Thinking for New Horizon in Criminal Justice: Moving from Retributive to Restorative Justice in the Treatment of the Offender in Sri Lanka

18

M.A.D.S.J.S. Niriella

18.1 Introduction

The Criminal Justice system in Sri Lanka has undergone transformations in the last five decades. The early traditional method of the administration of criminal justice is no longer limited to punishing the perpetrator with a punitive approach to satisfy the victim. The (recent) history of the criminal justice system in Sri Lanka shows us that the philosophy of the primeval administration of criminal justice based primarily on the retributive/punitive concept is being replaced by the restorative concept, a process which involves the reintegration of both the offender and the victim within the community. Today, the wrongdoer of a criminal offence is not considered (only) as an enemy of the society who should be treated harshly by imposing severe punishment but as a person who needs treatment to overcome his/her status of criminality in order to be reintegrated into the society as a law-abiding citizen. Further, the victim of crime is also being looked upon as a person who needs support to recover from physical, mental, economical and other losses that have occurred due to the crime committed by the offender, in addition to rehabilitation and reintegration into society in order to be free from the victimized mentality. New methods have been introduced to the criminal justice system to deter crime, sanction the perpetrators, rehabilitate the offenders, support the victims of crime, develop the victim offender mediation and finally control the human behaviour and protect the society from crimes and criminals.

This paper focuses on such new methods and the transformation from retributive to restorative justice in the criminal justice system in Sri Lanka with a special focus on the treatment of offenders. Further, the study examines whether these means and methods have affected the crime rate in Sri Lanka. The full paper contains three main parts including the response to crime and retributive theory of justice, the history of the criminal justice system and retributive justice and the

Attorney-at-Law; Senior Lecturer Public and International Law Department, Faculty of Law University of Colombo; Course Director of Advanced Criminal Law and Criminal Justice, LLM Programme, Faculty of Law University of Colombo; Coordinator—Certificate Course in Criminology and Society, Development Resource Centre (DRC), Department of Economics, Faculty of Arts, University of Colombo; Visiting Lecturer, Department of Law, University of Jaffna; Member of the Prison Welfare Association Sri Lanka; Member of the National Research Committee, National Science Foundation, Sri Lanka; Member of Asia Crime Prevention Foundation, Sri Lanka; Life Member of South Asian Society of Criminology and Victimology, India; Member of Advisory Penal, International Journal of Contemporary Laws; Member of International Economic and Development Research Foundation India and Member of International Bar Association; Editor of US–China Law Review. Contact: jeevaniriella@yahoo.com

M.A.D.S.J.S. Niriella, M.Phil (✉)
Department of Public and International Law, Faculty of Law, University of Colombo,
Colombo, Sri Lanka
e-mail: jeeva@law.cmb.ac.lk

J. Liu et al. (eds.), *Handbook of Asian Criminology*, DOI 10.1007/978-1-4614-5218-8_18,

concept of restorative justice, its practices and new methods of treating the offender. The study also explains the crime problem in Sri Lanka, mentioning the statistical data relating to crimes, especially the grave crimes.

18.2 Statistics of Crime in Sri Lanka

Commission of crime is an inherent habit of human beings which is being changed due to various reasons including socio-economic, cultural and political reasons. The nature and the magnitude of the criminal offences have undergone a remarkable change over the years. Sri Lanka is not an exception to this phenomenon. Among the other factors, rapid economic and social development, 30 years of civil war and changes of lifestyle have provided a considerable influence to the commission of crime. Though it is disputed by some groups, the increasing brutality of crimes and the crime rate including reconviction and recidivism reveal the necessity of new way of thinking of crime problem, especially in dealing with the offenders (See Table 18.1). The frequency with which crimes are committed is much higher than that in the past. This situation directs the policy makers to pay their high attention towards the issue. An effective role of the agencies of criminal justice system in the country is also essential to curb the crime problem (See Table 18.2). The following statistics may impart a rough idea of the crime problem in Sri Lanka.

The crime rate of Sri Lanka has gradually increased in the past years. The following statistics revealed the gradual increase of grave crime in Sri Lanka during the last 5 years.

18.3 Response to Crime and Retributive Justice

Reaction or response to crime has been diverse at different periods of human civilization. Even at a particular time it has been different in various societies. Certainly, there is a necessity of reaction to crime in order to control certain unlawful human behaviour and to protect law-abiding people from crimes and criminals. According to the general meaning of crime, it is an act that subjects the wrongdoer to punishment; it is the commission or omission of an act specifically forbidden by public law or criminal law (Marckwardt 1995, p. 360; Della 1995, p. 318).

People show their denunciation towards crime by reacting against it either in a formal or an informal manner. Institutions such as family, schools, peer groups, organized religions and other organized bodies like factories and companies have their own sets of rules based on social norms to react against the member of those institutions for violating those norms in an informal manner. Some informal responses are labelling, ignoring, warning, inflicting mild corporal punishments and terminating of jobs which are based only on retributive concept. Similarly, if a person violates criminal law which is a threat to the guilty and a separate branch of public law where crimes and punishment are prescribed, the society may file an action against the perpetrator (in the name of the State) where the court has the power to impose formal punishment on the offender according to the law. Thus, societies justify the reaction to crime for moral reasons which reflect the attitude towards crime, criminal and basic values of a particular society at a particular time.

The formal reaction to crime is carried out by the criminal justice system which has the main goals of upholding social control, deterring crimes, sanctioning those who violate criminal laws with punishment and rehabilitating and reintegrating them into the society as law-abiding citizens. There are three types of application of laws in relation to the criminal behaviour of a person (criminal justice): retributive justice based on punishment, distributive justice based on therapeutic treatment of offenders and restorative justice based on restitution (Eglash Albert 1977, pp. 91, 92; Daniel and Strong 1997, p. 24).

Retributive justice is a theory of justice which considers that punishment is a morally acceptable response to crime, with an eye to the satisfaction and physiological benefit bestowed to the aggrieved party and society (Retributive Justice).

Table 18.1 A brief statistical figure of grave crimes from 2005 to 2010

Category of the criminal offence	Offence and the section	2005	2006	2007	2008	2009	2010
Offences against body other than sexual offences (Penal Code)	Abduction (Sections 350–352) and Kidnapping (S. 353) Grievous hurt (Section 311 amended by Act No. 22 of 1995) Simple hurt (Section 312) Homicide (Section 293 and 294) and Abetment of commit suicide (Section 299)	953 1,749 4,666 1,221	1,190 1,856 4,163 2,045	1,229 1,675 3,642 1,663	1,239 1,367 3,250 1,488	947 1,368 2,920 958	897 1,410 2,939 745
	Attempted homicide (Sections 300 and 301)	466	576	468	397	298	308
Sexual offences (Penal Code)	Rape (Section 364 amended by the Amendment Act No. 22 of 1995) and Incest (Section 364 (A) amended by the Amendment Act No. 22 of 1995) Unnatural offences (Section 365): Grave sexual abuse Sexual exploitation of children (Section 365 B) amended by the Amendment Act No. 22 of 1995	1,540 429 451	1,462 418 362	1,397 475 366	1,582 457 340	1,624 441 346	1,854 519 334
Offences against the State (Penal Code)	Sections 114–127	None	9	8	21	9	15
Offences relating to coins (Penal Code) Offences against public tranquillity (Penal Code)	Sections 225–248 Sections 138–157	35 27	28 19	37 17	34 10	52 14	38 14
Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act No. 30 of 2005	Trafficking of Human Being and Procuration	15	35	30	33	31	47
Offensive Weapons Act No. 18 of 1966	Offences under Offensive Weapons Act	482	723	668	511	636	277
Firearms Ordinance No. 33 of 1916	Possession of Automatic or Repeater Shot Gun	78	73	39	91	51	80
Poisons, Opium and Dangerous Drugs Amendment Act No. 13 of 1984	Trafficking of drugs, import or possession	508	362	572	511	636	862

Source: Administration Reports Published by the Inspector General of Police (the year 2011 statistics are not available)

Table 18.2 Grave crime summary from the year 2005 to 2010

	2005	2006	2007	2008	2009	2010
Cases recorded	59,391	61,196	56,454	57,340	60,870	57,560
Total true cases	59,075	60,932	56,215	57,182	60,693	57,381
Cases ending with convictions	2,269	2,251	2,192	3,341	2,885	3,437
Cases ending with discharge or acquittal	350	288	196	140	216	749
Total disposed	23,366	22,410	19,705	19,040	21,195	21,661
Total pending	35,709	38,522	36,510	38,142	29,800	34,809

Source: Administration Reports Published by the Inspector General of Police (the year 2011 statistics are not available)

It is probably the most ancient justification of reaction to crime (Gobert and Dine 1993, p. 22). Under retributive justice, crime is an individual act where the liability for the commission of the act is defined as punishment. The criminal responsibility/punishment is imposed only on the particular perpetrator according to the magnitude of the offence committed by the perpetrator. This idea was expressed by the biblical dictum: eye for an eye and tooth for a tooth. In primitive societies/tribal societies where the concept of retributive justice was well established, the offender was regarded as an enemy of the tribe and he/she was punished with the same severity of the offence in order to get the revenge from him/her. This notion was present in the Hebrew Doctrine of Divine Sanction which was subjected to the will of Jehovah and Mosaic Law. Further, the Code of Hammurabi, the oldest written ancient penal practice, accepted that the punishment imposed on the offender should be equal to the weight of the crime as literally as possible (Dyneley 2010, pp. 601–609; Packer 1968, pp. 37–38; Munshi 2003). However, even today, retributive justice is appreciated in "just deserts" (proportionally) principle in many parts of the world.

As one of its main characteristics, retributive justice focuses on establishing guilt on the past behaviour of the wrongdoers and the offenders are perhaps considered as an unwanted group of people who deserve to suffer due to wrongful behaviour. In other words retributive justice is a process of backward-looking and punishment that is warranted as a response to a past event of injustice or wrongdoing. It acts to reinforce rules that have been broken by the offender and balance the scales of justice. Therefore, the main purpose of the retributive justice is that the offender is to be punished simply due to the commission of crime. It is clear in the philosophy established by the retributive advocates such as Mabbott (1969, pp. 39–64), Murphy (1994, pp. 44–77), and Moberly (1996, p. 145). According to these retributive advocates the rationale behind retributive justice is that a good deed deserves to be crowned with a reward whereas a bad deed should be meted out with a bad reaction, namely, suffering without considering the consequences. Their suffering should be of the same magnitude as that of their victims. The inherent threats/sufferings of punishment may deter crime and sometimes change the behaviour of the offender as to a better person.

Under the retributive justice, crime is understood as an offence against the State and defined as a violation of the law. Another feature of the retributive justice emphasizes the adversarial relationship between the accused and the State, and the victims of crime are peripheral to the justice process and represented abstractly by the State. According to the general feature of the adversary system, in the traditional and conventional model of judicial system of trial, the State has all the rights to conduct the prosecution and impose punishment on the offender. (Adversarial system is a judicial system of trial in English legal system (practiced in Great Britain, most commonwealth countries, and the USA except the US State of Louisiana and Canada's Quebec province). In this system, a case is argued by two opposing sides who have the primary responsibility for finding and presenting facts. The prosecutor tries to prove the defendant is guilty, and the defendant's attorney argues for the

defendant's acquittal. The case is then decided by a judge and punishments are prescribed.) Therefore, when a crime is reported, the State starts to discharge its responsibility assuming the State as a party of the criminal case while placing the victim in the category of a mere witness. The main agencies in the criminal justice system pay whole attention only to the offender to punish or otherwise rehabilitate him/her and the victim is regarded as a mere witness in the battle between the State and the accused (Barrett 2001, pp. 1–2; Hogg 1992, p. 836).

18.3.1 History of Criminal Justice System and Retributive Justice in Sri Lanka

In examining the history of criminal justice system in Sri Lanka, five main distinct periods could be identified according to chronological order, namely: period before the European powers occupied the island (before 1505 A.D.), period during the Portuguese occupation (1505 A.D.–1656 A.D.), period during the Dutch occupation (1656 A.D.–1796 A.D.), period during the British occupation (1796 A.D.–1947 A.D.) and post-independence period (1947 A.D.–to date).

During the reign of Kings in ancient Ceylon, the King was the top of the hierarchy of Courts and the source of all justice. With regard to the criminal justice system during this period, the hierarchy of Courts made it possible to appeal from a judgment of the lowest Court, i.e. *Gansabhawa,* the lowest Court (council) which had both civil and criminal jurisdiction in cases of petty offences and in boundary disputes (Hayley 1972, pp. 59–62), to the King (Hayley 1972, pp. 58–73). History shows us that the retributive justice was the dominant theory adopted by the criminal justice system in ancient Ceylon as well. Literature of the legal history of the country reveals some important information of punishment (*danda*). There were four main types of *danda* based on the retributive concept: They were *kayadanda* (corporal punishments), *vachidanda* (verbal punishments), *dhanadanda* (financial punishment) and *manodanda* (mental punishment).

Death, mutilation, flogging, whipping by cane, banishment, downgrading to the *Rhodiyas* (the people who belonged to the lowest cast in ancient Ceylon), putting into jail (*dangage/maha hirage*) and cutting off hair were the modes of corporal punishment. Death, mutilation and flogging were imposed on offenders for serious offences such as murder, conspiracy against King, etc. Reprimand was a verbal punishment imposed for minor offences to show anger and disapproval of crime in the Sinhalese law which comprised Buddhist law, Hindu law, *Tesawalamai* law, Islamic law and Mukkuwar law but today is more commonly referred to as Kandyan Law (Cooray 1971, p. 3). Being cursed was represented in *manodanda* inflicted for minor offences. Confiscation of properties was the common mode represented in *dhanadanda.*

The Portuguese arrived in Ceylon in 1505 A.D. (Cooray 1971, p. 4). By the *Malwana* Convention,[1] an Ordinary and a Supreme Tribunal (General's Court) were established to hear minor criminal matters and serious offences, respectively. By the same convention the Portuguese agreed to administer the laws of the Sinhalese in the coastal areas where they were settled and in power (Cooray 1971, pp. 26 and 194; Nadaraja 1972, p. 5; Tambiah 1977, pp. 3, 4 and 27). Therefore, they did not introduce their own system of law to Ceylon (Tambiah 1977, p. 4). Thus, the laws relating to punishment during the period of the Portuguese occupation appear to have been the Sinhalese laws (Cooray 1971, p. 5).

The Dutch occupied Ceylon in 1656 A.D. They ruled the Maritime Provinces (Coastal Areas) from 1656 to 1796 and introduced their law, the Roman Dutch Law, to Ceylon (Cooray 1971, p. 194; Nadaraja 1972, p. 5; Tambiah 1977, pp. 3, 4). Criminal justice was administered in *Radd van Justitie* (the High Court of Justice) in the case of serious criminal offences. Further, judicial power was exercised by certain European officials such as the fiscal, the chief

[1] This Convention came into operation in 1957.

residents and some military officers, and the local chiefs such as *disavanis* and *korala* (local officials who had the power to hear minor criminal matters over local persons). Dutch also continued to impose the same modes of punishments used by the Portuguese.

The British occupation of Ceylon is reported as of 1796 A.D. They captured all parts of the Maritime Provinces which were under Dutch power. By introducing a number of reforms to the law operating in the Maritime Provinces, the British developed the administration of justice. British rulers issued several important Proclamations to reform the existing penal system at that time. By the Proclamation of 23rd of September 1799, torture and all kinds of inhuman and barbarous forms of punishment (specially the public execution) were abolished. A uniform system of Court procedure and a uniform system for execution (hanging) were introduced by the Proclamation of March 23rd 1826. All degrading and inhuman modes of punishment were prohibited by the Proclamation of 04th October 1799. By regulation No. 04 of 1820, all kinds of mutilation were prohibited. The classification of crimes and establishment of a new Supreme Court of criminal justice consisting of the Chief Justice were introduced by the Charter of 18th April 1801. The formation of a uniform system of justice throughout the Island was introduced by the Charter of 1833 on the recommendation of the Colebrook Cameron report. The whole Kandyan criminal law (criminal law which applied to locals) was abolished and the "Law of the Maritime Provinces" was substituted by Ordinance No. 5 of 1852. The Penal Code Ordinance No. 2 of 1883, a model of the Indian Penal Code of 1860 which was based on English Law Principles, was introduced in 1883. Section 3 of the Penal Code expressly abolished the Roman Dutch criminal law in order to settle the uncertainties in the general law. The Criminal Procedure Code of Ceylon was introduced in 1882 to govern the procedure relating to criminal matters in the country. It was replaced by the Criminal Procedure Code No. 15 of 1898 which remained until 1973.

Sri Lanka gained independence in 1948, and for the purpose of this study the intervening period up to the present time will be discussed. Sri Lanka has been governed by various political parties elected by Sri Lankan citizens. Although these governments introduced numerous laws under their legislative powers, there was no significant alteration in either the substantive criminal law or the law of criminal procedure, except for a few amendments. With regard to the Penal Code, some significant amendments have been introduced where punishment is concerned, e.g. the Penal Code (Amendment) Act, No. 22 of 1995, and the Penal Code (Amendment) Act, No. 29 of 1998. Two very important changes were made to the criminal procedure, namely, the Administration of Justice Law No. 44 of 1973 and the Code of Criminal Procedure (CPC) Act No. 15 of 1979. Furthermore, recently a few amendments were introduced to the CPC Act. Among them the CPC (Amendment) Act, No. 17 of 1997, the CPC (Amendment) Act, No. 47 of 1999, and the Community Based Correction Act, No. 46 of 1999, are most important for the purpose of the present study.

18.3.2 Present Criminal Justice System and Retributive Theory of Justice

Similar to the other countries, until recently, the criminal justice in Sri Lanka has been dominated by retributive justice based on punishment. The State maintains law and order, ensures conformity with its rules and prosecutes and punishes those who violate it. The Police, the Court and the Prison and other Correctional Centres function as main State Institutions in this process. The Penal Code Ordinance No. 2 of 1883 and the CPC Act No. 15 of 1979 are the main Acts which set out the legal provisions for dealing with criminal matters in Sri Lanka.

The existing procedural law relating to criminal cases is set out in the CPC Act enacted in 1979. The rules relating to police investigation, arresting the suspect, searching the premises, releasing suspect/accused on bail, instituting the proceedings and conducting trials and appeal are laid down in this legal code. Further, the provisions (sections 13 and 14) in the CPC permit the Magistrate's Court and the High Court in First Instance to hear crimi-

nal cases, and to impose punishments on the convicted offender under the provisions of the Penal Code or any other written law which prescribes any act as a criminal offence.

The substantive criminal law of Sri Lanka is embodied primarily in the Penal Code and other Statutes which prescribe some human behaviour as criminal offences corresponding with punishment. The legal system in Sri Lanka provides penal provisions (section 52 of the Penal Code) for some modes of punishment such as the death penalty, rigorous and simple imprisonment, forfeiture of property, fine and whipping. This structure of the modes of punishment in the Penal Code confirms the retributive approach in responding crimes. The dominated view of "just deserts" compelled the criminal justice system to prosecute in the name of the State and punish the wrongdoers more commonly with imprisonment or fine according to the magnitude of the criminal offence. Death and forfeiture of property are the other two modes of punishment inflicted on perpetrators in Sri Lanka under this compelling notion of just deserts. However, until 2005 whipping was a permissible mode of punishment and was repealed by the Corporal Punishment (Amendment) Act enacted in 2005.

The death penalty is a classic example for the application of retributive theory of punishment. In Sri Lanka, the death penalty has been imposed for few crimes such as murder, treason and drug offences under the criminal law of the country. Like the other countries, imposing the death penalty as a punishment has been a subject of controversy over many years in Sri Lanka. Though there is a public outcry to re-implement the death penalty in Sri Lanka, it is an abolitionist in practice that has not executed any offender during the past 34 years and established a practice of not carrying out executions. The State has also paid attention to the implementation of the death penalty by appointing law reform commissions such as "Morris Commission" (the four-member commission appointed by the Governor General, after the assassination case of Prime Minister S.W.R.D. Bandaranayake, to report the practical utility of the death penalty) to examine the practical utility of capital punishment, especially as a better mode of punishment in reducing the crime rate. The conclusion of the report has revealed no observable relationship between the homicide death rate and the practice of executing offenders for murder. Since Buddhism is declared as the official religion in the country, offenders cannot be executed without violating the First Precept which prohibits killing of any live object.

As far as the history of prisons in Sri Lanka is concerned, the new prison system that evolved in Britain was introduced to the British colonies during 1844. The Department of Prisons came into existence first affiliated to the Police Department under the Act No. 18 of 1844. During that period the supervisions and control of all prisons in the Island were vested in Inspector General of Prisons. The office of Inspector General of Prisons was held by the Inspector General of Police until 1905. The prison and police departments were separated under two departments thereafter. At present the Department of Prisons is functioning under the Ministry of Prison and Rehabilitation of Sri Lanka. The Department of Prisons constitutes the Prison Headquarters, Centre for Research and Training in Corrections, Closed Prisons,[2] Remand Prisons,[3] Work Camps,[4] Open Prison Camps,[5]

[2] There are three closed prisons in Sri Lanka, namely, Welikada, Bogambara and Mahara. Welikada Closed Prison is for the first offenders, who had been admitted to prison for the first time. Bogambara Closed Prison is for the reconvicted prisoners, those who had been admitted to the prison for the second time. Mahara Closed Prison is for the recidivists, who had been convicted and admitted to prison more than twice.

[3] There are Twenty Remand Prisons in Sri Lanka. Those prisons are situated in Cololmbo, Kandy, Tangalle, Jaffna, Anuradhapura, Batticaloa, Badulla, Galle, Matara, Negombo, New Magazine, Kegalle, Tricomalee, Kalutara, Boossa, Kurunegala, Polonnarwwa, Retnapura and Vavunia.

[4] Work camps are prisons without a perimeter wall where prisoners are sentenced with short term (less than 2 years) or medium term (2 years to 5 years) of imprisonment and the offenders are detained under minimum security conditions. The eight work camps are in Watareka, Meethirigala, Navodawa, Weeravila, Anuradhapura Kuruwita, Wariyapola and Kandewatta.

[5] There are two Open Prison Camps in Sri Lanka at Pallekelle and in Anuradhapura.

Training Schools,[6] Correctional Centres for Youthful Offenders,[7] Work Release Centres[8] and Lock-ups.[9] The prison system of Sri Lanka consists of 4,325 prison officials of Uniformed Staff and 180 of Non-uniformed Staff. In the year 2010 the percentage of the un-convicted prisoners was 66% (approximately) and the convicted prisoners' percentage was 33% (Prison Statistics 2010). Ratio of convicted to un-convicted prisoners in the year 2010 was 1:3. In such a situation the present prison system in Sri Lanka is far behind in achieving its main goal concerning the rehabilitation of prisoners.

The Department of Prisons has to play an important role in carring out custodial sentences (imprisonment) and non-custodial sentences and orders (home detention, supervision, community work and release on conditions) imposed by Sri Lankan Courts. The prison statistics reveal that the number of direct admissions of both convicted and remand prisoners has considerably increased during the last decade.[10] In the year 2010, the number of direct admissions of both convicted and remand prisons was 1,32,619 and the number who were discharged from prison was 31,442.[11] This shows that 1,01,177 prisoners were kept in our prisons in 2010. From the year 2000 the reconvicted and recidivism rate has gradually increased[12] and in the year 2007 the number of the direct admission of reconvicted prisoners and recidivists was higher than the first offenders (prison statistics 2010).[13] Thus the above-said figures reveal that the crime wave continues to be high in Sri Lanka and the statistics further disclose the failure of retributive justice in the country.

An effective policing system is necessarily important in controlling the crime statistic (crime rate). As mentioned earlier, the Portuguese who controlled certain areas of the Maritime Provinces of the country did not effect any serious changes to the existing criminal justice system of the country. The concept of policing in Sri Lanka started with the Dutch who saddled the Military with the responsibility of policing the city of Colombo. It was the Dutch who established the earliest police stations which were initially established at the northern entrance to the Fort, the cause-way connecting Fort and Pettah and Kayman's Gate in Pettah. In addition to these the "Maduwa" or the office of Disawa of Colombo, who was a Dutch official, also served as a Police Station for these suburbs.

In 1805 under the British rule, the police functions were defined clearly. Apart from matters connected with the safety, comfort and convenience of the people, police functions also came to be connected with prevention and detection of

[6] Two Training Schools attached to our prison system for the youthful offenders and situated in Pallansena and Ambepussa.

[7] There are two Correctional Centres for Youthful Offenders in Pallansena and Taldena. Offenders between the ages of 16 and 22 are sent to these correctional/rehabilitation centres. Taldena correctional centre is an open camp and Pallansena Correctional centre has both a closed prison and an open camp.

[8] Sri Lanka has only one Work Release Centre.

[9] There are 28 Lock-ups in Sri Lanka in Ampara, Avissawella, Balangoda, Balapitiya, Chilaw, Elpitiya, Embilipitiya, Gampaha, Gampola, Hambantota, Hatton, Kalmunai, Kalutara, Kilinochchi, Kuliyapitiya, Kurunegala, Maho, Mannar, Matale, Mullaitivu, Nuwara Elliya, Panadura, Point Pedro, Puttalam and Vavuniya.

[10] The number of the direct admissions of both convicted and un-convicted prisons from year 2000 to 20007 is as follows: 2000—89,325, 2001—95,725, 2002—107,210, 2003—116,216, 2004—114,354, 2005—129,014, 2006—117,922, 2007—130,819, 2008—135,820, 2009—146,760, 2010—132,619. See Prison Statistics of Sri Lanka Published by the Statistics Division, Prison Headquarters Sri Lanka 2010 p. 24.

[11] Release on bail 294, on punishment 18,644, on payment of fines 9,326, on special occasions 2,978.

[12] Reconvicted and recidivism number together: 2000—8,160, 2001—10,300, 2002—11,303, 2003—12,833, 2004—12,925, 2005—16,408, 2006—13,618, 2007—16,430, 2008—16,401, 2009—18,596, 2010—12,597. These statistics were obtained from the Prison Statistics of Sri Lanka Published by the Statistics Division, Prison Headquarters Sri Lanka.

[13] Reconvicted and recidivism number together: 2000—8,160, 2001—10,300, 2002—11,303, 2003—12,833, 2004—12,925, 2005—16,408, 2006—13,618, 2007—16,430, 2008—16,401, 2009—18,596, 2010—12,597. These statistics were obtained from the Prison Statistics of Sri Lanka Published by the Statistics Division, Prison Headquarters Sri Lanka.

crime and maintenance of law and order. The Police Ordinance No. 16 of 1865 was enacted in 1865. 1866 could be considered as the beginning of the country's present Police Service in Sri Lanka (www.police.lk/index.php/crime-division). Since then the police force is primarily responsible for assuring the security of the people and their properties in the country. They are to act as the effective law-enforcing agency to maintain law and order in the country. After the emergence of Sri Lanka as an independent and sovereign State, it has become more essential for the police to achieve the above-said goal in marinating law and order in the country. With the change of the social structure and other social phenomenon great responsibility has been entrusted with police to curb the crime. However, in the present scenario in Sri Lanka, the police are required to engage in many nonpolice works which are not within the parameters of the main objectives of police, i.e. prevention and detection of crimes.

The above discussion shows us that retribution is not a proper answer to the crime problem in the country. It further reveals that retributive theory fails to control the crime rate, keep society safe, rehabilitate prisoners and reintegrate them to the society as law-abiding citizens.

18.4 Restorative Justice and New Means of Treating the Offender

Restorative justice (reparative justice) is an approach to justice whereby all the parities with a stake in a particular offence come together to resolve the problem collectively and how to deal with the consequences of the offence and its implications for the future (Wright 1991; Marshall 2000, p. 2). This approach of justice focuses on the needs of both parties of the case, i.e. needs of victim and offender as well as the needs of the community instead of satisfying the hard legal principles and punishing the offender. Unlike retributive justice, restorative justice observes crime as a violation of human relationship (Zehr 1990, p. 35) and crime is an offence against the individual and community rather than the State (Rotman 1990; Marty 2001, p. 1). Under this theory, justice means an exploration of solutions which encourage and support restoration, mediation/reconciliation agreeing by victim, offender and the community where victims of crime take an active role in process (Braithwaite 2002, 249). Restorative justice requires an offender to take responsibility for his/her offence to take steps for restitution of the victim (Daniel and Strong 2001, p. 106), promoting the maximum involvement of the two parties in the process at the highest level of victim satisfaction and offender accountability (Sharman and Strang 2007, p. 36). Since restorative justice maintains that increased crime is an overall failure of society, it provides an opportunity for the offender to meet his/her personal needs, rehabilitate offenders, help rebuild their life and reintegrate them into better persons. Restorative justice principle mainly aims at four key values. They are giving opportunity for the encounter of parties (where the victim, offender and the others in the community involved in the crime meet), compelling the offender to take necessary steps to repair the harm caused from the crime, helping the restoration of both parties (this includes third person who involved in the crime initially) and opening the opportunity for both parties to participate in finding a resolution/decision. Restorative justice could be found in victim offender mediation, restorative or family conferencing, healing/sentencing/peacemaking circles, victim/ex-offender assistance, restitution, police cautions and non-custodial measures such as probation, conditional discharge, suspended sentencing and community-based corrections.

Among those methods, the justice system of Sri Lanka adopts only a few, i.e. victim offender mediation, restitution (compensation to the victim), probation, conditional discharge, suspended sentencing and community-based correction. Although the programmes relating to ex-offender assistance (aftercare service) are not institutionalized or implemented in a proper manner, some religious and social service groups help the ex-prisoners to overcome the economical and social problems which they come across after being released from prison.

18.4.1 Victim Offender Mediation

In Sri Lanka the police are involved in the amicable settlement of minor (criminal and civil) disputes. There efforts towards settlement of minor disputes have begun to arise from statutory duty stipulated on them to prevent crime and maintain law and order in the country. In the 1950s the process of settling minor criminal disputes was officially entrusted by way of administrative direction 1998; the Mediation Boards Act No. 72 of 1998 was passed by Parliament, having the objective of providing the people in the country an opportunity to follow a less cost-effective mechanism to settle their minor disputes with the agreement of both parties. Therefore, the Act provides for the legal framework for institutionalizing Mediation Boards, which are empowered to resolve by the process of mediation all disputes referred to it by disputing parties, as well as by Courts in certain instances. At present the Mediation Board has the criminal jurisdiction over affray, causing hurt, grievous hurt, wrongful restraint, wrongful confinement, force, criminal force, assault criminal misappropriation, criminal trespass, house trespass, insult and criminal intimidation. A large number of the disputes handled by the Boards relate to these criminal offences. In the Mediation process the mediator encourages the parties towards negotiation by coordinating the large number of people involved in the matter, improving communication, helping them to generate options, assessing alternatives to agreement and bringing such agreements to closure.

18.4.2 Compensation to the Victim

Section 17 of the CPC Act No. 15 of 1979 provides necessary legal provisions for the court in order to compensate the victims of a crime or their dependants. Through compensation order Courts may direct the offender to repair the loss or damages caused to the victim. Usually, compensation is recovered from the fine (as an ancillary order), which is imposed for an offence [14] as decided by the Court in the decision of *Rabo v James* (32 NAL 91). But the Penal Code (Amendment) Ordinance, No. 22 of 1995,[15] enables Courts to impose a compensation order as a mandatory punishment[16] with imprisonment for sexual offences[17] and offences dealing with cruelty to children.[18] However, except the offences stated above, under that particular amendment, the Sri Lankan legislature does not provide for legal provisions, which empowers the Court to order compensation as an integral part of punishment. Thus far, the Sri Lankan Courts have not tendered a compensation order on the State or otherwise Sri Lanka does not have any other alternative mechanism such as "State Compensation Board" where the offender is unable to pay the compensation. This situation shows us that the offender is disregarded under the present law relating to compensation to the victim.

18.4.3 Community-Based Corrections

Community-based correction is a permissible mode of punishment in Sri Lanka. As an alternative to prison sentence, the Magistrate Court may order community task on an offender, for a number of hours stipulated by the Court within a certain period of time. If the offender fails to carry out the work assigned on him/her, he/she will be dealt with by the Court by imposing any other appropriate punishment. The present law relating to Community Service Orders was first introduced in Sri Lanka by the Administration of Justice Law No. 44 of 1973. Section 18(1) of the

[14] Section 17(6) of the CPC Act, No. 15 of 1979.

[15] Section 364 of the Penal Code (Amendment) Ordinance, No. 22 of 1995, says that whoever commits rape shall, except in the cases provided for in subsection (2) (3), be punished with rigorous imprisonment for a term not exceeding twenty years and, with a fine, shall in addition be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for the injuries caused to such person. For more see section 364(2) (g) of Penal Code (Amendment) Ordinance, section 365, as amended by the Penal Code (Amendment) Ordinance, No. 22 of 1995.

[16] *Inoka Gallage v Addaraarachchige Gulendra Kamal Alias Addaraarachchi* 2002 1 SLR 307.

[17] Sections 364 (1) and (2), 365 A of the Penal Code (Amendment) Ordinance, No. 22 of 1995.

[18] Section 303 (A) (2)of the Penal Code (Amendment) Ordinance, No. 22 of 1995.

CPC Act 15 of 1979 as amended by the CPC (Amendment) Act No. 49 of 1985 has stipulated the relevant provisions relating to Community Service today. These provisions were repealed and enacted in the Community Based Corrections Orders Act No. 46 of 1999 which presently lays down legal provision for unpaid community service orders in Sri Lanka. According to the law prescribed by the said Act, unpaid community service order may be issued *in lieu* of fine which is less than three thousand rupees or *in lieu* of imprisonment which is less than 2 years,[19] taking into consideration various factors including the nature of offence and the character of the offender.[20] Community-based correction orders are a step away from a prison sentence, and are a more successful form of punishment for minor offences from the corrective aspect, and a cheaper alternative to short-term imprisonment.

There are three ways (types) of serving under the unpaid community-based corrections, namely, community work corrections; special rehabilitation (programme) for drug offenders and work under trained supervisors. Since these programmes are not residential, offenders may participate in the activities while staying in the community.

Factors or criterion such as age, social history and background, medical and psychiatric history, educational background, employment history, previous convictions, financial circumstances, special needs, family background and other income of the offender, courses, programmes, treatment or other assistance that could be made available to the offender and benefit that he may gain from the assigned work are considered under this programme. Lack of counselling and excluding women and children from the process could be marked as demerits of the Sri Lankan system.

[19] Section 5 (1) of Community Based Corrections Act No. 46 of 1999.

[20] Section 5 (2) of Community Based Corrections Act No. 46 of 1999. The facts that the court should consider are the nature and the gravity of the offence, age of the offender, other relevant circumstances relating to the offence and the offender, pre-sentence report and facilities available for implementing such order.

18.4.4 Probation

Correctional programme and treatment of offenders in Sri Lanka started functioning in the form of Probation in 1956 through the promulgation of Probation of Offenders Ordinance No. 42 of 1956 for both adults and the children. In 1960 the probation system has been extended by appointing Probation Officers to all judicial districts in the country. However, today probation is ordered only against the juvenile delinquents.

18.4.5 Conditional Discharge

Conditional discharge is one of the non-custodial measures implemented on the offenders in Sri Lanka. Section 306 (1) of the CPC Act, No. 15 of 1979, lays down the legal provisions for conditional discharge. The Court may order conditional discharge after taking into account various factors, including the good character of the offender (*Peter* (1945) 47 NLR 23; *Fernando* v *Excise Inspector, Wennappuwa* (1949) 4 CLW 41), the age of the offender (*Jayasena* (1950) 52 NLR 183) and the nature of the offence (whether the offence is a trivial offence) *(Gunasekara v Solomon* (1923) 25 NLR 474*;* Appuhamy v Wijesinghe (1945) 46 NLR 189; *Krishnan* v *Sittampalam* (1952) 54 NLR 19; *Gomas* v *Leelaratne* (1964) 66 NLR 233; *Podiappuhamy* v *Food and Price Control Inspector, Kandy* 1968 71 NLR 93). However, the Sri Lankan judiciary imposes a conditional discharge on adult offenders only for trivial offences (*Gunasekara* v *Soloman* (1923) 25 NLR 474; *Appuhamy v Wijesinghe* (1945) 46 NLR 189[21]; R. v Peter (1945) 47 NLR 23).

18.4.6 Suspended Sentencing

As a result of the important proposals of the Law Commission in 1970, suspended sentence of

[21] The court did not justify a conditional discharge where the offence was accompanied by the use of violence.

imprisonment was introduced into our penal law in 1973, and section 239 of the Administration of Justice Law laid down the provisions relating to suspended sentencing for the first time. Section 303(1) of the CPC Act, No. 15 of 1979, which provided for suspended sentences has been amended twice in 1995 and 1998. Section 303 of the CPC Act, No. 15 of 1979, as amended by the CPC (Amendment) Act, No. 47 of 1999, lays down the existing provision for suspended sentences of imprisonment in Sri Lanka. Before the amendment of the CPC Act, No. 20 of 1995, came into operation, suspended sentencing of imprisonment had been restricted to cases where the sentence of imprisonment was more than 2 years[22] or where persons were convicted for grave crimes. Under section 2 of the CPC Act, No. 20 of 1995, although it was applicable to cases where imprisonment is for less than 2 years, if the statute provided that a particular sentence of imprisonment is mandatory, the offender was not entitled to a suspended sentence. This provision was amended by section 2 of the CPC (Amendment) Act, No. 19 of 1999.[23] At present, a suspended sentence is imposed under this Act for cases where the sentence of imprisonment is for not more than 2 years,[24] where the law does not provide a mandatory minimum imprisonment,[25] where the offender committed the offence while he or she was not on a probation order, conditional release or discharge;[26] the offender is serving a term of imprisonment or the offender is yet to serve the term of imprisonment which has not been suspended.[27]

According to the statutory provisions, Courts may suspend the sentence of imprisonment wholly or partly. Frequently, Sri Lankan Courts (both Magistrate's Courts and High Courts) prefer to suspend the whole term of imprisonment, especially where there is a plea of guilty. But there is considerable doubt whether the Sri Lankan courts in practice utilize the partly suspended sentence as a form of punishment where the accused has pleaded guilty. Even in severe crimes such as culpable homicide not amounting to murder, rape, etc., the Sri Lankan Courts suspend the sentence of imprisonment wholly. For example, in the following High Court orders[28] the Court suspended the whole term of imprisonment after it had taken into account the plea of guilt. At this point one may argue that in such cases the court should not impose a suspended sentence by considering the plea of guilt as the only sentencing factor. Moreover, according to sec. 303 (1) (b) of the CPC (Amendment) Act, No. 47 of 1999, the Court should consider the nature and gravity of the offence. In considering the cases of murder, rape and robbery they are crimes severe in nature, and for these crimes suspended sentence may not be the appropriate type of punishment. Therefore, especially when a person convicted for a heinous crime such as rape, robbery and culpable homicide not amounting to murder the Court should carefully exercise its discretion in the imposition of a suspended sentence on plea-bargaining. This may be a reason that the legislature introduced the mandatory minimum sentencing rule in 1995.

[22] Section 303 (1) of the CPC Act No. 15 of 1979 says that "A Court which imposes a sentence of imprisonment on an offender for a term not exceeding two years for an offence may order that the sentence shall not take effect unless, during a period specified in order, being not less than five years from the date of the order (hereinafter referred to as the 'operational period') such offender commits another offence punishable with imprisonment (hereinafter referred to as 'subsequent offence')".

[23] According to section 2 of the CPC (Amendment) Act, No. 19 of 1999 "a mandatory sentence of imprisonment was changed to a mandatory minimum sentence of imprisonment".

[24] Section 303 (2) (d) of the CPC (Amendment) Act, No. 47 of 1999.

[25] Section 303(2) (a) of the CPC (Amendment) Act, No. 47 of 1999.

[26] Section 303 (2) (c) of the CPC (Amendment) Act, No. 47 of 1999.

[27] Section 303 (2) (b) of the CPC (Amendment) Act, No. 47 of 1999.

[28] In some murder cases where an accused pleaded guilty to the offence culpable homicide not amounting to murder, the term of imprisonment was suspended by High Court: Kurunegala H.C.85/95; H.C 89/95; Negombo H.C. 675/87. In some rape cases where an accused pleaded guilty, two years rigorous imprisonment was suspended for five years by High Court: Kurunegala H.C. 99/95(rape); Kandy H.C. Jury 1226/92 (rape).

18.4.7 Aftercare Service

In considering the aftercare service in Sri Lanka, it is hard to find any public agency which undertakes this as an organized group. But with the assistance of Sri Lanka Prison Department some individuals including Buddhist Monks, Catholic Priests and Nuns help the ex-prisoners who need assistance according to their capacity. They provide counselling service, food and clothing, help them to find job opportunities, etc. According to prison representatives, lack of a proper aftercare service system is one of the reasons for the increase in the reconvicted/recidivist rate.[29] Therefore, Sri Lanka should introduce these aftercare service programmes to assist ex-prisoners who really need society's help, to restart their lives after they return to society. Therefore, Sri Lanka should pay attention to enacting necessary statutory provisions to institutionalize this service. However, what is most needed is the provision of increased opportunities for public participation in practical correctional work through community volunteering efforts. Industry, labour organizations and other civil organizations such as religious centres may formally organize and actively play a significant role in such social defence programmes.

18.5 Conclusion

The criminal justice system and criminal law in Sri Lanka have been transformed from retributive justice to restorative justice due to the decisions taken by the Parliament and the Court. However, the attitude of the public towards punishment is still influenced by traditional retributive thoughts where the offender should be treated harshly with severe punishments through punitive approach. The recidivism rate of country reflects upon this public thought and it further tells us the failure of the treatment (reform) of the offender and retributive concept. Since the phenomenon of treatment of the offender is a complex exercise, it is a strenuous procedure particularly in a developing country like Sri Lanka with limited resources and lacking the update and new technologies. Though Sri Lanka has introduced some restorative justice practices to the criminal justice system, those practices are not sufficient to meet the treatment of the offenders and crime problem. Therefore, the criminal justice system of Sri Lanka pays her attention to introducing new methods of restorative justice such as circles and conferencing. Further, existing mechanism such as probation, community-based correction and mediation should be strengthened for treatment of the offender in a productive manner.

[29] Annual Prison Reports, Sri Lanka.

References

Ahmad Siddique. (1997). *Criminology: Problems and perspectives*. Lucknow: Eastern Book Co.

Barrett John. (2001). *Balancing charter interests: Victims' rights and third party remedies*. Toronto: Carswell

Braithwaite John. (2002). *Restorative justice and responsive regulation*. New York: Oxford university Press

Cooray, L. J. M. (1971). *Introduction to legal system in Ceylon*. Colombo: Lake House Investment.

Daniel Van Ness and Strong Keren. (1997). *Restorative justice*. Cincinnati: Anderson Publication

Dyneley Prince, Review. (2010). *The Code of Hammurabi, (1904) American Journal of Theology, 8(3), (July)*. USA: The University of Chicago Press.

Eglash Albert. (1977). Beyond restitution: Creative restitution. In Joe Hudson, Burt Galaway (Eds.), *Restitution in Criminal Justice*. Lexington, MA: D.C. Heath and company

Gobert James, Dine Janet. (1993). *Cases and materials on criminal law*. London: Blackstone Press Ltd

Hayley, F. A. (1972). *The laws and the customs of the Sinhalese or Kandyan Law*. New Delhi: Navarang Publishers.

Hogg Peter. (1992). *Constitutional law of Canada*. 3rd ed. Toronto: Carswell

Mabbott, J. D. (1969). Punishment. In H. B. Action (Ed.), *The philosophy of punishment: A collection of papers*. London: Macmillan Co.

Marckwardt, A. (1995). Cassidy Frederic and McMillan James, Webster Comprehensive Dictionary, International Edition, Vol. I, London: Pioneer House

Marshall, T. (2000). Handbook on Restorative justice, 10th UN Congress on the Prevention of Crime and the Treatment of Offenders, April

Marty Price, J. D. Fall. (2001). Personalizing crime: Mediation produces restorative justice for victim and offenders, dispute resolution magazine, Published by the American Bar Association.

Moberly Walter. (1968). The ethics of punishment. p. 144 in Paranjape NV (1996) Criminology and penology, Central Law Publications, Allahabad.

Murphy, J. G., & Marxism and Retribution in Duff Antony and Garland (Eds.). (1994). *A reader on punishment*. New York: Oxford University press.

Munshi, M. H. Director General, Department of Social Services, Ministry of Welfare, Bangladesh (2003) 9th World Conference on the treatment of the offenders in New Century, ACPF Today, Asia Crime Prevention Foundation, Tokyo, Japan.

Nadaraja, T. (1972). *The legal system of Ceylon in its historical settings*. Leiden: E.J. Brill Ltd.

Packer Herbert. (1968). The limits of the criminal sanction, Stanford University Press, Stanford

Rotman Edgardo. (1990). *Beyond punishment, a new view of the rehabilitation of criminal offenders*. Westport, CT: Greenwood Press

Sharman Lawrence, W., Strang Heather. (2007). *Restorative justice: The evidence*. London: Smith Institute

Tambiah, H. W. (1977). *The judicature of Sri Lanka in its historical setting*. Colombo: M.D. Gunasena & Co. Ltd.

Thompson Della. (1995). *The concise Oxford dictionary of current english*. New York: Oxford University Press

Wright Martin. (1991). *Justice for victims and offenders*. Philadelphia: Open University press

Zehr Howard. (1990). *Change lenses: A new focus for criminal justice*. Pennsylvania: Herald Press.

Websites

en.wikipedia.org/wiki/Retributive_justice-visited in May 2011.

http://www.jstor.org/stable/3153895 visited in May 2011.

http://www.vorp.com visited in June 2011.