly tarnished by the bribery cases involving Chief Justice Noel Arrigo and Judge Patrick Vella. Towards the end of your term, has trust in the judiciary been restored?

When I became Chief Justice in August 2002, the reputation of the judiciary was at a low ebb. It was only natural that the general public would suspect that if something had gone wrong with one case then the same thing could have happened in others. The judiciary made a collective effort and after a few months I believe that problem was overcome. However, there is also the question of trust in the judicial system, which has nothing to do with the bribery cases. Trust in the judicial system is linked to its efficiency, the delivery of judgments in the required time and the quality of the judgments.

Let us draw this distinction between the judiciary and the judicial system. People complain that going to court is like going through hell because of the length of time it takes for cases to be decided. Are these complaints grounded in reality?

The situation is not as bad as it is, unfortunately, depicted. Very often people get a distorted picture of what happens in court either through misreporting in the media or incomplete reporting, or through second-hand information from people who have had a bad experience in court. In the appellate courts, for instance, the time delay factor has improved considerably from, say, the time I was a practising lawyer. It is highly unlikely for someone who has had a good experience in court to write about it in newspapers. For instance, I can tell you from experience that people who serve as jurors for the first time are normally terrified. However, at the end of a trial by jury the majority of them would say it was a worthwhile experience and an eye-opener as to what actually the judicial process is all about, even if they would not necessarily want to repeat that experience immediately.

In July Fr Hilary Tagliaferro wrote a letter to The Times complaining about the lack of respect shown towards normal citizens in court after he was summoned to give evidence and despite being given confirmation that the case would be heard, after an hour of waiting he was informed the sitting was adjourned to another day. Fr Hilary is certainly one who can see through the media haze.

I have time and again repeated that this is a problem in our system, especially in the Magistrates Court where cases are being literally dealt with in bulk because of the sheer number. On the other hand, it is not a problem peculiar to our system. There are many actors in the process – court officials, the police, the presiding judge or magistrate, the lawyers, the witnesses, the parties to the case. If, for example, the accused does not turn up after 30 minutes,it is not the court's fault that witnesses have been summoned unnecessarily. Obviously, if this repeats itself a second or third time, then there is something rotten in the state of Denmark because either the police are failing to execute an arrest warrant or the magistrate is not issuing one to make sure the accused does turn up in court.

When a case, like Fr Hilary's, is highlighted in the media, it gives the impression that this is the rule rather than the exception. If one were to follow the district sittings in front of a magistrate, one would find that only a small percentage of cases are adjourned without witnesses being heard. In most cases judgment is also delivered on the same day. The general impression is often fuelled by the selective reporting of the media who focus on what is sensational. This is why I insisted the judiciary should have its own website to put forward factual information that can be accessed by the public. Facts are one thing; comments, opinions and value judgments another.

Are you satisfied with the behaviour of magistrates and judges during sittings?

I am generally satisfied with their behaviour. There may have been some incidents when a magistrate or a judge lost his cool, but people err. Even I have made mistakes. The important thing is to learn from your mistakes and not repeat them.

Earlier this year a magistrate's private life was put under the spotlight by a journalist, a situation that created much controversy. When does the private life of a member of the judiciary become a matter of public interest?

A judge or a magistrate acts in public, but is not a public figure like a government minister. It is for this reason that the behaviour of a member of the judiciary must be such so as not to give rise to gossip. Gossip itself is harmful. Members of the judiciary should at all times keep a low profile in public. There are certain instances where you cannot do that. I, as Chief

Justice, very often cannot keep a low profile because I often have to speak on behalf of the judiciary or represent the judiciary. If judges and magistrates do not keep a low profile and do things with the specific intent of showing off, they are putting their private life on the clothes line. It is important to know the limits of what one can do and what one cannot do.

Even in their private life?

Even in their private life off the bench. A magistrate or a judge can in his private life gamble at a casino. But wouldn't this harm his image and possibly that of his colleagues? Of course it would, because it is not the kind of behaviour you would expect from a member of the judiciary. It is not easy to say where the line of demarcation is. Very often you would know when the line has been overstepped when it has been grossly overstepped. Although members of the judiciary are entitled to a private life they must behave in a manner so as not to give way to gossip or possibly scandal. Members of the judiciary need to keep in mind that not everything that is legal is necessarily appropriate.

Last week two minors were sent to prison. Is it right for minors to end up behind bars?

The rule is that for relatively non-serious offences magistrates bend over backwards not to send people to prison, even though the ordinary punishment may be that of imprisonment or detention. If incarceration can be avoided through one of the non-custodial measures, it will. This applies whether the accused is a minor or not. However, there may be instances when minors in their early or mid-teens are so unruly that it would be best to confine them, sometimes even for their own safety. Up to the 1970s Malta had the so-called approved schools where minors could be sent and kept in custody if they were convicted of a serious offence or pending sentencing.

When these institutions were wound down, mainly for financial reasons but also because of lack of adequate staffing, the country ended up without a facility where to confine unruly minors. The only two options available today are prison and the juvenile wing at Mount Carmel Hospital. Ideally, they should not be there but it has been a perennial problem for Malta. The difficulty is, I would think, a financial one, and finding a place for unruly girls is more problematic because these are far fewer in number than boys.

What about the social cost of sending minors to prison with all the risks this entails?

There is a social cost and I agree this is a problem, but from a political point of view I can understand that there may be other financial priorities. I am not saying the approved school was run in an ideal way, but ever since it was closed we have had a problem. I agree that prison is not a place for minors, but then there are cases that warrant confinement. Just think of the James Bulger case (the two-year-old boy murdered by two 10-year-olds in 1993) in England, although, admittedly, that is an extreme example.

You recently floated the idea of requiring lawyers practising in the family court to apply for a special warrant. Your proposal was shot down by lawyers. What difference will a special warrant make?

The suggestion was simply two or three lines in a 25-page paper, which dealt with some of the problems affecting the family in Malta and the changing notion of family. Typically, the

media picked up on this particular suggestion that was obviously and evidently going to be controversial.

However, you did make the suggestion.

The reason I made it was to highlight the fact that cases before the family court are very sensitive and have to be dealt with sensitively, not only by the judge or the court staff but also by lawyers. A lawyer cannot handle a family case in the same way he handles a shipping case. We do have certain lawyers who specialise in family cases but there are others who are generalists. There is nothing wrong with this but to deal with family law issues it is essential to do so in a sensitive manner.

Is your suggestion a reflection of the way some lawyers behave in the family court?

Yes. Sometimes I am appalled by the way some lawyers behave in family law cases. They are insensitive and their only interest seems to be to try to look good with their client. A lawyer appearing in court is an officer of the court and has the duty to treat cases objectively and dispassionately. I am not saying a lawyer should not do his best for his client but there are ethical limits. This applies to all cases but in the family court there are issues which require that little bit of extra knowledge and skill. This is why I made the suggestion. Having said that, there are lawyers who deal sensitively and very professionally with these cases, and whose primary aim is to try and reach a just out-of-court agreement between the parties.

Does the family court protect children's rights adequately in these sensitive cases?

It is up to the court to decide how minors' rights are best protected. I am very much against the idea of hearing children at all costs as a matter of course in family cases. From experience I know that in these cases children can easily be manipulated by the parties to suit their own ends. In most cases the parties are quite decent about the children and it is only in a small percentage of cases that the judge may feel the need to hear the children involved. Sometimes it may be worse for the child to be brought to court to be heard and give evidence, which after all may not even be necessary. I would prefer leaving the decision whether or not to hear the child in the hands of the judge. The two judges in the family court are doing a splendid job and this is the approach they adopt. In those few cases in which they feel it is appropriate to hear a child they do so, often in chambers away from the lawyers and the parties.

Were you disappointed with the Home Affairs Minister's recent declaration that the retirement age for the judiciary will not be raised?

I am not aware that the minister made any such declaration. To my knowledge, it was a spokesman for the ministry who made such a comment.

A spokesman speaks on behalf of somebody.

Not necessarily.

Has the door to the debate been closed?

Far from it. The debate is ongoing and there was a contribution by Chief Justice J.J. Cremona in The Times, who quite rightly pointed out that it was only the retirement age of magistrates

that was recently raised. Under the 1964 Constitution magistrates had to retire at 60. Nowadays, if they retire at 60 they would not even be entitled to a pension and that is why it was raised to 65. However, the retirement age of judges has been 65 since at least 1964, and after 46 years I do not think that benchmark is still valid. The average retirement age within the EU, at least for senior judges, is between 68 and 70. Why should Malta be the odd one out?

The European Court of Human Rights came under fire last year over the decision delivered in the Lautsi case, which dealt with the issue of crucifixes in the classroom. The ECHR was accused of being too distant and disconnected from the cultural context and traditions of the individual European states. Do you share this concern?

The European Court of Human Rights is perhaps the one institution in Europe which contributed significantly, albeit silently and without political fanfare, to the stability of, and to ensuring the rule of law in, the countries members of the Council of Europe. Saying it is disconnected from social reality is a big assumption. This court is composed of judges from every member state and these judges do not live on the moon.

The court handles thousands of cases today, unlike what it did in the 1960s when part-time judges held drafting sessions before delivering judgment. This is not possible today with the volume of cases. In the first half of this year, the ECHR disposed of more than 18,000 applications by decision or judgment. Sometimes a judgment may go off at a tangent.

The Lautsi case is not the only case that has raised alarm bells. There have been countless others, which have been criticised perhaps because the conclusion for the particular case was correct but the reasoning behind it was not. The danger is that in a subsequent case the court may take an excerpt from the judgment, and apply it to a completely different context, with weird results. But that sometimes happens even in domestic courts.

In any case, in the Lautsi case the Grand Chamber has not yet pronounced itself, so we will just have to wait and see.

A recent judgment involving adoption by married couples decreed that a particular provision was unconstitutional. Yet lawmakers seem to be taking their time to change the law. Is this right?

To give effect to a judgment of the Constitutional Court does not always require changing a law. In some cases a remedy of a pecuniary or other nature may be sufficient. In other cases, however, if the law is not changed to make it conform to the human rights provision, the end result may well be several cases involving the same breach. Technically, the Constitutional Court cannot annul a law simply because it is in breach of the fundamental human rights of an applicant. A provision was introduced in 2006 making it possible to change those parts of a law decreed to be in breach of human rights by regulations made by the Prime Minister.

In this particular case, for some reason, government chose to present an amending act, in the form of a bill, that would have to pass through normal parliamentary procedure, which is lengthier than going about it by regulations, even though it is a very short, one-section bill.

In your inaugural speech for the forensic year 2008 you called for an independent body to study the judicial system. What did you have in mind?

An independent body, an offshoot of the Council of Europe, did come to Malta, interviewing various judges and magistrates. They submitted a detailed confidential report earlier this year but I have not yet examined it. It will be now up to my successor to do so. In the report a number of recommendations have been made, some of which may not even require changes to the law, to improve the workings of the judicial system.

Have you started house-hunting in Strasbourg?

This is one of the main challenges. After two days of marriage my wife and I left for Cambridge for two years. It was an adventure. Now, after 33 years of marriage we are moving to Strasbourg for nine years and this is another adventure.