## ***SENTENCING AS IT RELATES TO THE REGION***

The sentencing process comes as the final judicial act in a criminal trial after the verdict of guilty has been pronounced, be it by a jury or by the presiding Judge, or Resident Magistrate in criminal trials without a jury.

There is in my view a tendency to treat the process as a sort of appendix to the trial, of much less importance than the determination of innocence or guilt, and which may therefore be perfunctorily performed without a reference to the principles which apply to the carrying out of this important function.

Some legal practitioners and courts may be surprised to discover that there are jurisprudential principles which impact upon the determination of the appropriate sentence in a particular case. The reason may well be because the jurisprudence with respect to sentencing is strongly influenced by sociological considerations rather than strictly legal principles, and not generally a part of the course which students are required to undergo to qualify as a lawyer.

Furthermore, judges who are the sentencers are not required in our jurisdictions to receive any special training directed towards an understanding of the role of punishment within social systems and the principles of sentencing. There does not emerge therefore from any review of sentences imposed by the courts in our region, any consensus between judges reflecting an identifiable rationale governing the imposition of sentences following convictions for criminal offences.

Indeed, in most of our territories the range of sentences authorised by legislation is far too limited.

The truth is that in all our jurisdictions such a review would be of necessity superficial rather than in-depth since the collating of information in our criminal justice systems is still at a primal stage and the professional analysis of the material in order to arrive at conclusions and solutions absent because of the non-existence of any Body or Unit charged with the responsibility for criminal justice research.

In the absence of such research and analysis we are left in a position of ignorance with regard to the effect of long terms of imprisonment on inmates, the probability of effective rehabilitation by the provision in the prisons of programmes designed for this purpose, the Institution of gainful work programmes which could generate funding to offset some of the costs of incarceration, and provide the basis for a criminal justice compensation fund for the victims of crime, and ensuring that the termination of custody does not release into the community the type of persons who will further endanger the society. As it is now, judges continue to remain blissfully unaware of the possible consequences to the society now or subsequently of the types of sentences which they impose in our courts.

It is therefore with some satisfaction that I note a recent Cabinet announcement of an intention to establish a Criminal Justice Research Unit in the Ministry of

National Security and Justice. This was proposed from as long ago as in the mid 1970s. The objectives of the Unit as stated are inter alia:

> "(i) To promote the development of research capabilities in relation to planning for crime control and the treatment of offenders.
>
> (ii) To collect data on the potential inter-relationships between crime prevention and criminal justice and various socio economic issues such as unemployment, under employment, population growth structure and migration.
>
> (ii) To develop the means to more accurately collect and analyze criminal justice data.
>
> (iv) To develop an integrated information system involving the Police, Courts and Corrections."

Hopefully resulting from this we will be better able to analyse the information which will lead to a more informed basis upon which judges can approach the sentencing process in our courts.

There is in every country a judicial culture in respect to law and justice, and particularly with regard to the acceptable penalty for criminal offences which

reflects the culture of the country as a whole and which infects the determination of the judge in terms of what is an appropriate sentence for a particular crime. For while the judiciary is independent, as indeed it is in Jamaica, unconsciously or otherwise a very upfront consideration by the judge with regard to sentencing is the question of what the people generally expect or demand. In countries where judges are elected this phenomenon would be more pronounced since it is seen as carrying out the wishes of the people who will have the opportunity of scrutinizing the sentencing record of the judge which might be made an issue in any future election for the judicial post. Fortunately, in my view, for the Commonwealth Caribbean judges are not elected, and are thus not so directly and centrally affected in terms of the wishes of the people. However, a country that is scarred by the experience of a history of slavery, indentured labour and colonialism in comparably recent times in historical terms, does have with regard to its culture, an inherited and indeed indoctrinated response of harsh solutions to societal deviance.

The challenge to judges ofcourse is that they must be wise enough to know that what is popular is not always necessarily just. Furthermore, public opinion assessments can be manipulated and engineered to reflect a popularity for a particular view point when in fact this does not really exist.

The available statistics are important for us to understand the dimensions of the consequence of the sentencing process. As of May 30, 1997, the total adult

prison population in Jamaica was 3,363 inmates of which 3,227 were males, 136 females and one infant. The latter is with a mother at Fort Augusta Correctional Centre where all female prisoners are incarcerated. The number there includes 15 persons on remand and 2 appellants.

The males are distributed between 6 male adult Correctional Centres and include 121 appellants and 479 prisoners on remand. St. Catherine Adult Correctional Centre accommodates among its inmates 51 males condemned to death and 3 persons incarcerated for civil debt.

Of the male prison population in Jamaica in 1996 there were 1,510 prisoners serving sentences imposed for less than 12 months and 609 for more than 12 months. Of the females 150 were serving sentences imposed for less than 12 months and 42 for more than 12 months. In 1995 our courts imposed 1,948 custodial sentences and the number in 1996 was 2,303. The total admission to custody for 1997 - January to March was 651.

I risk boring you with these statistics because I believe we can reasonably arrive at some relevant conclusions on a closer analysis. Quite apart from whatever lessons which those qualified to do so may glean with respect to tendencies which develop in human beings as a result of differences in the biological make up or societal conditioning of men and women, and accepting as a fact that the level of crime among women is much lower than among men, it is clear not only from the statistics but from experience that judges approach the sentencing of

female persons in a much more careful, sensitive and discriminating manner than they approach the sentencing of men. The factors which have traditionally influenced the sentencing approach in respect of women relate to the established fact that they are seen and expected to be the care givers with respect to children, not only at home but also significantly in our schools. Furthermore, in the matriarchal societies of the Caribbean women instinctively receive gentler treatment from "the authorities" than do men. I make these remarks not as a complaint with respect to the more favourable treatment of women in the sentencing process but rather as a plea to sentencers to apply a more sensitive approach to the sentencing of men as well.

The high numbers of remand prisoners in our Penal Institutions speak volumes for the need for a proper approach to the consideration of bail. Judges also seriously need to take into account in the sentencing process the time already spent by an accused person in prison before trial in a determination of the length of the appropriate custodial sentence to be imposed if a verdict of guilty is pronounced.

The inmate population in the St. Catherine Adult Correctional Centre - 1,273, and the Tower Street Adult Correctional Centre - 1,300, and these are both high security Institutions, represent approximately 79% of the total population of all the male adult Institutions. These facilities are therefore very much over-crowded. The numbers in the remaining male adult Institutions are as follows:

| | | |
|---|---|---|
| South Camp Road (Gun Court) | - | 228 |
| Tamarind Farm | - | 207 |
| Richmond Farm | - | 204 |
| New Broughton | - | 15 |

The last mentioned is a Correctional Centre for old prisoners.

The question therefore arises as to whether judges should be concerned as to the conditions into which they sentence male prisoners in our Penal System.

The high proportion both of male and female prisoners serving sentences of less than 12 months in our Penal Institutions suggests to me that the recipients are persons not considered by the Court to be a danger to the society and exposes a reluctance by judges to utilise the non-custodial options available under the law.

Lawyers appearing for convicted persons in criminal cases direct their efforts almost exclusively in the trial process on the achievement of a verdict of acquittal. The submission on sentence after conviction is very often without detailed preparation and, in the numbness of the verdict of guilty, very much a surrender to the mercy of the court. Yet, judges do need reliable information in relation to the convicted person in order to determine the appropriate sentence. For despite the varied menu of the objectives of punishment - retribution, that is just deserts, deterrence, reparation, protection of the society, rehabilitation, and

correction through work and the experience of service to others, the choice to be made by the judge to an important degree must depend upon the individual offender to whom the judge will dish out the sentence. The information as to that offender is important in order to influence the appropriateness of the sentence imposed. It is not time-wasting therefore for defence counsel either to have prepared beforehand, whatever the outcome of the trial may be, a full Social Enquiry Report on the client or to request one after the conviction.

The antecedent report usually provided to the court by the police after the conviction of the offender is generally sparse of information and except for the record of previous convictions doubtful as to accuracy in terms of content and lacking as to depth in terms of assessment.

It usually states that the information has been obtained from speaking with unnamed persons in the community. It is very often accepted without query by either the court or by defence counsel. It sometimes contains information which on the English authorities and in terms of the requirements of justice is not permissible to be given to the court.

In ***R. v. Van Pelz*** [1943] 1 All ER p. 36, the police officer who was called to give evidence in relation to the antecedents of the convicted person stated that she was a woman who had led a loose and immoral life and associated with convicted thieves in the west end of London. She was said to be well known as a prostitute who frequented the west end of London and her activities in this

direction had exercised the mind of the police for a considerable time past. On appeal Viscount Caldecote L.C.J. at p. 38 of the judgment delivered a very relevant sentencing dictum:

> "The question which has exercised the minds of the court is an important one. Police officers are always called, or nearly always called, to give the court such assistance as it ought to have in considering the sentence to be passed upon a convicted person. We think that in this case we should enlarge a little on what Lord Alverstone L.C.J., said in ***R. v. Campbell***[1]**,** and upon what Humphreys, J., said in ***R. v. Burton.***[2] When a police officer is called to give evidence about a man who has been convicted, he should in general limit himself to such matters as previous convictions, if any, and antecedents of the prisoner, including anything that has been ascertained about his home and upbringing in cases where the age of the person convicted makes this information material. It is the duty of the police officer, we think, to inform the court also of any matters, whether or not the subject of charges which are to be

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1. R. v. Campbell [1911], 75 J.P. 216;
   6 Cr. App. Rep. 131; 14 Digest 470, 5029.

2. R. v. Burton [1941], 28 Cr. App. Rep. 89.

taken into consideration, which he believes are not disputed by the prisoner and ought to be known by the court. Police officers should inform the court of anything in the prisoner's favour which is known to them, such as periods of employment and good conduct. We have no reason to believe that this is contrary to the present practice of the police who, as we all know, constantly inform the court of matters which are in the prisoner's favour. We think that it is the duty of counsel for the prosecution to see that a police witness, when speaking on all these matters, is kept in hand, and is not allowed, much less invited, to make allegations which are incapable of proof, and which he has reason to think will be denied by the prisoner. It must not be taken that we are attempting to lay down a rule in such wide, and at the same time such exact terms, as would cover every case, for the simple reason that this would be impossible, but it is hoped that these observations may be some guide to the right practice. The only other observations we need to make is this, and I hope it is unnecessary. Nothing I have said is intended to affect in the least degree the right of the

> court to inquire into any matter in any individual case upon which the court itself thinks it right to ask for information."

The making of such an improper statement might well result in a Court of Appeal reducing the sentence passed by the trial judge and substituting instead a sentence considered more appropriate if the excess offending remarks had not been made by the police. Defence counsel are well advised to take objection when the permissible boundaries are overstepped in antecedent reports prepared by the police for the information of the court with respect to sentence.

In the context of a rising crime rate and increasing violence in the society it is understandable that the need to protect the society from the perpetrators of violent crime must be an important judicial consideration in the determination of the appropriate sentence for the particular offender in the circumstances of a specific crime. The Legislature has in our past history imposed by statute mandatory custodial sentences for specific offences. In the 1960s the target was ganja. In the 1970s firearm offences. It is accurate I believe to assert that these mandatory sentencing initiatives failed to fulfill the purposes which the Legislature expected them to achieve. Judges do not like to have their sentencing discretion usurped by the Legislature and the imposition of mandatory sentences in these two areas caused manifest injustices and judges

developed creative manoeuvres to get around them. The history and experience of these experiments are an interesting exploration for another Paper. The only mandatory sentences now existing in our region relate to murder and treason.

Human societies, and ours is no exception, very often develop myths which cannot be substantiated. A current existing myth is that a sentence should send a message and consequently the message will deter. A message of course has no effect if it is not being received. For while the exercise of the sentencing function may have an effect in reducing crime (and the jury is still out on this) the certainty of arrest and conviction of criminal offenders as necessary precursors to sentencing are far more likely to have that reductive effect. In the absence of this, sending a message is whistling in the wind.

Since Parliament in the exercise of its legislative functions establishes in criminal law statutes various maximum sentences for criminal offences judges are able to have the Legislature's view of the seriousness of a particular crime as one of the ingredients in the mix required to produce a just sentence.

As far as the death penalty is concerned only Jamaica in the Commonwealth Caribbean so far has introduced legislation creating two categories of murder - ***Capital*** and ***Non-capital***. I will not deal with the Offences against the Person (Amendment) Act since I am aware that Lord Anthony Gifford QC has within recent times presented a Paper on this at a Seminar of the Jamaican Bar

Association. From a sentencing viewpoint the phenomenon in the legislation which would require some examination is the experience of the exercise of the judicial discretion given to impose a period of time beyond seven years which must be served by a person convicted of non-capital murder before such person can become eligible to apply for parole.

I make no reference to the periods which were set in the classification exercise with respect to persons on Death Row at the time the Act came into force. The Judges of Appeal in this classification had to make do with the limited information available in the summing-up, and without any established pattern in this area. An examination of ineligibility periods imposed in respect of convictions since the coming into force of the Act would disclose the range of numbers of years considered by judges to be appropriate. Unfortunately that material is not at present available for analysis.

Prior to the Act a person sentenced to life imprisonment was eligible under the Parole Act to apply for parole after seven years.

In the Caribbean territories which still fall under the political jurisdiction of the United Kingdom - Bermuda, Turks and Caicos Islands, the Cayman Islands and the British Virgin Islands, among them the death penalty has been abolished by fiat from Whitehall since that penalty no longer exists in the United Kingdom.

Dr. Farley Brathwaite of the Department of Sociology, University of the West Indies, Barbados, has stated in a Paper delivered at a Conference in Barbados in September 1994:

> "Sentencing disparity is also an area of concern in Caribbean Society but its nature, extent and factors related to it have not been as widely explored empirically as has been the experience of urban industrial societies to the north."[3]

Utilising date from the Annual Reports of the Commissioner of Police in Barbados and a specifically conducted social survey he concluded inter alia as follows:

> "Sentencing patterns in Barbados have changed dramatically over the period 1960-1990.
>
> An example of these changes is reflected in a consistent increase in the rate of sentencing to imprisonment between 1960 and 1980, and a dramatic increase since 1980.

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3. Some Aspects of Sentencing in the Criminal Justice System in the Commonwealth Caribbean, The case of Barbados - Farley Brathwaite Ph.D.

> Furthermore there is evidence that the more severe imprisonment sentence, 1-3 years and over increased relative to the others between 1970-1990.
>
> Another example is the consistent decline in fines as an option over the same period.
>
> Also that CRD (conviction, reprimand and discharge) which has increased over the 1960 to the 1980 period show a dramatic decrease between then and 1990.
>
> Taken together these show that by 1990 imprisonment as a sentencing option outstripped fines and CRD."

We have had no such survey in Jamaica but the information which is obtainable appears to support similar conclusions here. I am however constantly indebted to the Department of Correctional Services which in my view maintains the most reliable records and the in-house qualifications and capacity to make the relevant analyses.

There is an area in which however, Jamaica has been the pacesetter in the Commonwealth Caribbean and that is with respect to legislative provision for a range of non-custodial options not yet available in other Commonwealth Caribbean territories.

The Criminal Justice (Reform) Act passed in 1978 mandated a judicial focus for sentencers in respect of persons between the age of 17 to 23 years. It provides that the court instead of sentencing such person to imprisonment "shall deal with him in any other manner provided by law." It exempted from the mandate of this approach four categories; where:

> (a) the court is of the opinion that no other method of dealing with the offender is appropriate;
>
> (b) the sentence of imprisonment is fixed by law;
>
> (c) violence or threat of violence has been used in the commission of the offence;
>
> (d) at the time of the commission of the offence the person was in illegal possession of a firearm or imitation firearm.

Except in cases where legislation fixes the sentence the Act empowers judges:

> (a) where fines in lieu of imprisonment are imposed to order payment of such fines by installments;
>
> (b) to impose ...

(i) orders for attendance at Day Training Centres as part of probationary requirements;

(ii) suspended sentences where the offender is sentenced to custody for no longer than three years except where the offence involved the use or illegal possession of a firearm or imitation firearm;

(iii) suspended sentences supervision orders;

(iv) community service orders;

(v) in the case of custodial sentences under three months, orders providing for the serving of the sentence at stated periods, for example, on week ends.

The experience of nearly twenty years has not convinced me that sentencers have sufficiently availed themselves of the provisions of this legislation. In more recent tines however the use of the options provided have become more frequent.

The Judicial Committee of the Privy Council recently in the appeal of ***Brian Bernal and Christopher Moore v. The Queen,***[4] in a judgment delivered on the 28th of April 1997 had the opportunity to deal with the provisions of Section 3(3) of the Criminal Justice (Reform) Act which reads:

> "Where a court is of opinion that no other method of dealing with an offender mentioned in subsection (1) is appropriate, and passes a sentence of imprisonment on the offender, the court shall state the reason for so doing; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall take into account the nature of the offence and shall obtain and consider information relating to the character, home surroundings and physical and mental condition of the offender."

The Board stated:

> "In the Court of Appeal Forte J.A. was of the view that the Resident Magistrate ought to have requested a social enquiry report so as to determine whether or not a community service order or a probation order could

4. Privy Council Appeal No. 56 of 1996

> have been made in the circumstances. By a majority, however, the Court of Appeal upheld the sentence imposed by the Resident Magistrate."

The judgment further noted:

> "The policy enshrined in section 3 is the avoidance of imprisonment in the case of young persons except where no other method of dealing with them is appropriate and the importance of ensuring that before any sentence of imprisonment is imposed on such persons the court has full information as to the character, home surroundings and physical and mental condition of the offender. Furthermore, the words 'shall obtain and consider' indicate that steps are to be taken by the court to obtain this information after verdict and before any sentence is passed. Their Lordships would therefore agree that the approach suggested by Forte J.A. is, certainly in the vast majority of cases the correct approach."

As however was pointed out in the judgment:

> "It is not the practice of their Lordships' Board, however, to interfere with matters of sentence except where there is a danger of some serious injustice."

This being so, as far as sentence is concerned, for all practical purposes the Court of Appeal in Jamaica is the virtual final court on this determination.

In 1995 suspended sentences with supervision orders were imposed on 332 males and 35 females, in 1996, 296 males and 40 females and between January to March 1997, 42 males and 3 females benefited from this type of sentence.

With respect to community service orders this option was imposed in 1995 on 58 males and 14 females, in 1996 on 77 males and 33 females and in 1997 to the end of March on 6 males and 3 females. A declining trend is noticed when it is observed that in 1994 a total of 151 community service orders were made by the courts.

The provision in the statute for reference to a Day Training Centre as part of a probation order has never been utilised. The reason clearly is because there are no Day Training Centres in existence. An Attendance Centre established by the Family Court Caution Committee shortly after the legislative creation of that court in 1975 still exists on East Street, Kingston and is now funded by the Government.

A Magistrate attending a Conference on Alternatives to Custody held in Trinidad and Tobago in April of this year informed the Conferees that community service orders are sometimes imposed in that territory but without legislative authority.

A Bill to make provision for the imposition of community service orders is now before the Parliament of the Republic of Trinidad and Tobago.

Under long existing Probation of Offenders Statutes probation orders which have to be consented to by the convicted person is a non-custodial option available to sentencers in the Commonwealth Caribbean.

In Jamaica 322 males and 114 females received probation orders in 1995, 396 males and 148 females in 1996 and 76 males and 38 females between January 1 to March 31, 1997. It would appear that sentencers are more comfortable with imposing this long established custodial option.

## ***JUVENILES AND YOUNG PERSONS***

Under the Juveniles Act, a juvenile is a person under the age of 17 years, a "young person" is one between 14 and 17 years of age, and a "child" is a person under the age of 14 years. The age of criminal responsibility is legislated at 12 years.

If a child commits an offence he is presumed innocent but in need of care and protection.

The range of options available to sentencers in making orders under the Juveniles Act are indeed wide. They are set out under Section 27(1) as follows:

> "(a) dismissing the case;
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> (b) being a probation order under the Probation of Offenders Act;
>
> (c) placing the offender, either in addition to or without making any other order under this section for a specific period not exceeding three years, under the supervision of a probation and after-care officer or some other person to be selected for the purpose by the Minister;
>
> (d) committing the offender to the care of any fit person, whether a relative or not, who is willing to undertake the care of him;
>
> (e) where the offender is a young person, ordering the offender to pay a fine, damages or costs;

(f) sending the offender to a juvenile correctional centre;

(g) ordering the parent or guardian of the offender to pay a fine, damages or costs;

(h) ordering the parent or guardian of the offender to enter into a recognizance for the good behaviour of such offender."

Although generally, a juvenile should not be confined in a prison, a young person convicted of certain offences including murder, treason, and breaches of the Firearms Act (under the Gun Court Act) may be allowed to be detained in such place, including a prison, as the Minister may direct and when so detained is deemed to be in legal custody.

A person cannot be sentenced to death if the offence attracting the death penalty was committed by that person before the offender had attained the age of 18 years. The court sentences the offender to be detained during Her Majesty's pleasure for an unspecified period and except in the case of a child the place of detention may be a prison. Presently there are 17 persons so detained. Three (3) were released on licence in recent times - 1 in 1995, 1 in 1996 and 1 in 1997.

Although by law the commission of capital offences by women attracts the death penalty in practice this sentence has always been commuted to one of imprisonment for life. The death sentence cannot be imposed on a woman who is pregnant at the time of her conviction for committing a capital offence. The sentence of the court is imprisonment for life with or without hard labour.

It will therefore be clearly seen that counsel representing a young person in cases of capital murder have a duty to be in possession of reliable information as to the age of that person.

## ***CONSTITUTIONAL ISSUES***

More and more as lawyers and the population generally develop a greater sensitivity to constitutional protections there will emerge increased challenges to the constitutionality of sentences imposed by the courts.

In ***Hinds v. The Queen,***[5] the Judicial Committee of the Privy Council had to consider the provisions of the Gun Court Act of 1994 which prescribed a mandatory sentenceof detention "at hard labour during the Governor-General's pleasure" for certain offences under the Firearms Act. Such a detained person could not be discharged except at the direction of the Governor-General who had to act in accordance with the advice of a Review Board which was established for this purpose. The Judicial Committee struck down this provision as being contrary to the Constitution. The mischief was that the

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5. [1975] 13 JLR 262

power to determine the length of the custodial sentence was removed from the Judicature and vested in a body of persons not qualified under the Constitution to exercise judicial powers. Lord Diplock delivering the majority judgment of the Board at p. 279 stated as follows:

> "In the field of punishment for criminal offences, the application of the basic principle of separation of legislative, executive and judicial powers that is implicit in a constitution on the Westminister Model makes it necessary to consider how the power to determine the length and character of a sentence which imposes restrictions on the personal liberty of the offender is distributed under these three heads of power."

The judgment deals with the separation of the principles of legislative, executive and judicial powers implicit in a Westminister Model Constitution. Parliament may in the exercise of its legislative power impose a fixed punishment to be imposed on offenders found guilty of defined offences and it may likewise make a law imposing limits on the discretion of the judges to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct and the circumstances of the case.

However in Lord Diplock's words:

> "What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders."

In determining when to terminate the sentence the Review Board would be exercising a judicial function which it was not constitutionally empowered to do. The court cited with approval the dicta of the Supreme Court of Ireland in ***Deaton v. The Attorney-General and the Revenue Commissioners***[6] :

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; that is wholly different from the selection of a penalty to be imposed in a particular case. ... The Legislature does not prescribe a penalty to be imposed in an individual citizen's case;

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6. [1963] I.R. at pp. 182, 183

> it states the general rule, and the application of that rule is for the courts ... The selection of punishment is an integral part of the administration of justice and, as such, cannot be committed into the hands of the Executive. ..."

The provisions of Section 17 of the Constitution as it relates to "description of punishment" has received much exposure in the Judicial Committee of the Privy Council resulting in the landmark decision of ***Earl Pratt and Ivan Morgan v. Attorney-General for Jamaica et al***[7]**:** They read thus:

> "17(1) No person shall be subjected to torture or inhuman or degrading punishment or other treatment.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorise the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

I will not deal in this Paper with this interesting development, as recently in March, I explored in-depth this issue in a Paper delivered to the Advocates

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7. [1994] AC 1

Association of Jamaica[8] and which I am sure is available to you to read at your leisure. It seems strange to me that since the reawakening of flogging as a sentence in Jamaica our lawyers have not seem fit to question its constitutionality.

There may indeed be other areas in which statutes breach the principles of the separation of powers as did ***Hinds v. The Queen***. *Without* expressing my own opinion I do note that in ***Danhai Williams and Danwills Constructions Ltd. v. The Attorney-General of Jamaica,***[9] and in ***A & F Farm Produce Company Limited and Andre Chin v. Commissioner of Customs and Excise,***[10] Downer JA posited a view that the provisions of Sections 210 and 211 of the Customs Act which empowered the Collector General at his election to impose a penalty of treble the value of goods imported "in a manner calculated to deceive the Customs Officers" or "in any manner dealing with goods with intend to defraud Her Majesty of any duties thereon" would to his mind contravene the principle of the separation of powers enshrined in the Constitution. In neither case did his brethren in the Court of Appeal follow him down that road. They remained silent on the issue. So too did the Judicial Committee of the Privy Council in the appeal by the Attorney-General in the

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8. The Role of Human Rights in the Development of Caribbean Jurisprudence.

9. SCCA 7 of 1994
10. SCCA 46 of 1993

***Danhai Williams*** case[11] which although allowing the appeal the Law Lords maintained silence on the observations of Downer JA in this regard.

In Jamaica appeals against sentence to the Court of Appeal are quite infrequent. In my view this is so for two reasons. Firstly, because the question of sentence is not given the importance it should receive from defence counsel, and secondly because of the power of the Court of Appeal to increase the sentence imposed on an appeal against sentence if it appears in the circumstances to have been unduly lenient.

It is an interesting phenomenon that however excessively harsh the sentence of the court may be there is usually no public outcry. It is when the sentence is considered too lenient that public outrage surfaces. We would get less of this in my view if judges are required to explain their reasons for the sentences imposed at the time of their imposition. Certainly too, this would ensure that judges give thought to developing and enunciating the principles which govern the sentencing process.

While it is desirable to attempt to achieve uniformity in sentencing, particularly in order to establish and ensure public confidence in this judicial exercise, the subjective element of the carrying out of his function in relation to the particular offender militates against a carbon-copy sentencing regime. It may be possible to adopt a tariff approach in respect of certain offences, for example,

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11. Privy Council Appeal No. 70 of 1995

road traffic breaches and anti-litter sanctions. It is not possible or desirable to do so across the wider spectrum of criminal offences.

Many criminal offences involve a civil wrong to the victim. Yet, after the criminal penalty, the victim is required to embark upon civil litigation in order to receive compensation. We could do well to explore creatively orders for compensation to the victim of the crime by the offender as part of the sentencing exercise additionally to whatever other penal sanctions may be imposed.

The standard alternative for the non-payment of the fine imposed as a criminal penalty is a custodial one. It is because the judge has concluded that a custodial sentence is inappropriate in the particular case that the sentence of the court is a monetary payment to the State. Yet, if the fine is not paid, the result is, the very custodial sentence which was deemed inappropriate by the court. This means that in some cases the custodial sentence is served because of the poverty of the convicted person. There should be in the majority of cases in which a fine is imposed a range of non-custodial options available as alternatives in the event of the inability by the offender to pay the fine imposed by the court.

After nearly thirty-five years of being an independent nation it is a shame that our constitutional mandate against inhuman and degrading forms of punishment and treatment is still fettered by a provision of our Constitution

which keeps in place punishment and treatment even if inhuman and degrading if they existed in our laws at the time of our Independence.

It is an affront to national status and a fetter on the right of the judiciary to determine what penalties or treatment are inhuman and degrading and thus illegal and outside the pale of constitutional protection.

Finally, I am grateful for the opportunity to stimulate thought in an area of the justice system generally erroneously considered of more concern to sociologists than to lawyers.

***R. CARL RATTRAY OJ***
***PRESIDENT***
***COURT OF APPEAL***

***June 14, 1997***