

**ALTERNATIVE SENTENCING OF PARENT OFFENDERS AND IMPLICATIONS ON THE  
RIGHTS OF THE CHILD IN UGANDA'S CRIMINAL JUSTICE SYSTEM**

**A DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF  
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## DECLARATION

I Bareebe Rosemary Ngabirano hereby declare that all the work in this dissertation is original unless otherwise acknowledged and has not been presented in this or any other University or institution of higher learning.

Signed .....

Date.....

Supervisor: Dr Atangcho Akonumbo

Signature.....

Date.....

## **DEDICATION**

To Beryl (my daughter and my friend)

## **ACKNOWLEDGEMENT**

I wish to acknowledge and thank the following people who have played a role in this study in some form or another – be it by participating, sharing ideas, motivating, giving emotional and spiritual support or by providing assistance:

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## LIST OF ABBREVIATIONS

<b>ACHPR</b>	African Charter on Human and Peoples' Rights
<b>Cap</b>	Chapter
<b>CSA</b>	Community Service Act
<b>CS Order</b>	Community Service Order
<b>CS Regulations</b>	Community Service Regulations
<b>CRC</b>	UN Convention on the Rights of the Child
<b>FCC</b>	Family and Children's Court
<b>MCA</b>	Magistrates Court Act
<b>NCC</b>	National Council for Children
<b>NGO</b>	Non-Governmental Organisations
<b>OHCHR</b>	Office of the commissioner for Human Rights
<b>PSWO</b>	Probation and Social Welfare Officer
<b>TIA</b>	Trial on Indictments Act
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UDHS</b>	Uganda Demographic Health Survey
<b>UHRC</b>	Uganda Human Rights Commission
<b>UPE</b>	Universal Primary Education
<b>USE</b>	Universal Secondary Education
<b>WHO</b>	World Health Organisation
<b>CESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background to the study

The physical and emotional well being of children can be threatened or harmed in a myriad of ways, not the least of which is the absence of a parent from their lives. While parental absences can occur through marital separation or death, the removal of parent through incarceration creates unique problems in a child's life, many of which go unnoticed to the outside world.

Research suggests that parental incarceration disrupts family structure, diminishes available economic resources and decreases the quality of family life hence putting the children at a disadvantage.<sup>1</sup> Children of imprisoned parents are therefore subject to significant insecurities as well as psychological or mental instability, as many imprisoned parents may repeatedly cycle in and out of prison. The needs of such children should be a cause for concern especially in a country like Uganda where prison population continues to grow.<sup>2</sup> Children have specific needs due to their age the fulfilment of which is vital for the child to fully develop. The imprisonment of their parents or primary caregivers creates conditions under which many of their rights are undermined.

International human rights standards, specifically the UN Convention on the Rights of the Child (CRC) and the African Children's Charter emphasise the absolute necessity of respecting and protecting the child's best interests.<sup>3</sup> The concept of protection of children means pursuing all activities aimed at ensuring respect and fulfilment of the children's rights as expressed in the CRC and other international human rights instruments.<sup>4</sup> The Government of Uganda ratified and domesticated

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- 1 E Davies, et al 'Broken Bonds: understanding and addressing the needs of children with incarcerated parents' (2008) <[www.urban.org](http://www.urban.org)> (accessed 14 August 2008).
  - 2 World Prison Population list,' International Centre for Prison Studies, <<http://www.visionofhumanity.org/gpi/results/uganda/2008/>> (accessed 3 September 2008).
  - 3 CRC was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) entered into force on 29 Nov 1999; see also M Alejos, 'Babies and Small Children Residing in Prisons', Quaker United Nations Office, Geneva, 2005.
  - 4 See Protocol to the African Charter on Human and Peoples' Rights of Women in Africa (11 July, 2003) article 13(1) states that 'state Parties shall ...recognise that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the state and the private sector have secondary responsibility.' <<http://www.africaunion.org/innopac.up.za/root/au/index/index.htm>> (visited 20 April 2008). Uganda ratified the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (19 August 2002), which enshrines the right to life, protection from harm, survival and development; best interests of the child; non-discrimination; Similarities exist within the principal objectives of the African Charter on the Rights and Welfare of the Child.

the CRC by enacting a law for children.<sup>5</sup> The rights of the child are therefore comprehensively addressed under Uganda's legal framework.

The primary responsibility for ensuring protection, upbringing and development of children belongs to their parents and families. Government and *de facto* authorities have a secondary and social responsibility to look after the children.<sup>6</sup> Imprisonment of parents or primary caregivers creates conditions under which many of the rights of the child as laid out in the CRC are undermined and this hinders the fulfilment of their needs. The children are deprived of the right to protection and this exposes them to the danger of having several of their other rights violated.

It must be noted that the imposition of sentences, such as imprisonment, is a key element of any criminal justice system and a preserve of the judiciary. Judicial officers have discretionary powers to impose various forms of sentencing notably, imprisonment. However, aftermath of the aforementioned has varied implications on the family. Also available to the courts are alternative sanctions to punish the offender without necessarily breaking ties with their families. Community service is one such a sanction.

Whilst alternative sentencing measures have a long history of application in Europe and North America, they have found limited application in Africa.<sup>7</sup> It is only more recently, in the early 1990's, that these sentencing options such as community service have been actively promoted by Non Governmental Organisations (NGOs) in a number of African countries.<sup>8</sup> In 2007, Penal Reform International<sup>9</sup> decried the global trend in the overuse of imprisonment and the under-use of constructive alternative sanctions with a particular concern in the increase of women's imprisonment.<sup>10</sup> It was noted among other things that female prisoners are often primary or sole carers in their families and their incarceration has a devastating effect on their family, particularly on young children.<sup>11</sup>

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5 Uganda ratified CRC in 1990 and enacted Children Statute in 1996 (now Cap 59, Laws of Uganda). Sec 2 defines a child as a person below the age of 18 years.

6 Protocol (n 4 above).

7 L Muntingh 'Alternative sentencing' in Jeremy Sarkin (ed) *Human Rights in African Prisons* (2008) 178.

8 As above.

9 An International non- governmental organisation working on penal and criminal justice reform worldwide. <[www.prisonreform.org](http://www.prisonreform.org)> (accessed on 6 August 2008).

10 Penal Reform briefing paper No 3 (2007) 'Women in prison: incarcerated in a man's world' <<http://www.penalreform.org/resources/brf-03-2007-women-in-prison-en.pdf>> (accessed 6 August 2008).

11 As above.

In Uganda, various factors were advanced for the introduction of community service as an alternative to imprisonment, notably: - the need to decongest overcrowded prisons, the need for a restorative form of justice and the need to comply with international norms. Community service has also been looked at as a way of giving offenders a chance to reflect on their conduct without necessarily being incarcerated.<sup>12</sup> In Uganda, like in many other African countries, prison conditions are appalling.<sup>13</sup> Some prison facilities accommodate up to three times the number of prisoners they were built to house and because space is at such a premium, inmates sleep even in the corridors. Thus, these high numbers have a vast effect on the sanitation, health and feeding facilities. It was hoped that Community Service would decongest prisons by diverting deserving offenders to do work that is of benefit to the community. According to the United States Department of State report for 2002 covering 2001, both civilian and military prisons were believed to have high mortality rates from overcrowding, malnutrition and diseases spread by unsanitary conditions.<sup>14</sup>

It has been noted that prison conditions need to conform to the African Charter and International human rights norms and standards for the protection of prisoners.<sup>15</sup> The International Covenant on Civil and Political Rights (ICCPR) states that: ‘all persons deprived of their liberty shall be treated with humanity and with all the respect for the inherent dignity of the human person.’<sup>16</sup> Uganda as part of the international community has made several commitments to international standards in various fields. The African Union and United Nations respectively have developed standards in the field of human rights and treatment of offenders. One such instrument is the United Nations Standard Minimum Rules on Non-custodial Measures (The Tokyo Rules). Uganda is obliged to implement these rules. The rules state that: -

In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice should provide a wide range of non-custodial measures<sup>17</sup>

The Rules are intended to promote greater community involvement in the management of criminal justice, and to promote a sense of responsibility towards society amongst offenders. The rules provide a list of noncustodial dispositions including community service.

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12 As above.

13 Human Rights Watch Global Report on Prisons <<http://www.hrw.org/prisons/africa>> (accessed on 10 August 2008).

14 US Department of State <<http://www.state.gov/g/drl/rls/hrrpt/2001/af/8409.htm>> (accessed 6 August 2008).

15 Penal reform briefing (n 10 above).

16 Article 10(1).

17 Rules 2 & 3: The Tokyo Rules are binding to member countries including Uganda (adopted by UN General Assembly Resolution 45/110 of 1990).

Community service also represents a shift from traditional methods of dealing with offences and the offender towards a more restorative form of justice that takes into account the interest of both society and the victim. The introduction of this non-custodial sentencing option was also a result of the realisation that crime cannot be solved by incarceration alone. Community service therefore seeks to ensure that the offender maintains ties with his family and friends, retains his job and continues to fend for the family during free time; whilst performing work that benefits the community and reconciles him to the victim.

This research seeks to demonstrate the need for alternative forms of sentencing in the Uganda criminal justice system with a specific focus on the use of community service. Approaching community service as a child protection strategy in sentencing parent offenders would be a positive step in addressing issues of child neglect and attendant problems.

## **1.2 Statement of the research question**

Children are dependent on adults as their primary caregivers. Once the parents are sentenced to terms in prison, the children are most devastated. Thus, imprisonment is in practical effect punishment of the children as well. Yet very little is known or said about the needs of this unique population left behind by the incarceration of their parents.

This research explores how the Uganda criminal justice system through the use of alternative sentencing can lessen the adverse impact on children caused by imprisonment of their parents. It therefore seeks to answer the following questions: How can justice be meted on the child's primary caregiver while at the same time keep to a minimum the adverse effects of a punishment such as imprisonment on the children? How can the application of alternative sentencing enforce the children's rights under the children's legal regime?<sup>18</sup>

## **1.3 Objectives of the study**

This study seeks to:-

1. Analyse the impact of parental incarceration on children.
2. Make a specific inquiry into the use of community service orders as an alternative to imprisonment in Uganda.
3. Illustrate that approaching community service as a child protection strategy in sentencing parent offenders would be a positive step in addressing issues of child neglect and attendant problems.

4. Make recommendations for a new course of action that will highlight and be aimed at, prevention of abuse of children.

#### **1.4 Scope of study**

This research focuses on the Uganda penal system. Specifically it inquires into the use of community service as an alternative to imprisonment. Additionally, an inquiry into the implications of the penal sanctions on the rights of the child will be made.

In this research, 'alternative sentencing' is confined to mean 'non-custodial sentence' under the community Service Act of Uganda.<sup>19</sup> The two terms may however be used interchangeably.

#### **1.5 Hypothesis**

This research is based on the following hypothesis: The use of community service as an alternative sentence on parent offenders provides a better protective environment for children's development.

#### **1.6 Methodology of study**

This study is dominantly library-based research. This method involves perusal and excavation of literature on the subject. In addition, consultations with various stakeholders will be made in order to clarify some points. Information will be obtained from courts, local authorities, probation and social welfare officers as well as other institutions involved in childcare and implementation of sentences in Uganda. This will be through email communication.

#### **1.7 Literature review**

It is important to note that there has not been much literature published on the use of alternative sentencing in Uganda. Available literature is on sentencing in the African context in general. Even then, only a small number of studies have considered the situation of children of incarcerated parents.<sup>20</sup> Here again the available literature is dominated by work of scholars in the psycho-medical field, and outside Africa.<sup>21</sup> According to Ayittey, each indigenous African tribe or state had its own established mechanisms for handling offenders, depending on the gravity of the crime committed.<sup>22</sup>

As it was put by an Attorney General of Kenya:

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19 Community Service Act (CSA) Cap 115 Laws of Uganda.

20 n 11 above.

21 As above.

22 GBN Ayittey, 'The Rule of Law and Economic Development in Africa.' (2002) 130.  
<<http://www.freeafrica.org/features6b.html>> (accessed on 10 August 2008).

In traditional Africa, a criminal who is taken to prison or who is excommunicated from society is one who is actually beyond repair through social means or who has committed a major crime. What is recorded in our legal books as petty crimes by African standards were completely dealt with by the society itself. For example, if one stole a goat, the elders made sure another goat was paid and that was the end of the matter, the person who stole was so ashamed that he would never do it again.<sup>23</sup>

The above reflects the traditional and historical African mode of handling petty offenders; and the belief that the institution of 'prison' is a European import, as prisons did not exist in Africa before the arrival of the Europeans.<sup>24</sup> Also, that prior to the colonial era, the community dealt with its own offenders.

In recent times, however, community service sanctions have become a substantial part of the criminal justice system worldwide. The push for alternatives has in a large part been in response to increasing prison populations, the realisation that community alternatives are not as costly as traditional incarceration, and that the problem of crime cannot be solved by incarceration alone. Information is available through analysis of conference literature and reports on the background to, and introduction of, alternative sentencing in Africa.

The introduction of non-custodial measures, including the community service programme in Uganda and other countries of the world, was initiated at various forums to address and strengthen legislation regarding the protection of prisoners' rights and improvement of prison conditions.<sup>25</sup> The international conference on community service orders in Africa later held in Kadoma, Zimbabwe,<sup>26</sup> (The Kadoma Conference) provided a forum for key representatives from each National Committee on community service to meet and share information on progress made in their respective countries; to discuss and find solutions to common problems encountered within their community service schemes; to develop approaches to alternative measures adaptable to other African countries; and to lay the groundwork for joint actions in providing resources and mutual assistance

At the Kadoma Conference it was noted that,

While community service as a non-custodial sentencing option is not new to the Africa continent, the Zimbabwe model had successfully shown how to avoid some of the pitfalls and problems common to all

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23 Amos Wako, (then Attorney General of Kenya) Address to conference in December 1995.

24 Penal Reform International <<http://www.penalreform.org/english/cs-cs.htm>> (accessed on 20 April 2008).

25 The Beijing Rules adopted by the General Assembly of United Nations on the 29 November, 1985 as a set of guidelines for the administration of juvenile justice. They set out among other things, rules that give the police, prosecution and courts powers when handling offenders, especially juveniles. They advocate for measures like community service for young offenders.

26 The Kadoma conference, 24 to 28 November 1997.

jurisdictions and to manage the scheme in a way that is both highly effective in terms of cost to government and benefit to the community.<sup>27</sup>

The Conference went further and agreed: on a common declaration, a plan of action and a code of conduct by which National Committees (including that of Uganda) were to be bound; Also the fact that so much had been accomplished in so short a time was a measure of the consensus shared by governments and NGOs; and that the time had come for a new approach to criminal justice in Africa.<sup>28</sup> The Kadoma Conference does not stand in isolation. It followed directly from the recommendations contained in the 'Kampala Declaration.'<sup>29</sup> The Kampala Declaration contained a section on Alternative Sentencing, which recommended: -

That community service and other non-custodial measures should if possible be the plan of action designed to assist the sentencing option, preferred to imprisonment; Also that there should be a feasibility study of adapting successful African models of non-custodial measures and applying them in countries where they are not being used.

Thus, the plan of action, designed to assist government and civil society groups implement the Kampala Declaration suggested that: - Research into non-custodial sentencing options including community service, should be undertaken and broadly disseminated to assist governments in determining and implementing penal policy.

It can therefore be said that, the Kadoma Conference formed part of the process, namely, an African initiative to re-examine at the criminal justice systems in Africa.<sup>30</sup> The Kadoma Conference therefore represents a milestone in the penal reform movement. Ms Vivien Stein<sup>31</sup> stated:

For Europe and North America, it is a chance to learn from Africa: -to move away from a system based on retribution, suffering, inflicting pain, to one based on re-integration, compensation and reconciliation.

Golash also notes that; -

Continual shifting of the moral grounding for punishment reflects a fundamental uneasiness with institution ... As the justification of punishment comes full circle back to the most ancient idea of all, that harming offenders is good, it is worth re examining our commitment to the institution<sup>32</sup>

Further, M Jackson states that the criminal justice system is not adequate to deal with the social repercussions and relationships that have evolved as a result of crime.<sup>33</sup> It fails to rehabilitate the

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27 Compendium of the United Nations Standards and Norms in Crime Prevention and Criminal Justice, 'Alternatives to imprisonment and Restorative Justice', 128. <[http://www.unodc.org/pdf/compendium/compendium\\_2006\\_part\\_03\\_01.pdf](http://www.unodc.org/pdf/compendium/compendium_2006_part_03_01.pdf)> (accessed 14 August 2008).

28 Ayittey (n 13 above) 130 -131.

29 L Parker, 'Community Service in Uganda' (2002). <[http://www.restorativejustice.org/rj3/Features/April/Community\\_service\\_in\\_Uganda.htm](http://www.restorativejustice.org/rj3/Features/April/Community_service_in_Uganda.htm)> (accessed 14 August 2008).

30 n 17 above.

31 General Rapporteur at the conference

32 D Golash, *Punishment: An Institution in search of a moral grounding*, New York: Peter Lang Publishing, (1996) 11.

33 J Michael 'In search of Pathways to Justice' (1992) *British Columbia Law Review* 147 at 147.

offender, often victimising the victim yet again. It encourages retribution and adversarial relationships with little benefit to the overarching social structure within which it functions. Clearly, an alternative is required. This system should involve the victim, offender and the community.

Mwanje suggests that such 'reforms and improvements of any country's criminal justice system like Uganda can be an instrument of equity, leading to constructive social change and social justice.'<sup>34</sup> Therefore, such transformations within our justice system facilitate the process of protecting communities' basic values and their inalienable rights. Penal reforms such as, community service, are options for Uganda as they allow offenders, especially those who committed minor offences, to serve their sentences within their communities.<sup>35</sup>

Expectations of alternative sentencing are high and claims are made that this approach can achieve a number of objectives.<sup>36</sup> Zvekić argues:

The arguments for non-custodial sanctions are essentially the mirror image of the arguments against imprisonment. First, they are considered more appropriate for certain types of offences and offenders. Second, because they avoid 'prisonisation' they promote integration back into the community as well as rehabilitation, and are therefore more humane. Third, they are generally less costly than sanctions involving imprisonment. Fourth, by decreasing the prison population, they ease prison overcrowding and thus facilitate administration of prisons and the proper correctional treatment of those who remain in prison.

Imprisonment should only be used as a penalty when absolutely necessary and only in proportion to the nature of the crime. Parents or primary care givers who have committed offences to which the non-custodial sentence is applicable should be given that alternative. Incarceration and its devastating effect on the family, particularly on young children needs to be considered before primary child carers are sent to prison.

A study conducted in Iran explores the physical, social and psychological conditions of children affected by the incarceration of the mother.<sup>37</sup> It describes in an international perspective the physical and social conditions with which these children are confronted. The study comprised 33 children who had spent some time in prison with their mothers but were moved to welfare centres. The most prevalent ailments of these children were: infectious diseases, bruises, wounds on lips, and fractures of

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34 JBA Mwanje, 'Background and overview of community service in Uganda' (2000) Paper presented at the planning workshop on Community Service at Sheraton Hotel, Kampala.

35 As above.

36 Muntingh (n 1 above).

37 A Foroeddin, et al 'Physical and Social circumstances of children in Iran affected by the incarceration of the mother' *International Journal of social welfare* (2008) 17. <<http://www3.interscience.wiley.com/journal/118507267/abstract?>> (accessed 15 August 2008).

the hand. The Vineland Social Maturity Scale indicated that the children's locomotion and socialisation skills were relatively low. Whereas this study highlights the physical, social and physiological harm that children suffer, it was limited to children of incarcerated mothers and the setting in Iran may not compare closely to the setting for our study in Uganda.

Freeman re-assesses earlier works on children rights.<sup>38</sup> He notes that many of today's critics of children's rights are passionate defenders of the rights of others, notably the rights of parents. He underscores the fact that it is not in a child's interests to be raised in an environment in which a parent's rights are being wrongly ignored. Support for a child necessarily involves supporting that child's caregiver, and vice versa. Emphasising children does not necessarily mean that the interests of adults are neglected.

Quoting BB Woodhouse,<sup>39</sup> Freeman goes on to note:-

A truly child-centred perspective would . . . expose the fallacy that children can thrive while their care-givers struggle, or that the care-givers' needs can be severed from the child, which can lead to the attitude that violence, hostility and neglect toward the care-giver are somehow irrelevant in the best interests calculus

Though the above study draws attention to the importance of children's rights, it does not specifically inquire into the rights of children whose parents are incarcerated. A more recent study in the psycho-medical field by Foroeddin *et al*, analyses the physical and social circumstances of children affected by the incarceration of the mother.<sup>40</sup> Akbar notes that the children of incarcerated parents are a relatively invisible population.<sup>41</sup> Yet, these young people are at a high risk along several dimensions and tend to live under conditions characterised by poverty, instability and diminished access to sources of support.<sup>42</sup> The study provides a scenario of the problems that children of incarcerated parents suffer but it limits its inquiry to children whose mothers are imprisoned.

It can be stated that while there have been studies elsewhere that inquire into how imprisonment impacts on children; there is no available literature known to the researcher on a similar study that has been carried out in Uganda. Questions about the social and economic experiences of these children remain unexplored.

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38 M Freeman 'Why it Remains Important to take Children's Rights Seriously' (2007) 15 *Inter. Journal of Children's Rights* 5-23.

39 BB Woodhouse, 'Hatching The Egg: A Child-Centered Perspective on Parents' Rights' (1993) 14 *Cardozo Law Review*, 1747-1864.

40 Foroeddin (n 36 above).

41 As above.

42 As above.

## **1.8 Overview of chapters**

This work is divided into five chapters. Chapter one outlines the background to the study, problems that prompted the research and outlines the questions, methodology to be used. Chapter two lays a foundation of the study by discussing the types of offences and forms of penalties in the Uganda criminal justice system, juxtaposing the traditional forms of punishment against alternative sentencing. Chapter three explores the various child rights implicated through imprisonment of the caregivers. Chapter four analyses the use and need for community service as a penal sanction. Chapter five deals with conclusions drawn from the work and gives recommendations.

## CHAPTER TWO

### AN OVERVIEW OF TYPES OF OFFENCES AND PENALTIES IN UGANDA

#### 2.1 Introduction

In the history of mankind, four principal methods of implementing the punitive policy have been used, but there have been no distinct evolution of anyone system from the others: - removal from the group by death, exile, imprisonment and physical torture.<sup>43</sup> Social degradation and financial laws have also been used in several historical periods.<sup>44</sup> The Ugandan criminal justice is very punitive, based on fines, imprisonment and capital punishment.<sup>45</sup> Few people can pay fines, so prison is the main response to most crimes, large or small.<sup>46</sup> This chapter analyses the various forms of punishment in Uganda.

#### 2.2 Capital Punishment

Capital punishment- death sentence- is the maximum punishment imposed by courts in Uganda. The death penalty is permitted under article 22 of the Ugandan Constitution and is applicable to grave offences, such as, murder, treason, defilement, aggravated robbery, and rape, (otherwise referred to as capital offences).<sup>47</sup> In capital offences, it would be unlikely that the court would pass a sentence other than a sentence of imprisonment or the death sentence. However, the courts may make an order of restitution or compensation, in conjunction with a sentence of imprisonment or the death sentence. The element of non-arbitrariness underpins the penalty.<sup>48</sup> It is under the following circumstances that the death penalty can be carried out:-

- the death penalty must be provided under the law, i.e. penal law
- the penalty must be pronounced as an order of an impartial court of competent jurisdiction.<sup>49</sup>

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43 E Clive, 'Crime and Punishment, History of' Online Encyclopedia 2008 <<http://au.encyarta.msn.com>>1997-2008 Microsoft Corporation (accessed 26 August 2008).

44 As above.

45 M Liebmann, 'Restorative and Community Justice: Inspiring the future' Winchester International Conference 28-31 March 2001 <[www.restorativejustice.org/resources/docs/liebmann/download](http://www.restorativejustice.org/resources/docs/liebmann/download)> (accessed 26 August 2008).

46 As above. See BR Ngabirano 'The penal system in Uganda' 'Community service as alternative to imprisonment: a case study of Mpigi district' (2003) A dissertation submitted to the faculty of law Makerere University (unpublished) 9-11.

47 Uganda's Penal Code Act (PCA) provides for 15 capital offences: nine separate offences grouped under the collective heading 'treason' and offences against the state (ch VI), rape, defilement (ch XIV), murder (ch XVIII), aggravated robbery and aggravated kidnapping (ch. XXVII). Death is a mandatory punishment for six of the treasonous offences and a discretionary sentence for the remaining felonies.

48 Under article 22, 'no person shall be deprived of life intentionally except in execution of a sentence passed by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda, and the conviction and sentence have been confirmed by the highest appellate court.'

49 Article 128 (1) of the 1995 Ugandan Constitution as amended.

- the sentence must arise from a fair trial as provided under article 28 of the constitution.<sup>50</sup>
- the death penalty must be confirmed by the highest appellate court.<sup>51</sup>

In *Susan Kigula and 416 others v Attorney General*,<sup>52</sup> convicts on death row filed a petition before the country's second highest court contending that the death penalty - carried out by hanging in Uganda - amounts to cruel and degrading treatment which is prohibited by the Constitution. All five justices, however, rejected the inmates' argument that the death penalty was unconstitutional 'because it is given by the laws as punishment after due process.'<sup>53</sup>

There have been men and women of goodwill who have condemned the death penalty for whatever crime, arguing that it is no punishment at all, has no deterrent effect, brutalises society, and is contrary to the highest concepts of Judaic Christian ethics.<sup>54</sup> Those who advocate for the retention of the penalty argue that the death penalty is deterrent, those sentenced are usually beyond hope of rehabilitation, and that, if abolished, peace and law enforcement personnel would be exposed to greater risks from criminals and society would avert to lynching them. Others use the Holy Scriptures to support the retention, referring to Genesis 9:6:

Whoever sheds mans blood, by men shall his blood be shed, for in the image of God, made the man that Christ has told us to love our neighbours and that murderers cannot be tolerated

The death penalty has raised much controversy and misery.<sup>55</sup> Family members of the executed have been made orphans, widows, and childless.<sup>56</sup> Family members of the victims have been re-victimized over and over by mandatory appeals and overwhelming media attention on the offender. It nonetheless, remains a constitutional punishment in Uganda.

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50 Provides for a right to a fair hearing.

51 Article 12 of Constitution, the Supreme Court shall be the final court of appeal.

52 Constitutional Court Constitutional Petition, No 6 of 2003 (unreported).

53 The penalty is carried out by hanging in Uganda, and the 417 prisoners also said that those sentenced to death often had to wait in torment for unreasonable lengths of time before execution. On 10 June 2005, Uganda's Constitutional Court struck down the imposition of mandatory death sentences but rejected an appeal by death-row inmates to completely outlaw capital punishment by a narrow three-to-two decision. A five-judge panel at the country's second highest court said that laws that mandated the death penalty as punishment for certain serious crimes were unconstitutional and must be rewritten. The slim majority said various provisions on mandatory death sentencing were inconsistent with the Constitution and interfered with the discretion of judges in dispensing justice. The Justices did agree with the inmates that the implementation of death sentences should not be delayed as they had been in the past, in some cases for up to 20 years.

54 See Murder Victims' Families for Human Rights (MVFHR) an international, non-governmental organisation of family members of victims of criminal murder, terrorist killings, state executions, extrajudicial assassinations, and 'disappearances' working to oppose the death penalty from a human rights perspective and death penalty links <<http://www.willsworld.com/~mvfhr/images/links.htm#Religious%20Statements>> (accessed 27 August 2008).

55 As above.

56 As above.

## 2.3 Imprisonment

Under the 1995 Constitution, every person prima-facie has a right to personal liberty; but there are provisions restricting it under specific circumstances; hence legalising imprisonment.<sup>57</sup> Through imprisonment, an offender is physically incapacitated and therefore unable to commit new offences during the period. This penalty may take the form of life imprisonment (which has been adjudged to be twenty years),<sup>58</sup> or imprisonment for a shorter term.<sup>59</sup>

The use of imprisonment as a punitive measure in Uganda was inherited from Great Britain, a former colonial master.<sup>60</sup> There are two types of prisons; the local government's prisons and the central government's prisons.<sup>61</sup> The local government's prisons handle offenders who commit petty offences that can be settled within a short period of time, while the central government's prisons were built to cater for offenders who are on remand and convicts who commit serious offences like murder, rape, defilement and treason.<sup>62</sup> The conditions in these local and central prisons are deplorable and some do not even qualify to be in use penal institutions. They are characterised by overcrowding, lack of basic sanitary facilities like toilets, poor quality of food as well as being extremely dirty to the extent that most of them are infested with bedbugs and fleas.<sup>63</sup>

According to a report of the Uganda Human Rights Commission (UHRC), by January 2006, the excess capacity of prisons in Uganda stood at 8,229 inmates. The Uganda Prisons Annual Report reports that the number of prisoners in December 2005 stood at 18,225.<sup>64</sup> The International Centre for Prison Studies puts the number of Ugandan jailed population at 1,418 per 100,000 people.<sup>65</sup> The imprisonment rate is considered to be one of the world's highest. The Uganda National Report for the implementation of the Programme of Action for the least Developed Countries for the Decade 2001-2010 decries the country's prison congestion.<sup>66</sup> According to the 2008/9 ministerial statement on the Judiciary, 27,411 inmates have spent from one to several years on remand. These figures are less by

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57 Article 23 (1) a-c.

58 Sec 49 (7) of the Prisons Act 2006 and *Livingstone Kakooza v Uganda* Criminal Appeal No 17/93, Supreme Court.

59 Legislation specifies what period of imprisonment a particular offence attracts. See also Ngabirano (n 44 above) 11.

60 Liebmann (n 2 above).

61 UHRC Ninth Annual Report (2006) pg 41.

62 Such as Luzira maximum prison in Kampala, Kigo prisons in Wakiso, Kabale, Soroti and Bushenyi government prisons.

63 A Dissel, 'Prison Conditions in Africa' (2001) <<http://www.csvr.or.org.za/papers/papdis10.htm>> (accessed on 14 August 2008).

64 Census of Prisoners in Central Government Prisons, 18 August 2003.

65 'World Prison Population List' International Centre for Prison Studies, King's College London, <<http://www.visionofhumanity.org/gpi/results/uganda/2008/>> (accessed 3 September 2008).

66 Submitted to the national Community Service programme <<http://www.un.org/special-rep/ohrls/ldc/MTR/Uganda.pdf>> (accessed 3 September 2008).

those of 10 districts meaning the final figure is even higher. There are up to 82,285 cases pending in the courts, of which about 10,000 are of criminal nature.<sup>67</sup>

The Deputy Registrar of the Criminal Division at the Uganda High Court, Roy Byaruhanga has warned that unless an ingenious solution is found, the problem could get worse. 'It may take us 300 years to clear the backlog. We are talking of about three to four generations of people! This calls for innovative measures in handling the situation'<sup>68</sup> The Commissioner General of Prisons, Johnson Byabashaija, says that even if the Director of Public Prosecutions stopped committing offenders to prison, it would take up to five years to unclog the current 4700 prisoners committed to the High Court awaiting trial.<sup>69</sup> Mr Byabashaija told Daily Monitor that the total number of prisoners is 26,000, 58 percent (15,080) of whom are remand prisoners. But, the last available statistics as at January 2007 on overall backlog of criminal cases report of a colossal 33,524 cases from the High Court, the Chief Magistrates Courts and Grade I Magistrates Courts respectively.

However, the 2007 UHRC notes some positive developments in the human rights situation of inmates such as hygiene, food and clothing.<sup>70</sup> Areas of concern in prisons remain: detention of suspects for longer than 48 hours, restrictions in access to places of detention, inmate's access to food, medical care, water, clothing, beddings, and persistence of torture, congestion in cells, detention of suspects with convicts, of children with adults as well as the general welfare of both the inmates and prison staff.

According to Nsalasatta, most of these prison units were built in the early and mid 20<sup>th</sup> century to cater for a limited number of offenders.<sup>71</sup> For a long time, there has been neither renovation nor expansion to cater for the ever-increasing number of offenders, 'the majority of whom being those who committed minor offences'.<sup>72</sup> Kamuge Prison in Pallisa district which was constructed in 1948 is in a sorry state with dilapidated structures that are almost collapsing on inmates and warders.<sup>73</sup> The prison which was supposed to accommodate 150 inmates is now overflowing at double the capacity with suspects and convicted prisoners.

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67 '30,000 inmates languish in prisons as shortage of judges creates case backlog' The Daily Monitor News Paper, <[www.monitor.co.ug](http://www.monitor.co.ug)> (accessed 16 August 2008).

68 R Byaruhanga 'Unclogging Prisons - The Way Forward' (2007) presented at an annual Judges Review conference in Jinja.

69 300 years to clear case backlog – Judiciary' Monitor Newspaper Uganda, December 16, 2007.

70 UHRC Tenth Annual Report (2007) p 30.

71 DS Nsalasatta, 'Information on the Uganda Prison Service' (2003)1 *Uganda Living Law Journal*, 128-13.

72 C Birungi, 'Community service as an Alternative to imprisonment: A case study of Masaka and Mukono Districts' (2005). Mini-Thesis Presented to the Institute for Social Development Faculty of Arts, Univ. of Western Cape (Unpublished).

73 'Pallisa crime suspects walk 8 miles to court' The Monitor (n 66 above).

This tendency to impose imprisonment as the principal penal sanction rather than other punitive measures results in a high prison population, causing overcrowding. The Government of Uganda and the taxpayer therefore bear considerable expenses in order to maintain offenders. This also forces prisoners to break ties with their families and the most affected are the dependants, the majority of whom are children. These children therefore become hidden victims of crime as they are denied the help, support and guidance from their caregivers.

It must be noted that the traditional view that evil men deserve to be punished has been the ultimate justification for imposing sentences of imprisonment, but it is gradually giving way to a more modern approach which views punishment of criminals as having the main purposes of deterrence, rehabilitation, protection of society, and reformation.

Professor Marshal Clinard states: -

Prisons are largely failures; recidivism runs between 60 to 80 percent ...in prisons men are trained in more sophisticated crimes, at the state expense. Homosexuality is rampant in these one-sex communities, the prison environment itself has a degrading effect on human beings, initiative is crushed, men become embittered and filled with a hatred of society and prison inmates are denied their civil rights. Most of all a prisoner becomes labelled as being an 'ex- con' which interferes with jobs, marriage and his own self-respect<sup>74</sup>

The Government of Uganda, therefore, saw a need to introduce reforms in its criminal justice system, hence the introduction of community service. It also took into consideration international and national rules and other obligations regarding the treatment of all people including offenders for the enjoyment of their basic human and fundamental freedoms.

## **2.4 Corporal punishment**

Corporal punishment is infliction of physical pain and suffering upon a convicted person for the purpose of retribution, retaliation, deterrence and correction.<sup>75</sup> One of the ardent advocates of corporal punishment, Warden Elam Lynds is reported to have said:

I consider the chastisement by the whip the most efficient and, at the same time, the most humane which exists; it never injures health and obliges the prisoners to lead a life essentially healthy. Solitary confinement, on the contrary, is often insufficient and always dangerous. I have seen many prisoners in my life, whom it is impossible to subdue in this manner and who only left the solitary cell to go to hospital. I consider it impossible to govern a large prison without a whip: Those who know human nature from books only may say the contrary<sup>76</sup>

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74 MB Clinard, 'Sociology of deviant behaviour' (1971) 3.

75 Definition of Free Encyclopedia <[http://en.wikipedia.org/wiki/Corporal\\_punishment](http://en.wikipedia.org/wiki/Corporal_punishment)> (27 August 2008).

76 EH Johnson, *Crime, correction and society* (1968) p 429.

Corporal punishment is prescribed as a form of punishment in Uganda. Certain offences such as rape, indecent assaults on women or girls, indecent assaults on boys under eighteen and attempted defilement, are expressed as punishable with or without corporal punishment.<sup>77</sup> Under these provisions, the power to impose corporal punishment is discretionary. There are, however, offences where this form of punishment is mandatory. Under Section 288 of the Penal Code Act, when a person is convicted of the offence of robbery or assault with intent to rob he must in addition to imprisonment be awarded corporal punishment.<sup>78</sup> In the case of child offenders, however, a punishment of caning cannot be imposed by the Family and Children's Court (FCC).<sup>79</sup>

Over the years, however, corporal punishment has come under attack as being a violation of the right from cruel, inhuman and degrading punishment.<sup>80</sup> In the case of *Simon Kyamanywa v Uganda*<sup>81</sup> the Constitutional Court declared corporal punishment to be a violation of the freedom from cruel, inhuman and degrading punishment, and, therefore deemed Section 74 of the Magistrates Court Act (MCA) to be unconstitutional. Despite this constitutional court ruling, the punishment remains on the Ugandan statute book.

## 2.5 Fine

A fine is a sum of money paid by the offender to the state. Reaction to criminality by general confiscation of property, or by imposition of a fine, has always existed in most civilised societies.<sup>82</sup> In Uganda there are statutory provisions empowering a court to impose a fine instead of a sentence of imprisonment.<sup>83</sup> Many offences are expressed as punishable either by fine or imprisonment or both. Where the court has discretion to impose a fine or imprisonment, the accused should first be given an opportunity to pay the fine. It has been noted that it would be inappropriate in principle to impose a fine clearly beyond a person's means, and which would inevitably result in a default sentence of imprisonment.<sup>84</sup> However, due to poverty levels even where a small fine is imposed, the offenders end up in prison because often they cannot afford to pay fines. Most of these prisoners are often primary or

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77 PCA (n 45 above) secs 125, 128, 129 (2), 147 respectively.

78 A person sentenced to imprisonment under section 286 or 287 shall, in addition, be sentenced to corporal punishment.

79 Sec 94(9) Children Act.

80 A violation of article 24 of the 1995 Constitution of Uganda.

81 Constitutional Court ref No 10 of 2000 (Unreported).

82 T Mwene-Mushanga, *Crime and Deviance: An Introduction to Criminology*, (1988) 34.

83 Sec 180 of the Magistrates Court Act (MCA) Cap 16 and sec 110(b) of the Trial on Indictments Act (TIA) Cap 23 give the courts discretion to impose fines where the punishment for an offence is not fixed by law.

84 Sec 94 (e) Children Act, child offenders too can be ordered to re-pay or make up for the wrong. However, the court will first look into the ability of the child to pay. Where an order of a fine has been made and the child fails to pay, the child shall not be detained.

sole carers and their incarceration has a devastating effect on their family, particularly on young children.

## **2.6 Probation**

Probation is the subjection of an offender to supervision of a probation officer instead of imprisoning or fining him.<sup>85</sup> Its main objective is to re-integrate an offender into the community, while at the same time protecting society from the evils of anti-social behaviour, with the main purpose of rehabilitating the offender. In the FCC, a probation order may be made on the advice of a Probation and Social Welfare Officer (PWSO)<sup>86</sup> and may include a condition not to change residence without informing the PWSO, or to report to probation office at intervals.

## **2.7 Other penalties**

There are several other sentences available to the courts which for the sake of completeness, are listed below: compensation,<sup>87</sup> restitution: (the returning of stolen items to their rightful owner)<sup>88</sup> caution,<sup>89</sup> unconditional discharge,<sup>90</sup> conditional discharge,<sup>91</sup> police supervision,<sup>92</sup> suspended sentence,<sup>93</sup> binding over<sup>94</sup> and community service.<sup>95</sup>

## **2.8 Community service as an alternative to imprisonment**

### **2.8.1 Evolution**

The Tokyo rules provide the international legal framework for promotion and use of noncustodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment.<sup>96</sup> The

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85 By virtue of the Probation Act Cap 122; A probation order shall contain such requirements as the court considers necessary for securing the supervision of the offender, and such additional requirements as to residence and other matters as the court, having regard to the circumstances of the case, considers necessary for securing the good conduct of the offender or for preventing a repetition of the same offence or the commission of other offences; but without prejudice to the power of the court to make an order under section 197 of the MCA or section 126(1) of the TIA, the payment of any sum by way of compensation shall not be included among the requirements of a probation order (section 3).

86 As above.

87 Sec 126 of the TIA Cap 23

88 Sec 201(1) of the MCA Cap 16 and sec 130(1) of the TIA Cap 23.

89 Sec 119(1) (b) of the TIA Cap 23 and section 190(1) (b) of the MCA Cap 16.

90 Sec 119(1) & (2) of TIA Cap 23 and section 190(1) (a) of the MCA Cap 16.

91 Sec 120 of the TIA Cap 23 and section 191 of the MCA Cap 16.

92 Secs 194(1) & (2) MCA only applies to offences with a maximum sentence less than life imprisonment.

93 Sec 34 of the Criminal Procedure Code Cap 116.

94 Sec 94(1) (d) of the Children's Act Cap 16.

95 CSA (n 19 above) Community Service Regulations 2001.

96 Tokyo rules (n 17 above).

Rules are intended to promote greater community involvement in the management of criminal justice, and to promote a sense of responsibility towards society amongst offenders. In Uganda, the concept of community service was directly influenced by the Pan Africa seminar on Prison Conditions in Africa held in Kampala in 1996.<sup>97</sup> The conference resulted in the 'Kampala Declaration on Prison Conditions in Africa' (the Kampala Declaration) which later became a United Nations document.<sup>98</sup> The Kampala Declaration recommended alternative sentences to imprisonment and delegates adopted community service as one of those alternative sentences.<sup>99</sup> Community service was intended to alleviate poor prison conditions by lessening overcrowding, high costs of running prisons, to combat recidivism, and lack of rehabilitative programmes for prisoners and to create an attitudinal change from the punitive to the rehabilitative.<sup>100</sup>

Community Service as a sentencing option was introduced in Uganda by Community Service Act of 2000.<sup>101</sup> This was followed by the promulgation of the community service regulations<sup>102</sup> which paved the way for certain gazetted courts in Uganda to apply community service orders. The programme was first launched as a pilot phase in four magisterial areas of Mpigi, Masaka, Masindi and Mukono from May 2001 to May 2003. The nationwide rollout took place in March 2004 and as a result, all courts of judicature in Uganda can now apply community service order as a court sentence.

## **2.8.2 What is Community Service?**

Community Service is an alternative to imprisonment, whereby an offender convicted of a minor offence performs an activity for the public benefit.<sup>103</sup> When serving a Community Service Order (CS Order), the offender (convict) does the work personally; he or she cannot delegate the work to his servant nor can he hire someone else to serve the punishment on his or her behalf.<sup>104</sup>

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97 The declaration is annexed to the UNESCO Resolution 1997/36 on International Cooperation for the improvement of Prison conditions' and cited in the mandate of the Special Rapporteur on Prison Conditions and Conditions of Detention of the African Commission. < [www.un.org](http://www.un.org) > (accessed on 27 August 2008).

98 As above.

99 Penal Reform International Workshop Report on Prison and Penal Reform in Africa (1996) <<http://www.penalreform.org>> (accessed on 20 April 2008).

100 A Dissel, 'Prison Conditions in Africa' (2001) <<http://www.csvr.or.org.za/papers/papdis10.htm>> (accessed on 16 August 2008).

101 CSA (n 94 above).

102 Statutory Instrument No 55 of 2001.

103 As above.

104 Sec 2(a) CSA.

### 2.8.3 The legislative framework for alternative sentencing

The CSA defines community service as a non-custodial punishment by which after conviction the court with the consent of the offender makes an order for the offender to serve the community rather than undergo imprisonment.<sup>105</sup> A community service order on the other hand is defined as an order imposed by the court requiring the convicted person to perform unpaid work within the community for a specified period of time.<sup>106</sup>

Under the Act, community service shall be performed for a period of not more than six months and the offender shall not work for more than eight hours a day.<sup>107</sup> Thus, community service involves persons being sentenced to undertake work in the community, for example, cleaning public hospitals and schools, clearing feeder roads, digging pit latrines, cutting grass in public parks, helping in building schools and dams, etc. Community service is not meant to take away jobs in the communities but to supplement and /or fill gaps where communities lack resources to undertake the task.

All public and private institutions are considered as placement institutions as long as their operations directly benefit the public at large.<sup>108</sup> When serving CS Order, the quantum of work to be performed by the offender shall be computed in terms of work-hours but not volume of work; that is the offender performs the specified piece of work in terms of hours per-day of work, rather than the amount of work. On being sentenced to CS Order, the offender shall report to the supervising officer named in the order. It is the duty of the supervising officer or the placement institution to provide the working tools and materials for the offender to use while serving CS Order.

The supervisors of the scheme are prohibited from using the offender for personal gain; a fine is imposed in the event that a supervisor breaches this Act.<sup>109</sup> A placement institution should not be run for a commercial profit, it should have work available that would be within the capacity of prospective offenders on community service, and the institution's management body should be in agreement with the aims and principles of community service, and be willing to accept and supervise offenders on community service.

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105 Sec 2 CSA.

106 Sec 4(1) CSA.

107 Sec 5 CSA.

108 Sec 5 CSA.

109 Sec 6(5) CSA.

Further, provision is made for an offender who while performing community service commits another offence and for the amendment of the order in case the offender changes a place of abode.<sup>110</sup> It is the duty of the supervising office to give a report to the supervising court on the performance and general conduct of the offender. A female offender shall be supervised by a female supervisor.<sup>111</sup> Where the offender commits an offence outside his/her usual area of residence, the CS Order shall be served in his/her usual area of residence. Where in the course of serving the CS Order, the offender changes residence to outside the jurisdiction of the court; the supervising court shall make appropriate amendments in the CS Order and inform the court having jurisdiction for the area where the offender intends to go. A copy of the amended CS Order is then served to the new supervising court. The period of community service may then be reduced depending on the offenders' good conduct<sup>112</sup>

When the offender absconds or fails to comply with the requirements of the CS Order, the court shall, on report by the supervising officer issue a summons requiring the offender to appear before it. If it is proved to the satisfaction of the supervising court that the offender has failed to comply with any of the requirements of the CS Order, the court may either vary the order to suit the circumstances of the case. It may impose a fine not exceeding three currency points or cancel the order and sentence the offender to any punishment which could have been imposed in respect of the offence.

Under section 10 (1) the minister shall from time to time notify the Chief Justice in writing in which places and in which areas arrangements exist for courts to make CS Orders. The national committee is a body corporate with perpetual success and with a common seal.<sup>113</sup> Amongst its functions is, monitoring the operations of Community Service in all its aspects promote measures for effective operation of Community Service, receive and consider any complaints or views and make recommendations where possible.

The CSA and the Regulations there under, therefore, give the judicial officers an opportunity to determine the guilt or otherwise of the offender; sentence him to serve on community service and follow up to ensure that he/she is actually serving the sentence in the project assigned by the supervisor. They sanction the judicial officers to approve the projects in which the offender will be serving, vary the orders where necessary and receive information or data on the implementation of the scheme.

Above all, the regulations allow the judicial officer to inquire into:-

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110 Sec 7 & 8 CSA.

111 Sec 9(3) CSA.

112 Sec 9 CSA.

113 Sec 11 CSA.

- a) Whether the family of the offender remains entirely dependent on the offender for upkeep during the period of community service.<sup>114</sup>
- b) Whether the offender has a fixed place of abode on which he/ she has used for more than three months, either as the place for his work, or home.
- c) Whether the offender is employed,<sup>115</sup> or whether the offender is likely to lose employment if placed under community service orders. The community service order should be flexible enough to allow the offender to continue with his/her employment.<sup>116</sup>

The Act and regulations vest the sentencing officers with the power to ensure the use of incarceration as a last resort thus giving an opportunity for a sentence that allows offenders to contribute to society and maintain family and social ties.

#### **2.8.4 The Process of issuing community service order by the court**

Before issuing out a CS Order, the convicting court will consider the pre-sentence report, which will have been compiled by the investigating officer on Police Form 103. This form is usually attached in the Police file and contains very useful information about the offender. This assists the court to determine whether the offender is a suitable candidate for CS Order, or not.

Before passing CS Order, the court carefully considers the circumstances, character and antecedents of the offender and asks him or her whether he or she consents to the order.<sup>117</sup> The Court is further obliged to explain to the offender in the language he or she understands the effect of the order and consequences for non-compliance. On default, the offender becomes liable to imprisonment as the court could have imposed in respect of the offence.<sup>118</sup> CS Order can only be issued by the court in respect to a minor offence i.e. an offence for which the court may pass a sentence of not more than two years imprisonment. The offender has to be one who is physically able and possesses the skill necessary to perform the type of work stipulated in the CS Order.

#### **2.9 Concluding Remarks**

Imprisonment has always functioned as one of several punishment options available to courts. It is usually reserved for the most serious cases (except in cases where the death penalty was handed down). Options such as suspended sentences, fines, and corporal punishments are some of the more traditional court-imposed non-custodial sentences. However, courts often believe that these sentences

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114 Regulations (n 100 above) second schedule, regulation 14 - 18 guidelines for courts and judicial officers.

115 Employment includes even those working within the informal sector.

116 n 112 above.

117 Section 3 (2) CSA.

118 Section 3 (3) CSA.

do not constitute sufficient punishment for certain types of offenders, so a sentence of imprisonment is given instead.

Community service as a sentencing option gives the offender a certain responsibility to fulfil an obligation to the community, victim, and to look at positive ways of addressing the offending behaviour. Above all, this non-custodial sentence is served in the community and the offender remains at his home. The harmful effects of imprisonment are avoided, and the offender maintains contact with his or her family. Instead of losing any employment while in prison and denying the family support it would otherwise have, the offender is able to continue working to support himself or herself and any dependants.

## CHAPTER THREE

### PUNISHING LIFELINES AND THE IMPACT ON THE RIGHTS OF CHILDREN

#### 3.1 Introduction

When parents are sent off to serve jail terms, little is known or mentioned about what becomes of their young ones. There is no requirement that the various institutions charged with dealing with offenders such as the police, courts, prisons, probation and social welfare departments, inquire about children's existence or concern themselves with children's care. Conversely, there is no obligation on front-line systems serving vulnerable children – reception centres, schools, family and child protection unit,<sup>119</sup> FCC,<sup>120</sup> probation and social welfare office,<sup>121</sup> local councils,<sup>122</sup> or the national council for children (NCC),<sup>123</sup> to inquire about or account for parental imprisonment.

Children of prisoners have a daunting array of needs. While anecdotal evidence abounds,<sup>124</sup> to date there have been no statistical studies to help assess the magnitude of the problem. This chapter analyses the sketchy evidence to show that children need a safe place to live and people to care for them in their parents' absence, as well as need everything else a parent might be expected to provide like food, clothing, and medical care. However, beyond material requirements as mentioned above, children, it has been stated, have emotional needs.<sup>125</sup> They need to be told the truth about their parents' situation, to be listened to and be informed of their parents' status. These requirements go not just unmet but unacknowledged. This chapter also discusses the ways in which the rights of children are impacted, how the 'best interest' principle is used, or ignored, especially when courts sentence the primary caregivers of the children.

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- 119 Following the ratification of the CRC, Police stations in Uganda designated special units known as the 'Family and Child Protection Unit'. These are found at almost all Police stations and posts and handle issues relating to the family, children and child abuses. This unit is to ensure that vulnerable children get redress with minimum delay.
- 120 FCC created by Cap 59 are specialised courts to handle children matters such as children in conflict with the law and are located close the communities, e.g. at counties. Children's cases are to be heard in a friendly and a child sensitive manner.
- 121 Probation and Welfare Officers (PSWOs), designated officers to oversee that the best interest of the child is maintained at all times and in all actions and their mandate is to ensure children's rights are adhered to.
- 122 The Children Act Section 10 provides for the support of children by local authorities. For every Local Council, there is an adult representative for children known as the Secretary for Children's Affairs.
- 123 The NCC was established in 1992 to oversee implementation of Uganda National Plan of action for Children (UNPAC).
- 124 Mainly from NGOs assisting children whose parents are in jail in Uganda such as Prison Fellowship and Wells of Hope.
- 125 NG Vigne, et al 'Broken bonds Understanding and addressing needs of incarcerated parents' (2008). Urban Institute, Justice Policy Centre, Washington. <<http://www.aecf.org/~media/Pubs/Topics/Child>> (accessed 20 September 2008).

### **3.2 The right to protection from injury and harm**

All children have the right to have their basic needs met, not only for survival and for protection but also to be able to develop to their full potential, to participate as members of society and grow up to be caring and responsible citizens. Children of prisoners have committed no crime but the penalty they are required to pay is steep. They forfeit, in too many cases, virtually everything that matters to them: their safety, their public status and private self-image, as well as their source of comfort and affection.<sup>126</sup> Their lives and prospects are profoundly affected by the numerous institutions that lay claim to their parents such as police, courts, jails and prisons but they have no rights, explicit or implicit, within any of these jurisdictions.

This need not be the case. Uganda is a signatory to various international conventions and has several measures in place designed to prevent abuses as well as protect children affected with rights abuses and other rights violations. The ‘best interest’ of the child is one of the pillars in Article 3 of CRC and article 4 of the African Children’s Charter. In all actions concerning children undertaken by any person or authority, the best interest of the child shall be a primary consideration.

The CRC does not offer any definite statement of what is in the ‘best interest’ of an individual child in a given situation. However, the CRC as a whole provides a frame of reference and how to balance the interests of the child with wider societal interests. The Convention specifically spells out the rights of the child and sets the minimum standards that society should aspire to achieve. Uganda ratified the CRC in 1991 and is therefore obliged to translate these rights into reality through legislative and policy measures.

To this end, the rights of children are provided for in article 34 of the 1995 Constitution of Uganda and the Children Act. Article 45 of the Constitution states that the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned shall not be regarded as excluding others not specifically mentioned. The Constitution in principle has laid a foundation for review and reform of other laws to cater for protection of children against situations that are hazardous to their wellbeing. The CSA, which has been the focus of our discussion, already vests judicial officers with discretionary powers to pass a sentence that takes into consideration the best interests of the children.

Under the CSA, the final decision to pass a CS Order lies with the magistrates or judges to use their discretion and judgment after considering all the circumstances, in every given case.<sup>127</sup> Guidance is

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126 As above.

127 CSA (n 94 above) and Schedule A, CS Regulations (n 100 above) on conviction, the offender is offered the opportunity of community service instead of a sentence of imprisonment, which might otherwise have been passed upon the offender.

contained in the regulations on the types of offenders who deserve CS Orders, conditions for the order, placement areas, arrangement of work hours, how to match an offender to an institution and so on.<sup>128</sup> A grid of hours on Community Service is provided which suggests the number of community service hours, which may be considered appropriate alternatives for prison sentences up to 2 years.<sup>129</sup> The regulations make it clear that the magistrate has discretion to depart from the number hours indicated in the grid if there are individual circumstances in case that would justify him her to do so.

It is contended that an offender who is a primary caregiver for children should be liable to a CS Order since children rely on the exclusive protection of adults for the realisation of their rights. This argument is buttressed by the fact that statistics from the Director of Public Prosecutions reveal, for example, that out of 7,474 convicts in a year, more than 4000 were convicted of assaults, thefts, and malicious damage and traffic offences.<sup>130</sup> These are offences to which CS Order can be applied. Moreover, it is a common understanding among criminologists and corrections professionals that offenders who commit property crimes for an example do not usually need to be incarcerated, as they are not a violent threat to society.<sup>131</sup> In fact, they are the candidates most likely to respond to rehabilitation efforts at residences of lesser security and considerably less cost per individual to society. Furthermore, sentenced offenders can learn far more about personal responsibility and accountability in lower-security rehabilitation programs than they would ever be exposed to in prison.<sup>132</sup> Indeed, some offenders' crimes are so serious that imprisonment is warranted regardless of the implications for their families. But, for many low-level offences, alternatives to incarceration including community service and fines are sanctions that are more proportionate.

### 3.3 The right to education

Education is crucial to the promotion of human rights; it is both a human right in itself and a requisite means to realising other human rights. The exercise of the right to education is instrumental for the

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128 CS Regulations above.

129 (n 116 above) The basic grid is founded on the following facts-(a) 8 hours work per day for 5 days a week totalling to 40 hours of work per week. (b) 40 hours per week by 4 weeks per month totals to 160 hours per month.(c) 8 hours equals 1/3 of 24 hours a day in prison(d) 40 hours equals ¼ of 168 hours a week in prison (e) 160 hours equals ¼ of 720 hours a month in prison(f) 160 hours equals 1-month community service 4 months in prison(g) 320 hours equals 2 months community service 8 months in prison(h) 480 hours equals 3 months community service 12 months in prisons(i) 640 hours equals 4 months community service 16 months in prisons (j) 8000 hours equals 5 months community service 20 months in prisons(k) 960 hours equals 6 months community service 24 months in prisons.

130 Directorate of public prosecutions/statistics (accessed 23 September 2008).

131 J Crawford, 'Alternative sentencing necessary for female inmates with children' (2003) 65(3) *Corrections Today*, 8 to 10 <<http://www.allbusiness.com/public-administration/justice-public-order/983194-1.html>> (accessed on 23 September 2008).

132 RJ Cypser, 'The payback in reducing recidivism, and thereby reducing crime and cost.' New York Chapter of Citizens United for the Rehabilitation of Errants. <[www.bestweb.net/~cureny](http://www.bestweb.net/~cureny)>. (accessed 23 September 2008).

enjoyment of many other human rights, such as the rights to work, health and political participation thus fighting against poverty.<sup>133</sup> For instance, the right to receive a higher education on basis of capacity, and the right to choose work can only be exercised in a meaningful way after a minimum level of education is reached. Similarly, in the ambit of civil and political rights, the freedom of information, the right to vote and the right to equal access to public service depend on a minimum level of education.

Literature suggests that parental separation due to imprisonment has profound consequences for children.<sup>134</sup> The immediate effects include feelings of shame, social stigma, loss of financial support, weakened ties to the parent, poor school performance, increased delinquency, and increased risk of abuse or neglect among others.<sup>135</sup> Children whose parents are incarcerated therefore have trouble concentrating and struggle academically to keep up with their peers and are susceptible to behavioural problems in and outside of school.<sup>136</sup> The general effect on a child who is separated from an incarcerated parent, especially the primary caregiver, is that this circumstance interferes with the child's ability to successfully overcome the effects of such a separation. The incarceration of a parent can be especially scarring because of the humiliation that often surrounds it.

Some children may be sensitive to the stigma of their parent's crime and imprisonment and feel embarrassed or resentful around their peers and other adults. Their classmates may deride them, making them feel further alienated and hence culminate into poor performance at school.<sup>137</sup> Yet, quality education is one of the rights guaranteed by the CRC.<sup>138</sup> The Committee is specific about the 'relevance of curriculum to the child's life' and encourages State Parties to 'develop indicators for quality education and ensure that the quality of education is monitored and guaranteed'.<sup>139</sup>

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133 Draft Guidelines: A Human Rights approach to poverty reduction strategies by OHCHR, at 26.

134 CJ Mumola, 'Incarcerated Parents and Their Children' (Washington, DC: US Department of Justice, Bureau of Justice Statistics, NCJ 182335, (2000).

135 J Travis, et al 'Families left behind: the hidden costs of incarceration and Reentry' (2005).

136 As above.

137 Mumola (n 130 above).

138 Arts 28 &29 CRC.

139 Implementing Handbook for the Convention on the Rights of the Child.

<<http://www.adbi.org/3rdpartydrom/2002/06/01/1510.convention.rights.child/>>(accessed 10 August 2008) The Committee on Economic, Social and Cultural Rights has provided useful guidelines in its General Comment 13 on the implementation of the right to education. It has set out, inter alia, examples of possible violations of the right to education occurring through the direct action of states parties - acts of commission or through their failure to take the steps required for the realisation of the right - acts of omission.

International instruments providing for the right to education create general obligations for State parties.<sup>140</sup> The normative content of the right to education should be viewed in terms of availability, accessibility, acceptability and adaptability.<sup>141</sup> At the national level, Uganda has harmonized national laws and policies with international standards by providing for equality and non-discrimination and the right of all persons to education.<sup>142</sup> The right to education is expressly provided for in Article 30 of the Constitution of Uganda.<sup>143</sup> The Government of Uganda launched the Universal Primary Education (UPE) in 1997 and the programme has been under implementation since then.<sup>144</sup> The main objectives are to address inequality in the country and improve on the quality of life of its major beneficiaries; the children. However, this right to education of children cannot be realised if they are not protected from the disruptions in their lives such as imprisonment of their parents.

Allan Mugumya, a social worker with ‘Wells of Hope’ (Wells)<sup>145</sup> states that although UPE, local council structures, churches, relatives and other NGO’s exist, no particular agency takes responsibility for the children of incarcerated parents. Wells therefore organises scarce resources to pay children’s school fees, buy scholastic materials, uniform and other essential items. As of September 2008, 120 children (twenty-eight of them under the age of six years and about half of them teenagers) are in the care of Wells.<sup>146</sup>

### **3.4 The right to health**

Development theorists such as Freud, Adler, Erikson, Horney, Piaget, and Vygotsky have written extensively about parental nurturance and its influence upon healthy child growth and development.<sup>147</sup> Further, research in this area indicates that parental incarceration, and the process that precedes it, produces a chain of events that can seriously impugn developmental growth.<sup>148</sup> Parent-child separation,

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140 Art 26 of the UDHR, arts 13-14 of the CESC, article 10 of the CEDAW, articles 28-29 of the CRC and article 17 of the African Charter on Human and People’s Rights.

141 Prof. N Rembe (Rapporteur), Meeting on Priorities for Research to advance Economic, social and cultural rights in Africa, Addis Ababa, 9-11 March 2005.

142 Stipulated in arts 24 & 30 of the Constitution respectively and in the Education Act, Cap 127.

143 See also Principle XVIII of the National Objectives and Directive Principles of State Policy,

144 Government also introduced free secondary education (USE) at post-primary education and training level (PPET).

145 Wells of Hope Ministries a Children Welfare Mission in Namugongo Uganda, is one of the NGOs assisting children whose parents are in jail. <[www.wellsofhope.org](http://www.wellsofhope.org)> (accessed 10 August 2008).

146 E-mail communication from Kenneth Barungi to the writer on 23 September 2008.

147 L Berk, *Infants and Children: Prenatal Through Middle Childhood* (2005) 58.

148 B Bloom, ‘Imprisoned Mothers’ in K Gabel and Denise Johnston (eds) *Children of Incarcerated Parents*, (1995) 21.

enduring traumatic stress, and inadequate quality of care have major distorting influence upon these children and their development.<sup>149</sup>

The Parliament of Uganda has not yet enacted legislation giving effect to the right to health and other economic, social and cultural rights, which are laid out in the national objectives. Nevertheless, the Government of Uganda has international obligations to respect, protect and fulfil the right to health which forms the basis for the enjoyment of the right to life of all persons.<sup>150</sup> The 1995 Constitution explicitly provides for the promotion and protection of fundamental human rights and freedoms which are regarded as inherent and not provided by the State and have to be respected, upheld and promoted by all organs and agencies of Government and by all persons.<sup>151</sup>

Children are entitled to the enjoyment of the highest attainable standard of health conducive to living a life of dignity which is referred to as the right to health. The right to health contains both freedoms and entitlements. The entitlements include the right to a system of health protection which provides equality of opportunity to enjoy the highest attainable level of health. According to the Uganda Demographic Health Survey (UDHS) 2006, one in every two children in Uganda is underweight; 32% of the children under five are too short for their age; and 12% are severely stunted. Around three quarters of Ugandan children under the age of five are anaemic and 20% suffer from Vitamin A deficiencies, the two factors that cause brain hunger.<sup>152</sup>

Although no specific mention is made of children with incarcerated parents; it is argued that the harsh environment, neglect and lack of proper care that this category of children are exposed to are contributory factors to poor health of children in Uganda. In its process of tracing children of prisoners, Wells Ministries found in one family of 2 children that a boy had died and a girl 3½ years of age was seriously malnourished and taken to an orphanage.<sup>153</sup> The inmate's spouse had remarried. In another instance, a 6-year-old was found to be HIV positive and was enrolled in Mildmay for Anti Retro-Viral therapy by Wells but diet remains poor. Wells sometimes found the children had been

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149 C Jose-Kampfner, 'Post-Traumatic Stress Reactions in Children of Imprisoned Mothers' in K Gabel & D Johnston (eds) *Children of Incarcerated Parents* (1995) 34.

150 The right to health was first reflected in the WHO Constitution (1946) and reiterated in the 1948 Universal Declaration of Human Rights leading to the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966). It has also been reaffirmed in the Declaration of Alma Ata (1978) and the World Health Declaration adopted by the World Health Assembly in 1998. It has further been expounded by the General Comment on the right to health (2000) and the Special Rapporteur on the Right to health (2002).

151 Article 20.

152 Uganda Bureau of Statistics, 2007 < <http://www.ubos.org/> > (accessed 24 September 2008).

153 Wells (n 142 above).

taken away by relatives; or had simply hit the street; or gone to work as house-helpers. Sometimes the house to which the charity was referred to, was non-existent!

### **3.5 Emotional impact.**

Losing a parent to prison can be especially traumatic.<sup>154</sup> A mother who had been sent to prison for drug offences told Human Rights Watch that she believed her children had been punished for her crime as much as she was.<sup>155</sup> In addition to the feelings of abandonment, grief, fear, guilt, and anger that they share with children of divorced or deceased parents, children of incarcerated parents also may experience intense anxiety, shame, and unique fears about the conditions under which their parents live. Some of those children carry emotional injuries that will take a long time to heal. Repairing frayed family ties is a challenge and one that sometimes proves insurmountable.

In Britain, an alliance of prison charities consisting of Action for Prisoners' Families and Prison Advice & Care Trust and the Prison Reform Trust notes that prisoners' children are the innocent hidden victims of crime, and are far more vulnerable than other children are to becoming involved in crime in later life.<sup>156</sup> The campaign to improve access to prisoners is based on the premise that when the state locks up a child's parent, it has a duty of care to the child.

King Donna raises concerns on the effects of imprisonment on offenders, their families and the broader community.<sup>157</sup> As a former prisoner, who served multiple prison terms during the 1990's, he states that it has become clear to him that the impact of imprisonment extends well beyond the walls of any prison. More often than not, families and children of prisoners are forgotten in discussions about the social and economic cost of imprisonment. He writes:-

In Victoria, Australia, a new multi-program prison has recently been opened with the aim of giving prisoners 'the goods' to live a crime free life after release. But what are 'the goods' and how have they been determined? Can these 'goods' overcome entrenched poverty, inadequate housing and educational opportunities, unemployment and discrimination and all of the other factors that often have contributed to a person's offending and imprisonment, and will still exist after their release? And what 'goods', if any, are the families and children who have also borne the impact of imprisonment going to receive? Can any

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154 Human Rights Watch: *Collateral Casualties: Children of incarcerated drug offenders in New York*, Vol.14, No.3 (2002) p6.

155 Human Rights Watch interview with M.S., New York City, April 9, 2001.

156 BBC News UK, Family visits 'key for prisoners' 5 December 2007<[http://news.bbc.co.uk/2/hi/uk\\_news/7126762.stm](http://news.bbc.co.uk/2/hi/uk_news/7126762.stm)> (accessed 10 august 2008).

157 K Donna, 'One In, All In: The Imprisonment of Offenders, Families and Children' Paper presented at the annual meeting of the American Society of Criminology, Los Angeles Convention Centre, CA, (Nov 01, 2006) <[http://www.allacademic.com/meta/p126757\\_index.html](http://www.allacademic.com/meta/p126757_index.html)> (accessed 10 August 2008).

'goods' actually overcome the cost of imprisonment to them? My questions are based upon this simple acknowledgement: I may no longer be in prison, but I still bear the cost of it, as does my child.<sup>158</sup>

Wells recently held a camp for 100 children of incarcerated parents, the first of its kind, designed to help them cope with emotional trauma of not being with their parents. Mr. Ssuubi the charity's coordinator has stated that, they offer children psycho-social support to include counselling and sensitization on issues related to HIV and AIDS, sexuality, education and hygiene,'<sup>159</sup>

### **3.6 Care, Stability and Love**

The expression of the human rights for children take into account children needs- the needs that must be met for the children to have a happy and fulfilled childhood. They need all the things that will help them grow and develop. They need friends and family, love and laughter. The loss of a parent to prison can compound the risks the children already confront, by depriving them of a critical source of care, stability, and love. In many cases, families may already be in disarray prior to parental incarceration and some if not all of a parent's children were already living apart from a parent before he or she was sent to prison. The impact of parental incarceration is greatest when the parent had been actively present in the children's life and is then removed.<sup>160</sup>

Dependable statistics are not available, but some experts believe that the children of incarcerated offenders are more likely to be involved in the criminal justice system than other children their age are. Wildman, in his paper demonstrates that parental imprisonment negatively affects the structure of children's families, the finances available to them, and the quality of their family lives.<sup>161</sup> After showing that parental imprisonment disadvantages children, he relies on data from vital statistics registries and the criminal justice system to estimate the risk of parental imprisonment for recent birth cohorts of American children. He notes:

...nearly one in five black children born in 1990 had a parent imprisoned by their ninth birthday, while about one in 40 white children born in 1990 experienced this event; the risk of parental imprisonment is growing rapidly for nearly all groups of children, although relative and absolute growth for black children and children whose parents have little education dwarfs the growth for more advantaged children; and about 40% of black children born in 1990 whose parents did not finish high school had a parent

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158 As above.

159 Camp held from 22 to 24 August 2008- Daily Monitor News <[www.monitor.co.ug](http://www.monitor.co.ug)> (accessed 1 September 2008).

160 Human Rights Watch interview with Denise Johnston, Pasadena, California, January 31, 2000.

161 C Wildman, 'Parental Imprisonment, the Prison Boom, and the Emergence of a Novel Form of Childhood Disadvantage' Paper presented at the annual meeting of the American Sociological Association, TBA, New York, New York City, (2007) <[http://www.allacademic.com/meta/p175674\\_index.html](http://www.allacademic.com/meta/p175674_index.html)> (Accessed 10 August 2008).

imprisoned before their ninth birthday. Taken together, these estimates suggest that parental imprisonment is emerging as a salient form of childhood disadvantage.<sup>162</sup>

Under article 31(4) of the Uganda Constitution, parents have a right and a duty to care for and bring up their children. Under the Children Act, any decision that affects the child must take cognisance of the child's best interest and welfare. The legal protection of rights infers that they are comprehensive and sufficient enough to ensure the survival and development of the child. Prison Fellowship (PF) Uganda, a global Anglican charity notes that many prisoners' children are at a greater risk of having their rights violated.<sup>163</sup> The affected children are in two categories: those serving a prison sentence with their incarcerated parents, mainly women, and those left without parents in the communities. These children grow up feeling abandoned, isolated, and unloved.<sup>164</sup> According to the Executive Director PF Uganda, the charity tries to link up parents with their children. The charity mobilises church volunteers to buy gifts, which are given to the children with personal cards from their imprisoned parents. He notes, 'a strong bond between parent and child is essential for the emotional health of a child. That fragile bond can be easily shattered when a parent becomes incarcerated.'<sup>165</sup>

Frequently, the children are left without a caregiving arrangement or an arrangement that is adequate, and this causes further long-term damage to the development of the character and personality of the child. The quality of alternative care arrangements for the children may be worse, which only enhances the trauma of separation.<sup>166</sup> According to Hagan and Dinovitzer, children of incarcerated parents may be six times more likely than their counterparts to become incarcerated themselves because of these deprivations and traumas.<sup>167</sup> This unwanted and unanticipated effect is part of the emotional and physical damage not only to the child, but also to the society as a whole because of the intergenerational transmission of risks of imprisonment. Wells of Hope Ministries notes that one of its challenges is locating most of the children that they support and evaluating their performance. Some of the children cannot be located since they run away from home due to maltreatment from their relatives.<sup>168</sup>

As noted above, the Uganda Constitution outlines the duties and obligations of the state to act through its institutions to protect and prevent children from abuses. While the Constitution has laid down the

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162 Wildman above.

163 Prison fellowship has branches in at least 105 countries. PF Uganda is currently caring for prisoners' children across the country among other things.

164 C M Mwanguhya, 'Prisoners kids are potential criminals' <[www.monitor.co.ug](http://www.monitor.co.ug)> (accessed 10 August 2008).

165 As above.

166 J Hagan & R Dinovitzer, *Collateral consequences of imprisonment for children, communities & prisoners*. (1999) 26.

167 As above.

168 Wells (n 142 above) <<http://www.wellofhope.org/newsletter.php>> (accessed 10 August 2008).

duties of the institutions in protecting children's rights, the enforcement and implementation is left to the state organs of which the judiciary is a part. Legislators have vested in judicial officers the discretion to tailor sanctions appropriate to the seriousness of the offence and the culpability of the individual offender.<sup>169</sup> Birungi in his thesis notes that much as the community service programme was rated as being very beneficial by many stakeholders, magistrates still impose imprisonment as preferred sanction.<sup>170</sup> This should unnecessarily be the case since as community service is acceptable to the offenders, victims and community at large. There is need to send fewer people to prison and as a result, fewer children would be among the collateral casualties of imprisonment.

### **3.7 Children incarcerated with their mothers**

It is common in Uganda for babies and young children to be taken into prison with their mothers. Therefore, as the lifelines to these children serve their sentences or await their trials, so too do their little ones, enduring the life of the accused. This raises complex issues about the facilities available for such children to ensure their own appropriate physical, mental and emotional development.<sup>171</sup> Visiting Malukhu Prison in Mbale municipality of Uganda in late April 2008 a reporter noted that eight children were found living with the 35 female inmates at the detention facility.<sup>172</sup> This scenario is not only in Mbale but also in all prisons across the country. Asked whether children are supposed to be in prison, Margaret Obonyo, the officer in charge of the female wing at Malukhu Prison said, that the law permits it to an extent. 'Our law of prisons says once a child reaches one year and eight months, it should be taken back home. But some are not able to go home,' Ms Obonyo told members of the Rotary Club of Mbale who visited inmates on April 28, 2008.<sup>173</sup> This is because the children are deemed too young to be separated from their mothers, especially when they are still breast-feeding at the time of their mother's arrest.

The above scenario brings into perspective findings of a Cambodian study of children in prisons that the children face nutritional deficiencies.<sup>174</sup> In the Cambodian League for the Promotion and Defence of Human Rights (LICADHO) study it was found that though children share the allotted prison food with their mothers, extra food is not distributed to prisoners with dependents. The food provided typically lacks ample nutrients for adults, let alone for growing children. When split among two, three,

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169 CSA & Regulations (n 94 & 100 above).

170 Birungi (n 71 above).

171 R Taylor 'Women in prison and children of imprisoned mothers' (2004).

172 Source: <[http://www.wellsofhope.org/prisoners\\_for\\_%20no\\_%20crime.php](http://www.wellsofhope.org/prisoners_for_%20no_%20crime.php)> (accessed 17 August 2008).

173 'Prisoners for no crime' Monitor News Paper, Uganda <[www.monitor.achives.co.ug](http://www.monitor.achives.co.ug)> (accessed 10 August 2008).

174 As above.

or even more people, the nutritional value is depleted even further.<sup>175</sup> Most of the children who were staying with female inmates were below the age of five, according to the LICADHO study: living in prisons also presents a threat to children's safety. The study notes that 'the potential for maltreatment at the hands of other prisoners or prison staff is ever-present, particularly in facilities where sex offenders may be held.'<sup>176</sup> All these issues highlight the desirability of giving non-custodial sentences to mothers wherever possible.

The plight of children incarcerated with their mothers in Uganda has been raised at international level and commitments have been made by the government, promising to improve the situation but this has not happened. The UN Committee on the Rights of the Child on 15 September 2005 reviewed the second periodic report of Uganda on how the country is implementing the provisions of the CRC.<sup>177</sup> One of the questions put to the Ugandan delegation led by then Gender, Labour and Social Development Minister Zoe Bakoko Bakoru was on the figures of children living with their mothers in detention, and what measures were being taken to redress the plight of the children. While responding to experts' questions, Ms Bakoko did not respond to the question on children living with their mothers in prison.<sup>178</sup> Perhaps this explains why the situation has remained unchanged.

### **3.8 Concluding remarks**

International human rights standards, specifically the CRC emphasise the absolute necessity of respecting the child's best interests but these are not always easily established and therefore not respected.<sup>179</sup> The Convention covers all the rights that aim at the wellbeing of the child. It is worth noting that while parents are mainly accountable for their children's well-being, article 18(1) CRC reinforces the states' duty to ensure adequate care and protection of children in unusual circumstances. Prison sentences for offenders who are child carers, lead to unusual circumstances as they needlessly inflict pain and hardship on children. The Uganda criminal justice system should take as its constituency not just offending individuals when sentencing offenders, but also their families (and particularly children) . The most valuable intervention on behalf of children could take place before a parent ever sees jail through the use of alternative sentencing. Other rehabilitation-focused alternatives to incarceration such as fines, probation and suspended sentences could make a tremendous difference to offenders' children.

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175 'Prison conditions in Cambodia 2007: The story of mother and child' < <http://www.licadho.org> > (accessed 20 September 2008).

176 As above.

177 OUNHCR < <http://www2.ohchr.org/english/bodies/crc/crcs49.htm> > (accessed 24 September 2008).

178 As above.

179 M Alejos, 'Babies and small children residing in prisons', Quaker United Nations Office, Geneva, 2005.

## CHAPTER FOUR

### RETHINKING ALTERNATIVE SENTENCING FOR PARENTS IN UGANDAN CRIMINAL JUSTICE SYSTEM

#### 4.1 Introduction

It would be germane at this juncture to rethink the alternative sentencing sanction thus far presented in this research and the role of the Ugandan courts and other stakeholders in the criminal justice process. Various options are available to courts and offenders as viable alternatives to incarceration and a host of advantages as opposed to traditional sentencing procedures.<sup>180</sup> This chapter advances suggestions that exclusively relate to the need for community service with specific reference to parent offenders in the Uganda criminal justice system. It will invite stakeholders in the Uganda criminal justice system to go beyond what they are presently doing because of the advantages it presents. The advantages include: cost-effectiveness, reduction of prison populations, effectiveness and humanitarianism.

In courts across the country, stakeholders in the criminal justice system have to balance the need for offender punishment, deterrence, rehabilitation, and public safety with the reality of overcrowded prisons, costs for running prisons, while ensuring that the punishment fits the crime. This balance means that traditional sentences are not appropriate for some offenders and traditional sentences may even be detrimental to the offender and society. Prevalent crimes: malicious damage to property,<sup>181</sup> thefts,<sup>182</sup> affray,<sup>183</sup> assaults,<sup>184</sup> criminal trespassing,<sup>185</sup> removing boundary marks,<sup>186</sup> traffic offences,<sup>187</sup> and idle and disorderly,<sup>188</sup> to mention, deserve to be punished with non-custodial sentences such as community service.

#### 4.2 Why community service?

Until the implementation of the CSA, imprisonment was and still is the major form of punishment in Uganda even for minor offences.<sup>189</sup> Research findings in the previous chapters have demonstrated insufficient application of the penalty that would go a long way in alleviating the suffering of not only

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180 Discussed in chapter 2 above. These include restitution, fines, probation, and community service orders.

181 Sec 335 PCA.

182 Sec 253-255 PCA.

183 Sec 79 PCA.

184 Sec 235-239 PCA.

185 Sec 302 PCA.

186 Sec 338 PCA.

187 Under the Traffic and Road Safety Acts 1970 and 1998 (Caps 360 & 361) respectively.

188 Sec 167 PCA.

189 n 64 above.

the offenders but their families as well. Community service is applicable to offences punishable by a maximum of up to two years imprisonment in Uganda, and indeed the majority of offenders who go to prison serve a period of less than two years. These are the people who are expected to benefit from community service, but somehow, most of judicial officers still increasingly use imprisonment as the most popular form of punishment. Other jurisdictions such as South Africa have held that imprisonment should be imposed as a last resort. A noteworthy example is a case regarding community service as a sentence *S v Abrahams*.<sup>190</sup> Conradie J held that community service is not a sanction that can only be applied as a sentence for less serious offences. Whilst this type of sentence is not suitable for all offenders, there are some offenders who have committed serious offences but who would nevertheless be suitable for community service. The Judge was of the view that the courts should use imprisonment as a means of punishment only if the offence is so serious that non-custodial punishment would discredit the criminal justice system with the community.<sup>191</sup> In *S v Miners*<sup>192</sup> for an example, the court declined the use of community service on the grounds that the offender was aggressive and uncooperative.

In Uganda, the CSA and regulations made there under provide for a reasonably coherent statutory framework for the non-custodial sentence. The guidelines contained in the regulations provide for a range of factors that a judicial officer should take into consideration while sentencing. Some of the factors include: - whether the family of the offender remains entirely dependant on the offender for upkeep during the period of community service; whether the offender is employed and likely to lose employment if placed under community service orders.<sup>193</sup> If the sentencing officer finds an unusual, mitigating or aggravating circumstance not reflected in the guidelines, he has the latitude to depart from the prescribed sentencing range for valid reasons stated in open court and such decision is subject to review or appeal. The best interest of the child should be a guiding principle in sentencing. In *M v The State*<sup>194</sup> the applicant, was a 35-year-old single mother of three boys aged 16, 12 and 8. She was convicted for a second time, while out on bail, on multiple counts of credit card fraud, the total amount of which involved R29 000, and sentenced to four years' direct imprisonment in the Regional Court. She successfully appealed against the conviction on one of the count to the High Court, which converted her sentence to one of imprisonment from which she could be released under correctional supervision after serving eight months of imprisonment. After unsuccessfully petitioning the Supreme Court of Appeal for leave to appeal against the order of imprisonment, she applied the

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190 1990 (1) SACR 172 .

191 As above.

192 1992 (2) SACR 359.

193 n 112 above.

194 Constitutional Court Of South Africa 53/06.

Constitutional Court for leave to appeal. Sachs J, with 6 other Judges concurring, held that focused and informed attention needed to be given to the interests of children at appropriate moments in the sentencing process. The objective was to ensure that the sentencing court was in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts. In paragraph 17 of judgement, the Judge stated that regard accordingly has to be paid to the import of the principles of the CRC as they inform the provisions of section 28 of South African Constitution in relation to the sentencing of a primary caregiver. To the extent that the current practice of sentencing courts fell short in this respect, proper regard for constitutional requirements necessitated a degree of change in judicial mindset.

It has also been argued that community service would go a long way in maintaining family relationships and redressing the adverse impact occasioned on the children whose parents are incarcerated. Today, there are evidently growing numbers of prisoners and there is also a group of individuals whose lives have been grossly interfered with that few people stop to think about - the children. The damage done to the children when a parent is imprisoned is probably more serious than that done to an adult. Once the children are deprived of the care, protection and support that they should receive from their parents, a number of their rights are violated. Rights implicated have been discussed in chapter three above and include the right to education, health, care and deprivation of provisions from their carers. A number of children display emotional trauma, depression, feelings of anger and guilt, flashbacks about their parent's crimes or arrests.<sup>195</sup> Hagan and Dinovitzer go on to say that, the disturbances that these children experience due to separation from their primary caregiver and the difficult life that follows impact their physical and mental health.<sup>196</sup>

Female offenders demonstrate need for special consideration while sentencing because of the role they play in nurturing and tending the children. The Protocol on the Rights of Women in Africa takes cognizance of this in article 24. State parties are obliged to protect women who are heads of families and also ensure that pregnant and nursing women in detention are provided with an environment suitable for their condition and the right to be treated with dignity. In the case of *Hugo v President of the Republic of South Africa and Another*,<sup>197</sup> special remission of sentences was granted to certain categories of prisoners. Amongst the category qualified were all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years. The respondent would have qualified for remission, but for the fact that he was the father (and not the mother) of his son who was under the age

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195 Hagan & Dinovitzer (n 166 above).

196 As above.

197 (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708, pursuant to his powers under section 82(1)(k) of the interim Constitution, Act 200 of 1993, the President of South Africa signed a Presidential Act No. 17 which provides for special remission of sentences.

of twelve years at the relevant date. He challenged the presidential prerogative of releasing mothers of small children but not fathers, as being discriminatory on the grounds of sex. Goldstone J in his lead judgement noted:

The reason given by the President for the special remission of sentence of mothers with small children is that it will serve the interests of children. To support this, he relies upon the evidence of Ms Starke (National Director of the South African National Council for Child and Family Welfare) that mothers are, generally speaking, primarily responsible for the care of small children in society. Although no statistical or survey evidence was produced to establish this fact, I see no reason to doubt the assertion that mothers, as a matter of fact, bear more responsibilities for child-rearing in our society than do fathers. This statement, of course, is a generalisation. There will doubtless, be particular instances where fathers bear more responsibilities than mothers for the care of children. In addition, there will also be many cases where a natural mother is not the primary care giver, but some other woman fulfils that role, whether she be the grandmother, stepmother, sister, or aunt of the child concerned. However, although it may generally be true that mothers bear an unequal share of the burden of child rearing in our society as compared to the burden borne by fathers, it cannot be said that it will ordinarily be fair to discriminate between women and men on that basis.<sup>198</sup>

The above case highlights that parenting has tremendous burdens and responsibilities it bears on for child upbringing. Although there were dissenting views on some issues, all judges of the Constitutional Court of South Africa acknowledged that the President released mothers of young children because he was concerned for the welfare of children and mothers play a ‘special role . . . in the care and nurturing of young children’.<sup>199</sup> This position resonates not only in South Africa but also across Uganda in particular and Africa in general.

There are, of course, some fathers who share fully in the responsibilities of child rearing and in most cases are the sole breadwinners in the family. It is for this reason, that the current practice in the Uganda criminal justice system that is geared to sending more people to be locked up indiscriminately and at an exponential rate, needs to be reconsidered.

Furthermore, the situation of women giving birth in prison, women prisoners accompanied by small children or children separated from their mothers because of imprisonment is one of the most difficult questions regarding imprisonment. Some countries make special provisions for prisoners who are mothers: in the Russian Federation, for example, a custodial sentence may be postponed and subsequently cancelled or reduced for a pregnant woman or a woman with children under the age of

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198 Par 37 judgement.

199 As above judgement of Goldstone, O’regan, Kriegler (JJs) paras 39, 109 &111 respectively.

fourteen unless her sentence is for more than five years.<sup>200</sup> It is ironic that in Uganda, the answer to decreasing the problem of the growing incarceration of offenders is humane, more effective and less costly. The solution is to put as many minor and first time offenders to do community service. This keeps offenders in the community closer to their children, giving them a much better chance of not re-entering that revolving door.

Advocates of alternative sentencing argue that incarceration is not more effective in preventing re-offending<sup>201</sup> and that rehabilitation programs have been shown to be more effective when delivered in a community setting.<sup>202</sup> Effectiveness can be measured, among other issues, in terms of avoiding exposure to undesirable effects and promoting the successful re-integration of offenders into the community.<sup>203</sup> The proven ineffectiveness of incarceration at reducing recidivism and the perceived effectiveness of community corrections should lead the Uganda justice system to commit to employing the prescribed community alternative.

As a restorative form of justice, Community Service also presents opportunities that are more responsive to the needs of offenders, victims and communities. Offenders in the program are held accountable in their own communities and are assisted in taking responsibility for their actions. The offender is provided an opportunity to reconcile with the victims and re-integrate into society; he is also able to pursue and/or maintain employment opportunities. Furthermore, family ties are better maintained when an offender is serving his sentence yet residing at his or her home rather than in prison. Research has shown that sustained family ties help to improve inmate behaviour.<sup>204</sup> In New South Wales Australia, the Department of Correctional Services acknowledges that:

‘... people who maintain contact with their families are less likely to re-offend than people who do not. And we recognise that the types of relationships that people have with their families are very, very important, particularly relationships with children. People, when they come into custody, are dislocated from their families and from their social support network. One of the challenges for people when they return to the community after they have been in custody is to get

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200 ‘Female Prisoners and their Social Reintegration’ United Nations New York, (2007) UNODC Project: AFG/S47-Developing Post-Release Opportunities for Women and Girl Prisoners.

201 Y Vyas, ‘Alternatives to imprisonment in Kenya’ (1995) 6(1), *Criminal Law Forum*, 73-102.

202 P Gendreau & D Andrews ‘Tertiary prevention: What the meta-analyses of the offender treatment literature tell us about "what works." (1990)32(1) *Canadian Journal of Criminology*, 173- 184.

203 As above.

204 Taylor (n 172 above).

those relationships operating again and, therefore, the visits process is a very, very important part of that.<sup>205</sup>

All said, Community Service is an obvious improvement over imprisonment for humanitarian reasons. The program is considered to be humanitarian because it avoids many of the negative effects of incarceration, including stigmatization, damage to physical and/or mental health and constant exposure to criminal peers.<sup>206</sup> The punishment provides less serious offenders with alternatives that let them continue with various aspects of their lives, remain in their homes and continue with their jobs, while at the same time carrying out the work beneficial to the community.

Traditional sentencing does not accomplish the above stated goals; it simply means prison terms for offenders, for a minor or major offence. While this practice may be seen to provide ‘adequate justice’, often offenders and society are better served through alternative sentences. Prisons at times do more harm than good. Alternative sentencing does not only offer magistrates the opportunity to use discretion when sentencing offenders; it offers them a chance to employ a programme that helps offenders to become useful members of society while at the same time sparing their families the adverse effects that imprisonment occasions on them.

#### **4.3 Challenges to the use of alternative sentencing**

Adversaries to the Community Service program may argue that it is a time consuming process and may end up costing more than traditional incarceration. Birungi notes that it has some weaknesses that render it to be criticised as an intervention programme.<sup>207</sup> For instance, the sentencing procedure followed from the start of making the social inquiry report regarding the status of the offender up to the time the case is brought to courts and an order is passed is long. This partly explains why judicial officers prefer imprisonment as a penal sanction.

Another potential barrier to the use of alternatives to imprisonment is judicial reluctance to impose community service. In Kenya, for example, despite a wide variety of sentencing options available, the courts overwhelmingly impose terms of imprisonment.<sup>208</sup> Judges are often reluctant to impose community correction alternatives due to negative community sentiment towards them. The public

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205 L Grant, Assistant Director of the Department of Corrections, New South Wales, Australia to the General Purposes Committee No 3 on 17 November 2006.

206 Vyas, (n 196 above).

207 Birungi (n 71 above).

208 As above.

tends to disregard community corrections as real sentences; to much of the public, the very word 'sentence' implies incarceration.

Furthermore, though community service has been referred to as an alternative to imprisonment; it has often failed to reduce prison populations. Indeed, alternatives to imprisonment may have minimal impact on the prison population if failures on community based sanctions are automatically given prison terms.

#### **1.4 Concluding remarks**

Although community service may be criticised that it only caters for certain categories of offenders especially those who commit minor offences, it may be restated that most of the prisons are filled with offenders who have committed minor offences. First time and minor offenders should automatically qualify for community service because it is easy for them to realize their mistakes and reform. There is no specific bar to imposition of the sentence especially for non-violent crimes. The continued indiscriminate use of imprisonment defeats the objectives of introducing this reform in the criminal justice system.

Finally, if the Judiciary focuses attention on children and families at the centre of criminal justice system, others will listen. If there is a way to interject issues affecting children of incarcerated parents in the sentencing process, this could lead to more substantial and positive changes both in the eyes of the public and other stakeholders in the criminal justice system.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 General conclusion

Children with incarcerated parents have been a relatively invisible population to the public, the criminal justice system and to policymakers in Uganda. The criminal justice system has traditionally focused on the offender, his or her victims and the public safety of the community, ignoring the vast and growing number of other victims, the children. This research has illustrated that children affected by the incarceration of a parent face a multitude of risk factors, such as family instability, limited access to sources of social and economic support and overall vulnerability. The children are at high risk for a number of negative behaviours that can lead in some instances, absent positive intervention, to school failure, delinquency and intergenerational incarceration. The personal and social costs are high. Although this research has been unable to distinctly isolate the causal relationship, between parental incarceration and child right violations, it has succeeded in demonstrating the helplessness of this population.

Community service as a non- custodial alternative to imprisonment was introduced in the criminal justice system of Uganda as a reform measure for the good of the community. Children cannot choose whether or when their parents will be taken from them, or how long they will be gone. Alternative sentencing offers offenders an opportunity to remain with their families and gives them a chance to continue performing their own activities except for that time when they are required to go and serve their sentences. Parent offenders are able to take care of their children while ensuring that justice is done. To these ends, the Community Service Act, which allows for such an intervention should be wholly embraced.

It has been established that there is a framework of child caring institutions in Uganda. There is need to develop programs that raise awareness and help train stakeholders who interact with children and families with incarcerated parents, such as police, prisons, juvenile justice and child welfare to build public will to address issues affecting children with incarcerated parents. So far, efforts of Non Governmental Organisations like Wells of Hope Ministries and Prison Fellowship Uganda should be lauded. Their work implies that there is a wave of growing concern about children and families with incarcerated parents.

Much more can be done. The judicial officers when presented with an opportunity on the horizon, before arbitrarily sentencing offenders to imprisonment, to inquire about whether the person about to be incarcerated has a family totally dependant on him or not. This presents an opportunity to the officers to advocate for these vulnerable families. Otherwise, children of incarcerated parents appear to fall through the cracks and are left in legally ambiguous situations.

There is need for implementation of a major public education campaign that makes the issue of children with incarcerated parents ‘everyone’s issue.’ In conjunction with this, encouraging alternative sentences focused on policy and system reform opportunities. Community service programme in Uganda and other non-custodial measures like fine, probation and suspended sentences should be implemented. Otherwise, community service alone may not have the much-needed impact. A broader picture of a host of advantages presented such as reduction of prison overcrowding and savings on government expenditures should motivate the judiciary to apply the measures.

## **5.2 Recommendations**

- 1 The Judiciary needs to revitalise the implementation of community service throughout the country. True, the programme relies on well-overstretched officers and this contributes to the laxity of the implementation of the programme, however with concerted effort a lot more can be achieved in strengthening the performance of the programme.
- 2 The Judicial Studies Institute in its training and refresher courses could raise awareness of the judicial officers to consider children as they make sentencing decisions. Besides, encouraging them to use what discretion they already have would go a long way towards protecting children from ‘doing time’ for a parent’s crime.
- 3 Training stakeholders in the criminal justice system such as police officers to understand and address children needs when their parent is arrested is an important first step. At a minimum, police could be trained to inquire about minor children, and to rely in the absence of evidence on the arrested parent as a first source of information about potential caretakers. This would minimize both the possibility of children being left alone, and exposed to risks that may befall them.
- 4 Although law enforcement officers do not profoundly intervene in children’s lives when their parents are arrested and incarcerated, there is no clear official policy about how officials should respond. There is need to develop a policy in the justice systems to inquire, request or collect information about prisoners’ families and only then can judicial officers be guided to make an appropriate decision well aware of all circumstances of a case.
- 5 The availability of information on criminal justice reform and, more specifically, on alternative sentencing in Uganda, is problematic. The analysis of children of incarcerated parents was primarily based on reports and not on any empirical evidence, studies, or surveys of prisoners in Uganda. This limited the scope and discussion of this research. More research is needed to understand variation within this unique group of at-risk children. Particularly, the research should examine the impact of parental incarceration on different types of children and family situations, looking at factors such as age and gender; the sex of the incarcerated parent; and the relationship with that parent prior to incarceration.

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