Singapore Journal of Legal Studies
[2009] 25–51

PUBLIC INTEREST IN SENTENCING: DETERRENCE OR DESERT OR ANYTHING ELSE?

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The notion of public interest in sentencing conjures up images of utilitarian consequentialism and the emergence in Singapore of a role for public interests analysis in sentencing may create a superficial impression of judicial hardening and the beginnings of a new and repressive law and order ideology. This article demonstrates that the impression is not only superficial but also false. Its central argument is that public interests analysis is or has the potential to contribute clarity and add value to desert-based sentencing and that taken together with judicial benchmarking, which it complements, reflects a model of desert, which is neither deontological nor empirical. Nevertheless, the resultant model is not necessarily inferior to either.

I. THE PROBLEM

Sentencing an offender involves challenging responsibilities. The sentencer has to have an eye on sentencing aims, punishability limits, the harmful effects of the offence, the personal culpability of the offender, the concrete social conditions in which the offence was committed, and the social conditions in which possible sentences will operate. In addition, with the emergence in Singapore of a role for public interest in sentencing, at about the turn of the last century, he has to have regard to the public interest, whatever that may mean. To appreciate and evaluate the relevance of public interest in sentencing, this article proposes to trace and locate the development of such a role in Singapore, perspectively with shifts in sentencing theories and policy which have occurred elsewhere in major common law jurisdictions[1] as foreground. A comparative framework is first outlined and important ideas of desert-based sentencing are critically examined before the role of public interests analysis is evaluated. The central argument is that the recent focus on public interest in sentencing is not saying the obvious that every sentence must be in the public interest in the sense that it must have reference to established sentencing aims. Nor does it signal a hardening of sentencing policy or the onset of a new law and order ideology, at once repressive and right-wing. Rather, it is or has the potential to be a unique contribution to desert-based sentencing by providing a gauge of ordinal and cardinal proportionality. However, the potential that the role which public interest has in achieving more faithful and defensible desert-based sentencing is not to be taken for

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1 For a recent example, see Warren Young & Claire Browning, "New Zealand's Sentencing Council" [2008] Crim. L.R. 287.

granted but requires careful harnessing. Its correct appreciation will complement the promulgation of judicial benchmarks in promoting consistency and avoiding undue disparity in sentencing, and allow the courts to apply a communitarian desert-based model, with the public interest feature as a distinctive contribution.

A. *The Changing Backdrop in Common Law Sentencing*

For the purposes of establishing a comparative framework, a time frame is necessary and the year of the decision in *R v. Sargeant*[2] is selected as a start date since it famously relates that there are four (classical) sentencing goals or aims: retribution, deterrence, prevention and rehabilitation.[3] It also unforgettably puts deterrence in correct perspective, reminding us not to exaggerate its significance and limiting its efficacy to crimes committed with pre-meditation and involving deliberate conduct. On either score, it has been much cited but perhaps, the most significant contribution it then made, for which it has been less relied on, was to stress that no aim invariably predominates: hence the prescription that the sentencer ought always to have the four classical principles in mind and apply them to the facts of the case to see which of them has the greatest importance in the case. This 'eclectic' sentencing philosophy or counsel informs much of English sentencing in the 1970s and early 1980s before criticisms came thick and fast about its tendency, as Ashworth puts it, to produce anarchic sentencing. In his words, "[f]reedom to select among the various rationales is a freedom to determine policy … a licence to judges to pursue their own penal philosophies".[4] That licence, he implies, is exorbitant and wrong. He says in another place to the same effect that: "Any system which allows courts to choose among sentencing aims without clear guidance will produce disorganization, with scant respect for consistency, accountability, or rights."[5]

We can summarise more systematically, although perhaps more simplistically, the salient features of sentencing policies in the 1970s and early 1980s as follows:

(1) Sentencing is about crime control and public protection, to be achieved through deterrence, prevention and rehabilitation.
(2) All consequentialist aims are generally of equal importance and retribution is less important; *i.e.*, no consequentialist aim is exclusively dominant and the significance of each is contextual.
(3) The sentencer exercises his discretion and is assumed to be most familiar with the social conditions in which the sentence must operate. The appellate court should therefore accord him a large degree of deference.
(4) No two cases are the same and tariffs are entirely wrong, if not dangerous.[6]
(5) Coherence in sentencing is not essential and individual merits are pre-eminent.

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2 (1975) 60 Cr. App. R. 74.

3 *Ibid.* at 77.

4 Andrew Ashworth, *Sentencing and Criminal Justice*, 4th ed. (Cambridge: Cambridge University Press, 2005) at 72-73.

5 Andrew Ashworth, "Criminal Justice and Deserved Sentences" in Nicola Lacey, ed., *A Reader on Criminal Justice* (Oxford: Oxford University Press, 1994) 206-225 at 220.

6 If we go back earlier to *Low Oi Lin v. R.* [1949] M.L.J. 210 at 211, we see skepticism about the value and possibilities of achieving coherence: "it is impossible to lay down rules for fixing sentences".

(6) As a matter of fact and practice, the emphasis on crime control produces non uniform and high sentences on the whole.

B. *The Shift to Desert-Based or Proportionalist Sentencing*

The 1990s give us a suitable end-date so that we have a span of 30 odd years, which is about the conventional duration of a generation. In the 1990s, so far as the scholarship on sentencing is concerned, the ambitious crime-preventative conclusions just outlined have been much discredited. Seriously challenging them are views that contend that:

(1) Sentencing is not about crime control; in other words, prevention and deterrence to the extent they are offered as instruments of crime control cannot be principal sentencing aims. The weak correlativity shows that high sentences have little impact on future recidivism.[7] The evidence that rehabilitation is effective is only slightly or marginally better.[8] In short, research indicates that effective crime prevention requires sensitivity to criminological considerations, not sentencing.
(2) Emphasis on protection of the public in the preventive or social engineering sense is wrong.[9]
(3) Sentencing aims are not restricted to the four classical aims. They extend to social theories of indoctrination and reparation. The former emphasise community-oriented efforts which will inculcate a proper sense and appreciation of social values protected by the criminal law. The latter is an aspect of the rehabilitative aim, but is now given a new emphasis stressing involvement of the community and holistic restoration of the community.
(4) Retribution means the application of just deserts and sentencing is primarily the application or determination of just deserts so that the classical sentencing aims are not of coordinate value. It results that the criminal must not be punished with excessive severity or excessive leniency.[10]
(5) By desert is not meant personal culpability alone but also offence-seriousness. Desert is just if it is proportionate to blame-worthiness in the ordinal sense.[11] "Ordinal proportionality concerns the relative seriousness

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7 See Frankline E. Zimring & Gordon J. Hawkins, *Deterrence: The Legal Threat in Crime Control* (Chicago: University of Chicago Press, 1973); Daniel S. Nagin, "Deterrence and Incapacitation" in Michael H. Tonry, ed., *The Handbook of Crime & Punishment* (New York: Oxford University Press, 1998) at ch. 13; Neil Morgan, "Capturing Crimes or Capturing Votes? The Aims and Effects of Mandatories" [1999] UNSWJ 267. See also Alfred Blumstein *et al., Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington, DC: National Academy of Science, 1978). For a more recent study, see Anthony N. Doob & Cheryl M. Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" in Michael H. Tonry, ed., *Crime and Justice: A Review of Research* (Chicago: University of Chicago Press, 2003) at 143-195.

8 Andrew von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005) at 5-6.

9 It lacks an ethical basis and does not address the offender as a moral agent.

10 Andrew von Hirsch traces the rise of desert based theories to the mid-70s. See Andrew von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993) at 2-3.

11 The requirement of cardinal proportionality is discussed later.

of offences among themselves"[12] and should be rigorously observed to ensure comparable punishment of persons committing offences of like gravity and commensurable punishment of persons committing offences of dissimilar gravity.[13]

(6) It follows from the need for proportionality that consistency and coherence are of outstanding importance and benchmarks are vital in ensuring proportionality.

II. Practical Impact of Desert Theories

The impressive shift to desert-based sentencing (von Hirsch and Ashworth describe it as surprising) which marks sentencing in the 1990s is of course far from being universally acknowledged and entrenched.[14] Although several U.S. states, Finland,[15] Sweden[16] and the U.K. have been persuaded to convert to desert-based sentencing,[17] in others utilitarian and consequentialist policies persist or there is otherwise resistance to desert theories.[18] There are also variations and differences of emphasis in retributive accounts of punishment. Some derive the preeminence of just deserts from the rule of law, namely that judicial decisions should be taken openly and by reference to standards declared in advance.[19] Others stress the moral worth of retribution, explaining it as something that we intuitively grasp as being right.[20] This is too narrow to others who hold that just deserts is about taking away the offender's unjust advantage[21] or those who maintain that it is the expression or communication of the censure of wrongdoing.[22] Some are only half-convinced that desert theories are correct and under some proposal of limiting retributivism argue that retributivists should aim only to determine the outer limits of punishability;[23] attempts to scale punishments according to offence-seriousness, they argue, are futile. In practical detail

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12 Ashworth, *Sentencing and Criminal Justice*, *supra* note 4 at 84.

13 See Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (New Brunswick, New Jersey: Rutgers University Press, 1985) as cited in von Hirsch & Ashworth, *Proportionate Sentencing: Exploring the Principles*, *supra* note 8. Punishments should also be spaced according to the gradation in offence-seriousness.

14 Andrew von Hirsch & Andrew Ashworth, "Not Not Just Deserts: A Response to Braithwaite and Pettit" (1992) 12 Oxford J. Legal Stud. 83. Proponents of restorative justice as an alternative paradigm are an increasing voice. See Andrew von Hirsch *et al*., eds., *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford and Portland: Hart Publishing, 2003).

15 Was first off the mark in 1976.

16 Followed in 1989.

17 Minnesota's and Oregon's schemes are described by Andrew von Hirsch, "Proportionality and Parsimony in American Sentencing Guidelines: The Minnesota and Oregon Standards" in Chris Clarkson & Rod Morgan, eds., *The Politics of Sentencing Reform* (Oxford: Oxford University Press, 1995). See also Canada's *Youth Criminal Justice Act,* S.C. 2002, cap. 1.

18 Louis Kaplow & Steven Shavell, "Fairness Versus Welfare" (2000) 114 Harv. L. Rev. 961 at 1007; Erik Luna, "Punishment Theory, Holism, and the Procedural Conception of Restorative Justice" (2003) Utah L. Rev. 205; Andrew Sanders, "What Principles Underlie Criminal Justice Policies in the 1990's?" (1998) 18 Oxford J. Legal Stud. 533 at 538.

19 Ashworth, *Sentencing and Criminal Justice*, *supra* note 4 at 72.

20 See von Hirsch & Ashworth, *Proportionate Sentencing: Exploring the Principles*, *supra* note 8, ch. 2.

21 See von Hirsch, *Censure and Sanctions*, *supra* note 10 at 7-8.

22 R. Anthony Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986).

23 Some writers, such as Norval Morris, *The Future of Imprisonment* (Chicago: Chicago University Press, 1974) may be willing to concede that desert is not a hopelessly vague concept, and that it has some

too, there is no consensus among desert theorists over the precise primacy desert should have in sentencing, although there is common agreement that punishments must be scaled to fit offence-seriousness as a general rule and that a desert model is not necessarily exclusive of consequentialist sentencing aims such as deterrence and incapacitation. In this respect, a number of desert models purport to establish more rational and coherent sentencing schemes with desert as primary determinant but without excluding other sentencing aims. An outline will be useful for the sake of locating the sentencing scheme in Singapore in perspective and theory.

One model accords just deserts primacy as a sentencing aim but acknowledges that in exceptional circumstances one or another aim may have priority, usually as a singular sentencing objective.[24] This appears to be a popular modern model of desert-based sentencing and has been implemented in the sentencing schemes of the U.S. states of Oregon and Minnesota which purport to contain just and workable proportionality scales. The model predicates that we can reason from principles of right and good to a true ranking of relative offence-seriousness,[25] independent of particular personal preferences or sensitivities and one that will hold true of any particular communal experience or community opinion. The construction of such a model clearly has what Paul Robinson describes as deontological underpinnings. Deontological models make the highest demands on universality and deviations from desert require justification in terms of strong countervailing reasons. Paul Robinson for instance argues that deviations may be justified only exceptionally to suppress an intolerable level of crimes presenting the gravest risks of harm.[26] Dismissing the general relevance of utilitarian and consequentialist aims of sentencing, he is only prepared to recognise that "[d]esert is to be given priority over the combined utilitarian formulation, except where it causes an intolerable level of crime that the utilitarian formulation could avoid. At this point utilitarian adjustments can be made, but no utilitarian adjustment can be made if it generates a formulation that imposes an intolerably unjust punishment."[27]

Under alternative mixed or hybrid models, departures from the primacy of desert are more generous and consequentialist sentencing aims may more easily override

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meaning, but would make a related but slightly different criticism, namely that desert cannot specify a particular amount of punishment that should be imposed; it can only identify a range of punishment that should not be imposed because it would be seriously disproportionate, *i.e*. it is a limiting principle and within which consequentialist aims are operative. von Hirsch & Ashworth, *Proportionate Sentencing: Exploring the Principles*, *supra* note 8 at 138 argue that this thesis has more validity in relation to cardinal proportionality, *i.e*., the question of overall levels of onerousness.

[24] The expression orderly plurality of sentencing aims has been coined to describe the Swedish system which gives preeminence to just deserts but accommodates the pursuit of other aims for certain offences and certain offenders. See D. Galligan, "Guidelines and Just Deserts: A Critique of Recent Trends in Sentencing Reform" [1981] Crim. L.R. 297.

[25] It embodies deontological desert, a term coined by Paul H. Robinson, "Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical" (2008) C.L.J. 145.

[26] Paul H. Robinson, "Hybrid Principles for the Distribution of Criminal Sanctions" (1987) 82 Nw. UL. Rev. 19. See also A.E. Bottoms & Roger Brownsword, "The Dangerousness Debate After the Floud Report" (1982) 22 Brit. J. Crim. 229 for the view that exceptionally desert-based sentencing should not be applied to offenders who pose a vivid danger to others.

[27] See also A.E. Bottoms & Roger Brownsword, "Dangerousness and Rights" in J.W. Hinton, ed., *Dangerousness, Problems of Assessment and Prediction* (London: Allen & Unwin, 1983) cited in von Hirsch, *Censure and Sanctions*, *supra* note 10 at 52.

desert "within specified, fairly modest limits".[28] Although one can countenance a greater incidence of deviations at higher ordinal ranks, or deviations increasing or decreasing proportionately with ordinal ranks, such models as have been considered (by von Hirsch) are linear ones with a constant deviation (say at 10 or 15%) from ordinal desert constraints. One way of approaching such models is to acknowledge that they are prioritisation schemes for reconciling conflicts between just deserts and utilitarian or consequentialist aims at the margin. Just deserts merits the highest priority so that it is only when just deserts is indifferent as to which other aim should be followed that the aim which has second highest priority should be selected and advanced.[29] Under this refinement, just deserts always receives primary rank and other aims are advanced according to rank only when just deserts will not be compromised. Under another conceivable refinement, consequentialist aims are relevant only if they clear a probative threshold so that there is cogent evidence of effectiveness.[30]

Another model may be put forward which mimics the first in framework, not in operation, so that the prioritisation of desert and the scope of justifiable departures are, unlike the first, empirical and not theoretical. Paul Robinson has provided a lucid account of empirical desert as one that "tracks the community's intuitions of justice" and achieves valuable gains by gaining "access to the power and efficiency of stigmatization", avoiding "the resistance and subversion inspired by an unjust system", gaining "compliance by prompting people to defer to it as a moral authority in new or grey areas (such as insider trading)", and earning the ability to help shape or influence societal norms.[31] A deontological desert model has little tolerance of variant ranks; scales should be applied in universal fashion across the entire range of offences. An empirical model however is open to a larger degree of variableness of rank in consonance with the community's intuitions of justice. Relative blameworthiness under such a model is discovered and articulated in a process of narration, consultation, reflection, and interaction.[32] Such models can be constructed around categories of offences as well as categories of issues such as the effect of previous conviction or social deprivation which cut across categories of offences. Further, more eclectic deviations from just desert are possible since within each category of offence you can have reinforcing aims and conflicting aims and intuitive notions can provide solutions to the conflict of sentencing aims not by extracting priorities but by identifying the inter-play of these matters in categories of offence.[33]

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28 von Hirsch, *Censure and Sanctions, supra* note 10 at 54. Note that limited retributivist models such as those proposed by N. Morris have been omitted.

29 See Robinson, "Hybrid Principles for the Distribution of Criminal Sanctions", *supra* note 26.

30 *Ibid*.

31 Paul Robinson, "Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical" (2008) C.L.J. 145 at 155.

32 In this way, empirical desert avoids the charge of subjectivism or inordinate subjectivism.

33 Such desert models as have been outlined are relative models which establish punishment on a scale but do not determine what is the absolute severity of punishment. Taking the end points as given, the model locates the proper ordinal rank of each offence and offender. Further they share a common indifference to the methods of punishment when they are equivalent. They are designed to locate the ranking of the offence and offender to a scale of punishment according to his relative blameworthiness. Any method which achieves this ranking will be just.

As an example of the empirical desert model, the modern English sentencing scheme is a valuable foil against which to examine, compare, and evaluate sentencing policies in Singapore. In England, the shift to just deserts is traceable against earlier shifts in Finland, Sweden, and the U.S.[34] to a White Paper which sought to concentrate attention on just deserts and proportionality.[35] Significantly, while the primary rationale of just deserts was insisted on in the White Paper, the actual legislation implementing the recommendations, the *Criminal Justice Act 1991*, omitted to highlight it. One cannot, as a result, be definite about whether or not this created unhelpful confusion as to how to apply it but one assessment is that in the end, very little was achieved by the legislation: Ashworth wonders if it was ever "part of the judicial consciousness".[36] That may well have been so but in any case, the successor to the 1991 Act, the *Criminal Justice Act 2003*, was still only a little more explicit about just deserts. It set out in section 142, five conflicting principles to which the sentencer must have regard[37] and of which just deserts was one; but again, no system of priorities was enacted spelling out the preeminence of just deserts. The Act considered alone is clearly distinguished from other more deontological desert legislation which make it a point to set out desert as the primary determinant.[38]

To see how desert is actually determined and enforced, account has to be taken of legislative developments on another front which anchor the creation of a statutory body independent of the legislature and the courts to draw up sentencing guidelines for the courts' consideration and guidance, which are not ratified by Parliament although members of Parliament are widely consulted before they are finalised. An earlier version and important precursor of it was in existence before passage of the 2003 Act, namely the Sentencing Advisory Panel, which was established under the terms of the *Crime and Disorder Act 1998*.[39] After the 2003 Act established another sentencing body, namely the Sentencing Guidelines Council (SGC), as the body charged to issue sentencing guidelines, the Panel which was not abolished has become the SGC's the investigative arm[40] with the less prominent role of advising the Council.[41]

The present English sentencing scheme is thus best understood as a multi-pronged and multi-forum product in which (under what has been termed by von

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[34] See Andrew von Hirsch, "Principles for Choosing Sanctions: Sweden's Proposed Sentencing Statute" (1987) 13 New Eng. J. Crim. & Civ. Confinement 171.

[35] Martin Wasik & Andrew von Hirsch, "Statutory Sentencing Principles: The 1990 White Paper" (1990) 53 M.L.R. 508.

[36] Ashworth, *Sentencing and Criminal Justice, supra* note 4 at 98.

[37] In fact, judges were to stress crime preventative aims. See Andrew von Hirsch & Julian Roberts, "Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions" [2004] Crim. L.R. 649.

[38] Such as the Minnesota system.

[39] Established as an independent advisory and consultative body to provide advice to the Court of Appeal of England and Wales, the Panel was charged with the important aim of promoting greater consistency in sentencing by framing and revising sentencing guidelines. The panel's first significant work was its advice of 13 November 2001 to the Court of Appeal on the setting of the tariff in murder cases and the accompanying detailed consultation paper.

[40] The Panel is constrained by the sentencing framework established by the 2003 Act, but it has made it clear that it remains committed to the values of fairness, proportionality and consistency in sentencing.

[41] For an examination of the impact of the Sentencing Guidelines Council, see John Cooper, "The Sentencing Guidelines Council—A Practical Perspective" (2008) Crim. L.R. 277.

Hirsch a narrative approach, unconstrained by dogmatic adherence to proportionalist theories)[42] the SGC consults a broad range of opinions, including specially commissioned empirical and public attitude research, before drawing up principles and policies which the judiciary is bound to consider with a view to endorsing with or without qualification when passing sentence.[43] There is clearly symbiosis under this narrative scheme in which the sentencer and the SGC have mutually reinforcing roles;[44] in which, as Wasik writes, "[t]he SGC/SAP has selected a predominant rationale",[45] namely just deserts.[46]

III. Emergence of Public Interest Sentencing in Singapore

Turning to sentencing policies in Singapore, one will not find in the cases before the end of the last century explicit judicial, let alone legislative, statements that stress proportionality. Nothing in the sentencing case law even remotely alludes to the desert-based features which now mark the English sentencing scheme. This observation however should not lead to hasty conclusions about the irrelevance of desert theories in Singapore or create misleading first impressions about the Singaporean pre-occupation with efficiency in all things, sentencing not excluded. The central argument of this article is that although there is nothing like the desert-based models and the more empirical version exemplified by the English experience, the courts in Singapore have been surprisingly consistent in following desert-based sentencing throughout the last three decades. The emergence of the public interest in the late

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[42] Not all however agree that proportionality remains predominant. Laurence Koffman, "The Rise and Fall of Proportionality: The Failure of the Criminal Justice Act 1991" (2006) Crim. L.R. 281 argues that "proportionality has not only lost its status as the primary rationale of sentencing, but also that other criminal justice policies actually militate against this principle".

[43] Martin Wasik, "Sentencing Guidelines in England and Wales—State of the Art" (2008) Crim. L.R. 253 argues:

> the main advantages, as against guidelines developed by the appellate courts, are that the SGC/SAP is able to work more systematically, to devote more time to the task, and to consult across a broader range of opinion. It is also less case-driven, and able to focus on generic sentencing issues rather than just offence-specific guidelines. The main advantages, as against guidelines developed by the legislature, are that the SGC/SAP is able to work independently, and to devote more time to the task, insulated from any need to pursue policies which will secure votes, and so (to an important extent) able to resist political pressures and media hype.

[44] See *R v. Hills* [2008] All E.R. (D) 136 where the first instance judge said that he should not feel constrained by the SGC's guidelines in relation to sexual offences as the violence in question was very serious. See also *R v. Hurley* [2008] All E.R. (D) 84 where it was stated that although the guidelines were of the greatest possible importance, there were cases which fell outside the guidelines. In the circumstances, it was held that the judge had not erred in concluding that the facts permitted him to sentence beyond the guidelines and his sentencing remarks had made clear as why he had done so. See further and especially *R v. Mashaollahi* (unreported, 21 December 1999) where the court proposed to consult the SAP under s. 81(2) of the U.K. *Crime and Disorder Act 1998* (cap. 37) on sentencing on opium cases, acknowledging the distinct advantage that the Panel would have of considering views from a wide range of persons and bodies before formulating its own views.

[45] *Ibid*.

[46] Great Britain Sentencing Guidelines Council, *Overarching Principles: Seriousness and New Sentences* (Great Britain: Sentencing Guidelines Secretariat, 2004) states that it is proportionality between seriousness of the offence and severity of the penalty which should drive the choice between sentencing levels, and the degree of sentencing severity.

1980s and 1990s as a determinant of sentencing is of especial note. It can superficially create and may even have created an impression of consequentialist adherence where draconian punishments are legitimated by efficiency, utilitarianism and consequentialism. However, properly understood, the role which the public interest has been allowed to play in sentencing has paralleled the development of judicial benchmarks and has operated rather to underline the commitment to retribution than undermine it.

The Singapore literature on sentencing is not large but such as there is indicates an early commitment to retribution. T.T.B. Koh has given us very vivid insights into the sentencing experience up to the mid 1960s.[47] He found that "the dominant penal philosophy of our judiciary is a retributionist one and when [the sentencing courts] say that a punishment is excessive, they generally mean that it exceeds some unpublished tariff which they follow." His impression "was formed in part from a perusal of the decisions of the High Court in its appellate jurisdiction and in part from the sentences they imposed in criminal cases tried by the High Courts in its original jurisdiction". He was of course "not suggesting that our judges were wholly unresponsive to other aims of penal measures" but that they "generally [gave] greater emphasis to retaliatory and quantitative retribution and deterrence than to other objectives such as the needs of the individual offender and how best to reform him".[48]

15 years on, in a 1981 paper, 'Sentencing in Singapore', Peter English has surveyed many sentencing cases over the 1970s.[49] His observations at page 19 indicate that he detected a more nuanced (but unconcerted) sentencing scheme: "the presence of aggravating features is likely to incline the court to put uppermost in its mind the demands of deterrence, retribution and prevention. If mitigating features prevail in the case then the principle of rehabilitation is likely to loom largest in the court's thinking." Otherwise, the 'retributionist' bias has persisted.

The conclusions contained in these two local studies on sentencing policies (depicting a fairly monolithic retributivism) are so far contrasted with the shifts and turns earlier sketched out in this article that they raise an interesting question: why this constancy? The answer may well be that to the courts of the 1960s, 1970s and 1980s, desert or retribution meant vengeful desert; and that therefore consequentialist aims did not much matter since the high punishment levels associated with vengeful desert would have met the deterrence or crime prevention demands of most cases in any event. All these ruminations are beyond the scope of this article. Whatever the case may be, against such a retributivist backdrop any reference to a role for the public interest with its apparent utilitarian connotations would not have been missed. In neither study however was the public interest distinctly mentioned[50] let alone highlighted and so far from surprising us, both studies thus helpfully confirm that the interest in and significance of the public interest in sentencing is a distinctly modern development.

It is from the late 1980s and early 1990s that the public interest element has become conspicuous. The role of public interest was probably first announced in connection

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47 T.T.B. Koh, "The Sentencing Policy and Practice of Singapore Courts" (1965) 7 Mal. L. Rev. 291.

48 *Cf.* Molly Cheang, "Sentencing Criminals" (1974) 16 Mal. L. Rev. 204 which surveyed the state of the literature in the 1950s and 1960s and concluded that uncertainty and confusion was inevitable.

49 Peter English, "Sentencing in Singapore" (1981) 23 Mal. L. Rev. 1.

50 English, "Sentencing in Singapore", *ibid.* mentioned the public interest obliquely when he commented that Hilbery J.'s remarks in *R. v. Ball* (1951) 35 Cr. App. R. 164 were one of were one of the most frequently cited in Singapore and Malaysia.

with the introduction of mandatory minimum sentences[51] in *Fay v. PP.*[52] In the mid 1990s, there were occasional references to balancing the public interest and private interest in connection with giving a discount for a timeous plea of guilt. Paragraph 7 of Yong Pung How C.J.'s judgment in *Sim Gek Yong v. PP*[53] was a notable example.[54] The Chief Justice there cited two English Court of Appeal cases, *R. v. Costen*[55] and *R. v. Stabler*,[56] for the proposition that the public interest must be considered by the sentencing court when deciding whether a discount ought to be given for a guilty plea since in certain cases, any mitigating effect afforded by a guilty plea could heavily or even completely be outweighed by the need for a deterrent sentence. The English cases however did not refer to the public interest but the protection of the public; so there was in the Singapore case a generalisation to the public interest.[57] As we leave the 1990s, references to the public interest have grown apace in contexts far removed from mandatory sentences and the effect of timeous pleas. Interestingly, the terminology of 'public interest principle' appeared in *PP v. Tan Fook Sum*[58] while in a couple of other subsequent cases the Chief Justice took note of the public interest reference of Hilbery J. in *R. v. Ball* and arrived at the balancing approach not unlike that of the Malaysian High Court in *PP v. Loo Choon Fatt*.[59]

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[51] This is well documented in Stanley Yeo, "Judicial Policy on Sentencing Drug Traffickers: *Public Prosecutor v. Tan Hock Hai*" [1985] 2 MLJ clxxxvi and Andrew Phang & Chan Wing Cheong, *The Development of Criminal law and Criminal Justice in Singapore* (Singapore: Butterworths Asia, 2001) from which we may learn that the first mandatory sentences were introduced by the *Penal Code (Amendment) Act 1973* (Act 62 of 1973) (caning) and the first minimum mandatory sentences came in 1984 via the *Penal Code (Amendment) Act 1984* (Act 23 of 1984).

[52] [1994] 2 S.L.R.154. At para. 18 of the reported judgment, Yong Pung How C.J. addressed the argument that "the original legislative intent behind the provision for caning in s. 3 of the *Vandalism Act* was directed at suppressing those violent political elements which existed in Singapore in the 1960s and which wreaked havoc throughout our city by, inter alia, inscribing anti-national slogans in public places, the implication being that all this was a far cry from the appellant's conduct." The ventured reading was, however, too simplistic. While the punishing of riotous anti-national elements was one of the more urgent objectives at the time the Act was enacted in 1966, "the legislature was simultaneously concerned with containing anti-social acts of hooliganism." The Chief Justice then added that he was further satisfied "that, on the facts of the case and taking into account the need to secure the interests of the general public, he was fully justified in imposing a custodial sentence and the mandatory minimum of three strokes of the cane in respect of each charge of vandalism."

[53] [1995] 1 S.L.R. 537 [*Sim Gek Yong*].

[54] See also the reference to that case in *Than Stenly Granida Purwanto v. PP* [2003] 3 S.L.R. 576 [*Than Stenly*].

[55] (1989) 11 Cr. App. R. (S.) 182.

[56] (1984) 6 Cr. App. R. (S.) 129 [*Stabler*].

[57] For instance what Macpherson J. in *Stabler*, *ibid.*, said was this:

> [I]n nearly all cases the court must look at all the circumstances, including the nature of the offence and any mitigating features … which include the question of giving credit for the plea [of guilt] and the other matters which are raised. In addition the court must look at the interests of society and strike a balance when considering what sentence is proper. In some cases the protection of society is an overwhelming consideration and in our judgment this is just such a case. We see no ground for giving any discount in the circumstances of this particular case.

[58] [1999] 2 S.L.R. 523.

[59] [1976] 2 M.L.J. 256 [*Loo Choon Fatt*]. Such as *Lim Teck Chye v. PP* [2004] SGHC 72 and *Annis bin Abdullah v. PP* [2004] 2 S.L.R. 93, where he referred to the approach which he had adopted in *Sim Gek Yong, supra* note 53 at 541. At para. 9 of the latter report, he said:

> Like any other personal factor put forward on the accused's behalf in mitigation, the absence of similar antecedents is something to be taken into account by the sentencing court and weighed in the balance against other, possibly opposing, factors. The first and foremost consideration in this

The reference to the Malaysian case, *Loo Choon Fatt*, merits some elaboration, for that was where the public interest reference of Hilbery J. in *R*. v. *Ball*[60] was first canvassed in this part of the world. Hilbery J. put the point like this:

> In deciding the appropriate sentence, a court should always be guided by certain considerations; the first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it.[61]

In the Malaysian case, Hashim Yeop Sani J. highlighted the above passage and added:

> Presidents and Magistrates are often inclined quite naturally to be over-sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is seen facing an array of witnesses with authority. The mitigation submitted by a convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused.[62]

The proposition expressed in the last sentence above, which was purportedly derived by extrapolation from *R. v. Ball*, has since exerted an influence in Malaysian sentencing far beyond its original modest purpose of warning judges not to pander to their own penal philosophies. Notably, in a famous trilogy of cases, the Federal Court cited the public interest for its decision in the face of escalating drug trafficking to award the death sentence as a general practice ahead of legislative changes to make it mandatory.[63] Contrastingly, in England, the public interest reference of Hilbery

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balancing process, however, must be the public interest. Any sentence imposed must be such that it enables our criminal law not merely to punish crime effectively but also to prevent it.

60 *Supra* note 50.

61 *Ibid*.

62 *Loo Choon Fatt*, *supra* note 59 at 257-58. A little regrettably, these words have had an influence far exceeding the modest facts and immediate problem of the case. The twin propositions that public interest is the foremost consideration and that the public interest must be balanced against the private interest have consistently been acted upon in cases which were beyond the immediate context of the propositions. Just to mention some examples; in *Tan Bok Yeng v. PP* [1972] 1 M.L.J. 214, the court identified the public interest in certain species of crime which the alacrity of mind and body, the dare and defiance of youth alone was capable of performing and producing and considered that it outweighed the personal interest of the young offender. This approach was approved by the Malaysian Court of Appeal in *Koay Teng Soon v. PP* [2002] 2 M.L.J. 219; and again, acted upon in *PP v. Low Kian Boon* [2006] 6 M.L.J. 254 and in *PP v. Lim Guan Eng* [1998] 3 M.L.J. 14 where the Malaysian Court of Appeal commented that *PP v. Loo Choon Fatt* admirably expressed the correct psychological approach to sentencing.

63 Again speaking for the Federal Court in *Chang Liang Sang v. PP* [1982] 2 M.L.J. 231, he said: "A study of these cases indicates the strong concern of this court that as far as possible in this difficult area of sentencing there should be reasonable conformity in the sentences imposed in similar cases. Other than in the most exceptional circumstances, a sentence of death should be imposed following a conviction for trafficking, in order to mark the gravity of the offence, to emphasize public disapproval, to serve as a warning to others, to punish the offenders and most of all to protect the public." In *PP v. Tan Hock Hai* [1983] 1 M.L.J. 163 he reiterated that the public interest called for no less than the imposition of the death sentence other than in the most exceptional circumstances. It sufficiently appears that for the Federal Court the public interest was the instrumentality for achieving consistency of sentencing drug

J. continues to stand apart. In subsequent cases, no other English court has endorsed it and other scattered references to the public interest have specifically been limited to protection of the public.[64]

It would be tempting but wrong to infer that these demonstrations of the relevance of public interests analysis in sentencing signalled a judicial hardening and shift to deterrence and to harsher penalties, heralding a new law and order ideology, more repressive and right-wing, first in Malaysia and then Singapore. The temptation springs from the coincidence between the reliance on public interest in these cases and the apparently resultant harsher or more severe deterrent punishments. It is easily aroused when the public interest for some evokes images of utilitarian philosophies and attitudes. Such an inference would however be wrong. In fact, in these cases, public interest was not equated to deterrence and any suggestion of efficient crime prevention remote. Raja Azlan Shah J. in *Loh Hock Seng v. PP*[65] for instance was convinced that sentencing in drug trafficking cases should not ignore the public interest when he spoke for the Federal Court in these terms:

> We are of the view that in the circumstances of the second appellant's case, the imposition of a term of imprisonment for life is wholly inadequate as it does not reflect the gravity of the offence and the circumstances of the case against him, his record of previous convictions, the public interest involved in respect of crimes of this nature and a sufficient factor of deterrence to others of his ilk.[66]

There was in these remarks a clear difference between the public interest and deterrence. Further, a strong motivation in stressing the public interest was to put a lid on sentencing inconsistency. There is no doubt at all that when Hashim Yeop Sani

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traffickers and further that the court did not equate the public interest with deterrence. *Cf. PP v. Oo Leng Swee* [1981] 1 M.L.J. 247 where Suffian L.P. speaking for the Federal Court referred solely to the need to deter would be drug traffickers. Another notable but contrasting case is *PP v. Sulaiman bin Ahmad* [1993] 1 M.L.J. 74 in which the fluidity of the public interest was broached in these terms: "I am of the considered view that the public interest varies according to the time, place and circumstances of each case including its nature and prevalence. Therefore, what is deemed to be of public interest in one place may not be so in another. In short, the concept of public interest is very fluid." Would such fluidity, however, oppose the role of the public interest in achieving consistency in sentencing? These implications were left to speculation.

64 *R. v. Neville* [2002] EWCA 2522 would be considered a rare case in highlighting in similar vein that a substantial sentence is required in the public interest to mark the seriousness of the continuing conduct of the appellant and to deter him from persisting with it. If public interest is referred to at all in the sentencing cases, it has the narrow meaning of protection of the public. In *R. v. de Haan* [1967] 3 All E.R. 618 at 619 for instance Edmund Davies L.J. said: "It is undoubtedly right that a confession of guilt should tell in favour of an accused person, for that is clearly in the public interest." What he meant was that credit should be given to the public advantage of a plea of guilt which avoids the expense and nuisance of a trial. Is there recognition of the relevance of the public interest in the sentencing guidelines. In the Sentencing Advisory Panel's consultation paper, *Overarching Principles of Sentencing*, to which it sought responses by 28 October 2008, the Panel attempted to identify three categories of offences (by their characteristics) that would generally merit a custodial sentence: (1) where serious physical, psychological, financial or social harm was intended, whether or not the harm was actually inflicted; (2) where death or serious physical, psychological or social harm was caused by an offender who acted with a callous disregard as to whether such harm was likely to be occasioned or not; and (3) where public policy demands a custodial sentence, for example in response to immigration offences or perverting the course of justice. See para. 113.

65 [1980] 2 M.L.J. 13.

66 *Ibid*. at 14.

J. invoked the role of public interest, he was concerned that there should be consistency in sentencing. His off-guarded balancing approach, as will be argued shortly, is an unfortunate gloss, with its suggestions of utilitarian calculus.[67] But putting that aside, the role that public interest was to play was to ensure consistency.

In order to serve as a measure of consistency and rationality, the public interest feature must not be forced into one mould, particularly the deterrence one; and a very recent decision is timely in admonishing the courts against doing this. In *Angliss Singapore Pte. Ltd. v. PP*,[68] V.K. Rajah J.A. has with respect correctly exposed the misleading vocabulary which may easily entice the sentencer into the one mould trap of deterrence. In his words,

> Public interest *per se* [does] not constitute an autonomous and distinct sentencing principle … It [is] merely an all-embracing reference to the conventional sentencing considerations of retribution, deterrence, rehabilitation and prevention that continued to operate in all cases … Even after determining what [is] meant by the public interest, sentencing judges still [have] to ensure that the sentences passed [are] not disproportionate to both the severity of the offence committed as well as the moral and legal culpability of the offender.[69]

The proof of all this was impeccable. When Hilbery J. referred to the public interest, he had more than deterrence in mind; so too the Malaysian judges who followed him. There was accordingly no warrant to reduce the public interest to what was merely one aspect of it. If we ever thought otherwise, then it is time to renounce this way of speaking about the public interest.

Three comments should be made. First, cases which have reduced the public interest to deterrence (as an aspect of crime prevention) should now be seen as discredited and in need of fresh justification. The second and more tentative comment relates to the court's rejection of a separate autonomous principle of public interest in these terms at paragraph 24: "Therefore, neither authority nor principle compels the conclusion that the public interest *per se* is or ought to be an autonomous and distinct sentencing principle." According to some, there is a distinction in sentencing between aims and principles. Sentencing, Ashworth tells us,[70] does not stop at a consideration of sentencing aims; "[a] number of discrete principles and policies may also impinge on either general sentencing policy or individual sentencing decisions."[71] He proceeds to identify six principles, namely: the principle of respect for fundamental rights, the principle of restraint in the use of custody, the policy of controlling public expenditure, the principle of equality before the law, the principle of equal impact, and the principle of parsimony.[72] Conspicuously absent from the enumeration is any public interest principle, although the paramountcy of the public

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67 The striking a balance between public interest and private interest was in *Loo Choon Fatt*, *supra* note 59, intended to give greater eminence to the public interest. However, it has come to imply that the personal interest can trump the public interest if that is the proper balance to be struck; *i.e.*, the preeminence of the public interest is not a fixed constraint in striking a balance.

68 [2006] 4 S.L.R. 653 [*Angliss*].

69 *Ibid.* at paras. 21, 24 and 25.

70 Ashworth, *Sentencing and Criminal Justice, supra* note 4 at 91-98.

71 *Ibid.*

72 Unfortunately, it is not clear whether he means to say that these principles must be taken into account in passing sentence or whether they are criteria for extra-curial evaluation and criticism, addressed to the law-maker as opposed to the judiciary. It is doubtful whether the principle of parsimony exists in

interest as pronounced in *R. v. Ball* could readily be presented as a principle of sentencing. The question is: was V.K. Rajah J.A. similarly rejecting the paramountcy of public interest in sentencing? Perhaps not. In a later decision, *Law Aik Meng v. PP*,[73] V.K. Rajah J.A. has in fact endorsed the paramountcy of public interest, saying that public interest must be the court's foremost consideration when deciding on an appropriate sentence, although public interest was not a static concept fossilised by time or space, but rather a dynamic one, shaped and coloured by the circumstances and mores of a particular society. For that reason, sentencing courts had to be extremely circumspect when devising sentencing benchmarks based on another jurisdiction's public policy or interest.[74] So the rejection of an autonomous public interest principle would not appear to be a rejection of the paramountcy of public interest.

The remaining comment is that if the clarification of public interest as being only a reference to sentencing aims merely stopped there, it would be a superfluity, a dispensable proxy for sentencing aims, the sooner abandoned the better. Indeed, V.K. Rajah J.A. would be the first to point out that superfluous language encourages a tendency to slip-shod consideration of the sentencing aims and should be avoided. This admonition is evident in *Angliss* and again in *Tan Kay Beng v. PP*[75] where V.K. Rajah J.A. stressed the importance of rigorous exposure of the public interest alleged as being relevant. In the latter case, he observed that "[i]n practice, judges often place emphasis on one or more sentencing considerations in preference to, and sometimes even to the exclusion of all the other remaining considerations."[76] Without expressing overt criticism or approval of this model of sentencing, he added that: "[w]hen this occurs, it is imperative for the court to adequately articulate the justification underpinning the sentence meted out and in particular to explicate its preference for certain particular sentencing considerations over others."[77] There are also a couple of indications that public interests analysis is not wholly superfluous. In *Angliss* again, V.K. Rajah J.A. after disagreeing with the submission as to an autonomous public interest principle nevertheless went on to consider the public interest concerns in the case and to dismiss them; as there was, as he found, no threat

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Singapore. See *Than Stenly*, *supra* note 54 at para. 12 which is consistent not with rejection of the principle but acceptance of a lighter version of it.

73 [2007] 2 S.L.R. 814.

74 *Ibid.* at paras. 15 and 16.

75 [2006] 4 S.L.R. 10 [*Tan Kay Beng*].

76 *Ibid.* at para. 29.

77 *Ibid*. These remarks must not be read as suggesting that the learned Judge of Appeal was advocating a return to eclectic sentencing. See at para. 31 where he stressed that judges must not lose sight of proportionality, saying:

> Deterrence must always be tempered by proportionality in relation to the severity of the offence committed as well as by the moral and legal culpability of the offender. It is axiomatic that a court must abstain from gratuitous loading in sentences. Deterrence, as a concept, has a multi-faceted dimension and it is inappropriate to invoke it without a proper appreciation of how and when it should be applied. It is premised upon the upholding of certain statutory or public policy concerns or alternatively, upon judicial concern or disquiet about the prevalence of particular offences and the attendant need to prevent such offences from becoming contagious. Deterrence, as a general sentencing principle, is also intended to create an awareness in the public and more particularly among potential offenders that punishment will be certain and unrelenting for certain offences and offenders.

to the multi-racial fabric of society.[78] The endorsement of the Court of Appeal in *PP v. Kwong Kok Hing*[79] of the rejection of an autonomous public interest principle similarly did not result in total redundancy of the public interest. But the court went on to consider whether there was in that case any public interest in denunciation in these terms:

> More importantly, there was also the consideration of the public interest. The Prosecution alluded to this in its submissions, where it emphasised the pressing need to denounce the conduct of the offender in order to reflect the revulsion of society at his callous misdeed. While denunciation appears as a sentencing objective in several Australian sentencing statutes, it does not *per se* justify the imposition of punishment. The "denunciation" principle is merely another manifestation of the public interest in appropriately censuring wrongful conduct. Denunciation can be achieved through merely formal measures and therefore cannot explain why punishment needs to be in the form of hard treatment: see Richard Edney & Mirko Bagaric, *Australian Sentencing Principles and Practice* (Cambridge University Press, 2007) at 71. All said and done, every sentence communicates society's aversion and the proper degree of censure for the offending behaviour.[80]

IV. Going Forward with Public Interest

With this clarification, what should the role of public interest in sentencing be? If left broadly formulated, this role is superfluous. If the public interest in any case is precisely identifiable, this role can contribute to consistent sentences by illumining and informing the sentencing process in two ways; namely as a measure of proportionality and as a measure of the strength of any relevant consequentialist sentencing aim.

A. *As a Measure of Ordinal Proportionality*

First, determination of the public interest can provide a more satisfying answer to the problem of developing parameters of proportionality. There are many reasons for denying that proportionality can be established simply by examining and comparing maximum punishments prescribed by the legislature.[81] It is a mistake to suppose that a range is prescribed merely to cater to worst and least offensive cases of the same kind. A range is also essential if punishment must respond to social conditions at the time of punishment so that it reflects the relative offence-seriousness at a material time. Punishability in this sense may be conventional, sometimes obsolete, fail to reflect current social values, and march to different tunes.[82] The impact of changing circumstances may be missed, as where the offence ceases to have the same

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78 See *Angliss*, *supra* note 68 at para. 26.

79 [2008] 2 S.L.R. 684 [*Kwong Kok Hing*].

80 *Ibid*. at para. 38.

81 von Hirsch, *Censure and Sanctions*, *supra* note 10 at 30 goes so far as to maintain that substantive law gives no guidance at all as to relative offence-seriousness.

82 Convention and penal capacity may explain why maximum punishability limits are they way they are.

relative impact on living standards as a result of developments in those standards. On the other hand, offences which once seemed of little public consequence (such as drink driving) and therefore carried low upper punishability limits may now assume disproportionate importance. Further, as is well known, indiscriminate emphasis on punishability limits could produce distortion in sentencing. Suppose the offences of robbery and armed robbery. The worst case of robbery ought to be compared to the least serious case of armed robbery to ensure that there is ordinal proportionality because the difference between the definitional element of a crime and aggravation of sentence could simply be legislative tradition.[83]

These considerations among others provide the impetus to differentiate between ordinal and cardinal proportionality and to develop proper measures of ordinal proportionality, an exercise which has been on-going since the late 1980s when just deserts theories became popular. Explicit judicial articulations are rare; with the exception of *Turner*[84] judges generally shy away from making pronouncements on overall sentencing parities. But while there are academic scaling endeavours, none proposed by academics thus far has won full approbation;[85] and deep debates have failed to produce any consensus on whether punishment scales should be calibrated by a process of numerical guidelines or narrative guidelines.[86] To take just one example, the notable venture of von Hirsch and Jareborg in 1991[87] proceeded by identifying the nature of the interest violated by the criminal conduct with individual victims and assessing the impact on living standards[88] on the typical victim in terms of four bands ranging from subsistence to significant enhancement.[89] At the next stage, there is a descending to particulars and account is taken of personal culpability. Finally, the remoteness of the harm is factored in. Criticisms of such ventures ought not to overlook the fact that they are really proposals for a common methodology; and there are real advantages in that. Thus, suppose a sentencing commission is tasked to produce sentencing guidelines. Whether these are numerical or narrative guidelines, the commission will benefit from a formal analysis of relative offence-seriousness along the lines proposed by von Hirsch and Jareborg.[90] This formal analysis can seem very deontological but it can be made more empirical through reasoned and

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83 Ashworth, *Sentencing and Criminal Justice, supra* note 4 at 152.

84 (1975) 61 Cr. App. R. 67 at 89-91.

85 See, *e.g.*, Robert E. Harlow, John M. Darley & Paul H. Robinson, "The Severity of Intermediate Penal Sanctions: A Psychophysical Scaling Approach for Obtaining Community Perceptions" (1995) 11 J. Quantitative Criminology 71 at 85; Paul H. Robinson *et al.*, "Codifying Shari'a: International Norms, Legality and the Freedom to Invent New Forms" (2007) 2 J. Comp. Law 1 at 47-50.

86 Andrew von Hirsch, "Guidance by numbers or words? Numerical versus narrative guidelines for sentencing" in Martin Wasik & Ken Pease, eds., *Sentencing Reform: Guidance or Guidelines?* (Manchester: Manchester University Press, 1987).

87 Updated by Andrew von Hirsch & Andrew Ashworth, "Criteria for Proportionality: A Review" in von Hirsch & Ashworth, *Proportionate Sentencing: Exploring the Principles, supra* note 8, ch. 9. The 1991 model is reproduced in Appendix 3.

88 This notion includes economic and non economic interests and is not about actual life-quality but about the means and capabilities that people ordinarily can use to achieve a good life. In the updated version, the notion of enhanced wellbeing is dropped. See von Hirsch & Ashworth, *Proportionate Sentencing: Exploring the Principles, supra* note 8 at 146.

89 Andrew von Hirsch & Nils Jareborg, "Gauging Criminal Harm: A Living Standard Analysis" (1991) 11 Oxford J. Legal Stud. 1. This is considered to be an improvement on an earlier proposal based on comparing the extent to which an offence intrudes on people's choice.

90 See von Hirsch, *Censure and Sanctions, supra* note 10 at 30-31.

reflective adjustments in accordance with the results of opinion surveys of the general social consensus, if any, as to relative offence-seriousness.[91]

Even so, neglect of the impact of the public interest on ordinal proportionality is a shortcoming because it means that the model is individualist when it needs to take account of the group or collective effects of an offence, if any,[92] and static, when it needs to be dynamic. A living standard analysis of relative offence-seriousness is certainly capable of reflecting such group effects as cultural and social aspirations. It can recognise that "[d]ifferent social living-arrangements can affect the consequences of a criminal act, and normative differences among cultures can affect the impact of those consequences on the quality of person's lives."[93] However, an offence may be relatively more serious because of its group effect, *i.e.*, its effect on a hypothetical group of victims as opposed to a single hypothetical victim, going beyond social and cultural aspirations. It may in particular cases weaken solidarity, breed inter-personal envy or damage other aspects of inter-personal well being. If we denote by the public interest such interests as are derived from social and cultural aspirations, solidarity and inter-personal well being, we can immediately see that a living standard analysis of desert caters to only limited aspects of the public interest in sentencing. When unpacking the various kinds of interests that offences typically involve,[94] it should but does not take account of interests such as solidarity and inter-personal well being. Further, the analysis is essentially static and needs to be repeated at regular intervals if it is to achieve a necessary dynamic quality. Again, this need for dynamism can be supplied through an examination of the public interest element, if any, in the case. Just as we need parameters of ordinal proportionality which look beyond punishability limits, so that we can truly compare offence-seriousness, so we need a dynamic public interest analysis which can give us a dynamic measure of the impact of changing social conditions on sentencing decisions.

Public interests analysis has a further relevance in connection with the manner in which von Hirsch and Jareborg treat personal culpability at the same level as all other parameters of ordinal desert. We need however to appreciate that the so-called factors of personal culpability (aggravating and mitigating features) are not invariably parameters of ordinal proportionality. There is a point at which in the particular circumstances aggravating or mitigating features do not cross over into the territory of ordinal proportionality and a point at which they do. In the present view, this is the point where personal culpability has a public interest element.

Personal culpability prima facie excellently locates the scale of the offender's wrongdoing among the degrees with which the same offence may be committed by different offenders. It well answers the question: Is it a comparable case, or worse case or less offensive case so far as this kind of offences is concerned? This however is valid so long as we are merely asking about the just attribution of the harmful consequences of the offence to the offender given his subjective capacity to foresee them and his subjective opportunity to appreciate them. But subjective consistency

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91 See Andrew Ashworth, "Devising sentencing guidance for England" in Wasik & Pease, eds., *Sentencing reform: Guidance or guidelines?*, *supra* note 86, ch. 6.

92 The updated version recognises that crimes involving collective interests may not lend themselves to a living standard analysis. See von Hirsch & Ashworth, *Proportionate Sentencing: Exploring the Principles, supra* note 8 at 146.

93 von Hirsch, *Censure and Sanctions, supra* note 10 at 31.

94 Such as physical integrity, material support and amenity, freedom from humiliation, and privacy.

as between perpetrators of the same kind of offences cannot be the sole or primary focus for a scheme of ordinal proportionality. It is undoubtedly a fact that there is an uneasy and important tension between punishment for the criminal's personal culpability and punishment for the objective consequences of his act. The sentencing cases on manslaughter perhaps provide the best instance of this tension in practice. There are, moreover, cases where the criminal is predictably dangerous (and hence of high personal culpability) and may in consequence receive a life sentence which exceeds the demands of just deserts. There are other cases where for special reasons of some kind directed at a class or segment of the community an exceptionally lenient sentence is awarded, falling well short of proportionate justice. Last but not least, there are cases where the underprivileged offender seems to be an unfortunate victim of his own inferior and disadvantaged circumstances with reduced culpability and social deprivation, it is contended, should lead to imposition of a lower sentence. Consistency in sentencing in all such cases cannot be achieved by indiscriminate reference to personal culpability. For instance, a claim for reduced culpability of young offenders immediately implies that if no distinction is made between the public interest element in personal culpability and the personal interest element, the very exercise of achieving or ensuring ordinal proportionality will be mired in indeterminacy. On the other hand, if the public interest element is isolated for the purposes of determining the ordinal rank of the offence, there will be parity between the objective living standard analysis which is applied to relative offence-seriousness and consideration of personal culpability.

If in gauging relative offence-seriousness, we do not take heed of the subjective life-quality or goal achievement of the actual victim but concentrate on "the standardized means or capabilities for a good life",[95] we must by the same token ensure that in evaluating and grading personal culpability we do not take heed of the subjective personal culpability.[96] What is relevant to ordinal proportionality is the objective culpability. We should differentiate the public interest elements, if any, in mitigating or aggravating features offered to the sentencer. These must be isolated, elicited, and considered alongside other public interest considerations relevant to offence-seriousness. The value of highlighting the public interest is precisely because it cuts across both offence-seriousness and personal culpability, allowing us to engage in a more equitable consideration of both. In addition, as has been said, the paramountcy of public interest is upheld when the public interest is allowed to sort out which mitigation or aggravation counts towards the ordinal ranking and which does not.

As proof of that mitigating features may involve the public interest, *PP v. Siew Boon Loong*[97] may be cited. That was a case of criminal breach of trust. The prosecution also argued that "ensuring couriered goods arrive safely at their intended destination was a countervailing public policy against giving a discount in sentence to the respondent for his early plea of guilt." The Chief Justice however clearly rejected this narrow characterisation of the public interest. He thought there was, to the contrary, "an even greater public interest in encouraging a guilty person to come

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95 von Hirsch, *Censure and Sanctions*, *supra* note 10 at 32.

96 von Hirsch & Ashworth in *Proportionate Sentencing: Exploring the Principles, supra* note 8 at 146 maintain the contrary view: "While assessments of harm are thus to be standardised to a degree, culpability judgments need not be."

97 [2005] 1 S.L.R. 611.

forward to disclose the facts of the offence that he has committed, and to confess that he is guilty of that offence. Thus put, giving significant weight to an early plea of guilt, or for that matter, any other indicators of remorse and repentance, is entirely consistent with the public interest." With respect, in the last sentence the Chief Justice went too far in the opposite direction and as remorse and repentance per se are purely personal interests, the last sentence amounts virtually to saying that there is public interest in considering personal interests. This reference to a generalised public interest will not help further the cause of public interests analysis.

As a further illustration of the importance of objective culpability in scaling offences, the problem of previous convictions or a previous criminal record may be considered. Desert theorists are divided on whether this is a culpability factor which figures in the determination of ordinal proportionality. Views range from "[i]t is irrelevant"[98] to "[t]he absence of it justifies a limited penalty discount".[99] The debate in this regard and in the present view suffers from the omission to isolate the purely personal interest in culpability (such as ignorance, real repentance and remorse, genuine attempts to keep from crime) from the public interest in culpability. The purely personal interest in culpability in relation to previous convictions is irrelevant[100] but a public interest element, if any, may require more than the effect of a limited penalty discount in the absence of antecedents. Put another way, without delineating the public elements from the personal elements which attach to past convictions, courts are likely to under-react or over-react to the possession of a criminal record. The courts have of course not unhelpfully clarified that this feature has varying impact or effects; that its impact on sentencing is dependent on the seriousness of the previous offence, time and context;[101] further that the possession of a criminal record may lead to denial of the existence of good character as mitigation of sentence or elicit a more positive response of specific deterrence and in extreme cases of general deterrence. This counsel of guidance is helpful but consistency requires more than this; we need to place an anchor somewhere.

The fact that an offender repeats the same offence is often the occasion for a more severe mandatory penalty so far as the legislature is concerned, so that regardless of whether he is actually recidivist, this enhanced penalty must be awarded. That must signify that there may be a public interest element in previous convictions. In expressing the enhanced ordinal rank of a repeat offence, the legislature proclaims that there is a public interest element in the repeat offence. It hardly ever declares whether that is on account of prevalence of the crime or its impact on solidarity or difficulty of prosecution of an experienced offender or enlargement of penal capacities. It has the 'prerogative' simply to proclaim but the sentencer knows by virtue of the enhanced punishment that the repeat offence is graver and differs in kind and

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98 George P. Fletcher, *Rethinking Criminal Law* (Boston, MA: Little Brown, 1978).

99 von Hirsch, *Past or Future Crimes, supra* note 13, ch. 7; Martin Wasik, *Guidance, Guidelines and Criminal Record* (1987); Ashworth, *Sentencing and Criminal Justice, supra* note 4, ch. 6. There is "a progressive loss of mitigation" according to Ashworth, which reflects the diminishing tolerance of our expectations as to human fallibility.

100 As von Hirsch & Ashworth, *Proportionate Sentencing: Exploring the Principles, supra* note 8 at 149-150 argue, the harmfulness of a repeat offence (*i.e.*, the direct consequences on the living standard of the victim) is unaltered. The authors further argue that the personal culpability is also unaffected.

101 See *Tan Kay Beng*, *supra* note 75.

not degree from the solitary offence and it must surely be his duty to investigate or inquire into the relevant public interest elements.

Where the legislature has not declared public interest in a person's criminal record, public interests analysis is not dispensable. It is easy to see that judicial references to specific deterrence and general deterrence in relation to past convictions will be superficial without a public interests analysis. The role of public interests analysis here is to avoid the temptation to rely for instance on the simplistic argument for specific deterrence, namely that custodial sentence must follow a fine if that was earlier imposed as the offender clearly by his repeat offence shows that he has not repented or reformed; or on the glib argument for general deterrence, namely that the repeat offence is proof of prevalence and justification for general deterrence. One would raise his voice against either oversimplified analysis of a man's criminal antecedents which over-leaps consideration of offence-seriousness to seize upon considerations of deterrence. Before such consequentialist aims can be relied on, a more basic question must be asked: is there any public interest consideration that would indicate that the repeat offence is more blameworthy? There may be something about the repeat offence or its commission which makes it harder to detect (by virtue of the offender's previous experience or brush with the law) or which in the circumstances will have a larger than usual public impact making it possible to reach a conclusion in terms of the public interest. Take a simple example in which we contrast the risk of a repeat offence of manslaughter and of theft. The significance of risk from the point of view of the protection of the public must depend not only on the chances of recidivism but also on the seriousness of reoffending. It is obvious that the public interest in reoffending is very different if we hold the chances of recidivism constant. It is greater in the case of manslaughter. The converse is true where only personal interest elements are involved or of concern. So, to revert to the earlier comparison, if we hold the offence constant, but vary the chances of recidivism, the public interest remains slight even on great variation in the chances of recidivism. Enhanced sentencing to reflect the existence of a criminal record would accordingly contradict just desert.

B. *As a Measure of Cardinal Proportionality*

If consideration of the public interest has a place in determining ordinal proportionality, does it also help in sorting out cardinal proportionality? Cardinal proportionality refers to the location of the offence already judged in terms of ordinal severity on a scale of punishments. As Ashworth explains, it "relates the ordinal ranking to a scale of punishments and requires that the penalty should not be out of proportion to the gravity of the crime involved."[102] It ensures that the scale of sanctions is neither disproportionately severe nor lenient so that imprisonment for instance is not prescribed for all offences whether of high or low offence seriousness or a fine imposed on all offences regardless of severity. Two premises are involved. One is that we can put punishments on a scale of seriousness. In support of this, it is said that opinion surveys reveal a degree of consensus that penalties of different kinds are susceptible

[102] Ashworth, *Sentencing and Criminal Justice*, *supra* note 4 at 84.

to ranking on a scale.[103] There are however some philosophical objections to this premise. Within a given type of sanction, grading according to quantum or level of intensity is possible. Thus, one can speak of unit fines and a higher unit fine is more severe a fine than a lower. Similarly, 10 days of imprisonment will be less severe than 2 years of it. But in what sense is 2 days of imprisonment more or less severe than a unit fine of $10,000? Assuming comparability scales are possible, there may be several sanctions of equivalent severity. How is the choice to be made among different sanctions of equivalent severity? Paul Robinson, for instance, does not see the method of sanction as similar to the distribution of amount. "Two offenders may merit the same amount of sanction yet different methods of sanctioning may be suitable for imposing that amount. These two issues–how much for whom and what method–are not only functionally distinguishable but also may properly be subject to different distributive principles."[104] But he acknowledges that his proposal is conditioned on the viability and effectiveness of segregating the issue of amount from that of method of sanction. This has to be proven.

The second premise is that a true as opposed to a conventional relationship exists between these two scales. On the one hand, the ordinal scale measures relative offence-seriousness in terms of victim impact and offender culpability. On the other hand, a scale of severity of penalties seems to predicate unpleasantness to the offender. These scales appear to be incomparable as one relates to the victim in important part while the other to the offender exclusively. Andrew von Hirsch attempts to straddle both scales by applying the common methodology of interests analysis. Living standards impact will therefore determine the severity of the penalties as well. Doing this is claimed to attract several advantages from limiting the use of imprisonment to permitting a wider range of intermediate non custodial sanctions to be substituted for imprisonment.[105] So long as there is an equivalence in the substitution, proportionality will not be impaired or violated. As a modified thesis, one can admit that the equivalence of onerousness of different sanctions may not always be capable of calibration and suggest a more limited substitutability where within a range of offences (such as offences of intermediate severity) one sanction will be preferred as the normally recommended sanction.[106]

The contrary view however is that the discreteness and conventional nature of penal sanctions do not lend themselves to a gradation of sanctions in relative terms. Realistically, cardinal proportionality or non relative proportionality can aspire only to establish constraints, particularly upper constraints on penalties. Further, there is the inescapable fact that apart from the fine, every other kind of sanction is an imposition on the resources of the state. Imprisonment raises issues of prison capacity. Probation raises issues of manpower. Thus generally whether this is desirable or not, the distribution of sanctions may be one of convention or policy; and to the extent that it is one of policy, unless the political will in enhancing penalties is matched by a corresponding expansion in penal capacity, there will be injustice in the impact of

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[103] See the citations mentioned in Andrew von Hirsch, Martin Wasik & Judith Greene, *Punishments in the Community and Principles of Desert* (1989) n. 24 at 606.

[104] Robinson, "Hybrid Principles for the Distribution of Criminal Sanctions", *supra* note 26.

[105] von Hirsch, *Censure and Sanctions*, *supra* note 10, ch 7.

[106] von Hirsch, Wasik & Greene, *Punishments in the Community and the Principles of Desert*, *supra* note 103 at 604-6.

inadequate penal capacity on the penal suffering or unpleasantness on the offender. Without consulting the capacities of the penal system, under the process of examining the public interest in anchoring the penalty scale, it is impossible to say how limited penal capacity should be prioritised. Moreover the problem adverted to is not a static one and static descriptions or prescriptions of penalty-seriousness will not do. Still further, it could be argued that a scaling of sanctions exclusively in terms of offender unpleasantness does not adequately address the need to factor in victim satisfaction, not the subjective but the objective, as well as the social and cultural stigma of different levels of sanctions.

In the present view, under narrative formulations of cardinal proportionality, the role of the public interest is submerged, and not highlighted; it is catered to via the consultative process, which may discover the legal and political traditions, and the social and cultural stigma of different levels of sanctions in an incidental manner. In Singapore, it is the judges who must bear the responsibility of ensuring cardinal proportionality. How can they do it without falling prey to half-baked speculations and conjectures unless the relevant public interests are identified, isolated and considered under a public interests analysis? The argument is that this public interests analysis is an objective exercise, as the next section will show.

C. *Making Explicit the Public Interest*

For public interest to perform the vital functions which have been outlined, the public interest must of course be demonstrated and not left in a vacuous state of vague and sweeping generalisation which superfluously stands for prevention or crime control and retribution.[107] Where retribution is in view, particularisation is critical if the public interest is to serve as a parameter of ordinal as well as cardinal proportionality. For instance, in crimes of ordinary passion the public interest may be aroused if a sufficient segment of the public is implicated in the manner of its commission. If a higher degree of proportionality is called for, the precise manner in which the public interest is implicated must be demonstrated by for instance revealing the underlying racial or religious elements. Again, a criminal invasion of privacy may be private but the public interest may be engaged if the means employed were designed for public dissemination. The peculiar damage to the public interest should therefore be identified for the appropriate sentence to be awarded. A general public interest is of little value. So the general public interest in denunciation adds nothing to the sentencing determination as the Court of Appeal in *Kwong Kok Hing* has noted. But if the court has not overlooked it, the case will and should be different if there is in the circumstances of the case some distinguished and peculiar public interest in denunciation which takes the case beyond the normal run of similar cases. What has just been said about the need to reveal the relevant public interest elements is nothing new and there is ample evidence that the courts already do or insist on it in the 'best' cases. In *PP v. Wang Ziyi Able*[108] for instance what was arresting was the way the

[107] For an attempt to identify various public interests elements, see also Tan Yock Lin, *Criminal Procedure* (Singapore: LexisNexis, 2008), vol. 2, ch. XVIII, para. 651 and following.

[108] [2008] 2 S.L.R. 1082.

court identified the public interest and particularised it in these terms:

> The present case was of significant public interest because the postings were made on an online forum accessible to lay investors among the general public. Collective public reaction was unpredictable and could result in a level of chaos exponentially greater than the sum total of many prudent individuals' isolated reactions. The plausibility of a statement made in such an online forum therefore could not *per se* determine its possible consequences; even sceptical investors who would otherwise have ignored the statement might have felt compelled to cut their losses and sell their shares when market panic drove share prices down.[109]

Particularisation of the public interest is especially necessary when the supposed public interest is in the need to protect the public, if the sentence is to avoid falling into the trap of pandering to public emotions. There are cases which elicit or attract public concern of a general nature with regard to, for example, the prevalence of certain types of offence. Glib reliance on protection of the public could so easily translate into pandering to public clamour, perceived or in fact, that the particular offender on whom sentence is due should be singled out for severe punishment. The second reason for insisting on particularisation is to ensure that the sentence does not end up implementing some inarticulated or submerged premise of social engineering. Thus, the significance of mental instability in sentencing an offender to life imprisonment is that the precise requirement of mental instability identifies that aspect of the protection of the public that is material. The protection of the public is not left at large. Otherwise, it becomes a tool of social engineering.[110]

V. Relevance of Judicial Benchmarking

Adoption of public interests analysis in sentencing alone will not ensure consistency and rationality in sentencing. It needs to be complemented by the process of judicial benchmarking. In undertaking public interests analysis, the courts have sometimes lost sight of their role in devising judicial benchmarks. That there is a necessary correspondence and complementarity between each of these aspects of sentencing was sometimes overlooked when the public interest was ranged alongside the private interest for the purposes of striking a balance between them. Earlier, mention was made of the Malaysian innovation in *Loo Choon Fatt* and its adoption in Singapore in *PP v. Sim Gek Yong*.[111] Where the notion of balancing had been invoked, the reasoning was typically that considerations of fairness to an accused might in certain circumstances be substantially irrelevant or even outweighed by the public interest, if the offence in question was particularly heinous or where the offender was recalcitrant.[112] Admittedly then, the cases which have relied on balancing the public interest

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[109] *Ibid*. at para. 21.

[110] The same warning may be addressed with respect to the public interest in rehabilitation. The idea of social engineering should also not be permitted to creep in so as to change restoration to reformation.

[111] *Supra* notes 59 and 53 respectively. The language of balancing was more astutely avoided in *Chan Kum Hong Randy v. PP* [2008] 2 S.L.R. 1019 where the court said that the rehabilitative progress of the offender must also be considered in the light of the nature and the gravity of the offence, as well as the wider public interest in each individual case.

[112] For other cases of a similar vein, see *PP v. Mohammad Al-Ansari bin Basri* [2008] 1 S.L.R. 449; *PP v. Yusry Shah bin Jamal* [2008] 1 S.L.R. 487.

and the personal interest have done this so as to subordinate the personal interest. In theory however the balancing formula allows the personal to trump the public interest. If so, the paramountcy of the public interest could not be true if the public interest could be trumped by the personal interest. More fundamentally, as has been argued, in devising the ordinal and cardinal rank of an offence and its offender, the courts should take no heed of the personal interest in mitigation or aggravation. Only the public interest elements in personal culpability matter. That being the case, there is nothing left to balance. When the ordinal and cardinal rank has been ascertained, the proper effect of the personal interest in mitigation or aggravation is merely to move the rank downwards or upwards with reference to the offence's 'anchor point'.

The impression that the courts are balancing public and private interest is an illusion and is immediately perceived to be such once the judicial benchmarking role is considered. This role which has become of crucial importance also underscores the primacy or supremacy of retribution along just deserts lines. In *PP v. Loqmanul Hakim bin Buang*[113] for instance V.K. Rajah J.A. advised that the sentencing court "cannot lose sight of the proportion which must be maintained between the offence and the penalty and the extenuating circumstances which might exist in the case".[114] This emphasis on what proportionality demands, namely that offenders who commit more serious offences be punished more severely than those who commit lesser offences, is reinforced by the close attention which the courts increasingly give to the formulation of more refined and nuanced benchmarks. It is not my intention to lengthen an already long article and only a couple of citations will suffice. The first is *PP v. N.F.*[115] where the benchmarking for rape sentences relied not on one dividing point but four anchor points. The second is *PP v. Mohammed Liton Mohammed Syeed Mallik*[116] where the Court of Appeal endorsed these refinements and added that departures from the anchor points should be determined in accordance with three broad considerations.[117] Both reveal that the benchmarking exercise is not merely about generating consistency for consistency's sake. Nor is it indulged in for the sake of creating images of transparency but it reflects a return to experience, observation, and reflection. There is reliance on the past experience but in recognition that there are aberrational movements, a trend must be distilled. How much of it is a reaction to a moment's obstacles, and how much of it expresses the value being censured will be evaluated progressively. In this exercise, public interests analysis will of course ensure that experience and observation are brought up to date and are related to current dynamic concerns.[118]

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113 [2007] 4 S.L.R. 753.

114 *Ibid*. at para. 47. *Cf. Liow Siow Long v. PP* [1970] 1 M.L.J. 40 at 42.

115 [2006] 4 S.L.R. 849.

116 [2008] 1 S.L.R. 601.

117 *Ibid*. at para. 95.

118 There must at the same time be proper restraint and qualifications. See Daniel Chia, "Judicial Benchmarking in Singapore" (2000) 12 Sing. Ac. L.J. 194 who traces the progress in judicial benchmarking and argues that it has more advantages than disadvantages. See also Tan, *Criminal Procedure*, *supra* note 107, vol. 2, ch. XVIII, para. 702 and following. There are of course limitations on the benchmarking role. Thus, Yong Pung How C.J. who took benchmarking very seriously nevertheless warned that "In citing past cases, I should reiterate the caution that I sounded in *Soong Hee Sin v. PP* [2001] 2 S.L.R. 253 at para. 12 that: "any attempt to reduce the law of sentencing into a rigid and inflexible mathematical formula in which all sentences are deemed capable of being tabulated with absolute scientific precision [will] be highly unrealistic. In my view, the regime of sentencing is a matter of law which involves a

VI. CONSEQUENTIALISM

If there is one advantage to be gained by discarding the imagery of balancing, it is that just as there ought to be no balancing of the public and private, so there ought to be no balancing of public interests, namely the public interest in desert sentencing against the public interest in deterrence. For the sake of clarity of the benchmarking role, we need to renounce certain expressions of balancing the public interests which we still use in sentencing when we speak of selecting the aim with the greatest cogency with its connotation of freedom of choice of penal policy in the weak sense. Such language could mislead us into underestimating the importance of just deserts, which judicial benchmarking helps to promote. In *Kwong Kok Hing*,[119] for instance, the Court of Appeal said:

> In arriving at an appropriate sentence, a court should almost invariably consider the relevance of the sentencing considerations of deterrence, retribution, prevention and rehabilitation at the outset. It should assess which of these considerations have the greatest cogency in any given factual matrix. In this matter, deterrence, rehabilitation and, to some extent, retribution were clearly the most relevant ones.[120]

This is fine to a point. At the point where sentencing aims are in conflict, such recommendations could misleadingly take us back to the casuistic balancing approach. In the present view, the effect of giving primacy to just deserts is that we do not balance sentencing aims. All these matters must be put together and coordinated, not balanced.

Any such balancing is in danger of returning us to judicial anarchy as well as being a balancing of incomparables or incommensurables. Thus, whereas offence-seriousness can be scaled according to proportionality, deterrent effects appear to follow no linear scale and the relationship between deterrent effects and level of severity of punishment is obscure. Claims that some correlation of effectiveness exists are made for rehabilitation, but may be inflated.[121] This is already the lesson that hybrid (and especially deontological desert) models teach and it explains why admission is allowed to consequentialist aims grudgingly, in exceptional circumstances. Empirical desert models, however, achieve consequential deterrence or crime prevention or crime aversion by force of moral suasion, in the manner which Paul Robinson has persuasively identified. The Singapore scheme falls into neither

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hotchpotch of such varied and manifold factors that no two cases can ever be completely identical in this regard. While past cases are no doubt helpful and sometimes serve as critical guidelines for the sentencing court, that is also all that they are, *i.e*. mere guidelines only. This is especially so with regard to the unreported cases, in which the detailed facts and circumstances are hardly, if ever, disclosed with sufficient clarity to enable any intelligent comparison to be made. At the end of the day, every case which comes before the courts must be looked at on its own facts, each particular accused in his own circumstances, and counsel be kept constantly and keenly apprised of the fact that it is just not possible to categorise cases based simply on mere numerals and decimal points." See also *P.P. v. Tan Kei Loon Allan* [1999] 2 S.L.R. 288 where the Court of Appeal refused to set a benchmark for the offence of culpable homicide as the circumstances in which such offence was committed were typically extremely varied.

[119] *Supra* note 79.

[120] *Ibid*. at para. 33.

[121] See von Hirsch & Ashworth, *Proportionate Sentencing: Exploring the Principles, supra* note 8, ch. 3.

category. It is another category, in which public interest has a role which operates in tandem with judicial benchmarking. It may be described as a communitarian model in which the courts take cognisance of and enforce objective expressions of empirical desert in identifiable and ascertainable communal interests. Empiricism alone is insufficient as a measure of proportionality, for the court must ensure that justice to the offender is not compromised by popular opinion; a role which becomes the more vital when the public clamour is greater. At the same time, the courts are best for the mediatory role to provide a check against populist legislation as formalised public clamour by identifying its more objective elements and acting within the legitimate bounds of the public interest. This is not a role that the courts undertake as a watchdog; rather it is a reactive not proactive role because we presume there is communitarian value until and unless counsel proves otherwise by clear and cogent demonstration of the absence of public interest elements. Such a scheme benefits from the advantages of empirical desert models. But it is without the disadvantages. Empirical desert models make extraordinary demands on opinion surveys and extracurial materials. It will not work without an army of scholars to digest, decipher and reveal the pertinent parameters of proportionality. Singapore, it is fair to say, is far from having these resources and it is doubtful if there are resources to develop these resources.

Understood in this light, deterrence truly has an exceptional role. So-called deterrence arguments should be re-processed as proportionality arguments. Are there public interest elements which render the offence more serious in the ordinal and cardinal sense? If there are, and these elements are reflected in a more severe punishment, there will be an effect of deterrence through moral suasion.[122] One should not then add the public interest in deterrence as further justification for the more severe punishment. Ordinarily, there should not be any need to consider deterrence or incapacitation or rehabilitation if the proper proportionality is applied.[123]

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[122] *Cf. PP v. Ng Tai Tee Janet* [2001] 1 S.L.R. 343, where "in the light of domestic and global efforts to combat organised illegal migration, the offence was particularly grave as it assisted the illegal immigrant in circumventing Singapore's strict immigration laws." Deterrence was then added as further justification: "Furthermore custodial sentences had been awarded in cases involving offences of similar nature; Thus, the present offences called for a deterrent sentence and a fine would not be appropriate. The fact that the respondents were first offenders and had pleaded guilty were, at best, neutral factors."

[123] In my respectful view, the decision in *Lim Sin Han Andy v. PP* [2000] 2 S.L.R. 818 is open to the criticism that the proper proportionality should have been applied and that only deterrence through moral suasion was relevant. In that case, the appellant pleaded guilty to being absent without leave from his place of duty, an offence under s. 48(1) of the *Civil Defence Act* (Cap. 42, 2001 Rev. Ed. Sing.). He was sentenced to 18 months' imprisonment. On appeal, he contended that the judge failed to consider his mitigating factors and that the sentence was manifestly excessive. The trial judge had held that the fact that the appellant stayed away from work to support his family did not carry any weight in mitigation. This was because the public interest involved in national service required that servicemen be prepared to subordinate their personal interests to the interests of the State. The appellate judge agreed that the sentence imposed by the trial judge was not manifestly excessive because national service was vital to the security of Singapore and it necessarily entailed sacrifices by national servicemen and their families. Yong Pung How C.J. said:

> In order to safeguard the security interests of the State, everyone who is required by law to do national service must obey and carry out the lawful orders given to him. If the courts were to sympathise with the personal difficulties of every national serviceman, the overall effectiveness and efficiency of civil defence or the Singapore Armed Forces would be severely compromised. The deterrence of the individual offender, and others who might be tempted to commit the offence, is therefore necessary to advance the public interest involved in cases such as the present one.

VII. Where Does that Put Singapore?

Paul Robinson's typology well esteems the case for deontological desert and empirical desert. Closest to deontological models are the schemes of Oregon and Minnesota. The English scheme on the other hand is a good example of empirical desert-sentencing. In a word: "The special value of the empirical conception of desert is its utilitarian effectiveness of crime-control; the special value of the deontological conception of desert is its ability to produce true principles of justice independent of personal or community opinion." The Singapore scheme falls into neither category. It is another category, in which the public interest principle works in tandem with judicial benchmarking. Judicial benchmarking alone has limited viability. As Andrew von Hirsch well argues:

> Appellate courts, acting alone, might be able to establish some kind of tariff: imprisonment recommended for this kind of case, probation for that kind. But without external policy guidance, the appellate courts tend to have difficulty fashioning a principled resolution of sentencing issues. That difficulty has manifested itself in the English sentencing cases: guideline judgments issued without a clear statement of supporting rationale; claims about deterrence or treatment made with little regard for the availability of supporting evidence.[124] (footnotes omitted).

What the Singapore scheme indicates is that judicial benchmarking must be accompanied by public interests analysis if these criticisms are to be avoided.

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[124] Andrew von Hirsch, "Guiding Principles for Sentencing: The Proposed Swedish Law" (1987) Crim. L. R. 746 at 749. See also Ken Pease, "Sentencing and measurement: some analogies from psychology" in Wasik & Pease, eds., *Sentencing reform: Guidance or guidelines?*, *supra* note 86, ch. 8.