# The Family in the Dock: The Maltese Experience

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When, about a year ago, I was asked by Dr Anna Vella to address this meeting, my initial reaction was: What on earth do people want to know from the Chief Justice about the family? I am not, by any stretch of the imagination, an expert in Family Law – my expertise, if I may claim any, is in Criminal Law (which I taught at the University of Malta for many years right up to my appointment as Chief Justice) and, by virtue of having worked for many years in the Attorney General's Office before being "kicked upstairs" in 1994, I also have some experience in Public Law. Never having been in private practice, I have never had to file writs, or to reply to writs, to deal with such matters as separation between spouses, or custody of children, or maintenance to be paid to a spouse or to her or his children. Nor am I a psychologist or a family counsellor. My degree, among others, in criminology and sociology of deviance seems to point in the opposite direction of good couple and family relations. In fifteen years of service in the Attorney General's Office, the nearest I ever came to dealing with family matters was when I had to file, in two separate cases, applications before the Court of Voluntary Jurisdiction on behalf of the Chief Government Medical Officer so that doctors in government service could override the decision of the parents of children who were refusing to authorise blood transfusions for the child patient on religious grounds; and in another case I had to appear for the marriage registrar, again before the Court of Voluntary Jurisdiction, because the marriage registrar was refusing to recognise a "talaq" divorce obtained in Pakistan by a Pakistani husband from his Maltese wife on the ground that the procedure involved in such divorces (at least at that time in Pakistan) was not regarded by the said registrar as a "judicial procedure". This lack of experience in Family Law and, perhaps more importantly, the lack of experience in the sensitivity attaching to Family Law cases, came back with a sort of vengeance when I was made a Judge in March of 1994. It is not uncommon for judges,

immediately upon their appointment, to be assigned work in an area of law where they had previously never exercised their profession as lawyers. Patrick Devlin, better known as Lord Devlin when he become Lord of Appeal in Ordinary, and a leading exponent of the theory that criminal law could legitimately be used to enforce morality, when he was first appointed to the bench in 1948, had never exercised any criminal jurisdiction and not since his early days at the Bar had he appeared in a criminal court. Yet two days after being appointed, he was trying criminal cases at Newcastle Assizes. Likewise Hubert Parker, later to become Lord Chief Justice of England and Wales, once said that the first summing up in a trial by jury that he had ever heard was the one he delivered himself as a trial judge![1] There are endless other similar examples. In my case I was assigned to hear Family Law cases – something that I, rather presumptuously, thought that I could handle with consummate ease – after all there are only about three score provisions in the civil code dealing with personal separation of spouses (which forms the bulk of contentious work in the Family Court here in Malta) and even less provisions dealing with marriage annulment in the Marriage Act. I was in for a surprise. During my third or fourth sitting, I had before me a case that I had inherited from my predecessor in that court. Husband and wife were fighting tooth and nail as to how to divide the not insubstantial property which they had accumulated during their rather short and turbulent marriage. I was assured by counsel for the parties that there was a very good prospect that they would come to an amicable agreement over the property aspect of the separation. So I put off the case for the following week. In the following week husband and wife duly turned up before me, but without their respective counsel. They were staring at each other across the well of the court, and, as the saying goes, if looks could kill……That is when I made the cardinal mistake of enquiring from both of them, very politely but, I stress, in the absence of their counsel, whether they had come to any agreement. Instead of answering my question, the husband looked at the wife and passed what I thought was, from the tone in which the words were said, some sort of derogatory remark; she retorted with something similar – and don't ask me what they actually said – to

[1] Pannick, D., **Judges** OUP (1987), pp. 233-234.

this day I do not know – and before I could put in even one syllable, they had come to blows and were rolling over each other in the well of the court. In an instant the extended families of both husband and wife – there must have been at least a dozen from either side outside the court room – joined into the fray, and there was I calling for order and banging my gavel while more than a score of people were bashing each other in front of me in a free for all. My elderly usher, and the not so elderly Deputy Registrar – the only court officials present with me in the court room – simply took refuge behind my chair on the bench until a number of police officers, hearing the fracas, rushed from other parts of the court building and arrested all those involved. In those days we did not have "panic buttons" discreetly tucked away under the bench, as we have nowadays. I spent the rest of that eventful day dealing with contempt proceedings in respect of all the participants. But I had learnt the lesson – never address husband and wife who are in the trial stage of the litigation process other than in the presence of their respective counsel. Of course, addressing them not in the presence of counsel in other stages (for example, in the mediation stage) may not only be proper but often essential, even though the element of risk is always there.

Of course, I do not want you to go away with the idea that all or most of my cases in the Family Court ended up in a riot, a rout or an affray. There were the rewarding instances too. I remember in particular the case of a newly married couple – they were in their second year of marriage and had just had their first child – who one day turned up before me seeking a separation. I was baffled, and so, it would seem, were their lawyers. After hearing, not on oath, both parties directly, ie. not through counsel but in their presence, it turned out that some weeks before the filing of the case a casual remark by the wife, uttered in the heat of some trivial argument, to the effect that had she wanted to she could have married someone else, was deemed by the husband to be so offensive that he had immediately left the matrimonial home and gone back to his parents and, to spite his wife, had even spent a night with another woman. Yet it was clear to me that these two were still madly in love with each other. I asked where they came from – from Msida, they said – which happened to be then the parish

where my wife and I also lived. Did they know Fr Henry Balzan, then a young priest who had been sent to work in our parish? Yes they did, in fact they knew him very well. Then I used a provision of the Civil Code which is nowadays very rarely applied, Article 58(1), which provides that **"The Court may, where it shall deem it expedient so to do in the interest of the spouses and the children, order the suspension of the action of separation for such time as it may deem proper, and give such interim directions as circumstances may require."** I suspended the action for three months with a direction that the couple should go and have a good chat with Fr Henry. When, three months later, the case was resumed, neither party turned up in court, and I was informed by one of the lawyers involved that they had gone back to live together under the same roof. I never saw them again.

But you may well ask yourselves – and indeed you would be quite right in asking – what has all this got to do with the family being in the dock? Is not the expression "in the dock" usually used for the place where the accused is placed in the course of criminal proceedings (a word which, incidentally, only recently I discovered comes from the old Flemish word docksty, which means a cage)? I have purposely chosen this title – perhaps a slightly provocative title – for two reasons. First I believe that the family, including the family in Malta, has over the last forty years or so, been gradually pushed, figuratively, into the dock, because it has been somehow made to feel inadequate or incomplete or perhaps even defective when measured against new "rights" and new "values" with which its members are constantly being bombarded. In the second place, when the family is, more literally, placed in the dock – that it when it is involved in some way in civil or criminal litigation – it is, unfortunately, left very much to its own devices with very little, if any, structured help from civil society. It is within these two generic frameworks or parameters that I wish to make some remarks which, I hope, can be taken up in your further discussions in the course of this meeting.

I was born seven years after the end of the Second World war. As a child I still remember going with my father, who was an architect and civil engineer, to places where reconstruction work was going on all over the island, but especially in the area of the so called Three Cities. We lived close to a military barracks in Sliema, and right across the street Royal Navy destroyers and frigates crowded into Sliema Creek. These ships, incidentally, provided a convenient signal for reciting the Angelus: at eight in the morning when the Union Jack was hoisted on the bow and at sunset when it was struck, accompanied by the traditional piping. Round the corner from our house was the Dominican Priory and Church of Jesus of Nazareth, which we, as a family, frequented. Mass was still said in Latin and altar boys had the formidable task of having to learn all the responses off by heart if they wanted to serve as such. School, run by the Sisters of St Joseph of the Apparition, was also in Sliema. My father worked mostly from home, my mother was a housewife and my paternal grandmother, who lived with us, was the person to whom I and my siblings would rush to in an attempt, sometimes successful, to avoid our parents' discipline. For a ten year old boy, here were all the trappings of stability. I suppose if one had to ask me then what I understood by the word "family" I would simply have pointed to my mum and dad, to my sister and younger brother, and to my grandmother. There was no need to define a family – you recognised a family when you saw one, in much the same way that you do not define an elephant, you simply recognise it when you see it. There seemed to be a natural relationship between the family and marriage. Indeed, in 1963 – I was eleven then, just to keep track of the timeline – the Papal Encyclical *Pacem in Terris* underscored this relationship in a very matter-of-fact way. In paragraph 16 one reads:

> **"The family, founded upon marriage freely contracted, one and indissoluble, must be regarded as the natural, primary cell of human society. The interests of the family, therefore, must be taken very specially into consideration in social and economic affairs, as well as in the spheres of faith and morals. For all of these have to do with strengthening the family and assisting it in the fulfilment of its mission."**

This statement, it must be remembered, was made within the context of a document which was remarkable in two ways. It was the first papal encyclical, at least within living memory, which was not addressed to Catholics only – as all other previous documents had been – but also to "all men of Good Will" (as one found in the preamble). Secondly, it was a remarkable document because it attempted to compile a complete and systematic list of human rights some of which civil society to this very day does not consider to be fundamental human rights but rather rights of an economic or political nature which are secondary to fundamental human rights or unenforceable. In this document, in fact, we find that these rights include the right to life, clothing, shelter, rest, medical care, social services, education, freedom of conscience, marriage, safe working conditions, private property (which, the document emphasizes, has also a correlative "social duty" or "social function"), association and free assembly, emigration and immigration, and participation in public affairs. In this sense these human rights are both economic and political rights. But then the document does what few other documents on human rights have done, that is it looks at the other side of the coin by emphasizing the correlative "duties" not only of individuals but also the duties of national governments towards their citizens and, more importantly, the duties of governments in the relations between themselves. The duties of individuals are laid down as being the duty to respect other's rights, to live becomingly, to pursue truth and to collaborate with others to procure the rights of all. It emphasizes that society cannot be founded on force, but only on mutual respect and collaboration. A society is well ordered only if it is founded - and these are cornerstones of the document - on truth, justice, love and freedom. On the relations between governments or between nations, the document begins by asserting that states, like individuals, have both rights and duties. The first duty of a state is to acknowledge the truth - truth, which as Rudyard Kipling reminds us in his poem "If", is often "twisted by knaves to make a trap for fools" – and this, that is truth, entails, according to this encyclical, the rejection of racism and the careful use of the modern media. The second duty of a state is to regulate its activities by the norms of justice, which includes the watchful protection of the rights of minorities within the

nation. A third duty of nations is to co-operate with others - co-operation in solidarity. A final duty of nations is to respect the freedom of others. Even aid to others, we are reminded, must "respect the moral heritage and ethnic characteristics" of both donor and recipient. Finally - and again the document could well have been speaking of today - the document notes that the nation-state is an inadequate structure for dealing with modern global realities, and that some form of global authority is needed. One cannot help notice in this document the recurrent theme of "justice", as if to underline that there can be no peace without justice – almost reminiscent of the words of St Augustine in his *De Civitate Dei* – "*remota iustitia, quid sunt regna nisi magna latrocinia*"[2]-- if you remove justice, what are kingdoms (states) but a bunch of thieves!

Over time, however, this natural – or what appears to many to be a natural – relationship between marriage and family seems to have disappeared or, at least, to have been considerably dissipated. Legal, social and biological considerations have been injected into the equation to such an extent that to-day one is often bemused – not amused – as to what exactly we mean by "family" and "family life". The grafting of international obligations upon state law, and the caselaw of the European Court of Human Rights, have contributed in no small measure to this confusion. Let me say straight away that to my mind the European Court of Human Rights has been the most important post-war European institution which has ensured, in a practical and effective manner, that European Governments respect the fundamental human rights not only of their citizens but of all those within their territory – no other supra-national regional court, as far as I am aware, has had the success that the ECHR has enjoyed, and this is, of course, largely due to the fact that the States parties to the European Convention on Human Rights have accepted the right of any anyone within their territory to petition individually and directly this Court. There is no doubt in my mind that the political stability in Europe to-day, founded on the rule of law, owes a great deal, perhaps much more than we realise, to the work over the years of this Court and, until recently, of the

[2] De Civitate Dei, IV, IV.

Commission which was the "filter organ" of the Court before its re-organisation in 1998. Nevertheless, like any court which is called upon to apply a law, and sometimes to interpret it, the "activist" elements within the court may well overreach the boundaries of the Convention itself thereby in effect reducing, and sometimes eliminating, that "margin of discretion" or "margin of appreciation" that States themselves should enjoy in the enactment and application of domestic law. But before we have a look at how this Court has handled the concepts of "family" and "family life", allow me to make a few comments about Maltese Law.

Although it is true that there is no "general" definition of "family" or "family life" – that is a definition which would be applicable across the board for all purposes: civil, fiscal, administrative, commercial – and probably it is not even possible to have such a definition – our law states in no uncertain terms what it considers to be the family and family life. It is also quite clear as to what is marriage. In fact Articles 2, 3 and 3B of the Civil Code (Cap. 16) – which articles, I should point out, were introduced in their present form as recently as 1993 – read as follows:

> **2(1). The Law promotes the unity and the stability of the family.**
>
> **(2). The spouses shall have equal rights and shall assume equal responsibilities during the marriage. They owe each other fidelity and moral and material support.**
>
> **3. Both spouses are bound, each in proportion to his or her means and of his or her ability to work whether in the home or outside the home as the interest of the family requires, to maintain each other and to contribute towards the needs of the family.**
> **....**
> **3B. Marriage imposes on both spouses the obligation to look after, maintain, instruct and educate the children of the marriage taking into account the abilities, natural inclinations and aspirations of the children.**

These provisions fall under the general subheading **"Of the Mutual Rights and Duties of Spouses"** – which, in the Maltese text of the law – and the Maltese text prevails over the English text for purposes of interpretation – reads

**"Fuq il-Jeddiet u d-Dmirijiet tar-Ragel u l-Mara lejn xulxin"**. For the benefit of those of you who are not Maltese speaking "ragel u mara" means either "man and woman" or, given the context, "husband and wife". This subheading is preceded by the general heading which reads **"Of the Rights and Duties arising from Marriage"**.

**The Marriage Act**, which, after the amendments introduced in 1995, now recognises Catholic marriages celebrated in Malta for all civil effects, does not define "marriage" as such. However, when describing the formality of civil marriage, Article 15(2) provides as follows:

> **15(2). The Registrar or other officiating officer shall ask each of the persons to be married, first to one of them and then to the other, whether he or she will take the other as his wife or her husband respectively, and upon the declaration of each of such persons that they so will, made without any condition or qualification, he shall declare them to be man and wife.**

One need not be a rocket scientist, a brain surgeon or indeed a Chief Justice to realise that the cumulative effect of these provisions is that Maltese law still embraces, even if perhaps indirectly, a very traditional approach to marriage and the family. A family presupposes marriage; marriage presupposes a man and a woman who assume the role of husband and wife. It is interesting to note, however, that the declaration required from the spouses by the Registrar for a civil marriage does not refer to any permanence or irrevocability of the marriage. Indeed if sub-article (2) of Article 15 of the Marriage Act were to be strictly applied or strictly interpreted, a spouse who declared that he or she would take the other spouse as his wife or her husband but added something like "until death do us part" would be adding a "qualification" which would render the declaration invalid. This point, mercifully, has never been raised in court. Other issues, however, have. Thus, for instance, after a person underwent gender re-assignment surgery, now that the person had become externally a woman and also obtained from the courts a declaration that her birth certificate was to include a marginal annotation to the effect that she was now a woman, this

person sought to marry a man. The Marriage Registrar refused to publish the banns. The would-be spouse applied to the Court of Voluntary Jurisdiction, and this court, relying exclusively on the birth certificate which indicated that the applicant was now a woman, held that the Registrar was at fault in refusing to publish these banns and ordered him to do so. The Marriage Registrar sought to quash this decision by instituting a case before the First Hall of the Civil Court. The First Hall of the Civil Court, in its judgment of the 21 May 2008 [3] upheld the position taken by the Marriage Registrar and held that the defendant and her would be husband could not get married. The reasoning of the court was, briefly, as follows: (1) the marginal annotation in the birth certificate (which, incidentally, now, after several local court cases which had ordered such annotations, is specifically provided for by statute) is meant to protect the right to privacy of the person concerned, and does not effectively make him or her a man or a woman; (2) gender reassignment surgery only changes the external appearance, but does not make a man a woman or a woman a man; and (3) since under the marriage act, marriage may only be contracted by a man and a woman, defendant, being still for all intents and purposes a man, could not marry a man. The case did not go to the Court of Appeal, so for the moment that seems to be the position at Maltese law.

You may well say that all this does not seem to be putting the Maltese family "in the dock" in the sense of making the traditional Maltese family feel "inadequate" or "incomplete" – in other words on the defensive. (I should say, by way of parenthesis, that I use the adjective "traditional" rather warily, because unfortunately the word has been to much misused and abused, both in the context of the family and other contexts, not least in the context of the political posturing of all political parties in Malta when it comes to family assistance.) It would seem, you may well say, to be rather the opposite, that is, that the law and the courts appear to support the traditional concept of family and marriage. To this objection, I would like to counter by making two observations. The first is that the provisions of the Civil Code and of the Marriage Act I have referred to,

[3] D.P.R. v. Cassar.

and other provisions ancillary thereto, do not make provision or cater for a social reality which is now becoming palpable, namely children who are being raised, for one reason or another, by a single parent, as well as children who are being raised by couples who are not, again for one reason or another, married. Our civil law – and I specifically limit myself to the civil law because, quite frankly, I am not aware how such realities are dealt with, for instance, for fiscal or social security purposes – cannot continue to ignore these realities. Let me make it quite clear, I am not advocating divorce or civil partnerships or anything of the sort. In fact I am not advocating any form of legal or legislative solution or solutions to the problems raised by these realities. It may well be, indeed, that the solution does not even lie in the civil law, that is in amendments to the Civil Code or the Marriage Act, but in other laws or in policies or initiatives which, while continuing to uphold and strengthen the link between marriage and family, will allow people who are living and experiencing these other realities to be supported and to be absorbed into society while fully respecting their basic human rights.

My second observation is that the Maltese family, notwithstanding the position under Maltese law, is nevertheless affected by the way the concept of the family is viewed by others, especially significant others like the European Court of Human Rights. This court, I hasten to add, is not, unlike the European Court of Justice, a part of the domestic judicial system. Our Constitutional Court has said time and again that while the case-law (jurisprudence) of the Strasbourg court is important in the application and interpretation of the European Convention domestically, the Constitutional Court is not bound by the case-law of the ECHR. Indeed, we have had cases before our Constitutional Court (for example in tax matters) where the case-law of the European Court was specifically not followed and instead the Constitutional Court followed the line taken in dissenting or minority judgments of the Strasbourg court. Even in enforcing in Malta a judgment of the ECHR, our Constitutional Court has said that that it has the

power to refuse to enforce such a judgement if the judgment of the Strasbourg court runs counter, for instance, to Maltese public policy (*ordre public*) [4].

Let us see now, very briefly, how the "family" is conceived in the case-law of the Strasbourg court.

The relevant Articles of the Convention are Article 8 and Article 12. Article 8 provides:

> **8(1). Everyone has the right to respect for his private and family life, his home or his correspondence.**
>
> **(2). There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the preservation of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.**

Article 12, on the other hand, allows for no derogations:

> **12. Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.**

As early as 1979, the ECHR, in a case originating from Belgium (**Marcks v. Belgium** [5]), held that the notion of "family life" in Article 8 was an **autonomous concept** which must be interpreted independently of the national law of the Contracting State. Seven years later, in the case **Johnston v. Ireland** [6] that court laid down the rule that family life under the said Article did not refer solely to the *de jure* family, that is family where the parents were married, but also to the *de facto* family:

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[4] **Case of the San Leonardo Band Club** – Constitutional Court, 13 March 2005.
[5] 13 June 1979.
[6] 18 December 1986.

> **"In the present case it is clear that the applicants, the first and second of whom have lived together for some fifteen years…constitute a family for the purposes of Article 8. They are thus entitled to its protection, notwithstanding the fact that their relationship exists outside marriage."**

Basically, therefore, from the very start the ECHR has taken the stand that the traditional European concepts of the countries of the Council of Europe are not considered decisive for determining whether there is a family. Thus a family composed according to a different cultural pattern – for example a polygamous family – is equally entitled to protection under Article 8, but not under Article 12. Moreover in various other cases the Court has held, albeit sometimes *obiter*, that the same respect for different cultural patterns applies in principle to the way in which parents bring up their children. According to the Court, respect for family life comprises respect for a style of education which differs from that which is common in a given society, provided that the treatment involved is not to be considered criminal and punishable under the general standards prevailing in the Contracting states[7].

The next notable case is that of **Berrehab v. The Netherlands** [8]. Here the applicant complained that The Netherlands had violated Article 8 by separating him from his daughter when it refused to extend his visa and deported him. He was a Moroccan national and, while residing in The Netherlands, had married a Dutch wife. Their child was born almost two years later, days after the marriage had been dissolved. For four years after the birth Berrehab contributed to the child's support and saw her four times a week for several hours each time. The Government refused to extend his permission to remain in The Netherlands which had been granted "for the sole purpose of enabling him to live with his Dutch wife". After extended appeals and reviews by the domestic courts in Holland, he was deported. The ECHR held that even an entirely formal legal relationship could create *prima facie* a protected family unit:

[7] van Dijk, P. and van Hoof, G.J.H. **Theory and Practice of the European Convention on Human rights** 3rd ed. p. 504.
[8] 21 June 1988.

> **"It follows from the concept of family on which Article 8 is based that a child born of such a union [viz. a lawful and genuine marriage] is *ipso jure* part of the relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to a 'family life' even if the parents are not living together…Subsequent events, of course, may break that tie, but this was not so in the instant case [referring to the regular visits between the applicant and his daughter]."**

It seems rather peculiar that here the Court appears to give a special, stronger position to the children born out of a lawful marriage precisely in a case were the subsequent divorce indicated that the marriage had ended in a failure[9]. The cumulative result of these and a few other cases which I will not bother to mention is that according to the Strasbourg court a substantive family relationship is protected, even if unaccompanied by legal form, and that, conversely, a formal, legal family relation is protected even if without substantive content[10]. For example in **X, Y and Z v. U.K.** [11] the Court held that a family relationship existed between a female-to-male transsexual and the child (conceived by artificial insemination) of the woman with whom he had lived in a stable relationship for more than ten years. What seems to have prompted the Court to come to this conclusion is the fact that the couple had applied jointly for the fertilization treatment and that "X was involved throughout that process and has acted as Z's father in every respect since the birth."

In all the cases just mentioned the claim to "family life", whether based on legal or biological ties, was evidenced by a substantial social relationship. But even this seems not to be essential according to the ECHR. In a case coming from Ireland – **Keegan v. Ireland** [12]– the ECHR held that there was "family life" even where the father had established no personal relationship with the child, the relationship being only biological. Admittedly, the facts of the case were

[9] *op. cit.* p. 505.
[10] Janis, M. *et al.* **European Human Rights Law** 2nd ed. p. 236.
[11] 22 April 1997.
[12] 26 May 1994.

rather unusual. The child, born after its parents had cohabited and then separated, had been placed with prospective adoptive parents at the age of seven weeks. The applicant father had seen the baby the day after it was born but had not been allowed to see it thereafter. The adoption was carried out without his knowledge or consent. In holding that the adoption was a violation of Article 8, the Court said this:

> **"The Court recalls that the notion of the 'family' in this provision is not confined solely to marriage-based relationships, and may encompass other de facto 'family' ties where the parties are living together outside the marriage…A child born out of such a relationship is ipso jure part of that 'family' unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer co-habiting or if their relationship has then ended…In the present case the relationship between the applicant and the child's mother lasted for two years during one of which they co-habited. Moreover, the conception of their child was the result of a deliberate decision and they had also planned to get married…Their relationship at this time had thus the hallmark of family life for the purposes of Article 8. The fact that it subsequently broke down does not alter this conclusion any more than it would for a couple who were lawfully married and in a similar situation. It follows that from the moment of the child's birth there existed between the applicant and his daughter a bond amounting to family life."**

No weight, if any, seems to have been given by the Court in this judgment to the future welfare of the child – her interests automatically gave way to the "right" of the father under Article 8. Perhaps the Court was unduly impressed by the fact that Irish law, as it then was, allowed the secret placement of the child for adoption without the applicant's knowledge or consent, leading to the bonding of the child with the proposed adopters and to the subsequent making of an adoption order. And this case was a unanimous judgment. But in the next – and last – case I will be mentioning, there were dissenting voices coming from the Maltese and the Spanish judges on the Court. The case – **Kroon v. The Netherlands** [13]– dealt with the impossibility under Dutch law then in force for a

[13] 27 October 1994.

biological father to have legally recognised family ties established with his child, if the latter is born out of a relationship with a woman who at that moment was still married to another man. The Netherlands argued that the relationship between the father and his biological child did not amount to family life, since the child was born out of an extramarital relationship, the father did not live with the woman and the child, and did not contribute to the child's upbringing. This is what the Court, continuing to compound the problem of definition and stretching the concept of family life to the limits (and virtually transforming the word "life" into an unspecified "unit") had to say:

> **"…the Court recalls that the notion of 'family life' in Article 8 is not confined solely to marriage-based relationships and may encompass other *de facto* 'family ties' where parties are living together outside marriage… Although, as a rule, living together may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto 'family ties'; such is the case here, as since 1987 four children have been born to Mrs Kroon and Mr Zerrouk. A child born of such a relationship is ipso jure part of that 'family unit' from the moment of its birth and by the very fact of it…There thus exists between Samir and Mr Zerrouk a bond amounting to family life, whatever the contribution of the latter to his son's care and upbringing."**

Judges Morinella from Spain and Mifsud Bonnici from Malta strongly disagreed. Judge Morinella, after expressing the view that in interpreting the Convention the Court was, with its constant extensions of the definition of family life, in effect usurping the legitimate powers of the elected representatives of each member state, went on to say this:

> **"This dilemma is even greater in matters such as marriage, divorce, filiation or adoption, because they bring into play the existing religious, ideological or traditional conceptions of the family in each community. The majority of my colleagues have, however, considered there to be a 'positive obligation' incumbent on the Netherlands to recognise the right of the natural father to challenge the presumption of the paternity of the legal father (the husband of the mother), thus giving priority to biological ties over the cohesion and harmony of the family and the paramount interest of the child.**

**In my opinion, this conclusion involves a dangerous generalisation of the special circumstances of the instant case and one which imposes on the Contracting States an obligation not included in the text of Article 8, based on changeable moral criteria or opinions on social values."**

And he continued:

**"Account should also be taken of the importance of the family in many Contracting States, of the persistence in these countries of a social rejection of adultery and of the common belief that a united family facilitates the healthy development of the child. These factors provide justification for interference by the State, in accordance with paragraph 2 of Article 8, with the applicants' exercise of their right to respect for family life, since its aim is the protection of 'morals' or the protection of the interests of the child against the intrusion of an alleged biological father into his or her family circle or legal status. The social consequences of denying legal paternity as regards the cohesion and harmony of the family, or in terms of legal certainty concerning affiliation and parental rights, are better assessed by the national authorities in the exercise of the extensive margin of appreciation conferred on them."**

And Judge Mifsud Bonnici remarked, equally poignantly:

**"In my opinion, 'family life' necessarily implies 'living together as a family'. The exception to this refers to circumstances related to necessity, i.e. separations brought about by reasons of work, illness or other necessities of the family itself. Forced or coerced living apart, therefore, is clearly an accepted exception. But, equally clearly, this does not apply when the separation is completely voluntary. When it is voluntary, then clearly the member or members of the family who do so have opted against family life, against living together as a family. And since these are the circumstances of the instant case where the first two applicants have voluntarily opted not to have a 'family life', I cannot understand how they can call upon Netherlands law to respect something which they have wilfully opted against. The artificiality of this approach is in strident contradiction with the natural value of family life which the Convention guarantees. The judgment moreover fails to explain how 'a relationship [which] has sufficient constancy to create ... family ties' can be made equivalent to 'a relationship which has sufficient constancy to create family life' - as**

**manifestly these two propositions are by no means the same or equivalent."**

In the light of all this, is it in any way surprising that many people do not know exactly what a family is, whether there is a need for a relationship between marriage and family life, whether the traditional family to which I referred to earlier is, indeed, necessary for a stable society? Again, I repeat, I do not wish to be misunderstood – human society is not perfect and therefore families are not perfect. Some individuals and some families may have problems more than others, but one must always be very careful not to miss the wood for the trees and, in any attempt to rectify those problems, one should not dismantle the very foundations of society which is the family based on marriage. This applies also to judges, whether at the domestic level or otherwise. In determining particular cases one must be very careful not to lay down principles which go beyond the remit of the court concerned, or which could have undesired negative consequences when applied to different facts in a different case. Judges, being human like everyone else, sometimes do get knotted in legal arguments, and come out with a decision which, although it may do justice in the instant case, would have far-reaching and unintended consequences in other areas or in other cases. Sometimes the result may be even considered weird. A case in point is the decision of the ECHR in **Tysiac v. Poland** [14], which also dealt with Article 8 but where the issue touched not upon family life, but upon private life. Polish law allows therapeutic abortions where there is a threat to the woman's life or health attested by a consultant specialising in the field of medicine relevant to the woman's condition. The applicant – who suffered from severe myopia – was in her third pregnancy and she was worried that because of degenerative changes in her retina, she might suffer a detachment as a result of the pregnancy or of childbirth. Although three ophthalmologists acknowledged this possibility, they refused to issue the necessary certificate in terms of the relevant law because, in their view, this detachment was not a certainty. A general practitioner issued such a certificate, but this was not sufficient for the purposes of Polish law, and

[14] 20 March 2007.

the gynaecologist refused to perform the abortion. Tysiac delivered the baby boy safely, but some time after her eyesight suffered deterioration. She filed a criminal complaint against the gynaecologist, but a panel of experts, appointed by the public prosecutor, came to the conclusion that there was no causal link between her deteriorating eyesight and the gynaecologist's actions. She went to Strasbourg claiming that the Polish State had violated her right to private life under Article 8 because it had failed in its "positive obligation" to provide legislatively the means to challenge in court the ophthalmologists' conclusions and possibly to override them. The Court, by six votes to one, found that there had been a breach of Article 8. I would strongly recommend that you read the dissenting opinion of the Spanish Judge, Borrego Borrego. I will only quote the last paragraph of that dissenting judgement:

> **"All human beings are born free and equal in dignity and rights. Today the Court has decided that a human being was born as a result of a violation of the European Convention on Human Rights. According to this reasoning, there is a Polish child, currently six years old, whose right to be born contradicts the Convention. I would never have thought that the Convention would go so far, and I find it frightening."**

Let me now pass on to the second aspect of the Maltese family in the dock, namely when the family, or its members, are involved in civil or criminal litigation.

As I have said, the bulk of litigation in the family court consists of cases of personal separation and cases of marriage annulment. I am sure that those of you who are not Maltese have realised by now that we do not have a divorce law in Malta, but only a law which regulates annulments, the difference between the two being that in an annulment the court declares that because of a defect of consent or of some essential formality there was never a valid marriage, whereas a divorce presupposes a valid marriage which is dissolved either by mutual consent of the parties or at the request of one party with the approval of the court. As a historical aside, up till 1975 Malta did not even have a law regulating

civil marriage. For historical reasons, the law of marriage in Malta was canon law, in the sense that marriage, even by non-catholics and non-believers for that matter, had to be celebrated before a catholic priest in accordance with the formalities of canon law. Although the civil courts could take cognizance of annulment cases, they also had to decide the case by applying canon law. All this was changed in 1975 when a purely civil law of marriage was introduced. Apart from civil litigation, there is also the criminal offshoot to civil matrimonial litigation. When a civil court, whether by final judgment or by interim decree, orders the payment of maintenance by one spouse to the other, failure to do so amounts to a criminal offence, albeit only a contravention, not a crime. The same applies when a court orders one spouse to give access to the child or children in his or her custody to the other spouse, and the spouse so ordered fails to do so. The defaulting spouse faces a maximum jail term of two months for each infraction.

Now the problem as I see it here is this: when a couple has to resolve its problems in court, it generally means that the marital situation has reached a critical stage, in most cases the point of no return. If either one or both parties had previously sought some form of counselling or other help, this has clearly failed. The moment one of them or both decide to go to court – and the law requires that they go to court if they want to separate – a third person comes into the picture: the lawyer. Now I have nothing against lawyers. I am a lawyer myself. I know many practising lawyers who simply refuse to handle matrimonial cases, especially separation cases, because they find them too stressing and extremely distressing. I know of other lawyers who go out of their way to try and reconcile the parties, very often putting the brakes on their own clients in an attempt to see whether there is a possibility of reconciliation and, failing that, whether there is the possibility of an amicable separation (or as it is technically called, separation by mutual consent or consensual separation). Even this latter form of separation, that is separation by mutual consent, however, requires the intervention of the court. The court must examine the draft deed of separation to ensure that there really are valid grounds for separation according

to law and also to ensure that no party is taking undue advantage of the other, and, where minors are involved, to ensure that the children have been duly provided for in the contract. Only then will the court give its approval for the deed to be published by a notary public. Failing all this, lawyers will have to do what they are expected to do – fight it out in court on behalf of their clients. Now it is also true that the present legal regime, introduced in 2003, requires that before a separation case can go to trial before the Family Section of the Civil Court, the parties must appear before a mediator (either appointed by the court or chosen, from a list of mediators, by the parties themselves), who must first attempt to reconcile them and, failing a reconciliation, attempt an amicable separation. Unfortunately in Malta lawyers are allowed to appear before the mediator at any and every stage of the mediation process. Some lawyers assume a very low profile at this stage, intervening only when some clarification, perhaps on a point of law, is necessary. Others view their role differently. Once the case moves from the mediation stage to the trial proper, the relationship between the spouses tends to become even more acrimonious. Very often the tension in the court room is palpable. The situation is not made any easier when lawyers, whether directly or indirectly, use inflammatory language to make some point, or refer to the opposing party in very uncomplimentary terms, whether in writing or orally. In some cases husband and wife are still living under the same roof during the entire separation proceedings, and this behaviour by lawyers can have serious consequences for the safety of both spouses. Where children are involved the situation becomes dramatic – very often the children are used as pawns by their parents (and sometimes, unfortunately even by insensitive lawyers). The parent having the temporary custody of the child or children will sometimes come up with all sorts of excuses to deny or at least limit or frustrate access to the children by the other party – that the child is sick, that he or she is refusing to go with the other parent, that the time of access clashes with some school activity – the repertoire is endless.

Of course the judge – and we have two judges sitting separately in the Family Section of the Civil Court – does exert a moderating influence, but both because

of the sheer workload and also because of his/her very role as the final arbiter of disputes, there is a limit to what the judge can do. The judge is certainly not a mediator. Neither can he prefer any sort of advice to the parties, whether of a legal or other kind. It is trite knowledge that the social welfare agencies have limited resources and they also have their priorities – and even when dealing with child welfare cases they have to prioritise, with child abuse cases being given such priority – although to my way of thinking, the manipulation of children by the parents in the course of separation proceedings is a form of child abuse, and, indeed, a very insidious form of child abuse because of the covert means employed by the spouses. **Perhaps it is about time for the legislator to consider whether a special warrant should be introduced for advocates to practice in the Family Section of the Civil Court. Such a warrant would be granted only after the advocate has undertaken specialised training, possibly organised by the Chamber of Advocates, in matrimonial litigation, and the warrant would be subject to renewal every so many years**.

Let me just give you a quick bird's eye view of what I am talking about in terms of numbers, taking as a sample year last year – 2009.

**Mediation proceedings commenced in 2009:**

**Personal separation – 792**
**Care and custody of child/ren – 138**
**Access to child/ren – 65**
**Maintenance – 106**
**Variation of a previous contract of separation – 86**

**Mediation proceedings terminated in 2009**

**Separation by mutual consent – 508**
**Agreement involving single parents – 36**
**Reconciliation – 89**
**Abandoned – 232**
**Authorisation to proceed to trial – 334**
**Decreed but without proceeding to trial – 83**
**Deed of separation by mutual consent not approved by court -- 29**

**Trial proceedings commenced in 2009**

**Personal separation – 133**
**Annulment of marriage* – 137**
**Care and custody of child/ren – 27**
**Access to child/ren – 4**
**Maintenance – 9**
**Filiation* – 36**
**Repudiation of filiation* – 32**

**(cases marked with * do not require the parties to go to mediation before trial)**

These figures do not include the interlocutory or interim decrees that a judge sitting in the family court is constantly being asked to deliver – to vary access, to authorise one party to leave Malta temporarily with a child, to vary the temporary maintenance which one party was ordered to pay to the other party. Last year the two judges in the Family Section of the Civil Court delivered between them no less than **3403** such decrees in contentious proceedings and another **4026** in mediation proceedings.

Most of the protracted separation litigation is due to disagreement over the patrimonial aspect of the separation. My brief experience in the Family Court in the mid nineties showed that when the spouses had no property of any distinction, the issue as to whether there are grounds for separation, who, if any, it at fault, custody of and access to the children and, to a slightly lesser extent, the maintenance, if any, to be paid by one spouse to the other could be decided in two or three hearings. When, however, there was substantial property involved, and especially if this consisted of things like shares in commercial companies or stocks or property overseas, then the litigation could become seemingly endless. Maltese law, unfortunately, does not impose on the spouses in litigation an obligation, backed by sanctions, of prior disclosure of all assets involved. This means that in many cases, one party or the other has to go on a virtual fishing expedition, calling upon witnesses and examining them, and requesting from them bank statements and other documents. If the parties are unwilling to co-operate in this, even the possibility of a settlement at the initial mediation stage

is, of course, thwarted. **One possible solution to speed up separation cases could be to separate completely the personal separation, custody and maintenance issue from that of the liquidation of the community of acquests; and in any case to introduce an obligation of disclosure which would require the parties to disclose all assets at the very beginning of the litigation.**

As to mediation, while the statistics show that it is a useful tool to reach separation by mutual consent, it yet remains to be seen whether more can be done at this stage to effect reconciliation between the spouses. **Perhaps some sort of quality assurance should be undertaken of the mediation process to find out whether this goal of reconciliation is being properly approached by the mediators, and what can be done possibly to improve the rate of reconciliations**. Mediation in family law cases has now been in place for just over six years, and it is about time that all the stake holders sit down round the table and examine dispassionately the strengths and weaknesses of the regime introduced in December of 2003.

As you can see, I have taken up most of my time speaking about problems facing the family, some of which eventually end up in court. When I read that people have a negative view of the courts and of the judicial system, I always say that I would be extremely surprised if they did not! People do not go to court for fun; they go to court because they have a problem, very often a serious problem which, instead of resolving with the shotgun, they attempt to resolve it in what we regard to be a civilised way, that is, to use perhaps an American expression, "by due process". Or they end in court because they have been charged with having committed a criminal offence. Either way, court is no fun place – even those of us who were brought up on a weekly diet of Perry Mason or Rumpole of the Bailey must surely agree with this. I have chosen to speak about this negative aspect of marriage and family relations because it is a reality that no society can afford to ignore – just like the single parent families I mentioned earlier. But neither can society afford to ignore another and, perhaps more

important, reality – and I will end on this positive note – namely the reality of those families which never make the headlines for the wrong reason. I am referring to those families – and I would venture to add that they still constitute the majority of families in Malta – founded on a stable marriage, who, in spite of all the economic and social difficulties they may encounter at various times, and in spite of the inevitable ups and down of human relations, still provide the bedrock for a good upbringing, education and formation of children. Civil society owes a great deal to these families. They may not be vociferous in campaigning for this or that right or pseudo-right; they may not rush to send letters to the newspaper editors or to comment to blogs about the issues they make the daily headlines in the media. Nevertheless they are the cornerstones of civil society, and of the Church in so far as the Church is also a society. These families too need to be supported and encouraged directly. I am confident that you will be devoting a lot of time in the course of this conference, particularly in the workshops, to discussing how this can continue to be done in an ever more effective manner.

I thank you for your patience in listening to me.

12-03-2010