The difficult sentencing process

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Several letters have appeared in The Times criticising judgments delivered by the various courts of criminal justice on grounds that the punishment meted out in specific cases was too lenient.

The correspondents never seem to bother to check out what was the range of the punishment applicable according to law in the specific case, nor do they ever refer to the reasons, very often quite detailed, specified in the judgment which will have prompted the court to award one type of punishment as opposed to another.

This leads some of the correspondents to compare judgments delivered in drugs cases (where the maximum punishment according to law can be life imprisonment) with those delivered in rape cases (maximum punishment nine years) or cases of defilement of minors (maximum punishment, unless aggravated, three years) and even with cases involving slight bodily harm (maximum punishment three months).

In these, and in virtually all cases, the legislator allows a wide margin of discretion in the punishment that may be awarded in order to cater for all the circumstances, objective and subjective, of each case. This wide margin of appreciation is reflected also in the fact that the legislator has allowed for non-custodial measures, like probation and conditional discharge, to be applied even in case of crimes that carry a maximum punishment of seven years.

No two cases, even involving the same type crime, are identical.

The court is there to do justice first and foremost with the parties most intimately involved: the victim and the guilty party her/himself. But it is justice that must be done, and this may not necessarily coincide with popular perceptions.

Judges and magistrates have to act within the parameters of the law laid down by Parliament; within those parameters they have to exercise their discretion prudently and, ultimately, according to the dictates of their consciences which they must never allow to be substituted by the conscience of anyone else.

The famous English penologist and Recorder of Birmingham, Matthew Davenport Hill, writing in 1870, had this to say about the difficulties of the sentencing process:

"In our attempts to award pain according to desert, we are fated to err either on the side of mercy or of severity. Hence it has been a favourite habit with editors of newspapers to compare two discrepant sentences with a chuckle of triumph over the folly of one or other of the judges on whose proceedings they are animadverting, without a thought that the judges have neither weight nor scales.

"When the jury has convicted the prisoner, it remains to be considered whether the offence is mitigated or aggravated by its incidents; then must be considered the circumstances of the offender. Is he young or of mature age?

"Has he had the advantages of education, or has he been left to the influences of ignorance, bad example and evil associations? Has he been previously convicted so frequently as to make it clear that he has adopted crime as his calling or profession; or is his deviation from honesty an exception, and not made in pursuance of his rule of life?

"All these, and many other points for consideration, will rise up in the mind of a thoughtful judge, but they assuredly will not be dealt with by any two minds so as to result in precisely the same infliction. And if we take into account the modifications of opinion which society undergoes from time to time, and observe its effect on the sentences pronounced at various periods for offences of similar magnitude, we shall, I think, all come to the conclusion that standards of punishment are much more easy to imagine than to realise."

Judges and magistrates do, of course, err. That is why the party convicted can appeal from the punishment meted out to him/her if s/he considers it to be excessive. Until recently the prosecution could not appeal if it considered that the punishment meted out was either wrong in principle or manifestly lenient when taking into consideration all the circumstances of the particular case. Now, following the amendments introduced in the Criminal Code in 2002, the Attorney General may appeal from decisions of the Court of Magistrates in the case of crimes that carry a punishment exceeding six months imprisonment if he is of the opinion that the punishment is either wrong in principle or manifestly disproportionate.

The Attorney General may exercise his right of appeal in those cases where the sentence has been brought to his attention by the police or by the Inferior Court itself in those cases where it is obliged to transmit a copy of its judgment to him. When he does so appeal, the Attorney General will, no doubt, adduce cogent arguments to explain to the Court of Criminal Appeal why the punishment was wrong in principle or manifestly disproportionate. Not so, unfortunately, the correspondent Malcolm Mifsud (April 9), who sought to shame a lady magistrate, known for her industriousness and hard work, because she sentenced a young man to six months imprisonment for, according to the letter, "regularly beating his younger sister".

Had the correspondent bothered to read the judgment he would have found that the young man was found guilty of the crime of causing slight bodily harm on the person of his sister (apart from two minor contraventions). According to the Criminal Code, the maximum punishment for this crime, aggravated by the fact that it was committed on the person of his sister, is in fact of six months imprisonment (the minimum being one month), apart from the optional, not mandatory, increase because of the continuous nature of the offence in terms of section 18 of the Criminal Code.

It is not the lady magistrate who should be put to shame but whoever passes scurrilous comments on a magistrate based on total ignorance of the law and of the facts pertaining to a particular case.

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