

JUSTICE LAW AND ORDER SECTOR

A STUDY ON SENTENCING AND OFFENCES LEGISLATION IN UGANDA

PART A: SUMMARY AND 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. It may be pointed out that changes and “ reforms” of sentencing law are currently frequent features of legislative programmes in most countries.

New sentences are introduced, others phased out; maximum sentences are increased or reduced; the powers of various courts are enlarged or curbed. In that regard, one frequent form of legislation in the 1980’s was the mandatory minimum sentence; introduced in several jurisdictions including the United States, Singapore, and Uganda and in many other countries. Usually a mandatory sentence is aimed at a form of criminality regarded as a significant social menace, such as the carrying of firearms, importation of drugs or embezzlement and causing financial loss.

However, research in the United States casts doubt on the deterrent value of such laws and on their ability to produce consistent and predictable sentencing. This is because prosecutors and judges often go to considerable lengths to circumvent mandatory sentences in cases where they are considered unduly harsh, thereby emasculating the legislation¹.

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. In so doing, the following issues may arise:

- (i) Should either body have the greater responsibility for determining sentencing policy; or
- (ii) Is there scope for a third alternative?
- (iii) Have the courts failed Parliament with the wide discretion they have enjoyed?
- (iv) Would Parliament or some other body do a better job?

At this stage, one may be tempted to think 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.

However, one issue of particular concern is that the judiciary in Uganda have in the past been reluctant to use those non- custodial sentences that are available on a more frequent basis. Accordingly, that issue must be explored as to why non- custodial sentences are not imposed more readily. Whatever the reasons, there is now need for a change of attitude. This may best be achieved by enacting a legislation giving clear guidance to judges and magistrates as to how they exercise their sentencing discretion. If Parliament decides it is desirable to seek community - based sentences for example, to be used more frequently, the courts should properly reflect this policy in their sentencing.

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 is 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.

CHAPTER ONE: OFFENCES

PENAL OFFENCES

1.0 Felony and Misdemeanour

- 1.1 The Penal Code in section 4 defines a felony as an offence declared by law to be a felony, or, if not declared to be a misdemeanour is punishable with death or imprisonment for three years or more. The punishment however differs for example unlawful oaths c/s 46 provides for life imprisonment while other unlawful oaths c/s 47 and unlawful drilling c/s 49 provides for seven years imprisonment and yet fraudulent marriage ceremony carries a sentence of five years.
- 1.2 The punishment for a misdemeanour where no punishment is provided for is governed by section 24 of the Penal Code, which provides for imprisonment not exceeding two years. These misdemeanours are for example: forcible detainment c/s 73, challenge to fight a duel c/s 75, false assumption of authority c/s 86, threat of injury to persons employed in public service c/s 88, perjury and subordination of perjury c/s 89, false swearing c/s 94, deceiving witnesses c/s 95, compounding felonies c/s 98, compounding penal actions c/s 99, advertisements for stolen properties c/s 100, offences relating to judicial proceedings c/s 101, frauds and breaches of trust by person employed in the public service c/s 107, false information c/s 109, insult to religion c/s 112, disturbing religious assemblies c/s 113, trespassing on burial places c/s 114, hindering burial of dead body c/s 115, desertion of children c/s 152, neglecting to provide food ,etc for children c/s 153 and master not providing for servants or apprentices c/s 154. However other misdemeanours to wit: writing or uttering words with intent to wound religious feelings c/s 116, affray c/s 74, provide for imprisonment of up to one year.
- 1.3 According to **“Black’s Law Dictionary”**, sixth edition, felony is defined to mean a crime of a graver or more serious nature than those designated as misdemeanours; e.g. aggravated assault (felony) as contrasted with simple assault (misdemeanour). In the United States, the federal ¹and many state criminal codes define felony status crimes, and in turn also have various classes of felonies (e.g.; class A, B, C, etc) or degrees (e.g.; first, second, third) with varying sentences for each class. On the other hand, the term “Misdemeanour” is defined to mean offences lower than felonies and generally those punishable by fine, penalty forfeiture or imprisonment otherwise than in penitentiary. Under federal law, and most state laws, any offence other than a felony is classified as a misdemeanour. Certain states also have various classes of misdemeanours for example Class A, B, C etc.
- 1.5 **Accordingly our first recommendation is that:**
- (i) 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.
- (ii) 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.

2.0 **Offences against the State**

2.1 **Seditious offences**

Article 29(1) of the Uganda Constitution provides:

Every person shall have the right to:

- (a) *Freedom of speech and expression, which shall include freedom of the press and other media;*
- (b) *Freedom of thought, conscience and belief which shall include academic freedom in institutions of learning;*

Our Recommendation in this respect is that:

As can be seen from the above provision, 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**

- (a) Section 174 of the Penal Code provides: -

“Any person who, by print, writing, painting, effigy or by any means otherwise than solely by gestures, spoken words, or other sounds, unlawfully publishes any defamatory matter concerning another person with intent to defame that other person, is guilty of misdemeanour termed libel”.

Our Recommendation therefore is that:

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**

- (a) Section 53 provides

“Any person who is guilty of piracy or any crime connected with or relating or akin to piracy is liable to be tried and punished according to the Law of England for the time being in force.”

- (b) Article 28 (12) of the Uganda Constitution provides:

“Except for contempt of Court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law”.

- (c) The offence of piracy is not defined, and it cannot therefore be enforced under our Laws as it contravenes Article 28(12) of the Constitution.
- (d) Black’s Law Dictionary defines piracy as:
 - (i) Those acts of robbery and depredation upon the high seas which, if committed on land, would have amounted to a felony
 - (ii) Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.⁵

Our Recommendation therefore is that the offence of piracy should be defined presumably along the definition in (d) (i) and (ii) above but with special reference to the usage in Uganda.

3.0 Duties relating to the preservation of life and health:

All the duties as enumerated under Chapter Twenty of the Penal Code do not create any offences. They simply state responsibilities and duties that are expected to be fulfilled by persons in charge of others. They do not define any offences nor prescribe any penalties.

It is thus recommended that: -

- (i) Offences should be created and penalties prescribed.
- (ii) 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.
- (iii) 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 duplication. These should accordingly be deleted.

4.0 Offences against Morality

4.1 Defilement

(a) Defilement is defined in section 123 as:

Any person who unlawfully has sexual intercourse with a girl under the age of eighteen years is guilty of an offence and liable to suffer death.

Any person who attempts to have unlawful sexual intercourse with a girl under the age of eighteen years is guilty of an offence and liable to imprisonment for eighteen years with or without corporal punishment.

As teenagers approach adulthood, their parents’ responsibility for them is reduced. Young people should begin to take more responsibility for the consequences of their own decisions and actions. They are at an intermediate stage between childhood and

adulthood. The arrangements for dealing with people of this age – 16 and 17 years old (near adults) should reflect this. The current definition of the offence of defilement by raising the age of the victim from 14 – 18 years does not reflect this thinking. As a result, it has watered down the seriousness of defilement where the essence of the offence is having unlawful sexual intercourse with a female under the age of consent by equating it to rape where the essence of the offence is having unlawful carnal knowledge with a woman or girl without her consent.

Recommendations

- (i) It is therefore 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.
- (ii) After the age of 16 years, offences committed to the 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:

- (i) That courts should be empowered to require an offender to pay compensation to the victim for any injury, loss or damage resulting from the offence of which he was convicted and any other offence taken into consideration. Accordingly, Sections 118, 119, 120, 122, 123, 124, 126 and 129 should be amended to reflect a compensation order in addition to any other sentence that the court may impose. By enabling courts to order the payment of compensation either instead of, or in addition to/or dealing with the offender in any other way, a compensation order could therefore be a disposal in its own right.
- (ii) Furthermore, where the court does not order compensation, the court will be required to give reasons for not doing so.

It is hoped that such a provision will encourage courts to use compensation orders more readily. By so doing, they would place the responsibility where it belongs by requiring offenders to pay for the injury, loss or damage they have caused. In addition, such an approach will be in line with the spirit and aspirations of the people as expressed in Article 126(2) (c) of the Constitution that empowers courts in adjudicating cases of both a civil and criminal nature to award adequate compensations to victims of wrongs.

- (iii) 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**

Black's Law Dictionary defines 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.

In that regard we would recommend that the definition of adultery should be gender sensitive. It should not provide two sets of definitions for the same offence and besides, it should not provide different sentences for the same offence as that may be interpreted to offend Article 21 of the Constitution. A different definition for the same offence also promotes disparity in sentencing.

Accordingly, our recommendations are that: -

- (i) One definition similar to one given by Black's Law Dictionary above could be adopted as a unified definition,
- (ii) The law should provide the same sentences for the offence irrespective of which member of sex commits the offence;
- (iii) Section 150A of the Penal Code should accordingly be amended in the light of (i) and (ii) above.

4.3 **Indecent Assault**

(a) Section 122 provides: -

(1) *“ Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and is liable to imprisonment for fourteen years, with or without corporal punishment.”*

(b) Section 142 provides

“ Any person who unlawfully and indecently assaults a boy under the age of eighteen years is guilty of an offence and liable to imprisonment for fourteen years”

We would accordingly recommend that;

- (i) There is need for these provisions to be made gender sensitive that is to have one unified definition of the offence of Indecent Assault, as is the case with Adultery above.
- (ii) 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.

5.0 **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. The doctrine originates in due process clause of the Fourteenth Amendment, and is basis for striking down legislation, which contains insufficient warning of what conduct, is unlawful. 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”

5.3 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.

5.4 (a) Section 134 A defines prostitution as:

“ A prostitute means a person who, in public or elsewhere, regularly or habitually holds himself or herself out as available for sexual intercourse or other sexual gratification for monetary or other material gain ”

(a) Section 131(1) provides:

“Every person who knowingly lives wholly or in part on the earnings of prostitution and every person who in any place solicits or importunes for immoral purposes is guilty of an offence “

5.5 For reasons that we have endeavoured to give above, **we accordingly recommend that the offences of: -**

- (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, should be decriminalised.

6.0 OTHER OFFENCES

6.1 **Issue of False Cheques:**

Section 364 provides:

- (1) “Any person, including a public officer in relation to public funds who: -
- (a) Without reasonable excuse proof of which shall be on him, issues any cheque drawn on any bank where there is no account against which the cheque is drawn; or
- (b) Issues any cheque whether in respect of any account with any bank when he has no reasonable ground, proof of which shall be on him, to believe that there are funds in the account to pay the amount specified on the cheque within the normal course of banking business; or
- (c) With intent to defraud, stops the payment of, or countermands any cheque previously issued by him, commits an offence ”

Our recommendation therefore is that 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.

7.0 **STATUTORY OFFENCES**

7.1 **The Witchcraft Act**

- 7.2 The term “witchcraft” is not defined properly; the ingredients of this offence cannot be properly determined. If one does not sufficiently know the ingredients of the offence he is charged with, he cannot adequately prepare his defence. For example, in Canada a statute that was vague was held unconstitutional in a leading case of *Canadian Pacific Ltd -vs- R. (1996) 1 LRG 78.6.1.3.A* Statute that purports to encroach on a personal or proprietary right of a citizen should be construed strictly.

The Witchcraft Act compounds its vagueness by permitting the prosecution to adduce evidence of reputation that the accused is a witch or that witchcraft articles in issue by common repute are used in the practice. Under this legislation what is required in evidence is not scientific truth alone but also the subjective beliefs of the public, however unscientific they may be so long as they lead some people to believe generally that so and so practices witchcraft. Thus a law will be found unconstitutional if it is vague and so lacks in precision as not to give sufficient guidance for legal debate. The Witchcraft Act to that extent is therefore unconstitutional in so far as it contravenes Article 24, 26, 28 (12), and 44.

We accordingly recommend that in light of the observations made herein above, and considering the fact that this legislation is archaic, and the fact that it is cruel, ambiguous and violates the provisions of the constitution as indicated, this legislation should be decriminalised.

7.3 **The Enguli (Manufacture Licensing) Act**

- 7.4 This Act was passed in 1965 to regulate the manufacture, licensing sale and to regulate the consumption of Enguli. The history of why this legislation came into force is not hard to find. The consumption of Enguli in this country is widespread and

hence its being given different names in different localities such as Waragi in the central part of Uganda while in the West it is commonly known as “Kasese” and “Lira Lira” in the North. Its local manufacture is said to be basically the same although some of the ingredients differ. Before the coming into force of the act Uganda Distilleries Ltd a company wholly owned by Government was established to distil and manufacture a refined and bottled Waragi. The act therefore was to establish licensed brewers/dealers of crude waragi “enguli” who would subsequently sell it to Uganda Distilleries Ltd. The intention of setting up Uganda Distilleries was to afford natives a refined waragi so that they do away with the “enguli”. However it would appear the final price of the bottled product was slightly out of reach of the ordinary consumers.

- 7.5 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.

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

The disclosure of a persons’ names and the kind of drugs he is addicted to, to a minister would not only be unconstitutional but also medically unethical.

Article 27 (2) of the Constitution provides:

“ *No person shall be subjected to interference with the privacy of that person’s home, correspondence, communication or other property.*”

Our recommendations therefore are that: _

- (i) There is need to rationalise the sentences vis a viz the gravity of the offences created under this Statute.
- (ii) 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.

9.0 The Traffic and Road Safety Act 15 of 1998

- 9.1 The purpose of the new Act was intended to address the rising number of traffic cases by meting out harsh sentences in the hope that drivers and other road users would be more responsive in taking extra care on the road. While the intention of the Act was to raise the fines that had become meaningless under the old 1970 Act, most of the fines under the new Act were made disproportionate to the offences and are rather too on the high side. No wonder, shortly after it became operational, taxi drivers/operators staged a two day strike which led Government to suspend the operation of certain sections of the Act at least those that most affected the taxi drivers, like section 108 relating to conditions of motor- vehicles; section 109 relating to causing bodily injury or death through dangerous driving; section 110 relating to causing bodily injury or death through careless driving; section 111 relating to reckless or dangerous driving.

Our Recommendations therefore are that:-

- (i) In view of the above observations, 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.
- (ii) 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

10.0 The Local Government Act 1/94

The Act came in to amend, consolidate and streamline the existing law in Local Government in line with the certification to give effect to the decentralisation and devolution of functions, powers and services; and to provide for decentralisation at all levels of Local Governments to ensure good governance and democratic participation in and control of decision making by the people and to provide for revenue and the political and administrative set-up of local governments; and to provide for election of Local Councils and any other matters connected to the above. It should be noted that the Act does not provide as to how those who have defaulted would be brought to book. It is noted that in many cases, defaulters have been apprehended, tied up on ropes after the Council Officials mount roadblocks and demand for tax tickets. This procedure is not only humiliating and degrading but also unconstitutional.

Our Recommendations therefore are that:

- (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.
- (iii) 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.

11.0 The Children Statute No.6/1996

- 11.1 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. We sincerely do hope that the Courts will make use of the options provided in this 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.

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

12.1 Definition

Section 2 provides:

1. *When a person who in the opinion of the Court is not less than thirty years of age:*
 - (a) *is convicted of an offence punishable with imprisonment for a term of two years or more; and*
 - (b) *has been convicted on at least three previous occasions since reaching, in the opinion of the court, the age of sixteen years, of offences punishable with such a sentence, and was on at least two of those occasions sentenced to imprisonment, then, if the court is satisfied that it is expedient for the protection of the public that he should be detained in custody for a substantial time the Court may pass on him, in addition to or in lieu of any other sentence, a sentence of preventive detention for such term of not less than five or more than fourteen years as the court may determine; Provided that where a sentence of preventive detention is passed in addition to any other sentence the total term of preventive detention and imprisonment shall not exceed fourteen years.*

Article 28 (8) provides:

“No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed”.

The High Court has consistently held that when considering whether preventive detention should be awarded, the Courts should be guided by the same principles as those, which have been laid down in England. (However, preventive detention was abolished in England since 1967). Again it should be remembered that in the case of serious crime a sentence of imprisonment of sufficient length may often properly be given which will give adequate protection to the public as well as punishment to the prisoner. Finally, insufficient regard is often given to the fact that a prisoner may have shown that he was able to and had held down a job for a substantial period immediately before the offence for which he is being sentenced. Again one can only generalise but where such period is over twelve months preventive detention should not ordinarily be imposed.

The High Court has interfered on appeal or revision where preventive detention has been imposed in a number of cases, mainly on the ground that the accused had apparently “gone straight” for a considerable time.

- 12.2 A brief historical survey reveals two recurrent difficulties. First, legislation on persistent offenders has usually been framed in broad terms, often without clear and precise guidance about the types of offender to be included and excluded. Secondly, and more fundamentally, there has been little agreement about the group or groups of offenders who should be the target of special sentences. Terms such as “Professional Criminal” and “real menaces” have been used without much effort to precision. In

addition, it has been pointed out that prison sentences may prove counter-productive. The inference is that present methods not only fail to check the criminal propensities of such people, but may actually cause progressive deterioration by habituating offenders to prison conditions which weaken rather than strengthen their characters.” In short, it is possible that the considerable use of prison sentences makes these offenders less able to live law abiding lives and more likely to re-offend on release. Thus if the cumulative principle is based on individual deterrence, and if the point of deterrence is to protect the public, reliance on imprisonment for this purpose may be a self-defeating strategy.

12.3 **Our Recommendation therefore is :-**

In view of the above observations, 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:-

- (i) Flat rate sentencing; according to which a sentence should be governed by the crime and not at all by the offender’s prior record;
- (ii) The cumulative principle; according to which , for each new offence the sentence should be more severe than the previous one and ;
- (iii) 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.

12.4 Besides the original principles, which were supposed to guide courts in Uganda have since been abandoned with the abolition of the Prevention of Crime Act 1908 which was similar in wording with the current Habitual Criminals Act in Uganda.

CHAPTER TWO: SENTENCES

13.0 CUSTODIAL

13.1 Minimum and Maximum Sentences

13.2 In many countries the very existence of minimum sentences is being increasingly criticised. For example, the preliminary drafts of the French and Belgian Criminal codes abolish both minimum sentences and mitigating circumstances and leave the courts an unfettered discretion which is only limited by the maximum sentences. Similar measures have been put forward in Canada. The contemporary tendency to legislate in this direction has been criticised, in particular by Baaberger who argues that the minimum legal sentence was a fundamental criterion for the courts. However, it is by no means certain that the latter always attach so much importance to these figures when they have a purely indicative value. It is common in France that the maximum fines for misdemeanours are periodically updated by the legislature while the minimum fines are left unchanged. Generally the courts make considerable use of

these means of mitigation and the legal machinery does not prevent them from doing so. For example, the Italian provision that, where there are both aggravating and mitigating circumstances, the sentence should be based on a comparison between the two is generally interpreted by the courts as a means of reducing minimum sentences. The position in France is comparable, where aggravating circumstances for recidivism are not in fact taken in account except when the prosecution or the court wishes to pass a sentence above the maximum authorised for a first offence, which rarely happens bearing in mind the severity of these maximum sentences.

Recommendation

In view of the experiences as outlined above from other jurisdictions on the same issue, it is suggested that 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.

14.0 Corporal Punishment

14.1 Although corporal punishment is a legitimate criminal sanction under the Uganda law, and the argument is floated that it is culturally acceptable, nevertheless some doubts may be raised as to its legitimacy, at least from a comparative and international human rights perspective. The question may be asked whether the very reason, which militated the abolition of corporal punishment against juveniles, may also not be applicable to adults. It may be observed here that on a similar issue some years ago, the Court of Appeal of Zimbabwe ruled that corporal punishment to adults was unconstitutional whereas when applied to juveniles it was constitutional because a young person's character could still be reformed by such strokes for the better or worse.

14.2 International comparisons reveal that only few countries still retain corporal punishment as a criminal sanction. It may be observed here that former colonies and protectorates still retain this sanction as a colonial heritage and apply it as a common law practice while at the same time the country from whom they inherited it no longer apply it. For example, corporal punishment as an award for indiscipline in prison was abolished in England in 1967, this conforming to the Standard Minimum Rules, which forbid it. An argument is also made that every human being including the offender has a human right to physical integrity and personal dignity.

14.2 Recommendation

- (i) For reasons advanced in this paragraph, 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.

(ii) These provisions inter alia include:

14.2.1 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)

14.2.2 This will not only be consistent with the provisions of Article 24 of the Uganda Constitution but also with International Human Rights instruments to which Uganda is a signatory and most of which are drafted in the same wording as Article 24 of the Uganda Constitution.

15.0 The Death Penalty

15.1 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.
- (iii) 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.
- (iv) 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.

16.0 Caution

- 16.1 The law empowering a magistrate to impose a caution is to be found in section 202 of Magistrates Courts Act,1970. However, there are no clear guidelines as to when or what type of offences a caution may be used. It would appear the discretion is left to the Judge/Magistrate to decide when and what case merits a caution. Since there are many minor offenders who would not constitute a threat to society and their imprisonment may further damage rather than rehabilitate them there is need for provision of a system that will; balance between punishment and rehabilitation thereby reducing recidivism.

Accordingly, it is recommended that the Chief Justice should come out with guidelines as to which type of offences and when discharge with caution would be used by sentencers.

17.0 Conditional Discharge

- 17.1 A person convicted may be discharged by the court with or without sureties on condition that he keeps peace and good behaviour for 12 months other than being sent to prison. It would appear that these provisions are very rarely used by the courts. It is also not known for which offences and on what type they may be used. As an alternative to imprisonment, there is need for the courts to put in use these provisions.

We accordingly recommend also for the Chief Justice 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.

18.0 Suspended Sentence

- 18.1 Both the Magistrates Courts Act and Trial on Indictments Decree do not provide for the imposition of a suspended sentence after conviction, where the sentence is suspended for a period of time provided the accused commits no offence during the period.

However, section 331(3) of the Criminal Procedure Code provides:-

“ Where the appellate court maintains or imposes a sentence of imprisonment not exceeding three years in the exercise of its powers under the provisions of the sub-section (1) or (2) of this section, if the appellant satisfies the court that there are special reasons, having regard to the nature of the offence for which he was convicted, his age or antecedents that the sentence should be suspended, the court may order that it be suspended and shall record its reasons for making such order.”

18.2 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

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

19.0 Restitution or Compensation or Restoration

19.1 Section 213 of the Magistrates Courts Act provides:-

“(a) If any person charged with any offence as is mentioned in Chapters XXVI to XXXI , both inclusive, of the Penal Code, in stealing, taking, obtaining, extorting, converting, or disposing of, or in knowingly receiving any property is prosecuted to conviction or admits the offence under any of the provisions of this Act, the property shall be restored to the owner or his representative.

“(b) If in every case in this section referred to, the court before which such offender is convicted shall have power to award from time to time orders for restitution for the said property or to order the restitution thereof in a summary manner.”

19.2 The use of restitution/compensation/restoration is only limited to those offences covered in Chapters XXVI up to XXXI. However much as the legislation state that restitution/compensation/restoration is to be meted out to those offences in Chapter XXVI to XXXI some of the offences created therein do not specifically provide for compensation other than for the offences of Embezzlement c/s 257, Causing Financial Loss c/s 258 and Robbery c/s272 and 273 of the Penal Code.

Recommendation

- (i) There is therefore need to specifically provide for restoration/compensation/restitution for all these offences in the chapters referred to above.
- (ii) The Judges/Magistrates should be given guidelines by the Chief Justice as to how, how much, to whom and where it should be used.
- (iii) There is also need to educate the people as to how they should quantify their claims should they need to make a claim.

20.0 Fines

- 20.1 The principles that govern the use of fines are in general the same as those that govern sentences of imprisonment. The main principle that governs the use of fines is that the offence must be such that a sentence of imprisonment is not required. Secondly, the amount of the fine must be related amongst other things to the offender's own resources in deciding whether a fine is appropriate, and what amount of fine should be paid.
- 20.2 The fines as prescribed by the current legislations have not kept pace with inflation. Many of the minimum and maximum are now absurdly low. Our discussion with the First Parliamentary Counsel reveals that there is already a new Bill titled the Law Revision (Fines in Criminal matters) Bill, 2000. The purpose of the Bill is to revise the fines in criminal matters as specified in that enactment to cater for inflation and the fall in the value of the shilling over the years. The Bill also seeks to express fines in currency points at a rate specified in the Schedule. In our view, this is a step in the right direction. The sooner this Bill becomes law the better for society.

21.0 Day Fine or Unit Fine

- 21.1 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.

- 21.2 European day fine earning systems have guidelines for the second step: a day fine unit consists of the estimated daily incomes, minus certain specified deductions, (e.g. for child support). However, there generally have been no guidelines for step one: it is largely up to the Judge to decide, within broad statutory limits, how many day fine units are to be imposed on a particular Defendant. The recommended number of day fine units is graded according to the gravity of the offence. A modest downward adjustment in the number of day fine units is then authorised for defendants who lack a significant criminal record; and further adjustments are also permitted for aggravating and mitigating circumstances relating to the offence.
- 21.3 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 onerousness may need to be imposed.
- 21.4 The day fine system also requires an efficient system of collection. In

Sweden, fines are collected by the agency that collects overdue taxes and other debts owed to the State and that agency has wide powers of attachments, garnishments, etc. However, other jurisdictions, where day fines are new, may have to develop alternate collection mechanisms.:

22.0 Imprisonment in Default of a fine

- 22.1 The law requires the magistrate under the Magistrates' Courts Act in section 192 (d) to fix a sentence of imprisonment in case of default of payment of a fine as per scale (see Table 192 (d) MCA). In the High Court section 109(d) of the Trial on Indictments Decree sets the scale for imprisonment in default.

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.

23.0 Probation

23.1 Objects of Probation

The idea of a probation system is that an offender, instead of being imprisoned or fined or bound over, is placed under the supervision of a probation officer so that his rehabilitation is the main object. A probation order helps the offender to help himself, for without his willing co-operation the order will fail to achieve any result. However, there is a basic contradiction about the probation order, which ought to be resolved. This is that probation is being widely promoted as suitable for offenders who might otherwise be in custody, but it is still technically a conditional sanction, which is used instead of a penalty. It is misleading and counter-productive to maintain that a penalty, which may make heavy demands on an offender and involves a restriction of liberty is not really a penalty at all.

Recommendation

- (i) A probation order should become a sanction in its own right.
- (ii) The recognition of the probation order as a full penalty would have the added benefit of dispelling the "soft-option" image which it has.
- (iii) There should be clear statutory recognition of the probation order as a sentence in its own right.

24.0 House Arrest

- 24.1 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

25.0 Community Sentences:

- 25.1 The arrival of new forms of sentence in the last 25 years, such as suspended sentences, community service orders and probation orders have been accompanied by references to “alternatives to custody”. The new measures have been advanced as suitable for cases, which are serious enough for custody. 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”.
- 25.2 The new community orders are intended as a range of measures to deal with more offenders in the community than ever before. In one sense they are “alternatives to prison,” because they are intended for use in cases which might hitherto have received custody. The four main orders are community service orders, probation orders, combination orders and curfew orders/ house arrest.
- 25.3 The community service order remains as an order to do unpaid work in the community for between 40 and 240 hours as specified by the Court. The probation order is to be recognised as a sentence of the Court, and as having the purpose of rehabilitating the offender or preventing the commission of further offences by him. A Court may also include additional requirements in the order, being requirements as to residence, or specified activities, or attendance at a probation centre, or treatment for a mental condition, or treatment for drug or alcohol dependency. The combination order is a new form of sentence consisting of between one and three years’ probation together with 40 to 100 hours’ community service.

This is intended as an especially demanding form of punishment in the community, which might be suitable for some offenders such as persistent property offenders who now receive custody. The curfew order enables a court to require an offender to remain at a specified place (usually, his/her home) for between two and twelve specified hours on any day during a period of up to six months. The Act also provides for courts to require the electronic monitoring of a curfew order in areas where facilities are available. Before a Court imposes a community sentence, it must be satisfied that the offence was serious enough to warrant such a sentence. This will normally mean that the

case should be one that could not be dealt with satisfactorily by a fine or compensation order or both together. Once the Court has satisfied itself on that point, it must choose the community order or orders, which are appropriate according to two criteria. The first is that the restriction on liberty must be “commensurate with the

seriousness of the offence”, and the second is that the particular order or orders should be “ the most suitable for the offender.”

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.

CHAPTER 3: POLICY REFORM

26.0 Establishing Basic Principles

- 26.1 A lack of guiding principles, a lack of co-ordination and a lack of communication have been prevailing characteristics of penal policy in most jurisdictions including Uganda. The various non-custodial sentencing options have been introduced into a system, which might be seen, without exaggeration as out of control. If a system is to be established which deals with those offenders who are convicted in as human and effective a manner as possible, then the system must be brought under control. Unless this is done, it is likely that the most serious penalty available will continue to be meted out to an increasing proportion of those who are convicted, and that other offenders will be dealt by means of community based penalties which become increasingly demanding as a result of efforts to gain credibility with the Courts. Making changes in the range of penalties available, or altering their content, is unlikely to be effective unless fundamental questions about the principles and organisation of criminal justice are dealt with. Deliberations about these fundamental issues have featured much less in the Uganda penal policy than in other jurisdictions.

Recommendation:

- (i) Sentencing should be guided by the principle that provides for the selection of a sentence based on the criterion of what will be most effective in meeting sentencing objectives.
- (ii) Where the choice is between sentences that are likely to be equally effective, options that are least costly in human, social and financial terms should be preferred.
- (iii) Selecting the most economic method of achieving maximum effect makes the most efficient use of social resources. The application of this principle suggests that community based penalties are generally to be preferred.

27.0 Restricting the Use of Custody:

- 27.1 A lead in making a clear statement of principle should come from Parliament in a legislation to restrict the use of custody. As well as being a very important statement of principle, such legislation would limit the use of custody in courts directly and also indirectly.
- 27.2 Section 95(4) of the Children’s Statute provides:

“ Detention shall be a matter of last resort and shall only be made after careful consideration and after all other reasonable alternatives have been tried and where the gravity of the offence warrants the order.”

A similar requirement could be included in legislation specifying criteria for custodial sentences on adult offenders, stating that the courts must be satisfied that the circumstances, including the nature and gravity of the offence, are such that a sentence of imprisonment is appropriate. The restrictions on the use of custody for young offenders provide a good model that should be extended.

Thus it is recommended that:

Legislation should create a clear presumption in favour of community based sanctions in all cases. Tighter statutory restrictions on the use of custody should be introduced.

28.0 Limiting the availability of custody

- 28.1 Many sentencers would argue that legislation such as that proposed here would only codify what they already do and that custody is only when it is “really necessary”, as the last resort. The real difficulty is about drawing the line at which custody should be used. Factors that might be regarded as aggravating relatively minor offences should not, therefore detract from the principle that the use of prison should be limited to more serious offences.
- 28.2 Legislation should discriminate more finely between offences that are imprisonable and those that are not. Careful consideration should be given before imprisonment is made available for new offences.
- 28.3 Furthermore, there should be a review of existing offences with the purpose of considering whether the penalty of imprisonment could be abolished for some or abolished for offences below a certain level. This would mean sub-dividing broad offence categories, such as theft, in some way. One obvious way would be by the value of the property stolen, but other criteria for sub-division could be considered. To fix a point below which a custodial sentence would not be permitted would involve a statement that, whatever the aggravating circumstances the offence is not serious enough to warrant custody.

Recommendation

It is therefore proposed that the availability of imprisonment for less serious offences should be removed.

New offences should be susceptible only to community based penalty, unless it can be shown that custodial sentence could, in some circumstances, be necessary. A review of existing offences should be undertaken with a view to reducing the number of offences that carry a custodial sentence.

29.0 Back door Imprisonment

- 29.1 As well as limiting imprisonment directly, steps need to be taken to ensure that people do not continue to be imprisoned through the “back-door”. In principle, if the original offence is not so serious as to warrant imprisonment then it should not be possible for a custodial sentence to result, even indirectly. The courts do have a problem in dealing with the rising numbers of fine defaulters. But the solution to this problem rests in measures to ensure that fines are fixed at realistic levels and improvements in the collection of fines. The use of imprisonment should not be allowed to substitute for much needed

improvements in the fines system. This argument might be applied to default on fines imposed for imprisonable as well as non- imprisonable offences, but it is stronger in relation to the latter. **For this reason we recommend that:**

It should no longer be possible for someone to be imprisoned for default on a fine imposed in respect of a non- imprisonable offence.

CHAPTER 4: REFORM STRATEGIES

30.0 Cost considerations

30.1 Sentencers are resistant to the idea that cost considerations should be relevant to their decisions. Certainly saving money should not be an objective of sentencing in the sense that an ineffective sanction is imposed simply because it is cheaper. However, within a wider context, there are issues about how taxpayer's money is spent on this one element in the social response to crime. Cost considerations should not mean that expensive penalties are not imposed when they are needed, but equally resources should not be wasted. The financial costs of available sanctions vary considerably. Even the most expensive forms of community supervision, such as probation hostels rarely approach the cost of imprisonment. Three young offenders can be given attendance centre orders for about the same cost as keeping one in a young offender establishment for a week. Discharge of course costs nothing to administer. Fines actually bring in revenue, even after allowing for enforcement costs. There is a strong case for providing sentencers with up to-date information on the costs of various disposals. This would enable them to make a calculation of what they are spending and to consider whether or not money is being spent in the most effective way. Prison is an expensive resource and it is wasteful to use it to achieve aims which can effectively be met in less costly ways.

30.2 The human costs of various sanctions are at least as important as financial ones. Prison resources are limited and an unsparing use of them leads to the degrading and inhuman conditions that characterise many of today's penal institutions. Even without the added punishment that is inflicted by current conditions, imprisonment often deprives people of their homes, their jobs, family ties in addition to their liberty. These conditions also underscore the value of community based sanctions, which can achieve sentencing objectives without the risk of causing further problems for offenders with which society must then deal. It is a waste of human resources to use prison when a less damaging sanction could equally be effective. All these considerations point to a sparing use of penal sanctions and especially of imprisonment. It is argued that punishment involves the infliction of some deprivation upon a member of society. Since it is generally accepted that it is wrong to inflict harm, or deprivation upon members of society (indeed, much of the criminal law is concerned with that), it seems right that the state ought to inflict the minimum punishment consistent with its aims. Crimes themselves inflict misery on victims, but the state ought to avoid adding to the overall misery in society except to the extent that this may be necessary to attain other aims.

There are good grounds for adopting this argument. It implies that sanctions which do not involve restricting personal liberty should be preferred to those that do, and that sanctions which control and supervise the offender in the community should be preferred to those involving incarceration.

Recommendation

The aims of sentencing can be effectively achieved to a great extent without recourse to custody. To use the most expensive and damaging penalty when it is no more effective than other penalties is simply a waste of social resources.

31.0 Persistent Offenders

31.1 The problem for the courts in many cases, does not derive from the offence itself, but from persistent repetition of relatively minor offences. The approach followed by the Courts in several jurisdictions involves the Court first deciding on the proper sentence in the light of the case before it: this should form a “ceiling” of severity. The court should then look at mitigating factors that might reduce the sentence: repeated offending may act to reduce the degree of mitigation, but it should not be regarded as an aggravating factor. This approach has much to commend, in that it preserves the principle of proportionality. However, the problem is that the “ceiling” is in practice, set at disproportionately high level in relation to the offences committed and the amount of social harm that results particularly where the offender has had a number of previous convictions. One may be tempted to urge that there is a much better case for providing appropriate programmes in the community for such offenders.

31.2 In many instances no doubt such options will have been used prior to a custodial sentence being imposed. The court may feel that the fact of re-conviction demonstrates that community based options have not worked and that a different approach is needed. There is however, no evidence that custody is any more likely to work than community based penalties but there is often a readiness to use custody repeatedly. Re-conviction after a custodial sentence often seems to be taken as an indication that what is needed is not a different approach but a larger measure of the same. There may be much more scope for the repeated use of community based penalties which offer great flexibility of content as well as degree. Greater willingness to use community penalties in this way might also help to avoid the disproportionately high sentences on recidivist offenders that the penal ladder approach tends to produce.

In that regard it is recommended that:

- (i) Courts should be encouraged to use community based sanctions on more than one occasion. The idea of a penal ladder should be discarded. The fact that someone has re-offended after experiencing a community-based penalty on previous occasions does not mean that custody will be effective in preventing further offending. Custody should be used only where the instant offence warrants it. In other cases there should be an emphasis on flexible options, which allow courts to choose the most appropriate community based penalty.
- (ii) The proposals for introducing statutory restrictions on the use of imprisonment and for making certain categories of cases non- imprisonable would go a long way towards reducing imprisonment. But in a large number of cases, the problem of when it might be appropriate to use custody would still remain.
- (iii) Furthermore, injunctions to sentencers not to use custody do not provide them with assistance in knowing what amounts on which other penalties might be appropriate and in what circumstances. If community based sanctions are to be successfully promoted, then this type of guidance is necessary.

40.0 Promoting Public Confidence in the Criminal Justice System

40.1 Proposals for major changes in sentencing laws or procedures pose a dilemma for Judges. Since many such proposals are, or appear to be premised on criticism of Judges, it is not unnatural for Judges to oppose them. If judicial opposition succeeds, the proposed change is forestalled; if it fails, the changes go forward and they have little influence in its shaping. Similarly, the Judge's central role in sentencing poses a dilemma for sentencing policy makers. If substantial deference is given to judicial views and sensibilities, major policy shifts are seldom likely to occur. However if major policy initiatives are imposed on judges who oppose them in substance and are alienated from the process that produced them, the changes are likely to fail. In principle, the underlying differences in institutional interests and policy preferences should be reconcilable.

41.0 Structuring of sentencing discretion

41.1 What approach should be taken to the structuring of sentencing discretion? In the last twenty years or so, many countries have introduced or proposed reforms.

It is now possible to identify a number of key factors in the process of structuring. Decisions must be taken on the content of guidance, on the source of guidance, on the authority by which it should be laid down, and the style in which it should be formulated and attention must also be paid to the mechanics of putting the guidance into practice. There are other decisions of principle to be taken too.

- . One concerns the promotion of principles such as equality before the law particularly if there has been sentencing of discriminatory sentencing in the past.
- . A declaration that courts may not have regard to such factors as race, colour, gender, employment status and religion might be a step towards this goal. In this regard, Article 21 of the Constitution of Uganda which provides for "equality and freedom from discrimination" and Article 126(2)(a) of the Constitution that provides for the "exercise of judicial power" are steps in the right direction.
- . Another issue concerns the use of imprisonment. If there is to be a policy of restraint in the use of imprisonment, this may be implemented for example by means of specific legislative declarations.

50.0 Source of Guidance on Sentencing

50.1 What should be the source of any guidance on sentencing? In other words, if guidance is to be given, who should undertake the inquiries necessary to decide upon and formulate the guidance most appropriate to a particular system?

The typical English approach in times of legislative abstention has been for the senior judiciary in the Court of Appeal to develop guidance through their judgements. The perspective of the senior judiciary is narrow and is unlikely to demonstrate sensitivity to wider criminal justice policies.

In other jurisdictions the government has given the task to a specially appointed drafting committee as a prelude to a legislation (as in Sweden) or to a rule- making commission acting with the delegated authority of the legislature (as in Minnesota, for example). The membership of such a body can be more broadly based drawing upon the experience of some judges and also including others with wider correctional and criminal justice experience.

- 50.2 Once proposals for the structuring of sentencing have been drawn up, there is the question of the authority by which they should be adopted.
- . Should all the standards be contained in legislation, or should use be made of some other form of law or regulation?
 - . Some jurisdictions such as California have placed all the detailed guidance in a primary legislation. This might appear to ensure maximum control by a democratically elected institution but it brings the danger that a carefully contrived scheme of guidance can be distorted by individual and piecemeal amendments often proposed for political gain.
 - . Another approach adopted in Minnesota, Oregon and Washington state is for the legislature to set out some basic principles in primary legislation and to establish a rule-making commission to formulate detailed guidance in the form of regulations which will then take effect unless the legislature resolves otherwise. Much depends here on the competence and sense of commitment of the Commission and its ability to devise a coherent system of guidance which sentencers can be persuaded to adopt.
 - . A third approach would be for the primary legislation to set out the basic principles and leave the judiciary to develop the detailed guidance through appellate judgements. This approach adopted in the 1988 Swedish Sentencing law and in the 1991 English legislation depends for its success on the judiciary's willingness to take the principles seriously and to develop them sympathetically.

51.0 What style of guidance should be chosen?

- 51.1 The next question is what style of guidance should be chosen. Mandatory minimum sentences for certain crimes (e.g. gun laws, drug crimes) have been introduced by some legislatures but this technique seems attractive only to politicians. Mandatory minimum limit discretion only in one direction. They both leave insufficient leeway to deal with mitigating circumstances and fail to impose sufficient restraint on severity—that is, on sentences above the prescribed minimum. The evidence suggests that mandatory minimum sentences have little effect on the crime rate and that sentencers strive to avoid the injustice of having to treat different cases as if they were the same.
- 51.2 Determinate or “fixed point” sentencing has normally been the technique used in jurisdiction which place their sentencing guidance in primary legislation such as California. Once the Judge has categorised the crime, there are usually two stages of decision making. The first is whether to impose a prison sentence or a non-custodial penalty and that decision is (at least in California) largely discretionary.

But if the judge chooses prison, the next stage is narrowly restricted. Only three sentences will be available— the standard, the aggravated and the mitigated. The Judge may not go outside the three-fold choice, which leaves little scope for taking account of unusual combinations of circumstances.

52.0 Numerical Guidelines

- 52.1 Perhaps the best known style of guidance in the recent times has been numerical guidelines.
- . In Minnesota these take the form of a grid of normal sentence ranges, with scores for the seriousness of the crime and the prior record of the offender. Departure from this range is possible upon reasons given and subject to

appellate review and a body of jurisprudence on permissible reasons for the departure has grown up.

- . In the U.S Federal system the guidelines are approached by means of a step wise numerical calculation. First the judge categorises the offence, then takes account of the specific enhancements provided in the guidelines (e.g. possession of a weapon) and certain mitigating factors and then calculates the criminal history score. This will lead the judge to the applicable range of sentences from which departure is permissible in certain circumstances. The federal system suffers from a lack of any definitive rationale and from complexity in practice.
- . A different approach is that of setting out detailing principles, including guidance on how to resolve conflicts of principles and leaving the courts to translate those into actual sentencing levels. This is the new Swedish law's approach.

52.2 These various styles of guidance differ in extent to which they reduce judicial discretion but it would be wrong to assume that pursuit of principled sentencing means that most constraining approach is necessarily the best. The point is that there will inevitably be questions of detailed application, which can be answered differently by different sentencers so that even if all sentencers were conscientiously pursuing the same aim or a set of aims, inconsistencies could result. For example,

- . if the overall aim of the system were incapacitation it would still be important to have guidance on the types of offences and offenders for whom predictive restraint might be justified on whether limits should be placed on sentences in certain types of cases and on whether class-or-race related factors such as employment history might be taken into account.
- . If the overall aim is desert, it would be important to have parameters for determining the relative seriousness of different crimes and for deciding how much weight to give to an offender's prior record.
- . The more detailed the rules and the less room for discretionary choices, the more cumbersome the system becomes and the more it tends to deal inappropriately and unjustly with unforeseen contingencies.
- . The less the detail and the more interstitial discretion, the greater the risk of inconsistent treatment of similar cases"

52.0 Achieving Consistency in Sentencing

52.1 Training

In terms of achieving consistency the ideal position is that sentencers be persuaded of the desirability of the policies and principles underlying the sentencing system and also that they be fully trained in the approach, which it adopts. These training functions can be performed by an academy or centre for judges such as the "Judicial Training Committee". However, in Uganda, the current training strategy has been devoted in the areas of Court Administration and Case Management. Training in sentencing has not received sufficient attention as yet. Nevertheless, judicial training cannot contribute to principled sentencing unless there are clear principles in existence.

53.0 Introduction of technical aids

53.1. Another possibility is the introduction of technical aids for sentencers such as computerised systems with data bases, which help the judge to discover the relevant laws, policies and current practice relating to a particular type of case. Information

systems of this kind may be particularly useful in collating and presenting relevant guidance from different sources for example legislation, judicial decisions and common practice. In this respect it is noted with approval that the Government of Uganda plans to establish a “ Legal Information System”. Such a system, which is one of the proposed projects within the Justice, Law and Order Sector Wide Programme, should among other items also include the dissemination of sentencing information.

- 53.2 The implementation of a Management Information System (MIS) designed for the Judiciary by DANIDA which aims to assist the Judiciary Management in making informed decisions for the allocation of resources linked to workload and case throughout and to introduce mechanisms for improved monitoring and supervision of court stations may also be extended to cover the provisions aids for sentencers through computerised systems with databases.

54.0 Structuring of discretion at other points in the sentencing system

Finally it may be pointed out here that sentencing being one part of the wider criminal justice system, the exercise of discretion at other points in the system may reduce the impact of sentencing reform unless it too is subject to structuring.

54.1 Prosecutorial Discretion

- The other relevant points that may affect restructuring of the sentence discretion include plea bargaining, real offence sentencing and the sentence discount for pleading guilty, effects which will depend on the response of different kinds of defendant, defence counsel and prosecutor. If principled decision making and consistency of approach are aims of sentencing reform, those factors must be carefully considered and monitored.

54.2 Parole and Early Release

Reference must also be made to the intimate relationship between sentencing and parole. Indeed, a discretionary parole system could undermine the carefully contrived sentencing structures. One solution adopted in several U.S jurisdictions is to establish parole guidelines which structure decision making on release. Another approach taken or proposed in some other American jurisdictions is to abolish discretionary parole release when introducing the sentencing reforms. Both these approaches are capable of ensuring that the aims of sentencing are not undermined by discretionary decisions taken later on principles incompatible with the primary aims.

- 54.3 Parole might serve other goals of criminal justice and might be retained if those other goals are considered important. For example in a system, which wished to give some limited recognition to rehabilitative or incapacitative aims, some elements of discretionary parole system might be retained. The New English system introduced by the Criminal Justice Act of 1991 is an example of a parole system, which seems to incorporate limited elements of rehabilitative and incapacitative thinking into a sentencing system, which proclaims desert as its primary aim.

55.0 A Sentencing Council or Commission:

- 55.1 The initiatives, which have been discussed, need to be developed much further (in the longer run) in order to be more comprehensive in terms of content, particularly in relation to the use of community based sanctions and also to achieve greater co-ordination between the various levels of court. They need to be placed on a systematic basis. For this reason, there is a strong case for the establishment of a Sentencing Council along the lines proposed by the Hon. Chief Justice B.J. Odoki in

his paper on “ *An overview of Penal Reform in Uganda*”. Such a body would build on developments that may exist and extend the narrative guidelines that may have been formulated by both the Court of Appeal and Supreme Court to cover a wider scope of offences particularly those which are most commonly handled in the lower courts.

- 55.2.1 At this initial stage, it is not envisaged that the Council would produce numerical guidelines of the types we have earlier discussed. Nor is it envisaged that the Council would remove sentencing matters from the judicial sphere. The proposal of this study is that although there is more scope for legislature to establish general principles restricting the use of custody, the detail of sentencing policy should be a judicial function. **It is therefore proposed that** the Sentencing Council should be established as part of the Supreme Court.
- 55.2.2 However, it may be noted that sentencing guidance produced solely by the Judiciary may have its limitations. This tallies with the widely accepted argument that the real problem with calling upon the judiciary to provide a complete network of sentencing guidelines is that they would be fashioned solely from a judicial perspective, and informed only by the judicial outlook on the aims and effectiveness of sentencing... A mechanism is needed which allows the judicial expertise in formulating guidelines to be harnessed to the experience of other professionals such as probation officers, prison governors, magistrates etc. For this reason, it is essential that the proposed Council/ Commission should have powers to co-opt advisors from other agencies including those concerned with the administration of penal sanctions. This is necessary to promote clarity and coherence in the use made of various sentencing options available to courts.

Recommendation

- 55.2.3 The recommendation of our study on the best method of providing more guidance for sentencers is that the scope of The Court of Appeal and The Supreme Court guidance should be extended to encompass cases which are more typical of those routinely dealt with in lower courts.

A sentencing Council/ Commission should be established as part of the Supreme Court that would draw up narrative guidelines on sentencing in less serious cases and on the appropriate use of community based sanctions. In order to assist the Council/Commission in its work, it should have discretionary powers to co-opt advisers from the magistrates and agencies concerned with the organisation, implementation and supervision of penal sanctions. The above recommendation, in our view is in line with the provisions of Articles 126 (1) and 127 of the Constitution of Uganda, which provides respectively as:

Judicial power is derived from the people and shall be exercised by the Courts established under this Constitution in the name of the people and in conformity with law and with values, norms and aspirations of the people; and that Parliament shall make law providing for the participation of the people in the administration of justice by the courts.

56.0 Dissemination of Guidelines

- 56.1 It would be necessary to ensure that all sentencers were familiar with the guidelines produced by the Sentencing Council/Commission and with any subsequent revisions. This would most easily be done by incorporating the dissemination of such information into procedures for training and informing sentencers. The Judicial Training Committee already has responsibility for induction and refresher courses for

the judiciary, and has general oversight of the training of magistrates. It would therefore seem sensible that the Committee should be the body responsible for the dissemination of guidance emanating from the Sentencing Council/Commission.

Recommendation

- 56.2 Accordingly it is proposed that the guidance produced by the Sentencing Council/Commission should be issued as practice directions, disseminated by the Judicial Training Committee and incorporated in its training curriculum.”

57.0 Information for Sentencers

- 57.1 As well as the need to ensure that information about the results of the work of the Sentencing Council/Commission reaches sentencers, the Council/Commission would also need to have information about sentencing practice in order to keep its guidance up to date and under review.

That is to say, monitoring of sentencing practice would be needed. Such monitoring may also be of assistance to sentencers. Currently, sentencers do not have information, which enables them to know whether or not their sentencing patterns are very different from those in other similar courts, or not. The provision of such information could be of great value in allowing sentencers to reflect on their own practice and in promoting greater consistency.

- 57.2 The purpose of monitoring of sentencing practice, which is being suggested here, should not be misconstrued. It is not intended as a basis for any direct control of sentencing practice. Sentencers would not be called to account for apparently “aberrant” sentences except through the present channels of properly constituted process of appeal to the higher courts. In Germany for example, the results of research on sentencing variations have been fed back in this way and this has been welcomed by sentencers.

58.0 Information about the costs of sentencing

- 58.1 Information about the costs of sentencing could be included in the work of the Sentencing Council or Commission. It is increasingly being suggested that courts should become more cost conscious in their sentencing. However, many sentencers are very resistant to this. They argue rightly that justice must be done and that justice on the cheap is no justice at all. Nevertheless, as has been argued in this study, justice can be done without ready resort to custody. In some areas and for some groups of offenders, sentencers evidently do accept that justice can be done without heavy reliance on expensive custodial sentences. Whilst it is right that sentencing should not be determined by cost considerations these should be entirely irrelevant. To give courts a strict budget for dealing with the cases before them in a year would clearly be a basis for injustice. However, there is no reason why courts should not be given an indication of their spending as part of the provision of other information about their sentencing practices. This would give courts that spend above average amounts on dealing with the offenders who appear before them a basis for considering whether they could sentence just as effectively at a lower cost.

59.0 Feedback for Sentencers

- 59.1 At present, sentencers have no real means of knowing what the effects of their sentencing have been. They see the “failures”, those who are re-convicted whilst they are subject to a community based penalty. But the “success stories” do not come

back to court. There is a need for more feed-back for sentencers. To some degree general feed back on local sentencing patterns would be helpful. But there is need also for sentencers to be aware of what happens on local schemes.

- 59.2.1 Efforts should be made to provide this information and to ensure that it reaches beyond those sentencers who are involved in probation committees. Consideration should also be given to whether more feed back should be available on individual cases. This may be important in encouraging sentencers to use community based penalties in what they see as “ risky cases”. Furthermore, there may be an argument for saying that sentencers ought to take responsibility for being aware of the results of their actions and that this is an important part of their role.
- 59.3 Information about community based penalties should be given to sentencers at all stages. They should have good background information, detailed proposal for individual offenders and feedback on progress and outcome. Knowledge of this type is essential to building up the confidence of the courts in the community based penalties. Multi- agency co-operation is an important element in this. Our view of this in this study is that such a move should be encouraged and put in practice.

Recommendation

- 59.4 Accordingly we propose that sentencers should be encouraged to seek feedback on individual cases as well as receiving general information about their sentencing practice. In order that their responsibility for sentencing can be carried through, sentencers should have information about the outcomes of their decisions including the decision to use custody.

60.0 Public opinion

- 60.1 The courts are a vital audience for the effective promotion of community based sanctions, but they are not the only ones. Confidence in community based penalties must be promoted amongst the general public. This is partly because public opinion is often invoked as a justification for the use of custody. It is necessary to look carefully at this claim and for steps to be taken to increase public expression of support for dealing with offenders in the community so that sentencers feel that they are not against the demands of the public who they represent. Secondly, public support for community based penalties is important if resources are to be utilised and developed for dealing with offenders in the community. Studies of public opinion about crime and criminal justice have revealed more than anything that people do not really know very much about it. Information from the media tends to focus on particular court cases or on “ spectacular” events such as prison riots.
- 60.2.1 A public relations campaign is needed to promote community based sanctions. This should focus on what is being positively achieved in local schemes. A higher public profile for the probation service is needed, as they are a key agency. The service needs to consider how it could promote itself in the eyes of the public and should see effective public relations as a high priority in relation to public as well as in relation to sentencers. This study accordingly makes a recommendation in those terms

CHAPTER FIVE: OTHER STRATEGIC CONSIDERATIONS

61.0 Parole, remission and early release

- 61.1 One of the main government responses to the growing problem of prison over-

crowding in recent years has been the development of administrative mechanisms for securing the early release of prisoners of which the systems of remission and parole have been the most important contemporary examples. Hitherto, the main advantage of both these procedures from the government's point of view was that they operated independently of the court's decision on sentence, and could therefore act as an effective safety valve whenever the upward pressure on prison numbers threatened to overwhelm the system. The disadvantage is that, as with any system of crisis management, the procedures themselves had to be constantly adjusted in response to the latest turn of events. As a result the rules relating to parole and remission have not only been in an almost constant state of flux since the early 1970's they have also become exceedingly complicated. In addition, experience has shown that such systems of administrative release can do no more than temporarily contain the crisis. They cannot effect a lasting solution to it because they fail to address the real cause of the overcrowding which stems rather from the sentencing powers and practices of the courts.

- 61.2 There are numerous instances for example in England of remission being used explicitly as a means of reducing prison numbers. For example, In August 1940 the remission period was extended from one-sixth to one-third for all prisoners in response to the pressing demands for prison accommodation brought about by the wartime detention regulations. After that, the remission rate in junior detention centres was increased from one-third to one-half in 1975, and the following year, remission was also extended to one-half in Northern Ireland. Again in August 1987, the Home Secretary responded to yet another rise in the prison population by announcing an extension of remission to one-half for all mainland prisoners serving twelve months or less.

The immediate effect of this was a reduction in the prison population by approximately 3,500 though the simultaneous announcement of Lord Carlisle's wide ranging review of the systems of remission and parole appeared to reflect a realistic acknowledgement that such relief was likely to be of only temporary duration.

Recommendation

- 61.3.1 The prisons in Uganda are overcrowded. Currently many of them accommodate at more than three times the number of inmates they were originally designed for.

Accordingly, it is recommended that a study be conducted on the possibility of making a law that will provide for the effective application of parole, remission and early release within our criminal justice system. As a starting point, examples could be drawn from other common law jurisdictions that are currently applying the same systems. In that regard, an example of the system as applied in England and Wales under the 1991 Criminal Justice Act outlined in this study could provide a starting point for such a study.

62.0 Prerogative of Mercy

- 62.1 The President is authorised under the law to grant amnesty to anybody after he has been convicted and sentenced. This is provided for under Article 121 (4) of the Constitution The Constitution also creates a committee composed of six prominent citizens plus the Attorney General who is its chairperson. As soon as a sentence of death has been pronounced on an accused, the presiding trial judge must submit a report to the Advisory Committee on the Prerogative of Mercy. From the two provisions the most important aspect is the fact that the trial judge must write a report

whose contents must include recommendations or observations on the case as he feels fit. There was a practice by the Director of Public Prosecutions' office to also write a report after a sentence of death had been passed. The so-called " Death Sentence Report" addressed to the Secretary, Advisory Committee on the Prerogative of Mercy would be written by a State Attorney that was involved in prosecuting the case. The report would contain amongst other things a brief of the evidence adduced and what the accused may have said. It would also contain an assessment as to whether the accused looked sorry for what he had done and whether in the circumstances it was a fit and proper case for mercy to be exercised. Our interaction with the Director of Public Prosecutions' office seems to suggest that the practice is no longer strictly being followed.

Recommendation

- 62.2 We accordingly recommend that as there is legislation requiring Judges to make Death Reports the same should be for prosecuting State Attorneys.
- 62.3 The Prerogative of Mercy should not be limited to convicted and sentenced persons but should also those on remand

63.0 Prosecuting, Discretion and Sentencing

- 63.1 There is no rule that prosecution must automatically take place if a suspected offence is established against an individual. There are two stages in the decision to prosecute:
 - . The first stage involves a consideration of the evidence.
 - . The second involves a consideration of public interest.

This is in line with the provisions of Article 120(5) of the Constitution of Uganda. Thus, the above statement is equally applicable to the position in Uganda. This is mainly because the resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue with some vigour those cases worthy of prosecution. The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. It follows that especially fairness and consistency are of particular importance.

- 63.2.1 There is close relationship between sentencing and the many pre-trial decisions that filter and shape the cases that courts receive for sentence. In most jurisdictions (including Uganda as seen from the constitutional functions of the Director of Public Prosecutions) these decisions are largely discretionary and yet they constitute an exercise of official power, which may be no less significant for defendants than the sentencing decision itself. Some cases may not be prosecuted at all despite a sufficiency of evidence; some prosecutions may be dropped or otherwise discontinued; some defendants may be charged with higher offences than others; some cases may be brought in higher courts, some in lower courts; and a " bargain" between the prosecutor and the defence may alter the nature of the case which is presented for sentence. The variety of diversionary programmes available in different jurisdictions is extremely wide. Many of them are local in origin and application but four broad approaches may be singled out here:
 - . One is diversion involving reparation.

- . A second is non-prosecution conditional on the Defendant participating in some community activity, which may vary from mere deprivation of leisure time to supervised or treatment-oriented activities.
- . A third is a prosecutor's fine, used more in continental European systems.
- . A fourth approach much used in England and Wales is the formal police caution: the defendant has to attend to a police station and be cautioned by a senior police officer usually in uniform. Police cautioning has been developed so strongly that two-thirds of male juveniles believed to have committed offences are now cautioned instead of being prosecuted, a proportion rising to five-sixths for juvenile females. Recidivism rates appear to be no worse than previously and the juvenile crime rate is no higher.

64.0 Diversion of Cases from Prosecution

64.1 On what criteria are cases diverted from prosecution and on what criteria should they be diverted? The answers to the first questions are variable. In some jurisdictions there is a wide and un-reviewed discretion, the effects of which are felt throughout the subsequent decisions in the criminal process including sentence. Other jurisdictions have attempted to structure decision making at these crucial stages. For example in England and Wales there are criteria or guidelines both for the Police and for the Crown prosecutors. These seem to be generally consistent with the proportionality principle: prosecution should be avoided where the case is so minor that it would probably receive a nominal sentence if it were taken to court or where the defendant's culpability is low (e.g. mental disturbances, extreme stress at the time of the offence, advanced age or extreme youth etc).³ One key factor in the decision not to prosecute a juvenile is whether it is the first offence. Almost all juvenile first offenders are cautioned and a substantial number of second offenders also receive a caution. This may be connected with the reasons for modifying the penal response for first offenders. However there are other criteria, allowing non-prosecution where the offender is suffering from a serious or terminal illness and allowing some account to be taken of the wishes of the victim.

64.2 Choice of charges:

The decision whether or not to prosecute is perhaps the most important of the pre-trial decisions but there are further decisions of significance.

Where the case is prosecuted the court's sentencing powers and the Defendant's bargaining position may be affected by the charge, which the prosecutor decides to bring. Sentencing powers may also be affected by the level of court in which the prosecution is commenced. There are the various practices known as charge bargaining, plea bargaining etc.

65.0 Guidelines for the Exercise of discretion by Prosecutors

On what basis should guidelines or criteria for the exercise of discretion by prosecutors and other pre-trial decisions makers be formulated?

- . Rehabilitationism appears to have little to offer beyond basing the initial decision on whether or not to prosecute on considerations of the approach most likely to result in the improvement of the offender.
- . Deterrence theory is concerned with achieving maximum deterrence at minimum cost and so its approach at each stage would be that the prosecutor should choose the less onerous and less costly option (i.e. non-prosecution, less charge, lower court) if the prospects for deterrence are not materially weakened thereby.

social welfare services and public relations and advocacy of children's rights. For individual Probation Officers, their duties are mainly determined by the Probation Act as: attendance at court (Probation Officers should at all times be available for work at court); they should visit the homes of people about whom the court seeks information; they should ensure that the Probationer behaves in accordance with the terms of the Probation Order; they have a duty to advise and assist the Probationer, the Probation Officer should connect juveniles with young people's organisations, scouts etc; they should report to the court as appropriate; and they should maintain records on each Probationer.

66.2 Given the sparse distribution of Probation Officers and the volume of their non- court work, the responsibilities as set out above are unlikely to be achieved in a meaningful way. Besides, in addition to the above specific functions including emergency relief work, tracing and resettling children, and the supervision of state children's institutions. Although there may be no detectable conflict with the service in relation to this wide range of roles, it is unlikely given the limited number of Probation Officers, their distribution and lack of transport that they could ever do justice to all of them. Their problems are especially acute given the significant burden in Uganda arising out of poverty, war, homelessness, premature death and delinquency.

66.3 Clearly these are wide ranging functions that may demand very different types of skills and perhaps types of management structures. Consideration has been given, in the course of the study to whether or not there would be any advantage in separating these functions. One possible advantage would be that

- . the service would be able to focus on particular aspects of its work. For example, the organisation of community service could be done by a separate agency to which offenders could be referred by the Probation Service.
- . Another possibility would be that the function of providing information for the courts could be separated from the function of supervising offenders in the community. The advantage of this might be that social inquiry reports would more readily be seen as independent professional assessments.

The nature of the agency, which carries out a particular function, will affect how that function is perceived. Thus if probation is seen as a "soft", helping agency, the reports it provides for the courts may be seen as an advocacy for a client rather than a professional assessment of impact of particular sentencing options on an offender. Alternatively, the aura of "softness", which attaches to a service, which does not recommend custody, may carry over into perceptions of what is entailed in a probation order or a community service order.

66.4 Government should come up with a policy that will encourage the service to focus more on "high tariff" offenders. Such a policy should emphasise social inquiry report work and the provision of penalties to be focused on those at most risk of custody rather than on the basis of individual "need".² It may be noted that long standing tensions exist between the role of the probation officer as an officer of the court dealing with an offender and as a social worker professional dealing with a "client". These tensions have serious implications for social inquiry report practice and in terms of such issues as who is referred to a day centre or to community service. It is therefore very important that a consistent approach is adopted and that the service focus on those who are at risk of custody if community based penalties are to displace custody to a significant extent.

66.5 This however does not mean abandoning the helping or rehabilitative role, which many sentencers value and want from the service. Supervision in the community already involves a degree of surveillance and control although offenders also receive

social work help within that framework. It is precisely this combination of elements, which delineates the role and task of the probation service.

Our recommendations therefore are that:-

- (i) The probation service should continue to have the key role in the organisation of community based sanctions. A separate study should be commissioned to examine the possibility of separating out the various functions undertaken by the service.
- (ii) The probation service does offer effective supervision in the community but it needs to continue to develop a consistent strategy if it is to overcome the image problems, which it has with some sentencers.
- (iii) The probation service cannot achieve change alone. A co-ordinated multi-agency approach at local level would provide a fruitful way forward.

67.0 The Role of the Victim in the Sentencing Process

67.1 The rise of the victim movement in recent years has forced some fundamental rethinking in sentencing theory. It has become increasingly recognised that the criminal justice system ought to care more for the needs and rights of the victims of crime, and policies have been developed to provide for personal support for the victims after the crime, for state compensation for victims of violent crime, and for compensation orders to be made at the sentencing stage. A landmark here was the adoption of a Charter of Victims rights by the United Nations in 1985 in its Declaration on the Basic Principles of Justice for Victims and Abuse of Power. In some jurisdictions there have also been the beginnings of alternative schemes of criminal justice based on victim offender mediation where the victim and offender are invited to come together to discuss the crime and its effects.

67.2 There are powerful arguments in favour of the state ensuring that compensation is available for the victims of violent crime and that support is available for all crime victims. The element of support is a proper object of social policy for those suffering misfortune. A policy of compensation may be supported as demonstrating the state's concerns for those who fall victim to criminal violence, but it may also be regarded as a victim's right. It can also be argued that the state is responsible for maintaining law and order and therefore ought to assure compensation to those who suffer from failures of the policies pursued.

There is the further argument that the criminal justice system could not operate without the co-operation of victims (in assisting detection and in giving evidence) and so it is only fair that their suffering is recognised when their help is accepted.

67.3 The role of the state in these matters should not displace the primary responsibility of the offender to provide compensation. In practice, however many offenders are impecunious and others are imprisoned for serious crimes and therefore unable to earn the money with which to pay compensation: this is why state compensation schemes have grown up. But one must not overlook the point that some offenders can afford to pay some compensation to their victims and therefore should be required to do so. By empowering criminal courts to make these orders, the state is giving practical assistance to victims by obviating the need for them to sue the offender in the civil courts.

67.3 So far we have argued that justice for victims is to be sought and achieved mostly through additions to conventional sentencing systems. In this regard, two pieces of U.S Federal legislation, the Victim Witness Protection Act of 1982 and the Victims of Crime Act of 1984 are examples of this. The approach can be developed so that the state has obligations to pursue crime prevention policies and to ensure proper services, support and compensation for victims while at the same time requiring courts to order offenders to pay compensation to victims wherever possible. The Uganda Constitution provides under Article 126 that “ *adequate compensation shall be awarded to victims of wrongs*”. In that regard the above constitutional provision should not be restricted to civil wrongs but extended to crimes as well. Compensation is also more reconciliatory than imprisonment or any other punishment where the victim does not personally benefit and it restores the social equilibrium.

67.4 In that regard, it may be proposed that:

- (i) Compensation paid to victims would be greatly improved if courts were legally required to consider in every case involving injury, loss or damage whether a compensation order should be made. When the court does not order compensation the court will be required to give reasons for not doing so. Such a provision would encourage courts to use compensation orders more readily.
- (ii) Uganda should also consider incorporating the procedure used in the civil legal systems where a victim is often a prominent participant in the criminal process. Under such a system, the victim appears as a *partie civile* – and is entitled to compensation and other forms of redress if the Defendant is found guilty of the crime. This is in contrast with the common law system that is followed by Uganda where the victim may pursue a civil claim in an entirely separate proceeding.
- (iii) When recompense is not fully available from the offender or other sources, the State should provide financial compensation not only to victims of serious crimes but also to the family and particularly dependants of persons who have died as a result of victimisation.

67.5 Government may consider establishing an independent institution like a Compensation Board or Scheme where courts would be empowered to assess and award compensation as part of the sentence. For example, in 1963, New Zealand adopted the world’s first criminal injuries compensation scheme, a widely applauded initiative that became a model elsewhere. The result was the adoption of the “ Accident Act of 1972 which abolished the tort system as a means of compensating for personal injuries and established a state administered compensation scheme which handles compensation of criminally caused injuries.

Recommendation

67.6 Article 126(2) of the Constitution provides that, reconciliation between parties shall be promoted and section 156 of the Magistrates’ Courts Act provides for promotion of reconciliation and settlement in an amicable way of proceedings for assault or any other offence of a personal and private nature. In addition, it may be suggested that the spirit of reconciliation could be extended to cover informal mechanisms for the resolutions of disputes including mediation, arbitration, customary justice or indigenous practices to be utilised where appropriate to facilitate conciliation and redress to victims. The advantage of such a procedure would no doubt be to avoid unnecessary delay in the disposition of cases and in the execution of orders.

A list of legislations referred to in the study

1. The Penal Code Act Chapter 106. (1994) Edition, Laws of Uganda
2. The Constitution of the Republic of Uganda, 1995
3. Criminal Code of France
4. The Prisons Act
5. The Children's Statute
6. The Habitual Criminals (Preventive Detention) Act, Cap.112, Laws of Uganda
7. Prevention of Crime Act, 1908 of England and Wales
8. The Criminal Justice Act , 1948 of England and Wales
9. The Witchcraft Act, Laws of Uganda, 1964
10. The Enguli (Manufacturing Licensing) Act, 1965 Laws of Uganda
11. The National Drug Policy and Authority Statute No. 13 of 1993, Laws of Uganda
12. The Traffic and Road Safety Act, No.15 of 1998, Laws of Uganda
13. The Local Government Act, No.1 of 1994, Laws of Uganda
14. Magistrate's Courts Act, 1970, Laws of Uganda
15. Trial on Indictments Decree, 1971, Laws of Uganda
16. The Criminal Procedure Code Act of Uganda
17. The Law Revision (Fines in Criminal Matters) Bill, 2000
18. Probation Act, Cap. 107, Laws of Uganda
19. Community Service Act, Laws of Uganda
20. Criminal Justice Act, 1991 of England

21. The English Criminal Justice Act 1982 and 1988.
22. The Prisons Act (Cap.313) Laws of Uganda, 1964
23. The Criminal Justice Act, 1967 of England and Wales
24. Prosecution of Offences Act, 1985 of England and Wales
25. The Director of Public Prosecutions Act, 1983 of Commonwealth Australia

Government Papers and Reports(Official Publications)

1. The Uganda Participatory Poverty Assessment Report, the Poverty Eradication Action Plan and National Integrity Survey.
2. Immediate and Medium term Actions as identified by the Technical Committee and identified by the Steering Committee.
3. Documents relating to the development of a Sector wide approach for Justice, Law and Order Sector, including the medium term budget framework paper, 2001/2002 and the Strategic Framework and Priorities
4. A Study Report on rape, defilement and other sexual offences; Uganda Law Reform Commission Publication No.1, 2000
5. Institut Henry- Dunant: Seminare for Heads of the Penitentiary Administrators of the African Countries, Harare, Zimbabwe, Feb 29- March 5, 1988.
6. Canadian Sentencing Commission, “ Sentencing Reform; A Canadian Approach,” Canadian Government Publishing Centre, 1987
7. Victorian Sentencing Committee: Sentencing (1988) Vol.3 Appendix 1
8. The report of the Stewart Committee, “ Keeping Offenders out of Court: Further Alternatives to Prosecution,” (London, 1983)

International Instruments

1. Universal Declaration of Human Rights.
2. International Covenant on Civil and Political Rights
3. Convention Against torture and Other Cruel Inhuman or Degrading Treatment or Punishment.
4. African Charter on Human and People’s Rights
5. Standard Minimum Rules for the Treatment of Prisoners
6. Convention on the Rights of the Child
7. European Convention on Human Rights
8. South African Constitution

9. United Nations Minimum Rules for non- custodial sanctions
10. A Green Paper , “ Punishment, Custody and Community”, of England; Home Office, 1988
11. Action Plan, “ Tackling Offending”, of England, Home Office, White Paper 1988
12. United Nations Declaration on the Basic Principles of Justice for the Victims and Abuse of Power, U.N.Doc.A/40/53(1986)
13. European Convention on the Compensation of Victims of Violent Crimes (1984)
14. The Victims Witness Protection Act, 1982 of US
15. The Victims of Crimes Act, 1984, USA
16. The Accident Act, 1972, Australia
17. Model Penal Code of the United States , 18 USCA S.1
18. Italian Criminal Code
19. Kansas Criminal Code, KSA 21-4108
20. German Criminal Code
21. French Government Draft Code
22. French Criminal Code

Literature Review

A. JOURNALS; Essays and Articles

1. Paul East, “ Modern Sentencing Developments” in the New Zealand and Law Journal, August, 1990
2. Wald. M, “ Children’s Rights: A Framework for Analysis, “ ; University of California Davis L.R.12 (1976) pages 255
3. Greene.R; and Esselstyn.B; (1972), “ The Beyond Control Girl” in Juvenile Justice, 23, 13
4. Taylor. L. et al (1980), “ In Whose Best Interest? “ London: Gobden Trust/Mind
5. Skolnick, J.H and Woodsworth, J.R.L (1968) “ Morality Enforcement and Totalitarian Potential, “ in (eds) M.Levitz and B.Rubinstein, Ortho-Psychiatry and the Law, Detroit ; Wyne State University, p.175
6. American Bar Association and Institute of Judicial Administration (1977). Juvenile Justice Standards Project (Tentative Draft), Cambridge, Massachusetts: Ballinger.

7. Stern.V, (1987), “ Bricks of Shame,” Penguin, Harmondsworth.
8. Ashworth.A, (1983), Reducing the prison population in the 1980’s: the need for Sentencing Reform, “ in NACRO (1983) pp.1-20 at p.19
9. Fairhead.S and Wilkensan-Grey.J (1981) , “ Day Centres and Probation, “ Home Office Research Unit, Paper 4
10. Frimpong.K; “ Some Reflections on Ghana’s Penitentiary System,” in Jahrbuch Fur Afrikanisches Recht, Bnad 3, K.Madlener, (ed) Heidelberg, 1982
11. Judith.A.Greene, “ Structuring Criminal Fines: Making an Intermediate Penalty more useful and equitable,” 13 Justice System Journal 37, (1988)
12. Andrew von Hirsch and Nils Jareborg, “ Sweden’s Sentencing Statute Enacted,” (1989) , Criminal Law Review, 275.
13. “ Intensive Supervision Probation: How and for whom?” From Todd. R . Clear and Patricia .L.Hardyman, (eds) The New Intensive Supervision Movement, 36 Crime and Delinquency, 42 (1990)
14. Norval Morris and Michael Tonry, “ Between Prison and Probation: Intermediate Punishments in a Ratil Sentencing System; “ N.I.J.Reports January/February 1990, p.8-10. This article summarises a book of the same title by the same authors published by Oxford University Press,1990.
15. “ Scaling Community Punishments” from Andrew von Hirsch, Martin Wasik and Judith Greene in Punishments in the Community and Principles of Desert.” 20 Rutgers Law Journal, 595(1988).
16. Bottoms.A.E” Reflections on the Renaissance of Dangerousness,” (1977) XVII. Howard.J.70
17. A. Ashworth, “ Sentencing and the Constitution,” (1990) 1 King’s College Law Journal 29
18. Michael Tonry, “ Judges and Sentencing Policy – The American Experience”, in Sentencing, Judicial Discretion and Training by Colin Munro and Martin Wasik, (eds) Sweet and Maxwell, London 1992.
19. Andrew von Hirsch, “ Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and their Rationale, 2 74 J.Crim. and Criminology 209 (1983) at p.245
20. Kay.A. Knapp, “ Implementation of the Minnesota Guidelines: Can the Innovative Spirit be Preserved? “ in Andrew von Hirsch, Kay Knapp and Michael Tonry, The Sentencing Commission and its Guidelines, 1987 and in Michael Tonry, Sentencing Reform Impacts, 1987
21. Hann, Harman and Peare, “ Does Parole Reduce the Risk of Reconviction? “ 30 Howard J.C.J 66 (1991)
22. Odoki.B.J; An overview of Penal Reform in Uganda (1997) at p.17 unpublished.

23. A.Ashworth, “ The Public Interest Element in Prosecutions,”(1987) Criminal.L.R.595
24. S.Gottfredson and A.Ashworth, “ Criminal Process and Criminal Justice,” 28 Brit.J.Criminal (1988)
25. Goldstein.A, “ Defining the role of the Victim in Criminal Prosecutions,” 52 Missisipi Law Review 515 (1982)
26. Lamborn .L.L; “ The Propriety of Government Compensation of Victims of Crime,” 41 Geo. Wash.L. Rev.446 (1992)

Selected Bibliography | Books |

1. Tonry.M; Sentencing Reform Impacts,” National Institute of Justice, Washington D.C 1987
2. Ashworth.A (1983), “Sentencing and Penal Policy, “ Weidenfeld and Nicholson, London
3. Joan Petersilia, “ Expanding Options for Criminal Sentencing, “ Santa Monica, Cal: Rand Corp; 1987
4. Andrew von Hirsch, Kay Knapp and Michael Tonry, “ The Sentencing Commission and its Guidelines,” Boston: Northeastern University Press, 1987
5. Anthony .Kvass; “ Alternatives to Prison , London: Sage Publications, 1990
6. Colin Munro and Martin Wasik “ Sentencing, Judicial Discretion and Training, “ Sweet and Maxwell, London, (1992)
7. Cross. R, (1987), “ Punishment, Prisons and the Public, “ London, Stevens.
8. Stanley.S and Baginsky.M; 1984 “ Alternatives to Imprisonment,” London Vera Institute of Justice.
9. Ashworth.A ; (1989), “ Custody Reconsidered, “ Centre for Policy Studies, London
10. Walter.N and Hough. M; (1988) “ Public Attitudes to Sentencing: Surveys from Five Countries,” Aldershot, Gower.
11. Bottoms.A et al ; Intermediate Treatment and Juvenile Justice,” 1990
12. Baldwin.J, “ Courts, Prosecution and Conviction ,” 1981
13. Boswell.G; (1989), “ Skills, Knowledge and Qualities in Probation Practice,” in Shaw. R and Haines. K (eds) pp.139-183
14. Harris.R.(1989), “ Probation: Social Work in Society or Punishment in the Community; in Shaw.R and Haines.K (eds)

15. Toamsic. P and M. Feeley (eds) “ Neighbourhood Justice: Assessment of an Emerging Idea,” (1982)
16. Marshall.T, “ Alternatives to Criminal Courts: The Potential for Non-Judicial Dispute Resolution,” (1985).
17. Marshal.T and Merry. S; “ Crime and Accountability: Victim/Offender Mediation in Practice” (1990)
18. Shapland. J. et al ; “ Victims in the Criminal Justice System,” (1985)

List of Cases referred to

1. Robinson v California, 370 U.S 660, 82 S.Ct 1417, 8L Ed. 2nd 758.
2. Papa Christian v City of Jacksonville; 405 U.S 156, 162, 92 S.Ct 839, 843, 31 L.Ed 2nd 110
3. State v Fry, 218 Neb. 558, 357 N.W 2nd 216, 218
4. Pliscou v Holtville United School Dist; D.C.Cal; 411 F.Supp.842, 850
5. McCrary v Stae, Ala. Cr.App. 42950 2nd 1121, 1123.
6. Porta v Mayor, City of Omaha, Neb D.C Neb; 593 F.Supp 863, 865
7. Gesicki v Oswald, 336 F Supp. 371 (971) affirmed summarily 406 U.S 913 (1972)
8. Maillard v Bonzaes , 416 U.S 918 (1974)
9. Jackson v Bishop, C.A Ark, 404 F 2nd 571
10. 3603/68 v. Federal Republic of Germany (1970) 13 Y.B 332, 31 Coll. 48
11. Tyer v U.K (1978) Series A.No. 26 Para 31
12. State v Ncube & Others (1987) 2ZLR 246
13. Attorney General v Salvatori Abuki, Uganda Constitutional Cas No 1 of 1998
14. Furman v Georgia, 408, U.S 238 (1971)
15. Woodson v North Carolina, 428 U.S 325 (1975)
16. State v Makwanyane and Mchunu, Case No. CCT/3/94
17. Gregg v Georgia, 428 U.S 153, 230
18. 1977 45 Bvert Ge 228
19. Ng Kindler v Canada (1992) 6 CRR (2nd) 193, S.C
20. Soering v United Kingdom, (1989) 11 EHRR.439

21. Zimbabwe v Attorney General of Zimbabwe & others (1993) (4) S.A 239 (ZSC)
22. Pratt v Attorney General for Jamaica, (1993) 3 WLR 995
23. R v Andrea Mpendubundi; M.B 2/62
24. Stefano Ochaya v Uganda M.B 115/64
25. Yokana Mato v Uganda M.B 66/65
26. Yakobo Abuni v R M.B 55/67
27. Uganda v Patrick Lutaya M.B 66/70
28. Uganda v Lutaya Mulaki M.B 81/70
29. James Alemo v Uganda M.B 114/70
30. Francis Otheino v Uganda M.B 113/70
31. Practice Direction to restrict the use of Preventive Detention [1962] 1 All.E.R
32. Palling v Corfield (1970) 123 C.L.R 52 (Australia)
33. Mistretta v US (1989) 109 S.ct. 647
34. Rummel v Estelle (1980) 445 US 263
35. Queen (1931) 3 Cr.App.R (S) 245
36. Bailey 1988 10 Cr.App.R(S) 23
37. Canadian Pacific Ltd v/s R (1996) 1 LRG 78
38. Uganda v Bida Fred Traffic Case No.2157/2000
39. Uganda v Angelina Awuyo 1979 HCB 281
40. Uganda v Bwambale Ronald, Traffic Case No. NPT 093/ 2001
41. Uganda v Mubiru Badru Traffic Case No. NPT 2263/2000
42. Uganda v Mulaiba Bosco Traffic Case No. 2176/2000

