

# ALTERNATIVE SENTENCING IN SRI LANKA AND ITS CHALLENGES FROM A REHABILITATIVE PERSPECTIVE

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## I. INTRODUCTION

The Sri Lankan response to crime over the past half century has been highly punitive, with a growth in the number and scope of criminal laws as well as in the incarcerated population. The incarceration population has continued to rise<sup>1</sup> and all the while, crime continues to affect many Sri Lankans each year. Fine is the common punishment for petty offences, but most offenders are unable to pay the fine imposed and therefore are unable to benefit from this alternative punishment. The rate of offenders imprisoned for default of payment of fines is 70 per cent in 2019 from the total number of offenders admitted to the prisons that year.<sup>2</sup> This percentage has been rising from year 2015 according to statistics. The reconviction rate of the drug offenders in Sri Lanka is 33.3 per cent in year 2019.<sup>3</sup> In this category the number of the direct admission of reconvicted prisoners and recidivists is higher than first offenders. In 2018 and 2019 reconvicted prisoners constitute approximately 26.7 per cent<sup>4</sup> of the total prison population.<sup>5</sup> Therefore, the philosophy of the penal system of Sri Lanka needs to evolve into one with a correctional and rehabilitative focus, rather than a punitive purpose, and rehabilitation of offenders and their successful social reintegration into society should be among the basic objectives of the criminal justice system. Dissatisfaction with solutions currently available within the Sri Lankan Justice system has created an opening for a shift in response after a decades-long focus on punitive sentences and incarceration. The importance of this issue has become even more important amidst the Covid-19 outbreak and the overcrowding of the prisons. Agitation due to this vulnerability at the Anuradhapura prison resulted in two deaths in March 2020 amidst the Covid-19 outbreak. This article provides a directory of restorative justice statutes and practices to describe key features of restorative justice legislation and policies in sentencing in Sri Lanka and the challenges faced by the criminal justice system in implementing and improving these statutes and policies.

## II. THE EXISTING STATUTES RELATING TO RESTORATIVE JUSTICE

Sri Lanka, formerly under British colonial rule referred to as Ceylon, is a multi-ethnic and multi-lingual island. It was colonized by three different foreign rulers over a period of four hundred (400) years. Sri Lanka has remained a constitutional democracy since independence from British colonial rule in 1948. Prior to the arrival of the European powers in 1505, the country had varied laws, mostly catering to the different ethnic communities. Before that in ancient Sri Lanka the hierarchy of courts and the source of all justice was the King. The mode of punishment was retributive in nature.

The criminal law and procedure in Sri Lanka are governed by the Penal Code and the Code of Criminal Procedure.<sup>6</sup> The Penal Code, which was enacted in the year 1883, came into operation in the year 1885, and is still in operation to date. Some significant Amendments such as Penal Code [Amendment] Act No 22 of 1995 and the Penal Code [Amendment] Act No 29 of 1998 were introduced for specific categories of

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<sup>1</sup> Vol 39, Year 2020, Prison Statistics of Sri Lanka 2020, Statistics Division Prison [Headquarters], Sri Lanka.

<sup>2</sup> Ibid, page 78.

<sup>3</sup> Ibid, page 93.

<sup>4</sup> Ibid, page 35.

<sup>5</sup> Ibid, page 45.

<sup>6</sup> Code of Criminal Procedure Act No. 15 of 1979.

punishments. Section 52 of the Penal Code lists out the death penalty, simple imprisonment, rigorous imprisonment, whipping,<sup>7</sup> fines and forfeiture of property as criminal punishments. The punishments of the Penal Code are complemented by Section 303 of the Code of Criminal Procedure Act 1979. According to this provision, judges can substitute a sentence of imprisonment with a suspended sentence. There were several amendments to the Code of Criminal Procedure Act No 15 of 1979 and some significant amendments relevant to this article can be found in the Code of Criminal Procedure [Amendment] Act No 17 of 1997 and the Code of Criminal Procedure [Amendment] Act No 47 of 1999. Furthermore, the Community Based Correction Act No 46 of 1999 also facilitates the imposition of community-based correction orders in place of imprisonment where the prescribed punishment does not include mandatory imprisonment or imprisonment exceeding two-years. The Probation Ordinance 42 of 1944, Section 3, also gives courts the option of ordering a release on probation taking into account the offence, age, gender and condition of the offender.

### III. SENTENCING AND ALTERNATIVE PUNISHMENTS

Restorative justice is not an alternative paradigm that can replace the process of criminal justice. In Sri Lanka when sentencing an offender in certain offences restorative justice is referenced in statute, but with few mandates and little structure to support systematic use. The Police Department, the Attorney General's Department [prosecution] and the Prisons Department [corrections] should work with the Judges to prevent revictimization as well as recidivism in crimes, and this should begin at least at the sentencing stage of an offender. In Sri Lanka, imprisonment is the commonest mode of punishment other than imposition of fines. According to statistics,<sup>8</sup> 95 per cent of the convicted prisoners are sentenced with an imprisonment period of less than two years. Many of them who have committed minor offences and default of payment of a fine are sentenced with short-term imprisonment. A parole system is not available to them. The alternative sentencing methods and community-based correction that is in existence should be utilized in a successful manner.

#### A. Need for a Uniform Sentencing Policy

Judicial attributes should be inclined more towards a rehabilitative approach as well as a deterrent approach. Therefore, the judges should address their mind to a rehabilitative approach when sentencing, which should be considered as a foremost important matter. To achieve this end, a sentencing policy focusing on rehabilitation is required to be formulated to avoid individual justice in Sri Lanka. Absence of a mechanism to monitor sentencing trends and the need to set sentencing guidelines is paramount in this process. Sri Lanka does not have a sentencing policy or sentencing guidelines. A national policy on sentencing would provide guidance to judges in imposing sentences to ensure that they weigh aggravating and mitigating factors affecting the sentence in a uniform manner. Nevertheless, it is important for this process to be undertaken in a manner that does not undermine the independence of the judiciary but enhances its competence. Establishing a Sentencing Council to monitor sentencing trends and enact a statutory mechanism and criteria for commuting sentences can be suggested as legislative reform. Introducing a National Policy on Sentencing through collaboration of the Judiciary, Ministry of Justice and Attorney Generals' Department to provide sentencing guidelines can be suggested as a policy reform.

#### B. Suspended Sentence as a Non-custodial Measure

The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision by considering the rehabilitative needs of the offender, the protection of society and the interests of the victim. One such non-custodial method used in Sri Lanka is suspended sentence. Section 303 of the Code of Criminal Procedure [Amendment] Act No 47 of 1999 lays down the existing provision for suspended sentences. Suspended sentence cannot be imposed to an offender where the law provides a mandatory minimum sentence for the offence he has committed, or where the offender is serving a term of imprisonment or is yet to serve the term of imprisonment which has not been suspended, or where the offender committed the offence while he/she was on a probation order, conditional release or discharge, or where the term of imprisonment or the aggregate terms of imprisonment exceeds two years. The offender is convicted and the sentence is suspended for a period not less than 5 years from the date of

<sup>7</sup> Whipping was removed as a punishment under Section 3 of the Corporeal Punishment (Repeal) Act, No. 23 of 2005.

<sup>8</sup> Year 2021, Prison Statistics of Sri Lanka 2021, Statistics Division Prison [Headquarters], Sri Lanka.

the order and Courts may suspend the sentence wholly or partly. But very rarely the sentence is partly suspended in Sri Lanka. The offender is fingerprinted and therefore when Court calls for a fingerprint report of a person, it is reflected as a previous conviction.

In Court of Appeal Case *Kumara v. Attorney General* [2003] 1 Sri L R 139 Justice Edirisuriya held that: A suspended sentence is a means of re-educating and rehabilitating the offender, rather than alienating or isolating the offender. No offender should be confined to a prison unless there is no alternative available for the protection of the community and to reform the individual. Imprisonment has an isolating and alienating effect on the family of the imprisoned offender because of the hardships they are faced with during the imprisonment of one of the family members. This authority has taken precedence and shows the judicial attitude towards rehabilitation of offenders in Sri Lanka. The Sri Lankan Supreme Court in *S.C. Reference 03/2008* held, "mandatory minimum sentences" in certain offences were inconsistent with the Constitution.<sup>9</sup> One of the reasons attributed to the decisions of the Supreme Court was the imposition of mandatory minimum sentences would result in legislative determination of punishment and a corresponding erosion of a judicial discretion and a general determination in advance of the appropriate punishment without a consideration of relevant factors which proper sentencing policy should not ignore; such as the offender and his age, and antecedents, the offence and its circumstances (extenuating or otherwise), the need for deterrence and the likelihood of reform and rehabilitation.<sup>10</sup> These decisions paved way for judges to use their discretion and suspend a sentence even for an offence which carries a mandatory minimum sentence under a statute.

This non-custodial measure provided by the legislature has no provisions of monitoring and supervising the offender. Although suspending a sentence avoids institutionalizing an offender, there is no provisions for supervision and to provide assistance psychologically and socially to be reintegrated into society in a way which minimizes the likelihood if returning to crime.

### C. Community-based Corrections

Community-Based Correction Act No 46 of 1999 [hereinafter referred to as CBC Act] lays down legal provisions, alternative to imprisonment. A magistrate can issue an unpaid community service order for an offender instead of a fine or instead of imprisonment which is less than 2 years, taking into account the nature of the offence and the character of the offender. If used well, this legislation could substantively address core issues affecting the prison system, such as overcrowding and rehabilitation. Community work corrections, special rehabilitation [programme] for drug offenders and work under trained supervisors are the ways in which this system works, and since these programmes are not residential offenders may participate in the activities while staying in the community.

Even though the CBC Act does not provide for regular monitoring of the offenders, the correctional officers recruited by the department of CBC, tasked with undertaking monthly visits to persons who have been ordered to have their progress checked by CBC. Following each visit, they prepare a report, which is then forwarded every month to the senior correctional officer of the area where the offender resides, who then forwards it to the commissioner of the department of CBC. The monitoring of persons on CBC, however, is not undertaken as regularly or effectively as required due to severe shortage of staff. The implementation and monitoring of CBC require employing a variety of nuanced approaches. This requires the CBC officers to be trained in best practices, which requires considerable allocation of resources. Lack of financial resources and human resources to provide adequate vocational training programmes to offenders and monitor offenders is a huge setback in implementing the provisions of the said act.

Section 14 of the CBC Act does not provide the offender with an alternative non-custodial measure; instead, the offender is made to pay a fine and is imprisoned for the breach of the non-custodial measure. The offender's consent is required to issue a community-based correction order. Due to what appears to be the inherent bias of the different actors in the criminal justice system and lack of awareness about this law, offenders are not given CBC; hence offenders are ordered to pay a fine. This alternative punishment is sanctioned as an alternative to paying a fine. It invariably means for those who cannot pay it and a perfect solution for the offenders who are from very underprivileged backgrounds. The prison statistics illustrate that the majority (95%) of convicted prisoners were sent to prison for sentences of less than two years, while

<sup>9</sup> Articles 4(c), 11 and 12(1) of the Sri Lankan Constitution.

<sup>10</sup> SC Appeal No 17/2013 [decided on 12.3.2015].

70 per cent of convicted prisoners in 2019<sup>11</sup> were in prison for non-payment of fines,<sup>12</sup> which highlights this existing non-custodial option is not widely utilized in Sri Lanka. In 2017 the Judicial Service Commission, at the request of the Department of CBC, issued a circular to all Magistrate Courts, instructing magistrates to ensure the implementation of the CBC Act.<sup>13</sup> Offenders incarcerated for non-payment of fines even with provisions like Section 291(4) of the Code of Criminal Procedure, which grants courts the discretion to allow an offender to pay the fine in instalments over a period of time, is alarming and an indication of implementation of these provisions are scarce.

The CBC orders should be realistic, precise and achievable. One set back is that there are no guidelines and criteria to assist Magistrates in devising Community Based Correction orders to ensure conditions stipulated for non-custodial measures that are not so stringent for offenders that they fail and result in incarceration. It is important to increase awareness on Community Based Corrections Act and its important role in rehabilitation and restoration in order to reach communities and legal fraternity which will enable offenders to fully understand how Community Based Corrections Act is different from imprisonment.

#### **D. Conditional Discharge**

This is one of the non-custodial measures implemented and under section 306 of the Code of Criminal Procedure where the Court can "discharge conditionally" an offender on executing a bond, to be of good behaviour, after taking into consideration the character, age, health, or mental condition of the person charged, or the extenuating circumstances under which the offence was committed in lieu of convicting the offender. This provision can be used to discharge an offender after an admonition as the Court shall seem fit without entering a conviction and is even available for indicatable offences. In addition to a conditional discharge, Court can order the offender to pay compensation to the affected person under section 17[4] of the Code of Criminal Procedure and order state cost. This provision however is seldom used.

#### **E. Probation**

Probation, as a non-custodial measure is provided in the Probation of Offenders Ordinance<sup>14</sup> No 42 of 1944, which was last amended in 1948. The Department of Probation and Child Care Services, which is within the purview of the Ministry of Women and Child Affairs, is assigned the responsibility of overseeing the probation system. Unlike the CBC Act, the POO does not provide a threshold to decide to whom probation should be awarded, and it is decided on a case-by-case basis. Any convicted person can be released on "probation" in an appropriate case for a period of not less than one year and not more than three years. A court can issue a probation order after taking into account circumstances of the case, the nature of the offence, gender and condition of the offender and if it appears that probation is more suitable in lieu of sentencing. The POO makes provisions for when the probation order may be modified or cancelled and also stipulates the consequences of non-compliance with the probation order. The POO provides the offender another means through which to continue his/her probation in the event of non-compliance, instead of automatic imprisonment. This ordinance has provisions to engage the community by recruiting volunteer probation officers by the Minister. The Probation Department in Sri Lanka does not handle the probation of adult offenders and is only used for juveniles, which is a setback. Establishing a separate national entity to implement probation for adult offenders and monitor their adherence to the conditions of their probation and communicating to judicial officers and legal practitioners, the possible use of the Probation of Offenders Ordinance as an alternative to imprisonment is very important.

#### **F. Mediation**

Mediation Boards Act No 72 of 1998 provides people an opportunity to follow a less cost-effective mechanism to settle their minor disputes with the agreement of the parties to the dispute. Mediation Boards are empowered to resolve disputes. Within the Sri Lankan system there are both mandatory and voluntary mediation. Certain criminal offences are legally required to go to mediation prior to initiating proceedings in court. The panel of mediators, usually three, all respected figures from the village, are moral authorities. The mediator encourages the parties toward negotiation, improving communication and helping them to consider

<sup>11</sup> For the purpose of this study 2020 statistics are not considered. This is due to the fact that the Courts in Sri Lanka was not properly functioning due to the pandemic.

<sup>12</sup> Pages 47, 78 of Vol 39, Year 2020, Prison Statistics of Sri Lanka 2020, Statistics Division Prison [Headquarters], Sri Lanka.

<sup>13</sup> Judicial Service Commission, Circular JSC/SEC/CIR/2017.

<sup>14</sup> Hereinafter referred to as "POO".

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options and to assess alternatives to bring a closure to a criminal dispute. By attempting to resolve a high percentage of minor criminal disputes, mediation reduces the number of cases being filed in courts, and presumably plays a part in relieving case backlogs. Mediation improves social harmony and local dynamics by introducing a method of problem solving that seeks out mutually agreeable solutions focused more on restitution than punishment. Offenders are not incarcerated for minor criminal offences that are sent for mandatory mediation [if settled] and are not even charged, which helps them to have a clean record.

### **IV. CONCLUSION**

The hope of the world lies in the rehabilitation of the living human being, not just the body but also the soul. Our country cannot lose its eligible work force to the criminal world. It is the goal of this study to provide a starting point for collaborative dialogue between practitioners, policy advocates and scholars who are eager to consider the viability of alternative forms of justice in sentencing in Sri Lanka. Non-custodial measures when used well could substantively address core issues affecting the prison system, such as overcrowding and rehabilitation. It is however important to re-evaluate non-custodial measures regularly and innovate according to changing socio-economic conditions.