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CRIMINAL LAW IN SRI LANKA; RESTORATIVE JUSTICE OR RETRIBUTIVE JUSTICE?

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CONTENTS

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Editor's Note .....

The Review publishes in this Issue, three papers with a common general theme that reflects current debates in Sri Lanka in relation to the role of the criminal law in stemming crime in the country.

While the first analysis is set within a broad examination of the overall criminal law framework, the succeeding papers written on invitation for the Review discuss specific concerns in regard to sentencing policy in Sri Lanka. All three writers acknowledge the shift in emphasis in recent times, from the old deterrent view of punishment to a new restorative and reformative rationale that should, ideally, underlie domestic legal structures.

This, in a sense, is the same debate that compels prevalent contrary points of view regarding the re-implementation of the death penalty. In a recent judgement delivered in 1995 meant necessarily not only for the legal erudite, South Africa's Constitutional Court dealt with similarly emotionally charged questions. The calmly reasoned manner in which the Court, (in the judgement of its President, Justice Chaskalson), dealt with the death penalty and its validity in terms of the South Africa Constitution in a country where the crime rate is rampant, is useful for informing Sri Lanka's own public debates.

The Review publishes a descriptive note in reference to the above case given that it incorporates judicial reasoning that is immediately relevant for us. Its general acknowledgement of the purpose of the criminal law and the role of the courts in this regard are reflected in the three papers that we publish.

In counterpoint to these discussions, we also include a short reflection which advances some positive - if not challenging - thoughts on the changing nature of societal relationships between citizens and the manner in which they view themselves and the systems which govern them in Sri Lanka.

Kishali Pinto-Jayawardena

Retributive Justice and Restorative Justice; Competing Theories within the general context of the Criminal Law in Sri Lanka

Dr. Buvanasundari Buvanasundaram[*]

1. Introduction

The State has a vested interest in criminal law for it is through the criminal law that the State maintains law and order, ensures compliance with its rules and prosecutes and punishes those who defy it. State sanctions and the range of punishments that are imposed thereby, seek to ensure compliance with the law. This article will examine the criminal law as it developed through the years, the amendments to the Penal Code, the judicial interpretations of some sections, the problems in penal theory and suggest a way forward in sentencing with the competing aims of retributive justice and restorative justice in mind.

The criminal law of Sri Lanka is primarily embodied in the Penal Code No. 2 of 1883. The criminal law that existed immediately before the Code, we can conclude, was the English common law for the existing Roman Dutch law was difficult for the English judges to ascertain and consequently it was ignored.

In 1883, in Regina v. John Mendis[1] Bertram CJ delivering the principal judgment of the court observed that, what particular criminal law prevailed in the Colony at the time of cession to the British, is a matter of uncertainty. Previous to the conquest by the Dutch, the Portuguese had been in possession of a portion of the Maritime Provinces for many years, and it is scarcely possible to conceive that they should not have left some impress upon the criminal law.[2] The Chief Justice also observed that he had not been able to discover any authority that, at the time of the capitulation, the Roman-Dutch Law in its integrity and as administered in Holland, was exclusively the criminal law of the Maritime Provinces.[3]

Clarence J in his judgment observed[4] that the Portuguese possessed settlements for between one hundred and two hundred years in certain parts of the Island. The Articles of Capitulation under which the Fort of Colombo capitulated to the Dutch in 1656 are silent on legal matters. Until the close of the 18th century, the Dutch possessed settlements along the Ceylon sea-board. There is no information whether any Portuguese Law was retained under the Dutch Government, but the probabilities appear to be against any extensive survival of distinctive Portuguese Law to the later times of the Dutch occupation. In 1796, Great Britain succeeded by conquest to the Dutch possessions in Ceylon. The Articles of Capitulation of 15th February 1796 is silent as to legal matters except the

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[1] (1883) S.C.C. Vol. V, p. 186.

[2] *Ibid*, p. 188.

[3] *Ibid.*

[4] *Ibid, p. 190.*

decision of pending civil suits, which it was arranged, should if decided within twelve months, be decided according to the laws of the Dutch possessions.[5]

Roman-Dutch criminal law was forced to make way for the English Law. This took place mainly because the early Proclamations and Charters of Justice had used terms known to the English Law and because the English judges who functioned here were influenced by English precedents and brought with them the modes and habits of thinking of the English common law.[6] Clarence J observed that[7] the early British Proclamations and Regulations on the subject of criminal law, used terms such as 'felony', 'misdemeanour', 'benefit of clergy', which had no meaning in Roman-Dutch Jurisprudence.

Clarence J further observed, "The learned judge of this court, whose judgment, delivered in 1826, is preserved in Mr. Ramanathan's Reports (p.80), but whose name has been with-held from us by insects and damp; that learned judge recorded in 1826 the vast extent to which in his time the old Dutch Law had passed out of force...speaking of Criminal Jurisprudence, the same judge spoke of the Charters as having 'enacted such extreme deviations from the Dutch-Roman Law that excepting a few technical phrases, scarcely any of this law remains."[8]

Dias J., in his judgment, remarked that the Central Province and a great portion of the Island was never under Dutch rule at all. Confessedly, there was no Kandyan Law recognised by the British on criminal matters and the only law which could have been administered down to 1852 was the English Law. The Ordinance No. 5 of 1852 expressly declared the Kandyan Provinces to be subject to the same law in criminal matters as the Maritime Provinces. As regards the Tamil Provinces in the north, some of the interior Provinces in the north were never under Dutch rule, and there being no recognized Tamil Laws on criminal matters, those provinces will necessarily fall under the operation of the English Law. The criminal law administered throughout the Island during English rule was uniform, and it was never suggested that the Kandyan Provinces and the Northern Province were under the operation of a criminal law different from that which obtained in the Provinces ceded by the Dutch.[9]

In order to settle the uncertainties in the general law, in 1883 the Penal Code was enacted. Section 3 of the Code expressly abolished the Roman Dutch criminal law. The Penal Code was framed on the model of the Indian Penal Code of 1860, with modifications to meet local conditions.[10] The Indian Penal Code was described as containing the substance of the English Law, systematically arranged but stripped of technicalities and ambiguities and modified to suit the circumstances of India.[11] In fact it is an outstanding achievement. It has been observed that the likeness of the Indian Penal Code to the English criminal law is in many cases superficial and the English criminal law freed from all technicalities and ambiguities and systematically arranged, "has undergone such a metamorphosis as

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[5] *Ibid.*
[6] T. Nadarajah, The Legal System of Ceylon in its Historical Setting, Leiden, E.J. Brill, 1972, p. 232.
[7] *Supra n. 1, p. 191.*
[8] *Ibid.*
[9] *Ibid*, p. 193.
[10] *Supra* n. 6, p. 232.
[11] *Ibid.*

to be an entirely new thing."[12] The Code is said to contain some suggestions derived from the French Code Penal and from Livingston's Code of Louisiana, as well as traces of Scots law.[13]

2. The Penal Code

For almost 125, years prosecutions have been launched and punishment meted out against offenders under the Penal Code. Before independence and during the 50 years of independence, many amendments have been made to the Code. It could be said however that the principal amendment in recent times is the Penal Code (Amendment) No. 22 of 1995. Signaling a sign of the times we live in, this amendment sought to secure greater protection for children and amend the law relating to sexual offences. The amendment introduced new sections prohibiting the obscene publication and or indecent exhibition of children, prohibiting cruelty to children; and the sexual exploitation of children. The amendment also brought in a new offence of sexual harassment. It became an offence to procure or attempt to procure any person to become a prostitute. Trafficking in persons was also made an offence.

The earlier section on rape was amended. The new section introduced a part concept of marital rape, permitting the charge if the wife is judicially separated from her husband. In this respect, it fell short of the English law, which contains the full offence of marital rape. Instances of rape in situations of judicial separation are unlikely to arise and this change in the law is merely a cosmetic effort to show that the legislature looks forward though it seems to lack the energy to move forward.

The age for statutory rape was raised to 16 years. A significant change was the punishment for rape. The amendment embodied a minimum punishment of 7 years and also included provision for the payment of compensation to the victim. A minimum punishment of 10 years was laid down, *inter alia,* for custodial rape, gang rape and the rape of a woman under 18 years. The question of minimum punishment raised concerns as punishment had, so far, only a maximum limit.

Some critics have posed the question as to whether a minimum sentence fetters the discretion of the sentencing judge and could be unduly harsh on a particular accused, where circumstances may warrant a lesser sentence? It has been argued that inconsistencies in sentencing should be remedied by the use of the supervisory jurisdiction of the Court of Appeal; it should not be sought to be secured through minimum sentencing. The argument that minimum sentencing would deter, also does not hold good as would be offenders are unlikely to be familiar with the Code. Provision was made for a new offence of incest, which also carries a minimum term of 6 years. The earlier section on unnatural offences was given a minimum sentence of 1 0 years when previously, it carried a maximum of 10 years.

Section 365A provided for the offence of homosexual acts with punishment which may extend to two years or fine. The moral overtones of the earlier section are lacking here and no minimum sentence is laid down. While we recognise rape in judicial separation, we still are far away from de-criminalizing homosexual conduct. If the homosexual act is on a person under 16 by one over 18, it carries a minimum of 10 years imprisonment.

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[12] S.G. Vesey Fitzgerald, Bentham and the Indian Codes, cited in T. Nadarajah, *Supra* n. 6, p. 255.
[13] *Supra* n. 6, p. 255.

Section 365B dealt with grave sexual abuse which does not amount to rape under Section 363 and laid down a minimum punishment of 7 years. Where the victim is under 18, the punishment increases to a minimum of 10 years. The final section gave protection to the victim from printing or publication of his name by unauthorised means.

Further amendments were brought in by Penal Code (Amendment) Act No. 29 of 1998. This amendment created the offence of causing or procuring children to beg, hiring or employing children to act as procurers for sexual intercourse; hiring or employing children to traffic in restricted articles. The amendment also repealed the offence of attempted suicide, repealing a section that has seldom been used.

In relation to defences in criminal law, some sections have hardly given rise to judicial discussion. Though we have had two decades of continuous civil war, there are no cases on the defense of duress, which England has developed through the many IRA cases. Section 87 which embodies the defense of duress states,

> *"Except murder and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence; provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint"*

This section is clearly outdated as it refers to instant death of oneself. The Sri Lankan courts have had no opportunity to interpret the section. It is hoped they would, if called upon to do so, expand the section to include threats to loved ones which would ordinarily be more potent and not interpret the word "instant" too narrowly, recognising that the threat is as powerful even if it is to take effect at a subsequent time.

Further, despite the continuing civil war and the consequent opportunity for army excesses, the only single instance of superior orders being pleaded as a defence is Wijesuriya v. The State[14] *decided* in 1973 under the earlier JVP uprising. The decision in *Wijesuriya* is very satisfactory, laying down unequivocally that unlawful commands of a superior cannot be lawfully followed. No other subsequent case has arisen to endorse this view.

The defence of insanity is embodied in section 77. This section states,

> *"Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. "*

[14] (1973) 77 N.L.R. 25

Section 77 was considered in *Barnes* Nimalaratne v. Republic of Sri Lanka,[15] where the court said it must be carefully borne in mind that in order to succeed, the defence must establish on a preponderance of evidence that at the time the accused committed the criminal act, he was in one or other alternative states of mind set out in section 77. The court referred to abnormal personality due to an 'irresistible impulse' as laid down in the English law. In the English law, the defense of diminished responsibility is embodied in section 2 of the Homicide Act 1957. The section states that where a person kills another, he shall not be convicted of murder if he was suffering from abnormality of mind which substantially impaired his mental responsibility.

In *Barnes Nimalaratne,* the accused though recognised to have peculiarities in his mind could not benefit from the defense of diminished responsibility as this does not fall within the definition in section 77. Including 'abnormality of mind' to enhance 'unsoundness' of mind would be a salutary change in the law. There is between sanity and insanity, a wide range of aberrations and it is important that the law keeps pace with medical findings.

Besides defences, a series of cases have interpreted the sections relating to property offences. The principal offences against property are theft and criminal misappropriation. Theft arises when there is a dishonest appropriation of property. A series of cases[16] have held consistently that misappropriation arises when there is an innocent taking of property followed by a dishonest intention to retain it.

In Welgamage v. The Attorney General[17] the Supreme Court held that this distinction was unwarranted on an analysis of section 386. The court held the section itself does not refer to an innocent taking and consequently this requirement should be excluded. This, the court held, introduced an additional unwarranted ingredient into the definition of the offence. The Penal Code does not contain any rigid demarcation between offences and misappropriation is possible with an initial dishonest intent. This decision brings the law to some extent in line with the English law where the offences of breach of trust and criminal misappropriation come within the broad offence of theft under the Theft Act 1968.

It is submitted that this merging of offences unnecessarily clouds the law on property crimes. The distinction as maintained by the judiciary up to 1990 resulted in a meaningful demarcation between the offences of theft and criminal misappropriation. Though not expressly laid down in the section, the distinction is apparent from the illustrations. Illustrations to sections cannot expand or restrict a section, yet the distinction as maintained over many decades, was a sensible interpretation of the law. To merge the two offences is unnecessary and now theft and criminal misappropriation are in effect one offence. This would invariably lead to confusion and uncertainty among prosecuting counsel in recognising property offences and framing charges in decisions to prosecute.

3. The Death Penalty and Retributive Justice

In Sri Lanka, the death penalty is currently not meted out. The last execution took place in June 1976. There is now a move to bring it back. The outcry to bring back the death penalty is an emotive

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[15] (1976) 78 N.L.R. 51

[16] ***Eorgesy*** v. ***Seyadu Saibo***, (1902) 3 Browne's Reports 88; ***Kanavadipillai*** v. ***Koswatte***, (1914) 4 Balasinham's Notes 74; ***Peiris*** v. ***Anderson***, (1928) 6 Times of Ceylon Reports 49; ***Ranasinghe*** v. ***Wijendra***, 74 N.L.R. 38.

[17] SC 38/90 (unreported).

reaction to increased crime in society. There is a popular belief that capital punishment is a deterrent; that would be offenders are deterred from crime because of the possibility of a death sentence. This is erroneous reasoning. Capital punishment may be a deterrent in cases of pre-mediated homicides, but in instances of death resulting from sudden fights or precipitated killings, the death penalty is no deterrent. It is the certainty of detection, not the severity of punishment which deters crime. What we lack is effective policing. Instead of straightening this out, we moot that capital punishment be brought back.

The death penalty in England was suspended in 1965 and abolished in 1969. Further in Sri Lanka Buddhism is declared to be the official religion and the Constitution provides for state patronage of it. We cannot execute offenders without violating the First Precept which prohibits killing of any kind.. It is time to take stock of what is going wrong with the administration of criminal law and straighten out the police in an effort to reduce crime and introduce respect for the criminal code, rather than raise a cry for the death penalty, when most countries across the globe are abolishing it.

The crime wave continues to be high in Sri Lanka. The total number of serious crimes reported for 1998 was 9,478; the total number for 1999 was 9,056.[18] This figure excludes less serious crime and unreported crime Prison statistics reveal an increase in incarceration. Unconvicted prisoners in remand prisons increased from 65,356 in 1993 to 71,350 in 1997.[19] Particularly worrying is the incarceration of children. Children under 16 years in remand institution) moved up from 878 in 1993 to 1,431 in 1997.[20] The incarceration of convicted prison shows a marginal change, 18,644 in 1993 as opposed to 18,143 in 1997; a similar trend) apparent in regard to children under 16 years, being 25 in 1993 and 26 in 1997.[21] The number sentenced to death in 1993 was 120 and in 1997 the number dropped to 58.[22]

To control criminal statistics, we need to have effective policing and we need to rethink our, punishment ethic. The criminal law has, for many centuries, been dominated by the retributive theory of punishment. The compelling notion of 'just deserts' propelled criminal justice system to prosecute and punish and mete out in general, custodial sentence of different degrees of severity. Yet, this by no means, reduced the incidents of crime which continued to expand over the years, along with the prison population. The retributive theory fails to control crime statistics, fails to keep society safe and fails to reform prisoners. Yet retribution is almost impossible to dislodge from criminal theory primarily because it has been with us too long. We have grown accustomed to it and believe no system of punishment can exist without retribution being its primary force.

This is so because "in the public mind ... custody is generally seen as the only retributive or punitive sentence. Anyone who commits a crime of any seriousness and is not sentenced to custody is generally perceived to have got away with it."[23]

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[18] C.S. Dattatreya, 'Crimes, Human Rights and State Responsibility' in *Sri Lanka: State of Human Rights 2000*, Law & Society Trust, Colombo, 2000, p. 278 at 279.
[19] Prison Statistics of Sri Lanka, Statistical Division, Prison Headquarters, Colombo, Sri Lanka, vol. 17, 1998, p.27.
[20] *Ibid*, p. 28
[21] *Ibid*, p. 39
[22] *Ibid*, p. 65
[23] Lord Bingham, cited in M. Cavadino, I. Crow and J. Dignan, *Criminal Justice 2000-Strategies for a New Century*, Waterside Press, Winchester, 1999, p. 97

Yet years of experience and painful criminal statistics show us that retribution is not the answer to the crime problem. Not only is crime increasing but it is also becoming increasingly unpleasant in form. In meting out a punishment of a term of imprisonment, the judge orders the offender to live in an atmosphere which nourishes and teaches violence; violence may become for him a way of coping, a way of communication.[24] Further, once incarcerated, most offenders have virtually no means of making restitution or paying family support.[25] The inadequacy of the criminal justice system itself is apparent as it lurches from crisis to crisis, based as it is on an outdated philosophy of naked revenge.[26] Restorative justice is an alternative to mitigate the harshness of the retributive system.

The term 'restorative justice' was probably coined by Albert Eglash in 1977 when he suggested that there are three types of criminal justice, (i) retributive justice based on punishment (ii) distributive justice based on therapeutic treatment of offenders and (iii) restorative justice based on restitution.[27] Restorative Justice is defined as "the process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."[28] While retributive justice sees crime as a violation of the state, restorative justice sees crime as a violation of people and relationships; justice involves the victim, the offender and the community in a search for solutions which promote repair, reconciliation and reassurance.[29] It is desirable to modify the present criminal justice system in accordance with restorative principles.

4. Restorative Justice

Restorative justice requires offenders to take responsibility for their offence and to take steps to effect restitution. It involves reintegration of both victim and offender within the community. The philosophy of restorative justice maintains that increased crime is an overall failure of society to reform offenders and help rebuild their lives. Society owes a duty and should take active steps to ensure that those isolated from society because of their criminal inclinations are reintegrated back into society. This reintegration theory frowns upon prisons and its high walls as having totally misunderstood the causes, consequences and solutions to the crime problem. Restorative justice sees with compassion that the violation of most violent men is ultimately spawned by the hostility and abuse of others, it feeds on low self confidence and fractured self-esteem.[30] Restorative justice principles can be found in community service orders, victim offender mediation, community mediation, sentencing circles, peace-making circles, healing circles, family group conferencing and police cautions. The Truth and Reconciliation Committee of South Africa too is based on the philosophy of restorative justice. It encouraged victims to state their story, ask for the truth and seek atonement.

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[24] H. Zehr, *Changing Lenses: A New Focus for Criminal Justice*, Herald Press, Pennsylvania, 1990, p. 35
[25] D. Van Ness and K. Strong, Restoring Justice, Anderson Publishing Co, Cincinnti, 1997, p. 106.
[26] T. Marshall, 'Restorative Justice on Trial in Britain', in H. Messmer and H. Otto (eds), *Restorative Justice on Trial-Pitfalls and Potential of Victim Offender Mediation-International Research Perspectives*, Kluwer Academic Publishers, Netherlands, 1991, p. 15 at p. 26.
[27] *Supra* n. 25, p. 24.
[28] T. Marshall, cited in *Restorative Justice Handbook*, 10th UN Congress on the Prevention of Crime and the Treatment of Offenders, April 2000, p.2.
[29] *Supra* n. 24, p. 181.
[30] R. Johnson, cited in ibid, p. 36.

John Braithwaite has spoken at length of the role of law in reintegrative shaming, he believes that the key to crime control is cultural commitments to reintegrative shaming.[31] Shame is intimately tied to our identity, to our very concept of ourselves as human and to the extent that man is a social animal, shame is the shaper of modem life.[32] The theory of reintegrative shaming assumes that there is a core consensus in modern societies that compliance with the criminal law is an important social goal.[33]

Reintegrative shaming has been explained through the family model. When a parent punishes his child, both parent and child know that afterward they will go on living together as before. The child gets his punishment, within the continuum of love, after his dinner and before bed-time story and in the middle of general family play and he is punished in his own unchanged capacity as a child with feelings rather than as some kind of distinct and dangerous outsider.[34]

Reintegrative shaming is contrasted with disintegrate shaming which creates outcasts and propels them into criminal subcultures. Braithwaite cites Japan as the triumph of reintegrative shaming. Japan is the only clear case of a society which had a downward trend in crime rates since the second world war. This he argues is the result of the cultural traditions of shaming wrongdoers, including effective coupling of shame and punishment. Between 1976 and 1980 the number of murders in Japan fell 26 per cent, during the same period in the US, murders increased by 23 per cent.[35] In 1978 Japanese police cleared 53 per cent of known cases of theft, but only 15 per cent of the 231,403 offenders were arrested. Prosecution only proceeds in major cases or more minor cases where the normal process of apology, compensation and forgiveness by the victim breaks down. Fewer than 10 per cent of those convicted receive prison sentences and for two-thirds of these, prison sentences are suspended. Whereas 45 per cent of those convicted of a crime serve a prison sentence in the US, in Japan the percentage is under 2.[36]

L. Braithwaite observes that while it is a mistake to assume that Japanese cultural traditions of repentance can readily be transplanted elsewhere, it is also a mistake to forget that the repentant role has a place in the western culture and that the western criminal justice system based on retribution is one of the-institutions that systematically crushes these traditions.[37]

Shaming certainly has a powerful role in social compliance. As rightly observed most of us will care less about what a judge (whom we meet only once in our lifetime) thinks of us than we will care about the esteem in which we are held by a neighbor we see regularly. "I may have to put up with the stony stare of my neighbor every day, while the judge will get only one chance to stare stonily at me."[38]

Restorative Justice however is not without its problems. As observed, the involvement of the communities will require that restorative justice processes be decentralised - located in the neighborhoods of the victims and offenders and that the process be open and public. This may run

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[31] J. Braithwaite, Crime, Shame and Reintegration, Cambridge University Press, New York, 1989, p.1.
[32] D. Nathanson, *Shame and Pride-Affect, Sex and the Birth of the Self*, W.W. Norton and Co., New York, 1992, p.149.
[33] *Supra* n. 31, p. 38
[34] Griffith, 1970: 376, cited in ibid, p. 56.
[35] *Supra* n. 31, p. 61.
[36] *Ibid*, p. 62
[37] *Ibid*, p. 165
[38] *Ibid*, p. 87.

counter to notions of privacy and confidentiality, especially in juvenile proceedings. There is fear that with restorative justice, due process and legal rights will be compromised. Further, restorative justice would lead to de-professionalisation of the process empowering communities as well as victims and offenders.[39] Communities could be too authoritarian. It is necessary in this situation to give careful attention to community power to avoid vigilantism.[40]

Further, people see restorative justice as benefiting the offenders more than the victims. It is also feared that some offenders would feign repentance to benefit from restorative justice. The concept of community in restorative justice needs further development and clarification as the community's interest can and often do differ from those of the state.[41]

Further, as observed, there is the problem of fairness as between defendants. If one victim is forgiving and asks little, whereas another is vindictive and makes great demands, offenders might find themselves subject to widely differing expectations for similar offences.[42] As a further note of caution, it must be remembered that the restorative justice practice could run away as it were with what was originally intended. Restorative justice may be used by some as justifying every method of punishment save incarceration. Corporal punishment may be made a mode of diversion, or an offender may be compelled to wear a T-shirt declaring 'I am a thief. In Queensland it used to be common for pubs which sold watered - down beer to be ordered by the court to display signs prominently indicating that the proprietor had recently been convicted of selling adulterated beer. The practice was stopped because it was regarded, *inter alia*, as 'Dickensian.'[43]

It is true as observed that shaming is rough and ready justice which runs great risk of wrongdoing the innocent and that the most important safeguard is for shaming to be reintegrative, so that communication channels remain open to learning of injustices and social bonds remain intact to facilitate apology, and recompense.[44] When the accused is guilty, repentance plays an important role as a turning point between shame and reintegration. The desire to end the shame, to be reintegrated with others by adopting the repentant role can be so strong that people will even admit to crime they did not commit.[45] Also restitution would be simpler for the wealthy who enter the criminal justice system. We must ensure that restorative justice reaches the poor and the disadvantaged as well. When restorative justice fails the offender should still be encouraged reparation.

Recognising the problems restorative justice would encounter and finding the means to deal with it would further strengthen its function. It is important that restorative justice be incorporated into the existing criminal justice system. It is a simple humane method of dealing with those who have fallen by the way in society's effort to keep itself crime free, Retribution often leaves a legacy of hatred.[46]

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[39] J. Hudson, B. Galaway, 'Introduction' in B. Galaway and J. Hudson (eds), *Restorative Justice: International Perspectives*, Kugler Publications, Amsterdam, 1996, p. 3.
[40] *Ibid*, p. 14
[41] D. Van Ness, 'A Reply to Andrew Ashworth', 1993, 4(2) *Criminal Law Forum*, p. 301 at p. 306.
[42] A. Ashworth, 'Some Doubts about Restorative Justice', 1993, 4(2) *Criminal Law Forum*, p. 277 at p. 290.
[43] *Supra* n. 31, p. 60.
[44] *Ibid*, p. 161.
[45] *Ibid*, p. 162
[46] *Supra* n. 24, p. 192

The beauty of forgiveness is that by addressing hostilities it allows both the victim and the offender to take control of their lives.[47]

5. Conclusion

The criminal law of Sri Lanka has developed over the years with colorful cases and interesting judgments by successive judiciaries. We need now to rewrite the criminal law in softer tones and look differently at our prisoners and move towards effective reform and rehabilitation.

We have several options in this regard. Faced with crime, we may draw together defensively against the 'enemy.'[48] A sense of community may be increased, but as a defensive, exclusive, threatened community. Alternatively we can retire to fortified homes becoming distrustful of others. The sense of community, already weak becomes further eroded.[49] The attitude of the public towards punishment is influenced by their conception of criminals and their degree of knowledge about crime and sentencing; the public's image of an offender tends to be that of a violent offender who is often a recidivist.[50] Thus, the public also overestimates the amount of violent crime and recidivism.[51] We have been educated to believe that humiliating and suffering is what justice is about and that evil must be held in check by harshness rather than by love or understanding.[52]

To talk of forgiveness, however in the same breath as retribution, incapacitation, deterrence and other more traditional function of the criminal justice process seems somewhat incongruous.[53] Yet forgiveness lies at the very heart and centre of processes for overcoming the deleterious effects of crime and other social inequity.[54] Further, forgiveness is not something that a victim does for the benefit of the offender. Real forgiveness is the process of the victim letting go of the rage and pain of the injustice so that he can resume living freed from the power of the criminal violation.[55] There is little need for reconciliation when the loss is trivial or can be addressed by third-party compensation through insurance or the state, but there is a tremendous opportunity for reconciliation where pain runs deep.[56] Victims need to progress to the point where the offence and offender no longer dominate them.[57]

Since the mid 1970's, many criminologists have concluded that rehabilitation is simply an impossible goal and that pursuing it within the retributive prisons system, is a failed policy.[58] Like most sociological theories of crime, the theory of reintegrative shaming implies that solutions to the crime

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[47] *Ibid*, p. 193.
[48] *Supra* n. 24, p. 59
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.*
[52] J. Lampen, cited in H. Zehr, Changing Lenses: A New Focus for Criminal Justice, Supra n. 24, p. 192.
[53] J. Gehm, 'The Function of Forgiveness in the Criminal Justice System' in M. Messer and H. Otts (eds), *Restorative Justice on Trial-Pitfalls and Potentials of Victim Offender Mediation-International Research Perspectives*, supra n. 26, p. 541 at p. 547.
[54] *Ibid.*
[55] D. Peachey, 'Restitution, Reconciliation, Retribution: Identifying the Forms of Justice People Desire' in M. Messe and H. Otto (eds), *Restorative Justice on Trial-Pitfalls and Potentials of Victim Offender Mediation-International Research Perspectives*, supra n. 26, p. 551 at p. 556.
[56] *Ibid.*
[57] *Supra* n. 24, p. 25 at p. 25.
[58] *Supra* n. 25, p. 12 at p. 12.

problem are not fundamentally to be found in the criminal justice system.[59] The underlying assumption well worth holding up to the light, is that courts are harsh, uncomprehending places and that perhaps because of professional self-interest, perhaps because of financial constraints, perhaps because of lack of imagination, we cannot hope to change the nature of courts.[60] Court trial carries its attendant problems. Because of the threat of punishment, offenders are reluctant to admit the truth. Because the punitive consequences are serious, elaborate safeguards of offenders' rights are needed and these can make it difficult to get at the truth.[61] To find lasting solutions we will have to rebuild the criminal justice system from its foundations, the first step will be to construct a new pattern, of thinking about crime and justice.[62] That new pattern is restorative justice.

Most lives are not touched by the criminal justice system. It is a small segment that comes within it. So the burden on the criminal justice system is not heavy. No system is perfect but the restorative justice is a more perfect system than what we have. Restorative justice must be institutionalised in the existing system of police and courts. If not, it would become marginalized and would be soon overpowered by the retributive tradition.

Restorative justice cannot displace the retributive system immediately. Violent offenders and sexual offenders should remain for the time being within the existing system. But restorative justice should right now, be the only avenue for non-violent offenders. Of course, as with most cases involving policy change, we are dependent on political will. Educating the public on the advantages of restorative justice and its contribution towards victim satisfaction and reduced recidivism is an important first step. This public education is the responsibility of politicians and criminal justice officials. As observed, like Copernicus and Galileo, we shall have to spend some time getting other people to look through our telescope and verify our observations before they are persuaded.[63]

The best hope of progress in crime control is to work for a gradual shift from the repressive towards the restorative.[64] Nothing else is likely to work. Restorative justice is a different way of thinking about crime and this different way has grown out of experience. While retributive justice tries to vindicate the law, restorative justice invites full participation and consensus of all affected by the offence and seeks to heal what is broken. It seeks full and direct accountability, seeks to unite what has been divided and seeks to strengthen the law. Above all, it gives new hope to the concept of justice at a time when that concept seems to be wilting.

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[59] *Supra* n. 31, p. 178.
[60] G. Davis, J. Boucherat and D. Watson, 'Reparation in the Service of Diversion: The Subordination of a Good Idea', op. cit., p. 133.
[61] *Supra* n. 24, p. 25, p. 77
[62] *Supra* n. 25, p. 25, p. 13
[63] *Supra* n. 39, p. 227
[64] *Ibid.*

Sentencing Policy in Our Criminal Justice System

P.H.K. Kulatilaka[*]

The many factors that influence judicial thought in sentencing are retribution, justice, deterrence, reformation and protection. Modern sentencing policy reflects a combination of several or all of these aims. Penal provisions in a statute would fix a maximum penalty and leave a wide discretion to the trial judge to determine the exact sentence that is imposed. This exercise of discretion is a matter of prudence and not of law. The judge has to come to a just decision regarding the proper sentence that should be imposed.

Criticisms levelled by some against the exercising of such judicial discretion have focussed on the observation that sentencing powers are oftentimes exercised in too extreme a manner, either in the direction of severity or leniency. In recent years, the legislature in its wisdom, has "cut down" judicial discretion by introducing penal provisions setting out mandatory minimum sentences. This change of policy reflects the public perception that very strict punishment is necessary to curb certain categories of offences.

The introduction of mandatory sentencing laws seems however in apparent conflict with the emphasis in recent years on measures designed to keep offenders out of prison or other penal institutions. As examples of these latter measures, one can point to the imposition of suspended terms of imprisonment (vide Section 303 of the Code of Criminal Procedure Act No.15 of 1979 as amended) and community based correction orders under the Community Based Corrections Act No.46 of 1999. The modern trend in sentencing is to craft sentencing laws that are fair, respectful of Human Rights and protective of public safety.

Interests at Stake

Our sentencing policy has been to try case by case and impose sentences that vindicate the victim's interest, acknowledge offender's circumstances and take account of public safety concerns. The interests that are at stake in this process are manifold. These are firstly, the interest of the State in enforcing its laws; secondly, the defendant's interest in having a fair trial that preserves his liberty and finally the responsibility of the judge to reconcile these interests. In performing that duty, the judge takes into consideration particular factors such as behavioral norms that were violated or the gravity of the offence committed as well as aggravating or mitigating circumstances that make the offender more or less culpable. Accordingly, applicable penal provisions have been crafted to allow judges latitude to fashion sentences tailored to individual cases, thereby according judges a wide discretion. This has resulted in instances of unwarranted sentencing disparities, leading in turn to an unfortunate backlash from certain "interest groups" which particularly challenges the competence of the judges in sentencing.

Consequent to promises held out by politicians in this country that they would enact legislation to make the imposition of tough sentences compulsory and thereby reduce the crime rate in the country, led to the introduction of certain mandatory sentencing provisions in the Sri Lankan Penal Code.

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Judicial Discretion in Sentencing

Whilst criticizing mandatory sentencing laws introduced to the Criminal Code in Western Australia, former High Court chief justice Sir Gerard Brennan remarked that "sentencing is the most exacting of judicial duties because the interests of the community, of the victim of the offence and of the offender have all to be taken into account in imposing a judicial penalty."

In Sri Lanka, there is a dearth of case law providing guidelines for the judges of the criminal courts to follow in sentencing an accused person. Some of the earlier decisions of our appellate courts appear to be attracted by the retributive theory of punishment. Therefore, these decisions appear to have been more concerned about the need for deterrence and protection of society.

In the Attorney General v H.N. De Silva[1] Basnayake A.C.J. observed "a judge should in determining the proper sentence first consider the gravity as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statutes under which the offender is charged." The judge should also have regard to the effect of punishment as a deterrent and consider to what extent it will be effective. The other factors that the learned judge referred to in this regard are the incidence of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection. It was further observed that the reformation of the criminal, though no doubt an important consideration, is subordinate to the other considerations already mentioned. Where the public interest or the welfare of the State outweighs the previous good character, antecedents and age of the offender, public interest must prevail.

This decision was followed with approval by Sri Skanda Raja J. in Gomes v. Leelaratne.[2] In this case, the appellate court, exercising its powers of revision, set aside the order of the Magistrate made under Section 325 (1) of the Criminal Procedure Code (similar to Section 306 (1) of the present Code of Criminal Procedure Act No. 15 of 1979) and convicted the accused under Section 367 of the Penal Code, imposing a term of two years rigorous imprisonment.

Sri Skanda Raja J. added some more factors to be taken into consideration when punishing an offender who was convicted of theft; namely, nature of the loss to the victim, profit that may accrue to the culprit in the event of non detection and the use to which a stolen article could be put.

It appears that in these cases, the appellate court was anxious to follow a deterrent sentencing policy. In Bradley[3] the English Court of Appeal remarked thus "when a court finds that its duty is to pass a deterrent sentence, consideration of that particular prisoner's past good record are of much less moment than normally would be the case."

However, in an important recent judgment, the Court of Appeal went on further to declare "that imprisonment should be used sparingly and in the case of non violent petty offenders, a term of imprisonment, if considered necessary. should be used sparingly."[4]

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[1] 57 NLR 121
[2] 66 NLR 234
[3] (1970) Crim LR 171
[4] Vide Queen (1981) 3 Cr App R 245

As far as Sri Lankan law in concerned, a liberal, flexible and more detached approach was adopted by Rajaratnam J. and Ratwatte J. in Karunaratne v. the State.[5] In this case, the accused was charged with criminal breach of trust. After the trial, he was sentenced to two years rigorous imprisonment and a fine of Rs. 1000/-. The conviction came more than seven years after the proven offence. When this matter came up in appeal, a period of ten years had lapsed from the date of the offence.

The learned justices took two factors into consideration. Firstly, that the inquiry and trial must have caused hardship and unhappiness in the house of the accused and secondly, the serious consequences and disorganization it would have caused in the family of the accused. Rajaratnam J. went on to say "if there was a trial in due course, the accused by now would have served his sentence and come out of prison to look after his family"

Vythialingam J. (dissenting), did not think however, that the strain that the accused would have undergone during those ten years when the charge was hanging over his head would outweigh the demand of public policy that a deterrent sentence of immediate imprisonment should be imposed.

In Tierney[6] where the accused was convicted of burglary, the appellate court reduced the sentence of nine months imprisonment to six months imprisonment suspended for two years and expressed the view that the offender should be sentenced on the basis of his situation at the time of sentencing and not at the time of offence.

However, the argument for mitigation on these points will be much less stronger where the offence was a very serious one and/or where the offender has taken active steps to avoid detection. In such cases, the serious nature of the offences themselves results in any discount for the delay being minimal. In Hook[7] the accused pleaded guilty to a range of sexual offences committed on his stepdaughter over a period of ten years. Nearly fourteen years had lapsed before the offender came to be sentenced. He was sentenced to a period of five years and nine months. The court refused to give any discount with reference to mitigating factors. This sentence was affirmed in appeal.

One of the most frequent matters urged before court in mitigation is that the offender has a good character and a clean record. In fact, our procedural law has thought it fit to give a suspended sentence of imprisonment to an offender sentenced for a term of imprisonment not exceeding six months if he had no previous experience of imprisonment.[8]

On the other hand, the fact that the antecedents of the offender up to the time of conviction show a long record of convictions for offences, does not justify the imposition of a sentence disproportionate of the facts of the case.

Andrews L. C. J., in Ray Moore[9] observed from the bench of the Court of Criminal Appeal for Northern Ireland that "it is clearly established that when one is dealing with a relatively minor case, a

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[5] 78 NLR 413
[6] (1982) Grim LR 53
[7] (1990) 12 Crim App R S 5(54)
[8] Vide Section 303 of the Code of Criminal Procedure Act No 15 of 1979 and also provisions relating to conditional release of offenders under Section 306 of the same Act.
[9] (1938) 73 ILTR 143

previous bad record does not warrant the imposition of an unduly severe sentence. A court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed. However the previous crime record of the accused may justify the court in ignoring mitigating factors and the possibility of an individualized sentence in favour of a sentence of imprisonment."[10]

The circumstances, under which the offence was committed, is also a relevant factor in deciding upon the sentence. These circumstances may have come to light at the trial itself. If it is a case where the accused pleaded guilty at the commencement of the trial, the background information could be supplied to court by the prosecuting counsel, defense counsel medical experts and notes of investigation prepared by the Police.

There may be cases where the offender has rendered substantial assistance in the detection of the crime[11] where the offender had shown remorse and repentance or suffers from a serious illness. These are also factors that a judge could take into consideration when sentencing a convicted person.

The fact that the accused has pleaded guilty to the charge or indictment is an additional factor to be considered in sentencing. A guilty plea by an accused is an element of remorse. Such plea saves time of court, shortens trials, helps to reduce backlog of cases and saves cost of legal aid. In the High Court, it is a common practice that prior to the commencement of a trial, the counsel for the accused and the prosecuting counsel may confer about a plea and if agreed they would indicate about it to the trial judge. It may be a case where the accused is willing to plead guilty to a lesser offence. As in the United Kingdom, judges in Sri Lanka are not a party to these negotiations. A leading case on this point is Turner[12] which laid down principles to be followed in the following terms." Counsel must be completely free to do what is his duty."

The duty of counsel is to give the accused the best advice that he can. If need be, such advice could often include pointing out that a guilty plea, showing an element of remorse, is a mitigating factor which might enable the court to give a lesser sentence than would otherwise be the case. Vide Keuneman J. in Attorney General vs. Fernando[13]

A statement by the judge that on a plea of guilty, he would impose one sentence but that on a conviction following a plea of not guilty, he would impose a more severe sentence, should however never be made.

Non-Custodial Measures

Legislation has found alternative methods in dealing with offenders without sending the offender to detention in a penal institution in cases for which a custodial term of imprisonment is not warranted.

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[10] Vide Queen (1982) Crim LR 56.
[11] Vide Lowe (1977) 66 Crim App 122
[12] (1970) 2 QB 321
[13] 47 NLR 431

(i) Total Discharge

There is provision for a magistrate to order a total discharge in appropriate cases in terms of Section 306 (1) of the Code of Criminal Procedure Act No 15 of 1979. The factors that the magistrate should take into consideration in this regard are enumerated in that section; namely, the character, antecedents, age, health or mental condition of the person charged or the trivial nature of the offence or the extenuating circumstances under which the offence was committed. According to this section, two conditions have to be satisfied. Firstly, the court has to form the opinion that the charge is proved. Secondly, having regard to the factors referred to above, the court must decide that it is inexpedient to inflict any punishment or any other than a nominal punishment.

In such cases, the magistrate may order such offender to be discharged after such admonition as to the court shall seem fit, as was the case for example, in O'Toole[14] where the accused was morally blameless and Smedley's Ltd. v. Breed[15] where considerable time had lapsed between the commission of the offence and prosecution.

(ii) Conditional Discharge

Having regard to the factors referred to above, the court may discharge the offender conditionally on his entering into a recognizance with or without sureties, to be on good behaviour and to appear for conviction and sentence when called for at any time during such period, not exceeding three years, as may be specified in the order of the court.

The difference between an absolute discharge and conditional discharge referred to in the above section 306 (1) is that in a conditional discharge, a condition is imposed that the offender commits no offence for a specified period in the future. In Gomez v. Leelaratne[16] the appellate court reprimanded the magistrates for discharging offenders of grave crimes on conditional discharge orders.

When the High Court has powers to effect conditional discharge of offenders

Section 306 (2) deals with the power to make an order discharging the offender conditionally in lieu of imposing a sentence of imprisonment. The factors to be taken into consideration in effecting such an order are similar to those enumerated in Section 306 (1). Before making such an order, the accused has to be convicted on indictment.

Suspended Sentence

Section 303 of the Code of Criminal Procedure Act as amended by the Act No.47 of 1999 provides for the imposition of a suspended term of imprisonment where the accused is sentenced to a term not exceeding two years. In this regard, discretion is given to court. The operative period is not less than five years. In terms of Section 303(2), a suspended term is mandatory in reference to a first time offender who has been sentenced for a term not exceeding six months, subject to the exceptions

[14] (1971) 55 CR App R 206
[15] (1974) 10 AC 839
[16] *Supra*

referred to therein. An order suspending a term of imprisonment cannot be made when the statute prescribes a mandatory minimum sentence of imprisonment.

The primary objective of the suspended sentence is to keep the offender out of prison and is intended as a deterrent measure. It differs from a conditional discharge for the reason that with the latter, there is no specified sentence hanging over the head of an individual which will became operative on the commission of a further sentence. The thinking was that non-custodial measures may possess both penal and corrective characteristics and may also serve other purposes such as public protection.

When a judge imposes two suspended sentences, he should state whether as between themselves they are to be concurrent or consecutive.[17]

It is wrong in principle, either to pass a suspended term for one offence and impose a custodial sentence with immediate effect for another offence at the same time and to activate one suspended sentence while imposing another, the reason being that the main objective of the suspended sentence is to avoid sentencing an offender to prison at all.

In Mary Sapiano[18] it was held that it is not proper to pass suspended sentence to be consecutive to an effective sentence, as the main object of a suspended sentence is to avoid sending the offender to prison and in any event, the procedure would not be workable in practice.[19]

Change of Emphasis

The growth of crimes in recent years itself has created an increasing prison population and an increased tariff of penalties. Hence, emphasis is no longer on providing measures which increase the opportunities for prisoners to be detained longer in order to achieve reform. The problem has been to find measures restricting the use of imprisonment thus involving a search for non-custodial measures, which would have the effect of reforming petty offenders.

One of the main reasons for this change of emphasis is that a large percentage of the prisoners were languishing in jail for the defaulting of payment of fines. Therefore, the need arose to bring in legislation enabling the Magistrate Court to impose Community Based Correction orders in lieu of sentences or imprisonment. It is in that background that the Community Based Correction Act No. 46 of 1999 saw the light of day. Section 6 of the Act gives power to the magistrate to make a Community Based Correction Order in lieu of imposing a sentence of imprisonment or a suspended term of imprisonment or fine, except in cases where the offender has to serve a mandatory minimum sentence or the offence for which the penalty prescribed for, includes terms of imprisonment exceeding two years. In exercising discretion in this regard, the court has to take into consideration the nature and gravity of the offence and the other circumstances relating to the commission of such offence. The court will be provided with a pre sentence report as well. To execute the said order, the Act creates a Commissioner of Community Based Corrections.

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[17] Vide George Wilkinson (1970) 1 W L R 1319.
[18] (1968) 55 Cr App R 674
[19] Vide Raymond Charles Butters (1971) 55 Cr App R 515.

Sexual Offences

In recent years in Sri Lanka, certain changes have come in respect of Sexual Offences. Penal Code (Amendment) Act, No.22 of 1995 introduced new offences such as Procuration (360A), Sexual Exploitation of Children (360B), Trafficking; (360C), Marital Rape and Gang Rape. Punishment for Sexual Offences has been enhanced and a Mandatory Sentencing Policy has been introduced.

A new sentencing scheme was thereby brought into the Statute Book due to the recognition that an inadequate sentence frequently adds to the anguish of the victim who feels that society has not recognized her suffering, particularly when she is compelled to speak in public of the grave wrongs committed against her. In these offences, even though a mandatory minimum sentence has been introduced, we do not have any guideline as to how the limited discretion should be exercised. Lord Justice Mantell in the recently decided Attorney General's Reference Nos 91,119 and 120 of 2002[20] lays down certain guidelines which could well be adopted by our courts. These guidelines are as follows;

1. The degree of harm to the victim.
2. The level of culpability of the offender.
3. The level of risk posed by the offender to society.
4. The need to deter others from acting in a similar fashion.

Mandatory Sentencing Laws

With a view to curb and prevent terrorism and drug offences, recent legislation introduced offences for which the imposition of mandatory minimum sentence of imprisonment has been prescribed. Eg; The Prevention of Terrorism (Temporary Provisions) Act, Poisons, Opium and Dangerous Drugs Ordinance. Similar penal provisions were brought into the Penal Code. E.g. Penal Code (Amendment) Act No 22 of 1995. The idea of mandatory sentencing is, in fact, based on the principle of deterrence. These laws reflect the public perception that very strict punishment is necessary to deal with persistent criminal offenders.

We do not yet have readily available statistics or assessment of recidivism regarding mandatory sentencing. One difficulty in assessing the impact of mandatory sentencing is that imprisonment statistics are based on the offence and do not record whether the incarceration is the result of a mandatory sentence.

The main criticism against the introduction of mandatory sentencing laws to our penal system is that mandatory sentencing excludes the exercise of judicial discretion. Mandatory sentencing also has a particularly unjust impact on those with mental illness or intellectual disability.

Commenting on the mandatory sentencing laws in Australia, it is interesting that "The Sydney Morning Herald" remarked thus: "Popular feelings and emotions are not a sound basis for deciding how justice should be done without dealing with variety of offences."

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[20] (2003) 2 Grim App.R-55

The following criticisms have been levelled against the introduction of mandatory sentencing laws into penal systems.

I. discretion is removed from Courts
II. these laws are harmful to vulnerable and disadvantaged persons in society.
III. statistics do not indicate that these laws deter criminal activity.
IV. these laws are an affront to the notion that punishment should fit the crime. It would cause disparity in sentences for offences, which are or are not subject to mandatory sentencing.

Further, it has also been contended that these laws will have the effect of increasing the prison population. There will be an increase in the number of prisoners sentenced to full time imprisonment and the length of time they spend in prisons.

Conclusion

Dr. A. R. B. Amerasinghe, (Chairman of the Law Commission and former justice of the Supreme Court), in a report prepared on Community Service Orders, has remarked that sentencing is a matter that is within the discretion of the judge, and this should be the case. He lamented that there are no guidelines with regard to the exercise of this power. We have only a few guideline judgments. Guideline judgments reinforce public confidence in the integrity of the process of sentencing. An appropriate balance must be struck between the broad discretion given to courts to ensure that justice is done in each individual case and the need for consistency in sentencing and the preservation of public confidence in sentences actually imposed.

The problem of sentencing disparity between courts is not so much one of different sentences, but inconsistency in basic principles and sentencing assumptions. If, for instance, one court generally views an offence, whatever the circumstances of commission and of the offender, quite differently from another court, there is an evident disparity of sentencing policy in relation to that offence. There must be a number of guiding principles and commonly held assumptions to provide coherence to the whole system.

The maximum sentence available for a particular offence must be reserved for the worst form of that offence.[21] Aggravating factors may be taken into consideration in the imposition of a higher sentence and mitigating factors may lead to the imposition of a lesser sentence. The Court has to be mindful of the gravity of the offence and the punishment prescribed by the statute. Sentences imposed must be proportionate to the facts of the case. Deterrent punishment imposed on an offender convicted of a grave crime will be a warning to others not to engage in similar criminal activity.[22] For petty offenders and with regard to cases where compelling mitigating factors are present, the sentencer may choose an individualised measure, e.g; total or conditional discharge suspended sentence or a community based (correction order). Where the statute provides a mandatory sentence, it is imperative that it should be complied with.

[21] Vide Byrne (1975) 62 Crim. Aop.R. 159.
[22] Vide Bradley (supra).

The following factors may be taken into consideration in determining the character of an offender.

(i) The number, seriousness, date, relevance and nature of any previous convictions.
(ii) General expectations of the accused
(iii) Any significant contribution made by him to the community.

Article 12(1) of the Constitution lays down that all persons are equal before the law and are entitled to the equal protection of the law. It requires that in the administration of Criminal Justice, no one shall be subjected for the same offence, any greater or different punishment than that to which other persons of the same class are subjected. Equality of sentencing does not require uniform sentences for all accused committing the same offence, but only similar sentences for accused where the characteristics of the accused and the crimes they have committed, are more or less alike.

Challenges Ahead in Sentencing Policy in Sri Lanka

Aditya Sudarshan[*]

Introduction

In recent years, two developments in the law governing sentencing in Sri Lanka- namely, the institution of mandatory minimum sentences for offences under the Penal Code, the Prevention of Terrorism Act, as well as other criminal legislations, and the introduction of community based correction under the Act of 1999- raise, both independently and in conjunction, important questions of sentencing policy and criminal justice in this country.

Mandatory sentences have for long been a source of controversy, both in and outside Sri Lanka. Its supporters point to the need to reduce judicial discretion in sentencing, and the arbitrary sentencing disparities associated with it, as well as the value of strong deterrence in respect of serious offences.[1] Its critics argue that such sentences are both theoretically and practically flawed- theoretically, because by excluding or limiting judicial discretion in sentencing they serve to treat unequal cases equally, thereby undermining the goals of sentencing, and practically, because they tend to discriminate against socially disadvantaged groups, besides contributing to congestion in prisons.[2] In its first four sections, this article outlines these arguments and comes to certain preliminary conclusions as to their relative merit.

The fifth and sixth sections of this article are a study of community based correction (CBC), as it exists in Sri Lanka, and as it has been conceptualised elsewhere. It is argued here that, more than the *administrative* benefits of CBC- i.e. its utility in checking the overcrowding of prisons- it is the substantive value of the system, both in the rehabilitation of the offender, as well as in the promotion of *restorative justice*, that makes it important. A failure to fully appreciate this is reflected in the Community Based Correction Act of 1999. As a result, the fundamental inadequacy in the principle of incarceration as a mode of punishment, which CBC brings to light, has so far not been given sufficient consideration in Sri Lanka. The implications of doing so, for sentencing policy in general, and for mandatory sentencing schemes in particular, are also considered here.

Finally, the article concludes by suggesting the direction in which sentencing policy in Sri Lanka ought to move, so as not only to give effect to the rule of law in sentencing, without sacrificing the achievement of the goals of sentencing, but more importantly, so as to enrich the prevailing understanding of what those goals are and how they can be achieved.

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[1] **See** UNITED STATES SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 14 (Aug. 1991).

[2] **See** Rob White, 10 ARGUMENTS AGAINST MANDATORY SENTENCING, Youth Studies Australia, Jun2000, Vol. 19, Issue 2.

1. Mandatory Sentences in and outside Sri Lanka

Even prior to the amendments to the Penal Code, mandatory minimum sentences had been introduced into other criminal legislations in Sri Lanka. The Poison, Opium and Dangerous Drugs Ordinance of 1973, the Prevention of Terrorism Act of 1979 and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act of 1994, all envisage minimum periods of incarceration for particular offences. More recently, however, mandatory minimum sentences in respect of certain categories of sexual offences, among others, were added to the Sri Lankan Penal Code (SLPC), through the Penal Code (Amendment) Act of 1995. S. 286A- defining the offence of obscene publication- imposes a minimum sentence of two years imprisonment for its commission. S. 360A also imposes the same minimum period for the offence of procuration, and S. 360B imposes a minimum of five years imprisonment for the sexual exploitation of children. S. 363 imposes a minimum prison term of seven years for whoever commits rape, and of fifteen years for certain kinds of rape, such as gang rape.

Mandatory minimum sentences have also been instituted for the crime of grave sexual abuse. It has been pointed out that "in introducing the controversial concept of mandatory minimum sentences for sexual violence the Sri Lankan legislation was influenced by Indian Penal Law."[3] S. 376 of the Indian Penal Code of 1860 (IPC) provides that the minimum sentence for those convicted of rape is to be seven years imprisonment, and for those convicted of particularly grave kinds of rape, ten years. Amendments to the IPC in particular States also impose minimum prison terms for the publication or sale of obscene matter.

In addition, the IPC imposes mandatory minimum sentences for certain non-sexual offences as well- S. 304B provides for a minimum of seven years imprisonment for a person convicted of dowry death, and S.311 provides for a mandatory sentence of life imprisonment for 'thugs' who "have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with murder."[4]

Like in Sri Lanka, other legislations in India as well, such as the Prevention of Terrorism Act of 2002, incorporate mandatory minimum sentences. Such sentences are also prevalent in Australia, Singapore and the United States of America, among others.

2. The Case for Mandatory Minimum Sentences

The arguments in favour of mandatory minimum sentences are several. Perhaps the one most frequently made is that they are usually imposed only for those offences that are thought particularly grave, and therefore in need of at least a minimum level of punishment, in the interests of public safety and deterrence- it is, as one writer put it, "very important that persistent and serious offenders, when detected, are given prison sentences long enough to protect the public as well as to deter others."[5] Further, mandatory *minimum* sentences do not eliminate judicial discretion, but only limit it, which is what *maximum* sentences do as well. This point was elaborated upon during the

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[3] REPORT OF THE SPECIAL RAPPORTEUR ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY TO THE COMMISSION ON HUMAN RIGHTS, E/CN.4/1997/95, available at http://www.hri.ca/fortherecord1997/documentation/commission/e-cn4-1997-95.htm (visited on 16/6/2004).

[4] S. 310, IPC.

[5] Peter Coad, MANDATORY SENTENCES: PUTTING THE RECORD STRAIGHT, Contemporary Review, Feb 97, Vol. 270, Issue 1573. Note, however, that in parts of Australia mandatory sentences are now prevalent for even minor offences such as smashing a street light.

parliamentary debates on the subject in the Northern Territory of Australia, where one member argued that-

> *"Mandatory minimum sentencing is all about providing a base line below which the courts cannot go because it is unacceptable to the community. Because of the endless variety of fact situations that may come before the courts, it is desirable, within the limits set by the baseline of mandatory minimum sentencing, to give some discretion back to the courts to determine the appropriate sentence. The parliament sets maximum penalties, so why is it unable to set minimum penalties? The community demands its government intervene and set the framework on many issues. If the community believes that the punishment meted out by the courts is not sufficient or appropriate, then governments have no option but to act upon the will of the people."*[6]

Another important justification for mandatory minimum sentences is "the widespread belief that sentencing is characterised by disparity"[7], that the severity of the sentence imposed "often depends more on the judge hearing the case than on the facts of the case."[8] This is a phenomenon that is not confined to any one country, and is not absent from Sri Lanka either. It is illustrated by the following: in Gomes v. Leelaratne[9], the Appellate Court here upheld the principle that considerations of public safety and deterrence, as goals of sentencing, outweigh such factors as the good character of the accused and his or her personal situation, in determining the severity of sentence to be passed.

However, precisely such personal factors were taken into account in Karunaratne v. State[10], where Rajaratnam and Ratwatte JJ. held that a delay of 10 years in the hearing of the appeal from a sentence of two years rigorous imprisonment for criminal breach of trust had caused sufficient hardship to the accused and his family, to justify his release. The dissenting judgment of Vythialingam J., however, reiterated the primacy of deterrence over such considerations, thereby highlighting the lack of judicial uniformity on sentencing policy.[11]

The argument for mandatory minimum sentences is that such sentencing disparities ought to be eliminated if the rule of law is to prevail in decision-making. As Thomas Macaulay, the man who almost single-handedly drafted the IPC, once said of the process of codification, it "should be animated by the principle; uniformity where you can have it; diversity where you must have it; but in all cases certainty."[12]

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[6] Denis Burke, MANDATORY SENTENCING--A CATALYST FOR DEBATE, National Observer,, Autumn2001, Issue 48.
[7] Austin Lovegrove, SENTENCING REFORM: THE PUBLIC WANT IT BUT ITS HARDER THAN YOU THINK, Legaldate, May2003, Vol. 15, Issue 2.
[8] *Id.*
[9] 66 NLR 234.
[10] 78 NLR 413.
[11] See P.H.K. Kulatilake, SENTENCING POLICY IN OUR CRIMINAL JUSTICE SYSTEM.
[12] Cited from http://www.icescolombo.org/Neelan/ps190995.htm (visited on 16/6/2004).

3. The Case against Mandatory Minimum Sentences

Mandatory minimum sentences have been criticized on both principled and practical grounds. The chief theoretical argument against them is that they curb flexibility in the process of determination of sentences, whereas such flexibility must be intrinsic to that process if the purposes of sentencing are not to be defeated. Sentencing an offender is generally regarded as having four aims- the incapacitation of the particular offender from committing further offences, the deterrence of potential offenders, the achievement of justice (understood in the retributive sense of giving the offender his 'just deserts') and the re-integration of the offender into the community.[13] The balancing of these various aims to arrive at a sentence in each individual case is a task for the judge to perform. Therefore, the decision as to whether or not the offender should be sentenced to imprisonment, and if so, for what period, can be made only by *judging* in each case as to what sentence would best serve the above goals, taken together, *in that particular case*. Lord Bingham of Cornhill stated this requirement in the following manner:

> *"It is a cardinal principle of morality, justice and democratic government that an offender guilty of a crime should be sentenced by the court to such penalty as his crime merits taking account of all the circumstances including the nature of the crime, the circumstances of the offender, the effect of the crime on the victim and the victim's family, the need to prevent the offender from reoffending and deter others from offending in the same and the need to protect the public."*[14]

This requirement of flexibility is usually reflected in the options available to the judge at the time of sentencing. For example, under the Sri Lankan Criminal Procedure Code, the Magistrate can order total or conditional discharge of the offender under S. 306, or a suspended sentence under S. 303. Probation was introduced in 1944, with the Probation Offenders Ordinance. Community based correction under the Act of 1999 is another option, the implications of which will be noted later. However, a *mandatory* minimum sentence would entail that even if a judge were of the opinion that the offender in a particular case did not deserve a sentence of the length prescribed, and that such a sentence would harm his chances of reintegration with the community, he would nevertheless be bound to impose it.

A decision of the Indian Supreme Court is particularly relevant for the above argument. In Mithu Singh v. State of Punjab[15], S. 303 of the IPC, which provided for a mandatory sentence of death if a person sentenced to life imprisonment committed murder, was struck down. The then Chief Justice of India , Y.V. Chandrachud, held that:

> *"It has to be remembered that the measure of punishment for an offence is not afforded by the label which that offence bears, as for example 'Theft', 'Breach of Trust' or "Murder'. The gravity of the offence furnishes the guideline for punishment and one cannot determine how grave the offence is without having*

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[13] Sheldon Krantz, THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS, 3rd edition, West Publishing Co., St. Paul, Minnesota, 1988, p. 3.

[14] Cited from Palakrishna SC, MANDATORY SENTENCES AND JUDICIAL DISCRETION IN CRIMINAL LAW: THROWING AWAY THE KEY?, at http://www.nzls.org.nz/conference/palakrishnan.pdf (visited on 16/6/2004).

[15] 1983 SOL Case No. 026.

regard to the circumstances in which it was committed, its motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion... compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence... "[16]

It has been suggested that the above argument might establish the unconstitutionality of mandatory sentences in legal systems where the constitution prohibits arbitrary State action.[17] Further, it has also been suggested that in some cases mandatory sentences may even "cross the line into cruel and unusual punishment."[18] Now, Article 12(1) of Sri Lanka's Constitution, which provides that "All persons are equal before the law and are entitled to the equal protection of the law", has been interpreted by the Supreme Court so as to bring all arbitrary action within its purview.[19] In addition, A. 11 of the Constitution provides that "no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

However, the argument that mandatory minimum sentences violate the right to equality, and are therefore unconstitutional, has not been successful elsewhere. The Privy Council, in Ong Ah Chuan v. Public Prosecutor[20], an appeal from Singapore against the constitutionality of a mandatory death sentence for trafficking in drugs in excess of a minimum quantity, held that the sentence was not violative of the right to equality. The Court reasoned that "wherever a criminal law provides for a mandatory sentence for an offence there is a possibility that there may be considerable variation in moral blameworthiness, despite the similarity in legal guilt of offenders."[21] The guarantee of equality before the law, it held, is "not concerned with equal punitive treatment for equal moral blameworthiness; it is concerned with equal punitive treatment for similar legal guilt."[22]

Further, it was stated that the question of "whether this dissimilarity in circumstances justifies any differentiation in the punishments imposed upon individuals who fall within one class and those who fall within the other, and if so, what are the appropriate punishments for each class, are questions of social policy"[23] for the legislature to decide, and if its decision bears a reasonable nexus to the social policy involved, it would be valid. Therefore, the social goals of public safety and deterrence can be used to justify a system of sentencing that dispenses with the consideration of otherwise mitigating circumstances. If this is so, then mandatory sentences cannot also be considered 'cruel, inhuman or degrading treatment.' Therefore, although mandatory sentences may be unjust and antithetical to the goals of sentencing, they are not unconstitutional.

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[16] *Id.*
[17] William L. Anderson & Karen S. Bond, FEDERAL MANDATORY SENTENCES ARE UNCONSTITUTIONAL, at www.lewrockwell.com/anderson/anderson75.html (visited on 16/6/2004).
[18] Anonymous, MANDATORY SENTENCES AND CRUEL AND UNUSUAL PUNISHMENT, Supreme Court Debates, December2002, p. 257.
[19] ***Gunarathna*** v. ***Sri Lanka Telecom*** 1993 1 Sri LR 109; ***Premachandra*** v. ***Major Montegu Jayawickrama*** 1994 2 Sri LR 90; ***Gunaratne*** v. ***Petroleum Corporation*** 1996 1 Sri LR 315; ***Priyangani*** v. ***Nanayakkara*** 1996 1 Sri LR 399; ***William Silva*** v. ***Shirani Bandaranayake*** 1997 1 Sri LR 92.
[20] [1981] AC 648.
[21] *Id.*
[22] *Id.*
[23] *Id.*

The arguments against mandatory sentences as they operate in practice are as follows. First, it is argued that mandatory sentences tend to single out socially disadvantaged groups. It has been pointed out that since-

> *"the courts are not allowed to take into account what happened and why, and the particular circumstances of the offender, it is not surprising that young people and people with disabilities are more likely to end up in detention or prison than otherwise would be the case. This is because mitigating factors, such as age, or mental illness, are ignored, as are the general patterns of offending pertaining to such groups (for example, young people primarily engage in various kinds of property crime), and the greater likelihood of their being apprehended (due to greater public visibility, group nature of activities, inexperience, and so on).* "[24]

Another common argument from practicality, against mandatory sentences, is that they can lead to a situation where accused persons are compelled to plead guilty to offences that do not carry mandatory prison sentences, even if they are not guilty of these offences, so that the charges which do carry a mandatory prison term are dropped. Therefore, the prosecutor's discretion in pressing or dropping charges has the potential to warp the operation of justice.

Finally, it is also often argued that since imprisonment is expensive and prisons overcrowded, any law which *mandates* a minimum term of imprisonment for all those found guilty of a particular offence leads only to rising prison numbers and costs, thereby worsening prison congestion and adding to the burden on public money.

4. Reviewing the Debate

The previous two sections have outlined the chief arguments for and against mandatory minimum sentences. A consideration of this debate gives rise to certain important conclusions.

To begin with, the force of the *practical* arguments on either side is difficult to gauge in the Sri Lankan context, for the reason that no precise data exists here on the subject. Therefore, whether or not mandatory sentences are in fact valuable in protecting public safety and deterring potential criminals from the commission of serious offences cannot be determined adequately. Similarly, although it is fairly well established in Australia and America that disadvantaged groups suffer more from mandatory sentences, it is not clear if that is the case in Sri Lanka. Nor is it clear whether prosecutorial discretion is being abused as a result of it. However, given that mandatory sentences in Sri Lanka are limited to serious offences like rape and torture, unlike in Australia and America, the failures in their implementation are likely to be far less extensive here.

The argument that mandatory sentences are wrong in principle, because they limit judicial discretion in sentencing- the success of which depends on the exercise of such discretion- has two aspects. The first is that the limitation of discretion is *unjust* because an offender in a particular case may deserve a lesser sentence than the one prescribed as the mandatory minimum. However, although it is undeniable that in individual cases such injustice may accrue, the same is true with the prescription of maximum sentences, for although an offender may justly deserve a greater sentence than that which is permissible by law, the judge has no discretion to award it.

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[24] Rob White, 10 ARGUMENTS AGAINST MANDATORY SENTENCING, Youth Studies Australia, Jun2000, Vol. 19, Issue 2.

Furthermore, this kind of limitation of discretion, through maximum sentences, is commonplace and arouses no controversy. The second aspect of the principled argument against mandatory sentences runs as follows- If it is recognized that re-integration with the community is an important consideration in sentencing, then prison terms ought to be imposed only when all the other considerations of public safety, deterrence and retributive justice- require it. This is because it is widely accepted that not only does imprisonment not contribute to an individual's chances of re-integration; it damages them.[25] However, if *in addition to the goal of re-integration*, justice requires that a person not be imprisoned, or be imprisoned for a lesser period than that which is mandated, then to impose the mandated sentence *purely for its deterrent effect*, is wrong.[26] Therefore, although justice *alone* does not provide a sufficient basis to argue against mandatory minimum sentences (since, as noted above, *maximum* sentences can also work injustice), it does do so when combined with the goal of achieving the offender's integration with the community. This argument acquires even greater force in a legal system like Sri Lanka's that recognizes community based correction, which is elaborated upon in the next section.

Finally, although the argument that mandatory sentences introduce greater consistency in sentencing does point to an important principle- namely, that the rule of law must prevail in sentencing- there exists a mechanism to achieve this without sacrificing the goals of justice and integration with the community. This is discussed in the concluding portion of the article, after considering the implications of community based protection for mandatory sentencing, and sentencing policy in general.

5. The Community Based Correction Act

The Community Based Corrections Act of Sri Lanka was enacted in 1999. Prior to its enactment, there was a provision for the Court to order that an offender perform community service in lieu of imprisonment; however, the details of this power were not spelled out adequately. Now, S. 5 of the Act provides that when an offender is convicted of any offence, other than one subject to a mandatory minimum prison term, or one for which the penalty prescribed includes a prison term of more than two years, the Court can enter a 'community based correction order.' This is to be done after obtaining a report from the Commissioner of Community Based Corrections, as to the suitability of the offender for community based correction, the availability of facilities for this purpose and the conditions that should be attached to the order.

6. The Need to Recognize The Value of CBC

CBC has both administrative and social benefits. Prisons in Sri Lanka are estimated to be overcrowded by as much as 450 percent[27], and the maintenance of inmates is expensive. CBC is therefore thought to assist in the reduction of the burden on the prison system. However, to conceptualise CBC as merely a more convenient alternative to imprisonment would be a mistake. It

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[25] See, "Visionary Project", Daily News Editorial, Wed, 9 Feb, 2000: "Rather than cure social ills, local prisons have aggravated quite a few of them", at http://www.priu.gov.lk/news_update/EditorialReviews/erev200002/20000209editorialreview.html (visited on 16/6/2004). See also De Luca, H.R., Miller, Thomas J PUNISHMENT VS. REHABILITATION: A PROPOSAL FOR REVISING SENTENCING PRACTICES, Federal Probation, Sep91, Vol. 55, Issue 3.

[26] The goal of deterrence cannot, in itself, be a *sufficient* justification for punishment because it might then permit even the punishment of an innocent person. It is therefore always subject to the requirement that justice be done.

[27] "Remedy for Prison Overcrowding", Daily Mirror Editorial, Thursday, 17 Feb, 2000.

has been pointed out that when CBC was introduced in Delaware, in America, in the 1970s, it was touted primarily for its administrative benefits, with the result that it came to be perceived as "nothing more than an administrative tool to ease the management problems encountered in the primary system of total institutions"[28], and local citizens resisted what they thought of as "attempts to transfer the risks of existing policy from its architects to them."[29] There is a danger of a similar phenomenon in the Sri Lankan context, because the introduction of CBC here was associated with the need to reduce the burden on the prisons. It is important, therefore, to stress the substantive worth of CBC as a system of dealing with offenders.

According to Gunaratne Kuruppu, the Department of Prisons in Sri Lanka "has for many years been committed to a correctional policy, where the ultimate objective is to rehabilitate and reform convicted offenders and reintegrate them to society mobilising community support."[30] The goal of re-integration, which is affected *adversely* by imprisonment, is furthered through CBC, because "by keeping the offender in his or her community, retaining links with a family unit, and hopefully maintaining employment, the prospects of reoffending would logically appear lower compared to custodial sentences."[31]

For this reason, it is regrettable that S. 5 of the 1999 Act restricts the scope of offences for which CBC can be ordered. It is generally recognized that if an offender is *violent*, and therefore likely to endanger public safety, CBC may be unfeasible in his or her case.[32] However, S. 5 of the Act provides for a blanket exclusion of *all* offences which carry a prison term of two years or more as a possible sentence. Since there exist a host of offences, such as counterfeiting, which are subject to sentences of more than two years imprisonment, but which do *not* indicate a propensity for violence on the part of the offender, therefore the possibility of CBC in such cases ought not to be excluded. This is particularly so given the requirement under the Act that the Commissioner's report on the suitability of the offender be made before an order for CBC is issued.

Further, offences which carry minimum mandatory sentences are also excluded from the purview of CBC. This only serves to accentuate the argument made in the previous section- that such sentences are wrong because they can be both unjust *and* counter-rehabilitative. Although at present Sri Lankan penal law imposes mandatory sentences for primarily violent offences, non-violent offences such as obscene publication do also carry such sentences. Further, the range of offences subject to mandatory prison terms may well expand in the future, with the result that in several cases the aim of re-integrating the offender will be needlessly undermined through imprisonment. It is for this reason that mandatory minimum sentences should be abolished.

Apart from assisting in the reintegration of the offender, the other important social benefit of CBC- which is perhaps unique to it- is that it promotes *restorative justice*. It was mentioned earlier that

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[28] John Byrne & Donald Yanich, INCARCERATION V. COMMUNITY BASED CORRECTIONS: MORE THAN JUST POLITICS, POLICY STUDIES REVIEW, Vol. 2, No. 2, November1982, 216, at 222.
[29] *Id.*
[30] Gunaratne Kuruppu, CURRENT ISSUES IN CORRECTIONAL TREATMENT AND EFFECTIVE COUNTERMEASURES, at http://www.unafei.or.jp/pdf/57-25.pdf (visited on 16/6/2004).
[31] Chris Corns, STRATEGIES FOR DEALING WITH CRIMINAL OFFENDER, Legaldate, Jul 94, Vol. 6, Issue 3.
[32] Gorczyk, John F., Perry, John G WHAT THE PUBLIC WANTS, Corrections Today, 01902563, Dec 97, Vol. 59, Issue 7.

'justice', as a goal of sentencing, is usually thought of as retributive justice- giving the offender his or her 'just deserts.' However, a study conducted in Vermont, in 1991, found that:

> *"The people want justice that is restorative rather than retributive. They want to have confidence in their justice system, because it is their justice system. They want the needs of victims attended to, and the needs of the community attended to. They want to work with corrections to make their communities better places to live. They want us to provide offenders with the opportunities to improve the quality of life, not spend a small fortune to inflict pain on the offender."*[33]

Restorative justice refers to justice that is "used to heal... the victims of crime"[34] It represents a break from the traditional conception of a crime as an injury to the State, to be dealt with by the State- and focuses instead on the victims of crime, which include the *community*. The former Chief Justice of India, A.S. Anand has pointed out that "giving the victim of crime his rightful place and taking a serious note of his existence, his feelings and his rights with a view to offer redress to him for his "injuries" may in the long run help check the rising graph of crime."[35]

This principle finds support internationally, in the UN General Assembly's Resolution on Basic Principles of Justice for Victims of Crime and Abuse of Power.[36] Restorative justice requires that the offender make *reparation* for the wrong he has done to the victim, in order to put the victim in the position that he or she would have been in but for the offence, as far as is possible. It also requires that the victim- including the community- be *involved* in the process of justice-i.e. in the determination and implementation of the sentence.[37]

It is evident that CBC, as conceptualised in the Act of 1999, fails to take note of the concept of restorative justice. The order for community based correction is made by the Court, after consulting the Commissioner's report. There is no provision for involving the victim or the community in this process. Nor is there a recognition of the need to provide restoration to the victim, through the correction order.

Clearly, the CBC Act is intended to fulfil only two aims- reducing the load on the prison system, and, perhaps to a lesser extent, reintegrating the offender into the community. But by ignoring the need to establish restorative justice, it fails to capitalize on one of the key ideas behind community based protection - one that has important implications for sentencing policy in general. These implications, as well as other concluding comments, are discussed in the next section.

Conclusion

How can Sri Lanka's sentencing policy be improved? The analysis undertaken here leads to certain important conclusions in this regard.

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[33] *Id.*
[34] Miller, Shereen Benzvy, Schacter, Mark, FROM RESTORATIVE JUSTICE TO RESTORATIVE GOVERNANCE, Canadian Journal of Criminology, 07049722, Jul2000, Vol. 42, Issue 3.
[35] A.S. Anand, VICTIMS OF CRIME: THE UNSEEN SIDE, (1998) 1 SCC (Jour) 3.
[36] Available at http://www.unhchr.ch/html/menu3/b/h_comp49.htm (visited on 16/6/2004).
[37] *Supra* note 33.

Traditionally, the goals of sentencing have been thought of as four-fold- public safety through incapacitation of the particular offender, deterrence of future offenders, justice, and reintegration of the offender into the community. However, the *dominance of incarceration* among sentencing options has meant that the aim of reintegrating the offender has been largely marginalized. The institution of mandatory minimum sentences in Sri Lanka is an extreme extension of the philosophy of incarceration, which is prepared to sacrifice the rehabilitation of the offender *even if it causes retributive injustice*. This is the fundamental reason why mandatory sentences should be done away with.

The "ideology of incarceration"[38] has also meant that the concept of justice has come to be conceived of as purely retributive. It is for this reason that community based correction is particularly valuable- not only does it emphasize the much ignored goal of rehabilitating the offender, but it also offers a deeper criticism of the principle of incarceration, by introducing the concept of restorative justice. Sri Lanka's CBC Act does not reflect this criticism, perhaps because CBC here has been articulated primarily as an administrative tool to reduce the burden on prisons.

However, a recognition that criminal justice ought to be restorative for the victim, as far as is possible, will go a long way towards displacing incarceration as *the* mode of responding to offenders. A study in Vermont, mentioned previously, showed that incarceration was supported *only* for *violent* offenders, who might otherwise threaten public safety. Progress in sentencing policy would entail a recognition of this principle. Confining imprisonment to cases of violent offences might also make it evident that the ambit of operation of retributive justice is properly confined to those cases where restoration *is not possible*- i.e. typically, in cases of violent crimes. Currently, retributive justice is dominant, while restorative justice is ignored. Ideally, the former should be subordinate to the latter, to come into operation only where restoration cannot occur.

It is crucial, however, that these changes in sentencing policy be incorporated in a manner that secures consistency in its operation. A recognition of this truth is the only valuable contribution of mandatory sentencing. However, the same goal- non-arbitrary, determinate sentencing- can be achieved without abandoning both the goal of reintegration, and the possibility of restorative justice. This is through the framing of *sentencing guidelines*.

In the United States, the Sentencing Reform Act of 1964 created the United States Sentencing Commission, which in turn formulated the Federal Sentencing Guidelines under which all federal crimes since 1987 have been punished. These guidelines incorporate an informed understanding of the kinds of behaviour and circumstances that are treated as aggravating or mitigating, and provide for their application in a manner that is uniform. Since not every such conceivable circumstance can be accounted for, judges are given legal freedom to depart from the guidelines if necessary. However, the guidelines themselves list certain factors which *cannot* be considered as aggravating or mitigating (such as race, sex, national origin and religion). Therefore, arbitrariness in sentencing is minimized, while flexibility is retained.

The formulation of such guidelines in Sri Lanka requires first the compilation of sentencing data, so that the kinds of circumstances commonly considered aggravating or mitigating can be understood.

[38] *Supra* note 29.

Further, the sentences prescribed should reflect the importance of community based correction. The long term goal should be to establish CBC as the norm in sentencing, so that both restorative justice and offender rehabilitation can be promoted. Imprisonment needs to be displaced from its current position as the standard form of punishment, and should be restricted to cases where public safety requires it. Since the fundamental flaw in current sentencing policy is that it is based on an ideology of incarceration; it follows that its improvement requires a fundamental shift in ideology.

The State v. *T. Makwanyane and M. Mchunu*
(Case No. CCT/3/94, 6 June, 1995)

Case Note

In this case, the South African Constitutional Court considered appeals by two accused against death sentences imposed upon them following convictions for murder by a local division of the Supreme Court, which convictions had been upheld by the Appellate Division.

The judges of the Constitutional Court were invited to consider whether Section 277(1)(a) of the Criminal Procedure Act No. 51 of 1977, prescribing the death penalty as a competent sentence for murder in South Africa, was consistent with the Republic of South Africa Constitution of 1993. The Constitution had come into force subsequent to the conviction and sentence by the trial court. The 1993 (transitional) South African Constitution does not specify either that the death sentence is not a competent penalty, or that it is permissible in circumstances sanctioned by law.[1]

In its decision, the Court declared the relevant sub-sections of section 277(1) of the Criminal Procedure Act, (and all corresponding provisions of other legislation), sanctioning capital punishment, inconsistent with the Constitution.

The State was forbidden to execute any person already sentenced to death under those provisions and ordered to substitute such sentences with lawful punishments. Dealing with the question of the death penalty as a deterrence, the judges rejected the argument that the spiralling rate of crime made the death sentence an indispensable weapon for combatting violent crime.

While acknowledging the need for strong deterrent to violent crime and the fact that the State is clearly entitled to take action to protect human life against violation by others, the Court emphasized that, to meet these ends, the choice was not between the death penalty and freedom but between the death penalty and life imprisonment. The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. In the opinion of the Court, it was that which is presently lacking in South Africa's criminal justice system; it is at this level and through addressing the causes of crime that the State must seek to combat lawlessness.

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[1] This is in contrast to the comparable Sri Lankan provisions. Article 13(4) of the Constitution) allows a person to be punished with death provided that it is by order of a competent court, made in accordance with procedure established by law.

Thus;

> *"allowing the State to kill will cheapen the value of human life and thus [through not doing so] the State will serve in a sense as a role model for individuals in society. "……Our country needs such role models."*

Accordingly, the inherent right of the State to assume extraordinary powers and to use all means at its disposal in order to defend itself when its existence is at stake is wholly distinguishable from an alleged "right" of the State to execute murderers.

In an additional rejection of the argument that the Court take into account the strongly pro-death penalty public opinion prevalent at that time in South Africa, the judges observed that what they had to consider was not public opinion but whether the Constitution allows the sentence. Thus, the new legal order in South Africa required that the courts, through the Constitution, protect the rights of minorities and others who cannot protect their rights adequately through the democratic process.

Equally, the Constitutional Court ruled that the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. Such a process would then displace its role as an independent arbiter of the Constitution, which role has to be exercised without bowing to the wishes of the majority.

Sri Lanka – What Went Right?

Basil Fernando*

"Sri Lanka; What Went Right?" is the title that I have chosen for this short reflection. One might well ask "has anything gone wrong with Sri Lanka?" From this perspective, what may be seen as what 'going wrong', may well be merely the contradictions that come together regarding what is really 'going right' in the country.

To illustrate, let us recall some of those who thought that something was really going wrong in the country. Among these, the leaders of the 1962 coup need to be mentioned first, as, they not only thought that things were going wrong, but were also ready to do something radical to alter the situation. Hence, the attempted coup. Later, many of these leaders explained their motives and stated that the country was changing for the worst. Their families were losing privileged positions in the society and this was what they saw as "something going wrong"; where they faced competition for positions in society which were theirs before without any contest on their part.

A similar perspective was behind the making of the 1978 Constitution where attempts were made to deviate from the liberal democratic form of government towards an authoritarian form of government. The very foundations of the previous Constitutions were regarded as something that "went wrong in the country." Some form of authoritarianism and not democracy, was thought of as the suitable form of government for Sri Lanka. While the attempt was camouflaged by references to the constitution as introducing aspects of the French system, in fact as Dr. Colvin R. De Silva pointed out, these 'constitutional borrowings' were more from the legacies of emperor Bokassa rather than any modern constitutional document. Jean-Bedel Bokassa of the Central African Republic, overthrew his cousin, David Dacko, in a bloodless coup that was said to be backed by the French in 1966. He abolished the 1959 constitution, dissolved the National Assembly and concentrated power in the presidency, symbolising authoritarianism in its worst form.

Currently, some of us feel that something is 'going wrong' in Sri Lanka. On the one hand, there is a growing sense of crisis in the functioning of democracy and the democratic system that cannot be denied. There is loss of faith in the law and the institutions that administer the law, including the judiciary. The old order has become corrupted and we have a burgeoning crime rate despite stricter laws and punishments that are imposed. It is in this background that the death penalty is sought to be re-imposed.

On the other – and more positive hand – we have also a deepening of the sense of equality among the ordinary folk in the country, of all the communities – Sinhala, Tamil and Muslim. The ordinary folk, (the common people, as they also are called), had not experienced a sense of equality throughout the history of this country. Prior to colonialism, local rule both among the Sinhalese and the Tamils was based on caste. Those classes with privileges and those without them were clearly demarcated. Colonial rule reinforced these demarcations, with another privilege added; the use of the English

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language. Though doors were opened to some to enter the privileged classes despite caste barriers, a clear distinction between the privileged and the not-so-privileged persisted.

These barriers began to break down from around the 1950's. There were two major reasons for this change; spread of education and the use of the local languages. Both contributed to a greater enlightenment achieved by the ordinary folk of all communities in Sri Lanka. In other words the sons/daughters of the soil were gaining an advantage over the elite in their struggle for equality. We are remembered of the words of the great 18 century Danish thinker Grundtvic who said that 'What enlightenment is for the sons of the soil, is like the sun to the soil.'

In a society where sons and daughters of the soil, as opposed to the children of the elite, were well separated throughout their history, the former managed to achieve a significant change of outlook during the 20th century. This became a source of confusion to those who administered systems of authority in the country, both in the localities and in the government. The elite was not able to adjust to this new situation. They did all they could, to retain their authority in the same way as before. They still have not come to terms with a society that has so completely changed in favour of equality as the shared basis of society.

Sri Lanka is now desperately in need of - and is ready for - democracy, in the real sense of the word. How can the old coercion-intensive and authoritarian form of rule be replaced by a democratic system that enlightened people can accept? This is the core question faced by us. The current system of administration in the country seems meaningless to many true sons and daughters of the soil who have a greater sense of what is taking place in the country, (as opposed to the elite who are far distanced from such events), and who are now not as fearful as they were in the past.

There is a new sensitivity among such people in all communities, which is based on the acknowledgement that they are not inferior to any one. The only type of respect they wish to have towards others is mutual respect. Relationships that are not based on such mutual respect wound their sensitivity. This sensitivity also percolates into gender relationships. Attitudes based on superior-inferior relationships, whether between races or men and women, are now reacted to as offensive. A political system that does not adjust to these changed sensitivities can only undermine itself.

To those who look at it from a democratic perspective, one important factor has 'gone right' in the country. The ordinary folk of all communities are now ready for democracy. They have become fundamentally and irrevocably transformed.

This very transformation has generated tensions and has become the source of violence in the country. There are contradictions between a backward political system, an outdated civil administration, outdated civil and criminal laws and the calling by more enlightened people for recognition and resolution of these contradictions. This is not a consequence of something that has "gone wrong in the country" but something that has been produced by "what went right."

To attribute today's tensions to the mistakes of early leaders after independence is to attribute to them, an importance that they do not deserve. Products of colonialism, inheriting also the former feudal prejudices and attitudes, these leaders did not have had the imagination to understand the social transformations that were taking place in the country or to lead a transformed society and could be

looked upon as being socially retarded. Examining what they did or said may be useful to understand how they envisaged society at that time. But, such an exercise is only of a limited value, if at all.

It is necessary to see history in its evolution in Sri Lanka. To take an evolutionary view of history is to look at the manner in which many things that have happened in the real life of people which have contributed to real social change. Such an approach does not see events as 'good' or 'bad. In our history, we have had processes whereby social exchanges among people have had a cumulative effect in changing their mentalities. They have lost the old habits of submission. They have sought equality. Such is the mood of the majority in the country, be they among the Sinhalese, the Tamils or the Muslims. We need to wield these responses together in a manner that will build a new and transformative society in this country.

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Sri Lanka: State of Human Rights 2003

This is a detailed account of the state of human rights in Sri Lanka focusing on events which occurred in the country in 2002.

The report considers Internally Displaced Persons: Some Key Human Rights Issues; Integrity of the Person; The Status of Women in Sri Lanka: An Overview of Some Critical Aspects; Children Affected by Armed Conflict in Sri Lanka: The Year in Review; Freedom of Expression and Media Freedom; Judicial Protection of Human Rights and the Rights of Prisoners. The report, therefore, represents an important watershed with regard to human rights in Sri Lanka.

Fundamental Rights and the Constitution – II

- A Case Book -

The first casebook, *Fundamental Rights and the Constitution* was published by the Law & Society Trust in 1988 to give a background to human rights law through judgments of the Supreme Court. Fundamental Rights and the Constitution II, is an update of the earlier publication.

Most cases in the first book have been excluded in book II to find room for important new cases and cases on Article 12 that found no place in the first book. Interpretation placed on "executive and administrative action" has been dealt with in a separate Chapter.

The contents of the book include state responsibility; executive and administrative action; president's actions and article 35; torture, cruel inhuman and degrading treatment; appointments; promotions; transfers; extensions; award of tenders; terminations; termination of agreements; freedom from arbitrary arrest and detention and freedom of speech, assembly and association.

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