

# Should We Punish Drug Abusers?: Reconsideration of Laws and National Polices of Sri Lanka

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**Abstract**— Elimination of illegal drug usage has been placed as one of the important objectives in the criminal justice system of Sri Lanka. In order to outmatch this challenge, Sri Lanka has enacted and adopted various laws and policies such as Penal Code, National Authority on Tobacco and Alcohol Act, Poisons, Opium and Dangerous Drugs Ordinance, Drug Dependant Persons (Treatment and Rehabilitation) Act etc in addition to the Sri Lankan National Policy for the prevention and control of Drug Abuse. But the risk is holding true. Incarceration and recidivism rates of the drug offenders are still high. Therefore the researcher strives to make ultimate goal to overcome the issue by overturning the problem towards new dimension. Main objective of this study is to explore the issues relating to rehabilitating drug offenders, especially drug abusers and to find out a professional solution to rehabilitate and make them part of National development. They were recognized as patients or vulnerable and aggrieved group among other offenders, both in legal and sociological aspects. This research paper focuses on justifiability and fairness of punishing drug abusers while having more appropriate solutions. Paper expects to compare expenses of prisoners and rehabilitation costs. Tax payers should not be paying such high costs for drug abusers to be incarcerated when rehabilitation costs are significantly cheaper. Researcher adopts legal research methodology and it is based on a library research. The researcher adopts quantitative research method where it is appropriate to establish research objectives. Field research includes interviews and discussions with Magistrates, Prison officers and Officers in charge of correctional authorities and collecting data relating to this area. However, it is important to note that obtaining statistics relating to rehabilitation of offenders through either incarceration, community based correction or by referring to treatments was one of main difficulties that the author had to face in the completion of this study.

**Keywords**— Criminal Justice, Drug Abuse, Recidivism and Rehabilitation

## I. INTRODUCTION

This paper intends to discuss productive alternatives that can be adopted to rehabilitate drug abusers who would be reintegrated to the society effectively. Significant age category of the drug abusers is between year 20 to 40, which is considered as the golden young generation. Best part of the society have neglected the drug abusers and labelled them as offenders. No remedies available for reintegration of drug abusers even for judicial officers before the existing laws. Hence the drug abuser has to suffer alone as a matter of the remarkable failure of inability of law to distinguish the drug abuser from drug trafficker. This paper intends to pay fair attention towards self victimized innocent aggrieved party of drug abusers in order to accomplish the justice for them and regulate the social omission.

Moreover this study aims to explore the issues relating to rehabilitating drug abusers and to find out a professional solution to rehabilitate and take part them to the National development. They were recognized as patients or vulnerable and aggrieved group among other offenders, both in legal and sociological aspects.

The reason why for the reconviction and recidivism rates are being increased even though the drug abusers are constantly punished by law? is the research problem which discussed in this paper.

It should be noted that this research does not include the statistics relating to rehabilitation of offenders through either incarceration, community based correction or by referring to treatments.

## II. HOW TO IDENTIFY DRUG ABUSERS

Two basic offenders can be seen in drug related crime scenario; Drug traffickers and Drug abusers. Since this study is mainly focused on in search of optional method of reintegration of drug abusers it is desirable to identify the difference between drug abuser and drug trafficker. Drug traffickers are not in a position to rehabilitate because they are particular criminals who engaged with

malicious activity which harmful to the entire society. Drug abuser becomes an offender due to possession and consumption of drugs. Since the drugs are banded intoxicants, they become offenders automatically.

Drug trafficking is a new offence introduced later to the poisons, opium, and dangerous drugs Act No. 13 of 1984. Trafficking is consisting with several offences; sell, give, procure, store, administer, transport, send, deliver or distribute. This new offence covers a wide range of activities in relation to handling of drugs and it involves doing an act of one of the kinds specified above, and should be conveying with the object of parting with possession to some other person. According to the Sec 2 of Misuse of Drugs Act of 1971 mere possession is not trafficking and some further step is needed to be brought to the definition of trafficking. There should be evidence of more than mere possession and it requires an element of illicit trading or dealing. The amount in possession should be a commercial quantity and more than the necessary supply for an addict. Court should consider first, whether the accused had the drug in possession, and then whether or not he had it for the purpose of trafficking. The further steps should be proved from inferences. There is a presumption that if a person possessed more than two grams of heroin it is done for trafficking. (Sec 15 of Misuse of Drugs Act of 1971)

In order to prove drug offences both physical (*Actus reus*) and mental element (*Mens rea*) should be proved. The physical element in a drug case could be proved by possession, sale and trafficking of drugs and the mental element could be proved by the intention knowledge, awareness and consciousness. Alleged offence should be proved that the accused had positive knowledge as to the identity, characteristics and the quality of the substance which he was dealing.

According to the legislative interpretation possession is "anything in the order, disposition, power, or control of a person is deemed to be in his possession". (Sec 2(2) of Poisons Opium and Dangerous Drugs Ordinance No. 17 of 1929)

For an instance many cases have been discussed of drug possession such as, *Saraswathie Vs. AG* (CA No.212/95 decided on 30.06.1999 ) *Rajapaksha Arachchige Malani vs. The AG* ( CA 9/97 decided on 13.10.1998) *Warner Vs. Metropolitan Police Commissioner* (Criminal Appeal Reports Vol. 52 1968) *Siddick Vs. The Republic of Sri Lanka* ( CA 2/2001) *Sumanawathie Perera Vs. AG*

(1988 - 2 SLR 20) *Tansley Vs. Painter* ( 1969 – Crim LR 139 DC) are name to few.

### III. THEORIES OF PUNISHMENT

The modern criminal law regimes have developed several theories of punishment, in response of crimes to punish the offenders with the most appropriate method. The many factors that influence judicial thought in sentencing are retribution, justice, deterrence, reformation and protection. Modern sentencing policy reflects a combination of several or all of these aims. Penal provisions leave a wide discretion to the trial judge to determine the exact sentence that is imposed.

Society has generally justified punishment for moral reasons, and these reasons are identified as aims of punishment. Throughout the history, people in different periods justified punishment differently. Summarizing those different justifications there are four main aims/objectives of punishment which could be treated as fundamental of the same. They are retribution, deterrence, incapacitation and rehabilitation. (Gobert James and Dine Janet, cases and Materials on Criminal Law, 1993, Blackstone Press Ltd, London, P. 2) These four main aims of punishment, each with variants and complexities, are known as theories of punishment.

Every judicial system imposes punishments on drug offenders in terms of rehabilitating them. however drug abuser is not an actual offender whom committed an offence against the society; those theories cannot be applicable against him. The theory of retribution is probably the most ancient theory of punishment. The main purpose of retributive theory of punishment is that the offender needs to be punished because of his/her commission of the crime. In case of a drug abuser it is not practicable to punish him for the main offence upon that theory since he has not act against anybody.

Existing penal system of Sri Lanka considers the revenge concept as aim of punishment, not as a reflection of revenge but as either a reflection of denunciation or reparation or just desert. It is clear that the punishment prescribed by the legislature in the Penal Code on the basis of crime is a reflection of the social denunciation or the disapproval towards the crime by the society. The traditional explanation of the function of criminal law is that the threat of punishment for violation of law is a deterrent which supposedly operates at three levels such as general deterrence, individual deterrence and

educative deterrence. (For general and individual deterrence – see, Clarkson C.M.V. Understanding Criminal Law, 1987, Fontana Press, Collins Publishing Group London, PP 180- 181. And for Educative Deterrence- Gross Hyman, a Theory of Criminal Justice, 1979, Oxford University Press London, P. 400). In case of a drug abuser educative deterrence can be executed. However the performance of educative deterrence is not practicable in most of prisons due to overcrowding.

The Sri Lankan judiciary has taken some progressive steps to justify the punishment of deterrence in recent times of the post independence era of Sri Lanka. As per the decided cases such as *Piyasena Vs. The Attorney General* (1986 SLR 388) and *Chandradasa Vs. Liyanage Cyril* (1984 2SLR 193) it was clear that deterrence was one of the main objectives of punishment in Sri Lanka. These two cases are evident that Sri Lanka clearly accepts general and individual deterrence as one of the prime objective of punishment.

Incapacitation is another important theory of punishment. In addition to capital punishment severe corporal punishments were adopted in ancient Sri Lanka to disable the offenders committing similar offences in the future. Mutilation was the commonest corporal punishment justified under the incapacitation theory during the monarchies time. Banishment was another reprehensive mode of incapacitation which was imposed for severe crimes in ancient Sri Lanka. Sending the offenders to jail was also adopted as a punishment under this theory. However incapacitation of the present penal system in Sri Lanka might be seen only in the death sentence, life imprisonment and long term imprisonment. Since the prisons are full of availability of drugs, that theory also not a possible solution for drug abuse other than segregating offender from the society.

Rehabilitation is also an accepted penal theory in Sri Lanka. Treatment to the offender or in other words make the offender a better person, capable of being – reintegrated in to society by improving his/her character was recognized even in the Monarchy's period. The present penal system also took several measures to introduce the rehabilitating the offender as an aim of punishment. Offenders aged between 18- 22 years are recognized as a separate category and are referred to open correctional centres such as training schools for youthful offenders called the Borstal Institutes and Open camps. Most probably minor drug offenders are sent to separate rehabilitation camps.

Therefore, it is clear that no point of punishing drug abusers without taking rehabilitating effort. Since the most of prisons are not capable enough to rehabilitate drug offenders properly, it is desirable to think of an optional punishment method for the betterment of each and every stakeholder. As per the views of the minor judiciary officials, Community based correction system is more appropriate solution to rehabilitate drug offenders while undergoing a punishment and without affecting to the prison population.

Since this research was basically based on empirical data several interviews had to be conducted with following stakeholders in order to gather information regarding existing judicial practice, punishment procedure, health effects of the drug abusing, rehabilitation system and their suggestions on reducing the rate of reconvictions of drug offenders.

Minor judiciary officials, Coordinators of the Government Rehabilitation Centres, responsible officers of volunteer Drug rehabilitation Authorities, Probation officers observing drug offenders, Prison officers dealt with rehabilitation programmes for drug offenders, Police officers engaged with arresting drug offenders in Police narcotic Bureau, officers of the national dangerous drugs control board were the main stakeholders of this research.

Apart from the interviews, following sources were used to collect data. Secondary data were collected by library researches. Apart from that referred books, periodicals, journals, thesis presented regarding correction and Reports and Records published by the responsible authorities such as Department of prison and Department of police.

Some Qualitative data like critics on present correction strategies and suggestions on rehabilitations were gathered by interviews, library research and via internet. Quantitative Data such as timely records and the relevant statistics on recidivists and reconvictions of drug offenders published by the Department of Prison and Department of Police were gathered by respective sources. As well as the court records and records maintained by the rehabilitation centres were much helpful to analyze the comparative doctrine pertaining to rehabilitations.

Contemporary data were helpful to proving the hypothesis. Court records, prison records and records of rehabilitation centres emphasized the fact that most of drug offenders were reconvicts or recidivists.

Rehabilitation is not a local concept and it has made use of several other developed countries. Accordingly international standards and comparative mechanisms which have been applied by developed countries such as Australia and USA were much helpful to improve suggestions for drafting local rehabilitation principles.

#### IV. RATIONALE OF PUNISHING VICTIMLESS OFFENDER

There are several conflicting doctrines among scholars on whether drug abusers should be punished or not. However it is clear that they should be rehabilitated even though punished as per the statutory provisions. Main problem of punishing a drug abuser is a particular victimless offender. Main victim of the cause of action is drug abuser himself.

Victimless crime is involved with an illegal action, but not directly violates or threatens the rights of any other individual. In these types of crimes, one or more persons commit a criminal offence without involving other persons. Prostitution and gambling are other crimes which don't have a victim apart from consuming drugs.

Committing victimless crimes is an issue in many countries and it has highly affected to increase the prison population. The rationale behind this is that drug use does not directly harm other people. Since the victimless nature of the drug abusing, it is not fair to punish them solely for the offence of consumption of drug. As per the doctrine of the sociological theory of punishments, whole society has a duty to correct the drug abusers and help them to reintegrate with the society again.

According to the clinical and sociological schools of thought, treatment of the offender was the principal aim of punishment. (Gomperz T., Greek thinker, Vol. III, 1905, John Murray, London, p. 251) The main objective of this concept is to make the offender a 'better person' capable of being re-integrated into society by improving the offender's character. According to the socio-economic theory the crime was seen as a symptom of illness that could with the appropriate remedy, be cured. Under this theory an opportunity is provided for the state to take steps to reform offenders and so to control crime. The ultimate aim of the punishment is to make the offender

re-adjust as a law-abiding person and to reintegrate him into the society.

#### V. DRUG RELATED OFFENCES AND PUNISHMENTS

It is important to identify that what are drugs, before categorizing offences and punishments. Mainly drugs have been identified in Sri Lankan law under Chapter V of the Poisons, Opium and Dangerous Drugs Ordinance. Dangerous Drugs are defined and listed in groups A, B, C, D and E in part 1 of the Third Schedule. Since Heroin or the Brown sugar was appeared in Sri Lankan market for the first time in 1981, it was included for the legislature by the Amendment of No. 13 of 1984.

There are many interpretations for "Drugs". A drug is, in the broadest of terms, a chemical substance that has known biological effects on humans or other animals.

In pharmacology, a drug is "a chemical substance used in the treatment, cure, prevention, or diagnosis of disease or used to otherwise enhance physical or mental well-being. Drugs may be used for a limited duration, or on a regular basis for chronic disorders. (The American Heritage Science Dictionary)

As per the Sri Lankan legislature several offences have been stipulated regarding drugs in following statutes.

- a) The Penal Code (Ordinance No. 2 of 1983) Chapter 14 which covers public health and safety)
- b) The Cosmetics, Devices and Drugs Act (Act No. 27 of 1980, as amended by Act No. 38 of 1984) The Act regulates manufacture, sale, distribution, labeling and advertising of all commercial drugs.
- c) The Ayurveda Act (Act No. 31 of 1961 as amended by Act No. 5 of 1962) entitles ayurvedic physicians to, obtain opium and ganja for manufacture of their medicinal preparations.
- d) The Customs Ordinance (Ordinance 17 of 1869, imposes prohibitions and restrictions of both import and export of substances prohibited under the Poisons, opium and Dangerous Drugs ordinance)
- e) Drug Dependent Persons (Internal and Rehabilitation) (Act No 54 of 2007)
- f) Conventions Against Illicit Trafficking in narcotic drugs and psychotropic substances (Act No. 1 of 2008)

The standard drug associated arrests are taking place for trafficking, sale and possession. Under the Poisons, Opium and Dangerous Drugs Ordinance acts considered crimes include possession consumption and manufacture of illicit drugs. It is also a crime to sell, give, obtain, procure, store, administer transport, send, deliver, distribute, traffic, import or export such drugs and aid or abet in the commission of such offences.

Sri Lankan legal system has implemented very few categories of punishments upon drug offenders. The penalties for drug offences have ranged from fines and mere rehabilitation sentences to death or life imprisonment. As per the views of the responsible officers of the minor judiciary most probably drug abusers are awarded fines and simple imprisonment sentences. Those who were unable to pay fines also again referred to jail terms. Further according to the reports submitted to the court by responsible officers court referred drug abusers to correctional centres or rehabilitation centres. As well as any other minor punishments such as suspended imprisonments, community based sentences and observational terms also can be imposed.

As per the Sec 78 of amendment of the principle enactment of the Poisons, Opium and Dangerous Drugs Act No. 13 of 1984, every person guilty of an offence for drugs can be imposed to a fine not less than one thousand rupees and not exceeding ten thousand rupees or to imprisonment of either description for a period not exceeding five years or to both such fine and imprisonment by a magistrate. And on the same grounds the High court can impose a fine not less than ten thousand rupees and not exceeding than twenty five thousand rupees and imprisonment of either description for a period not less than six months and not exceeding than five years or to both such fine and imprisonment.

As per the Section 54A and 54B of amendment of Poisons, Opium and Dangerous Drugs Act No. 13 of 1984, drug manufactures can be imposed sentences of life imprisonment or death. It accrues for manufacture of heroin, cocaine, morphine or opium and the trafficking, possessions, import or export of a minimum amount of 500 grams of opium, 3 grams morphine, 2 grams of cocaine or 2 grams of heroin. Less severe offences including the regulatory ones warrant sentences of fines or imprisonment, the amount of the fine or the length of

imprisonment depend on the quantity of drug, the gravity of the offence and the courts having jurisdiction.

According to the views of the high authorities of the country though the drug abusers referred to rehabilitative corrections, drug traffickers should be severely punished. As per the 2010 United Nations report there are thirty countries have prescribed for death penalty by the legislation for drug-related offences. (<http://www.hr-dp.org/files/Prof-Schabas-Death-Penalty-for-Drug-Offences> ) In the post- World War II period, China was the first and only country identified as having the death penalty for drugs. By the start of the last decade number of states that imposed the death penalty for drugs had risen to as high as thirty- six. (Hood R and Hoyle C (2008) *The Death Penalty: A Worldwide Perspective*. Oxford: Oxford University Press, p. 137.)

## VI. DISCUSSION

Though the drug abusers are a certain parasite to the entire society they should not be banished from the society. Therefore proper system of rehabilitation should be established while punishing under existing statutory provisions. prison system of every country plays a vital role in the criminal justice system, an effective function of this institutions is essential for both crime prevention and crime control for successful criminal justice system. But due to the overcrowding and other cohesive problems of the prisons they have been unable to execute rehabilitation techniques properly. Hence Sri Lankan criminal justice system has introduced community based correction as an optional method of rehabilitating drug offenders.

Even though the community based correction is functioning in the Sri Lanka still the reconviction rate of drug offenders has not reduced. As per the findings of the research there are several practical defects has revealed that not to reduce the reconviction rate of drug offenders. Mainly the courts do not have a proper faith in community based corrections. Furthermore the criminal justice authorities has not provided proper staff and affiliated facilities to execute community correctional methods. Other governmental organs doesn't have an inter connection with the department of community based corrections. Though the community based correction is there, expected result of rehabilitation has not achieved, due to defects of affiliated infrastructure and faith.

Each Country is facing same kind of issues on drug rehabilitation such as negative perception of the

community to ex-drug offenders which affect to find a suitable job, lack of institutional collaboration and networking among criminal justice agencies, other competent agencies and organizations such as public health centres, welfare offices, child guidance centres, mental hospitals and so on, insufficient crisis intervention at community-based treatment and the aftercare stage, no proper parole, probation and aftercare system, no sufficient networking and community involvement, no enough basic training for both institutional and field services staff, lack of specific programmes for drug abusers in institutional facilities.

The recovery process of individual drug abusers has a dynamic and chronic attribute. There are many factors to be considered for effective prevention of drug abuse and treatment within the community, as stated above. In order to achieve the same goal, any country needs to develop and enhance the proper system, as it is a process that supervises and supports the drug abuser in institutional and community based treatment and provides aftercare.

#### VII. CONCLUSIONS AND RECOMMENDATION

Existing statutory provisions should be amended as to providing proper discretion to the Judiciary (judiciary with judicial activism plus judicial review) to impose community correction orders on drug offenders without inquiring their consent. As same as after arresting drug offenders have to wait considerable period until produce to the courts and even after starting the trials offenders get embarrassed due to delaying of government analysis reports and other formalities. Hence some drug abusers will have to stay a long period in remanded prisons and it will affect to deteriorate them again and again. Even they refer to community sentences, they will not rehabilitate well due to uncertainty of the correctional programmes.

Rehabilitation methods such as release on license, work release scheme, home leave should be strengthened and expand as much as possible. Opportunities should be given them to be employed in some selected places and a percentage of the wages should be allocated to particular welfare fund. Expanding the capacity of offenders with modern facilities would enable the offenders to conduct the rehabilitation process effectively.

Classification of offenders is another recommendation. When imposing community based sentences they should be categorized according to the offenses they have

committed, and the supervisors should have a special training on criminal behaviours. During the period of sentence continuously they should be provided counseling or treatment programmes to change their mind set to become law abiding citizens thereby recognizing and giving up their unlawful, anti social or immoral activities.

Institutionalizing the proper aftercare service is the next recommendation which needs for an effective rehabilitation system.

Increasing the involvement of civil society in the rehabilitation process will cause to promote and strengthen the community based correction in Sri Lanka.

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