THE SRI LANKAN SCENARIO OF PREVENTION OF REOFFENDING IN CASES OF VIOLENCE AGAINST WOMEN AND CHILDREN

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I. INTRODUCTION

Violence against women and children (hereinafter referred to as VAWC) is widespread in Sri Lanka, which is linked inextricably to conventional patriarchal society. These crimes are reported in a range of rape, assault, sexual or verbal harassment, or by acts of stalking, unwanted sexual advances, child abuse, forced pornography and annoyance. Violence takes place from the domestic level to public places, public transport, public roads, workplace, social media, short messages, phone calls etcetera. The impact of VAWC includes physical and mental trauma that takes time to recover. The visible consequences are the breakdown of marriages, family and education.

The paper will analyse the prevalent situation of VAWC in Sri Lanka with examples, the judicial response to VAWC, and the adequacy of preventive measures with special reference to treatment programmes. The recommendations, suitable to the socio-economic fabric of Sri Lanka, are made for effective prevention of reoffending of crimes relating to VAWC. The case study is based on the writer's experience. Literature, interviews and statistics are the methodologies used in this paper.

II. THE BACKDROP AND CURRENT SITUATION OF VAWC IN SRI LANKA

The reported incidents of VAWC are much less than the unreported rate which is again a characteristic of patriarchy where the victims tolerate violence mostly from family members or associated persons. Socioeconomic conditions, conventional stereotypes towards women, drugs and alcohol are basic causes of violence against women and children in Sri Lanka. In addition to these causes, post-armed conflict conditions created another ground in war affected areas in the country. Women in welfare centres that were established after the civil war are reported to have suffered, according to the Asian Development Bank Gender Based Assessment in 2008. Very recently, a Rohingya refugee in a welfare centre alleged that she was raped by a police officer.¹ Although males dominate the domestic economy and property ownership in the Sri Lankan society, it does not significantly affect violence against women.² The current situation being as it was mentioned above, however, historically the dignity of women had a high esteem in the old Sri Lankan society though it was male dominated. There are Goddesses who are worshiped by all ethnic groups in the country. Against this backdrop, the circumstances under which VAWC takes place in Sri Lankan society shall be discussed next with examples in the light of causes mentioned above.

Children who are unattended while their parents are engaged in their employment in the daytime are commonly subject to sexual abuse by their close family members. These incidents are reported both in rural and urban areas on the island. Recently, the Borella police, which is in the city limits of Colombo, reported to my court an incident in which a girl had been raped for a long period of time by her father while the mother travelled to the Middle East for employment as a housemaid.³ The girl who was 14 years of age did not reveal her plight until she got pregnant. Sexual abuse by persons who have authority over the children

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¹ Sunday Times Sri Lanka October 08, 2017.

² A 2005 study on *Property Ownership and Inheritance Rights of Women for Social Protection* concludes that property ownership by women did not obviously affect violence. Gunaratne, C. (2005). *Property Ownership and Inheritance Rights of Women for Social Protection: The Sri Lanka Experience*. Centre for Womens Research (CENWOR) and International Center for Research on Women (ICRW). Colombo.

³ Case no 1168/2/18 in the Magistrate Court of Colombo

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are not reported frequently since the parents hesitate to go against the culprits due to their influential social background. Likewise, a teacher was convicted by me in the magistrate court of Colombo very recently for sexual harassment during the school hours of a girl who was a student of his school.⁴ Concerning the psychological impact on children of sexual abuse, an incident deserves to be noted here about a girl who was sexually abused for a longer period in Balangoda, a remote area from Colombo, who became very fond of sexual contacts with men after this incident, and the controller of the children's home complained to me as the magistrate of the area that she is very difficult to be saved.

In the meantime, civil society demands severe punishment against offenders based on an "eye-for-an-eye" policy. Very recently in Jaffna, a suspect of an alleged rape was tied to a tree and was assaulted by the public. His photographs were published on social media. Three of the suspects' houses in Punguduthivu had been attacked and burnt down by angry villagers.⁵ The mother of the victim of the high-profile case of the Vidya rape and murder told the media that she was very complacent about the court verdict to hang seven accused.⁶ Similarly, the victims and the police seek pre-trial detention and severe imprisonment for the offenders.⁷ The reason behind this is a belief that a severe punishment is a deterrent to other members of the society. However, there is no evidence to suggest that a severe penalty actually acts as an effective deterrent to rape.⁸ Consequently, the Legislature has also introduced new offences and severe punishments for sexual offences by an amendment to the Penal Code in 1995. Despite this intervention of the legislature, the crime rate has increased significantly during the past few years. 1,854 persons were convicted and imprisoned in 2010 for rape, and it has gradually increased to 2,036 in 2016.⁹ The number of recidivists in 2007 according to the statistics of the prison department of Sri Lanka is 6,760, and it has gradually increased to 9,912 in 2009. Again 6,271 recidivists were reported in 2016.¹⁰ Accordingly, these statistic reflect a fluctuation instead of a development. It is depicted in the following graph.



The percentage of recidivists from the total number of offenders in 2007 is 21.6, while it is 26 percent in 2016.¹¹ A person was convicted by me very recently for sexual harassment of a young lady who is the daughter of the previous marriage of his wife. It was revealed when the case was called for sentence that he had pleaded guilty for the same offence against the same victim two years ago. In this scenario, this paper will discuss whether the punitive options such as imprisonment shall offer the best way to tackle VAWC or whether offender treatment programmes and other preventive measures will drive the society to combat

⁴ Case no 678/2/16, Magistrate Court of Colombo.

⁵ BBC/Asia 20.5.2015.

⁶ Daily News 28.9.2017.

⁷ This is the experience of the writer as a magistrate.

⁸ Donohue, J. and Wolfers, J. (2004). Uses and abuses of empirical evidence in the death penalty debate. The Stanford Law Review, 58(3), 791-845.

⁹ Prison Statistics of Sri Lanka. Vol 38 2018.

¹⁰ Ibid.

¹¹ Ibid.

this crime more effectively.

III. CATEGORIES OF OFFENDERS REPORTED TO COURT

Offenders of VAWC can be categorized in view of the types of offences reported to courts by police as follows:

- a) Offenders of sexual offences such as rape, grave sexual abuse and sexual harassment
- b) Respondents of domestic violence litigation under the Domestic Violence Act
- c) Accused of simple or grievous hurt against spouse
- d) Offenders of domestic violence or sexual harassment reported to NGOs for relief, by-passing the police.¹²

It should be noted that the domestic violence is not a specific offence and it is still governed by the general law of causing harm.

IV. EXISTING MECHANISM TO PREVENT REOFFENDING IN SRI LANKA

Recidivism is a treatment-naïve problem which gives an indication that the legal framework and mechanism combating violence against women and children have to be reviewed. The alternative measures currently available for courts to prevent recidivism and the challenges will be discussed under this subtopic. The case study mentioned below in a domestic violence case will reflect the successfulness of a methodical and well-cared psychological treatment in an uncommon situation. Firstly, what's going on currently in the prison system needs to be examined.

Except the Domestic Violence Act (hereinafter referred to as the DVA) the other legislation that governs the crimes against women and children, the Penal Code, is purely punitive. The term of imprisonment of an offender ends with simple or hard work. Psychological interventions during the period of imprisonment before his release to the society have no place in prisons in Sri Lanka except where the prisoner shows symptoms of unsoundness of mind. The psychiatric hospital is located few miles away from the prison, and there is no permanent psychiatrist attached to the prison hospital. The prisoners who appear to be mentally unsound are taken to the psychiatric hospital with court orders. A consultant psychiatrist visits the prison hospital once a week. Treatments are not conducted according to the crime they have committed except for drug addicts. There is no regulation that compels the prison authorities to have psychiatric assistance. particularly in the rehabilitation process. Few prison officers have been trained in counselling. They do not wear the officers' attire in order to avoid the fearful attitudes towards the officers. These officers have regular meetings with those prisoners who have been found to be suffering from depression by the counsellors. The medical officers before whom the prisoners are produced having symptoms of mental illness are treated by the consultant psychiatrist. Accordingly, there is no treatment programme currently undergoing within the prison system in Sri Lanka targeting the prisoner's crime with the aim of minimizing the risk of reoffending when he is released to the society. It should be noted that the condition in prisons in Sri Lanka is chaotic and they are overcrowded. Sri Lanka has the second most overcrowded prison system in the region after Bangladesh.¹³ Therefore, the offender who suffered in deficient conditions in prison is released with negative thinking in to the society without any assessment of risk of reoffending. In contrast, for a sexual offender to be released from detention in England and Wales, he must show that his risk of reoffending is at an acceptable level. One of the main ways this is achieved is through the completion of an accredited sex-offender treatment programme.¹⁴

In lieu of a punitive approach for offenders, the following non-custodial measures are available for the Sri Lankan courts as alternative sentences.

a) Suspended Sentences under Sec 303 of the Criminal Procedure Code

¹² These victims do not wish to reveal their plight in public.

¹³ Cristina Albertin, a representative of the United Nations Office on Drugs and Crime (UNODC). Aljazeera 25.5.2011.

¹⁴ Gill & Harrison - Sentencing Sex Offenders: Retributive Justice versus Sex-Offender Treatment Programmes and Restorative Justice Approaches; 2013 International Journal of Criminal Justice Sciences (IJCJS).

- b) Rehabilitation orders under the Community Based Corrections Act. No. 46 of 1999 (This law can be used only for offenders who are convicted for sexual harassment under Sec 345 of the Penal Code as this law has no application for offences for which the prescribed penalty exceeds two years)
- c) Probation orders under the Probation of Offenders Ordinance

The measures available in the legal framework in Sri Lanka in order to prevent reoffending will be dealt with next with the problems associated with them including the DVA protection orders.

A. Protection Orders under DVA

DVA, which aims at prevention of domestic violence, provides for various non-contact orders that the court can make as protection orders against the respondents in order to prevent further violence against the victims. However, the supplementary orders can be made by the court with or without the non-contact orders in order to rehabilitate the respondent. Sec 12 states that supplementary orders can be made compelling the respondent and the aggrieved person to attend mandatory counselling sessions, psychotherapy or other forms of rehabilitative therapy. The court also can order a social worker, family counsellor, probation officer or family health worker to monitor the observance of the Protection Order between the aggrieved person and the respondent and submit to the Court a report relating thereto, once in every three months. Practically the parties to a domestic violence case are referred to the family counsellor whose responsibility is to do counselling himself or refer them for suitable psychiatric treatments. Since detention is not permissible under the DVA, parties are referred to the psychiatrist as patients at the hospital. Treatments and supervision are permissible pending inquiry. At the inquiry, if the respondent shows progress in his behaviour, the parties can come to a settlement.

B. Non-Custodial Sentences

The main non-custodial form of sentence that can be used as a rehabilitative measure in the criminal procedure in Sri Lanka is suspended sentence. In fact, a suspended sentence has both deterrent and preventive elements. A sentence can be suspended subject to the qualifications mentioned in Sec 303 (2) of the Criminal Procedure Code. However, an accused who is released on a suspended sentence is not subject to supervision of any kind after his release. His release is subject only not to reoffend. There is no state intervention for any rehabilitation process during the period of suspension. The outcome of a suspended sentence is therefore limited since it has not been fully utilized as an effective prevention measure. Criminal Procedure also has made a suspended sentence impossible in circumstances where there is a minimum mandatory sentence for the offence or where the aggregate term exceeds two years. However, the supreme court in case no. 3 of 2008 held that the minimum mandatory sentence is unlawful since the judicial discretion has been curtailed. It was a case of statutory rape where the parties were married. Nevertheless, suspended sentence has not been utilized as a preventive measure in respect of sexual offenders.

C. Probation Orders

Having regard to the circumstances of the case, including the nature of the offence and the age and the condition of the offender, the court can make probation orders under the Probation of Offenders Ordinance in lieu of sentencing him to any other punishment. Accordingly, the offender is subject to the supervision of the probation officer for the period specified in the order, which is within one to three years. During this period the probation officer, for the purpose of securing the good conduct of the offender, can make directions to the offender to undergo psychological treatment. Supervisory process of the probation officers consists of collection of evidence from the family members, friends, workmates, subordinates, teachers, village government agent, and psychiatrists from interviews and direct contacts with the offender. Probation officers court having his office within the premises or nearby. These officers are capable of analysing such data in order to report to the court. The Probation Order can be extended by modifications on an application made by the probation commissioner or offender. It also can be cancelled after expiry of the period having considered the progress of the probation officer opines as to the possibility of reoffending, having considered his attitudes and the circumstances under which the offenders' live.

D. Treatment for Juvenile Offenders

Community-based treatment and institutional treatment for juvenile offenders as opposed to adult offenders have a long history in Sri Lanka. The treatment of juvenile offenders as distinct from adult offenders was first considered in Sri Lanka in the 1920s.¹⁵ The juvenile justice administration was first introduced in 1939 with the enactment of the Children and Young Persons Ordinance (CYPO) and the Youthful Offenders 'Training School' Ordinance (TSYO.). The CYPO Provides for supervision of juvenile offenders. The TSYO Provides for the establishment of training schools for youthful offenders for their detention, training and rehabilitation. Institutional treatment of juvenile offenders is implemented mainly by the Provincial Department of Probation and Child Care Services in Sri Lanka in terms of court orders. For instance, a youthful offender who has sexually abused a younger school mate in the school premises of a leading Boys School in Colombo was referred to a psychiatrist with the consent of their parents and was subject to the supervision of the probation officer before the trial when I was the Magistrate of Maligakanda. The teachers were advised by the probation officer not to divulge the offender's act to the other children in order to maintain a smooth rehabilitation process.

V. CASE STUDY

This Case Study is based on an actual case that came before me under the DVA. The family counsellor of the Colombo Magistrate's Court was interviewed and his records together with the medical reports were perused for the case study. The names of the parties and the case number will be withheld having considered their privacy. The offender has been treated and counselling had been done as community-based treatment since the offender was not imprisoned for the offence.

The parties are parents of two children aged 10 and 13 years. The parties are attached to the Sri Lanka Army. The husband (X) is a high ranking army officer while the wife (Y) is a lady soldier. They live in the Colombo suburbs.

X appeared to be a lovely husband to his wife Y in the society and sometimes helped her in the kitchen as well. However, most of the decisions including household necessities were determined by X. He has gifted a small but a smart car to his wife. They attend social events together and parents' meetings in the school. He never takes alcohol and enjoys time with children at home.

The Kirilipana police, which is located in the Colombo suburbs, produced X before the Magistrate Court of Colombo for assaulting Y under the Penal Code. The police revealed that constant occurrences of assault of his wife have taken place within the domestic sphere. The allegation of the police is that he has committed grievous harm, which is an offence under Sec 216 of the PC. The medical evidence revealed that there was a fracture of the ulna of her right hand. It was revealed that there was another assault case between X and Y for causing simple harm to Y in another court. He had beaten the sexual organs of his wife. He also has stopped any sexual relationship with her for a long period although they continued to live under same roof as husband and wife. They pretended that they were on good terms to the outside world. The police filed a report under the DVA subsequently.

Under the DVA, the parties were referred to the family counsellor who referred them to Dr. Neil Fernando, a Consultant Psychiatrist, followed by his counselling. X was subject to medication including psychotherapy for his anger and disorder. It was revealed by the family counsellor that X blamed Y for having a sexual relationship with another man whom he does not know. He has been suspicious of his wife throughout the marriage life. It has developed recently, and he started to assault his wife in front of their children as well.

After treatment significant progress was made, and Y has informed the family counsellor that there has been no physical attack thereafter although there had been some heated arguments with regard to family matters. However, the family counsellor has lost track of this case after the parties settled their cases in court. Y did not seek any order in the DVA case.

VI. PSYCHOLOGICAL INTERVENTION TO OFFENDERS OF VAWC

The three main goals of psychological intervention to offenders of VAWC are:

¹⁵ R. Sunethra Gunawardhana. Operational issues in institutional treatment and community-based treatment for juvenile offenders in Sri Lanka.

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- 1. Help the offender learning to reduce and manage their risk to reoffend.
- 2. Monitoring and managing the offenders more effectively.
- 3. Remain accountable to the people of the country by routinely evaluating and aligning the treatment with evidence-based practices.

Treatment of sexual offenders has gained credence in many countries and researches have proven its effectiveness. One such study was Lösel and Schmucker's 2005 meta-analysis of all studies of efficacy reported in English, French, Dutch, Swedish and German up to 2003. From the sixty-nine studies located, they concluded that treatments did produce an effect, of treated offenders reoffending at a rate of 11.1 per cent compared with 17.5 per cent for the untreated group. Likewise, Robertson found a recidivism rate of 9.4 per cent for treated offenders compared with 15.6 per cent for untreated offenders; while Reittzel and Carbonell (2006), found recidivism rates of 7.4 per cent for treated offenders and 18.9 per cent for untreated offenders.¹⁶

VII. CHALLENGES

The perception of the civil society as mentioned above is that a punitive approach serves as a better way to combat VAWC. Negative reaction can be expected for using public money for treatment of offenders instead of punitive measures even from the parliamentary representatives. Therefore, the stereotype attitudes of stakeholders including the judiciary will stand as a barrier for treatment programmes. Funds for advancement of infrastructure, recruitment of officers is a major challenge.

When the functions of the officers are concerned it was found that the probation officers and family counsellors are inundated with their work in the magistrate court and the district court as well. The family counsellor in Colombo is currently handling 50 files. He has participated in only two training programmes during his 22-years of service. Therefore, lack of trained staff including psychiatrists is a major problem required to be overcome for the implementation of treatment programmes.

The respondents who are charged for offences relating to VAWC are involved in other crimes such as drug cases. Hence their constant stay in remand prison for such cases is a barrier for suitable treatments for VAWC. Infrastructure of the prison and probation services is woefully inadequate to facilitate the treatment programmes for offenders.

VIII. RECOMMENDATIONS

A. Adoption of an Individualized Offender Treatment Programme in the Prison System

In terms of comparing offender treatment programmes with punitive options, the evidence suggests that positive reinforcement of good behaviour is a much more effective way of changing maladaptive behaviour than either punishment or negative reinforcement.¹⁷ The current belief in the civil society in Sri Lanka that sexual offenders cannot change and, thus, punishment with severe imprisonment or life without parole is warranted for public protection, should be reconsidered in light of the above discussion.

In order to achieve this goal, the current practices of the prison should be changed so as to treat the prisoners in accordance with the type of crime they have committed. They can be accustomed with dignified behavioural pattern programmes. These programmes work to change the beliefs, behaviours and attitudes that underpin offending. The respect that one should have to the rights and liberty of others should be focussed in order to eliminate the stereotype of patriarchal thinking that women are sex objects and women and children are weak. Emphasis should be placed on the importance of repeating positive behaviours. In terms of the cognitive element, these programmes are able to explore offender's distorted beliefs in order to help them change their attitudes towards violent-deviant behaviour, improve their attitudes towards children and women and improve their interactions with them. If VAWC is associated with other elements such as drugs, the programme should be planned, focusing on individual characteristics. Special attention should be drawn to the social and economic background of the offender.

¹⁶ Citing Brown, S.J. (2010). An Introduction to Sex Offender Treatment Programmes and their Risk Reduction Efficacy mentioned in Anisha K Gill & Karen Harrison in Sentencing Sex Offenders in India: Retributive Justice versus Sex-Offender Treatment Programmes and Restorative Justice Approaches.

¹⁷ See 14.

It is change of this sort that the prison system requires to eradicate violence against women and children. In order to achieve this target a change of procedures in the prison is a *sine qua non*. Development of infrastructure, change of attitudes of the prison officers towards inmates are matters to be considered by the state authorities. Assistance of permanent psychiatrists and qualified counsellors to the prison who are not part of the prison is required.

B. Increasing Conviction Rate

Low conviction rate is another problem to be addressed. The present conviction rate in Sri Lanka stands at 4 to 6 percent. In order to minimize reoffending, the offenders should not be allowed to escape from the adjudication system. Improvement of investigation methodologies, technology and infrastructure should be prioritized.

C. A Sentencing Policy

Sri Lankan courts are guided by certain judicial principles in respect of sentencing. In terms of the judicial thinking, offences relating to VAWC warrant custodial sentences in most of the cases. Non-custodial sentences are given in very limited circumstances. Judicial attributes tend to opt a deterrent approach rather than rehabilitation. Therefore, the judicial thinking needs to be led to a rehabilitative approach. It should be considered as a foremost important matter. To achieve this end, a sentencing policy focusing on rehabilitation is required to be formulated to avoid individual justice.

D. Scope of Suspended Sentence to be Expanded

The current suspended sentencing can be used as a community-based correction method by imposing conditions for treatments and supervision during the period of suspension. With a slight amendment to Sec 303 of the Criminal Procedure Code, this measure can be fully utilized as a rehabilitative and supervision measure to prevent reoffending.

E. Scope of Bail to Be Expanded

The primary consideration of bail is to ensure the attendance of the suspect. A secondary reason for refusing bail is reoffending while the suspect is released. This qualification of granting bail can be used to assess the risk of reoffending by psychological assessment at the time of granting bail. Where the psychiatrist finds there is a risk of reoffending the suspect can be referred to psychological intervention even before the trial. However, this process should not disturb the constitutional guarantee of presumption of innocence until the person is found guilty. This bail procedure should be shaped as a measure of minimizing the risk of reoffending even before the trial, using an evidence-based system. A statutory amendment is required to be done before implementation.

F. Delays to Be Eradicated

Time consumption from investigation to trial level is far more unsatisfactory. Subsequent to investigations the police seek advice from the Attorney General in most of the sex-related offences. The Attorney General takes couple of years for his advice due to lack of sufficient staff. When it comes to sentence after trial, which takes another couple of years, the purpose of sentencing and its effect becomes a failure. Reoffending pending litigation is a very common feature in the Sri Lankan criminal justice system. Disposal of cases within a time period, including investigations, is required to be introduced by the legislature so that effective preventive measures can obtain the best results.

IX. CONCLUSION

"India looks beyond the natural human desire for retributive justice to seek comprehensive solutions, including sex-offender treatment programmes and restorative justice approaches that provide a true and lasting legacy of change".¹⁸

Sri Lanka is no exception to this situation. Punitive response to VAWC without taking measures to prevent reoffending has been proved ineffective in Sri Lanka. It wastes public money, and moreover, the

¹⁸ Anisha K Gill & Karen Harrison in Sentencing Sex Offenders in India: Retributive Justice versus Sex-Offender Treatment Programmes and Restorative Justice Approaches.

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increasing crime rate¹⁹ in Sri Lanka has proved that incarceration is not a solution for recidivism. On the other hand, community-based treatment programmes have gained credence among academics and practitioners. It has been used in many occasions by Sri Lankan courts with the assistance of probation officers and counsellors. Economically, it is inexpensive compared to the cost of maintenance of a prisoner.²⁰ The National Action Plan of Sri Lanka developed on the vision of creating "a violence free life for women and children" emphasizes the importance of strengthening alternative dispute resolution mechanisms.

The existing legal framework is adequately supported to achieve this target with a slight amendment, only in respect of suspended sentences. The time is ripe to reform the prison system to absorb the new treatment methodologies to minimize the level of risk of reoffending when the offender is released to the community.

"If you treat an individual as he is, he will remain how he is. But if you treat him as if he were what he ought to be and could be, he will become what he ought to be and could be."²¹

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¹⁹ See Police Statistics - www.police.lk/index.php/crime-trends

²⁰ A study conducted by the Washington State Institute for Public Policy (WSIPP) in December 2013 reviewed the costs and benefits of sex offender treatment and found that treatment saves more money than it costs in prison-based settings. A 2009 study by WSIPP indicated that for each participant that had treatment in prison and aftercare in the community, there was an estimated \$4,064 in victim and taxpayers' benefits, and crime was reduced by almost 10 percent.

²¹ Johann Wolfgang von Goethe