

# The Most Appropriate Degree of punishment: Underline Policies in Imposing Punishment in Criminal Cases with Special Reference to Sri Lanka

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**Abstract:** Striking a fair balance between uniformity and judicial discretion of sentencing is of utmost importance in imposing the most suitable degree of punishment on an offender for a crime. The wide disparities of sentencing for similar offences reveal that the criminal justice system of Sri Lanka has failed in this regard. Therefore, the objective of the paper is to introduce a clear sentencing policy and criteria to determine the most appropriate degree of punishment in order to avoid the wide sentencing discrepancy in criminal cases.

**Keywords:** judicial discretion, uniformity, sentencing policy, guiding principles.

## 1. Introduction

The appropriate mode and degree of punishment play a significant role in the question of imposing punishment. In Sri Lanka, the sentencing policy in relation to the above matter varies depending on the attitude of the judges who hear the cases. Until the 1990s, it appeared that there was no uniformity or certainty in imposing punishment in various criminal cases. However, after some amendments were introduced to the penal laws of the country, the sentencing Judges have a narrow discretion in relation to the determination of the appropriate punishment on the offender with a slight uniformity. On the other hand, the inflexible application of the uniformity principle creates the artificial nature of the punishment. Therefore, a fair balance between the Judges' discretion in imposing punishment considering relevant factors in a criminal case and uniformity of punishment for a particular offence is of utmost importance in passing an appropriate degree of sentence. As far as Sri Lankan penal laws are concerned there are only a few Statutes which provide a guidance to maintain the balance between the above said two aspects. The present study briefly discusses such laws, judicial decisions which emphasize the factors that have to be determined in imposing a punishment on the offender, international law relating to this subject and how a policy/guiding principle should be designed for Sri Lanka which might be adopted, while comparing the criterion in other jurisdictions in determining the appropriate degree of punishment.

## 2. Individualization vs. Uniformity

'Individualization' means that the criminal sanction should fit the offender. In other words, the Court considers whether the offender can suffer the particular punishment which the Court imposed on him/her. Therefore, under this principle, Judges should consider the extenuations or aggravations relating to age, mental condition, previous criminal records of the offender, and particular circumstances of the offence, the social danger to and interest of society when imposing a punishment where the punishment should vary from case to case, even for similar offences. In other words, the rule individualization reflects the discretion of the

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judges and 'just deserts' principle. Bentham advocated this rule and introduced guidance for the gradation of offences in terms of different punishment. According to him the value of punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence includes every advantage, real or apparent, providing motivation for the commission of the offence etc. (Siddique Ahmad, 1997). In the 19<sup>th</sup> century, this rule was used by German penologists to introduce some adjustments in prison conditions in the light of the prisoner's age and health and in French jurisprudence, to mitigate the punishment on the grounds of age of the offender and his motivation for the commission of the crime. Recently, a former High Court Chief Justice Sir Gerard Brennan in Western Australia supported this concept by stating 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 all have to be taken into account in imposing a judicial penalty' However, this discretion for considering various factors may lead to create discrimination among offenders through the disparity of punishments, even for similar offences which defeats the idea of uniformity of punishment.

With regard to the concept of uniformity of the punishment under Sri Lankan scenario, Article 12 (1) of the Constitution (1979) 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 to. The equality of sentencing means the uniformity of the sentence for a particular offence committed by any accused as well as a similar punishment for accused where the characteristics of the accused and the crime committed are more or less alike. The uniformity principle is recognized in mandatory minimum sentences. The scholars who advocate the minimum mandatory sentences believe that punishment of this nature would help to deter the people from committing crimes and maintain the equality and consistency of the punishment to a certain extent (Peter Coad, 1997). However, the criticism for this punishment and the uniformity principle is, it eliminates the judges discretion in considering the important factors such as extenuating circumstances in imposing punishment and making the punishment unnatural. Therefore, there must be a balance between the two concepts of uniformity and individualization to avoid such disparity in order to provide the justice to all the parties in the case.

### **3. International Law relating to the guiding principles**

The international treaty law and guiding declarations lay down some policies relating in determining the most appropriate mode of punishment on the offenders who committed criminal offences. They are, evading cruel and degrading punishments, imposing non-custodial punishments at first glance and imprisonment as last resort and restitution for the victim of crime.

Declaration on the Protection of all persons from Being Subjected to Torture and Other Cruel, Inhuman or degrading Punishment (1975), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and 2<sup>nd</sup> Optional Protocol to the International Covenant on Civil and Political Rights (1984), discourage the countries imposing cruel, inhuman or degrading punishment and advise both member and non-member States to initiate some policies which compel the Court to evade from imposing such punishments.

United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) 1985 and United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (1990), tell us that once the guiltiness is established, the Court should consider the possible non-custodial measures first if possible and then move to custodial punishment as the last resort.

Declaration of Basic Principles of justice for victims of crime and Abuse of Power (1985) directs that the compensation/restitution for the victim or dependants of the victim should be awarded in each and every criminal case as long as there is a victim.

### **4. Comparative law**

With regard to South African law (Van Der Merwe, 1993), the Court has to weigh all relevant factors in order to determine the blameworthiness of the offender which is either the subjective blameworthiness which relates to the offender personally such as a mental illness or defect, physical weakness, whether the offender is a young adult or an old person or objective blameworthiness which means a fair and well balanced decision with regard to the blameworthiness of the offender.

In the UK there are some cases for which the Court of Appeal laid down a range of punishments for certain offences. These cases are called 'guideline cases'<sup>1</sup> because they lay down certain guidelines to determine the appropriate degree of punishment. The factors that have to be considered for a criterion to determine the appropriate degree of punishment can be categorized into four main groups, namely: the facts of the case, the principles of sentencing, crime and punishment, and demographic features of sentencing (Ashworth Andrew, 1995).

In India, sections 235 (2)<sup>2</sup> and 248 (2)<sup>3</sup> of the Code of Criminal Procedure Act No. II of 1974, provide the opportunity to 'hear' the accused on the question of punishment before imposing the appropriate punishment upon him which is known as 'hearing on question of punishment'. In *Santa Singh vs. State of Punjab*<sup>4</sup> the Court stated that, before imposing an appropriate degree of punishment a 'hearing' directs the Court's attention to matters such as the nature of the offence, a prior criminal record, age, record of employment, background of the offender with reference to education and home life, the possibility of treatment or training, the possibility that the punishment may act as a deterrent to both the offender and others, and meets the current community needs, if any, for such a deterrent in respect of that particular type of offence.

By introducing a punishment guideline system called the Minnesota Guideline Grid in the State of Minnesota in the USA, the legislature has attempted to implement more determinate rather than indeterminate punishment. This guideline involves assessment, as a commission has to work out a two dimensional sentencing grid in which two correlating factors are the gravity of the offence and the previous convictions of the offender. This provides the Court with a fairly narrow punishment range, but does not mean that the judge loses his punishment discretion. However, if in this system the judge wishes to depart from the prescribed guideline, he or she should state the reasons for such a departure in writing the judgment.

## 5. Statutory and Case Law in Sri Lanka

The Code of Criminal Procedure (Amendment) Act No 47 of 1999 which replaced sections 303 and 304 of the original Code stipulates that suspended sentence of imprisonment could be imposed considering some factors mentioned in the section.<sup>5</sup> This brought about a certain degree of uniformity in imposing punishment. Section 303(2) stipulates that a Court should not make an order suspending the imprisonment where a mandatory minimum sentence (Denis Burke, 2001) of imprisonment has been prescribed in any penal law, the offence was committed under probation order, conditional release or discharge, the prescribed custodial sentence should not be suspended or the term of imprisonment imposed or the aggregate of imprisonment where the offender is convicted for more than one offence in the same proceedings exceeds two years.

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<sup>1</sup> *R vs. Nicholas* 1986 The Times 23 April 986: Quoted from John Sprack, *Emmins on Criminal Procedure, 5<sup>th</sup> Edition*, 1992, London, Blackstone Press Limited, p. 278; *R vs. Billam* (1986) 1WLR 349 Lord Lane CJ pp 350-352. For more see, Hook (1990) 12 Cr. App. R. S 54; *R vs. Roberts* (1982) 1WLR 133; *R vs. Brady* 1970 Cr. L.R. 171; *Vide Queen* (1981) 3 Cr. App. R. 245; *Vide Lowe* (1977) 66 Cr. App. R. 122; *Ray Moore* (1938) 73 ILTR 143 .

<sup>2</sup> Section 235 (2) says that if the accused is convicted, the judge shall unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him.

<sup>3</sup> Section 248 (2) says that 'where in any case (under this Chapter), the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of section 235 or section 360 he shall after hearing the accused on the question of sentence, pass sentence upon him'.

<sup>4</sup> AIR 1976 SC 2386.

<sup>5</sup> According to the section 303(1) of the Act the Court may order to suspend the term of imprisonment imposed on the offender wholly or partly taking into considering some factors prescribed under the particular provision. Those factors are nature and the gravity of the offence, offender's culpability, responsibility, and previous character, injuries, loss or damage resulting from the offence, the need to deter the others from committing the same offence, the social denunciation etc..

There are some decided cases which provide guidance for some factors which should be considered in order to determining the appropriate degree of punishment. Some of the earlier decisions of the superior courts appear to be influenced by the retributive and deterrent theories of punishment and sentencing policy reflecting a combination of the two theories. The judicial decisions appear to be more concerned about the need to deter the offender and the rest of the society from committing future crimes and to protect the society from wrongdoers and crimes.<sup>6</sup> Later, a flexible and more distinct approach was adopted in some cases moving from retributive theory to reformatory theory.<sup>7</sup>

In the case of *A.G. vs. Ranasinghe and Others*<sup>8</sup> the Court said that the gravity of the offence, the public disapproval, the protection of vulnerable group of people (in this case women), deter potential criminals and punishing the offender are the factors which called immediate custodial punishment. As held in *A.G. vs. Janak Sri Uluwaduge and Others*, in determining the proper punishment the Judge should consider the gravity of the offence, the deterrence aspect of the punishment imposed on the offender and the nature of the loss of the victim.<sup>9</sup> The same view was expressed in *A.G vs. Medis*<sup>10</sup> and *A.G. vs. De Silva*.<sup>11</sup> And further said the reformation of the criminal should also be taken into consideration subsequent to the gravity of the offence.<sup>12</sup>

The Penal Code (Amendment) Act, No 22 of 1995 stipulates some offences such as Obscene publication (section 286 A), Cruelty to Children (section 308 A), Procuration (section 360A), Sexual Exploitation at Children (section 360 B), Trafficking (section 360C), Rape (section 364), Incest (section 364 A), Acts of Gross Indecency (section 365 A), Grave Sexual Abuse (section 365B) where the minimum mandatory punishment is applicable. Similarly the Forest Amendment Act No 23 of 1995 says (section 25) that transport of timber without permit also carry the mandatory minimum punishment.

## 6. Conclusion

The purpose of a criminal trial is to determine whether the accused person is guilty of the offence he is charged with and to impose appropriate punishment if he is proved guilty on the basis of an elaborate system of substantive and procedural criminal law. The determination of the second issue, i.e. the choice of an appropriate type and degree of punishment out of many permitted by law in a particular situation is of enormous consequence to the individual offender, as well as to the victim and to society at large. While the offender's life, liberty, or property and his entire future hinge on the outcome of the sentencing process, it is also bound to have an impact on social interest, which ought to be the primary concern of the criminal law machinery. Various means of criminal sanctions such as a fine, imprisonment, suspended sentencing, community service order, forfeiture of property, and sometimes the extreme punishment of death are available to the Courts under the provisions of law governing a particular kind of offence. Moreover, the process of punishment should involve the determination of the appropriate degree of punishment in both qualitative and quantitative terms. In other words, the determination of the degree of punishment should vary from case to case; it should be appropriate to each offender individually, and at the same time the disparity of punishment for the same offence should be minimized by following formal criteria for determining the appropriate degree of punishment. The adopted policy and the criteria for determining the most appropriate degree of punishment are the two critical issues of the penal law in Sri Lanka. Sri Lanka as the Member State for the above said treaties and guiding declaration except the 2<sup>nd</sup> Optional Protocol to the International Covenant on Civil and political Rights, the policies declared by those conventions and declarations may adopt in selecting the mode of punishment.

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<sup>6</sup> See *A.G. vs. H.N. De Silva* 57 NLR 121; *Gomas vs Leelaratne* 66 NLR 234.

<sup>7</sup> *Karunaratne v the State* 78 NLR 413.

<sup>8</sup> (1993) 2 SLR 81. Further see *Gomas vs. Leelaratne* 66 NLR 234; *Karunaratne vs. The State* 78 NLR 413

<sup>9</sup> Further see *De Zoysa vs. Inspector of Police* 74 NLR 425; *A.G. vs. De Silva* 57 NLR 138; *Peramarajh vs. Officer of In-Charge of Wattala Police* 2 SLR 361.

<sup>10</sup> 1995 SLR 12

<sup>11</sup> 57 NLR 138.

<sup>12</sup> Further, see *De Zoysa vs. Inspector of Police* 74 NLR 425; *Peramarajh vs. O.I.C. Police Wattala* 2 SLR 361; *John Mathew* 1 SLR 243. In contrast; *Bandara vs. Republic of Sri Lanka*, 2002 SLR 277.

In order to address the issue of determining the most appropriate degree of punishment the judiciary should provide discretion with certain guidelines in considering the factors which help to come to a better conclusion. First the factors relating to the offence should be considered. Since there must be a balance among the rights of the two parties i.e. the offender and the victim, as well as the rights of the society as whole the factors relating to the above said parties should be taken into consideration respectively. Therefore, the nature and the magnitude of the offences should be considered under the factors relating the offence. The previous convictions, brutality, brazenness, premeditation recklessness and the negligence of the offender, age, social background, health condition of the offender (physical and mental) and social contribution by the offender should be taken into consideration next under the preview of factors relating to offender. The vulnerable situation of the victim and the damage or loss caused by the offence to victim should be considered within the factors relating to the victim. Finally the social danger, the effects on society from the crime and the main objective which is necessary to be achieved in the particular case should be taken into consideration in determining the most appropriate degree of punishment.

## **7. Reference**

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