SENTENCING PERSONS CONVICTED OF MINOR OFFENCES IN GHANA: REDUCING JUDICIAL OVER-RELIANCE ON IMPRISONMENT

by

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DEDICATION

This thesis is dedicated to the Kwasitsu family especially my parents, Lydia and Kingsley Kwasitsu. Memou and KK we did it!

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ABSTRACT

This thesis argues that there is overuse of imprisonment for minor offenders in Ghana. These are offenders whose punishments go up to 3 years of jail time, essentially offending mainly for reasons of material poverty. Statutory sentencing provisions have essentially limited judges to impose jail terms. It is argued that one way to decongest Ghana's prisons is to consider the institutionalization of a regime of community service orders and probation, the administration of which would equip the offenders with income-earning skills while they also reform. Drawing on Kenya, a country that has achieved reasonable success in this reform effort, this thesis recommends that successful implementation of this scheme in Ghana must involve reorienting major criminal justice system actors: the police, judges and legal practitioners. Given its community-based social structure, it is argued that the prospect of successful implementation of the scheme is enhanced by conscientious incorporation of community and family support for its implementation.

LIST OF ABBREVIATIONS USED

ACHPR	African Commission on Human and Peoples' Rights
ACLU	American Civil Liberties Union
ALR	American Law Reports
AMIMB	Association of Members of Independent Monitoring Boards
CA	Court of Appeals
CAD	Canadian Dollar
CAT	Convention against Torture
CAT-OP	Optional Protocol to the Convention against Torture
CC	Circuit Court
CHRAJ	Commission for Human Rights and Administrative Justice
CID	Criminal Investigation Department
CJ	Chief Justice
CPS	Crown Prosecution Service
EAUMF	Edward A. Ulzen Memorial Foundation
EMPE	Extra-Mural Penal Employment
GA	General Assembly
GHC	Ghana Cedis
GIMPA	Ghana Institute of Management and Public Administration
GLR	Ghana Law Reports
GPS	Ghana Police Service
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome
HRC	Human Rights Council
HSRC	Human Sciences Research Council
ICCPR	International Covenant on Civil and Political Rights
ICLQ	International & Comparative Law Quarterly
ICPS	International Convention on Psychological Science
ILM	International Legal Materials
JSTOR	Journal Storage
LEG	Legislation
LI	Legislative Instrument
LR	Law Review
NCCD	National Council on Crime & Delinquency
NGO	Non-Governmental Organization
NRCD	National Redemption Council Decree
OAU	Organization of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
PNDCL	Provisional National Defense Council Law
POS	Perfector of Sentiments
PRI	Penal Reform International
QL	Law Quarterly
RGL	Review of Ghana Law

RSC	Revised Statutes of Canada
SA	South Africa
SCC	Supreme Court of Canada
SCGLR	Supreme Court of Ghana Law
SCR	Supreme Court Reports
SHC	Social, Humanitarian, and Cultural Issues (Third Committee)
TB	Tuberculosis
TDC	Tema District Court
UGLJ	University of Ghana Law Journal
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNODC	United Nations Office on Drugs and Crime
UNODC-ROEA	United Nations Office on Drugs and Crime – Regional Office in Eastern Africa
US	United States
UTLJ	University of Toronto Law Journal

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CHAPTER 1 INTRODUCTION

1.1 Introduction

> A man is taken from his village, from his family and kindred, from the only life which he knows, and confined to a prison cell… The cell where he sleeps is provided with ventilation based on the British ideas of fresh air. The result is often such that it would be more merciful to hang him at once. He pines at the loss of freedom; the unaccustomed food and sleeping arrangements cause disease-and he dies. To all intents and purposes he had been sentenced to death as surely as if he had been sentenced to hanging.[1]

The quote above summarises the harshness of imprisonment imposed on colonized people unaccustomed to such modes of punishment for offences -- any offence at all. It encapsulates its detrimental impact for psychological health and, quite clearly, the potential for reform of a person so treated. The poignancy of this observation is that it is from a colonial officer in London expressing the severity of imprisonment for the African particularly because this sanction removed them from communal living.

1.2 Rationale for Thesis

[1] David Killingray, "Punishment to fit the crime?" in Florence Bernault, ed, *A History of Prison and Confinement in Africa* (Portsmouth, NH: Heinemann, 2003) 97 at 101.

Present day Ghana used to be the British colony of the Gold Coast. Consequently, the common law has been applied from the establishment of the colonial legal system in 1874-76 to the present.[2] This includes the application of British criminal law.

This thesis argues that this imported criminal law system has contributed to the overuse of imprisonment and that there is a need for alternative sentencing in the form of community-based sanctions for minor offenders. Over-reliance on custodial sentences in Ghana is addressed by focusing on the need for legislative and sentencing practice reforms.

The continued extensive use of imprisonment in a society that does not traditionally punish by incarceration is problematic. This is especially so when it is used to sanction minor offences. Ghana's over-reliance on imprisonment has discouraged the development of alternative sentences and created a carceral environment where there are few prospects for reformation or rehabilitation, and reduction in prison over-crowding.[3] It should be noted here that the suggestion on alternative sentencing is

[2] Gordon Woodman, "British Legislation as a Source of Ghanaian Law: From Colonialism to Technical Aid" (1974) 7:1 L and Pol in Africa, Asia and Latin America 19; Victor Essien, "Sources of Law in Ghana" (1994) 24:3 J Black Studies Special Issue: Social, Economic, Political and Cultural Dimensions of Life in Ghana 242 at 247; *Supreme Court Ordinance* (Gh) of 1876, s12:"The Common Law, the doctrines of Equity, and the statutes of general application which were in force in England at the date when the colony obtained a local legislature, that is to say on the 24th day of July, 1874, shall be inforce within the jurisdiction of the Court." online: JSTOR < https://www.jstor.org/stable/pdf/2784581.pdf?refreqid=excelsior%3Ab781f9c2633b958122a02a32356871dc>

[3] JoyFm News, "Decongesting Ghana's prisons: Judge wants fines for some convicts" (8 July, 2017), online: myjoyonline.com <https://www.myjoyonline.com/news/2017/july-8th/decongesting-ghanas-prisons-judge-pushes-for-fines-for-some-convicts.php> (A Ghanaian Judge of the Court of Appeals noted that "Ghana's laws are silent on non-custodial sentence, giving judges no option than to hand prison sentences to offenders, even for mild offences"); Edison K Agbesi, "Causes and Effects of Overcrowding at Prisons: A Study at the Ho Central Prison" (2016) 6:5 Pub Pol'y and Admin Res 1 at 4 online: International Knowledge Sharing Platform <

premised on sanctions which require offenders to be supervised by designated officials (such as probation officers) in the community while complying with the orders of the sentencing court.

Imprisonment is generally alien to African traditions. It is particularly inconsistent with Ghanaian cultural and traditional concepts of reformatory punishment for crime or wrongdoing. Imprisonment can also be dehumanizing and a waste of a person's life, causing despair. Ghana's continuation of routine imprisonment for offences, including ones that could be defined as minor, shows the negative impact of colonial rule.

Alternatives to custodial sentences are available under the Ghanaian *Criminal Procedure Code*,[4] including probation[5], fines and police supervision.[6] These options can be expanded to include community service, that is an arrangement by which the judge orders the offender to work a prescribed number of hours within the community in a

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https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=2ahUKEwiRmveb6oDdAhVhk-AKHVZlCQIQFjAEegQIBhAC&url=http%3A%2F%2Fwww.iiste.org%2FJournals%2Findex.php%2FPPAR%2Farticle%2Fdownload%2F30692%2F31519&usg=AOvVaw2xxnSeJy3ST1D75rV9DLFo> (This writer highlights Ghanaian prison overcrowding as a result of overuse of prison sentencing and over-criminalization and how it results in problematic access to rehabilitative programming for prisoners) [*Agbesi*]; International Centre for Prison Studies, ICPS News Digest (July-August 2014) 22nd ed, online: Prison Studies <http://www.prisonstudies.org/sites/default/files/resources/downloads/icps_news_digest_july-august_2014.pdf> (Minister of the Interior for Ghana on the "importance of decongesting prisons to make room for quality prison care.") [*ICPS Digest*]

[4] *The Ghana Criminal Procedure Code*, 1960, Act 30, ss 297, 299, 318, 353, 354, 356, online: World Intellectual Property Organization <http://www.wipo.int/edocs/lexdocs/laws/en/gh/gh011en.pdf> [*Act 30*].

[5] *Ibid* at s355 ("A probation order shall have effect for such period of not less than six months and not more than three years from the date of the order, as may be specified therein, and shall require the probationer to submit during that period to the supervision of a probation officer appointed for or assigned to the district or area in which the probationer will reside after the making of the order, and shall contain such provisions as the court considers necessary for securing the supervision of the offender, and such additional conditions 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.")

[6] *Act 30, supra* note 4.

time frame in lieu of imprisonment. However, from colonial times and since independence, criminal legislation and policy, as well as judicial practice, have rendered incarceration as the nearly certain outcome following a finding of guilt.[7]

This thesis argues that the continued overuse of imprisonment for punishing minor offences is no longer tenable. Imprisonment substantially reduces prospects for the reformation of the unnecessarily imprisoned offender.[8] Second, prisons have become a nonproductive drain on State coffers. In fact, most minor offenders are put in prison for offences they commit largely for reasons of economic hardship, such as theft of small quantities of farm produce, and also failure to pay relatively small debts.[9] Meanwhile the very existence of a debtors' prison such as the one at Kpando in Ghana's Volta Region is questionable. As further discussed below in this chapter, Ghanaian legislation and jurisprudence have made it clear that there is no provision for imprisonment for nonpayment of debt. Prisoners have little to no opportunity to acquire skills which would

[7] This is shown in more detail later in this chapter.

[8] Mavis Dako-Gyeke & Frank Darkwa Baffour, "We are like devils in their eyes: Perceptions and experiences of stigmatisation and discrimination against recidivists in Ghana" (2016) 55:4 J Offender Rehabilitation, 235 at 237 online: Taylor & Francis <https://www.tandfonline.com/doi/pdf/10.1080/10509674.2016.1159640> [*Dako-Gyeke & Baffour*]; D K Afreh, "The Prisons and Sentencing Policies" (1996-2000) 20 RGL 141 at 144. [*Afreh*]

[9] *Agbesi*, *supra* note 3 at 3 (where the writer notes the presence of "debtors, mentally disordered persons, pregnant and nursing mothers" in Ghanaian prisons); The Ghana Prisons Service, online: The Ghana Prisons Service <http://www.ghanaprisons.gov.gh/volta_region.html> (the second paragraph notes that the Kpando Local Prison is specifically for housing "first offenders, recidivists, remand prisoners and debtors."); Joojo Cobbinah, online: YouTube <https://www.youtube.com/watch?v=yOTSZ_GjI0A> (this young prisoner was sentenced to 5 years for a GHC740 debt); Adelina Iftene & Allan Manson, "Recent Crime Legislation: The Challenge for Prison Health Care" (2012) CMAJ DOI:10.1503/cmaj.120222 at 1 online: Social Science Research Network <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2896856> (the authors raise the point that among other reasons, a background of "low economic status" is usually reflected with prisoners in general.)

help them take care of themselves when they leave prison and to contribute to society.[10] Also, the current punishment regime generally results in sanctions which are disproportionate to the offences committed. The need for social rehabilitation and reformation has caused other countries to supplement incarceration with non-custodial punishment options.[11] It is time for Ghana to institute similar alternatives commensurate with the nature and gravity of minor offences.

The thesis discusses that virtually every offence, even for first-time offenders, attracts custodial sentences.[12] This assertion has strong anecdotal confirmation from prominent

[10] UNGA, Third Committee, 6th and 7th Mtg, GA/SHC/3817 (7 October 2005), "Crime is both cause, consequence of poverty, Third Committee told as it begins discussion of crime prevention, international drugs control", online: United Nations < https://www.un.org/press/en/2005/gashc3817.doc.htm> (statement by Antonio Mara Costa, Executive Director of the United Nations Office on Drugs and Crime (UNODC) and Director-General of the United Nations Office in Vienna in relation to much of Africa, Central and Southern America, Western Asia, and the Golden Triangle.)

[11] Chief Justice Willy Mutunga, "Kenyan Sentencing Policy Guidelines" Republic of Kenya, online: Kenya Law <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Sentencing_Policy_Guidelines_Booklet.pdf> (these guidelines were crafted as a response to sentencing challenges such as "an undue preference of custodial sentences.")

[12]Sandra Coffie, "Non-Custodial Sentences And Its Relevance in The Justice System" (2004) 6:3, online: Ghana Centre for Democratic Development < https://www.cddgh.org/vol-6-no-3non-custodial-sentences-and-its-relevance-in-the-justice-system-by-sandra-coffie/> (this writer decries existing Ghanaian sentencing policy that sees the imposition of "custodial sentencing as a matter of course."); Ghana News Agency, "
"Interior minister presents non-custodial sentencing report", online: Ghana Government <http://www.ghana.gov.gh/index.php/media-center/news/253-interior-minister-presents-non-custodial-sentencing-report> (Ghanaian Minister of the Interior at para 9 noted the importance of taking note of certain charges in respect of advocating for non-custodial options for those charges, although he did not specify which charges; Ghana Business News, "Chief Justice lauds POS foundation on non-custodial sentencing bill", October 11, 2018, online: Ghana Business News <https://www.ghanabusinessnews.com/2018/10/11/chief-justice-lauds-pos-foundation-on-non-custodial-sentencing-bill/> (Chief Justice lauded draft Bill produced by the POS Foundation as a means of reducing the use of imprisonment as a form of punishment for non-serious offences); Robert B Seidman & J D Abaka Edison, "Ghana: The System of Penal Legislation" in Alan Milner, ed, *African Penal Systems* (New York: Frederick A Praeger, Inc, 1969) 61 at 76 (in 1969 they noted that " Prison remains a principal form of punishment.") [*Seidman & Edison*]

government officials and major players within Ghana's criminal justice system. Prison is also used to house relatively high numbers of pre-trial detainees.[13]

As will be shown, incarceration is used in Ghana to punish not only criminal offences, but also regulatory offences. It must be clarified that this thesis is in no way advocating for the complete abolition of imprisonment as punishment for certain offences. However, the choice of sanction should always fit the offence as will be shown.

The focus on legislation is predicated on the fact that the pervasiveness of mandatory minimum custodial sentences required by legislation restricts the sentencing practices of the judge and takes away most of their discretion. For example, the *Criminal Procedure Code* provides that "where a person is convicted of any felony or misdemeanor or any offence punishable by imprisonment (other than an offence for which the sentence is fixed by law) the Court may, in its discretion, sentence the offender to pay a fine in addition to or in lieu of any other punishment to which he is liable."[14] This provision offers a series of alternatives that the judge can choose. First, it is clear that the judge has no discretion where the sentence is already fixed by law. The possible discretion in this regard will be to determine the penalty between the minimum and the maximum prescribed for the identified offence. Second, where the sentence is not fixed by law,

[13] Eric Nyavor, "Seminar on the Treatment of Offenders" (1989-1990) 17 RGL 138 at 138 (he reports that "Prison officers have persistently complained that the prisons are over-crowded; social workers have reported that there are inmates in the prisons who have been there for years, not convicted and yet apparently forgotten by whoever took them there; accused persons have complained that their cases take too long to decide; there are reports that if you have a disagreement with your neighbour and he tells you, 'I will show you,' all he has to do is to walk into a police charge office and before you realize what is happening, the police have taken off all your clothes except your pants and pushed you into a cell.")

[14] *Act 30, supra* note 4 at s 297.

though the judge has the discretion to impose "any other punishment to which the offender is liable," it seems that within the context of the provision the judge may choose between imprisonment and fine or both. Essentially, therefore, how much fine or what length of imprisonment may be imposed, are the only determinants within the judge's discretion.

As discussed in Chapter 3, the category of misdemeanor includes minor offences as conceived in this thesis. That chapter also discusses how the judges exercise discretion in relation to punishing such offences. In relation to this, the judges work with both prescribed sentences and the discretion to impose appropriate sentences. In essence, this provision[15] means that mandatory minimum sentencing and judicial discretion to impose appropriate sentence in regard to a felony or misdemeanor coexist uneasily in Ghanaian law.

The introduction of mandatory sentences was intended to reduce sentencing disparities. However, the result has often been unjust because judges are not free to sanction offenders as they might prefer.[16] This results in overcrowding in the prisons because offenders end up being routinely sent there. It also defeats the reasons and purposes for incarceration in Ghana, which are "reformation" and "rehabilitation" of criminal offenders. Sentencing reforms serve as a response to what appears to be an

[15] *Ibid.*

[16] JoyFm News, "Decongesting Ghana's prisons: Judge wants fines for some convicts" (July 8, 2017) online: myjoyonline.com https://www.myjoyonline.com/news/2017/july-8th/decongesting-ghanas-prisons-judge-pushes-for-fines-for-some-convicts.php (A Ghanaian Judge of the Court of Appeals noted that "Ghana's laws are silent on non-custodial sentence, giving judges no option than to hand prison sentences to offenders, even for mild offences.").

overwhelming legislative requirement leading to judicial preference for custodial sentencing. This tendency prevails in spite of the presence of alternative options, due to the explicit legislative requirements to incarcerate for certain kinds of offences.

1.3 Methodology and Research Questions

A study of this nature requires focus on specific and narrow points to pinpoint the issue of concern that is sought to be explained, and to undergird the relevance and usefulness of recommendations. To this end, the following questions are addressed:

1. Are current Ghanaian law, sentencing practices and policies the main drivers of the over-use of imprisonment?
2. Why is incarceration the wrong option for punishing minor offences?
3. What are more effective sentencing options/tools/measures to encourage rehabilitative punishment?

To address these issues, the following methodological choices are made.

1.4 Method

This work draws upon legal theory, doctrinal, socio-legal and historical methodologies. The research is mostly based on legislation, policies, jurisprudence, sociological data and statistical information.

1.5 Methodology

Legal theory is used to explain punishment. In particular, it addresses the basic philosophy behind sentencing and penology in terms of the purposes of sentencing and its utility for prisoner reform. This discussion considers the foundations of traditional criminal punishment in Ghana's communities before the advent of colonial rule. It explains western penological thinking, which informs the choices made in Ghana's Criminal Code and sentencing as pursued by Ghana's modern judiciary. Canvassing legislation, statutes, jurisprudence, case reports and parliamentary debate on the issue, the discussion demonstrates the Ghanaian judiciary's predisposition toward imprisonment as the most potent answer to crime of whatever magnitude. The analysis in Chapter 2 shows that the outcome is imprisonment for even the most minor offences. This has led to a high prison occupancy rate - over 152.5%[17] - and increasing recidivism rates.[18]

Interdisciplinary research methodologies and criminological scholarship are employed to understand how these laws directly impact society, especially minor offenders. Socio-legal research is used to assess the impact of the overuse of imprisonment for minor offences on society. This is done through an examination of the sentencing provisions of

[17] World Prison Brief, Institute for Criminal Policy Research "Ghana" (September 30, 2018), online: Prison Studies <http://www.prisonstudies.org/country/ghana>.

[18] Alex Antwi, *Social Reintegration of Offenders and Recidivism in Ghana* (PhD Dissertation, University of Ghana 2015) [unpublished] at 106 online: <http://ugspace.ug.edu.gh/bitstream/handle/123456789/8364/Alex%20Antwi%20_%20Social%20Reintegration%20of%20Offenders%20and%20Recidivism%20in%20Ghana_2015.pdf?sequence=1> (here he notes that the percentage of recidivism in Ghana has been fluctuating from 21% in 2004 through to 19.3% in 2008 and went up to 22.2% in 2011.) [*Antwi*]

the Ghanaian Criminal Code, jurisprudence, the Ghana Law Reports (GLR), the Review of Ghana Law (RGL), the University of Ghana Law Journal (UGLJ), available statistical information, Masters and PhD theses, speeches, official publications from the prisons and the judiciary, newspaper articles, internet and legal academic writings and comments generally from Ghana. The study also discusses Kenya's management of minor offences as a case study for the kind of progress Ghana can make.

To explain the legal history of the management of offenders in Ghana, it is necessary to resort to the historical context of the legislation in question. The Criminal Code of Ghana, 1960 (Act 29) is discussed as a post-colonial document in aspiration and a colonial one in reality. The codification of the regime of crime identification and prosecution Ghana inherited from Britain was retained, more or less, the same, after independence. For this reason, it is important to reflect on the failures and successes of the operation of Ghana's criminal justice regime thus far, taking into account its colonial and immediate post-colonial days, whilst considering its present and future utility. Ghana's *Criminal Code* and sentencing guidelines, which judges are not obliged to use, contain no general sentencing principles. This means that the judges are confined to sentences prescribed for specific offences. All offences in Ghana have prescribed minimum and maximum sentences. Alternatively, where, as indicated above, they possess some sentencing discretion, they exercise such discretion within the boundaries set out in the legislation. The practical point is that currently, Ghana is faced with high incarceration rates mainly due to over-penalization of minor offenders. It would appear that, as the main means of punishment,

incarceration has failed to realise the objective of prisoner rehabilitation that the parliamentary discussions prior to the passing of the *Criminal Code* emphasized.[19] This thesis recommends reform, including through legislative amendments, to ensure that minor offences especially, are not punished out of proportion to their seriousness and are punished within the community.

The recommendation to adopt alternative means of punishment, such as community service and probationary orders, arises from the lessons offered by other African common law jurisdictions. An examination of the efforts of Kenya, a former British colony in East Africa, in this direction, anchors this part of the study in Chapter 4. This country was selected for its similarity to Ghana in socio-economic terms. It is thought, therefore, that the changes Kenya made in sentencing minor offenders to the community based sanctions of probation and community service and results there are highly relevant for Ghana.

1.6 Scope and place of the study

Existing research on Ghana's criminal justice system is focused on a number of issues related to prison reform. First there is criticism of the inability of the current prison

[19] *Seidman & Edison, supra* note 12 at 447 note that Mr Boateng, Minister of the Interior, stated that government prison policy is "one of reform and not necessarily to wreak vengeance upon people who sometimes through their unfortunate background and circumstances have found themselves behind bars".

system to support rehabilitation, which is then claimed to be the driving force behind recidivism.[20] Second, some research traces the origins of overcrowding in Ghanaian prisons to the immediate post-colonial era.[21] Finally, some studies address the impact of certain state interventions, such as the Justice for All Program, within the penal system.[22] This study, however, seeks to address the root of the problem of the judicial over-use of imprisonment by attempting to focus on the role of legislation and advocating for the introduction and use of probation orders and community service. While the application of these tools would help ensure that minor offenders are rehabilitated by ensuring that their links to society are maintained, their use would also help to minimize the detrimental economic and social effects of over-incarceration. The government of Ghana is cognizant of the depth of this particular problem as evidenced by a statement of the current Ghanaian Minister of the Interior who noted the "importance of decongesting prisons to make room for quality prison care."[23] Also, members of the Ghanaian judiciary, including the Chief Justice and Judges of the Court of Appeal, and the Ghana Commission for Human Rights and Administrative Justice (CHRAJ), have called for legislative reform on custodial sentencing for minor offences.[24] The Ghana Prisons Service has decried the

[20] *Dako-Gyeke & Baffour*, *supra* note 8; *Afreh, supra* note 8; *Seidman & Edison, supra* note 12 at 61-83.
[21] *Seidman & Edison, Ibid.*
[22] *Antwi, supra* note 18 at 177.
[23] *ICPS Digest, supra* note 3.
[24] Dailyguideafrica.com, "Chief Justice pushes for non-custodial sentencing," (11 October 2018) online: Ghanaweb <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Chief-Justice-pushes-for-non-custodial-sentencing-691804>; Ghana News Agency, "Ghana judiciary examining practice of non-custodial sentences-CJ," (19 November 2017) online: Ghana Business News < https://www.ghanabusinessnews.com/2017/11/19/ghana-judiciary-examining-practice-of-non-custodial-sentences-cj/>; The Ghanaian Times, "Introduce non-custodial sentences," (11 July 2017) online: The Ghanaian Times <http://www.ghanaiantimes.com.gh/introduce-non-custodial-sentence/>; Ghana News Agency, "CHRAJ advocates for non-custodial sentencing," (14 October, 2018) online: Citifm

current overcrowding in Ghana's prisons, a situation that is severely affecting their ability to control and rehabilitate prisoners.[25] Also, the United Nations Human Rights Council, through its Special Rapporteur on Torture, has raised the need for a remedy to the problem of the over-use of incarceration in Ghana.[26]

1.7 Limitations of Sources

For this work, two groups of data were drawn upon: qualitative and quantitative statistical data.

1.7.1 Media and Unpublished Data

This work relied in part on academic writings, newspaper reports and unpublished data gathered from the Justice for All Project,[27] as well as official data available on the

<https://citinewsroom.com/2018/10/14/chraj-advocates-for-non-custodial-sentencing/> (CHRAJ is the Commission on Human Rights and Administrative Justice.)

[25] Ghana News Agency, "Ghana Prisons' overcrowding rate hits 52 percent", (October 3, 2018) online: Ghanaweb <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Ghana-Prisons-overcrowding-rate-hits-52-per-cent-689892>.

[26] Juan E Mendez, Mission to Ghana, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/25/60/Add1, 25th Sess, 2014, online: Antitorture.org < http://antitorture.org/wp-content/uploads/2014/03/Ghana_Country_Visit_Report.pdf > (During his initial visit he observed that prisoners undergo seriously harsh treatment in the worst possible environment) [*Mendez*]; Juan E Mendez "Follow up report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his follow-up visit to the Republic of Ghana", A/HRC/31/57/Add2, 31st Sess, 2016, online: Antitorture.org < http://antitorture.org/wp-content/uploads/2016/03/English_Ghana_Follow-up_Report.pdf> (a follow-up visit did not reveal much difference.)

[27] The POS Foundation, online: Pos Foundation <http://posfoundation.org/projects/justice-for-all/> (The Justice for All Program organizes in-prison court sittings where specially trained high court judges adjudicate the cases of prisoners on remand awaiting trial. It has been successful, in that remand prisoner population has dropped from 33% in 2007 to 12% in 2018); Classfmonline, "61 inmates benefit from the Justice for All Program", (November 3, 2017) online: Ghanaweb < https://www.ghanaweb.com/GhanaHomePage/NewsArchive/61-inmates-benefit-from-Justice-for-All-Programme-597077>; The Ghana Human Rights NGOs Forum, Joint Stakeholders' Report, United Nations

internet, specifically police and prison information, also personal contacts. The difficulties faced in accessing information are detailed below.

1.7.2 Statistics

Accessing relatively recent data was difficult.[28] The data available are also quite limited in scope, and tended to be dated. In particular, information on incarceration as against conviction rates was impossible to come by. Cases from the District Magistrate's Court referenced in this work were accessed through personal contact. Letters written to the Ghana Prisons and Police Services asking for data went unanswered. However, quite recently, the Ghana Police website was updated with some pertinent information. Offences reported to the police tend to be more reliable, compared to those recorded by the courts or prisons because they represent those crimes that have been reported by citizens to the police, or those discovered by the police and recorded by them.[29] Clinard and Abbott, writing on crime in developing countries, argue that "each alternative measure-arrest, court, or prison statistics - loses reliability as it becomes further removed from the actual offence.[30] They note that the collated arrest data depends on police

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Third Universal Periodic Review Ghana, online: Universal Periodic Review < https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=4250&file=EnglishTranslation>.

[28] Joseph Appiahene-Gyamfi, *Alternatives to imprisonment in Ghana: A focus on Ghana's Criminal Justice System* (Masters Dissertation, Simon Fraser University, 1995) [unpublished] at 40 online: Simon Frazer University <summit.sfu.ca/system/files/iritems1/6650/b17416905.pdf> [*Gyamfi*] (he outlines similar issues at 54-55 and in more recent works. He notes that getting information from the Judicial service, Prisons, Attorney-General's Department, Police was next to impossible.)

[29] Marshall B Clinard & Daniel J Abbott, *Crime in Developing Countries: A Comparative Perspective* (John Wiley & Sons: Canada, 1978) at 22 [*Clinard & Abbott*).

[30] *Ibid*.

efficiency and the fact that the police have the discretionary power to pursue a case on the basis of "appearance and social status of the suspect, the type of crime, and the available institutional facilities."[31] These concerns are reflected in the description of the Ghanaian Police Service of some cases as "true" and others as "refused." Chapter 3 provides further discussion on this. Mensa-Bonsu, also observes that "whilst some agencies, such as the Police, dutifully compile criminal statistics, these records remain on the shelves of the various departments and are in time transferred to the Archives. Since no public use has been found for them, there is no compulsion to keep them up to date or even accessible."[32] Also, especially in developing countries, court statistics are generally dependent on police prosecutors' decisions to go to trial.[33] Many criminal cases in Ghana are withdrawn because either the family decides to handle the matter privately or the prosecutor decides that the case does not have much merit.[34] As to the usefulness of prison statistics, they are said to be flawed for being completely dependent on court-sanctioned punishment.[35] In Ghana, statistics from the prison authorities appear to be limited and dated as is shown.

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[31] *Ibid*; HJAN Mensa-Bonsu "Non-Custodial Offences – The need for Reform at the Pre-Trial Stages", Seminar on the Treatment of Offenders, (1989-1990) 17 RGL 138 at 181 (makes the same point in the early nineties

[32] HJAN Mensa-Bonsu, "Publishing Criminal Statistics – An Unexplored Asset to the Criminal Justice System", (1993-1995) 19 UGLJ 32 at 52 (This writer found that this state of affairs has not changed much since the early 90s.)

[33] *Clinard & Abbott*, *supra* note 29 at 22.

[34] Group 2, "The Role of Prosecution in the Screening of Criminal Cases", 107th International Training Course, Reports of the Course 326 at 330-331, , online: United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders <https://www.unafei.or.jp/publications/pdf/RS_No53/No53_30RC_Group2.pdf > (this group of magistrates observed that police prosecutors in common law systems such as Ghana and Kenya are usually limited to less serious offences and act as representatives of the Attorney-General or the Director of Public Prosecution. The police prosecutor screens cases on the basis of sufficiency of evidence.)

[35] *Clinard & Abbott, supra* note 29 at 22-23.

The implications of the above discussion for my thesis is that the extent and quality of data is indicative of the nature of the problem discussed, and should serve as a basis upon which to do further research in this area of Ghanaian criminal law.

1.8 Context of Discussion

Ghana's need for reform is also motivated by the country's commitment to observe those international sources obligating it to change its crime punishment mechanisms. A brief overview of a number of international instruments that Ghana has ratified follows. These sources are relevant to a rounded consideration of not only Ghana's obligations for reasonable and humane treatment of offenders, in this case, those who commit minor ones. As well, the provisions of these instruments suggest appropriate legislative and practice reform regarding the use of incarceration as punishment for minor offences.

1.8.1 International Legal Framework

Ghana, by virtue of Article 40 of its 1992 Constitution, under the heading of *Directive State Principles* is to "promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means."[36] The same provision asks the state to apply the principles of the Charter of the United Nations and the African Union Charter.[37] As shown below, torture, cruel and inhumane treatment of persons are prohibited under Article 15 of the Constitution.

[36] *Constitution of the Republic of Ghana, 1992*, article 40 (c). [*1992 Constitution*]
[37] *Ibid* at art 40 (d).

The Ghanaian Constitution does not expressly merge international law with the domestic legal system. However, some of its provisions appear to be drawn from international law and suggest that international law is recognized by Ghanaian courts.[38]

International law jurisprudence recognizes two main approaches to the manner in which individual countries receive international law into their domestic legal systems: monism and dualism.[39] The monist approach recognizes domestic and international law as facets of the same national legal order, although international law is considered to be superior to municipal law. Thus there is no need for any domestic legal procedure to adopt international legislation, which is more or less automatically applied. The dualist position is that international and municipal law are two separate and distinct legal systems, and for international legislation to apply domestically there must be municipal consent. Thus, in general, even where consent is given, international legislation is subordinate to domestic law.[40]

Ghana is mainly dualist and this is seen in the way its municipal law interfaces with international law. International law is not mentioned as one of the sources of law in the

[38] *New Patriotic Party v Inspector General of Police* [1993-94] 2 GLR 459 at 466 (Ghana).
[39] Malcolm N Shaw, *International Law*, 5th ed (Cambridge: Cambridge University Press, 2003) chapter 4 at 122-125.
[40] *Ibid* at 161:"However, to declare that international legal rules therefore prevail over all relevant domestic legislation at all times is incorrect in the vast majority of cases and would be to overlook the real in the face of the ideal. States jealously guard their prerogatives, and few are more meaningful than the ability to legislate free from outside control; and, of course, there are democratic implications. The consequent supremacy of municipal legal systems over international law in the domestic sphere is not exclusive, but it does exists an undeniable general principle."

Ghanaian Constitution.[41] However, there appears to be some indication of monism in its application of human rights probably given its universality. In fact, in the case of *New Patriotic Party v Inspector General of Police,*[42] it was held that though Ghana had not passed legislation to give effect to the African Charter, the fact that it had signed it meant that it had to respect the rights and freedoms enshrined therein. While this category of laws may not be generally regarded as automatically legally binding, they signify international best standards for criminal justice systems and are expected to be applied.

Domestic criminal justice systems in countries such as Ghana are able to assess their existing institutional frameworks against international standards. If found wanting, there should be reform to sentencing practices and the prison system. For example, after the visit of the UN Special Rapporteur on Torture to Ghanaian prisons, the Judicial Service, in collaboration with the Attorney-General and Ministry of Justice, the Police and Prisons Service, the POS Foundation and the Danish Development Agency, revived the Justice for All Program[43] which is a program that essentially brings the courts to the prisons. The UN Special Rapporteur found that there was severe overcrowding in some detention centres

[41] *1992 Constitution, supra* note 36 at art 11(1) lists the sources of law as the Constitution, Parliamentary enactments, Constitutional orders, rules and regulations, existing law and common law which comprises the rules of equity and Ghanaian customary law.
[42] *Supra* note 38 at 466.
[43] Denmark in Ghana, Ministry of Foreign Affairs of Denmark, "Ten years celebration of the Justice for All Program", online: Ministry of Foreign Affairs of Denmark < http://ghana.um.dk/en/news/newsdisplaypage/?newsid=a4d516b1-7e37-4a65-95ca-565de864d2c7>, The Justice for All Program organizes in-prison court sittings where specially trained high court judges adjudicate the cases of prisoners on remand awaiting trial. It has been successful, in that remand prisoner population has dropped from 33% in 2007 to 12% in 2018; *supra* note 21.

resulting in inadequate nutrition, shortage of water, poor sanitation and health-care, and lack of medicine. He recommended that the Ghanaian government should:

> review sentencing policies to reduce or eliminate mandatory minimum sentences for lesser, non-violent offences and provide more reasonable sentencing guidelines in order to reduce excessively lengthy sentences.[44]

Ghana has ratified the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT),[45] the Optional Protocol of the Convention against Torture (CAT-OP),[46] the International Covenant on Civil and Political Rights (ICCPR)[47] and the African Charter on Human and Peoples' Rights (ACHPR).[48] Ghana also has to comply with the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules),[49] the Body of Principles for the Protection of All Persons Under Any Form

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[44] *Mendez*, *supra* note 26.

[45] *Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment,* 10 December 1984, GA res 3452 (XXX), 30th Sess, (1975) (Articles 1, 2, 3, 4), (entered into force 26 June 1987) online: United Nations High Commissioner for Refugees < https://www.unhcr.org/protection/migration/49e479d10/convention-against-torture-other-cruel-inhuman-degrading-treatment-punishment.html>.

[46] *Optional Protocol to the Convention against Torture and other Inhuman or Degrading Treatment or Punishment,* 18 December 2002 GA A/RES/57/199 (2002), (entered into force 4 February 2003) online: Office of the United Nations High Commissioner for Human Rights < https://www.ohchr.org/Documents/ProfessionalInterest/cat-one.pdf>.

[47] *International Covenant on Civil and Political Rights,* 16 December 1966 GA resolution 2200A (XXI) (1966), (entered into force 23 March 1976) online: Office of the United Nations High Commissioner for Human Rights < https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf >.

[48] *African (Banjul) Charter on Human and People's Rights,* 27 June 1981 OAU Doc CAB/LEG/67/3 REV 5, 21 ILM 58 (1981), (entered into force 21 October 1986) online:< http://www.achpr.org/instruments/achpr/>

[49] *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules),* 14 December 1990 GA res 45/110, 68th Plen Mtg (1990), online:< http://www.un.org/documents/ga/res/45/a45r110.htm>, (Principles 1.2, 1.5, 2.3, 2.5, 8) (They encourage the development and implementation of alternative sentencing measures through guidance at the pre-trial, sentencing and post-sentencing stages (Principles 1.2, 1.5, 2.3, 2.5, 8), The rationale of the Tokyo Rules is re-echoed at the regional level through instruments such as the Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa (Recommendations 1, 3, 6, 7).

of Detention or Imprisonment,[50] the Basic Principles for the Treatment of Prisoners,[51] the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines),[52] the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules),[53] the Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa[54] and the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).[55]

1.8.2 Terminology

Two concepts are important for this thesis, namely, the concept of "crime" and of "minor criminal offences" or "minor offences." These are explained in detail here.

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[50] *Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment*, 9 December 1988 GA res 43/173, 76th Plen Mtg (1988), online: < http://www.un.org/documents/ga/res/43/a43r173.htm> (Principles 1, 6, 24, 28).

[51] *Basic Principles for the Treatment of Prisoners,* 14 December 1990 GA res 45/111, 68th Plen Mtg (1990), online: < http://www.un.org/documents/ga/res/45/a45r111.htm > (Principles 1, 6, 8, 9, 10).

[52] *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa,* 23 October 2002 ACHPR 32nd Ord Sess, online: <http://www.achpr.org/files/instruments/robben-island-guidelines/achpr_instr_guide_rig_2008_eng.pdf > (Robben Island Guidelines A - b,c,d, C-37).

[53] *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, the Bangkok Rules*, 21 December 2010 GA Res 65/229, 65th Sess (2010), online: <https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf > (Sections I – IV)

[54] *Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa,* November 2003 ACHPR, Res 64 XXXIV 03 online: <http://www.achpr.org/instruments/ouagadougou-planofaction/> (Recommendations 1, 3, 6, 7).

[55] *United Nations Standard Minimum Rules for the Treatment of Prisoners, the Nelson Mandela Rules,* 70th Sess, Annex, GA res 70/715 online: <https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf>, the Mandela Rules are so named in honor of the former South African president who spent 27 years in prison.

1. The concept of "crime" in this thesis must be understood according to its definition in Ghanaian legislation. The *1992 Constitution* of Ghana presumes that a crime is a crime only by definition of law.[56] "Law" in this sense refers to the main criminal legislation that confines the categories of crimes to offences punishable by death or imprisonment or fine."[57] Thus, the nature of the offence must be defined by legislation, whether as an Act of Parliament, or subsidiary legislation such as regulations or byelaws, orders or instruments issued by public bodies or legislative instruments.

Essentially, the concept of crime under Ghanaian criminal law does not include offences that may be punished by similar sentences under subsidiary legislation, such as regulations,[58] that may still prohibit certain behaviour but are, otherwise deemed "non-criminal." Regulatory offences that carry prison sentences are problematic because they generally prohibit behavior and conduct not deemed serious enough to be criminalized and they may be numerous.[59] Recognizing that this is a problem for the Ghanaian prison system, regulatory offences will not be addressed in this thesis. The justification for excluding a focus on regulatory offences as part of the general need to reconsider how minor criminal offenders are punished is not because they are less important, or that they fall within a separate category of consequences for offending. The simple reason is that the offences charged under the *Criminal Code* constitute the overwhelming majority.

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[56] *Supra* note 36, article 19 (21), "a criminal offence under the laws of Ghana".
[57] *The Ghana Criminal Code*, 1960 (Act 29), s 1.
[58] *The Road Traffic Act* (Ghana), *2004,* Act 683 – *Road Traffic Regulations*, 2012 LI 2180; *The Labor Act* (Ghana), *2003* Act 651 -- *Labor Regulations*, 2007 LI 1833; *The Electronic Communications Act* (Ghana), *2008,* Act 775 -- *Electronic Communications Regulations*, 2011 LI 1991 are examples.
[59] The issues with data collection in Ghana are outlined in this work.

It is expected that once changes take place in how the *Code* offences are dealt with, it will trickle down to how regulatory ones are also punished, more so since the regulatory offences also come before the district courts that try all the "minor" offences.

Another potential issue concerns civil debtors and the possibility of their imprisonment, especially because under the Ghanaian Constitution, there is no provision for imprisonment for non-payment of debt.[60] In fact, it was held in *The Republic v High Court (Fast Track Division), Accra, Ex Parte P.P.E. Ltd and Paul Jurk (Unique Trust Financial Services Ltd) Interested Party*[61] that there should be no imprisonment for non-payment of debt. However, it is still happening and is evidenced by the existence of a debtor's prison located in the Volta Region of Ghana.[62] These subjects require studies of their own and are not considered any further in this thesis.

2. The second major item comes under the nature of the criminal offences dealt with. The offences considered for the purpose of this thesis are characterized as "minor offences." These might be limited to those offences dealt with by district courts. This thesis is in no way advocating that all offences dealt with by the district court ought to be automatically defined as minor. However, the category of cases dealt with here could represent a starting point for a conversation on the delineation of what could constitute a minor offence.

[60] *Supra* note 36 article 14 (1).
[61] (2007-2008) SCGLR 188. (Ghana)
[62] Kpando Local Prison, online: Ghana Prisons Service <http://www.ghanaprisons.gov.gh/volta_region.html >.

District courts have jurisdiction over criminal offences punishable by imprisonment of not more than two years. They also have jurisdiction over "any other offence (except an offence punishable by death or by imprisonment for life or any offence declared by an enactment to be a first degree felony), if the Attorney-General of Ghana is of the opinion that having regard to the nature of the offence, the absence of circumstances which would render the offence of a grave or serious character and all other circumstances of the case, the case is suitable to be tried summarily."[63] Thus, the district courts handle misdemeanours.[64] They can impose a sentence with an upper limit of three years by permission of the Attorney-General. These courts make up the largest number of courts in Ghana and process most of the criminal cases.[65] The lower maximum sentence limit they can impose indicates that these offences are characterized by Parliament as "less serious." It should be noted that this category of offences is not defined within Ghanaian criminal legislation.

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[63] *The Courts Act* (Ghana) *1993,* Act 459 at s 15 (the High Court has original jurisdiction in all matters; appellate jurisdiction in a judgment of the Circuit Court in the trial of a criminal case; appellate jurisdiction in any judgment of a District Court or Juvenile Court; jurisdiction to enforce the Fundamental Human Rights and Freedoms guaranteed by the Constitution; and any other jurisdiction conferred by the Constitution, this Act or any other enactment.[As substituted by the *Courts (Amendment) Act*, (Ghana) *2002,* Act 620, For the purposes of paragraph (c) of subsection (1), an order requiring a person to enter into a recognizance is a sentence. [As inserted by *Courts (Amendment) Act,* (Ghana) *2004* (Act 674) para. (b)] ,(3) The High Court shall have no power, in a trial for the offence of high treason or treason, to convict any person for an offence other than high treason or treason) online: Ghana Legal < http://laws.ghanalegal.com/acts/id/116/section/15/Jurisdiction_Of_High_Court>.

[64] *Supra* note 4 at s296 (4) limits term of imprisonment for misdemeanors to 3 years.

[65] Judicial Service of Ghana, "Annual Report of the Judicial Service of Ghana," (2015/2016) at 13, online: Judicial Service of Ghana <https://www.judicial.gov.gh/annualrep.pdf> (the fact that the District Court was found to have handled most of the criminal cases in the 2015/2016 report is indicative that most crimes in Ghana are punishable by up to three years in prison or might be loosely termed as "less serious.")

Among others, this thesis suggests a means for identifying and punishing minor offences more appropriately. As to their treatment, the argument is that for many of the offences punishable by a maximum of three years in prison, individuals should receive non-custodial sentences as is done in Kenya.[66] Rendering custodial sentences routinely for some of those offences punishable by a maximum of three years results in overuse of imprisonment.[67] The incarcerated individuals lack the opportunity, while in custody, to attain reformative experiences such as vocational and technical training, or access to rehabilitative facilities. Most prisons do not have skilled instructors or facilities for practical training.[68] Also, using incarceration for large numbers of people who have committed minor offences, and who correspondingly might represent low risk to society, depletes the already meagre resources for maintaining prison populations. This thesis is not arguing that minor offences should never result in incarceration. Rather it posits that the reflexive use of incarceration that currently exists ought to be limited.

The rest of this Chapter provides a summary of how the analysis of the incidence of over incarceration and possible solutions to it in Ghana unfolds in the thesis.

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[66] Penal Reform International, "Alternatives to Imprisonment in East Africa" (2012) at 10, online: < https://cdn.penalreform.org/wp-content/uploads/2012/05/alternatives-east-africa-2013-v2-2.pdf> [*PRI*].
[67] Jessica Jacobson, Catherine Heard & Helen Fair, *Prison Evidence of its use and overuse from around the world*, (London: University of London, 2017) vii, online: Prison Studies <http://www.prisonstudies.org/sites/default/files/resources/downloads/global_imprisonment_web2c.pdf>.
[68] *Seidman & Edison, supra* note 12 at 452; *Gyamfi supra* note 28 at 40.

1.9 Overview of the Thesis

Chapter 2 outlines the background of the Ghanaian criminal justice system in terms of sentencing, the various theories of penology and punishment practices in indigenous Ghanaian societies. It argues that Ghanaian theory of crime and punishment or sentencing policy is reformative or rehabilitative, but the practice is different. This would explain why imprisonment is the predominant means of punishing crime. It addresses the difficulties in creating a prototype of minor offences in Ghana because of the absence of a coherent system of offence classification. It then suggests indicators by which to determine what could constitute a minor offence.

Chapter 3 shows that currently, minor offences are usually punished by imprisonment. This is done by way of limited statistical information and case reviews. The chapter establishes that on the surface, at least, Ghanaian penal policies and sentencing practices, as well as their enforcement, results in the overuse of incarceration, especially for minor offences. As a result, "a series of mutually reinforcing challenges in responding appropriately to the social reintegration needs of offenders"[69] has been created. Such an outcome does not enhance the efforts of a developing economy to ensure real justice and economic progress.[70] It then argues that using non-custodial punishment can divert

[69] United Nations Office on Drugs and Crime, "Addressing the global prison crisis: Strategy 2015-2017", online: United Nations Office on Drugs and Crime <http://www.unodc.org/documents/justice-and-prison-reform/Global_Prison_Crisis_ebook_rev.pdf>.

[70] Ghana Prisons Service, "The Ghana Prisons Annual Report", online: Ghana Prisons Service < http://www.ghanaprisons.gov.gh/pdf/Annual%20Report%20Prisons%202013.pdf> (the latest of which

offenders guilty of minor offences to alternative non-custodial punishment within the community. The chapter then discusses the shortfalls of using incarceration rates to measure the over-use of imprisonment and the resultant prison overcrowding as against optimal occupancy rates.

Chapter 4 introduces an analysis of community-based sentencing and presents Kenya as a case study of a country that has taken measures to reduce incarceration rates and resultant prison congestion. Kenya is selected as comparator to Ghana because they inherited a similar criminal justice system but now employ alternative sentencing practices in the form of community service and probationary orders to reduce the use of incarceration for minor offenders. As well, Kenya has established a Probation and Aftercare Service Department to oversee the administration of these community-based approaches for minor offenders. Their approaches offer examples that Ghana could tailor to its own system of criminal justice administration. To this end, chapter 4 argues that adoption and enforced implementation of non-custodial forms of punishment, such as community service and probationary orders by legislation and regulation will result in reducing the judicial resort to imposing jail terms for minor offences. It then outlines how these measures could be applied in Ghana, couching the recommendations in response to the issues and evidence of recidivism,[71] prison overcrowding, the nature of the

dates from 2013 notes an amount of GHC 222, 804, 551.77 or an equivalent of CAD 61,226,356.981 as the amount spent in that year alone on the prisons upkeep.)

[71]Ghana Prisons Service, "Categorization of Convicts Admitted", 2015, online: Ghana Prisons Service <http://www.ghanaprisons.gov.gh/MANAGEMENT OF PRISONERS.pdf> (Out of a total of 7,776 convicts admitted, recidivists accounted for 1,214 Ghana, Prisons Service Annual Report, 2010); Antwi, *supra* note 18 (observes that the rate of recidivism could be higher. However, because of the absence of modern

Ghanaian justice system, and the social costs of retaining the current system's preference for incarceration.

The analysis then considers the legislative and implementation implications of adopting non-custodial alternatives for Ghana. It draws a picture of the road to reducing judicial over-reliance on incarceration, emphasizing that the core issue for sentencing reform is legislative change.[72] It then considers the prospects of achieving the proposed legislative reform and highlights the need for political will to pass the appropriate legislation and to allocate resources to implement it.

1.10 Conclusion

This thesis makes the argument that Ghanaian courts have overused incarceration to punish minor offences. They have, and continue to do this because of the constraint placed on them by the *Criminal Procedure Code* which they are bound to apply in sentencing such offenders. Judges are not given enough discretion in the choice of sentencing options. Indeed their discretion is generally limited to sentencing an offender

technologies such as biometric data and fingerprinting, certain recidivists may return unnoted by the system.)

[72] The place of the police in this cannot be overstated. There is a need for them to be educated to put a stop to their interference in civil matters and focus on criminal matters which is their sole mandate. As an illustration, the following is included: Chief Justice, ENP Sowah, Opening Address, Seminar on the Treatment of Offenders, Judicial Service of Ghana, 1989 (he had heard of times when a person had a neighbour thrown into prison by the police after a disagreement. "…if you have a disagreement with your neighbour and he tells you, "I will show you", all he has to do is to walk into a police charge office, and before you realize what is happening, the police have taken off all your clothes except your pants and pushed you into a cell.")

to imprisonment or fines or both. This chapter has explained that this is the wrong default, especially because of the socioeconomic circumstances of the offenders.

More effective sentencing options which can encourage rehabilitation should be considered. Though the Ghanaian *Criminal Procedure Code* confines itself to imprisonment and fines, its stated objective is to rehabilitate criminal offenders and reintegrate them into society as responsible citizens. The law already makes provision for options such as probation and this means that similar alternatives to imprisonment such as community service can be accommodated. This thesis argues that it is time to both change the law and adopt new policies which can accommodate and legitimize new alternatives.

CHAPTER 2 PENOLOGICAL CONCEPTS, MINOR OFFENCES AND THE STATE OF INCARCERATION IN GHANA

2.1 Introduction

This chapter considers the penological concepts that underlie indigenous and modern Ghanaian crime and punishment practices. The evolution of modern Ghanaian criminal law is also considered with a focus on its sentencing aspects. Finally, the concept of minor offences is explained. This is done to give the background to the Ghanaian criminal justice system as currently exists.

Before the introduction of British colonial rule, Ghanaians had their own notions of crime and punishment which did not usually involve imprisonment. Rather, the focus was on maintaining communal solidarity and stability. The following section shows that indigenous criminal law traditions did not include the same level of reliance on imprisonment because of doubts about its reformative potential. Traditional sanctions tended to be community-based.

2.2 Indigenous Ghanaian Concepts of Crime and Punishment Practices[1]

Indigenous communities in Ghana had a criminal justice system which did not generally include prison as a form of punishment, especially for minor offences.[2] Before the introduction of the English common law into the Gold Coast, chiefs made and administered the law. The law was a common thread running through the fabric of society, connecting the physical, spiritual, social, economic, religious, cultural and moral aspects of the community.[3] Indigenous criminal law had two main purposes: it maintained the balance between the community and the gods to ensure a consistent harvest so that there was sustenance in the form of food for the entire community. Secondly, indigenous criminal law aimed to sustain the community by ensuring peace.[4] Failure to observe the rule of law interfered with the interconnection and resulted in famine and other catastrophes. In short, criminal behaviour was considered a disruption of the social equilibrium because it resulted in negative spiritual and social consequences for the entire community. It was believed that these consequences were reflected in poor

[1] Hammurabi, *The Code of Hammurabi: Translated by L. W. King* (CreateSpace Independent Publishing Platform: 2005), online: Yale Law <http://avalon.law.yale.edu/ancient/hamframe.asp> (Ghana's indigenous concepts of crime appear to have aligned with those of other ancient civilizations. These practices trace as far back as the Babylonian *Code of Hammurabi,* and was found among the Greeks, Romans and Chinese. Ancient practices of punishment were based on offence gravity. In practice, some wanted punishment to be harsh. Others advocated for rehabilitative approaches. Among others, offenders were punished to do hard labour, were stoned or crucified. Where imprisonment was used, it was for those on death row, or to protect debtors from maltreatment by their creditors. Thus, historically imprisonment was rarely used.)

[2] R S Rattray, *Ashanti Law and Constitution* (Oxford: Oxford University Press, 1969) at 377-378 (The writer explains that imprisonment should probably not be added to the list of sanctions, "As it was unknown as a form of sanction in its literal sense or as the alternative to fine or other punishment.") [*Rattray*].

[3] Justice Modibo Ocran, "The Clash of Legal Culture: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa (2006) 39:2 Akron L Rev 466.

[4] Robert B Seidman & J D Abaka Edison, "Ghana: The System of Penal Legislation" in Alan Milner, ed, *African Penal Systems* (New York: Frederick A Praeger, Inc, 1969) at 431-432. [*Seidman & Edison*].

harvests, poor rainfall, and epidemics. In this way, conduct considered harmful to the community was proscribed and sanctioned.

From this standpoint, certain customary offences were treated, both substantively and procedurally more seriously than others. These included offences infringing sacred customs and taboos, such as murder, suicide, witchcraft, invocation of a curse on a chief, incest and adultery.[5] Such offences were tried by the head chief and his council of elders. In general, punishments depended on the severity of an offence and ranged from public ridicule,[6] flogging, communal labour, imprisonment, fine, sale into slavery and beheading.[7] Rattray explains that imprisonment as a sanction in its literal sense was unknown in pre-colonial Ghana.[8] He did note, however, the case of people "put in

[5] GK Acquah, "Customary Offences and the Courts" (1991-92) XVIII: 2 RGL at 36-67.

[6] Rattray *ibid* note 2 at 372-378 (describes this as the strongest sanction to enforce the observance of community mores. He explains that it was a subtle weapon from which there was no escape and served to rob a man of his self-respect and the respect of his associates. He continues by recounting a sad illustration: "During the visit of a person of considerable importance, who was much beloved by the loyal and generous-hearted Ashanti, the Chief and Elders of a remote province, in common with many others, had come to do him honor. When it came to the turn of a certain old man to be presented, in bending forward to do obeisance, he, unnoticed by all but his immediate followers, inadvertently broke wind. Within an hour of the termination of the ceremony he had gone and hanged himself. He had ' disgraced 'himself and his following. The universal comment in Ashanti among his fellow countrymen was that he had done the only right thing under the circumstances. He could never have lived down the ridicule which he might otherwise have incurred. Fadie ene ewuo a, fanyinam ewuo (' If it be a choice between disgrace and death, then death is preferable '). It was, in fact, this occasion which first made me familiar with a proverb which I later found to be universally known in Ashanti.")

[7] *Ibid*. it is necessary to note that with the passage of time, slavery and beheadings became a thing of the past confined to old history books. Ghana: a country study, Federal Research Division, Library of Congress, ed LaVerle Berry, November 1994 at 11, online: US Marines < https://www.marines.mil/Portals/59/Publications/Ghana%20Study_1.pdf> ("To be sure, slavery and slave trading were already firmly entrenched in many African societies [but not on a large scale] before their contact with Europe. In most situations, men as well as women captured in local warfare became slaves. In general, however, slaves in African communities were often treated as members of the society with specific rights, and many were ultimately absorbed into their masters' families as full members. Given traditional methods of agricultural production in Africa, slavery in Africa was quite different from that which existed in the commercial plantation environments of the New World.")

[8] *Rattray, ibid* note 2 at 377-378.

fetters" by the paramount chief while awaiting trial or sentencing.[9] This was very much a situation of impromptu restraint/ arrest, and was usually done for a very short time by tying the person to a log during the trial so they did not escape.

The second category of offences, those against the State, were considered very serious crimes, the worst of which included treason, and offences directly or indirectly infringing on the sacred rights of the Stool which is the symbol of a traditional kingdom,[10] could have resulted in the offender being banished from the community[11] such that social equilibrium is restored.

Acts, conduct or behaviour that did not offend customs and taboos were settled, "more or less privately and unofficially by and among the parties."[12] It must also be noted that certain minor offences were tried by lesser chiefs or the head of the extended family who exercised jurisdiction in minor courts.[13] Lesser offences were resolved by the offender making reparations to the victim or his family and the gods in a bid to restore peace. Examples of such lesser offences included small debts, petty theft, assault and disobeying a local municipal order on oath to attend public labour.[14] These matters came before the

[9] *Rattray, ibid* note 2 at 378 (he explains that during the reign of one Kwaku Dua 1, a youth was fastened to a log until he grew up and had a beard.)
[10] *Ibid* at 90.
[11] *Ibid* note 2; Kofi Abrefa Busia, *The position of the Chief in the Modern Political System of Ashanti: A Study of the Influence of Contemporary Social Changes on Ashanti Political Institutions,* (Oxford: Oxford University Press, 1951).
[12] *Ibid*.
[13] Minor courts here just mean more informally than say, in the chief's palace. For example, this class of matter could be dealt with at home.
[14] JB Danquah, *Gold Coast: Akan Laws and Customs and the Akim Abuakwa Constitution* (London: George Routledge & Sons Ltd., 1928) at 87. [*Danquah*]; *Rattray ibid* note 2 at 324-325, 329.

courts of village chiefs whose mandate was, *inter alia,* to ensure that amicable relations between the plaintiff and defendant were maintained and furthered.[15] As will be shown shortly, there is some similarity between those lesser offences of yesteryear and those proposed to be dealt with via alternative community-based sentencing in this thesis.

The above overview of Ghanaian indigenous notions of crime and punishment is intended to highlight the absence of imprisonment (as currently understood) and a focus on the promotion of reconciliation and restoration of social harmony. These are components that could be merged with the modern Ghanaian criminal justice system to reduce overuse of incarceration for minor offences and perhaps result in the rehabilitation and reformation of the offender.

2.3 The Onset of British Rule and Establishment of Criminal Jurisdiction

The traditional order changed with the start of British colonialism via the signing of the Bond of 1844. The chiefs recognized the authority of the British to rule what became Ghana and led to their loss of jurisdiction over serious customary offences.[16] Paragraph 3 of the Bond of 1844 set the tone for modelling the Ghanaian criminal justice system on the British one: "Murders, robberies, and other crimes and offences[17] will be tried and

[15] *Danquah* at 84-86.
[16] Edward A Ulzen Memorial Foundation, "March 6, 1844: Bond of 1844 Signed by Fanti Chiefs and Britain," online: Edward A Ulzen Memorial Foundation < https://www.eaumf.org/ejm-blog/2018/3/6/march-6-1844-bond-of-1844-signed-by-fanti-chiefs-and-britain> (EAUMF).
[17]Jonquil Van, "The Rise of British Jurisdiction In Ghana" (1998) African Diaspora ISPs Paper 39, 1 at 14, online: School for International Training Digital Collections < https://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=1078&context=african_diaspora_isp> (the

inquired of before the Queen's judicial officers and the chiefs of the districts, shaping the customs of the country to the general principles of British law."[18] Under the Bond, chiefs were limited to cases concerning custom and other lesser offences, such as marriage settlements and land boundary disputes. The replacement of indigenous criminal justice systems in Ghana with the British colonial criminal justice system introduced current ideas of penology into the Ghanaian criminal justice context which were codified in the substantive and procedural statutes on crime.

2.4 Ghana's *Criminal Code*: Colonial "Commonwealth" Origins

Ghanaian criminal law descended directly from Sir James Stephen's *Draft Code of 1878*, itself a partial codification of the common law on criminal offences.[19] Seidman and Eyison observe that "where there were ambiguities in the case law, Sir James made choices which reflected his view of what the law ought to be."[20] These choices were then replicated in what came to be the original draft of the *1871 Draft Code for Jamaica*, although Jamaica never adopted it. The purpose of Sir Stephen's draft was that it be

writer observes that In the actual disposition of the Bond, it was found that "in the fourth quarter of 1844 there were 61 out of 88 minor dispute cases, such as small debts. Only six serious cases, pertaining to murder and robbery were acted on. The remaining were domestic complaints, including minor assaults, disputes over slaves and pawns, and complaints by slaves over their treatment…")

[18] *Supra* note 16.

[19] *Seidman & Edison*, *supra* note 4 at 66.

[20] *Ibid*.

adapted for use in the other Crown Colonies.[21] It was, for instance, adopted in St. Lucia and in Canada.[22]

The Chief Justice of the Gold Coast, J. T. Hutchinson, noted that in drafting a Criminal Code, he "kept as closely as I could to the St. Lucia Code, considering it to be desirable that there should be as great uniformity as possible in the codes of the different Colonies."[23] Thus, the overarching concern in drafting a criminal code was not to ensure that crime and punishment was dealt with in an equitable manner or in keeping with the understanding of the indigenes as to how crimes should be punished. Rather, it was to ensure that British rule was deeply entrenched in each colony, including the Gold Coast.

2.5 Evolution of Acts 29 & 30

Not much has changed since Sir Stephen's Draft. Since 1960 at least, it has been pressed that the "revision of the Criminal Code in Ghana was overdue."[24] Indeed, both the *Criminal Code* and the *Criminal Procedure Code* were ostensibly "redrafted" and re-enacted in 1960. However, the reality is that "fundamental changes of substance are few."[25] Primarily the alterations were limited to "recasting" the Code, repealing certain obsolete enactments and grading the offences.[26] In recent times, there have been some

[21] *Ibid.*
[22] *Ibid*; R S Mackay, "Some Reflections on the New Canadian Criminal Code," (1958) UTLJ 12: 2 206, online: JSTOR <https://www.jstor.org/stable/824229?seq=1#metadata_info_tab_contents>.
[23] *Supra* note 4 at 66; James S Read, "Criminal Law in the Africa of today and tomorrow" (1963) J African L 7: 1 5, online: JSTOR < http://www.jstor.org/stable/745277>.
[24] James Read, "Ghana: The Criminal Code, 1960" (1962) ICLQ 11: 1 Jan 1962 272, online: JSTOR <http://www.jstor.org/stable/756174>.
[25] *Ibid.*
[26] *Ibid*.

amendments,[27] but they have tended to increase punishment or re-categorize offences in a bid to increase their gravity, and widen the scope of punishments.[28]

During the parliamentary debate on the passing of the *Prisons Bill, 1962*, the then Minister of the Interior noted that government policy towards prisoners was one of reform.[29] The reality has, however, been very different. In 1991, Chief Justice Archer, at the Annual Conference of the Association of Judges and Magistrates of Ghana, said that "the *Ghanaian Criminal Code* and *Criminal Procedure Code* were not only very outmoded or out of touch with reality but that their principles and objectives had failed."[30]

The provisions of the *Criminal Procedure Code* include the sentencing policy as it contains the punishments to be administered in response to particular offences although the underlying reasons are neither given nor explored.

Mensa-Bonsu[31] observes that since independence the criminal law appears to only be amended when particular crimes were on the increase. She points out that these amendments so far have only served to re-define existing crimes, increase punishment

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[27] *Criminal Offences (Amendment) Act* (Ghana) 2012, Act 849; *Criminal Code (Amendment) Act* (Ghana) 2003 (Act 646); *Criminal Procedure Code (Amendment) Act* (Ghana) 2002 (No 633).

[28] *Criminal Procedure Code (Amendment) Act* (Ghana) Act 633 at s 23.

[29] *Seidman & Edison supra* note 4 at 447 (they note that Mr Boateng, Minister of the Interior stated government prison policy as "one of reform and not necessarily to wreak vengeance upon people who sometimes through their unfortunate background and circumstances have found themselves behind bars."); Akua Kuenyehia, "Problem of Recidivism in the Ghanaian Penal System," (1978) Vol XV U Ghana L J 81 at 84 (she noted how Mr Kofi Baako, then leader of the house in Parliament during the debates prior to the passing of the Act said: "We say that a person needs rehabilitation. His punishment should not just be punitive. It should be reformative and so he goes on the farm to farm himself and make a living." This was in reference to plans to use prisoners on the then newly established State Farms.)

[30] Chief Justice P E N K Archer, "Address to the Annual conference of the Association of Judges and Magistrates of Ghana", The People's Daily Graphic (21 October 1991) and the Ghanaian Times (23 October, 1991).

[31] HJAN Mensah-Bonsu, "'Political Crimes' in the Political History of Ghana: 1948-1993" in HJAN Mensa-Bonsu et al, eds, *Ghana Law Since Independence-History, Development and Prospects* (Accra: Black Mask, 2007) at 240. *[Political Crimes]*

and introduce new processes for trial.[32] Thus, post-independence amendments have only served to deepen the imprisonment mindset. In short, there does not appear to have been any major sentencing change to date.

She traced these cosmetic changes in *Act 29.* She observed that it came with revisions in criminal procedure,[33] pointing out that in 1956, *Ordinance No. 33* re-defined 'misdemeanours' to be offences punishable by terms of imprisonment not exceeding two years, from the previous one year under *Cap 7 of 1939*. A felony, as provided in the *Criminal Code of 1892,* was punishable by a minimum of three years' imprisonment. She suggests that one reason for this re-categorisation was increased public unrest due to economic turmoil in the post-independence era.[34] In other words, the reasoning behind amendments done on at least one occasion, was not to improve the administration of criminal justice in Ghana, but to respond to an economic crisis. The trend has continued in amendments to both the substantive and procedural criminal law with the aim to impose stiffer punishments and to justify a greater stripping away of individual liberty for even minor offences.[35] Essentially, there have been no amendments to Ghanaian criminal procedure in terms of sentencing, not even a clarification of what Ghanaian sentencing principles are.

The absence of amendment means that the colonially-inherited concepts of penology continue to inform modes of punishment. As this work argues, the preponderance of the

[32] *Ibid*.
[33] *Ibid* at 257.
[34] *Ibid*.
[35] *Ibid*.

judicial mind-set created by this has contributed to the ubiquitous resort to incarceration, including for minor offences. An appreciation for change must begin with appreciating the theoretical justifications for this practice and, therefore, its shortcomings and the need for change.

Punishing Crime in Ghana: Concepts and Theories of Penology

2.6 Concepts of Penology

Penology is the study of punishment in relation to crime.[36] The purpose of penology includes the administration of punishment by society, and assessment of the impact of the implementation of policies concerning crime and punishment. Penology enables comparison of criminal procedures through history and in modern times. This is particularly relevant in the Ghanaian context where, before the advent of its modern criminal legislation, indigenous communities had their own concepts of crime and punishment with a different approach to the management of minor offences.

Von Hirsch notes that judicial sentencing defines the appropriate type and length of a sentence. Cumulatively, the type and length of a sentence must fit with the purpose of punishment.

> While people will disagree about what justice requires… the primary aim of justice [in determining sentence lengths] is vital ... One cannot… defend any scheme for dealing with convicted criminals solely by pointing to its usefulness in controlling crime: one is compelled to inquire whether that scheme is a just one and why. …

[36] Rajendra K Sharma, *Criminology and Penology*, (New Delhi: Atlantic Publishers and Distributors, 1998) at 2; Rev Richard W McLain, *A Treatise on Penology,* (Jackson, Michigan: 1932) at 7.

> [A] wise [political and practical] accommodation requires, first, a coherent conception…[37]

Existing Ghanaian penal practices appear to be different from indigenous practices. It appears that current penal policies are "primarily made-for-export judicial dispensations introduced by the British."[38] This means that there are no particularly reformatory or rehabilitative intentions behind them, in spite of the early rhetoric.[39]

Theories of penology frame the evolution of crime and punishment. As well, they inform their criminal justice superstructures, especially sentence enforcement. In this way, these theories determine the definitions and management of what constitutes crime and punishment within any society. In terms of this study on Ghana, the concepts explored below are utilitarianism and retribution.

2.7 Theories of Penology

Two main philosophies or schools of thought underlie modern justifications for criminal punishment: utilitarianism and retribution.[40]

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[37] A Von Hirsch, Doing Justice (New York: Hill and Wang, 1976) cited in Robert A Pugsley "Retributivism: A Just Basis for Criminal Sentences" (1979) Hofstra LR 7:2, Article 6 at 1, online: Hofstr Law <https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1235&context=hlr> However, I do not agree with Hirsch's position that offenders should get what he terms their "just deserts", as I advocate for a more rehabilitative model of sentencing.

[38] Joseph Appiahene-Gyamfi, *Alternatives to imprisonment in Ghana: A focus on Ghana's Criminal Justice System* (Masters Dissertation, Simon Fraser University, 1995) [unpublished] at 90 online: Simon Frazer University <summit.sfu.ca/system/files/iritems1/6650/b17416905.pdf> [*Gyamfi*].

[39] The opinions of judges, politicians and other criminal justice actors are discussed at appropriate points throughout the rest of this thesis. Chief Justice P E N K Archer, "Address by to the Annual conference of the Association of Judges and Magistrates of Ghana", The People's Daily Graphic (21 October 1991), and the Ghanaian Times (23 October, 1991); *Political Crimes, supra* note 31 at 240.

[40] Tim Newburn, *Criminology* (Devon: Willan Publishing, 2007) at 518-524. [*Newburn*]

2.7.1 Retribution

Retribution makes a case for punishment to be applied because it is deserved.[41] Banks observes that such means of punishment have been in existence for a long time with the "best known being the *lex talionis* of Biblical times, calling for an "eye for an eye, a tooth for a tooth, and a life for a life".[42] In its original, Biblical form, this position advocates a cycle of perpetual violence where punishment is applied to avenge whatever loss that occurred. Although in modern times retribution no longer has this feature, it is a form of justice based on three principles. First, wrongs should face proportionate punishment; second, a legitimate authority should be the one doling out the punishment; and finally, it is morally wrong for the innocent to be punished or for an offence to attract a punishment that is not commensurate with it.[43]

These three principles are similar to Flew's five elements of punishment.[44] These are: an unpleasantness to the victim; it must be a sanction for an actual offence; the punishment must be for an actual offender; the offence being punished must not be the natural consequence of an action; and the sanction must be imposed by a special authority or

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[41] *Newburn*, *supra* note 40.

[42] Cyndi Banks, *Criminal Justice Ethics: Theory and Practice* (California: SAGE Publications, 2004) at 109 [*Banks*]; Marvin E Wolfgang, "The Medical Model versus the Just Deserts Model" (1988) 16:2 Bull Am Acad Psych L 111 at 112 online: Journal of the American Academy of Psychiatry and Law < http://jaapl.org/content/jaapl/16/2/111.full.pdf> (in Hebrew, the image of an eye under an eye signifies money, interpreted as monetary compensation to the victim by the offender.)

[43] Alec Walen, "Retributive Justice", in Edward N. Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), online: Stanford University <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=justice-retributive>. [*Walen*]

[44] Punishment (2002) in Antony Flew, ed, *A Dictionary of Philosophy*, Macmillan, Basingstoke (UK: Macmillan Publishers Ltd), online: <http://ezproxy.library.dal.ca/login?qurl=https%3A%2F%2Fsearch.credoreference.com%2Fcontent%2Fentry%2Fmacdphil%2Fpunishment%2F0%3FinstitutionId=365>.

institution against whose rules the offence was committed.[45] This definition places deserved punishment within a system of rules and ensures that it is not an arbitrary discharge of discipline for imagined reasons or vengeance.

Kant, an advocate of this approach, argued that retributive punishment was necessary to restore the balance that had been broken by the offence between the State, citizens and the offender.[46] Hegel provided a different rationale. He argued among others that because the State was much more powerful than individuals, it had the right to punish retributively.[47] Thinking developed on this approach and led to the formulation of the "just deserts" theory. It is considered to be "restoring a sense of justice through proportional compensation from the offender."[48]

Proponents who support this theory advocate proportionality of punishment.[49] Banks describes this as "tariff sentencing", because past convictions are considered in imposing new sentences. Indeed, the just deserts theory appears to support lesser sentences for first time offenders.[50] In determining how much harm has been done, proponents of just

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[45] JD Mabbott, "Professor Flew on Punishment" (1955) 30:114 Philosophy 257 at 258, online: JSTOR <https://www.jstor.org/stable/pdf/3749384.pdf?refreqid=excelsior%3A858ed14d87ae3d6fb6ebf59a02bbeb30>.

[46] *Walen, supra* note 43.

[47] *Newburn*, *supra* note 40.

[48] J O Finckenauer, "Public support for the death penalty: retribution as just deserts or retribution as revenge?", Justice Q, 5:1 81-100, cited in Monica M Gerber and Jonathan Jackson, "Retribution as revenge and just deserts (2013) 26:1 Social Justice Research at 62, online: Antonio Casella <http://www.antoniocasella.eu/restorative/Gerber_2013.pdf>; in the Canadian case of *R v M (C A)* [1996] 1 S C R 500, it was noted that "It is a well-established tenet of our criminal law that the quantum of sentence imposed should be broadly commensurate with the gravity of the offence committed and the moral blameworthiness of the offender."

[49] *Banks*, *supra* note 42 at 109.

[50] *Ibid* at 113.

deserts focus on the harm involved in the offence and the guilt of the offender. Von Hirsch[51] points out the importance of considering how the victim's quality of life is affected by the offence in question, and suggests the application of the existing substantive criminal law, as it already separates "intentional from reckless or negligent conduct,"[52] for example, as concerns the treatment of murder as against manslaughter. Banks thinks the main difficulty with this theory is that it does not definitively outline any principle that could be used to determine what a commensurate sentence would look like.[53] As well, this theory does not consider social disadvantages that may have contributed to the commission of an offence.[54] This is why the statement by Canadian Chief Justice Lamer[55] that "sentencing is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community,"[56] is important.

A Ghanaian criminologist has observed that because "… judges have no clearly defined policy, the ... result is that, retribution and general deterrence have emerged as the objectives attained in practice."[57] Unfortunately in Ghana, this sense of proportion does not seem to inform what sentences judges may impose for minor offences.

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[51] A Von Hirsch, "Penal Theories" in Michael Tonry, ed, *The Handbook on Crime and Punishment* (New York: Oxford University Press, 1998) at 659-682.
[52] *Banks*, *supra* note 42 at 113.
[53] *Ibid* at 114.
[54] *Ibid* at 115.
[55] *R v M (CA*), 1996 CanLII 230 [1996] 1 SCR 500 at para 91.
[56] *Ibid*.
[57] *Gyamfi, supra* note 38 at 106.

2.7.2 Utilitarianism

The utilitarian theory of punishment argues for preventing the commission of a future crime through deterrence, incapacitation and rehabilitation.[58] It is not primarily predicated on whether or not an offender deserves punishment. Instead, it considers whether the punishment will prevent a recurrence of the offence. In other words, will the punishment be useful in any way? An early advocate of utilitarianism is Beccaria,[59] upon whose ideas Bentham [60] later built.

Beccaria prescribed a more humane principle of punishment. He advocated for mildness, certainty and swiftness of sanctions for offenders. He argued for punishment to have a

[58] Beccaria cited in Imogene L Moyer, *Criminology Theories: Traditional and Nontraditional Voices and Themes* (California: Sage Publications, 2001) at 17 ("But what are to be the proper punishments for such crimes? Is the death penalty really useful and necessary for the security and good order of society? Are torture and torments just, and do they attain the end for which laws are instituted? What is the best way to prevent crimes? Are the same punishments equally effective for all times? What influence have they on customary behavior?")

[59] Cesare Bonesana di Beccaria, "An Essay on Crime and Punishment" (1764) chap 3, online: Online Library of Liberty <http://oll.libertyfund.org/titles/beccaria-an-essay-on-crimes-and-punishments> (he observes that; "If it can only be proved, that the severity of punishments, though not immediately contrary to the public good, or to the end for which they were intended, *viz.,* to prevent crimes, be useless; then such severity would be contrary to those beneficent virtues, which are the consequence of enlightened reason, which instructs the sovereign to wish rather govern men in a state of freedom and happiness, than of slavery. It would also be contrary to justice, and the social compact").[*Beccaria*]

[60] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Kitchener: Batoche Books, 1781) at 28-29, online: McMaster University <http://historyofeconomicthought.mcmaster.ca/bentham/morals.pdf> ("As to such of the pleasures and pains belonging to the religious sanction, as regards a future life, of what kind these may be we cannot know. These lie not open to our observation. During the present life they are a matter only of expectation: and, whether that expectation is derived from natural or revealed religion, the particular kind of pleasure or pain, if it be different from all those which he open to our observation, is what we can have no idea of… ")

preventative function, and not to be used as revenge.[61] Building on Beccaria's work,[62] Bentham argued that to be useful, punishment ought to be more painful than the crime was pleasurable. Beyleveld[63] argues against this form of punishment. He found that punishment had no individual deterrent effect. Other studies have supported this assertion, to some extent.[64] Interestingly, Andenaes[65] recognised that deterrence depended on the individual in question. He observed that in general, a lawful citizen would obey the law, whether or not there is a threat of punishment. He continued, noting that though an offender has broken the law, it does not mean he did not fear it. The data seems to echo this finding, as researchers cannot conclusively say that harsh sentences, including imprisonment for minor offences, prevent the individual from committing crimes.[66]

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[61] *Beccaria supra* note 59.

[62] Tony Draper, "An Introduction to Jeremy Bentham's Theory of Punishment" (2002), J Bentham Studies, 5 at 6, online: University College London <http://discovery.ucl.ac.uk/1323717/1/005%20Draper%202002.pdf>.

[63] Deryck Beyleveld, "Identifying, Explaining and Predicting Deterrence" (1979), Brit J Crimonol 19:3 205-224.

[64] C L Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction*, (Oxford: Clarendon Press, 1987) at 9 (He argues that punishment does not necessarily deter individuals)[*Ten*]; N Walker, *Why Punish?* (Oxford: Oxford University Press, 1991) at 108 (Walker makes the point that capital punishment has not been shown to have a greater effect on the behavior of offenders than life imprisonment does); Daniel Nagin, "Deterrence and Incapacitation," in Michael Tonry, ed, *The Handbook of Crime and Punishment,* (Oxford: Oxford University Press, 1998) at 108 (he found that ecological and perceptual studies did identify certain instances where some deterrent effect was found.)

[65] J Andenaes, "Does Punishment Deter Crime?" in Gertrude Ezorsky, ed, *Philosophical Perspectives on Punishment* (Albany: State University of New York Press, 1972) 342 at 357, cited in *Banks, supra* note 42 at 108.

[66] Daniel S Nagin, "Criminal Deterrence Research at the Outset of the Twenty-First Century," (1998) 23 Crime and Justice; Anthony N Doob & Cheryl M Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis", in Michael Tonry, ed, *Crime and Justice: A Review of Research Vol 30* (Chicago: University of Chicago Press) (they found from their extensive research of work done by criminologists that harsh sentences do not necessarily deter crime); Todd R Clear, "Mindful Punishment: What to do about the South African Penal System, and Why," (2008) 23 SA Crime (QL) at 2 (he noted that stays in prison are essentially criminogenic); *Gyamfi, supra* note 38 at 126, (he quotes a respondent judge who stated that 'there is a lot of evidence to suggest that imprisonment could worsen the attitude of some criminals and expose them to further criminal misconduct.")

In Ghana, exemplary deterrence was the means by which private British merchants "kept the multitude in order."[67] Thus punishment found purpose at the time in the view of those merchants as it ensured that the colonised obeyed their rules. The current president of Ghana concluded that the concept of deterrence as captured in the *Criminal Offences Act* should be applied fully[68] because, to him, deterrence works. This is his position, despite evidence that the rate of recidivism shows that the deterrence policy is not working.[69]

The incapacitation model, part of the larger utilitarian paradigm, is used where offenders are placed in prison for stretches of time to protect society during their incarceration.[70] Other supplemental measures could include curfews, restrictions on movement, regular reporting and monitoring and even regular drug checks.[71] These could constitute parts of

[67] *Seidman & Edison supra* note 4 at 433.
[68] Rex Mainoo Yeboah, "Deterrence must be an important part of sentencing-President Akuffo-Addo", online: Ghana Government <http://www.ghana.gov.gh/index.php/media-center/news/5041-deterrence-must-be-an-important-part-of-sentencing-president-akufo-addo>.
[69] Mavis Dako-Gyeke & Frank Darkwa Baffour, "We are like devils in their eyes: Perceptions and experiences of stigmatisation and discrimination against recidivists in Ghana" (2016) 55:4 J of Offender Rehabilitation 235 at 237 online: Taylor & Francis <https://www.tandfonline.com/doi/pdf/10.1080/10509674.2016.1159640>. [*Dako-Gyeke & Baffour*]
[70] H Morris, "A Paternalistic Theory of Punishment", in Antony Duff & David Garland, eds, *A Reader on Punishment*, (Oxford: Oxford University Press, 1994) at 92-111 cited in *Banks*, *supra* note 42 at 117.
[71] Donald Ritchie, Sentencing Advisory Council, Victoria, Australia, July 2012, online: Victoria Sentencing Council <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/How%20Much%20Does%20Imprisonment%20Protect%20the%20Community%20Through%20Incapacitation.doc>.

the community-based sanctions proposed in this thesis. Banks notes that the removal of the offender from the main society finds support in utilitarian theory.[72] This model is operational even in the parole system, given that the offender is still under supervision and that may affect their ability to commit an offence.[73]

This model is reflected in Canadian criminal law under general and specific deterrence. It may be considered problematic because, in practice, it may be ineffective to incarcerate a current offender to reduce the possibility of their committing a future offence.[74] There is no certainty in predicting the likelihood of a future offence, and doing so can result in over-incarceration in a bid to "net" as many "criminals" as possible.[75] However, in Canada, at least, a blend of the utilitarian and retributive models is used in the sentencing process, including in dangerous offender decisions, regular sentencing, and parole.

In Ghana, the coupled use of fines and imprisonment, and even the single use of fines, results in incapacitation for minor offenders because socio-economic reasons appear to drive offending. Gyamfi[76] observes that some offenders are too poor to pay fines and, "incapacitation through incarceration rather than reconciliation and reintegration of the offender into society is the main method of disposal."[77] It is reasonable to suggest that the imposition of fines should consider the ability of the offender to pay the fine imposed.

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[72] *Banks*, *supra* note 42 at 117.
[73] *Ten*, *supra* note 64 at 238.
[74] *Banks*, *supra* note 42 at 118.
[75] Larry J Siegel & Chris McCormick, *Criminology in Canada: Theories, Patterns and Typologies*, 6th ed (Toronto: Nelson Education Limited, 2016) at 154.
[76] *Gyamfi, supra* note 38 at 113.
[77] *Ibid* at 96.

As well, extended payment periods can be arranged or as argued by this thesis, programs substituting another mode of punishment such as community service and probation should be utilized. However, as it is now in Ghana, the prevailing use of incapacitation does not particularly deter offenders, nor does it drive any reformation or rehabilitation.

Rehabilitation or reformation finds its footing in the utilitarian model and is seen in the evaluation of the offender by considering his social background in a bid to make sure that he or she does not engage in future offences.[78] Thus, "crime is seen as the symptom of a social [malaise or] disease, and the aim of rehabilitation is curing that disease through treatment."[79] Supporters of this model propose that punishment should be patterned more on the offender's peculiar requirements than on the offence committed.[80] However, for the focus of punishment to be based only on the offender's requirements, it can mean that the victim's needs are ignored. The better approach is that both positions are considered.

One criticism of this model came from Martinson,[81] who claimed that there is no single program to successfully prevent reoffending. The literature suggests that the rehabilitative model works to prevent reoffending. A 2015 study by MacKenzie and

[78] Andrew Ashworth, "Sentencing" in Mike Maguire, Rod Morgan, and Robert Reiner, eds, *The Oxford Handbook of Criminology*, 4th ed (Oxford: Oxford University Press, 2007) at 994.
[79] P Bean, *Punishment: A Philosophical and Criminological Inquiry* (Oxford: Martin Robinson, 1981) at 54.
[80] *Banks*, *supra* note 42 at 116.
[81] R Martinson, "What Works? - Questions and answers about prison reform," The Public Interest 35 22-54.

Farrington[82] found that therapeutic rehabilitation had some success in reducing future reoffending. Banks identified a study that found "adult correctional treatment is effective in reducing recidivism; that behavioral, cognitive treatments are more effective than others; and that intensive in-prison drug [substance abuse] treatment is effective, especially when it is done in conjunction with community after-care."[83] Adult correctional treatment involves interventions put in place for offenders in the prison system, drug treatment and vocational training. Vass indicates that there is some evidence that certain community-based interventions like probation and community service targeted at particular groups of offenders appear to be successful.[84]

As highlighted later, Ghanaian penal philosophy, can be said to not be one of rehabilitation. This is because as later shown, the evidence is that, offenders are not given adequate skills training nor do they benefit from rehabilitation programs in prison, When an offender is sentenced, for instance, to a prison term and is also provided with rehabilitative opportunities, their chances of resuming normal social life are heightened.[85] In other words, combining philosophies of punishment and rehabilitation

[82] Doris L MacKenzie & David P Farrington, "Preventing future offending of delinquents and offenders: what have we learned from experiments and meta-analyses?" J Exp Criminol, online: Springer Science <https://www.gwern.net/docs/sociology/2015-mackenzie.pdf>.
[83] G T Gaes et al, "Adult Correctional Treatment" in Michael Tonry & Joan Petersilia, eds, in *Prisons* (Chicago: University of Chicago Press, 1999) at 361-426.
[84] Antony A Vass, *Alternatives to prison: punishment, custody and the community* (London: Sage, 1990) at 106.
[85] Nikhil Roy, "Penal Reform International, An international perspective of how other countries prepare their prisoners for release" at 13-16, online: Penal Reform International <https://www.penalreform.org/wp-content/uploads/2013/05/Reintegration-AMIMB-conference-291012.pdf>.

in practice gives some opportunity to an offender to reform, and, thus, to become eligible for return to normal social life.[86]

However, chances of reformation have been shown to be better when the offender maintains community ties. There is already a provision for adult probation contained within the criminal laws of Ghana. However, so far it has been limited in operation to juveniles.[87] An expansion of probation to include community service could result in some positive rehabilitative outcomes for minor offenders.

Indeed, most jurisdictions employ varying combinations of the philosophies of punishment in their treatment of offenders. Ultimately, the idea is for society to denounce the offence while ensuring that prospective offenders are effectively deterred, that the offender is given opportunity to reform or rehabilitate and to become eligible for reintegration into society. This also enables the victim to feel that justice has been done. Sometimes it is important that society is protected by incapacitating the offender in order to control their behavior and ensure that the offence is not repeated. The offender takes responsibility for the harm caused through the punishment inflicted. With this in view, it is argued in this work that Ghana's retributive management of offenders must change so that punishment for crime in the country can achieve its stated ends of

[86] See *R v M (C A),* [1996] 1 SCR 500, 1996 CanLII 230 (SCC) at para 91; *R v Gladue*, [1999) 1 SCR 688, 1999 CanLII 679 (SCC) at para 93.

[87] *The Ghana Criminal Procedure Code*, 1960, Act 30 online: World Intellectual Property Organization <http://www.wipo.int/edocs/lexdocs/laws/en/gh/gh011en.pdf> [*Act 30*] ss 352-369 (gives the court the option of applying probation to all manner of offenders who deserve it, however, so far only young offenders appear to have had that opportunity); *Gyamfi, supra note 38* at 152 (notes that "there was no record found on adult probationers in Ghana.")

rehabilitation and social reintegration as previously noted by the implementation of community-based punishment.

2.8 Current Ghanaian Penological Concepts and Practices

Theoretically, Ghana combines philosophies of punishment in the management of offenders.[88] In practice, however, the management of offenders appears to be overwhelmingly retributive. The justification for this outcome resounds in Ghanaian penological thinking and practice. The discussion that follows shows that under Ghana's legislation on crime and punishment, there are non-custodial alternatives such as probation as mentioned earlier. But these are not used as stand-alone options. Rather, they supplement custodial sentences. As well, judges have little leeway to utilize non-custodial options. They are mainly confined to a choice between imprisonment, and fine or both under the *Criminal Procedure Code* for all offences, including minor ones. Perhaps if judges had other options with the accompanying institutional supports such as community service as argued in this thesis, along with probation, the punishment they administer could effectively promote deterrence and reformation.

[88] *Seidman & Edison supra* note 4 at 447 (notes that Mr Boateng, Minister of the Interior stated government prison policy as "one of reform and not necessarily to wreak vengeance upon people who sometimes through their unfortunate background and circumstances have found themselves behind bars"); *Gyamfi, supra* note 38 at 96 (argues that Ghanaian sentencing guidelines attempt to fit the punishment to the crime and that deterrence and retribution are the main objectives like all common law countries do. However, he notes that "incapacitation through incarceration rather than reconciliation and reintegration of the offender into society is the main method of disposal.") This is true as actual practice is overwhelmingly retributive because the incapacitation of prisoners within a harsh environment where they do not have access to the basic requirements of life and do not have access to rehabilitative facilities ensures a cycle of constant criminal activity and subsequent punishment.

2.8.1 Sentencing Aspects of Ghanaian Criminal Law: An Overview

The criminal law system in Ghana has a retributive bias. The governing provisions come from the *1992 Constitution of Ghana,*[89] the *Criminal Code, 1960*[90] and the *Criminal Procedure Code, 1960.*[91] They contain provisions that determine what crime an individual has committed and what sentence is available.

Crime is used interchangeably with "offence" in this thesis, in keeping with the interpretation section of the *Criminal Code, 1960 (Act 29).* Judges, after presiding over a criminal trial, are required to use the *Criminal Code* and the *Criminal Procedure Code, 1960 (Act 30)* to pass sentences. The *Criminal Procedure Code* contains guidelines and basic principles for application by the courts, making it the sentencing law of the courts. It is, however, not explicit regarding sentencing principles and what informs them, although Section 294 of *Act 30* lists the prescribed punishments. These are death, imprisonment, fine, detention, payment of compensation and liability to police supervision. Imprisonment and fines (or imprisonment for failure to pay) appear to be the punishments consistently imposed, with imprisonment leading the way.[92] With

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[89] *Constitution of the Republic of Ghana, 1992*, article 13. (this provision states that no one shall be deprived of his life intentionally except in respect of a criminal offence under the laws of Ghana. Art 14 says that a person is entitled to his personal liberty except in accordance with the law. Art 15 that a person arrested, restricted or retained cannot be subjected to torture or other cruel, inhuman or degrading treatment or punishment, and Art 19 indicates that if sentencing provisions change between the date of offence and date of sentencing, the offender is entitled to lesser punishment.) [*1992 Constitution*]

[90] *The Ghana Criminal Offences Code,* 1960 Act 29 online: World Intellectual Property Organization < https://www.wipo.int/edocs/lexdocs/laws/en/gh/gh010en.pdf >. [*Act 29*]

[91] *Act 30, supra* note 87.

[92] Joseph Appiahene-Gyamfi, "Crime and Punishment in the Republic of Ghana: A Country Profile" (2011) 33:2 Int J Comp and Applied Criminol Justice 309 at 314, online: Taylor & Francis <https://doi.org/10.1080/01924036.2009.9678810> (where he observed that over 80% of the criminal cases in Ghana tend to be non-serious offences that carry penalties not exceeding two years'

respect to the sanction of death, it is important to clarify that such sentences are routinely commuted to life sentences. In fact, the last execution in Ghana took place in 1993.[93] *Act 30* comprehensively sets out pre-trial, trial and post-trial processes for criminal justice administration in Ghana. Individuals with prior criminal record face increased punishment.[94] Thus, for a summary conviction crime, the judge has discretion to impose twice the maximum punishment on a second time offender.[95]

Ghana recognizes four categories or degrees of offences.[96] First, there are capital offences.[97] Those have the maximum penalty of death[98] and include murder[99] and treason.[100] Secondly, first degree felonies are divided into those, such as rape,[101] punishable by up to five to twenty-five years imprisonment, and those for which the punishment is unspecified and offenders are liable to life imprisonment.[102] These include

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imprisonment or fines of less than $50 or both and that most of the offences recorded by the police are non-serious or misdemeanors); see also Sandra Coffie, "Non-Custodial Sentences And Its Relevance *[sic]* in The Justice System" (2004) 6:3, online: Ghana Center for Democratic Development <http://www.cddgh.org/publications/Briefing-Papers/Vol-6-No-3-NonCustodial-Sentences-And-Its-Relevance-in-The-Justice-System-By-Sandra-Coffie> (this researcher decries existing Ghanaian sentencing policy that sees the imposition of "custodial sentencing as a matter of course")[*Coffie*]; Ghana News Agency, "Chief Justice lauds POS Foundation on non-custodial sentencing bill", online: Ghana Business News < https://www.ghanabusinessnews.com/2018/10/11/chief-justice-lauds-pos-foundation-on-non-custodial-sentencing-bill/> (Chief Justice lauded draft Bill produced by the POS Foundation as a means of reducing the use of imprisonment as a form of punishment for non-serious offences); *Seidman & Edison, supra* note 4 at 76; *Gyamfi, supra* note 38 at 101.

[93] Amnesty International Report 2016/2017, "Death Penalty: Countries abolitionist in practice", online: Amnesty International <https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf>.

[94] *Act 30, supra* note 87 at s 300; *Punishment of Habitual Criminals Act 1963* Act 192 (Ghana).

[95] *Act 30*, *supra* note 87 at s 300.

[96] *Act 30*, *supra* note 87 at s 296.

[97] *Act 30*, *supra* note 87 at s 245.

[98] *Act 30*, *supra* note 87 at s 304 (3) (a), (b), (c), (d).

[99] *Act 29*, *supra* note 90 at s 49.

[100] *Act 29*, *supra* note 90 at s 180.

[101] *Act 29*, *supra* note 90 at s 97.

[102] *Act 30*, *supra* note 87 at s 296(1).

the use of offensive weapons[103] and manslaughter.[104] Thirdly, there are second degree felonies[105] that attract up to ten-year prison terms, including causing harm,[106] threat of death[107] and robbery without an offensive weapon.[108]

Germane to this work is the fourth category of offences explicitly classed as misdemeanours. These attract, at most, three years in prison where the punishment is not specified.[109] They include those heard in the district courts, although their jurisdiction is generally limited to sentences of a maximum of two years. District courts can, however, hear any other offence (except an offence punishable by death or by imprisonment for life or an offence declared by any enactment to be a first degree felony) if the Attorney-General decides that having regard to the nature of the offence, the absence of circumstances which would render the offence of a grave or serious character and all other circumstances of the case, the case is suitable to be tried summarily.[110] For this reason, some misdemeanours are heard in the High Court.

Beyond these statutorily defined categories of crime, there is the informal one of "minor offence," popularly referred to by stakeholders of the Ghanaian criminal justice system (police, prisons officials, and judiciary) as a petty offence (henceforth known as a minor

[103] *Act 29*, *supra* note 90 at s 70.
[104] *Act 29*, *supra* note 87 at s 50.
[105] *Act 30*, *supra* note 87 at s 296(2).
[106] *Act 29*, *supra* note 90 at s 69.
[107] *Act 29*, *supra* note 90 at s 75.
[108] *Act 29*, *supra* note 90 at s 149.
[109] *Act 30*, *supra* note 87 at s 296(4).
[110] *The Courts Act* (Ghana) *1993,* Act 459 at s 48. [*Courts Act*]

offence).[111] The classification of offences in Ghana does not explicitly include the category of "petty or minor".

In sum, imprisonment is available and, as will be shown, it is used for almost all offences, including for first time offenders within the "minor" category. In between, judicial authorities may exercise very limited discretion according to the gravity and context of the offence.

2.9 Minor offences

Of central importance to the discussion in this thesis is the concept of 'minor offences.' It is argued that sentencing for this category of offences in Ghana, must be reformed to make it non-custodial and community-based for the most part, as the current regime of handing down custodial sentences has resulted in the overuse of incarceration, a situation that has led to overcrowding in the prisons. [112] The discussion of this concept begins with the treatment of such offenders in other jurisdictions. Afterwards, the focus

[111] The Daily Graphic ,"Decriminalising and declassification of Petty Crimes in Ghana" (June 14, 2018) (The Ghanaian national newspaper, reported on the launch of a research report that called for offences such as petty stealing, unlawful entry, unlawful assembly, negligently causing harm, loitering and general nuisance to public order to attract alternative sentencing. Present at the launch were the Commissioner of the Ghanaian Commission on Human Rights and Administrative Justice, representatives of the Police, legal Aid, the Attorney-General's Department, Ministry for the Interior and Prisons were there in support. In fact, the head of the public law department of the Ghana Institute of Management and Administration (GIMPA) law school argued "we found out that there is no clear-cut definition for petty offences in Ghana. But these petty offences affect people who are vulnerable and poor in society") online: The Daily Graphic < https://www.graphic.com.gh/news/general-news/decriminalise-petty-crimes-justice-sector-stakeholders.html>; HJAN Mensa-Bonsu, "Non-custodial offences- the need for reform at the pre-trial stages, Seminar on the treatment of Offenders" (1989-1990) 17 RGL 138 at 181 (the writer lists the following as possible candidates of this category: assault(without grievous bodily harm), traffic offences, riot and unlawful assembly, gaming, prostitution and other offences such as breach of the peace, nuisance, loitering like those found under section 296 of Act 29, 1960.) [*Non-custodial offences- the need for reform at the pre-trial stages*]

[112] *Coffie, supra* note 92.

is on Ghana so as to draw a picture of what could constitute minor offences using statistics, jurisprudence and academic thought.

2.9.1 Minor Offences in Other Jurisdictions

Other jurisdictions, such as Kenya, Uganda, Canada and the United Kingdom, provide clearer criteria for delineating minor offences. Some of these features could be transplanted into the Ghanaian context, as discussed in detail later.

2.9.2 Kenya

Beginning with Kenya, its section of the International Commission of Jurists defines minor offences to be "minor criminal acts which attract less severe punishment and are of a lower level of seriousness compared to felonies."[113] Although this definition appears to be rather circular, they explain that minor offences are “usually punishable by a relatively small fine and/or a short term of imprisonment” and that they are usually accompanied by summary trial.[114]

In Kenya,[115] crimes carrying a maximum of 3 years’ imprisonment are the ones that can elicit two alternative modes of punishment: first, community service orders, that is an order by a judge for an offender to work within the community in a particular time frame, in lieu of punishment; and second, probation orders, that is an order by a judge for an offender to be of good behaviour for a certain length of time and to report periodically

[113] International Commission of Jurists at 3, online: International Commission of Jurists, Kenya Chapter <http://icj-kenya.org/pettyoffences/index.php/2016/04/03/concepts/>
[114] *Ibid.*
[115] Penal Reform International, “Alternatives to Imprisonment in East Africa” (2012) at 10, online: Penal Reform International < https://cdn.penalreform.org/wp-content/uploads/2012/05/alternatives-east-africa-2013-v2-2.pdf> [*PRI*].

to a probation officer who certifies to their good conduct. Offences in this category include common nuisance,[116] stealing,[117] traffic in obscene publications,[118] idle and disorderly conduct,[119] a person who for the purposes of trade, makes loud noises or creates offensive or unwholesome smells.[120]

2.9.3 England

The Crown Prosecution Service of England[121] divides minor offences in two categories. First, they note those "which, by their very nature, are minor."[122] This category of offence then could be considered to be perhaps, petty. The other category concerns those that are not, by their nature minor, but based on the facts of the case, may be considered as minor. If an offence is considered minor by its nature, then the elements of that crime can be considered just above the *de minimis* threshold to warrant punishment, but not grave enough to incur the higher forms of punishment such as imprisonment. In cases involving minor offences, a decision to prosecute may have severe ramifications if the prosecution submits a disproportionate response to the offence. This means that if the impact of the minor offence in question is disproportionately low compared to the cost burden imposed on the criminal justice system, and the courts can only impose a nominal

[116] *The Kenyan Penal Code* (Kenya) (Cap 63) at s175.
[117] *Ibid* at s275.
[118] *Supra* note 116 at s 181.
[119] *Ibid* at s 182.
[120] *Ibid* at s 193.
[121] The Code for Crown Prosecutors, Director of Public Prosecutions, Crown Prosecution Service, CPS Communication Division Rose Court 2 Southwark Bridge London, SE1 9HS, England, online: Crown Prosecution Service <https://www.cps.gov.uk/legal-guidance/minor-offences> (this document sets out principles Crown Prosecutors should follow to make decisions on cases under authority of section 10 of the *Prosecution of Offences Act 1985.)*
[122] *Ibid*.

sentence, after reviewing the case, the Prosecutor may decide not to prosecute after a review of the case.[123] Public interest is also considered before the pursuit of a particular case.[124]

A decision to prosecute a minor offence is, therefore, a serious step and should only be taken after the reviewing prosecutor has considered whether the offence can be disposed of in an alternative way (which includes not taking any action), and concludes that a prosecution is the most appropriate point of disposal of the case.

The exercise of prosecutorial discretion in common law systems, such as Ghana[125] and Kenya, was discussed by a group of magistrates who observed that police prosecutors are usually limited to less serious offences and act as representatives of the Attorney-General or the Director of Public Prosecution. The police prosecutor of a minor offence screens cases to determine whether to prosecute or not on the basis of sufficiency of evidence.[126] One can only hope that they consider public interest and the cost as well of full prosecution of relatively minor offences that could be better dealt with within the community by probation and community service.

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[123] *Ibid.*

[124] *Ibid.*

[125] Moses Aggawena, *An Assessment of the Criminal Justice System of Ghana: Perspectives of Police Prosecutors* (Masters Degree, Griffith University, 2011) [unpublished] (this researcher found that there are no formal guidelines for them to follow, there have been some suggestions of corruption against Ghanaian police prosecutors, and some decisions are taken based on the prosecutors absolute discretion which could lead to miscarriage of justice.)

[126] Group 2, "The Role of Prosecution in the Screening of Criminal Cases," 326 at 330-331, 107th International Training Course, Reports of the Course, online: United Nations Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders <https://www.unafei.or.jp/publications/pdf/RS_No53/No53_30RC_Group2.pdf >.

The preceding survey of these countries is meant to consider whether they have a "better solution approach"[127] to the "minor offender" characterization or categorisation from which Ghana may learn. What emerges is that the features that these other common law jurisdictions look for are that the offences carry up to three years imprisonment, and generally, are seen as being of a low level of seriousness. This malleability characterises what minor offences may be in Ghana. This is considered next.

2.9.4 Minor offences in Ghana

In Ghana, the categories of offences which could be catalogued as minor are not well defined. However, what constitutes a minor offence in Ghana may be reduced to certain features, based on the jurisdiction of the court. As previously indicated, most minor offenders are brought before the district court. The district court is authorised by the *Courts Act*[128] to have jurisdiction over offences punishable by imprisonment not

[127] Mark van Hoecke, "Methodology of Comparative Legal Research" (2015) online: <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001#content_RENM-D-14-00001.ID2213-0713_0020> (offers a "toolbox" methodology for defining the paramaeters of comparative legal research) as I set out to do in this thesis.

[128] *Courts Act, supra* note 110 at s 48 (Jurisdiction of District Court in Criminal Matters. (1) In criminal matters a District Court has jurisdiction to try summarily— (a) an offence punishable by a fine not exceeding 500 penalty units or imprisonment for a term not exceeding 2 years or both; (b) any other offence (except an offence punishable by death or by imprisonment for life or an offence declared by any enactment to be a first degree felony) if the Attorney-General is of the opinion that having regard to the nature of the offence, the absence of circumstances which would render the offence of a grave or serious character and all other circumstances of the case, the case is suitable to be tried summarily; (c) an attempt to commit an offence to which paragraph (a) or (b) of this subsection applies; (d) abetment of or conspiracy in respect of any such offence. (2) Subject to the other provisions of this section, a District Court shall in the exercise of its jurisdiction in criminal matters not impose a term of imprisonment exceeding 2 years or a fine exceeding 500 penalty units or both. (3) A District Court does not have jurisdiction to try an offence under paragraph (b), (c) or (d) of subsection (1) where the enactment creating the offence has prescribed in relation to the offence a minimum penalty that exceeds the penalty permitted to be imposed by a District Court under subsection (2). (4) Where under any enactment increased punishment may be imposed upon any person previously convicted of a crime, a District Court may impose the increased punishment, or twice the maximum punishment prescribed by

exceeding two years or a fine not exceeding 500 penalty units,[129] or both. Also considered are summary offences (any offence punishable on summary conviction under any enactment).[130] The district court[131] can also impose increased punishment or twice the maximum punishment on an accused person with a previous conviction; that is, when the accused is described as "known". To be known means that the offender is either a recidivist or a repeat offender. In effect, the fact that the court in question has jurisdiction to consider the offence identifies that offence as a relatively minor one with the ability to impose a prison sentence of up to three years. As already noted, the district courts account for the largest number of committals to prison.[132] Thus, a minor offence could be defined on the basis of which court has jurisdiction to entertain it and the sentence that it is authorised to impose, in this case, the district courts.

Beyond this starting point, some Ghanaian scholars acknowledge that the reality is more nuanced and better criteria will be required to more precisely identify and classify offences. In Ghana, it is routine to sentence offenders determined as involved in the theft of even small quantities of foodstuff to imprisonment within the district courts. On minor offences, Mensa-Bonsu observes:

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subsection (2) whichever is the lesser. (5) The Attorney-General may by legislative instrument amend the amount or value specified in subsections (1) and (2) of this section.")

[129] 12GHC or CAD 3.30, the Ghana cedi has kept on changing due to the volatility of the Ghanaian economy.

[130] *Act 29, supra* note 90, interpretation section.

[131] *Act 30, supra* note 87 at s300; *Courts Act, supra* note 110 at s 48 (4).

[132] Judicial Service of Ghana, "2015/2016 Annual Report' at 13, 72-73, online: Judicial Service of Ghana <https://judicial.gov.gh/annualrep.pdf> (the page also points out that the district court makes up the largest number of courts in the country and statistically handles the largest number of cases.)

> …The offences that are dealt with here are those classified by the police as being the petty offences most frequently handled by them. These include assault (without grievous bodily harm), traffic offences, riot and unlawful assembly, gaming, prostitution, and other offences. (The latter are usually offences such as breach of the peace, nuisance, loitering and offences under section 296 of the Criminal Code, 1960 (Act 29).[133]

Prima facie, these offences may look minor, but their potential to be serious is suggested by the offences themselves - assault and riot, for example. In the end, in fact, it is a challenging task to identify clearly what in Ghanaian criminal law comes within the category of minor offences. It may thus be observed that a clear definition or identification of what a minor offence is, would help judges to decide whether a case before them is minor and could be dealt with alternatively or otherwise. Arguably, they may be more likely to order an alternative and appropriate way of dealing with the offence rather than through a procedure that may end up in a prison sentence.

2.10 Minor Offences versus Misdemeanours

As stated before, the closest grouping to this conceptualization would be a misdemeanour under Ghana's *Criminal Code, Act 29.* However, to characterize all misdemeanours as minor offences is deceptive. First, some misdemeanours are punishable by up to three years in prison, and others attract a maximum of two years imprisonment. Those that attract three years are still in the purview of the district court

[133] *Non-custodial offences- the need for reform at the pre-trial stages, supra* note 111.

although they can also be heard in the high court. Second, some misdemeanours, such as corruption, a very serious criminal offence (at varying degrees of depth), could attract a higher categorisation than it currently does.[134]

It should be noted that certain offences considered serious under traditional law, also made their way into the criminal law of Ghana and are classed as misdemeanors, although they could be categorized as minor offences. These include playing the drum to insult or annoy a neighbor, or behaving irreverently at a funeral. They are specifically listed as criminal in the *Ghanaian Criminal Code.*[135]

2.11 Beyond the Code: Scholarly Opinion and Procedural Rules on Minor Offences

[134] *Act 29, supra* note 90 at s239; *Act 30, supra* note 87 at s260 (these are confusing legislation, corruption is currently classified as a misdemeanour under *Act 29* and a felony under *Act 30* attracting imprisonment of up to 25 years), this is because it "…holds back economic growth, increases the cost of doing business, reduces revenue to the state, leads to capital flight, and inflates the cost of running the government, it also results in a loss of legitimacy and respect for legally constituted authority", in "The Budget Statement and Economic Policy of the Government of Ghana for the 2017 Financial Year," presented to Parliament on Thursday March 2, 2017 by Ken Ofori-Atta, Minister for Finance at 154, online: Citifm <http://citifmonline.com/wp-content/uploads/2017/03/2017-BUDGET-STATEMENT-AND-ECONOMIC-POLICY.pdf>; The Ghanaian Times, "Justice Emile Short: Make corruption felony offence," online: The Ghanaian Times (April 24, 2018) <http://www.ghanaiantimes.com.gh/justice-short-make-corruption-felony-offence/>, last accessed; "Corruption is already a felony offence -- Lardy Anyenini" (April 24, 2018) suggests, online: Joyfm <http://www.myjoyonline.com/news/2017/March-3rd/corruption-is-already-a-felony-offence-lardy-anyenini-suggests.php>.

[135] *Act 29, supra* note 90 at ss 285, 290, 291 and 296 (These are mostly found in Chapters 7, 8, and 9 of *Act 29 supra* note 87, offences in Chapter 7 are classified as offences against public morals and mostly criminalize prostitution, operation of a brothel, gross indecency and obscenity chapter 8 covers public nuisances comprising a range of acts, from hindering the burial of a dead body, playing the drum when under the circumstances, it is prohibited, and throwing rubbish in the street, chapter 9 deals with offences related to the use and treatment of animals.)

As indicated above, the classification of offences in Ghana does not include a category of "minor offences." An extensive search through the *Review of Ghana Law*[136] and the *University of Ghana Law Journal,* for instance, yielded practically no works on criminal law which considered the concept of minor offences.[137] Also, the 2018 crime statistics published by the Ghana Police Service only identified concrete offences involving human trafficking, narcotics, murder, rape, defilement and robbery, but nothing as "minor offences."[138] They did not refer to any offences which could be minor. It appears that implicitly, these are the criteria of offences they consider to be particularly serious. Interestingly, as will be seen in chapter 3 they do make reference in their annual reports to "crimes commonly committed." Reference to minor offences is, however, made only once in the Ghanaian Criminal Bench Book for district courts.[139]

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[136] Search done via heinonline which holds all the RGL and UGLJ publications. These are the only criminal law related reviews on Ghana and available in Ghana.

[137] *Non-custodial offences- the need for reform at the pre-trial stages, supra* note 111 at 180-181.

[138] Director-General/CID, Ghana Police Service, "Crime Statistics: Quantitative Data with Charts*,"* (2018) online: Ghana Police Service <http://police.gov.gh/en/wp-content/uploads/2018/05/CRIME-STATISTICS-PRESENTATION.pdf>; Joseph Appiahene-Gyamfi, "Urban crime trends and patterns in Ghana: The case of Accra, (2003) 31 J Crim Justice" 13 at 16, online: Sciencedirect <https://ac.els-cdn.com/S0047235202001964/1-s2.0-S0047235202001964-main.pdf?_tid=078151ca-fb1b-4322-b560-92cb91710f29&acdnat=1531932534_9cb06e928854a9b697afda2ec1b1f1a0)> (Appiahene-Gyamfi, studying the trends of crime in Accra, Ghana noted that of the 511, 549 cases that were reported between 1980 and 1996, over 85% of them were deemed non-serious offences);; Joseph Appiahene-Gyamfi, "Crime and Punishment in the Republic of Ghana: A Country Profile, 2009" (2011) 33:2 Int J Comp and Applied Criminol Justice 309 at 314, online: Taylor & Francis <https://www.tandfonline.com/doi/pdf/10.1080/01924036.2009.9678810?needAccess=true> (the writer observes in 2009 that non-serious offences constitute 88% of Ghanaian criminal cases and that they carry penalties not exceeding 2 years imprisonment or fines of less than $50 or both)

[139] Judicial Training Institute, *The Criminal Bench Book,* May 2011 at 7, online: Judicial Training Institute <http://www.jtighana.org/downloads/publications/CriminalBench.pdf>.

Second, the classification of offences as "minor" could also be denoted by the rules governing the prosecution of offenders and other procedural considerations[140] covering pre-trial, trial and post-trial stages of the criminal justice process. Section 2 of the *Criminal and other Offences (Procedure) Act, 1960 (Act 30)* sets out the mode of trial for offences. In general, the section provides for summary trials for less serious offences (including misdemeanours), trial on indictment for more serious ones (including first-degree felonies such as murder and subversion), and a 'hybrid/alternative' system which allows for the use of either mode of trial. *Act 29*, however, does not always make the choice of the mode of trial commensurate with the gravity of the offence, though admittedly, the police prosecutor might make this choice. This replicates the Canadian category of hybrid offences.[141] On this point, Twumasi observes as follows:

> Indictability of an offence does not necessarily depend on the gravity of the offence. One offence may involve a huge sum of money, but it may be tried summarily while another offence involving a comparatively small amount of money may be tried on indictment. For example, in *Amadu Fulani v The Republic,*[142] the offence involved the theft of a staggering sum of ¢3,462 by means of unlawful entry, and the appellant was tried summarily, but in *Republic v Luguterah*[143] the appellant was tried on indictment on charges of conspiracy to steal and stealing involving the sums of ¢420 and ¢440 respectively.[144]

The *Criminal Procedure Code, 1960 (Act 30)* is the main body of substantive criminal law in Ghana and forms the basis for provisions for criminal sanctions. These constitutional and statutory prescriptions are supported by a body of case law developed by the

[140] *Act 30, supra* note 87 at s2.
[141] *Interpretation Act,* RSC 1985*,* c I-21, s34 (1) (a).
[142] *Amadu v The Republic* (1968) CC 67. (Ghana)
[143] *Republic v Luguterah,* Court of Appeal, Criminal Appeal Number 120/70, 29 January 1971, unreported.
[144] P K Twumasi, *Criminal Law in Ghana,* (Tema: Ghana Publishing Corporation, 1985*)* at 6.

superior courts.[145] The courts are strictly bound by the doctrine of *stare decisis.* It may be observed from *Act 29* that, whereas offences like rape, defilement and robbery can be classified as serious, they can also be punishable on summary conviction. On the other hand, an offence, such as insulting the national flag, is a misdemeanour but is punished by a term of imprisonment. In this sense, they are open to either a summary trial or trial on indictment in terms of section 2 of *Act 29*. Section 149(2) of *Act 29* indicates that the Attorney-General "shall in all cases determine whether the case shall be tried summarily or on indictment."[146]

The choice of punishment is discretionary, although extremely limited, as previously indicated, and left to the trial court with the help of police prosecutors and state attorneys who suggest a suitable sentence. It has been observed that "the sentences imposed by the courts admit of no systematic analysis; indeed they suggest that the judges have no clearly defined policy."[147] A search through Ghanaian case law has not located this statement in any sentencing appeals. Perhaps, Ghana could borrow a leaf from Canada where the Sentencing Commission observed that where the purpose of a sentence is rehabilitative, there may be no problematic disparity even if two accused persons receive very different punishments.[148]

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[145] There does not appear to be a terminological guidance from the Ghanaian superior courts.
[146] *Act 29, supra* note 90 at s 149.
[147] *Seidman & Edison*, *supra* note 4 at 82.
[148] Julian Roberts, *Empirical Research on Sentencing,* Canada Sentencing Commission, Department of Justice, Canada, 1988 at 40-41, online: Government of Canada publications < http://publications.gc.ca/site/archivee-archived.html?url=http://publications.gc.ca/collections/collection_2018/jus/J23-3-1-1988-eng.pdf>.

Afreh also comments on the correlation between crime, punishment and its impact. He argues that the seriousness of an offence should inform the nature and extent of punishment. Drawing on the *Criminal Justice Act, 1991* of England, he writes:

> … offence seriousness is the crucial threshold that must be crossed before a term of imprisonment can be imposed…. Our courts in practice consider the circumstances of an offence before imposing a sentence. But in the absence of statutory criteria, some courts pass terms of imprisonment when a fine or something else will do. Recently it was reported that a heavily pregnant woman was sent to prison for insulting behaviour. She delivered within a few hours of arrival in prison. A statutory criterion for offence seriousness will make such sentences impossible. [149]

"Statutory [criteria] for offence seriousness"[150] do not exist in Ghana. If they did, they would assist in spelling out what offences could merit custodial or non-custodial sentences. These criteria could encompass gravity or seriousness of the offence and victim impact, similar to the system in the United Kingdom. Also, in Kenya, as a condition for imposing community-based sanctions, the judge is given a pre-sentencing report or social inquiry report containing information on the gravity of the offence in question as well as victim impact.[151] Kuenyehia[152] considers minor offenders to be largely recidivists

[149] D K Afreh, "The Prisons and Sentencing Policies" (1996-2000) XX RGL 153.
[150] Richard Kuuire, "Non-Custodial Sentences and Alternatives to Imprisonment" 20 RGL (1996-2000) at 311.
[151] Penal Reform International, "Community service and probation for women: a study in Kenya" at 8, online: Penal Reform International < https://www.penalreform.org/resource/community-service-and-probation-for-women-a-study/>
[152] Akua Kuenyehia, "Problem of Recidivism in the Ghanaian Penal System," (1978 – 81) XV UGLJ 84 (She writes: "Research elsewhere has shown that contrary to the popular stereotype of a persistent offender, few of these prisoners were prone to violence and hardly any were efficiently organised professional criminals. The majority of them were shiftless work-shy characters for whom petty stealing represented the line of least resistance. Most of the habitual offenders in prison will seem to fit into the above description. Most of them spend their lives in and out of prison committing petty thefts like stealing foodstuffs or fowls, goats and the like. The Daily Graphic of Friday 23 June, 1978 carried a front-page

who habitually enter prison for stealing such things as foodstuffs, fowls and goats and for the extortion of small amounts of money.

In summary, for the purpose of this work, minor offences in Ghana could be defined on the basis of the court of jurisdiction, the mode of trial, gravity of offence and the fact that these offences are directly exported from Ghanaian traditional law. However, this proposed definition is for convenience. It is not clear cut and definitive.

2.12 Conclusion

The foregoing discussion allows for the observations that, as far as prosecutorial processes and procedural safeguards are concerned, Ghana's substantive and procedural criminal laws offer no clear directions for defining a minor offence. However, the concept appears to be generally accepted even without a clear and definitive legislative meaning in Ghana. Perhaps, the UK designation of "those which, by their very nature, are minor or those that are not, by their nature minor, but based on the facts of the case, may be considered as minor" could be borrowed. As well, it was shown that the particular offences implicated by this designation could be identified by at least four features. First, the fact that they go before the district courts and the sentences that attach to them are

story of a 26-year-old unemployed man described by the police as a habitual fowl thief who had been sentenced to 10 years' imprisonment with hard labour for stealing yet another fowl. He had three previous convictions. A 40-year-old driver, with two previous convictions was sentenced to 18 months' imprisonment with hard labour by a magistrate court for fraudulently extorting an amount of ¢320 from a baker under the pretext of supplying her with flour.") [*Kuenyehia*].

either fines worth the equivalent of CAD 2000 and/or terms of imprisonment of up to three years may be helpful. Also, certain conduct is considered criminal or offensive because it is not in accord with contemporary Ghanaian social mores (traditional implants) although they do not harm the larger society in any significant way (seriousness of offence). These include a duty to prevent a felony[153] and behaving irreverently at a funeral.[154] Another feature could be on the basis of mode of trial. Consequently, to punish such conduct with imprisonment opens the door to unnecessary limitations to the freedom and well-being of the offender. Imprisonment for minor offences should not be the default response of the judiciary. Alternatives such as community-based sentencing should be considered so even though the offender is held accountable for the offence committed, it is done in a way that facilitates reformation and is more in accordance with traditional Ghanaian principles of sentencing, in particular, in view of the low level of seriousness of most of the offences, as well as the socio-economic factors that impel many of them. [155]

[153] *Act 29, supra* note 90 at s 22.
[154] *Supra* note 135.
[155] *Kuenyehia*, *supra* note 152 (suggests that a good number of minor offenders are victims of economic hardship and the high rates of recidivism among minor offenders speak to the presence of conditions that promote this problem. However, this writer admits that we cannot discount the fact that socio-economic factors may also impel very serious offences.)

CHAPTER 3 OVER-INCARCERATION IN GHANA FOR MINOR OFFENCES: THE JURISPRUDENTIAL AND STATISTICAL EVIDENCE

3.1 Introduction

This chapter discusses the over-use of imprisonment in Ghana, arguing that this practice is used for offences that should not be sanctioned by custodial sentences. As pointed out in chapter 2, in theory, Ghana's penological philosophy includes reformation as an objective.[1] However, in practice, the operation of Ghana's criminal justice system does not achieve this reformatory objective. There was no formal prison system in indigenous Ghanaian society.[2] During British colonial rule in the Gold Coast, criminal justice policies were dominated by a conscious strategy to physically restrain bodies in a bid to ensure control of individuals and land in order to consolidate control of colonial territories.[3] Thus, there were no expectations of reformatory results from punishment for criminal offences. The importation of the British model of incarceration into the Gold Coast was

[1] Robert B Seidman & J D Abaka Edison, "Ghana: The System of Penal Legislation" in Alan Milner, ed, *African Penal Systems* (New York: Frederick A Praeger, Inc, 1969) at 447 notes that Mr Boateng, Minister of the Interior stated government prison policy as "one of reform and not necessarily to wreak vengeance upon people who sometimes through their unfortunate background and circumstances have found themselves behind bars." [*Seidman & Edison*); Akua Kuenyehia, "Problem of Recidivism in the Ghanaian Penal System," (1978) Vol XV UGLJ 81 at 84, Mr Kofi Baako, then leader of the house in Parliament during the debates prior to the passing of the Act said: "We say that a person needs rehabilitation. His punishment should not just be punitive. It should be reformative and so he goes on the farm to farm himself and make a living." This was in reference to plans to use prisoners on the then newly established State Farms.

[2] See overview of traditional Ghanaian penology in this Chapter 2 of this thesis.

[3] Florence Bernault, 'The Politics of enclosure in Colonial and Post-Colonial Africa', in Florence Bernault, ed, *A History of Prison and Confinement in Africa*, (Portsmouth, NH: Heinemann, 2003) at 15; David Killingray, 'Punishment to Fit the Crime? Penal Policy and practice in British Colonial Africa', in Florence Bernault (ed), *A History of Prison and Confinement in Africa*, (Portsmouth, NH: Heinemann, 2003) at 97-113.

for the colonial need to "'control' and 'civilize' the local population, leading the aims of imprisonment to be more political than penal, with a focus on punishment/severity, productivity/efficiency and reform/welfare."[4] This means that the treatment of prisoners changed along with the rise of anti-colonial and African nationalist sentiments. In the early colonial days, British merchants established harsh [private] prisons ostensibly to carry out their mandate of "meeting the demands of sound men to keep the multitude in order by way of exemplary deterrence."[5] It is clear then that the purpose of colonial prisons was not reformation but rather to provide a pool of cheap and forced labour.[6] Even then, there was some evidence of prison overcrowding through the over-use of imprisonment.[7] Since those times, not enough progress has been made toward rehabilitating or reforming prisoners.

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[4] *Seidman & Edison*, *supra* note 1 at 433; S Hynd, ""Insufficiently Cruel" or "Simply Inefficient"? Discipline, Punishment and Reform in the Gold Coast Prison System c 1850-1957" at 3, online: University of Exeter <https://ore.exeter.ac.uk/repository/bitstream/handle/10871/32069/Hynd%20-%20Gold%20Coast%20Prisons%20translating%20penal%20cultures%20draft.doc?sequence=2>.

[5] *Seidman & Edison, supra* note 1 at 433 (this quotation highlights the perception at the time that the natives were simple-minded savages who could not be relied on to keep order by themselves, this group of merchants. *Seidman & Edison* record, "without a whistle of formal authority, exercised criminal jurisdiction not only within the Forts, but frequently outside them, achieving compliance by the power of his personality and, when necessary, the strong red-coated right arm of his soldiery", in fact, one of the chiefs complained to the governor of their leader's methods, that he was "A white face, a red jacket was … a terror on the Gold Coast" at 465.)

[6] Kwabena O Akurang-Parry, "Colonial forced Labor Policies for Road-Building in Southern Ghana and international Anti-Forced Labor Pressures, 1900-1940" (2000) African Econ History, 28:1 at 1-25, online: < Researchgate https://www.researchgate.net/publication/274189029_Colonial_Forced_Labor_Policies_for_Road-Building_in_Southern_Ghana_and_International_Anti-Forced_Labor_Pressures_1900-1940>.

[7] Robert B Seidman, "The Ghana Prison System: An Historical Perspective" (1966) 3:89 UGLJ 121 at 106 (in fact, this state of affairs introduced the seeds of contradiction between the Ghanaian correctional tradition and English common law practices on dealing with offenders) [*Seidman*]; *Seidman & Edison*, *supra* note 1 at 434 (notes that on the death of his sister in 1834, the Chief of Denkyira in accordance with royal funeral custom, sacrificed 85 persons. Maclean fined him heavily, A trader wrote to the Colonial Office, warning them that fining and imprisonment would not stop the performance of certain customs but will only drive them underground;
"They know not that they are committing a crime. Their money is taken from them, and they are irritated at the circumstance; they believe the object sought is only their gold, for the attainment of which the

The discussion begins by arguing that the very nature of some minor offences should mean that this class of offenders should be presumptively punished in a community-based manner to allow for their effective reformation as far as that is possible, given the admittedly low moral culpability for some offences. It is true that crime is crime, but the severe nature of punishment imposed for certain crimes results in negative consequences. Next, the discussion draws attention to the latest statistical information available from the Ghana Prisons Service and Police websites indicating the number of offenders in prison for relatively minor offences, as against the number of those imprisoned for much more serious offences. The discussion suggests that too many people are imprisoned. The study also argues that the prison environment into which offenders are sentenced does not allow for their reformation.[8]

3.1.1 Dominance of Incarceration in Criminal Sentencing in Ghana

The discussion first establishes that there seems to be anecdotal agreement that incarceration is used too often to punish minor offenders. Those who hold this view include academics, members of the Ghanaian judiciary and United Nations officials. Following this, statistical and related information is utilized to argue that the anecdotes cannot be lightly discounted. Finally, it is argued that what Ghana must heed, in view of the adverse outcomes of over-incarceration on its economy and society, is to reform the

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other is a mere excuse. Milder measures should, in the first instance, be resorted to. You are dealing with a nation, not an individual. They should be reasoned with, which, aided by the assistance of their friends in endeavoring to convince them of their error, would in time succeed with these people as it has with others.")

[8] *Seidman & Edison*, *supra* note 1 at 447.

tools utilized to punish minor offenders to set them on a course of reformation and rehabilitation. This approach is also demanded by international rules and declarations.

3.2 Judicial Over-Reliance on Imprisonment

The United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment observed in 2014 that there was over-reliance on excessively lengthy custodial sentences in Ghana.[9] Agbesi has also observed that there is an overuse of imprisonment by the judiciary in Ghana.[10] He[11] points to the fact that a third of convicted offenders are imprisoned for stealing without violence; that about 80% are serving not more than two years' imprisonment; and that more than 55% of convicted prisoners are first time offenders. He also is concerned about the presence of debtors, persons with mental health issues, and pregnant[12] and nursing mothers in prison that serves as further proof of the overuse of imprisonment by the Ghanaian judiciary. The

[9] Office of the High Commissioner, United Nations Human Rights Office, "Ghana: Much remains to be done but UN expert welcomes steps taken to combat torture and other ill-treatment" Juan E Méndez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Ghana, A/HRC/25/60/Add1, 5 March 2014, online: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=2ahUKEwiRkubJ5qPdAhUyvlkKHcPxCK0QFjACegQICBAC&url=https%3A%2F%2Fwww.ohchr.org%2Fen%2Fhrbodies%2Fhrc%2Fregularsessions%2Fsession25%2Fdocuments%2Fa-hrc-25-60-add-1_en.doc&usg=AOvVaw0vLTc2ZuesikofKshKjkSy>.

[10] Edison Kwame Agbesi, "Causes and Effects of Overcrowding at Prisons: A Study at the Ho Central Prison, Ghana" (2016) 6: 5 Public Pol'y and Admin Research at 4, online: International Knowledge Sharing Platform <https://www.iiste.org/Journals/index.php/PPAR/article/viewFile/30692/31519> [*Agbesi*].

[11] *Ibid.*

[12] Ghanaweb.com, "Prof Mike Oquaye sets pregnant prisoner free" (July 29, 2018), online: < Ghanaweb https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Prof-Mike-Oquaye-sets-pregnant-prisoner-free-672809>; Graphic.com.gh, " 14 pregnant women in jail", online: <https://www.myjoyonline.com/news/2013/October-5th/14-pregnant-women-in-jail.php>.

presence of pre-trial detainees in prison can also not be discounted.[13] A Court of Appeals judge, Justice Clemence Honyenugah, affirmed that Ghanaian law says nothing about when to use non-custodial sentences, and that this gives judges no option other than to hand down prison sentences for minor offences.[14] As explained in chapter 2, judges are routinely limited by the law to choose between imprisonment or fine or both. Although the law states the existence of probation for example, it is silent on when it can be used. Judges are then limited in their discretion as the law does provide for amount of fine and, perhaps, the sentence length for specific offences. [15] This results in custodial sanctions being the routinely preferred means of disposal. The situation raises questions as to Ghana's adherence to international standards especially as an alternative like probation already exists but judges choose to apply it to only a few juveniles.

It must be recalled as pointed out in chapter 1, that Ghana's need to develop alternative sentencing tools is also a matter of international obligation. For example, by principles 1.2, 1.5, 2.3, 2.5 and 8 of the Tokyo rules,[16] Ghana is encouraged to make sufficient

[13] World Prison Brief, Institute for Criminal Policy Research "Ghana", online: Prison Studies <http://www.prisonstudies.org/country/ghana>. (13.8% of prisoners in Ghana are pre-trial detainees.)
[14] JoyFm News, "Decongesting Ghana's prisons: Judge wants fines for some convicts" (8 July, 2017), online: myjoyonline.com <https://www.myjoyonline.com/news/2017/july-8th/decongesting-ghanas-prisons-judge-pushes-for-fines-for-some-convicts.php> (A Ghanaian Judge of the Court of Appeals noted that "Ghana's laws are silent on non-custodial sentence, giving judges no option than to hand prison sentences to offenders, even for mild offences").
[15] *The Ghana Criminal Procedure Code*, 1960, Act 30 at ss 297, 299, 318, 353, 354, 356 online: World Intellectual Property Organization <http://www.wipo.int/edocs/lexdocs/laws/en/gh/gh011en.pdf> [*Act 30*].
[16] *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules),* 14 December 1990 GA res 45/110, 68th Plen Mtg (1990), online:< http://www.un.org/documents/ga/res/45/a45r110.htm>, (Principles 1.2, 1.5, 2.3, 2.5, 8). [*Tokyo Rules*]

provision for the use of alternative sentencing measures.[17] The African regional Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa[18] also encourages the development and implementation of alternative sentencing measures. But Ghana has not responded to these by way of revising its relevant legislation and sentencing guidelines.

3.3 Limits of Incarceration on Prisoner Reform

In the previous chapter, the main theories of punishment that dominate the legal system in Ghana with its strong British influences were considered, namely, utilitarian and retributive philosophies. Generally, imprisonment as punishment is meant to satisfy one or more of these goals.[19] Ultimately, the idea of punishment is for society to denounce the offence, ensure that prospective offenders are effectively deterred, and that the offender is given opportunity to reform or rehabilitate and, thus, to become eligible for reintegration into normal social life. Through all these, the goal of imprisonment is that society is protected via incapacitating the offender to control their behaviour and to ensure that there is no repetition of the offensive behaviour. Ideally, it is expected that the punishment will result in some reparation to the victim and the wider society because

[17] *Ibid* Principles 1.2, 1.5, 2.3, 2.5, 8.
[18] *Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa,* November 2003 ACHPR, Res 64 XXXIV 03 online: <http://www.achpr.org/instruments/ouagadougou-planofaction/> (Recommendations 1, 3, 6, 7).
[19] Tim Newburn, *Criminology* (Devon: Willan Publishing, 2007) at 518-524.

the offender shall have taken responsibility for the harm caused.[20] This is the ultimate goal of indigenous Ghanaian punishment philosophy, namely, the reform and rehabilitation of the offender.

However, this is not the vision of the current criminal system model. Evidence shows that the principles of denunciation and retribution appear to be highlighted when imprisonment is used, rather than reformation. This is worrying, especially in light of research that shows that recidivism may be on the increase in Ghana.[21] On the surface, at least, the evidence shows that prison sentences or incapacitation do not deter offenders.[22] Research from various jurisdictions that provide an overarching summary across offence categories in general offer some proof of this assertion.[23] In Australia,

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[20] *Seidman & Edison*, *supra* note 1 at 447.

[21] Alex Antwi, *Social Reintegration of Offenders and Recidivism in Ghana* (PhD Dissertation, University of Ghana 2015) [unpublished] at 106 online: <http://ugspace.ug.edu.gh/bitstream/handle/123456789/8364/Alex%20Antwi%20_%20Social%20Reintegration%20of%20Offenders%20and%20Recidivism%20in%20Ghana_2015.pdf?sequence=1> (here he notes that the percentage of recidivism in Ghana has been fluctuating from 21% in 2004 through to 19.3% in 2008 and went up to 22.2% in 2011. He acknowledged that "although crime statistics published by the GPS in their annual report include categories of convicts, any detailed information relating to the type of offense, frequency, geographical distribution as well as the age and sex of recidivists are usually excluded from the publications. As a consequence, changes over time in the levels and patterns of re-offending in Ghana are difficult to estimate. In addition, classified and tabulated facts relating to recidivism rates compiled not only by the GPS but also by the police and the courts suffer from inaccuracies because they are not representative of the entire repeated crimes in Ghana. Most recidivism rates go to the "dark figure" because there is no proper mechanism of identifying first offenders from re-offenders. The result is that the recidivism rates compiled by the GPS do not represent the true picture of re-incarceration in Ghana." The Ghana Prisons 2013 report recorded that 23% of inmates were recidivists.) [*Antwi*].

[22] Christine Glover et al, "Risk Factors of Recidivism: Lessons from Central Prison in Kumasi, Ghana" (2018) 5: e4744 Open Access Library Journal at 8-9, online: Open Access Library Journal <https://file.scirp.org/pdf/OALibJ_2018102410194146.pdf> (these researchers found that as many as 80% of the respondents stated that this was their second time in prison.)

[23] Carolyn W Deady, "Incarceration and Recidivism: Lessons from Abroad" March 2014, online: Antion Casella <http://www.antoniocasella.eu/nume/Deady_march2014.pdf> (the author lists Australian Bureau of statistics, March 16, 2010, Irish Prison Service Recidivism Study, May 2013; The Japan Times "Reducing the Rate of recidivism," (July 8, 2013); Reconviction Rates in Scotland: 2010-2011 Offender Cohort,

there is a 39% recidivism rate within ten years of release. Ireland has a 62% rate of recidivism; Japan, a rate of 43%; Scotland a 50% recidivism rate; and the United States has a 52% rate. Within limits, this might be cautiously viewed as some evidence that prison sentences may provide access to "a social experience that deepens illegal involvement."[24] In Ghana, this is also generally acknowledged as the case.[25]

3.4 Incarceration vs. Occupancy Rates

It is easy to be skeptical of the premise of this thesis, that in Ghana, there is overuse of imprisonment by the judiciary. The skepticism may arise from the position Ghana occupies on the generally accepted unit of measurement -- incarceration rates. The

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Scottish Government, "Confronting Confinement," Commission on Safety and Abuse in America's Prisons, June 2006. Patrick A Langan and David J Levin, "Bureau of Justice Statistics Special Report, Recidivism of Prisoners Released in 1994" (2002), they found that 67.5% of those prisoners released were rearrested within three years), online: Bureau of Justice Statistics <https://www.bjs.gov/content/pub/pdf/rpr94.pdf>; London: Office of the Deputy Prime Minister, Social Exclusion Unit "Reducing Re-offending by Ex-prisoners, Summary of the Social Exclusion Unit Report" (2002) at para 3, online: <http://webarchive.nationalarchives.gov.uk/+/http:/www.cabinetoffice.gov.uk/media/cabinetoffice/social_exclusion_task_force/assets/publications_1997_to_2006/reducing_summary.pdf> (this particular study, commissioned by the British Government, found that more than half of released prisoners in 1997, were convicted of another crime within two years of their release.)

[24] Francis T Cullen, Cheryl Lero Jonson & Daniel S. Nagin, "Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science," Prison J Supplement to 91(3) 48S-65S at 60S, online: Sage Publications <http://journals.sagepub.com/doi/pdf/10.1177/0032885511415224> (they state that: "With some confidence, we can conclude that, across all offenders, prisons do not have a specific deterrent effect.")

[25] See Alex Antwi, "Inmate Subculture and Criminal Recidivism in Ghana," (2017) International Conference on Education, Development and Innovation online: International Conference on Education, Development and Innovation < http://www.incedi.org/wp-content/uploads/2018/06/146.pdf> [*Inmate Subculture*]; *Antwi*, *supra* note 21.

authoritative source of world incarceration rates is the *World Prison Brief,*[26] the only one of its kind. The *World Prison Brief* outlines the world's prison population rate from highest to lowest in a unique database containing monthly updates on the prison population data of most countries. Incarceration rates are calculated as the number of prisoners per 100,000 of the population of a country. Ghana is at number 202 with a prison population rate of 50 per 100,000 people, compared to a country like Canada with a ranking of 140 and a prison population rate of 114 per 100,000 prisoners. Even Kenya, the comparator country for this work comes in at number 143 with a rate of 111 per 100,000.[27]

These figures, however, do not give a completely accurate depiction of the nature and extent of the use of incarceration in a country like Ghana. A more accurate measurement of over incarceration could be by occupancy rate, where every prison with an occupancy of over 100% is automatically denoted as overcrowded.[28] The *World Prison Brief* also publishes occupancy rates and Ghana's place is 150.3%.[29] It should, however, be noted that this means of measurement also has its flaws. It has been observed[30] that official

[26] World Prison Brief, Institute for Criminal Policy Research, online: http://www.prisonstudies.org/world-prison-brief-data.

[27] India has a ranking of 213 and a prison population rate of 33. Yet there is severe overcrowding with an occupancy rate of 114. In fact, prison conditions there have been labelled as "frequently life threatening". See Jessica Jacobson, Catherine Heard & Helen Fair, Institute for Criminal Policy Research "Prison: Evidence of its use and over-use from around the world" at 13-14 online: <http://www.prisonstudies.org/sites/default/files/resources/downloads/global_imprisonment_web2c.pdf>. [*Jacobson, Heard & Fair*]

[28] Andrew Coyle, Catherine Heard & Helen Fair, "Current trends and practices in the use of imprisonment" (2016) 98(3) Int Review Red Cross 761 at 771.

[29] World Prison Brief, Institute for Criminal Policy Research "Ghana" (September 30, 2018), online: Prison Studies <http://www.prisonstudies.org/country/ghana>. [*World Prison Brief-Ghana*]

[30] Warren Young & Mark Brown, "Cross-National Comparisons of Imprisonment, Crime and Justice" (1993) 17 at 1, online: JSTOR <https://www.jstor.org/stable/pdf/1147549.pdf?refreqid=excelsior%3A331a0bbe1364ef9aeae24cbd17bf

figures may be questioned on the basis that they do not present reality and may be used to give the wrong impression in order to paint a political system or government in a positive light. Using incarceration (prison population) or occupancy rates to measure prison overcrowding does not paint a reliable picture of the reality of the extent of imprisonment in Ghana. The reality as depicted in the 150.3% occupancy rate denoted by the *World Prison Brief* defends the point that incarceration in Ghana is high and the probability of prison overpopulation is high.

Incarceration rates are limited to the population of inmates confined in prison or other facilities under state jurisdiction. As previously noted, Ghana has a rate of 50 per 100000. Even though there is no information on conviction rates, it is acknowledged that in developing countries like Ghana, occupancy rates are generally high.[31] Young & Brown[32] think that the *World Prison Brief* figures aggregate the data and may be regarded as "rough approximations."[33] That is, they believe that such data does not paint a statistically reliable picture of the reality. Between *World Prison Brief* and Young & Brown, one may say Ghana's prisons are not overpopulated. But this writer's assertion, based on personal experience and anecdotal information, is that Ghana's jails are overcrowded and contain too many minor offenders.

f791> (they highlight their findings with respect to the use of official occupancy rates as received and published by the World Prison Brief, they question its reliability.)[*Young & Brown*].

[31] *Ibid.*

[32] *Ibid* at 6.

[33] *Ibid.*

Another difficulty is that the *World Prison Brief* only deals with prison figures for Ghana. Their data on remand prisoners does not differentiate between those who have not yet been convicted and are awaiting trial, and convicted prisoners awaiting sentencing. This discrepancy was identified by the Council of Europe as an obstacle to producing genuine figures on detention before trial.[34] In Ghana, time spent in remand does not always count toward sentencing. This is because case files and court warrants regularly go missing or, in the case of court warrants, they expire while prisoners are still being held.[35] However, pre-trial detention is within prison and they are counted as prisoners.

A look at occupancy rates tells another tale. According to the *World Prison Brief* occupancy rates in Ghana are currently at 152.5%;[36] Canada has a rate of 102.2%;[37] and Kenya has a rate of 201.7%.[38] Even if Ghana is not yet as overcrowded as other countries, it is still untenably overcrowded. For this reason, it will not be wise to wait until the figures reach crisis proportions to flag the problem. Even if more prisons are built, prison

[34] *Young & Brown*, *supra* note 30 at 12.
[35] Amnesty International, "Prisoners are Bottom of the Pile: The Human Rights of Inmates in Ghana" at 14, online: Amnesty International < https://www.amnesty.org/download/Documents/16000/afr280022012en.pdf> ("The fact that case files sometimes go missing was reported by prison officers, prisoners and lawyers. One long-term prisoner told Amnesty International that he was unable to initiate an appeal because his case records had been lost. Lawyers interviewed by Amnesty International said that official papers relating to individual cases were regularly lost. In 2009, Amnesty International recorded that the files of about 300 prisoners awaiting trial were reportedly lost, and another 300 prisoners were still being held after the expiry of their court warrant. The detainees were being held at Nsawam Prison while prison officials, courts and the police rebuilt the cases."); as at November 2018 remand figures were of 14,846.
[36] *World Prison Brief-Ghana, supra* note 29. (2018 figures.)
[37] World Prison Brief, Institute for Criminal Policy Research "Canada", online: Prison Studies <http://www.prisonstudies.org/country/canada> (latest figures date from 2015.)
[38] World Prison Brief, Institute for Criminal Policy Research "Kenya", online: Prison Studies <http://www.prisonstudies.org/country/kenya> (latest figures date from 2016.)

populations can expand to fill whatever space is available.[39] The evidence shows that "overcrowding is inextricably linked with the overuse of prison."[40] Determining whether or not a country has a problem with the overuse of imprisonment on the basis of incarceration rates exclusively is potentially problematic. For Ghana, this thesis isolates the point that the country's minor offenders are jailed far too often without much, if any, rehabilitation prospects.

The Pew Charitable Trusts and its Public Safety Performance Project[41] offers what may be considered a good snapshot of crime and punishment. Unfortunately, it has only been used to measure crime statistics in the United States. This project measures the ratio of

[39] *Young & Brown*, *supra* note 30 at 35 (for example, where they note that in the US, prison population increased with a prison construction program); "Criminal Justice Alliance, Crowded Out? The impact of prison overcrowding on rehabilitation" (2012) at 3, online: Criminal Justice Alliance < http://criminaljusticealliance.org/wp-content/uploads/2015/02/Crowded_Out_CriminalJusticeAlliance.pdf> (the coalition of 67 UK organizations note that between 1997 and 2010, the UK built about 26000 places but they presently 60% of the prisons being overcrowded.)

[40] *Ibid* at 3; American Civil Liberties Union (ACLU), "Overcrowding and Overuse of Imprisonment in the United States," Submission to the Office of the High Commissioner for Human Rights, May 2015, online: Office of the High Commissioner for Human Rights <https://www.ohchr.org/Documents/Issues/RuleOfLaw/OverIncarceration/ACLU.pdf>; *Jacobson, Heard & Fair, supra* note 27; Jimmy Nguyen, "A Comparative Study of Prison Overpopulation and its Consequences" (2012) Arthur Levitt Public Affairs Summer Research Fellow, online: Hamilton College <https://hamilton.edu/documents/Jimmy%20Nguyen%20Levitt%20paper.pdf>; European Committee on Crime Problems, "White Paper on Prison Overcrowding" June 30, 2016, online: Council of Europe <https://rm.coe.int/16806f993a>; United Nations Office on Drugs and Crime, "Handbook on strategies to reduce overcrowding in prisons" (2013) Criminal Justice Handbook Series at 9, online: United Nations Office on Drugs and Crime <https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf>; *Agbesi*, *supra* note 10.

[41] Pew Charitable Trusts, "Punishment rate measures prison use relative to crime" (2016), online: Pew Charitable Trusts <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/03/the-punishment-rate>;
Tom Meaher, "The tricky business of measuring crime and punishment" (2016) Justice Lab, online: The Marshall Project <https://www.themarshallproject.org/2016/03/23/the-tricky-business-of-measuring-crime-and-punishment>.

inmates to serious crime. To extend this project to Ghana where the majority of prisoners are minor offenders would highlight the point of this thesis -- that the overuse of imprisonment has led to high occupancy rates when there should be no such issue. For, as asserted throughout this project, this group of offenders are sent to prison for up to 3 years by judges who have little discretion in deciding other punishment options appropriate to their offences that are mainly impelled by daily socio-economic survival.

At this point in the discussion, it will be useful to consider the status of Ghana's prison population through available statistics and the criteria outlined earlier; court of jurisdiction, mode of trial, gravity of offence or direct import from traditional law.

3.5 Over-incarceration: The Statistical Evidence

In 2003, a leading Ghanaian criminologist noted that more than 85% of cases reported to the police were categorized as non-serious or summary offences and the rest as serious offences.[42] In 2009, he observed that over 80% of the criminal cases in Ghana tend to be non-serious offences that carry penalties not exceeding two years' imprisonment or fines

[42] Joseph Appiahene-Gyamfi, "Urban crime trends and patterns in Ghana: The case of Accra" (2003) 31 J Crim Justice 13 at 16, online: Sciencedirect < https://www.sciencedirect.com/science/article/pii/S0047235202001964#!>. [*Urban crime trends*]

of less than $50 or both and that most of the offences recorded by the police are non-serious or misdemeanors.[43]

A 2013 study using Suits index and regression analysis on data collected on theft[44] and robbery[45] in Ghana between 2005 and 2010 found, among others, that petty offenders are punished disproportionately for their offences by incarceration.[46] Armed robbery is not a petty offence because of the element of the use of force present in it. Theft, on the other hand here, refers to relatively minor theft. The *Criminal Code*[47] leads us to see that theft and armed robbery, irrespective of amount or impact, are not considered minor offences. However, the actual evidence on the ground, as shown in this study, tells us that the current management of minor theft presents a legitimate case for legislative reform. The punishment is not shown to fit the crime.

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[43] Joseph Appiahene-Gyamfi, "Crime and Punishment in the Republic of Ghana: A Country Profile" (2011) Int J Comp Applied Crim Justice 33:2 309 at 314, online: Taylor & Francis <https://doi.org/10.1080/01924036.2009.9678810>. [*Crime and Punishment*]

[44] *The Ghana Criminal Offences Code*, 1960, Act 29 at s 125 online: World Intellectual Property Organization < https://www.wipo.int/edocs/lexdocs/laws/en/gh/gh010en.pdf> (this provision defines stealing as dishonestly appropriating a thing of which the person is not the owner.) [*Act 29*].

[45] *Ibid* at s150 defines robbery as a situation where for the purpose of stealing something, a person uses force or causes harm to any person, or if they use any threat or criminal assault or harm to any person, with the intent to prevent or overcome their resistance of that or other person to the stealing of the thing.

[46] Wisdom Akpalu & Anatu Mohammed, "Socioeconomics of crime and discretionary punishment: the case of Ghana" Int J Soc Econs 40:2 116 at 124, online: < https://www.emeraldinsight.com/doi/pdfplus/10.1108/03068291311283599 > (they used convicted theft cases found on ghanaweb.com, a Ghanaian news site. They found that the judiciary assign a heavier penalty to petty theft relative to serious theft. In fact, they found that the least amount stolen GHC 0.35(0.098 CAD) attracted a jail term of 24 months; while the maximum amount of GHC 2,202,111.00 received a total prison term of 57 months (at 120).)

[47] *Act 29, supra* note 44 at s124. (It denotes stealing to be a second degree felony which attracts not less than ten years imprisonment. Armed robbery attracts term of not less than 15 years.)

The Annual Crime Statistics[48] published by the Ghana Police Service for 2017 presents some intriguing data. The police outlined what they termed "crimes commonly committed" separately from what they termed major offences[49] (murder, robbery, rape, defilement, and possession, use and distribution of narcotic drugs[50]).These "crimes commonly committed" are assault, stealing, threat of harm, fraud, causing damage, causing harm and unlawful entry. One could reasonably conclude that in some instances, these crimes could also be referred to as minor offences. These statistics do not explain what minor offences are or how many there may be. Given the Ghanaian criminological research presented in this thesis interpreting the statistics, it appears that many of the "commonly committed offences", while they can be minor or serious by name alone, based on the circumstances in which they were committed, appeared to be trivial in high proportions.[51] However, this is not to say that everything not classified by this Police Annual Report as a major offence is automatically a minor offence for the purposes of this thesis.

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[48] Ghana Police Service, Statistics and Information Technology Unit, "Annual Crime Statistics 2017" 1 at 36 online: Ghana Police Service <http://police.gov.gh/en/wp-content/uploads/2018/08/ANNUAL-REPORT-2017.pdf>.

[49] *Supra* note 48 at 6.

[50] The possession and use of narcotics in Ghana is a major crime. See *Narcotic Drugs (Control, Enforcement and Sanctions) Law, 1990 (PNDCL 236).*

[51] In the case of the *Republic v Dawutey Teye (*Case No.: 41/16. Begoro District Magistrate Court), the defendant was charged with defrauding by false pretense. Both the complainant and defendant were farmers in a village. The complainant needed farming land of 2 acres and the defendant promised to help and collected GHC100 (CAD 30) for that purpose. He then disappeared. In reading the judgement, the magistrate noted that the "Accused is hereby convicted and sentenced to a fine of 20 penalty units or in default serve three months' imprisonment. Accused is to compensate the complainant with a sum of GHC 200 (CAD 60) to meet some of the expenses incurred." This is fraud but the amount involved is trivial indeed. In fact, the compensation amount is even higher than the initial sum that the defendant was unable to pay. What then is the indicator that he would be able to pay that amount? These are poor farmers and the chances of the defendant paying the fine is possibly low and chances of his defaulting might be high, resulting in his imprisonment and this highlights the use and abuse of fines.

Research published by Gyamfi in 2003[52] provides some reasoning for the commission of these offences, and could also offer some understanding for why they could be labelled as relatively minor. Gyamfi observed that those offences against the person, such as threatening and causing harm incidents, accounted for 58% of Accra figures and tended to arise from chieftaincy issues, kinship, land/property, and inheritance-related disputes.[53] Assault (including common assault and battery, assault without actual battery, and imprisonment), resulted from "kinship, residential proximity or contractual obligations," usually triggered by children quarrelling over trivial matters which degenerates into fights between their older relatives taking up each child's cause.[54] Those neighbourhoods with the highest number of such incidents were those with the closest residential proximity (usually referred to as "compound houses") and communal sharing of toilets, baths and household utensils and accounted for over 44% of these incidents.[55] Further evidence is provided by his observation that the highest number of these incidents tended to take place between six and nine o'clock in the morning and between five and seven o'clock in the evening when most people were home.[56] He continued with the observation that funerals tend to be one of the sites for these

[52] *Supra* note 42, the author acknowledges the problems he encountered with data access from the Criminal Data Services Bureau of the Ghana Police Service although he made do with what he received from them after some delay.
[53] *Ibid* at 18.
[54] *Ibid.*
[55] *Ibid*.
[56] *Ibid*.

incidents because they are usually characterized by excessive drinking, and result in litigation over inheritance issues that produce "altercations, assaults, and mass arrests."[57]

The incidents identified above or similar, according to police reports, have yielded the statistical information below in terms of arrest and attempts to prosecute. Although these incidents fall into what might be considered as minor offences, these people end up going to prison when they could be corrected by community-based punishments.

Out of a total of 201,936 complaints received by the police in Ghana in 2017, 95% were registered as "true cases", or those deemed fit to warrant police attention; the remainder were refused. Of the "true cases," 24,350 were sent to court for prosecution. Seven thousand, seven hundred and fifty-three (7,753 - 31.8%) of these cases resulted in convictions and 707 (2.9%) in acquittals. At the end of 2017, 15,890 (65.3%) of the cases were still awaiting trial at the district courts. The report continued: "A total of 26,173 cases were closed as undetected, whilst 141,247 representing 73.7% of the total number of true cases were under investigation at the close of the year 2017." These figures are highlighted in the table below and include corresponding figures for the years 2014 to 2017. The only currently accessible prison inmate figures are for 2015.

[57] *Ibid*.

TABLE 1

TOTAL NUMBER OF CASES REPORTED	**2017 (201,936)**	**2016 (177,241)**	**2015 (186,434)**	**2014 (210,499)**
MAJOR OFFENCES	5225	4465	4715	4738
MAJOR OFFENCES COMMITTED BY INMATES			1464	
OFFENCES COMMONLY COMMITTED	166,502	169,553	155,910	177,850
OFFENCES COMMONLY COMMITTED BY INMATES			5156	

Available inmate statistics show that those major offences for which the courts of first instance are the high courts and other superior courts, produce only 21% of the total inmate population of 2015.[58] In other words, it appears that on the surface at least, major offences tend to result in less than a quarter of the Ghanaian prison population. For offences commonly committed, the total number constitutes a total of 5,156 out of a total number of 7,834, at a percentage of 66%. Other offences that could be added to those officially denoted by the police as commonly committed, include, in some cases at least, contempt of court (5), dishonestly receiving (69), driving offences (353), conspiracy

[58] Ghana Prisons Service, "Management of prisoners", online: Ghana Prisons Service <http://www.ghanaprisons.gov.gh/MANAGEMENT%20OF%20PRISONERS.pdf for latest figures (2015)> (also remand figures are not considered in this thesis, given the success of the Justice for All Project in steadily decreasing and clearing the backlog of those on remand.)

(412), defrauding[59] (97), possession of offensive weapon[60] (34) and possession of stolen property (23). Including these figures would raise the percentage of those that could possibly be punished alternatively to 78%. These figures bolster the point of this thesis, which is that currently, there appears to be some overuse of imprisonment for punishing minor offenders in Ghana.

3.5.1 Judicial Over-Reliance on Imprisonment: Evidence through the Cases

For those cases that are actually recognized for prosecution, as a matter of judicial pronouncement, minor offenders are sentenced to prison, or have fines[61] imposed on them that can convert to jail time if they are not paid. The illustrative cases listed below in the footnotes, most of which are from the District Magistrate Courts, provide evidence of the retributive and deterrence philosophies prevalent in Ghanaian judicial reasoning, and which lead to routine imposition of prison sentences for minor offences.[62] These

[59] *Supra* note 51.

[60] I have included this category because from my work with the Justice for All Project, those charged with this offence tended to be illiterate farmers and hunters who had no idea of the illegality of their usually locally manufactured weapons. In fact, if these weapons were used as part of robbery then the figures (34) should correspond to the number of inmates charged with robbery (501), also the inclusion of conspiracy is in terms of these listed offences and not major offences.

[61] 1 penalty unit is the equivalent of GHC 12 or CAD 3. S2 of the Fines (Penalty Units) Act 572, 2000, defines one penalty unit to be equal to the amount of cedis specified in the Act. It is the amount of money used to calculate pecuniary penalties for some statutes.

[62] *The Republic v David Atsu, Suit No: B10/5/2015,* Adjabeng District Magistrate; *The Republic v Stanley, Suit No: CC/11/2015,* Adjabeng District Magistrate; *The Republic v Wonder Tetteh Senehia, Case No. B7/11/16,* Tema-TDC District Court; the *Republic v Edmund Baidoo, John Kofi Addison, Case No. B7/8/16,* Tema-TDC District Court*; the Republic v Robert Nii Addy, CC/107/16,* Weija District Court 1*; the Republic v Veronica Dziwornu, Suit No.:313/16,* Ashaiman District Court*;* the *Republic v Isaac Quaye, Case No.: CC/063/16,* Weija District Court; the *Republic v Dawutey Teye Case No.: 41/16,* Begoro District Magistrate Court and *Kungua & Others v The Republic (1984-86) 2 GLR 489*.

cases were selected randomly from the judicial archives where they had been typed up and stored in hard copy. They come from district courts all over Ghana.

The statistical evidence is that over 70% of offences which have resulted in incarceration could possibly be minor offences.[63] The judges seem to be tied, in light of their pronouncements in each decision, suggesting that they have no option but to impose a fine and/or a jail term. Statements[64] made by these judges, among others, note how serious they consider the offences, which range from breach of the peace,[65] possession of stolen property,[66] assault,[67] unlawful damage,[68] and defrauding by false pretense.[69] This view was consistently repeated. The district courts which deal with these cases,

[63] *Crime and Punishment, supra* note 43 at 314.

[64] In *the Republic v Robert Nii Addy* the magistrate wrote: "in sentencing the accused person, I have taken into consideration the fact that the accused is a first time offender and has borne the cost of repair of 3 of the vehicles. I have taken into consideration also his plea for mitigation. I am also mindful of the increase in road traffic accidents in the country. I would therefore impose a sentence that would be both punitive and serve as a deterrent to others. I hereby sentence the accused person to a fine of 50 penalty units or in default 3 months' imprisonment for count 1. He is also sentenced to a fine of 25 penalty units or in default 2 months' imprisonment for each count for counts 2, 3, 4 and 5. All sentences are to run concurrently. Accused person is also to pay compensation of GHC100 to each of the injured persons in the accident." On the surface, this sentence appears to be a non-custodial one. However, if the defendant was unable to pay, he would end up in jail for 11 months.

[65] In *The Republic v David Atsu,* the magistrate concluded that because the victim was a married woman, the actions of the driver had affected her reputation.

[66] In the *Republic v Edmund Baidoo, John Kofi Addison,* the defendants were charged with possession of stolen property (two used cellphones). They were sentenced to 20 months of imprisonment. They also had to sign a bond of good behaviour for 12 months, or in default, serve 24 months in prison custody.

[67] In *the Republic v Robert Nii Addy* the defendant was charged with assault. He had advanced towards the complainant in a threatening manner with the intention of causing him harm and putting him in fear of imminent danger.

[68] *In the Republic v Veronica Dziwornu* where an estranged wife damaged her husband's screen door and was given the option of paying a fine equivalent to 60 penalty units or in default go to prison for three months

[69] In the case of the *Republic v Dawutey Teye*, the defendant was charged with defrauding by false pretense. Both the complainant and defendant were farmers in a village. The complainant needed farming land of 2 acres and the defendant promised to help and collected GHC100 (CAD 30) for that purpose. He then disappeared. In reading the judgement, the magistrate noted that the "Accused is hereby convicted and sentenced to a fine of 20 penalty units or in default serve three months' imprisonment. Accused is to compensate the complainant with a sum of GHC 200 (CAD 60) to meet some of the expenses incurred."

which in the characterization of this thesis are minor offences invariably impose prison terms or fines converted to prison terms. The punishment measures are, thus, always the same. This automatic fallback contravenes the Tokyo Rules, for instance Rule 2.6 which says that non-custodial sentences should be used in accordance with the principle of minimum intervention.[70] Though the cases cited above are not statistically representative, they provide examples on how pattern of jail time and fines are common as punishment for this class of offences at this level of court. Thus, it appears to support a pattern of overuse of imprisonment for minor offences in Ghana.

It is true as indicated by the cases cited that the magistrates make occasional references to alternative sentences, but they do not appear to choose those as the ultimate means of punishment in the cases they decide. The current law makes provision for such alternative punishments: absolute and conditional discharge,[71] payment of fines and/or compensation,[72] and probation.[73] They are currently either misapplied, as shown above, or not applied for reason of lack of funds for resources such as probation officers and infrastructure.[74] Obviously prison is more expensive than these alternatives would cost but providing them is additional cost which the criminal justice budget does not seem able to cover. Although they could result in substantial savings. Currently, probation is

[70] *Tokyo Rules, supra* note 16.
[71] *Act 30, supra* note 15 at s53.
[72] *Ibid* at s316.
[73] *Ibid* at s 355.
[74] http://justiceghana.com/blog/law-justice/a-death-of-ghanas-probation-service/. The author points to the writings of Professor Quansah, "The Ghana Legal System" (Black Mask Ltd: 2011) (where he notes that Ghana lacks the required infrastructure to effectively implement probation.)

only used for a few juveniles.[75] The introduction of community service, as will be shown shortly, will circumvent these problems, especially as the suggestions are modified to make up for resource shortfalls.

The Perils of Overincarceration

3.6 Overview

As pointed out earlier, pre-colonial traditional penal thinking did not consider imprisonment as a fruitful way of dealing with an offender.[76] Needless to say, the extent of the imprisonment of minor offenders is, as Coyle observes, "a very expensive use of scarce resources."[77] This is because, "it takes a large group of people out of society, to render them totally unproductive, and then have to feed, clothe and care for them."[78] His point is echoed by Nguema who notes that placing persons in prison, where they become societal responsibilities, "is seen as very odd in these cultures."[79] It seems that prison is used as a means of dealing with social problems. An important point to mention here is that there is a huge debate as to whether imprisonment levels have any effect on

[75] *Act 30, supra* note 15 at ss 352-369. (here the court is given the option of applying probation to all manner of offenders who deserve it, however, so far only young offenders appear to have had that opportunity); Joseph Appiahene-Gyamfi, *Alternatives to imprisonment in Ghana: A focus on Ghana's Criminal Justice System* (Masters Dissertation, Simon Fraser University, 1995) [unpublished] at 152 online: Simon Frazer University <summit.sfu.ca/system/files/iritems1/6650/b17416905.pdf>. (He notes that "there was no record found on adult probationers in Ghana.") [*Gyamfi*]

[76] See discussion on indigenous Ghanaian societies in chapter 2 of this thesis.

[77] Andrew Coyle, "Penal reform: Prisons in Africa" *West Africa*" (1993) 3971, 1977 as cited in Transcendental Meditation in Criminal Rehabilitation and Crime Prevention, (Psychology Press, 2003).

[78] *Ibid.*

[79] Isaac Nguema, *Forward* to Prison Conditions in Africa: Report of a Pan-African Seminar in Kampala, Uganda 5 (1997) Penal Reform International, 2001.

levels of crime.[80] To continue to increase incarceration as a means of sanctioning offenders will continue to cost society highly, but apparently offer minimal, if any beneficial returns.

If the current rate of resort to imprisonment as punishment for minor offences continues, more jails must be built and staffed in order to ensure a humane prison system.[81] It drains the limited resources available to a developing economy like Ghana.[82] If there were funds available to build a "humane prison system" with more rehabilitative programs and transitional planning, it might increase rehabilitation. But still, this should be avoided. Regardless of how good prison programs are, the best rehabilitation is achieved through community programs.[83]

3.6.1 Incarceration a Bane for Prisoner Reform and Rehabilitation: The Environment in a Ghanaian Prison

The claim of the statistics-based discussion above is that too many of Ghana's minor offenders are sent to jail. Worse still, when they are released, many of them come out equipped without any rehabilitative experiences and training. The prison facilities

[80] See chapter 2 and text accompanying note 63; see also; Ryan King, et al, "Incarceration and Crime: A Complex Relationship" (2016) online: The Sentencing Project https://www.sentencingproject.org/wp-content/uploads/2016/01/Incarceration-and-Crime-A-Complex-Relationship.pdf;

[81] https://www.youtube.com/watch?v=9_V11EiwlMY.

[82] The World Economic Situation and Prospects employs the term "developing economy" as one of three classifications on the basis of per capita gross national income as established by the World Bank. The other two are developed economies and economies in transition.

[83] Marja-Lisa Muiluvuori, "Recidivism Among People Sentenced to Community Service in Finland," (2001) 2:1 J Scandinavian Studies in Criminol and Crime Prevention 72-82, online: < Taylor & Francis https://www.tandfonline.com/action/showCitFormats?doi=10.1080%2F140438501317205556>; Hilde Wermink et al, "Comparing the effects of community service and short-term imprisonment on recidivism: a matched samples approach" (2010) 6:325 J Exp Criminol online: Springerlink < https://link.springer.com/content/pdf/10.1007%2Fs11292-010-9097-1.pdf>.

themselves are overcrowded, poorly resourced and poorly ventilated. Overall, their time spent in prison is economically unproductive to the Ghanaian State and does not foster their personal socio-economic improvement.

This state of affairs is addressed by the Mandela Rules[84] which seek to impel governments to ensure that prisoners enjoy conditions commensurate with respect for their basic human rights. The details of these Rules are considered next.

3.6.2 The Mandela Rules[85]

The Mandela Rules constitute a universal acknowledgement of the minimum international standards for the treatment of prisoners, although admittedly, it does not make much reference to non-custodial measures.

The following principles found in the Mandela Rules, though not legally binding, reflect the focus of this thesis in terms of the overuse of incarceration, the absence of reformatory facilities within the prisons and the call for reforms to the management of minor offenders in Ghana. The rules contain the necessary components whose observance would make for the creation of an internationally accepted prison system. They ensure that all aspects of the prison system, such as prison management, prison conditions, prisoner management in terms of health, food, accommodation, rehabilitative programming in anticipation of release and post-release support are held

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[84] *United Nations Standard Minimum Rules for the Treatment of Prisoners, the Nelson Mandela Rules,* 70th Sess, Annex, GA res 70/715 online: United Nations Office of Drugs and Crime <https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf>.[*Mandela Rules*]

[85] *Ibid.*

to the highest international standards. In other words, each state is able to self-assess and determine where it falls short and how it can improve according to these standards. There are no criteria against which a State's self-assessment may be measured. However, its ability to self-assess and accept criticism is a first important step taking into account the available resources and the fact that the supreme law of Ghana, the Constitution demands it.[86]

At the 58th Ordinary Session of the African Commission on Human and People's Rights on the revised Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), it was resolved that stakeholders be encouraged "to draw inspiration from the Mandela Rules in order to fill the existing gaps in the applicable laws, policies and practices with the view to enhance a better treatment for detainees [and point to alternatives other than jail]."[87] In this way, the Rules of General Application lay out international best practices[88] in the treatment of prisoners and the management of penal institutions. Article 15, paragraph 2, of the 1992 Constitution of Ghana advances this content as an absolute prohibition; "no person shall … be subjected to (a) torture or other cruel, inhuman or degrading treatment or punishment, (b) any other condition that detracts or

[86] The Ghana Human Rights NGOs Forum, Joint Stakeholders' Report, United Nations Third Universal Periodic Review Ghana, online: <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=4250&file=EnglishTranslation> (here this coalition indicts Ghana on its various shortcomings in the criminal justice sector in line with recommendations from other UN Member States); Amnesty International, "Ghana: Abolish the death penalty for all crimes and commute all sentences", October 10, 2017 online: Amnesty International < https://www.amnesty.ie/ghana-abolish-the-death-penalty-for-all-crimes-and-commute-all-death-sentences/> (here Amnesty International asks the government to abolish the death penalty.)

[87] Resolution on the Collaboration between the ACHPR and Partners on Promoting the revised United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), online: https://s16889.pcdn.co/wp-content/uploads/2016/04/Resolution-on-Mandela-Rules-adopted-by-the-ACHPR-April-2016.pdf

[88] *Mandela Rules, supra* note 84 at Preliminary observation 1.

is likely to detract from his dignity and worth as a human being." These provisions acknowledge that measures such as imprisonment have already deprived individuals of their liberty. For this reason, there is no need to aggravate the suffering of Ghanaian prisoners by making prisons any worse than they are already.[89]

Rules 18 to 35 state that appropriate provision should be made to ensure prisoners' personal hygiene, the cleanliness of their clothing and bedding, their food, exercise and medical services are kept at a proper standard. These Rules are not currently applied in Ghana as will be shown.[90]

Rule 92 particularly focuses on ensuring that prisoners are actually rehabilitated or at least, are offered the opportunity to reform by the provision of:

> education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his or her social and criminal history, physical and mental capacities and aptitudes, personal temperament, the length of his or her sentence and prospects after release.

If implemented, this Rule might ensure that Ghanaian prisoners, especially, given the relative triviality of the offences that result in their imprisonment, could mean an opportunity to be reformed.

3.6.3 Basic Principles for the Treatment of Prisoners[91]

[89] *Ibid.*

[90] Ghana 2016 Human Rights Report, Country Reports on Human Rights Practices for 2016, Bureau of Democracy, Human Rights and Labor, United States Department of State online: United States Government <https://www.state.gov/documents/organization/265472.pdf>.

[91] *Basic Principles for the Treatment of Prisoners,* 14 December 1990 GA res 45/111, 68th Plen Mtg (1990), online: < United Nations <http://www.un.org/documents/ga/res/45/a45r111.htm >.

Principle 5 states that "Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants."[92] This statement protects prisoners' rights to education, their religion, and their access to cultural activities so long as they are available in the country. It ensures their meaningful remuneration for employment while incarcerated so as to ensure their social reintegration while contributing to their own, and their family's upkeep.[93] As discussed next, these needs are not being met in Ghana.

3.6.4 Prison Conditions in Ghana: A General Overview

Ghana has a total of 43 prisons with an official holding capacity of 9,875. These are made up of 14 local prisons, 7 female prisons, 11 open camp prisons, 7 central prisons, 1 juvenile facility, 1 special facility, I medium security prison and 1 maximum security prison.[94] The current inmate population overall is 14, 467. The percentage of overcrowding is 46.5%.[95] This reality ought not to cause one to advocate for the building

[92] *Ibid* Principle *5.*
[93] *Ibid* Principles 1, 6, 8, 9, 10.
[94] https://web.archive.org/web/20110825030644/http://prisonministryghana.org/prisons.html
[95] The Ghana Prison Service, online: <http://www.ghanaprisons.gov.gh/statistics.html>; Amnesty International, Amnesty International Ghana Report 2016/2017, online: <https://www.amnesty.org/en/countries/africa/ghana/report-ghana/> (they list overcrowding and lack of access to health, educational and recreational facilities as problems inmates face); Mavis Dako-Gyeke & Frank Darkwa Baffour, "We are like devils in their eyes: Perceptions and experiences of stigmatisation

of more prisons, because even the new prisons could be filled up to overflowing because of the chronic judicial resort to imprisonment. It is necessary to improve conditions and reduce risks within all prisons, and to use this sanction less frequently and more reflectively, especially for minor offences.

There are many hazards associated with overcrowding, including the spread of infectious diseases from inadequate ventilation, poor hygiene and poor sanitation. Gyamfi[96] notes that the government no longer supplies prisoners with soap, sponge and towels for their personal hygiene.[97] It would seem that the state of affairs in Ghana's prisons contravenes the express provision in Ghana's Constitution, 1992, to protect the dignity of all prisoners. [98] As well, under Part VII of *The Prisons Service Act,*[99] prisoners are guaranteed access to good food to maintain their health, and adequate supplies of clothing, soap, bedding and other necessaries to maintain good health. Section 36 of the *Prisons Service Act* provides that all prison facilities - cells, kitchens, washing and toilet facilities - are kept in clean and sanitary conditions,[100] while section 37 of the prescribes the provision of sufficient accommodation for all prisoners.[101]

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and discrimination against recidivists in Ghana" (2016) 55:4 J of Offender Rehabilitation 235 at 237 online: Taylor & Francis <https://www.tandfonline.com/doi/pdf/10.1080/10509674.2016.1159640>. (as part of their discussion, they point out the conditions of overcrowding prevalent in Ghanaian prisons.) [*Dako-Gyeke & Baffour*]

[96] *Gyamfi, supra* note 75 at 152.

[97] *Ibid* at 122.

[98] *Constitution of the Republic of Ghana, 1992*, article 15.

[99] *The National Redemption Council Decree, Prisons Service Decree* (Ghana) 1972, NRCD 46 at ss 35, 36 and 37.

[100] *Ibid.*

[101] *Ibid.*

Mandela Rules 1, 12-21, provide that all prisoners be treated with respect because they are human beings and inadequate ventilation, sanitation and the refusal by the government to supply basic necessities of hygiene is a breach of these Rules.[102]

Gyamfi also points out that "over 99% of the prisons use pit latrines."[103] A pit latrine is a type of toilet that collects human faeces in a hole in the ground.[104] Prisoners carry head-loads of faeces from their cells to dump in the pit latrines. The prisoners do not use hand gloves. There are probable serious health implications from this practice. These health problems are compounded by the fact that on admission, prisoners are not screened by medical officers. This is in itself a violation of recommended international best practices. In fact, it is only when prisoners are extremely sick, or there is an epidemic that they get access to medical care.[105] Medication is available on a "cash and carry" basis in situations where sick prisoners cannot afford to pay for them.[106]

This is against the Mandela Rules 24 to 35 which states that prisoners are entitled to the same standards of healthcare available in the community and free of charge. They are

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[102] *Mandela Rules*, *supra* note 84.
[103] *Ibid*.
[104] Anne Nakagiri et al, "Are pit laterines in urban areas of Sub-Saharan Africa performing? A review of usage, filling, insects and odour nuisances", online: National Center for Biotechnology Information <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4743102/>
[105] *Gyamfi, supra* note 75 at 121.
[106] D K Afreh, "The Prisons and Sentencing Policies" (1996-2000) 20 RGL 141 at 144 [*Afreh*]; Efua Idan Osam, June 26, 2016 "Medicine shortage hits Ghana Prison Clinics", online: <http://www.pulse.com.gh/news/local/ghana-prisons-medicine-shortage-hits-ghana-prisons-clinics-id5194911.html>; The Finder newspaper reported April 9, 2014 on the lack of medication in prisons for common illnesses such as malaria, skin rashes and body pains, online: <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Prison-leader-regrets-lack-of-medicine-in-prisons-305721>; The Ghana Prisons Service, online: <http://www.ghanaprisons.gov.gh/news19.html> (The Chairman of the Prisons Service council commented on the meagre feeding allowance allotted to prisoners.)

also to have prompt access to medication, special diets or whatever prescription is made by a medical officer to promote their health per *The Prisons Service Act.*[107]

For instance, in the Nsawam Medium Security Prison, a high prevalence of tuberculosis was found along with a high probability of active transmission within the prison.[108] The response of the Ghanaian government to this danger across Ghana's prisons, with a view to forestall overcrowding, was to establish 'settlement farms'. The purpose of these open and agricultural settlement camp prisons, ostensibly, was to supply food to the prisons to supplement government food allowance and reduce overcrowding. At least, these farms would have offered prisoners some agricultural training and the skills to earn some income outside of prison upon their release. However, for lack of resources, these agricultural projects have not been successful in producing enough food to feed prisoners and teach them income-generating skills.[109] The overall feeding allowance of GHC 1.80

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[107] *Supra* note 99.

[108] Frances Magadalene Tinna Sesay, *Prevalence of Pulmonary Tuberculosis and Human Immuno-Deficiency Virus Among Inmates in Nsawam Medium Security Prison in Ghana* (Master's Dissertation, University of Ghana, 2016) [Unpublished], online:< University of Ghana http://ugspace.ug.edu.gh/bitstream/handle/123456789/21637/Prevalence%20of%20Pulmonary%20Tuberculosisand%20Human%20Immuno-Defeciency%20Virus%20among%20Inmates%20in%20Nsawam%20Medium%20Security%20Prison%20in%20Ghana_July%202016.pdf?sequence=1>; Philip Nii Lartey, , "Kumasi Central Prison: Authorities working to curb TB outbreak", (September 17, 2017) online: Citifm <http://citifmonline.com/2017/09/17/kumasi-central-prison-authorities-working-to-curb-tb-outbreak/> (he reported that there was an outbreak of tuberculosis in 47 prisoners in the Kumasi central Prison. An outbreak attributed to overcrowding, as that prison was built to hold 800 prisoners but at the time of reporting held 1,850 people. In my work in the prisons in Ghana, I saw for myself the nature of the overcrowding, and in my interviews with some of the prisoners, they always had some sort of health complaint to make; from skin rashes to coughs to body pains. I also recall going to interview one visibly ill, although as yet undiagnosed and untreated prisoner and returning the next day to continue my work only to be informed of his death from tuberculosis at the Kumasi Central Prison.)

[109] The Ghana Prisons Service, online: Ghana Prisons Service < http://www.ghanaprisons.gov.gh/agric.html>.

(CAD 0.51) per prisoner is meagre. For this reason, prisoners do not eat wholesome and nutritious food.[110]

Mandela Rule 22 identifies the right of prisoners to nutritious food that is adequate for health and strength. Ghana's performance in this regard does not live up to the expected standard.

The second purpose of these settlement farms was to decongest the walled prisons. As Gyamfi explains, even on these farms, living conditions are deplorable for both prison officers and prisoners. Visiting two of these, he reported that there were no toilets in the dormitories, as in most prisons in Ghana. Rather, the settlement farm prisons he saw had rough pit latrines and bathrooms that overlooked dormitories and kitchens. He also observed that feeding pans are not properly cleaned because there is no soap available for such cleaning.[111] This is in direct contravention of Mandela Rules 12-21 and the *Prison Services Act* as previously noted.

Infrastructurally, not only are Ghanaian prisons overcrowded, most of the physical buildings are also old and decrepit.[112] Built with thick walls, they are perpetually damp, a

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[110] Their food is heavy in starchy carbohydrates, and there is usually no protein, fruit or vegetables to be seen. The "Left to Rot" documentary shows this plainly, online: <https://www.youtube.com/watch?v=9_V11EiwlMY&t=1s.

[111] Gyamfi, *supra* note 75 at 112.

[112] Kwaku Keddy, "Ghana's prison infrastructure: the need for an overhaul," (May 18 2017) online: <https://www.graphic.com.gh/features/opinion/ghana-s-prison-infrastructure-the-need-for-an-overhaul.html>; (with the exception of the Ankaful Maximum Security Prison inaugurated in 2011, there has not been any purpose built prison since 1962. For example, the Kumasi Central Prison was established in 1901 and the last renovation done was in 1925, The UN Special Rapporteur noted that Ghanaian prisons tend to be "decaying forts or former slave warehouses built during the colonial era and transformed into prisons after independence"); Juan E Mendez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, March 2014, online:< https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16574&LangID=E> (the OHCHR website states that after visiting 9 Ghanaian prisons, psychiatric hospitals and prayer camps he observed that; "I welcome the steps taken by the Government of Ghana in its fight against torture and other ill-treatment in the country, but much remains to be done.)

situation that contributes to the airless nature of the overcrowded cells. This feature has been present from the colonial era.[113]

In terms of educational and vocational training opportunities, the most recent Annual Report of the Ghana Prisons Service published in 2013 was self-serving. It stated that prisoners have access to training in technical and vocational skills. The reality is different, given the lack of tools, workspaces and trainers.[114] The overcrowded nature of the prisons limits the number of prisoners who can take part in any skills training. This is because although the number of prisoners has increased, prison infrastructure has remained the same size.[115] Rule 4 of the Mandela Rules states that efforts should be made by prison authorities to ensure that prisoner reintegration into society is generally ensured by offering education, vocational training and work.[116] Research done elsewhere shows that chances of recidivism are lowered and, behavioural misconduct, even within prison, is reduced with the use of rehabilitative programs.[117]

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[113] *Seidman & Edison, supra* note 1 at 440 (they note that the Chief Medical Officer at the time in a statement to the Governor-General stated; "I have repeated over and over again… that air rendered impure by his repository impurities does not injure the lower class of native".)

[114] Selorm Kwami Ansre, *Analysis of the rehabilitation of inmates at the Nsawam Medium Security Prison*, (Ashesi University College, Ghana, 2010) [Unpublished] at 17, online: Ashesi University <https://air.ashesi.edu.gh/bitstream/handle/20.500.11988/59/Ansre%20Selorm%20Rehabilitation%20of%20inmates%20in%20the%20Nsawam%20Prison.pdf?sequence=1&isAllowed=y> (this study at the Nsawam prison noted the lack of tools, workshops and trainers were cited as barriers to effective rehabilitation at 39-40. Other barriers included poor food and poor medical care.)

[115] *Seidman & Edison*, *supra* note 1 at 452.

[116] *Mandela Rules*, *supra* note 84.

[117] Sheila A French & Paul Gendreau, "Reducing Prison Misconducts, What Works!" (April 2006) 33: 2 Crim Justice and Behaviour 185-218, online: Researchgate <https://www.researchgate.net/profile/Sheila_French/publication/247744865_Reducing_Prison_MisconductsWhat_Works/links/552e8aff0cf2acd38cbaa5f3/Reducing-Prison-MisconductsWhat-Works.pdf >; Jacob Reich, "The economic impact of prison rehabilitation programs" August 17, 2017 online: <https://publicpolicy.wharton.upenn.edu/live/news/2059-the-economic-impact-of-prison-rehabilitation/for-students/blog/news.php#_edn8> (he notes the importance of educational opportunities and job-training programs accessed in prison for improving the re-offending rate in the United States);

Whatever the jurisdiction, it is not intended that an offender, after imprisonment, would return to society in a worse condition than when they went in. Neither are they expected to return to prison after initial release. However, evidence shows that prison is itself criminogenic and increases the rate of recidivism.[118] The reality is that prison conditions do not maximize the likelihood of reformation of the offender. This may be evidenced in part by the high recidivism rates there are in Ghana[119] and many other jurisdictions.[120]

In 1996, the then Assistant Director of Prisons and the chief legal officer of the service admitted to this plethora of problems.

> First, the prisons suffer from woefully inadequate budgetary allocations, such that prisoners cannot have regular, adequate and nourishing food to maintain good health, to have regular and adequate clothing, bedding and medical facilities. Second, reformation and rehabilitation efforts are also hampered by lack of funds to repair broken down machines and procure needed logistics. Third, the prisons are overcrowded, and this adversely affects the proper care of prisoners. In fact, it makes it impossible to separate the unconvicted from the convicted.[121]

Grant Duwe, "An Outcome Evaluation of a Prison work release program, estimating its effects on recidivism: employment and cost avoidance", 26: 6 Crim Justice Pol'y Rev at 531-554, online: Sage Publications <http://journals.sagepub.com/doi/10.1177/0887403414524590> (here he touted the success of the State of Minnesota's job-training program in prison.)

[118] *Inmate Subculture, supra* note 25; *Antwi, supra* note 21; Don Stemen, "The Prison Paradox: More Incarceration Will Not Make Us Safer" (2017) Loyola University Crim Justice & Crim'logy: Fac Pubs & Other Works at 1-2, online: <https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1027&context=criminaljustice_facpubs>.

[119] *Dako-Gyeke & Baffour, supra* note 95 at 253.

[120] *Ibid.*

[121] Paper delivered in Accra, 1996 cited in *Afreh*, *supra* note 106 at 144.

Their solution was to recommend the adoption of more non-custodial sentencing dispositions in Ghana to help reduce prison overcrowding.[122] However, there were no specifics as to the alternatives suggested.

In sum, *the Constitution of Ghana 1992, the Prisons Services Act* and *the Mandela Rules,* among others, are not being respected in the regime of prison administration as it is in Ghana today.[123] Given that only about 21% of custodial sentences were for serious offences, a review of the existing legislation could result in significant reduction of the prison population. In this atmosphere where one can cautiously suggest that a majority of Ghanaian prisoners should not be incarcerated. Moreover, they not being well fed and housed, results in there being even less prospect for their reformation or rehabilitation. Clearly, the call for non-carceral means of punishment, including by high officials of Ghana's prison system, is well-justified.

3.7 Conclusion

This chapter began by pointing out that the population of Ghana's prison system needs to be reduced. It has shown that the cause of overcrowding traces to the fact that a large segment of criminal conduct under Ghanaian legislation falls within the minor offences

[122] *Supra* note 106.

[123] Seth Kwame Boateng did two documentaries on the state of Ghana's prisons, one in 2015 and another a year later, and nothing had changed. The documentary shows the horrendous, unsanitary and overcrowded conditions that prisoners face, online: <https://www.youtube.com/watch?v=9_V11EiwlMY&t=1s>

category where offenders are too often sent to prison. Essentially, the chapter contends that rather than be in prison, minor offenders could be giving positive services in the community/society by way of community service.

It was also explained that, the objective of Ghana's criminal justice is to rehabilitate prisoners, but that this remains an aspiration. This is not surprising, given, as discussed, that physical conditions and the absence of programming in the prisons do not support such efforts in any meaningful way. It was pointed out that the prisons are over-crowded, prisoners are poorly fed, living conditions are inhumane and facilities to create opportunities for them to be educated barely exist.

Overall, this daunting reality requires a consideration of practical and useful means by which minor offenders can be "punished" differently. The argument of this thesis, which is explored in chapter 4, is that Ghana needs to institutionalise alternative sentencing practices and to amend its relevant legislation accordingly. This would require political will to effect the desired change. Officials within the Ghanaian criminal justice and prison administration structures, and among the judiciary recognise the need for change. Hopefully, the politicians will be willing to legislate and provide the resources to make the change a reality.

The next chapter pursues this theme, namely, the need for alternative sentencing measures for punishing minor offenders in Ghana. First, it presents a case study of another African country, Kenya, that has put alternative sentencing into practice via community service and probation. Drawing lessons from Kenya’s implementation

experiences, the chapter explores the feasibility of the options of probation and community service in Ghana.

CHAPTER 4 A Regime of Alternative Sentencing for Minor Offences in Ghana

4.1 Introduction

The problem identified by this thesis so far is the need to curb overuse of incarceration in Ghana through finding alternative mechanisms of punishment, namely community-based sanctions – probation and community service, for minor offenders.

The previous chapters have found that the regime of criminal punishment operated in Ghana traces back to the colonial one, codified under *Criminal Offences Code (Act 29), Criminal Procedure Code (Act 30)* and other related legislation.

The import of sentencing regarding minor offences, as discussed, is that in essence, the district magistrate courts that exercise jurisdiction over these offences are essentially limited to imposing fines, or prison sentences, or both.

Also, the impact of imprisonment on minor offenders is that they are generally not rehabilitated or reformed, contrary to the objective of the criminal law regime. As well, there appears to be some indication of rising recidivism rates among released individuals. This may be because the socio-economic reasons which impel them to offend are not alleviated by their experiences of jail time, since facilities, opportunities, programs and tools do not exist by which to train them in basic income-earning skills.

Another finding was that over-incarceration is due in part to the fact that sentencing options in practice are either imprisonment or fine or both. Moreover, the need to accommodate growing numbers within the same inadequate facilities worsens the

results of overuse of imprisonment. Even if more of these prisons are built, they would only be filled up.

These dilemmas are not concerns limited to Ghana, but that of many nations on the continent, as underscored by various declarations, both regional and international, urging adoption of measures to deal with it in all the African countries. To this end, this chapter draws on the example of Kenya to deduce lessons and offer recommendations for Ghana to follow.

The specific case study on Kenya is preceded by an explanation of the rationale behind the choice of alternative sentencing for Ghana as a part of the solution to the overuse of imprisonment. The consensus is that criminal justice systems in many African countries result in too many accused becoming prisoners and that one means by which to reduce this is to adopt alternative sentencing mechanisms. These mechanisms may include proven traditional means that each state identifies. More pointedly, they are encouraged to utilize community service orders to punish and rehabilitate minor offenders in the community as a step towards achieving the goal of reducing prison populations.[1] The change of punishment regime must rest on appropriate legislation. As well, the mechanisms of probation and community service adopted must reflect Ghanaian

[1] *Kampala Declaration on Prison Conditions in Africa*, September 1996 ACHPR online: Penal Reform International <https://s16889.pcdn.co/wp-content/uploads/2013/06/rep-1996-kampala-declaration-en.pdf>. [*Kampala*]

traditional penological concepts of punishment, namely, rehabilitation, rather than imprisonment simpliciter.[2]

The discussion in the rest of the Chapter proceeds as follows; first, a number of critical assessments are set out regarding the effectiveness of probation and community service orders as means of punishing minor offenders in a more humane way with a focus on their reform. My response to criticisms of probation and community service orders simply points out that their potential usefulness for this purpose depends on how well each jurisdiction incorporates them into its framework of criminal justice administration. Ghana must incorporate its traditional institutions and social structures to help oversee offender compliance with the orders. Therefore mechanisms must be adopted to use local participation.

The subsequent section discusses the functioning and outcomes from the adoption of these orders in Kenya. The objective is to assist in considering the prospects of Ghana's adoption and implementation of probation and community service orders.

[2] Feikoab Parimah et al, "Community service for misdemeanours in Accra: Preferences of offenders, victims, judiciary and community members," (2017) 27:5 J Psychology in Africa 455-457, online: Researchgate <https://www.researchgate.net/profile/Osafo_Joseph/publication/308518499_Community_Service_for_Misdemeanours_in_Accra_Preferences_of_Offenders_Victims_Judiciary_and_Community_Members/links/5b7c67aca6fdcc5f8b594460/Community-Service-for-Misdemeanours-in-Accra-Preferences-of-Offenders-Victims-Judiciary-and-Community-Members.pdf?origin=publication_detail>.

The discussion concludes by reiterating that for Ghana, alternative sentences for minor offenders offer the most hopeful opportunity for this class of offenders to be reformed. Consequently, imprisonment may be utilized in some cases, but only as the very last resort.

Why alternative sentencing?

Alternative sentencing in general encompasses all options other than custodial sentences for the punishment of offences. Vass defines these alternatives as "those penalties which, following conviction and sentence, allow an offender to spend part or all of his or her sentence in the community and outside prison establishments."[3] These non-custodial measures help "to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender."[4] Research shows that conviction for an offence and imprisonment carry a social stigma[5] for the former prisoner, and even for his or her family. As commonly known in many jurisdictions, including Canada, a criminal record affects other aspects of an ex-

[3] Antony A Vass, *Alternatives to prison: punishment, custody and the community* (London: Sage, 1990) at 2. [*Vass*]

[4] *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules),* 14 December 1990 GA res 45/110, 68th Plen Mtg (1990), online:< http://www.un.org/documents/ga/res/45/a45r110.htm> (Rule 1.5). [*Tokyo Rules*]

[5] Gwendoline M Omane-Brimpong, *Psychosocial Correlates of Recidivism among Prisoners in Ghana*, (MPhil Dissertation, University of Ghana, 2010) [Unpublished].

prisoner's life, including employment and even housing options.[6] The previous chapters discussed that majority of offenders in Ghana can be dealt with by other options in the community, rather than by imprisonment.

In Ghana, the criminal law offers the options of fines,[7] compensation, disposal and restitution,[8] absolute and conditional discharge and probation.[9] The imposition of fines, especially where they are converted to imprisonment for the poor who are unable to pay, becomes an exercise in equating justice with money.[10] As to compensation, disposal and restitution, they are used in Ghana for offences resulting in economic loss, harm or damage to the State or a State agency. These offences go before the High Court or Regional Tribunals.[11] Gyamfi[12] suggests that they can be used for break and enter offences. Suspended sentences and probation exist in the criminal law, but in practice they are only used for juveniles. There is no record of an adult probationer in Ghana.[13]

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[6] Adelina Iftene, "The Case for a New Compassionate Release Statutory Provision" (2017) 54:4 Alta L Rev at 941, online: < https://www.albertalawreview.com/index.php/ALR/article/view/783/775 >; Helen Lam & Mark Harcourt, "The Use of Criminal Record in Employment Decisions: The Rights of Ex-offenders, Employers and the Public," (2003) 47:3 J Business Ethics, at 237, online: Springerlink https://link.springer.com/content/pdf/10.1023%2FA%3A1026243413175.pdf.

[7] *The Ghana Criminal Procedure Code*, 1960, Act 30 online: World Intellectual Property Organization <http://www.wipo.int/edocs/lexdocs/laws/en/gh/gh011en.pdf> at s297 (apart from offences whose sentences are fixed by law, the court has discretion to fix a fine in lieu or in addition to imprisonment, or to convert fines to imprisonment for failure to pay. It covers summary offences, fines and misdemeanours.) [*Act 30*]

[8] *Ibid* at ss141-142, see also Courts Act 1993 s35. These provisions govern the payment of compensation in case of frivolous or vexatious charge, default of payment of compensation results in imprisonment.

[9] *Act 30, supra* note 7 at ss353-369.

[10] Joseph Appiahene-Gyamfi, *Alternatives to imprisonment in Ghana: A focus on Ghana's Criminal Justice System* (Masters Dissertation, Simon Fraser University, 1995) [unpublished] at 149 online: Simon Fraser University <summit.sfu.ca/system/files/iritems1/6650/b17416905.pdf> [*Gyamfi*].

[11] *The Courts Act* (Ghana) *1993,* Act 459 at s 35.

[12] *Gyamfi, supra* note 10 at 151.

[13] Asiedu Wiliam Kwadwo, "Effective Treatment Measures for Prisoners to Facilitate their Reintegration into Society: The Ghanaian Experience," Participants' Papers 327 at 334-335, online: United Nations Asia

The Tokyo Rules noted in Chapter 1 list a wide variation of alternative sentencing dispositions. They include verbal sanctions (reprimands by the court); conditional discharge (here the court discharges the offender on condition that he commits no offence within a stipulated time frame); status penalties (the offender may not access certain positions in society);[14] economic sanctions (these are exemplified by the fine system); confiscation (here, proceeds of crime are seized and forfeited to the State); victim restitution (this is usually compensation paid to the victim and is common in Africa even for very serious crimes); suspended sentence (the sentence is put on hold by the court[15]); probation and judicial supervision (the release of an offender from detention subject to supervision); community service orders (the offender is expected to work a prescribed number of hours within the community in a time frame in lieu of imprisonment); referral to an attendance center (here, the offender spends his days at a facility where they usually participate in some therapy and go home in the evening); house arrest (the movements of the offender are limited to his place of domicile); or any

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and Far East Institute for the Prevention of Crime and the Treatment of Offenders <https://www.unafei.or.jp/publications/pdf/RS_No54/No54_25PA_Kwadwo.pdf> (this writer, the then regional commander of the prisons of the Northern Region of Ghana indicates that even for juveniles, probation is not usually granted, rather they are convicted and sent to the Boys and Girls Industrial Homes or to the Borstal Institution depending on the severity of the offence. He clearly states that "probation, as is commonly accepted, is not available in Ghana yet; it is part of judicial reforms being contemplated by the judiciary and relevant stakeholders.") [Kwadwo]; Emmanuel Kwabena Quansah, *The Ghana Legal System* (Black Mask Limited: 2011) at 356, (the writer observes that "Despite the statutory provision for probation, it does not seem that the infrastructure is in place for effective utilization of this alternative means of punishment.") [Quansah]

[14] For example article 94 of the Constitution of Ghana ensures that a person will not be able to become a member of parliament if he has been convicted of various offences.

[15] *Act 30, supra* note 7 at s 313 (which provides for the suspension of sentence for pregnant women for non-capital offences.)

other mode of non-institutional treatment (the state has the flexibility to develop new modes of non-custodial punishment as long as they do not infringe on basic human rights).[16]

Alternatives to imprisonment are not alien to Africa, or in this context, to Ghana. As has been highlighted in chapter 2, "in the traditional African societies, imprisonment as a form of punishment was almost unknown… There was no room for institutionalized forms of punishment such as imprisonment or preventive detention… Offenders were often left in the care of their families or extended families once the appropriate penalty had been imposed."[17] Historically, the indigenous Ghanaian system of criminal justice was restorative, rehabilitative and reformative. Ghanaian criminal law makes room for some alternatives to imprisonment such as probation but community service is not mentioned. However, as has been shown, these alternatives are either not used, or they merely supplement custodial sentencing.

Alternatives to custodial sentencing such as probation and community service are usually considered by researchers as the lesser of two evils because they save costs to the state. The assumption is that offenders make reparation to the community and that they get to maintain their links to the community, and keep their jobs and access to family. In other

[16] *Tokyo Rules, supra* note 4 at Rule 8.2.

[17] Chukuma Ume, "Alternatives to Imprisonment: Community Service Orders in Africa", in Vivian Saleh-Hanna, ed, *Colonial Systems of Control: Criminal Justice in Nigeria* (University of Ottawa Press: 2008) 1 at 384. [Ume]

words, it appears that "prisons punish, but alienate, community punishes but reintegrates."[18]

4.2 But Will Alternatives Work?

There are criticisms relating to the supposed benefits of alternative sentencing. The basic argument is that non-custodial punishments should not be considered a panacea to the problem of overuse of imprisonment in Ghana. To start with, Vass cautions that "there is nothing really new about contemporary penal measures."[19] Thus, even with the passage of non-custodial sanctions for minor offences, the threat of imprisonment hangs like the sword of Damocles over the heads of offenders if they breach the terms. Penal reforms evolve out of this pre-existing institution.[20] Morris reiterates this reality: "Prisons may not follow corporal and capital punishment and transportation into desuetude for within the term "prison," great development is possible. In the late 18th and early 19th centuries the prison changed its character and it will change again. Prison walls will not entirely disappear. As a background sanction supporting alternative punishments, the prison may long be required."[21] Garland reminds us that the very emergence of prison was a result of the rise and fall of alternatives to it, such as penal transportation. Penal transportation refers to the practice where convicted offenders or other persons regarded as undesirable, were sent to a distant place, often a colony for a specified term. This is

[18] *Vass, supra* note 3 at 41.
[19] *Ibid* at 14.
[20] Hermann Mannheim, *The Dilemma of Prison Reform* (London: George Allen & Unwin, 1939) at 35.
[21] Norval Morris, "Prison in Evolution," (1965) 29:4 Fed Probation 20 at 27.

because at the time, prison was considered an answer to changing notions of crime and punishment.[22]

The point of the foregoing is that the force of alternative sentences consists in the ready availability of prison as a fallback instrument of punishment. This composite reality is captured under Rodgers' "dispersal of discipline thesis."[23] This school of thought claims that alternatives are really not alternatives. Rather, they widen the net of surveillance and control by ensuring that social discipline ceases to be the sole domain of the criminal justice system. They are supplemented in discipline enforcement by the activities of social welfare departments. In this sense, the proverbial net is widened. Austin and Krisberg indicate that the reason reform strategies, such as alternative sentencing, have resulted in net widening is because changes in a segment of the criminal justice system result in a situation where "agencies compete with one another, and reactions to a given reform depend upon the perceived value of that reform to the agency's survival."[24] They argue that theoretically, reducing the nets and limiting them to arrest and prosecution should result in lower incarceration rates. They note that in reality there are increased prison populations due to the diversion (that is, alternatives like community service and probation). This is because these diversion mechanisms have also created new nets

[22] David Garland, *Punishment and Welfare: A History of Penal Strategies* (Aldershot: Gower, 1985).
[23] John J Rodger, "Social Work as Social Control Re-examined: Beyond the Dispersal of Discipline Thesis," (1988) Sociology 22:4 563-581, online: Sage Publications < https://journals.sagepub.com/doi/pdf/10.1177/0038038588022004006>. [Rodger]
[24] James Austin & Barry Krisberg, "Wider, Stronger, and Different Nets: The Dialectics of Criminal Justice Reform," (1981) NCCD Research Review, J Research in Crime Delinquency at 166 online: < Sage Publications https://journals.sagepub.com/doi/pdf/10.1177/002242788101800110>. [Austin & Krisberg]

because the alternatives are new programs requiring the allocation of new financial and institutional resources. Austin and Krisberg further point out that alternatives have produced wider nets (increased state control of the behavior of society on the basis of age, sex, class, and ethnicity); stronger nets (the state's capacity to control individuals is intensified as they have more resources); and new nets (the institution of reforms that transfer authority to control the behavior of members of society from one agency to another).[25]

The enormity of this net-widening is captured by Cohen who pictures it in terms of the ocean "vast, troubled and full of unchartered currents, rocks and other hazards."[26] He considers the criminal justice system to be the fishing net and offenders as the fish that are ensnared therein and sorted. Even so, Vass[27] argues that alternatives may help to divert, so long as they are targeted at the appropriate group of offenders who will benefit from such treatment. In fact, Matthews[28] thinks that much of the rhetoric of net-widening is based on misunderstood premises because he believes that the data shows that different populations have been impacted dissimilarly by the introduction of diversion. To this end, he argues that the dispersal of discipline thesis suffers in three ways. The first is the tendency to overgeneralize by lumping together different offender groups. This tendency assumes that practices of social control come about by well-thought out decisions made by the ruling class, an assumption that forgets that class

[25] *Ibid* at 169.
[26] Stanley Cohen, *Visions of Social Control: Crime, punishment and classification* (Oxford: Polity Press, 1985) at 41-42.
[27] *Vass*, *supra* note 3 at 107.
[28] Roger Matthews, "Decarceration and social control: fantasies and realities" (1987) 15 Int J Sociology L 55-60.

struggles can result in such changes. His second criticism is that the relationship between prison populations and alternatives have been read in a very crude manner, a reading which ignores other intervening social factors. To him, "it is not the absolute size of the prison population which should be our primary point of reference but the relationship between the imprisonment rate, the crime rate and the growth of community corrections."[29]

Taking Matthews' last point, it is admitted that the size of the prison population is the primary point of reference for this work. Obviously the size of the prison population is a direct result of imprisonment rate and this necessitates the growth of community corrections, which is the alternative argued for in this work and admitted by Matthews as well. In recognizing this, Vass lists an interrelated number of factors that must be taken into account to institutionalize an effective diversion program. They are: "changes in policing tactics, legislative changes, sentencing practices, offender populations and type of offenders given alternatives to custody, length of prison sentences, how supervisors enforce sanctions in the community, the differential nature of intervention, the diverse types and backgrounds of supervisors, the social characteristics of offenders, differences between type of alternatives, economic factors, changes in the ratio of women and men, and ethnic groups given prison sentences."[30]

[29] *Ibid.*
[30] *Vass*, *supra* note 3 at 110.

Matthews disagrees with the 'dispersal of discipline thesis' for discounting any possibility that alternatives might work. He sees this view as "the impossibility impasse in a nutshell. Prisons are a disaster, community corrections are invariably worse, realistic reform cannot be achieved without a fundamental transformation of the social structure, which is unlikely to occur in the foreseeable future, so there is nothing to be done."[31] Rather than this, Matthews sees "the growing array of agencies and institutions with their different roles, discourses and specialisms … as part of an increasingly complex, opaque and expanding network of crime control, involving a diverse range of interventionist strategies."[32]

The foregoing arguments from both sides can be summed as follows: those entirely skeptical of the potential of any diversion program to achieve the reformatory goals of criminal sanctions, along with reducing prison population, have that attitude because they pre-suppose that this potential derives its power from the institutional structure of imprisonment as the fallback position. This means, in essence, that an alternative regime of correctional and punishment measures may never exclude imprisonment as the foundation of punishment for crime, nor can it be successful without the threat it offers. However, those who support diversion appreciate imprisonment as the foundation of criminal punishment. In fact, they admit that alternatives may not be the panacea for the ills of the criminal justice system. However, they contend for the presence of some

[31] *Ibid.*

[32] Roger Matthews, "The myth of punitiveness," (2005) 9:2 Theoretical Criminology 196, online:< Antonio Casella http://www.antoniocasella.eu/nume/Matthews_myth_punitiveness_2005.pdf >

evidence that alternatives do divert some offenders from custody. It is this potential that impels the hope to explore alternatives for application to the administration of criminal justice regarding minor offenders in Ghana for purposes of reducing their numbers in jail, helping them rehabilitate, enabling them to remain in community and to explore socio-economic opportunities to help keep out of criminal trouble. In relation to this, my focus in this thesis is limited to two examples of alternatives to custody: probation and community service orders.

Probation and its Reflection in Ghana's Criminal Law

4.3 Probation: The Concept

As previously indicated, Ghana's criminal law makes provision for probation as an alternative to custodial punishment. There does not appear to be a definition for probation in the law. However, Penal Reform International, borrowing from the Commentary on the 2010 Council of Europe Rules on Probation, defines it as "referring to arrangements for the supervision of offenders in the community and to the probation services responsible for this work. Depending on the national system, the work of a probation agency may also include providing information and advice to judicial and other deciding authorities to help them reach informed and just decisions; providing guidance and support to offenders while in custody in order to prepare their release; restorative

justice interventions; and offering assistance to victims of crime."[33] For instance, in Canada probation orders may be given after absolute or conditional discharges. Also, the court may decide to suspend sentence and make a probation order in addition to a fine or jail sentence of not more than two years. The courts take into account the age and character of the offender, the nature of the offence and the surrounding circumstances of its commission. As well, the court imposes some compulsory conditions for the offender to observe. Among these are that he must keep the peace and be of good behavior, appear before court when required, and notify the court or probation officer when his address or employment changes. Optional conditions may be added, including regular reporting to a probation officer, abstaining from substance consumption and working to support dependents and performing community service for a specified number of hours.[34]

4.3.1 Probation in Ghanaian Criminal Law

Sections 353-369 of Ghana's *Criminal Procedure Code, Act 30*[35] makes provision for the use of probation. Section 354[36] particularly encourages a court of summary jurisdiction to apply probation where it is of the opinion that it is deserved on the basis of youth,

[33] Penal Reform International, "On probation: models of good practice for alternatives to prison" at 7 online: Penal Reform International < https://www.penalreform.org/resource/probation-models-good-practice-alternatives-prison/ >. [*On Probation*]
[34] See Kent Roach, *Criminal Law 7th ed* (Toronto: Irwin Law, 2018) at 540.
[35] *Act 30, supra* note 7.
[36] *Ibid* at s 354 ("Where any person is charged with an offence before a Court of summary jurisdiction or on indictment and the court thinks that the charge is proved but is of opinion that, having regard to the youth, character, antecedents, home surroundings, health or mental conditions of the offender, or to the nature of the offence or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may make a probation order.")

character, home surroundings, health or mental conditions of the offender, the nature of the offence, and any extenuating circumstances in which the offence was committed. However, there is provision to ensure that the offender consents to the probation order when he or she is above the age of seventeen.[37] From Section 355,[38] it is apparent that probation is expected to last anywhere between six months to three years. The probationer is also to be under the supervision of a probation officer to ensure that the conditions of his or her sentencing are met. It appears that a probationer may be required to reside in a correctional institution (not a formal jail) for up to twelve months under supervision.[39] Failure to comply with a probation order results in a fine or custodial sentencing.[40]

The court selects an officer from the probation service to supervise the probationer.[41] There is provision for the Minister to appoint a Principal Probation Officer to oversee the service. He or she may also appoint probation committee(s) whose duty is to review the

[37] *Act 30, supra* note 7 at s 354 (3) (The provision reads: "The Court shall not make a probation order where the offender is above the age of seventeen years unless the offender expresses his willingness to comply with the provisions of the order.")
[38] *Ibid at* s 355 ("A probation order shall have effect for such period of not less than six months and not more than three years from the date of the order, as may be specified therein, and shall require the probationer to submit during that period to the supervision of a probation officer appointed for or assigned to the district or area in which the probationer will reside after the making of the order, and shall contain such provisions as the court considers necessary for securing the supervision of the offender, and such additional conditions 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.")
[39] *Ibid at* s 361.
[40] *Ibid* at s 358.
[41] *Ibid* at s 364.

work of probation officers in individual cases.[42] Also, the parent or guardian of a probationer may be required to contribute towards the expenses of their ward.[43]

The Minister of Social Welfare has power to make regulations prescribing the management of probation orders. Given that there is no official record or published policy on the point, it may be surmised that the reason probation orders in Ghana have never been passed for adult offenders may be that, so far, the only regulations relating to the issuance of these orders have been geared towards juveniles.[44] However, there is no evidence that it has ever been used, for adult offenders. It appears that its use has been limited to juveniles. This state of affairs is problematic as adult offenders appear to be totally excluded from accessing this mode of sanction and it does not seem to be because the statute or regulations or infrastructure exclude them.

It could also be surmised that if the practice of probation with respect to adult offenders were in existence in Ghana, probation officers may become, essentially, social police rather than social workers.[45] Fielding[46] indicates that it is possible that though official

[42] *Ibid* at s 366.
[43] *Ibid* at s 369.

[44] *Kwadwo, supra* note 13; *Quansah, supra* note 13; See also *The Juvenile Justice Act* (Ghana) *2003* which provides guidance on the juvenile justice system in Ghana and establishes junior and senior correctional centres and the mandate of the Department of Social Welfare which under the *Children's Act* is to oversee the administration of juvenile justice and the protection of children in general.
[45] Howard Parker, Graham Jarvis & Maggie Sumner, "Under New Orders: The Redefinition of Social Work with Young Offenders," Br J Social Wk (1987) 17 21-43, online: PennState University <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.881.7974&rep=rep1&type=pdf>
[46] Nigel Fielding, "Social Control and the Community," (1986) Howard J Criminal Justice 25:3 172 online: Wiley online < https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1468-2311.1986.tb00556.x>.

figures may show that probationers may commit fewer offences after conviction, this outcome might be due to the preferential treatment they may receive, as their infractions of the law may not be reported because their probation officers may decide to exercise their discretion to deal with some issues internally. This writer thinks that the reality is probably more nuanced and cannot fit easily into a category of good or bad.

4.3.2 Probation: Some Benefits

Regardless of its potential shortcomings, probation has some benefits. Vass[47] argues that when an alternative like probation is properly managed, it could balance care and control and keep an offender away from exposure to the potentially destructive environment of a prison. This does not belie the fact that since alternatives appear to work differently with different types of offenders, probation may be effective with some and not so effective with others. Again, some research proves that probation reduces recidivism in the lower criminal history risk group.[48]

Another advantage of probation lies in the potential cost savings it offers. There appears to be some evidence that the cost of imprisoning an offender is much higher than the cost of placing him or her on probation. For example, in Tunisia, the cost of putting an offender on probation is six times less than imprisoning him or her.[49] In Canada, the cost

[47] *Vass, supra* note 3 at 162.
[48] Glenn D Walters, "Changes in Arrest Rate as a Function of Probation and Participant Criminal History Risk: Does Probation Work Best With Lower Risk Probationers?" (2017) 1:17 Criminal Justice Policy Review at 2, online:< Sage Publications https://journals.sagepub.com/doi/pdf/10.1177/0887403417721605>; Danielle Kaeble and Thomas Bonczar, "Probation and Parole in the United States, 2015 (revised in 2017)," US Bureau of Justice Statistics, online:< US Bureau of Justice Statistics https://www.bjs.gov/content/pub/pdf/ppus15.pdf>.
[49] *On Probation, supra* note 33 at 9.

of putting an offender under community supervision was almost four times less than imprisoning them.[50]

If the purpose of criminal justice in Ghana is, indeed, rehabilitative rather than punitive, then probation might be more effective than imprisonment to achieve this purpose. Among others, this is because convicted offenders who are put on probation are able to maintain links with their community, and to continue working if they have a job. In this way, they can support dependents while disposing their debt to society.

4.4 Community Service Orders: How Effective as Means of Offender Punishment for Rehabilitation

In essence, community service orders refer to "a program through which convicted offenders are placed in unpaid positions with nonprofit or tax-supported agencies to serve a specified number of hours performing work or service within a given time limit as a sentencing option or condition."[51] Community service orders are used in Africa to punish "poor people who have committed offences at the lower end of the criminal scale (simple theft, damage to property) and who are not 'professional criminals.'"[52] In this writer's opinion, community service orders are appropriate and could be effective for use in Ghana. As shown by the example of Kenya's use of it – discussed below – this is because

[50] The John Howard Society of Canada, "Financial facts on Canadian prisons," online: < The John Howard Society http://johnhoward.ca/blog/financial-facts-canadian-prisons/>.
[51] Ken Pease, *Community Service Orders* (The University of Chicago Press: 1985) at 51-52, online: JSTOR < https://www.jstor.org/stable/pdf/1147496.pdf?refreqid=excelsior%3Aa0c0e107250ce87fdd21e3111020e7b3>.
[52] Penal Reform International and the Zimbabwe National Committee on Community Service, "Community Service in Practice (1997)" at 8, online: Penal Reform International < https://www.penalreform.org/resource/community-service-practice/>.

the majority of this class of offences are committed for socio-economic reasons. Others in this class of offences are minor assault and simple property damage committed out of emotional provocation in family and social contexts.[53]

The push for the use of community service orders across Africa is partly influenced by the idea that "development for Africa is not working to build societies and social structures that mirror colonial, European, or western societies. Development in Africa is working to re-establish our own social structures. Consequently, to maintain a reliance on penal institutions as social control would only continue to reinforce colonial social structures that have been destructive and decivilizing."[54] It is the writer's opinion that this use is consistent with keeping African communities involved in maintaining order and enforcing socially constructive conduct. The operation of community service orders reinforces traditional mores and engenders community collaboration with formal government institutions to ensure social control and sanctioning of deviant behavior.[55]

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[53] See Chapter 3 of this thesis.

[54] *Ume*, *supra* note 17 at 387.

[55] Adedokun Adeyemi, "Personal Reparations in Africa: Nigeria and Gambia (From Research Workshop on Alternatives to Imprisonment," (1990) 1 3-18; Charles Birungi, *Community service in Uganda as an alternative to imprisonment: a case study of Masaka and Mukono Districts* (2005, Master's Degree, University of the Western Cape) [Unpublished] online: < https://acjr.org.za/resource-centre/Community%20Service%20Uganda.pdf > [*Birungi*]; Rosemary Ngabirano, *Alternative sentencing of parent offenders and implications on the rights of the child in Uganda's criminal justice system* (2008, Master's Degree, University of Pretoria) [Unpublished] online: University of Pretoria < https://repository.up.ac.za/handle/2263/8002 >; Mandeep Dhami, Greg Mantle & Darrell Fox, "Restorative Justice in prisons," (2009) 12:4 Contemporary Justice Review: Issues in Criminal, Social and Restorative Justice 433-448, online: < Researchgate https://www.researchgate.net/publication/233032745_Restorative_justice_in_prisons >; Heidi Verhoef & Claudine Michel, "Studying Morality Within the African Context: A model of moral analysis and construction," (1997) 26:4 J Moral Education 389-407, online: Taylor & Francis < https://www.tandfonline.com/doi/abs/10.1080/0305724970260401 >; Vivian Stern, "Alternatives to prison in developing countries: Some lessons from Africa," (1999) 1:2 Punishment & Society 231-241,

Of course, this is not to suggest that the use of community service orders will wholly reverse the ill consequences of incarceration for minor offences. As shown below, their use offers a way to decongest prisons in some African states. Even so, the practice elicits some justifiable criticisms which are now considered.

4.4.1 Community Service Orders: Criticisms and Responses

Community service orders are first criticized for net-widening.[56] Simon[57] argues that community supervision has moved from a clinical model of assessment and treatment, to a managerial model meant to sort and manage bundles of risk rather than rehabilitating individuals. This view reiterates the argument of net-widening – that the use of community-based alternative sentencing "widens the net of penal control and leads to higher incarceration rates."[58] Thus, community supervision is not an alternative to imprisonment, but a delayed form of it.[59] This point overlooks the fact that community

online: Sage Publications < https://journals.sagepub.com/doi/abs/10.1177/14624749922227801 >. [Stern]

[56] *Rodger, supra* note 23; *Austin & Krisberg, supra* note 24 at 166.

[57] Jonathan Simon, *Poor Discipline: Parole and the Social Control of the Underclass 1890-1990* (University of Chicago Press: 1993) at 203 ("here is the irony of this tale. Parole, which once operated as a mechanism to control prison inmates with the promise of early release and ultimately relinking them to the social discipline of the community, now functions as a mechanism to secure the borders of communities without social discipline by channeling its least stable members back to prison. Rather than functioning as a 'surety' for the disreputable, parole functions as a lower cost system of incarceration for a population that is increasingly defined as inherently, irredeemably dangerous").

[58] Michelle S Phelps, "The Paradox of Probation: Community Supervision in the Age of Mass Incarceration" (2013) 35 (1-2) L Policy 51-80, online: National Center for Biotechnology Information < https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3780417/>.

[59] Cecelia Klingele, "Rethinking the use of community supervision" (2013) 103:4 J of Crim Law & Criml'y at 1015, online: Northwestern University < https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7463&context=jclc>; Marcelo F Aebi, Natalia Delgrande & Yann Marguet, "Have community sanctions and measures widened the net of the European criminal justice systems?" (2015) 17:5 Punishment & Society 575-597, online: < Sage Publications https://journals.sagepub.com/doi/pdf/10.1177/1462474515615694> (this study from

supervised offenders do not always re-offend. This charge is quickly countered by the point that net-widening could be resolved by modifying sentencing outcomes and the practices of supervision.[60] That is, net-widening could be dealt with by ensuring that very clear guidelines for the application of community service orders are laid down in terms of the category of offence and the sentence length, and if not applied, the magistrate or judge will have to give reasons for their decision.[61] This, in itself, is a solution because it must be accepted that not all offenders are the same and there should be constant re-evaluation of outcomes.[62] In short, penal control need not mean incarceration. As the study of Kenya below, shows, the vast majority of these offenders complete their community service orders and are suitably rehabilitated and reintegrated into society through it.

A second criticism is Garland's[63] suggestion that community service orders epitomize a "crisis of penological modernism" for seeking to ensure social control beyond conventional prison walls. This prompts Kingele to suggest that a solution to this would be to impose community service less and to use other alternatives (Kingele does not identify these), and that these orders may be imposed only when there is a direct

1990-2010 found that both the number of persons serving community sanctions and the number of inmates have had continual increments in most of the countries studied.)

[60] *Ibid.*

[61] *Stern, supra* note 55 at 234.

[62] Ted Palmer, "Martinson Revisited, Journal of Research in Crime and Delinquency," (1975) 12:2 133-152, online: Sage Publications <https://journals.sagepub.com/doi/pdf/10.1177/002242787501200206>.

[63] David Garland, "The Culture of Crime Control: Crime and Social Order in Contemporary Society," (Oxford University Press, 2011) at chapter 3; Gwen Robinson, "The Cinderella complex: Punishment, society and community sanctions" (2016) 18: 1 Punishment & Society 95 at 99, online:< https://journals.sagepub.com/doi/pdf/10.1177/1462474515623105>

correspondence to a risk of re-offense. As well, such an order should have a limited duration, enough to ensure that there is a period of structured reintegration after sentencing.[64]

The strongest criticism, however, suggests that community service is dangerously close to forced labour, or that it is slavery under another name. It has been suggested that the antecedents of this alternative punishment are transportation and impressment.[65] Riordan suggests that modern community service is "a continuation of former severe punishments which have now been repackaged in a more culturally acceptable manner."[66] Garland expands this notion further:

> The intensity of punishments, the means which are used to inflict pain and forms of suffering which are allowed in penal institutions are determined not just by considerations of expediency but also by reference to current mores and sensibilities. Our sense of what constitutes a conscionable, tolerable or civilized form of punishment is very much determined by these cultural patterns, as is our sense of what is tolerable or, as we say, inhumane. Thus culture determines the contours and outer limits of penality as shaping the detailed distinctions, hierarchies, and categories which operate within the penal field.[67]

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[64] Klingele, *supra* note 59.
[65] Ken Pease, "Community Service Orders" (1985) 6 Crime & Justice at 57, online: JSTOR <https://www.jstor.org/stable/pdf/1147496.pdf?refreqid=excelsior%3A40eb1bb9d227086553cb0ef7552f04ca> (impressment refers to the act of forcing unwilling persons into service.)
[66] David Riordan, *The role of the community service order and the suspended sentence in Ireland: a judicial perspective*, (PhD Thesis, University College Cork, 2009) [Unpublished] at 24, online: Cork Open Research Archive <https://cora.ucc.ie/bitstream/handle/10468/734/RiordanD_PhD2009.pdf?sequence=1&isAllowed=y>.
[67] David Garland, *Punishment and Modern Society: A Study in Social Theory* (Chicago: University of Chicago, 1990), at 195-196.

In other words, Riordan's view is that community service orders seem more humane than incarceration today, but only because society says so, though in fact, they are just as severe as those forms of punishment we wish to use less and less today.

However, the criticism that such an order amounts to forced labour is no longer tenable because even though the community service order is imposed, the offender is given the chance to reform within the community and as part of day to day societal living. Beyond this, it must be stated that this model could work if the number of hours offenders are required to work are reasonable. In this way, their punishment would not interfere with the individual's need to do paid work so as to support him or herself and their family. This flexibility already exists in Ghanaian law via the provisions for probation. In fact, community service orders basically see the community as the victim that has been wronged by the offender, and so reparation and restitution is required from him or her to the community.

Altogether, it can be said fairly confidently that community service orders, as well as probation, are not meant to replace incarceration, but to reduce its frequency. The reality is that prisons are more expensive to maintain than funding community service order programs. However, expecting community-based sanctions to pick up the slack in a completely successful manner would be incredibly naïve. However, the argument of this thesis is that alternative means of punishment can have a chance of real success if the services are targeted at low risk offenders or, as maintained in this thesis, minor offenders. The use of an objective risk and needs assessment is important so as to target

the right demographic. Effective corrections means that the right offender is in the right program.

These programs do indeed, offer socially holistic contexts to foster offender rehabilitation via observance of criminal sanctions whose benefits go to an offended society, rather than to a retribution-minded institutional state system. This composite benefit commends probation and community service orders for adoption in African states, in this case, Ghana. This is why it must be reiterated that the general problem of poor prison conditions and the resort to imprisonment as the pervasive means of responding to crime has galvanized African continental thinking to find solutions. The next section considers both continental and regional efforts in Africa.

4.4.2 Community Service Orders: A Continental Urging to Adopt

The overwhelming concern across Africa today is that each state must endeavour to reform its prison policies to reduce inmate numbers, and to offer alternative means by which appropriate offenders could serve their sentences outside of jail. There are a number of alternatives for African states to consider.

4.5 Over-incarceration and Congestion in African Prisons: Policy Recommendations for Change

The first concern of policy makers and criminal justice agencies across Africa is the conditions in the prisons which hold convicted offenders and others in African states. Their major concern is that there are too many prisoners across the continent, especially for minor offences.[68] Resolutions to combat this trend and rehabilitating the offenders are set out in a series of policy declarations.

4.5.1 Kampala Declaration

In September 1996, the Kampala Seminar on Prison Conditions in Africa came up with the Kampala Declaration on Prison Conditions in Africa.[69] Produced by a hundred and thirty-three (133) delegates from 47 countries, including 40 African countries, the Declaration was adopted a year later by the United Nations Economic and Social Council.[70] The delegates identified the main African prison problem as overcrowding, a situation that results in violations of prisoners' human rights.[71] The sum of their suggestions was to urge African States to adopt non-custodial sentencing practices, particularly community service, over routine imprisonment for minor offences.[72] However, they did not produce a definition for community service nor of minor offences. The delegates were particular that successful African alternative models should be adopted, and that African states should educate their public on the importance of

[68] *Kampala, supra* note 1.
[69] *Ibid.*
[7070] *International cooperation for the improvement of prison conditions,* 21 July 1997 36th Plen Mtg Economic and Social Council Resolution 1997/36 online: United Nations < http://www.un.org/documents/ecosoc/res/1997/eres1997-36.htm>.
[71] Lukas Muntingh, "Alternative Sentencing in Africa" in Jeremy Sarkin, ed, *Human Rights in African Prisons*, (HSRC Press, Cape Town, South Africa: 2008) at 178. [*Muntingh*]
[72] *Ibid* at 2.

alternative sentencing mechanisms.[73] They agreed that ideally, minor offences should be dealt with without recourse to the criminal justice system, but by mediation between the parties through customary mediation practices.[74] In regard to replacing custodial sentences with community service orders and the payment of compensation,[75] the Declaration, suggested that the financial capabilities of offenders and their parents should be considered, and that the work that the offender does in the community should go to compensating the victim. An individual's wrongdoing is considered a family liability that must be made good by pooling family resources. For this reason, parents of an offender are the first resort to supply the resources necessary to meet the obligations imposed on the offender. This is cultural and Ghanaian society functions by this.[76]

4.5.2 International Conference on Community Service Orders in Africa, Kadoma

The Kampala Declaration's endorsement for community service orders to serve as an alternative to routine prison sentences was re-emphasized by the Kadoma Conference in Zimbabwe where community service had already been introduced with some success. The purpose of this conference was to establish what progress had been made by member countries in terms of the Kampala Declaration. The Kadoma Conference went

[73] *Ibid* recommendations 6 and 7; *Kampala, supra* note 1.
[74] *Ibid* recommendation 2.
[75] *Muntingh, supra* note 71 at 3.
[76] Albert Fiadjoe, *Alternative Dispute Resolution: A Developing World Perspective*, (London: Cavendish Publishing, 2004) at 5 online: EPDF <https://epdf.tips/alternative-dispute-resolution-a-developing-world-perspective.html > (the author notes that "Also, in the present day customary law regime of Ghana, there is still a recognition of non-litigious modes of dispute resolution whereby the parties to a dispute may refer their disagreement to conciliation, mediation or arbitration, outside of the formal court system, to a chief or some respected elder of the community.")

further to urge that imprisonment be used as a measure of last resort.[77] This Conference agreed that community service conforms to African traditions, and that as long as the African public is educated about them, their implementation and management should be effective and achieve reformatory results in the lives of convicted minor offenders.[78] It established that the effective implementation of community service "involves a program of work where the offender is required to carry out a number of hours of voluntary work for the benefit of the community in his or her own time."[79]

A Plan of Action was also adopted to establish a network of National Committees on Community Service, a Community Service Directory containing the contact information of the network of National Committees on Community Service, and a list of experts and resource persons, a Newsletter to update members of progress in each member country and a commitment to collate and analyze data on community service.[80]

4.5.3 Ouagadougou Declaration and Plan of Action on Accelerating Prison Reforms in Africa

The purpose of this conference held more than 15 years ago was, among others, to determine strategies to reduce prison populations, and promote the reintegration of offenders into society. The Conference held in Burkina Faso's capital, Ouagadougou, produced the Ouagadougou Declaration which called, *inter alia*, for the reduction of

[77] *International Conference on Community Service Orders in Africa*, November 1997 online: Penal Reform International <https://www.penalreform.org/resource/kadoma-declaration-community-service-orders-africa/>. [*Kadoma*]
[78] *Ibid at* Declaration 3.
[79] *Ibid* at Declaration 4.
[80] *Ibid* at Plan of Action.

prison populations in Africa by a Plan of Action to increase the use of proven alternatives, such as community service, partially or fully suspended sentences, probation and correctional supervision.[81] They hoped to achieve a reduction in prison population by resort to custodial sentences for only the most serious offences and as a last resort, and by considering prison capacity in determining decisions to imprison. They recommended regular assessment of sentencing practices and empowering the courts with the power to review custodial sentences with the intention to substitute them with community service orders.

Clearly, African states collectively see themselves as housing too many prisoners. They also acknowledge that many of their prisoners need not be in jail for the nature of their offences. And by way of practical response to this common problem, they accept traditional non-carceral punishment alternatives; that is reformation arrangements rooted in traditional practices under which the family and the local community collectively ensures observance of the correctional conditions imposed on the offender. In concrete terms, the nature and implementation of this arrangement looks like the community service order regime recommended for Ghana later in this chapter.

It is obvious in the openness of their recommendations that the African policymakers understand that to have community service orders as a sole sentencing alternative does

[81] *Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa,* November 2003 ACHPR, Res 64 XXXIV 03 online: <http://www.achpr.org/instruments/ouagadougou-planofaction/>.

not give courts the requisite range of sanctions they need. This is not to say that imprisonment should not be retained for serious cases. However the objective must be to rein in convicted offenders who do not comply with their service orders by mechanisms other than imprisoning them for it.[82] This practical challenge is one of those that Kenya had to confront in its pioneering efforts to institutionalize a probation and community service orders system under its Probation and Aftercare Department as an alternative to carceral sentencing practices. The discussion now looks at how Kenya set its system up, where it succeeded, where it failed, and what lessons Ghana could learn from its experiences.

4.6 Operating Probation and Community Service Order Arrangements in Kenya

Kenya has taken the lead in Africa to move away from total dependence on imprisonment as the means to deal with committal of minor offences. In so doing, it has, however, limited itself to the use of fines, probation[83] and community service orders.[84] They took into consideration their available state and social institutions that would be beneficial to the objective of adopting these alternatives.

4.6.1 Prison Population Rates and Early Reform Efforts

The International Centre for Prison Studies records that the occupancy rate for Kenyan prisons was 201.7% of capacity as at August 2016, with a prison population rate of 108

[82] Andrew Von Hirsch, Martin Wasik & Judith Greene, "Scaling community punishments," in Andrew von Hirsch & Andrew Ashworth, *Community punishment – principled sentencing* (Boston: North Eastern University Press, 1992)
[83] *The Probation of Offenders Act* (Kenya) *1943* at s 14(2). [*Kenya Probations Act*]
[84] Community Service Orders Act 1998, s 3(2) (b).

per 100,000 (September 2018).[85] Penal Reform International records that in 2010, the occupancy rate was 226% of capacity.[86] By comparison, the same source notes that Ghana's prison occupancy rate is 150.3% (November 2018) and a prison population rate of 50 per 100,000 (November 2018).[87]

It was from the early 1960s when Kenya sought to effect penal reforms. The goal was to reduce prison overcrowding and to promote positive treatment of minor offenders. There are three main non-custodial sanctions available. These are fines,[88] probation orders[89] and community service orders.[90] The Kenya Sentencing Policy Guidelines, align with the Kampala Declaration on Prison Conditions in Africa and Plan of Action, and the Ouagadougou Declaration and Plan of Action on Accelerating Penal Reforms in Africa. The relevant provision says that "where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence."[91] The sentencing objectives as stated in the Guidelines include proportionality, equality, accountability and

[85] World Prison Brief, Institute for Criminal Policy Research "Kenya", online: Prison Studies <http://www.prisonstudies.org/country/kenya> (These are the latest figures); Penal Reform International, "Alternatives to Imprisonment in East Africa: Trends and Challenges, 2012 online: https://s16889.pcdn.co/wp-content/uploads/2012/05/alternatives-east-africa-2013-v2-2.pdf. [*PRI*]
[86] *PRI, supra* note 85 at 9.
[87] World Prison Brief, Institute for Criminal Policy Research "Ghana", online: Prison Studies <http://www.prisonstudies.org/country/kenya> http://www.prisonstudies.org/country/ghana.
[88] *The Kenya Penal Code* (Kenya) 2014 at s 24 (e). [*Kenya Penal Code*]
[89] *Ibid* at s 24 (i); *Kenya Probations Act, supra* note 83 at s 4.
[90] *Kenya Penal Code*, *supra* note 88 at s 24 (c); *The Community Service Orders Act* (Kenya) 1998 at s3 [*Kenya Community Service Orders Act*].
[91] Chief Justice Willy Mutunga, "Kenyan Sentencing Policy Guidelines" Republic of Kenya at 7.18 online: Kenya Law <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Sentencing_Policy_Guidelines_Booklet.pdf>. [Kenya Sentencing Policy Guidelines].

inclusiveness. The Guidelines also state that because the rehabilitative ideal of sentencing is usually not met when offenders serve short custodial sentences, minor offenders should not be imprisoned.[92]

Relevant to the focus of this work for purposes of drawing lessons for Ghana are Kenya's regime of probation and community service orders.

Among others, the legitimacy or, otherwise, of the foregoing criticisms of probation and community service orders is a matter for each jurisdiction that chooses to utilize them. For the purposes of recommending it for Ghana, lessons as to their effectiveness, and as being more appropriate than incarceration to utilize to punish minor offenders, come from Kenya. As will be shown, the lessons Kenya offers include the need to put in place appropriate structures to support the implementation of the orders, and to secure comprehensive public involvement in doing so. This includes drawing on traditional institutions and structures that are geared to discipline and rehabilitate offenders.

4.6.2 Probation and Community Service Orders in Kenya

The British colonial administration in Kenya had a probation scheme under which it dealt with criminal offenders. Thus obviously, the Kenyan Probation Service was established much earlier. However, it is used to oversee community service orders. Its first probation officers were appointed from 1946.[93]

[92] *Ibid* at page 11.
[93] *Kenya Probations Act, supra* note 83.

The Probation of Offenders Act[94] gives the court authority to impose probation orders. The Act defines a probation order[95] to mean an order placing a person under the supervision of a probation officer. The offender's youth, character, antecedents, home surroundings, health or mental condition, the nature of the offence or any extenuating circumstances are considered by the court.[96] Social Enquiry or Pre-Sentence Reports are obtained from the Probation and Aftercare Services (PAS) to guide judicial officers in their decision making process. The offender may be required to enter into a recognizance with or without sureties.[97] Failure to obey the terms of a probation order can result in the offender's custodial sentencing for the original offence, and the court is obligated to explain these terms to the offender at the time of imposition.[98] The period of time for which an offender can serve a probationary term ranges from no less than six months to three years.

These provisions are similar to the Ghanaian ones discussed earlier in this chapter.[99] However, unlike Kenya, Ghana has no specific legislation under which probation orders are managed. Under the Kenyan system, after considering both the circumstances of the offender and the offence in question, the probation officer designs an individual

[94] *Ibid* at s 4.
[95] *Ibid* at s 2.
[96] *Ibid* at s 4(1).
[97] *Ibid* at s 4 (2).
[98] *Ibid* at s 4(3).
[99] *Act 30, supra* note 35 at s 354.

supervision plan. These plans are rehabilitative in outlook and may include counselling or restorative justice proceedings, such as mediation.[100]

Section 17 of the *Probation of Offenders Act* provides for the adoption of *The Probation of Offenders Rules.*[101] These define the roles and responsibilities of probation officers. The probation officers are expected to provide, generally, extensive supervision of offenders under their care. The Central Probation Committee is expected to advise the Minister on policies related to the management of probation services and to discuss the effective management of any issues that come up. The Probation of Offenders (Case Committee) rules established Case Management Committees in different districts. These Committees are expected to review the work of probation officers on their individual cases, to make the Court aware of any pertinent information, to make recommendations to the Central Probation Committee, and to provide assistance to probation officers as required so that they are able to perform their duties satisfactorily.[102]

4.6.3 Community Service Orders in Kenya: Onset and Implementation

[100] *Kenya Probations Act, supra* note 83 at s 5, Ministry of Interior and Coordination of National Government, State Department of Correctional Services, Probation and Aftercare Services, online: Kenya Probation and Aftercare Services <http://www.probation.go.ke/news/82-chief-justice-appoints-taskforce-on-informal-justice-systems.html > (So far all that appears to have been done in this direction in Kenya has been the setting up of a a Taskforce on Informal Justice by the Chief Justice of Kenya. This Taskforce is to draft a policy document on Alternative Justice Systems "to consider the methodology and viability.")

[101] *The Probation of Offenders Act* (Kenya) 1960 Cap 64 online: Kenya Law <http://kenyalaw.org/lex/sublegview.xql?subleg=CAP.%2064>. [*Kenya Probation of Offenders Act*]

[102] *Kenya Probation of Offenders Act, supra* note 101.

Before the current community service orders scheme was put in place, Kenya had earlier established a precursor scheme to deal with prison overcrowding and to redirect sentencing options from the predominance of incarceration. This began in 1963 through a program known as Extra Mural Penal Employment (EMPE) under the *Prisons Rules*.[103] The program was meant to cater for offenders with maximum sentences of six months. Its administration was entrusted to the Prison Department. However, it turned out to be ineffective in reducing the prison population. A major cause was its rampant abuse: offenders would simply walk away and never return, mainly because of poor warden supervision.[104] Thus, though offenders were punished by having to work in a public institution, prison officers were required to supervise them as part of their work in the prisons. This arrangement was not well-coordinated, hence the poor supervision. As this worsened, it became next to impossible to keep track of offenders.

In 1996, an interim committee was set up to implement a new round of penal reforms. This resulted in the introduction of the Community Service Orders Program.[105] The supporting Kenyan Community Service Orders Bill was enacted in 1998.[106] Under the scheme, to be eligible for a community service order, an offender must have committed an offence that could carry a maximum penalty of three years' imprisonment, with or without the option of a fine; or an offence that could potentially attract three years' imprisonment but in regard to which the court decides that a community service order

[103] *The Prisons (Prisons Council) Rules* Kenya 1963 Cap 90 at s 68 online: Kenya Law < http://www.kenyalaw.org/lex/sublegview.xql?subleg=CAP.%2090 >.
[104] *Birungi*, *supra* note 55 at 26.
[105] *Ibid* at 26.
[106] *Kenya Community Service Orders Act, supra* note 90.

will be an appropriate punishment.[107] The unpaid public work done within a community is imposed for a minimum of two hours daily, and a maximum of seven hours daily.[108] The rationale is not necessarily to provide income for the offender. It is to keep him or her out of prison. The fact that the economic need that may have impelled the offence may not be addressed in this way is a different matter, as far as direct alleviation of it is concerned. In practice, the term can be as short as one day for offenders charged with particularly minor offences "who are transported to different work stations immediately after the court session to work for the rest of the day."[109]

4.6.4 The Community Service Orders Legislative Scheme

Under the Community Service Orders Act of 1998, community service and probation in Kenya are overseen by the Probation and After-Care Department within the Ministry for Home Affairs and the Office of the Vice-President. It is administered through the Directorate of Probation and After-Care. The duties of this department are:

> the provision of advisory reports to various agencies for purposes of determining bail and bond terms, sentencing and pre-release decision making, ensuring public safety by working with victims of crime and the community in the management of offenders, and the supervision, resettlement and rehabilitation of offenders serving various sentences in the community.[110]

Management of implementation and compliance with the orders is entrusted to the National Community Service Orders Committee. This is chaired by a High Court judge,

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[107] *Ibid* at s 3.
[108] *PRI, supra* note 85 at 10.
[109] Penal Reform International, "Community service and probation for women: A study in Kenya" at 8, online: Penal Reform International < file:///C:/Machine%20Files/Downloads/Revised-PRI-Kenya-women-prisoners-report-WEB.pdf>.
[110] *Kenya Probations Act, supra* note 83.

and includes the Director of Public Prosecutions or his representative, the Permanent Secretary in the Ministry for Public Works or his representative, the Inspector-General of Police or his representative, the Commissioner-General of Prisons or his representative, the Director of Probation, the Director of Children's Services, a representative of the Council of Law Society of Kenya, a professor of law, a magistrate, the National Community Service Orders Coordinator and five other appointees.[111] This Committee advises the Minister of Justice and Chief Justice on the implementation of the provisions of the Act. More specifically, they are to co-ordinate, direct and supervise community service workers and manage data on the operationalization of the provisions of the Act to improve it.[112] The objective regarding the composition of the committee is to ensure the support of both the criminal justice sector stakeholders, and the general public whose support is obviously key to the successful implementation of the community service program.

In terms of staffing, as at 2010, there were 117 Community Service Officers.[113] Their duties, as listed in the Second Schedule of the Community Service Orders Act, are to identify suitable work placements, ensure compliance with orders and, in general, monitor the scheme to ensure its smooth running.

Kenya was careful to be clear as to the mandates and tasks assigned to the scheme of community service orders. Ultimately, the goal is to recognize and maintain value for the

[111] *Kenya Community Service Orders Act, supra* note 90 at s 7.
[112] *Ibid* at First Schedule, s 9(2).
[113] *PRI, supra* note 85 at 9.

proper treatment of those who commit minor offences. This is especially because of Kenya's past experience with the Extra-Mural Penal Employment (EMPE) scheme under which this mandate was not met, with the result that offenders were neither reformed nor trained in income-earning activities.

4.6.5 Community Service Placements

Under Kenya's Community Service Orders Act, minor offenders are expected to participate in clearly prescribed work areas. Among others, they are: "construction or maintenance of public roads or roads of access; afforestation works; environmental conservation and enhancement works; projects for water conservation, management or distribution and supply; maintenance work in public schools, hospitals and other public social service amenities; work of any nature in a foster home or orphanage; rendering specialist or professional services in the community and for the benefit of the community."[114]

For instance, in 2008-9, the Kenyan Community Service Order National Afforestation Program was put in place. Under this program, offenders are expected to contribute to increasing Kenya's forest cover from 3% to 10% by 2030. Every year since then, offenders have planted 1.5 million tree seedlings.

[114] *Kenya Community Service Orders Act, supra* note 90 at s 3(2).

The scheme also enables the undertaking of income-generating activities by offenders. They include raising rabbits, fish, goats, bees, and apprenticeships in brick-making. Products from these undertakings are sold at subsidized prices. Altogether, offenders learn skills to generate income and their activities enhance their prospects for social integration.[115]

Penal Reform International explains that the aims of the Government of Kenya in its implementation of community service orders are:

> "to keep non-serious offenders out of prison where they would be exposed to serious offenders and cost the taxpayer for their maintenance; to punish the offender by compelling them to undertake work that directly benefits their community; and to rehabilitate the offender by ensuring that their ties to family and friends are not broken, and that they retain existing employment while performing work of benefit to the community.[116]

Obviously, the legislative scheme and its implementation through the service orders reflects a commitment to reach those goals. The question that arises is how successful they have been so far.

4.6.6 Compliance

It appears that under the operation of the Kenyan scheme so far, the majority of offenders successfully complete their sentences. Between 2005 and 2010, the Kenya Probation Service reports that out of 314,013 community service orders, 304,421 (97%) were satisfactorily completed. 2% of the offenders absconded, and court proceedings were started against them. Another 1% of the orders were only partially completed.[117]

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[115] *PRI, supra* note 85 at 11.
[116] *Ibid* at 10.
[117] *Ibid* at 12.

This success rate builds on earlier beginnings. For instance, it is reported that as early as 2002, more than 60,000 offenders had benefited from community service orders instead of going to prison.[118]

Notwithstanding this good record, the Kenyan scheme must overcome some challenges to remain successful and gain greater effectiveness as to achieving its objectives.

4.6.7 Implementing Community Service Orders in Kenya: Current Challenges

As noted, the community service scheme in Kenya, arguably, has achieved some success. However, there are some significant challenges in terms of ensuring its effectiveness as an alternative to imprisonment. First, it is acknowledged that some alternative sentences might be more appropriate for certain offenders, except where Kenyan law does not permit it in relation to the specified offence.[119] To overcome this, the State has embarked on a decongestion program where offenders serve part of custodial sentence and the rest is commuted to community service.[120] In this regard, the capacity of the community service scheme to absorb them is directly highlighted. This leads to the second challenge.

This challenge is the concern that resources are inadequate to ensure the implementation of the sentences once they have been imposed. This challenge,

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[118] *Ibid* at 11.

[119] Penal Reform International, "Summary Note to Alternatives to Imprisonment: Trends and Challenges at 1 online: Penal Reform International <https://s16889.pcdn.co/wp-content/uploads/2012/05/Summary-Note-Alternatives-to-Imprisonment-Final-February-20121.pdf > (the idea of community service was suggested by an international NGO, Penal Reform International and that was picked up at the policy level by the Kenyan government who probably appreciated the pragmatic solution proffered.)

[120] *Ibid* at 1.

combined with the first, has meant that placement and supervision are not correlatively effective, resulting in varying rates of compliance and reoffending.[121]

The third issue concerns the perception of the general public and the courts regarding the viability of alternative sentencing. Education campaigns to sensitize the public to community service orders (and other means of punishment) have not been wholly successful. In fact, it appears that many members of the public are unsympathetic to the idea. For example, it was found that there were nearly 600 convicted prisoners in Nairobi Central Prison serving sentences of less than six months because "magistrates do not trust their capacity [the capacity of the offenders] to commit to community service."[122] As a result, a 2003 evaluation of community service in Kenya found that there had not been much improvement in prison overcrowding with the introduction of community service.[123] The same evaluation suggested that the prospect of the paperwork involved in the imposition of community service was a disincentive to some magistrates.[124] Another challenge was discovered by a study in Kenya that found that "net-widening" was taking place, that is, instead of community service orders being imposed, more convicted offenders are imprisoned rather than put into the community service order programs they may be eligible for. In essence, the reality here is that alternatives like community service orders, do not necessarily replace imprisonment. Rather, they are

[121] *Ibid.*
[122] Rumin Siege, "Report on the Independent Assessment of the Community Service Programme and Zambia, Kenya and Uganda 2003" in *PRI, supra* note 85 at 18.
[123] *Ibid*.
[124] *Ibid*.

used for offenders who would have otherwise attracted discharges or fines, such as for public nuisance.

4.6.8 Lessons from Kenya

The discussion of the Kenyan scheme offers some valuable lessons for recommendations for Ghana in pursuit of its need to create an effective scheme and mechanisms to punish and rehabilitate its minor offenders.

First, it is necessary to ground an alternative scheme of criminal offender sentencing within the structure of existing applicable legislation. This is what Kenya has done.

Second, novel alternatives require either amendment of existing law to accommodate it, or complementary legislation. Again, Kenya's scheme is grounded in both existing and new legislation.

Third, the legislative scheme must provide clear, workable mandates which can be pursued through existing institutions. In this regard, Kenya's supervising magistrates are instrumental, seeing also that their perceptions of the likelihood of which offenders would comply with such orders informs their decisions on whether to impose an order or not.

Fourth, Kenya's experience teaches that it is wiser to confine the category of offenders who are most eligible for it, namely, minor offenders as conceived in this thesis and as reflected by the class of offenders that Kenya's scheme was established to cater to under its community service orders scheme. In this way the problems that led the offender into

trouble with the law are defined, and the goals of community-based sanctions are identified so that these new solutions can be implemented successfully.[125]

As has been noted in earlier chapters, many minor offences are committed for economic reasons. In Kenya, as part of Vision 2030, a governmental development plan, Community Service Orders Flagship Projects was established. They had two aims: the creation of employment and poverty reduction, and environmental conservation. These aims were informed by the discovery that a large number of convictions were for "stealing farm produce; being in possession of or found selling illicit liquor; loitering for immoral purposes; and domestic violence arising from issues of poverty."[126] The initiative established community service order work centres where offenders could learn income generating skills while serving their sentences so that they turn away from offences for the purpose of survival. The products from these centres are sold at subsidized rates to the community, thus ensuring that the offender regains social capital while the community also benefits directly. However, this means that although offenders learn new skills that they could use to generate income, they are still not paid for their labour. For those of them who are not gainfully employed, it means they remain in poverty. Capital is needed to benefit from opportunities to acquire income generating skills.

[125] Francis T Cullen and Paul Gendreau, "Assessing Correctional Rehabilitation: Policy, Practice, and Prospects" (2000) 3 Policies, Processes, and Decisions of the Criminal Justice System at 109-175, online: Semantics Scholar < https://pdfs.semanticscholar.org/d232/863893171b4022e0bf69076e83a70e01a524.pdf>.
[126] UNODC, "A Draft Report: Alternatives to Prison in Kenya" at 8.1, online: United Nations <file:///C:/Machine%20Files/Downloads/UNODCROEADraftReportAlternativestoPrisoninKenyaFINAL2013Jan_28.pdf>.

Perhaps the tree nursery initiative by the same community service order program where offenders participating in the afforestation program are trained on the establishment and management of tree nurseries could be applied to the work centres. Some of the former offenders have been able to establish their own nurseries from which they are earning income.[127] The information available does not show how they established their own nurseries. Perhaps they were given tree cuttings on completion of their sentences.[128] Ideally, limiting community service hours to weekends or evenings and providing support with finding concomitant paid work should be the goal. However, it must be stated that simultaneous paid work for an offender relates to job opportunities in the general economy. This is the proverbial Catch 22 in most African states where unemployment is quite high.

Finally, not only must there be a national oversight body of relevant stakeholders. Additionally, the participation of the public must be sought through educating them in the benefits of the scheme and their appreciation of the indispensability of their support for it.

This short study of Kenya's example is not intended to advocate for a transplantation of an apparent success story. Rather, it draws from Kenya's success to inform appropriate

[127] Penal Reform International, "Kenya Probation Service (2010) Feedback 2005-2010," Making Community Service Work: A resource pack from East Africa at 58, online: Penal Reform International < https://cdn.penalreform.org/wp-content/uploads/2012/05/Making-Community-Service-Work-A-Resource-Pack-from-East-Africa-2MB.pdf >
[128] *Ibid.*

choices and actions in Ghana. This approach is necessary because "the trajectory of criminal justice development depends on a wide range of political, economic, social, cultural and emotional influences, interacting with each other in uncertain ways."[129] This is why lessons, rather than transplanted structures, are the more appropriate fruit to take from a comparative study. Van Hoecke[130] counsels that learning or borrowing must be used to improve domestic situations, including laws. This is what the comparative discussion aims to highlight for Ghana's need to tackle its punishment and rehabilitation of its minor offenders.

The issue of how well Ghana can take in these lessons to create an alternative scheme for punishing and rehabilitating its minor offenders is considered next.

4.7 Institutionalizing a System of Probation and Community Service Orders for Ghana's Minor Offenders

The arguments for and against the introduction and actual implementation of alternatives earlier discussed, pitted the advantages and disadvantages of adopting them against each other. The emergent justification, however, is that diversion cannot replace

[129] Penal Reform International, "On probation: models of good practice for alternatives to prison" at 2, online: Penal Reform International <https://s16889.pcdn.co/wp-content/uploads/2016/12/Probation-model-report-final-2016.pdf>.

[130] Mark van Hoecke, "Methodology of Comparative Legal Research" (2015) online: <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001#content_RENM-D-14-00001.ID2213-0713_0020> (offers a "toolbox" methodology for defining the paramaeters of comparative legal research) as I set out to do in this thesis.

imprisonment for its own sake. Rather, along with incarceration, and, in the appropriate situation, alternative sentences act as complementary sanctions to prison sentencing. Indeed, on their own, alternatives are not enough to check rising prison populations. In Ghana, there does not appear to be a centralized policy on the administration of alternative sanctions, especially in light of an objective to reduce prison populations while addressing the economic reasons that impel majority of the minor offences committed in the country. As shown in chapters 1-3, what Ghana faces is overuse of imprisonment for minor offences. Within the limits acknowledged, the statistical and anecdotal evidence for this in chapter 3 found plausible verification in the pronouncements of magistrates when they sentence these offenders either to prison, or to pay fines which may be converted to prison terms if they do not pay. Earlier in this chapter, it was pointed out that prison overcrowding is now recognized not only as a matter for international attention. Within Africa, policymakers and political leaders accept that African states must take steps to reduce their prison populations. Kenya has made noticeable and largely positive impacts on the regime of minor offender management for reformation and social integration. The lessons Kenya's example offers, as summed up above, constitute points of departure for assessing how Ghana may also set up a system of community service orders and its administration. The high points of this discussion focus on legal reform, institutional restructuring, and enforcement of the orders via state and public participation.

4.7.1 Punishing Minor Offenders: 'Soft' Law Influences for Ghana to Adopt Non-Custodial Sentencing

Ghana's need to develop a more progressive sentencing policy and legislation is not only a matter of domestic imperative. It is also rooted in soft law (non-binding rules) demands arising from its membership in the United Nations and the African Commission on Human and People's Rights. These organizations prescribe international and regional standards on this issue.[131] Regional instruments, such as the Kampala Declaration on Prison Conditions in Africa, 1996,[132] which was adopted by the UN in 1997, note the need to decrease overcrowding by promoting non-custodial sentencing in African prisons. The pivotal Kampala Declaration set the stage for the Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa. Though these documents are not binding treaties, they are persuasive as consensus policy indicators regarding what African states must do about their regimes of criminal justice administration. Indeed, Penal Reform international[133] calls for restriction on the use of custodial punishment for minor offences.[134] As discussed earlier, the African policy Declarations acknowledge the usefulness of indigenous forms of justice, especially in terms of "reconciliation, mediation, arbitration and traditional dispute resolution mechanisms."[135] Traditionally,

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[131] *New Patriotic Party v Inspector General of Police* [1993-94] 2 GLR 459 (Ghana) at 466 *(*it was held that though Ghana had not passed legislation to give effect to the African Charter on Human and Peoples' Rights, the fact that it had signed it meant that it has to respect the rights and freedoms enshrined therein.)

[132] *Kampala, supra* note 1.

[133] Penal Reform International (PRI) is an independent non-governmental organization that develops and promotes fair, effective and proportionate responses to criminal justice problems worldwide online: < https://www.penalreform.org/>.

[134] *PRI, supra* note 85 at 19.

[135] *Ibid* at 20.

guilty offenders were not committed to penal custody. They were fined or sentenced to communal labor or, in some cases, to both, provided it was reasonable for the offender to honour both.[136] Between tradition, international, and African policy persuasion, Ghana is being pushed to face the need to redefine the tools it utilizes to punish its minor offenders.

4.7.2 Alternative Sentencing Tools: Prospects of Acceptance in Ghana

Research undertaken so far to evaluate the views of Ghanaians on alternatives to custodial sentences has tended to focus on assessing acceptance or, otherwise, of these measures, including restorative justice measures.[137] One study done in the Kumasi Metropolis in the Ashanti Region of Ghana found that, in general, the public appeared receptive to community service and actually preferred it to incarceration.[138] This

[136] R S Rattray, *Ashanti Law and Constitution* (Oxford: Oxford University Press, 1969) at 377-378

[137] N O Dagadu, "Restorative Justice and Alternatives to Custodial Sentencing. A Research Report on the Northern and Upper East Regions" (2006) Accra: The Law Reform Commission; J M Alifo, "Restorative Justice and Alternatives to custodial sentencing. A Research Report on the Greater Accra, Ashanti and Brong Ahafo Regions" (2006) Accra: The Law Reform Commission in Feikoab Parimah, *Community Sentencing of Adult Non-Violent Offenders: Exploring Attitudes and its Viability in the Accra Metropolis* (2005, Master's Degree, University of Ghana) [Unpublished] online: University of Ghana <http://ugspace.ug.edu.gh/bitstream/handle/123456789/22644/Community%20Sentencing%20Of%20Adult%20Non-Violent%20Offenders%20%20Exploring%20Attitudes%20and%20Its%20Viability%20in%20the%20Accra%20Metropolis.%20-Feikoab%20Parimah.pdf?sequence=1 >; Feikoab Parimah, Joseph Osafo & Kingsley Nyarko "Ghanaians' Attitudes Toward the Sentencing of Offenders to Community Service," (2015) 2nd Annual Psychology Research Conference," online: Researchgate <https://wwwresearchgate.net/publication/288824201_Ghanaians'_Attitudes_Toward_the_Sentencing_of_Offenders_to_Community_Service> (24 people were surveyed).

[138] Kwadwo Ofori-Dua et al, "Prison without Walls: Perception about Community Service as an Alternative to Imprisonment in Kumasi Metropolis" (2015) 3:6 Int J Social Science Studies at 130 online: Researchgate <https://www.researchgate.net/publication/283236491_Prison_without_Walls_Perception_about_Community_Service_as_an_Alternative_to_Imprisonment_in_Kumasi_Metropolis_Ashanti_Region_Ghana> *[Ofori-Dua et al].*

preference appeared to be related to the reduced stigma faced by offenders who serve community service orders, along with the higher possibility of their reformation compared to when they were sentenced to custodial punishment. Overall, respondents agreed that minor offenders should be punished by community service instead of through imprisonment. In particular, they recommended that "people with communicable diseases, pregnant and nursing mothers, single parents and first-time offenders" should be included in the number of those punished by "communal community service."[139]

As to the nature of offences to attract this form of sanction, those surveyed agreed on public disturbance, minor traffic offences, minor domestic violence, minor fraud, and minor assault, deceit of a public official, causing minor damage to public property, contempt of court, defilement, incest and public disturbance.[140] This list indicates how Ghanaians think those who commit these offences, some of which, like domestic violence and incest may seem grievous, should be helped to reform – by means of traditional disapproval and disgrace balanced by community support for reform.

As discussed in Chapter 3, within limits, the data supports my view that Ghana has too many minor offenders in jail. As such, implementation of non-custodial sentencing will not only help decongest the prisons. It will also help to reduce the rate of infections from HIV/AIDS, tuberculosis (TB in particular thrives in congested, unhygienic places) and

[139] *Ibid* at 130.
[140] *Ibid.*

other communicable diseases within prisons. The reduction in the number of prisoners will mean that it is likely that those incarcerated have access to adequate reformatory programming. The greatest impact is the diversion of minor offenders from jails and their redirection to contribute to their communities by their work, while simultaneously learning skills that will enable them to set out on the road to support themselves and, at the same time, learn skills to be able to support themselves in reasonable time.

Between these foregoing socio-economic advantages to implementing a system of community service orders for Ghana's minor offenders, and the social and cultural acceptance of doing so among Ghanaians, there is reason to utilize the lessons learned from Kenya to make recommendations for Ghana in keeping with its own context.

4.7.3 Setting Up a Community Service Orders System for Minor Offenders in Ghana

This discussion proceeds on the expectation that, Ghana's need to divert minor offenders from carceral punishment must be recognized in relevant legislation, either by way of amendments to existing laws or the promulgation of a dedicated statute. This point is contextualized within the recommendatory analysis that now follows. The discussion assesses the practical matters of ensuring placements for minor offenders ordered to terms of community service, prospects of compliance with the orders, and of success for functioning of the system.

4.7.4 Placements

In Ghana, community service placement possibilities lie in such areas as environmental sanitation, that is the offenders are organized to clean city streets, declog public drains and clean public toilets. The need for this has been there since independence in 1957 rooted in issues of rapid urbanization and the fact that local government authorities are unable to consistently deal with maintaining clean municipal environments. These authorities lack adequate financial resources to apply to this task. Major urban settlements across the country have "heaps of solid waste [littering many] residential areas. As a result, many major street drains are choked and regularly lead to flooding."[141] In fact, concerning the type of community service preferred by the general Ghanaian public and some prisoners, a recent study found that the priorities include "construction of public buildings, cleaning of public places, cleaning of cemetery/ digging of graves, digging drainages, making of furniture for public schools, farm work, painting of public buildings, construction of feeder roads, tree planting, uniform sewing for school children and cross walk services for school children in high traffic times and areas."[142]

Needless to say, the challenge is to simply organize the service order system to direct offenders to these areas of local and national need. Given this as an example, the lesson from Kenya for Ghana is to ensure collaboration between criminal justice officials and

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[141] Kwasi Kwafo Adarkwa, "The changing face of Ghanaian towns," (2012) 4:1 African R Economics Finance at 22, online: African Journals Online <https://www.ajol.info/index.php/aref/article/viewFile/87230/76962> at 22.

[142] *Ofori-Dua et al, supra* note 138 at 9; William Clifford, *An Introduction to African Criminology* (Oxford University Press: Nairobi, 1974) at 192 (he suggests "road maintenance companies, road building units, fishing camps, harvesting camps, cooperative farming squads or settlements, mechanical aid units for village self-help projects and low-cost housing teams.")[*Clifford*]

local and national institutions under whose authority and supervision identified activities must be undertaken. As seen in Kenya's case, magistrates oversee placement and compliance via the oversight of local community service committees. Similar arrangements could work in Ghana. In particular, local government authorities and traditional rulers who carry tremendous influence in local areas across Ghana, can constitute such committees. In all likelihood, they will be able to ensure success in their oversight of placement and compliance under community service orders.

4.7.5 Challenges of Ensuring Compliance

The remarks above concerning placement prospects for community service offenders, and by implication, as to their compliance with those orders do not, however, ignore that actual compliance with the orders faces potential difficulties. At least, two challenges face community service orders administration in Ghana.

First is the sparse availability of, especially, competent personnel for the purpose. For this reason, until requisite numbers are trained and equipped, available supervision officers may be stretched thin, making it problematic to ensure compliance with the orders. The proposal for using community service orders to punish minor offenders would build on the administrative resources available through the Ghana Social Welfare Department. The Department would liaise with government and non-governmental organizations that might have need of such labour. Clifford suggests that a prison service could employ crafts persons to train this class of offender.[143] Even if this idea is taken up,

[143] *Ibid* at 192.

it must be noted that Western style social work characterized by individualized treatment protocols cannot be successfully applied in Ghana. This is because resources, such as halfway houses where such offenders may be put, require capital investments and human resources that Ghana cannot yet afford. It is more in keeping with the nature of Ghanaian society, which places emphasis "on informal kinship community networks focusing on self-help processes," [144] rather than on formal social or legal structures, to keep these offenders within their families. This way, they also remain under the oversight of their own communities whose members, by this arrangement, would directly participate in their rehabilitation and reintegration under the community service orders system. This is more salient given that, for the most part, social services are virtually non-existent in Ghana.

This is why the handing over of these offenders into, as it were, the "custody" of their extended families has great potential to be effective for compliance assurance. Ghana's extended family system provides a means of social control and support, an advantage that is not as visible in Western societies. The family protects and punishes its members who offend the law (thus embarrassing the family), while rewarding those who indicate reformatory changes in conduct. Beyond the extended family, traditional rulers are an important resource of social power and control.[145] Community elders, including competent retirees who may have technical or vocational skills which they will be able to

[144] Morena J Rankopo & Kwaku Osei-Hwedie, "Globalization and culturally relevant social work: African perspectives on indigenization" (2011) 54:1 137 at 140.
[145] Marshall B Clinard & Daniel J Abbott, *Crime in Developing Countries: A Comparative Perspective* (John Wiley & Sons, 1973) at 246.

share with this category of offenders, not only through serving their orders, but also for the rehabilitative and reform purpose of enabling them to generate income, are rich and worthy resources for enhancing offender compliance with the orders. The challenge for the state is to pool these resources in support of the program.

Second, there is a potential public perception problem though, as exemplified in the Ashanti Region study noted above, there is general social and community acceptance of community service orders. In fact, it is possible that some of those punished under service orders would be regarded as having gotten away with their crime for reason of the relatively reduced sentencing such as an order imposes. The combatting tactic would be to attempt to harness the pervasive electronic and print media in Ghana to create awareness and sensitize the public to the virtues of the system in order to enhance popular acceptance for it. [146] Once the community "buys into" this concept, it would, under Ghana's structure of community care, take on a life of its own. This is another lesson the comparator state of Kenya offer to Ghana.

4.7.6 Facilitating Minor Offender Reform through the Law

This thesis is particularly directed to judges and, magistrates in particular, to seek, along with other stakeholders, legislatively backed discretion to overcome the rigidities of the Ghanaian criminal justice system in order to ensure that, in keeping with its objective,

[146] *Birungi, supra* note 55.

criminal justice is dispensed in a reformative manner under the *Criminal Code*. As discussed in Chapter 2, the omnibus classification of criminal offences that currently pertains in the Ghanaian Criminal Code is a major factor in this rigidity, resulting in the overuse of incarceration for the punishment of minor offences.[147] Prisons must become only a last resort and, community service orders must be accompanied by sanctions for non-compliance that do not include prison.

Penal labour need not be wasted in imprisonment where there is a very low possibility that any offender would acquire any rehabilitative skills. Such labour, protected under the Mandela Rules 96-103,[148] would not exploit a criminal as if he or she were a slave. The objective is that beyond discharging their community service order obligations, minor offenders would also acquire skills that, metaphorically speaking, would place them in position to "cultivate their own gardens."[149] This means that beyond the short

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[147] *The Ghana Criminal Offences Code*, 1960, Act 29 at s 125 online: World Intellectual Property Organization < https://www.wipo.int/edocs/lexdocs/laws/en/gh/gh010en.pdf> (this provision defines stealing as dishonestly appropriating a thing of which the person is not the owner.) [*Act 29*]; s150 defines robbery as a situation where for the purpose of stealing something, a person uses force or causes harm to any person, or if they use any threat or criminal assault or harm to any person, with the intent to prevent or overcome their resistance of that or other person to the stealing of the thing; Wisdom Akpalu & Anatu Mohammed, "Socioeconomics of crime and discretionary punishment: the case of Ghana" Int J Soc Econs 40:2 116 at 124, online: < https://www.emeraldinsight.com/doi/pdfplus/10.1108/03068291311283599 > (they used convicted theft cases found on ghanaweb.com, a Ghanaian news site. They found that the judiciary assign a heavier penalty to petty theft relative to serious theft. In fact, they found that the least amount stolen GHC 0.35(0.098 CAD) attracted a jail term of 24 months; while the maximum amount of GHC 2,202,111.00 received a total prison term of 57 months (at 120).); *Act 29* at s124. (It denotes stealing to be a second degree felony which attracts not less than ten years imprisonment. Armed robbery attracts term of not less than 15 years.)

[148] *United Nations Standard Minimum Rules for the Treatment of Prisoners, the Nelson Mandela Rules,* 70th Sess, Annex, GA res 70/715 online: United Nations Office of Drugs and Crime <https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf>.[*Mandela Rules*]
*(*these rules ensure that prisoners are not subjected to slave labour.)

[149] Francois Marie Arouet de Voltaire, *Candide, ou l'Optimisme* (Dover Publications, 1759.)

term of their punishment, they are able to find employment to provide for themselves and their families. Thus, the period of labour under punishment should constitute a training phase.[150] This means a prisoner is not and, will not be made to do forced labour, although as earlier indicated, available job opportunities are contingent on the general economy. Police description of the kinds of petty losses and harms caused by this class of offender points directly to socio-economic reasons for the commission of a majority of minor offences. As Kenya has shown, an effective after-care service will ensure the success of this system. In this way, the training of minor offenders who are punished through community service orders in poultry or fish farming, for example, will ensure that they acquire income-earning skills and the experience required, at least, to attempt a new, reformed life.[151]

Ghanaian criminal legislation must be reformed to empower enforcement efforts to aim at rehabilitating minor offenders and enabling them simultaneously, to contribute to the development of the country. Offences identified in this thesis, such as assault, stealing, threat of harm, fraud, causing harm, unlawful entry, contempt of court, dishonestly receiving, driving offences, conspiracy, defrauding, possession of offensive weapon,[152] and possession of stolen property can, subject to severity in each case, be re-categorized as minor, ensuring that those who commit them are no longer routinely jailed. A further

[150] *Clifford*, *supra* note 141 at 191.
[151] *PRI, supra* note 85 at 11.
[152] I have included this category because from my work with the Justice for All Project, those charged with this offence tended to be illiterate farmers and hunters who had no idea of the illegality of their usually locally and crudely manufactured weapons. In fact, if these weapons were used as part of robbery then the figures (34) should correspond to the number of inmates charged with robbery (501).

step in legal reform is to review and repeal outmoded laws and the inconsistencies they presently create for the categorization of crimes under Ghanaian law. As a follow-up policy measure, the state may then release into community service, those whose offences should not have, thus, landed them in prison.

The foregoing suggestions for law reform are fundamental for Ghana at the moment. This is because a dedicated piece of legislation on community service orders, like Kenya created, will not operate independently of the overall criminal justice legal structure. Consequently, this reform requires major input from stakeholders. In particular, input from the Ghanaian judiciary, the Attorney-General's Department and the Police Service are even more important than that from the Prisons Service. The legislative and policy outcomes from this combined effort will better situate the potential for a system of community service to function effectively under Ghana's regime of criminal justice administration.

The foregoing insights deserve re-emphasis in terms of the roles that specific actors can bring to ensure a successful implementation of a system of community service orders across Ghana. The judiciary, a national committee, and the public are identified for this reiteration.

4.8 Key Role of the Ghanaian Judiciary

This thesis suggests that in Ghana, the recipient of a community service order be a minor offender convicted of an offence for which the prison sentence is three years or less. The only way to ensure this is to put in place new sentencing guidelines for magistrates of the district courts. There should also be regular training sessions and seminars for these magistrates to sensitize them to the new orientation in understanding and appreciating the nature of a minor offence. Consequently, a magistrate who may hand out a custodial sentence for a minor offence must explain the justification for it in keeping with the objectives and guidelines of the applicable criminal law and sentencing guidelines.[153] Thus, a dedicated law on non-custodial sentences must be promulgated, setting out, among others, requirements and criteria for imposing a non-custodial one in regard to an offence under its purview. Though not discussed in this thesis, a useful rule under Zimbabwe's system is that custodial sentences that could have been disposed by community service orders must be reviewed by the higher court judges, and the review judgements must be circulated to all magistrates.[154] The circulation of these review judgements produce guidance to ensure consistency in the details of community service orders in terms of the number of hours per equivalent period in custody. Even more

[153] Vivien Stern, "Alternatives to prison in developing countries, Some lessons from Africa" 1:2 Int Centre for Prison Studies, SAGE Publications at 234, online: Sage Publications < http://journals.sagepub.com/doi/pdf/10.1177/14624749922227801>.[*Stern*]
[154] *Ibid* at 234.

interesting, though this may not look like an appropriate judicial role in Western conception, under the Zimbabwean system, by law, magistrates are expected to visit those who have been sentenced under community service orders at their places of work to inspect "the management of the placements."[155] It is recommended for Ghana to do similarly. This ensures that the magistrates who impose the community service orders, are also the state's gatekeepers ensuring their successful implementation. By doing so, they strengthen the hands of those other actors who are tasked with ensuring compliance with the orders, like the authorities at the workplaces where the orders are served.

4.9 National Community Service Committee

It is recommended that a National Community Service Committee be established. This body would be key to structuring and managing community service orders. It should be made up of stakeholders from the general public and the criminal justice system because such composition would be crucial to its success. This must be a remunerated position, as remuneration is a necessary incentive for dedication to a fundamentally radical overhaul of minor criminal offender disposition which the establishment of a system of community orders shall be for Ghana.

[155] *Ibid* at 234 (in my opinion this is just a way for these magistrates to ensure that the scheme is working and it is to help them have a personal connection to the work.)

The members should include representatives of the judiciary, the police, and the prisons, the Attorney-General's Department, local government, social services, print and electronic media and representatives of those who supervise the offenders. This makeup will ensure that new developments and problems are addressed as they spring up. As this is potentially a big group, it is expected that a smaller group drawn from it will meet more regularly, probably monthly, or as necessary, to discuss progress and, if necessary, initiate and modify strategies to ensure best practices for meeting the objectives of the Program. This group will be a major institutional support for the community service scheme proposed in this thesis. The remuneration must be additional to their regular incomes within a scale of reasonability that reflects the onerousness of their task under this scheme.

4.10 Public involvement

It has already been highlighted that public involvement and "ownership" of this project is key to its success as in Kenya.[156] To generate and maintain public support requires that the Ghanaian people be regularly informed about, and allowed to be involved in the workings of community service orders via appropriate avenues created for this purpose. The National Committee must assume leadership in engaging public input. It could tour Ghana's administrative regions to meet with traditional rulers and their local area

[156] See Yvon Dandurand, "A Second Chance - Alternatives to Imprisonment and the Social Reintegration of Offenders In Kenya" (2012) UNODC-ROEA at 22.

segments of the public to inform them of the workings of the project and elicit their commitment to its success. Public involvement should include that of local organizations and non-governmental organizations, seeing that their programs and activities may be germane to the tasks that magistrates could impose under community service orders. Ghana would do well to intentionally incorporate this as a central feature of implementing its community service orders system.

4.11 Regular Research and Evaluation

It was admitted in Chapter 3 of this work that, the anecdotal evidence and the common knowledge that pervades Ghana that too many minor offenders end up in jail, is not as easy to verify statistically. Consequently, to gauge the current social acceptance of an established system of community service orders would require additional research and evaluation, also a valid and dependable assessment of the success, or otherwise, of the program in light of its objectives, particularly, as regards prison population decongestion and reform and rehabilitation of the intended beneficiaries of the program, the minor offenders is required.

It is not clear that Kenya schematically provided for this. However, Zimbabwe did and Ghana can, and should make this a strong feature of its system.[157] By way of suggestion, my recommendation envisages that information and data will be collected and collated

[157] *Stern, supra* note 151.

at specific junctures of the process, from imposition of an order, to compliance and up to its completion. Questionnaires should be administered regularly to all participants in the program. Members of the National Committee should participate in this as appropriate to their oversight and leadership duties.[158] The feedback received through these questionnaires would inform timely program review to ensure that the mandate of the community service scheme is properly implemented and that its goals are being met. Ultimately, the lessons this yields could be applied to other areas of criminal justice administration and reform.

The proposal here is for Ghana to have a model where community service is subsumed under the probation office. Here, offenders are supervised by probation officers assisted by community service workers. This is because there is already in existence a Probations Department under the law. Probation officers select appropriate placements and make recommendations to the court. It is true that a probation-directed community service would be less expensive than prisons in the long run. It would also mean the high risk of net widening and the possibility of offenders being at risk of going to prison on subsequent court appearances. Even so, as discussed, incarceration is not abolished by the institutionalization of probation and community service orders. They all constitute complementary tools in a regime of punishment requiring treatment of offenders as is commensurate with the gravity of their offences. The tying point, therefore, is that

[158] *Ibid* at 236 (A questionnaire was administered to committee members, judges and magistrates, heads of placement institutions, community service staff and offenders asking for their opinions on the scheme, its administration and effectiveness. The results received were generally positive and those portions of the scheme that required re-tweaking were dealt with appropriately.)

diversion does for an offender what incarceration under Ghana's current regime of imprisonment does not achieve, namely, a greater prospect of reformation and social reintegration. In this sense, both probation and community service orders are worthy paths towards realizing the ultimate goal of Ghana's criminal justice system – reformation and rehabilitation.

4.12 Conclusion

Ghana as a developing country gains little by keeping minor offenders in prison. Prison conditions are abusive of prisoners' human rights. Properly structured prisons are expensive and the lack of adequate resources for even food and medical care raises the risk of disease, and makes no room for effective rehabilitation and reformation of this class of offenders. It is time to adopt a new model that engages the community, is significantly less costly, and benefits the offender. Community service orders have been successfully introduced in Kenya, as discussed, and also in Zimbabwe, Uganda, Tanzania and Burkina Faso, among others.[159]

Community service orders require cooperation among the players in the criminal justice system to plan, deliver, monitor and evaluate the functioning and outcomes of the program, but this is not impossible. As well, beyond judicial retraining in the requirements of the scheme, legislative amendments and political will to ensure its implementation are key. Doing these is fundamental to stepping onto the horizon of change and benefit that this program promises.

[159] *Muntingh, supra* note 71 at 187.

Indeed, alternative sentencing needs to be seen beyond the scope of prison overcrowding. It is a necessary component of sentencing and criminal justice reform in Ghana. Such reform must, particularly, involve an approach that includes traditional Ghanaian criminal justice structures. In sum, undertaking this change helps Ghana restore the good of community commitment to shaping and directing the conduct of its members. It also helps the country modernize what is effective and beneficial in its British-bequeathed philosophy and system of criminal justice administration and enforcement.

CHAPTER 5 DISCUSSION

Conclusion

This thesis has argued that there are too many minor offenders in Ghana's prisons. As shown, this situation has been largely fostered by the sentencing practice of the judges under applicable legislation. For the most part, the magistrates' courts which deal with this category of offenders are largely limited to fines or jail sentences or both. Where fines are not paid, the offender goes to jail. It was emphasized that this incarceration-focused practice of minor offender disposal undermines the objective of Ghana's criminal justice system, which is to rehabilitate offenders. However, because the country's prison administration lacks sufficient resources, imprisoned offenders have hardly any opportunities for training in marketable skills, or to participate in programs geared to their reform and rehabilitation. Another major concern is the poor conditions in the prison facilities: prison health conditions are poor and access to health care is difficult. There is overcrowding in the jails and, because reform programs are absent, recidivism is also high.

The thesis argues that given the international and domestic calls for prison reform, it is necessary to think of alternatives means to punish and rehabilitate minor offenders. The alternatives advocated for in this project, given Ghana's socio-economic and legal system, are structured on the pioneering example of Kenya which, for the same reasons

as Ghana has, set up a prison reform program established on a regime of community service orders and probation.

Overall, it was recommended for Ghana to institutionalize a scheme of community service orders to be utilized along with probation which already exists in Ghanaian criminal law. For these two to be effective alternative measures to punish and also promote minor offender rehabilitation, they must be supported by new, dedicated legislation. In the alternative, Parliament must make amendments to relevant sections of the current legislation on criminal justice. The recommendations also outline key features of the scheme: the community service order system should be overseen by a National Committee empowered to conduct regular research to continually improve administration of the scheme in light of the lessons yielded through experience in its implementation. Second, the prospect of real change in this area of criminal justice administration in Ghana depends on community involvement. To this end, another key feature is the need to educate the Ghanaian public about it, and to reorient magistrates and judges to utilize these two alternatives to prison sentences. Similarly, the lawyers, prisons service and the police must also be educated in the operation of this new minor offender disposal regime. While the state must provide the necessary funding, as well as institutional and personnel resources to support it, another indispensable factor for successful implementation is eliciting community support. In particular, including offender family participation is necessary to operationalize this scheme. This feature of the scheme activates Ghanaian traditional notions of criminal justice administration. As

discussed, this is because offences are considered to be family shame. For this reason, family members are keen to see that their relatives who offend are suitably rehabilitated and deterred from reoffending. Clearly, involving community and family greatly enhances reform and rehabilitation as well as the prospect of keeping many minor offenders out of jail.

The thesis admits that an important obstacle to the recommended reforms is the will of the state to prioritize the necessary legislative changes and to provide the resources to get it off the ground. To hope is better than to not hope.

BIBLIOGRAPHY

Legislation

Legislation: Ghana

The Constitution of the Republic of Ghana 1992.

The Courts Act 1993 (Act 459).

The Ghana Criminal Offences Code, 1960 *(*Act 29*).*

The Ghana Criminal Procedure Code 1960, (Act 30).

The Criminal Procedure Code (Amendment) 2002 (Act 633).

The Ghana Criminal Offences (Amendment) Act, 2003 (Act 646).

The Criminal Offences (Amendment) Act, 2012 (Act 849).

The Electronic Communications Act, 2008 (Act 775).

The Electronic Communications Regulations, 2011 LI 1991.

The Fines (Penalty Units) Act 572, 2000.

The Labor Act, 2003 (Act 651).

The Labor Regulations, 2007 LI 1833.

Narcotic Drugs (Control, Enforcement and Sanctions) Law, 1990 (PNDCL 236).

The Prisons Service Decree, 1972 (NRCD 46).

The Punishment of Habitual Criminals Act, 1963 (Act 192).

The Road Traffic Act, 2004 (Act 683).

The Road Traffic Regulations, 2012 LI 2180.

Legislation: Kenya

Community Service Orders Act (No 10), 1998.

The Kenyan Penal Code (Cap 63), 1930.

Prisons Act (Cap 90), 1962.

Legislation: Zimbabwe

Criminal Procedure and Evidence Amendment Act, 2016 (No 2 of 2016) [Chapter 9:07].

Magistrates Court Act, [Chapter 7:10], 1931.

Supreme Court Act [Chapter 7:13], 1981.

Legislation: Canada

Contraventions Act SC 1992, c 47.

Criminal Code, RSC 1985, c C-46.

Criminal Code, R.S.C. 1985, c. c-46, S… (what is the section number?)

Interpretation Act, RSC 1985 c I-21.

Legislation: United Kingdom

The Prosecution of Offences Act 1985.

Legislation: Africa

Kadoma Declaration on Community Service orders in Africa.

Kampala Declaration on Community Service, UN ECOSOC Res 1997/36.

Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa.

Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa.

Legislation: International

Basic Principles for the Treatment of Prisoners, GA res 45/111, 68th Plen Mtg (1990).

Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment, GA res 43/173, 76th Plen Mtg (1988).

The Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, GA res 3452 (XXX), 30th Sess, (1975).

United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, the Bangkok Rules, GA Res 65/229, 65th Sess (2010).

United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), GA res 45/110, 68th Plen Mtg (1990).

United Nations Standard Minimum Rules for the Treatment of Prisoners, the Nelson Mandela Rules, GA res 70/715, annex, (2015).

UNGA, Third Committee, 6th and 7th Mtg, GA/SHC/3817 (7 October 2005).

Jurisprudence

R v M (C A), [1996] 1 SCR 500.

R v Gladue, [1999) 1 SCR 688.

R v M (CA), [1996] 1 SCR 500.

Suit No: B10/5/2015, Adjabeng District Magistrate Court.

New Patriotic Party v Inspector General of Police [1993-94] 2 GLR 459 (Ghana).

Amadu v The Republic (1968) CC 67.

Republic v Luguterah, Court of Appeal, Criminal Appeal Number 120/70, 29 January 1971, unreported.

Republic v High Court (Fast Track Division) Accra; Ex Parte PPE Ltd & Paul Juric (Unique trust Financial Services Ltd Interested Party) (2007-2008) SCGLR 188.

*Republic v Dawutey Teye (*Case No.: 41/16. Begoro District Magistrate Court).

Suit No: B10/5/2015, Adjabeng District Magistrate Court.

Suit No: CC/11/2015, Adjabeng District Magistrate Court.

Case No. B7/11/16, Tema District Court.

Case No. B7/8/16, Tema District Court.

CC/107/16, Weija District Court 1.

Suit No.:313/16, Ashaiman District Court.

Case No.: CC/063/16, Weija District Court.

Case No.: 41/16, Begoro District Magistrate Court.

Kungua v The Republic (1984-86) 2 GLR 489.

Secondary Materials: Monographs

Andenaes, J "Does Punishment Deter Crime?" in Gertrude Ezorsky, ed, *Philosophical Perspectives on Punishment* (Albany: State University of New York Press, 1972) at 342.

Ashworth, Andrew "Sentencing" in Maguire, Mike, Rod Morgan, and Robert Reiner, eds, *The Oxford Handbook of Criminology*, 4th ed (Oxford University Press: 2007) at 994.

Banks, Cyndi *Criminal Justice Ethics: Theory and Practice* (California: SAGE Publications, 2004).

Bean, P *Punishment: A Philosophical and Criminological Inquiry* (Oxford: Martin Robinson, 1981).

Cesare Bonesana di Beccaria, *An Essay on Crime and Punishment* (Albany: WC Little & Co: 1872).

Bernault, Florence, "The Politics of enclosure in Colonial and Post-Colonial Africa" in Bernault, Florence, ed, A history of Prison and Confinement in Africa, (Portsmouth, NH: Heinemann, 2003) at 15.

Bentham, Jeremy *An Introduction to the Principles of Morals and Legislation* (Kitchener: Batoche Books, 1781).

Busia, Kofi Abrefa *The Position of the Chief in the Modern Political System of Ashanti: A Study of the Influence of Contemporary Social Changes on Ashanti Political Institutions,* (Oxford: Oxford University Press, 1951).

Chynoweth, Paul "Legal research" in Knight, Andrew & Les Ruddock, eds, *Advanced Research Methods in the Built Environment* (John Wiley & Sons Ltd: Chichester, UK, 2008) at Chapter 3.

Clinard, Marshall B & Daniel J Abbott *Crime in Developing Countries: A Comparative Perspective* (John Wiley & Sons: Canada, 1978).

Coyle, Andrew "Penal Reform: Prisons in Africa" in Transcendental Meditation in Criminal Rehabilitation and Crime Prevention, (Psychology Press, 2003) at 303.

Cullen, Francis T, Cheryl Lero Jonson & Daniel S. Nagin, "Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science," The Prison Journal Supplement to 91(3) 48S at 60S.

Doob, Anthony N & Cheryl M Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" in Tonry, Michael ed, *Crime and Justice: A Review of Research Vol 30* (Chicago: University of Chicago Press, 2003) at 143.

Flew, Antony "Punishment" in Flew, Antony, ed, *A Dictionary of Philosophy*, (UK: Macmillan Publishers Ltd, 2002).

Francois Marie Arouet de Voltaire, *Candide ou l'Optimisme*, 1759.

Gaes, G T et al, "Adult Correctional Treatment" in Tonry, Michael & Joan Petersilia, eds, in *Prisons*, (Chicago: University of Chicago Press, 1999) at 361.

Garland, David *Punishment and Modern Society: A Study in Social Theory* (Chicago: University of Chicago, 1990).

Hirsch, Andrew Von "Penal Theories" in Tonry, Michael, ed, *The Handbook on Crime and Punishment* (New York: Oxford University Press, 1998) at 659.

Hirsch, Andrew Von Martin Wasik & Judith Greene, Scaling community punishments, in Hirsch, Andrew Von & Andrew Ashworth, eds, *Community punishment – principled sentencing* (Boston: North Eastern University Press, 1992).

Hudson, Barbara *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory*, (Buckingham: Open University Press, 1996).

JB Danquah, *Gold Coast: Akan Laws and Customs and the Akim Abuakwa Constitution* (London: George Routledge & Sons Ltd., 1928).

Judicial Training Institute *The Criminal Bench Book,* May 2011.

Killingray, David "Punishment to fit the crime?" in Bernault, Florence ed, *A History of Prison and Confinement in Africa* (Portsmouth, NH: Heinemann, 2003) at 101.

Mensah-Bonsu, HJAN "'Political Crimes' in the Political History of Ghana: 1948-1993" in Mensa-Bonsu, HJAN et al, eds, *Ghana Law Since Independence-History, Development and Prospects* (Black Mask: 2007) at 240.

McLain, Rev Richard W *A Treatise on Penology,* (Jackson, Michigan: 1932).

Morris, H "A Paternalistic Theory of Punishment" in Duff, Antony & David Garland, eds, *A Reader on Punishment* (Oxford: Oxford University Press, 1994) at 92.

Moyer, Imogene L *Criminology Theories: Traditional and Nontraditional Voices and Themes* (California: Sage Publications, 2001).

Muntingh, Lukas "Alternative Sentencing in Africa" in Sarkin,Jeremy, ed, *Human Rights in African Prisons* (HSRC Press, Cape Town, South Africa: 2008) at 178.

Nagin, Daniel "Deterrence and Incapacitation" in Tonry, Michael, ed, *The Handbook of Crime and Punishment,* (Oxford: Oxford University Press, 1998) at 345.

Newburn, Tim *Criminology* (Devon: Willan Publishing, 2007).

Pease, Ken "Community Service Order*"* (The University of Chicago Press:1985).

P K Twumasi, *Criminal Law in Ghana,* (Tema: Ghana Publishing Corporation: 1985).

Quansah, Emmanuel Kwabena *The Ghana Legal System* (Black Mask Limited: 2011).

Rattray, R S *Ashanti Law and Constitution* (Oxford: Oxford University Press, 1969).

Seidman, Robert B & J D Abaka Edison "Ghana: The System of Penal Legislation" in Milner, Alan ed, *African Penal Systems* (New York: Frederick A Praeger, Inc, 1969) at 76.

Sharma, Rajendra K *Criminology and Penology*, (New Delhi: Atlantic Publishers and Distributors, 1998).

Siegel, Larry J & Chris McCormick, *Criminology in Canada: Theories, Patterns and Typologies*, 6th ed (Nelson Education Limited: Toronto, 2016).

Simon, Jonathan *Poor Discipline: Parole and the Social Control of the Underclass 1890-1990* (University of Chicago Press: 1993).

Ten, C L *Crime, Guilt, and Punishment: A Philosophical Introduction*, (Oxford: Clarendon Press, 1987).

Ume, Chukuma “Alternatives to Imprisonment: Community Service Orders in Africa” in Saleh-Hanna, Vivian, ed, *Colonial Systems of Control: Criminal Justice in Nigeria* (University of Ottawa Press: 2008) at 384.

United Nations Office on Drugs and Crime, *Handbook on strategies to reduce overcrowding in prisons* (2013) Criminal Justice Handbook Series at 9.

Walen, Alec "Retributive Justice" in Zalta, Edward N, ed, *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition).

Walker, N *Why Punish?* (Oxford: Oxford University Press, 1991).

William Clifford, *An Introduction to African Criminology* (Oxford University Press: Nairobi, 1974).

Secondary Materials: Articles

Acquah, GK, “Customary Offences and the Courts” (1991-92) XVIII: 2 RGL at 36-67.

Adarkwa, Kwasi Kwafo, “The changing face of Ghanaian towns” African Review of Economics and Finance 4: 1 (2012) 1 at 22.

Agbesi, Edison K, “Causes and Effects of Overcrowding at Prisons: A Study at the Ho Central Prison” 6:5 (2016) Pub Policy and Admin Res 1 at 4.

Aebi, Marcelo F, Natalia Delgrande & Yann Marguet, “Have community sanctions and measures widened the net of the European criminal justice systems?” 17:5 (2015) Punishment & Society 575 at 575-597.

Afreh, D K, “The Prisons and Sentencing Policies” (1996-2000) 20 RGL 141 at 144.

Akpalu, Wisdom and Anatu Mohammed, “Socioeconomics of crime and discretionary punishment: the case of Ghana” (2013) at 124-125.

Akurang-Parry, Kwabena O, “Colonial Forced Labor Policies for Road-Building in Southern Ghana and international Anti-Forced Labor Pressures, 1900-1940” (2000) Afr Econ Hist, 28:1 at 1-25.

Amidu, Martin ABK, “Powers of a court to convict an accused person for a lesser or included offence other than that charged” [1987-88], Vol XVI RGL 260-281.

Appiahene-Gyamfi, Joseph, “Crime and Punishment in the Republic of Ghana: A Country Profile” 33:2 (2011) Int J of Comp and Applied Crime Just 309 at 314.

Appiahene-Gyamfi, Joseph, "Urban crime trends and patterns in Ghana: The case of Accra, Journ of Criminal Justice" 31 (2003) 13 at 16.

Clear, Todd R, "Mindful Punishment: What to do about the South African Penal System, and Why," 23 SA Crime (QL) 2008 1 at 2.

Coffie, Sandra, "Non-Custodial Sentences and Its Relevance in The Justice System" (2004) 6:3.

Coyle, Andrew, Catherine Heard & Helen Fair, "Current trends and practices in the use of imprisonment" International Review of the Red Cross 98:3 (2016) 761 at 771.

Duwe, Grant, "An outcome evaluation of a prison work release program, estimating its effects

on recidivism: employment and cost avoidance" 26: 6 Crim Just Policy Rev at 531-554.

Dako-Gyeke, Mavis & Frank Darkwa Baffour, "We are like devils in their eyes: Perceptions and experiences of stigmatisation and discrimination against recidivists in Ghana" 55:4 (2016), 235 at 237 Journal of Offender Rehabilitation.

Draper, Tony, "An Introduction to Jeremy Bentham's Theory of Punishment" (2002), 5 Journ of Bentham Studies, 1 at 6.

French, Sheila A & Paul Gendreau, "Reducing prison Misconducts, What Works!" (April 2006) 33: 2 Crim Just and Beh 185-218.

Gerber, Monica M & Jonathan Jackson, "Retribution as revenge and just deserts (2013), 26:1 Soc Just Res 61 at 62.

Hoecke, Mark Van, "Methodology of Comparative Legal Research" (2015), Law and Method.

Kasey McCall-Smith, *Introductory Note to United Nations Standard Minimum Rules for the Treatment of Prisoners* (2016) 55 ILM 1180 at 1180.

Hynd, S, "Insufficiently Cruel" or "Simply Inefficient"? Discipline, Punishment and Reform in the Gold Coast Prison System c 1850-1957" at 3.

Klingele, Cecelia, "Rethinking the use of community supervision" 103:4 (2013) J of Crim Law & Criminology 1015 at 1015-1065.

Kuenyehia, Akua, "Problem of Recidivism in the Ghanaian Penal System," (1978) Vol XV U Ghana L J 81 at 84.

Kuuire, Richard, "Non-Custodial Sentences and Alternatives to Imprisonment" 20 RGL (1996-2000) at 311.

Mabbott, JD, “Professor Flew on Punishment” 30: 114 Philosophy (1955) 256 at 257-258.

Mackay, R S, “Some Reflections on the New Canadian Criminal Code,” The U of T L J, 12: 2 (1958), 206 at 206.

MacKenzie, Doris L & David P Farrington, “Preventing future offending of delinquents and offenders: what have we learned from experiments and meta-analyses?” (2015) J Exp Criminal.

Martinson, R, “What Works? - Questions and Answers About Prison Reform”, The Public Interest 35 (1974) at 22-54.

Mensa-Bonsu, HJAN, “Non-custodial offences- the need for reform at the pre-trial stages, Seminar on the treatment of Offenders” (1989-1990) 17 RGL 138 at 181.

Mensa-Bonsu, HJAN, “Publishing Criminal Statistics – An Unexplored Asset to the Criminal Justice System” 19 UGLJ 32 at 52 (1993-1995).

Nagin, Daniel S, “Criminal Deterrence Research at the Outset of the Twenty-First Century,” 23 (1998) Crime and Justice 1 at 1.

Nyavor, Eric, “Seminar on the Treatment of Offenders” (1989-1990) 17 Rev Ghana L 138 at 138.

Ocran, Justice Modibo, “The Clash of Legal Culture: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa (2006) 39:2 Akron Law Rev 466.

Ofori-Dua, Kwadwo et al, “Prison without Walls: Perception about Community Service as an Alternative to Imprisonment in Kumasi Metropolis, Ashanti Region, Ghana” 3: 6 International Journal of Social Science Studies (2015) 130 at 130.

Phelps, Michelle S, “The Paradox of Probation: Community Supervision in the Age of Mass Incarceration” 35: 1-2 (2013) Law Policy 51 at 51-80.

Pugsley, Robert A “Retributivism: A Just Basis for Criminal Sentences” (1979) 7:2 Hofstra Law Review, 6 at 1.

Rankopo, Morena J & Kwaku Osei-Hwedie, “Globalization and culturally relevant social work: African perspectives on indigenization” 54:1 International Social Work (2011) 137 at 140.

Read, James, “Criminal Law in the Africa of today and tomorrow” (1963) 7: 1 J of African L 5 at 5.

Read, James, “Ghana: The Criminal Code, 1960” (1962) 11: 1 The Int and Comp L Q, Jan 1962, 272 at 272.

Robinson, Gwen, "The Cinderella complex: Punishment, society and community sanctions" 18: 1 (2016) Punishment & Society 95 at 99.

Seidman, Robert B, "The Ghana Prison System: An Historical Perspective" (1966) 3:89 UGLJ.

Stemen, Don, "The Prison Paradox: More Incarceration Will Not Make Us Safer" (2017) Loyola University Crim Just & Criminology: Faculty Pubs & Other Works at 1-2.

Stern, Vivien, "Alternatives to prison in developing countries, Some lessons from Africa" 1:2 (1997) Punishment & Society 231 at 234.

Van, Jonquil, "The Rise of British Jurisdiction In Ghana" (1998) 39 African Diaspora ISPs Paper 1 at 14.

Wolfgang, Marvin E, "The Medical Model versus the Just Deserts Model," (1988) 16:2 Bull Am Acad Psych Law.

Young Warren & Mark Brown, "Cross-National Comparisons of Imprisonment", Crime and Justice 17 (1993) 1 at 1.

Other Materials

Ansre, Selorm Kwami, *Analysis of the rehabilitation of inmates at the Nsawam Medium Security Prison* (BSC Thesis, Ashesi University College, 2010) [unpublished].

Antwi, Alex, *Social Reintegration of Offenders and Recidivism in Ghana*, (PhD Thesis, University of Ghana, 2015) [unpublished].

Appiahene-Gyamfi, Joseph, *Alternatives to imprisonment in Ghana: A focus on Ghana's Criminal Justice System*, (MA Thesis, Simon Fraser University, 1995) [unpublished].

Darkwa, Baffour Frank, *Factors Contributing to Recidivism among Inmates in the Nsawam Medium Security Prison* (MPhil Thesis, University of Ghana, 2016) [Unpublished].

Parimah, Feikoab, *Community Sentencing of Adult Non-Violent Offenders: Exploring Attitudes and its Viability in the Accra Metropolis* (MPHIL Thesis, University of Ghana, 2015) [unpublished].

Riordan, David, *The role of the community service order and the suspended sentence in Ireland: a judicial perspective*, (PhD Thesis, University College Cork, 2009) [unpublished].

Sesay, Frances Magadalene Tinna, *Prevalence of Pulmonary Tuberculosis and Human Immuno-Deficiency Virus Among Inmates in Nsawam Medium security Prison in Ghana*, (MPH Thesis, University of Ghana, 2016) [Unpublished].

International Centre for Prison Studies, *ICPS News Digest*, 22nd ed, July-August 2014, online: <http://www.prisonstudies.org/sites/default/files/resources/downloads/icps_news_digest_july-august_2014.pdf>.

Jacobson, Jessica, Catherine Heard & Helen Fair, "Prison Evidence of its use and overuse from around the world", (University of London: Institute for Criminal Policy Research, 2017) vii, online: <http://www.prisonstudies.org/sites/default/files/resources/downloads/global_imprisonment_web2c.pdf>.

Hon Mutunga, Willy, "Kenyan Sentencing Policy Guidelines", The Judiciary, Republic of Kenya, online: <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Sentencing_Policy_Guidelines_Booklet.pdf

The Ghana Human Rights NGOs Forum, "Joint Stakeholders' Report", United Nations Third Universal Periodic Review Ghana, online:< https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=4250&file=EnglishTranslation>.

Siege, Rumin, "Report on the Independent Assessment of the Community Service Programme in Zambia, Kenya and Uganda 2003", online: < https://s16889.pcdn.co/wp-content/uploads/2012/05/alternatives-east-africa-2013-v2-2.pdf >.

Dagadu, NO, "Restorative Justice and Alternatives to Custodial Sentencing, A Research Report on the Northern and Upper East Regions", The Law Reform Commission (2006).

Alifo, JM, "Restorative Justice and Alternatives to custodial sentencing: A Research Report on the Greater Accra, Ashanti and Brong Ahafo Regions", The Law Reform Commission (2006).

Parimah, Feikoab, Joseph Osafo & Kingsley Nyarko, "Ghanaians' Attitudes Toward the Sentencing of Offenders to Community Service", 2nd Annual Psychology Research Conference, (2015).

Judicial Service of Ghana, "Annual Report of the Judicial Service of Ghana", 2015/2016 at 13, online: <https://www.judicial.gov.gh/annualrep.pdf>,

World Prison Brief, Institute for Criminal Policy Research, "Ghana", online: <http://www.prisonstudies.org/country/ghana>.

Amnesty International, "Ghana: Abolish the death penalty for all crimes and commute all sentences" October 10, 2017, online: < https://www.amnesty.ie/ghana-abolish-the-death-penalty-for-all-crimes-and-commute-all-death-sentences/>.

United States Department of State, Bureau of Democracy, Human Rights and Labor, "Ghana 2016 Human Rights Report, Country Reports on Human Rights Practices for 2016", online: <https://www.state.gov/documents/organization/265472.pdf>.

Juan E Mendez, Mission to Ghana, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment", A/HRC/25/60/Add1, 25th Sess, 2014, online: <

http://antitorture.org/wp-content/uploads/2014/03/Ghana_Country_Visit_Report.pdf >. Juan E Mendez "Follow up report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his follow-up visit to the Republic of Ghana", A/HRC/31/57/Add2, 31st Sess, 2016, online: < http://antitorture.org/wp-content/uploads/2016/03/English_Ghana_Follow-up_Report.pdf>.

Group 2, "The Role of Prosecution in the Screening of Criminal Cases", 326 at 330-331, 107th International Training Course, Reports of the Course, online: <https://www.unafei.or.jp/publications/pdf/RS_No53/No53_30RC_Group2.pdf >.

United Nations Office on Drugs and Crime, "Addressing the global prison crisis: Strategy 2015-2017" , online: <http://www.unodc.org/documents/justice-and-prison-reform/Global_Prison_Crisis_ebook_rev.pdf>.

The Ghana Prisons Service, "The Ghana Prisons Annual Report", online: < http://www.ghanaprisons.gov.gh/pdf/Annual%20Report%20Prisons%202013.pdf>,

Ghana Prisons Service, "Categorization of Convicts Admitted", 2015, online: <http://www.ghanaprisons.gov.gh/MANAGEMENT OF PRISONERS.pdf>.

Chief Justice Arche,r P E N K, "Address by to the Annual conference of the Association of Judges and Magistrates of Ghana", *The People's Daily Graphic* (21 October 1991), and *the Ghanaian Times* (23 October, 1991).

Ritchie, Donald, Sentencing Advisory Council, Australia, " How Much Does Imprisonment Protect the Community through Incapacitation", July 2012, online: <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/How%20Much%20Does%20Imprisonment%20Protect%20the%20Community%20Through%20Incapacitation.doc>.

Roy, Nikhil, "Penal Reform International, An international perspective of how other countries prepare their prisoners for release" at 13-16, online: <https://www.penalreform.org/wp-content/uploads/2013/05/Reintegration-AMIMB-conference-291012.pdf>.

Amnesty International Report 2016/2017, "Death Penalty: Countries abolitionist in practice", online: <https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf>.

Roberts, Julian, Canada Sentencing Commission, Department of Justice, Canada, 1988 at 40-41, online:< http://publications.gc.ca/site/archivee-archived.html?url=http://publications.gc.ca/collections/collection_2018/jus/J23-3-1-1988-eng.pdf>.

Langan, Patrick A & David J Levin, "Bureau of Justice Statistics Special Report, Recidivism of Prisoners Released in 1994" (2002), online: <https://www.bjs.gov/content/pub/pdf/rpr94.pdf>.

Office of the Deputy Prime Minister, Social Exclusion Unit "Reducing Re-offending by Ex-prisoners, Summary of the Social Exclusion Unit Report" (2002) at para 3, online: <http://webarchive.nationalarchives.gov.uk/+/http:/www.cabinetoffice.gov.uk/media/cabinetoffice/social_exclusion_task_force/assets/publications_1997_to_2006/reducing_summary.pdf>,

Deady, Carolyn W, "Incarceration and Recidivism: Lessons from Abroad" March 2014, online: <http://www.antoniocasella.eu/nume/Deady_march2014.pdf>.

Amnesty International, "Amnesty International Ghana Report 2016/2017", online: <https://www.amnesty.org/en/countries/africa/ghana/report-ghana/>.

Penal Reform International, "Summary Note on Alternatives to Imprisonment in East Africa: Trends and Challenges", online: <https://s16889.pcdn.co/wp-content/uploads/2012/05/Summary-Note-Alternatives-to-Imprisonment-Final-February-20121.pdf> at 1, the idea of community service was suggested by an international NGO, Penal Reform International and that was picked up at the policy level by the Kenyan government who probably appreciated the pragmatic solution proffered.

Penal Reform International, "Alternatives to imprisonment in East Africa, Trends and challenges", online: < https://s16889.pcdn.co/wp-content/uploads/2012/05/alternatives-east-africa-2013-v2-2.pdf>.

Birungi, Charles, *Community Service in Uganda as an Alternative to Imprisonment: A Case Study of Masaka and Mukono Districts* (Mini-Thesis, University of Western Cape, 2005) [unpublished].

Isaac Nguema, *Forward* to "Prison Conditions in Africa: Report of a Pan-African Seminar", Kampala, Uganda 5 (1997), Penal Reform International, 2001.

Secondary Materials: Online Materials

American Civil Liberties Union (ACLU), Submission to the Office of the High Commissioner for Human Rights, "Overcrowding and Overuse of Imprisonment in the United States", May 2015, online: <https://www.ohchr.org/Documents/Issues/RuleOfLaw/OverIncarceration/ACLU.pdf>.
Amnesty International, "Ghana: Scrap death penalty and end grim conditions for scores on death row" (July 12, 2017), online: < https://www.amnesty.org/en/latest/news/2017/07/ghana-scrap-death-penalty-and-end-grim-conditions-for-scores-on-death-row/>

Asiedu, Wiliam Kwadwo, "Effective Treatment Measures for Prisoners to Facilitate their Reintegration into Society: The Ghanaian Experience", Participants' Papers 327 at 334-335, online: <https://www.unafei.or.jp/publications/pdf/RS_No54/No54_25PA_Kwadwo.pdf>.

Black's Law Dictionary (10th ed, 2014).

Burke, Jason, " Zimbabwe election unrest turns deadly as army opens fire on protesters", *The Guardian*, August 2, 2018, online: < https://www.theguardian.com/world/2018/aug/01/zanu-pf-wins-majority-of-seats-in-zimbabwe-parliament-elections>.

ClassFm News, "61 inmates benefit from the Justice for All Program", Classfmonline, online: < https://www.ghanaweb.com/GhanaHomePage/NewsArchive/61-inmates-benefit-from-Justice-for-All-Programme-597077>.

CNN, "Political upheaval grips Zimbabwe", *CNN*, November 21, 2017, online: <https://www.cnn.com/2017/11/15/africa/gallery/zimbabwe-political-unrest/index.html>.

The Code for Crown Prosecutors, Director of Public Prosecutions, Crown Prosecution Service, England, online: <https://www.cps.gov.uk/legal-guidance/minor-offences >.

Criminal Justice Alliance, "Crowded Out? The impact of prison overcrowding on rehabilitation" (2012) at 3, online: < http://criminaljusticealliance.org/wp-content/uploads/2015/02/Crowded_Out_CriminalJusticeAlliance.pdf

The Daily Graphic, "Decriminalising and declassification of Petty Crimes in Ghana" *June 14, 2018*, online:< https://www.graphic.com.gh/news/general-news/decriminalise-petty-crimes-justice-sector-stakeholders.html>.

Denmark in Ghana, Ministry of Foreign Affairs of Denmark, "Ten years celebration of the Justice for All Program", online: < http://ghana.um.dk/en/news/newsdisplaypage/?newsid=a4d516b1-7e37-4a65-95ca-565de864d2c7>.

Dhwty, “Prisons and Imprisonment in the Ancient World: Punishments Used to Maintain Public Order”, online: <http://www.ancient-origins.net/history-ancient-traditions/prisons-and-imprisonment-ancient-world-punishments-used-maintain-public-020588>.

Director-General/CID, Ghana Police, “Crime Statistics: Quantitative Data with Charts, Jan to 21 May, 2018”, online: <http://police.gov.gh/en/wp-content/uploads/2018/05/CRIME-STATISTICS-PRESENTATION.pdf>.

European Committee on Crime Problems, “White Paper on Prison Overcrowding” June 30, 2016, online: <https://rm.coe.int/16806f993a>.

Federal Research Division, Library of Congress, “Ghana: A Country Study”, ed, LaVerle Berry. November 1994 at 11, online :< https://www.marines.mil/Portals/59/Publications/Ghana%20Study_1.pdf>,

Ghana Business News, “Chief Justice lauds POS foundation on non-custodial sentencing bill”, October 11, 2018, online: <https://www.ghanabusinessnews.com/2018/10/11/chief-justice-lauds-pos-foundation-on-non-custodial-sentencing-bill/>,

Ghanaian Times, “Justice Emile Short: Make corruption felony offence”, *April 24, 2018,* online: <http://www.ghanaiantimes.com.gh/justice-short-make-corruption-felony-offence/>.

Ghana News Agency, “Interior minister presents non-custodial sentencing report”, online: <http://www.ghana.gov.gh/index.php/media-center/news/253-interior-minister-presents-non-custodial-sentencing-report>.

Ghana Police Service, Statistics and Information Technology Unit, “Annual Crime Statistics 2017), online: <http://police.gov.gh/en/wp-content/uploads/2018/08/ANNUAL-REPORT-2017.pdf>.

Ghanaweb.com, “Prison leader regrets lack of medicine in prisons”, online: <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Prison-leader-regrets-lack-of-medicine-in-prisons-305721>.

Ghanaweb.com, “Prof Mike Oquaye sets pregnant prisoner free” *July 29, 2018*, online: < https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Prof-Mike-Oquaye-sets-pregnant-prisoner-free-672809>; Graphic.com.gh, “ 14 pregnant women in jail”, online: <https://www.myjoyonline.com/news/2013/October-5th/14-pregnant-women-in-jail.php>.

http://justiceghana.com/blog/law-justice/a-death-of-ghanas-probation-service/>.

Global Ethics Observatory, "Kenyan Legal System, Database 4: Legislation and guidelines", online: < http://www.unesco.org/shs/ethics/geo/user/?action=Geo4Country&db=GEO4&id=29&lng=en.>.

Government of British Columbia, online: <https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-accused-of-a-crime/understanding-charges/types-of-offences>.

Hammurabi, "The Code of Hammurabi: Translated by L. W. King" (CreateSpace Independent Publishing Platform: 2005), online: <http://avalon.law.yale.edu/ancient/hamframe.asp>. International Commission of Jurists, Kenya Section, online: <http://icjkenya.org/pettyoffences/index.php/2016/04/03/petty-offences-info/>.

Jacob Reich, "The economic impact of prison rehabilitation programs" August 17, 2017 online: <https://publicpolicy.wharton.upenn.edu/live/news/2059-the-economic-impact-of-prison-rehabilitation/for-students/blog/news.php#_edn8>,

Jimmy Nguyen, "A Comparative Study of Prison Overpopulation and its Consequences" (2012) Arthur Levitt Public Affairs Summer Research Fellow, online: <https://hamilton.edu/documents/Jimmy%20Nguyen%20Levitt%20paper.pdf>.

JoyFm News, "Corruption is already a felony offence- Lardy Anyenini suggests", *April 24, 2018*, myjoyonline.com, online: <http://www.myjoyonline.com/news/2017/March-3rd/corruption-is-already-a-felony-offence-lardy-anyenini-suggests.php>.

JoyFm News, "Decongesting Ghana's prisons: Judge wants fines for some convicts", *8 July, 2017*, Myjoyonline.com, online: <https://www.myjoyonline.com/news/2017/july-8th/decongesting-ghanas-prisons-judge-pushes-for-fines-for-some-convicts.php>.

JoyFm News, "'Dumsor' leads to violent attacks among Nsawam inmates – Prisons chief", *March 15, 2015*, Myjoyonline.com, online: <https://www.myjoyonline.com/news/2015/March-15th/dumsor-leads-to-violent-attacks-among-nsawam-inmates-prisons-chief.php>.

Judicial Service of Ghana, "2015/2016 Annual Report', online: <https://judicial.gov.gh/annualrep.pdf>.

Keddy, Kwaku, "Ghana's prison infrastructure: the need for an overhaul", *May 18 2017*, online: <https://www.graphic.com.gh/features/opinion/ghana-s-prison-infrastructure-the-need-for-an-overhaul.html>.

King, Ryan, et al, "Incarceration and Crime: A Complex Relationship" (2016) online: <https://www.sentencingproject.org/wp-content/uploads/2016/01/Incarceration-and-Crime-A-Complex-Relationship.pdf>.

https://web.archive.org/web/20110825030644/http://prisonministryghana.org/prisons.html

Lartey, Philip Nii, "Kumasi Central Prison: Authorities working to curb TB outbreak", *September 17, 2017*, online: <http://citifmonline.com/2017/09/17/kumasi-central-prison-authorities-working-to-curb-tb-outbreak/>.

March 6, 1844: Bond of 1844 Signed by Fanti Chiefs and Britain, Edward A Ulzen Memorial Foundation, online: < https://www.eaumf.org/ejm-blog/2018/3/6/march-6-1844-bond-of-1844-signed-by-fanti-chiefs-and-britain>.

Musah Yahaya Jafaru, "Guidelines on Sentencing Launched", *February 20, 2015*, online: <https://www.graphic.com.gh/news/general-news/guidelines-on-sentencing-launched.html>.

Nakagiri, Anne et al, "Are pit laterines in urban areas of Sub-Saharan Africa performing? A review of usage, filling, insects and odour nuisances", online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4743102/>

Ofori-Atta, Ken, Minister for Finance "The Budget Statement and Economic Policy of the Government of Ghana for the 2017 Financial Year," Parliament of Ghana, *March 2, 2017*, online: <http://citifmonline.com/wp-content/uploads/2017/03/2017-BUDGET-STATEMENT-AND-ECONOMIC-POLICY.pdf>.

Osam, Efua Idan, "Medicine shortage hits Ghana Prison Clinics", *June 26, 2016*, online: <http://www.pulse.com.gh/news/local/ghana-prisons-medicine-shortage-hits-ghana-prisons-clinics-id5194911.html>.

Penal Reform International, "Alternatives to Imprisonment in East Africa" (2012), online: < https://cdn.penalreform.org/wp-content/uploads/2012/05/alternatives-east-africa-2013-v2-2.pdf>.

Penal Reform International, "Alternatives to imprisonment in East Africa, Trends and Challenges", online: < https://s16889.pcdn.co/wp-content/uploads/2012/05/alternatives-east-africa-2013-v2-2.pdf>.

Penal Reform International, "On probation: models of good practice for alternatives," online: <https://s16889.pcdn.co/wp-content/uploads/2016/12/Probation-model-report-final-2016.pdf>.

Penal Reform International and the Zimbabwe National Committee on Community Service, Community Service in Practice (1997), online: <https://www.penalreform.org/resource/community-service-practice/>.

Pew Charitable Trusts, “Punishment rate measures prison use relative to crime” (2016), online:<http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/03/the-punishment-rate>.

Saki, Otto & Tatenda Chiware, “Update: The Law in Zimbabwe” (2017), Hauser Global Law School Program at 3, online:< http://www.nyulawglobal.org/globalex/Zimbabwe1.html>.

Seth Kwame Boateng, “Left to Rot”, online: <https://www.youtube.com/watch?v=9_V11EiwlMY&t=1s>.

Tom Meaher, “The tricky business of measuring crime and punishment” (2016) Justice Lab, online: <https://www.themarshallproject.org/2016/03/23/the-tricky-business-of-measuring-crime-and-punishment>.

World Prison Brief, Institute for Criminal Policy Research, “Canada”, online: <http://www.prisonstudies.org/country/canada>.

World Prison Brief, Institute for Criminal Policy Research, Kenya, online: < http://www.prisonstudies.org/country/kenya>.

Yeboah, Rex Mainoo, “Deterrence must be an important part of sentencing-President Akuffo-Addo”, online: <http://www.ghana.gov.gh/index.php/media-center/news/5041-deterrence-must-be-an-important-part-of-sentencing-president-akufo-addo>.