

CHAPTER IX

PROPOSALS AND CONCLUSION.

While the sentencing policy in the Subordinate Courts of West Malaysia may not be as inconsistent and whimsical as the average man thinks it is, it leaves much to be desired.

In the preceeding chapters, it has been observed that magistrates do not always apply the correct sentencing rules, that in so far as magisterial discretion is concerned, magistrates attach different weights to different factors and often consider the irrelevant, or do not consider what is relevant. There is further, a startling lack of awareness of the rehabilitative measures we have or do not have in Malaysia. For most magistrates, sentencing trumpets in the grand finale' to the case. What happens subsequently does not seem to concern them. In such an important matter as sentencing there should be protective measures against any miscarriages of justice. Justice should not only be done, it should be seen to be done.

Steps should be taken to ensure a consistency in policy and uniformity of consideration when sentencing offenders. It is appreciated that the element of magisterial discretion cannot, and should not be totally eliminated. However, discretion should be subject to law and should not be vague and arbitrary.

Legislative Control.

One could check the exercise of magisterial discretion by drastically limiting it by legislation. Parliament could lay down limits in punishments for various offences under varying circumstances. Parliament has already fettered magisterial discretion to an extent with regard to the young offender and the first offender. "Children"¹ cannot be imprisoned and "young persons"² should not be imprisoned unless there are suitable measures³.

Section 173A of the Criminal Procedure Code provides that under certain listed circumstances, the court may discharge an offender conditionally or unconditionally. Section 294 provides for the binding over of adult offenders. These sections are discretionary ("... the Court may ...") and there is no definite persuasive influence that the courts should consider those circumstances and factors that the sections lay down.

It is not feasible to codify all matters relating to sentencing. No criminal code can successfully take into account all the relevant combinations of human personality and the circumstances of the case. Some guidelines should on the other hand be laid down in black and white to decrease discrepancies in sentences. For example, Parliament could lay down the factors that should be considered in

¹Any person under ten years of age.

²Any person under fourteen years of age.

³Juvenile Courts Act (1947), s.12(1)(e).

determining the amount of fine to impose. Rules relating to factors which should or should not be considered should be given the force of law so that non-compliance should provide the offender with a ground of appeal.

If it is felt that legislation is too rigid a method, it is suggested that the Attorney-General's Department should produce handbooks on the guides to sentencing. This may serve to enlighten the magistrates as to the principles of sentencing although it may have no force of law behind it. Such handbooks may be published and circulated regularly to the magistrates to keep them informed of developments in the law of sentencing, rehabilitative measures and other data related to the process of sentencing⁴.

Writing of reasoned decisions.

Legislation and handbooks would not take us far if the offender has no way of finding out if the rules have been complied with. Hence, the next safeguard would be the writing out of reasoned decisions. Mr. D.A.Thomas puts down several arguments in favour of the case for

⁴In Great Britain, the Home Office publishes these handbooks. An example is "Handbook for Courts on the Treatment of Offences. The Sentence of the Court." 1st Publication-1964, Fourth Impression-1971. Printed and Published by Her Majesty's Stationary Office.

reasoned decisions⁵.

The most obvious reason is based on the principle of natural justice. Quasi-judicial decisions have to be reasoned decisions, and it is essential to fair procedure that this requirement is complied with. Non-compliance provides the aggrieved party with a ground of appeal. There seems to be no good reason why this argument should not apply to sentencing decisions which may deprive a man of his liberty; which is more than an administrative decision can do.

Stating the reasons for a particular sentence would help in two ways. It would make it easier for the offender to appeal against sentences. It would also lead to the rationalisation of sentences. "The choice of sentences in many cases involve the careful consideration of different and often conflicting factors."⁶ It would go to show that apparent discrepancies in sentences may have reasons behind them. In this way it would serve to avoid apparent arbitrariness thereby vindicating the reputation of the Subordinate Courts. Further, the Franks Committee (1957) states that,

"... a decision is apt to be better if the reasons

⁵D.A.Thomas, "A Case for Reasoned Decisions." [1963] Criminal Law Review 245.

⁶Ibid. p.246.

for it have to be set out in writing because the reasons are more likely to have been properly thought out."

Rationalisation of sentences tends to decrease the chances of "immediate emotional reactions"⁷ to any irritation an offender may have afforded during the trial. Thus the writing out of reasoned decisions would in turn lead to a more consistent sentencing system, making the differences in the approaches of various courts to the sentencing process obvious. The giving of reasons would show that what seems a whim may in fact be a carefully considered decision.

It is the writer's opinion that of all the proposals made, the most important and efficacious is the writing out of reasoned decisions. The only objection that could arise would be that it would place a great burden on the magistrates. However, it should not be the aim of the criminal procedure to sacrifice fairness and accuracy for convenience.

⁷ Thomas, "A Case for Reasoned Decisions.", op cit. p.247.