CHIEF JUSTICE'S CHAMBERS
SUPREME COURT OF SEYCHELLES

Speech of the Dr. Mathilda Twomey, Chief Justice of Seychelles

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Good morning everyone. I hope that by this stage in the proceedings you will permit me to accept that all protocol has been duly observed, and to dispense with the formalities.

It is a privilege to be invited to speak this morning, and in this year when so many events have been cancelled, aren't we lucky to be able to meet, even if with masks and 1m distances between us.

I have been asked to reflect on a topic that goes right to the heart of the justice system, which is whether we have managed to get the right balance when it comes to sentencing persons who commit crimes. This is a topic that came to the foreground of public discussion in March when the Supreme Court convicted three persons, part of a ring of sexual offenders, to 25, 12 and 8 years' imprisonment respectively on 26 sexual offence charges committed against children. To our knowledge there were at least 75 young girls and the crimes included luring them into relationships through Facebook. The public was understandably shocked about the nature of the crimes, but there was also a strong public outcry focused on a perception that the sentences imposed were too lenient. People called for much more stringent sentences to be imposed. Some even called for the re-imposition of the death sentence.

I would say that in Seychelles, public opinion appears to favour a lock-them-up-and-throw-away-the-key approach to two types of crimes in particular: theft, particularly repeat

offenders (especially by drug dependent persons) and sexual offences (where the person is found to be guilty – we also see a strange culture of turning blind eyes to sexual predators until they are convicted). So strong was this public pressure that in 2012 the government introduced provisions into the Penal Code prescribing "mandatory minimum sentences" for several types of offences, including theft. These provisions set the minimum amount that the Court needed to sentence someone to for a crime, and compounded the amount of time significantly if the person reoffended within a certain period.

In 2015, and 2016 two persons were convicted of trafficking in 47 kilograms of cannabis and another person of trafficking in 680 grammes of heroin. All three were sentenced to life imprisonment under the mandatory sentences imposed by the Misuse of Drugs Act.

The public were shocked by the severity of the sentences imposed by the Judiciary in accordance with the laws. Despite the fact that these laws had been amended to reflect calls by the public to impose harsher sentences on drug and drug related offences, when they were meted out, the public opinion believed that they were too harsh.

Even as a Judge, we sometimes struggle to accept the imposition of penalties required by the law. When Domah JA and I were writing the judgment in ***Poonoo v Attorney-General***, I did not know how **not** to send a man to jail for five years for the crime of stealing a pair of shoes because the Penal Code prescribes such a mandatory sentence. The sentence of five years failed to individualise the offender. Yet parliament had prescribed a sentence *it* felt appropriate for such cases of theft. On the other hand, as a judge, I could not send a man to imprisonment for five years because the sentence manifestly did not fit the crime nor did I believe that it was in the interests of society. In that case we developed a line of reasoning that permits Judges to depart from mandatory minimum sentences when it is appropriate and this has been followed until now.

These situations I have illustrated show just how difficult it is to talk about sentencing when it transcends from the theoretical to the personal level; from the laws imposing penalties, to the individuals on whom the penalties will lie.

Sentencing has always attracted interest from society, the different arms of government, the victim and the victim's family and of course, the offender and the offender's family. These interest groups also have differing ideas about what the goal of sentencing is – be it retribution, rehabilitation, deterrence or incapacitation. Throughout history, judges and legislators have attempted to balance these aspects with some goals dominating the adopted sentencing regime at any given time.

Rule 4 of the Nelson Mandela Rules shows the combination of these goals of sentencing:

> *The purposes of a sentence of imprisonment or similar measures deprivative of a person's liberty are primarily to protect society against crime and to reduce recidivism. Those purposes can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life.*

Whilst sentencing has traditionally fallen within the exclusive power of the Courts, in recent years Parliaments across jurisdictions, including Seychelles have increasingly prescribed the applicable sentences, particularly for serious offences including murder, rape, robbery and drug related offences. What has differed across jurisdictions in respect of mandatory minimum sentences is the level of discretion permitted for the sentencing judge. This is where the tension and the challenges for achieving a balance become critical. This is the area that I'd like to focus on today. I'd like to talk about the difficulties I have with the imposition of mandatory minimum sentences and how the courts practically attempt to overcome these difficulties on a daily basis.

Traditionally, at the sentencing stage, a judge is guided by various factors and principles to arrive at a just sentence. The trial judge will consider factors related to three categories, broadly speaking: the crime, the offender and the interests of society. The Judge must balance these factors which may be competing, and consider the public interest, the nature of the offence, circumstances under which the offence was committed, whether there is a possibility for the offender to be reformed, the gravity of the offence, the damage caused, the age and previous records of the offender, aggravating and mitigation factors, time spent in custody and whether the convicted cooperated with the law enforcement agencies. These are not factors that the minimum sentencing laws are able to balance.

We require the Judge to take these matters into account with sufficient nuance to do "justice".

Justice, in this sense is an objective criterion. The result that the court comes to does not have to reflect public opinion, but at the very least, courts have a duty to shape such public opinion through explaining its balancing of the various factors. Public opinion is often vengeful and vindictive and neglects the constitutional mandate of an independent judiciary. Public opinion often influences the choices made by the legislature, but it is not a substitute for the duty vested in the court and courts cannot allow themselves to be swayed or diverted by public opinion from their duty as independent arbiters in individual cases.

Any prescriptions in law that seek to replace the discretion of a judge during sentencing may come into conflict with the independence of the judiciary and the court's ability to do justice in a case. However, minimum sentences can also be useful in reducing sentencing disparities and there is a widespread perception that setting harsh and compounding sentences will act as a deterrent.

The premise of these perspectives are noble, but their accuracy in real life is debatable. Studies in South Africa and the United States have demonstrated that in fact harsher sentences do not have a deterrent effect at all. Thus, all they do is merely reflect the often tenuous public opinion. From a judiciary standpoint, the reasons for disliking the mandatory minimum sentences are based on broader principles of judicial independence and the separation of powers. When the other arms of government prescribe sentences for the judiciary to apply and without giving the court any discretion to depart from these sentences, it offends against the fundamental constitutional principles of separation of powers and directly undermines the independence of the judiciary. Moreover, it may violate Article 16 of the Constitution – the prohibition on cruel, inhuman and degrading punishment.

The Nelson Mandela Rules provide that

> *"[a]ll prisoners shall be treated with respect to their inherent dignity and value as human beings. No prisoners shall be subject to, and all prisoners shall be protected from torture and other cruel, inhuman or degrading treatment or punishment…".*

While this applies to the conditions under which the prisoner is kept, it also applies to the extent of the imprisonment. In addition, the Nelson Mandela Rules provide that

> *"imprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty."*

When mandatory minimum sentences are imposed blindly without attention to the circumstances of the offender, the crime committed and the interests of society, there is a potential for such sentences to be cruel, degrading and inhuman. The court has a duty to ensure that sentences imposed are not wholly disproportionate to the crime committed – if the sentence is, it will be inhumane, cruel or degrading. The Court ensures this balance by applying the proportionality principle in sentencing. Such a principle ensures that the sentence imposed reflects the gravity of the offence and instils confidence in the administration of justice.

But there is something else that I find problematic about the blind imposition of mandatory sentences – which is the fact that it can result in the deprivation of a convicted person's right to hope. A little known fact about me is that my father was the Superintendent of Prisons for a long period during the colonial years and after independence, and I spent much of my childhood within the walls created to keep convicts away from good society like myself. I have seen how prisons and sentences can act as a catalyst for change in a person's life – change for both the good and the bad. The prospect of release for good behavior, how an individual is treated with dignity throughout their criminal justice system experience, and for rehabilitation to be taken seriously can significantly impact the offender. One thing that is so important is that a prisoner is given the right to hope that their actions, and their behavior can in some way atone for their disruption to society. Imprisonment without the hope of release is in many respects the same as a death sentence. Despite a prisoner using imprisonment to atone for the crime, without the right to hope for a review of the sentence, his punishment is only extinguished by his death.

The ECtHR has ruled that any imprisonment without the hope of release violates Article 3 of the European Convention on Human Rights and Fundamental Freedoms. A trend in many jurisdictions is thus to have life sentences reviewed after 25 years and to allow further periodic reviews with time. No sentence life is thus truly a 'life sentence' in the meaning of life sentences.

In *Poonoo v Attorney General,* we held that "The legislature could only prescribe sentences as a general principle. It was the responsibility of the court to take into account the particular facts of the case and his personal circumstances adhering to the principle of proportionality which underlie due process."

We held that

> *"A substantial sentence of penal servitude […] cannot be imposed without giving the accused an adequate opportunity to show why such sentence should not be mitigated in light of the detailed facts and circumstances surrounding the commission of the particular offence or after taking into consideration the personal history and circumstances of the offender or where the imposition of the sentence might be wholly disproportionate to the accused's degree of criminal culpability. Fair hearing includes fair sentencing under the law but includes individualization and proportionality"*

The new Misuse of Drugs Act, passed in 2016 takes a more modern approach to sentencing, requiring the Judge to look at all of the sentencing factors as well as other options for punishment, and not merely long prison sentences. At the end of the day imprisonment, that is the deprivation of your freedom, is a difficult restriction on a person – think of how we all felt during lockdown. People were going out of their minds when they were restricted to their houses for three weeks. And during that time they were still allowed to sleep whenever they wanted, watch as much tv as they wanted, and bake as much as they wanted. Incarceration strips a prisoner of much of his or her ability to make choices about his or her life and this is a major restriction on our self-determination. But prisons can be a good place for rehabilitation and reskilling. I am minded of the fact that Nelson

Mandela learnt key life skills during his 27 years in prison that would make him a statesman and a Nobel Prize winner.

While minimum sentences can provide some certainty and consistency on the sentencing of crimes, we need to ensure that the Courts are able to take these sentences and apply them appropriately to the circumstances of the individual before the court. We need to trust that the court will be able to adequately balance the various needs, and ‘do justice’ in the circumstances before the court. Minimum sentences set by the legislature need to enable the courts to do just this. The media and the public also need to accept that they are not always privy to all of the circumstances of the case that might have been put to the court’s attention. And if we can manage this then I do believe that we have gotten the balance right when we undertake our very serious role as imposers of punishment on persons who harm society. There are many more matters that could be discussed in this interesting area of law, but I will leave those to be raised during the plenary session a bit later. Thank you for your time today.