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JUDICIAL PUNISHTECTURE AND MERCYING IN CYPRUS

NICHOLAS GEORGE SANTIS

DOCTOR OF PHILOSOPHY THESIS IN LAW

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ABSTRACT

The thesis unveils how judges decide sentences in Cyprus and how they employ mercy to contour their judgments by determining at the same time whether these decisions are reached within or on the basis of a consistent legitimising framework founded in or derived from moral legal theory. The study professes a degree of originality in that it deals with the academically unexplored ground of the Cypriot sentencing reality and investigates the role of mercy not only as a component (or not) element of justice but, additionally, as a purposive ingredient of judicial discretion in the determination of sentence. It emphasises positive rather than normative analysis. It concentrates on how Cypriot judges sentence, and not on how they should or ought to sentence, by depicting and explaining the judges' method of reaching their sentencing decisions in substance and in form (or their *punishment* as it will be characterised), including the demonstration on their part of mercy to certain defendants at the sentencing stage (or *mercy* as it will similarly be referred to). Following a discussion of relevant conceptual and empirical literature the thesis present and analyses a substantial body of data generated from a series of tête-à-tête semi-structured interviews conducted by the researcher with the majority of the Cypriot judiciary between 2007 and 2008. The research yields the judges' views on the nature of the sentencing process and the conceptions, design, structuring, and utterance of their resultant judgments within the criminal justice context in which they find themselves acting. It presents what they have said about the choice of punishment and mercy and reconstructs what they may be taken to have meant by saying it; their aims and purposes in sentencing; the constraints under which they operate; the way they exercise their penal choices; and the use (or dismissal) of mercy as an etiological foundation of sentencing rationales.

DECLARATION

This thesis has been composed by me, is my work, and has not been submitted for any other degree or professional qualification.

Nicholas George Santis

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CHAPTER 1: INTRODUCTION

The dissertation at hand will unveil how judges decide sentences in the Republic of Cyprus, and how they employ mercy to contour their sentencing judgments as well as determine, in parallel, whether these judgments are reached within or on the basis of a consistent legitimising framework founded in or derived from moral legal theory.

In full awareness that no study can ask all the questions and provide all the answers, the thesis will set out to depict and explain the Cypriot judges' views on sentencing and the relationship between those views and their actual conduct, in terms of the confluence of two sets of influence on practice. The first of these is the architecture of judicial sentencing (or *punishtecture*,¹ as it will be hereinafter referred to), that is, the judges' method of reaching, formulating, and justifying their sentencing decisions in substance and in form. The second, considered as that aspect of *punishtecture* that frames real decisions in certain kinds of hard cases, concerns their considerations and ponderings in deciding to utilise and exercise mercy in determining the punishment of a defendant at the sentencing stage for the crime he has committed (or *mercying*,² as it will be referred to here). On the premise that the practice of *mercying* arises within and is constrained by the framework - the *punishtecture* - that envelops it, the study will examine the judges' views on the nature of the sentencing process, and the conceptions, design,

¹The term *punishtecture* is coined on the basis of a loose etymological analogy to the Latin term 'architectura,' and the Greek word 'arkitekton,' an architect, or more precisely 'master builder,' from the combination of *arki* ('chief') and *tekon* ('builder'). In this context, the architect of sentencing, or master builder, is the sentencing judge: See, S Tulloch (ed), *The Oxford Dictionary and Thesaurus* (OUP, Oxford 1993) 69-70.

²The term *mercying* (*to mercy*) is invented by reference to the word 'mercy,' which derives from the Medieval Latin word 'merces' (reward, compassionate action), influenced by the Latin term 'miserere' (to have pity): See, Tulloch, *The Oxford Dictionary and Thesaurus* (n 1) 955.

structuring, and utterance of their resultant judgments within the criminal justice context in which they find themselves acting. It presents what they have said about the choice of punishment and mercy, and reconstructs what they may be taken to have meant by saying it. With these concepts in mind, and viewing punishment as a construct formed from a structured process of thought combining the application of law and legal sentencing principles on the one hand and the Cypriot cultural realities as perceived by the judges on the other hand, the study will reflect upon a number of aspects of the judges' orientations towards passing sentence. These include the general justifying aims and purposes in sentencing, the constraints under which the judges operate, the way they make their penal selections and the use (or dismissal) of mercy as an etiological foundation (express, implied, disguised, or hidden) of sentencing rationales and mercying. These will be pursued through a presentation and qualitative analysis of information obtained from a series of tête-à-tête semi-structured interviews conducted by the researcher for the purposes of the dissertation with the majority of the Cypriot judiciary between 2007 and 2008.

The study has a certain originality in that it differs significantly from similar projects undertaken and published thus far, in two key respects: Firstly, it deals with the academically unexplored ground of the Cypriot sentencing reality. Secondly, it investigates, at the judicial level, the role of mercy not only as a component (or not) element of justice but, additionally, as a purposive ingredient of judicial discretion in the determination of sentence.

The thesis emphasises positive rather than normative analysis. It concentrates on how Cypriot judges sentence, and not on how they should or ought

to sentence.³The endeavour is to describe their actual sentencing decision process, and not to conclude whether or not these decisions are optimal according to some normative theory of decision-making.⁴This is not to suggest, however, that there will be no espousal of normative inquiry at any particular level, as questions of what *ought to be* have, or can have, relevance and meaning quite apart from the question of what *is*.

Judging is both a practice much theorised about, and a practice that is itself filled with theory or theory talk. Judging or doing judging is one thing, while giving accounts of theories of judging is another. As practices, they are independent, even though the successful performance of the first will often involve engaging in the second.⁵Indeed, much of the interest in studies about judges appears to lie in the comparison between actual and ideal behaviour, with the content of the normative standard sometimes being uncontroversial and its application straightforward, while in others (like in the instant case, as it will henceforth become evident), controversial or hard to delimit, and its application unclear.⁶From this perspective, it will be argued that although judicial decision-making in the field of sentencing (with or without the adoption of mercy) cannot and should not be value-free, criminal judges need not make judgments concerning

³For a normative analysis of judicial decision-making see, for example, R Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (Stanford University Press, Stanford, California 1961).

⁴For which one could refer to the extensive work of R Aldisert, *The Judicial Process: Text, Materials, and Cases* (2nd edn West Publishing Co, St Paul, Minnesota 1996).

⁵S Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press, Durham 1989) 384.

⁶L Baum, 'Motivation and Judicial Behavior: Expanding the Scope of Inquiry' in D Klein and G Mitchell (eds), *The Psychology of Judicial Decision Making* (American Psychology-Law Society, OUP, Oxford 2010) 3.

the moral value and moral justifiability of punishment as a precondition of effectively and legitimately exercising their sentencing functions.

In reality, there have been very few attempts thus far to test whether or not judges, irrespective of jurisdictional origin, base their decision processes on penal principles.⁷ The study will therefore be concerned with the association between the theoretical justifications, and goals of legal punishment, and the actual practice of punishment per se. The reality of a diversity of academic and philosophical approaches towards the justification, functions and goals of punishment is in itself no assurance that the practice of legal punishment in Cyprus is morally justified. Conceivably, moral theory of punishment always serves as an expedient pond of rationalisations, to be drawn from eclectically.⁸ For this reason, one must be able to demonstrate the significance of such justifications for the practice of punishment and to examine whether the fundamental concepts derived from moral legal theory have any meaning to Cypriot sentencing judges. If there is indeed a legitimising (moral) view, or framework, underlying sentencing in Cyprus, that should, in some way, be reflected in the minds of its judges. On this premise, the examination of the judges' approach to sentencing is important in demonstrating how, if at all, abstract theoretical concepts become translated into practice.⁹

The array of perspectives which will be examined in the thesis, will principally be those of retributivism, utilitarianism, and hybridism; these theories, particularly the first two, have been in the academic mainstream for decades,

⁷C Tata, 'Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process' (2007) 16 Soc & Legal Stud 425, 433.

⁸J Keijser, *Punishment and Purpose: From Moral Theory to Punishment in Action* (Thela Thesis, Amsterdam 2000) 3.

⁹Keijser, *Punishment and Purpose* (n 8) 3.

constituting the main theoretical core of an ongoing public (and not merely academic) debate on punishment justification and sentencing practice, as well as the focus of a plethora of pertinent and constantly growing bibliography.¹⁰ The decision to concentrate on these theories, as opposed to others, was based on the fairly reasonable assumption, as made at the planning stages of the study, that these were known to the majority of the judges who were to participate in the research, given that some sporadic mention of them had been made in the sentencing case law of the Supreme Court of Cyprus (hereinafter ‘the Supreme Court’), and other relevant Cypriot publications.

1.1 The Justification for Making the Cyprus Judiciary the Subject Matter of the Thesis

Cyprus is an island with an area of 9,251 square kilometres, situated at the Northeastern corner of the Mediterranean Sea, approximately 69 kilometres from Turkey, 122 kilometres from Syria, and 408 kilometres from Egypt. Following a military invasion in 1974, Turkey has been illegally occupying 36.43% of the northern part of the island ever since.¹¹ Cyprus is the third largest island in the region, after Sicily and Sardinia, but larger than Corsica or Crete, and nearly half the size of Fiji (or Wales), seven times smaller than Scotland, and relatively larger than countries like Puerto Rico and Trinidad and Tobago.¹² It became an independent Republic in 1960 and a full member of the European Union on the 1st

¹⁰See, more recently, G Mackenzie and N Stobbs, *Principles of Sentencing* (The Federation Press, Sydney 2010); G Johnstone and T Ward, *Law and Crime* (Key Approaches to Criminology, Sage Publications, London 2010); M Maguire and D W Okada (eds), *Critical Issues in Crime and Justice: Thought, Policy, and Practice* (Sage Publications, London 2010); N Walker, *Crime and Punishment in Britain* (2nd edn Aldine, London 2010).

¹¹For more on this aspect, see Chapter 3.2.1.

¹²The Central Intelligence Agency, *The World Factbook 2010*, <https://www.cia.gov/library/publications/the-world-factbook/index.html> accessed 1st March 2010.

of May 2004. It has a population of approximately 1 million (of which four-fifths are members of the Orthodox Church and one-fifth are Ottoman Turks). Its population is almost double to that of the city of Edinburgh and roughly equal to that of the cities of Glasgow and Aberdeen combined.¹³ Being a former British colony, it has adopted and retained not only a multifarious variety of British influences (including, even, driving on the left-hand side of the road), but the common law system of precedent as well, still drawing on the judicial decisions of the English judiciary¹⁴ and, to a far lesser extent, on North-American judicial decisions.¹⁵ Given this background, all Anglo-American and other similar commonwealth legal and academic references presented in the thesis, have a corresponding relevance and applicability on the issues for which they are cited and quoted.

No country or jurisdiction is wholly typical for the purposes of sentencing analysis of any type, and Cyprus is not so atypical as to be unique, and thus unfit, for becoming the focus of a work on sentencing like the one at hand, with its conclusions capable of being promulgated for purposes of referential application to (or avoidance of in) other criminal law jurisdictions. Cyprus forms no exception to the problems that bane the practice of legal punishment in other countries, whether they be of a legalistic or normative character or a concoction of the two. These problems have essentially a universal dimension, as sentencing systems, no

¹³See, General Register Office for Scotland 2010, <http://www.gro-scotland.gov.uk/census/schoolhm/map/edinmye.html> accessed 1st March 2010.

¹⁴B H McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library, Brisbane 2007) 331-332.

¹⁵W Wiegand, 'The Reception of American Law in Europe' (1991) 39 Am J Comp L 229. There is, though, a notable difference between the Anglo-American legal system and the Cypriot one, as pertains to the inapplicability in the latter, of the jury system, as opposed to the former.

matter where they are situated geographically, or on what jurisdictional influences they function, are comparatively and relatively similar. They are run by people for people, with largely the same human strengths and weaknesses, this being, in actual fact, a presumption that one could safely and reasonably make based on common sense and observation.¹⁶ Penal and criminal justice systems today, are constant sources of inspiration to each other, just as international policy-making and collaboration builds cross-national movements and concerns with common key elements.¹⁷ This tendency for internationalisation - one of the most significant themes of the 1990s in the development of criminal law¹⁸ - could be said to be resulting from the fact that crime has ceased from being largely local in origin and effect, having been rooted on an international scale.¹⁹

Admittedly, Cyprus has not participated to any notable extent in the international discussion on punishment justification preoccupying scholars for decades in much of the common law world.²⁰ In truth, apart from some periodic and synoptic mentions in a handful of judgments by the Supreme Court, and a few basic analyses in several academic writings of mostly general sentencing and penological interest, there has not been much other pertinent Cypriot scholarly or

¹⁶Without the need for presenting, for example, corroborative evidence for the truth of the statement, such as Paul McCartney's lyrics in 'Ebony and Ivory' (performed with Stevie Wonder): '...we all know that people are the same wherever we go. There is good and bad in everyone...' (The song, was produced by George Marvin, and was featured in McCartney's album *Tug of War*, released on March 1982 by Parlophone/EMI), or Jacob Ofalis's stories about the places he went and people he met all over the world, revealing his discoveries the essential unity of human nature (See, S Orfali, *Everywhere You Go, People are the Same* (Robin Publishing Berkeley, California 1995).

¹⁷See, R Cotterrell, 'Seeking Similarity, Appreciating Difference: Comparative Law and Communities' in A Harding and E Orucu (eds), *Comparative Law in the 21st Century* (W G Hart Legal Workshop, Kluwer Academic Publishers, London 2002) 43.

¹⁸See, P Alldridge, *Relocating Criminal Law* (Applied Legal Philosophy, Ashgate Publishers, Dartmouth 2000) 137.

¹⁹See, *Liangsiriprasert v United States Government* [1990] 2 All E R 866, 878.

²⁰See for example, R Henham, 'The Philosophical Foundations of International Sentencing' (2003) 1 JICJ 64.

judicial²¹wisdom to draw from in such a context.²²It is worth mentioning that the first time the Supreme Court had ever referred to an English sentencing judicial precedent since 1960, was in 1971 in the case of *Kakathymis v The Republic*,²³citing *DPP v Ottewell*,²⁴in relation to the penological treatment of persistent offenders. In that same year, there was also a first time judicial reference²⁵to an English author on sentencing, namely David Thomas, and his book *Principles of Sentencing*,²⁶in relation to the distinction, for sentencing purposes, between a peddler and a consumer of narcotic drugs. Additional similar references have since then been infrequent. Markedly enough, as derived from a systematic analysis of the published Cypriot case law on sentencing in its entirety between 1960 and 2008,²⁷the Supreme Court referred to English judicial

²¹Together with David Thomas's book *Principles of Sentencing* (2nd edn Heinemann, London 1979), the book by George M Pikis, *Sentencing in Cyprus* (Proodos Press, Nicosia, Cyprus, 1978), has been the main reference book on sentencing since its publication. There has been a new edition of the book in 2008, by the same author and publishers, titled *Sentencing in Cyprus: Sentencing Revisited*. A book by A Kapardis, C Solomonides, and E Stephanou, *Sentencing in Cyprus: Penological Aspects, Principles and Case Law* (Ant N Sakkoulas Publishers, Athens 2003), presents a synoptic exposition of sentencing in Cyprus.

²²See, for example, the list of various books and articles published in Cyprus by advocates and judges on a variety of legal matters, including sentencing, in A C Emilianides, *Bibliography of Cyprus Law* (Power Publishing, Nicosia 2005). The book, nonetheless, is incomplete, as numerous books and articles published diachronically on various legal issues on Cyprus law have not been included. The book in Greek by G Giorgis, *The Practice of the Cyprus Courts in the Determination of Sentence in Comparison to the Greek Practice* (Ant N Sakkoulas Publishers, Athens 1986), offers a comparative study on Greek and Cypriot sentencing, though of limited use to the Cypriot practitioner, due to the differences between the legal systems of Cyprus and Greece, with the latter, ascribing to the continental system of law. An excellent and synoptic overview of sentencing in Cyprus is presented by A Kapardis, in his contributory chapter 'A Review of Sentencing in Cyprus' in M S Michel and A M Tamis (eds), *Cyprus in the Modern World* (La Trobe University Press, Melbourne 2005) 85, as well as in his book *Sentencing: Some Key Issues* (La Trobe University Press, Melbourne 1995).

²³[1971] 2 CLR 309. The abbreviation 'CLR' is herein used to refer to the Cyprus Law Reports.

²⁴[1968] 3 All E R 153, HL.

²⁵This was done in the case of *Abdullah v The Republic* [1971] 2 CLR 323.

²⁶Thomas, *Principles of Sentencing* (n 21).

²⁷For the purposes of the thesis, the researcher proceeded to an in depth analysis and codification of pertinent issues to the thesis of the total of 891 sentencing judgments of the Supreme Court reported in the CLR between 1960 (the year Cyprus became an independent Republic) and 2008, the year in which the judicial interviews were completed (in any event, at the time of completing this thesis, the 2009 appeals had not yet been published), relating to criminal appeals against

precedent, statutory provisions and academic work in only 11.7%% of the total judgments on appeal against sentence reported for that period (i.e. in 104 out of 891 appeals), whereas it referred to similar US precedent in 0.34% (i.e. in 3 out of 891 appeals). Nevertheless, this picture of the Cyprus sentencing scene does not affect the viability of the present research, as any insight into the methodology of judicial thinking in sentencing always contributes, though in variable degrees, to the venture of enhancing the understanding of sentencing judges, that is, the real moulders of the practice of criminal punishment and mercy.

1.2 The Perturbed Field of Punishment Practice

For years, there have been doubts and criticisms worldwide regarding the rules and quality of the practice of legal punishment,²⁸ emitting as a result an aura of discontent to the typical observer, and Cyprus has been no exception in this regard.²⁹

One would not profess originality if he had asserted that, quite often, sentencing practice becomes murky in the shadows of the criminal law institutions,

sentence, issued by the Cypriot Assize and District Courts. No other such analysis exists in relation Cypriot case law covering the said period. The analysis is presented in Chapter 3.6. Mention of the results of the analysis occurs, as needed, throughout the thesis.

²⁸A Ashworth, 'Towards European Sentencing Standards' (1994) 2 Euro J Crim Pol & Res 7; J Clark, J Austin, and A Henry, *Three Strikes and You're Out: A Review of State Legislation* (National Institute of Justice, Washington DC, 1997); C Kelk, L Koffman, and J Silvis, 'Sentencing, Practice, Policy and Discretion' in C Harding, P Fennell, N, Jörg and B Swart (eds), *Criminal Justice in Europe: A Comparative Study* (Clarendon Press, Oxford, 1995); R S Frase, 'Sentencing Principles in Theory and Practice' in M Tonry (ed), *Crime and Justice: A Review of Research* (Vol 22 University of Chicago Press, Chicago 1997); M C Bassiouni, and Z Motala (eds), *The Protection of Human Rights in African Criminal Proceedings* (Kluwer, Dordrecht 1995); L Kukri, 'International Standards for Sentencing and Punishment' in M Tonry and R S Frase (eds), *Sentencing and Sanctions in Western Countries* (OUP, Oxford 2001); C Tata and N Hutton (eds), *Sentencing and Society: International Perspectives* (Ashgate Publishers, Aldershot 2002).

²⁹A Kapardis, 'Key Issues in Sentencing Criminal Defendants in Cyprus' (2nd International Conference on Sentencing and Society, Glasgow, Scotland 27-29 June 2002).

no matter how much that practice strives to retain its jural idealism.³⁰ This idealism may seem irrelevant to some judges (and additionally, lawyers, prosecutors, concerned citizens and others), who due to their pressing preoccupations inside the system of sentencing practice, have little, if any, opportunity to reflect. Instead, faced with the harsh realities of case overloads,³¹ increasing crime rates,³² fear of crime,³³ moral panics,³⁴ and overcrowded prisons,³⁵ they ask for instant implementation of practical solutions. They have no time or reason to theorise or philosophise about these problems, as that, they feel, will practically lead nowhere. They demand immediate and tangible results in the quest against crime (primarily from the under-staffed and overworked judicial system), and insist on offender intolerance and unmerciful treatment;³⁶ and all these, amidst a general accord between academics (primarily), that contemporary penal policy and practice is

³⁰M Tunick, *Punishment: Theory and Practice* (University of California Press, Berkeley 1992) 25.

³¹See, S Snacken and K Verfaillie, 'Media, "Public Opinion" and (Criminological) Research' in H Eisendrath and J P Van Bendegem (eds), *It Takes Two to Do Science: The Puzzling Interactions Between Science and Society* (ASP-VUB Press, Nederland 2010) 164.

³²J V Roberts, L J Stalans, D Indermaur, and M Hough, *Penal Populism and Public Opinion: Lessons from Five Countries* (Studies in Crime and Public Policy OUP, New York 2002) 21.

³³See, for example an interesting analysis of crime fear as a system of social control, in M Felson and R V Clark, 'Routine Precautions, Criminology, and Crime Prevention' in H Barlow and S H Decker (eds), *Criminology and Public Policy: Putting Theory to Work* (Temple University Press, Pennsylvania 2010) 106.

³⁴See, in general, E Goode and N B Yehuda, *Moral Panics: The Social Construction of Deviance* (2nd edn Blackwell Publishing, Oxford 2009) 2.

³⁵For the impact of prison overcrowding, in sentencing policy and administration, see K E Bloch, 'Changing the Topography of Sentencing' (2010) 7 *Hastings Race & Poverty* L J 185.

³⁶Professor David Marshall prefacing David Fraser's book *A Land Fit for Criminals* (Book Guild Publishing, Sussex 2007), writes on the point, on page xi, that 'Social scientists, civil servants and Ministers of the Crown have conspired for decades to deceive the public about the state of law and order. They have consistently underestimated the level and severity of crime. They have insisted on the efficacy of methods of crime prevention and control, which patently do not work. They have stubbornly persisted with utopian theories of crime, criminality and punishment, which fail entirely to take account of human nature and social reality...Modern criminology constitutes a tissue of pseudo-liberal prejudice and counter-productive phoney knowledge. Contemporary penal policy comprises a vast body of misconceived and nonsensical doctrine which has the effect of exculpating criminals, punishing victims and escalating social collapse.'

complex, inconsistent, and capricious.³⁷In fact, the difficulty in reaching a consensus on a single punishment theory or a set of sentencing rationales in some countries, including Cyprus,³⁸ has influenced scholars in expressing the stance that, in democracies where there is a division among its members about theories of punishment, legislators realise, that ambiguity but not honesty is the best policy.³⁹Ashworth made analogous observations in commenting on the failure of (the then applicable) Criminal Justice Act 1991 to provide for a rational and coherent objective in sentencing. He indicated that the manifest need to analyse sentencing from the point of view of philosophy and principle often gives away in practice to stronger political and pragmatic pressures.⁴⁰Along similar lines, Duff and Garland caution that the sturdy absence of a common theoretical pedestal on sentencing and punishment confuses rather than clarifies matters.⁴¹Some even suggest that the source of the predicament is the lack of judicial understanding of

³⁷L Zedner, 'Dangers of Dystopias in Penal Theory' (2002) 22 OJLS 341.

³⁸Council of Europe Recommendation No R (92) 17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing in '*Consistency in Sentencing: Recommendation to Member States and Explanatory Memorandum*' (1993) 4 Crim L F 355, 364. The recommendation does not prefer or suggest any particular sentencing rationale: See, M Killias, 'Sentencing Reform: From Rhetorics to Reducing Sentencing Disparity' (1994) 2(1) Euro J Crim Policy & Research 19-28.

³⁹N Walker, *Why Punish?* (OUP, Oxford, 1991) 84.

⁴⁰A Ashworth, *Sentencing and Criminal Justice* (Law in Context, 2nd edn, Butterworths, London 1995) 88.

⁴¹R A Duff and D Garland (eds), in their *A Reader on Punishment* (Oxford Readings in Socio-Legal Studies, OUP, Oxford 1994) 19, assert that: '...how far should we even hope, or aim, for a penal system which is structured by just one coherent normative theory of punishment? Should we not rather recognise that punishment is inevitably a locus both of conflicting principles, and of conflicts between principles and more pragmatic considerations? Von Hirsch argues, for instance, that the principle of proportionality should be the primary guide to sentencing; legislators, policy-makers, and sentencers should strive to ensure that each offender receives a sentence whose severity is proportionate to the seriousness of the crime, in order that the punishment can express the appropriate degree of censure. Critics have objected, first, that we cannot in practice hope to achieve a proper proportionality between crime and punishment; second, that there are other principles such as that of parsimony in punishment which may conflict with the demands of proportionality; and third that an undue emphasis on strict proportionality stands in the way of making effective use of the wide range of intermediate sanctions (such as intensive probation or supervision, substantial fines, and community service, which fall between imprisonment and traditional probation) which are finding favour amongst penal policy-makers.'

the pertinent theories surrounding the issue of sanctions,⁴² or the irrationality of the judges themselves,⁴³ supposing, clearly, that the judges definitely know of the philosophical parameters on the matter, as drawn mostly by the academic world, and are therefore expected to employ them in their sentencing decision-making; and that the viability and effectiveness of the practice is directly correlated to the ability of the sentencing judges to assimilate and apply properly and effectively the appropriate justificatory theory (whatever that might end up to be, depending on one's view), thus, giving as a direct consequence, meaning and essence to the sentencing practice. Others maintain detached from normative acrobatics, that the judicial rationale supporting sentencing decisions is usually superficial and mechanistic, concentrating on broad factors taken into account rather than a detailed explanation of how judges balance them in arriving at the chosen penalty.⁴⁴ The present study will attempt to show to what extent this holds true in Cyprus sentencing.

The failure to endorse an underlying rationale for sentencing has also led to its description as a complex and ill-structured task, partly moral and partly instrumental, without clear criteria for correct solutions,⁴⁵ as a 'kind of cafeteria

⁴²Walker, *Why Punish?* (n 39) vii, asserts pertinently that: 'I have known magistrates who confused retribution with deterrence, and judges of appeal who confused it with denunciation. Reports of committees hurry past the fundamental issues because the drafters want to avoid dissension. Writers of textbooks on criminal law dispose of them in a few smooth paragraphs, knowing that they are skating on thin ice, with deep waters underneath the deep waters are where moral philosophers lurk, preying like sharks on each other and on practitioners who are careless enough to put their feet through the ice.'

⁴³P Robinson, 'One Perspective on Sentencing Reform in the United States' (1997) 8 Crim L F 1-41.

⁴⁴A Ashworth, E Genders, G Mansfield, J Peay, and E Player, *Sentencing in the Crown Court: Report of an Exploratory Study*, Occasional Paper No 10 (Oxford Centre for Criminological Research, Oxford 1984) 127.

⁴⁵S M A Bostock-Lloyd, *Law and Practice: Applications of Psychology to Legal Decision Making and Legal Skills* (OUP, Oxford 1989) 80.

system⁴⁶ prone to unjustified disparities,⁴⁷ and a prescription for sentencing anarchy,⁴⁸ as well as a source of ‘political’ friction and disagreement between the judiciary and the executive.⁴⁹ As the study will show, a prominently contributing factor to such a perceived state of affairs has been the non-application, in a coherent and unifying way, of consistent sentencing principles and aims. As a result, due to the supposed numerous competing principles, there appears to occur a degree of relative vagueness on the identification and consistency of the enterprise, with such a situation however, also being present in other common law jurisdictions as well, such as England,⁵⁰ Canada,⁵¹ New Zealand,⁵² Australia⁵³ and Tasmania.⁵⁴

In Cyprus, with two exceptions, which will be dealt with directly below, the Supreme Court, has in general been reluctant to articulate and prioritise the aims of punishment by spelling out the reasons underlying its sentencing decisions.

⁴⁶A Ashworth, *Sentencing and Criminal Justice* (n 40) 331. This description has been omitted from the later editions.

⁴⁷A K Bottomley, *Decisions in the Penal Process* (Martin Robertson, London 1973) 132.

⁴⁸A Ashworth, ‘Criminal Justice and Deserved Sentences’ [1989] *Crim L R* 340, 350.

⁴⁹J A G Griffith, *The Politics of the Judiciary* (5th edn Fontana Press, London 1997) 51-52.

⁵⁰*Cunningham* [1993] 14 Cr App R (S) 444. For the English approach see, D A Thomas, ‘Theories of Punishment in the Court of Criminal Appeal’ (1964) 27 *MLR* 546-567. For an analytical exposition of Victorian (unsuccessful) attempts to resolve major criminal sentencing issues consistently recurring throughout that period, such as uniform and proportional sanctions, see, L Radzinowicz and R Hood, ‘Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem’ (1979) 127 *U Pa L Rev* 1288-1349.

⁵¹*R v Smith* [1988] 40 *DLR* (4th) 435. For a wider view on the Canadian approach, see, J V Decore, ‘Criminal Sentencing: The Role of the Canadian Courts of Appeal and the Concept of Uniformity’ (1964) 6 *CLQ* 324-380.

⁵²*Radich* [1954] *NZLR* 86.

⁵³*Walden v Hensler* [1987] 163 *Commonwealth Law Reports* 561 (High Court of Australia).

⁵⁴K Warner, *Sentencing in Tasmania* (2nd edn The Federation Press, New South Wales 2002) 62-121.

In *Tryfona v The Republic*,⁵⁵ it was said that:

Admittedly, one of the purposes of a sentence is to help the offender to become a good citizen, and return him to the community as such. However, alongside with the offender, the judge must consider the interests of the community. And another purpose of a sentence is to protect the community against offenders; to protect the law-abiding citizen against the aggressor who has no respect for the law; to protect the hundreds or thousands of people who wish to live in peace and safety under the rule of law, against the few, who persistently disturb peace and good order in the community, in illegal pursuit or personal advantage. And this is just as important a purpose as the reforming of the offender.

In *Tattari v The Republic*,⁵⁶ the Court held that:

A sentence of imprisonment must, as a rule, be justified on the accepted foundation for such a sentence. Public security, retribution, deterrence and rehabilitation of the offender, must all be fully considered together with all other relevant circumstances in each particular case. As it has been aptly said, the sentence must fit the crime as well as the criminal. This, as many other rules in life, is easy to state but very difficult to apply... The question of sentence is being constantly considered with all due care and anxiety, in case after case, in the trial Courts and in the Supreme Court, in the light of developments in the philosophies and practices in sentencing, in other countries; and of the progress in the trend of present-day schools of thought in penology and criminology.

In the aforementioned cases, the Supreme Court referred to deterrence, prevention, social protection, and rehabilitation, without explaining, in spite of this, how these aims could be reconciled when they conflict with one another. As will be analysed in the thesis, one reason for this attitude could be that the judges do not appreciate the theoretical dimensions of their approach, let alone that any such dimensions are indeed perceived as existing by them.

1.3 The Feasibility of Research on Judicial Sentencing Decision - Making

The research into judicial sentencing and mercy is meagre compared to the surfeit of analogous academic writings on penal theory. This is owing to a range of

⁵⁵[1961] CLR 246, 247.

⁵⁶[1970] 2 CLR 6, 11.

reasons, relating mainly to the difficulty of research access and reluctance (actual or apparent) on the part of judges to reflect on their perceptions and experiences to researchers, let alone participate openly and befittingly in the public debate on sentencing in general. This state of affairs has created a sort of a romanticised mysticism on what speculatively takes place behind the judicial scene in relation to sentencing and mercying, and has become the subject matter of analogous bibliography,⁵⁷ and even of a television series.⁵⁸ Therefore, judges are, in truth, reticent in talking about any form of judging, especially talking frankly about it. Even when scholars are able to after protracted and delicate negotiation, gain access to them for purposes of research, they are sometimes viewed with suspiciousness and reservation, or still, as parts of a vigorous effort to prevent the full publication of the findings.⁵⁹ Even though only a judge can impose a criminal sentence, few of them have written books on sentencing, and when they did they dealt largely with the mechanics of the process. Rarely does one find a judge writing about this task. In fact, it would not by any standard be unreasonable to state that, for a group of professional decision-makers who have to make important and complex decisions every day of their professional lives, it is astonishing that judges have written so little about the moment of decision and the process through which their minds go to reach and resolve the challenge of that moment.⁶⁰ Some try to explain this by saying that ‘the experience of law makers and law enforcement

⁵⁷See for example, J Toobin, *The Nine: Inside the Secret World of the Supreme Court* (Doubleday, New York 2007), and B Schwartz, *Decision: How the Supreme Court Decides Cases* (OUP, New York 1996).

⁵⁸See, *Judge John Deed*. A Riley (dir), G F Newman (writ), Martin Shaw (star) (Series 1-6 BBC, DVD 2006-2009).

⁵⁹C Tata, ‘Accountability for Sentencing Decision Process – Towards a New Understanding’ in C Tata and N Hutton (eds), *Sentencing and Society* (n 28) 411.

⁶⁰An exception to this is the former Australian High Court of Justice, judge M Kirby, and his article ‘Judging: Reflections on the Moment of Decision’ (1999) 18 Aust Bar Rev 1.

officials is subject to serious limitations as a source of knowledge.⁶¹ But even if a judge does write about judging in a more informative manner, he risks unpopularity for giving away trade secrets or for criticising his colleagues,⁶² hence undermining the judicial institution in the eyes of society.⁶³ As a result, this caginess makes the scholarly study of judicial behaviour challenging and indispensable.⁶⁴ The Cypriot judiciary (or at least part of it) forms no exception to this insulation and conservatism on the (additional) guise that such studies might also enfeeble judicial independence. Indeed, in 2005, the researcher, in attempting to obtain the permission of the Supreme Court to proceed with the present study (being a professional member of the Cypriot Judiciary), faced the objection of the then President of the Supreme Court, His Honour Justice Artemides, who expressed his great concern on the rightness and propriety of the venture, by saying that (the quote with his consent):

I do not think that what you are about to do is a great idea. I think that it might not be so appropriate given that you are a judge. It is not proper for the outside world let alone the academics to know how a judge thinks or does not think in Cyprus. They can read our decisions if they wish, at least those that are written in English. To what extent they would be interested in Scotland to find out about us I do not know but I would suspect that they would most probably not even know where we are on the map. I hope that what you are about to do will not hurt the reputation of the Bench and you will not be classified as a Trojan horse. You know how some of your fellow judges might think. The only forum in which it is permissible for judges to express their thoughts and opinions on such matters is through their judicial decisions. I personally do not wish to become part of this. However I will place your request for approval before the Full Bench of the Supreme Court.

⁶¹G J Hawkins and F E Zimring, *Deterrence: The Legal Threat in Crime Control* (University of Chicago Press, Chicago 1973) 24.

⁶²D Pannick, *Judges* (OUP, Oxford 1987) 172.

⁶³K Malleon, *The New Judiciary: The Effects of Expansion and Activism* (Ashgate Publishers, Aldershot 1999) 198.

⁶⁴R Posner, *How Judges Think* (Harvard University Press, Cambridge, Massachusetts 2008) 2.

To his credit (if nothing else, an indication of fairness and objectivity on his part), Artemides, P, did place the request before the Full Bench of the Supreme Court for consideration, with that, finally being approved a few days later, hence the present thesis.

1.3.1 Earlier Research on Judicial Sentencing Decision-Making

There have been various attempts to study judicial decision-making in the field of sentencing, at different levels of analysis and subject matter orientation.

A study undertaken by Wandall between 2002 and 2004, used quantitative and qualitative methods from other studies, carried out in Denmark, to address the formal and informal norms and ideologies used to generate decisions to imprison by Danish judges. It focused on the operations of court participants, investigating how judicial decision-making is organised.⁶⁵

Another study conducted by Mackenzie between 1998 and 1999, focused on the contents of interviews of 31 judges of the Queensland Supreme and District Courts, and examined how the judges arrived to their sentencing decisions by exercising their discretion.⁶⁶This study has provided valuable feedback and guidance in the organisation and structuring of the present thesis.

A study by Keijser between 1996 and 1998, examined the attitudes towards retributivism, utilitarianism, and restorative justice of almost half of the practicing criminal law judges of the Netherlands (168 in all), by using questionnaires.⁶⁷This

⁶⁵R H Wandall, *Decisions to Imprison: Court Decision-Making Inside and Outside the Law* (Advances in Criminology, Ashgate Publishing, Aldershot 2008).

⁶⁶G Mackenzie, *How Judges Sentence* (The Federation Press, Sydney 2005).

⁶⁷Keijser, *Punishment and Purpose* (n 8).

study, too, provided precious groundwork that aided in building some of the themes in the present research.

Lovegrove undertook an extended quantitative study of Victorian judges. The goals of the study were to present a decision strategy, defined as a body of principle consisting of working rules, and to develop to this regard ‘a prototypical numerical guideline,’ aiming at producing a decision structure or framework in the form of a comprehensive sentencing guideline, comprising written policy statements and a numerical decision aid, for the application of that principle to the sentencing of the multiple offenders.⁶⁸

The Crown Court study - as it has come to be called - conducted between 1980 and 1981 (and published in 1984), in the United Kingdom by a research team led by Ashworth, involved a pilot study of sentencing in the Crown Court in England, based on interviews with 25 judges, court observations, and analysis of 96 cases. The aims of the project were to reflect the realities of Crown Court sentencing and the system within which it took place, and to explore the reasons why judges approached sentencing as they did.⁶⁹ After the study was completed and a short report presented, permission to proceed further was withheld by the Lord Chief Justice on the grounds that many of the points raised therein were allegedly well known to judges, with further research on these issues to be of no assistance to the judiciary.⁷⁰ As a result, the study remained uncompleted, thereby illustrating, once more, the difficulties encountered by this type of research, as previously mentioned.

⁶⁸A Lovegrove, *The Framework of Judicial Sentencing: A Study in Legal Decision Making* (CUP, Sydney 1997) 1-2.

⁶⁹Ashworth and others, *Sentencing in the Crown Court* (n 44) 5.

⁷⁰Ashworth and others, *Sentencing in the Crown Court* (n 44) 64.

Henham conducted a similar research on magistrates' in the United Kingdom in a study commencing in 1981.⁷¹ The stated aim of the research was to examine the role of sentencing decisions by the Court of Appeal in magistrates' sentencing behaviour.⁷² Again, although this study related mainly to magistrates' sentencing, its methodology has proven valuable for the planning and development of the present study.

Kapardis conducted a psychological study of sentencing of lay magistrates between 1978 and 1983, examining their characteristics, attitudes, and penal philosophies. He studied the variations in their sentencing decisions and their severity, by evaluating the impact of a number of both legal and extra-legal factors on magistrates' sentencing.⁷³

In the late 1970s and early 80s, McCormick and Green studied the Canadian judicial system by investigating judicial appointments and backgrounds, judges' attitudes to sentencing and their role in decision-making.⁷⁴ The study analysed interviews with judges in the Provinces of Alberta and Ontario, as well as biographical data, and provided telling insights into judicial attitudes that influence the decision-making process.

A judicial survey conducted in 1978 as part of the Australian Law Reform Commission (ALRC) with reference to sentencing, analysed the views of 350

⁷¹R Henham, *Sentencing Principles and Magistrates' Sentencing Behaviour* (Avebury, Aldershot 1990). See also, previous publications of this study by the same author: 'The Influence of Sentencing Principles on Magistrates' Sentencing Practices' (1986) 25 Howard J Crim Just 190, and 'The Importance of Background Variables in Sentencing Behaviour' (1988) 15(2) Crim Just & Behaviour 255.

⁷²Henham, *Sentencing Principles and Magistrates' Sentencing Behaviour* (n 71) 1.

⁷³A Kapardis, *Sentencing by English Magistrates as a Human Process* (Asselia Publishers, Nicosia 1985).

⁷⁴P McCormick and I Greene, *Judges and Judging* (James Lorimer and Company, Toronto 1990).

judges and magistrates in Australia, ascertained by way of a questionnaire. The survey asked 50 questions and covered issues such as the need for sentencing reform, the need for greater uniformity in sentencing, jurisdiction, the pre-trial process, the trial process, imprisonment, prison conditions and parole, non-custodial alternatives, compensation for victims of crime, corporal punishment, the death penalty, sentencing federal offenders, and perceived severity of sentencing. There was also a determination of the personal profiles of the judges participating in the survey.⁷⁵

One of the earliest studies of judicial methodology in sentencing was that by Hogarth, in Canada, published in 1971, which was concerned with the formulation of generalisations on observed regularities in behaviour. The study was based on the answers of judges on three principal questions pertaining to the denotation of sentencing to each of them, any common patterns, and the meaning of sentencing to the researcher as a student of the process.⁷⁶ These questions are similar to those posed by the current study, and even though criminological fashions and sentencing practices have changed, fundamental questions of disparity remain. The present study will not however deal with the issue of disparity and its existence in the Cyprus sentencing system (except in the form of offering a basis for the development of general observations relating to its nature, role, and consequences within the system of sentencing practice), as such an endeavour falls outside the objectives of the thesis, although its conclusions could conceivably be utilised for such an enterprise by a separate research on the point.

⁷⁵P Cashman, *Sentencing Reform: A National Survey of Judges and Magistrates: Preliminary Report* (Law Foundation of New South Wales 1979) 305-309.

⁷⁶J Hogarth, *Sentencing as a Human Process* (University of Toronto Press, Toronto 1971).

Judicial education has been a theme of some other studies, such as that by Armytage in New South Wales, who examined, amongst other things, judicial competence, and the need for judicial education, judicial selection, and professional development of judges.⁷⁷

The above studies confirmed the usefulness of research in the field of judicial decision-making and appositely informed the public debate and assisted in the development of sentencing policy in common law jurisdictions.

1.4 The Chapter Taxonomy of the Thesis

The pattern of the thing precedes the thing;⁷⁸ that is why the taxonomisation of the thesis is due at this stage by schematising the framework of the things to follow, hoping to aid to their better conceptualisation and understanding.

The current first chapter presents the introduction to the thesis. It sets out the essence of the dissertation and explains the rationale behind it. Due to the nature of its content and the purpose it sets to accomplish it is one of the shortest chapters in the study, along with Chapters 2, 9 and 10. The second chapter analyses the methodology, research design, and mode of judicial participation in the study, the interview process, and the method used to evaluate the information obtained. The third chapter offers a reasonably detailed examination of the formation and development of the Cyprus legal and criminal justice systems, to the extent relative to the study, aiming towards easing the comprehension and processing of its judges' punishment culture and attitudes. The fourth chapter

⁷⁷L Armytage, *Educating Judges: Towards a New Model of Continuing Judicial Learning* (Kluwer Law International, The Hague 1996).

⁷⁸E Pifer (ed), *Vladimir Nabokov's Lolita: A Casebook* (Casebooks in Criticism, OUP, New York 2002) 201.

considers the issues of the different approaches to the justification and goals of punishment, judicial discretion, and separation of powers. The fifth chapter deliberates on the moral value of philosophies and theories of punishment, paying due attention to the main issues and controversies that shape the theoretical debate. The sixth chapter deals with an analysis of mercy and mercying within the area of punishment theory and its relation to justice and criminal sentencing. The seventh chapter analyses in detail the role of Cypriot judges in the process of sentencing and punishment with reference to a glut of information emanating from the interview statements. It is the longest chapter in the thesis. Similarly, the eighth chapter (which is the second longest chapter in the dissertation) examines punishment and sentencing decision-making by analysing the judges' perceptions and practices on the various sentencing aims and purposes, yet again drawing on the interviews' rich primary material. The ninth chapter deals with mercy, mercying, and the sentencing decision. Its comparatively shorter length to most of the other chapters is attributed to the more limited quantitative and qualitative judicial response to its subject matter. Finally, the tenth chapter offers a summary of the study and draws conclusions on the major themes that emerge.

1.5 Conclusions

The present chapter outlined the fundamental nature and scopes of the dissertation and explained the underlying principle behind it. It described how the thesis will set out to depict and explain the Cypriot judges' architecture of sentencing (*punishment*), that is, their method of reaching, formulating, and justifying their sentencing decisions in substance and in form, and similarly, as

part of their punishtecture, their considerations and ponderings in deciding to utilise and exercise mercy in deciding on the punishment of a defendant at the sentencing stage for the crime he has committed (*mercying*). It also identified the study's major parameters of concern, to be dealt with both descriptively and prescriptively, on the basis of the information attained from the judicial interviews, explaining at the same time the thinking behind the choosing of the Cypriot sentencing reality (and its judges) as its theme, and the resonance of the research, with reference to other previous studies on judicial sentencing decision-making, some of which attempted, through interviewing, to evaluate and comprehend the functioning of the judicial nous in punishment practice. By implication, these studies have advanced realistic reasons on why such a systematic research must persist. The rarity of extra-judicial comments on sentencing and mercying as well as the relative absence of clear and consistent rationales in the decisions of the judges on their sentencing methodology, can offer cherished insights not only into judicial opinions, impressions, and philosophies, but also into the literature and practice of legal punishment and mercy, and their surrounding legitimising framework.

The next chapter will deal with the methodology of the study and the research methods utilised in that regard, as well as with the philosophy behind it, the selected interview topics, the manner in which the interviews were carried out, and the way in which the ensuing information was analysed and interpreted, on the basis of the chapter taxonomisation described above.

CHAPTER 2: METHODOLOGY

The present chapter will describe the methodology of the study and the interview research method adopted (as well as the idea behind it), the interview thematology, the mode in which the interviews were carried out and the way the ensuing information was analysed and interpreted.

2.1 The Judicial Participation

For reasons already stated in Chapter 1, pertaining to the researcher's judicial status, prior to undertaking the study, as required, there was an application submitted to, and approval obtained from, the Supreme Court. Following the granting of the permission, the researcher sent letters (together with an information package that included assurances of anonymity and confidentiality of the data collected), to all the Supreme Court judges and the District Court judges, requesting an interview for the purposes of the study. The letter additionally included a copy of the interview questionnaire. Of the 79 Cypriot judges at the time (66 District Court Judges and 13 Supreme Court judges), 54 of them (including 7 Supreme Court judges) gladly agreed to participate, and did so. The majority of the remaining 25 judges (as some failed to reply at all), courteously declined to take any part, as they thought it inappropriate and potentially damaging to the Bench because, in their view, the research could publicly expose details that 'no one has any business in knowing, not even other fellow judges,' in the words of one judge.

2.2 The Research Design

2.2.1 Qualitative Research Methodology

The research approach, involved in-depth face to face interviews with the participant judges (hereinafter referred to as the ‘judges’), using open questions to amass statements of their preferences and opinions, explore their experiences, motivations and reasoning and, on the whole, determine their views on numerous issues relevant to the study. The interviews were semi-structured in the sense that their general construction was set up by the researcher by deciding in advance the ground to be covered and the main questions to be asked, leaving the judges interviewed to answer at some length in their own words, and with the interviewer responding using prompts, probes and follow-up questions to get them to clarify or expand on their answers.⁷⁹This methodology was not the only one available. For instance, observational studies were an option. Nonetheless, due to the limited scope of the project, judicial interviewing was preferred. Observational studies are rare in any case and the benefits in gaining more knowledge about judicial attitudes and perceptions toward sentencing, considerable.

The shaping of the research design proceeded along the following assumptions:

- That the judges would have limited time to participate in the study due to court and other commitments;
- That because of this anticipated limited time, a long and detailed questionnaire would not be appropriate because it may not have been completed in the interview time;
- That there might be some reluctance on the part of the judges to participate;

⁷⁹E Drever, *Using Semi-Structured Interviews in Small-Scale Research: A Teacher’s Guide* (The Scottish Council of Research in Education, Edinburgh 1995) 1,10.

- That somewhat less than 50% and probably only 30% of the available pool of judges would participate;
- That the judges may not be willing to answer a structured questionnaire;
- That the judges would have fairly firm views on many of the interview topics and an opportunity should be given to them to express these views; and
- That, while it might not be difficult to get the judges to express their views, it might be difficult to direct the interview through using more than a small number of questions.

2.3 The Research Method (In-Depth Interviews)

2.3.1 Open or Closed Questions

The use of a small number of general questions allowed substantial leeway on the part of the judges to discuss topics as they wished, instead of having answers suggested to them through the imposition of closed questions.⁸⁰

The acknowledged disadvantage of this open-ended approach is that interview subjects may each give different responses to the question, which reflect their understanding of both the question and experience with that particular issue. This, in turn, can make statistical and meaningful comparisons between answers difficult. Even though this phenomenon did occur in the study, albeit to a limited extent, there was never an intention of statistical analysis in any event.

An additional drawback of the interview methodology using open questions is the quantity, and sometimes disparity, of the raw interview data collected, and resultant difficulties in the analysis and consequent writing up of the responses. To deal with the difficulty, the researcher kept an interview schedule. This was used to read out the main questions, mark off the points covered, as well as the prompts and probes, and make extended notes, something that helped going

⁸⁰W Foddy, *Constructing Questions for Interviews and Questionnaires* (CUP, Cambridge 1993).

through the interviews without drying up, missing out questions, going off at a tangent, and leading or confusing the interviewees. Furthermore, it guaranteed consistency of treatment across the interviews, which allowed an easier comparison of the interview comments, where that was deemed necessary.

In those instances where the judges were let to decide the order in which they talked about topics, an effort was made to retain the standard prompting-and-probing routine for all topics they brought up, as had happened in the case where the questions were imposed and answered according to the sequence in the questionnaire. By doing this, the researcher had in mind that the purpose of prompts and probes was to help the judges say what they wanted to say. The prompts were directed towards what they knew, but had not yet mentioned. They encouraged the judges to talk and jog their memory without, however, putting words into their mouths or pressurising them to come up with something. The probes were directed at what the judges had already said, asking them to clarify and explain, but not as a rule to justify or defend their position.⁸¹

In any event, open questions yielded the required information, providing seemingly valuable and rare insights into sentencing judicial attitudes, perceptions and methodology, often not easily (if at all) deduced from sentencing decisions.

2.3 2 The Questions

Bearing in mind that the order of the questions could affect what the judges had in mind when answering each one, and influence what they said, there was particular care and thinking exercised behind the sequence in which these

⁸¹Drever, *Using Semi-Structured Interviews in Small-Scale Research* (n 79) 23-24.

questions were presented. The list of questions had to be as concise as possible to reduce the danger of not asking them in each interview.

The questions were as follows:

1. *How do you see the sentencing process in Cyprus?*
2. *How do you approach the task of sentencing?*
3. *What are the purposes, if any, of judicial sentencing in Cyprus?*
4. *What influences you, if anything, when implementing the purposes of sentencing?*
5. *How do you make a decision, if at all, on which of these purposes, if any, to apply in a particular case?*
6. *What role, if any, do theories of punishment play in your sentencing decisions?*
7. *Is there is a predominant sentencing aim/rationale in Cyprus?*
8. *Should there be a predominant sentencing aim/rationale in Cyprus?*
9. *Does judicial discretion play a role in sentencing decisions, and if so how important do you see this as being?*
10. *Does mercy have a role to play in sentencing, and if it does, when should it be granted?*
11. *Upon what grounds would you grant mercy?*
12. *How would you define a 'just sentence'?*
13. *Have you ever studied penology or read about the various theories and philosophies of punishment and sentencing?*
14. *Do you think that there should be established a specialised and permanent criminal law bench, both in the District Court and the Supreme Court of Cyprus?*
15. *Is there anything else you want to say about these topics that has not been asked?*

The questions were developed on the basis of a review of the relevant literature and identification of the concerning issues as well as from looking at other similar exercises.⁸² It was clear to the judges that the questions referred to the project.

The questions were intended to be broad and formless in nature so that the judges would be given a chance to articulate unreservedly on the issues they wished. The first question (Question 1) was broader in nature so as to set the right tone for the interview and elicit general comments about sentencing from the

⁸²As presented and summarized in Chapter 1.3.1 of the thesis.

judges' point of view and make them feel more comfortable, by allowing them to articulate their thoughts freely.

Because of the semi-structured nature of the interviews, the intention was that not all of the available questions would necessarily be asked in every interview, in the sense of follow-up questions, which may have already been answered, and for this likelihood, there was an explicit mentioning in both of the covering letters as well as orally, immediately before the commencement of the interviews.

2.3.3 The Interview Process

All of the judges treated the interview earnestly. Most of them had strong views on the topics discussed, and tended to speak at length about each of them. This largely vindicated the decision to keep the question list relatively brief.

The reason for providing the judges with a copy of the questions in advance was to make them fully informed in making the decision to participate and to assuage any fears they may have had as to the subject matter of the study and the actual interviews. This choice arose after consultation with one Supreme Court judge and one District Court Judge, who were involved on a preliminary basis, as a reference group, in assisting with the assessment and development of the questions.

Although handing-out the questions ahead of time is generally an uncommon practice for interview-based qualitative research, in the present case the expected benefits in participation rates, as it was thought at the time, would outweigh any potential disadvantages in addition to the fact that the latter were

judges, asked to give their considered official view on the matters discussed.⁸³Comments made by some judges during the interviews tended to support the earlier view, that participation rates would have been significantly reduced and the interviews more difficult to conduct had the questions not been supplied beforehand.

Even though the judges had already had the questionnaires ahead of time, every interview began with a preamble that reminded them of what they had agreed to, and what the interview was about, with particular emphasis on the prospect of using verbatim, parts or the whole of their comments in the form of quotations in the thesis, always anonymously. This allowed the clearing up of any misunderstandings.

One disadvantage of providing the judges with the questionnaire well before the interviews was the possibility of the judges exchanging views and deliberating on the questions and the purposes of the study. Obviously, this could have negatively affected the sincerity of their answers. Nonetheless, it is comforting to know that none of the judges mentioned or implied any previous discussion of the questions with other participants or non-participant colleagues nor any indication of collusion was at all noticeable during the interviews. One could not have dismissed the danger of discussion between the interviewees had the researcher not given them the questionnaires in advance, and proceeded instead to interview them separately and over a period of a year (as it actually happened). The possibility of discussion of the questionnaires among those judges who would have already been interviewed and those whose interviews were to follow would

⁸³Drever, *Using Semi-Structured Interviews in Small-Scale Research* (n 79) 41.

still have existed, unless the researcher had the capability of conducting the interviews simultaneously with all of them. No such capability existed or was feasible due to the study's constraints. Non-judicial research assistants could have been used, although that could have negatively affected other parameters of the research such as for example their ability to effectively assess the demeanour of the interviewees. It would have also diminished the degree of trust (if any) between the judges and the assistants, as well as deprive them of the 'insider' capacity enjoyed only by the researcher as a colleague of the interviewees, with all the possible repercussions to the study as discussed in Chapter 2.4 below.

Interview experts emphasise the dangers of unintentionally leading interviewees towards a particular answer. The mere fact that they were called for an interview on the selected subject matter might have been considered by some of them to be suggestive of the fact that the researcher regarded it of importance, and hence led them to attempt to appear knowledgeable and interested in the fields covered by the research. In truth, interviewees sometimes try to express views that they think the interviewer wants to hear. It is for these reasons that the preamble deliberately avoided emphasising the importance of the research topic in favour of stressing the researcher's interest in their views.⁸⁴

Each of the 54 participating judges was ascribed a different reference number from 1 to 54, so that their respective comments and quotations would be accurately identified.

A small number of interviews proceeded in a rather ordered manner, with the judges virtually dictating answers to the questions, and almost taking charge of

⁸⁴Drever, *Using Semi-Structured Interviews in Small-Scale Research* (n 79) 30.

the interview. Five judges thought it better to supply their answers in a typewritten form just before the commencement of the interview, in order to expedite things and ensure accuracy in the presentation of their reflections, as they said.⁸⁵

In most instances, the interview proceeded by asking the first question, and then allowing the answers and the discussion to flow from there. Because of their semi-structured nature, some of the remarks were spontaneous and not in response to a particular question.

In all cases, the interview was informal, with the judges feeling at ease to answer the questions as they saw proper. Interview times ranged from 45 minutes (only one interview was this short) to two and a half hours, with the timing and pace dictated by the circumstances of each interview. The average interview was one and a half hours in length.

Because judges were being interviewed, a decision was taken not to tape-record them. This apophysis resulted from discussions with the reference group since there was a real possibility that some judges would either refuse participation or feel constrained during the interviews, something that could have negatively affected the whole project.

A decision was also made to handwrite the interview transcript, which could then be corrected by the interviewees, if they so wished. Justification of the decision not to tape came ex post facto during many of the interviews when judges frequently mentioned cases before them, or personal or other matters, that would have served to identify them in the final transcript. Taking notes of the interview meant that these matters were not recorded (and did not have to be excised from

⁸⁵Judges 2, 8, 11, 23 and 53.

the transcripts), and confidentiality of the subjects could be maintained at all times. The interview procedure consisted of thorough and detailed handwritten notes in Greek, kept during each interview, which were then dictated immediately afterwards (so that the importance of some of the researcher's more cryptic jottings would not elapse) to form a transcript, also in the Greek language. The translation of the comments from Greek to English, strived to retain the informality of the comments to the greatest possible extent.

The judges proceeded on the prior agreed basis that if there were no explicit request on their part, it would be assumed that they did not have any comments or corrections to make on the content of the interview transcript. Of the 54 judges, 7 judges responded with minor corrections or additions to the transcript.⁸⁶ In two instances, the judges returned a corrected version, which they had dictated, based on the original transcript.⁸⁷

All italicised quotations in the thesis indicate a translation from the Greek language. Some quotations from cases decided by the Supreme Court and published in the English language, are quoted as originally reported in the Cyprus Law Reports, in a non-italicised form.⁸⁸

2.3.4 The Thematic Analysis of the Interviews

Even though many of the interview responses were extensive, the choice at the time of the analysis was that there was going to be a presentation of the quotations from the interviews in the text of the chapters (where appropriate), as

⁸⁶Judges 21, 28, 32, 40, 41, 50 and 54.

⁸⁷Judges 7 and 13.

⁸⁸The CLR were published in the English language up until 1989.

the material is rare and there is a need to maintain context in its usage. The potential disadvantage with this approach is that some of the quotations are lengthy and potentially detract from the overall qualitative analysis. Despite these possible drawbacks - to using unmodified extracts from selected interview statements - there were outweighing benefits, in that the portrayal of the judges' thinking would be natural and unpretentious, and provide the opportunity to the reader to get a grasp of their utterances and feelings in a more direct way. There are explicit excerpts in the thesis of at least one quotation from every participating judge. Certain judges are quoted more often than others either because their comments entailed a particular interest on the subject matter under analysis or because, in the opinion of the researcher, their observations reflected the broader balance of comments expressed by other judges on the specific issue, however in a more graphic and encompassing manner.

The same reasons governed the decision to quote rather than summarise parts of selected judgments of the Supreme Court presented in the thesis. The average foreign researcher or reader might not be familiar with the decisions of this Court, so it was thought imperative to present extracts of the applicable rationales in order to make them more comprehensible and contextual.

2.4 A Few (Supplementary) Cautions

Owing to the nature of the interviews, there are some cautions on the interpretation and use of the material, further to those already touched upon above.

The fact that there were not many comments expressed by the judges on a particular issue was not taken to imply that other judges might have held an

opposite view, or even no view at all. A quantitative analysis of the responses was therefore not generally possible in most instances, and a comparative analysis likewise not always feasible. This was not one of the purposes of the thesis in any case.

The judges' comments seemed quite casual and loquacious at times. One must bear in mind that these remarks are not court judgments (though their substance could be used as denoting an equivalent judicial position), tempered by the constraints of formal legal writing, but the product of informal interviews where the judges were free to speak their own mind anonymously, as they did. For this reason, the contents of the interview statements of only a few judges, or even that of a single judge, will be treated as sufficient for the purpose of reaching a more general conclusion in the thesis in relation to the subject matter dealt with by the comment or remark. The reason for this is that these particular answers will be deemed as representing a viable and sufficient basis for such a course, on the premise that they form in a loose sense a species of quasi-judicial ratios, expressive of the stance relating to the matters covered by the interview, in the same way they are articulated in sentencing judgments. However, these answers should not be deemed as representing the views of the entire Cypriot judiciary (or that part of it which has participated in the research). Instead, they should be evaluated as merely indicative of the existence of particular judicial views within the judiciary on the matter concerned, as uttered at the time.

Not least in mind was the important limitation of questionnaires and interviews, in that they may report what people say and not necessarily what they do or truthfully think about the topic in question. Associated to this was the

possibility that by asking the judges to introspect on their sentencing practice, it might have affected their answers due to insincerity or fear despite their having been assured of anonymity. Introspective utterances as sources of information about other minds are intrinsically susceptible to delusion on the part of the subject (here the judges).⁸⁹This applies to almost every aspect of human behaviour related to the expression of ideas, emotions, feelings, and other similar conscious mental processes.⁹⁰Nonetheless, because judges are so accustomed to articulating their sentencing decisions authoritatively and (by presumption) sincerely and candidly, asking them to introspect on their decision making processes should not be considered a methodological weakness. In the particular case, the researcher had the opportunity to see and hear the judges, and was also able to evaluate their demeanour and frankness. None was pretentious. But even this view is nothing but a subjective one and conceivably not necessarily correct. Related to this, and having recognised that what the judges have said during the interviews required them to be surrounded with whatever intellectual context could make best sense of the ensuing remarks, one could not have been too quick about dismissing any feature of that context as tedious or irrelevant. Any impatience with what might have been thought of as irrelevance or triviality might have deprived the researcher of just the understandings he sought. Indeed, when one says of a given belief that it is true or correct, what he means is that one finds it rationally acceptable. This is not to claim that there is nothing more to truth or correctness than acceptability.

⁸⁹G Piccinini, 'Data from Introspective Reports: Upgrading from Commonsense to Science' in A Jack and A Roepstorff (eds), *Trusting the Subject?* (Vol 1 Imprint Academic, Devon 2003) 145.

⁹⁰D J Chalmers, *The Conscious Mind: In Search of a Fundamental Theory* (Philosophy of the Mind, OUP, Oxford 2004) 180.

The aim here is not to offer a definition of truth or correctness, or talk about truth and correctness, but merely to deal with what in the current instance, Cypriot judges at the time of the interviews may have had good reasons - by their lights - for holding true and correct, regardless of whether one believes that what they held as true and correct, was in fact so. By analogy to what Quentin Skinner advises in his historical hermeneutics, however peculiar the beliefs one explores may seem to be, one must begin by trying to make the agents who accepted them (in this case the Cypriot judges who participated in the study), appear as rational as possible.⁹¹ This rule, according to Skinner, in effect embodies three precepts, respectively adapted to the needs of the present venture and applied during the analysis and taxonomy of the interview statements. The first merely states a condition *sine qua non* of the whole enterprise. To this regard the researcher assumed a convention of truthfulness and correctness among the judges whose beliefs he sought to explain. The first task was to obviously identify what they believed. However, the only evidence of their beliefs was the substance of their interview statements, and occasionally, some pertinent judicial pronouncements in the case law. It is of course likely that some of these comments and dicta may have been pervasively marked by hidden codes. However, there was no option but to assume that, in general, they could be treated as relatively straightforward expressions of belief and correctness. Unless one could assume such a convention of truthfulness, there could not have been hoped to make any headway with the project of explaining

⁹¹Q Skinner, *Visions of Politics: Regarding Method* (Vol 1 CUP, Cambridge 2002) 27-56. See also, I Loader and R Sparks 'For an Historical Sociology of Crime Policy in England and Wales since 1968' in M Matravers (ed), *Managing Modernity: Politics and the Culture of Control* (Routledge, London 2005) 5-32, and J B Thompson (ed), Paul Ricoeur, *Hermeneutics & the Human Sciences* (CUP, Cambridge 1981).

what they believed. The second and closely related precept on which the researcher acted upon, was to be initially prepared to take whatever was said by the judges, however bizarre it might seem, as much as possible at face value. This would not only serve to retain the precise character of the explanatory task, but it would also enable the avoidance of a familiar but condescending form of interpretative charity. It would have prevented, purportedly, the rescuing of the rationality of the participating judges by way of suggesting that, whenever they said something that could appear as grossly absurd, it would be best to assume that the speech act they were performing must have been something other than that of stating or affirming a belief. Based on the third precept acted upon, there was sought to surround the particular statement of belief, or correctness of interest to the study, with an intellectual context that served to lend adequate support to it. This committed the researcher to something more than trying to establish that the judges may have had good practical reasons for saying what they had said. It also committed the researcher to establish that the utterances of the judges were not merely the outcome of a rational policy, but was also consistent with their sense of epistemic rationality. The primary task was to therefore attempt the recovery of a very precise context of presuppositions and other beliefs, a context that could serve to exhibit the relative utterance as rational for those particular judges, in the circumstances held to be true.

The fact that the judges knew the researcher as a fellow colleague was probably a critical factor in making them comfortable with participating in the project. As an insider, one is more likely than others who are outsiders, to avoid asking meaningless questions and to be able to probe sensitive areas with greater

ease.⁹² Furthermore, being an insider, could act as a form of triangulation, since one is able to take a knowledgeable view of misinformation (whether deliberate or inadvertent).⁹³ The researcher was conscious that the same factors, which appeared to strengthen the likelihood of respondents agreeing to talk (namely, their knowledge of the researcher as an ‘insider’ [and not Trojan horse]),⁹⁴ might have proved disadvantageous if the judges had any qualifications regarding the confidentiality of the interviews. That is why the confidentiality of the process was particularly stressed, explaining that there was not going to be an identification of any of them under any circumstances whatsoever. All of the judges indicated that the warning was unnecessary and that for them, the fact that a fellow judge assured confidentiality was more than sufficient to ease any hypothetical or objective qualifications. None of the judges objected to their identification as District Court judges, Assize Court judges, or Supreme Court judges in the thesis, in case such a connection appeared to surface from their respective comments.

The ‘insider’ factor had a further dimension for which the researcher exercised particular vigilance. It was possible, and it did in fact occur during the interviews, that some judges could have taken for granted that they shared a body of common knowledge and experience with the interviewer, and consequently avoided mentioning it in their answers or remarks. This led to a reminder to them that they should have done so, even if it seemed rather unnecessary and pedantic at the time, otherwise it could not appear in the interview record.

⁹²P A Adler and P Adler, *Membership Roles in Field Research* (Sage Publications, London 1987) 67-84.

⁹³S Roseneil, ‘Greenham Revisited’ in D Hobbs and T May (eds), *Interpreting the Field* (Clarendon Press, Oxford 1993) 189.

⁹⁴See on this, the comments of the ex President of the Supreme Court in Chapter 1.3.

Another difficulty, which occurred, was the assumption by some of the judges that the researcher did or did not share their views. In such instances, the researcher had to remind the judges of the formality of the interview, and of his duty to pose the same questions as the ones he posed to everyone else, in the same manner, and that they should answer in view of that. The extensive data obtained appears to confirm that respondents were willing to share their detailed views with an interested insider.

Most interviews took place in chambers, but on occasion in the homes of the interviewees or elsewhere, always making sure that the overall setting was appropriate and free of disturbances and distractions. One took place in a central (but quite nonetheless) cafeteria in Nicosia, though not Ashworth's.⁹⁵

2.5 Conclusions

The chapter described the general methodology of the study, the interview research method used, as well as the idea behind it, the interview thematology, the fashion in which the interviews were carried out, and the way in which the resulting information was scrutinised and construed. It was stressed that the interviews revealed a wealth of rare information. The chapter also analysed the hermeneutical and other cautions underlining the study and its subject matter.

Before proceeding with the rest of the thesis, it is deemed essential (as an intermezzo), to present an overview of the formation and development of Cyprus's legal system in general and criminal justice system in particular, so that one could

⁹⁵Reference is made here to Ashworth's description of sentencing as 'a sort of cafeteria system,' mentioned in Chapter 1.2 (n 46).

even more easily grasp the context of punishment and mercy, and how judges in Cyprus act and think within this realm.

CHAPTER 3: THE CYPRUS LEGAL AND CRIMINAL JUSTICE SYSTEM

It is important to briefly outline in the present chapter the formation and development of the Cyprus legal system in general and the criminal justice system in particular. This will facilitate the comprehension and processing of the island's judicial punishment culture and attitudes, in the manner dealt with in the chapters to follow.

The chapter will describe the birth of the island's modern legal and criminal justice system, as well as the position of the judiciary, in an otherwise politically tumultuous society. There will be a presentation of the organisation of the criminal courts and their jurisdictions, a summary of the role and powers of the Attorney General and Deputy Attorney General of the Republic, and a description of the prison system. It will also offer a quasi-empirical exposé of the criminal statistical portrait of Cypriot society, and a panoramic presentation of the sentencing rationales and approach, derived from the ratios of the totality of sentencing appeals against sentence decided by the Supreme Court between 1960 and 2008.

3.1 The Historical Origins of the Cypriot Legal System⁹⁶

The island of Cyprus, due to its geographical position between three continents, namely Europe, Asia and Africa, was naturally destined to suffer the vicissitudes of foreign conquests,⁹⁷ with its legal history being resultantly

⁹⁶For a general overview, see, A Kapardis, *Society, Crime, and Criminal Justice in Cyprus 1878-2000* (Vol 1 Ant N Sakkoulas Publishers, Athens 2001).

⁹⁷R Holland and D Markides, *The British and the Hellenes: Struggles for Mastery in the Eastern Mediterranean 1850-1960* (OUP, Oxford 2006) 173-240; R Storrs, *Orientalisms* (Ivor Nicholson &

interwoven with the legal systems of its conquerors.⁹⁸The oldest laws known to have been in force in Cyprus, are those attributed to Demonassa, a mythical rather than historical Queen of Cyprus. Its city kingdoms followed the pattern of the Greek City States, and the coming to Cyprus of Solon, the Athenian legislator, has left no evidence that he brought his Laws to the Island. Cyprus was part of the Roman and Byzantine Empire, and as such, came under Roman law and its Byzantine offspring. The Louisianan Kings brought with them the Assizes of Jerusalem, translated into the colloquial Greek of the time. However, the most relevant legal systems for proper appreciation of the present day administration of criminal justice in Cyprus are those of its last conquerors, the Turks and the British.⁹⁹

3.1.1 The Turks

The Turks invaded Cyprus in 1570, occupying the island in the following year. At the time, the Greek element was considerably greater than the Turkish, in spite of the massacre of many Christians and the conversion of others to Islam. Under the Ottoman rule, the island's economy and cultural level, reached their nadir. In the Ottoman Empire, down to the 19th century, the determination of what constituted an offence and its proper punishment, derived from the *Sher Law*, that is, the '*Law of God.*' For an Empire, which covered such an extensive area and was populated by such a variety of ethnic groups, this state of the Law was

Watson, London 1937) 533-559. Sir Ronald Henry Amherst Storrs (1881-1955) was the first Governor of Cyprus between 1926 and 1932.

⁹⁸G Tornaritis, *The Legal History of Cyprus* (Government Printing Office, Nicosia, Cyprus 1984) 2.

⁹⁹The published doctoral thesis of P Evangelides, *The Republic of Cyprus and its Constitution with Regard to the Constitutional Rights* (Difo-Druck GmbH, Bamberg, Germany 1996), has proven most valuable in the preparation of paragraphs 3.1.1 and 3.1.2.

unsatisfactory. The need for reform was evident, but it was not until 1858, that an array of circumstances, including political and diplomatic ones, led to the enactment of a comprehensive criminal code, namely the Imperial Ottoman Penal Code ('the Ottoman Penal Code'), the general arrangement of which followed that of the French Penal Code. As a legislative work, it was comparatively simple and enduringly well adapted to the social realities of the country. The Ottoman Courts functioning at the same time were the Daavi Courts in each district, composed of a Cadi as President and four members, of whom two were Moslems and two Christians, all wretchedly paid. At Nicosia, there was a Superior Court termed the Medjliss Temyiz Houkouk and Genaiet. It consisted of a Cadi as President and six members, of whom three were Moslems and three Christians, and it had jurisdiction to try offences punishable with more than three months imprisonment, but the Governor could not confirm any sentences over three years. Such sentences had to be confirmed by the Governor-General of the vilayet (province) or at Constantinople.

3.1.2 The British

By the Convention of Defensive Alliance between Great Britain and Turkey, signed on the 4th of June 1878 in Constantinople, Turkey consented to assign Cyprus to be occupied and administered by Great Britain, for enabling the latter to make the necessary provisions towards executing its engagements under the Treaty. On the 1st of July 1878, an Annex to this Convention was signed between the same contracting parties. This Annex provided for the conditions under which Great Britain would occupy Cyprus, and stated that, if Russia restored

to Turkey, Kars and other conquests made by it in Armenia during the Crimean War, the island would be evacuated by Great Britain and the Convention of the 4th of June 1878, put to an end. On the 4th of August 1878, an additional Article was signed, according to which the High Contracting Parties agreed that, for the term of the occupation and no longer, full powers were granted to Great Britain for making laws and conventions for the government of the island and for regulating its commercial and consular relations and affairs. Great Britain agreed also to pay yearly to Turkey 92,000 pounds.¹⁰⁰

The state of the administration in general, and the dispensation of justice in particular, at the time the British took over, was not an enviable one.¹⁰¹ The legal system consisted of the Ottoman Law in force on the 13th of July 1878 (the definite date of the British occupation of the island), the English Law, consisting of common law, the rules of equity, the acts of general application of the British Parliament, and the Cyprus statute law, as enacted by its legislature. Ottoman law was applicable in all cases where the defendants, or the accused, were Ottoman subjects, and English law was applicable in all other cases in which the defendants or the accused were not Ottoman subjects; litigants, however, could agree to have their case governed entirely either by Ottoman or English law.

Great Britain annexed Cyprus on the 5th of November 1914, after the declaration of World War I, and Turkey's siding with the Axis Powers. In 1923,

¹⁰⁰C Spyridakis, *A Brief History of Cyprus* (Zavallis Press, Nicosia, Cyprus 1974) 167.

¹⁰¹As noted in C Saville, *Cyprus* (HMSO, London 1878) 33, a report made in 1867 concerning the condition of the Christians in Cyprus claimed that: 'It seems that in Cyprus it is not so much the laws themselves but rather the administration of the laws, which needs reform. The Ottoman Government is noted for publishing innumerable firmans, laws and ordinances which leave but little room for improvement as regards either completeness or natural equity; and it has been either the disregard or the mal-administration of these laws which has done so much injury in the country.'

the Treaty of Lausanne ended the war between Greece and Turkey of the previous year. Though Turkey undertook by the said Treaty to give up all its claims to Cyprus, the island remaining under British rule, was given, two years later on the 10th of March 1925, the status of a crown colony. This terminated whatever vestiges of sovereignty the Sultan had over the island. The distinction in the legal system between Ottoman and non-Ottoman subjects was henceforth abolished, and it consisted at this time of the statute laws of Cyprus, certain Ottoman laws which continued to be in force having not been replaced by Cyprus legislation, the English common law, and the rules of equity in force in Britain on the date of annexation, save as amended by any statute law of Cyprus, and the acts of the British Parliament of general application. The still subsisting (until today, and as amended) Criminal Code, Cap 154, finally replaced the Ottoman Penal Code in 1928.¹⁰²The first steps taken by the British when they assumed the administration of the island were the reorganization of the Courts. They set up a High Court, which in the case of foreigners applied English Law. The Daavi Courts continued functioning for another two years with jurisdiction over the Ottoman subjects, but as a step towards stimulating its members to a careful examination of the merits of the case, an Englishman was in most cases in attendance, although without legal status. In 1882, the first major reorganization of the Courts took place by an Order in Council of that year. There was an establishment of a Supreme Court together with District Courts and Assize Courts, which were composed of English and Cypriot professional judges. The Order retained the representative element of judges belonging to each of the two communities in the trial of criminal cases.

¹⁰²See, *Anastasiades v The Republic* [1977] 2 CLR 97, 158.

This was the position until 1935. The Courts of Justice Law of 1935 introduced a modern system of Courts of Justice, where the communal origin of the judge had no significance whatsoever. Under this Law, there was a Supreme Court and District Courts, composed of a President, District Judges and Magistrates, each one having jurisdiction to try criminal cases of different severity, summarily and singly. Assizes were also set up in each district, three times a year, composed of three judges, the presiding one being a judge of the Supreme Court. Assizes had jurisdiction to try all indictable offences. Conducive to the good administration of criminal justice were the establishment by the British of a modern Police Force, prisons based on western concepts, and the introduction of the basic principles of English criminal procedure. In August 1960, Cyprus became independent on the basis of an agreement reached, on basic points, between the Prime Ministers of Greece and Turkey, in Zurich. The London Conference followed the Zurich meeting, and a Joint Commission was established with the duty of completing a draft Constitution for the independent Republic of Cyprus. This draft eventually became the Constitution of the Cyprus Republic, the whole functioning of which was, in essence, based on the existence of only two communities, the Greek-Cypriot community and the Turkish-Cypriot community. It was a compromise solution and as such, it unavoidably contained the seeds of many new problems between the two communities.¹⁰³ The communal basis of Court jurisdiction was introduced and the requirement of a neutral President of the High Court of Justice (and later Supreme Court) became constitutionally imperative. Cyprus became a member of the United Nations on the

¹⁰³For pertinent analyses, see, D Hotham, *The Turks* (John Murray Publishers, London 1972) 110-121, and C Hitchens, *Cyprus* (Quartet Books, London 1984) 29-50.

20th of September 1960,¹⁰⁴ and on the 24th of May 1961, a member of the Council of Europe,¹⁰⁵ signing the European Convention on Human Rights and its First Protocol on 16 December 1960, and the ratifications that followed on the 6th of October 1962,¹⁰⁶ by Law 39 of 1962. Since the ratification, Cyprus has been participating in the European Court of Human Rights and the European Commission of Human Rights. A few months earlier, that is, in February 1961, Cyprus became a member of the British Commonwealth. In 1963, as a result of heightened and tense intercommunal-armed conflict between the Greek and Turkish-Cypriots, the latter withdrew from any participation in the island's administration. This led to the enactment of the Administration of Justice (Miscellaneous Provisions) Law of (Necessity) 1964 (Law 33 of 1964), whereby the communal element of the various Courts was abolished. On the 20th of July 1974, following a coup initiated by the Greek military junta aiming towards overthrowing the then President of Cyprus Archbishop Makarios, Turkey militarily invaded Cyprus in violation of international law and occupied 36.43% of its territory situated in the northern part of the island, which it still retains illegally until today.¹⁰⁷ The Turkish Army conducted a policy of ethnic cleansing, consisting of wholesale attacks and massacres of the Greek population in the territories that came under Turkish

¹⁰⁴Cyprus was admitted to UN membership and, therewith, ipso facto, also party to the Statute of the International Court of Justice, on the 20th of September 1960, by UN Resolution No 1489 (XV).

¹⁰⁵C Spyridakis commends on the accession of Cyprus to the Council of Europe as follows: 'Her membership in the Council of Europe is of particular importance, for this acknowledges that, while geographically Cyprus belongs to Asia, it is otherwise part of European civilisation...' See, Spyridakis, *A Brief History of Cyprus* (n 100) 183.

¹⁰⁶The links with the European Convention on Human Rights go back, however, to the period of the colonial regime. When the said Convention was signed in Rome in 1950, it provided the possibility to the member states of extending the applicability of the Convention to all the 'territories for whose international relations it is responsible.' Great Britain made such a declaration, according to the said conventional provision, to various territories, including the then colony of Cyprus.

¹⁰⁷See, *The Case of Cyprus v Turkey*, Application No 25781/94, dated 10.5.01.

military occupation in an attempt to terrorize the Greek population into evacuating these areas, displacing more than 200,000 Greek-Cypriots, and killing thousands of others.¹⁰⁸ Nonetheless, despite the resulting plight and catastrophic consequences of the invasion, the country had to continue functioning as an independent state, and so it did. The administration of justice has since then been progressing in the non-occupied part without the participation of the Turkish-Cypriots. Gradually, and following the usual path of societal and judicial evolution,¹⁰⁹ punishment in Cyprus was rationalised in a system oriented more firmly to predictability, certainty, formal justice, and the rule of law. With the accession of The Republic of Cyprus to the European Union in 2004, the Constitution was amended so that European law has supremacy over the Constitution and national legislation.

3.2 The Modern Organisation of the Criminal Courts of Justice in Cyprus

Constitutionally, the judicial power in Cyprus vests in the Supreme Court and its subordinate courts, whereas the House of Representatives exercises the legislative power, and the President of the Republic the executive power. The courts exercising criminal jurisdiction are the District Court, the Assize Court, and the Supreme Court, in its appellate jurisdiction.

¹⁰⁸See, the 1st and 2nd Reports of the European Commission of Human Rights on Turkey's Intervention in Cyprus and Aftermath (20 July 1974-18 May 1976, and 19 May 1976-10 February 1983, respectively).

¹⁰⁹N Lacey, 'Historicising Contrasts in Tolerance', in T Newborn, *The Politics of Crime Control: Essays in Honour of David Downes* (Clarendon Studies in Criminology, OUP, Oxford 2009) 197.

3.2.1 The District Court

The District Court (there is one in each of the five districts)¹¹⁰ is the Court exercising original jurisdiction in general. In 2008, it was comprised of 66 first instance professional judges, that is, 36 District Court Judges, 17 Senior District Judges, and 13 Presidents of District Court. First Instance judges are loosely referred to as ‘District Court Judges’, and that is how they will be referred to hereafter. The Supreme Court appoints all District Court judges amongst successful practitioners of some years standing (currently of at least 6 years standing in legal practice), with demonstrated professional ability and ethos. Promotion is supposed to be on merit, despite the fact that the general impression among the judicial and legal community is that, unfortunately (at least for the majority of them), the most decisive factor is seniority. The age of retirement is 63. In their criminal functions, District Court Judges try summarily offences that carry a maximum sentence of 5 years imprisonment and /or a fine up to €85.430¹¹¹. With the consent of the Attorney General of the Republic signified in writing, they have jurisdiction to try any offence punishable with more than 5 years imprisonment, as well as any other case remitted to the District Court from the Assize Court, with the order of the Attorney General. In both cases, the District Court judge has no extra powers of sentencing. As a rule, District Court judges try all criminal cases in the District Courts, such as road traffic cases, private criminal cases, and serious criminal cases, the latter been usually referred to as proper criminal

¹¹⁰These are the Districts of Nicosia, Limassol, Larnaca, Famagusta, and Paphos.

¹¹¹As from 1.1.2008 the Euro became legal tender in Cyprus replacing the Cyprus Pound at the irrevocable fixed rate of 1 Euro = CYP 0.585274. The amount of the maximum fine stated above is the result of the conversion into Euros (rounded down to the nearest Euro) of the previously provided maximum fine in Cypriot Pounds (£50,000), on the basis of the conversion and rounding provisions of section 9 of the Adoption of the Euro Law 33/07.

cases.¹¹²Occasionally, Senior District Court Judges undertake proper criminal cases whereas Presidents of District Courts deal exclusively with civil jurisdiction cases, and never with criminal cases, unless of course appointed as Presidents in any of the Assize Courts.

3.2.2 The Assize Court

The Assize Court has unlimited jurisdiction to hear and determine at first instance any criminal case. In practice, only criminal cases punished by law with more than 5 years imprisonment are brought before the Assize Court. Each Assize Court is composed of three judges (a President of the District Court and two District Court Judges or a President of the District Court, a Senior District Court Judge and a District Court Judge or a President of the District Court and two Senior District Court Judges). Unless the majority of the Court considers the defendant guilty, he is acquitted. In deciding the sentence to be imposed, if there is an equality of votes, the President of the District Court has an additional casting vote. As a rule, the Supreme Court appoints District Court Judges to serve in the Assize Court, on rotation. At present, there are four Assize Courts in session in the Republic, based respectively in Nicosia, Limassol, Larnaca and Paphos. The Assize Court of Larnaca also covers jurisdictionally the non-occupied part of the District of Famagusta.

¹¹²These, in general, are considered to be all offences punishable with more than one year's imprisonment, and do not include road traffic offences.

3.2.3 The Supreme Court

The Supreme Court is comprised of 13 professional judges, one of whom serves as President with equal authority and standing to the rest. They retire at 68. The Supreme Court is the product of an amalgamation between the Supreme Constitutional Court of Cyprus and the High Court of Cyprus (as established by the Constitution) by force of Law 33 of 1964, following the intercommunal events of 1963.

The power to appoint judges of the Supreme Court and its President vests exclusively in the President of the Republic. Nonetheless, as a result of a longstanding constitutional tradition evolved in the interests of the separateness and independence of the Judiciary, the President of the Republic, invariably, seeks the recommendations of the Supreme Court as to who should be appointed, which as a rule he follows with very few exceptions.

The Supreme Court is the final appellate court in the country. In its appellate jurisdiction it deals with all appeals from the lower courts. The court sitting for a criminal appeal is composed of at least three judges. As it happens with all judicial judgments in Cyprus, the Supreme Court judges sign their judgments immediately upon pronouncement. These judgments are binding on all subordinate courts and the Supreme Court, on matters of legal principle. A judgment given on behalf of more than one judge reflects the opinion of the totality of them. Sometimes, more than one judgment is given concurring in the result. Dissenting judgments are a rare occurrence.

The Supreme Court has very wide powers in dealing with appeals against conviction, acquittal or sentence, filed by either the prosecution or the defence. By

virtue of the provisions of section 145 of the Criminal Procedure Law, Cap 155, the Supreme Court may dismiss the appeal or quash the conviction, where on the evidence adduced, the conviction is unreasonable or wrong on a question of law, or where a substantial injustice has occurred. It can substitute the quashed conviction with another offence, or order a retrial. In appeals against sentence, it can interfere only on the ground that the sentence is manifestly excessive, inadequate, or wrong in law. In dismissing an appeal by the defendant against sentence, the Supreme Court has statutory power in accordance with the provisions of section 145(3)(b)(i) of the Criminal Procedure Law, Cap 155, to increase the sentence imposed. This power, however (as an act of equity towards defendants), is by practice very rarely used so that it does not, in general, constitute a hindrance to their accessing the Court on appeal.¹¹³ A rough test on detecting such an inadequacy or insufficiency is to see whether the facts of the case bear no proportion to the sentence or by the sentence being altogether out of range with sentences approved by the Supreme Court in previous occasions. The Supreme Court has repeatedly stressed that in reviewing sentence it does not, and should not, assume ab initio the task of determining the sentence to be imposed, a course that would involve the stepping into the shoes of the trial court;¹¹⁴ and that no intervention is justified merely by reason of the fact that, had they tried the case, they would have imposed a different sentence.¹¹⁵ Nonetheless, what derives from a review of the cases decided on appeal between 1960-2008 is the impression that the Supreme Court interferes quite often with the sentences passed by the trial

¹¹³See, *Christodoulou v The Republic* [2007] 2 CLR 229, 232.

¹¹⁴See, e.g. *Eleftheriades v The Republic* [1967] 2 CLR 214, 216.

¹¹⁵See, e.g. *Foulias v The Police* [1976] 2 CLR 57, 59.

courts, as the reversal rate is calculated at the noticeable percentage of 36.7%.¹¹⁶In the interest of certainty in this area of sentencing, it is essential that the impression be eradicated, by the strict application of the principles relevant to reversing a sentence on grounds of excessiveness or inadequacy.

Sentencing decisions of the Supreme Court are not binding on District Court judges unless, of course, they deal with issues of legal principle. Nonetheless, a District Court judge wishing, in his discretion, to deviate from the generally established range of sentences, must thoroughly explain and justify his decision. This indirect control on judicial discretion serves to constrain caprice, aiming to limiting unjustified disparities and unfairness in sentencing.

3.2.4 The Office of the Attorney General and the Deputy Attorney General of the Republic

The Attorney General and the Deputy Attorney General of the Republic are appointed by the President of the Republic from amongst lawyers of high professional and moral standard. The Attorney General is the Head and the Deputy Attorney General is the Deputy Head of the Law Office of the Republic, which is an independent office, not being under any Ministry. The Attorney General and the Deputy Attorney General have the right of audience in, and take precedence over any other persons appearing before, any Court. They are members of the permanent legal service of the Republic, and hold office under the same terms and conditions as the Supreme Court judges and are not removed from office except on similar grounds and in the same manner applicable to the latter. The Attorney

¹¹⁶See, para 3.6, below.

General is the legal adviser of the Republic, exercising all such other powers and performing all such other functions and duties as conferred or imposed on him by the Constitution, or by law. He has power, exercisable at his discretion in the public interest, to institute, conduct, take over and continue or discontinue any criminal proceedings. Such power may be exercised by him in person or by officers subordinate to him acting under and in accordance with his instructions. The President of the Republic, on the unanimous recommendation of the Attorney General and the Deputy Attorney General, may remit, suspend, or commute any sentence passed by a Court in the Republic. All actions filed by the Republic against any person, unless otherwise provided by any law, are filed in the name of the Attorney General, and actions filed by any person against the Republic, unless otherwise provided by any law, are filed against him, as defendant. As regards International Courts, such as the European Court of Human Rights, the Attorney General acts as agent of the Republic in all cases in which it is a party to the proceedings.

The Deputy Attorney General has such powers and performs such duties as normally pertain to his office and, also, subject to the directions of the Attorney General, exercises all the powers and performs all the functions and duties vested in the latter under the provisions of the Constitution or by law. He acts for the Attorney General in his absence, or his temporary incapacity to perform his duties. The Attorney General is an ex officio member of the Administrative Board of the Cyprus Bar Association and Honorary President of the Cyprus Bar Association, President of the Legal Board, of the Advocates Disciplinary Board and of the Board of the Advocates' Pension Fund.

3.2.5 The Cyprus Prison System

In Cyprus, there is only one correctional institution, the Central Prisons in Nicosia, which operate under the provisions of the Prison Law 62(I)/96, as amended. This legislation incorporates the European Prison Rules and is consonant to the standards contained in relevant instruments of the Council of Europe. Cyprus has a relatively low prison population rate of 83 in a national population of 100,000 (well under the median rate of 95 for Southern and Western European countries, and the median rate of 127 for Northern European countries), compared to a 153/100,000, for England and Wales, 152/100,000 for Scotland, and 88/100,000 for Northern Ireland (all of them being classified as Northern European countries).¹¹⁷ The Central Prisons cater for all categories of convicted and non-convicted prisoners of both sexes and of all age groups from 14 years and over. According to the Prison Regulations, with the exception of lifers, all other prisoners who have served part of their sentence, ranging from 3/12 of the term for sentences up to 2 years, to ½ of the terms for sentences over 12 years, are sent to the Open Prison, which is located within the premises of the Central Prisons. This, of course, depends on their overall conduct while serving their sentence, and if there are no security, disciplinary or other special reasons making such a measure inappropriate. The decision rests with the Prisons' Classification Committee, which also assigns to the prisoners the appropriate work, provides exit permits and generally assists the Director of Prisons in the formulation and application of the mode of treatment in prison under the regulations. The last step towards reintegration into the social environment is the emplacement of inmates from the

¹¹⁷R Walsmley, *The World Prison Population List* (8th edn International Centre for Prison Studies, Kings College London-School of Law, London 2009).

Open Prison, where there exist conditions of reduced security, to the Guidance Centre for out of Prison Employment and Rehabilitation of Prisoners, where prisoners serve the remaining of their sentence in conditions of controlled freedom. All prisoners have the opportunity to work, as far as possible, in a type of work of their choosing. To this direction, fully equipped workshops are operated in the prison, where prisoners are encouraged, under the supervision and instructions of trainers, to improve the level of their vocational training by working as cooks, tailors, carpenters, electricians, bookbinders, barbers, gardeners, mechanics and at the prison farm. There is cooperation between the Department of Prisons, the Cyprus Productivity Centre, and the Ministry of Education in order to improve vocational training. Prisoners are also encouraged to improve their level of education and vocational training by attending classes in or outside the prison or by correspondence courses. There are psychological and psychiatric services and support to all prisoners in need, on a regular basis, with personal meetings, group discussions and meetings in the presence of the prisoner's family. There is also provision for a welfare service and support to all prisoners, with regular visits and contacts with their families and home leave, in order to facilitate their social integration. Recreational activities include sports, theatre, musical performances and chess games, among others. The Central Prisons are equipped with a theatre hall and grounds for football, volleyball and basketball. A prisoner may file a complaint with the Prison Board if he feels that the prison administration has overlooked or deliberately ignored him. The Prison Board can also evaluate the inmates' vocational and work programmes. It also holds hearings about disciplined inmates in order to determine whether the disciplinary sentence was just. The

board has the authority to overrule any punishment imposed by the prison Director. In 2009, by virtue of Law 4 of 37(I)/09, which has amended the Prison Law 62(I)/96, there has been established a first-ever Parole Board in the country, consisting of a former judge as Chairman, a university professor (currently, Professor Andreas Kapardis), two psychiatrists and a social worker. The Parole Board has been mainly set up to afford the possibility of a second chance to those prisoners serving a life sentence who until then, could only be released by a presidential pardon. Those eligible to apply are, in general terms, prisoners sentenced to more than two years imprisonment who have completed half of their imposed sentence.

3.3 A Précis of the Criminal Trial and Sentencing Procedure in Cyprus¹¹⁸

The three major laws that regulate criminal justice in Cyprus are the Criminal Code, Cap 154, the Criminal Procedure Law, Cap 155, and the Evidence Law, Cap 9, whilst the Courts of Justice Law 14/60, regulates the structure and jurisdiction of the Courts. Hundreds of other criminal statutes and regulations, rule nearly every aspect of individual and social interaction. The Criminal Code, Cap 154, embodies the general principles and main criminal offences of the English common law, whereas the Criminal Procedure Law, Cap 155, introduces the English criminal procedure laws, with comparable modifications. The Evidence Law, Cap 9, introduces the law and rules of evidence to a great extent applicable in

¹¹⁸See, in general, A N Loizou and G M Piki, *Criminal Procedure in Cyprus* (Proodos Press, Nicosia, Cyprus 1975); P Artemis, 'An Outline of Criminal Law and the Working of the Judicial System in Criminal Cases' (1989) 26 *Cyprus L Tribune* 4016 – 4021; and, D Kyprianou, *The Role of the Cyprus Attorney General's Office in Prosecutions: Rhetoric, Ideology and Practice* (Springer, Berlin 2010).

England, subject to the amended adaptation made in that law, or in any other law. In interpreting the Criminal Code and the Criminal Procedure Law, and in the absence of satisfactory Cypriot precedent, judges refer mostly to English precedent, which is, though, only of instructive and not binding effect. Regarding sentencing, it was stressed in *Nicolaou v The Republic*,¹¹⁹ that foreign sentencing precedents (specific reference was made therein to English precedent), might have their own importance, but Cypriot courts need to follow Cypriot sentencing precedents due to the differing local social conditions as compared to those in England or other countries. Indeed, the distinct historical and cultural characteristics of a country may, sometimes, offer the best (or a better) explanation of national patterns of punishment at any one time, with more general theories, or models, occasionally falling apart when applied to national experiences.¹²⁰

Both the defence and the prosecution have the right to appeal against decisions of the District Court and the Assize Court, without leave. The Attorney General acquired the right for appeal against an acquittal in 1998, by force of Law 54(I)/98, which amended the relative provisions of the Criminal Procedure Law, Cap 155.

Briefly, following the steps of a criminal case, the prosecution starts with the filing of a charge at the Registrar of the appropriate District Court, if the case concerns a summary offence. The case is then placed by the Registrar before the judge for approval of the charge, and is subsequently fixed for first appearance before the court. In the case of an offence triable by the Assize Court, after the

¹¹⁹[1992] 2 CLR 51, 57.

¹²⁰M Tonry, *Thinking about Punishment* (Pioneers in Contemporary Criminology, Ashgate Publishers, Aldershot 2009) 23.

filing of the charge, a District Court Judge may carry out a preliminary inquiry and commit the defendant for trial before the Assize Court, on a particular date. Depending on the offence and the surrounding circumstances of the case, the judge may order that the defendant remains in custody until the hearing of the case or its completion. The Attorney General, almost invariably, dispenses with the holding of a preliminary inquiry in writing, and provides the defendant with the substance of the evidence of each prosecution witness. The prosecution must prove its case against the defendant beyond reasonable doubt. Upon conviction, the court proceeds to the sentencing stage. If the conviction results from a full hearing, then the prosecution refers to facts strictly relevant to the issue of sentencing and not at variance with the court's findings, mentioning, in addition, any subsisting previous convictions, which the defendant is called to admit or deny accordingly. If the defendant does not admit a previous conviction, the prosecution has the burden of proving it. Upon request by the defendant, the consent of the prosecution, and the approval of the Court, he may ask that other pending offences or criminal cases are placed before the Court to be taken into consideration during sentencing. If the Court is minded to impose a sentence of imprisonment, then, as a matter of practice, it orders a social investigation report so as to have a fuller picture of the defendant's personal circumstances and other pertinent information. This is particularly helpful and perhaps fairer to the defendant, particularly if he is unrepresented. The preparation of a social investigation report is imperative when the defendant is a minor, a young or elderly person. The value of the social investigation report is, regrettably, very often small because it is commonly very synoptic and incomplete, mainly because of the fact that the social workers who

undertake to prepare it are overworked and overloaded with similar and other departmental tasks, and therefore unable to dispense of their duties before the Court in a satisfactory manner. The defendant (or his advocate) can admit or refute the factual basis presented before the Court as forming the basis of his pending sentence. In such cases, the Court can order a ‘*Newton*’¹²¹ type sentencing hearing¹²² (akin to the identically named procedure in England,¹²³ and the proof in mitigation procedure in Scotland),¹²⁴ and this applies, similarly, where the prosecution denies substantial factual allegations of the defendant during mitigation, in which case a reverse ‘*Newton*’ type of hearing takes place.¹²⁵ During the speech in mitigation, the defendant has the opportunity to present before the Court any arguments that could feasibly lead to the imposition of the most lenient possible sentence under the circumstances. Punishment, upon reasoned pronouncement, must take effect immediately, and there is no jurisdiction to pass sentence in futuro. In reaching its decision, the Court has usually no statutory restrictions or guidance other than the statutory maximum sentence for the offence under consideration. The offences of premeditated murder and high treason are mandatorily punished with life imprisonment. The death penalty was abolished in 1983, by virtue of Law 86/83. When the defendant is guilty on several counts, and the component parts of the heavier offence give rise to offences of lesser gravity,

¹²¹See, *Newton* (1979) 1 Cr App R (S) 252.

¹²²For the procedure as followed in Cyprus, see, *Vryoni v The Police* [1986] 2 CLR 102, 105-108. See also, Loizou and Pikis, *Criminal Procedure in Cyprus* (n 118) 86.

¹²³Hooper, Lord Justice and D Ormerod (eds), *Blackstone’s Criminal Practice 2010* (OUP, Oxford 2009) D19.8.

¹²⁴See, A V Sheehan and D J Dickson, *Criminal Procedure* (Scottish Criminal Law and Practice Series, 2nd edn, LexisNexis, Edinburgh 2003) 266.

¹²⁵See, for example, *Constantinou v The Police* [2005] 2 CLR 282, 293. For the position in Scotland, and an interesting analysis of pertinent Scottish case law, see, R M White, ‘What Happens After a Guilty Plea? A Gap in the Study of Criminal Procedure’ 1997 JR 465.

there must be sanctioning only for the heavier offence. One only imposes the maximum punishment provided by law, in circumstances of exceptional gravity, where all hope for reforming the offender and protecting society has been lost.

There is no power to impose an extended sentence based on the bad record of the offender to protect society from the menace posed by his repeated criminal conduct. Previous convictions may justify the withholding of leniency to the offender, but cannot lead to a longer sentence than the gravity of the facts of the case warrants, for to do so, would be tantamount to punishing the defendant twice for past misdeeds. In determining the appropriate sentence¹²⁶ and measuring its extent, the court has regard to a wide variety of factors, always judging each case according to its own facts and circumstances. While there is no set ranking of punishment sanctions in the Criminal Code, Cap 154, non-custodial options are largely considered less severe than custodial options, although, as research suggests, this may not necessarily be the view of offenders.¹²⁷

3.4 Law Reporting in Cyprus

In Cyprus, there is no systematic manner of publication of sentencing decisions given by District Court judges, apart from the distribution of these judgments to the parties concerned, and without usually becoming readily (if at

¹²⁶See Section 26 of the Criminal Code, Cap 154, which enumerates the principal modes of punishment in Cyprus. These are life imprisonment, fine and compensation, binding over to keep the peace and be of good behaviour or to come up for judgment, supervision, and community service orders. Based on other criminal statutory provisions, a court may discharge a defendant either conditionally or absolutely and in the case of young offenders, it may impose a probation order or commit the offender to the care of a relative or other fit person, issue various disqualification, forfeiture, and demolition orders.

¹²⁷See P Wood and H Grasmick, 'Toward the Development of Punishment Equivalencies: Male and Female Inmates Rate the Severity of Alternative Sanctions Compared to Prison' (1999) 16 JQ 19, reporting on a survey of 415 offenders in the US, and finding that prisoners do not necessarily rate non-custodial options as less punitive than imprisonment, and that the reality of perceptions of severity is more complex than had previously been assumed.

all), available to anybody else, even to the judges. Only occasionally do these judgments circulate among judges serving in the same District Court or Assize Court, and this only on their initiative, but this constitutes the exception rather than the rule. The annual reporting of sentencing decisions is limited only to the judgments of the Supreme Court, which are selectively published yearly in the Greek language in the second volume of the Cyprus Law Reports, and circulate monthly, before publication, to all Cypriot judges through the Chief Registrar of the Supreme Court, for purposes of speedier and prompter reference. The preparation of these reports in bound volumes usually takes approximately two years to complete. These judgments often limit their content to the absolute basic facts and legal principles necessary to dispose of the issues on appeal, and almost never expand on wider sentencing or penological issues. The Supreme Court does not issue guideline sentencing judgments or any other comparative directions to judges, as this, it is thought, could be perceived as restricting judicial discretion and independence.

3.5 The Criminal Statistical Portrait of the Cypriot Society

According to the criminal statistics for 2009,¹²⁸ in that year (not being statistically dissimilar from preceding years), crime in the island occurred mostly in the big urban centres at a percentage of 78% of the total offences committed nationwide, with Limassol being in the lead accounting for the 27.7%, and followed by Nicosia with 23.7%. Among rural areas, the incidence of crime was higher in the non-occupied (by Turkey) part of Famagusta, and Paphos, followed

¹²⁸Cyprus Statistical Service, *Criminal Statistics 2009* (Government Printing Office, Nicosia 2009).

by Larnaca. As far as serious criminal offences¹²⁹ are concerned, 7,648 of them were reported to the police. Of these, 0.43% were classified as no case, with no criminal offence having been really committed, 29.3% were undetected, 21.7% were cleared up, and 48.5% were still open cases at the end of the year. The average time taken between the commission of the offence and disposal of a case was 12.9 months, ranging between 6.8 months on average for undetected cases, and 20.3, for those tried. The detection rate was estimated at 46.2%, covering detected cases and pending cases at the end of the year. The lowest detection rate was 16.4%, and concerned cases of malicious damage to property including with explosives. Offences against property formed the largest group of offences accounting for 63.1%, of serious offences, followed by offences relating to forgery, coining, and personation with 17.4%, and offences injurious to the public in general with 4.5%. A large proportion of these offences i.e. 31.1%, were committed in offices, shops, and factories, 32.2% in residential places, and 10.1% in streets and open spaces. The rest concerned recreation places, churches, schools, motor vehicles and other places. Offences of violence involving victims, whether these were offences against the person in general or sexual offences, were examined separately. In 2009, there were 282 cases and 335 victims. Of these, 70 cases (24.8%) were sexual offences with 73 victims, and 212 cases (75.2%) offences against the person involving 262 victims. Of the sexual offences, 50%

¹²⁹ According to the Cyprus Statistical Service, for the purposes of the statistical analysis under discussion, the term 'serious offences' is deemed to cover '...all serious offences reported to the police...' and includes most offences against public order, against the administration of lawful authority, offences injurious to the public in general, sexual offences, offences against the person, offences against property, malicious damage to property, forgery, coining, counterfeiting and other similar offences and personation, offences against the security of civil aviation, as well as and other miscellaneous offences such as conspiracies, incitements to commit an offence, and offences deriving from violations of the narcotic drugs law, the currency law, and the firearms and explosives law.

were cases of rape, 12.9% were defilements of girls between 13-16 years of age, 4.3% were unnatural offences, 12.9% were cases of abduction, 15.7% were cases of sexual exploitation of children, 2.9% were cases of domestic rape, and 1.4% were cases of a domestic defilement of a girl under the age of 13 years. In the cases of rape 10% of the victims were Cypriots, 20% were tourists, and another 20% were foreign residents. Of the offences against the person 5.7% were cases of murder, manslaughter, or killing on provocation involving 17 victims, and 5.7% were cases of attempted murder involving 19 victims. Of the victims, 67.1% were Cypriots and 32.8% foreign nationals (of which 65.1% were residents and 34.9% were tourists). A variety of weapons were used in the offences against the person. In 82.1% of these cases only physical force was used with no weapon, in 9.0% firearms, in 2.4% explosives, in 18.4% sharp instruments, in 1.4% noxious substances, in 0.94% verbal threats, and in 3.8% blunt instruments. There were 507 cases of drugs, of which 1.4% pertained to mere drug use. The types of drugs encountered were mainly of flowering tops and leaves of cannabis (61%), cannabis resin (9.5%), and cannabis plants cultivation (3.6%). Also reported were cases of possession and trafficking of hard drugs (Class A Drugs), such as heroin (21.9%), cocaine (9.9%) and ecstasy MDMA (7.3%). A total of 2,007 adults (that is, persons over 14 years old), of which 90.8% were males and 9.2% were females, were proceeded against for serious offences. Of these, 11.3% were kept in custody either before being charged or while awaiting trial for a median time of 6 days, and 13.5% entered into bail when charged. Of the persons tried, 60.2% were legally represented. When called upon to plead, the vast majority (87.5%) pleaded guilty, and only 12.5%, pleaded not guilty. The share of women to the serious crime was

relatively lower compared to men. Of the total number of women offenders (184), 69.6% were convicted, accounting for 9.1% of the total convictions for serious offences. The median age of offenders convicted was calculated at 30.0 for women, and 26.0 for men. The main offences committed by women were offences against property and offences of forgery and personation. Of the male offenders, 30.8% were married and 54.7% were single. As regards women, 35.2% were married and 32.8% were single. The percentage of unemployed among offenders was far above the corresponding percentage of unemployed persons in the economically active population as a whole. Of the economically active offenders, 34.9% were unemployed. Of the total convictions for serious offences 28.8% were committed by males, and 44.5% by females, whereas 30.2% by foreign nationals. Of the 27.8% of the persons convicted for offences against property, 26.0% were convicted under the Narcotic Drugs Law, whereas 61% of those convicted for forgery, coining and personation, were foreign nationals. Of the 1,406 persons convicted of serious offences, 73.8% were first time offenders while the remaining 26.2% had at least one previous conviction, and 37.4% of them at least one previous custodial sentence. Some of the recidivists had started their criminal careers at a very young age. Of these, 5.7% had been convicted for their first offence as juveniles below the age of 16, 48% at the age of 16-20, and 22.0%, at the age of 21-24. On the basis of the adults convicted between 1976-2009, it is made clear that recidivists do not necessarily concentrate on the same type of offences. Of those having a criminal record, 3.5% had previous similar convictions, 57.7% had been convicted of different offences, and 38.8% were convicted of offences some of which were similar and some different. The total

number of juveniles involved in the commission of offences was 21.3% (300), of which 97.7% were boys and 2.3% were girls. The majority of offences committed were those against property (47.7%), whereas offences against the public order accounted for 18.3%, malicious damage to property 18.0%, and offences against the person 10.7%. Of the juvenile offenders, 58.0% were 15 years old, 23.7% were 14 years old, and 13.3% were 13 years old. The remaining 5.0% was in the age group of 10-12 years of age.¹³⁰Of these offenders, 71.7% were living in urban or greater urban areas. About 88.3% of the juveniles were living with both their parents, 4.3% with one of their parents, usually the mother, and only few had other living arrangements. Of the 300 juvenile offenders mentioned, 8.3% were of foreign nationality, 17.3% had adult accomplices, 61.3% had juvenile accomplices, and 21.0% had no accomplices, whereas 99.7% were proceeded against, and 87.7% were convicted; of those, 16.8% admitted having committed additional offences, which were taken into consideration by the court in passing sentence.¹³¹

According to the unpublished judicial statistics kept by the District Courts and the Assize Courts, in 2009 there were 25,322 fresh cases filed, while the number of pending cases was 25,711. Since 1996 (the earliest year for which there are judicial statistics available for the District Courts and the Assize Courts), the total number of criminal cases filed in these courts in 2009 was below the yearly average of 34,000, and the same applied for the pending cases compared to the

¹³⁰In considering the statistical information on juveniles, the data after the 24th of February 2006 are affected by the fact that the age of criminal responsibility was raised from 10 to 14 years by virtue of an amendment of section 14 of the Criminal Code, Cap 154.

¹³¹Criminal statistics must, though, be viewed with caution as they are (usually) at variance with the actual incidence of crime: See, A Kapardis, 'Crime in Cyprus' (2004) 8 *Israel Stud Criminology* 151, 159.

yearly average of 15,000. Every year, approximately 40% of all fresh and pending criminal cases are disposed of. A total of 58,538 offenders were convicted. Of those, 80.6% were males, and 19.4% females. The bulk of offences were motoring offences accounting for 46.1% of males convicted, and 52.5% of females, and regulatory offences, which accounted for 31.9% of males and 35.2% of females convicted. The most common offences, excluding motoring and regulatory offences, were offences against property, of which 2.9% of the male offenders and 1.6% of the female offenders were convicted, and offences against the person of which 2.2% of the male offenders and 0.9% of the female offenders were convicted. Referring to miscellaneous offences, 14% males and 8.8% females were convicted. The most commonly used sentence was the imposition of a fine, which occurred in 95.6% of convictions. About 0.7% of the defendants were bound over, 0.6% were given suspended sentences of imprisonment, and 2% were sentenced to imprisonment. Absolute and conditional discharge accounted for 0.9% of convictions. Fines were mostly imposed for motoring and regulatory offences though they have been used for all groups of offences. Probation orders have been mainly used for offences against property. The use of binding over covered all groups of offences. Similarly, suspended sentences of imprisonment and immediate imprisonment were used over the entire range of offences. There are no detailed or complete records kept by the Supreme Court with reference to appeals disposed of, or pending, before the year 2000. What can be deduced from the available records is that every year there are on average 24 criminal appeals filed, and 23 appeals disposed of. The percentage of those appeals filed against conviction and/or sentence is not known. Furthermore, in 2009, receptions of

convicted prisoners to the Central Prison amounted to 1,279 males and 106 females. Of these, only 80.7% of males and 6.6% of females were convicted of criminal offences by the ordinary criminal courts and military courts. The rest were convicted mainly for offences against the military criminal code or were non-criminal prisoners such as fine defaulters. Most sentences of imprisonment were shorter than 6 months giving a median length of sentence of 4.4 months. The median length of sentences imposed on penal offenders was 3.1 months. The actual time spent in prison was generally less than the sentence imposed, being reduced to a large extent by the use of remission. Thus the medium length of stay in prison for offenders, computed from the releases, was 1.9 months. The corresponding length of stay of penal offenders was 2.2 months. Out of the 1,385 persons imprisoned, 20.4% had been previously given non-custodial sentences, 17.0% had at least served previously one sentence of imprisonment, and 62.5% had no previous convictions. Of the 240 defendants that had served a previous custodial sentence, 80.8% had been convicted during the five years prior to their last reception into prison, and 19.2% had been convicted earlier.

The criminal statistics provided above provide a backdrop against which to consider sentencing. What broadly emanates from these statistics (as well as from almost half-a-century's criminal sentencing appeals as presented in Chapter 3.6 below) is that crime, despite the limitations of official criminal statistics (e.g., the dark figure of crime), is one of the major social issues confronting contemporary Cypriot society.¹³²

¹³²Rai Consultants Public Ltd, Cyprobarometer 2009, <http://www.rai.com.cy/main/data/Cyprobarometer2009.pdf/> accessed 5 August 2010.

3.6 A Panorama of Forty-Eight Years of Criminal Sentencing Appeals (1960-2008)

As noted in Chapter 1, the researcher analysed for the purposes of the thesis all 891 appeals against sentence decided by the Supreme Court between 1960-2008, as published in the CLR. The data collected were subjected to a conventional quantitative and qualitative evaluation by the researcher. The outlining of some of the results directly below, aims towards offering a broad impression of the judicial approach on sentencing and mitigation issues as comprehended and applied by the highest court in the island.

Between 1960 and 2008, the Supreme Court decided on 891 appeals against sentence, of which 530 (59.5%) were appeals against decisions of the District Court and 361(40.5%) of the Assize Court. From these, 23.1% were allowed as the sentence imposed at first instance was considered as manifestly excessive, 12.3% were allowed on the ground that the first instance sentence was considered as manifestly inadequate, 3.3% were allowed because the sentence was considered as wrong in principle due to a misdirection in law or fact, or owing to an overlook of some material factor and the introduction of extraneous matters in the decision, whereas 61.3% were dismissed as the sentence was deemed as neither manifestly excessive nor manifestly inadequate. Of the 891 appeals, 54.2% concerned violent offences, 15.3% offences against property, 11.1% offences against public order and the administration of lawful authority, 14,9% were drug related offences, 4.8% were offences against public health and safety, and another 3.3% were immigration law offences, while 5.8% were related to various road traffic violations, and 1.7% to an array of other statutory offences. The defendants

filed 89.3% of the appeals while the prosecution 20.5%. From those appeals, 79.5% concerned pleas of guilty and 20.5% pleas of not guilty. From the total of 984 appellants (in some appeals there were more than one appellant) 16.2% were aliens, 1.4% Turkish-Cypriots while the rest were Greek-Cypriots. As regards gender, 86.7% of the defendants in all the appeals were male and 4.0% female. In relation to the age of majority of the defendants, 9.0% were between 20 and 25, whereas 3.9% were between 17 and 19, and 0.51% between 12 and 16 years old. Another 4.1% were over 50, with 0.30% being over 71 years old. The remaining 17.8% were between 26 and 49 years of age. In 15.5% of the total appeals, the defendants were not legally represented before the Supreme Court, by their free choice. The majority of the imprisonment sentences, concerned terms ranging from 1-2 years. Of the total number of appeals against sentences of imprisonment (742), 3.0% concerned appeals against sentences over 10 years of imprisonment, while 0.67% were appeals against life sentences, while another 3.8% concerned suspended terms of imprisonment. The rest were appeals against the imposition of fines or criminal orders ranging from borstal and supervision to sealing, disqualification, and demolition orders. In 12.1% of the imprisonment cases, the trial court took into consideration other outstanding criminal offences against the defendant, whereas in 14.0% it imposed concurrent terms of imprisonment, and in 2.2% consecutive terms, while in 1.1% of the cases the court activated suspended sentences of imprisonment against the offender. From an overall of 708 cases where the defendant pleaded guilty, 96.6% concerned instances where the plea was entered either on the first or the second appearance before the court while in the remaining 3.4% of the cases the defendants entered their plea subsequently. The

Supreme Court evaluated the guilty plea in all of the cases as a mitigating factor, though in correspondingly diverse degrees, while it characterised 61.2% of the appeals as serious or very serious on the basis of their surrounding facts and circumstances and the statutory maxima provided by law while 5.8% of them were considered as extremely serious. The remaining cases were thought to be of minor or relatively serious importance. In 99.8% of the appeals, the Supreme Court made specific or implicit reference to the maximum sentence provided by the applicable legislation as a relevant factor in the determination of the seriousness of the case and the offence. In 22.2% of the cases (198 in all) the offender had prior convictions for offences committed before the new offence. In 56.1% of these cases the number of prior convictions ranged between 1 and 10. In 0.67% of the cases the Supreme Court referred to the long lapse of time from the commission of the offence until the trial court's sentence or the appeal, for reasons attributed to the defendant. Consequently, this factor was not accepted as mitigating. In 3.3% of the cases, the Supreme Court found that the delay was attributed to the prosecution and thus accepted it as a mitigating circumstance. In all of the appeals the court made specific or implicit reference to the particular circumstances of the offence or to other circumstances not relevant to the personal circumstances of the defendant as pertinent to the determination of sentence, while in 49.6% of the cases (442 in total) it took into account the personal circumstances of the defendant. In 3.2% of these cases, the Supreme Court referred to circumstances considered as exceptional, and accepted them as mitigating or pertinent to the determination of sentence. In 1.7% of the cases, the Supreme Court accepted as a mitigating factor the victim's forgiveness of the defendant's criminal behaviour, in

14.1% his confession to the police, and in 13.6% of the cases his cooperation with them. These mitigating factors were not necessarily mentioned in isolation to the other factors, and not all were inevitably referred to in different cases. This applies also to all other similar mentions to mitigating, aggravating or other factors conceivably relevant to the determination of sentence, or to the theoretical background used by the court during its reasoning. In 1.0% of the cases the court accepted as a mitigating factor the disclosure to the police of the defendant's accomplices. In 0.34% of the cases the court accepted the voluntarily surrender of the defendant to the police as mitigating. In 1.3% of the cases the court considered the major role of the defendant in the commission or planning of the offence as an aggravating factor, whereas in another 1.2% , his secondary role as an aspect attenuating the seriousness of the circumstances of the offence. In 0.79% of the cases the court accepted as mitigating the fact that an accomplice of the defendant was not similarly prosecuted for the same or other similar offence. In 0.79% of the cases it accepted as an aggravating factor the fact that the defendant escaped from legal custody pending police investigation or trial, and committed other offences. In 0.67% of the cases the court credited the defendant as acting under duress in the commission of the offence while in 1.3% with the fact that he had suffered an injury as a result of his illegal act. In 3.0% of the cases the court acknowledged as a mitigating factor the defendant's addiction, and in 2.5% the fact that he had undergone or was undergoing during the criminal process rehabilitation therapy. In 3.5% of the cases the good character of the defendant was acknowledged as mitigating, as happened in 0.56% of the cases with reference to his ignorance of the law, and in 0.22%, to his mistake in connection to the tolerability of his illegal

action. Intoxication was accepted as mitigating in 1.5% of the cases. The fact that the defendant was a prisoner of war having been captured and tortured by the Turkish troops during the invasion of 1974 was accepted as mitigating in 0.22% of the cases. Similarly, in 1.7% of the cases the court accepted as a significant sentencing aspect the social unrest that prevailed in Cyprus as a result of the inter-communal conflict between Greek-Cypriots and Turkish-Cypriots during the period between 1963 and 1970, and the civil strife amongst Greek-Cypriots between 1970 and 1974, which led to the 1974 coup. Likewise, in 2.0% of the cases the court accepted as a relevant factor the social unrest, which followed the Turkish invasion. In 4.4% of the cases the defendant's change of circumstances since the commission of the offence and his sentencing by the trial court was also accepted as mitigating, as was his meritorious conduct in 1.0% of the cases, and his personal tragedy in 0.90% of the cases. In 1.8% of the cases the defendant's provocation by the victim was established as extenuating, but in other 0.67% of the cases it was not, and in the same way in 7.3% of the cases the fact that the defendant showed remorse for his actions counted as mitigating while in other 1.6% it was not. In 7.4% of the cases the defendant compensated the victim partially or fully, and that counted as a mitigating factor. In 4.7% of the cases the defendant's physical illness was also received as mitigating. Additionally, in 8.1% the defendant's psychological problems were deemed as mitigating. Furthermore, in 11.1% of the cases the defendant's youth, in 1.1% his old age, and in 1.2% the gap in his criminal record were accepted as mitigating factors, as in 1.5% of the cases his stress resulting from the criminal prosecution and its subsistence pending completion. In 1.8% of the cases the defendant's financial problems, in 8.1% the

potential adverse effects of his prospective imprisonment on his family, and in 0.22% the withdrawal of his appeal against conviction during the hearing of the appeal, were also accepted as mitigating. In 1.2% of the cases the fact that the defendant was pursuing or was about to pursue higher or other studies, in 0.67% his low intelligence, and in 0.79% of the cases his immaturity, were also deemed as mitigating. In 2.9% of the cases the defendant's extrajudicial punishment or the prospect thereof had a decreasing effect in his sentence, as did his reconciliation with the victim in 0.90% of the cases. In 3.7% of the cases the court viewed the equality of treatment between the defendant and his co-defendants or other accomplices as mitigating or pertinent to the determination of sentence whereas in 0.56% the defendant's entrapment by the police was acknowledged as mitigating, as opposed to 0.11% that it was not so accepted. In 6.5% of the cases the defendant's planning of the offence, in 0.90% his professionalism in its execution, and in 5.5% his obtaining financial gain from his illegal act was perceived as aggravating, as was the use of a weapon (firearm or any other object) during the commission of the offence in 3.3% of the cases. Aggravating were also the defendant's criminal actions deriving from breach of trust shown to him by the victim in 2.1% of the cases. The degree of violence during the commission of the offence in 4.3% of the cases, the commission of the offence as a group in 4.6% , the value of the property stolen or destroyed in 14.5% of the cases, and the amount of narcotics in the 133 drug related offences, were also identified as factors with variable effect on sentence. The prevalence of the offence was mentioned in 15.6% of the cases as relevant in sentencing and occasionally as aggravating. Offending while on bail or on a suspended sentence of imprisonment was deemed

aggravating in 1.1% of the cases, as was the fact that the victim was vulnerable to the defendant's actions in 1.7%. Likewise, aggravating was the fact that in 0.90% of the cases the defendant (or his advocate) cross-examined the victim of a sexual offence to an unacceptable degree. In 11.4% of the cases the court referred to the individualisation as a principle of sentencing, and in the same way, in 1.3% to proportionality. In 3.7% of the cases there was reference to retribution as a sentencing purpose. In 8.2% of the cases there was reference to deterrence, in another 15.0% (which concerned different cases) to general deterrence, in 3.7% to specific deterrence, in 1.5% to incapacitation, in 4.6% to rehabilitation, in 5.5% to denunciation, and in 19.3% to social protection and public order. In 0.56% of the cases there was reference by the court of approaching the defendant's case with sympathy and in 0.11% with compassion. In 3.1% of the cases there was reference to leniency, in 1.2% to *epieikeia* (equity), and in 1.1% to mercy.

The results of the Supreme Court cases analysis presented above indicate (like in the case of the criminal police and judicial statistics dealt with in Chapter 3.5):

(a) The continuum within which the Supreme Court deliberates and decides on substantive issues of sentencing (b) That the said court is trying to administer sentencing justice as effectively as possible within the parameters of its statutory powers (c) The Supreme Court, has mapped over a period of 48 years the sentencing spectrum which, in turn, can be said to epitomise sentencing justice in Cyprus, identifying at the same time its primary concerns, aims, purposes and objectives within the island's prevailing cultural realities.

3.7 Conclusions

The purpose of the present chapter was to provide a succinct impression of Cyprus's legal and criminal justice system and its formation and development so that the acquired picture could form a point of reference in the subsequent attempt to comprehend and process the judges' culture, role, impact and attitudes in their punishment and mercy. It has described, between other things, the origins of the contemporary legal and criminal justice system in Cyprus and the role of the judiciary in politically turbulent times. It provided an overview of the organisation of the criminal courts and their jurisdiction as well as a synopsis of the role and powers of the Attorney General and Deputy Attorney General of the Republic, and the prison system. Furthermore, it outlined the sentencing hearing, explained the parameters of law reporting in Cyprus, and gave an empirical and statistical overview of societal criminality in the island, and a summation of the sentencing practice as derived by the content of the totality of the sentencing appeals against sentence decided by the Supreme Court between 1960 and 2008.

The next chapter will examine the question of punishment justification, the issue of judicial discretion and separation of powers, the explanation of the practice of punishment through the spectrum of external and internal criticism, and the interrelationship between punishment theory and sentencing practice. It will furthermore prepare the basis for presenting, in a micrographic form, the realities of the Cypriot judicial sentencing practice on the one hand, and the supposed parallel reality of the academic and theoretical debate on the morality and justification of the said practice, on the other. This analysis will assist the reader in

better comprehending and capturing important elements of judicial punishment and mercy.

CHAPTER 4: THE QUESTION OF PUNISHMENT'S JUSTIFICATION

This chapter examines the question of punishment's justification, the issue of judicial discretion and separation of powers, the explanation of the practice of punishment through the spectrum of external and internal criticism, and the interrelationship between punishment theory and sentencing practice. One of its objectives is to prepare the basis for presenting the realities of the Cypriot judicial sentencing practice on the one hand, and the supposed parallel reality of the academic and theoretical debate on the morality and justification of the said practice, on the other. This analysis will hopefully assist in the better comprehending and capturing of important elements and parameters of judicial punishment and sentencing. The intention here will not be to resolve the normative debate that surrounds these issues, if one indeed could reasonably assert that such a resolution could have been feasible in any event. Such a task falls completely outside the purposes of the study due to its nature and aims, as already described. Rather, the presentation and analysis of some of the parameters of the theoretical debate will be pursued only to the extent relating to the objectives of the study and the formulation of the required theoretical setting for their advancement.

4.1 Immanent and Radical Criticism as an Explanatory Tool of Punishment Practice

The study uses as its main background the theories of retributivism and utilitarianism. The reasons behind the choice have already been noted in Chapter 1. Explaining and justifying a punishment practice requires an analogous method

of observation and critique, a tool that would assist in approaching the matter from the necessary angle of analysis. One such tool is the methodology of immanent and radical criticism. The sense of this categorisation is better comprehended if viewed through the distinction between the justification of the practice of punishment and the justification of a particular action falling under it. Indeed, one's conceptions of the justification of punishment can help shape his understanding of the justification of the practice. No matter how much it has become an academic truism to mention, the mere fact of an existence of a practice is not in itself a justification for that practice, and indeed, justifying a practice such as legal punishment, is different from justifying an action within the practice. In order to justify it, one needs to appeal to some standard of what is right, proper or just. When one justifies an action within a practice, one refers to the rules of the practice.¹³³ It has been suggested by Tunick,¹³⁴ and elaborated by Keijser,¹³⁵ that a theorist of legal punishment is either an immanent or a radical critic of the practice. Immanent critics of punishment accept the institution of legal punishment, seek a sound moral justification for it, and use this as a critical standard against which to test the actual practice of punishment. They might reject particular justifications that are given within the practice but accept that, in principle, actions within the practice can be justified, with them assuming their immanent role inside the practice. They believe that we can persevere within our ideals even in the face of a non-ideal practice if we bring the actual practice back to line with its ideals or perhaps with an adjusted version. There is however a

¹³³J Rawls, 'Two Concepts of Rules' (1955) 64(1) *Phil Rev* 3.

¹³⁴Tunick, *Punishment* (n 30) 18.

¹³⁵Keijser, *Punishment and Purpose* (n 8) 8-9.

necessary caution to immanent criticism that needs to be exercised. To think within a practice is to have one's very perception and sense of possible and appropriate action issue 'naturally' (without further reflection), from one's position as a deeply situated agent. Someone who looks with practice-informed eyes sees a field already organised in terms of clearly defined obligations, self-evidently authorised procedures, and relevant pieces of evidence. To be an immanent theoretician, one must think with the practice. Self-consciously wielding some extrapolated model of its working is to be ever calculating just what one's obligations are, what procedures are indeed legitimate, what evidence is in fact evidence, and so on.¹³⁶The radical critics, on the other hand, question the existential foundation of the institution of legal punishment. In effect, they deny that there can be sufficient justification for any action that is part of the practice, concluding that the whole practice, root and branch, serves no good purpose, or perhaps a maligned one. Their purpose is to go beyond explication and rationalisation, and interrogate the deeper political, historical, and philosophical logic that underlies the power of law.¹³⁷Their theories are explanatory in that they attempt to explain how it is that punishment, in its current form, or in general, has evolved as a social practice. They do not give an answer as to the definitional nature of punishment. Neither do they focus, because of the character of their critique, on approaches or techniques for achieving crime prevention, justice, or social harmony.¹³⁸Nonetheless, radical criticism challenges one's commitment to

¹³⁶Fish, *Doing What Comes Naturally* (n 5) 386-387.

¹³⁷N Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5 Soc & Legal Stud 131.

¹³⁸A Ashworth, 'External Critiques of Sentencing Theory' in A Von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (2nd edn Hart Publishing, Oxford 1998) 362.

the practice,¹³⁹ and this is important since it strengthens one's sense of purpose and direction. Such reflections are positive, as they activate the primal need to question and rationalise certain attributes of human behaviour pertaining to the issue of punishment. They also stimulate the observer to recognise the possibility of contextualising and interpreting the development of the various theories of punishment within a wider socio-historical perspective attributing this growth to the inextricable relation between legal individualism, social individuality, and social control.¹⁴⁰ However, for our purposes, the premise and direction of this external theory is detached from the practicalities of endeavouring to criticise and improve the practice, and this makes for disability. Indeed, when critical distance stretches into infinity, the critical enterprise collapses.¹⁴¹

4.2 The Disconcerting Need for Legal Punishment

Every human society, from the most democratic to the most autocratic, uses some form of formal or informal punishment.¹⁴² Societies, history and observation seem to suggest, need to *punish* for reasons that may range from the purely symbolic to the instrumentally required, for limiting the degree to which crime interferes in the day-to-day conduct of the peoples' lives, with the need to *justify* the sanctioning, to reflect not only history but moral logic as well.¹⁴³

¹³⁹Tunick, *Punishment* (n 30) 65.

¹⁴⁰A Norrie, *Law, Ideology and Punishment* (Kluwer Publishing, Dordrecht 1991) 202.

¹⁴¹M Walzer, *The Company of Critics* (Basic Books, New York 1988) 207.

¹⁴²W C Hamblet, 'The Paradox of Punishment' in A Sarat (ed), *Crime and Punishment: Perspectives from the Humanities* (Studies in Law, Politics, and Society, Vol 37, Elsevier, Amsterdam 2005) 99.

¹⁴³A Norrie, *Crime, Reason and History* (Law in Context, 2nd edn Butterworths, London 2001) 153.

Legal punishment is a polymorphous concept and a most disconcerting social practice,¹⁴⁴awakening conflicting and primeval emotions.¹⁴⁵It can mean different things to different people, depending on their perception (pragmatic, philosophical, atheoretical, or uninformed) and, to some extent, their level of subscription to the various theories of punishment and their justification. It is the medium through which the state punishes legally by invoking its authority to inflict pain, deprivation or some other form of suffering on the offender,¹⁴⁶essentially (some argue), keeping its promise as made in the criminal code,¹⁴⁷or in order to fulfil its duty to denounce injustice.¹⁴⁸It is a form of obligation towards the citizen, which lies in the nature of the promise, given that the aim of the criminal code is, precisely, to protect his rights. The infringement of any penal provision is, thus, a sufficient and compelling reason (but not necessarily morally justified), for imposing the prescribed sanction.¹⁴⁹Some contend that punishment is a form of institutionalised revenge, and as a result, morally unacceptable.¹⁵⁰The criminal justice system delivers pain in all forms of punishment. Undeniably, they assert, the infliction of pain by the state through this system, is a process involving a number of discreet but mutually reinforcing stages: defining, classifying, broadcasting, disposing and punishing. These very processes can create social harms that bear little relationship to the original

¹⁴⁴E Pincoffs, *The Rationale of Legal Punishment* (Humanities Press, New York 1966) 1.

¹⁴⁵D Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon Press, Oxford 1990). Garland begins by noting that punishment has various 'dismaying' features and ends with reflections on what terms its 'tragic' dimension. See, also, R Lowie, *Primitive Society* (Boni and Liveright, New York 1925) 425.

¹⁴⁶A Flew, 'The Justification of Punishment' (1954) 29 *Philosophy* 291, 292.

¹⁴⁷W D Ross, *The Right and the Good* (Clarendon Press, Oxford 1930) 18.

¹⁴⁸T Metz, 'Censure Theory and Intuitions about Punishment' (2000) 19 *Law & Phil* 491, 493.

¹⁴⁹J D Mabbott, 'Punishment' (1939) 48 (190) *Mind* 152-167.

¹⁵⁰J L Mackie, 'Morality and Retributive Emotions' (1982) 1 *Crim Just Ethics* 3

offence, such as loss of employment, a home, family life, and ostracism from society.¹⁵¹ However, some say, in order to understand fully state punishment, and therefore to be in a position to accept or reject its moral milieu, it must be realised that punishment is something that happens in non-institutional contexts as well.¹⁵² Others see punishment as a cultural process, and then, as a mechanism of particular institutions, of which criminal law is but one.¹⁵³ There are, additionally, those who disagree with the morality of any degree of sanctioning because as they claim, legal punishment revengefully inflicts pain on other human beings.¹⁵⁴ On the other hand, there are others who maintain that the return of suffering for evil voluntarily done, is itself morally good.¹⁵⁵ The desire for revenge is innate to human nature;¹⁵⁶ after all, the reason God established exact justice in the Old Testament was to put a stop to uncontrolled blood feuds and tribal wars.¹⁵⁷ Western cultures have gone too far in seeking to de-legitimise this deep natural human desire for revenge.¹⁵⁸ To love your enemies may be morally beautiful but is humanly unrealistic. Vindictive impulse is natural and legitimate.¹⁵⁹ Vengeance

¹⁵¹P Hillyard and S Tombs (2004), 'Beyond Criminology?' in P Hillyard, C Pantazis, S Tombs, and D Gordon (eds), *Beyond Criminology: Taking Harm Seriously* (Fernwood Publishing, London 2004) 16.

¹⁵²L Zaibert, *Punishment and Retribution* (Law, Justice, and Power, Ashgate Publishers, Aldershot 2006) 98. See also, C Bennett, 'L Zaibert: Punishment and Retribution' (2010) 4 Crim L & Phil 105.

¹⁵³G Newman, *The Punishment Response* (2nd edn Transaction Publishers, New Brunswick, New Jersey 2008) 2-3.

¹⁵⁴On the association of punishment with pain, see, for example, H Packer, *The Limits of the Criminal Sanction* (Stanford University Press, Stanford 1968) 21.

¹⁵⁵H L A Hart and J Gardner, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edn OUP, Oxford 2008) 231.

¹⁵⁶T Govier, *Forgiveness and Revenge* (Routledge, London 2002) 13.

¹⁵⁷D Smarto, *Justice and Mercy: A Christian Solution to America's Correctional Crisis* (Tyndale House Publishers, Wheaton, Illinois 1987) 207.

¹⁵⁸P B Gersternfeld, *Hate Crimes: Causes, Controls, and Controversies* (2nd edn Sage Publications, London 2010) 67-68.

¹⁵⁹S Jacoby, *Wild Justice* (Harper and Row, New York 1983) 142.

may be primitive, but it is still the conceptual core of justice.¹⁶⁰ People naturally approve of the quest for and achievement of revenge. Most typical, decent, mentally healthy people have a kind of commonsense approval of some righteous hatred and revenge,¹⁶¹ even subscribing to the view that truly ‘... one must forgive one’s enemies - but not before they have been hanged.’¹⁶² Others think that being in an age of enlightenment and living in accordance with humanitarian principles, punishment is a regression to a past we have discarded and that is best to forget. They argue that punishment conflicts with these humanitarian principles and feel unease about the practice.¹⁶³ They are seeking new ways of going beyond traditional penal theory, by attempting to convert punishment in a process of amicable and universal restoration of the harm caused by the criminal act between offender and victim.¹⁶⁴ However, this perceived metamorphosis is not universally shared. Many are outraged, and driven by the desire for revenge for any injury suffered, real or fancied, and insist that criminals must suffer for their wrongs and be hurt the same way they harmed the victim.¹⁶⁵ Punishment, for them, is so deeply rooted as a societal requisite in a fundamentally violent¹⁶⁶ and bellicose¹⁶⁷ humankind, that they demand justification for its absence,¹⁶⁸ stressing,

¹⁶⁰R Solomon, *A Passion for Justice: Emotions and the Origins of the Social Contract* (Addison-Wesley, New York 1990) 42-43.

¹⁶¹J Murphy, ‘Getting Even: The Role of the Victim’ in J Murphy (ed), *Punishment and Rehabilitation* (3rd edn Wadsworth, Belmont, California 1995) 132-152.

¹⁶²Quoted in J Strachey (tr), Sigmund Freud, *Civilization and its Discontents* (W W Norton, New York 1961) 57.

¹⁶³W Kauffmann (tr), F Nietzsche, *On the Genealogy of Morals and Ecce Homo* (Vintage, Hollingdale, New York 1969).

¹⁶⁴M Findlay and R Henham, *Beyond Punishment: Achieving International Criminal Justice* (Palgrave Macmillan, London 2010) 178.

¹⁶⁵P N Marongiu and G Newman, *Vengeance: The Fight Against Injustice* (Rowman & Littlefield, Totowa, New Jersey 1987) 164.

¹⁶⁶S Glueck, *Crime and Justice* (Little, Brown and Company, Boston 1936) 1

¹⁶⁷Y Dinstein, *War, Aggression, and Self-Defence* (Grotius Publications, Cambridge 1988) 1.

at the same time, that there is nothing shameful for being revengeful in specific cases, thus underlying the need for solidarity within the group.¹⁶⁹ Others, see legal punishment as a morality play¹⁷⁰ heeding Nietzsche's classical 'Pharisees warning': 'Mistrust all in whom the impulse to punish is powerful... Mistrust all who talk much of their justice! Verily, their souls lack more than honey. And when they call themselves the good and the just, do not forget that they would be Pharisees, if only they had worldly power.'¹⁷¹ Some, realising the cruelty of sanctions,¹⁷² but submissive to their necessity, seek more humane, parsimonious and merciful means of punishment.¹⁷³ Others, exasperated by those who overprotect the criminals, look for even stricter penalties.¹⁷⁴ Some others, conceivably convinced that harming another human being could never be just or beneficial in any way, try to persuade for the abolition of the practice.¹⁷⁵ Along similar lines, to others, punishment reflects a crisis of law and order, a crisis of legitimacy. Punishment, they say, is pure power with no authority, and it is the authority we lack not the power.¹⁷⁶ Punishment is not merely symptomatic of, but a reaction to, the aforementioned crisis. Marxists for example, argue that the state constructs threats

¹⁶⁸R Small, 'Ressentiment, Revenge and Punishment: Origins of the Nietzschean Critique' (1997) 9 *Utilitas* 39; J Elster, 'Norms and Revenge' (1990) 100 *Ethics* 862.

¹⁶⁹M Freeman and D Napier (eds), *Law and Anthropology* (Current Legal Issues, Vol 12, OUP, Oxford 2009) 153.

¹⁷⁰K Menninger, *The Crime of Punishment* (Viking Press, New York 1966) 153.

¹⁷¹As cited in W Kaufman (tr), *Nietzsche* (Random House, New York 1968) 374.

¹⁷²P Barrozo, 'Punishing Cruelly: Punishment, Cruelty, and Mercy (2008) 2 *Crim L & Phil* 67.

¹⁷³A Bailin, 'The Inhumanity of Mandatory Sentences' [2002] *Crim L R* 641.

¹⁷⁴S Brody and R Tarling, *Taking Offenders out of Circulation* (Home Office Research Study No 35 HMSO, London 1980).

¹⁷⁵D Rothman, 'Decarcerating Prisoners and Patients' in H Cross and A von Hirsch (eds), *Sentencing* (OUP, Oxford 1980); L Hulsman, 'The Abolitionist Case: Alternative Crime Policies' (1991) 25 *Israel L Rev* 681-709.

¹⁷⁶J Schaar, *Legitimacy in the Modern State* (Transaction Books, New Brunswick, New Jersey 1981) 281.

in order to legitimise an exercise of power¹⁷⁷ that in reality serves only to maintain existing unjust property relations.¹⁷⁸ Others support that punishment is an instrument of control by the governing class, but with a more visible role in safeguarding security and order for the community, hence fulfilling a political function, that is, an integral strand in the wide and complex tapestry of modern society.¹⁷⁹ Still, others state that in the political world where one sees crime through an amoral prism, those who wish to see a more humane criminal justice system must come to the debate with insights of moral philosophy. Mercy, they claim, carefully used to respect the retributive instincts of the electorate, will permit legislators to move away from long prison sentences to those that recapture a semblance of humaneness.¹⁸⁰

4.3 The Need for Punishment Justification

The paradoxical state of affairs in the field of punishment¹⁸¹ described above, requires a very strong justification if it is to escape the criticism of inconsistency, for instance, by demonstrating that the positive outcome of the practice outweighs its negative consequences.¹⁸² Preceding the decision on the mode and extent of the penalty there must be a rationalisation and justificatory

¹⁷⁷ E B Pashukanis, *Law and Marxism: A General Theory* (Ink Links, London 1978) 27.

¹⁷⁸ S Hall, C Crither, T Jefferson, J N Clarke, and B Roberts, *Policing the Crisis: Mugging, the State and Law and Order* (Macmillan Press, London 1978) 306.

¹⁷⁹ J Hostettler, *The Politics of Punishment* (Barry Rose Publishers Ltd, Chichester 1994) 194.

¹⁸⁰ R L Misner, 'A Strategy for Mercy' (2000) 41 Wm & Mary L R 1303, 1397.

¹⁸¹ Indeed, Stephen saw the history of punishment as the most curious part of the history of the criminal law: J F Stephen, *A History of the Common Law of England* (Macmillan Press, London 1883) 457.

¹⁸² F M Grombag, 'Of Crimes and Punishment' in G Bruisna, H Elffers, J Keijser, *Punishment, Places and Perpetrators: Developments in Criminology and Criminal Justice Research* (Willan Publishing, Cullompton, Devon 2004) 97.

basis of the punishment,¹⁸³ since (as already noted), the infliction of something to which a person objects is prima facie wrongful and morally problematic,¹⁸⁴ unless morally defended.¹⁸⁵ Even the very threat of legal punishment requires a justification because it constitutes a special form of suffering, often very acute, on those who, by the fear of punishment, frustrate their desires. As Duff thinks, and not unreasonably, a system of criminal law which aims to serve the common good, and which is to respect the autonomy of its citizens as forming an essential part of that good, can still be justified in imposing punishments on criminals, even though punishments involve hard treatment. If such punishments aim to persuade the criminal to respect his crime, and to accept his punishment as a penance, they can still respect their autonomy; they can be an appropriate way of pursuing the proper aims of the law.¹⁸⁶ Subsequent to a justification of the general practice of punishment, one needs to have consistent ideas on whom to punish and how to punish.¹⁸⁷ These issues form component parts of the philosophy and theory of punishment, and in fact, at a very general level, the philosophical discussion in the area of punishment is usually confined to the rationalisation of sanctions, while legal analysis focuses, primarily, on practical sentencing issues. It is a relatively precise observation for one to make that the system itself is often more

¹⁸³T Honderich, *Punishment: The Supposed Justifications Revisited* (Pluto Press, London 2006) 4-8.

¹⁸⁴R A Duff and D Garland, 'Thinking about Punishment' in Duff and Garland (eds), *A Reader on Punishment* (n 41) 2.

¹⁸⁵N Walker and N Padfield, *Sentencing Theory, Law and Practice* (2nd edn OUP, New York 2005) 110.

¹⁸⁶R A Duff, *Trials and Punishments* (Cambridge Studies in Philosophy, CUP, Cambridge 1991) 277.

¹⁸⁷H L A Hart, *Law, Liberty, and Morality* (OUP, Oxford 1963) 22.

preoccupied with vindictiveness than mercy,¹⁸⁸ although it is equally precise to assert, that historically,¹⁸⁹ as long as people have been thinking about punishment,¹⁹⁰ they have also been thinking about its reduction, mitigation, and mercy.¹⁹¹ This is true not only of the common law world,¹⁹² but also of the Far East,¹⁹³ and other jurisdictions.¹⁹⁴ This view has not remained within the narrow parameters of strict legal thinking, but extended through the more expressive and aesthetic field of literature too, thus helping people communicating their stance and emotions in a more unrestrained manner.¹⁹⁵ To this long lasting debate on the purposes and justification of punishment, there is simply no end. It is repetitive, and feeding itself from antitheses, clash, and an alluring diathesis for novelty on the part of some of its thinkers. As the thesis indicates, the Cypriot judges appear to abstain from this fusion. However, in order to have a proper perspective of the relationship between the theory and application of sentencing, and accordingly, between mercying and justice, it is important to view matters through the wider

¹⁸⁸H Buetow, *The Scabbardless Sword: Criminal Justice and the Quality of Mercy* (Associated Faculty Press, Frederick, Maryland 1982) 333.

¹⁸⁹T D Miethe and H Lu, *Punishment: A Comparative Historical Perspective* (CUP, Cambridge 2005).

¹⁹⁰For a good exposition of punishment attitudes and approach in ancient Greece, see for example, M M Mackenzie, *Plato on Punishment* (University of California Press, Berkeley 1981).

¹⁹¹This has diachronically been correlated, among other factors, to harsher judicial sentencing, and administrative stringency on pardons: See for example, K J Kesselring, *Mercy and Authority in the Tutor State* (Cambridge Studies in Early Modern History, CUP, Cambridge 2003) 72-73; A D Leipold, 'Why Are Federal Judges So Acquittal Prone?' (2005) 83 Wash U L Q 151, 201-205; R E Barkow, 'The Ascent of the Administrative State and the Demise of Mercy' (2008) 121 Harv L Rev 1332.

¹⁹²C Strange (ed), *Qualities of Mercy: Justice, Punishment, and Discretion* (UBC Press, Vancouver 1996). The book consists of a collection of essays dealing with the history of mercy and the remittance of punishments in the criminal law of the principal common law jurisdictions.

¹⁹³See for example, B E McKnight, *The Quality of Mercy: Amnesties and Traditional Chinese Justice* (The University Press of Hawaii, Honolulu 1981).

¹⁹⁴S Kadri, *The Trial: A History from Socrates to O J Simpson* (Harper Perennial, London 2005).

¹⁹⁵See for example, G C Macurdy, *The Quality of Mercy: The Gentler Virtues in Greek Literature* (Yale University Press, New Haven, Connecticut 1940); M C Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (CUP, Cambridge 1986); and P J Heald (ed), *Literature and Legal Problem Solving: Law and Literature as Ethical Discourse* (Carolina Academic Press, Durham, North Carolina 1998).

spectrum of the interrelationship between punishment theory and sentencing practice. Only then might it be possible to understand and appreciate the chasm between them.

4.4 The Interrelationship between Punishment Theory and Sentencing Practice

Despite their logical interdependence, sentencing and punishment have evolved with minimal consideration of each other's fundamental features causing as a result, inconsequence between the theory and practice of legal punishment.¹⁹⁶ Sentencing is the study of the link between unlawful activity and state-imposed punishment, an instrument for achieving the objectives of society, and the cutting edge of the judicial process.¹⁹⁷ It is the extended arm of punishment in a more pragmatic and perceptible dimension. It is the function of the courts, whereas the actual administration of the punishment is the responsibility of the correction services, prison administrations and other agencies. It is the most delicate¹⁹⁸ of all judicial tasks, and an utmost critical part of the criminal trial for all the parties involved.¹⁹⁹ It is, possibly, the most public facet of the criminal justice process,²⁰⁰ the visible pinnacle of criminal justice decision-making,²⁰¹ and the stage where the state had aimed to reach after a long trial, and the one that the defendant

¹⁹⁶M Bagaric, *Punishment and Sentencing: A Rational Approach* (Cavendish Publishing, London 2001) 4.

¹⁹⁷H S Gour, *The Penal Law of India* (Vol 1 Law Publishers, Allahabad, India 1996) 413.

¹⁹⁸*Gross v O'Toole* (1982) 4 Cr App R (S) 283.

¹⁹⁹J Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge & Keegan Paul, London 1981) 1.

²⁰⁰A Ashworth, 'Sentencing' in M Maguire, M Morgan and R Reiner (eds), *The Oxford Handbook of Criminology* (OUP, Oxford 2002) 1076.

²⁰¹R Morgan and C M V Clarkson, 'The Politics of Sentencing Reform' in R Morgan and C M V Clarkson (eds), *The Politics of Sentencing Reform* (Clarendon Press, Oxford 1995) 7.

strived to avoid all along.²⁰²It is the phase where the defendant, by pleading guilty, as is usually the case,²⁰³ is ready and willing to accept his dues, the point where the state acts in its most coercive and intrusive manner,²⁰⁴ and where the judge will determine how much the offender must suffer for his offence with the potential sufferance including deprivation of liberty.²⁰⁵ The sentencing decision results from a process of gathering and interpreting information about the offence and the offender, with the sentencing judge evaluating the harm done by the crime and painting a portrait of the offender.²⁰⁶ It is far from a mechanical process (although oftentimes it may appear to be so). It presupposes a high level of human cognitive abilities in understanding and interpreting, as well as applying, theoretical considerations to specific cases and undoubtedly, being an example of human behaviour involving decision-making, is prone to error. History teaches that there are no perfect solutions to problems; and that, even if we cannot take comfort in the hope that God will ultimately put everything right, at least we can be humble enough to admit that some things, like erring, even if they concern human actions

²⁰²The pronouncement of sentence has a crucial, complex, and in many ways misunderstood place in the criminal justice system. It's an indispensable part of every criminal case in which guilt is established, whether by trial or guilty plea. Yet in some cases, the sentencing may be almost anticlimactic to the onlooker; after a dramatic courtroom trial, when the defendant's guilt hangs in the balance until the verdict of the court, the sentence seems to serve mainly to give weight to the court's decision, to lend finality to the criminal proceedings, and most of all to show that punishment inevitably follows crime. To the onlooker, it may appear that the hard work of determining the defendant's guilt has already been accomplished and that the imposition of a sentence is a relative simple matter of making the punishment fit the crime: S Manaugh, *Judges and Sentencing* (Chelsea House Publishers, Philadelphia 2002) 15.

²⁰³See, J Chalmers and F Leverick, 'Fair Labelling in Criminal Law' (2008) 71 MLR 217, 224-225, and S Schulhofer, 'Due Process of Sentencing' (1980) 128 U Pa L Rev 733, 779. See also, paragraphs 3.5 and 3.6 of the thesis for a similar conclusion in relation to Cyprus.

²⁰⁴P Gregory (tr), R Girard, *Violence and the Sacred* (John Hopkins University Press, Baltimore 1977) 53.

²⁰⁵L Page, *The Sentence of the Court* (Faber & Faber, London 1948) 31.

²⁰⁶C Spohn, *How do Judges Decide? The Search for Fairness and Justice in Punishment* (2nd edn Sage Publications, London 2009) 122.

and choices, are simply, not within human control.²⁰⁷ Sentencing has also been characterised as the most controversial and politically sensitive aspect of the criminal law,²⁰⁸ and at the same time, the least principled and coherent body of law,²⁰⁹ let alone an exact science. In fact, some sentencers (not the Cypriot) call it²¹⁰ and regard it as an art rather than a science,²¹¹ with Lady Wootton once likening the sentencer to a small boy adding up his sums but with no one to correct his answers.²¹²

4.5 Judicial Discretion in Sentencing and the Doctrine of Separation of Powers

The judicial way of thinking would be of insignificant concern if judges simply applied clear rules of law formed by legislators, administrative agencies, the framers of constitutions, and other extrajudicial sources, to facts that judges determined in an unbiased manner. Then judges would be well on the road to being superseded by digitalised computer programmes or sentencing vending machines. But even legal thinkers who believe passionately that judges should be strictly rule appliers and unbiased fact finders do not suppose that, that is how all or most judges (including Cypriot judges), behave at all times. Indeed, as it will be shown, Cypriot judges do have and exercise considerable discretion in sentencing

²⁰⁷J Samaha, 'Some Reflections in the Anglo-Saxon Heritage of Discretionary Justice' in E A Lawrence and R S Irving (eds), *Social Psychology and Discretionary Law* (Van Nostrand Reinhold Company, New York 1979) 4-16.

²⁰⁸I Freckelton, *Criminal Sentencing in the Laws of Australia* (Law Book Co, Sydney 1996) ix.

²⁰⁹More than three decades ago the American judge Frankel described sentencing as a 'wasteland in the law': M Frankel, 'Lawlessness in Sentencing' (1972) 41 U Cin L Rev 1, 53.

²¹⁰*Graham* [1999] 2 Cr App R (S) 312.

²¹¹H Parker, M Summer, and G Jarvis, *Unmasking the Magistrates: The 'Custody or Not' Decision in Sentencing Young Offenders* (Open University Press, Milton Keynes 1989) 134.

²¹²P K Cooke, 'The Practical Problems of the Sentencer' in D C Pennington and S M A Lloyd-Bostock-Lloyd (eds), *The Psychology of Sentencing: Approaches to Consistency and Disparity* (Centre for Socio-Legal Studies, Oxford 1987) 57.

in a legal system staunchly functioning on the constitutional grounds of the separation of powers.

4.6 The Doctrine of Separation of Powers

One ambition of the Enlightenment thinkers was to rationalise and systematise the processes of governance. Montesquieu argued for the separation of powers into legislative, executive, and judicial functions, without which there is no liberty.²¹³ The doctrine of separation of powers refers to the decisional independence and decisional authority of the judicial branch, that is, the ability of the courts to interpret and apply, rather than create, substantive legal principles in the specific context of an individual adjudication; free from control or interference by the purely political branches.²¹⁴ This doctrine is most significant both intellectually and in terms of its influence upon institutional structures.²¹⁵ The legislature, most responsive to the people, should have sole authority to enact laws, while the judges would exercise neither legislative nor executive power. On this view, judges are, what Montesquieu called, the mere mouthpieces of the law.²¹⁶ As Lord Justice Wright put it, judges proceed ‘from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point avoiding the dangers of the open sea of system or science.’²¹⁷ Separation of powers is a complex

²¹³A M Cohler, B C Miller, and H S Stone (eds), *Montesquieu: The Spirit of the Laws* (CUP, Cambridge 1989) 161.

²¹⁴M Redish, ‘Federal Judicial Independence: Constitutional and Political Perspectives’ (1995) 46 *Mercer L Rev* 697, 699.

²¹⁵M J C Vile, *Constitutionalism and the Separation of Powers* (OUP, Oxford 1967) 1.

²¹⁶Cohler and others, *Montesquieu* (n 213) 163.

²¹⁷Wright, Lord Justice, ‘The Study of Law’ (1938) 54 *LQR* 185, 186. Lord Devlin in his book *The Judge* (OUP, Oxford 1979) 4, pertinently indicated that: ‘In the course of their work judges quite often dissociate themselves from the law. They would like to decide otherwise, they hint, but the law does not permit. They emphasise that it is a binding upon them as it is upon litigants. If a judge leaves the law and makes his own decisions, even if in substance they are just, he loses the

concept that operates on several different levels. There is a distinction, for example, between its application to the primary powers of government and policy-making process.²¹⁸ However, it appears that this conception of the judicial function relates primarily to the finding of facts during adjudication, and not sentencing, with Montesquieu underlining that: ‘...in England... the jury decides whether the accused is guilty or not...and, if he is declared guilty, the judge pronounces the penalty imposed by law for this deed; and he needs only his eyes for that.’²¹⁹

4.7 The Controversy of Judicial Discretion

Many of the controversies concerning sentencing appear to centre on the distinct but related questions of the necessity, extent, and administration of judicial discretion. Some object to it on the ground that the legislature and not the judiciary should decide issues involving moral judgments.²²⁰ This intense aversion to discretion probably derives from a widely shared mistrust of the ability of others to make decisions for us where the result is not predetermined but depends on the exercise of judgment.²²¹ Certainly, rules assist in the promotion of order. They contribute to the elimination of subjectivity and ensure to some degree, stability, predictability, and equality of treatment. They also assist in the protection of the

protection of the law and sacrifices the appearance of impartiality which is given by adherence to the law. He expresses himself personally to the dissatisfied litigant and exposes himself to criticism. But if the stroke is inflicted by the law, it leaves no sense of individual justice; the losing party is not a victim who has been singled out; it is the same for every body, he says. And how many a defeated litigant has salved his wounds with the thought that the law is an ass! So I am not distressed by the fact that at least nine-tenths of the judiciary spends its life submerged in the disinterested application of known law.’

²¹⁸J Caesar, ‘In Defence of Separation of Powers’ in R Goldwin and A Kaufman (eds), *Separation of Powers-Does It Still Work?* (The American Enterprise Institute, Washington, DC 1986) 168.

²¹⁹Cohler and others, *Montesquieu* (n 213) 76.

²²⁰A Dershowitz, ‘Who Decides and When?’ in H Gross and A Von Hirsch (eds), *Sentencing* (OUP, Oxford 1981) 343.

²²¹S Wexler, ‘Discretion: The Unacknowledged Side of Law’ (1975) 25 U Toronto L J 149, 154.

judiciary against charges of misjudgement and bias,²²² and other potentially unforeseeable situations.²²³ Some retributivists (for whom there follows an analysis in Chapter 5, together with utilitarians) hold that there is a just amount of punishment simply by virtue of the act committed by the offender, so that there is no point taking into account other features of him in determining his sentence. Conversely, utilitarians argue that there are instances where, for the sake of public interest, it is necessary to individualise sentencing so that the sentencer could give either an extended or a more lenient sentence according to the circumstances and the utility involved.²²⁴ For retributivists, this is unacceptable and inconsistent with the practice of punishment, because through the imposition of extended sentences, offenders receive additional punishment for something they did not do whereas, by a more lenient sentence, they get a less than a deserved punishment.²²⁵ However, the question of whether there should be discretion or whether utilitarian considerations should weigh up in the determination of sentence is separate from the question of the commensurability of punishment.²²⁶

Politicians, many of which are actively involved in the formation of legislation, oftentimes blame the judiciary for allegedly failing to apply the law correctly and grasping the true essence of the philosophy behind the ‘legislative wisdom,’ and this is not uncommon in Cyprus either. Some claim that our democratic theories of political legitimacy have very little to say about judicial

²²²N Isaacks, ‘The Limits of Judicial Discretion’ (1923) 32 Yale L J 339, 343.

²²³J L Jowell, *Law and Bureaucracy: Administrative Discretion and the Limits of Legal Action* (Dunellen Publishing, New York 1975) 135.

²²⁴See, James, Lord Justice, ‘A Judicial Note on the Control of Discretion in the Administration of Criminal Justice’ in R Hood and R Sparks (eds), *Key Issues in Criminology* (Littlehampton Book Services, West Sussex 1970) 157, where the author claims that: ‘...the existence of discretion is an essential factor. Individualisation cannot be achieved without a discretion being exercised.’

²²⁵W Sadurski, *Giving Desert Its Due* (D Reidel, Boston 1985) 255.

²²⁶Tunick, *Punishment* (n 30) 155.

behaviour, and have almost no way of justifying judicial discretion even at the highest judicial level, that being true, to a greater or lesser extent, in all democracies.²²⁷The sentiment formed is that there is a repetitious and cyclical struggle for the domination and control of an apparently apolitical judiciary,²²⁸ by the executive²²⁹ and the legislature.²³⁰The cause might partly be the discretion with which the judiciary has been empowered with in order to execute its functions. Legal literature is satiated with criticisms of the judicial discretionary decision-making on sentencing as opposed to the censuring of the discretionary powers of the two other branches of governance and particularly the legislature, which, after all, passes the laws judges, interpret and apply.²³¹The main theme is that the control of discretion is not only necessary but also possible,²³² pointing to the results of empirical analyses which demonstrate, as they profess, that the sentencing process could be more finely honed or, at least, less blunt. They assert that judicial discretion is poorly structured and ill exercised to the extent that it results to unjustified sentencing disparities, thus becoming an anathema²³³ to

²²⁷D Robertson, *Judicial Discretion in the House of Lords* (Clarendon Press, Oxford 1998) 4.

²²⁸This holds true at least in jurisdictions such as the British, the Australian and the Cypriot, where the public does not elect judges, as for example in the United States.

²²⁹P Rawlings, *Crime and Power: A History of Criminal Justice 1668-1998* (Longman, London 1999) 430-436.

²³⁰J F Nagle, 'Punishment, Parliament and the People' (1998) 10(3) *Judl Officers Bull* 17, 19.

²³¹J V Roberts, 'Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application' [2008] *Crim L R* 264-276; R Pattenden, *Judicial Discretion and Criminal Litigation*, (Clarendon Press, Oxford 1990) 11; D A Thomas 'Equity in Sentencing' Sixth Annual Pinkerton Lecture (The University at Albany, The Graduate School of Criminal Justice 1977) 1-23.

²³²S Walker, *Taming the System: Control of Discretion in Criminal Justice 1950-1990* (OUP, Oxford 1993) 156.

²³³Lord Camden, LCJ, once said in the case of *Doe d Hindson v Kersey* (1765), that: 'The Discretion of a Judge is the Law of Tyrants; it is always unknown; it is different to different Men; it is casual and depends on Constitution, Temper, and Passion. In the best it is often times Caprice, in the worst it is every Vice, Folly, and Passion to which Human Nature is liable.' See: T B Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanours from the Earliest Period to the Year 1783 with Notes and Illustrations* (Vol 8 Longman, Hurst, Rees, Orme, and Brown, London 1816) 57.

fairness and consistency in punishment.²³⁴ These authors believe that the only way one can regulate²³⁵ this discretion, and so attain greater impact in this facet of societal control,²³⁶ is pre-emptively and, exactly, on the allegation of disparity, by limiting and structuring the breadth of the power through legislative and other means,²³⁷ aiming, inter alia, towards a more direct citizen review.²³⁸ Hence, they say, the exercise of sentencing discretion would become more objective and quantitative and, accordingly, less intuitive and more deliberative.²³⁹ Some scholars even label this, the ‘crux of the matter.’²⁴⁰ Punishment and *epieikeia*, it appears, must not remain at the mercy of judges but be constructively controlled and tuned, and thus indirectly regulated by the legislature. On their part, judges are usually content to blame the imperfections of the criminal justice system on others, and most of all on the legislature.²⁴¹ They view this polemic with scepticism and discontent. Some of them become sarcastic and ironical (but not necessarily out of line), not hesitating even to characterise this criticism as horse manure,²⁴² reaffirming to some degree, the perceptual divergence of opinion over sentencing between the judiciary, the Executive, and the Legislature, and part of the

²³⁴ See, for example, M Tonry, *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy* (Willan Publishing, Cullompton, Devon 2004) 118-119.

²³⁵ R G Fox, ‘Controlling Sentencers’ (1987) 20 ANZJ Crim 218-246.

²³⁶ W Reckless, *The Crime Problem* (Appleton-Century-Crofts, New York 1967) 487.

²³⁷ L Gelsthorpe and N Padfield (eds), *Exercising Discretion, Decision Making in the Criminal Justice System and Beyond* (Willan Publishing, Cullompton, Devon 2003) 23.

²³⁸ C F Pinkele, ‘Discretion and Judicial Sentencing’ in C F Pinkele and W C Louthan, *Discretion, Justice, and Democracy: A Public Policy Perspective* (The Iowa State University Press, Ames, Iowa 1985) 61.

²³⁹ A Lovegrove, *Judicial Decision Making, Sentencing Policy, and Numerical Guidance* (Springer-Verlag, New York 1989) 295.

²⁴⁰ M Cavadino and J Dignan, *The Penal System: An Introduction* (4th edn Sage Publications, London 2007) 91.

²⁴¹ M Zadner, *What’s Wrong with the Law?* (BBC London 1970) 5.

²⁴² A Kozinski, ‘What I Ate For Breakfast And Other Mysteries Of Judicial Decision Making’ in D M O’ Brien (ed), *Judges on Judging: Views from the Bench* (3rd edn CQ Press, Washington DC 2008) 77.

academe.²⁴³ Similar friction, but much more subdued, exists also in Cyprus where there are occasional attempts to limit judicial discretionary power. To these attempts, rare as they are, the Cypriot judiciary projects the fundamental constitutional safeguards of separation of powers to reassert its dominance in the judicial sphere, as the vestees of the judicial power,²⁴⁴ and understandably so. A characteristic example is the case of *Amira v The Republic*,²⁴⁵ where the Supreme Court, dealing with the constitutional prerogative of the President of the Republic to award pardons (charis) to convicted offenders, held that:

*We do not think that our powers as a Court of Appeal in dealing with an appeal against sentence and those of the President of the Republic under the said Article 53.4 are always and inevitably mutually exclusive; and this is one of those cases in which either our powers may be resorted to or those of the President of the Republic might be exercised. We are of the view that even though the crimes which were committed by the appellant are quite serious there is no justification at all in law or in justice and morality for saying that the appellant because of having been sentenced in respect of such crimes has to lose his eyesight by remaining in prison here whilst he can possibly save his eyesight by being treated without delay abroad by means of surgery which cannot be performed in Cyprus. We have decided to adopt the exceptional course of showing the Court's mercy to the appellant (and see, in this respect, too, *Barhouch v. The Republic* [1987] 2 C.L.R. 245) by reducing his sentence so that he can be released immediately in order to be enabled to leave Cyprus and return to his country where his eye affliction may be treated in a manner not possible as yet in Cyprus.*

There is an argument to be made that the ostensible elimination or rigid regulation of judicial discretion diminishes the role and authority of the judge, as it impoverishes the quality of justice and weakens public respect for legal institutions.²⁴⁶ However, this does not mean that judicial discretion in sentencing is not, and should not be, subject to a number of constraints and influences, such as

²⁴³W Morrison, A Gearey, and R Jago, *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions* (Routledge - Cavendish, Oxford 2008) 335.

²⁴⁴G M Pikis, *Constitutionalism-Human Rights-Separation of Powers: The Cyprus Precedent* (Martinus Nijhoff Publishers, Leiden 2006) 87.

²⁴⁵[1987] 2 CLR 248, 250.

²⁴⁶M Tonry, *Sentencing Matters* (Studies in Crime and Public Policy, OUP, New York 1998) 165.

statutory maxima, judicial precedent, sentencing directions from the Supreme Court, due reasoning of decisions, and appellate review, so as to minimise or eradicate the intrusion of irrelevant factors and thwart whimsicality. On the other hand, complete uniformity is not only unrealisable but (for some) also undesirable, as it can lead to the imposition of fixed sentences, regardless of the particular circumstances of the offender. If there are established agreed criteria for sentencing, one could hope in an equality of consideration, whereby in roughly similar situations, courts consider similar factors and have similar reasons for selecting particular forms of sentence. According to some scholars,²⁴⁷ judges rarely acknowledge the risks of irrelevant influences that accompany unstructured or poorly monitored discretion.²⁴⁸ Whether this position holds true for Cypriot judges is an issue explored in the thesis. Nonetheless, according to another perspective in no jurisdiction of the member states of the Council of Europe, such factors as the judge's personality or idiosyncrasies, external pressure of popular sentiment, or pure chance, are or should be relevant for deciding a sentence.²⁴⁹ Parenthetically, this of course, one might consider as relevant to forming and decoding the personality of the academics themselves and for that reason, the rationality and intentions behind their own sentencing analyses and motives. In spite of this, the

²⁴⁷B Hudson, 'Doing Justice to Difference' in A Ashworth and M Wasik (eds), *Fundamentals of Sentencing Theory* (Oxford Monographs on Criminal Law and Justice, OUP, Oxford 1998) 223.

²⁴⁸These may include political or journalistic pressures, public hysteria, prejudice against minority groups, and the personality of the judge-factors that are discordant with the proper goals of criminal justice. Jurists and criminologists claim that these elements exert an enormous influence on sentencing. Most of the opinions on this subject converge towards the view that the state of the judge's humour, his digestion, his unconscious fears and desires, and in short, the caprices of judicial temperament, determine the penalties on criminal offenders: E Green, *Judicial Attitudes in Sentencing* (Macmillan & Co Ltd, London 1961) 6.

²⁴⁹N Jareborg, 'Introductory Report' in *Disparities in Sentencing: Causes and Solutions* (Council of Europe, European Committee on Crime Problems, Collected Studies in Criminological Research Vol XXVI, Strasbourg, France 1989) 7.

Supreme Court recognises judicial idiosyncrasy as a variable factor in Cypriot sentencing.²⁵⁰ The judges on the other hand, tend to argue strongly against restriction of their discretion.²⁵¹ As it will be shown later on in the study, Cypriot judges insist that the preservation of wide judicial discretion is necessary, and that individual justice is more important than some abstract notion of systemic fairness. In Australia, for example, the New South Wales Law Reform Commission has rejected any changes that would constrain the exercise of discretion by codification of common law principles, creation of sanction hierarchies or specification of tariffs for each offence.²⁵² Scholars have interpreted the judicial firmness for wide judicial discretion as ‘insistence on unfettered judicial sentencing power.’²⁵³ This assertion is sweeping. The fact that wide judicial discretion could theoretically be unfettered (or the reverse), neither does, nor calls, for an inelastic cause-and-effect hypothesis. In any case, two explanations seem to prevail in support of the allegation. The first stems from the rehabilitative ideal with judges seen as quasi healers who fit their treatment to the offender.²⁵⁴ The second is that judges do not wish to part with sentencing discretion because that would diminish their power. Those who oppose, question the absence of similar judicial concerns in relation to the development of standards in other areas of the law. The discretionary approach is better understood as a judicial aspiration conveyed in the form of a ritualistic

²⁵⁰ *Pitsillos v The Police* [1998] 2 CLR 346, 353.

²⁵¹ A Freiberg, ‘Guerrillas in Our Midst? Judicial Responses to Governing the Dangerous’ in M Brown and J Pratt, *Dangerous Offenders: Punishment and Social Order* (Routledge, London 2000).

²⁵² New South Wales Law Reform Commission, *Sentencing* (Report 79, New South Wales Law Reform Commission, Sydney 1996).

²⁵³ A Von Hirsch, ‘The Project of Reform’ in M Tonry and R Frase (eds), *Sentencing and Sanctions in Western Countries* (n 28) 405.

²⁵⁴ B Hudson, *Justice through Punishment: A Critique of the ‘Justice’ Model of Corrections* (Macmillan Education, London 1987) 43.

expression of the imposed sentence rather than one in which penal purposes serve as principles designed to provide rational support and guidance for the choice of sanction. Depending on the case, the sentencer can thus express the desired purpose of sentence. From this standpoint, one can comprehend why is that every case is different and all sentencing aims relevant, notwithstanding their potential for leading to a conflicting result. The difficulty with this approach is that the infringement of the offender's liberties demands a justification going beyond the expression of supposed community aspirations.²⁵⁵ This is to show the extent of the divergence.

Inconsistencies in sentencing are expectantly prevalent in sentencing systems because they are human systems involving both large numbers of cases and judges. As long as there are human beings there will be variations in sentence; no two minds think exactly alike. The appointment of judges rests on the assumption that they are people with a sense of responsibility who are likely to discharge their difficult duties with care and fairness. They are inevitably bound to differ in their views about a case.²⁵⁶ There are differences in the input to sentences as well as divergence in the way they perceive and weigh particular kinds of case information, and justify their decision about the disposition of the offender.²⁵⁷ Not surprisingly therefore, inconsistencies in sentencing (presumably serious and unjustifiable), have been the cause of concern, attracting researchers' interest for decades.

²⁵⁵A Ashworth and A Von Hirsch, 'Recognising Elephants: The Problem of the Custody Threshold' [1997] Crim L R 187.

²⁵⁶H Cecil, *The English Judge* (Arrow Books, London 1972) 148.

²⁵⁷James, Lord Justice, 'A Judicial Note on the Control of Discretion in the Administration of Criminal Justice' in R Hood and R Sparks (eds), *Key Issues in Criminology* (n 224)154.

One of the criticisms levelled against judicial discretion is that it often results in disparities,²⁵⁸ a criticism with which the study will not be concerned with in relation to Cyprus, but only identify it as a possible consequence of discretion. The commonness of this view is reflected in the trend towards sentencing commissions, which are bodies, authorised by the legislature, to establish guidelines for judges to follow when sentencing. No such measure has ever been undertaken in Cyprus in relation to sentencing. Sentencing according to such guidelines is presumptive, since, if the judge parts from the guidelines, he must justify the departure. Discretion remains, but shifts partly to the Commission.²⁵⁹ There can be little doubt that, like Beccaria in the 18th century, these guidelines sought to replace judicial discretion with an elaborate, less intuitive, and more mechanistic system for the administration of penal sanctions in the form of a self-contained penological calculus. What constitutes sentencing disparity might depend on the objective aim and the choice of sentencing rationale.²⁶⁰ On a deterrent or incapacitative rationale, this might not be the cause for much concern, since what would matter is whether the sentencing policy on average intimidates potential offenders more efficiently, or restrains dangerous ones better. On a rationale emphasising proportionality, unexplained differences in sentence would be more problematic, but variations in the sentences for a given category of offence would be permissible – as not being disparities at all – where

²⁵⁸T Skyrme, *The Changing Image of the Magistracy* (Macmillan Press, London 1979) 2.

²⁵⁹A Von Hirsch, K Knapp and M Tonry (eds), *The Sentencing Commission and Its Guidelines* (Northeastern University Press, Boston 1987) 32.

²⁶⁰J C D'Esposito, 'Sentencing Disparity: Causes and Cures' (1969) 60 J Crim L, Criminol & Poli Sci 182, 185-186.

they reflect differences in the harm or culpability of the conduct in the particular circumstances.

The emphasis in reducing disparity resulting from the exercise of judicial discretion is somehow misplaced.²⁶¹ There are other participants in the criminal justice system with significant role in the determination of the sentence. Prosecutors have discretion as to what circumstances they mention in court as the factual basis of the sentence and as to whether they will mention the previous convictions of the offender and any other special characteristics that derive from these convictions, such as whether violence was used in the commission of the previous offence, whether there was compensation of the complainant, whether the stolen property was found, whether the offences were committed while on bail or while he was a fugitive, and innumerable other circumstances. Defence advocates, on the other hand, depending on their ability and expertise,²⁶² can indicate factors that distinguish or should distinguish the offender's case from the similar cases of other offenders or, for that matter, bring it in line with other sentencing judgments that appear more favourable for the offender. In the case of an unrepresented offender, various reports, such as those prepared by the social services or other medical and psychiatric experts, acquire even more significance under the circumstances as they provide the court with important information, which the offender may not be capable of putting before the judge. Despite wide acceptance of the notion that sentencing disparities are rife, the empirical evidence is far from

²⁶¹Indeed, the problem of disparity may have been an illusion. Sentence disparity is highly resistant to measurement and offenders convicted of the same crime may not be comparable along other dimensions: see P J Hofer, 'The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity' (1999) 90 J Crim L & Criminology 239.

²⁶²S B Haire, S A Lindquist, and R Hartley 'Attorney Expertise, Litigant Success, and Judicial Decision Making in the U. S. Courts of Appeal' (1999) 33 L & Soc Rev 667.

persuasive, with the most common failing being that of not accounting adequately for the numerous factors that potentially affect sentencing decisions.²⁶³

Unwarranted disparities impinge on the administration of justice in a multiplicity of ways. For example, they create the impression, that sentencing is a very subjective and personalised judicial function. Such phenomena might lead defence advocates on the lookout for lenient judges, and prosecutors for harsh and tough judges that will have no hesitation in imposing a sturdy sentence, given the circumstances of the case at hand. As a result, some suggest that the notion that the criminal justice system is fair and even is nothing but a myth.²⁶⁴ There is evidence that unwarranted disparities also affect the correctional administration, as prisoners tend to compare sentences, and those who believe that have been the victims of judicial prejudice, often become aggressive inmates with a profound disrespect to the law and the justice system.²⁶⁵ In addition, such sentencing inconsistencies may create hostility and resentment among the general population of offenders, which could be counterproductive in achieving penal aims whatever these may be.²⁶⁶

According to the discretionary ethos of sentencing, each case is unique. All sentencing aims have relevance, and the sentencing judge, using his personal experience on the bench, should apply them to the particular facts of the case, using his intuition or common sense. What is notable about this perspective is not that it involves elements of discretion, for virtually any workable sentencing

²⁶³D McDonald, *On Blaming Judges: Criminal Sentencing Decisions in New York Courts: Are Guidelines Needed to Restrain Judges?* (Citizens' Inquiry on Parole and Criminal Justice, New York 1982) 1.

²⁶⁴W Middendorff, 'The Effectiveness of Punishment, and Other Measures in Traffic Offences' in *Collected Studies in Criminological Research* (Vol II, Council of Europe, Strasbourg 1968) 22.

²⁶⁵J Hall and G O Mueller, *Cases and Readings in Criminal Law and Procedure* (Bobbs-Merrill, Indianapolis 1965) 33.

²⁶⁶R Henham, *Criminal Justice and Sentencing Policy* (Dartmouth Publishing, Aldershot 1996) 2.

scheme must have such elements, but rather, that sentencing should primarily be a matter for judicial discretion. There has never been a clear and authoritative doctrine on the respective responsibilities of the legislature and the judiciary on sentencing matters.²⁶⁷ Undoubtedly, Parliament possesses constitutional authority to enact sentencing laws of general application, and in the United Kingdom (and arguably in Cyprus) has supremacy, subject only to higher obligations such as the European Convention on Human Rights. In the United States, there has been a constitutional challenge to the federal sentencing guidelines formulated by the country's Sentencing Commission pursuant to the Sentencing Reform Act of 1984. The US Supreme Court rejected it by a majority of 8-1, ruling that the scope of judicial discretion with respect to the sentence is subject to congressional control.²⁶⁸ Similarly, the High Court of Australia has held that it is no breach of the Constitution not to confide any discretion to the court as to the penalty.²⁶⁹ If judges are considered to form part of the sentencing policy problem then they must be part of the solution, which can only result from the synergistic cooperation of the Executive, the Legislature, and the Judiciary. Ordinarily, judges decide cases by applying the law. However, at times the society's sense of justice cannot readily be reduced to precise legal standards. In such circumstances, the legislature may merely announce a general standard and rely on judges to use their discretion to do justice on a case-by-case basis. When this occurs, the state's policy, instead of

²⁶⁷C Munro, 'Judicial Independence and Judicial Functions' in C Munro and M Wasik (eds), *Sentencing, Judicial Discretion and Training* (Sweet and Maxwell, London 1992) 13. The author observes that the classical texts on the separation of powers do not assign sentencing to the judicial branch, and remarks that it is neither novel for the legislature to participate in the determination of sentences, by prescribing the sentence or its limits, nor for the executive to influence sentencing practice. Therefore, he concludes, neither constitutional theory nor historical precedent justifies the judicial objection to interference.

²⁶⁸*Mistretta v United States* 488 U.S. 361 (1989).

²⁶⁹*Palling v Corfield* [1970] 123 Commonwealth Law Reports 52.

being defined by legislative mandate, actually emerges from the totality of judicial decisions.²⁷⁰

As this study will demonstrate, the Cypriot sentencing system gives the sentencer a central and powerful role in the process, as that has diachronically been the case in the Commonwealth as well.²⁷¹ Because judicial discretion is a major part of this process, the views of sentencers on punishment and mercy, assume central importance, and can pose equally dilemmas for policy makers.

4.8 Conclusions

The present chapter examined the issue of punishment justification, the problem of judicial discretion and separation of powers, and the rationalisation of the practice of punishment through the prism of external and internal criticism, and the interrelationship between punishment theory and sentencing practice. The chapter (in concert with the succeeding chapters 5 and 6, which deal with the different perspectives relating to the justifications and goals of punishment and the role of mercy in criminal sentencing correspondingly), will mark even further the parameters within which the analysis on how Cypriot judges sentence, and mercy, will occur, and establish whether their subsequent decisions are actually reached within or on the basis of a sound legitimising moral framework.

²⁷⁰A G Tarr, *Judicial Process and Judicial Policymaking* (2nd edn West Wadsworth Publishing Company, Belmont, Canada 1999) 296.

²⁷¹P Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (Hart Publishing, Oxford 2009) 86.

CHAPTER 5: THE THEORETICAL DEBATE ON LEGAL PUNISHMENT

This chapter will focus on the theoretical debate (relevant for the purposes of the thesis) arising in relation to the key issues relating to the differentials of the general justification of the practice of legal punishment and the specific aims of sentencing within the realm of the competing philosophical theories. Naturally, and given that the present study deals with attitudes and decisions of judges in the Cypriot criminal justice system, the discussion of these theories will be limited to those that could have some practical relevance for the prescribed immanent analysis *within* the Cyprus sentencing system.

5.1 The Distinction Between General Justification of Punishment and its Purposes

The distinction between the general justification of the practice of legal punishment, and the specific aims of punishment is essential for a good understanding of the different philosophical and theoretical approaches on the issue of punishment. Another means to describe this distinction is to separate the purposes *of* sentencing from the purposes *at* sentencing.²⁷² While, in the different approaches, the general justification of the practice of punishment is always a normative matter, the purposes *at* sentencing can become the subject of analysis in a descriptive or prescriptive manner. Both types of purposes are continuously subjected to debate. As already underlined in Chapters 1 and 4, different philosophical theories of punishment offer different accounts of why we punish, whom to punish and what the objectives of punishment should be. For the

²⁷²N Morris and M Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (OUP, New York 1990) 52.

purposes of the present study there shall be no need to take a stance on which theory prevails or should prevail as the more politically and morally correct. Theories of punishment are, after all, philosophical attempts to find rational moral justifications for what we in fact do with criminal wrongdoers, and for the proper limitations that should be observed in the way we deal with them.²⁷³ Although we do not expect judges and other officials involved in everyday practice to justify all their decisions in these terms, philosophical theories of punishment provide rationalisations for the practice of punishment in most discussions on the subject. We expect (or should expect) normative accounts of punishment to form the basis of a systematic and consistent sanctioning practice, constituting something more than a mere ‘...symbolic function in the cultural debate about punishment...’²⁷⁴ as Tata appears to assert in a rather sweeping manner, and instead, setting a critical standard against which, one could consistently measure and scrutinise the practice of punishment. It may though be inexpedient to anticipate an explicit and unified philosophical theory to govern both the justification of punishment and the aims at sentencing for all people involved in every case. In practice, elements of different philosophies may be implicitly combined both at the level of purposes *of* sentencing (general justification), and of the purposes *at* sentencing (aims). The exact form of such combinations may draw from eclectic considerations depending on specific characteristics of the offence, the offender, and the sentencing judge. Because of such a gap between theory and practice, the descriptive value of any single philosophical theory of punishment for the justice system as a whole may be

²⁷³V W Barry, *The Courts and Criminal Punishments: Three Lectures by Sir John Vincent William Barry* (A R Shearer, Government Printer, Wellington, New Zealand 1969) 16.

²⁷⁴C Tata, ‘Conceptions and Representations of the Sentencing Decision Process’ (1997) 24 J L & Soc’y 395, 414.

limited. Yet, they can play an important role in the analysis of specific decisions and should continue to play the role of critical standard. Theories can (and should) bind the practice of punishment to a certain order and regularity.²⁷⁵ Theory and social reality of punishment systems should be interrelated. However, one must be able to escape the narrowness of philosophical critiques of punishment that often derive from the social realities of sentencing systems, and have penological approaches and objectives that tend to focus on the effectiveness of various types of sentence, depending of course on their stated aim.²⁷⁶ To isolate sentencing in laboratory conditions is likely to produce inadequate theories.²⁷⁷ Upon sociological reflection, abstract philosophical debates about sentencing do have their place but with little impact on sentencing policy and practice, particularly if detached from the prevailing social conditions at any given moment.²⁷⁸ Each of these perspectives could be more valuable when connected with the broader concept of punishment as a complex social institution serving conflicting objectives.²⁷⁹ Otherwise, one might end up (like Nygaard J of the United States Court of Appeals for the Third Circuit), nihilistically (and with a quasi realist inclination), arguing that the difficulties faced by the criminal justice system to ameliorate the pains crimes cause, and to control it, categorise it as a *non*-system which must be rejected, rethought, and restructured.²⁸⁰ We should think of our practices of holding responsible our own understandings of what it means to be responsible and the

²⁷⁵Keijser, *Punishment and Purpose* (n 8) 8.

²⁷⁶D Garland, 'Sociological Perspectives on Punishment' (1991) 14 *Crime & Just* 115-165.

²⁷⁷Ashworth, 'External Critiques of Sentencing Theory' (n 138) 636.

²⁷⁸N Hutton, 'Reflections' in C Tata and N Hutton (eds), *Sentencing and Society* (n 28) 575.

²⁷⁹Garland, *Punishment and Modern Society* (n 145) 115-165.

²⁸⁰R L Nygaard, *Sentencing As I See It* (Copperhouse Publishing Company, Nevada 2000) xxvii.

needs we have in constructing practices and institutions of justice together.²⁸¹ It is therefore necessary, as a next step, to examine the role of punishment theories in the sentencing process. One needs to foster an understanding of earlier theories, and particularly those of retributivism and utilitarianism, for reasons already explained in Chapter 1, as many of their features linger multifariously on the more synchronous. The tribute to these immanent theories is essential as it gives some direction to the pursuit of understanding (through this spectrum of analysis), sentencing practice and the judicial decisions flowing therefrom, along with their relation to punishment and mercy.

5.2 Retributivism and Utilitarianism²⁸²

Both retributivist and utilitarian theories have a long history. Retributivism is strongly associated with the German Idealist tradition,²⁸³ particularly with the works of Kant and Hegel. The rival tradition of utilitarianism encompasses the justifications of deterrence, social protection or incapacitation and rehabilitation and is chiefly associated with Bentham and Beccaria. The taxonomy of these theories as groups or categories of philosophical theories derives from the fact that both terms represent an entire breadth of refinements and different directions but still fit under the general header of either label. In the descriptions of retributivism and utilitarianism given below, due attention is paid to such differentiations, although the focus will remain on the most important premises of these accounts of

²⁸¹M Matravers, *Responsibility and Justice* (Polity Press, Cambridge 2007) 141.

²⁸²In structuring the overview that follows, the discussions provided by S Easton and C Piper, in their book *Sentencing and Punishment: The Quest for Justice* (2nd edn OUP, Oxford 2008), Keijser, *Punishment and Purpose* (n 8) 5-25, and Tunick, *Punishment* (n 30), have been very helpful.

²⁸³The German Idealist tradition focuses on the role of ideas in the construction of reality and sees reality as mediated through consciousness. See, in general, G Lukacs, *The Young Hegel* (Merlin Press, London 1975).

legal punishment. Elements from both retributivism and utilitarianism are sometimes combined or mixed, and seen not so much as reconcilable, but as unobviously closely conceptually connected, offering an alternative theoretical approach to the two core theories and their various versions by those who subscribe to the need of moral justification of punishment and the consequent casing of sentencing judgments in philosophical dogmatism.²⁸⁴

5.2.1 Retributivism

Many theories of punishment can be classified as retributive.²⁸⁵ Although similar in substantive respects as to the justification for punishment, they provide different accounts of why criminals deserve to suffer.²⁸⁶

5.2.2 The Similarities (Not Without Distinctions)

There are three essential similarities between retributivist theories.²⁸⁷ The first similarity is the premise that only the blameworthy deserve punishment, and that desert is the sole justification for punishment. Those who commit crimes deserve punishment for the same reason that those who commit evil wrongs deserve to pay damages. We are justified in punishing because and only because the offender deserves it. Moral culpability desert is in such a view a necessary and sufficient condition of liability to punitive reasons.²⁸⁸ Those of course who try to combine utilitarianism with retributivism must deny that desert is both necessary

²⁸⁴J Suzman and J Cottingham, 'Just Punishment' (1987) 61 Proceedings of the Aristotelian Society 25.

²⁸⁵J Cottingham, 'Varieties of Retribution' (1979) 29 Phil Q 238.

²⁸⁶D Dolinko, 'Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment' (1997) 16 L & Phil 507.

²⁸⁷J Anderson, 'Reciprocity as Justification for Retributivism' (1997) 16 Crim Just Ethics 13.

²⁸⁸Hart, *Law, Liberty, and Morality* (n 187) 17.

and sufficient, in order to allow the operation of utility.²⁸⁹This has been criticised as not justifying the imposition of punishment, but rather as acting as a constraint on the circumstances of penalty infliction, not even purporting to justifying the link between crime and punishment.²⁹⁰

The second similarity is the proportionality thesis,²⁹¹ which amounts to the claim that the punishment must be equivalent to the level of wrongdoing. Sentences must be proportionate in their severity to the gravity of the offender's conduct. In such a system, only those convicted of serious felonies must face imprisonment because of their severity. For less serious crimes, we must resort to penalties less severe than imprisonment.²⁹²This assertion is criticised on two grounds. Firstly, that it is not purely retributivist as it is a virtue endorsed by some utilitarians as far back as Bentham²⁹³and, secondly, it does no more to legitimise the existence of penal sanctions.²⁹⁴

The third similarity is the claim that punishing offenders is inherently just. We must not inflict it as a means of pursuing some other aim.²⁹⁵Kant and Hegel make the additional claim that punishment of wrongdoers is not only just, but obligatory as well. Some, however, disapprove of this categorical imperative as

²⁸⁹A M Quinton, 'On Punishment' in H B Acton (ed), *The Philosophy of Punishment* (Macmillan, London 1969) 40, 55.

²⁹⁰Oliver Wendell Holmes (later an Associate Justice of the US Supreme Court) argued that the Hegelian theory of retribution restoring the balance disturbed by a criminal offence is wrong. Being the negation of right, punishment is the negation of that negation, a quasi-mathematical theory, a metaphor that does not prove anything, let alone, justify it: O W Holmes, *The Common Law* (Little, Brown & Co, Boston Massachusetts 1881) 193.

²⁹¹R G Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melb U L Rev* 489-511.

²⁹²A Von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Manchester University Press, Manchester 1986) 10.

²⁹³J H Burns and H L A Hart (eds), *An Introduction to the Principles of Morals and Legislation* (Athlone, London 1970) 165-174.

²⁹⁴Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Canadian Government Publishing Centre, Ottawa 1987) 131.

²⁹⁵Anderson, 'Reciprocity as Justification for Retributivism' (n 287) 14.

pure revenge²⁹⁶ that is, ‘an enigmatic emotion of as yet unclear function.’²⁹⁷ However, it seems that even if punishment is intrinsically good, there is still no moral duty to bring about such a state of affairs.²⁹⁸ Retributivists assert that punishment is justified because it is inherently good to sanction offenders. This principle seems to accord with the deep intuitions of some analysts regarding justice,²⁹⁹ whereas for others this justification is so self-evident that it does not require further substantiation,³⁰⁰ or defence of its rightness and morality.³⁰¹

The popularly accepted belief that punishment for its own sake does no good is nothing but a reiteration of the consequentialist idea that only further good consequences achieved by punishment could possibly justify the practice. It is simply not the case that justification always requires the showing of further good consequences. Retributivism purports to be a theory of justice, and as such, claims that punishing the guilty achieves something good, namely justice. Therefore, reference to any other good consequences is irrelevant. One cannot defeat the central retributivist claim that we achieve justice by punishing the guilty simply by assuming that it is false. We certainly seem confident both that it is true and that we can know that it is true and that we should not punish the morally innocent because they do not deserve it. Based on this premise, some question why it should be different when we use the presence of desert as a reason to punish since if we can know when someone does not deserve punishment, that presupposes

²⁹⁶Elster, ‘Norms and Revenge’ (n 168) 862.

²⁹⁷N Frijda, ‘On Vengeance’ in S H M Van Goozen, N E Van de Poll, and J A Sergeant (eds), *Emotions: Essays on Emotion Theory* (Erlbaum, Hillside New Jersey 1994) 263.

²⁹⁸Dolinko, ‘Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment’ (n 286) 518.

²⁹⁹J Kleinig, *Punishment and Desert* (Martinus Nijhoff Publishers, The Hague 1973) 67.

³⁰⁰L H Davies, ‘They Deserve to Suffer’ (1972) 32(4) *Analysis* 136.

³⁰¹Hart, *Law, Liberty, and Morality* (n 187) 231.

knowledge that someone does in fact deserve punishment.³⁰² From this perspective, Karl Menninger's thesis³⁰³ that it does not advance a solution to use the word *justice*, because it is a subjective emotional word and a vague and distorted concept in its application so as to lead to injustice, cannot stand, unless one knows injustice when he sees it, even if injustice is a useless concept. Hence, neither metaphysical scepticism nor epistemological modesty can viably prohibit the use of moral desert as a reason not to punish. To this perception, one can detect a certain weakness, as human sentiment is neither universal nor inelastic. That a person has broken the law does not compel any particular moral deduction. As Bagaric rightly observes,³⁰⁴ sometimes, we are simply indifferent that lawbreakers go unpunished. However, one can propose that the utilitarian human sentiment critique presupposes that intrinsic retributivists share the premise of these sentiments. In fact, that should not be the case, as the desire or obligation for punishment exists in all cases of proved criminal wrongdoing. There is a stronger criticism, in that the pervasive desire to punish simply explains the practice without justifying it per se.

Even if wrongdoing triggers automatically the innate human impulse for punishment of the culprit (some say of our moral thinking),³⁰⁵ it does not follow that the theory justifies punishment any more than an inborn sense of overprotection justifies locking up our children so that they are sheltered from

³⁰²M Moore, 'The Moral Worth of Retribution' in A V Hirsch, A Ashworth, and J Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd edn Hart Publishing, Oxford 2009) 110, 113.

³⁰³Menninger, *The Crime of Punishment* (n 170) 10.

³⁰⁴Bagaric, *Punishment and Sentencing* (n 196) 56 - 57.

³⁰⁵Moore, 'The Moral Worth of Retribution' (n 302) 110.

what we perceive as external dangers.³⁰⁶The infliction of punishment, even when no positive consequences will derive from it, appears irrational to utilitarians.³⁰⁷They argue that it appears wrong to impose a harsher penalty if one can reform the offender through a lesser sanction. Retributive justice (they declare), can be a very good thing, but the saving of souls is a much better thing.³⁰⁸Because retributive theories are, as such, theories of just punishment rather than, as utilitarian theories are, of efficient punishment, they presuppose a relatively just system,³⁰⁹but still, even this classification, is disputable depending, largely, on one's retributivist or utilitarianist inclinations. The theory of retribution faces the difficulty of explaining whether deserved suffering is influenced by past, undeserved suffering. Desert must be determined not only based on culpability for the particular offender but also on the cumulative effect of his life suffering, weighted against his wrongs. Indeed, the social deprivations of the offender may be such that may lead to no punishment at all.³¹⁰To this, retributivists argue that everybody has a story that hardly excuses what they have done.³¹¹The fact remains though, that offenders ought to get what they deserve within the confines of practicality and reasonableness.³¹²

³⁰⁶For a similar analogy, see Bagaric, *Punishment and Sentencing* (n 196) 59.

³⁰⁷G Rowell, *Hell and the Victorians* (Clarendon Press, Oxford 1974) 13. The author says: 'The doctrine of hell was framed in terms of a retributive theory of punishment, the wicked receiving their just deserts, with no thought of the possible reformation of the offender. In so far as there was a deterrent element, it related to the sanction hell provided for ensuring moral conduct during a man's earthly life.'

³⁰⁸A C Ewing, *The Morality of Punishment and Some Suggestions for a General Theory of Ethics* (Kegan Paul, London 1929) 18.

³⁰⁹M Davies, 'Method in Punishment Theory' (1996) 15 L & Phil 309, 311.

³¹⁰C L Ten, *Crime, Guilt and Punishment* (Clarendon Press, Oxford 1987) 49.

³¹¹M Moore, *Placing Blame: A Theory of Criminal Law* (OUP, Oxford 1998) 113.

³¹²J A Corlett, *Responsibility and Punishment* (Library of Ethics and Applied Philosophy, 3rd edn, Kluwer Academic Publishers, Dordrecht, The Netherlands 2008) 227.

On the other hand, crimes, and particularly evil crimes, evoke passionate responses, but it must be the aim of a moral theory to locate the particular moral reaction within the whole.³¹³ This objection, however, may not be decisive as it looks to the quantum of punishment, not its justification. The premise of the theory is that wrongdoers deserve punishment. It does not proceed to provide for the severity of the sentence. Nor does it need to provide so directly. One can achieve this by invoking other principles and this is not necessarily a shortcoming.

No general theory of punishment appears to provide clear-cut answers to every aspect of punishment. Subordinate principles compatible with the primary claim of the theory, may provide for the required clarifications. Such an encompassing view of the offender's life is unattainable let alone that, from one perspective, this aspect is already included in the sanction. The problem of the retributivist theory is that it cannot justify the link between punishment and wrongdoing, although there have been numerous attempts to that direction according of course to the rival utilitarians.³¹⁴

5.2.3 The Distinctions (Not Without Similarities)

Retributivists provide different accounts on why criminals deserve to suffer. Often the answers to these accounts are interpretable on utilitarian terms, thereby rendering some retributivists susceptible to the allegation of being 'disguised utilitarians.'³¹⁵ Indeed, 'sometimes the differences among retributivists

³¹³A Norrie, 'Michael Moore's Deviation' (1999) 19 OJLS 111.

³¹⁴M Bagaric and K Amarasekara, 'The Errors of Retributivism' (2000) 24 Melb L Rev 124.

³¹⁵L B Yeager, *Ethics as Social Science: The Moral Philosophy of Social Cooperation* (Edward Elgar Publishing, Cheltenham 2002) 184.

seem greater than the differences between some utilitarians and some retributivists.³¹⁶

5.2.4 Negative and Positive Retributivism

A significant first distinction is that between negative and positive retributivism. Two rules define negative retributivism. First, that only the guilty can be punished, and second that the punishment of the guilty must only be to the extent of their desert. The principle laid out by these two rules is what Hart calls 'retribution in distribution.' Relying on this negative principle of retributivism means that punishment is not a necessary response to crime, but rather it is permissible only to the extent regulated by the two rules. The principle is a negative principle because its purpose is to restrict (limit) punitive action. The fact that theories of this kind are retributive lies in their adherence to proportionality in punishment. An offender who has been found guilty may not be punished more severely (as one might wish, for instance, with instrumental aims in mind) than the seriousness of the offence and his culpability permit. Nor may one legally punish an innocent person to deter potential offenders. For retribution in distribution, the general justifying aim of punishment need not even be retributive.³¹⁷ It is, therefore, not surprising that the principles of negative retributivism are often found in combination with utilitarian elements, for instance as a limiting (negative) principle in consequentialist accounts of punishment.

Positive retributivism attempts to offer a more complete account of punishment than negative retributivism, which can only operate in combination

³¹⁶Tunick, *Punishment* (n 30) 67.

³¹⁷Hart, *Law, Liberty, and Morality* (n 187) 9.

with a general justification (utilitarian or retributivist). The positive retributivist holds that *justice* demands the meting out of punishment; punishment of offenders is required by certain principles of justice. In the view of true positive retributivists, it is not only permissible to punish up to the limit indicated by the negative principle, it is even a duty to do so.³¹⁸

Kant gave the classical formulation of positive retributivism. However, he seemed more concerned with the ‘dangers’ of utilitarianism (in the form postulated by his contemporary Bentham), than with formulating a thorough and complete account of punishment. His retributive theory, therefore, is sketchy,³¹⁹ and open to multiple interpretations. Kant, like many positive retributivists after him (and long after Plato for that matter),³²⁰ insists that humans are rational beings capable of moral understanding and should never be treated as a means to promote some future good, neither for themselves nor for society – no wonder Kant was never married,³²¹ thus having the privilege of testing his insistence about the rationality of human beings through the furnace of marital life (and this would have been equally applicable had he been a woman). Punishment, in Kant’s view, is a categorical imperative, a moral necessity without any reference to possible consequences (good or bad). A wrongdoer should be punished because he has done something morally reprehensible, because he has committed a crime and for

³¹⁸Walker and Padfield, *Sentencing Theory, Law and Practice* (n 185) 108.

³¹⁹A Von Hirsch, ‘Proportionality in the Philosophy of Punishment’ in M Tonry (ed), *Crime and Justice* (n 28) 65.

³²⁰T J Saunders, *Plato’s Penal Code: Tradition, Controversy, and Reform in Greek Penology* (Clarendon Paperbacks, Clarendon Press, Oxford 1991) 186.

³²¹According to biographer Manfred Kuehn, Kant not only was never married but, as speculated, he never had sex either, although he did once admit that he would have loved to share his life with a certain woman but he calculated income and expenses and delayed the decision from one day to the next, until she got married to someone else: See, M Kuehn, *Kant: A Biography* (CUP, Cambridge 2002) 116-117.

no other reason. In answer to the question of what kind and what amount of punishment should be inflicted, Kant refers to talionic measures (he equates his law of retribution to *lex talionis*).³²² The question of why wrongdoers deserve punishment instead of some other (non-punitive) reaction to their actions remains unanswered by Kant. For the positive retributivist, the moral necessity to punish must lie in the retributive general justification for the practice.

5.2.5 The Intuitionist Approach

There is one very straightforward, but not very enlightening, retributive general justification for the practice of punishment that relies on intuition. The argument is simply that a guilty person should be punished because he deserves it. Drawing on our emotions of love and hatred, we *feel* that he deserves it. Although such an argument appeals to our *sense* of justice and emotions of revenge, which the intuitionist retributivist holds we all share,³²³ it does not provide a clear theoretical argument as to why punishment (the infliction of suffering) is the appropriate and required response to crime. If we are to distinguish retribution from mere revenge, we need *objective* criteria to justify it. Relying on intuition in order to justify the practice of punishment is reductionist oriented, if not a fallacy, since the question that was supposed to be answered is why a person deserves punishment.³²⁴ One cannot answer satisfactorily by asserting: 'Because we *feel* that it is deserved'. Surely, we can go further and pose the question of where we get this intuition. Where lays the origin of this feeling that punishment is deserved?

³²²M J Gregor (ed), *Kant: The Metaphysics of Morals* (Cambridge Texts in the History of Philosophy, 2nd edn, CUP, Cambridge 1996) 106.

³²³Moore 'The Moral Worth of Retribution' (n 302) 110.

³²⁴T R Clear, 'The Punitive Paradox: Desert and the Compulsion to Punish' (1996) 33 J Res Crime & Delinq 94.

Could it be that it is really a learned reaction to offending rather than an inborn intuition?³²⁵ The intuitionist should then be able to show that the feeling of deservedness and the inclination to punish is a ‘natural’ feeling with which we are born. Although few philosophers explicate purely intuitionist justifications, any moral justification of punishment that presupposes the existence of objective moral values *implicitly* contains intuitionist elements that make it prone to discussion. The choice, which is usually unconscious, between intuitive and conscious problem solving involves a trade-off between the amount of available knowledge, including long-buried knowledge that nonetheless can be recovered as intuition, and the precision with which whatever knowledge one has can be applied to solving the problem. Because the unconscious mind has greater capacity than the conscious mind, the knowledge accessible to intuition is likely to be vast. The alternative to drawing on that knowledge by means of intuition is to apply explicit, systematic reasoning to one’s smaller stock of conscious knowledge. That is often the inferior choice, even when time is not pressing. When a decision depends on several factors, you may do better by using your intuition than by trying to evaluate consciously each fact separately and combining the evaluations to form a final standpoint. The costs of consciously processing the information may be so high that intuition will enable a more accurate as well as a speedier decision than analytical reasoning would. This often is true in the open area in law because what makes it open may be the number of factors that are relevant to making a decision. However, intuition is important in the disposition of routine cases as well. Judges gain experience in deciding on legalist grounds, the cases that can be decided on

³²⁵Walker, *Why Punish?* (n 39) 72.

those grounds, and that experience, enables them to decide more rapidly than a novice could, thereby economizing on information - processing costs,³²⁶ and this, as indicated in Chapter 7.2.1, is idiomatic of some Cypriot judges.

5.2.6 Retributivism and the Restoration of Social Balance

Most positive retributivists, in one way or another, refer to a balance in society that can be disturbed by the act of crime. Punishment, in their view, is the required response to offset the disturbed balance. The act of punishment is purely retrospective and has an inherent moral value.

One classical type of balance-restoration stems from Hegel who believed that punishment should be meted out in order to cancel the ‘negation of right’ brought about by a crime to return to a previous state of affairs.³²⁷ Punishment, in other words, is to *annul* a crime. Although annulment may have a ritual function, as Walker points out, the fact that punishment has been meted out is, in the eyes of the victims, not equivalent to the crime not having been committed: ‘Victims can be compensated, but not unraped or unmurdered.’³²⁸ Hegel, however, was more concerned with abstract moral notions of right rather than with concrete compensation to victims in specific cases. An omission in Hegel’s account is that he leaves largely unanswered the question of how, and how much to punish. However, while pointing to the absurdity of talionic measures, he indicates that punishment in some way must be equivalent to the qualitative and quantitative

³²⁶For an extensive elaboration on intuitionism and its role in our conception of justice, see J Rawls, *A Theory of Justice* (Revised Edition The Belknap Press of Harvard University Press, Cambridge, Massachusetts 1999) 30-35, and H Sidgwick, *The Methods of Ethics* (7th edn Macmillan, London 1967) 96-216. The content of the paragraph is based on discussions in these two books.

³²⁷Honderich, *Punishment* (n 183) 42.

³²⁸Walker *Why Punish?* (n 39) 74.

characteristics of the crime. Furthermore, as a true positive retributivist, Hegel insists (like Kant), that the treatment of humans must not turn into the means to an (utilitarian) end.

Another influential positive retributivist approach views punishment as a method to restore the balance of *benefits and burdens* in society; our system of rules (i.e., criminal law), the argument goes, supplies us with benefits by protecting us from harmful actions such as violence and deception. It defines a sphere for each person ‘which is immune from interference by others.’³²⁹ In order to enjoy these benefits, everyone must exercise the burden of self-restraint over inclinations that would interfere with that sphere of immunity. Nozick for instance, goes beyond the benefits-and-burdens approach in his retributive account of punishment, advocating that a precondition for the infliction of a deserved penalty on an offender is the removal or counterbalancing of his unfairly gained advantage.³³⁰ In the mid-seventies, Andrew Von Hirsch endorsed this theory as partially an account of punishment. At the time, however, he saw one pitfall in the approach. Imposing a deprivation on the offender in order to redistribute the benefits and burdens does not explain why an offender deserves punishment ‘instead of being made to suffer another kind of deprivation that connotes no special moral stigma.’³³¹ Von Hirsch escaped the pitfall by contending that because the offender has done wrong, he deserves *blame* for his conduct. While depriving

³²⁹H Morris, ‘Persons and Punishment’ (1968) 52 *The Monist* 475, 477.

³³⁰R Nozick, *Philosophical Explanations* (Clarendon Press, Oxford 1981) 363-364.

³³¹Von Hirsch, ‘Proportionality in the Philosophy of Punishment’ (n 319) 48.

the offender of his unfairly gained advantage, the implicit element of reprobation in punishment expresses the deserved blame.³³²

5.2.7 Character Retributivism and Choice Retributivism

The more basic question for retributivists is the conceptual one, pertaining to the classification of the nature of the moral desert. Two leading contenders seem to emerge to this regard. The first, character retributivism, concentrates on an individual's character. On this view, the primary object of our responsibility is our own character, and responsibility for wrongful action is derivative of this primary responsibility, our actions being proxies for the characters such action express.³³³ The second, the choice conception of desert, holds that a person is responsible for the wrongs he freely chooses to commit, but not for wrongs he lacked the freedom to avoid doing, as an offender's desert depends on his choice on his having chosen to act (and having acted) wrongfully.³³⁴ Thus, determining 'whether an action expresses the agent's character, requires longer, more complete narration of what sort of person, in general, he is; whereas to see whether an action is freely chosen by an agent seemingly requires a more limited enquiry into his capacities and opportunities at the moment of acting.'³³⁵ The question of mercy depends on a considerable degree on whether one subscribes to choice or character retributivism, provided of course that he chooses sectarian theorising as the basis for his inquisition. For the character retributivist, an offender's post-offence contact will have a direct and profound bearing on whether he is a good candidate

³³²Keijser, *Punishment and Purpose* (n 8) 15.

³³³Moore, *Placing Blame* (n 311) 577.

³³⁴A Von Hirsch, *Doing Justice: The Choice of Punishments* New York: (Hill and Young, New York 1976) 127.

³³⁵Moore, *Placing Blame* (n 311) 577.

for mercy. That is, in taking the measure of a person, one will have to consider the whole life, including the full range of individual attributes and dispositions exhibited over the course of a lifetime.³³⁶

5.2.8 Denunciation

Denunciation is a secondary aspect of retributivism whereby the state, by inflicting the punishment, acts on behalf of society to denounce, disapprove, or censure the crime. The idea that punishment is a public denunciation of wrongdoing has a lengthy derivation. Kant espoused it by suggesting that a community abandoning a desert island would be obliged to execute the last murderer in its prison rather than merely leave him behind to a solitary life on the island to avoid being associated with the crime that he had committed.³³⁷ The act of punishment expresses a moral distancing from the crime, the wrongfulness of which is underlined by the otherwise apparently vindictive execution. This denunciation addresses both the needs of victim and of society. It shows the victim that the harm he has suffered is both recognised and denounced, and to society that its rules are being affirmed and strengthened. The legitimacy of the rule is spelled out by the very fact that there is a response to the rule's infringement. As a general rule, a severe punishment sends a forceful and unambiguous message condemning the conduct in question; a lenient punishment correspondingly sends a message that although the conduct is wrong, the wrong is not substantial. Accordingly, if

³³⁶M Sigler, 'Mercy, Clemency, and the Case of Karla Fay Tucker' (1997) 4 Ohio St J Crim L 455, 465.

³³⁷Gregor, *Kant: The Metaphysics of Morals* (n 322) 105.

there is no punishment at all, then the message conveyed is that the rule does not matter to society and one can ignore it.

Denunciation as a penal aim involves the imposition of sanctions that are of a nature and of sufficient degree of severity to express adequately the public's abhorrence of the crime. For some academics, denunciation seeks to contribute to crime prevention by strengthening people's disapproval of the crime and thereby promote social solidarity.³³⁸ However, viewed from this perspective, denunciation is a hybrid of utilitarianism and retribution. It is utilitarian because the prospect of being publicly denounced serves as a deterrent. It is retributive because it promotes the idea that offenders deserve to be punished.³³⁹ Of course, the conviction and punishment of an offender necessarily carries a moral and condemnatory message. A suspended sentence for instance is a prison term activated upon breach of its terms; therefore, the prison term is a declaratory statement of the inappropriateness of conduct.³⁴⁰

Denunciation relates to the aim of retribution, as harsh sentences, while fully merited for certain crimes, also serve the purpose of symbolically expressing the indignation of the public, as a form of an exclamatory sentencing

³³⁸See for example, H Jones and N Potter, 'Deterrence, Retribution, Denunciation and the Death Penalty' (1981) 49(2) UMKC L Rev 158.

³³⁹J Dressler, *Understanding Criminal Law* (5th edn Matthew Bender Publishers, Albany, New York 2009) 17.

³⁴⁰Bagaric claims that irrespective of which theory of punishment one adopts, suspended sentences should be abolished as a sentencing option, primarily because they do not constitute a recognisable form of punishment: See, M Bagaric, 'Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments' (1999) 22 UNSW L J 535, 562-563. The author's concerns could be said to be alleviated (at least semantically) by the ratio in *AG v Phanieros* [1996] 2 CLR 303, 310, where the Supreme Court reiterated that a suspended sentence is not a new form of punishment but simply a method of executing a term of imprisonment.

function.³⁴¹ Denunciation and retribution differ, however, in that retribution demands the punishment of the offender whereas denunciation does not.³⁴² It is difficult to make strong claims about the effectiveness of denunciation. Research suggests that the imposed sentences cannot influence the moral attitudes of the public. They seem to have sufficient respect for the law to disapprove more strongly of an action when the legislature passes a law against it, but they do not have sufficient respect for the criminal justice system so that they value the severity of the inflicted punishment. Denunciation may not provide a general justification for punishment, but it may afford an acceptable principle of distribution of punishment, that is, a paragon of determining the severity of the punishment.

A theory that resembles denunciation, but nonetheless contains also elements of rehabilitation and reintegrative shaming,³⁴³ is the communicative theory of Antony Duff, which sees punishment as an attempt at moral dialogue with offenders to censure their actions hoping to secure their contrition.³⁴⁴

5.3 Utilitarianism

Utilitarianism is a forward looking or consequentialist theory that aims to justify punishment by its alleged future consequences. By utilitarianism, one

³⁴¹M Findlay, S Egger, and J Sutton (eds), *Issues in Criminal Justice Administration* (George Allen and Unwin, New South Wales 1983) 133.

³⁴²Walker and Padfield, *Sentencing Theory, Law and Practice* (n 185) 115.

³⁴³John Braithwaite claims that successful societal responses to crime are those that bring about the reintegrative shaming of the offender. The treatment of offenders must be of such nature to shame them before other members of the community. Nevertheless, shaming must not be of a stigmatised nature tending to reject them from membership in the community. It must be of a kind, which will assist them to reintegrate within it by getting them to accept that they have done wrong, while encouraging others to readmit them to society: J Braithwaite, *Crime, Shame and Reintegration* (CUP, Cambridge 1989) 88.

³⁴⁴R A Duff, *Punishment, Communication, and Community* (OUP, Oxford 2003) 110.

signifies the approach that sees individuals as motivated by the pursuit of pleasure and avoidance of pain and uses this to devise social and penal policies to promote the greatest happiness of the greatest number. It derives its foundation on the intuition that a human being, because of his ability to experience pleasure and pain, will seek to maximise his pleasure and minimise his pain. It is a normative philosophy, so it defines an individual's desire to maximise pleasure or happiness as a moral virtue. Within utilitarianism, as in the case of retributivism, there is no shortage of esoteric dissents, sub-divisions and categorisations. One can distinguish between many aspects of utilitarianism, such as act-utilitarianism or extreme utilitarianism, rule-utilitarianism or restricted utilitarianism, indirect utilitarianism, mild utilitarianism and so forth.³⁴⁵ For the strict and rule utilitarian the individual is a means to society's ends. Punishment, in this approach, attempts to prevent or reduce offending through deterrence, rehabilitation (reformation),³⁴⁶ and incapacitation.³⁴⁷

5.3.1 Deterrence (General and Specific)

Deterrence and the other forward-looking objectives, endeavour to accomplish reduction and prevention of crime as an overall scope of the criminal

³⁴⁵J J C Smart, 'Extreme and Restricted Utilitarianism' in P Foot (ed), *Theories of Ethics* (OUP, Oxford 1967) 171,183.

³⁴⁶Some writers define the terms '*rehabilitation*' and '*reformation*' differently: see, for example, P Bean, *Punishment: A Philosophical Inquiry* (Martin Robertson, Oxford) 46. For present purposes the term '*rehabilitation*' will be preferred, as this is the term used by the Supreme Court.

³⁴⁷Ashworth, in his article 'Deterrence' in A Von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (2nd edn Hart Publishing, Oxford 1998) 44, points to the fact that another possible aim of punishment is vindication, which aims to punishments sufficient to ensure that citizens aggrieved by offences accept the state's response and do not seek justice through a vigilante behaviour. According to one extreme (for today's pragmatism) view of an American historian, vigilantism assists the law to accomplish its purpose; even if by definition denotes resorting to unlawful means. From this point, the vigilante principle does not spring from disrespect to the law: G Bancroft, *History of the United States* (Little, Brown and Co, Boston 1866) 234.

justice system. The underlying idea of the theory is that punishment is necessary by reference to its crime-preventive consequences.³⁴⁸ On this approach, the purpose of sentencing is either to deter or incapacitate the offender, displacing issues of desert to the outer limits of setting punishment scales.³⁴⁹ These aims are part of a utilitarian framework on how the calculation of the utility of punishment compares with its disutility in order to justify and measure punishment on a cost-benefit analysis basis. Deterrence, and the other forward-looking objectives, endeavour towards reduction and prevention of crime as an overall scope of the criminal justice system. Penal institutions must combine both general and specific deterrence. In the utilitarian philosophy of Bentham, general deterrence has priority over specific deterrence. Even in modern debates, there is little reference to specific deterrence in the literature.³⁵⁰ General deterrence sanctions may extend their influence over differing time periods. Long-term deterrence may come about through the perpetuation of fear of punishment type of contact. Medium-term deterrence may be associated with legislative attempts to influence social behaviour by increasing certain maximum penalties and then there are 'exemplary sentences' occasionally imposed in discretionary sentencing systems (though not in Cyprus),³⁵¹ on certain offenders in order to deter potential imitators. If conditions in prison are harsher than outside, that will constitute a specific and general

³⁴⁸J Wilson, *Thinking about Crime* (Vintage Books, New York 1985) 85.

³⁴⁹E Van den Haag, 'Punishment as a Device for Controlling the Crime Rate' (1985) 33 Rutgers L Rev 706.

³⁵⁰As for example in, J Gibbs, *Crime, Punishment and Deterrence* (Elsevier Science Ltd, New York 1975) Ch 2.

³⁵¹See, *Kakathymis v The Republic* [1971] 2 CLR 309.

deterrent factor.³⁵² Perceptual deterrence must be enhanced so that the public knows of the probability of punishment but it is debatable whether punishment has such or any deterrent effect.³⁵³ Some question the methodology used in some studies to prove the deterrent effects of punishment.³⁵⁴ The better view is that we must think that the inability to deter some people is only temporary.³⁵⁵ By analogy, to prove the utility of medicine it is not necessary to prove that it always prevents death and cures all disease. It is enough that it prolongs life and diminishes or limits suffering. To justify punishment is not necessary to prove that it always prevents crime by its deterrent quality. It is enough to indicate that there would be more crime without the existence of any punishment.³⁵⁶ The difficulties in proving deterrence and interpreting the evidence do not mean that they must lead to an abandonment of the approach. We cannot say that deterrence never works but rather that punishment may deter fewer offenders or future offenders than we like.³⁵⁷ Or even, that deterrence is a necessary though not sufficient element in punishment, which combined with other approaches such as forgiveness, reconciliation, and societal acceptance of the offender following his punishment, could complete the cycle of an overall effective systemic treatment.³⁵⁸ There can

³⁵²To this regard, human rights case law demands that the conditions of imprisonment and any special circumstances of the offender are taken into account in assessing the severity of the sanction. In *Price v UK* (2002) 34 EHRR 1285, the Court held that a seven days' imprisonment of an offender who was a thalidomide victim with serious health problems, was disproportionate as it was imposed without ensuring in advance that there were adequate facilities to accommodate her due to her limb deficiency.

³⁵³A DiChiara and F Galliher, 'Thirty Years of Deterrence Research: Characteristics, Causes, and Consequences' (1984) 8 *Crime, L & Soc Change* 243.

³⁵⁴P Robinson and J M Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24(2) *OJLS* 173.

³⁵⁵Walker and Padfield, *Sentencing Theory, Law and Practice* (n 185) 199.

³⁵⁶M Cohen, 'Moral Aspects of Criminal Law' (1940) 49 *Yale L J* 987, 1015.

³⁵⁷Easton and Piper, *Sentencing and Punishment* (n 282) 133.

³⁵⁸P Rossman, *After Punishment What?* (Collins, Cleveland 1980) 108.

also be little doubt that the existence of a system of punishment has some general deterrent effect.³⁵⁹ According to one view, to assert that deterrence does not work is tantamount to either denying the plainest facts of everyday life, or claiming that potential offenders are utterly different from the rest of us.³⁶⁰ Retributivists counter-argue that it takes more to convince on the utility of deterrence than the application of common sense and obviousness of real life realities.³⁶¹ On the same premise, this position is not sufficient to weaken the effects of common sense and social reality for the sake of elaborative arguments. One could reasonably propose to that end that human observation and common sense are far safer in this respect than statistical correlations.

5.3.2 Rehabilitation

The aim of rehabilitation is to reduce the crime rate by reforming and rehabilitating the offender.³⁶² It promises a payoff to society in the form of transforming offenders into law-abiding productive citizens who no longer desire to victimise the public.³⁶³ Proportionality is less important to this regard, as indeterminate sentences provide for treatment for as long as it is necessary to rehabilitate the offender.³⁶⁴ An inherent normative weakness of this approach has always been the great difficulty in measuring the effectiveness of rehabilitative

³⁵⁹ Cavadino and Dignan, *The Penal System* (n 240) 38.

³⁶⁰ Wilson, *Thinking about Crime* (n 348) 121.

³⁶¹ Ashworth, 'Deterrence' (n 347) 44.

³⁶² P Raynor, 'Some Observations on Rehabilitation and Justice' (1997) 36 *Howard J Crim Just* 248.

³⁶³ F Cullen and K Gilbert, *Reaffirming Rehabilitation* (Criminal Justice Studies, Anderson Publishing, Cincinnati, Ohio 1982) 20.

³⁶⁴ B Hudson, 'Beyond Proportionate Punishment' (1995) 22 *Crime L & Soc Change* 59.

measures.³⁶⁵The generalised and often cited wrapping up associated with the American Robert Martinson that ‘nothing works’ became widely accepted, not so much because it proved true, but more for the reason that the disappointment of high hopes invested in reform led to an overreaction against the rehabilitative ideal.³⁶⁶The latter declined in popularity in the 1970s and 1980s, being confronted with high degrees of recidivism.³⁶⁷It was in addition criticised on the basis that the means to achieve rehabilitation were vague,³⁶⁸and that the deterrence of the great majority of the population from serious crime is always the consideration of first importance, and not the rehabilitation or incapacitation of the much smaller number of persons convicted of criminal offences.³⁶⁹It was moreover criticised for failing to get to grips with the underlying social inequalities and problems that generate crime and for treating the individual without addressing social causes.³⁷⁰It appeared to deny individual responsibility for crime and to justify apparently spendthrift programmes.³⁷¹

The extreme form of the rehabilitation model sees the task of the criminal justice system as therapeutic for curing the delinquent individual rather than punishing if it will be unjust to punish if he is not responsible due to an illness for

³⁶⁵C Lloyd, G Mair, and M Hough, *Explaining Reconviction Rates: A Critical Analysis*, Home Office Research Study No. 135 (HMSO, London 1994).

³⁶⁶Cavadino and Dignan, *The Penal System* (n 240) 38.

³⁶⁷C Kershaw, *Reconviction of Offenders Sentenced or Released From Prison in 1994*, Home Office Research Findings No 90 (London, HMSO 1999).

³⁶⁸S Brody, ‘Research into the Aims and Effectiveness of Sentencing’ (1978) 17 *Howard J Crim Just* 133.

³⁶⁹F Allen, *The Decline of the Rehabilitative Ideal* (Yale University Press, New Haven 1981) 43.

³⁷⁰R R Ross, E A Fabiano and C D Ewles, ‘Reasoning and Rehabilitation’ (1988) 32 *Int’l J Offend Therapy & Comp Criminology* 29.

³⁷¹Home Office, *Crime, Justice, and Protecting the Public: The Government’s Proposals for Legislation* (Cm 965, 1990).

example which precipitates offending.³⁷²This perception originates from the positivist Cesare Lombroso.³⁷³Positivists believe in the doctrine of determinism, that is, in the belief that human beings, including criminals, do not act from their own free will, but they do so because of forces beyond their control³⁷⁴(and this could finally explain the mystery of marriage and Kant's choice not to succumb). Thus where Beccaria's vision of human nature had been one of untrammelled free will, while Bentham had admitted that the responsibility of some humans is limited, positivism denies responsibility altogether. It follows that for the positivist retribution cannot serve as a justification for punishment. Positivism is also sceptical about deterrence due to the absence of supportive scientific evidence. Positivism rejects also the classicist concept of due process and the neo-classicist notion of proportionality. Due process is inappropriate due to the condition of the offender and the consequent futility of the legalistic process, whereas proportionality can be of the essence only if the treatment fits the offender and not the offence. This individualised treatment model favours, due to its nature, the indeterminate sentences.

Positivism and the rehabilitative ideal associated with it have declined in influence due to the lack of evidence backing their theoretical foundation. In response to these critiques, some argue that rehabilitation has adapted. One of them is Hudson,³⁷⁵who advocates that in-prison rehabilitation can prevent re-offending. Prison must be a positive rather than a negative experience for the

³⁷²Easton and Piper, *Sentencing and Punishment* (n 282) 411.

³⁷³See, G Lombroso, *Criminal Man According to the Classification of Cesare Lombroso* (Putman, New York 1911).

³⁷⁴R Kane, *The Significance of Free Will* (OUP, New York 1998) 124.

³⁷⁵B Hudson, *Justice in the Risk Society: Challenging and Reaffirming 'Justice' in Late Modernity* (Sage Publications, London 2003) 66.

offender. The new rehabilitationism³⁷⁶ does not entail indeterminate sentencing, as rehabilitative progress is not the criterion for sentence length. In cases of low culpability, rehabilitation must be the prime objective and punishment kept to a minimum. If there is imprisonment, then it must not exceed the sentence pronounced. The right of the state to punish and the right of the offender to due punishment is best protected by rehabilitation being offered within a determinate sentence fixed by considerations of desert and dangerousness. The obligation of the state is to provide basic physical standards in the prison and rehabilitative facilities sufficient to ensure that the effects of incarceration do not damage the offender. The aim is to reduce re-offending by improving the education and vocational qualifications of prisoners so they leave prison better prepared to re-enter society, and indeed this appears to be the philosophy of the Cyprus Prison System, as discussed in Chapter 3.2.5. The focus must be on sentence outcomes looking at what works for which type of offender. Hence, prison funding must increase for behavioural programmes, practical skills courses and drug programmes. The emphasis must be on justice rather than treatment, to protect the offender's fair trial rights and from coercive treatment. From this perspective, rehabilitation still offers a constructive way for improving the criminal justice system.³⁷⁷ It treats the individual as possessing rights and as capable of making

³⁷⁶P Walton, 'Big Science: Dystopia and Utopia – Establishment and New Criminology Revisited' in P Walton and J Young (eds), *The New Criminology Revisited* (Macmillan Press, London 1998).

³⁷⁷E Rotman, *Beyond Punishment: A New View of the Rehabilitation of Offenders* (Greenwood Press, Connecticut 1990) 171.

choices, but also as having a positive right to appropriate treatment to prevent re-offending.³⁷⁸

5.3.3 Incapacitation / Social Protection

Incapacitation means that the offender is prevented (usually physically), from re-offending by the punishment imposed, either temporarily or permanently, and aims to protect community.³⁷⁹ Incapacitation can take the form of imprisonment or that of a disqualification, attendance or restraining judicial order. There are questions as to whether incapacitation is inherently unfair. A person who receives an incapacitating sentence, even though he might have not re-offended, is not presumptively innocent but has committed exactly the type of offence for which he is being detained, and future detention or control may be justified. Moore argues that predictive sentencing is compatible with desert theory because a dangerous person is more deserving of punishment if the criminal record indicates that he is a bad risk.³⁸⁰ The general problem with incapacitation is that behavioural predictions about offenders have proven to be unreliable.³⁸¹

Unlike deterrence or rehabilitation, incapacitation does not seem to rest on a particular behavioural premise, but is still justifiable on utilitarian grounds. The aim is to maximise happiness and restrain dangerous offenders in order to protect the majority of society by removing harmful individuals. Incapacitation and

³⁷⁸D K MacKenzie, 'Probation: An Untapped Resource in U.S. Corrections' in L Gideon *Rethinking Corrections: Rehabilitation, Reentry, and Reintegration* (Sage Publications, London 2010) 108-109.

³⁷⁹A Dershowitz, 'The Origins of Preventive Confinement in Anglo-American Law Part 1: The English Experience' (1974) 43 U Cin L Rev 1.

³⁸⁰M Moore, 'The Moral Worth of Retribution' (n 302) 110.

³⁸¹M D Gottfredson, 'Behavioural Prediction and the Problem of Incapacitation' (1994) 32(3) *Criminology* 441; A Dershowitz, 'The Law of Dangerousness: Some Fictions About Predictions' (1970) 23 *J Legal Educ* 24.

rehabilitation are not mutually exclusive concepts. One can combine incapacitation with programmes intending to reform the individual, but one can also incapacitate while recognising that there is no prospect of reform. In addition, as with deterrence, there is the problem of isolating the effects of incapacitation on the overall crime rate. On the utilitarian model, to sacrifice the individual from persistent and dangerous offenders is justified for the greater good of society.

Incapacitation is an expensive penal policy,³⁸² and sometimes, in democratic regimes, citizens are indeed hesitant, or even unwilling, to spend resources in order to confer benefits on hated criminal offenders, particularly when politicians portray spending money in prison conditions as a status competition, in which a citizen must choose between the interests of prisoners and the interests of crime victims.³⁸³ Offending can resume upon release so the method will not solve longer-term problems of crime. A shift towards the use of prisons as warehouses may mean reduced funding for costly treatment programmes in prison. The strategy of incapacitation seems to assume a finite pool of offenders, yet there is no reason why others will not fill the vacuum. Available research suggests that even substantial increase in the use of custody will achieve only a small cut in the criminal rate, as punishment is only one factor linked to criminality.³⁸⁴ The impact of punishment on crime will be limited if only a small number of offenders come before the courts and receive a custodial sentence, which raises the question of whether it is better to invest resources in policing rather than punishment.³⁸⁵

³⁸²N Walker, 'Unscientific, Unwise, Unprofitable, or Unjust?' (1982) 22 Brit J Criminol 276.

³⁸³F E Zimring, G Hawkins and S Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (OUP, New York 2001) 14.

³⁸⁴I O'Donnell 'Punishment and Society' (2003) 92 Studies 258.

³⁸⁵C Stahlkopf, 'Testing Incapacitation Theory' (2010) 56 Crime & Delinquency 253.

In addition, as with deterrence, there is the problem of isolating the effects of incapacitation on the overall crime rate. There is an inherent tendency for incapacitation to be an expansionist policy. In case of mistakes in predicting high-risk offenders, the public's response may well be to demand broadening of the range of offenders and offences within the net. Governments may be reluctant to resist pressures for more incarceration and so be unable to abandon it as a policy. Through this spectrum, the tendency in recent years has been to concentrate on particular offenders and groups who are more prone to recidivism, to cut costs and ensure that limited expensive resources are allocated to those most likely to benefit.³⁸⁶ One may see selective incapacitation as ethically flawed as it may mean that a risk prone offender receives a higher sentence than he deserves, and because it denies autonomy to the individual by presuming that he will re-offend, and punishes him for a choice not yet made.

There have been doubts about predictive sentencing since the 1970s.³⁸⁷ Over-prediction is real and inherent in the approach. True positives are spotted (that is, persons correctly predicted to offend), but the overwhelming majority will be a false positive, that is, persons mistakenly predicted to offend. The false-positive argument does not in principle question the appropriateness of predictive sentencing. The issue becomes only one of accuracy; were one able to reduce the number of false positives, selective incapacitation will become unobjectionable.³⁸⁸ The argument however, does not address the nature of prediction criteria. With sufficient accuracy, it will not matter whether these

³⁸⁶Easton and Piper, *Sentencing and Punishment* (n 282) 133.

³⁸⁷Dershowitz, 'The Law of Dangerousness: Some Fictions About Predictions' (n 381) 24.

³⁸⁸Von Hirsch, *Past or Future Crimes* (n 292) 152.

criteria rely on the current crimes, past offending or social factors and whether or not sentences indicate parity among offenders convicted for similar crimes. Desert works differently. The acceptability of sentencing criteria depends on whether and to what extent these rely on the gravity of the criminal conduct in determining the severity of the penalty. Standards that rely on offence gravity will pass, even on poor predictors of recidivism. Moreover, those that rely chiefly on ulterior factors, like the offender's social history or previous convictions, will infringe desert criteria even if they happen to predict recidivism as well. In the interest of liberty, non-convicted persons are harmless and thus need not fear losing their freedom on grounds of their supposed dangerousness. There is a presumption of harmlessness; those that fall outside this category renounce or forfeit that right and give society the right to interfere with their lives.³⁸⁹ An offender has a right to release at the end of the normal term. The right to discharge is inviolable unless the release poses a vivid danger to other rights-holders. Seriousness of the contemplated injury, predictive frequency, immediacy, and certainty are the criteria. The latter is the most crucial by far, as it is of pivotal importance given the extensive effect of the measure to the liberty of the subject. Given the very high rate of false positives, protective sentences only rarely can be justified. A statement of a prediction of dangerousness is a statement of a present condition, not the prediction of a particular result.³⁹⁰ A jurisprudence that pretends to exclude such concepts is self-deceptive. These concepts frequently figure prominently in decision-making,

³⁸⁹N Walker, 'Incapacitation, Dangerousness and the Forfeiture of Right' in N Walker (ed), *Dangerous People* (Blackstone, London 1996) 7.

³⁹⁰N Morris, 'Incapacitation Within Limits' in A Von Hirsch, A Ashworth, and J Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd edn Hart Publishing, Oxford 2009) 90, 91.

whether or not receive mention in jurisprudence. The reality of such predictions must be recognised and put into a proper jurisprudential spectrum. Predictive punishment must rely on solid criteria and viable predictions. Nevertheless, in their absence, one must conclude such an approach has many dangers, as there is an inherent weakness in the incapacitation theory to identify the proper limits and judge the accuracy of the prediction.³⁹¹ Morris puts forward the need for statistical support but its reliability is questionable.³⁹²

5.4 Hybrid Theories of Punishment

Regarding the justification for punishment and the aims of sentencing, one strategy, although neither truly a hybrid nor a true theory, is eclecticism. For instance, in cases where the sentencing judge has confidence in achieving prevention through deterrence or rehabilitation, he chooses a utilitarian mode of reasoning. In case where there is little confidence in achieving prevention or the offence is particularly shocking, the sentencer falls back on retributive reasoning.³⁹³ This, for some, is more of a pragmatic, multi-stage rocket approach to sentencing than a theoretically integrated account of punishment.³⁹⁴ Hybrid (or mixed, or compromise) theories differ from such eclectic approaches towards punishment. They are the product of a diachronic and exigent aspiration of some theorists to succeed an encircling synergy between retributivism and utilitarianism, with dubious results.³⁹⁵ Historically, theorists attempted this

³⁹¹D Champion, *Measuring Offender Risk: A Criminal Justice Sourcebook* (Greenwood Press, Westport, Connecticut 1994) 213.

³⁹²N Morris, 'Incapacitation Within Limits' (n 390) 107.

³⁹³Walker, *Why Punish?* (n 39) 123-126.

³⁹⁴Keijser, *Punishment and Purpose* (n 8) 25.

³⁹⁵R L Lippke, 'Mixed Theories of Punishment and Mixed Offenders' (2010) 44 SJ Ph 273.

endeavour in the context of defending utilitarianism against the objection made by the retributivists that the principle of utility, consistently applied, recommends in principle the punishment of the innocent.³⁹⁶In essence, these theories do not supply any new insights concerning the general justification of punishment or the aims at sentencing. Rather, they draw upon elements from both retributivist and utilitarian approaches to form *hybrid* accounts of punishment.³⁹⁷In such accounts, through the combination and integration of retributive and utilitarian principles, one type of reasoning is moderated or limited by the other type of reasoning. This converts hybrid accounts of punishment into theoretical and practical alternatives for strict retributive or utilitarian reasoning. As Hart indicates, it is unsustainable to offer a theory of punishment, which is either totally utilitarian or totally retributive, and that rather conciliation is needed.³⁹⁸Similarly, but on a more imposingly sounding tenor, Brooks proposes a rethinking of punishment in a more pluralistic manner by seeking the reintegration of different theories of punishment together rather than hopelessly apart in a monistic manner. Thus, a proper theory of punishment would be one that is proportionate to what is deserved, deterring potential criminals, and helping to rehabilitate the person punished.³⁹⁹One type of a hybrid theory is negative retributivism whereas another, that which sees retribution as punishment.

³⁹⁶I Primoratz, *Justifying Legal Punishment* (Humanities Press International, Atlantic Highlands, New Jersey 1989).

³⁹⁷P H Robinson, 'Hybrid Theories for the Distribution of Criminal Sanctions' (1987) 82 North U L Rev 19.

³⁹⁸Hart and Gardner, *Punishment and Responsibility* (n 155) 73.

³⁹⁹T Brooks, 'Rethinking Punishment' (2007) 1(1) Int J Juris & Phil L 27, 33. The author asserts that the ideal solution would be to discover a theory of punishment that can avoid the defects of each of the retributivist and utilitarian theories of punishment, and accommodate the attractive elements of each, moving away from the dominant monism and thus forming a stronger and more plausible punishment theory.

5.4.1 Hybridism and Negative Retributivism

The shape of a hybrid account of punishment depends on the theoretical point of departure. Two general shapes are possible, as the general justification for the practice. First, is utility. The negative retributive principle superimposes to limit punitive action aimed at prevention: Only the guilty may be punished and only to the extent of their desert. Secondly, it is retribution. Retributive demands on punishment tone down by utilitarian considerations. Although retribution provides the general justification for the practice, *justice* no longer dictates punishment to mete out to the degree of the offender's desert. Rather, utilitarian considerations allow for punishing less than would be indicated by desert, and may even allow for refraining from punishment altogether by employing the principle of mercy under such circumstances to justify the decision.

There are utilitarians who have recognised the necessity of independent side constraints of justice that forbid the deliberate punishment of the innocent, and perhaps the excessive punishment of the guilty.⁴⁰⁰ These utilitarians have embraced the negative retributive principle as a limiting principle.⁴⁰¹ The negative principle provides protection to individuals against disproportionate and unfair use of punishment, for the sake of utility, by presumably employing leniency as a form of compromise against the rigours of unexpected and undesired results.⁴⁰² Pure utilitarian reasoning cannot provide such a limiting principle. An external principle

⁴⁰⁰R A Duff, 'Penal Communications: Recent Work in the Philosophy of Punishment' in M Tonry (ed), *20 Crime and Justice: A Review of Research* (University of Chicago Press, Chicago 1996) 1, 3.

⁴⁰¹D M Gottfredson, 'Measuring Justice: Unpopular Views on Sentencing Theory' in W S Laufer and F Adler (eds), *The Criminology of Criminal Law* (Vol 8 Transaction Publishers, New Jersey 1999) 247, 251.

⁴⁰²J Miller, 'The Philosophy of Leniency in Crime Treatment' (1931-1951) 32 *J Crim L & Criminology* 389, 395.

is in need to guard against the potential excessiveness of utilitarianism. Beccaria also saw the need for a negative principle. However, instead of the negative retributive principle, he refers to the social contract as a safeguard against the potential excessiveness of utilitarianism.⁴⁰³ Beccaria apart, it appears that there must be no interest in mercy or any kind of leniency. This goes beyond Bentham's principle of frugality, that is, the principle that punishment should be no more severe than is necessary for its utilitarian purpose. As they are not interested in inconsistencies, they can apply different sentences in co-defendants if they believe that they are thus applying the minimum severity needed to achieve their aim. However, this relies on the assumption that utilitarian sentencers know what sort of sentence will maximise the effect they want, and will not be content with anything less than maximisation.

5.4.2 Hybridism and Retribution as Punishment

The second type of hybrid theory takes the opposite view. Retribution, in this hybrid account, constitutes the essence of punishment, its general justification. Below the (upper) limits, defined by retribution, notions of utility determine the choice concerning mode and severity of punishment. Although retribution constitutes the justification for punitive action, punishment is not a moral necessity, contrary, that is, to Kant's categorical imperative. Rather, punishment is permitted on grounds of retribution and only to the extent of the offender's desert. Retribution provides a threshold (lower boundary) in the sense that punishment is only for the guilty.

⁴⁰³Keijser, *Punishment and Purpose* (n 8) 26.

5.5. Hybrid Dangers

The two types of hybrid accounts discussed here are each other's theoretical mirror image. Interestingly, although the normative foundations (the general justifications) are completely different, implications for the practice of sentencing are quite similar. Eventually, in both hybrid accounts, utility rules within the limits of desert. Hybrid accounts may provide useful guidelines for the practice of sentencing. They also seem to circumvent some of the ethical objections made to pure utilitarian or retributive reasoning. However, their practical and theoretical attractiveness tends to hide some potential dangers. A question arises on whether a theory should bind the practice of punishment to a certain mode and frequency so as to provide the hybrid accounts with acceptable and stable points of reference. After all, hybrid accounts are pre-eminently suitable for 'criminal politics'. In accordance with temporal and local circumstances or trends, a mixed theory provides ample room for shifting emphasis on functions and goals of punishment within the framework of the dominant mixed theory. The pendulum, however, does not swing from one extreme to the other. Such shifting emphasis will be legitimate because this occurs within the hybrid framework.⁴⁰⁴

Nevertheless, within the parameters set by proportionality, the judge must impose the least severe sanction consistent with the aims of sentencing. At lower levels, there is more scope for flexible parsimonious sentencing punishments, which might otherwise be justified on predictive, rehabilitative, or merciful grounds. There is, however, the counter position of scholars who think that fundamental differences between the two theories convert the practice to an

⁴⁰⁴Keijser, *Punishment and Purpose* (n 8) 27.

essentially contested one, with them forming in effect two mutually exclusive concepts. Perhaps one of the most troublesome aspects of the conflict between the two theories comes from the denial of the fundamental conflict, and indeed the support for an unachievable combination of the two as a solution.⁴⁰⁵ One academic has even described hybrid theories of punishment as ‘everybody happy theories’ that can only justify confused thinkers,⁴⁰⁶ with some of the latter probably being Cypriot judges.

5.6 Conclusions

This chapter discussed the distinction between the general justification of the practice of punishment and the specific aims of punishment, as well as the said aims, namely retributivism, utilitarianism, and hybridism. It also argued that sentencing is morally problematic because it involves actions otherwise wrong or evil in other contexts and therefore in demand of moral justification. It emphasised, though epigrammatically, that the pursuit of justice forms the common denominator among the theories discussed, as supposed and defined through the corresponding perspectives, and that justice in the dominion of sentencing rationalisation, has additional variables. These variables relate to the diachronic societal outlook for merciful and lenient treatment of the criminal offenders by recognising their human frailty and faultiness and not only pursuing their harsh punishment as if their crime was that of being imperfect and not that of, simply, violating human laws. It was also argued that the relation between mercy

⁴⁰⁵Robinson, ‘One Perspective on Sentencing Reform in the United States’ (n 43) 1.

⁴⁰⁶Grombag, ‘Of Crimes and Punishment’ (n 182) 97.

and justice, and of both, with punishment needs further attentiveness and that the venture must take place not only within the orb of punishment theory but also in detachment from it as a parallel and independent aspect of the more general debate.

On these perspectives, the analysis in the following chapter on the relation between mercy and justice, and of both with punishment, will conceivably be aptly encompassing for the purposes of the thesis. As indicated in Chapter 4, the present chapter together with Chapter 6 which follows, will serve as a backdrop for dealing with the different perspectives of the Cypriot judges relating to the justifications and goals of punishment and the role of mercy in criminal sentencing correspondingly, and establishing whether their punishment and mercy are actually taking place within or on the basis of a sound legitimising moral framework.

CHAPTER 6: MERCY, JUSTICE, AND CRIMINAL SENTENCING

The objective of the present chapter is to examine mercy and its connection to justice, and criminal sentencing within the parameters of the dissertation's scopes. This connection will provide the tool for comprehending the sentencing thinking of the Cypriot judges in the descriptive manner mentioned in Chapter 1. It will moreover reinforce the foundations for demonstrating the existence (or not), of a pertinently consistent legitimising framework underpinning the practice. It will further, illustrate that there are differences amongst approaches to mercy and their justification in the theories of punishment under consideration, for which there are equally divergent ideas as to their own moral justification. The proceeding analysis will additionally indicate that there are variations between conceptions of mercy that deny it any peculiarity in relation to justice, and affirming that it is simply a form of sensibility to criteria of justice, theories of mercy that see it as refusing to apply principles of justice, and theories of justice that operate a division of labour between them, and in which justice gives general limits for the decision, with mercy allowing the judge to navigate on the area of discretion.

6.1 The Interrelationship Between Justice and Mercy

As expected, theorists have approached the issue of mercy and its relationship to justice and punishment from different perspectives. The viability of these perspectives depends on the theoretical inclinations of the analyst, with no universally acknowledged answer given as of yet. This is hardly surprising, given that scholarship (penal or other) usually thrives and feeds from incongruity and

differentiation. Applicable examples of this are stated throughout Chapter 5, with reference to the sectarian theories of retributivism and utilitarianism.

As has already been noted, the concept of justice in the prosecution of criminal charges means many different things to different people. To some, justice invokes considerations of retribution, imposing appropriately severe punishment on those who cause harm by violating the rights of others. To others, it invokes considerations of mercy and rehabilitation, and seeks to understand and promote change in the behaviour of those who do not abide by society's norms. Yet to others, justice should be concerned with the plight of victims in the criminal justice system and to aid their recovery. But if by justice one refers to legal justice (that which a judge is bound to administer), then one must also note that legal justice is not always identical to moral justice, as legal justice may fall short of moral justice in its ability to adequately distinguish between relevantly different cases. Thus, built into what the judge may do to effect justice, is discretion. And when that discretion is exercised in order to remit or reduce punishment, which the law prescribes, the discretion is mercy.⁴⁰⁷ Mercy (or mercying), concerns second chances and forgiveness when forgiveness is not possible.⁴⁰⁸ It is an act of benevolence or compassion that reduces what is owed,⁴⁰⁹ though not as of right but as a gift from one harmed to his harmdoer.⁴¹⁰ By the grace of forgiveness, the thing

⁴⁰⁷C A H Johnson, 'Entitled to Clemency: Mercy in the Criminal Law' (1991) 10 L & Phil 109, 116.

⁴⁰⁸M Braswell, J Pollock and S Braswell, *Morality Stories: Dilemmas in Ethics, Crime and Justice* (Carolina Academic Press, Durham, North Carolina 2005) 131.

⁴⁰⁹D T Kobil, 'Should Mercy Have a Place in Clemency Decisions?' in A Sarat, and N Hussain (eds), *Forgiveness, Mercy, and Clemency* (Stanford University Press, Stanford, California 2007) 39.

⁴¹⁰M Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, Boston 1998) 17.

that had been done has not been done,⁴¹¹ although that does not necessarily entail mercy, that is, exempting an offender from atonement, restitution, or punishment.⁴¹² Nonetheless, no matter how one conceives justice, a common thread running through most of these conceptions is a desire to ascertain the truth, accurately sorting out the facts that are relevant to a criminal charge, not implying, in spite of that, that the concept of truth is inevitably germane to the venture of amplifying beliefs. It is difficult to find much agreement on the definition of *justice*. The definitional process requires reflection and care. We are commonly more aware of those things that breach our concept of *just* than we are able to identify the qualities of those that are within the range of our conception of the meaning of the term. This does not mean that *justice* is a boundary-setting condition. Law may be boundary setting, but *justice*, seemingly, implies more than that. It is something that should be both 'done' and 'seen to be done'. 'It relates to the conception of equity, and goes further and embraces more. It is an idea that one seems to learn quite early in life, although the notion may undergo considerable change with maturity.'⁴¹³ Uncertain as we are as to exactly what constitutes *justice*, there is nothing like *injustice* for stirring emotional, antagonistic attitudes toward the source of that malevolence.⁴¹⁴ There is a need to develop a comprehensive theory of the conditions under which people are morally bound to obey the law and all that it involves, be it obligations, rights or sanctions. For it does seem

⁴¹¹A Kelley (tr), Vladimir Jankélévitch, *Forgiveness* (The University of Chicago Press, Chicago 2005) 164.

⁴¹²J Landman, 'Earning Forgiveness: The Story of a Perpetrator, Katherine Ann Power' in S Lamb, and J Murphy (eds), *Before Forgiving: Cautionary Views of Forgiveness in Psychotherapy* (OUP, Oxford 2002) 237.

⁴¹³L Kohlberg, 'Stages of Moral Development as a Basis for Moral Education' in C Beck and E Sullivan (eds), *Moral Education* (University of Toronto Press, Toronto 1970) 23.

⁴¹⁴L T Wilkins, 'Policy Control, Information, Ethics and Discretion' in E A Lawrence and R S Irving (eds), *Social Psychology and Discretionary Law* (n 207) 44.

reasonable to suppose that one is sometimes bound to abide by social norms that leave something to be desired, but it also appears reasonable to conclude that a legal system does not automatically merit the respect that we might give it by our obedience. Law must earn that respect.⁴¹⁵ For Nussbaum, for instance, such a systemic respect could be attained if equity and mercy (linked under the Greek term *epieikeia*, and later translated by Seneca as *clementia*)⁴¹⁶ prevails that of strict justice (*dike*). The resulting ideal of merciful justice leads to milder and more sympathetic reactions to the offender on the basis of individualisation rather than on strict proportionality.⁴¹⁷

6.1.2 The Supposed Incompatibility between Justice and Mercy, and the Paradox of Mercy

As typically defined, the concepts of mercy and justice seem incompatible in the sense that if justice is the austere application of the law, and mercy its compassionate digression, then mercy is unjust and justice is merciless. Law is narrower than justice, and mercy is broader than both. Justice can be merciless, but mercy must be just.⁴¹⁸ This incongruity (or puzzle),⁴¹⁹ still plagues jurists who usually attempt to deal with it by adopting, as a vaulting bar, Saint Anselm's of Canterbury two paradoxes of God's mercy, as discussed in his *Proslogion*,

⁴¹⁵D Lyons, *Ethics and the Rule of Law* (CUP, Cambridge 1984) 214. For a more psychologically oriented and empirical view, see: T R Tyler, *Why People Obey the Law* (Yale University Press, New Haven 1990).

⁴¹⁶R Campbell (tr), *Seneca: Letters from a Stoic* (Penguin Classics, Penguin Books, London 1969) 24.

⁴¹⁷M C Nussbaum, 'Equity and Mercy' (1993) 22 *Phil & Pub Aff* 83.

⁴¹⁸J R Brown, 'The Quality of Mercy' (1992) 40 *UCLA Rev* 327, 335.

⁴¹⁹R A Duff, 'Justice, Mercy and Punishment' *CjScotland* (16 September 2009), www.cjscotland.org.uk/ accessed 14 February 2010.

whereby he expressed the human uneasiness with iniquitous divine mercy.⁴²⁰The first paradox asks how justice and salvation can originate from the same source. If God is perfectly just, how can he also show compassion and grant mercy to the wicked?⁴²¹The second paradox is concerned with equal treatment, asking how we can understand God's choice to show mercy only to some.⁴²²These paradoxes widely known as the 'paradox of mercy' seem to suggest that mercy is different or even antithetical to justice in punishment. Jeffrie Murphy elaborated on the paradox, concluding (in what has become a locus classicus position in the field of mercy theory), that if mercy requires a tampering of justice, then there is a sense in which mercy may require a departure from it.⁴²³Thus, to be merciful is perhaps to be unjust. However, it is a vice, not a virtue, to manifest injustice. Thus mercy must be, not a virtue, but a vice, a product of morally precarious over-romanticising. This is particularly evident in the case of a sentencing judge. We, society, hire this individual to enforce the rule of law under which we live, and Cypriot judges form no exception in this aspect. We think of this as 'doing justice', and the doing of this is surely the judge's sworn obligation as an officer of

⁴²⁰S N Deane (tr), *St. Anselm: Proslogium; Monologium; An Appendix in Behalf of the Fool by Gaunilon; and Cur Deus Homo* (The Open Court Publishing Company, Illinois 1954). Anselm appears to have given a solution to the paradox of mercy by concluding that Justice as he perceived it would require that everyone be punished; but that would seem pointless for God to have created the human race simply to punish it and therefore, if God is to be merciful and refrain from punishing at least some people, that mercy must be consonant with justice and right order hence mercy is the restoration of right order for the sake of that right order itself.

⁴²¹Deane (n 420) 14: 'What justice is it that gives him who merits eternal death everlasting life? How, then, gracious Lord, good to the righteous and the wicked, canst thou save the wicked, if this is not just, and thou dost not aught that is not just?'

⁴²²Deane (n 420) 18-19: 'But if it can be comprehended in any way why thou canst will to save the wicked, yet by no consideration can we comprehend why, of those who are alike wicked, thou savest some rather than others, through supreme goodness; and why thou dost condemn the latter, rather than the former, through supreme justice.'

⁴²³J Murphy and J Hampton, *Forgiveness and Mercy* (Cambridge Studies in Philosophy and Law, CUP, Cambridge 1988) 167.

justice. What business does he have, then, Murphy could have pondered, in ignoring his obligations to justice while he pursues some private, idiosyncratic, and not publicly accountable virtue of love or compassion?⁴²⁴

Antithetically, one could assert that mercy and justice are not mutually exclusive concepts, as the preceding argument appears to suggest, but two synergistically overlapping virtues,⁴²⁵ more likely to emerge in a person who has compassion. This is what precisely portrays the essence of the modern dialectics on the issue of mercy in criminal sentencing. Whether, in other words, it has any legitimate role to play in criminal sentencing and if so, on the grounds and reasons upon which it could plausibly be mobilised by a court of law for justifiably reducing the amount of punishment to lower levels than those that a judge would have under normal circumstances legitimately determined as just and fair. Mercy, from this perspective, is being more beneficial to the defendant than any other proper determinate sentence.⁴²⁶ Indeed, according to Aristotle, what puzzles people is the fact that equity (re mercy), though just, is not the justice of the law courts but a method of restoring the balance of justice when the law has tilted it, with the need for such a rectification arising from the circumstance that law can do no more than generalise.⁴²⁷ Someone may deserve mercy for what he is, has suffered, has done, will suffer, or will do, just as he may deserve punishment for his crime. The difficulty, is explaining why that deserving should be a matter of justice rather

⁴²⁴J Murphy and J Hampton, *Forgiveness and Mercy* (n 423) 167-168.

⁴²⁵J Murphy, *Getting Even: Forgiveness and its Limits* (OUP, Oxford 2003) 55.

⁴²⁶*R v Parole Board, ex p. Bradley* [1990] 3 All E R 827, 836.

⁴²⁷J A K Thomson (tr), *The Ethics of Aristotle* (Penguin Books, Harmondsworth, Middlesex 1955) 166-167.

than of some weaker moral consideration.⁴²⁸Therefore, the question for judges is, or should be, whether there is a moral or legal rationale for distinguishing mercy from sentencing mitigation. Mercy, in addition to being a moral virtue, is also a sentencing attitude, standing between retribution and revenge.⁴²⁹To what extent Cypriot judges reflect on such levels of analysis, forms a parallel issue in this study, as that on whether they have discretion to circumvent an otherwise justified sentence following the mandatory mitigation-aggravation balancing exercise, and impose a lesser sentence as an act of mercy.

It is necessary therefore to define the parameters of *justice* and accordingly decide whether mercy (ergo mercying) can or cannot justifiably form part of it as a constituent element, and be utilised as an evaluative and potentially determinant factor in judicial sentencing decision-making and punishment. This calls, as a first step, the filtration of the idea of mercy through the basic principles of retributivism and utilitarianism, as per the etiology provided for in the introductory part of the present chapter.

6.2 Mercy and Retributivism

6.2.1 The Synergy between Justice and Mercy

There is an argument that the conflict between justice and mercy is only apparent and that both can peacefully coexist in synergy.⁴³⁰The viability of this argument, presupposes acceptance of the premise that justice is disjunctive, in that

⁴²⁸M Davis, *To Make Punishment Fit the Crime: Essays in the Theory of Criminal Justice* (Westview Press, Boulder, Colorado 1992) 196.

⁴²⁹E L Muller, 'The Virtue of Mercy in Criminal Sentencing' (1993) 24 Seton Hall Rev 288, 290, 346.

⁴³⁰S Garvey, 'Is it Wrong to Commute Death Row? Retribution, Atonement and Mercy' (2004) 82 N Carolina L Rev 1319, 1320.

it specifies a range of deserved sanctions, with a high and a low end. Any imposed punishment falling below the maximum allowed is both merciful and just as it is being encapsulated within the array of deserved punishments; hence the seeming conflict between mercy and justice evaporates. On this account, mercy does not involve injustice since, hypothetically, injustice can arise only when an offender is sentenced harsher than he deserves, and not more leniently. If the giving of mercy means imposing the punishment that equity requires, then again, mercy and justice can coexist, at least insofar as equity is the name justice goes by when it attends to all the particulars to which it should attend, as mercy is nothing but a form of justice.⁴³¹

Dolinko suggests that a judge exercises mercy when he imposes a sentence that is more lenient than normally expected in a case of the sort, but nonetheless just, based on the evaluation of a range of mitigating factors broader than what would be standard in sentencing an offender in a similar case for the same crime.⁴³² Tudor is more precise in his definitional approach than Dolinko. He claims that mercy is the refraining from imposing the minimally just suffering (distinguishing it from leniency and equity), in favour of an even lesser suffering, for reasons stemming, *inter alia*, from magnanimity, stoicism, contrition, compassion and forgiveness.⁴³³ Consequently, by this approach, a judge can be

⁴³¹S Garvey, 'Questions of Mercy' (2007) 4 Ohio St J Crim L 321, 322.

⁴³²D Dolinko, 'Some Naïve Thoughts About Justice and Mercy' (2007) 4 Ohio St J Crim L 349, 357. See also, for similar arguments, N Brett, 'Mercy and Criminal Justice: A Plea for Mercy' (1992) 5 Can J L & Juris 81, 94; S H Hestevold, 'Justice to Mercy' (1985) 46 Phil & Phenomenological Research 281. For criticisms, see A Brien, 'Mercy and Desert' (1991) 20 Phil Pap 193,197, in which the author characterises the concept of disjunctive desert as incoherent. See also the article by G Rainbolt 'Mercy: In Defense of Caprice' (1997) 31 Nous 226, 229-230, where the writer vividly argues that: '... one cannot deserve two or four years for a crime. This seems as odd as a student whose work in a class deserves either an A or a C.'

⁴³³S Tudor, 'Modes of Mercy' (2003) 28 Austl J Leg Phil 79, 89-100.

both merciful and just to the effect that ‘leniency is not in itself a vice [and] that mercy should season justice is a proposition soundly based in law as in literature.’⁴³⁴

Mercy should occur only upon fulfilling the demands of justice. To do otherwise would promote permissiveness that would be neither merciful nor just. Permissiveness neither corrects the offender nor restores the original condition that existed before the offence. Mercy alone fails to serve the demands of justice either in its deterrent or retributive functions.⁴³⁵

Jung places the argument on a somehow different level. He says that the issue is not about whether mercy should claim a special privilege over justice but whether it is possible to talk simultaneously in a justificatory manner about justice and mercy. When an offender is treated mercifully, either the offender is given the penalty he deserves, in which case he is not being shown mercy, but justice, or is not given the deserved penalty, in which case he is being treated unjustly. Thus, mercy is either justice or injustice without the two being in conflict,⁴³⁶ but again, the viability of this approach depends on how one perceives the concept of justice. From this angle of analysis, a *just* sentence could debatably denote two things. First, that a sentence is just according to all the normal criteria, but subsequently changeable to take account of exceptional considerations such as mercy or equity

⁴³⁴As per Judge LJ, in *Attorney General's Reference (No 4 of 1989)* (1989) 90 Cr App R 366. The Court of Appeal recognized that a sentencer may on occasion, and in the right case, temper justice with mercy. In this case, an 81-year-old offender was spared a prison sentence in respect of a series of sexual offences against children. There was compelling mitigation: apart from his age, the offender was in poor health, had chosen to stop his offending some years before, and had entered a guilty plea at the first opportunity.

⁴³⁵P Paris, ‘Justice and Mercy: The Relation of Societal Norms and Empathic Feeling’ in J Rothchild, M M Boulton, and K Jung (eds), *Doing Justice to Mercy: Religion, Law, and Criminal Justice* (University of Virginia Press, Charlottesville 2007) 227.

⁴³⁶K Jung, ‘Fallibility and Fragility’ in Rothchild and others, *Doing Justice to Mercy* (n 435) 207.

factors. Second, it may refer to the sentence that is just, taking account every factor with a good claim to affect sentencing, which would include mercy or equity factors in the first place. On this perspective, whether equity factors are esoteric or exoteric from justice is not significant if there is consistency in the analysis. The core of the matter, somewhat differently put, is that if a judge purportedly departs from the just sentence to take account of mercy, then the *just sentence* (or the *right sentence*)⁴³⁷ means that is just in a defeasible sense. However, if the judge regards equity factors as part of the process of arriving at a just sentence then the issue of an unjust sentence does not arise since equity is an element in determining the just sentence. It is clear however that any justification for reducing sentence on these grounds needs to secure equality of treatment and avoid the possibility of discrimination.⁴³⁸

A position similar to that of Lyons⁴³⁹ (referred to above),⁴⁴⁰ as to the need for a legal system to earn the reverence of those whose obedience demands, arises when one views mercy through the lens of negative retributive justice, according to which the state has the right, but not the obligation, to impose the otherwise deserved punishment on an offender. On this perspective, mercy and justice do not conflict, because the state acts justly when it shows mercy. It has (as Murphy argues), simply waived a right, with mercy being not an alternative or substitute to justice but a moral response. A response, characteristic of justice as a virtue of

⁴³⁷According to one academic view, the right sentence is the one that achieves a given penal aim for a given type of offender most effectively and efficiently: D P Farrington, *The Effectiveness of Sentences* (1978) 4 JP 68. A different academic opinion asserts that the right sentence is the one of the judicial authority that spoke last and highest on the matter: A Kapardis, *Psychology and Law: A Critical Introduction* (3rd edn CUP, Cambridge 2010) 178.

⁴³⁸A Von Hirsch and A Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford Monographs on Criminal Law and Justice, OUP, Oxford 2005) 165.

⁴³⁹Garvey, 'Questions of Mercy' (n 431) 5.

⁴⁴⁰Lyons, *Ethics and the Rule of Law* (n 415).

persons who have the right to punish, although it is not part of the justice of the institution of punishment as far as that institution is defined by rules delineating rights in accord with principles of social justice.⁴⁴¹

On a somewhat different streak, another retributivist, Claudia Card, proposes that the infliction of desert (that is, that which one deserves morally based on all considerations) is a duty and occasionally a mere right in the sense of an institutionally recognised entitlement. Mercy ought to be shown to an offender when it is evident that otherwise he would be made to suffer unusually more overall, owing to his peculiar misfortunes; the offender deserves mercy but this desert does not create a right to receive it.⁴⁴² Nevertheless, Card fails to explain, or so her critics say, why mercy is non-obligatory and therefore discretionary, creating as a result the probability of discrimination and inconsistency without even discussing whether judges are morally obligated to provide for such a course.⁴⁴³ A counter argument could be that mercy, as proposed by Card, presupposes, exactly, the exercise of mercy since it is obvious from her proposition, that the selection of mercy results from a certain weighing of all the relevant considerations affecting the choice of punishment ergo the product of discretion. This is indeed the heart of her argument, that is, the necessity of discretion as the means of executing the judicial choice of mercy, hence its non-obligatory sense.

⁴⁴¹Murphy and Hampton, *Forgiveness and Mercy* (n 423) 176; S Harwood, 'Is Mercy Inherently Unjust?' in M Gorr and S Harwood, *Crime and Punishment: Philosophic Explorations* (Wadsworth, Belmont, California 2000) 464-465. This approach is vulnerable to all the criticisms directed against negative retributivism on which it depends: See, Moore, 'The Moral Worth of Retribution' (n 302) 91.

⁴⁴²C Card, 'On Mercy' (1972) 81 *Phil Rev* 182, 192.

⁴⁴³N Walker, *Aggravation, Mitigation and Mercy in English Criminal Justice* (Blackstone Press, Oxford 1999) 224-225.

6.2.2 Mercy and Power

Mercy is also definable not in relation to justice, but in relation to power.⁴⁴⁴ On this approach, one might assert that an act of mercy is an action in a relationship of vulnerability and power in which a powerful person intentionally reduces or removes altogether the threat to or the present suffering of another.⁴⁴⁵ Mercy and justice need not conflict. If a person has the power to reduce the suffering of another whom he has at his mercy, his act is also a just one. Thus, a single act can be both just and merciful.⁴⁴⁶ Biblical laws, show for example that a law concerned with justice, fairness or equity may also take into account the special needs or intentions of the persons affected by the situation or by application of the law.⁴⁴⁷ However, where the focus is on the legalistic role of mercy (that is, within the context of the law), mercy is more comprehensible in relation to justice than power, as the former is the pivotal factor and the point of reference and comparison. Therefore, by deduction and logic, an act can only be merciful and just if an actor has the power to act unjustly.⁴⁴⁸

6.2.3 The Mutual Incompatibility of Justice and Mercy

In terms of its relationship with retribution, and chiefly positive retributivism, mercy is typically understood as the partial or total remission of the punishment that the judge can impose. On this explanation, and given the retributivist premise that the state is obligated to impose on the offender a specific

⁴⁴⁴Garvey, 'Questions of Mercy' (n 431) 5.

⁴⁴⁵A Brien, 'Mercy within Legal Justice' (1998) 24 Soc Theory & Prac 83, 85.

⁴⁴⁶T Eisenberg and S Garvey, 'The Merciful Capital Juror' (2004) 21 (2004) 21 Ohio St J Crim L 165, 168.

⁴⁴⁷R H Hiers, *Justice and Compassion in Biblical Law* (T & T Clark Ltd, New York 2010) 4.

⁴⁴⁸L L Weinreb, 'The Complete Idea of Justice' (1984) 51 I Chi L Rev 752.

and identifiable punishment, the offender deserves no more and no less punishment than that. In any event, the harm caused to the victim is not lessened by the social origins or personal problems of the offender, even though one might feel compassion or sympathy for their circumstances. Reductions in such cases strike at the principles of proportionality, equality of treatment of offenders, and the presumption of human agency at the heart of retributivist theory.⁴⁴⁹ Therefore, justice (that is, in its non-disjunctive form) and mercy, unavoidably become two mutually exclusive and conflicting concepts because justice means giving an offender the punishment he deserves, while mercy means giving him less than that. Another approach accepts the position that the concepts of justice and mercy are two independent and reciprocally exclusive values belonging to the public domain and when there is a conflict between them, state actors such as judges must promptly attempt to resolve them efficiently and expeditiously.⁴⁵⁰ Doing justice is not constantly the ultimate objective, and when justice and mercy conflict justice should not always prevail. If mercy is simply the beneficial side of equity (as opposed to the equitable ability to increase the apparent just punishment due to aggravation), then it is not a virtue distinct from justice, but simply a part of justice. An essential point of punishment is to communicate society's emphatic condemnation of criminal wrongdoing. Punishment is not merely the communication of deserved blame, but of justified censure. The retributive norm is the fundamental norm in determining what is justified as censure, but it is not the

⁴⁴⁹S Easton, 'Dangerous Waters: Taking Account of Impact in Sentencing' [2008] Crim L R 105-120.

⁴⁵⁰Garvey, 'Questions of Mercy' (n 431) 322.

only one. As Tasioulas argues, there is also a norm of mercy,⁴⁵¹ which has a place in the deliberations of state actors in relation to criminal punishment.⁴⁵²

Alwynne Smart claims that using the term ‘mercy’ as inclusive of mitigation and proportionality distracts from its genuine and most characteristic sense.⁴⁵³ A judge who does not weigh mitigation and proportionality in reaching his sentence is unjust, whereas genuine mercy is deciding not to inflict the just penalty. True mercy occurs when there is a deduction in the level of punishment to mitigate the suffering of a third party when for instance, the offender at the time of the commutation is a changed person from the one who committed the offence due to reformation or interposition of drastic changes in his personal and family circumstances.⁴⁵⁴ However, these factors are neither purely retributivist nor exoteric to the formal definition of justice, principally because equality forms a central role in the concept of justice. And that, Smart appears to admit it by saying, with a Shakespearean flair it seems,⁴⁵⁵ that: ‘(we are) justified in being merciful...when we are compelled to be by the claims that other obligations have on us.’⁴⁵⁶ Still, treating like cases alike is a value, but not the only one as equality also requires treating unlike cases unlike, and forgiveness is a factor that makes cases unlike and worthy of differing sentences. Equality must not trump all other values.

⁴⁵¹J Tasioulas, ‘Repentance and the Liberal State’ (2007) 4 Ohio St J Crim L 487, 499.

⁴⁵²J Tasioulas, ‘Mercy’ (2003) 103 Proceedings of the Aristotelian Society 101, 106.

⁴⁵³A Smart, ‘Mercy’ (1968) 43 Philosophy 345, 349.

⁴⁵⁴Smart, ‘Mercy’ (n 453) 349.

⁴⁵⁵‘Sweet mercy is nobility’s true badge’: (see, P Werstine and B Mowat (eds), *Titus Andronicus* by William Shakespeare Act 1 scene 2 (Pocket Classics, Washington DC 2005) 12.

⁴⁵⁶Smart, ‘Mercy’ (n 453) 358-359.

6.2.4 Mercy and Justice Conflicting

An alternative approach is the proposition that justice belongs to the public domain whereas mercy belongs to the private domain and when justice and mercy conflict, they do so because the public and the private come into conflict and it is to this idea that Antony Duff subscribes.⁴⁵⁷ His analysis differs from that of Tasioulas, for, whereas the latter treats mercy as an internal competitor of justice, he treats it as an external competitor. In the battle between justice and mercy, Duff sees mercy as an invader in a conflict between sovereigns, while Tasioulas sees it as a combatant in a civil war though with rare and justified intrusions of the private into the public domain.⁴⁵⁸

Farmer sees things differently from Duff, in the sense that if the exercise of mercy is beyond law, it must also be beyond punishment (or desert). The exercise of mercy is a different type of judgment from that exercised in doing justice, and while it might temper the strict demands of justice, it is strictly speaking external to it. Mercy or compassion requires that we do what is appropriate or right in the circumstances, not judged according to the measure of what is just, but according to our compassion or ability to recognise the situation of the other. The possibility of mercy must always be present, and must be exercised according to the individuality or humanity of the other person and the sense of compassion for their situation. The attention to the separation of powers (discussed in Chapter 4.6) will prevent us from eliding the distinction between the duty to punish and specific institutions of punishment. The duty of the state to punish is typically fulfilled by the judiciary who must determine the appropriate sentence to be imposed in any

⁴⁵⁷R A Duff, 'The Intrusion of Mercy' (2007) 4 Ohio St J Crim L 361, 376-377.

⁴⁵⁸Garvey, 'Questions of Mercy' (n 431) 323.

given case. The question of how that sentence will work or whether or not it may be remitted, is a matter for the Executive, to be decided not exclusively according to desert criteria but on a variety of other factors such as the likelihood of reoffending, and public safety and interest.⁴⁵⁹

On this perspective, Duff counter-argues that there are cases in which what mercy must temper is not justice itself, but the very rough form of justice that the normal rules and operations of the criminal justice system can do. Attention to the individual features and circumstances of a particular defendant show that he does not deserve the sentence prescribed by the law. Instead, an act of mercy is then needed to save him for his undeserved fate. Since we can be confident that any human system of justice will be at best, a system of rough justice, we need to make room for discretionary power to vary and temper the overtly harsh requirements of the law. This is not, however, a matter of mercy tempering justice. It is rather a matter of using discretion to do what comes closer to justice in the individual case. Indeed, as Duff, concludes on the point, the extent to which this kind of discretion is needed, depends on the degree to which the criminal justice system fails to do justice to those who come before the courts, and the extent to which the justice of its processes and punishments is undermined by the various forms of social injustice that lie behind so much offending.⁴⁶⁰

⁴⁵⁹L Farmer, 'Mercy and Criminal Justice: A Reply to Antony Duff' *CjScotland* (16 November 2009) www.cjscotland.org.uk/>accessed 14 February 2010.

⁴⁶⁰R A Duff, 'Mercy and Criminal Justice: A Response to Lindsay Farmer' *CjScotland* (17 December 2009) www.cjscotland.org.uk/accessed 14 February 2010. The preceding exchange of views on the issue of mercy between Duff and Farmer, emanated from the controversial decision of the Scottish Government to release the Lockerbie prisoner, Abdelbaset Ali al-Megrahi, in August 2009.

For Twambley,⁴⁶¹ mercy properly understood (on the basis of the retributivist rationale) has no (and should not have any) essential connection with punishment. Mercy is not the prerogative of the sentencing judge. The offender needs to be punished and must be punished by the members of the community as recipients of his criminal behaviour so the avoidance of the duty to punish by the granting of mercy violates the rights of society and moral law, thus giving him an unfairly won and undeserved benefit. The judge has no right to be merciful as it is not to him that any obligation is due. The obligation a judge undertakes when sworn into office is to impose just sentences and treat like cases alike and not the opposite.

Along the same lines, Kathleen Dean Moore is likewise sharp. She asserts that if judges decide to override considerations of justice and act out of pity, they become usurpers, as they are relinquishing a right that is the legitimate expectation that offenders will be punished, that belongs not to them, but to the people. A judge cannot be merciful, because the debt owed is not his to exact. The offender owes nothing, or nothing more, than is owed to every other law-abiding citizen. A judge cannot therefore exercise either real mercy or quasi-mercy in an official capacity, as opposed to the private individual who can and should do so in his relations with others.⁴⁶²

Not being retributively original, Markel similarly insists that mercy has no place in the criminal justice system, which must operate impartially, rationally, and with equality for all offenders.⁴⁶³ State actors, Murphy and Harrison similarly

⁴⁶¹P Twambley, 'Mercy and Forgiveness' (1976) 36 Analysis 84, 85.

⁴⁶²K D Moore, *Pardons: Justice, Mercy, and the Public Interest* (OUP, Oxford 1997) 178.

⁴⁶³D Markel, 'Against Mercy' (2003) 88 Minn L Rev 1421, 1480.

assert, have no business being merciful, as institutional acts of mercy are morally and legally indefensible.⁴⁶⁴ The sole objective of criminal law, Heidi Hurd argues, is to distribute retributive justice and therefore judges cannot and should not be merciful, as institutional acts of mercy are morally and legally indefensible, at least on grounds consistent with retributive theory. Mercy is a constitutive part of the private domain and not only part of it, and because judges cannot always act without reference to their private selves in addition to their public selves, mercy will intrude into the public domain. This intrusion or rather the inability of the judge to act strictly wearing his public hat is, for Hurd, unacceptable and never justified. This conflicts with Duff's approach as he treats the intrusion as occasionally justified and inevitable due to the existence of the private domain. Hurd's position appears to be even more doctrinaire than that of the patriarch of retributivism Immanuel Kant who believed that mercy belongs to the realm of private relations between individuals who can freely act mercifully when suffering civil wrongs, and not to that of criminal justice, but not always. Kant admitted that the absolutism of the retributivist principles could only be justified in an *ideal* retributivist society, which our society has never been.⁴⁶⁵ Kant also asserted that mercy (externalised in the form of pardon which he was discussing), may be justified when the crime is encouraged by the state whose laws forbid it, such as infanticide, or where a remission of a death sentence to one of deportation is

⁴⁶⁴J Murphy and R Harrison 'The Equality of Mercy' in H Gross and R Harrison (eds), *Jurisprudence: Cambridge Essays* (Clarendon Press, Oxford 1992) 107; H Hurd, 'The Morality of Mercy' (2007) 4 Ohio St J Crim L 389, 398.

⁴⁶⁵For instance, in a letter to J B Erhard, Kant wrote: 'In a world of moral principles governed by God, punishments would be categorically necessary (insofar as transgressions occur). But in a world governed by men, the necessity of punishment is only hypothetical, and that direct union of the concept of transgression with the idea of deserving punishment serves the ruler only as a prescription for what to do': See, A Zweig, *Kant: Philosophical Correspondence 1759-1799*, University of Chicago Press, Chicago 1967, 199.

essential in order to avoid societal dissolution, ergo conceding to consequentialist grounds.⁴⁶⁶

6.3 Mercy and Utilitarianism

The issue of mercy is typically discussed in the context of the retributive approach to punishment rather than the utilitarian, as the concept of mitigation and its relationship to that of mercy is of greater significance in retributive sentencing in which the aim is to have the punishment fit the crime than when sentences aim to serve therapeutic or other utilitarian goals.⁴⁶⁷ Such instances can be found when mercy is used to defend the choice of a rehabilitative measure over a retributive one. As already analysed in Chapter 5.3.1-5.3.4, for utilitarians, offenders should not be punished merely because they have committed an offence, and purportedly deserve to be punished as a result. Punishment does not have to fit the crime nor the offender but only the public interest and the needs of society for an effective penal system. Sometimes even vengeance may justify punishment not because of justified retaliation but because people often derive pleasure when the score is evened. Bentham advocated that punishment ought not to be inflicted when it would be ineffective in deterring crime, when it would be groundless, needless or too expensive, but even he was not absolute in his proposition,⁴⁶⁸ reminding one of

⁴⁶⁶The point is made by Kathleen Dean Moore who supports that this apparent inconsistency in Kant's approach could be understood if he considered death and deportation to be punishments of roughly equal severity as then there would be no injustice in changing a death sentence to a sentence of deportation as a matter of convenience, just as there would be no injustice in selecting hanging over beheading, but in that case, the commutation would no longer be a kind of pardon. See K D Moore, *Pardons* (n 462) 20.

⁴⁶⁷R G Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25 Monash U L Rev 1, 10.

⁴⁶⁸Bentham, although believing in the incompatibility between mercy and utilitarianism, has said at one point that: 'Remission of punishment, yes: for that, there may be good reason on various occasions; but they are all of them capable of being, and all of them ought to be, specified': J J

Kant's own qualifications to the retributivist rationale apropos merciful treatment of offenders upon consequentialist grounds, as indicated above. Beccaria suggested that punishment ought not to be inflicted where it would cause harm greater than the harm of not punishing. Punishment deters specifically and generally hence any decision not to effect the justified punishment is unjustifiable and to this regard a penal system cannot tolerate exceptions. It follows that to identify mercy as a general ground for waiving punishment, would not involve an otherwise avoidable mischief to society greater than the mischief of punishing the offender.⁴⁶⁹ Individualisation of punishment has no place in sentencing unless it serves the greater good of the community. The right of punishment belongs to society at large so even if the victim forgives the offender, the obligation to try and punish persists, with the element of forgiveness constituting an evaluative factor in the determination of the sentence. As Kathleen Dean Moore explains, touching the shift of standards between act-utilitarians and rule-utilitarians, individual acts of punishment are not tested against the utilitarian requirement that each produce more good than withholding punishment. The beneficial consequences of punishment depend on certainty. So it must be general rules about punishing that are subjected to the utilitarian test. Individual acts of punishment are then justified if they comply with utilitarian-justified rules about punishment and mercy.⁴⁷⁰ The rules themselves must be humane, but their enforcement absolute. Therefore, the executors of the laws must be inelastic whereas the legislators tender, indulgent, and humane making certain at the same time through legislation that no

Bowring (ed), J Bentham, *The Works of Jeremy Bentham* (Adamant Media Corporation, Boston 2001) 35.

⁴⁶⁹S I Benn, 'An Approach to the Problems of Punishment' (1985) 33 *Philosophy* 325, 339-340.

⁴⁷⁰K D Moore, *Pardons* (n 462) 39.

punishment is imposed that does not accomplish some future societal good.⁴⁷¹ However, if one accepts that mercy and utilitarianism are incompatible then the ideal utilitarian legislator cannot act mercifully. Judges are not in a moral position to act mercifully on utilitarian grounds. They must impose the sentence that is more productive of good. Once the sentence is determined by weighing all the relevant factors (provided of course in all reality that one is able to know for certain that the required balancing of the pertinent factors is not tainted by elements of hidden and undisclosed mercy), the judge may not act mercifully and impose less than the imposed punishment as that would be morally unjustifiable. There is no logic for a utilitarian to act mercifully by imposing a lesser sentence than would be justified on grounds of utility maximisation. Either mercy is unjustified because it involves doing less than is justified and consequently lacks any utilitarian justification, or it is justified because it maximizes utility; but then the act cannot count as an act of mercy, since there is no justification for any heavier penalty at all as in this case the act ceases to be a departure from anything and so it fails to be an act of mercy. The utilitarian can act rightly, but never mercifully, or mercifully only by acting wrongly.⁴⁷² There are, however, ways of avoiding the hurdles of dogmatism. Brien, for instance suggests that if we consider utilitarianism, as a metaethical theory, that is, a theory dealing with what makes an action right rather than a decision, then a theory of how judges ought to decide should not create any incompatibility between mercy and utilitarianism as the objective is at all times the greatest possible social benefit no matter what the

⁴⁷¹E Ingraham (tr), and A Caso (ed), *An Essay on Crimes and Punishment by Cesare Beccaria* (Kessinger Publishing, Whitefish, Montana 2007) 98.

⁴⁷²A Brien, 'Mercy, Utilitarianism and Retributivism' (1995) 24 *Philosophy* 493, 496.

reasoning behind the action. The ends justify the means. Therefore, if allowing judges to act on springs that are not directly utilitarian produces the best results then they should be encouraged to do so. Finally, the author concludes that mercy, utilitarianism, and retributivism are not necessarily incompatible (unless viewed with an idealistic discernment) and that we could view mercy as having intrinsic worth rather than because it promotes utility or accords with retributive justice. These intrinsic reasons are the justification to perform a merciful action, as the power of the judge is such as to render him immune to any ingratitude that the offender may show. The fact that such a merciful decision may be justified under utilitarian or retributive theory is only accidental, as the actual decision has been reached on a higher ground of reason independent of the dogmatism of both retributivism and utilitarianism schools, which apparently have failed to convince one another of the viable ascendancy of their stance.

6.4 Mercy and Justice Outside the Diarchy of Retributivism and Utilitarianism

Not all agree on the need for categorising all aspects pertinent to the issue of punishment and sentencing within the parameters of consequentialist or non-consequentialist theories. There is an alternative perspective, which supports that there is no conflict between justice and mercy. Mercy appropriately occurs after the question of justice is settled. The virtue of justice is a duty to treat all fairly and equally. A judge has the option of enforcing a claim, but waives that option. Mercy is virtuous because it exceeds obligation. By arguing that we ought to be virtuous, we do not produce an ethical onus to act in a particular manner. There is a

difference between mercying and mercifulness, since the former denotes, among other qualities, an action, whereas the latter, a trait not necessarily accompanied by an intention to act accordingly, or at all. Although the two are not certainly mutually exclusive, the one does not necessarily presuppose the other. It includes both characteristics that meet the minimum standard of behaviour, such as justice and honesty, as well as those that aim at excellence, like courage and mercy. This virtue can be both inspirational as well as essential, and mercy falls into the former.⁴⁷³

One proponent of this perspective is Derrida who places mercy outside the circle of economic exchange, and his move apparently protects mercy from any claims of justice.⁴⁷⁴ While justice operates on the plane of calculation and measurement, mercy runs perhaps on a higher plane of self-giving and consciousness. It is irreducible to the ordinary logic, freeing mercy from justice and the necessity to calculate who merits mercy and how much. Derrida's account of forgiveness may explain how mercy is distinct from justice, but it fails to address whether it is acceptable or permissible to exempt an offender from the requirements of justice, or even explain how or when we must forgive under such a system. Christodoulidis locates mercy in the space between law (law's justice) and particularity, as the most fruitful way of elaborating the concept because it treats mercy as an independent virtue that does not collapse into justice. Justice sets rules and rule-like exceptions to these rules, and within their ambit, all so determined like cases must be treated alike. If mercy is to be something beyond

⁴⁷³M Lauchs, 'Justice and Equity v Mercy' in S L Hayes, M A Lauchs, and N Stobbs, *Social Ethics for Legal and Justice Professionals* (Pearson Education Australia, Sydney 2006) 98, 108.

⁴⁷⁴J Derrida, *On Cosmopolitanism and Forgiveness* (Routledge, New York 2001) 31-32.

that, an independent virtue, it must provide its own criteria for judgment other than these rules stipulate,⁴⁷⁵ and indeed, mercy is integrally linked to judgment, with that linkage making mercy into a distinct and autonomous virtue.⁴⁷⁶

6.4.1 Mercy and Individualised Punishment in Criminal Sentencing

A Procrustean system of fixed penalties or mandatory minima could certainly ensure definitional equality by sacrificing individualisation, but justice demands a balance of many competing values, not a simple one-dimensional yardstick. The possibility of mercy is one important factor that can keep justice from being inexorable and rigid. Mercy involves respecting individual differences, and the ability of the judicial system (and the judge) to see through the defendant and treat him as per Goethe's admonition, that is, not as he appears to be but as if he already were what he could potentially be.⁴⁷⁷ In this sense, mercy involves individualisation of justice, a willingness to distinguish between more deserving and less deserving cases and circumstances.⁴⁷⁸ Mercy stresses the need of the individual criminal, his motivation, and the intensity of the temptation to which he is exposed. Justice requires distribution, or retribution, according to what the act deserves, and equal treatment where desert is equal.⁴⁷⁹ However, charity will give most when the need of the individual, independent of his merit, is greatest. Charity

⁴⁷⁵E Christodoulidis, 'The Irrationality of Merciful Legal Judgment: Exclusionary Reasoning and the Question of the Particular' (1999) 18 L & Phil 215, 217.

⁴⁷⁶N E Simmonds, 'Judgment and Mercy' (1993) 13 OJLS 52, 56.

⁴⁷⁷See, P Gumpert and C Gumpert, 'The Teacher as Pygmalion: Comments on The Psychology of Expectation (1968) 3(1) The Urban Rev 21.

⁴⁷⁸J Q Whitman, *Harsh Justice* (OUP, Oxford 2003) 12-13.

⁴⁷⁹P H Robinson, *Distributive Principles of Criminal Law: Who Should be Punished and How Much?* (OUP, New York 2008) 141.

will mitigate punishment most when the offender was most needy, motivated, deprived of other gratifications, or tempted to commit the offence.⁴⁸⁰

6.4.2 Principled Mercy

Retributivists advocate that if mercy is to be justified (as a deviation from proportionality), then that must take place in a principled and coherent manner. For example, Von Hirsch and Ashworth suggest three factors.⁴⁸¹ The first derives from a so-called equal impact principle. According to this principle, if the offender suffers from certain handicaps that would make his punishment significantly more onerous than the sanction should be adjusted in order to avoid an undue differential impact on him or excessive hardship, calculated on approximation depending on the particular unusual situation so that to avoid burdening the offender with a higher sentence.⁴⁸² The second stems from compassion, but as the authors conclude, there must at the outset be established a link between the offender's misfortune and the punishment he must receive. In addition, this tie could concern, thirdly, quasi-retributive grounds. These do not form part of the general principles of proportionality in punishment. They are not directly related either to the seriousness of offences in terms of harm and culpability or to the severity of punishments or to the permissible role of previous convictions but they relate to the wider underlying conceptions of penal censure as a response to criminal offending. Censure for an offence provides reason for the offender to reflect on the wrongdoing and to consider the reasons for his conduct. Quasi-

⁴⁸⁰S Bibas, 'Forgiveness in Criminal Procedure' (2007) 4 Ohio St J Crim L 329, 347.

⁴⁸¹Von Hirsch and Ashworth, *Proportionate Sentencing* (n 438) 172-173.

⁴⁸²There appears that this proposition calls for a differentiation between objective proportionality and proportionality in subjective suffering: See, D L Gray, 'Punishment as Suffering' (2010) 64 Vand L Rev 3.

retributive grounds may address special situations, which may relate to this reflective process and explicate why there should be extra sympathy shown for the offender having to experience that suffering. Examples of quasi-retributive grounds are the offender's advanced age or serious illness, voluntary reparation and delay in prosecution.⁴⁸³ Nigel Walker correctly deduces that a review of the practice and literature suggests five criteria for mercy: (a) Compassion for someone (which distinguishes it from mitigation) (b) It must not be whimsical or random, but consistent (rule following) (c) It must not be improper in other ways that is resulting from bribery, intimidation, favouritism, or superstition (d) It must not be leniency of a kind required by justice (e) Expediency must not be the only motive (which would exclude bargains with hostage-takers, leniency in exchange for guilty pleas, economising in scarce resources, such as prison places, or granting diplomats immunity from prosecution).⁴⁸⁴

6.4.3 Mercy and Reasons

Irrespective of the dialectics on mercy (or mercying), in the area of punishment and sentencing, public agents ergo judges must always act on reasons relating to any pertinent decision they may take. A coherent, detailed and communicative reasoning to all those affected by such a decision contributes to the proper understanding of the action irrespective of the reasons one might have to differ from the outcome and its ratio. That holds true even if the disagreement relates to an objection as to the power or discretion of the judge to elect mercy as a

⁴⁸³For which, see in general, D Shuman and A McCall Smith, *Justice and the Prosecution of Old Crimes: Balancing Legal, Psychological, and Moral Concerns* (American Psychological Association, Washington, DC 2000).

⁴⁸⁴Walker, *Aggravation, Mitigation and Mercy in English Criminal Justice* (n 443) 22.

tool in administering and effecting justice. To say that one must reason instead of acting on the excitement of unsettled dispositions by the perceptions of particular states of affairs is not to say that certain sorts of perception are irrelevant to practical reasoning. The absence of the right 'perceptive framework' in a particular judge would imply that he is more likely to reach the wrong decision by means of a careful rational deliberation, as without the right sort of perception, reasoning itself could lead us astray.⁴⁸⁵ Michelin argues that having taken the right decision, that often works as a moral excuse for those who performed wrong actions. If one does everything he could do, given his limitations that he cannot eliminate before performing the action, and if he correctly balances his reasons to decide under those conditions of limitation, he has a claim to be encratic although that may sometimes not be enough.⁴⁸⁶ What remains unanswered however is the comparing standard for the testing in order to lead to the inference that indeed the action is wrong, and how one secures that the judge or critic of the first action will not face the same limitations anyway. Reasons for action and reasons for deciding are both practical in the sense that one can judge through those reasons either the correctness of the action or the correctness of the decision to act. Judges have a moral obligation to decide the issues before them based on the reasons they believe to be applicable to the case at hand and not on their dispositions to act, and this could be an additional graft to the hypothetical link between the way the judges sentence and mercy in Cyprus.

⁴⁸⁵C Michelin, *Being Apart from Reasons: The Role of Reasons in Public and Private Moral Decision-Making* (Springer, Dordrecht 2006) 74 -75.

⁴⁸⁶Michelon, *Being Apart from Reasons* (n 485) 116.

6.5 Conclusions

The current chapter examined mercy and mercying and their connection to punishment, sentencing, and justice in the search of tools and associations for pursuing the rationalisation of the sentencing decisions of the Cypriot judges within the methodological boundaries of the research. It illustrated that there are differences among approaches to mercy and their justification between retributivism and utilitarianism. The analysis indicates that there are variations between conceptions of mercy that deny it any peculiarity in relation to justice and affirming that it is just a form of sensibility to criteria of justice, that there are theories of mercy that see it as refusing to apply principles of justice, and theories of justice that operate a division of labour between them, in which justice gives general limits for the decision, but mercy allows the judge to navigate on the area of discretion. The sense Cypriot judges have of their duty to sentence and the way they orientate and operate within the criminal justice system in that regard, could indicate the way in which they interpret their systemic surroundings and allow those to influence their sentencing and mercying decisions. In exploring the manner in which mercy is being practiced and approached by Cypriot judges, the concept put forward by Nigel Walker on the basis of the five criteria mentioned above, is the one used when discussing mercy vis-à-vis the judges interviewed. Walker's criteria, the researcher espouses as legitimate, rational and reasoned, even though (as already indicated in the introduction of Chapter 4, it is not the purpose of the present study to take a stance and attempt to resolve the academic debate that environs the question of mercy in criminal sentencing). Therefore, how Cypriot judges and its various actors see the process of sentencing and how they

place themselves in the system of administration of criminal justice, is germane on how they apply therein their punishment and mercy, and this aspect will be the subject matter of the next three chapters that follow.

CHAPTER 7: CYPRIOT JUDGES AND THE PUNISHMENT PROCESS

What follows in this chapter, is an examination of the approaches of Cypriot judges to sentencing, their ideas and stance on the punishment process and the manner in which they view the role and impact of the other main actors in the sentencing function, such as the prosecution and defence advocates, as suggestive to the manner in which they function within the punishment practice and the way they exercise or utilise punishment and mercy.

7.1 Judges as Mortals

The way judges see the process of sentencing and place their selves in the system of administration of criminal justice is directly relevant on how they sentence. Their diathesis for work, the means they have at their disposal to execute their duties, all bear significance. Their morale as officers of justice is proportionate to how others see them and respect their performance. Judges, despite popular belief (the academe probably excluded), are neither divine nor by presumption exceptionally bright. As Lord Devlin once said, one must be a very arrogant man (and so probably a bad judge) if he supposes that even on questions of fact he is always right. In difficult cases, he cannot be right every time.⁴⁸⁷ If truth were told, there is no reason to assume that judges are a complex subdivision of the human race deserving a theory of their own.⁴⁸⁸ Harold Laski once wrote to Justice Oliver Wendell Holmes that he ‘wished that people could be persuaded to realise that judges are human beings; it would be real help to

⁴⁸⁷Devlin, Lord, ‘Judges and Lawmakers’ (1979) 39 MLR 1, 3.

⁴⁸⁸P Van Duyne, ‘Simple Decision Making’ in D C Pennington and S M A Lloyd-Bostock (eds), *The Psychology of Sentencing* (n 212) 151-152.

jurisprudence.⁴⁸⁹ Certainly it is a dangerous myth that merely by putting on a robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, and becomes a passionless thinking machine,⁴⁹⁰ untouched by temptation and corruption.⁴⁹¹ On the contrary, judicial dishonesty, arrogance, incompetence, and injudiciousness, are not uncommon features in judiciaries⁴⁹² and criminal justice systems all over the world,⁴⁹³ in varying degrees of course, and there is no reason for one to suggest that Cypriot judges form an exception to this ascertainment, at least as a matter of statistical probability.

The judicial divine model just described, was apparently once necessary to consolidate the judge's impartial role in societies where blood relationships and the rule of reciprocity governed. Other symbols of impartiality such as the blindfold and the scales also became important adjuncts in creating the standard of a judge above the litigants and their interests. Important as these symbols may have been, they created an image of a judge that masked completely the play of human personality in judging never quite realising though the notion of the ideal judge in human experience.⁴⁹⁴ Posner is apparently right when he writes on how

⁴⁸⁹M Howe (ed), *The Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J Laski* (Harvard University Press, Cambridge, Massachusetts 1953) 845.

⁴⁹⁰Per Jerome Frank J, in *Re J P Linahan* 138 F 2d 650 (2nd Cir 1943) 652-653.

⁴⁹¹C Banks, *Criminal Justice Ethics: Theory and Practice* (2nd edn Sage Publications, Los Angeles 2009) 132.

⁴⁹²See, for example, M Boot, *Out of Order: Arrogance, Corruption, and Incompetence on the Bench* (Basic Books, New York 1998), and on a lighter note (but still authoritative), D Pannick, *I Have to Move my Car: Tales of Unpersuasive Advocates and Injudicious Judges* (Hart Publishing, Oxford 2008) 9-80.

⁴⁹³G T Lowenthal, *Down and Dirty Justice* (New Horizon Press, Far Hills, New Jersey 2003).

⁴⁹⁴J Noonan and K Winston (eds), *The Responsible Judge: Readings in Judicial Ethics* (Praeger, Westport, Connecticut 1993) 1.

unrealistic the conceptions of the judge are, as held by most people, including lawyers and even eminent law professors.⁴⁹⁵

Cypriot judges, like most, in order to be productive and creative must be given the capabilities to perform and function within the criminal justice system, by regulating and controlling the process and not letting it or any other actor therein regulate them. This has its own importance because it helps conceptualise better their institutional and idiosyncratic drives, and consequently their keenness and ambition for acting within a consistent legitimising framework based on moral theory, or simply purely mechanically and legalistically, and hence idly and monolithically (ergo completely antithetical), to how a judge must think and act, as most would agree. As derived from the interviews in this study, the judges' drive for work, productivity and inspirational logos, seem to relate directly to the judicial logistics and the degree of parallel support they get from the state to that regard. Appropriate office space, sufficient courtrooms, adequate and properly trained personnel and the availability of modern opticoacoustical systems, computer and internet facilities, together with other amenities, least of which is their psychological and gnostic equanimity and wherewithal, determine the degree to which some of them would wish to involve themselves in a normative analysis of their responsibility within the system. At a basic level, legal punishment theory presupposes the existence of suitable institutions for the judges to be able to perform their societal role in effecting punishment, awarding mercy and distributing justice as per their moral and normative inclinations, fused with legislative and pragmatic factors. Without a system of practice through which

⁴⁹⁵Posner, *How Judges Think* (n 64) 2.

judges could give essence to these theories (without necessarily having to embrace them in any way), they might have to remain in an indeterminate state, and from this point of view, enfeebled at least as regards the prospect of a wider and more effective dissemination of their thinking among the legal world.

7.2 The Compound Process of Balancing

By far, the most common view expressed by the judges during the interviews was that sentencing is a balancing exercise. When offered an opportunity to describe how they saw the process, well over two thirds of the judges (48 out of 54), described it as some kind of weighing act in accord, in this respect, with the diachronic stance of the Supreme Court. For instance, in *Demetriou and Another v The Republic*, the Supreme Court stated that:

‘Sentencing is a compound process that involves the balancing of a multitude of factors, ultimately designed to be socially beneficial.’⁴⁹⁶

Similarly, in *Azinas and Another v The Police*,⁴⁹⁷ the Full Bench of the Supreme Court had the following to say in one of the very rare expositions made by it on the issue of punishment and sentencing:

Sentencing is a fundamental aspect of the criminal process and the principal tool in the hands of the Court for the furtherance of the objects of the Criminal Law. It is indeed a difficult and delicate duty that must be performed with the greatest care. In determining the appropriate sentence and measuring its extent, the Court must have regard to a wide variety of factors, often conflicting, and must balance them in a way that makes the criminal process socially fruitful, sustaining thereby the faith of the public in the law and the administration of justice. It is a process involving the exercise of discretionary powers that must never be standardised, for justice should never be blind in its path. In the long run the ability of the courts to do justice according to the intrinsic merits of the case is perhaps the one single factor that tends to uphold and strengthen the faith of the people in the courts as the law-enforcing authority of the State and arbiters of the rights of citizens under

⁴⁹⁶[1988] 2 CLR 175, 178.

⁴⁹⁷[1981] 2 CLR 9, 127.

the law. But we would go further and state that the proper enforcement of the law in the interests of the society is the most important consideration to which a Court of law should have regard in selecting the sentence and determining its extent. In our democratic society laws embody the objectives of the society and the judicial process is one of the avenues for the attainment of its goals. Therefore, the interest of the people in direct and proper law enforcement is of supreme interest to every citizen conscious of the pursuits of his society. It has been observed that the main purpose of sentence is to punish the offender for the crime he has committed and not to confer benefits on the defendant, implying thereby that the needs of the defendant cannot take precedence over those of society.

The subject matter of balancing varied, from the principles that favour a heavier or lighter penalty to the interests of all the parties in the sentencing process. Additionally, judges frequently mentioned the concept of balancing to explain the conflict between competing interests in sentencing.

These are some of the comments:

*The role of the judge is to find a balance within the range of circumstances of the offence presented to him and the offender and the reasons he offended.*⁴⁹⁸

*Everything depends on everything else. Each sentence is a balancing workout and diverse factors prevail from time to time. Every case is different and therefore the approach must be different and appropriate for the needs of that particular case.*⁴⁹⁹

In keeping with the balancing analogy, two judges described the process of sentencing using similar similes:

*Sentencing is like putting the pieces into a jigsaw puzzle in each case. Some sentences have recurring themes, but all are different. In the end, though everything fits. The point is how good and reliable is the puzzle and who manufactured it.*⁵⁰⁰

*On the whole I think that sentencing is a like a fixture. You have to go through it whether you like it or not and play by the rules. The issue is to have a winner every time, that being Justice.*⁵⁰¹

⁴⁹⁸Judge 4.

⁴⁹⁹Judge 11.

⁵⁰⁰Judge 22.

⁵⁰¹Judge 2.

The judges saw the concept of balancing, as a central element of judicial discretion, as well as a critical aspect of the sentencing exercise, articulating their views with a palpable trepidation and awareness of the importance of the task and its repercussions to all concerned:

The quintessence of sentencing is the pondering of interests within the structure of law. The interests to be balanced are those of the community, the defendant, his family, the victim, and his family. The balance is difficult to achieve in practice. There are many things to consider. First, there are the constraints of the law and more specifically of the case law. There are judicial precedents for all intents and purposes. You just decide what sentence you want to impose and then you look for the precedent. You need case law for imprisonment of so many years; you will more or less find it. You need judicial precedent for suspended sentence, all the same. You even want for a fine and it happens to be a serious offence, let us say possession of drugs or even supplying, you will find it. What all these mean is that we must be very careful in our approach and with our decision on the selection of the proper sentence. The task is, as most would understand and realise, a critical one.⁵⁰²

Sentencing is a balancing process; I've got to come up with the most appropriate sentence to fit all of the circumstances. Sometimes it is easy sometimes it not. It depends from the case. And sometimes on how tired you feel or how fed up with the system which lets loose the big fish and goes for the small, the poor and those without the proper connections or the money to appoint lawyers with the right connections so that the strike a deal with the prosecution or even a noble prosequi. So much hypocrisy sometimes; it makes you feel completely detached from reality when you say that you are here to safeguard the rule of law and equality and fair treatment and impose just sentences and all these. Fairness is among all not only among those who could not escape prosecution because they are 'important.' Otherwise, we are talking about a charade. And sometimes by talking about balancing exercises and all these I am afraid that we are becoming part of it. However, a good and decent judge has a duty towards society to perform his task appropriately irrespective of discrepancies in the administration of justice in general. Each must do his job as best as he can.⁵⁰³

The task of the sentencing judge is not to add and subtract from an objectively determined sentence but to balance the various factors and make a value judgment as to what is the appropriate sentence in all the circumstances of the case. Judicial precedent is rarely helpful. Anyway, I find the case law inconsistent as regards sentencing pretty much like I find inconsistent the general damages awards for pain and suffering in civil accident cases. Whenever there is discretion no matter

⁵⁰²Judge 5.

⁵⁰³Judge 25.

*how careful you are, eventually you or other judges will cause disparities and confuse not only the defendants and their lawyers but other judges as well. We all need to know where we stand more or less, so that we know whether the result of our balancing is fair for all concerned. No matter what however our duty is there, and it must be executed in a proper and balanced manner, which is easier said than done really.*⁵⁰⁴

Another judge commented:

*In deciding the appropriate sentence a court should always adhere to certain balancing considerations. The first is the public interest. One enforces criminal law publicly not only to punish crime but also in the hope of preventing it. I see criminal law from a wider angle, as a law that reflects the values of the society it serves and vice versa. I see my role in a more general socio - contributively manner.*⁵⁰⁵

This last comment reminds of a similar position put forward by the French intellectual Emile Durkheim to the effect that criminal law does not simply exist to prohibit and punish crimes, but more importantly, to shore up group values, as law expresses all that is fundamental in the morality of a society.⁵⁰⁶ Again, however, this is more a subjective view on the purpose of the criminal justice system that is to the extent shaped and defined by judicial precedent.

The conception of balance discussed by the judges referred to a scaling of various factors and circumstances either relatable to the facts surrounding the commission of the offence or the personal circumstances of the offender. The balancing, however, was never elevated to a more abstract level of moral theorisation, analogous for example to Hegel's idea of meting out punishment in order to cancel the negation of rights, or for that matter, to the balance-restoration thoughts expressed by positive retributivists, as discussed in Chapter 5. Alternatively, no discussion took place on the justification of mercy as a

⁵⁰⁴Judge 28.

⁵⁰⁵Judge 7.

⁵⁰⁶E Durkheim, *The Division of Labor in Society* (Free Press, Glencoe 1960) 150.

sentencing tool, with it being esoteric or exoteric to justice, as discussed in Chapter 6. The judicial discussion remained within the boundaries of legalistic social arithmetic (or physics re balancing) without expanding to wider issues of moral justification. This of course is neither improper nor critical of judges for want of moral correctness. After all, it is the constituent element of balancing which does not appear to comply with this supposed division of moral theory, and not the balancing per se.

Within the preceding descriptions of balancing, there is a fundamental premise of sentencing as a course, whereby the judge exercises his discretion to make the factors in the individualised sentencing process capable of creating the foundation upon which the Court can rely and determine the appropriate sentence. Cypriot sentencers seem to express, in their notable majority, concerns about the nature of the balancing exercise and its culture, exactly because they appear to feel bound by principle which requires them to impose a just and proportionate sentence based on well-established criteria, irrespective of whether these presuppositions could be seen by academics (or others), as either erratically intuitive or brusquely erroneous and fallacious.

7.2.1 Balancing and Intuition

As already discussed in Chapter 5.2.5, intuition plays a major role in judicial reasoning as in most decision-making processes. This factor was obvious in many of the judicial comments (a total of 23), which connected it and placed it within the balancing exercise. The most elaborative of these comments were the following three:

*Long before I had balanced the facts and the law, I had decided on the sentence, surely the type of it, whether in other words, that would be imprisonment, suspended imprisonment, or a fine. This comes almost automatically, you can call it experience, gut feeling, innate ability or what have you; I doesn't really matter. You just know that, that is the correct sentence plus or minus a few months.*⁵⁰⁷

*Balancing means weighting all the relevant facts of the case and the mitigating and aggravating elements. That is clear. The point is that this balancing in real judicial life is not so methodological, sequential, or perhaps time consuming as some might think. On the contrary, that is very rare. I guess that all the thoughts that pass through my mind moments before I decide on the sentence must have some coherence if uttered to the objective observer. I don't know that, and I couldn't know that. I choose the sentence before even having time to think on the matter. I mean that the thing comes by itself. I say, this case calls for three years imprisonment. I guess you have some sort of a feedback, drawing from your knowledge. Once I have decided, I try to find a way to justify my decision on the basis of the facts and any existing case law on the point. You can virtually find any judicial precedent for every sentence you want to pass, either an English one or an American one, or of course a Cypriot one.*⁵⁰⁸

*Sentencing is my job, and I have been doing it for many years. What seems difficult to others, including some of our colleagues, for me is a piece of cake. Routine (or practice) makes perfect. I decide on what I consider to be the fairer result having in mind the case law but mostly my common sense, based on the logic of law and precedent.*⁵⁰⁹

What surfaces from these comments is what academic literature has already ascertained with specific reference to judges of other nationalities (with any universal generalisations following by reasonable inference, and in the case of Cyprus by direct evidence). Namely, that decision-making is part of routine professional practice and what they do daily, and what most of them have been doing for many years. What these comments also indicate is that, in their notable majority, sentencing decisions have to be made quickly with little time for scrupulous reflection.⁵¹⁰ As Hutton observes, with partial reference to Tata's⁵¹¹ and

⁵⁰⁷Judge 40.

⁵⁰⁸Judge 48.

⁵⁰⁹Judge 17.

⁵¹⁰Hogarth, *Sentencing as a Human Process* (n 76) Ch 5.

Freiberg's findings,⁵¹² the decision comes first, with the judges knowing from the start in all but the hardest cases (whichever those might be or be categorised as such), what the right decision is, call it instinctive synthesis or anything else. The judges work backwards to construct a post hoc justification, and to demonstrate that the sentence 'fits' the case and the offender. Therefore, based on this perspective, an understanding of sentencing is an understanding of the range of legitimate accounts, which judges can construct to justify their sentence, not on the basis of how it was reached but on how a plausible account was constructed.⁵¹³

The faculty of intuition enables the judge to make a quick judgment without a conscious weighting and comparison of the pros and cons of the possible courses of action. It is a capability of reaching down into a subconscious repository of knowledge acquired from one's education and experiences. Intuition, in this sense, is related to judgment, as in the proposition that experienced people tend to have good judgment because their experiences, though largely forgotten, remain accessible sources of knowledge for coping with challenges that despite being new are not novel, because they resemble previous challenges. Most judges in Cyprus are highly experienced; many are middle-aged or older, have been judges for a long time, and before becoming judges they were practicing advocates. Their experiences nourish their intuitions. Unconscious preconceptions, which play such large a role in the judicial process and are the key to reconciling the attitudinal literature with what the judges think they are doing,

⁵¹¹C Tata, 'Accountability for the Sentencing Decision Process - Towards a New Understanding' in C Tata and N Hutton (eds), *Sentencing and Society* (n 28) 419 - 420.

⁵¹²A Freiberg, 'Sentencing Reform in Victoria: A Case Study' in R Morgan and C M V Clarkson (eds), *The Politics of Sentencing Reform* (n 201) 58.

⁵¹³N Hutton, 'Sentencing as a Social Practice' in S Armstrong and L McAra (eds), *Perspectives on Punishment: The Contours of Control* (OUP, Oxford 2006) 169.

are products of intuition. This implies, incidentally, that the more experienced a judge is the less his decision in a new case will be influenced by the evidence and arguments in that case. The role of the unconscious in judicial decision-making is obscured by the convention that requires a judge to explain his decision in an opinion. That is a check on the errors to which intuitive reasoning is prone because of its compressed and inarticulate character; hence the value of a judge's having a suite of emotions that does not cut him off from considering challenges to his intuitive take on a case.⁵¹⁴

7.2.2 Balancing and Judicial Illusionism

Judicial reasoning must be full and genuine thus enhancing the ability of observers to gain confidence in the system,⁵¹⁵ thus removing the danger of sentences being based on an immediate emotional reaction to some feature of the offence.⁵¹⁶ Yet, reason giving is only part of the overall picture. The other part relates to the truth behind the actual sentencing judgment (to isolate the matter on what is of direct concern here) and the honesty behind its reasoning as such. Definitely, one cannot convincingly assert that every thought that is part of a judge's stream of consciousness in deliberating about a case is connected to the result; nor that every thought needed to explain the decision to those affected by it should form part of the reasoning. This is more or less accepted and reasonable, as well as practicable. What is contested as rather improper is the existence of

⁵¹⁴See, Rawls, *A Theory of Justice* (n 326) 30-35, and H Sidgwick, *The Methods of Ethics* (n 326) 96-126.

⁵¹⁵M Miller, 'Guidelines Are Not Enough: The Need for Written Sentencing Opinions' (1989) 7(1) *Behav Sci & L* 3, 20.

⁵¹⁶D Thomas, 'Sentencing-The Case for Reasoned Decisions' [1963] *Crim L R* 245, 246-247.

untruthfulness behind sentencing decisions, usually warily hidden or concealed, needless to say.

The following comments by one of the participating judges puts matters bluntly in perspective:

Sentencing is a balancing act for the purpose of reconciling all those often difficult to reconcile considerations. It is like balancing scales. Of course, we all know that this balancing thing is somehow a deceiving façade. You balance what you consider as the actual balancing factors by interpreting the evidence and you no that this interpretation can usually go both ways. You can find strong ways to imprison and equally strong reasons not to. It is the same with the Supreme Court at the appeal stage. If they want to reverse for whatever reason, they will no matter what you have said at first instance because that is what they wish to do and I do not question their integrity. The latter factors you must mention of course that you have weighted and finely analysed in your mind and so on and so forth. However, in reality you did not. You only balanced for example the fact that the defendant in a breaking and entering case entered the house of a young woman with a child knowing she was in and stole the wallet on the kitchen table wearing a hood, terrorising her and the kid with the need to deter others and show this woman that there is somebody out there, the Courts, that really care. So, what is it, two or three year's imprisonment? I could have given him 12 years but you know that the maximum is ten. That is what you actually weight. Who cares whether he pleaded guilty and saves us all of the time and hassle looking at his face until the trial is over and listen to his lawyer talking about his human rights and how difficult childhood his client had, just because he is on legal aid or he wants to justify his hefty fee.⁵¹⁷

These revelations, and others that follow, raise matters of particular concern. Evidently, to put things mildly, there appears to be a disjunction between the reasons appearing in judicial decisions as their etiological foundation and those that judges exchange among themselves as portraying the true dimension of things. Evidently, Dr Gregory House is right when he avers in the TV series 'House MD,' that 'everybody lies.'⁵¹⁸ On this premise, one could conceivably agree by reasonable analogy with Tata's suggestion that judicial decision-making may not

⁵¹⁷Judge 16.

⁵¹⁸See, H Jacoby and W Irwin (eds), *House and Philosophy: Everybody Lies* (John Wiley and Sons, Hoboken, New Jersey 2009) 42.

be very different in character to that of other discretionary decision makers.⁵¹⁹ However, whoever else might think in a similar manner, might not be relevant, or in any event comforting, simply because they are not judges who (for better or worse) are responsible in making such detrimental decisions concerning peoples' lives, and their families. Lord Bingham asserts, and correctly so, that most judges and their critics would today think it generally preferable to be open and frank on what they are doing without any hidden policy factors,⁵²⁰ with reason giving constituting part of the judicial process because they are true, and not merely because they are defensible.⁵²¹ Clearly, this judicial illusionism, as it has been called,⁵²² the attitude in other words, of some judges not to be frank and honest in the reasons they officially give for their sentencing decisions, may look, and is, absurd and morally unethical to those who still believe that judges are free from human ordinariness. Despite its immorality, to some degree, this behaviour is socially understandable and perhaps expected by some. Any efforts to close this gap of untruthfulness in judging would assist advocates who must seek to persuade the judge in the future, but such efforts would also assist judges in intergrading their work in the act of judging and their work in explaining those judgments to others. However, further to the practical reasons judges may have in saying what they say about the inconsistency under discussion, their stance on the matter is consistent with their sense of epistemic rationality and their bona fide intentions to

⁵¹⁹Tata, 'Conceptions and Representations of the Sentencing Decision Process' (n 274) 414.

⁵²⁰T Bingham, *The Business of Judging: Selected Essays and Speeches* (OUP, Oxford 2005) 30.

⁵²¹C Fitzmaurice, and K Pease, *The Psychology of Judicial Sentencing* (Manchester University Press, Manchester 1986) 45.

⁵²²See, P Atiyah, 'Judges and Policy' (1980) 15 *Israel L Rev* 346, 367.

act fairly and justiciously in every case, as they so deem appropriate. For example, judge 16, later clarified that:

The fact that a judge can balance things as he sees correct, fair and just by definition means that he will do so honestly and in accordance to his judicial oath. What a judge does is to administer justice, and the fact that he selects the best possible course from those available or from those which could be selected, is exactly, a proof of what I am saying.

Along the same lines, another judge alleged:

The fact that I can write a sentencing decision with case depending on the sentence I wish to impose as the just and fair sentence, does not indicate that such a choice is malignant or mala fide. It is simply the right one, as I see things.⁵²³

Worthy of special mention, are the remarks of yet another judge on the point:

Sentencing is a peculiar thing. Sometimes is related to the guilt of the offender viewed however from another perspective. What I mean is this. Sometimes, after I have found the defendant guilty of an offence after a trial, I might have some second thoughts, for whatever reasons. When that happens, I make sure that I am far more lenient with my sentencing, and where I can I manage to suspend the sentence, so that I minimise the possibility of an appeal and the possible reversal of my decision.⁵²⁴

On similar grounds, 13 other judges used terms like:

'You know how these things work'⁵²⁵

'I can write a sentence for jailing the defendant with the same ease as I could write another for fining him and vice versa'⁵²⁶

'There is always a judgment of the Supreme Court or of another foreign court that could back up almost any decision you want to take. You choose according to your needs in the particular case you are dealing with, it is a matter of judicial policy.'⁵²⁷

⁵²³Judge 23.

⁵²⁴Judge 2.

⁵²⁵Judge 5.

⁵²⁶Judge 24.

⁵²⁷Judge 6.

These comments observations show plainly the total disregard of any consistent legitimising framework in sentencing (at least on the basis under discussion) and the despondency of even thinking the possibility of searching for such a framework in the realm of moral legal theory. In fact, the said comments bring-up the political and academic qualms about anarchy and capriciousness in sentencing referred to in Chapter 1.2.

7.2.3 Balancing and Imaginative Sentencing

A number of judges noted the ‘vanity,’ as they described it, in going through the process of balancing with all that it entails knowing that they will almost never be able to see and evaluate the impact of their sentence on an offender, unless of course he reoffends and appears before them again for sentencing. These are some of the comments:

We go through all that process, we say things like deterrence, social protection, and the like, without ever knowing whether what we have so painfully have said had any meaning to the offender or any practical result, other than ending up in prison or back to his home with a fine. There is a problem in this regard, which must be solved.⁵²⁸

Big fuss for nothing; we never know whether for example there has been specific deterrence to the offender, or any of the issues dealt with during the sentencing stage. It would have been interesting if there were a follow-up somehow.⁵²⁹

Its good to know what happens to the defendant after his conviction and sentence, and more specifically whether the sentence had any impact on him, and the way he approaches things and his life after the sentence.⁵³⁰

What these judges are essentially expressing (verifying applicable academic opinion on the subject),⁵³¹ is that sentencing, from this lookout, is

⁵²⁸Judge 50.

⁵²⁹Judge 42.

⁵³⁰Judge 24.

imaginary, in the sense that for the most part at least, they cannot know if the sentence they impose actually achieves its purpose, other than for those sentences imposed simply on grounds of denunciation, for instance, although most sentencers, as it will be analysed in Chapter 8, typically involve multiple sentencing purposes. On this approach, judges can only imagine the impact of their sentences. They cannot know whether their sentences ‘work.’ They sentence because they hope that something will happen, in the sense that, at least some of the time, their sentences will achieve what they want them to.

7.3 The Judicial Conception of the Sentencing Undertaking and its Harshness

The intricacy of the sentencing task was one of the most regular themes running through the interviews. It was noticeable that the judges took the sentencing part of their judicial role very seriously. Less than one third of the judges (15 judges) specifically discussed the sentencing process as being ‘harsh,’⁵³² ‘difficult,’⁵³³ ‘messy,’⁵³⁴ ‘very hard,’⁵³⁵ ‘a necessary evil,’⁵³⁶ ‘not something any sentencing judge takes lightly,’⁵³⁷ ‘difficult and thankless,’⁵³⁸ ‘trying,’⁵³⁹ ‘hard,’⁵⁴⁰ ‘something that doesn’t get any easier,’⁵⁴¹

⁵³¹J Tombs, ‘Telling Sentencing Stories’ in P Carlen (ed), *Imaginary Penalties* (Willan Publishing, Cullompton, Devon 2008) 85.

⁵³²Judge 14

⁵³³Judge 18.

⁵³⁴Judge 29.

⁵³⁵Judge 21.

⁵³⁶Judge 15.

⁵³⁷Judge 20.

⁵³⁸Judge 15.

⁵³⁹Judge 54.

⁵⁴⁰Judge 52.

⁵⁴¹Judge 27.

‘uncomfortable,⁵⁴² and ‘even worse than trying to figure out general damages in accident cases.’⁵⁴³ Ten of them expressly correlated the difficulty they were referring, to jailing. Three of the comments were particularly elaborative:

The sentencing process has always been a muddled situation for me. It is never easy to tell someone that he will go to jail, no matter for how long. Of course, the more serious the offence and the circumstances of its committal the less difficult is the decision but it is still a difficult decision. Usually however we do not deal with such serious cases. More often than not, we deal with cases where the offence is serious admittedly but the circumstances are such that they have to do with ordinary human weaknesses. These people just happened to be caught. Forging cheques, petty theft, minor assaults and the like, where the defendant has also a prior criminal record are the most difficult. When you tell them you will go to serve a sentence of imprisonment, you are sentencing at the same time their families as well. You create a chain of consequences to that family which could be disproportionate to the offence. The defendant committed the offence, fair enough, but how about his family. What would that mother say to her children, particularly if they were young when they ask where their father is? How much would that woman be able to carry everyday and raise her children properly? Moreover, the children when they go to school would they be fraught and made fun of for being the children of a convict? It is easy to say that all these are not directly related to the offence and the punishment, but are they not. Every time I sentence someone to imprisonment, when I go home in the afternoon, I see my children and my wife and I feel guilty, I do not know if is for me I am feeling guilty of or for the defendant. It is a bad feeling, which I have never been able to overcome all these years. From this perspective sentencing is messy and difficult.⁵⁴⁴

Imprisonment is bad for the overwhelming majority of offenders and we all know that, particularly if he is a first offender with a family and all that. I think that jail can have some positive effects on some people but it can have some negative effects as well. I feel sorry for these people and their families, but what can you do, this is life I suppose, but the decision is difficult every time.⁵⁴⁵

Sentencing is a trying process, and you do not have to imprison someone to be able to say that, fining can do that as well. Sometimes it is the agonising process leading to that fine that causes the difficulty, and you know fines can cause serious problems as well.⁵⁴⁶

⁵⁴²Judge 32.

⁵⁴³Judge 47.

⁵⁴⁴Judge 11.

⁵⁴⁵Judge 34.

⁵⁴⁶Judge 40.

The remaining two-thirds of the judges indicated that sentencing, even though a difficult task (mainly because of the imprisonment factor) did not cause them any problems or complexities worth mentioning. Their comments were in the range of ‘sentencing is just part of the everyday business,’⁵⁴⁷ ‘nothing special,’⁵⁴⁸ ‘not worse than having to give your findings after a hearing,’⁵⁴⁹ ‘just a part of the game,’⁵⁵⁰ and ‘just a necessary procedure.’⁵⁵¹

Two additional representative observations were the following:

*Sentencing is part and parcel of the judicial duty. It has rules, it has practice, and it has case law that pretty much covers what you need to know. Granted that not all of these can rule how to feel, but still this does not make sentencing difficult in the sense of being something special or whatever. Sentencing is nothing extraordinary, from this standpoint. It is difficult in the sense of the responsibility not the action per se. It is of course crucial to the defendant but ok, my duty is to sentence him and that is what I do. That is what a good and descent judge should do. Apply the law and do his job.*⁵⁵²

*We are professional judges and sentencing is part of our everyday business. I see no particular difficulty in it or experience any negative feelings. I just do what I have to do. We all have our role in this world. We sentence and criminals offend; we do our part, they do theirs.*⁵⁵³

The fact that some of the judges found sentencing easier or less complicated than their colleagues does not strip the former of genuine motivation and interest in dispensing justice, or for that matter, attribute to the rest a greater sense of judicial sensitivity and social concern for the proper administration of justice. The presumption that all judges act towards the latter scope, though

⁵⁴⁷Judge 3.

⁵⁴⁸Judge 48.

⁵⁴⁹Judge 8.

⁵⁵⁰Judge 16.

⁵⁵¹Judge 50.

⁵⁵²Judge 23.

⁵⁵³Judge 19.

rebuttable, is hard to refute, particularly if viewed through the prism of their resonance, as the above interview comments indicate.

What ensues from the aforesaid interview statements is that punishing, for the most part, is an unpleasant and knotty experience for the judge. He is after all the ultimate institutional critic, whether one likes it or not. He is the one with the immense societal responsibility and grand powers in his hands to punish and decide the fate of his fellow human beings (truthfully that is), no matter how much Albert Einstein would aver that whoever undertakes to set himself up as a judge of truth and knowledge would be shipwrecked by the laughter of gods⁵⁵⁴(and perhaps not only them, having in mind the judicial comments in paragraph 7.2.1, above).

The other main actors in the sentencing system, namely the prosecution and the defence, present their case and all the information they consider relevant, then sit back, and wait for the decision of the court. It is not rare however that they be lacunas in their cases mostly due to poor preparation or inadvertence, and occasionally pure and simple incompetence. The judge has to balance matters and decide to what extent he can or cannot interfere, and fill-in the gaps so as to dispense substantive justice. His responsibility for judging subsists. He must come to a decision strictly in accordance to the evidence and facts presented before him; this is the fundamental nature of the adversarial system. It is likewise a fact though, that this systemic pragmatism can be the cause of tension and angst to the judge, often times not immediately felt, or ironically, with its repercussions properly and timely balanced by him.

⁵⁵⁴A Calaprice, *The New Quotable Einstein* (Princeton University Press, New Jersey 2005) 120.

Twenty-five of the judges spoke specifically about the psychological strain and unease that sentencing causes them. This is not to say that it was not a matter of concern to the rest of the judges, as the researcher was able to gather by their demeanour during the interviews. However, reading through the lines of the comments presented above on the difficulty of sentencing (mainly, vis-à-vis the decision to imprison), such a reasoning is prima facie reasonable, to say the least. Possibly, it might not be far from the truth for one to assert that judges engage in one of the most stressful jobs in contemporary society having constantly to make publicly, non delegable decisions about the life and freedom of people, usually in dramatic circumstances, with their sentencing decisions subjected to appeal and criticism (often times unconstructive and spiteful), being at the same time obliged to discharge their functions with ‘impeccable honesty, resolute even-handedness, conspicuous humanity and a high degree of judicial wisdom.’⁵⁵⁵ Indeed, the work of judges is highly varied and multifarious. It can involve criminal matters, family matters, private disputes of various types, and challenges to governmental decisions. They find themselves called upon to make decisions about the law, to determine facts, to assess the credibility of witnesses, to manage courtrooms, to impose criminal sanctions, and determine damages. Judges perform their duties in majestic courthouses, decrepit buildings, small hearing rooms, and their chambers. Some of them spend most of their time working in the same building, while others travel from place to place to handle cases in various districts. Advocates appearing before judges include accomplished specialists, struggling beginners, mediocre

⁵⁵⁵A Watson, ‘Some Psychological Aspects of the Trial Judge’s Decision-Making’ (1988) 39 Mercer L Rev 937, 938.

veterans, and inarticulate self represented litigants. Throughout all of the variations, we expect judges to act with intelligence, dignity, neutrality, respect, compassion, and efficiency.⁵⁵⁶

The four more detailed and expressive comments made specifically on the issue of the general psychological tension of the judge in the process of sentencing, were the following:

*I view sentencing as psychologically upsetting and hectic. It is not something you can endure for a long time. It gets on you, and at first, you might not even notice it, except perhaps your wife and children when you go home. There is a lot of misery out there, many unhappy and unlucky people whose problems and who knows what brought forced to the edge, and there you come you give the final push and there they go. That, I cannot stand, it eats me from the inside no matter how deserving the punishment it that is not the point.*⁵⁵⁷

*Sentencing is soul fading. There is so much pain and so much anger in society. I feel so sad every time I have to put away offenders, see, and worse of all hear in the courtroom the sobbing of their parents, grandparents, wives, husbands, you name it. It kills me no matter what. It purely kills me.*⁵⁵⁸

Punishing people is hard. It causes me great stress and emotional commotion. I remember once I came to my chambers early in the morning and found in the parking area a young woman who appeared to be very distressed but in a very proud and decent manner. I could see into her eyes that look of a person in despair however. She told me 'I know that I could end up in jail if I approach you but I will. I am the mother of so and so. You are going to give out his sentence today, you know for that fight. He is a good boy my son, a very good and sensitive boy, do not send him to prison, they will destroy him in there. His father used to beat him up everyday because he was not man enough he used to say and look what happened. He is a good boy my boy.' At first, I felt anger because she dared to approach me in such a manner. I called up my wife to tell her. She told me what I did not want to hear 'wouldn't you have done that if you were she? It is her child. Imagine how hard it was for her to do that.' I sent him to prison for six months. The facts were serious and he had a prior conviction, a fine for common assault. He was only 17 though. I gave the sentence and withdrew immediately in my chambers for the courtroom to clear up from his relatives. I could hear the mother weeping. Tears came into my eyes. We decide, we give our sentences according to the law and the case law for justice and so on but the bottom line is that we are

⁵⁵⁶H M Kritzer, 'Toward Theorization of Craft' (2007) 16 Soc & Legal Stud 321.

⁵⁵⁷Judge 10.

⁵⁵⁸Judge 26.

*causing anguish and sadness at the same time to a lot of people, and that I do not like at all.*⁵⁵⁹

*Sometimes we have no time to think about what are we deciding. We act on feedback based on our experience. We use our knowledge to improvise. The tension is immense. Theories under these circumstances are a curse to deal with. We just want to finish up the case in a practical and fair way. When we finish with a sentence we don't utter that we have awarded justice to that offender and his victim, although we did of course, but that we have disposed of one more case file; one less case file to go, yes!*⁵⁶⁰

The strain and the anguish many Cypriot judges feel in the exercise of their sentencing duties could prospectively cause serious problems to the administration of criminal justice and to them personally. One measure could be a more careful selection of judges in general and of those who are to assume duties in the criminal Bench in particular. Frustrated and stressed judges may face difficulties in executing their duties with stillness and reasonableness. They may not have the time to properly reflect and decide on a sentence let alone think in terms of moral theories of punishment and the justification of imposing a sanction, or be merciful, with their focus (or what is left of it) being directed elsewhere. In this ambience of things, the effort to speak about theoretical rationales and equilibriums between sentencing practice and punishment theory might actually appear pointless.

7.3.1 Sentencing as a Rational Process

Judges view sentencing as an essentially pragmatic exercise, and no factor is less predictive of the ultimate sentencing decision than their general theoretical rationale. Such a pragmatic approach involves, more or less, the judge's response to a particular set of facts. The present study tended to reflect that approach to

⁵⁵⁹Judge 12.

⁵⁶⁰Judge 49.

sentencing as did to show, in addition, that Cypriot judges are also sensitive of procedural justice as a precondition for the substantive justice in the particular case:

*My role as a judge is to stick to the facts and decide on the appropriate sentence based on these facts. This is what it basically comes down to.*⁵⁶¹

*We judges know that we have a specific role in sentencing. We are neither the prosecution nor the defence. We may suspect that what they present before us is not the whole truth due to a variety of reasons but that should not change things. Our role remains the same, which is sentence on the facts and only on them not on the facts, as we wanted them to be or suspect them to be. The sentencing process has therefore its own philosophy that is the creation of the factual basis of the sentencing decision more or less like the trial of the case.*⁵⁶²

Other judges saw the sentencing process in a related way as imposing justice according to law:

*The judge is here to give effect and meaning to the law and based on the law he must sentence. I do not think that there is much controversy on this if at all.*⁵⁶³

*The sentencing process is planned in such a way so as to structure the manner in which the facts are to be presented before the judge for deliberation. The role of the judge is to make sure that this process is followed to the letter and fairly for all parties concerned, particularly the defendant. No judge wants any offender taking advantage of any procedural pitfalls and is released or has his sentence reduced for such reasons. Judges must follow procedure strictly. From thereon the decision is for the judge on which sentence to select and impose on the defendant.*⁵⁶⁴

The latter statement reflects also the inveterate assertions in the literature to the effect that a sentence is nothing but a mere procedural and substantive phase of the wider criminal justice system, and that no matter how important and difficult it is, it cannot be a principal means of restricting crime, though that must be the main aim of any penal system in its totality.⁵⁶⁵

⁵⁶¹Judge 54.

⁵⁶²Judge 7.

⁵⁶³Judge 5.

⁵⁶⁴Judge 50.

⁵⁶⁵N Walker, *Sentencing in a Rational Society* (Allen Lane The Penguin Press, London 1969) 21.

Another judge stated:

*The courts are not here to reform society or even the system of administration of justice. Judges decide on the evidence adduced. If our decisions could help in improving, things then that would be a blessing. But from thereon the efforts for solving societal problems are synergistic with the courts having a small only role to play.*⁵⁶⁶

Indeed, the limited role of sentencing in the criminal justice process implied in the above comment, was also borne out by Peter Taylor, the former Lord Chief Justice of England, who once stated that ‘...it must be remembered that the courts alone cannot make people good or more responsible to one another. The courts are only one of a number of social influences.’⁵⁶⁷ Courts are, truly, reflections of society and not the society itself. The causes of crime are numerous, having little to do, if at all, with the judicial actions or inactions. Surely though, by examining those who administer justice, the judges, one can catch a glimpse of *how* and *why* penal is administered as it is.⁵⁶⁸

7.3.2 The Procedural Judicial Perception of the Process and the Fear of Reversal

A number of judges, when asked how they saw the process of sentencing, gave an account of the procedure they followed in court. This points to the fact that they perceived sentencing in practical terms, and yields some insights into how they handle the task. Appreciably, there appears to be an opinion by some judges that if one pursues the proper method, the analogous result will follow:

I listen to the submissions, I refer to the offence in the indictment and then I proceed with my rationale. I usually have ready one or two paragraphs on the

⁵⁶⁶Judge 29.

⁵⁶⁷Lord Chief Justice Taylor, ‘Judges and Sentencing’ (1993) 38 (4) J Law Soc Sc 129,131.

⁵⁶⁸M M Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (Russell Sage Foundation, New York 1992) 122.

seriousness of the offence, its nature and the need for deterrence, and I conclude with my sentence. I usually keep it brief. The less said the fewer the chances to say something that could lead to reversal. And I would not want that, and the same would apply I think to most other judges.⁵⁶⁹

Another comment was made to the effect that:

[...] I make sure that I am far more lenient with my sentencing, and where I can I manage to suspend the sentence, so that I minimise the possibility of an appeal and the possible reversal of my decision.⁵⁷⁰

Thirty-eight of the judges interviewed, expressed similar concerns in various parts of their comments, such as:

Do you know anybody who wants to have his decisions doubted, let alone overturned?⁵⁷¹

I don't like to be reversed on appeal, honestly. That is why I manage to form my decisions in a way that it would make it difficult to be reversed.⁵⁷²

I don't like playing hero and take bold steps in my sentencing with comments and social statements, and the like, because reversal is always lurking.⁵⁷³

The less said the better. The more you say the more grounds of appeal you give out, and the more grounds for the appeal court to reverse you. Of course we all know that if the Supreme Court wants to reverse it will no matter how correct and to the point you were.⁵⁷⁴

These comments signify that the Cypriot judges are generally, institutionally responsive to specific precedents and trends in their sentencing decision-making,⁵⁷⁵ showing however an apparent fear (and probably the greater constraint to their discretionary sentencing powers), to being reversed by the Supreme Court, though in a calculating and methodological manner, and not

⁵⁶⁹Judge 39.

⁵⁷⁰Judge 3.

⁵⁷¹Judge 10.

⁵⁷²Judge 7.

⁵⁷³Judge 52.

⁵⁷⁴Judge 16.

⁵⁷⁵For similar findings in the US, see D Klein, and R J Hume, 'Fear of Reversal as an Explanation of Lower Court Compliance' (2003) 37 L & Soc'y Rev 579.

unconsciously, as more recent research seems to suggest.⁵⁷⁶ This fear might be the result of the widespread impression between the Cypriot judges, expressed during the interviews, that the Supreme Court is easy on reversals of first instance sentences. In fact, as indicated in paragraph 3.2.3, this impression is corroborated by the statistical fact that between 1960 and 2008, 36.7% of the sentences appealed against were reversed.

7.3.3 The Procedural Judicial Perception of the Process and Defendant Insincerity

On a different tenor, but still related to the judges' broad perception of the sentencing process, one of the judges said:

The process is a mechanistic process basically. Each actor plays his role, and I do not mean to underestimate the importance of the sentencing procedure. The prosecution mentions the facts, if there is a guilty plea and whether there are previous convictions for the offender. You sense almost immediately if there has been a plea-bargaining or some thing of collusion in the acceptable sense between prosecution and defence. You let the defence lawyer say what he wants to say, and then you give the sentence. You hear how much the defendant feels remorse for the offence he has committed and the like. We all know that in the vast majority of cases these mitigating remarks, particularly the remorse ones are far from the truth. The system works until the next time the same defendant will appear before you with the same or a different lawyer and tell you the same things.⁵⁷⁷

Indubitably, everyone involved in the sentencing process (at least those who do not act as if they cannot see), is aware of the insincerity prevailing, especially the defendant. When he pleads guilty, he must at least pretend to show remorse. This allows the judge to also pretend that the defendant deserves special

⁵⁷⁶J G Delahunty and S L Sporer, 'Unconscious Influences in Sentencing Decisions: A Review of Psychological Sources of Disparity' (2010) 42(1) Aust J For Sci 19, 27.

⁵⁷⁷Judge 33.

consideration and leniency for being truly sorry for his crime.⁵⁷⁸The scepticism pertaining to the remorseful motives of defendants has been diachronic. In the 1960s Blumberg wrote that '[The guilty plea is, in fact, an act,] during which an accused must project an appropriate and acceptable degree of guilt, penitence, and remorse. If he adequately feigns the role of the "guilty person," his hearers will engage in the fantasy that he is contrite and thereby merits a lesser plea. One of the essential functions of the criminal lawyer is that he coach the defendant in this performance.'⁵⁷⁹More recently, Jeffrie Murphy, exploring moral and epistemic issues along similar lines as Blumberg, expressed considerable scepticism toward relying on judgments about offender remorse at the time of sentencing by signifying that he does not give much weight to expressions of remorse and repentance at the sentencing stage, as he simply sees too much chance of being made a sucker by fakery.⁵⁸⁰So, predictably enough, the Cypriot judges, again, do not constitute an exception to judicial behaviour noticed in other jurisdictions.

7.3.4 Delay in Sentencing

Thirty-three judges identified, with noticeable fret, certain procedural difficulties in the case of sentencing delay. The following two statements incorporate the gist of the rest of the comments:

If the sentence takes place two years after the offence, the immediacy is lost, particularly if it is a custodial sentence. The big change I would like to see is that the trial should take place as soon as possible after the offence, or at least as soon as things such as scientific tests have taken place. This would also assist witnesses or people who are pleading guilty. Delay is one of the big issues in the court, and

⁵⁷⁸J Galliher, *Criminology: Human Rights, Criminal Law, and Crime* (Prentice Hall, Englewood Cliffs, New Jersey 1989) 222.

⁵⁷⁹A S Blumberg, *Criminal Justice* (Quadrangle Books, Chicago 1967) 89.

⁵⁸⁰J Murphy, 'Remorse, Apology, and Mercy' in P H Robinson, S P Garvey, K K Ferzan, and K Ferzan (eds), *Criminal Law Conversations* (OUP, Oxford 2009) 191.

*the philosophy of sentencing offenders, and one that might negatively affect Justice and its distribution.*⁵⁸¹

*The issue of delay has various parameters. One parameter is the availability of evidence, and this is relevant not only in case where there is a trial as to the guilt of the defendant but also at the sentencing stage if there be a need for example for a Newton type of hearing. Will the witnesses come to testify properly and not just show up and profess they do not remember? Will the victim be willing to continue with the case particularly if he or she went on and put everything behind? These are serious issues and they become even more serious if the delay is attributed to the courts. Justice might be affected.*⁵⁸²

These observations bring out a normative concern on the part of the judges as to the effects of delay and the way they interpret, not only their role within the system of punishment, but the viability and moral legitimacy of the system itself.

Very few, if any, would disagree that punishment must be swift in order to strengthen the association between crime and punishment. This is indeed a remark of practical importance. Nonetheless, at a more abstract level, delay emits a problem of justification and it conflicts with both retributivist and utilitarian accounts of punishment. Bentham argues that in calculating the consequences of an action, the proximity of the punishment to the offence must be considered and weighed against the immediacy of the profit of the offence; so if the individual receives immediate gratification from the offence, this is more significant than the prospect of a distant punishment.⁵⁸³

Two judges, linked the issue of delay, and the realisation on their part of its impact in sentencing, with their perceived conception of the proper and expected discharge of their judicial duties. They said:

⁵⁸¹Judge 2.

⁵⁸²Judge 27.

⁵⁸³Research shows that indeed punishment is more effective when it is immediate, inescapable, and severe and given on a fixed ratio schedule: See, G C Walters and J E Grusec, *Punishment* (Freeman, San Francisco 1977).

*Justice delayed is justice denied. We all know that, it has become a cliché, but I wonder to what extent do we really appreciate the problems that can arise from delay not only in completing the trial proceedings speedily and effectively but also in sentencing the offenders. Delay can sometimes be as cruel or nerve breaking for the offender as his final sentence for that matter. I personally feel that if I don't sentence the offender without delay I would have failed in my judicial duty, provided of course that the delay is due to my handling of the case and not from other extra judicial factors.*⁵⁸⁴

*A judge must be the worse enemy of delay in judicial proceedings, particularly in the sentencing stage where the defendant has pleaded guilty in a serious offence. He has decided to assume responsibility for his actions. He is naturally anxious to proceed with his life. This anxiety usually overcomes his family as well, and also the family of the victim but the victim as well. A judge is responsible to bring closure to the case for both the sake of the offender, and the victim of his crime soon. This is justice.*⁵⁸⁵

If nothing else, these comments are indicative of the sense of responsibility that some judges have or show in the exercise of their duties, and of their sensitivities towards not only the offenders and their rights but also towards the victims and the idea (or notion) of justice. This judicial concern does not constitute a Cypriot patent. It has been troubling judges in other parts of the world as well for years.⁵⁸⁶

The issue of delay is also inevitably and inextricably related to the sentencing workloads of the judges, as noted in the following paragraph.

7.3.5 Sentencing Workloads and the Art of Edvard Munch

Judges commonly perceive their sentencing workload as mounting. They are under considerable pressure to complete cases as quickly as possible so that other cases can take turn and the system gets moving. There are a lot of demands

⁵⁸⁴Judge 1.

⁵⁸⁵Judge 28.

⁵⁸⁶R Gavison, 'The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability' (1988) 61 S Cal L Rev 1617, 1624.

on the courts to get through many sentences daily; otherwise, the system may stalemate. A notable number of judges stated that they were under significant strain because of the workload placed upon them. Apparently, many District Court judges, spoke of commonly having daily 10-12 cases for sentencing listed (in addition to the 2 -3 hearings, and several fresh cases) and the difficulties that this caused during the six hours for which they sit in court daily from Monday to Friday:

*One of the only constraints on the process is a lack of time, as I sometimes have to impose ten or even twelve sentences in a day. These are many sentences for one day in the proper criminal jurisdiction. Remember also that we have daily hearings as well plus fresh cases. Mistakes are happening because of this, but let us not discuss it now.*⁵⁸⁷

*There are disproportionately more cases than judges to decide on them. Either one must consider recruiting more judges to do the job or the prosecution must learn to exercise their discretion to prosecute more efficiently. It does not necessarily mean that all those who commit criminal offences must be brought before a court of law. At some point the system will collapse and much earlier when the few judges who are very productive and particularly competent fall back because the system does not reward them accordingly? It is unheard of for a judge to have ten serious criminal cases everyday for sentencing. It is not fair to them and not fair to the defendants but to the prosecution as well.*⁵⁸⁸

*What is happening in the courts of Cyprus is abhorrent. How could a judge put in so many hours of work and many more when he goes home? This is unacceptable. We need to rest in the sense that we need to have time to think and write our judgments and keep informed of developments not only in Cyprus but abroad as well. There is no such chance.*⁵⁸⁹

The pressure to get through a large number of sentencing cases apparently extends to the Supreme Court judges as well:

Sentencing appeals can be distressing. The Supreme Court is under a lot of pressure to get work done; sometimes we hear four to five, sentencing appeals a

⁵⁸⁷Judge 9.

⁵⁸⁸Judge 7.

⁵⁸⁹Judge 13.

day. Some of them are disposed of by ex tempore judgments and others are reserved. Do not forget that we deal with civil and administrative cases as well. Sometimes we feel that a particular point may have some specific theoretical or more general interest the resolution of which may have wider repercussions but we have no energy and no time to tackle it and we decide the appeal on the substance of things.⁵⁹⁰

The pressures on the Supreme Court in sentencing matters are not greater than the pressures to try the appeals fast both in the civil and the criminal jurisdiction but also in the administrative law jurisdiction. We are not thirty year olds. Most of us are well into their late fifties plus. We get tired easily and our concentration span is decreasing. In the Supreme Court we must have the time to decide issues in depth and give careful directions and not work with the workloads and conditions of a newly appointed District Court Judge in the traffic jurisdiction.⁵⁹¹

The pathos and despondency with which almost all judges graphically described their workload anxiety and demands during the interviews, brought to mind Edvard Munch's often quoted utterance 'Am I in hell?'⁵⁹² It also reminded of his painting 'The Scream'⁵⁹³ (one of his best known and most frequently reproduced expressionistic motifs), or even the projected melancholy of his 'Angst', or still of his 'Ashes', two more of his famous paintings dealing with anxiety and despair and giving shape (as with most of his art) to the inner life and psyche of modern man.⁵⁹⁴

Another judge, apparently of the Supreme Court, gave a different dimension on the impact of stress and workloads. He said:

We are very pressed for time. We sit in court almost everyday, that is, two and sometimes three divisions of the criminal division. Sometimes we don't know what the other judges in the other divisions are deciding or have decided for quite a few

⁵⁹⁰Judge 53.

⁵⁹¹Judge 22.

⁵⁹²E Lunday, *Secret Lives of Great Artists: What Your Teachers Never Told You About Master Painter and Sculptors* (Quirk Books, Philadelphia 2008) 172.

⁵⁹³Painted in 1893, with broad bands of garnish colour and highly simplified forms, and employing a high viewpoint, it portrays an agonised figure reduced to a garbed skull in the throes of an emotional crisis.

⁵⁹⁴U Bischoff, *Edvard Munch: 1863-1944* (Taschen Books, Cologne 1999).

*days. So there you have inconsistencies and disparities. It is a problem hard to be solved, if at all.*⁵⁹⁵

This comment is very similar to the observations made by Lane LCJ, more than a quarter of a century ago in relation to the difficulties arising in ensuring appellate consistency in judicial judgments:

Sitting as we do in several division, each with a heavy workload, there are inevitably going to be discrepancies between different divisions of the Court of Appeal (Criminal Division), and there are going to be judgments of that Court which trouble judges at first instance (and, I may add, sometime trouble the Court which delivered the judgment.⁵⁹⁶

The same situation as that described above by Lane LCJ appears to apply in Cyprus as well, in the 21st century, and this might be indicative of the fact that certain (to say the least) issues relating to sentencing have a common denominator, and a diachronic transnational importance.

The logic one could reach on the basis of the above comments is that the administration of the justice system must be adapted to current judicial needs and allow judges the luxury of time and manageable working conditions to keep-up with legal and extra-legal developments and to make contributions out of court to issues affecting the administration of justice. Once, Lord Megarry supported the view that judges (he was referring to English judges) needed a few days a month out of court, and a sabbatical term every few years to give them time to reflect.⁵⁹⁷ This it seems could not have been more appropriate and welcomed by the Cypriot judges of today.

⁵⁹⁵Judge 51.

⁵⁹⁶See Lane, LCJ's, 'Forward' in (1982) 1 Bulletin of the Judicial Studies Board.

⁵⁹⁷R E Megarry, *Lawyer and Litigant in England* (Steven and Sons, London 1962) 163.

7.3.6 Adjourning For Reflection Before Sentence

Related to the discussion on workloads is the practice of rarely adjourning a sentencing hearing and reserving the decision for a later time. Unless there has been a report ordered or some other specific reason, many (particularly competent) judges seldom adjourn, and it is standard practice to give their sentence *ex tempore* after hearing submissions, or after a short brake. *Ex tempore* sentencing judgments are however rare in the Assize Court where the panel usually retires for consideration, sometimes for substantive reasons and occasionally out of comity to the prosecution and defence advocates:

*I usually give out my decision on sentencing ex tempore. Rarely, when I am not sure about something such as the existence of some precedent, I adjourn. I also adjourn when in a rather serious case I am almost certain that I will not impose custody so that I can order the defendant to stay in custody for a few days until the decision just to teach him a lesson.*⁵⁹⁸

*I rarely reserve my sentencing judgments, but I might recess shortly if the speech in mitigation is a particularly competent and well thought out, mostly out of courtesy for the advocate rather than from a real need to reflect, as that I do during the mitigation speech.*⁵⁹⁹

*In the road traffic jurisdiction I almost never reserve my decision on the sentence. The case is so big that reserving will lead to absolute catastrophe of my diary.*⁶⁰⁰

Three judges recognised that there are, from time to time, instances that call for an adjournment:

*Thinking well and seriously before you sentence is the best advice you can give and get. Sometimes, when you think something repeatedly might change your perspective of things. If I am minded to hand down a custody sentence, I almost invariably adjourn.*⁶⁰¹

⁵⁹⁸Judge 11.

⁵⁹⁹Judge 54.

⁶⁰⁰Judge 51.

⁶⁰¹Judge 22.

On an emotional level if I am irritated about something the defendant did or the prosecution sometimes and I feel that that might affect my judgment, I reserve and adjourn. At those times the best thing is to adjourn the court for a period.⁶⁰²

From time to time when I have already decided that I will imprison despite the very able mitigation speech of defence advocate I adjourn for a while so as to show that I carefully considered all that has been placed before me. It is a matter of respect to the advocate but the defendant as well or his family if it happens to be present in the courtroom.⁶⁰³

Although the practice of not adjourning sentencing is mainly one of convention, it could also be indicative of time pressures on judges to get through matters quickly, something, which is very much connected to the workload and pressure issues already mentioned.

Two other judges, evidently participating in collective bodies such as the Assize Court and the Supreme Court, gave a very noteworthy picture of the behind the scenes judicial deliberations on sentencing, proving once more the (very) human nature of the judicial officers:

In the Assize Court as a rule you have to adjourn. We are three so we have to discuss the case and the mitigation particularly when the defence advocate's speech is able and reflective. Many times we do not agree on the extent of the imprisonment, and the final sentence usually reflects a compromise of many things, not uncommonly of principle and one's sense of justice in the particular case. This will depend, as you know, on who is the President of the Assize Court, how competent he is or considered to be by the other judges sitting with him, and the various interpersonal circumstances and skills (and egos) of the members forming the Assize Court.⁶⁰⁴

In the Supreme Court we might have to adjourn for consideration so that we could go through the minutes of the trial and all these. We usually do so. One of us undertakes to write the judgment, and the other members of the bench usually sign it in agreement, sometimes not even reading it. Of course all these depend on the state of relationship between the judges. We do have our differences on certain matters relating on sentencing. Some of us are excessively lenient, and some others excessively harsh, so you do realise what happens when these people are part of the same criminal bench, particularly if their differences reach beyond the

⁶⁰²Judge 10.

⁶⁰³Judge 1.

⁶⁰⁴Judge 23.

*level of principle and theoretical inclinations, and reach the level of egopathy and psychological insecurity.*⁶⁰⁵

These comments, viewed in conjunction with pertinent opinions expressed by other judges elsewhere in the world, indicate that the judicial behaviour and attitudes they describe, is characterised by a sort of a universality which helps understand the noticeable similarities of judicial behaviour found (at least) in the common law jurisdictions, irrespective of country or nation magnitude and credence. Chief Judge Richard Posner, for instance, described his experience in the American judicial system by saying that judges rarely level with the public (and not always with themselves), concerning the seamier side of the judicial process, and that this is the side that includes the unprincipled compromises and petty jealousies and rivalries that accompany collegial decision-making and indolence and apathy.⁶⁰⁶

7.3.7 Previous Convictions

Interestingly, 8 judges connected the sentencing process with the issue of previous convictions. They indicated that the first thing they want to hear even before the facts, is whether or not the defendant has previous convictions as that alerts them and forces them to be even more attentive to the facts of the offence

⁶⁰⁵Judge 30.

⁶⁰⁶R Posner, *The Problems of Jurisprudence* (Harvard University Press, Cambridge, Massachusetts 1993) 458. Another Chief American judge, Patricia Wald, expressed similar feelings to those of Posner, signifying that: 'Real friendships are rare on the court. Heartfelt differences of philosophy and ideology militate against them. Powerful egos often impede them, even among philosophical allies. Judges are like monks without the unifying bonds of a common faith. They are consigned to one another's company for life. They cannot speak about their work outside the walls of the monastery. Lingering resentment and hostilities may be kept under wraps – and a bottle of Mylanta at hand – to preserve the image of the court that is impartial and neutral enough to decide other people's disputes': (See, P Wald, 'Some Real-Life Observations About Judging' (1992) 26 *Ind L Rev* 173, 179).

and the mitigation because of the increased possibility of a custodial sentence.

Two of the comments summarise the position of the rest:

The first thing I want to know before anything else is if the defendant has any previous convictions. That is very helpful because it warns you to be even more careful in understanding the facts and have the right perspective. Sometimes if the prosecution starts presenting the facts without first mentioning whether there are previous convictions I would interfere and ask the question myself.⁶⁰⁷

We all have to admit that the previous convictions of the defendant are crucial, whether are similar to the offence at stake or not. I want to know the kind of man the offender is. In an assault case, for example I do deem as relevant his previous convictions on gambling or road traffic violations. These previous convictions are indicative of his wider respect to the laws of the country and his attitude towards them. In such cases I say that these convictions although not directly relevant to the offence they take away the benefit of a clean record and the possibility to ask the court to show mercy. The process is therefore important and in this sense.⁶⁰⁸

There are debatably some moral problems with the factor of previous convictions besides the practical concerns raised by some of the judges, though not seen or evaluated by them, at least expressly, in the context of philosophy or jurisprudence. Previous convictions are material for retributivists,⁶⁰⁹ but surely not for all.⁶¹⁰ The risk of re-offending is irrelevant. Modern utilitarians on the other hand, like Edney and Bagaric,⁶¹¹ claim that previous convictions lead to punishing the offender twice for the same offence, thus violating the principle of proportionality, which according to Ashworth is not part of the utilitarian ratio in any event.⁶¹² The influence of prior criminal behaviour has been challenged both in

⁶⁰⁷Judge 44.

⁶⁰⁸Judge 16.

⁶⁰⁹R Singer, *Just Deserts: Sentencing Based on Equality and Desert* (Ballinger Publishing Company, Cambridge, Massachusetts 1979) 67-74.

⁶¹⁰See for instance, G Fletcher, 'The Recidivist Premium' (1982) 1(2) *Crim Just Eth* 54.

⁶¹¹R Edney and M Bagaric, *Australian Sentencing: Principles and Practice* (CUP, Melbourne 2007) 239-240.

⁶¹²Ashworth, 'Deterrence' (n 347) 44.

the European Court of Human Rights⁶¹³ and the European Commission,⁶¹⁴ under Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁶¹⁵ and was held to be in harmony with the pertinent provisions.

7.3.8 Giving Reasons

In Cyprus, giving reasons for a decision is a judicial duty stemming from constitutional provisions.⁶¹⁶ There has never been a case in Cyprus (at least since it became an independent Republic in 1960), for a judge not to be obliged to give effective and detailed reasons for any decision, let alone for imposing a particular sentence. The judgment has always been the voice of the judge, through which he realises his role in a democracy. It is the exclusive means through which the judicial voice is actualised in practice.⁶¹⁷ This enables the parties to see the extent to which the Court considered their arguments; to further judicial accountability; to enable interested parties to ascertain the basis upon which similar cases will be decided in the future; and to enable an appellate court to determine whether the

⁶¹³In *Engel v The Netherlands* (1979-1980) 1 EHRR 647, a military supreme court had taken into account as an aggravating factor applicants' participation in a forbidden publication, for which they had not been prosecuted or convicted. The Court refused to see a connection between Article 6(2) and sentencing: 'As its wording shows, it deals only with the proof of guilt and not with the kind or level of punishment.'

⁶¹⁴In *X v Germany* (1976) 6 Digest 129, The Commission followed the Court's interpretation that the presumption of innocence is a procedural and not a substantive right, and held that the European Convention does not prevent considering an offenders personality as an aggravating factor in sentencing.

⁶¹⁵Article 6(2): 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'

⁶¹⁶Article 30.2 of the Constitution provides that the judgment of the court must be reasoned. This Article, forms part of the fundamental provisions of the Constitution and casts a mandatory duty on the judge to give due reasons for his deliberations and the conclusions embodied in his judgment. The structure and the style of reasoning is a matter of discretion for the judge. The object of this constitutional requirement is to guard against the possibility of a judgment appearing to be arbitrary and the feelings of grievance such judgment may give rise to.

⁶¹⁷A Barak, *The Judge in a Democracy* (Princeton University Press, Princeton, New Jersey 2006) 205.

decision is erroneous or not. It is principally important to give reasons where the judge is imposing a particularly lenient or harsh sentence so that the appeal court could be in a position to better evaluate the decision within the parameters of the first instance reasoning.

The Supreme Court has indicated that it will be less likely to interfere with a sentence when reasons have been given by the trial court to justify a sentence that is otherwise outside of the normal range,⁶¹⁸ along the lines, it seems, of English precedent⁶¹⁹ - to which the Supreme Court did not however refer. It has been argued with reference to English judges (with direct applicability to the Cypriot judges as well), that if judges could be persuaded to be more explicit about their sentencing calculations, at least in the general sense of stating what sentence they think appropriate for the offence itself and then roughly to what extent they have modified that to reflect specified aggravating and mitigating factors in the case, that would further accountability and transparency.⁶²⁰

It is worth noting that the way the Supreme Court justifies its sentencing decisions, is not significantly dissimilar to that of the Court of Criminal Appeal in

⁶¹⁸See, for example, *Michael v The Republic* [2003] 2 CLR 123, 131, where it was held that: 'Indeed, where there appears to be a sentencing tendency in relation to the commission of certain offences which is justified on solid grounds, a tariff could be formed, but this tariff could not lead to an ossification of powers of the court to sentence according to the realities of each case and its particular facts. This would not mean that that the tariff will be ignored, where there are substantial similarities. However, caution must be exercised, because despite the fact that human behaviour is repetitive, certain differences and details are detectable which might give to the sentencing precedent a different dimension.'

⁶¹⁹See, *Johnson* (1994) 15 Cr App Rep (S) 827, 830, where it was said by Roch LJ that: 'a judge when sentencing must pay attention to the guidance given by this Court and sentences should be broadly in line with guidance cases, unless there are factors applicable to the particular case which require or enable the judge to depart from the normal level of sentence. In such special cases the judge should indicate clearly the factor or factors which in his judgment allow departure from the tariff set by this court. What a judge must not do is to state that he is applying some personal tariff because he considers the accepted range of sentences to be too high or too low.'

⁶²⁰A Ashworth, 'The Roles of Legislature and Judiciary in English Sentencing' in S Doran and J Jackson (eds), *The Judicial Role in Criminal Proceedings* (Hart Publishing, Oxford 2000) 291, 305.

Scotland, in appeals against sentence. As we are informed by Hutton, a typical judgment of the Court of Criminal Appeal recites the facts and circumstances of the case to display that they have been taken into account; the Court then states an opinion as to whether the original sentence was within the appropriate boundaries or not. Occasionally, the Court will make references to past cases, and even more rarely there may be some rehearsal of one or more of the conventional aims of sentencing. However, the judgment never articulates the nature of the relationship between the severity of the penalty and the facts and circumstances of the case.⁶²¹ On this basis, there appear to be two differences between the two courts and their reasoning approach. The first is that the Supreme Court (but also the District Courts and the Assize Courts) refers to past cases almost invariably in an attempt to ‘give authority to the judgment,’⁶²² and perhaps portray a sense of continuity and consistency in their sentencing approach, without of course that constituting a necessarily true and accurate statement of the actual reality. The second is that, more often than not, the judgments of the Supreme Court do correlate the penalty to the facts of the case, on the authority of the constitutional requirement for due reasoning and moral fairness to the defendant who has, after all, the right to know exactly why he ended up in prison.

It was the view of one judge (apparently of the Supreme Court), that when sitting on sentencing appeals, he did not find the remarks of the trial court helpful:

*On appeal we usually see what the facts are and if the judge properly evaluated them. What the trial judge said is of little if any importance. The point is if the facts justify his observations.*⁶²³

⁶²¹N Hutton, ‘Sentencing as a Social Practice’ (n 513) 169-170.

⁶²²Judge 45.

⁶²³Judge 4.

Other comments were:

*Sentencing remarks are crucial in the sentencing process.*⁶²⁴

*Giving reasons for your sentence is crucial. You explain to the defendant and to the public at large the real reasons why you have decided the way you did and not otherwise. You communicate to everybody the stance of the state on the matter, a stance that becomes even heavier if expressed by the Supreme Court for obvious reasons. This communication can only take place, or at least most of the times by the media. The media need caution however. Sometimes are not accurate or bona fide in their coverage in sentencing matters.*⁶²⁵

*The reasoning must be clear and frank, and expressed in a comprehensible manner so that everyone can understand it, including the journalists who will be the ones transmitting the court's reasoning and messages to society. We judges must realise that we do not write our judgments for the other judges but for the public, part of which is illiterate or close to illiterate, and so are some defendants.*⁶²⁶

What the last judge is alluding is the importance of giving reasons for the sentence in everyday language so that both the offender and victims understand it. With constant criticism of the courts in the media,⁶²⁷ in terms of both public accountability and the perceived lack of sensitivity of the court to victims, it is important that the courts do whatever is possible to communicate the reasons for a particular decision. If the obligation to give reasons is honestly discharged, in the sense that the judge gives what really were his reasons, then it will, in principle, be possible to disagree as to whether the decision has been motivated by proper or improper considerations. So long as it is motivated by proper reasons then it will be possible to disagree as to whether the decision was correct or incorrect, but the

⁶²⁴Judge 52.

⁶²⁵Judge 4.

⁶²⁶Judge 3.

⁶²⁷O Tsoudis, 'The Portrayal of Crime in the Cyprus Media: An Exploratory Study' (2001) 3(1) Western Criminology Review 1.

manner in which the decision was reached will be a legitimate exercise of the judicial role.⁶²⁸

The sentence as a communication tool is becoming a critical aspect of the process, at a time when politicians and the media regularly focus on law and order, and calls for harsher sentences are becoming louder. If the sentences, handed down, are not properly communicated to the parties and the public at large where necessary, a lack of proper understanding of what is occurring in court will compound the difficulties, and result in further criticism. To put it differently, proper and effective communication in court is a necessary, but not sufficient, condition for wider understanding by the media and the community. This is in accord with Nozick's stance on communication, that retributive punishment is, essentially, the communication of a moral message. This message is to be communicated through punishment (i.e., infliction of suffering) in order to make sure that it has a substantial effect (in some way) on the wrongdoer's life. The moral message of punishment must match the magnitude of the wrong or harm without aiming to the moral improvement of the offender (this would be teleological). Rather, such consequences are 'an especially desirable and valuable bonus, not as part of a necessary condition for justly imposed punishment.'⁶²⁹The objective merely is to *connect* the offender to the correct values even though he might never accept them.

⁶²⁸B Simpson, 'The Reflections of a Craftsman' in M Andenas, and D Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP, Oxford 2009) 197.

⁶²⁹Nozick, *Philosophical Explanations* (n 330) 374.

7.4 The Role of the Defence Advocate in the Determination of Sentence

As was the case with some topics already discussed in this chapter, there was no express inquiring about the function of the defence advocates in sentencing, but a number of judges commented on it as a matter of essence to them. Most comments stressed the importance of the role of the advocate in putting information before the court. The judges particularly highlighted the importance of the advocates being well prepared and competent, expressing concerns though that this is not always the case. They indicated that advocates could help them understand the real stakes in a case, shed some light to the not so obvious aspects of it, and assist the court dig below the semantic surface of things.

In the Crown Court Study, there was questioning concerning the judges' expectations and opinions of defence advocates. There were also related discussions with a small number of barristers. Most of the judges, stated that good submissions in mitigation were or could prove influential on the result of the case, with the exception of very serious crimes where the outcome was inevitable. They underlined that a good mitigation submission is that which is 'articulate, not repetitive, and well attuned to the judge's own thoughts.'⁶³⁰ This point is significant in that it denotes that the judges in that study tended to believe that advocates were doing a good job if they told them what they wanted to hear. This view was not so evident in the present study however. Quite the contrary; the majority of the judges who dealt with the matter said that they saw the role of defence advocates as critical, and rightly so.⁶³¹ They viewed them as being the mediums for putting the

⁶³⁰Ashworth and others, *Sentencing in the Crown Court* (n 44) 43.

⁶³¹N G Santis, 'The Role of the Defence Advocate in the Determination of Sentence' (2004) 3 Cyprus L J 38, 39.

defendant's mitigating factors before the court, and who by their argument and ability to distinguish his case from subsisting precedent, could direct things to an entirely different direction. Even from that which, they as judges predicted hence imposing a lesser sentence,⁶³² or the least punishment consistent with justice.⁶³³ The following two comments encompass the general mood of other remarks or observations made on the point by 22 other judges:

*Mitigation speeches can make all the difference or a lot of difference. The competent ones I mean. The incompetent as well, however towards the opposite direction. If the speech in mitigation is succinct and sincere with reference to the facts and the personal circumstances of the defendant and how those contributed, if at all, to the commission of the offence then that can make the judge pay real attention to his argument. The manner of presentation is also very important. Pompous submissions and eloquent words destruct and weaken the presentation and inevitably its content. The speech in mitigation is not a political speech. Mannerisms and the like also do not help, like the occasional turning back to the court spectators to check whether they see and admire his eloquence. Similarly, no particular benefit will derive if while the advocate conveys to the Court how truly sorry the defendant is for his actions the latter shakes his head with disapproval for his lawyer's submission or stares with condemnation towards the complainant. This behaviour may be the result of anxiety or insecurity but no less it creates a certain image which can hurt his case, and you know us judges know from experience to detect the truth either through words or behaviour.*⁶³⁴

*The role of the defence advocate during mitigation is almost as important as that of the judge. It is the defence advocate who presents the case for the defendant and pinpoint the grey areas. He is the one that could control to some degree the decision of the judge and the way he decides the right sentence, aiming towards the minimum sentence possible within the proper boundaries of justice in the particular case.*⁶³⁵

What comes to light from these comments is that because legal representation increases the ability of the individual to influence discretionary decisions affecting him it has indeed considerable potential as a control over

⁶³²For a similar position, see R H Kuh, 'Trial Techniques: Defense Counsel's Role in Sentencing' [1978] Crim L Bull 433.

⁶³³Sir David Napley also offered such a schematisation of the ultimate purpose of the speech in mitigation in his book *The Technique of Persuasion* (2nd edn Sweet & Maxwell, London 1975) 140.

⁶³⁴Judge 12.

⁶³⁵Judge 22.

discretion.⁶³⁶ Another aspect is the fact that judges, although they view the speech in mitigation as a most important facet of the sentencing process, they also express their dislike for it becoming an insincere and portentous endeavour. This, however, does not mean that the role of the defence advocate in the plea in mitigation cannot be creative in the sense of him becoming an ‘author,’ aiming to producing an empathic narrative on behalf of his client, analogous to a work of literature,⁶³⁷ provided it be sincere and true. The most important aspect though is that Cypriot judges do recognise and accept as crucial the role of the defence advocate in the sentencing process, regarding it, inter alia, as a form of external constraint to their discretion.

There were also concerns that the advocates appearing before the courts were poorly prepared:

*The sentencing process is in disarray. The prosecutor sometimes treats serious criminal cases as if they are routine road traffic cases. They do not seem to care although we all no that they do. It is just that they are seriously overloaded, like us. They need more personnel and fewer cases to deal with. Many cases end up in court for nothing. The system must find ways to dispose of these cases more efficiently. The Attorney - General of the Republic has discretion which cases to prosecute and which not to prosecute. Let him exercise that discretion freely.*⁶³⁸

The final decision is for you as a judge and alas, if the defence lawyer does a bad job in the sense that his mitigation speech was totally general and unacceptable then what do you do? You cannot do whatever you want that is for sure. You have to stay within the boundaries of the case law otherwise; there is a good chance that the sentence will not stand in the appeal court. People think that we do as we like and blame us for everything. The task is very difficult, particularly if the defence lawyer is inadequate. That is the worse. You have to puzzle how to avoid imprisoning the defendant because of stupid thing the lawyer said, for example in a case of contempt to a court order to close down a dwelling that the defendant did

⁶³⁶R O Dawson, *Sentencing: The Decision as to Type, Length, and Conditions of Sentence* (American Bar Foundation Administration of Criminal Justice Series, Little, Brown and Co, Boston 1969) 408.

⁶³⁷See on this interesting analogy, R Edney, ‘Literary Concepts and the Plea in Mitigation (2004) 9 Deakin L Rev 183, 184.

⁶³⁸Judge 13.

*not obey immediately because that would have been against his best financial interest; and they pay these people! The defendant would have been better off without him. He would have escaped imprisonment in all probability. It is the most difficult job that a District Court Judge does; it is the complexity of the balancing, which is emotionally draining.*⁶³⁹

*Every sentencing process involves a balancing of the principles of those, which tend to favour a heavier penalty and a lighter one. The key here is how good the mitigation is. If the defence lawyer succeeds in shedding light to the dark areas that no one could see and led things to a different direction from what the case law points. Therefore, I would say that a lot depend on how well the lawyer does the balancing in order to help you do yours. Still however we are talking about weighting not with an accurate scale but the way our grandfathers used to weight things, that is with their own two hands.*⁶⁴⁰

Being rushed and having too many cases listed would also tend to make reliance on advocates imperative for much of the time. The fact that some judges perceived advocates as insufficiently prepared is a matter for concern. The results of this study do however raise a paradox with a system that is adversarial and assumes thoughtful and researched submissions, when the reality may be otherwise.

As indicated in Chapter 4.4, the sentencing process, despite its fundamental significance, tends to be a relatively rudimentary affair in comparison to the process for determining criminal responsibility. There are relatively few procedural and evidential rules involved, at least in comparison to those applicable at the trial stage.⁶⁴¹ Nonetheless, defence advocates, being in the centre of this so-called unprincipled and unstructured environment, often seem not to realise⁶⁴² the

⁶³⁹Judge 26.

⁶⁴⁰Judge 9.

⁶⁴¹For the position in Cyprus, see, Loizou and Pikis, *Criminal Procedure in Cyprus* (n 118) 125-131. For the position in England see, Hooper and Ormerod, *Blackstone's Criminal Practice 2010* (n 123) D19.1-D19.108.

⁶⁴²M McConville, J Hodgson, L Bridges, and A Pavlovic, *Standing Accused: The Organization of Criminal Defence Lawyers in Britain* (Oxford Monographs on Criminal Law and Justice, Clarendon Press, Oxford 1994) 182.

vital importance of their role⁶⁴³ in the determination of the proper punishment,⁶⁴⁴ the structuring of judicial discretion,⁶⁴⁵ and the minimisation of unjustified sentencing disparity. Of course, disparity is less common in the presence of statutory sentencing guidelines,⁶⁴⁶ or other discretion restrictive circumstances since the advocates' role diminishes notably.⁶⁴⁷ All these can leave one pondering over the justness of the process,⁶⁴⁸ particularly having in mind the hearing stage and the meticulous emphasis placed therein in securing the fair trial of the defendant.⁶⁴⁹ Sentencing is in fact part of the trial process, given its character and inextricability,⁶⁵⁰ with the complex trial issues,⁶⁵¹ with the presumption of

⁶⁴³For the role of the prosecuting counsel, see, I Tembly, 'The Role of Prosecutor in the Sentencing Process' (1986) 10 Crim L J 199; G Zellick, 'The Role of Prosecuting Counsel in Sentencing' [1979] Crim L R 49; C Humphreys, 'The Duties and Responsibilities of Prosecuting Counsel' [1995] Crim L R 739.

⁶⁴⁴I B Cooper, 'United States v. Unterman: The Role of Counsel at Sentencing' (1977) 13 Crim L B 101, 113; H Williamson, 'Defence and Mitigation in the Juvenile Court: The Role of the Solicitor in Juvenile Justice', in Z Bankowski and G Mungham (eds), *Essays in Law and Society* (Routledge and Kegan Paul, Oxford 1999) 38.

⁶⁴⁵C Guthrie, J Rachlinski, and A Wistrich, 'Inside the Judicial Mind' (2001) 86 Cornell L Rev 777.

⁶⁴⁶The rigidity of these guidelines and the overpowering of judicial discretion can however become the cause of other and more serious concerns, resulting from a fear of judging due to the resulting suppression of informed discretion by judges. As pertinently argued by Stith, the elimination of judicial discretion in sentencing under the sentencing guidelines, transforms sentencing into a puppet theatre in which defendants are not persons but kinds of persons or some kind of abstract entities. Judges under such a system become instruments of distant bureaucracies. The abolition, in essence, of judicial discretion affects other parameters of judicial sentencing powers as well, and more specifically mercy, as without moral authority neither mercy nor moral condemnation is possible. Mercy by which the full application of the law is relaxed in furtherance of the laws ends is rendered obsolete: See, K Stith, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (University of Chicago Press, Chicago 1998) 84, 169.

⁶⁴⁷M Etienne, 'The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy under the Sentencing Guidelines' (2004) 92 Calif L Rev 425.

⁶⁴⁸N Lacey, 'Discretion and Due Process at the Post-Conviction Stage' in I Dennis (ed), *Criminal Law and Justice: Essays from the W G Hart Workshop* (Sweet and Maxwell, London 1987) 221.

⁶⁴⁹A Ashworth, 'Article 6 and the Fairness of Trials' [1999] Crim L R 261.

⁶⁵⁰J Knowles, B Emmerson, A Ashworth, and A Macdonald (eds), *Human Rights and Criminal Justice* (Sweet & Maxwell, London 2007) 692.

⁶⁵¹In *X v United Kingdom* (1972) 2 Digest 766, the Commission emphasised that Article 6 continues to apply at the sentencing stage. Thus, rights such as those of legal representation and legal aid, a public hearing, equality of arms, adequate time and facilities and free interpretation would all continue at the sentencing hearing. There was no dispute about this position before the European Court of Human Rights in *T and V v United Kingdom* (2000) 30 EHRR 121.

innocence continuing to have effect even after conviction.⁶⁵² One needs only to remind that, at a basic level, the fundamental aim of a criminal trial is the attainment of justice by the fair establishment of criminal liability and determination of the appropriate sentence to the offender.⁶⁵³ Most legal systems share the values and principles on which such liabilities and penalties are determined. Their implementation varies, of course, from one jurisdiction to the other.⁶⁵⁴

7.5 Specialisation and Training

Judicial education and specialisation was a topic that concentrated a lot of meaningful smiling and head nodding by the judges. Here are some of the comments:

*We need more education on sentencing matters. Combined with education and specialisation it will empower us with more weaponry and support to deal with the everyday battle for fairness and justice. We need to have audiovisual support systems in the courtroom. We need to have computers on the bench while we are presiding to assist us in locating precedents or even academic articles. We have been asking for all these for years but to no avail. No one cares. Evidently, the judicial system is not in the government's high priorities any government's I mean. Probably we are not bringing in enough proceeds.*⁶⁵⁵

⁶⁵²If, for example, previous criminal activities were held to constitute an aggravating circumstance, whether formally in the sense of recidivism or in some other way, the presumption of innocence would be violated if a court were to apply such a rule in the absence of prior convictions: See, S Trechsel, *Human Rights in Criminal Proceedings* (OUP, Oxford 2005) 172-173.

⁶⁵³A Duff, L Farmer, S Marshall, and V Tadros, 'Towards a Normative Theory of the Criminal Trial' in A Duff, L Farmer, S Marshall, and V Tadros (eds), *The Trial on Trial: Truth and Due Process* (Vol 1 Hart Publishing, Oxford 2004) 1.

⁶⁵⁴In Anglo-American common law jurisdictions the mode of procedure is adversarial while in the Continental system is inquisitorial. The essential feature of the adversarial system is concentrated to the fact that the onus rests on the litigant to advance his case for a decision to be made by the judge remains more or less passive throughout the proceedings whereas in the inquisitorial system he plays a most active role in conducting the proceedings to their conclusion: See, W Zeidler, 'Evaluation of the Adversary System: A Comparison: Some Remarks on the Investigatory System of Procedure' (1981) 55 ALJ 390; S Landsman, 'A Brief Survey of the Development of the Adversary System' (1983) 44 Ohio St L J 713; E Sward, 'Values, Ideology, and the Evolution of the Adversarial System' (1989) Ind L J 301.

⁶⁵⁵Judge 13.

*I think the judges are poorly trained in criminology and sentencing. There should be specific judicial education in this area and there ought to be compulsory training in criminology and sentencing for all judges.*⁶⁵⁶

*Specialisation could solve many problems, but is not going to be a panacea. However, it will make judges stronger and more assertive, and therefore justice will benefit.*⁶⁵⁷

*We need specialisation. Judges must specialise and deal with cases only in their respective fields and this includes criminal law and sentencing. The judges will be more productive and more assertive. They will know their stuff well, and the lawyers will know about it so they will be more hesitant in wasting the Court's time with their accustomed mambo jumbo.*⁶⁵⁸

Thirty-two other judges put forward the need for further education and specialisation. The core of their position is that sentencing is a crucial part of the judicial functions and dealing with human behaviour in an ever changing multicultural society, judges must at least familiarise themselves with the pertinent developments and ongoing arguments. Many judges come to the bench from a successful commercial practice at the bar and would have had little criminal law experience. This has also constituted a reason for concern among some of them.

Two judges discussed specialisation, with opposite views:

*I am a firm believer in specialist jurisdictions, so that judges who have experience and expertise in crime for example can be appointed only to do that. Some judges can be appointed to the court after having spent 20 years in common law practice and have not much experience in crime at all.*⁶⁵⁹

*Many judges come from a background of civil law and know very little about sentencing on their appointment. I don't believe however in formal specialisation of judges.*⁶⁶⁰

⁶⁵⁶Judge 5.

⁶⁵⁷Judge 23.

⁶⁵⁸Judge 4.

⁶⁵⁹Judge 49.

⁶⁶⁰Judge 6.

The increasing complexity of the law, coupled with greater public and media scrutiny of the practices of the court and more accountability requirements, may justify the re-examination of the issue of specialisation of the judiciary. Criminal law is a specialist and difficult jurisdiction, and may merit a distinct specialisation in the courts. This may also be reflecting what is occurring as a de facto practice, by self-selection and other means.

7.6 Conclusions

The present chapter discussed that the way Cypriot judges perceive the sentencing process and their responsibility within that context, which is directly relevant to their resulting actions within the system of punishment practice, and their sentencing decisions, and of course their punishment. It indicated that a primary premise arising from the interviews is that the judges, view sentencing as a balancing process in which they see themselves as playing a predominant role and that many of them, consider sentencing as a hard, taxing and emotionally draining activity. Numerous judges felt under pressure to get through many cases rapidly, and some felt that this affected the quality of their decision-making. A range of procedural facets of the sentencing process were also mentioned as reference points for analysing the judges' interview responses and presenting their observations and insights on the rationality of the process. The judges placed particular emphasis on the role of defence advocates describing their role in the sentencing process as vital. This factor is indicative of the judges' unselfish admission and realisation that they are indeed only one of the actors in the sentencing process. Perhaps not surprisingly, quite a few judges discussed the need

for further training in criminology and like matters. There was an overall (with noted exceptions) high level of confidence on the part of the judges as regards their ability to carry out their sentencing role.

The next chapter will concentrate on the judges' remarks on the various sentencing aims and theories of punishment, isolated as relevant to the thesis, in an attempt to explore the possibility of deducing therefrom any indications or proof that when Cypriot judges decide sentences, they do so within a particular legitimising retributive, utilitarianist, or hybridist moral punishtecture framework.

CHAPTER 8: PUNISHTECTURE AND THE SENTENCING DECISION

The present chapter will focus on the Cypriot judges' comments on the various theories of punishment in an attempt to investigate whether when they sentence they do so within retributive, utilitarianist, or hybrid parameters. Furthermore, the discussion will show the judges' sentencing motivations and intentions as leading actors in the sentencing stage and provide evidence on whether they understand and appreciate the wider manifestations of the theoretical debate or whether they have no such feedback, but nonetheless exercise their sentencing functions without needing normative legitimacy for the exercise of their discretion within the realm of punishment already described.

8.1 The Multiplicity of Sentencing Aims and Sentencing Balancing

Judges in Cyprus sentence in the absence of pertinent legislation specifying the aims of criminal sentencing, under a system of multiplicity of punishment purposes set forward by the case law of the Supreme Court. In addition to the case of *Azinas v The Police*,⁶⁶¹ two other cases illustrate the point fully:

In *Mirachis v The Police*,⁶⁶² it was said that:

When all other alternatives are considered unsuitable to meet the particular case in hand, the Court may well have to resort to imprisonment. However, in such a case, the sentence has to be justified upon one of the purposes to be served by such sentence. Rehabilitation, mainly in the interest of the offender; deterrence, mainly in the public interest and protection; retribution, in the proper enforcement of the law; all these matters have to be considered and weighed together with the consequences and probable effect of imprisonment on the particular offender. Four months in prison, or any such short term, while sufficient to upset radically the offender's family life and business, cannot operate on his mind and habits for purposes of rehabilitation; short terms have, as a rule, proved of very little deterrent effect; and are hardly justified as retribution. Moreover, they are

⁶⁶¹[1981] 2 CLR 9.

⁶⁶²[1965] 2 CLR 28, 32-33.

undesirable as tending to disturb discipline, and the proper mental attitude within the prison walls.

In *Savva v The Republic*,⁶⁶³ the Court indicated that:

The responsibility of a court in measuring and imposing sentence has been described as immense to both the community and the defendant. The wide discretionary powers vested in the Courts in this connection make that responsibility all the heavier. The need to deter or reform the offender must be weighed together with the equally important need to protect society and to deter potential offenders. The principle that a judge in considering sentence in a particular case should pay due attention to the individual offender's criminal record and should take that into serious consideration, is well established in the criminal law and widely accepted in judicial practice. Sentencing has been the subject of endless academic discussion and continuous experimental study on the part of a great number of judges in different times. Together with the accepted main criteria, there are a variety of factors, which weigh in the mind and conscience of the judge in forming his decision as to sentence, including factors peculiar to different times and different places. The nature and organization of the prison where the convict will serve a sentence of imprisonment, is one of such factors.

These cases, despite being two of the most encompassing and detailed judgments of the Supreme Court on the issue under assessment, do not offer guidance as to the use of the punishment purposes they referred to. Their rationale is eclectic and their approach akin to a form of 'pick-and-mix' sentencing.⁶⁶⁴ Not surprisingly, they do not refer to an integrated or compromise theory of punishment between, say, retributivism and utilitarianism in the manner, for instance, Hart espoused it by thinking and arguing in favour of a hybrid theoretical alternative in the realm of legal punishment justification, as discussed in Chapter 5.4. Rather, the whole picture reminds of Keijser's illustrative observation, mentioned in the same chapter, that such approaches refer to a pragmatic, multi-

⁶⁶³[1968] 2 CLR 218, 221.

⁶⁶⁴See a similar comment made by Andrew Ashworth in relation to the English Criminal Justice Act 2003 s 142, in the 4th edition of his book *Sentencing and Criminal Justice* (Law in Context, CUP, Cambridge 2005) 74. See also, C Wells and O Quick, *Lacey, Wells, and Quick Reconstructing Criminal Law: Texts and Materials* (Law in Context, 4th edn, CUP, Cambridge 2010) 60.

stage rocket approach to sentencing rather than a theoretically integrated account of punishment, with the rationale of the said cases not resembling retributivism and utilitarianism as discussed in Chapter 5, in any event. With such guidance given to trial judges, and implicitly to the rest of the judges of the Supreme Court, one could not have possibly sincerely expected a different judicial approach in practice.

The following comments are characteristic of the more general judicial attitude:

*In deciding what sentence to impose I have in mind deterrence, rehabilitation and retribution mainly and depending what sentence I want to impose, I apply some of the rules that characterise the particular purpose and I apply them.*⁶⁶⁵

*When I sentence I do not have in mind neither the purposes of punishment as outlined by the Supreme Court, neither any other philosophical boundaries nor restrictions. I decide according to what the law and the case law say. That is a good way to be consistent and fair to all.*⁶⁶⁶

Perhaps predictably, all of the judges said that they would decide which sentencing purpose they would use depending on the facts of the case:

*You balance deterrence, rehabilitation, social protection, and retribution according to your facts. The exercise is rather simple.*⁶⁶⁷

*The whole judicial functioning is a matter of balance not only sentencing. You weigh the facts of the case, the circumstances of the defendant, his previous convictions or clean record and having in mind the purposes of punishment you reach your decision, the sentence of the court.*⁶⁶⁸

*Above all are the facts. It is the facts that regulate so to speak the method of sentencing and not the reverse. That makes sentencing easier than what happens if you bring into the picture other factors such as complicated legal principles and theories.*⁶⁶⁹

⁶⁶⁵Judge 14.

⁶⁶⁶Judge 5.

⁶⁶⁷Judge 15.

⁶⁶⁸Judge 9.

⁶⁶⁹Judge 17.

The balancing of the purposes discussed by the judges is evocative of the way in which they deal with the position of having five competing aims of punishment from which to choose, and being provided with no judicial or legislative guidance as to how to do this. None of the judges identified this as a problem though. Most of those who discussed it saw themselves competent to undertake the choice of sentencing aims in a particular case. Ashworth however (to the extent that it would matter to those judges), is critical of a sentencing system which aims to have the purposes of sentencing balanced in every case, and notes that a major source of disparity in sentencing is the difference in penal philosophies between sentencers, concluding that the desire on the part of some judges for balancing the purposes in each case might not necessarily be a desirable goal.⁶⁷⁰

The balancing of the purposes as described by the judges appears to operate as a subset of the general balancing in the sentencing process. The application of sentencing purposes to specific offences will be discussed below. As it will be seen, this differed between individual judges. The general lack of guidance on the application of these purposes to particular cases tends to confirm

⁶⁷⁰Ashworth in his *Sentencing and Criminal Justice* (Law in Context, 5th edn, CUP, Cambridge 2010) 76, says that: 'There are many who would agree that sentencers ought to have some discretion so as to take account of the peculiar facts of individual cases. So be it. But does that remove the argument for bringing the rule of law as far into sentencing decisions as possible? The rule of law, in this context, means that judicial decisions should be taken openly and by reference to standards declared in advance. It is one thing to agree that judges should be left with discretion, so they may adjust the sentence to fit the particular combination of facts in an individual case. It is quite another to suggest that judges should be free to choose what rationale of sentencing they will adopt in particular cases or types of case. Freedom to select from among the various rationales is a freedom to determine policy, not a freedom to respond to unusual combinations of facts. It is more of a license to judges to pursue their own penal philosophies than an encouragement to respond sensitively to the facts of each case.'

the argument put forward in relation to lack of consistency and accountability in the application of these aims and purposes.⁶⁷¹

8.1.1 Do Cypriot Judges Specifically Refer to Sentencing Purposes?

Most judges said that they kept the purposes of sentencing at the back of their mind, rather than specifically referring to them. It is debatable however whether or not safe conclusions could be drawn from this, other than presumptively on how judges think (or not) about philosophy and jurisprudence when sentencing (or about anything else for that matter) since, as already noted in Chapter 7.2.2 judicial illusionism while deemed unacceptable, forms part and parcel of Cypriot sentencing and judicial reality. Twenty-four of the judges distinctively said that they do not think or write ‘*in such abstract terms.*’⁶⁷²

Other specific comments were as follows:

*I do not have a background on criminology although I would have liked it. Thank God I do not deal in theories and I dread the moment a defence lawyer will come and start theorizing about the purposes of sentencing and that I should not take into account this or the other factor because it conflicts with this or that factor and so on. This theorising has no place in a court of law, and anyway have all these theoreticians unanimously agreed on which purpose or theory is the best and we have refused to apply it?*⁶⁷³

*I don't specifically refer to the purposes of punishment in the sentencing process.*⁶⁷⁴

⁶⁷¹Ashworth in his article ‘Criminal Justice and Deserved Sentences’ [1989] Crim LR 340, 355, claims that even where a system pursues a plurality of aims rather than a single aim, it is essential that the various aims be either ranked in order of priority or confined to distinct spheres of application and that any system which allows courts to choose among sentencing aims without clear guidance will produce disorganisation, with scant respect for consistency, accountability or rights.

⁶⁷²The remark belongs to Judge 43, and its essence reflects the relative opinions of the remaining 23 judges.

⁶⁷³Judge 5.

⁶⁷⁴Judge 3.

I do not believe in theories. When I have to sentence I do so on the basis of the facts and the case law of the Supreme Court⁶⁷⁵

This theorising is for the academics not for us. We are judges. We deal with real problems. Sentencing is about real life, not about the 'aims and purposes of sentencing' and so on and so forth.⁶⁷⁶

I do not think of philosophy during the exercise of my duties. I am a judge and I think that I am doing just fine as a criminal judge for the last eight years without being a philosopher or a theoretician of the law.⁶⁷⁷

Stating the purpose of sentence is also part of giving reasons, which assists the offender, the prosecution, and the public at large to understand the reasons and rationale behind the sentence, at least to the extent that the sentencing judges so deem appropriate to utter in their judgment, given that published reasons usually form a rough outline, if at all, of the main factors that led to the final decision. Not surprisingly, the judges, for example, made no prescriptive mentioning of Nozick's ideas on communications (as noted in Chapter 5.2.6), or of the wider moral necessity of the state to be able to offer a viable justification of its practice of punishment to the people. This, however, does not point towards a definitive premise that such normative processes are absent from judicial thinking on this (or any other) issue.

Forty-three of the judges said that they did not know of any penal philosopher or a specific penal philosophy, and that the particular fact did not bother them at all. One of the comments was particularly interesting and rather reflective of the rest on point at hand:

I do not know any penal philosophers or penal philosophies. Good for me though because if I judge on what I sometimes read about the philosophy of religion, these people get lost in words, semantics and superficially complicated thinking. There

⁶⁷⁵Judge 15.

⁶⁷⁶Judge 12.

⁶⁷⁷Judge 24.

*is only one philosophy in sentencing if you want to call it like that, the philosophy of judicial sentencing. Do these philosophers know anything about it? I don't think so.*⁶⁷⁸

From those judges who claimed to have known of particular penal philosophers or philosophies, only one commented that he had these philosophies in mind when sentencing. He said:

*A few years ago I bought a book on sentencing by Ashworth and there I discovered that there is so much to read and take into account in sentencing. I do not remember of a particular name right now but I do remember that utilitarianism made sense to me, particularly the bit on deterrence and rehabilitation, so when I have a sentence to decide, that is a serious sentence, and not a routine one, I direct my mind to the things I have read, to the degree I remember them.*⁶⁷⁹

Another one alleged rather sullenly:

*I wish I could see Ashworth and Thomas, or what have you, on the same Bench trying to decide on a sentence and start discussing moral theories and the like with the defendants waiting on line to hear their decisions. I don't think that they would ever agree.*⁶⁸⁰

In relation to this obvious and almost sweeping objection of Cypriot judges towards academics, one has to be able to separate whichever pragmatic problems preoccupy the practice of punishment, and the normative dimension of those problems as seen through a more abstract analysis; and of course to be able to discuss and listen to relevant information in the appropriate forum. There is undeniably a big gulf between academia and practice, and a sense of suspicion and sometimes-outright resentment towards the former by the legal profession.⁶⁸¹ The interrelationship between punishment theory and sentencing, and the various penal theories is complex, and to a notable extent conflicting, primarily because there exist apparently valid reasons to support, but at the same time criticise each one of

⁶⁷⁸Judge 20.

⁶⁷⁹Judge 9.

⁶⁸⁰Judge 25.

⁶⁸¹F Cownie, *Legal Academics: Culture and Identities* (Hart Publishing, Oxford 2004) 156-158.

them. In fact, one could conceivably ascribe to the proposition that the founding ideological principles of the criminal law are in essence contradictory and hence, any rationalistic readings of the law are bound to fail.⁶⁸² The significance of the sentencing debate is vital as, if one does not know the reasoning behind a particular sanction, it is unlikely that he could subject the decision to an effective and logical evaluation, matters seen of course within the prescribed normative lens mobilised for the objectives of the thesis. To place the debate about punishment is not to resolve it; it is to make it more intelligible, and hence more amenable to a reasoned decision. If we have no idea of the context within which the punishment question is taking place, we have no idea what might count as an answer.⁶⁸³ Consequently, determining what constitutes the justice of particular punishment requires a decision on the particular theory of punishment. Unless of course such a decision is considered unnecessary since it might be thought that its justness emanates, precisely, from the fact that it was reached without resort to inelastic and dubious principles with sole criterion the correctness of the judicial approach resulting from legalistic considerations (and why not), spiced even by a flare of normativity.

Just punishment from a retributivist standpoint might seem unjust from a utilitarian perspective, and vice versa. It is not difficult to substitute the question ‘What is deserved?’ with its consequentialist counterpart ‘What is necessary?’ The point is though ‘What do we want?’⁶⁸⁴ No human institution will ever distribute ideal justice even assuming there was an accord as to what that was; neither of

⁶⁸²A Norrie, *Law, Ideology and Punishment* (n 140) 231.

⁶⁸³E Pincoffs, *The Rationale of Legal Punishment* (n 144) 61.

⁶⁸⁴W Wilson, *Central Issues in Criminal Theory* (Hart Publishing, Oxford 2002) 76.

course a perfect sentence. Justice embodies notions of fairness to all members of the community, including victims and offenders, and striking a balance between their competing interests is the cornerstone of current criminal justice policy. However, it also assumes consensus on what constitutes justice. To withdraw to the empirical level only, and try to tackle the problem there or attempt to set up all of our principles of punishment in a vacuum of pure reason at the exclusion of everything else, is nonsensical.⁶⁸⁵ The need is for synergy.⁶⁸⁶ Whatever the case, it is a utopia to believe that the sentences that the courts impose (whether perfectly just, or nearly just, to paraphrase John Rawls) will resolve the problems of crime and probe the limits of the realistically practicable, that is, how far in our world (given its laws and tendencies) a democratic society can attain complete realisation of its appropriate societal values.⁶⁸⁷

8.2 Cypriot Judges on Retribution

Thirteen judges referred to retribution in a manner clearly suggestive of the fact that it is well into their thoughts, though they expressed them in a far more direct and desiccated manner compared to the usually more elaborate and abstract syllogisms of academe, without this being necessarily objectionable. The judges projected their own understandings of the term 'retribution' rather than reflecting the criminological literature on the matter. This finding applies in almost all other cases where the judges mentioned or attempted to elaborate on such terminologies.

⁶⁸⁵R Gerber and P Mc Anany, 'The Philosophy of Punishment' in N Johnston, L Savitz, and M Wolfgang, *The Sociology of Punishment and Correction* (2nd edn John Wiley and Sons, New York 1970).

⁶⁸⁶C Valier, *Theories of Crime and Punishment* (Longman, London 2002) 2.

⁶⁸⁷J Rawls, *Justice as Fairness: A Restatement* (The Belknap Press of Harvard University Press, Cambridge, Massachusetts 2001) 13.

Of course, the same occurred in relation to the terms ‘justice’ and ‘punishment.’

These are some of the comments:

*Imposing the right punishment cannot ignore the purposes of the law. The offender will have to pay its dues. That is what his fellow civilians decided by passing the laws he broke. Once proven guilty the defendant must be ready to accept his dues and most certainly the judge must punish him accordingly.*⁶⁸⁸

*Retribution is the essence of sentencing. It constitutes I would think a pretty good basis or justification if you may for the court to sentence him in accordance with the law.*⁶⁸⁹

*The meaning of justice is to sentence fairly and indeed what better way there is than punishing according to the law? Letting the offender know that no matter what, the law is the law and he must pay for what he did, no matter what.*⁶⁹⁰

*It's all a matter of responsibility I think. The offender must accept the responsibilities of his actions by accepting the punishment. This is justice. Now, if the offender was not in a position to be responsible or his capability of comprehending the nature of his actions that is a different story. Still however he must be judged under the perspective of the society's reaction to his offence. The defendant's guilt should be a sufficient basis for the judge as the representative of the societal values and attitudes relating to criminal responsibility to effect the right punishment.*⁶⁹¹

Clearly, these judges appear to accept the Kantian view that guilt is a sufficient condition for punishment regardless of utility,⁶⁹² irrespective of the fact that they did not pay tribute to his theory expressly. In fact, it seems that there is in many of us an Immanuel Kant (but not necessarily knowing of it, or him), allowing thus, an interpretation of their own moral stance through appropriation, as it so usually happens with the works of such philosophical icons.⁶⁹³

⁶⁸⁸Judge 46.

⁶⁸⁹Judge 28.

⁶⁹⁰Judge 2.

⁶⁹¹Judge 39.

⁶⁹²J Murphy, *Kant: The Philosophy of Right* (Mercer University Press, Macon, Georgia 1994) 120.

⁶⁹³R Dworkin, *Justice in Robes* (The Belknap Press of Harvard University Press, Cambridge, Massachusetts 2006) 261.

8.2.1 Retributive Pressure from the Community

It was evident from the responses in this study that the judges were feeling pressurised by the community to sentence based on retribution, but that they were resisting, feeling that this pressure needed to be kept in balance with all other factors in the process. Some of the pertinent observations have as follows:

*As judges, we punish according to the law. Our motives are to neither avenge nor revenge. The community can ask and complain about many things, but it is not the community the one to judge but only the courts. The expression of the needs of community can be expressed strictly speaking by the Parliament. Retribution has its place, and the same applies to the other purposes as well. We are usually, or should be, sensitive to the needs of the public and try not to antagonise their feelings and emotions.*⁶⁹⁴

*The public always is bloodthirsty. If it were possible they would hang the offenders and put on a party, in certain cases. That is why we have to be careful on how we approach sentencing, and evaluate these feelings, to the degree possible and judicially acceptable that is. We are in a unique position to judge our fellow citizens and to some extent society at large. The public can have its impact on sentencing through lobbying with the legislature, not by pressing the courts. This is unacceptable and to some degree anarchic oriented.*⁶⁹⁵

*The courts impose sentences but you are not really sure what these sentences represent be it deterrence, rehabilitation, public order, retribution or what have you. Judges are coy. You cannot know ever if the judge by saying retribution meant deterrence, retribution, social protection, or even rehabilitation. These are the intricacies of judging. Part of it is some sort of judicial politics, you know.*⁶⁹⁶

These comments look compatible with the findings of much social science research, which assumes that since judges are ‘politicians in black robes’, they will behave in about the same way as legislators or other officials in the political arena. Indeed, while judges have a lot in common with other officials, they are also likely to see their job (or mission) as unique with how they see themselves, their relations

⁶⁹⁴Judge 32.

⁶⁹⁵Judge 13.

⁶⁹⁶Judge 35.

with other people, and their duties, contributing to their conception of the judicial role.⁶⁹⁷

One of the judges questioned the method of applying this pressure and the motives behind it:

*Punishing another human being has its moral dimensions these on which academics thrive on. They all demand punishment. I understand that, but they have to realise that we are exercising a certain power here and we have to be careful. We should not act on passion and pure vengeance.*⁶⁹⁸

Commentators have noted that the continuing retributive pressure from the community often derives from perceptions of societal breakdown, rising crime levels and the need for tougher counteracting sanctions.⁶⁹⁹ Potent elements in this process are violent crimes that attract substantial media attention, marginalising due process and distorting the debate.⁷⁰⁰

The present study reveals that Cypriot judges are aware of the community's punitive feelings and feel under pressure to act accordingly, without this implying, however, that they will actually do so. This initial judicial predisposition verifies to a certain degree academic opinion to the effect that on the basis of an examination of vengeance and retribution from a historical, philosophical, and psychoanalytic perspectives, retribution has a valid general aim in allowing individuals who have suffered the loss of an object of personal meaning to satisfy

⁶⁹⁷H Click, *Courts, Politics, and Justice* (McGraw-Hill Book Company, New York 1983) 243.

⁶⁹⁸Judge 31.

⁶⁹⁹R Hogg and D Brown, *Rethinking Law and Order* (Pluto Press, Annandale, NSW 1998) 54.

⁷⁰⁰G Zdenkowski, 'Sentencing Trends: Past, Present and Prospective' in D Chappell and P Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (Butterworths, Sydney 2000) 161, 185.

their instinctive desire for vengeance.⁷⁰¹Retribution, or at least the concept of just deserts, does not figure largely in the thinking of the judges. On the other hand, it is possible that desert *is* considered one of the major sentencing purposes, but that it is not expressed as such as can be seen by many of the comments above. The overall impression given by responses to the study was that while the community and the media were clamouring for primarily retributive sentences the judges were, at least as identified by themselves, holding steadfast against the tide of public opinion.

The (morally) discouraging aspect of these responses is the total absence of reflection on any aspect of the retributive theory or any other thought pertaining to a similar perspective, even at the level of sophistry. This is true of almost every similar feature dealing with theory in this research. The decision to deal methodologically with the aspect of theory in some detail in Chapters 4, 5, and 6, was not based on a particular proclivity to refer to what so many other people have said on almost everything in the satiated field of legal punishment theory. Nor, there was any possibility for such an exposition to have even a stroke of originality, under the circumstances. The reason has been one of showing something simple but simultaneously crucial; that there exists a notable chasm between punishment theory and criminal practice as perceived by Cypriot judges. Academics appear to know it,⁷⁰²but judges do not seem to care. None said that he did. One judge thought:

A couple of times I tried to read a few articles on penology written by academics. My daughter is a second year law student in Wales. They were impossible to

⁷⁰¹K Wilson, 'Vengeance and Mercy: Implications of Psychoanalytic Theory for the Retributive Theory of Punishment' (1981) 60 Neb L Rev 276, 302.

⁷⁰²M Bagaric, 'Sentencing: The Road to Nowhere' (1999) 23 Syd L Rev 597, 625.

comprehend. I had to read them repeatedly but to no avail. How do these people write? Don't they want judges to read and comprehend their thoughts and try to improve or whatever? Don't they want judges to understand anyway the answers to the questions academics put on their behalf? ⁷⁰³

This comment, appears reminiscent to Leo Tolstoy's query more than a century ago:

He asked a very simple question: 'Why, and by what right, do some people lock up, torment, exile, flog, and kill others, while they are themselves just like those they torment, flog, and kill?' And in answer he got deliberations as to whether human beings had free will or not; whether or not signs of criminality could be detected by measuring the skull; what part heredity played in crime; whether immorality could be inherited; what madness is, what degeneration is, and what temperament is; how climate, food, ignorance, imitiveness, hypnotism, or passion affect crime; what society is; what its duties are - and so on... There was much that was wise, learned, and interesting; but there was no answer on the chief point: 'by what right do some people punish others?' ⁷⁰⁴

Three other judges said:

If Aristotle or whoever else of these otherwise academic giants were present in my court experiencing what I experience in there every day having to deal with all sorts of unbalanced and dangerous people under the pressure of my workload, they would have probably reconsider some or all of their theories of punishment and the like. I know I would if I were in their position. ⁷⁰⁵

Has anyone of these penal philosophers been to court before embark writing their theories? ⁷⁰⁶

I do not think that the problem of sentencing lies in the courts. I think that the problem lies to most of the academics and their inability to grasp the essence of practice. It is as simple as that. ⁷⁰⁷

The last three remarks encapsulate the feelings of many other judges, not only the Cypriot ones. Philosophers seek to propound an overarching theory, valid in all situations. A judge faced with an infinite variety of circumstances under

⁷⁰³Judge 18.

⁷⁰⁴Maude, L (tr), Leo Tolstoy, *Resurrection* (Oxford World's Classics, OUP, Oxford 1994) 340-341.

⁷⁰⁵Judge 33.

⁷⁰⁶Judge 34.

⁷⁰⁷Judge 38.

which crimes are committed and the unique qualities of each criminal and each victim has more modest goals, a theory that will morally justify what the judge is impelled by law to do in a particular case, deriving essentially no assistance from the philosophical fortitude of theoreticians,⁷⁰⁸ even if they would wish to, but failed to do so, because of the lack of common language and effective communication between them and the latter.⁷⁰⁹ The fact that Cypriot judges, firsthand and indolently, express the same thoughts as those of Forer and Thomas, could become a cause of concern to those who favour a narrowing of the gap between punishment theory and sentencing practice, as a synergy between academic and judicial thinking (an otherwise typically incompatible exercise) might lead to a redefinition of the perceived disassociation between moral legitimisation of punishment and sentencing practice, for all that could worth. There is however an alternative angle of approach. That is, by accepting that the essence of the matter depends on the ability of judges to be self-consciously reflective about their practice, and therefore more likely to display a more consistent and

⁷⁰⁸ L G Forer, *Criminals and Victims: A Trial Judge Reflects on Crime and Punishment* (W W Norton & Company, New York 1980) 7, in which the author asserts that a painstaking review of philosophical literature from Plato to Hart, Rawls and Foucault, has failed to provide judges with an acceptable rationale for the sentences they are obliged to impose every day.

⁷⁰⁹ E W Thomas, *The Judicial Process; Realism, Pragmatism, Practical Reasoning and Principles* (CUP, Cambridge 2005) 9-12. The writer, an academic and judge of the Supreme Court of New Zealand, pertinently asserts that: 'Many legal theorists seem to write to and for each other. In the result, jurisprudence theory has become burdened with a surfeit of theories and sub-theories... Jurisprudence has come to possess the variety of a giant supermarket. Small wonder that the practitioner is bemused as to what to take from the shelf... More critical than these strictures, perhaps, are the recurring more substantive shortcomings of legal theory, which, to the experienced judge immersed in the reality of the legal process, are likely to seem somewhat remote. One such shortcoming is the vain but persistent efforts of legal theorists to unearth a predetermined or impersonal law. A second is the failure to recognise the full extent of judicial autonomy necessary to resolve the vast array of choices confronting a judge in reaching a decision, and the essential place of that judicial autonomy in the legal system. A third is the distance seemingly placed between theory and the basic requirement that the law exists to serve the needs of society. It is not and never can be an end in itself. Legal theory that departs from or obscures this basic truism does a disservice to the law and legal process.'

methodological judicial behaviour. In Dworkin's view, a judge is always a philosopher whether he is aware of it or not, for any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation offered by jurisprudence, hence rendering any of his opinions a piece of legal philosophy, even when the philosophy is hidden.⁷¹⁰ They follow instructions they have never properly considered and derive at their arguments from distinctions they have never subjected to scrutiny. The good judge is supremely aware of his philosophy and is always in the process of both consulting and refining it whenever he takes up the task of making a decision about a fresh case. The choice is clear. One can either be an unreflective judge and be at the mercy of one's theory, or indeed, one can be in command of one's theory and use it as a mode of 'calculation' to produce coherent and considered decisions.⁷¹¹

8.3 Rehabilitation

Twenty-three judges in all discussed the importance of rehabilitation as a sentencing purpose, with the following four comments summarising the overall stance:

For me rehabilitation is the essence of sentencing. Society must strive to help offenders not to repeat their criminal behaviour particularly young offenders. We as judges must exercise care on this respect. Sentencing requires reflection and deep thinking; it requires concern for the offender. It is very easy to say that all offenders in imprisonable instances will definitely end up in jail. This is the easy way out. Rehabilitating or as judges giving the offender the chance of rehabilitation has societal benefits as well. You communicate to them that society has not erased him and that it still cares for them. I already said that this is not the easy way out. A rehabilitative sentence will have to depend on a variety of circumstances such as the seriousness of the offence, the offender's criminal

⁷¹⁰R Dworkin, *Law's Empire* (Clarendon Press, Oxford 1979) 90.

⁷¹¹R Dworkin, *Taking Rights Seriously* (New Impression with a Reply to Critics, Duckworth, London 1996) 104.

*record, his personal circumstance and many other factors depending on the case, even the whether for example the victim has forgiven the offender.*⁷¹²

*Rehabilitation can be used and I do use it if the case before me with its particular facts justifies such an action, particularly if the offender is a minor or a young person.*⁷¹³

*I consider suspended sentences of imprisonment as rehabilitative sentences. I use this method when I can do so justifiably. You give the defendant a second chance. I am particularly careful in cases where the defendant is very young or very old. We are all humans and we all make mistakes. You do not have to erase the defendant from the first time, and I say not even from the second or the third time. A lot depend on the facts of the case in such instances and the circumstances of the offence, which could be numerous to outline.*⁷¹⁴

*The point is not only what we as judges are doing towards the rehabilitation of the offenders, which I espouse as a most important punishment purpose. The point is what the criminal justice system is doing to assist these people to rehabilitate. Can the system find them employment? Secure them counselling for themselves and their families? These are important parameters.*⁷¹⁵

These comments reflect a strong emphasis on rehabilitation as a sentencing goal among the Cypriot judiciary. Judges linked rehabilitation with protection of the community, because they view reformation of the offender from a utilitarian perspective as serving the interests of all, since, in most cases, an imprisoned offender releases back into the community. Once more, the judges referred to the surrounding facts of the offence and the circumstances of the defendant as determinant for the exercise of their discretion to choose the particular sentencing purpose.

8.3.1 Rehabilitation and Imprisonment

Some judges spoke about rehabilitation in relation to imprisonment:

It is peculiar really, to send a defendant to prison and at the same time talk about rehabilitation in your decision. We know what is happening in prisons. Drugs,

⁷¹²Judge 6.

⁷¹³Judge 1.

⁷¹⁴Judge 39.

⁷¹⁵Judge 47.

*rapes, bullying, violence of all sorts; it is a crooks' university in there, postdoctoral stuff. Chances are that they come out worse than they got in. I have my doubts if imprisonment can be rehabilitative.*⁷¹⁶

*I do not see rehabilitation microscopically. An offender can rehabilitate in prison if he wants to and the prison system helps him. At the same time, he does his time for the offence for which rightly and deservedly he was sentenced. The two purposes can coexist.*⁷¹⁷

*Jail can certainly rehabilitate offenders and punish them at the same time deservedly for what they did if the prison system works properly and on scientific basis having for example expert and specialised personnel, schooling, the learning of arts and crafts, all of these and many others could contribute to his rehabilitation. However, the question is if the prison system works properly indeed. Well it does not. We all know that, but few of us admit it. Political parties initiate corruption in society, and that corruption spreads to the micro-society of prisons. Look at the problem of drugs in prison for example. There must be ways to eradicate the drugs and the violence that it appears to scourge the Central Prison. It is a shame for a democratic system which supposedly respects human rights to imprison offenders for their betterment and them coming out worse.*⁷¹⁸

What one deduces from these comments is that some judges consider feasible the combination between retribution and rehabilitation provided that the prison system is equipped and ready to assist them in doing so. Imprisonment was mainly seen as a sentence that did little for the offender's chances of rehabilitation, in fact probably producing the opposite effect. A recurring theme was the judges' belief that drugs were somehow available in prisons, and the fact that the harshness of prison would serve to reinforce and intensify criminal behaviour rather than have a rehabilitative effect, giving life, in a perverse sort of way, to complaints made by prisoners to the effect that: 'You are sent to prison as a punishment, not to be punished. Unfortunately, that is what happens most of the

⁷¹⁶Judge 2.

⁷¹⁷Judge 36.

⁷¹⁸Judge 52.

time.⁷¹⁹ Interestingly so, some of the judges' comments gave life to some of Foucault's pessimistic views on prisons, as a torture and spectacle, and a façade of politics of power.⁷²⁰

Another judge was more philosophical (and poetic) in his comments on prisons and imprisonment (and perhaps historically informed as well), by saying that:

*Prison is the beacon of state authority over the individual. When we imprison, we help preserve this notion of state power and authority. Prisons are also an expression of democracy. It is there we send those who having the right to choose how to live their short and sweet life, they select offending. We as judges have to do our duty.*⁷²¹

This comment, gives a feeling of judicial politicisation of the wider prison system and its functions, more than simply categorising it as merely a place where convicts end up after sentencing. Indeed, ever since the Enlightenment, the prison has been a major site of democratic state building as it created new institutions of crime control and new sites of state power from policing to sentencing. The prison helped establish new frameworks for understanding and classifying citizenship in democratic societies as it distinguished which people are subject to state sanctions, which are not, and why. By setting the limits of what the state authorities could do to someone who broke the law, penal sanctioning helped define individual rights and protections from state power,⁷²² and by analogy to the observations of judge

⁷¹⁹The comment is attributed to an ex-prisoner as cited in D Robins, *Just Punishment* (Understanding Social Issues, Gloucester Press, London 1990) 41.

⁷²⁰Sheridan A (tr), Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage Press, New York 1977) 55.

⁷²¹Judge 28.

⁷²²V Barker, *The Politics of Imprisonment: How the Democratic Process Shapes the way America Punishes Offenders* (Studies in Crime and Public Policy, OUP, Oxford 2009) 12.

28, gave the free choice to the polity not to become members of prison society by breaking the law (and getting arrested).

The present study revealed strong support for rehabilitation as a sentencing aim, particularly in relation to young offenders and interestingly enough to elderly offenders. Rehabilitation as a sentencing aim appeared to be clearly understood by the judges. What appeared to contribute to the popularity of rehabilitation was the fact that judges see it as being not only important for the offender but also for the community as a whole. The finding coincides with that of a study by Indermaur on offenders' perceptions, according to which there was a tendency on their part to see the purpose of a sentence as rehabilitative. Indermaur also noted the propensity of judges to favour rehabilitation, which coupled with defence advocates presenting similar views, creates a possibility of an unintended collusion emphasising the needs of the offenders.⁷²³

Lastly, one of the judges commented on the 'politics' of rehabilitation, indicating that a rehabilitative sentence does not necessarily denote what *ex facie* denotes, but it is rather the product of a policy choice:

*Rehabilitation is an interesting concept. It is a good thing to give a second chance to someone, and help him find his way, preferably outside the incarceration system. We know that prisons are full, and that there is a lot of niggling by those who fail to understand that judges are not the only ones responsible for this phenomenon. Many other factors play their role. Whether we like it or not we as judges take into account this situation in the prison system, at least I do. So, when I can avoid sending someone in prison, say by imposing a suspended sentence, or a hefty fine, I do so, and in this way I help the system.*⁷²⁴

This comment clearly puts the issue of rehabilitative sentencing on an interesting new ground, not necessarily correct however from a legal point of

⁷²³D Indermaur, 'Offenders' Perceptions of Sentencing' (1994) 29 Aust J Psychol 140, 143.

⁷²⁴Judge 29.

view. Courts could not be held responsible for prison overcrowding. This problem is within the responsibilities of the Executive and the Legislative branches of government, not of the Judiciary. The judge's comment nonetheless, describes a reality, not far different, in essence, from that analysed in recent academic literature in relation to the policy and practice of rehabilitation. In Canada, for example, it has been argued that rehabilitation measures may be a way of dealing with prison overcrowding due to an abundance of tough-on-crime laws.⁷²⁵

8.4 Deterrence

Judicial opinions in the study displayed a strong approval of deterrence.

Twenty-four judges were of the opinion that deterrence was a primary goal in sentencing, not specifying however whether they were referring to general or specific deterrence. Five of the most encompassing comments are the following:

*Deterrence is the most effective penal measure in the armoury of judges. It provides a very reasonable ground for punishing offenders and teaching them a lesson. At the same time it serves as a paradigm to other potential offenders.*⁷²⁶

*I think that deterrence is the primary purpose of sentencing. It expresses fully and clearly the societal feeling for punishment and exemplification.*⁷²⁷

*I am personally sceptical about deterrence generally, but it doesn't mean that you shouldn't give a person a deterrent sentence merely because you don't know that it will have that effect. Similarly we do not know what it would happen if we did not have deterrence type of sentences. One must be careful though not to overdo it.*⁷²⁸

*Deterrence only works with some offenders but it can backfire. One needs to be prudent on this.*⁷²⁹

⁷²⁵D A Andrews, 'Rehabilitating Criminal Justice Policy and Practice' (2010) 16 Psych Pub Pol and L 39.

⁷²⁶Judge 35.

⁷²⁷Judge 24.

⁷²⁸Judge 1.

⁷²⁹Judge 2.

*I often use deterrence as an excuse the basis of my sentence but that does not necessarily mean that I espouse everything that accompanies the concept. I am not sure if deterrence works, nonetheless if one case works and prevents in actual fact the repetition of the crime either from the offender or a potential offender, then that is enough justification for me.*⁷³⁰

Some of the observations focussed on how judges consider and evaluate the issue of deterrence in their decision-making process:

*Deterrence has always been part of my reasoning in sentencing. In general, potential offenders know that they will be punished for their offence. The rest is mechanics; it is for the system to decide how to punish them. Deterrence works, perhaps not all the time but it works.*⁷³¹

*Deterrence is one of the recognised purposes of sentencing, so I use it when I deem necessary. I do not care whether it works or not, for me it works by presumption. Has anybody proved that punishment works? People all over the world get punished and still they offend and sometimes the same people. That means that we must stop punishing. That is not a logic I could support.*⁷³²

Of all the purposes for sentencing discussed in the interviews, deterrence generated the most interest among the judges, with some holding the view that it constituted *the* primary purpose of sentencing. Generally, however, deterrence was not looked upon with favour as a sentencing purpose, although a number of judges stated that they felt under pressure to use it, although they did not agree with it personally. Significantly, there was little agreement between the judges on which offences should attract a deterrent sentence, and few judges discussed why they imposed deterrent sentences.

Many of the judges did not differentiate between general and specific deterrence, preferring to speak generally of ‘deterrence’ and ‘deterrent sentences.’ Noticeably, the Supreme Court in its case law on sentencing, as summarised in

⁷³⁰Judge 23.

⁷³¹Judge 4.

⁷³²Judge 37.

Chapter 3.6, referred to deterrence in 8.2% of the cases, to general deterrence in 15% of the cases, and to specific deterrence in 1.5% of the cases. This could mean that the Supreme Court uses the term ‘deterrence’ for both concepts and does not meticulously differentiate between the two, either intentionally or unintentionally, hence the resulting comments. Alternatively, it could mean that in a number of cases the Supreme Court was in fact referring to general deterrence rather than specific deterrence. It could also point to lack of understanding in some cases on the difference between the two types of deterrence, with corresponding confusion.

8.4.1 Deterrence and Other Purposes of Sentencing

Two judges identified links between deterrence and other sentencing purposes, such as retribution, incapacitation, and social protection:

Deterrence is a side dish for all other punishment purposes. It goes well with retribution as it sends out a loud message that punishment is not only for the offence the defendant has committed but for the warning of all other potential offenders and the defendant as well that this is the proper treatment. It also goes well with denunciation as you denounce the defendant’s behaviour in an even stronger manner. Deterrence goes well also with rehabilitation in that he will have to cooperate in his rehab attempts so that he will not have to repeat the same or any other offence.⁷³³

Deterrence goes part and parcel with social protection and incapacitation. It has to do with social protection because it can help deter other offenders to the benefit and protection of society. Moreover, it can help in the giving of the wider message that people who offend, and the circumstances of the case and their personal circumstances are such, will be punished in such a way as to be deterred and incapacitated according to the provisions of the law. In this sense, incapacitation has a deterrent effect as well.⁷³⁴

These judges were of the view that deterrence may be effective in combination with other sentencing rationales, and were therefore supportive of the

⁷³³Judge 41.

⁷³⁴Judge 48.

use of deterrence in sentencing. Of course, analysing the grounds of their approach, one easily detects their probable confusion as to the moral justification of the said rationales and their function, as explained in Chapter 5, without the need of any additional elaboration as (by sardonic analogy), the axiom of *res ipsa loquitur* applies fully in this instance ('The thing speaks for itself').

The discussion of the use of deterrence by the judges revealed endorsement of the notion of deterrence generally, with qualifications for that support in cases where it was seen to be inappropriate.

The next section looks specifically at general deterrence and the judges' respective comments.

8.4.2 General Deterrence

Ironically, despite many of the judges stating that deterrence was a useful sentencing purpose (21 judges), with some having the opposite idea (9 judges), a number of those who did not support it, gave examples of cases where they would use general deterrence as a sentencing tool. The other noticeable aspect was that there was little agreement between judges as to which categories of offences merited the deployment of general deterrence as part of the *raison d'être* of the sentencing judgment:

*General deterrence is a very powerful sentencing purpose. Through it the State makes a point and it deters all those who might think to offend.*⁷³⁵

*General deterrence is a justifiable purpose in every case where the offence is serious. The court must without more be able and ready to impose such deterrent sentences as to make people think two and three times over before committing an offence.*⁷³⁶

⁷³⁵Judge 53.

⁷³⁶Judge 8.

*Deterrence does not serve any meaningful purpose. It is generally ineffective and unfair to the defendant who has committed one crime and he will be punished for another offence that he has not committed. I could conceivably see general deterrence applied in cases of hooliganism and sexual offences against children but as I said I do not believe in its effectiveness.*⁷³⁷

*General deterrence is generally speaking (and I emphasise the 'generally') an empty letter in the sentencing reality and from one perspective an unfair measure as well as it can lead to a higher sentence than the one deserved for the particular offence under the particular circumstances. I see however how one could think of utilising it in cases of serious assaults sexual and others against small children. That is an area where we must be absolute and vertical in our approach for extremely heavy sentences.*⁷³⁸

*As judges we decide on proof. Is there any proof that general deterrence works? I personally have not heard of any.*⁷³⁹

8.4.2.1 Categories of Offences

The following, were categories of offences where judges stated that general deterrence was appropriate:

(a) VAT Fraud and Contempt of Court

*Specific examples I can give are VAT fraud and contempt of court. These two offences need to be addressed and punished with 'special' general deterrence. The first has to do with people collecting the VAT tax from the consumer and not returning it and later on, they try to strike a deal with the VAT Office to pay a lesser amount as a compromise. It is a classical case of fraudulent theft. The second has to do with the discipline in courts and the respect of judicial orders and judgments, without which the justice system will fall in disrepute.*⁷⁴⁰

(b) Sexual Offences Against Children

*Any kind of sexual offence against children particularly the very young ones deserves the maximum even without prior convictions. The message must be clear to the community of perverts and the rest 'hands off otherwise we will cut them!'*⁷⁴¹

⁷³⁷Judge 43.

⁷³⁸Judge 18.

⁷³⁹Judge 20.

⁷⁴⁰Judge 40.

⁷⁴¹Judge 22.

(c) Domestic Violence

Domestic violence is a very important area to which general deterrence can have an impact. Wives (more often than not the victims are women) are not possessions to be thrown left, right and centre, kicked, beaten, and spat at, quite often in front of the children - which is another facet of the problem. Wives and children have rights and macho men must know that and if they do not they will find out the hard way.⁷⁴²

(d) Hooliganism

Hooliganism is social terrorism for the healthy fans and spectators. Many hooligans are young offenders but here we must make an exception and not consider their youth as a mitigating factor. We should impose crushing sentences so that others know that they will end up the same way.⁷⁴³

One judge while discussing, in broad terms, the issue of general deterrence, mentioned hooliganism as an area where general deterrence must have no utilisation, where the offenders are young persons:

General deterrence equals to severer sentences usually of imprisonment. I have no problem over that with the exception of one qualification regarding young offenders. These kids need attention and understanding. The mass hysteria and anarchy carries them away and makes them misbehave, and I do not mean to minimise the seriousness of the offences related to hooliganism. In this respect, I am in favour of normal sentencing preferably non-custodial as for example a suspended sentence.⁷⁴⁴

(e) Drinking and Driving Offences

My mind goes directly to the drinking and driving offences. Of course, other offences deserve a general deterrence approach. Drinking and driving is a kind of behaviour, which I think it can become the subject of manipulation. With the proper approach driving without previously drinking can become some sort of a culture, and part of this positive and bona fide manipulation is the imposition of strict sentences for purposes of general deterrence.⁷⁴⁵

(f) Drug Trafficking

Narcotic drugs constitute a scourge for society. The battle is and must remain universal. There are no mitigating circumstances for these offences in my opinion. Sentences must be such as to convey the message that drug supply and the commercialization of the white death will be viewed with intolerance at its

⁷⁴²Judge 15.

⁷⁴³Judge 32.

⁷⁴⁴Judge 1.

⁷⁴⁵Judge 8.

*maximum. General deterrence can help towards this direction. If a dealer or a carrier want to take their chances let them take them but they must know that once caught the sentence will be such that it would not make it worth the while. Only in this way we could deal with this problem. I would not mind at all if for this offence we had the death sentence in Cyprus.*⁷⁴⁶

(g) Spying for the Enemy

*Fortunately, we do not have that many cases relating to spying and the divulging of information on defence works but it is an area where I would have been very willing to sentence on the principle of general deterrence as well. Turkey is illegally occupying half of our country and it is inconceivable to me how one could work for the enemy.*⁷⁴⁷

Themes emerging from the judges' statements were diverse, and did not always fit within the normal use of deterrence. In most of these cases, the offence would be unlikely to be committed on the spur of the moment, and offenders may be well aware that what they were doing was legally wrong. However, this does not guarantee that deterrence would have been an effective sentencing option.

Eighteen judges mentioned sexual offences against children. This category of offence is a doubtful candidate for deterrence due to the nature of the offences where the offender is unlikely to be motivated to desist based on the prospect of criminal sanctions. One of the judges who nominated deterrence as being appropriate for this offence, acknowledged this qualification by stating that it would not be so much the deterrence of the offender but general deterrence the appropriate mode of sending a 'clear community denunciation' for the particular criminal behaviour.⁷⁴⁸ Although the judges are talking about 'sending a message,' which involves general deterrence, the better description of what is being referred to, is denunciation, and perhaps also just deserts.

⁷⁴⁶Judge 34.

⁷⁴⁷Judge 39.

⁷⁴⁸Judge 2.

The offence of drunk driving was nominated as being a subject to possible deterrent effect by 19 judges. The offence would often be committed without sensible thought (by definition the offence is committed while the offender is intoxicated); however there may be stronger arguments for deterrent sentences for drunk driving rather than the other types of offences. This may however have a general deterrent effect based on the existence of the sanction itself, rather than the actual sentences being handed down by the courts, particularly on the basis that most are not publicised. Ashworth points out that there is strong empirical evidence of a general deterrent effect based on the existence of a punishment structure.⁷⁴⁹ Thus in the case of drunk driving, it is arguable that it is the existence of the punishment structure which deters many offenders from committing the offence. It is also arguable that many offenders cease from offending because of the real possibility of being caught, rather than a fear of the actual penalty to be imposed. Added to this are other reasons for desisting from such behaviours, such as moral grounds.⁷⁵⁰ Again, as discussed above, it is debatable whether the preferable basis of such a sentence should in fact be general deterrence, when just deserts and denunciation may be more appropriate. The same approach applies to the remaining offences proposed by the judges as calling for general deterrence.

It seems fair to conclude that while the judges were giving examples of cases where general deterrence may be appropriate, these cases may not in fact be suitable for general deterrence by their very nature. In most instances, just deserts or denunciation were more appropriate bases for the sentence than deterrence. This

⁷⁴⁹ Ashworth, 'Deterrence' (n 347) 51.

⁷⁵⁰ Ashworth, 'Deterrence' (n 347) 50.

raises the enigma of the continued enthusiastic use of deterrence by the judges, despite their analysis of its faults, and the empirical evidence. The reasons could not but be speculative, although the interviews suggest that it may have been due to familiarity with the concept of the deterrence perceptions (real or otherwise), that the public were calling for deterrent sentences, and statements by the Supreme Court that were perceived as indicating the appropriateness of deterrence, at least in relation to certain offences.

8.4.3 Public Communication of Punishment

General deterrence has a strong tie with publicity, since without propagation of the details of the sentence, it can hardly be argued that the sentence could be justifiable on general deterrence, provided of course that the court knows this weakness. Likewise, the imposed penalties must be publicised widely as deterrent, and the public to perceive them as such.⁷⁵¹ Comments by the judges tended to display disparagement as to the efficacy of general deterrence if potential offenders did not know of the sentence. This group of judges centralised their rationale on the extent of the contribution by the mass media. Other judges' comments saw things from a different perspective and disconnected the whole issue from that of the media factor:

*The media do not deal with all of the sentences all of the time. They deal with sentencing when the particular case is a high profile one or when they have nothing better to report and they are in need for some interesting sentence, conviction, or acquittal. The judicial system cannot rely on the media to put forward an argument in favour of general deterrence.*⁷⁵²

The role of the press is very important. Reporting of sentences help spread the judicial message around, which is after all the essence of general deterrence.

⁷⁵¹Ashworth, 'Deterrence' (n 347) 49.

⁷⁵²Judge 16.

However, we have to make sure that they do hear about the sentences we impose so that they deal and with the not so 'important' ones. We also must make sure that the reporting is accurate. Experience shows that this is not always the case.⁷⁵³

I would still exercise general deterrence nonetheless still if I thought that I am not being reported because you do not know when this will be the case.⁷⁵⁴

Our sentences become known not only through the media. They become known from mouth to mouth and those who must know about them or many of these do find out about them eventually I sentence with deterrence in mind, both to the person and to others. If it is publicised, then others may feel that they should not commit a certain offence. It gets through one way or another, not necessarily through the media. It gets around enough to have some effect.⁷⁵⁵

If, as it is normally the case, the media report cases selectively, there is probably little chance of covering a particular case that the judges consider 'reportable' and in any event, the judges will be unaware in advance whether or not this will be the case. Even if a case is reported, there is no guarantee that it will be reported accurately, or in sufficient detail. In any event, even if all cases intended to have a general deterrent effect were in fact reported, there is no guarantee that reports of these cases would reach the persons to whom they were intended, that such persons would recall the details, and whether knowledge of such a sentence would have an effect on their propensity for offending behaviour, this latter factor being, of course, one of the criticisms of deterrence through the years. Deterrence is a subjective notion, depending on what potential offenders *believe* to be the case with respect to certainty and severity of punishment; and how those offenders evaluate the risk of offending in relation to their own situation. If offenders have no knowledge of previous sentences, there is no basis for their subjective belief, and therefore little deterrent effect. This can be

⁷⁵³Judge 44.

⁷⁵⁴Judge 19.

⁷⁵⁵Judge 21.

contrasted with the type of deterrent effect produced by the presence of sanctions themselves.⁷⁵⁶ The judges' comments, disavowing the deterrent effect of sentences by way of publicity are significant, and contrast with statements by some, that general deterrence is a useful sentencing implement. The fact that 30 judges expressed reservations about general deterrence by characterising it as an essentially futile aim without it being accompanied with efficient reporting, suggests a reasonably widespread belief among the Cypriot judiciary that this is the case.

8.4.4 Offence Prevalence

The immediate social environment at a particular period of time helps to establish the areas to which the vigour of the law should be directed. That is why it is permissible for a court to take judicial notice of the prevalence of crimes at any particular time and their repercussions.⁷⁵⁷ As noted in Chapter 3.6, prevalence was evaluated as a factor determinative of the imposed sentence in 16.1% of the appeals against sentence decided by the Supreme Court between 1960-2008.

Like publicity, prevalence is often linked with general deterrence, with assertions being made by its supporters that a prevalent crime requires a deterrent sentence particularly in order to deter other potential offenders. Some judges held the view that individual offenders should be punished only in accordance with the severity of the offence and their culpability:

Prevalence is a factor that sets the parameters of the seriousness of the offence. The more prevalent the offence the more likely it is to attract a strict sentence, but

⁷⁵⁶A Von Hirsch, A E Bottoms, E Burney, and P O Wikstrom, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Hart Publishing, Oxford 1999) 3,6.

⁷⁵⁷Pikis, *Sentencing in Cyprus: Sentencing Revisited* (n 21) 6.

*this is not an absolute rule. A lot depends as always on the circumstances. I usually connect it with the need for general deterrence and social protection but again this is not unqualified.*⁷⁵⁸

*Prevalence would most likely lead to a deterrent sentence.*⁷⁵⁹

*When looking at the offence I always take into account prevalence and the effects of this on society and the need to uphold the law and protect the citizens from similar criminal behaviour.*⁷⁶⁰

*I would be more inclined to impose a deterrent sentence if there was evidence before me of prevalence. Such proof is only not often given.*⁷⁶¹

*I always take prevalence in consideration. I do need evidence on that by the lawyers. I have and can have judicial knowledge of prevalence of a variety of offences based on my knowledge of how many cases were tried before me similar to the offence under consideration or based on the statistics the various district courts are publicising from time to time. I can also derive and do take judicial knowledge of prevalence on the basis of the judgments of the Supreme Court of Cyprus on similar issues.*⁷⁶²

Prevalence is not a precondition for the imposition of deterrent sentences;⁷⁶³ other offences, which are not prevalent, can also attract particularly harsh sentences depending on the nature of the offence and the circumstances surrounding its committal. The presence of prevalence as a marker for the use of general deterrence raises the issue of how to establish this factor. The factual basis should perhaps be something more solid than judicial notice, such as official statistics or through the offering of relevant evidence.⁷⁶⁴ Nonetheless, the most popular method cited by the judges in the study for incorporating prevalence was indeed judicial notice and an utilisation of their local knowledge and consequent

⁷⁵⁸Judge 35.

⁷⁵⁹Judge 22.

⁷⁶⁰Judge 19.

⁷⁶¹Judge 6.

⁷⁶²Judge 52.

⁷⁶³*The Attorney-General of the Republic v Pavlou* [1997] 2 CLR 170, 175

⁷⁶⁴P V Lowenthal, 'Some Issues in Fact Finding for Sentences (1980) 11(2) U Queensland L J 145, 147.

capability to assess the situation in that particular area. Courts can use their own general judicial knowledge on the extent of crime; however, there have been instances where such judicial assertions and findings on the prevalence of particular offences have later been proven erroneous and capricious.⁷⁶⁵ This raises the risk of the judges' views on crime being derived by other, potentially inaccurate sources, for example the media. Ideally, the prosecution must present official data before the court to support assertions that an offence is prevalent, unless of course there is available recent case law of the Supreme Court directly on the point, or knowledge on the part of the judge of the prevalence of an offence on the basis of similar cases he has tried or which he knows that they are pending for sentence based on official information by the Registrar.⁷⁶⁶

Several judges expressed dissatisfaction with the lack of proper evidence put before the court on the alleged prevalence of offences. The following is the most encompassing comment:

*There are times where you know that certain crimes are prevalent but you cannot derive judicial knowledge for the fact. The Supreme Court must issue frequent directions on this matter or the prosecution must be able to present official and pertinent evidence.*⁷⁶⁷

A better view would appear to be that of supporting the issuing of frequent and up to date directions by the Supreme Court (or even by the police and the Ministry of Justice) as to the prevalence of particular offences. Such a course will assist in the detachment of the court from either the competency or the motives of the prosecution, which could in turn wish to be lenient to the accused due to a deal

⁷⁶⁵ *Jenkinson and Another v The Police* [1983] 2 CLR 295, 299-300.

⁷⁶⁶ *Panayiotou v The Police* [2001] 2 CLR 540, 544.

⁷⁶⁷ Judge 49.

cut with the defence, or in fact for any other reason deemed appropriate by those responsible to utilise such a course.

8.4.5 General Deterrence - Other Considerations

In considering general deterrence, issues of compliance are closely related, as many people will obey the law for reasons other than the legalistic threat of criminal sanctions. For example, they may normatively obey the law because it is morally appropriate to do so, or because they agree that the behaviour is wrong, or even because they may not necessarily agree but respect the need to obey the law.⁷⁶⁸ Two judges noted this:

*There is a stance related to general deterrence that courts can deter potential offenders from committing serious crimes. This stance is not viable. People who obey the law usually do so for a variety of reasons not necessarily connected with deterrence, such as their own morality and upbringing and a plethora other social factors.*⁷⁶⁹

*People do not need the courts to tell them that child rape, murder, burglaries, assaults and so many other offences are serious and one must avoid committing them; that is pedantic. One need not therefore rely or pursue deterrence to make a point.*⁷⁷⁰

Certainty of punishment is an important aspect of deterrence theory, and general deterrence in particular. A number of judges specifically mentioned this:

*General deterrence can be deterrent to some but not to others. It is rather the prospect of arrest that is really deterrent.*⁷⁷¹

*General deterrence has its value. It conveys to people that if they offend they will be punished.*⁷⁷²

⁷⁶⁸Von Hirsch and others, *Criminal Deterrence and Sentence Severity* (n 756) 3.

⁷⁶⁹Judge 21.

⁷⁷⁰Judge 26.

⁷⁷¹Judge 27.

⁷⁷²Judge 30.

These comments relate to both the certainty of detection and arrest and the certainty of punishment, both of which are important aspects of deterrence. If, as is often the case, the offence is committed impulsively and spontaneously, deterrence may have little effect:

*There are times where anybody, even us judges, can commit a serious criminal offence either due to momentary loss of self-control or for other similar reasons. So, do other people. Deterrence can make no difference in such cases, of provocation and impulsive reactions.*⁷⁷³

8.4.6 Specific Deterrence

A sentence based on specific deterrence would require detailed information on the personal circumstances of the offender including his previous criminal record, with the court then calculating what sentence would be required to deter that person. This may give an appearance of lack of consistency in sentencing, and result in harsher sentences for persistent offenders.⁷⁷⁴ It would also make such sentences of little use as precedents. Although significantly fewer judges commented on specific deterrence compared to general deterrence, there were some thoughtful comments on its utilisation in the sentencing practice:

*Specific deterrence is an indirect form of incapacitation in that you punish the defendant for a longer time so that to show him that he must abstain for future criminal behaviour in the future while keeping him out of the streets for a longer period of time, if the sentence is custodial.*⁷⁷⁵

*The actuality of the matter is that personal deterrence is certainly an aspect and can be important. In my experience, specific deterrence can be very significant.*⁷⁷⁶

Specific deterrence is tricky. Where do you draw the line between the deserved sentence of the offender based on the offence and the facts of the case and taking into account proportionality issues and that extra punishment attributed to specific

⁷⁷³Judge 31.

⁷⁷⁴J V Roberts, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (Clarendon Studies in Criminology, OUP, Oxford 2008) 33-34.

⁷⁷⁵Judge 38.

⁷⁷⁶Judge 8.

*deterrence? And how do you know that a sentence based on the first criteria will not have been sufficient?*⁷⁷⁷

One judge pointed out the relative needlessness of specific deterrence in theft, burglary and robbery cases where the offender is a drug addict:

*No matter what you give the offender in (such cases) the possibility is that the defendant will repeat his criminal behaviour.*⁷⁷⁸

There was an obvious support from the judges on the use of specific deterrence, although in many cases this was qualified to apply in certain circumstances only. In comparison with general deterrence, specific deterrence was less controversial with the judges, and received analogically greater support, although paradoxically, it was mentioned much less frequently in the interviews than general deterrence.

8.5 Denunciation

The judges expressed the view that denunciation is about visible and felt justice, with the following comment encircling the substance of other similar observations:

*Denunciation the way I see it has its importance in the punishment process in that it allows people to hear and feel the anger of society for the type of crime the defendant has committed. It is also a way for the court to express in so many words its resentment for the particular criminal action and to send a clear message of criminal and societal intolerance to prospective offenders in the form of general deterrence and to the defendant specifically in the form of specific deterrence. That can make an impact.*⁷⁷⁹

In this sense, one sees that judges employ denunciation in a similar manner to general and specific deterrence linking them in terms of thematology and

⁷⁷⁷Judge 37.

⁷⁷⁸Judge 7.

⁷⁷⁹Judge 22.

sentencing purposefulness. However, in one view, denunciation had little judicial significance:

*In my view denunciation or rather the issue of denunciation is misunderstood even amongst us judges. It is not we, judges, which denounce the criminal conduct of the offender but the House of Representatives (Parliament). It is the Parliament, which is responsible with the passing of the legislation that has created the offence, and not the Judiciary. Therefore, one can say that the community, the people through their elected representatives have already decided on the degree of denunciation to the defendant's criminal behaviour.*⁷⁸⁰

In contrast, two judges spoke about the relevance of denunciation:

*In one way you are society's angry voice, which denounces the offence and the defendant's behaviour.*⁷⁸¹

*Judges cannot entirely ignore the sentiment of the community. We are here to serve the community's legitimate interest in social safety and protection. To this extent denunciation has its place in the system.*⁷⁸²

One judge used the concept of denunciation by comparing the behaviour of the offender to those who are law abiding thus vindicating their behaviour by implying some type of a judicial positive reinforcement for the law abiding members of the community or more fancifully a sort of a reverse general deterrence:

*Denunciation can also become a means for vindicating the conduct of other citizens who choose to abide by the law in contrast to the defendant.*⁷⁸³

Most judges saw denunciation as a factor parallel to other punishment objectives, and a means of highlighting the purposes of the defendant's punishment:

Sentencing is the culmination of many factors, deterrent, rehabilitative, retributive and sometimes denunciatory. When I sentence, I always say that it is a serious

⁷⁸⁰Judge 26.

⁷⁸¹Judge 22.

⁷⁸²Judge 10.

⁷⁸³Judge 4.

*case, provided of course that it is, and that with my sentence I will show the defendant but also to the public at large the court's stance and abhorrence to such a type of behaviour.*⁷⁸⁴

*As to denunciation, I will usually include general comments about the public's aberration to such behaviour but I would avoid getting too personal with the offender. I do not want to sound and look patronising and arrogant so to speak. It is easy for someone to say that you were spiteful with the defendant due to prejudice and I who knows what. One has to be very careful.*⁷⁸⁵

*At times a reason for sentencing the offender is to confirm the anguish of the victim and also denounce the conduct of the defendant. Punishment and denunciation are sometimes inseparable.*⁷⁸⁶

Two judges gave examples of specific offences for which denunciation is important. These were generally seen as the more serious and violent offences:

*I adopt a denunciatory approach only in cases that are really repulsive to me and to the general public such as sexual offences against young children, including incest.*⁷⁸⁷

*The public disapproves of many offences and this sometimes changes according to the social circumstances prevailing at any one time. However, to me a particular offence stands out the most, without implying that it is the most serious one because it is obviously not, and I am referring to burglary and theft. The citizen has the right to be safe in his castle. No one must be able to take that away. In such cases I make very strong comments against this sort of behaviour by the defendant.*⁷⁸⁸

It was evident from the interviews that the judges did not see denunciation as a central sentencing purpose, in broad consistence with the relevant literature. There was, perhaps surprisingly, a good understanding of the concept (not necessarily in its scholarly dimension), from most of the judges who chose to discuss it, with many claiming to use it as a practical and communicative sentencing purpose. Several of the comments showed obvious intersections of

⁷⁸⁴Judge 17.

⁷⁸⁵Judge 6.

⁷⁸⁶Judge 16.

⁷⁸⁷Judge 1.

⁷⁸⁸Judge 14.

denunciation as they connected it with other sentencing purposes, particularly retribution and deterrence.

8.6 Incapacitation / Social Protection

In common with denunciation, the judges did not comment in much depth on the purpose of incapacitation and social protection despite the fact that it is the factor most often referred to in the case law of the Supreme Court (in 151 cases),⁷⁸⁹ to which case law, surprisingly enough, no judge cited in any way or form.

One judge considered that social protection included deterrence of the unspecified kind:

*Social and public protection is also an important purpose; probably the most important and this cannot but include deterrence.*⁷⁹⁰

Some judges saw social protection as an important sentencing rationale even though of limited purpose and use. A characteristic comment was the following:

*Occasionally it is vital to punish for public protection so as to isolate the offender for such period as necessary so as to secure the protection of the public, for example in the case of a serial rapist or a forger.*⁷⁹¹

This judge seems to connect social protection with incapacitation in the sense of using the premise of social protection to ‘isolate’ the defendant for a longer period than he would otherwise have done. This is, admittedly, an approach resembling an approach with elements of incapacitation. This observation seems to

⁷⁸⁹See paragraph 3.6.

⁷⁹⁰Judge 24.

⁷⁹¹Judge 17.

gain more ground, considering several other comments put forward by some judges while discussing social protection:

*In approaching matters from the perspective of social protection one must be careful on how he is going to predict the future dangerousness of the defendant on the basis of his past behaviour.*⁷⁹²

In a similar way, the following judge also pointed out the possibility of mistake, but added that there are times when there is clear evidence that the defendant will offend again:

*The difficulty is that you cannot sentence an offender on the mere possibility that he might become a recidivist. But if I have clear evidence that the person is a psychopath and constitutes an obvious threat to the commune, then society needs to be protected from him and a heavier sentence may well be appropriate.*⁷⁹³

The need to protect society from dangerous offenders was important to a number of the judges:

*I think you should jail people to protect society when it is evident that they are a threat to society.*⁷⁹⁴

*I would use social protection to imprison an offender for a longer period only in exceptional and very clear cases.*⁷⁹⁵

Another judge alleged:

*Protection of the community is definitely an important matter, but not one that is essentially evaluated by the Supreme Court as it is really in the District Court, where a judge can assess the risk.*⁷⁹⁶

This statement conflicts with the case law of the Supreme Court, which in fact deals evaluative with the issue of social protection, as already stated in Chapter 5.3.3.

⁷⁹²Judge 25.

⁷⁹³Judge 54.

⁷⁹⁴Judge 2.

⁷⁹⁵Judge 1.

⁷⁹⁶Judge 19.

Another statement was:

*I would rarely use social protection as a sentencing purpose because I am not sure if it is proper to make such sweeping statements without evidence of prevalence.*⁷⁹⁷

Again, this statement appears to connect social protection to offence prevalence and not to the nature of the offence per se, as most judges said or implied in their comments. The fact that prevalence can conceivably have some bearing on the wider issue of social protection does not convert it in to a definitional parameter. The fact for example that serious sexual offences against very young children are not prevalent does not mean that they must not become the subject of social protection.⁷⁹⁸

*Social protection is something I evaluate but I do not feel bound to refer to it explicitly in my judgment.*⁷⁹⁹

This statement relates to similar observations made in Chapter 7.3.8, as to the tendency of some judges not to explicate in their reasoning the punishment purpose they used in order to reach their decision. This usually happens either because judges think that they simply do not have such an obligation or because they are under the impression that their reasoning will be easily deduced from the overall drift of their judgment, unless of course they simply fail to think at that level, being unaware of such a potential perspective.

8.7 Sentencing Discretion

All of the judges were of the view that a wide judicial discretion is imperative in sentencing, and that the sentencing judge is not merely the only one

⁷⁹⁷Judge 4.

⁷⁹⁸This position seems to be supported, but not clearly, by the dicta in the case *The Attorney General of the Republic v Pavlou* [1997] 2 CLR 170.

⁷⁹⁹Judge 9.

authorised to do so but also in the best position to make decisions about the sentence because of his experience and knowledge, and that includes Supreme Court judges. These views consort with those expressed in the pertinent literature as discussed in Chapter 4.7. In addition, judges stressed that District Court judges as opposed to Supreme Court judges are in a better position to evaluate the defendant for purposes of sentencing:

*Discretion is vital in sentencing as in many other judicial functions. You see the defendant and his reactions in the live judicial process. The Supreme Court lacks that opportunity.*⁸⁰⁰

Some of the judges perceived wide discretion as necessary, to take into account the variety of facts in different situations and to tailor the sentence to fit those individual circumstances:

*How on earth can a judge assess the proper sentence without discretion?*⁸⁰¹

*Judicial discretion is absolutely crucial. It is the means that will enable you to evaluate the circumstances of the offence, the circumstances of the defendant, and every other possible and relevant factor in order to reach your decision.*⁸⁰²

Judges saw the evaluation of the defendant's individual circumstances as critical in order to lead to a fair outcome, without that necessarily implying that these circumstances also constituted a mitigating factor as well:

*I must take into consideration the personal circumstances of the defendant in order to evaluate them without that denoting that in actual fact I will credit the defendant with any mitigating factors related to those circumstances. However, you have to go through the procedure first.*⁸⁰³

⁸⁰⁰Judge 10.

⁸⁰¹Judge 4.

⁸⁰²Judge 1.

⁸⁰³Judge 11.

8.8 Conclusions

The chapter dealt with the way Cypriot judges decide sentences. There was an analysis of the factors they take into account and the reasons for their choice. There was also reference to case law of the Supreme Court to provide a legalistic milieu for the ensuing analysis, to the extent that such a case law existed to cover the issues under examination. The analysis shows that there are multifarious and morally conflicting sentencing purposes in the Cypriot practice, with the judges appearing to be unconcerned about the resulting uncertainty and any inconsistencies flowing as a result of their diverse punishment.

The next chapter will deal with the way Cypriot judges view and practice mercy and enquire whether the attitudes extracted by the interview comments show similar tendencies as those expressed by the judges in relation to the sentencing purposes discussed in the present chapter.

CHAPTER 9: MERCYING AND THE SENTENCING DECISION

The present chapter will examine the attitudes and responses of the judges in relation to mercy and its practice inside the Cypriot sentencing structure. There will be, at first, a presentation of all the Cypriot case law on the issue of mercy (all 10 of the reported cases since 1960, that is), and following that, an analysis of the judicial interview statements and comments, in order to extract the mode in which Cypriot judges mercy.

9.1 The 'Merciful' Jurisprudence of the Supreme Court

The commonly accepted impression in the Cyprus sentencing reality is that neither hardship nor purely humanitarian considerations allow, in the usual course of things, to override the primary duty of the court for proper law enforcement. However, there have been some hard cases where the Supreme Court had to employ mercy in order to do justice (as the judges perceived it), on the force of their residual discretion.

In *Mavros and Others v The Police*,⁸⁰⁴ the Supreme Court, mercifully reducing the appellant's 12-month sentence of imprisonment to 8 months' imprisonment for the commission of homosexual offences under sections 171(a) and 171(b) of the Criminal Code, Cap 154 (now repealed), indicated that:

Men suffering from such disorders [i.e. homosexual] do not come within the purview of the Mental Health Act 1959 unless the disorder is so gross that it amounts to psychopathy. The types of disorder may vary: at one end of the scale there is the mentally immature adult who is in the transitional stage of psychosexual development: he can be helped to grow up mentally. At the other end are those with severely damaged personalities, such as the obviously effeminate and flauntingly exhibitionist individuals and the deep resentful anti-social types. Probably nothing can be done for these individuals; but their pitiable

⁸⁰⁴[1975] 2 CLR 171, 179, 184.

condition calls for understanding and mercy... [The appellant] realized himself, on his own, the depravity and impropriety of his conduct, long before he was arrested by the police, and had been living a moral and normal life since 1973, one whole year before his arrest.

In *Georgiou v The Republic*,⁸⁰⁵ the appellant, a member of the House of Representatives and a practicing advocate, was convicted by the Assize Court for the forgery and uttering of an official document, namely a faked authorisation of the Central Bank of Cyprus for the export of money, and was sentenced to 1-year imprisonment. The offences were committed whilst he was acting for the administratrix of the estate of a deceased person who died in England but was the owner of movable and immovable property in Cyprus. In dismissing the appeal against conviction but allowing the appeal against sentence reducing it to one of 6-months imprisonment, the Supreme Court observed:

We have anxiously examined the sentence imposed from every angle. Certainly, it was right in principle and warranted by the grave facts of the case, made all the more serious because of the identity of the appellant, a lawyer pledged as every lawyer, to defend the law and, a Member of the House of Representatives, entrusted by the people with one of the highest offices of the State. It has been said repeatedly and, now we repeat, that the higher one stands, the higher becomes his duty to observe the law; in fact, give by his conduct an example of obedience to the law. On the other hand, we cannot overlook that the sentence of imprisonment is not the only punishment of appellant. He forfeited his seat as a Member of the House of Representatives-no small punishment by any measure-whereas his law practice, the means of support of himself and his family, was shattered, no mean punishment either. Faced with this human tragedy, we decided, not without reluctance, to temper justice that justifies a sentence of one year's imprisonment in the interests of law enforcement, with mercy-that judicial power that enables the Court to adjust punishment to the human dimension and intrinsic complexion of a case.⁸⁰⁶

In *Barhouch v The Republic*,⁸⁰⁷ the appellant was a young Lebanese woman of 27 with two minor children. She was sentenced to 4 1/2 years imprisonment

⁸⁰⁵[1984] 2 CLR 65.

⁸⁰⁶[1984] 2 CLR 65, 101-102.

⁸⁰⁷[1987] 2 CLR 245.

after having been found guilty of the offence of possessing 727 grams of heroin.

The Court, in allowing the appeal said:

On the basis of the medical reports which are now before us we have a quite complete picture about the health of the appellant; and, unfortunately, the appellant is in an, indeed, grave predicament. The mental condition of the appellant has deteriorated greatly while she has been in prison...(and) as it appears from the reports of two psychiatrists... she is suffering from depression... she has suicidal tendencies which must be taken seriously as she has attempted to commit suicide in the past. Another psychiatrist... states in his report that further incarceration will make the condition of the appellant worse. While she has been in prison it was discovered that she has a lump in her left breast; and we have now before us the reports of two surgeons...according to which there are strong suspicions that it is malignant, but, of course, no final diagnosis can be made unless and until a biopsy is performed. Due, however, to her mental depression she refuses to undergo the surgery necessary for a biopsy. In the meantime the appellant has been granted by an Ecclesiastical Court in Lebanon custody of her two minor children and an order of separation from her husband; and there can be no doubt that her condition is being aggravated by the knowledge that her children need her and she is away from them. This is really a tragic situation. Though we cannot regard the sentence passed upon the appellant as being either manifestly excessive or wrong in principle it is quite clear that since she has gone to prison there has been serious deterioration of her physical and mental health. Actually her life is now in grave danger because she may either commit suicide or the malignancy in her breast may spread with fatal results before it is definitely diagnosed and treated as such. It appears that in a case of this kind an appellate tribunal may, on the ground of subsequent developments regarding the personal or family circumstances of a person sentenced to imprisonment, interfere with a sentence that is considered as being otherwise appropriate... The time has come to show the mercy of this Court to this appellant; and in the very exceptional circumstances of this case we order that her sentence is to be so reduced that she can be released immediately.⁸⁰⁸

In *Amira v The Republic*,⁸⁰⁹ the Egyptian appellant was sentenced to 3 years' imprisonment after he had pleaded guilty to uttering three false traveller's cheques for \$100 each. While in prison he was examined by a Government eye-specialist and was found to have been suffering from a serious affliction of the right eye, with nearly complete loss of eyesight. According to the ophthalmological report it was not possible to treat the eyes of the appellant in

⁸⁰⁸[1987] 2 CLR 245, 246-247.

⁸⁰⁹[1987] 2 CLR 248.

Cyprus (the affliction affected the other eye as well), but it was possible that they would improve if they were operated on abroad. The Court held that:

We are of the view that even though the crimes which were committed by the appellant are quite serious there is no justification at all in law or in justice and morality for saying that the appellant because of having been sentenced in respect of such crimes has to lose his eyesight by remaining in prison here whilst he can possibly save his eyesight by being treated without delay abroad by means of surgery which cannot be performed in Cyprus. We have decided to adopt the exceptional course of showing the Court's mercy to the appellant... by reducing his sentence so that he can be released immediately in order to be enabled to leave Cyprus and return to his country where his eye affliction may be treated in a manner not possible as yet in Cyprus.

Similarly, in *Zewar v The Republic*,⁸¹⁰ the appellant pleaded guilty to possession and supply of controlled drugs (194.2 grams of heroin), and was sentenced by the Assize Court to a term of imprisonment of 4 ½ years. The Supreme Court reiterated the need for deterrent sentences in this type of offences stressing simultaneously that they should not be cruel and inhuman. The health problems suffered by the appellant were deemed exceptional and sufficient to justify his merciful treatment thus lessening the sentence to one of 3 ½ years of imprisonment.

In *Gregoriou v The Republic*,⁸¹¹ it was indicated that feelings of sympathy are not out of line but should not take the form of reduction of sentence, as that would be not the reasoning of an appellate Court but of a parole board (which Cyprus did not have at the time).

In *Khalife v The Police*,⁸¹² the court held that a 12-month sentence for uttering a forged document (passport) after a guilty plea was not manifestly

⁸¹⁰[1990] 2 CLR 384.

⁸¹¹[1993] 2 CLR 158, 167-168.

⁸¹²[1998] 2 CLR 315.

excessive but reduced it to 9 months due to the appellant's serious health problems as an act of mercy.⁸¹³

In *Karyolemou v The Republic*,⁸¹⁴ the appellant pleaded guilty to robbery. He had no previous convictions. He confessed and returned almost the entire stolen amount. His psychological problems (which led to his partial paralysis), deteriorated because of the imprisonment. The Supreme Court dismissed the appeal, indicating that the imposed 5 years imprisonment was lenient. The court underlined that in such cases the Supreme Court acts, in essence, as a first instance Court due to the principle of the greater principle of mercy and eleos. For this latter function, the Court expressed doubts and concerns, leaving however the matter to be conclusively determined by the Full Bench.

In *Piskopou v The Republic*,⁸¹⁵ the 48-year-old defendant pleaded guilty to intentionally wounding the 26-year-old complainant with a knife causing him grievous bodily harm during a brawl in which the defendant attacked the complainant following the slapping by the latter of the defendant's daughter. After the attack, the defendant carried the victim to the hospital for treatment. He was convicted to a 6-year term of imprisonment. The court recognised that there was no planning and that the attack occurred at the spur of the moment. The Supreme Court dismissed the appeal and a plea for reducing the sentence as an act of mercy by stressing that such a course can only be taken in exceptional instances and on the basis of the extraordinary facts of the case.

⁸¹³[1998] 2 CLR 315.

⁸¹⁴[1998] 2 CLR 437.

⁸¹⁵[1999] 2 CLR 342, 350.

In *Kara v The Republic*,⁸¹⁶ the 61-year-old Lebanese appellant admitted possession of 247 grams of heroin with the intention of supplying it for money. She was sentenced to 7 years imprisonment. The Supreme Court distinguished her medical condition to that of appellants in other cases where the principle of mercy was applied, and rejected the appeal.

In view of the above, and as a general observation, it can fairly be stated that the Supreme Court, though recognising that 'justice is sweetest when tempered with mercy,'⁸¹⁷ could be loosely classified as being relatively mean with mercy,⁸¹⁸ and very reluctant indeed towards expanding such a discretion, except in truly unique and exceptional cases bringing to the fore the benevolence of man before a human tragedy,⁸¹⁹ a position one might add, not particularly dissimilar to either that of the House of Lords⁸²⁰ (now Supreme Court), or the Scottish judiciary.⁸²¹

9.2 The Individual Judicial Perspectives

9.2.1 Balancing Again

The judges were far more philosophical in their comments on mercy and mercying compared to those on the sentencing process and the punishment purposes, presented in Chapters 7 and 8, respectively. Only 36 judges commented on mercy. The rest indicated that they simply did not desire to discuss it, and

⁸¹⁶[2003] 2 CLR 239.

⁸¹⁷See, *The Attorney General of the Republic v Kouppis and Others* [1961] CLR 188, 195.

⁸¹⁸The term is borrowed from C Piper and her article 'Should Impact Constitute Mitigation? Structured Discretion Versus Mercy' [2007] Crim L R 141, 142.

⁸¹⁹Pikis, *Sentencing in Cyprus: Sentencing Revisited* (n 21) 100.

⁸²⁰L B Cooper, B Dickson, and G Drewry, *The Judicial House of Lords 1876-2009* (OUP, Oxford 2009) 532.

⁸²¹L Farmer, *Criminal Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (CUP, Cambridge 2005) 108.

refused further embellishment on their choice. The general approach of the judges was to deal first with the concept of justice as an introduction to their individual syllogisms and attitudes towards the issue in perspective, and its role in criminal sentencing in Cyprus, interrelating at the same time justice and mercy:

I think of mercy sometimes when the facts are indeed exceptional for the offender. My sense of justice just revives. However, I worry, because my sense of justice might be different from the generally acceptable one. For me justice is to sentence in a way that the punishment is consistent to the gravity of the offence but at the same time be equitable and fit to assist the unfortunate offender in his plight. Remember, we are talking here about serious mitigating circumstances such as health problems, death in the family and the like.⁸²²

Justice demands that the judge sentence according to the provisions of the law, of the particular sections of the Criminal Code or other criminal statute that he violated. The sentence must be appropriate. Mercy has no role to play. Should we say to the offender take I month imprisonment instead of five years because you have cancer? No. At least I don't think so.⁸²³

Justice is the key word. For me justice is for the judge to be able to give a reasonable and equitable sentence to the offender that it will make him realise that the court took into account all the mitigating considerations, and the victim realise that he or she was in the mind of the judge during sentencing. Is a question of balance really and this applies to mercy.⁸²⁴

I cannot possibly think of mercy without having in mind injustice. My primary concern is the victim and not the offender. Of course, this does not mean that I dismiss it altogether. It will depend on the circumstances, such as the development of cancer after the offence or the deterioration of pre-existing cancer after the offence.⁸²⁵

These comments are in line with the observations presented in Chapter 6.1 regarding the interrelationship (or incompatibility) between justice and mercy, and the difficulty in finding a unifying stance on the definition of 'justice'. The judicial observations are also in accord with the remarks pertaining to the resultant multiplicity on the definition of justice, which encompass, inter alia,

⁸²²Judge 54.

⁸²³Judge 49.

⁸²⁴Judge 51.

⁸²⁵Judge 53.

considerations of retribution, rehabilitation, forgiveness, and victim-respect. The comments also indicate that some judges view justice as a boundary setting condition having associated it in a strict legalistic manner, with law in its pragmatic statutory sense rather than in a more abstract and normative level. The comments made by judge 53,⁸²⁶ regarding the connection between mercy and injustice as an initial attitudinal response, bring the issue squarely within the parameters of a similar observation put forward in Chapter 6.1.1, in relation to the antagonistic attitudes between the two.

Three judges indicated that mercy is the judicial means of correcting legal injustices:

*Mercy helps in alleviating or even curing wrongful legal decisions and their results of whatever form.*⁸²⁷

*Mercy balances any imbalance between law and justice.*⁸²⁸

*Judicial mercy contributes in minimising injustice and contributes in social stability, in appropriate cases.*⁸²⁹

These rather philosophical explications appear to convoke with the view that the of mercy, as correcting legal injustices arising out of both the written and customary law, has to be the essential ingredient to diagnosing what is wrong with any legal order.⁸³⁰ Thus, as these comments appear to imply, mercy is required if a judge is to avoid doing grave wrongs, with one academic even saying that only a merciful judge could achieve a truly just result.⁸³¹

⁸²⁶See (n 825).

⁸²⁷Judge 5.

⁸²⁸Judge 32.

⁸²⁹Judge 9.

⁸³⁰J Anderson, *Why Lawyers Derail Justice: Probing the Roots of Legal Injustices* (The Pennsylvania State University Press, University Park, Pennsylvania 1999) 188.

⁸³¹J Adler, 'Murphy and Mercy' (1990) 50 *Analysis* 262, 268.

9.2.2 Mercy and Individualised Sentencing

Six judges made the connection between mercy and individualised sentencing:

*Mercy is the end product of individualisation. If the circumstances of the offender are there it may be granted, but they have to be exceptional.*⁸³²

*It will depend on the crime to a large extent. I would be minded to be merciful so to speak to an offender who has committed a crime of moderate seriousness with no aggravating circumstances rather than the opposite. I would also take into consideration the type of the criminal behaviour, for example if he was tempted to commit the crime due to his personal circumstances, for example if he has any addictions without implying that addicts of any kind should receive special treatment in the courts of law.*⁸³³

*The personal and family circumstances of the offender are the most important aspect on the issue of mercy if and this is a very big if the circumstances of the offence are not aggravating and the offence is not very serious in its facts.*⁸³⁴

*There is no possibility in my mind that I would consider mercy as an alternative if the offender has not truly regretted what he did to the victim. Mercy is compassion among other things. How can you say to someone that I am merciful to you even if you are not sorry for what you did? A few times in the Supreme Court, we hear submissions of mercy. The first question I ask is whether the offender pleaded guilty and repented. If the answer is negative that is that's the end of the story for me.*⁸³⁵

*Mercy is related to many variables. One cannot be rigid and absolute. A reason for mercy is the weakness of the trial court's decision pertaining to the issue of guilt. Sometimes if we see that, the decision is wrong but there is no appeal against sentence we might interfere. It may sound radical or nonconformist but that is how it works. It is something that many of us judges do either up here or down at the district courts. There is nothing wrong with it provided that the action you take is for justice to prevail, always in accordance to legal principle.*⁸³⁶

For Cypriot judges therefore, mercy is also about respecting individual differences, in divergence with the wider utilitarianist perspective supporting that individualisation of punishment has no place in sentencing *unless* it serves the

⁸³²Judge 11.

⁸³³Judge 27.

⁸³⁴Judge 29.

⁸³⁵Judge 30.

⁸³⁶Judge 25.

greater good of the community; and that the right of punishment belongs to society at large, so even if the victim forgives the offender, the commitment to try and penalize persists. Nonetheless, despite the absence of moral justification on the part of the consequentialist school (unless of course one accepts Brien's metaethical theory approach mentioned in Chapter 6.3), Cypriot judges are very much eager to distinguish between more deserving and less deserving sentencing cases and circumstances, and evaluate the offender's motivations, and the strength of the enticements or temptations to which he was exposed. These judges view justice as requiring justified distribution according to offence deservedness, and equality of treatment upon equal desert. They say in fact that justice can be tempered by mercy but cannot be replaced by it.⁸³⁷ They associate the nature of the offence and its surrounding aggravating circumstances with the discretion to mercy in accordance to a certain perception of positive retributivism and the state's obligation to impose on the offender the deserved punishment, and only that. By so doing the judges appear to imply that justice (that is, in its non-disjunctive form) and mercy, inescapably turn into two mutually exclusive and contradictory concepts as justice means giving an offender the punishment he deserves, while mercy means giving him something lesser. Their criteria however for the justification of mercy appear to differ from those proposed, for example, by Von Hirsch and Ashworth (discussed in Chapter 6.4.2), in one important respect (though none of the judges referred to the said authors or appeared to have any knowledge of their theories and notional quests). They insist, contrary to the

⁸³⁷See, E Van den Haag, *Punishing Criminals: Concerning a Very Old and Painful Question* (Basic Books, New York 1975) 47.

position of the two authors, in the existence of a direct relation of the mitigating factors with the seriousness of the offences in terms of harm and culpability.

9.2.3 Mercy, Balancing and Discretion

Three judges discussed the balancing equation within the parameters of mercy, characterising the exercise as the quintessence of sentencing discretion:

*There are times where you know that the facts of a case are such that you must be as lenient as you possible can with the defendant. The circumstances of the offence, any serious health problems that the offender is facing or any other serious problems of his immediate family are important weighing factors. All these combined with a less serious offence can do the trick. Everything of course is relative. You do have the discretion to show mercy, give much less than he would normally get.*⁸³⁸

*Discretion equals mercy and mercy equals discretion. Discretion and mercy together equal justice, the justice of the courts.*⁸³⁹

*Mercy is part of sentencing, and to sentence you must balance everything before reaching your decision.*⁸⁴⁰

The approach mentioned by these judges is similar in essence to the comments made by the Supreme Court in *Georgiou*⁸⁴¹ to the effect that: ‘... mercy (is) that judicial power that enables the Court to adjust punishment to the human dimension and intrinsic complexion of a case’⁸⁴² but not, it seems, in an unstructured manner, by simply using compassion as a variable in a purely discretionary exercise.

⁸³⁸Judge 1

⁸³⁹Judge 42.

⁸⁴⁰Judge 4.

⁸⁴¹[1984] 2 CLR 65.

⁸⁴²[1984] 2 CLR 65, 97.

Two other comments, the only ones in this direction together with those of judge 53 above,⁸⁴³ raised the issue of the conflict between justice and mercy in a rather elaborative manner, and more forcefully than their brethren:

*The administering of mercy and the administration of justice are two different procedures. The first is capricious, the second orhological, although both could be wrong as a matter of law (the first for sure as it has nothing to do with the law), or fact. It all depends.*⁸⁴⁴

*To my mind one must not confuse mercy with justice and vice versa. Justice is your sentence based on the mitigating and aggravating factors. If you say after you do that, that 'I must however give him less because of this and this reason' that is doing something different from justice. The constitution provides for the right of the President of the Republic to pardon. He can pardon, not you. Otherwise there will be injustice.*⁸⁴⁵

The remarks of judge 47 (whose name interestingly enough, is not Jeffrie Murphy, and that much the researcher can divulge), fall evenly within the paradox of mercy on which the judge elaborated in Murphy's classical 'temperings are tamperings' approach referred to in Chapter 6.1.2. His comments show an acclamation of the paradox, in that mercy is or can be different or even antithetical to justice in punishment. Another judge elaborated in detail on the matter as follows:

Mercy is not only a matter of mitigating factors. It is also a matter of equality and justice. We all know that there are indeed some cases that stand out as potential candidates for mercy. However, say that defendant's child is ill with an incurable disease and needs his father 24-hour attendance in order to be emotionally capable to undergo treatment and because of this, you are minded to be merciful. What about his co-defendant who might say, 'Sorry for not having children so that they would become sick but I want the same treatment.' Alternatively, say that there is no co-defendant; but another defendant who is in the courtroom waiting for his sentence for a similar offence and more or less the same circumstances of offence, and he says also, 'I want the same treatment like the other one with the sick child, or the co-defendant of that guy with the sick child. I do have children but they are not sick, should I go to prison for more time because of that?' I know

⁸⁴³See (n 825).

⁸⁴⁴Judge 36.

⁸⁴⁵Judge 47.

that there are legal ways of differentiating the cases between them. We judges are very good in 'differentiating' and 'distinguishing' circumstances and case law when we want to support a decision we want to give just because that is how we want things to be done in that particular case unless of course the facts against such a decision are such that if you proceed with your intentions the decision will cry out loud 'I am a capricious decision.' I will say for example that the cases differ and that the defendant with the sick child can have mercy whereas the other defendant not because his circumstances are not the same and so on. I will also say that the defendant or co-defendant who does not have a sick child or children at all is not punished because of that but simply he cannot have mercy because he does not meet the criteria. However, is this fair? It might be justice for the defendant with the sick child but not for the others. On the other hand, if you were not merciful with the defendant with the sick kid, wouldn't that be unjust to him? I had a case like that once. I was merciful to the one with the sick child but not to the others. I have already told you my rationale. When I was having my dinner I was thinking about the case feeling worried that I was unjust to the other defendants but relieved that I was just about the defendant with the sick kid.⁸⁴⁶

These observations of judge 33 are indicative of a judicial recognition of the paradox of mercy. The judge appears to have considered it unjust not to be merciful. But as Murphy would argue, what business did he have ignoring his obligations to justice while pursuing some private, idiosyncratic, and not publicly accountable virtue of love or compassion to the defendant with the ill child?⁸⁴⁷ Assuming that Murphy's observations and epithets are accepted, then the judge's thoughts and dilemmas are indicative of the actual problems facing sentencing practice and its need for justification. Of course, one could instead agree with Card's position that the infliction of desert is a duty, and infrequently a mere right, in the sense of an institutionally recognised entitlement, and that mercy ought to be shown to an offender when it is obvious that, if not, he would be made to endure unusually more due to his atypical misfortunes.⁸⁴⁸ Nevertheless, the judge's statement portrays a qualification on the correctness of mercy's role in

⁸⁴⁶Judge 33.

⁸⁴⁷Murphy and Hampton, *Forgiveness and Mercy* (n 423) 167-168.

⁸⁴⁸Card, 'On Mercy' (n 442) 182.

sentencing. To this perception of things, one could maintain that the judge acted under a serious moral misconception in his insistence that justice (as he saw it) prevails. Doing justice however, is not always the definitive intention, and when justice and mercy conflict, justice, some say, should not always prevail, as the essential point of punishment is to communicate society's emphatic condemnation of criminal wrongdoing.⁸⁴⁹

There is additionally, one more aspect of judge's 33 comments that needs addressing. He said that when a judge makes up his mind about the sentence he would find a way to etiologise it irrespective of any other considerations, unless such a course would objectively be clearly whimsical. This brings to the surface other similar comments made by other judges, for example in Chapter 7.2.2 in relation to judicial illusionism. This approach is not necessarily deplorable, if the decision could be legalistically justified and the discretion be deemed as judiciously exercised, although issues of moral justification could arise irrespective of whether the said decision is or could be legally defensible. The concern is that a judge can decide the outcome of a sentence first, irrespective of merit, or on a lower key, after considering the merits, balance them in such a way as to guide them to the decision he had been aiming to in the first place. This, however, is fickle and it would still be so, even if the merits symptomatically coincided with the decision as first perceived by the judge. It would have been eclectic and morally indefensible. In the reality of things, and this is the bottom line of the matter, no one but the judge would ever know the niceties that took part in his nous in deciding the sentence, and this applies obviously to every judicial

⁸⁴⁹Tasioulas, 'Repentance and the Liberal State' (n 451) 499.

judgment, unless of course something said or implied in the dicta reveals the actuality of the reasoning. A reminder is due on this aspect on Michelin's argument on the necessity of reasons and the resulting moral obligation of judges to decide the issues before them based on the reasons they believe to be applicable to the case and not on their sheer disposition to act, as referred to in Chapter 6.4.3.

One judge commented on his mercying rationale as a purposive element of judicial discretion:

*In every case I can impose the sentence the law provides. I have the right even not to impose any sentence whatsoever. The law does not provide for minimum sentences. Therefore, I can select anything from one-day imprisonment to life or to whatever the maximum is and from one euro to the maximum if we are talking about a fine. So why are we talking about mercy? Mercy is something you do when you cannot do otherwise. Here you can you have the discretion. That is the essence of your power. You can select the sentence that you think appropriate on the circumstances and let the appeal court decide. This is another way of looking at mercy.*⁸⁵⁰

The part of the comment referring to mercy being '...something you do when you cannot do otherwise...' has some abstract resemblance of the proposition set in Chapter 6.1, that mercy concerns second chances when that appears impossible. As to the remaining part, the statement points to the coexistence of mercy and justice on the premise that justice is disjunctive, in that it specifies an array of deserved sentences, with a high and a low end with any imposed punishment falling below the maximum been allowable. Hence, the sentence by being encapsulated within this range of deserved punishments is both just and merciful. On this account mercy does not involve injustice. The judge's position also bears some resemblance to similar views held by Twambley,⁸⁵¹ Kathleen Dean

⁸⁵⁰Judge 8.

⁸⁵¹Twambley, 'Mercy and Forgiveness' (n 461) 85.

Moore,⁸⁵² Murphy and Harrison,⁸⁵³ Markel,⁸⁵⁴ and Hurd,⁸⁵⁵ regarding the asymmetry and incompatibility of justice and mercy, and the deterring role judges must play in prohibiting the mixture. The following statements by two other judges could also be analysed along the same lines:

*Judges must above all respect the victims of criminals not the criminals. This is justice.*⁸⁵⁶

*I do not feel that I could be so merciful and tell a killer or a robber, because you are sick I am not going to give you the sentence that fits your offence and your circumstances and I am going to give you far less. I see mercy as a mine bomb. A lot has to do with the type of the offence and the circumstances of the offence. If the offence is a very serious one involving for example the loss of life particularly after careful planning there is no way on this earth that I could be merciful to the offender even if he was dying the next day.*⁸⁵⁷

Another judge said (along Dolinko's line of thinking),⁸⁵⁸ that:

*If I decide in favour of mercy then that would mean imposing a sentence less than the most lenient sentence I could impose on the basis of the facts. This balancing is not at all easy. I only had to do it once in my fifteen years on the Bench.*⁸⁵⁹

This statement is also consistent, to some degree, with Smart's position that true mercy occurs when there is a deduction in the level of punishment to mitigate the suffering of an offender when he at the time of the commutation is a changed person comparatively with whom he was when he committed the offence.

Another judge (in addition to judge 33),⁸⁶⁰ said that mercy is a dangerous concept that can lead to conveying the wrong messages to the public:

⁸⁵²K D Moore, *Pardons* (n 462) 169-178.

⁸⁵³Murphy and Harrison, 'The Equality of Mercy' (n 464) 107.

⁸⁵⁴Markel, 'Against Mercy' (n 463) 1480.

⁸⁵⁵Hurd, 'The Morality of Mercy' (n 464) 389.

⁸⁵⁶Judge 10.

⁸⁵⁷Judge 43.

⁸⁵⁸Dolinko suggests that a judge exercises mercy when he imposes a sentence that is more lenient than normally expected in a case of the sort, but nonetheless just, based on the evaluation of a range of mitigating factors broader than what would be standard in sentencing an offender in a similar case for the same crime: Dolinko, 'Some Naïve Thoughts About Justice and Mercy' (n 432) 349, 354.

⁸⁵⁹Judge 6.

*One has to weigh things carefully. Mercy is a complex issue. It can be misinterpreted for favouritism and the like.*⁸⁶¹

Incidental to these comments, a reminder is due regarding what emanates from the discussion in Chapter 6, that mercy and mercying may not always promote or be seen to promote the demands of justice, by allowing tolerance, which (for some), neither corrects the offender nor restores the original condition that existed prior to the offence.

Another judge said:

*If you show mercy it means that there will be no deterrence in the punishment. A potential offender or any body else can say 'do the crime and then cry for mercy-and-you-will-get-it' situation, and I do not discuss whether in theory and all these mercy could be justified. I am just talking of the repercussions. The negative impacts on society might be more than the benefit to be conferred to the defendant.*⁸⁶²

This utilitarianist perspective is in conformity with that of Beccaria who thought punishment deters specifically and generally hence any decision not to effect the justified punishment is unjustifiable, and in that regard a penal system cannot tolerate exceptions. Benn built on this to elucidate the more general utilitarian perspective that to identify mercy as a general ground for waiving punishment would not involve an otherwise avoidable mischief to society greater than the mischief of punishing the offender.⁸⁶³ It was furthermore argued in Chapter 6, how a judge does not possess the moral agency of deciding on merciful grounds once deciding on the appropriate sentence following the proper balancing of the appropriate considerations. Provided of course, in all reality, that one is able to know for certain that the required balancing of the pertinent factors was not

⁸⁶⁰See (n 846).

⁸⁶¹Judge 13.

⁸⁶²Judge 2.

⁸⁶³Benn, 'An Approach to the Problems of Punishment' (n 469) 339.

tainted by elements of hidden and undisclosed mercy as implied by the position of judge 33, and his claim that he decides, in essence, differently to the reasoning he gives to support his decision.

A different judge thought:

*Mercy is a big thing. It is a dangerous concept. It is discretion to the fullest, so one must be very careful and extremely stingy in employing it. It is a big power than the judge has and must be careful in not popularising it. The circumstances of the offence and of the offender must be indeed exceptional. It is one thing to have discretion in choosing between two relatively similar sentences or even between dissimilar ones like imprisonment and a fine and another thing to say that although you deserve to go to jail for a long time you will not. It is not the offender I worry about really but the message you are communicating to the rest. Equal treatment plays its role. That is why discretion is so dangerous in such cases. The balancing is extremely fine, and the feeling, the realisation of that authority immense.*⁸⁶⁴

The above observations, in addition to bringing up once more the dangers of conveying to the public the wrong message as regards the utilisation of mercy in criminal sentencing, touches upon another feature of the debate on mercy theory and practice,⁸⁶⁵ that which correlates it to justice and connects it with the power of its administration. So, in essence, what the judge says is that, given his power to reduce the suffering of the offender whom he has at his mercy, his act is also a just one, and by analogy, a realisation of ‘... an awesome, and ultimate power over the lives of others.’⁸⁶⁶

Three judges discussed mercy with a definitional tenor by providing a merely descriptive elaboration of what mercy (or mercying) is in their opinion:

*Mercy begins where the law reaches its limits.*⁸⁶⁷

⁸⁶⁴Judge 48.

⁸⁶⁵ See, for example, the pertinent comments of Judge 33 (n 846) and Judge 13 (n 861).

⁸⁶⁶E (Pat) Brown and D Adler, *Public Justice, Private Mercy: A Governor's Education on Death Row* (Weidenfeld & Nicolson, New York 1989) 163.

⁸⁶⁷Judge 12.

*Mercy is a process whereby the judge acts beyond the law but within justice, if you know what I mean.*⁸⁶⁸

*When I impose a merciful sentence, I do so on the authority I have to expand the outer limits of the law.*⁸⁶⁹

These comments have their own importance for three reasons. Firstly, they are indicative of the judges' perception, that when they act mercifully, they do so in a structured and legitimised manner. Secondly, they bear a surprising relevance to similar remarks made by the House of Lords in *De Freitas v Benny*⁸⁷⁰ (the case was not explicitly mentioned by the judges, something which does not necessarily mean that they did not know about it, although that was the impression they conveyed), where Diplock, LJ, said that mercy is not the subject of legal rights, and that it begins where legal rights end.⁸⁷¹ Thirdly, they show that disagreement as to the classification and parameters of mercy exists not only in the field of academe but to judiciaries as prominent as the English, and less prominent as the Cypriot.

9.2.4 Mercy, Leniency and Equity

Contrary to certain remarks in the Supreme Court's case law, apocalyptic of an apparent phraseological confusion regarding the meaning of leniency and mercy,⁸⁷² the judges were clear in distinguishing mercying from the mere exercise

⁸⁶⁸Judge 34.

⁸⁶⁹Judge 35.

⁸⁷⁰[1976] AC 239, 274G.

⁸⁷¹Slynn, LJ, contradicted this dictum a few decades later in *Lewis v AG of Jamaica* [2001] 2 AC 50, 70A, where he said that: 'Although on the merits there is no legal right to mercy, there is not the clear-cut distinction as to procedural matters between mercy and legal rights which Lord Diplock's aphorism... might indicate.'

⁸⁷²For example, in *Kyprianou v The Republic* [1963] 2 CLR 78, 79, the Supreme Court referred to the defendant's mitigation speech as 'a strong plea for mercy,' clearly denoting leniency, and not an act of mercy in the sense of imposing a sentence below the minimum justified under the circumstances. Similarly, in *Pilatos v The Republic* [1988] 2 CLR 92, 94, the Supreme Court

of leniency. They essentially classify the latter along Walker's categorisation of leniency (that is as required by justice and therefore not amounting to mercy).⁸⁷³ They also differentiated between mercy, leniency, and equity, akin to Tudor's approach by describing mercy as abstaining from imposing the minimally just suffering as opposed to imposing that minimum possible sentence or a more severe one:⁸⁷⁴

*For me mercy and justice go together. Mercy is compassion. Is that extra step beyond leniency and sympathy for the offender, but his personal circumstances must be really and truly very, very exceptional. I exercise mercy only when the personal or family circumstances of the offender deserve such a course.*⁸⁷⁵

*Justice and forgiveness go hand in hand. Judges have the discretion to be merciful and forgive in the sense of imposing a sentence, which is much lower than the norm but this must be an exceptional course to take.*⁸⁷⁶

9.2.5. Mercy and Emotion

Two judges wedged into the discussion of mercy a relatively distinct parameter, which could be taken as having a wider applicability in the realm of judicial sentencing behaviour - that of emotion, and the impact which it could have in distorting judicial reason:

Showing mercy to an offender is not necessarily reproachable, I do know of course of our case law but let us forget that for a moment. The point is how would you know that the judge's decision to show mercy is indeed the result of proper balancing, that is, objective balancing, and purely subjective disguised as objective and based on the judge's emotion or even personal sympathy to the

clearly implying leniency rather than mercy as defined in its case-law, stressed with reference to narcotics, that '...courts should show no mercy to those who trade and supply our youth with such kind of disastrous materials.' Likewise in *Police v Ioannou* [1989] 2 CLR 61, 68, the Supreme Court noted (again obviously denoting leniency rather than mercy), that: 'anyone who takes a knife to another person in the course of a robbery would get no mercy, whether he was drunk at the time or not.'

⁸⁷³See (n 484).

⁸⁷⁴See (n 433).

⁸⁷⁵Judge 50.

⁸⁷⁶Judge 31.

*offender? I don't know the answer that is why I feel that one must be extremely careful with these concepts.*⁸⁷⁷

*The judge must have the power to be merciful, but caution is needed. Emotional reactions sometimes blur proper judgment.*⁸⁷⁸

What these judges have said is indeed sound and logical, showing that the judicial qualification over mercy may have nothing to do with strictly normative interpretations but with the realisation that, simply, the existence of operative emotions about litigants, and issues before them, is unacceptable and must be suppressed. Thus reflecting an untested (though judicially noted as the above comments designate), commonsense wisdom that emotion distorts judicial reasoning demanded by the judicial role. Contrary to this presumption, recent neuroscience research has demonstrated that emotion is likely to play a key facilitative role in legal decision-making via participation of the ventromedial cortex in particular areas of law where personal, social, and moral circumstances are considered areas that include criminal law and sentencing, in a manner securing objectivity and control.⁸⁷⁹ However, no matter how one views judicial decision-making on mercy or generally on sentencing, that is, through legal theory, neurobiology, or any other field or perspective for that matter (without implying that they be necessarily unconnected and incapable of synergistic overlapping), the fact remains that even if we show that it was rational for a judge to espouse a certain belief, the explanation of why he espoused it may always be independent of

⁸⁷⁷Judge 16.

⁸⁷⁸Judge 3.

⁸⁷⁹H Bennett and G A Broe, 'Judicial Decision-Making and Neurobiology: The Role of Emotion and the Ventromedial Cortex in Deliberation and Reasoning' (2010) 42(1) Aust J For Sci 11. See also by the same authors, 'Judicial Neurobiology, Markarian Synthesis and Emotion' (2007) 31 Crim L J 75.

that fact. And with reference to judicial hermeneutics,⁸⁸⁰ the attribution (to the degree possible) of logic and reason to judges who adopt and utilise the beliefs and concepts, form part of the attempt to describe and explain their decision-making processes.⁸⁸¹

If nothing else (as one more area of science is striving to go into the neurobiological, this time, depths of the judicial mind), this attempt, that is, to rationalize and explain judicial decision-making, is indicative of the importance placed by researchers from a variety of fields, on the judicial function. One could also stress in this regard the hyperbolic ascription of distinctiveness and inimitability in the judicial mental facilities, irrespective of course of how important the judicial role is, or is perceived to be, in the administration of justice.

9.2.6 The Just Sentence

One of the interview questions related to the definition of the *just sentence* (for which there was further analysis in Chapter 6.2.1). Only 4 judges gave a specific answer. The rest of those who expanded on the issue of mercy referred to the ‘substance’ of their argumentation on other issues concerning mercy, justice and sentencing as fully encompassing their views. From the answers they gave one deduces that for them, the justness of the sentence depends on the perception of the judge of what the right sentence is, according to the surrounding circumstances as he sees and interprets them:

⁸⁸⁰See (n 91).

⁸⁸¹M Hollis, ‘The limits of Irrationality’ in B R Wilson (ed), *Rationality* (Blackwell, Oxford 1970) 219.

*A just sentence is every sentence imposed by a judge after a procedurally and substantively correct and fair hearing. Unless and until that decision is reversed or altered on appeal it is the just sentence of the court.*⁸⁸²

*The just sentence is that imposed by the Supreme Court.*⁸⁸³

*A just sentence is every sentence reached by a judge after due consideration of all pertinent issues provided that all the actors of the sentencing process including of course the judge and the defence advocate, perform their function to the greatest possible extent.*⁸⁸⁴

*There is no such a thing. If somebody tells me what 'justice' is, I might be able to give a definition. I do not know what justice is. What I know is that my job is to administer the effective application of the law to the extent the constitution permits based on the law. If you want to call that justice, you can call it. There is no correct answer.*⁸⁸⁵

The first three comments attempt a procedural definition of justice, classifying as a just sentence every sentence a judge imposes after due and fair deliberation, with the sentences approved, altered or imposed by the Supreme Court considered to be *the* just sentence, imposed or approved by the highest judicial authority, along the lines of a similar proposition expressed by Kapardis.⁸⁸⁶ The fourth comment relates to an overall feeling during the interviews (not only in the subject of mercy) that the judges when asked to give definitions on abstract concepts or discuss issues at a normative level, they would in truth react dismissively rather than constructively.

9.3 Conclusions

The chapter examined the way Cypriot judges mercy in Cyprus. There was a presentation and analysis of the pertinent case law and an analysis of the judges'

⁸⁸²Judge 28.

⁸⁸³Judge 14.

⁸⁸⁴Judge 7.

⁸⁸⁵Judge 52.

⁸⁸⁶Kapardis, *Psychology and Law* (n 437) 178.

comments on a variety of related issues ranging from the way they see mercy and mercying as a practical tool in effecting justice, to their views on the justification of the practice and the definition of justice, and its relation to mercy and mercying. Although most judges from those who commented on the matter were far more philosophical in their approaches, compared to other aspects of the interview thematology, the inference is that most of them act according to their own perceptions in an inconsistent and unjustified manner, even, against the ratio of related decisions of the Supreme Court. No judge referred to these decisions during the interviews. This is a matter of some concern. One would have reasonably expected that in a subject so rare in actual practice, these very few judgments of the Supreme Court, or at least the most important ones, would have been known or be cited by the judges. Unless of course this rarity constitutes the explanation per se in that as a result the said case law might not have been in their knowledge or that it simply slipped their mind. Unless again, it did not, and was simply not uttered because that would have been thought to be unnecessary.

The analysis also indicated that there are variations between judges as to the role of mercy in criminal sentencing and its relation to justice and mercying, as a practical tool of discretion in their punishtecture functions.

The next and last chapter summarises and concludes on the issues covered previously in the thesis.

CHAPTER 10: SUMMARY AND CONCLUSIONS

The thesis set out to unveil how judges decide sentences in Cyprus, and how they employ mercy to contour their sentencing judgments as well as determine, in parallel, whether these judgments are reached within or on the basis of a consistent legitimising framework founded in or derived from moral legal theory. In full awareness that no study can ask all the questions and provide all the answers, the thesis endeavoured to portray and describe the Cypriot judges' views on sentencing and the relationship between those views and their actual conduct, in terms of the convergence of two sets of influence on practice. The first of these was labelled as the architecture of sentencing (or *punishtecture*), that is, the judges' manner of reaching, formulating, and justifying their sentencing decisions in substance and in form. The second, *mercying*, was considered as that aspect of *punishtecture* that frames real decisions in certain kinds of hard cases, concerning their considerations and ponderings in deciding to utilise and exercise mercy in determining the punishment of a defendant at the sentencing stage, for the crime he has committed. On this ground, that the practice of *mercying* arises within and is constrained by the *punishtecture* framework that encloses it, the thesis examined the judges' views on the nature of the sentencing process, and the conceptions, design, structuring, and utterance of their resultant judgments within the Cypriot criminal justice context. It presented what they have said about the choice of punishment and mercy, and attempted to reconstruct what they may be taken to have meant by saying it. With these concepts in mind, and viewing *punishtecture* as a construct formed from a structured process of thought combining the application of law and legal sentencing principles on the one hand and the Cypriot

cultural realities as perceived by the judges on the other hand, the study reflected upon a number of aspects of the judges' orientations towards passing sentence. These included the general justifying aims and purposes in sentencing, the constraints under which they operate, the way they make their penal selections and the use (or dismissal) of mercy as an etiological foundation (express, implied, disguised, or hidden) of sentencing rationales and mercying.

It was beyond the purposes of the study to pursue, in addition, a prescriptive analysis of how Cypriot judges should or ought to optimally punish and mercy according to some equivalent normative theory, at least in depth. Such a mission though could perhaps form the subject matter of future doctoral or postdoctoral research that could conceivably be developed from the present work.

The approach utilised for the purposes of the study was primarily descriptive and qualitative but at the same time inexorably permeated with prescriptive and quantitative elements due to the nature and scopes of the project. On this prospect, the thesis examined the extent to which perspectives derived from moral legal theory made sense for the Cypriot criminal judges and the degree to which abstract theoretical concepts formed in reality part of their punishment and mercying rationale. On this basis, one could ponder at a more speculative and normative level at this conclusory stage on the wider ramifications and implications certain issues and findings could have for the future. Whether acknowledged or not, theory forms part of any practice. Practice is not the offspring of parthenogenesis. To paraphrase French philosopher Antonin Sertillanges, we never think entirely alone; we think in company, in a vast collaboration; we work with the workers of the past and of the present. In the

whole intellectual world each one finds in those about him the initiation, help, verification, information, encouragement, that he needs,⁸⁸⁷ like for example from the wisdom of writers of law and penology in order to give essence and purpose to the practice, and position it in the wider picture of justice and fairness. In essence, then, the study dealt with the association between the theoretical justifications and goals of legal punishment, by trying to exhibit (through an immanent critique perspective) the significance of such justifications for the actual practice of punishment and mercy in Cyprus and their correlation to justice. The theoretical perspectives employed were tactically narrowed down to those of retributivism, utilitarianism, and hybridism, as these were thought to be, and rightly so in the end, of significance and bearing to the chosen venture.

It was discussed with reference to earlier (and scarce) research on judicial sentencing decision-making in other continental and common law jurisdictions, that such efforts are usually met with deep admonition on the part of the judiciary. As demonstrated in the thesis, to this state of affairs Cyprus forms no exception. On this actuality, the intention was to show that the thesis possessed a degree of uniqueness by proving that it diverged to an appreciable extent from earlier similar projects as it dealt with an academically virgin ground such as that of the Cypriot sentencing reality, and investigated the role of mercy in Cypriot punishment practice based on significant and novel information obtained from the judges.

The research showed that the Cypriot criminal sentencing system, as historically originated and developed, is not as nonconforming or atypical so as to

⁸⁸⁷M Ryan (tr), A D Sertillanges, *The Intellectual Life: Its Spirits, Conditions and Methods* (Mercier Press, Dublin 1978) 145.

be considered unique and thus unfit to become the midpoint of research work on sentencing like the one at hand, and thus contributing to the better understanding of judicial sentencing and mercying thinking process from a wider and more encompassing spectrum, beyond territorial confines.

It was also established that although Cyprus has never been a noteworthy participant (at least quantitatively) in the international discussion on punishment justification and practice (most certainly not at the judicial level), the insights offered in the present study could not be easily ignored or cancelled as a result. On the contrary, they could add to the better understanding of the centrality of sentencing judges' decision-making processes, with potentially international ramifications. As discussed in the thesis, Cyprus, like many other international jurisdictions, has proven unable to formulate and establish a consensus on a single punishment theory or on a set of sentencing rationales so as to make sentencing more coherent and rational, if nothing more, in the eyes of the academe. A reason for this, as the study has shown, has been the fact that the judges (or at least most of them) do not appreciate or do not appear to appreciate the theoretical dimensions of the penological debate and its impact (or the absence of it) in sentencing practice.

The attainment of the thesis's objectives was pursued on the basis of first-hand information obtained from a series of one-to-one semi-structured interviews contacted through the use of open questions with the majority of the Cypriot criminal judges. The primary undertaking of this was to attempt the recovery of a very precise context of presuppositions and other beliefs for use as background for exhibiting the respective comments as rational for those particular judges, in

circumstances held to be true. No feature of their comments was dismissed as irrelevant or trivial as such a course could have proven detrimental to the understandings pursued. The comments were presented in the thesis verbatim in an effort to retain their originality and candour, and in this sense it was probably successful. Not all judges expressed an opinion or commented on every aspect of the questionnaire. Naturally, some of them were more talkative and bold in their opinions than others while a few were particularly cautious in what they divulged about their behind-the-scenes judicial sentencing deliberations. All comments were assessed both individually and synergistically in a way roughly analogous to testimonial and evidential evaluation for extracting findings pertinent to the issues under consideration, having of course constantly in mind the research objectives and its non judicial nature. On this premise, all interview comments or any part of them on any aspect considered directly or indirectly relevant to the issues at hand, were deemed to offer adequate and reliable foundation for reaching a more general corresponding finding, being treated as a form of a quasi judicial ratio decidendi on the aspect dealt with.

The aims and purposes of sentencing was a theme on which the judges had strong views, yet a lot of their observations appeared to be individual opinions and were not automatically linked to the sentencing aims and purposes as set out in the case law of the Supreme Court, or the abounding criminological and other pertinent literature, a small fraction of which was dealt with in the dissertation. It was not an objective of the research to test the judges' criminological or other theoretical knowledge. It was not easy to know if the judges had any genuine and thorough acquaintance with the criminological literature, as such knowledge was

only apparent from the observations of a small number of them. The general feeling, however, has been that the overwhelming majority of judges were not criminologically conversant, and they almost never elevated any part of their discussion to a theoretical dimension. In referring to concepts such as *justice, law, punishment, mercy, retribution, deterrence, denunciation, incapacitation, social protection*, and so on, the judges simply projected their own ideas and understandings as to their meaning, without referring to any scholarly sources or reflections.

At a basic level, the judges' views on the espousal of the sentencing aims and purposes could be said to have been eclectic and assorted in an unprincipled manner, with by and large, utilitarian tendencies.

Deterrence would appear to be the one most regularly used in practice, if the interviews in this study could be relied upon to provide an indication of popularity in Cypriot sentencing practice, together with the supporting data derived from the analysis of the Supreme Court case law. This inference is in harmony with the finding in that chapter, that between 1960-2008, the Supreme Court referred to deterrence (of all forms) as a purpose in sentencing in 27.9% of the overall number of appeals against sentence. In a number of cases where the judges listed instances in which they had considered general deterrence as suitable, it seemed that what they were in fact referring to was just deserts (without appearing to be realising it, at least expressly). The lack of publicity in many cases was thought to be a chief reason for hindering general deterrence. Many of the judges disagreed with deterrence as a sentencing aim, especially general deterrence; yet oddly enough they gave examples of cases where they considered

deterrence as appropriate. The reason for this inconsistency cannot be determined from the information collected. Public expectations, common practice, and Supreme Court statements are probable causes. There are also indications that the use of deterrence by the judges may have reflected the utilisation of retributive goals in the guise of deterrence. Few conclusions beyond such speculation could be drawn. However, the judges' personal distaste for deterrence in their comments, and to a lesser extent retribution, was one of the most unexpected findings of this study, as it appears to contradict pertinent case law of the Supreme Court, to which the judges expressed general adherence.

Rehabilitation was a popular sentencing purpose among the judges, mainly for young offenders for whom there was anticipation of salvation. This aim was referred to by the Supreme Court in 4.76% of the overall number of appeals against sentence decided in the aforementioned period. Imprisonment was not generally seen as a rehabilitative sentence, with uncertainty being articulated by some judges as to the usefulness of programmes offered within the corrective services system.

Incapacitation and social protection were seen as an essential purpose of the sentencing course for use in restricted circumstances, although the Supreme Court had referred to the former in 1.51% of the overall number of appeals against sentence decided, whereas the latter was extensively adopted in 19.9% of the overall number of appeals.

Retribution did not find particular support with the judges. This accords with the frequency with which the Supreme Court referred to this sentencing aim, that is, in 3.83% of the overall number of appeals against sentence decided

between 1960-2008. While many of the judges said they felt the burden of retributive pressure from the politicians and the community, still their judicial independence and sense of responsibility allowed them, as they claimed, to sentence in a way that they saw fit.

Denunciation was generally perceived as a useful sentencing purpose. Some judges though, thought that it was meaningless despite its recognition by the Supreme Court in 5.69% of the overall number of appeals against sentence decided during the aforementioned period. Links with other purposes, mainly retribution, were also noted. An important conclusion derived from all these is that there is a notable divergence between the diachronic stance of the Supreme Court on what it considers to be the recognised punishment aims in Cyprus, and that of individual judges. This unexpected discovery of judicial insubordination within the ranks of the Cypriot judiciary is alarming as it could potentially cause inconsistencies in treatment and disparities in sentencing, as well as reel the credibility of the system of administration of justice in the eyes of the public, something that could potentially form the basis for future research. Furthermore, the continued reliance by judges in their sentencing decisions on deterrence and rehabilitation appears to endorse the view that sentencing has a determinant role to play in crime prevention. This could produce a boomerang effect. If Cypriot judges were to continue emphasising purposes such as deterrence and rehabilitation in their sentences, that could encourage belief on the part of the public that sentencing has a major role to play in crime prevention, and therefore harsher sentences would be called for in order to prevent crime. If the sentence fails to deter or rehabilitate, as will often be the case, it is easy for the public and politicians to lose faith in the

system. This may be an inevitable outcome in a system where there is little understanding of what actually occurs in the courtroom. If, however, there were less emphasis placed by sentencing judges on deterrence and rehabilitation, and more placed on communication of the limits and purpose of sentencing, which could at least have the potential of assisting the public to understand what the sentencing system is hoping to achieve.

The study has discussed to some extent the impact of the media in sentencing. The judges were cautious of this involvement, but not dismissive. Some judges saw a positive role for the media in sentencing as a means by which critical information could be circulated to the public, and a way in which the people could be better informed about the sentencing process.

The study has additionally demonstrated that if the criminological literature on theories of punishment and mercy were to have a constructive influence on the judicial system, and as a result on the judges' punishment and mercy, it is important that they be informed on how these theories are being utilised by sentencers and the reverse. If, for example, studies show that deterrence is only effective in certain limited circumstances, then continued enthusiastic use of deterrence by sentencers is almost pointless. It is likewise important that sentencers be more aware of developments and trends in sentencing theory. The judges in this study appeared to almost unanimously disapprove of retribution, but yet the said aim is still one of the most enduring themes in the sentencing literature. This of course cannot lead to conclusive inferences; nonetheless the point is there to be made. Similarly, the study showed that despite the decline in popularity of rehabilitation since the 1970s, this has apparently gone largely

unnoticed by the Cypriot judiciary. It is probably for all these reasons that perhaps not unpredictably, some judges discussed the desire for training or further training in criminology and related fields.

Another finding of the study is that for Cypriot judges, sentencing is, in essence, a balancing exercise between various duly scaled judicial factors within a system of competing interests, with such balancing constituting a central element in the exercise of their cherished sentencing discretion.

The judges viewed sentencing as a rational process, though at times, of a particularly hard and tense nature. According to some of the judges, sentencing is not only a hectic but also a disturbing undertaking, while for others nothing more than a necessary and rather uncomplicated routine function. From all of the tasks of judging, imprisonment emerged as the one to which the judges were most likely to show their humane self, as sending a person to jail was seen widely as a complex and daunting task, except in those very rare cases where the particularly serious nature and extent of the criminal behaviour superseded any such feelings.

The study has also demonstrated that judges occupy a central and powerful role in the sentencing process. They consider each sentencing case as distinct, and all sentencing aims relevant, using their personal experience on the bench and applying them to the particular facts of the case, by employing their intuition and common sense, without as a rule, ever having a feedback from their previous sentences on offenders. Rather than looking for more direction on the employ of the sentencing purposes by perhaps specifying a superseding aim or seeking additional direction as to the use of these purposes, the judges appear to be approving of less regulation instead of considering the issue as mostly entwined

with the 'hands off' issue of judicial discretion. They also appear not to feel controlled by notional incompatibilities and confines, and not to have a stable approach, or method in dealing and expressing their views on the justification and goals of punishment in their sentencing practice, let alone share a common idea in relation to these goals. This has been an essential part of judicial punishment and mercy as presented in the thesis. Instead, the judges considered specific qualities of the offence and the offender as actually more probable determinants of the worth to be attached to precise objectives and justifications of punishment in every case, hence demonstrating a prominent desire to individualise sentences by fitting them into the distinctive aspects and conditions of specific cases and individual offenders. Associated to this conclusion is also another resulting finding to the effect that preferences for goals of punishment are in any event not especially germane for choosing a particular sanction, nor are sentencing decisions consistently rationalised by goals of punishment.

The thesis shows in addition that Cypriot judges have, in general, a fear of being reversed by the Supreme Court in their sentencing judgments, with that fear constituting probably the most effective internal constraint on their discretionary sentencing powers. It has also been demonstrated that Cypriot judges are deeply concerned with the manner in which the inefficiency of the practice affects their judicial image, and restrains their ability to effect and administer penal justice properly and suitably on the basis of their standards and their conception of equality and fairness. Evidence of this is the particular antipathy of the judges to insincere apologies in mitigation and the weighing of pseudo-remorse and repentance as mitigating factors; their great concern on the negative impact of

sentencing delay on the credibility of the judicial system and the execution of judicial duty; their considerable pressure in trying to perform effectively under their mounting workloads which give them no time for reflection and in depth legal analyses, and perhaps normative expeditions in the fields of moral/penal theory; and their respect for the critical role of defence advocates in the sentencing process in moulding judicial sentencing discretion. However, it was also stressed by the judges, that the incompetency of some of these advocates has a negative impact, not only on the defendants, but also on the criminal justice system in general.

The judges likewise saw the giving of detailed and comprehensive reasoning for their sentencing and mercying decisions as imperative. However, the research has also found that there has been discord between what some judges genuinely and legally thought about a case and how they would deliberately decide differently in the end. This judicial illusionism (as called and explained) cannot but become the cause of trepidation to the reasonable observer as regards the politesse and guilelessness of the Cypriot judicial system in general.⁸⁸⁸ One should not, however, easily become a callous critic. And that because the moral and justificatory prism through which positive observers and faultfinders alike (usually academics and politicians) normally judge judges' judging on sentencing and mercying, is in itself in (great) need of both consistency and justification. In fact, theorists themselves have not hitherto been able to reach equilibrium let alone a

⁸⁸⁸Generalisations are of course, usually dangerous (Alexander Dumas thought that they always are): See, E Knowles (ed), *The Oxford Dictionary of Quotations* (OUP, New York 2009) 299. On the other hand, Hegel observed, that a generalization is a property of thinking and therefore to generalize means to think: See, C Dingle, *Memorable Quotations: Philosophers of Western Civilisation* (IUniverse, Nevada 2000) 96.

resolution, on how and why judges think and act as they do. Surely though, the academics' and politicians' idiosyncrasy (as that of judges) plays its own role in the formation and expression of critique (of whatever nature) towards judges. Truly then, everything is relative when it has to do with human judgment.⁸⁸⁹

The assessment of mercy and its relationship with punishment, sentencing, and justice, has illustrated that there are differences among approaches to mercy and their justification among retributivism and utilitarianism. It also signified that there are variations between conceptions of mercy that deny it any peculiarity in relation to justice affirming that it is just a form of sensibility to criteria of justice, that there are theories of mercy that see it as refusing to apply principles of justice, and theories of justice that operate a division of labour between them in which justice gives general limits for the decision, but mercy allows the judge to navigate on the area of discretion. It also explained that, at least on a theoretical level, within a system of conflicting values and justifications like the Cypriot one, mercying plays a legitimate role in criminal sentencing. This role takes part both within the parameters of traditional penal theory, and independently of it, as a self-determining axiom accountable only to justice, and as a purposive ingredient of judicial discretion in the determination of sentence and hence a component element of justice.

There was a critical hypothesis made for the purposes of the study in that the sheer existence of the practice does not without more entail that it is or can be consistently justified in its particular form. The practice of punishment, it was

⁸⁸⁹T. Mussweiler, "“Everything is Relative”: Comparison Processes in Social Judgment" (2003) 33 *Eur J Soc Psychol* 719, 720.

argued, is a morally problematic practice and hence in need of a consistent (moral) justification because it involves actions that would be considered wrong and evil in other contexts. On this premise, the study went looking for an obvious and dependable connection between justifications and goals of punishment derived from moral theory on the one hand and the practice of punishment on the other within the boundaries of a more general attempt to determine the moral legitimisation of the sentencing decisions of the Cypriot judges. Such a link could not be established. What was established is that judicial sentencing decision - making (with or without the implementation of mercy) cannot and should not be reached in a moral limbo, and that Cypriot criminal judges need not and do not on the whole reach judgments concerning the moral value and justifiability of punishment as a prerequisite of effectively and legitimately performing their sentencing and mercying functions. Conceivably, there are other mechanisms or processes separate from those emanating from moral legal perspectives that may offer adequate justification and direction for judicial punishment and mercying. From the viewpoint adopted in this study, however, it seems secure to conclude that there is no consistent legitimising and guiding moral framework underlying the existing practice of punishment and mercying in Cyprus on the premises covered by the research. This may be attributed to a number of causes. One argument may be that the theories of retributivism and utilitarianism are inherently gauche for practical purposes and thus unable to offer a clear and practically relevant legitimising and guiding framework for the contemporary practice of punishment, therefore retaining the gap between punishment theories, sentencing and mercying. As it has been argued, hybrid theories (to which none of the Cypriot

judges expressly referred to during the interviews) could not offer a feasible option as they typically camouflage eclecticism in sentencing practice. Another argument could be that sentencing is not a morally problematic practice but rather a practice in which a sound vision on the moral foundations of punishment and the goals at sentencing are not present. Finally, and on a more radical tone, one could also argue that morality does not constitute an important and distinctive domain with a distinctive set of overriding norms or a privileged mode of reasoning, and that morality is in any event everywhere and nowhere in particular.⁸⁹⁰ Again, the final stance depends on the angle of observation, having always in mind Bertrand Russell's cautions on the value of such philosophical endeavours to the effect that philosophy is to be studied, not for the sake of any definite answers to its questions, since no definite answers can as a rule, be known to be true, but rather for the sake of the questions themselves; because these questions enlarge our conception of what is possible, enrich our intellectual imagination and diminish the dogmatic assurance which closes the mind against speculation.⁸⁹¹

While individual judges may have their own distinctive models of the relationship between goals of punishment and specific sanctions, such a relationship is hard to discern at the aggregate level. These arguments are not mutually exclusive but in either way there still subsists apparently a tenuous tie between moral theory and sentencing, and obviously punishment. Therefore, a commonly shared vision of the justification and goals of punishment between

⁸⁹⁰A Rorty, 'Questioning Moral Theories' (2010) 85 *Philosophy* 29.

⁸⁹¹B Russell, *The Problems of Philosophy* (Lulu Enterprises, North Carolina 1912) 131.

judges and theorists could be aimed at, provided the two are eager to understand each other's perceptions and responsibilities.

The study will hopefully assist in enhancing the understanding of judicial thinking relating to the sentencing decision and the rational mechanics surrounding it, giving at the same time the opportunity to the Cypriot judiciary in particular to have their views heard in an otherwise conservative and slothful surrounding (as opposed to most of its judges), and to gain greater understanding of their role in the process.

Although it is not the purpose of this thesis to make recommendations for change, a number of findings have emerged from the analysis, and it is useful to note these so as to inform further debate on sentencing practices, and in particular highlight the interplay between theory, law, and practice. Some of these matters are issues for legislative change, and others for judicial consideration, either formally or informally:

- The establishment of a Judicial Studies Board for the education and research in sentencing matters. This would be of notable assistance to the judges, to the development of policy (both legislative and otherwise), and to sentencing researchers and commentators. It would also generally enhance the standing of the courts, by allowing the judges to perhaps having to deal with decreased workloads, and as a result have some more time to reflect and probe on issues of sentencing theory and practice.
- Legislative codification in a clear and unambiguous way of sentencing aims and purposes, principles, and dispositions to be followed without hindering in

any way judicial discretion in accordance to the prevailing societal circumstances and needs.

- While the thesis argues that judicial discretion should remain in the hands of the judges, sufficient issues in relation to fairness and consistency arise with such a system that call for further internal structuring of judicial discretion. The Supreme Court should give serious consideration to the introduction of sentencing guideline judgments. This, by presumption, would give important and appropriate guidance to the sentencing judges, and allow greater flexibility in sentencing within the guidelines introduced. These guidelines should be comprehensive, although not binding in the formal sense, so that they would not hinder judicial discretion.
- Realisation on the part of the Supreme Court that its function on sentencing appeals should strictly and honestly be confined to the provisions of Criminal Procedure Law, Cap. 155, and not to the substitution of the trial sentence on the premise of pure disagreement with it under the pretext of manifest excessiveness or inadequacy. This would assist in the quest of attaining (to the degree possible and desirable) greater consistency in sentencing.
- Initial and continuing education of judges in sentencing, or follow-ups in sentencing theory, policy, and practices in Cyprus and other jurisdictions.
- Awareness on the part of sentencing scholars of the issues in the practice of sentencing, so that this, in turn, could inform sentencing research.
- Education of the media in the field of procedural and substantive sentencing issues. This could assist journalists in bettering their understanding of sentences and their rationales, and hitherto being able to convey them to the

public accurately and appropriately, and even criticise these sentences constructively in a more convincing and momentous manner.

- Involvement of the University of Cyprus Law School and the rest of private law schools in Cyprus in a constructive debate and criticism of sentencing judicial policy and decision-making. This approach, virtually absent today from Cypriot reality, would assist in the exchange of ideas and establish a channel of communication between the academe and the judiciary, and create an additional constrain on capriciously exercised sentencing discretion.
- Establishment of procedural and substantive mechanisms for the blunting of case workloads and the giving of more time to judges to reflect on various sentencing issues, their sentences, and their role within the criminal justice system in general.

At long last, the epilogue; the Cypriot judges play a fundamental role in the country's criminal justice system with all of its conflicting values and rationalisations. It is for this reason that the legitimacy of their decisions is crucial, and not because their robes convert them into some kind of divine and enlightened androids but precisely because their robes empower them with divine powers and responsibilities, though human. The manner in which Cypriot judges see the sentencing process and their accountability within that perspective is connected to their consequential conduct inside the system of punishment practice, and the way they apply their punishtecture and mercying in designing and schematising what they deem as the right and proper sentence in each case. Cypriot judges (as the writer livingly proves) are not giants of intellect, prophets, oracles, or mouthpieces, nor are they appointed for their competence as moral philosophers or

social commentators. In fact, like Lord Chancellor Eldon once said referring to the English judges (with applicability to the Cypriot judges as proved by the present study) they take as much interest in ‘abstract metaphysical calculations’ as does ‘the ox that stands staring at the corner of the street.’⁸⁹² They are instead all-too-human employees, responding as other employees do, to the conditions of the labour market in which they labour. They are not pure formalists, legalists, pragmatists and the like. They are, merely judges, free from inelastic denominations and categorisations, knowing too well evidently, in accord to their English counterparts, that law is too serious a matter to be left exclusively to them.⁸⁹³ Judges want to regard themselves and be regarded by others, especially by their peers and advocates, as good judges, and to achieve that, they feel they must conform to the accepted norms of judging. They know that one cannot be considered as a good judge if he takes bribes, decides cases by flipping a coin, falls asleep in the courtroom, ignores legal doctrine, cannot make up his mind, bases decisions on the personal attractiveness or unattractiveness of the litigants or their lawyers, or decides cases on the basis of ‘politics’ (still, though, some Cypriot judges apparently subscribe to judicial illusionism). They modestly derive satisfaction from being judges and in a position to influence over the development of law with the ambition of a better and fairer society. They exercise discretion, which they cherish as the most important power they have in their mission to administer justice and punish justly and mercifully, rarely acknowledging the risks of extraneous influences that escort formless or poorly monitored discretion. They

⁸⁹²W Hazlitt, *The Spirit of the Age* (OUP, Oxford 1970) 242.

⁸⁹³*Miliangos v George Frank Textiles Ltd* [1976] AC 443,481.

usually look outside conventional texts for guidance in deciding difficult sentencing decisions without accepting law as an autonomous domain of knowledge and technique, trying hard not to become prisoners of their experiences. They are flexible and adaptive to the sentencing needs of the society in which they live and function as citizens and judges. They act occasionally on constructive and self-regulated intuition based on their feedback on legal principle. A few (very few) wish to keep in close rapport with punishment theory so that they are reminded of the dangers of unreflective and mechanised sentencing. Most do not. Instead they are possessed by a profound antipathy towards legal academics and theorists, considering them as incapable if not incompetent to capturing the essence of the real problems scourging the sentencing practice, and offer feasible and down to earth solutions, being at the same time virtually oblivious of the wealth and depth of the academic literature on punishment and mercy theory, and indeed one of the reasons for the surfeit of footnote references in the thesis to legal and academic literature aimed exactly towards highlighting the disparity between the judicial and academic cosmos.

Cypriot judges should be seen and evaluated within the context of a process in which many others participate (such as the prosecution, defence advocates, and the police as the investigative authority), and whose decisions may predetermine to a very large extent the nature and extent of their own judicial decisions and actions. They strive for the best knowing full well that they are not and cannot be a panacea for any of the pragmatic or normative problems that scourge the practice of legal punishment and society at large, no matter how small, large or influential that society might be. They are merely the persons chosen to

perform a particular social duty, and there is no awe about that but simply perhaps a touch of old fashioned idealism or romanticism depending on the perception of each and every one of us.⁸⁹⁴

The punishment and mercy of the Cypriot judges exemplifies the ways in which they act or not within the island's criminal justice system, in pursuit of the elusive ends of justice and fairness. Their punishment and mercy embodies an overall systemic mechanism, but also an attitude, a social and philosophical stance, a state of mind as to how they perceive their role and duty within the parameters in which they have to operate. Though possibly prosaic, this is the modest, and one can only hope at least partially new, original and significant contribution of the present dissertation to the advancement of legal knowledge in the field of judicial sentencing decision-making; and the way criminal judges, sentence and mercy in the small and obscure Republic of Cyprus, for whatever that may be worth.

⁸⁹⁴Or even, on a more cynical diathesis, on an equally old fashioned financial cost-benefit approach given the financial struggles that blight many of the advocates interested for appointment to the bench.

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