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## New Sentencing Structure and Policy in the Republic of Sri Lanka

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### Introduction

The Administration of Justice Law No. 44 of 1973, which came into operation on January 1st, 1974, is without doubt one of the most revolutionary and certainly progressive enactments affecting both the sentencing structure and policy of the law courts in Sri Lanka. This law was intended to achieve simplicity and uniformity in procedure, fairness in administration, the elimination of unjustifiable expenses and delay, and the just determination of every judicial proceeding. As its provisions have now been in operation for the past two years, it would be opportune to consider what kind of changes have been brought about in the sentencing structure and how far the objectives of the new sentencing policy have been realized under the new legislation.

### Reorganization of Court System

The law was intended to provide, inter alia, the establishment and constitution of a new system of courts for the administration of justice within the Republic of Sri Lanka and to regulate the procedure in and before such courts. The immediate changes which it brought about were as follows:

1. It abolished several law courts which were found to be either redundant or unnecessary.
2. It enlarged the composition of the Supreme Court from nine judges to 21 judges and vested the court a position as the final and only court of appeal in all civil and criminal cases.
3. It established 16 new high courts in 16 important towns of the Island, and empowered them to try all cases, before a judge and a lay-jury of seven, of grave crime including murder com-

mitted within their respective zones. The sentencing powers of both the district and magistrates' courts were also considerably enhanced. Preliminary inquiries or pre-trial proceedings, which were conducted in magistrates' courts in cases of grave crime were abolished, and a newly created Director of Public Prosecutions will in future examine the evidence available in such cases and forward an indictment against an accused directly to the appropriate high court or district court for trial.

Prior to the introduction of the new law, there existed in Ceylon (as Sri Lanka was then known) a considerable number of law courts, which had come into existence from time to time as and when the necessity arose. There were at that time Conciliation Boards, Rural Courts, Courts of Requests, Magistrates' Courts, District Courts, Assize Courts, the Supreme Court, and the Court of Criminal Appeal. An appeal may be made against a judgment of the Supreme Court or the Court of Criminal Appeal to the Judicial Committee of the Privy Council in England.

After appeals to the Privy Council were abolished in 1971, the Court of Appeal, Rural Courts, and Courts of Requests were also abolished by the new law of 1973. Since then, the Law Courts (other than Conciliation Boards) in existence have been: (1) Magistrates' Courts, (2) District Courts, (3) High Courts, and (4) the Supreme Court.

The sentencing powers of imprisonment by Magistrates' Courts were trebled from six months to 18 months, while their powers of imposing fines were increased 15 times from Rs. 100 to Rs. 1,500. The powers of imprisonment by District Courts were increased two and a half times from two years to five years, and five times in the case of fines from Rs. 1,000 to Rs. 5,000. Consequently it was possible for a District Court to try even a case of at-

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tempted murder. Further, new Magistrates' and District Courts were established in areas where they were considered necessary, and today there are as many as 51 District Courts and 49 Magistrates' Courts, which, together with the 16 High Courts, constitute a total of 116 "trial" courts for an island of 25,000 square miles and inhabited by nearly 14 million people.

### Changes in Sentencing Policy

What was the purpose or objective of these increased numbers of law courts and the enhanced sentencing powers? For one thing the new law certainly did not intend to impose either longer terms of imprisonment or larger fines. The new sentencing policy introduced by the law appears to have changed the emphasis drastically from deterrent or retributive to reformatory and rehabilitative sentences to be imposed in future, enabling the prisoner to take his place as a useful member of society once he has paid the price for his lapse.

It should be noted that, for the first time in the history of sentencing in this country, provision was made for imposing suspended sentences, whereby all convicts who are sentenced to a term of imprisonment of two years or less, can have their sentences of imprisonment suspended for a minimum period of five years. If he is not convicted of any other offence during that period of suspension in which the offender was at liberty, he would not have to serve any portion of that imprisonment which was imposed upon him.

The three forms of legal punishment which are still being imposed in most "developed" as well as "developing" countries are: deprivation of life, liberty, property, and, in rare cases, the infliction of positive suffering such as whipping. The new law in Sri Lanka has adopted several alternative forms of punishment other than "suspended sentence" with a view to reforming and restoring the offender as a useful member of society rather than punishing him as a deterrent to himself and the rest of society.

One of such alternatives is the performance of "community service" where a

prisoner is unable to pay a fine. The court is empowered to require the accused to perform unpaid work for the community on the basis of one month for every Rs. 100 instead of imposing a term of imprisonment at the rate of one month for every Rs. 100.

There is the provision in the law to "discharge conditionally" an offender on his 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. There is also the provision to release any convicted person on "probation" in an appropriate case for a period of not less than one year and not more than three years. Further, convicted offenders who are between 16 and 21 years can be sent for "borstal training" for a period of not less than nine months and not more than three years.

### Discretion in Sentencing

In spite of this change of emphasis in the policy of sentencing brought about by the new law, the question of selecting the appropriate sentence to impose on a particular accused is one which still presents difficulties to a judge. As Professor P.J. Fitzgerald pointed out, the punishment of a criminal is a combined operation of Parliament, the courts, and the administration. The part played by the courts is only one part of the whole operation of punishing the offender. One result of this is that once sentence has been passed, the courts are no longer concerned with the offender's fate; their task is concluded. This means that the effect of the sentence can be seen less by the courts themselves than by those whose function is to see that the sentence is carried out and by those who study the social effect of punishment. For this reason those who actually pass sentence on the offender must to some extent work in the dark, unless they are willing to accept the guidance of those who study the effects of punishment.

In regard to the sentencing policy, a notable feature of the criminal justice system of Sri Lanka from colonial times

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to the present day has been the extremely wide discretion vested in the sentencing judge as to the type and the quantum of the sentence which he may impose on the convicted offender. While the new law made far-reaching changes in the criminal justice system in respect of the structure and policy of the courts, hardly any attempt has been made to control or fetter the wide discretion of judges in sentencing the convicted offender.

For example, a high court judge has the options of the following sentences against a person who has been convicted of the offence of rape: (a) imprisonment for any term from seven days to 20 years; (b) imprisonment for up to two years together with an order that the sentence be conditionally suspended for a period of not less than five years; (c) imprisonment for a term up to five years together with whipping up to 24 strokes with a rattan; (d) probation for a period of not less than one year and not more than three years; (e) conditional discharge on the offender's executing a bond with or without sureties; (f) order to be detained in the precincts of the court, in lieu of imprisonment, until a specified hour on the date of sentencing, not being later than 8 p.m.; (g) fine of any sum without any restriction upon the judge's discretion as to an upper or lower limit; or (h) order to perform community service for a specified period with the consent of the offender.

Such unfettered discretion is quite a desirable provision, because any attempt to control the sentencing judge by such measures as a set of rules for their guidance is much more likely to cause more harm than good. Since all the circumstances relating to any two cases can hardly be the same, it is generally agreed that restricting the judge's freedom would inevitably result in miscarriages of justice or substantial hardship to the offender and his dependants in many cases.

### Disparities in Sentences

Disparities in sentences would not only cause a prisoner who has received the longer term to nurse a grievance but would also defeat the very purpose for

which the imprisonment was imposed, namely, to reform the offender. No offender can be reformed if he feels that he has been unfairly or unjustly punished. It is therefore essential that judges should select not only the appropriate sentence but the sentence which will achieve the object for which it was imposed.

The traditional controls of a judge's sentencing powers are virtually absent in the new law except in regard to the imposition of an upper limit on the terms of imprisonment and the amount of fines. Mandatory sentences are extremely rare in the penal statutes with rare exceptions such as the compulsory death sentence for murder and an obligatory prison sentence of not less than three months for offenders convicted of a second or subsequent offence under the Control of Prices Act.

In the present criminal justice system, any errors, disparities, or inconsistencies in sentences may be corrected by the Appellate Court, i.e., the Supreme Court, whose principal function under the law is the hearing of appeals against the judgments and orders of all the subordinate courts. In disposing of an appeal from the judgment of a District Court or a Magistrate's Court, the Supreme Court has the power to increase or reduce the amount of the sentence or the nature thereof. In the case of an appeal against the sentence imposed by a judge of the High Court, the Supreme Court has the power to quash the sentence pronounced by the trial judge and pass in its stead such other sentence warranted in law as it thinks ought to have been passed by the High Court.

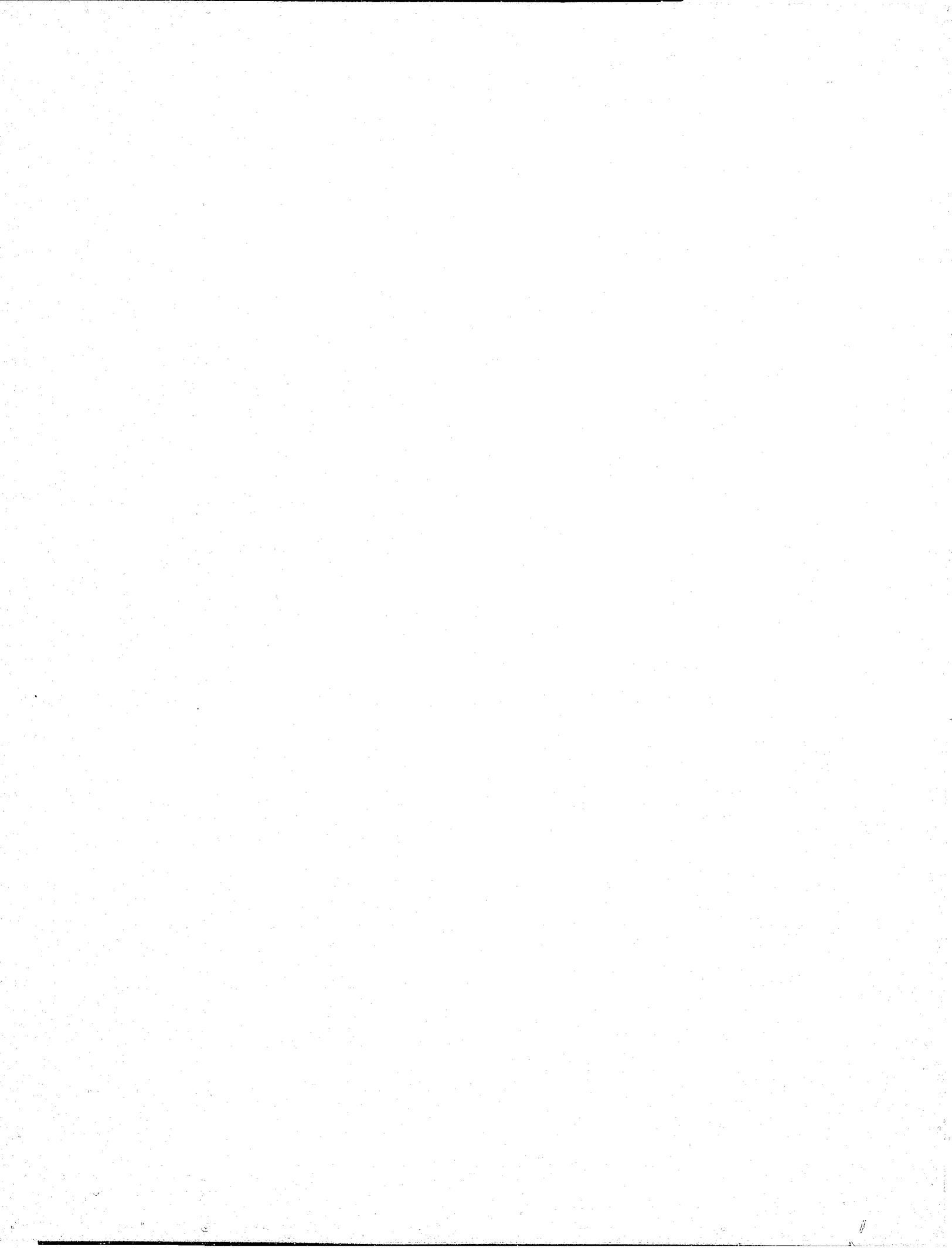
Although under some systems the appellate jurisdiction is not vested with the power to enhance the sentence passed by the lower jurisdiction, the appellate court in Sri Lanka is not fettered by any such restriction, and it may impose a more severe sentence on the offender. Nor is there any provision that only the convicted offender can appeal against the sentence.

There is a school of thought which advocates that the law should make it obligatory for judges to state reasons in detail for the sentences they choose to impose. There is much to be said in favour of such a provision not only because it will result in judges giving more thought and anxious consideration to the question of

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sentence but also because it would help the appeal court considerably in reviewing and judging on the propriety and quantum of the sentence imposed by the subordinate court. It has the further advantage

that judges of various lower courts, who read such published reasons which have been upheld by the appeal court, will tend to fall in line, thus ensuring some degree of uniformity of sentences.



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