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NON-CUSTODIAL SENTENCING AND ITS RELEVANCE IN THE JUSTICE SYSTEM

by
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■ Introduction

In Ghana, sentencing policy has ensured that courts place more emphasis on custodial sentences than on other forms of punishment: for most, if not all, criminal convictions, Ghanaian courts impose custodial sentences as a matter of course. As a result, Ghana's prisons now contain more inmates than they were ever intended to - stretching prison facilities beyond capacity. Prison officials persistently complain of dangerous overcrowding. Social workers warn that some inmates have simply been forgotten, and many accused persons languish in pre-trial detention while their cases are pending. Rather than serving as places of reform, prisons have become a training ground for seasoned thugs.

Unquestionably, the conditions of Ghana's prisons fail to meet international human rights standards. This unfortunate reality is inconsistent with the notions of democracy and constitutionalism which our nation has unequivocally embraced. The prison system in Ghana, however, has neither the resources, manpower, nor the infrastructure to cope with the overwhelming burden that so many prisoners represent. Accordingly, for both philosophical and practical reasons, Ghana must explore alternative ways of punishing offenders.

■ The Challenge

Over the years, various administrations in Ghana have expressed concern about the inadequacies of our prison system. These governments, of course, were

constrained by the exorbitant costs of confining thousands of individuals. Nevertheless, the inadequacies of our prison system can be remedied without a huge infusion of cedis. By starting to use non-custodial sentences, we can begin to decongest the prisons and decrease overcrowding. Reducing overcrowding, in turn, will reduce the HIV/AIDS infection rate and the spread of other communicable diseases.

Moreover, as fewer people are incarcerated, the overall budgetary cost of running prisons will be reduced. Research from around the world demonstrates that non-custodial sentencing is a much cheaper alternative than incarceration and its attendant costs of feeding, clothing, housing and medical bills. The public money saved could be reinvested into rehabilitating the prison infrastructure.

Furthermore, in addition to rehabilitating offenders, Ghanaian society will benefit as well if offenders contribute to their communities through service projects. Offenders may learn a skill, have access to education or a trade or through the probation orders come to terms with and overcome the source of their delinquency.

Finally, as Ghana makes strides in developing a progressive sentencing and offender treatment policy, we will be in step with the rest of the developed world. The Kampala Declaration on Prison Conditions in Africa of 1996, which the U.N. adopted in 1997, noted the urgent need to decrease

overcrowding in African prisons and endorsed the promotion of non-custodial sentences as the way to alleviate this problem. The Kampala Declaration was followed by the Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa, 2003, which further developed the ideas set out in the Kampala Declaration.

■ The Way Forward

In order for Ghana to adopt the application of non-custodial sentences, however, we must first move from viewing sentencing as purely punitive to mainly reformatory. There are three principal theories of punishment: the retributive or punitive theory; the deterrent or preventive theory; and the reformatory or corrective theory. There was a time when the sole essence of sentencing was purely punitive and retributive. Retributive justice is a refinement of the primitive urge to take revenge for injury - holding that wrongdoers must be punished in accordance with a moral law - a throw back, perhaps, to the old Mosaic Law of *lex talionis*: an eye for an eye, a tooth for a tooth.

On the other end of the spectrum are those who believe that the essence of punishment is prevention or deterrence. Under this theory, punishment is permitted only insofar as it promises to exclude some greater evil. Otherwise, there is little point for punishment. Thus, a sentence serves as a warning to others with criminal tendencies. In effect, it deters future criminals, engendering a respect for the law.

The third theory of punishment is the reformatory or corrective theory upon which we must seek to hang the peg of non-custodial sentences. The exponents of this theory of punishment believe that the whole purpose of punishment should be to reform a criminal. The advocates of this theory believe that any delinquent can be reformed. If crime is the result of social inadequacies, then given the right set of social circumstances, a person's character can be reformed. By involving individuals, even against their will, in a variety of programmes - generally ones focused on rehabilitation, re-education and re-integration - their behaviour can be changed. Any worthwhile sentencing policy must seek to do just that.

Research demonstrates that non-custodial sentences

have proved effective in reducing recidivism and in rehabilitating offenders. Many Western countries, such as the United Kingdom, employ non-custodial sentencing. In Africa, countries such as South Africa, Senegal, Kenya, Uganda and Tanzania apply them.

There are three modes of non-custodial sentences: (i) an absolute or conditional discharge; (ii) a suspended sentence of imprisonment (iii) fines and (iv) community sentences. In order to impose an absolute or conditional discharge, the court must be satisfied that having regard to the circumstances and nature of the offense and the character of the defendant, punishment is inexpedient. A conditional discharge may be imposed for example where a person of previous good character commits a petty theft or crime. In such circumstances, the court may feel that a court appearance with the attendant publicity is punishment enough. Where he is only warned, it is an absolute discharge the familiar expression being cautioned and discharged. He may also be discharged upon a condition that he commits no further offense within a specified period. If the offender commits a crime during the period of his discharge, he may be sentenced for the original offense, in addition to the subsequent one.

A suspended sentence can only be imposed if the court first decides to imprison, but later determines, due to the case's exceptional circumstances, that the sentence can be suspended. A suspended sentence, however, should not be used in an attempt to frighten a petty offender who does not qualify for imprisonment. A suspended sentence can be combined with a fine or a compensation order so that the offenders do not go unpunished. If an offender commits an offense during the operational period of the suspended sentence, the sentence may be activated and may run consecutively with any term imposed for the subsequent offense.

The court can also decide just to fine the defendant. The amount of any fine, as fixed by the court, reflects the seriousness of the offense. In fixing the amount of the fine, a court shall take into account the circumstances of the case including the financial circumstances of the offender. This is intended to prevent instances of imposing a fine

on a person who is, as they say in America, "judgement proof" - that is, a person who is simply does not have the financing to pay the fine. The court must be given the power to order an offender to provide a statement of means before passing the sentence of a fine.

Finally, community sentences may be an effective way of dealing with offenders convicted of crimes against property or less serious offenses of violence. A community sentence is a sentence composed of one or more of the following: probation, community service orders, combination orders, curfew order - including electronic tagging of offenders - and attendance center orders.

Where an offender requires advice and support to overcome the reason they committed a crime, a probation order is appropriate. The offender is placed under the supervision of a probation officer and "probation requirements" can be imposed. These may include requirements to undergo treatment for psychiatric problems and drug or alcohol dependency or for any other deviant behaviour specific to the case. Further, the offender can be required to live in a particular place that provides close supervision - for example, with a specified relative or in a probation hostel. Attendance at a probation center will also be required. Such centers help the offender face the consequences of committing a crime. To make the probation effective, the offender must consent to the probation order; refusing to consent to a probation order is grounds for the imposition of a custodial sentence. Additionally, a probation order may be combined with a fine.

The second type of community sentence is the community service order, which requires an offender to participate in community projects under the supervision of the probation service. A court typically imposes this sentence where it decides that the defendant should be deprived of leisure time and must make some reparation to the community. Offenders could be involved in manual or communal labour e.g. street cleaning and bricklaying. In the process, the convict learns a trade, while simultaneously repaying his debt to society. The court must impose a maximum number of hours for the community service.

A curfew order is an order requiring the defendant to stay for a specified period in specified places. For example, an order could require the offender to stay in doors at home between the hours of 8 P.M. and 6 A.M. to prevent the offender from visiting drinking bars or night clubs. If a curfew order is made, the court will appoint a person to monitor the defendant's whereabouts. Of course, the court cannot make a curfew order unless there are means and facilities for monitoring the whereabouts of the offender.

In some sophisticated jurisdictions, offenders are electronically tagged during curfew hours and their movement outside of the restricted area is recorded. Along with a curfew order, the offender must report to a specified police station at regular intervals. Failure to report is a breach of the conditions of the order and the offender will be punished. An attendance center order requires the offender to attend a specified place to take part in supervised activities

Additionally, there are specific non-custodial sentences applicable to juveniles and offenders who are under twenty-one years of age (i.e. 17 - 20 year olds). These sentences include: care orders, residential conditions, supervision orders, attendance orders, recognisance by a parent or by a person standing in loco parentis. Failure to comply with a community service order - or any of the non-custodial order requirements - can lead to a fine. Moreover, if an offender has wilfully and

Non-custodial sentences, nonetheless, are not without their problems. Given the enormous cost of most recommendations, many of them may sound like pie in the sky for a developing country like Ghana. For non-custodial sentences to work effectively the infrastructure to support it must be in place and must be efficient; this will require attendance centers and probation hostels. We will require extensive training of the various human resource and support services involved, such as the probation officers, social workers, the police, judges and advocates. There will also be huge administrative costs. By their very nature, non-custodial sentences call for an emphasis on case coordination. Furthermore, liaisons will need to be established between social workers and the

police, probation officers and social workers, the courts and the social workers etc.

Society is dynamic; as it changes, we must re-examine our sentencing policy to determine whether it continues to ensure justice. Thus, Ghana's sentencing policy must respond to, and reflect our social, economic and political development.

To start, we need to critically assess Ghana's laws - such as those contained in the Constitution, the Rules of Court, the Rules of Criminal Procedure, and Legislative Instruments - and determine their effect on sentencing policy.

Secondly, there should be a reclassification of offenses with imprisonment reserved as a sentence of last resort. In other words, a court may not impose a sentence of imprisonment unless no other method of dealing with him is appropriate. Certain offenses, especially those which do not involve dishonesty - e.g. assault and causing damage for which the payment of compensation would adequately satisfy the complainant - should be made non-custodial offenses. Then, a structured approach to sentencing can be applied to ensure a standard non-custodial penalty, such as a fine. If the offense is too serious for a fine, a community sentence will be given, e.g. probation or community service. If the offense is too serious for a community sentence, then, and only then, should a custodial sentence be imposed.

In deciding whether there is an alternative to imprisonment, the court must take into account any available information about the character, the mental and physical condition of the offender, and about the circumstances of the offense contained in any pre-sentence reports or in a social enquiry report. Of course, the gravity of the offense and/or the offender's failure in the past to respond constructively to non-custodial penalties are obvious reasons for issuing a custodial sentence.

This is by no means a call for blanket imposition of non-custodial sentences. A person who commits armed robbery can expect a prison sentence even if it is his first offense. But a pickpocket will probably not go to prison unless he has several previous convictions which have been dealt with by a variety

of non-custodial methods, none of which have led to any significant reformation of character.

A working group should be formed to analyse the subject in more detail. The group should be tasked with, among other things, an examination of other jurisdictions, particularly those in Africa where non-custodial sentences have been successfully implemented.

Conclusion

Modern day penological thinking is humanistic. That is, it emphasizes reform and rehabilitation - not custody and punishment. Accordingly, non-custodial sentences are the future of any penal reform in a democratic Ghana.

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