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## SUMMARY RECOMMENDATIONS

### Overview

That the imposition of sentences is a decision of critical importance can scarcely be doubted. It determines how much the offender must suffer for his offence, and that suffering may include deprivation of liberty.

Having a sentencing policy is an essential guide in the area of sentencing. However, sentencing policy is not inherently a legal matter and there is no logical reason to leave to a judge an unfettered discretion within the, often, wide boundaries drawn by the Parliament. It has accurately been said that sentencing is an amalgam of morality, tradition and politics. Therefore, any debate on public policy matter such as sentencing must deal with respective roles of Parliament and the Courts.

It can be proposed that that perhaps it is time in Uganda for Parliament in consultation with the legal profession and other interested parties to sit down and carefully determine the principles upon which a modern sentencing system ought to be developed. Having provided clear guidelines to the Courts, Parliament can then leave the implementation of the principles through individual sentences up to the Judges.

Furthermore, fundamental to any sentencing policy is the role that prisons play in the system and the use of non – custodial sentences. In Uganda, prisons in their current form do not rehabilitate offenders back into the community. Equally so, are lengthy terms of imprisonment which fail to deter potential offenders from committing serious crimes of violence. In reality the only real deterrent they may offer is the fear of being caught. Regarding alternative sentences, the solution is to be found in developing and using non- custodial sentences for offenders convicted of crimes other than those involving serious violence.

Responding to the safety and well being of victims are of the utmost importance in any criminal jurisdiction. There is growing concern for victims at both national and international levels. In 1985 for example, the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and the Use of Power. The Principles in the Declaration include access to justice and fair treatment, restitution, compensation and assistance.[2] Improving efficiency is not the only goal of a criminal justice system. Providing justice to victims and defendants as well as protecting society are generally considered to be its principal goals. These goals require that persons who have been victimised receive the protection; treatment and compensation that are needed to alleviate their distress. Defendants must be treated fairly, as well as efficiently and offered opportunities for rehabilitation and for integration into the community after their sentences have been served. Too often criminal justice process has become impersonalised; that is, little emphasis is placed on the personal qualities of the Defendant in determining guilt and in framing appropriate sanctions.

Criminal justice must not be allowed to become an assembly line, where the output becomes increased cynicism on the part of the victim and recidivism on the part of the offenders.

Lastly, the challenges posed to the criminal justice officials in this country in particular, and throughout the world in general are ever mounting. This situation should be seen as both an opportunity as well as a challenge to exchange experiences from each other's systems. This is because officials in several industrialised nations are currently exploring new ways to effectively combat crime and improve on criminal justice management without involving massive expenditures for new prisons, expensive technologies and ever increasing personnel needs. In the same way, developing countries including Uganda that have not yet made tremendous capital investments in similar facilities and technologies may explore such alternative methods to avoid some of the problems that may have been encountered in industrialised nations. However, in doing so, they should develop criminal justice processes that more closely reflect their society's values and way of life.

## 1 OFFENCES

### 1.1 PENAL OFFENCES

### 1.2 Felony and Misdemeanour

Recommendation:

The distinction between felonies and misdemeanours in the penal code appears meaningless. Both felonies and misdemeanours are not sufficiently defined and classified, as is the case in the United States. Such offences should be classified and graded according to the seriousness of the offence. Failure to classify them, they should be discarded so that those offences are punished according to their seriousness.

If the distinction between felonies and misdemeanours is discarded, it follows that Chapter VI that provides for general punishment for misdemeanours under Section 24 of the Penal code should be decriminalised and all those provisions in the Penal code that make reference to those terms should be adjusted accordingly.

### 2 Offences against the State

### 2.1 Seditious offences

Recommendation:

The offences of sedition contravene the provisions of the Constitution. Accordingly it is recommended that the seditious offences falling under Sections 42, 43, 44 and 45 of the Penal Code should be decriminalised. Some of the purposes seditious offences serve could still be achieved by making reference to treasonable offences against the state under Chapter VII and those relating to the Administration of Justice, under chapter XI of the Penal Code.

2.2 Defamation

Recommendation:

The offence of libel is akin to the offence of sedition and hence it also falls under the protection of Article 29(I) of the Constitution. Besides, libel is very adequately catered for by the tort of defamation. Accordingly, it is recommended that all offences falling under Chapter XVIII of the Penal Code in Sections 174-181 of the Penal Code should be decriminalised and handled in civil courts as civil actions as opposed to the current dual recourse for remedy. This will also minimise on the delays in exposing of such cases and also save on costs incurred by both the state and the victim.

2.3 Piracy

Recommendation:

The offence of piracy should be defined.

3. Duties relating to the Preservation of Life and Health:

Recommendation:

Offences should be created and penalties prescribed.

Alternatively if offences are not created and penalties prescribed, they should be deleted from the Penal Code as their continued existence thereon does not serve any useful purpose.

Some of these responsibilities and duties are provided under Sections 152,153 and 154 of the Penal Code and offences are created thereof. This is a duplication. These should accordingly be deleted.

4. Offences Against Morality

4.1 Defilement

Recommendations

It is recommended that in order to strengthen the need to protect young girls particularly those falling in the age bracket of near adults – 16 – 17 year olds, and at the same time allowing them freedom to prepare for founding their own families in terms of Article 31(1) of the Constitution, the age of consent in terms of Section 123 of the Penal Code should be reduced to 16 years while maintaining the punishment.

After the age of 16 years, offences committed by near adults (17 –18 year olds) would be catered for by the offence of rape which in its current state caters for both women and girls and besides it attracts the same penalty as defilement.

Under chapter fifteen that deals with offences against morality, it is only the offence of elopement contrary to Section 121A where courts are empowered to make an

order for the convict to pay the aggrieved party compensation in addition to any other punishment. In that regard, our recommendations are:

It is recognised that there is a high rate of HIV infection in Uganda. Many times the offenders for the offences of Rape and Defilement may be HIV positive. It is suggested that where somebody knowing that he is HIV positive does rape or commit the offence of defilement or where anybody is convicted of any of the above offences and is proved HIV positive then that should be an aggravating factor in the sentencing process.

4.2 Adultery

Recommendations:

One definition similar to one given by ***Black's Law Dictionary,*** which defined adultery as voluntary sexual intercourse of a married person with a person other than the offender's husband or wife, or by a person with a person who is married to another above could be adopted as a unified definition;

The law should provide the same sentences for the offence irrespective of which member of sex commits the offence;

4.3 Indecent Assault

Recommendation:

There is need for these provisions to be made gender sensitive, which is to have one unified definition of the offence of Indecent Assault as is the case with Adultery above.

Furthermore, there is need to have the same penalty for the same offence to avoid having different penalties that apparently appear to be based on the sex of the victim. That will reduce disparity in the sentences that may be imposed.

5. STATUS OFFENCES

5.1 Status Crime

According to ***Black's Law Dictionary***, status crime is defined as a class of crime, which consists not in proscribed action or inaction, but in the accused' s having a certain personal condition or being a person of a specified character. Status crimes are constitutionally suspect. For example, being a drug addict is no longer a punishable offence in the United States.

5.2 Vagueness Doctrine

Under this principle, a law, for example, a criminal statute which does not fairly inform a person of what is commanded or prohibited is unconstitutional and in violation of due process. It requires that penal statutes give notice to ordinary persons of what is prohibited and provide definite standards to guide discretionary actions of Police officers so as to prevent arbitrary and discriminatory law

enforcement. Status offences have been a common object of attack in the United States. They are said to be vague and over broad. Indeed, courts have invalidated statutes on this ground where jurisdiction could be assumed over a wayward minor, defined as one who was "morally depraved or in danger of becoming morally depraved".

Recommendation:

The American Bar Association Juvenile Justice Standards Project advocates for the removal of the status offence jurisdiction on the grounds that it would encourage more people to get more effective help; stimulate the creation and extension of a wider range of voluntary services than is presently available, and the corrosive effects of treating non-criminal persons as though they had committed crimes; and free up a substantial part of resources. This submission tallies with the Poverty Eradication Action Plan (PEAP) that is currently being pursued by the Government of Uganda to increase access of justice to the poor. In that regard, the legislators in Uganda should adopt the same reasoning and revise those laws accordingly.

5.3 Prostitution

Recommendation:

The following offences should be decriminalised:

(i) Persons living on earnings of prostitution, contrary to Section 131 of the Penal Code;

(ii) Brothels, contrary to Section 134 of the Penal Code;

(iii) Definition of prostitution under Sections 134A and 134B;

(iv) Idle and disorderly persons, contrary to Section 162 of the Penal Code; and

(v) Rogues and vagabonds, contrary to Section 163 of the Penal Code.

6. OTHER OFFENCES

6.1 Issue of False Cheques:

Recommendation:

This offence is civil in nature than criminal and as such, the criminal law has not handled this case effectively. Interested parties settle most of the cases involving cheques out of court amicably. It is therefore recommended that the offence should be decriminalised and the matter be handled by the Commercial Court.

7. STATUTORY OFFENCES

7.1 The Witchcraft Act

Recommendation:

This legislation is archaic, and the fact that it is cruel, ambiguous and violates the provisions of the Constitution, it should be decriminalised.

7.3 The Enguli (Manufacture Licensing) Act

Recommendation:

In view of the fact that the brewing and selling of enguli is a source of revenue, especially to the rural poor and some local administrations, this Act has outlived its usefulness given the fact that other big companies are by law authorised to produce a similar product. This legislation has outlived its' usefulness. In that regard we recommend that the Enguli (Manufacture Licensing) Act be decriminalised.

7.4 The National Drug Policy and Authority Statute No. 13/93

Recommendation:

There is need to rationalise the sentences vis a viz the gravity of the offences created under this Statute.

The disclosure of the names of a patient and the kind of drugs that patient may be addicted to, to a minister is a constitutional breach of the privacy of the individual by a surgeon and we recommend that it be amended accordingly.

7.5 The Traffic and Road Safety Act 15 of 1998

Recommendations:

An urgent study in the use of prompt fines on site by offenders should be made. This would empower police officers to deal with the less serious traffic offences promptly. This is the case in many jurisdictions like the United Kingdom, Sweden, Australia, Spain and several other countries.

There is also need to harmonise and/or reduce fines. Much as there is need to fight traffic offenders, there is also need to look at the means to pay the fines

7.6 The Local Government Act 1/94

Recommendations:

(i) Apart from what is provided in Regulation 9 spelling out who are exempted from paying graduated tax. There is need to come out with a definition of what would constitute "lawful excuse".

(ii) There is also need for the government to come up with guidelines/methods that would be followed in apprehending defaulters.

(vi) In respect to a defaulter who is convicted but is not able to pay the fine he should carry out community service in the locality at the end of which he should be given a ticket worth his assessed tax.

7.7 The Children Statute No.6/1996

This statute, which came into force in 1997, was intended to reform and consolidate the law relating to children, to provide for the care, protection and maintenance of children, to provide for local authority support for children, to establish a family and children's court, to make provision for children charged with offences and for other purposes connected therewith.

It also implements international obligations relating to the Children under the United Nations Conventions and the O.A.U. Charter. It may be observed that the statute specifies detention to be used only as a last resort and to be undertaken in identified centres for children. It also provides for alternatives to imprisonment, which include caution, conditional discharge, binding over to be of good behaviour, compensation, restitution, fine and probation.

Recommendation

We sincerely do hope that the Courts will make use of the options provided in this Children's Statute. We have of course already considered elsewhere that some of the options available in this Statute should also be utilised for adults in appropriate cases.

7.8 The Habitual Criminals (Preventive Detention) Act, Cap.112

Recommendation:

The trend of sentencing habitual criminals renders the Habitual Criminals (Preventive Detention) Act obsolete and out dated. It should accordingly be decriminalised. Habitual Criminals should be sentenced in accordance with the approaches of sentencing persistent offenders namely:-

**Flat rate sentencing**; according to which a sentence should be governed by the crime and not at all by the offender's prior record;

**The cumulative principle**; according to which, for each new offence the sentence should be more severe than the previous one and;

The progressive loss of mitigation; which contains two parts: namely that the offender should receive a reduction of sentence and the other is that with second and subsequent offences an offender should progressively lose that mitigation. This principle assumes a limit beyond which the sentence cannot go, no matter how many previous convictions the offender has.

## CHAPTER TWO

## SENTENCES

### 1 CUSTODIAL

#### 1.1 Minimum and Maximum Sentences

Recommendation

There is need to review the current minimum and maximum penalties in our criminal justice system so as to reflect the relative seriousness of different types of offences. This is so because the current ranges of sentence for offences are too wide to give sufficient guidance to the court and the relative seriousness of the offence.

#### 1.2 Corporal Punishment

Recommendation

Corporal punishment as a sentence or penalty should be decriminalised and abolished. All criminal provisions stipulating corporal punishment as a penalty should be amended accordingly by replacing corporal punishment with other appropriate sanctions to reflect the seriousness of those offences.

These provisions inter alia include:

(a) Rape and attempted rape(ss. 118and 119 Penal Code), indecent assault on a female(s.122 Penal Code), attempted defilement of a girl under the age of eighteen years (s.123(2) Penal Code),Robbery and upon females and males of more than 45 years of age and various prison offences(ss.55 and 56 of the Prisons Act (Cap. 313)

#### 1.3 The Death Penalty

In Uganda, the imposition of a death sentence by a court in accordance with the law cannot be successfully challenged as unconstitutional on the basis of Article 22. However, there are two situations in which the death penalty might not be beyond challenge. First the method of execution could constitute an inhuman punishment. Secondly, the death penalty could be open to challenge on the basis that in a particular case it was disproportionate to the offence . The International Covenant on Civil Political Rights referred to earlier, actually specifies that " sentence of death may be imposed for the most serious crimes.

In Uganda the challenge could emanate from the provisions of Article 24 of the Constitution on the premises that the death penalty is a cruel and inhuman punishment. This approach has been the argument advanced in many countries and courts including the United States, European Union, Canada, India, Jamaica, South Africa and Zimbabwe. The Uganda Constitutional Commission reported that the majority of the people favoured the retention of capital punishment and thus the Draft Constitution retained the death penalty. The issue was further debated in the

Constituent Assembly, which was almost evenly divided, but the retentionists obtained majority votes and the death penalty was retained with safeguards.

Recommendation

In that regard, it is recommended that:-

(i) The struggle must go on and the legal profession and public spirited individuals and activists must continue to advocate for the abolition of the death penalty by law if not by the Constitution, or to challenge its execution using human rights standards.

(ii) The legislature should be slow to create new capital offences and even be prepared to remove the current ones from our statute books.

If public opinion continues to favour the death penalty, it should be limited to very grave and atrocious offences like treason and murder. Otherwise life imprisonment seems to be an adequate and humane alternative to capital punishment.

In that connection, life imprisonment should mean imprisonment for the life of an offender not subject to release as opposed to the current term of twenty years.

(iv) The extension of capital punishment for rape and defilement may have had good motives but it seems unlikely to have had any effect on the incidence of these crimes, which seems to be on the increase or on the sentencing policy of the courts, which have so far not imposed any death sentence. It is accordingly recommended that the death penalty for rape and defilement should be replaced by life imprisonment, which will mean imprisonment for life of the offender.

1.4 Caution

Recommendation:

It is recommended that the Chief Justice (Sentencing Council) should come out with guidelines as to which type of offences and when sentencers would use discharge with caution.

1.5 Conditional Discharge

Recommendation:

For the Chief Justice (Sentencing Council) to come out with guidelines as to what offences and the type of offenders on whom they may be used for, and we recommend so.

1.6 Suspended Sentence

Recommendation

One of the cardinal considerations of sentencing is the rehabilitation of the offender but, of course, without losing sight of the fact that society must be protected. Where therefore, there is need to reduce on the number of inmates but of course bearing in mind that those who commit offences should be punished, we would recommend

The use of suspended sentence, which hitherto appears to have been used very sparingly by the courts. The Magistrate or Judge on appeal in appropriate cases should inform the accused of this right to apply for suspended sentence.

That this provision be enacted in both the Magistrates Courts Act and the Trial on Indictments Decree so that they are available to be used by the accused other than have them restricted to those on appeal only.

1.7 Restitution or Compensation or Restoration

Recommendation

(a) There is need to specifically provide for restoration/compensation/restitution for all these offences in the chapters referred to above.

(b) The Judges/Magistrates should be given guidelines by the Chief Justice (Sentencing Council) as to how, how much, to whom and where it should be used.

(c) There is also need to educate the people as to how they should quantify their claims should they need to make a claim.

1.8 Fines

Recommendation

**Day Fine or Unit Fine**

The most obvious drawback of the ordinary fine of a specified monetary amount is that its punitive bite varies with the resources of the offender. A $1,000 (£1000) fine is a devastating penalty to a poor defendant, but trivial in the case of a millionaire.

The day fine addresses this difficulty by assessing the fine in income units: the offender is assessed the equivalent of so many days work (or so many days worth of disposable income), instead of so many dollars and pounds. The actual monetary amount is then calculated on the basis of the offender's income. Assessing day fines involves two steps namely, deciding how many day fine units (that is how many days worth of income) should be assessed against a Defendant) and; deciding the actual amount involved per unit, given that defendant's earning power.

A system of day fine results, of course, in offenders convicted of the same crime paying different amounts: the rich Defendant pays more per unit than the Defendant with only modest means. Is that a disparity? The theory of the day fine is that it is

not, but rather a way of avoiding disparity: the proportion of income taken from the two Defendants is the same, making the punitive bite comparable. Yet the measure of punitiveness used – namely, units of income is an objective and readily measurable one. Purely subjective differences in sensitivity to punishment would pay as many units for a given offence as the prodigal one, though payment might subjectively "hurt" more. The day fine is best suited for Defendants with regular, measurable (and legal) income flow. Where day fines are normally prescribed but the Defendant is indigent, a sanction of comparable weight may need to be imposed.

1.9 Imprisonment in Default of a fine

Recommendation

Where a Defendant is sentenced to a fine because of the minor nature of the offence, he should not be sent to prison in default but should instead be sentenced to a community-based penalty.

1.10 Probation

Recommendation

(a) A probation order should become a sanction in its own right.

(b) The recognition of the probation order as a full penalty would have the added benefit of dispelling the " soft –option" image which it has.

(c) There should be clear statutory recognition of the probation order as a sentence in its own right.

1.11 House Arrest

In some jurisdictions like the UK house arrest is one of the measures that may be imposed on a convicted offender. This arrangement is for offenders who are basically of no risk to the public and are unlikely to require heavy punishment and/or to be involved in any further criminal activity. In this case the offender would either report to Police or Probation officer weekly or as the case may require. By this the offender would remain working and stay with his family.

In Uganda's case the offender would probably report to the LC 1 Chairman of the area where he resides, Probation officer or to the nearest Police. It is observed that as of now there is no legislation to put in effect this kind of arrangement.

Recommendation

Legislation, which would enable the courts to put it in use in appropriate cases should be put in place.

NON –CUSTODIAL SENTENCES

2 Community Sentences:

The arrival of new forms of sentence in the last 25 years, such as suspended sentences, community service orders and probation orders has been accompanied by references to "alternatives to custody". The new measures have been advanced as suitable for cases, which are serious enough for custody.

These requirements can be viewed as an attempt to combine proportionality with individualisation. The seriousness of the offence should indicate the level of the penalty, which should be pegged on the proposals for rehabilitation or for public protection.

However, courts have often not regarded them in this light, believing that neither in their conception nor in their enforcement can they be compared to prison. It has now been accepted that " in reality there can be no alternative " to custody, but it is argued that there are "other ways of punishing". There can and should be "punishment in the community", the punishment being "in the restrictions on liberty and in the enforcement of the orders".