

# INJECTING COMMERCIAL SENSE INTO PENAL ENACTMENT: A Critique of the Fines (Penalty Units) Act, 2000 (Act 572)

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For a very long time the draftsman has been saddled with the problem of couching penal enactments. The problem that has often exercised the mind of the draftsman is mainly two-fold. First, it is pretty difficult getting the right and all embracing language that can capture various scenarios falling within the scope of the enactment. Sometimes over enthusiasm on the part of the draftsman to adopt an all embracing language with sufficient width to encapsulate all conceivable situations in the context of the enactment leads to the adoption of open textured language which is often fraught with vagueness and ambiguity that eventually gives rise to interpretation problems. A typical instance of this problem is the Section 179A of the Criminal Code (Amendment) Act, 1993 (Act 458)<sup>2</sup>.

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2. 179A. Causing Loss, Damage or Injury to Property.
  - i) Any person who by a willful act or omission causes loss, damage or injury to the property of any public body or any agency of the State commits an offence.
  - ii) Any person who in the cause of any transaction or business with a public body or any agency of the State intentionally causes damage or loss whether economic or otherwise to the body or agency commits an offence.
  - iii) Any person through whose willful, malicious or fraudulent action or omission—
    - a) the State incurs a financial loss; or
    - b) the security of the State is endangered, commits an offence.
  - iv) In this section "public body" includes the State, Government of Ghana, public board or corporation, public institution and any company or other body in which the State or a public corporation or other statutory body has a proprietary interest

Another conundrum which is even more troubling and which is the burden of this brief paper is how to draft sanctions or penalties which will stand the test of time. Regarding custodial sentences the problem is not that acute since a more convenient formula has been adopted by draftsmen long ago. Two main approaches are often used in drafting the custodial sentence provision of a penal enactment. One, the enactment may indicate expressly either the maximum<sup>3</sup> or minimum<sup>4</sup> number of years to be imposed. The other alternative is to classify the offence as a first or second degree felony or misdemeanour and to prescribe a range of years that may be imposed as custodial sentence.

The puzzle encountered in drafting a penal enactment arises where a fine i.e. a monetary sanction or penalty is to be prescribed. The practice for a long period of time until the passage of the Fines (Penalty Units) Act, 2000 (Act 572) was to stipulate the amount of money or the ceiling of fine payable as monetary unit in a prevailing currency. This had a number of implications in a country like Ghana where the economy is relatively unstable, with frequent swings or shifts in the currency value and the inflationary rate changing with the unpredictability of the pendulum. The practical effect of such a phenomenon is that fines or monetary penalties prescribed in the various enactments produced a lot of commercial nonsense and ridicule often rendering the penal enactment impotent like the toothless bulldog barking without the capability to bite!

Few illustrations on the commercial nonsense inherent in the practice of prescribing fines in currency here will not be out of place.

- i) Section 282 of Criminal Code, 1960 (Act 29) on Indecent Inscriptions. stipulates: "whoever affixes to or inscribes on any place or thing so as to be visible from any public place, or affixes to or inscribes on any

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3. Section 179D. Penalty.

*A person convicted of an offence under any of the offences specified in this Chapter is liable on conviction to a fine of not less than ₵5 million or imprisonment not exceeding ten years or both."*

4. Section 97. "Rape.

*Whoever commits rape shall be guilty of a first degree felony and shall be liable on conviction to imprisonment for a term of not less than three years and in addition to a fine not exceeding ₵500,000.00 and in default of the payment of the fine to a further term of imprisonment not exceeding the minimum imprisonment specified under this section".*

public urinal, or delivers to any person in a public place, or exhibits to public view from any building, any picture or printed or written matter of an indecent or obscene nature, shall be liable to a fine not exceeding **€500,000**".

- ii) Similarly Section 298 on acts tending to disturb the peace in a public place provides "whoever in any public place, or in any place within sight or hearing of persons then being in a place, disturbs the peace by fighting or quarrelling with any other person, or by making any loud or unseemly noise; or abets an unlawful fight, or uses or applies to any other person then being in such public place or within sight or hearing thereof, any violent or abusive term of reproach, or sings any profane, indecent, or obscene song, or exposes any defamatory or insulting writing or object, or with the intention of annoying or irritating any other person, sings any scurrilous or abusive song or words, whether any person be particularly addressed therein or not or is guilty of any riotous, indecent, disorderly, insulting behaviour, to the obstruction or annoyance of any passenger or person in such public place, shall be liable to a fine not exceeding **€200,000.00**."
- iii) Section 299 on taking and using cattle, etc. states "whoever intentionally and unlawfully catches, takes, or drives, or attempts to catch, take, or drive, any cattle from or out of any pasture, enclosure, stable, or other place, for the purpose of riding such an animal, or of using it in the carrying of any load or burden or in the drawing of any cart or carriage, or for the purpose of sorting it loose or of driving it about, or for any other unlawful and mischievous purpose, without the consent of the owner or of the person entrusted with the charge of the animal, and without having any probable claim or pretence of title, thereto, shall be liable to a fine not exceeding **€100,000.00**."
- iv) Section 29 of the Companies Code, 1963 (Act 179) on penalties for breach of Section 27 or 28 states "in the event of default in complying with either of the two immediately preceding sections, (a) the company and every officer of the company who is in default shall be liable to a fine not exceeding five pounds for each day during which the default continues"
- v) Section 121(3) dealing with publication of name of company states "If an officer of the company or any person purporting to act on its behalf

ses or authorises the use of a seal purporting to be a seal of the company whereon its name is not engraved as required by subsection (1) of this section he shall be liable to a fine not exceeding fifty pounds.”

Numerous instances of this commercial nonsense in couching fines in enactment abound, but we cannot exhaust all of them here. The common thread running through the few provisions adumbrated above is that the fines contained in those provisions do not have any regard to the rampant inflationary swings in our economy. During inflation it is pretty easy for fines prescribed in an enactment passed about 100 years ago to be paid. The obvious implication of this conundrum is that not only the rich but even the average income-earner can easily pay the fines imposed on them after conviction. Indeed a related consequence is that fines are increasingly becoming ridiculous and ineffective as a deterrent.

Against the backdrop of the foregoing the paper seeks to assess the merits and legislative drafting efficiency of using a universal system like penalty units to prescribe monetary penalties that can be imposed on convicted criminals. Our primary focus of discussion will be the Fines (Penalty Units) Act, 2000 (Act 572).

The object of ACT 572 is to provide for fines in enactments to be expressed in penalty units and to provide for conversion of fines in already existing enactments to be expressed in penalty units. ACT 572 is a short enactment consisting of only five sections. Section 1 requires that where in an enactment a fine is to be paid as a penalty for breach of a provision in that enactment the amount of fine shall be expressed in terms of a number of penalty units. A fine is explained to mean any pecuniary penalty by which a person may be liable for a breach of a provision in an enactment<sup>5</sup>. There are a number of implications from the provision in Section 1. First, does it mean that a fine expressed not in penalty units but in absolute figures (such as € 100.00) be invalid. In my submission the answer should be in the affirmative because all that the 1992 Constitution requires per its article 19(1) is that a crime must be defined and penalty for it defined in a written law.

Section 2 permits the Attorney-General to review the value of a penalty unit. The important limitation on this power of amendment is that the new value is not to exceed one-third of the national minimum wage<sup>6</sup> multiplied by thirty. The lawmakers intend that a penalty unit should not be higher than one third of the monthly earning of the average worker. The wisdom in this legislative prescription lies in the trite principle of human rights that punishment or penal should not impoverish a person to the point of rendering him or her unable to make ends meet at the most basic level of subsistence. The expression of maximum fines in legislation in terms of penalty units (which are multiplied by a cedi value for each unit) rather than having fines fixed in cedi amounts is a good technique of keeping penalties in our statutes from fluctuating with inflation. Indeed this would make easier to retain the real value of all maximum fines as only the cedi value of the unit would need amending (rather than each individual fine).

Section 3 of the Act is a transitional provision making it possible for penalties prescribed in currency amount prior to this legislation to be translated into appropriate fine unit commensurate with the real value of the penalty in monetary terms.

The present law should be supplemented by sentencing guidelines that encourage judges to use fines more often as the main sentence for offences and/or to reduce or increase fines according to financial circumstances of the offender.

To that extent the Fines (Penalty Units) Act, 2000 (Act 572) is a good piece of legislation transforming the formal character of crafting penal enactment in Ghana.

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6. The current minimum wage in Ghana as of the 1<sup>st</sup> quarter of 2006 is ₵16000.00