Sentencing Guidelines

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Australia

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SUMMARY Discussions regarding mechanisms for reducing disparities in sentencing are ongoing in Australia. All of the jurisdictions have sentencing laws that provide general guidance on principles and factors to be taken into account in sentencing. However, judges retain significant discretion and utilize an individualized approach to justice. The approach of authorizing an entity to set sentencing guidelines for particular offenses has been rejected as being contrary to these aspects of the system. In the late 1990s and early 2000s, there was some movement by the courts themselves to deliver guideline judgments, but this has not been widely adopted and was seen by the High Court as potentially breaching constitutional provisions related to the separation of powers. There has also been considerable political debate about the need for and effectiveness of mandatory minimum sentencing laws, which have been enacted in a number of jurisdictions, often as a result of public concerns regarding sentencing for particular offenses or in individual cases.

During the last ten years, several states have established sentencing advisory councils in an effort to increase the amount of information and analysis available regarding sentencing matters. One of the broader goals of this approach is to improve public confidence in the justice system.

I. Introduction

Australia's six states, two mainland territories, and the federal jurisdiction each set out sentencing law frameworks in separate legislation:

- Commonwealth/federal: Crimes Act 1914 (Cth), Part 1B[1]
- New South Wales: Crimes (Sentencing Procedure) Act 1999 (NSW)[2]
- Queensland: Penalties and Sentencing Act 1992 (Qld)[3]
- South Australia: Criminal Law (Sentencing) Act 1988 (SA)[4]
- Tasmania: Sentencing Act 1997 (Tas)[5]

[1] Crimes Act 1914 (Cth) pt 1B ("Sentencing, imprisonment and release of federal offenders"), http://www.comlaw.gov.au/Details/C2014C00088.

[2] Crimes (Sentencing Procedure) Act1999 (NSW), http://www.legislation.nsw.gov.au/maintop/view/inforce/act+92+1999+cd+0+N.

[3] Penalties and Sentencing Act 1992 (Qld), https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PenaltASenA92.pdf.

[4] Criminal Law (Sentencing) Act 1988 (SA), http://www.legislation.sa.gov.au/LZ/C/A/CRIMINAL%20LAW%20%28SENTENCING%29%20ACT%201988.aspx.

- Victoria: Sentencing Act 1991 (Vic)[6]
- Western Australia: Sentencing Act 1995 (WA)[7]
- Australian Capital Territory: Crimes (Sentencing) Act 2005 (ACT)[8]
- Northern Territory: Sentencing Act (NT)[9]

The statutes typically contain the purposes and aims of sentencing; aggravating and mitigating factors that should be considered in sentencing (mostly derived from common law); and the types of sentences that may be imposed (including, in some cases, penalty scales that provide maximum penalties for different levels of offenses).[10] Statutes defining the crimes or offenses of each jurisdiction establish maximum penalties, and in some cases minimum penalties or standard non-parole periods are prescribed.

The sentencing statutes provide general rather than prescriptive guidance, and Australian judges maintain broad sentencing discretion.[11] With the courts emphasizing individualized justice and generally favoring an approach known as "instinctive synthesis"[12]—an "exercise in which all relevant considerations are simultaneously unified, balanced, and weighed by the sentencing judge"[13]—concerns have been raised about sentencing inconsistencies. As a result, political and scholarly debate has focused on mechanisms for reducing unjustified disparities in sentencing. For example, in 2006, the Australian Law Reform Commission completed a substantial report on sentencing of federal offenders titled *Same Crime, Same Time*.[14]

Australia has not adopted the approach of appointed commissions developing standardized numerical sentencing guidelines for judges, such as the Federal Sentencing Guidelines in the

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[5] Sentencing Act 1997 (Tas), http://www.thelaw.tas.gov.au (click "browse a-z," search for "sentencing").

[6] Sentencing Act 1991 (Vic), http://www.legislation.vic.gov.au/domino/Web_notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/db4c553c93d34198ca25753e0074676c!OpenDocument.

[7] Sentencing Act 1995 (WA), http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_888_homepage.html.

[8] Crimes (Sentencing) Act 2005 (ACT), http://www.legislation.act.gov.au/a/2005-58/default.asp.

[9] Sentencing Act (NT), http://notes.nt.gov.au/dcm/legislat/legislat.nsf/d989974724db65b1482561cf0017cbd2/0dc0539e4b26f69269257ba30014ca03/$FILE/ATTTY0BA.pdf/Reps038.pdf.

[10] RICHARD EDNEY & MIRKO BAGARIC, AUSTRALIAN SENTENCING: PRINCIPLES AND PRACTICE 5 (2007).

[11] *See generally* Arie Freiberg, *Australia: Exercising Discretion in Sentencing Policy and Practice*, 22(4) FED. SENT'G REP. 204 (Apr. 2010), *available at* http://www.jstor.org/stable/10.1525/fsr.2010.22.4.204.

[12] *See* EDNEY & BAGARIC, *supra* note 10, at 15–33.

[13] Sarah Krasnostein & Arie Freiberg, *Pursuing Consistency in an Individualistic Sentencing Framework: If You Don't Know Where You're Going, How Do You Know When You've Got There?*, 76 L. & CONTEMP. PROBS. 265, 268 (2013), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4354&context=lcp. *See also* Terry Hewton, *Instinctive Synthesis, Structured Reasons, and Punishment Guidelines: Judicial Discretion in the Modern Sentencing Process*, 31 ADELAIDE L. REV. 79 (2010), http://www.austlii.org/au/journals/AdelLawRw/2010/3.pdf.

[14] AUSTRALIAN LAW REFORM COMMISSION, SAME CRIME, SAME TIME: SENTENCING OF FEDERAL OFFENDERS (ALRC Report 103, 2006), http://www.alrc.gov.au/report-103.

United States or the United Kingdom's sentencing guidelines.[15] This option is generally seen by Australian courts as being overly restrictive on the exercise of judicial discretion and against the concept of individualized justice. However, there has been some push for more prescriptive guidelines or mandatory minimum sentences in the political arena, as well as judicial debate on approaches to sentencing.[16]

This report provides information on three mechanisms aimed at achieving consistency in sentencing that have been implemented in some Australian jurisdictions: guideline judgments, mandatory minimum sentences in legislation (including examples for specific offenses), and sentencing councils. Other mechanisms not covered in detail include: appellate review of sentences; provision of sentencing information to judges, such as sentencing statistics and databases; and judicial training and education.[17]

II. Guideline Judgments

A. Background

In the 1990s and early 2000s there was movement towards developing a system of guideline judgments in some Australian jurisdictions. This approach was "most enthusiastically embraced" by the courts in New South Wales.[18]

The first formal guideline judgment in Australia was issued by the New South Wales Court of Criminal Appeals in 1998 in the *Jurisic* case.[19] Following that decision and a second guideline judgment issued by the Court in 1999, the Chief Justice of New South Wales advocated for the use of such judgments in a speech at a national conference of judges. He emphasized the importance of judicial discretion and stated that "[g]uideline judgments are preferable to the constraints of mandatory minimum terms or grid sentencing."[20] He further stated that judges "must strive for both consistency and individualised justice" and clarified that:

> Sentencing guidelines as promulgated by the NSW Court of Criminal Appeal are not binding in a formal sense. They are not precedents that must be followed. They represent a relevant indicator for the sentencing judge. They are not intended to be applied to every

[15] Western Australia debated a sentencing matrix approach (similar to a grid system) in the late 1990s. Some legislation to establish such a system was enacted, but was later repealed following widespread criticism.

[16] Hewton, *supra* note 13, at 88. *See also* survey of sentencing guidelines in England and Wales, *infra*.

[17] Krasnostein & Freiberg, *supra* note 13, at 273–81.

[18] EDNEY & BAGARIC, *supra* note 10, at 38.

[19] *R v Jurisic* (1998) 45 NSWLR 209. For information on the discussion in New South Wales related to mandatory sentencing, sentencing guidelines, and guidelines judgments at the time of this decision, see Honor Figis, *Mandatory and Guidelines Sentencing: Recent Developments* (NSW Parliamentary Library Research Service, Briefing Paper No. 18/98), http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/80ABE5B6C693DC94CA256ECF0009D847/$File/18-98.pdf.

[20] Spigelman CJ, Address to the National Conference of District and County Court Judges, Sentencing Guidelines Judgments (June 24, 1999), http://www.justice.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCO_speech_spigelman_240699.

> case as if they were binding rules. The sentencing judge retains his or her discretion both within the guidelines as expressed, but also the discretion to depart from them if the particular circumstances of the case justify such departure.[21]

Provisions specifically authorizing the courts to issue guideline judgments on their own initiative are currently included in the sentencing legislation of New South Wales, Queensland, Victoria, South Australia, and Western Australia. In addition, in all these states except Western Australia the Attorney-General or other state entities can request such a judgment from the courts. However, the courts have generally been reluctant to issue guideline judgments in particular instances.

There are no legislative provisions related to guideline judgments at the federal level. In fact, in a 2001 decision in *Wong v The Queen*,[22] an appeal from a decision of the New South Wales Court of Criminal Appeal, the High Court of Australia "cast some doubt over the constitutional validity of certain forms of guideline judgments so far as they concern federal offenses."[23] In particular, the Court was concerned about the extent to which guideline judgments might bind future courts, as this would be akin to legislative action and therefore a breach of the Constitution. The majority particularly considered that guideline judgments that set out numerical sentencing ranges for defined offenses would be unconstitutional. Furthermore, the Court overruled the New South Wales court's sentencing guidelines for the federal offense of drug importation on the basis that the weight given to the quantity of drugs involved meant that the guidelines were inconsistent with the sentencing considerations contained in the Crimes Act 1914 (Cth).[24]

B. Guideline Judgments in New South Wales

1. Legislative Provisions

In 1999, following the *Jurisic* judgment, the state parliament enacted legislation enabling the Attorney-General to request guideline judgments from the Court of Criminal Appeals.[25] Then, in 2001, further legislation was passed to "specifically authorize, and retrospectively protect, guideline judgments issued on the Court's own motion."[26]

Under the Crimes (Sentencing Procedure) Act 1999 (NSW), guideline judgments may include guidelines that apply generally, or "guidelines that apply to particular courts or classes of courts,

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[21] *Id.*

[22] *Wong v The Queen* (2001) 207 CLR 584, http://www.austlii.edu.au/au/cases/cth/HCA/2001/64.html.

[23] EDNEY & BAGARIC, *supra* note 10, at 38.

[24] *Id.*

[25] Criminal Procedure Amendment (Sentencing Guidelines) Act 1998 (NSW), http://www.legislation.nsw.gov.au/sessionalview/sessional/act/1998-159.pdf.

[26] Rowena Johns, *Sentencing Law: A Review of Developments in 1998-2001*, exec. summary (NSW Parliamentary Library Research Service, Briefing Paper No. 2/02), http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/0C05B81C080F963ACA256ECF000715D0/$File/02-02.pdf. The relevant amendments were contained in the Criminal Legislation Amendment Act 2001 (NSW) sch 5, http://www.legislation.nsw.gov.au/sessionalview/sessional/act/2001-117.pdf.

to particular offences or classes of offences, to particular penalties or classes of penalties or to particular classes of offenders (but not to particular offenders)."[27] Guideline judgments made pursuant to an application from the Attorney-General may be given separately or included in any judgment of the Court that it considers appropriate.[28] Guideline judgments may be issued on the court's motion "in any proceedings considered appropriate by the Court, and whether or not it is necessary for the purpose of determining the proceedings."[29] In either situation, a guideline judgment may be reviewed, varied, or revoked in a subsequent guideline judgment of the Court.[30] The statute allows the Senior Public Defender, the Director of Public Prosecutions, and the Attorney-General to appear at proceedings related to the giving of a guideline judgment.[31]

In terms of the application of guideline judgments by the courts, the legislation states that these are to be considered in addition to any other matter that must be taken into account under the legislation, and do not "limit or derogate from any such requirement."[32] These requirements are set out in part 3, division 1 of the Crimes (Sentencing Procedure) Act 1999 (NSW) and include matters such as aggravating and mitigating factors, guilty pleas, and penalty reductions for actions that facilitated the administration of justice or assisted law enforcement authorities.[33]

2. Judgments Issued

Only six guideline judgments are currently applicable in New South Wales.[34] These relate to the following subjects: dangerous driving causing death or grievous bodily harm;[35] armed robbery;[36] break, enter, and steal;[37] discounts for pleading guilty;[38] taking further offenses into account;[39]

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[27] Crimes (Sentencing Procedure) Act 1999 (NSW) s 36.

[28] *Id.* s 37(5).

[29] *Id.* s 37A(1).

[30] *Id.* s 37B.

[31] *Id.* ss 38–39A.

[32] *Id.* s 42A.

[33] *Id.* pt 3 div 1.

[34] *Sentencing Guideline Judgments*, SUPREME COURT OF NEW SOUTH WALES, http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_sentencingguidelinejudgments.html (last updated Apr. 24, 2012); JUDICIAL COMMISSION OF NEW SOUTH WALES, SENTENCING BENCH BOOK 13-600 (Sentencing Guidelines), http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/sentencing_guidelines.html (this section last updated Sept. 2006).

[35] *R v Jurisic* (1998) 45 NSWLR 209. The guideline judgment was later reformulated in *R v Whyte* (2002) 55 NSWLR 252, http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2002/343.html.

[36] *R v Henry & Ors* (1999) 46 NSWLR 346, http://www.austlii.edu.au/au/cases/nsw/NSWCCA/1999/111.html.

[37] *Re Attorney-General's Application [No 1] under s 25 of the Criminal Procedure Act, R v Ponfield; R v Scott; R v Ryan; R v Johnson* (1999) 48 NSWLR 327, http://www.austlii.edu.au/au/cases/nsw/NSWCCA/1999/435.html.

[38] *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2000/309.html. *See also* JUDICIAL COMMISSION OF NEW SOUTH WALES, *supra* note 34, 11-510 (Guideline for guilty plea discount), http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/guilty_plea.html#p11-510.

[39] *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2002/518.html. *See also* JUDICIAL COMMISSION

and high-range drink driving.[40] As noted above, a guideline judgment issued in 1999 related to drug importation[41] was subsequently overruled by the federal High Court in *Wong* as being inconsistent with federal legislation. No new guideline judgments have been issued in New South Wales since 2004.

In addition to the judgments referred to above, in 2001 the Attorney-General submitted an application for a guideline judgment related to basic and aggravated sexual assault separate from an appeal against the sentences handed down in a particular gang rape case.[42] However, following public outcry at the sentences in that case, the New South Wales Parliament passed legislation that provided for a sentence of life imprisonment to be imposed for "aggravated sexual assault in company."[43] It appears that the Criminal Court of Appeals did not subsequently issue a guideline judgment on the matter.[44]

In 2002, the Attorney-General sought a guideline judgment with respect to sentencing for assaults on police officers. The Court of Criminal Appeals declined to issue such a judgment.[45] Subsequent amendments to the legislation included standard non-parole periods for such assaults.[46]

In November 2013, following the sentencing of an individual convicted of manslaughter in a so-called "king hit" or "one-punch" case, the Director of Public Prosecutions and Attorney-General indicated that, in addition to appealing the sentence, they would seek a guideline judgment from the Court of Criminal Appeals on sentencing for these types of "unprovoked" and "random attacks" by groups or individuals.[47] However, the application for such a judgment was

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OF NEW SOUTH WALES, *supra* note 34, 13-210 (Guideline judgment for Form 1 sentencing), http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/taking_further_offences_into_account.html#p13-210.

[40] *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305, http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2004/303.html.

[41] *R v Wong; R v Leung* (1999) 48 NSWLR 340, http://www.austlii.edu.au/au/cases/nsw/NSWCCA/1999/420.html.

[42] *See* NSW Parliamentary Debates, Legislative Assembly, 6 Sept. 2001, 16511, http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20010906017.

[43] Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001 (NSW), http://www.legislation.nsw.gov.au/sessionalview/sessional/act/2001-62.pdf.

[44] *See R v Aem; R v Kem; R v MM* [2002] NSWCCA 58, http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2002/58.html.

[45] *Attorney General's Application under s37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* (2002) 137 A Crim R 196, http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2002/515.html.

[46] Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002 (NSW), http://www.legislation.nsw.gov.au/sessionalview/sessional/act/2002-90.pdf.

[47] *NSW AG Seeks Guideline on Loveridge Case*, THE SYDNEY MORNING HERALD (Nov. 21, 2013), http://news.smh.com.au/breaking-news-national/nsw-ag-seeks-guideline-on-loveridge-case-20131121-2xwzo.html; Louise Hall, *Thomas Kelly Death: Unfair to Hear Kieran Loveridge Appeal at Same Time as Considering New Sentencing Guidelines, Lawyer Says*, THE SYDNEY MORNING HERALD (Dec. 19, 2013), http://www.smh.com.au/nsw/thomas-kelly-death-unfair-to-hear-kieren-loveridge-appeal-at-same-time-as-considering-new-sentencing-guidelines-lawyer-says-20131219-2znfo.html.

withdrawn when legislation introducing a mandatory minimum sentence for an aggravated offense of assault causing death was passed in the state parliament in January 2014.[48]

C. Guideline Judgments in Other Jurisdictions

1. Legislative Provisions

a. Western Australia

Western Australia was the first state to enact provisions relating to guideline judgments when it passed sentencing legislation in 1995. The current provisions in the Sentencing Act 1995 (WA) authorize the Court of Appeal to give a guideline judgment in any proceeding that the Court considers appropriate, regardless of whether it is necessary for the purpose of determining the proceeding.[49] Section 6 of the Act, which sets out the principles of sentencing, states that in sentencing an offender a court "must take into account any relevant guidelines in a guideline judgment."[50]

Unlike the relevant state statutes authorizing guideline judgments, the Western Australia legislation does not make provision for the Attorney-General or other entities to apply to the Court for a guideline judgment. In October 2013, as part of a statutory review of the sentencing legislation, the Department of the Attorney General did not recommend allowing such applications.[51]

b. Victoria

In Victoria, provisions related to guideline judgments were enacted in 2003. Part 2AA of the Sentencing Act 1991 (Vic) currently authorizes the Court of Appeal to give or review guideline judgments when considering an appeal against a sentence, either on its own initiative or on an application made by a party to the appeal.[52] The legislation requires that the Court notify the Victoria Sentencing Advisory Council of its decision to give or review a guideline judgment and

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[48] Louise Hall, *NSW Pulls Request for New Sentencing Guidelines for Random Attacks*, THE SYDNEY MORNING HERALD (Feb. 13, 2014), http://www.smh.com.au/nsw/nsw-pulls-request-for-new-sentencing-guidelines-for-random-attacks-20140213-32jd7.html. *See also Mandatory Minimum Sentences Introduced to Tackle Drug and Alcohol Violence*, NEWS WATCH BLOG, STATE LIBRARY OF NEW SOUTH WALES (Feb. 10, 2014), http://blog.sl.nsw.gov.au/hsc_legal_studies/index.cfm/2014/2/10/mandatory-minimum-sentences-introduced-to-tackle-drug-and-alcohol-violence. The new sentences were contained in the Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014, http://www.legislation.nsw.gov.au/sessionalview/sessional/ act/2014-2.pdf.

[49] Sentencing Act 1995 (WA) s 143.

[50] *Id.* s 6(5).

[51] Department of the Attorney General, Statutory Review of the Sentencing Act 1995 (WA) 25 (Oct. 2013), http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3911102cda8d9b01225a46d348257c39000ee51e/$file/tp-1102.pdf.

[52] Sentencing Act 1991 (Vic) s 6AB. For a discussion of the provisions, including comparisons with guideline judgments in other jurisdictions, see Beth Crilly, *Guideline Judgments in Victoria*, 31(1) MONASH U. L. REV. 37 (2005), http://www.austlii.edu.au/au/journals/MonashULawRw/2005/3.html.

must have regard to any views that the Council expresses.[53] In addition, the Director of Public Prosecutions and Victoria Legal Aid must be given the opportunity to make a submission on the matter.[54] The Court must also have regard to "the need to promote consistency of approach in sentencing offenders" and "the need to promote public confidence in the criminal justice system."[55]

c. South Australia

Amendments to the Criminal Law (Sentencing Act) 1988 (SA) passed in 2003 authorize the Full Court of the Supreme Court of South Australia to give or review a judgment establishing sentencing guidelines on its own initiative or on application by the Attorney General, Director of Public Productions, or Legal Service Commission.[56] In addition to these entities, the Commissioner for Victims' Rights, the Aboriginal Legal Rights Movement Inc., and other victim or offender rights organizations may appear in the relevant proceedings.[57]

The legislation states that sentencing guidelines established by the Court may "indicate an appropriate range of penalties for a particular offence or offences of a particular class" and "indicate how particular aggravating or mitigating factors (or aggravating or mitigating factors of a particular kind) should be reflected in sentence."[58] A sentencing court should have regard to relevant guidelines, but is not bound to follow them if there is good reason for not doing so in the circumstances of the case.[59]

d. Queensland

Provisions related to guideline judgments were not inserted into the Penalties and Sentencing Act 1992 (Qld) until 2010. Part 2A of the legislation authorizes the Queensland Court of Appeal to give or review a guideline judgment either on its own initiative as part of a proceeding[60] or on the application of the Attorney-General, the director of public prosecutions, or the chief executive of Legal Aid Queensland.[61] In considering whether to give or review a guideline judgment, the Court must consider "the need to promote consistency of approach in sentencing offenders" and "the need to promote public confidence in the criminal justice system."[62]

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[53] Sentencing Act 1991 (Vic) ss 6AD(a) & 6AE(c).

[54] *Id.* s 6AD(b).

[55] *Id.* s 6AE(a) & (b).

[56] Criminal Law (Sentencing Act) 1988 (SA) s 29B(1). For background information on the amendments, see Michael Atkinson, *Sentencing Guidelines* (Cabinet Paper submitted May 1, 2002, approved May 13, 2002), http://dpc.sa.gov.au/sites/default/files/pubimages/documents/cabinet/cabinet-documents/051302_ATTG0150_02CS.pdf.

[57] Criminal Law (Sentencing Act) 1988 (SA) s 29B(2).

[58] *Id.* s 29A(3).

[59] *Id.* s 29A(5).

[60] Penalties and Sentencing Act 1992 (Qld) s 15AD.

[61] *Id.* s 15AE.

[62] *Id.* s 15AH.

The legislation makes a distinction between issuing guideline judgments in relation to state and Commonwealth (i.e., federal) offenses. In a reflection of the High Court's ruling in *Wong*, guideline judgments for offenses under Commonwealth legislation must be consistent with Commonwealth law; "set out non-binding considerations to guide the future exercise of discretion and not purport to establish a rule of binding effect;" and "articulate principles to underpin the determination of a particular sentence and not state the expected decisions in a future proceeding."[63] In addition, such judgments may be issued only where the Court considers it necessary for the purposes of determining a proceeding.[64]

2. Judgments Issued

While various state courts have discussed guidance or standards in relation to particular offenses or the application of sentencing considerations,[65] only one decision was found that was expressly considered a formal "guideline judgment," being a Western Australia decision on the power to make a "spent conviction order."[66] A small number of cases were located in which the appellate court specifically rejected the option of delivering such a judgment. For example, in 2004, the Supreme Court of South Australia declined to issue a guideline judgment related to sentencing for the offense of dangerous driving causing death, stating

> [w]e understand the desire to identify a benchmark sentence and the sort of case it applies to. But this will not remove the need for the individual assessment of each case, and for the making of what is always a difficult decision. The circumstances of the offences in question vary too much for the fixing of a benchmark to be wise or helpful. And, we repeat, it has not been shown that we should act as proposed because courts are not observing appropriate standards and need to be given a standard to work from.[67]

III. Mandatory Minimum Sentences

A. Background

Over the past two decades mandatory sentencing laws have been debated at various times in the different Australian jurisdictions.[68] Some states have adopted minimum penalties for certain

[63] *Id.* s 15AC.

[64] *Id.* ss 15AD(2) & 15AE(6).

[65] *See, e.g.*, *R v Payne* [2004] SASC 160, http://www.austlii.edu.au/au/cases/sa/SASC/2004/160.html. *See also* McMurdo J., Address to the Queensland Magistrates State Conference, *Sentencing*, 33 QLDJSCHOL (2011), http://www.austlii.edu.au/au/journals/QldJSchol/2011/33.html.

[66] *R v Tognini* [2000] WASCA 31, http://www.austlii.edu.au/au/cases/wa/WASCA/2000/31.html. A spent conviction order allows a person to not disclose, e.g., to an employer, that he or she has been charged with and convicted of an offense. *See What Spent Conviction Orders Do*, LEGAL AID WESTERN AUSTRALIA, http://www.legalaid.wa.gov.au/InformationAboutTheLaw/crime/criminalrecords/Pages/SpentConvictionOrders.aspx (last modified Nov. 10, 2010).

[67] *R v Place* (2002) 81 SASCR 395, at [66], http://www.austlii.edu.au/au/cases/sa/SASC/2002/101.html.

[68] *See generally* Lenny Roth, *Mandatory Sentencing Laws* (NSW Parliamentary Research Service, Jan. 2014), http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/Mandatorysentencinglaws/$File/mandatory+sentencing+laws.pdf.

serious offenses in response to public concerns about perceived leniency or inconsistencies in sentencing. Western Australia and the Northern Territory first introduced several minimum sentencing provisions in the 1990s, and such provisions have more recently also been enacted in New South Wales, Queensland, and Victoria.[69] These may relate to both first-time and repeat offenders. At the federal level, minimum sentences apply for certain aggravated people smuggling offenses.[70]

In New South Wales, in addition to there being some mandatory sentence provisions, a standard non-parole period approach was incorporated into the Crimes (Sentencing Procedure) Act 1999 (NSW) in 2003.[71] This currently consists of a table setting out standard non-parole periods for thirty offenses. The provisions governing the application of such periods state that "the standard non-parole period represents the non-parole period for an offence . . . that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness."[72] A court must provide reasons, including each factor that it took into account, for setting a non-parole period that is longer or shorter than the standard period in the table.[73] A judge must also record the reasons, including each mitigating factor taken into account, where he or she imposes a noncustodial sentence for any of the offenses listed.[74]

Following a 2011 High Court decision that effectively reduced the significance of the New South Wales standard non-parole periods in setting sentences,[75] in 2013 the state parliament passed amendments that clarified the approach to applying the periods.[76] In particular, the legislation now states that "[t]he standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender."[77]

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[69] *Id.* at 1.

[70] *See* Andrew Trotter & Matt Garozza, *Mandatory Sentencing for People Smuggling: Issues of Law and Policy*, 36(2) MELBOURNE U. L. REV. 553 (2012), http://www.austlii.edu.au/au/journals/MelbULawRw/2012/15.html.

[71] Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002 (NSW). *See* JUDICIAL COMMISSION OF NEW SOUTH WALES, *supra* note 34, 7-890, http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/standard_non-parole_period_offences.html.

[72] Crimes (Sentencing Procedure) Act 1999 (NSW) s 54A(2).

[73] *Id.* s 54B(3).

[74] *Id.* s 54C(1).

[75] *Muldrock v The Queen* (2011) 244 CLR 120, http://www.austlii.edu.au/au/cases/cth/HCA/2011/39.html.

[76] Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013 (NSW), http://www.legislation.nsw.gov.au/sessionalview/sessional/act/2013-78.pdf.

[77] Crimes (Sentencing Procedure) Act 1999 (NSW) s 54B(2).

B. Minimum Sentences and Standard Non-Parole Periods for Particular Offenses

1. Burglary/Larceny

In 1996, Western Australia introduced minimum sentences for repeat home burglary offenders. The current provisions require that a minimum term of twelve months' imprisonment be imposed on home burglary offenders for their third such offense.[78]

Certain burglary and home invasion offenses are included in the standard non-parole period table in the New South Wales legislation. For example, for the most serious offense of breaking and entering into a house and committing an indictable offense in "specially aggravated" circumstances, a standard non-parole period of seven years applies.[79] The maximum sentence is twenty-five years' imprisonment.[80]

As noted above, the New South Wales Court of Criminal Appeals has issued a guideline judgment with respect to "break, enter, and steal." This did not involve the Court setting a starting point for sentences or specifying a sentencing range. Instead, it outlined relevant factors to be taken into account in sentencing for this offense.[81]

2. Manslaughter

As indicated above, New South Wales recently passed legislation that introduces a mandatory minimum sentence of eight years' imprisonment for the aggravated offense of assault causing death; where a person fatally punches someone while under the influence of drugs or alcohol.[82]

3. Murder

A sentence of life imprisonment for murder is mandatory in Queensland, South Australia, and the Northern Territory.[83] It is also mandatory in New South Wales where the victim is a police officer who was acting in the course of his or her duty, and this sentence is expressly stated as meaning the person's natural life.[84]
In Queensland, a standard non-parole period of twenty years applies to single murders, with a period of thirty years applying to multiple murders and twenty-five years for murdering a police officer.[85]

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[78] Criminal Code Compilation Act 1913 (WA) s 401(4), http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_218_homepage.html.

[79] Crimes (Sentencing Procedure) Act 1999 (NSW) pt 4 div 1A Table item 13.

[80] *Id.* s 112.

[81] *See* JUDICIAL COMMISSION OF NEW SOUTH WALES, *supra* note 34, 17-020, http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/break_and_enter_offences.html#p17-020.

[82] Crimes Act 1900 (NSW) s 25B.

[83] *See* Roth, *supra* note 68, at 2 & 5.

[84] Crimes Act 1900 (NSW) s 19B, http://www.legislation.nsw.gov.au/maintop/view/inforce/act+92+1999+cd+0+N.

[85] Criminal Code (Qld) s 305, https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/CriminCode.pdf.

The New South Wales sentencing law also sets a standard non-parole period of twenty years for murder, or twenty-five years for the murder of a public official or a child under eighteen years of age.[86] Where a person is sentenced to life imprisonment for murder, the Crimes Act 1900 (NSW) requires that the sentence be served "for the term of the person's natural life.[87]

4. Human Trafficking

Maximum penalties for slavery and human trafficking offenses are set out in the federal Criminal Code Act 1995 (Cth).[88] As indicated above, there are separate offenses related to people smuggling that are subject to mandatory minimum sentences. These offenses and sentences are set out in the Migration Act 1958 (Cth) and include a minimum term of five years' imprisonment, with a three year non-parole period, for the aggravated offense of smuggling into Australia a group of five or more unlawful migrants.[89] Higher sentences apply for repeat offenses and for subjecting the victim to cruel, inhuman, or degrading treatment.[90]

5. Drug Trafficking

Drug trafficking offenses are prosecuted under the federal Criminal Code Act 1995 (Cth), which sets out only maximum penalties for the various offenses.[91]

The New South Wales sentencing legislation provides for standard non-parole periods for certain state-level drug offenses, including supplying a commercial quantity of a prohibited drug, for which the period is either ten years or fifteen years depending on the amount.[92]

6. Rape

In New South Wales, as noted above, a maximum penalty of life imprisonment is available for aggravated sexual assault in company (i.e., gang rape), with a standard non-parole period of fifteen years applicable under the sentencing legislation.[93] A person sentenced to life imprisonment for that offense must "serve that sentence for the term of the person's natural life."[94] Other sexual and indecent assault offenses are also subject to standard non-parole periods of various lengths. This includes sexual assault (i.e., sexual intercourse without consent),

[86] Crimes (Sentencing Procedure) Act 1999 (NSW) pt 4 div 1A Table items 1A, 1B & 1.

[87] Crimes Act 1900 (NSW) s 19A.

[88] Criminal Code Act 1995 (Cth) divs 270 & 271, http://www.comlaw.gov.au/Details/C2014C00011.

[89] Migration Act 1958 (Cth) ss 233C, 236B(3)(c) & (4)(a), http://www.comlaw.gov.au/Details/C2014C00146. *See* Roth, *supra* note 68, at 12–13.

[90] *Id.* ss 233B, 236B(3)(a) & (4)(a)–(b).

[91] Criminal Code Act 1995 (Cth) pt 9.1.

[92] Crimes (Sentencing Procedure) Act 1999 (NSW) pt 4 div 1A Table items 18 & 19.

[93] Crimes Act 1900 (NSW) s 61JA; Crimes (Sentencing Procedure) Act 1999 (NSW) pt 4 div 1A Table item 9.

[94] Crimes Act 1900 (NSW) s 61JA(2).

which has a maximum penalty of fourteen years imprisonment and a standard non-parole period of seven years.[95]

Queensland has a mandatory sentence of life imprisonment, with a twenty-year non-parole period, for repeat serious child sex offenders.[96]

IV. Sentencing Councils

Sentencing advisory bodies currently operate in four Australian states. They are independent entities with functions related to monitoring and researching sentencing matters and providing information that could assist judges and/or policymakers as well as helping to educate the public. In addition to the councils, in some states judicial branch or related entities may publish information on sentencing with the aim of improving consistency and public confidence in the justice system.[97]

The first sentencing council was established in New South Wales in 2003.[98] This was followed by similar entities being established in three other states: Victoria (2004), Tasmania (2010), and South Australia (2012). Queensland's Sentencing Advisory Council was created in 2010, but was subsequently abolished in 2012.[99] In early 2013, it was reported that the Labor Party in Western Australia had put forward a plan for a sentencing council, which was opposed by the current state Attorney-General.[100]

In Australia's two mainland territories, a sentencing council proposal was part of the Labor Party's platform during the 2008 Australian Capital Territory election campaign, but was not subsequently implemented.[101] There were also government announcements in 2011 related to the establishment of a sentencing council in the Northern Territory,[102] but no such council has yet been established.

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[95] Crimes Act 1900 (NSW) s 61I; Crimes (Sentencing Procedure) Act 1999 (NSW) pt 4 div 1A Table item 7.

[96] Penalties and Sentences Act 1992 (Qld) pt 9B. The relevant provisions were inserted by the Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012 (Qld).

[97] In addition to those cited below, see QUEENSLAND SUPREME AND DISTRICT COURTS BENCH BOOK, http://www.courts.qld.gov.au/information-for-lawyers/benchbooks-and-ucpr-bulletin/supreme-and-district-courts-benchbook (last updated Oct. 24, 2013).

[98] *What We Do*, SENTENCING COUNCIL (NSW), http://www.sentencingcouncil.lawlink.nsw.gov.au/sentencing/functions.html (last updated Aug. 24, 2012).

[99] Criminal Law Amendment Act 2012 (Qld), https://www.legislation.qld.gov.au/LEGISLTN/ACTS/2012/12AC019.pdf.

[100] *Sentencing Council Plan Flaws: Mishcin*, THE AUSTRALIAN (Feb. 18, 2013), http://www.theaustralian.com.au/news/latest-news/sentencing-council-plan-flawed-mischin/story-fn3dxiwe-1226580239766.

[101] Lorana Bartels, *A Sentencing Council for the ACT?*, 38(1) ALTLJ 55 (2013), https://www.altlj.org/news-and-views/downunderallover/duao-vol-38-1/490-a-sentencing-council-for-the-act.

[102] Press Release, Delia Lawrie, New Sentencing Council for the Territory (Aug. 26, 2011), http://www.territorystories.nt.gov.au/bitstream/handle/10070/238999/Lawrie-260811-New_sentencing_council_for_the_Territory.pdf.

A. New South Wales

The New South Wales Sentencing Council consists of up to sixteen members, appointed by the Attorney-General for a fixed term, who are selected based on their experience and expertise in different aspects of the justice system.[103] The functions of the Sentencing Council are set out in the Crimes (Sentencing Procedure) Act 1999 (NSW) and include

- Advising the Attorney-General on offenses suitable for standard non-parole periods and their proposed lengths;
- Advising the Attorney-General on matters that may be suitable for guideline judgments, as well as the submissions to be made in guideline proceedings;
- Monitoring sentencing trends and practices and reporting to the Attorney-General on these annually;
- Preparing research papers and reports on particular sentencing topics at the request of the Attorney-General; and
- Educating the public about sentencing matters.[104]

To date, the Sentencing Council has published more than thirty papers or reports, including their annual reports on sentencing trends and practices.[105]

Separate from the Sentencing Council, the Judicial Commission of New South Wales was established by the Judicial Officers Act 1986 (NSW) and is part of the judicial branch.[106] One of the Commission's principal functions is to "assist the courts to achieve consistency in sentencing."[107] The Commission publishes the Sentencing Bench Book, among other resources aimed at assisting judicial officers to conduct trials. This provides information on various sentencing principles and provisions and their application in court decisions, as well as on procedural matters.[108]

[103] Crimes (Sentencing Procedure) Act 1999 (NSW) s 100I(2).

[104] *Id.* s 100J.

[105] *Reports and Publications*, SENTENCING COUNCIL (NSW), http://www.sentencingcouncil.lawlink.nsw.gov.au/sentencing/publications.html (last updated Dec. 16, 2013).

[106] *Our History*, JUDICIAL COMMISSION OF NEW SOUTH WALES, http://www.judcom.nsw.gov.au/about-the-commission/our-history (last visited Apr. 4, 2014).

[107] *Welcome to the Judicial Commission of New South Wales*, JUDICIAL COMMISSION OF NEW SOUTH WALES, http://www.judcom.nsw.gov.au/ (last visited Apr. 4, 2014).

[108] JUDICIAL COMMISSION OF NEW SOUTH WALES, SENTENCING BENCH BOOK, http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/index.html (last updated Mar. 2014).

B. Victoria

The Victoria Sentencing Advisory Council was established by the same amendment bill that resulted in the provisions related to guideline judgments.[109] It consists of between eleven and fourteen members who must be appointed under eight "profile areas."[110] The functions of the Council are set out in the Sentencing Act 1991 and include

- Providing statistical information on sentencing and information on current sentencing practices to members of the judiciary and "other interested persons;"
- Conducting research and disseminating information on sentencing matters;
- Gauging public opinion on sentencing matters;
- Consulting with government departments and other bodies, as well as the general public, on sentencing matters; and
- Advising the Attorney-General on sentencing matters.[111]

The Council has published around 100 reports and other documents, including on sentencing practices in relation to specific offenses, as well as nearly eighty "sentencing snapshots."[112]

Similar to the situation in New South Wales, the Judicial College of Victoria, which provides continuing education programs for judicial officers, maintains the Victorian Sentencing Manual. The aim of the Manual is to "promote consistency of approach by sentencers in the exercise of their discretion."[113]

C. Tasmania

The Tasmania Sentencing Advisory Council was established through administration action taken by the Attorney-General in 2010. The appointment of such a council was recommended by the Tasmania Law Reform Institute in its 2008 report on sentencing issues.[114] The Council's functions are stated as follows:

- To improve the quality and availability of information on sentencing in Tasmania
- To undertake research on sentencing

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[109] *Functions of the Council*, SENTENCING ADVISORY COUNCIL (Vic), https://sentencingcouncil.vic.gov.au/page/about-us/council/functions-council (last updated June 14, 2011).

[110] *The Council*, SENTENCING ADVISORY COUNCIL (Vic), https://sentencingcouncil.vic.gov.au/page/about-us/council (last updated Oct. 18, 2013).

[111] Sentencing Act 1991 (Vic) s 108C.

[112] *Publications by Topic*, SENTENCING ADVISORY COUNCIL (Vic), https://sentencingcouncil.vic.gov.au/listing/publications/category (last updated Feb. 24, 2014).

[113] JUDICIAL COLLEGE OF VICTORIA, VICTORIAN SENTENCING MANUAL (Introduction), http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#13888.htm (last visited Apr. 4, 2014).

[114] TASMANIA LAW REFORM INSTITUTE, SENTENCING (Final Report No. 11, June 2008), http://www.utas.edu.au/__data/assets/pdf_file/0004/283810/completeA4.pdf.

- To better inform the public on crime and sentencing issues
- To gauge public opinion on sentencing matters
- To provide policy advice to the Attorney-General
- To provide advice to agencies, on request, in relation to penalties and sentencing matters.[115]

The Council has so far undertaken work in three major project areas: arson, assault on emergency workers, and sex offending. Its website states that it is also in the process of developing a sentencing database.[116]

D. South Australia

The Sentencing Advisory Council of South Australia was established by the Attorney-General in 2012 and "aims to enhance the community's knowledge and understanding on matters relating to sentencing and to bridge the gap between the courts and the community."[117] Its functions include

- preparing research papers, advice and reports on particular subjects in connection with sentencing at the request of the Attorney-General;
- making recommendations to the Attorney-General on sentencing related matters;
- publishing information relating to sentencing;
- educating the public about sentencing matters; and
- obtaining the community's views on sentencing matters.[118]

The Council's current project relates to the "applicability and functionality of the 'insanity defence' " contained in Part 8A of the Criminal Law Consolidation Act 1935 (SA).[119]

V. Conclusion

All Australian jurisdictions have grappled with issues related to reducing disparities in sentencing and enhancing public confidence in the justice system, while also maintaining judicial discretion and an individualized approach to sentencing. These debates have led to various mechanisms being adopted over the past twenty years, ranging from legislatures setting mandatory sentences based on factors that may include public opinions regarding deterrence and

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[115] *The Sentencing Advisory Council*, SENTENCING ADVISORY COUNCIL (Tas), http://www.sentencingcouncil.tas.gov.au/home (last updated Aug. 11, 2013).

[116] *Projects*, SENTENCING ADVISORY COUNCIL (Tas), http://www.sentencingcouncil.tas.gov.au/projects (last updated July 25, 2013).

[117] *Sentencing Advisory Council of South Australia*, ATTORNEY-GENERAL'S DEPARTMENT, http://www.agd.sa.gov.au/about-agd/what-we-do/services-government/sentencing-advisory-council-south-australia (last updated Aug. 7, 2013).

[118] *Id.*

[119] *Current Project of the Sentencing Advisory Council*, ATTORNEY-GENERAL'S DEPARTMENT, http://www.agd.sa.gov.au/about-agd/what-we-do/services-government/sentencing-advisory-council-south-australia/current-project (last updated July 31, 2013).

punishment, to establishing sentencing councils that analyze and provide information on sentencing matters to the public, judiciary, and policymakers. The option of an independent entity setting standardized sentencing guidelines or grids for multiple offenses has largely been rejected due to the restrictions these would impose on judicial discretion. For a period in the late 1990s and early 2000s, it appeared that the judiciary itself might provide guidelines for certain offenses or sentencing options in the form of guideline judgments. However, this approach was not widely adopted and its constitutionality has been questioned by the High Court.

The discussion regarding the balance between individualized justice and avoiding disparities in sentencing is ongoing. Most recently, for example, New South Wales enacted mandatory minimum sentences for certain violent offenses following public outcry over perceived leniency in a particular case involving a "one punch" fatality. This and other similar cases have again led to substantial debate around the country over the need for and effectiveness of mandatory sentencing laws.

England and Wales

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SUMMARY The English justice system considers that sentences imposed on offenders should reflect the crime committed and be proportionate to the seriousness of the offense. It has a Sentencing Council that is responsible for producing, issuing, and reviewing guidance to the courts on what factors should be considered when sentencing offenders and the range of sentences that should be awarded, among other things. The guidance should be followed, unless it is not in the interests of justice to do so. The aim of the guidance is to ensure consistency in sentencing across the country.

I. Introduction

England and Wales has a robust system of sentencing guidelines that the court must follow for crimes committed after April 6, 2010[1] For offenses committed prior to that date, the court must consider any sentencing guidelines that were in place at the time and relevant to the case and, in cases where no guidelines exist, it must consider how similar cases have been handled in the past by reviewing Court of Appeal judgments.[2]

The rationale behind the adoption of the guidelines is to provide guidance on factors the court should take into account when sentencing an offender, promote transparency, and ensure that courts across the countries are consistent in sentencing offenders.[3] The guidelines do provide judges with the flexibility to deviate from them if it is in the interests of justice to do so.[4]

II. The Sentencing Council

The Sentencing Council is an independent nondepartmental body of the Ministry of Justice.[5] It was established in 2009 by the Coroners and Justice Act and is responsible for issuing guidelines for sentencing that must be followed by the courts unless it is contrary to the interests of justice to do so. Its role includes

[1] Coroners and Justice Act 2009 c. 25, pt. 4, http://www.legislation.gov.uk/ukpga/2009/25.

[2] *Sentencing Guidelines*, SENTENCING COUNCIL, http://sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.htm (last visited Mar. 24, 2014).

[3] *Id.*

[4] Coroners and Justice Act 2009 c. 25 § 125.

[5] *About Us,* SENTENCING COUNCIL, http://sentencingcouncil.judiciary.gov.uk/about-us.htm (last visited Apr. 1, 2014).

- developing sentencing guidelines and monitoring their use;
- assessing the impact of guidelines on sentencing practice. . . . and
- promoting awareness amongst the public regarding the realities of sentencing and publishing information regarding sentencing practice in Magistrates' and the Crown Court.[6]

When conducting the above functions, the Sentencing Council must take into account the impact of sentences on victims of crime, monitor how the guidelines are applied in practice, and help increase public confidence in the sentencing and criminal justice system.[7]

The council is accountable to Parliament in terms of achieving it's statutory remit, to the Permanent Secretary at the Ministry of Justice to show efficient and proper use of public funds, and to the Director General of the Justice Policy Group at the Ministry of Justice to account for effective oversight of the body.[8] The Council must report annually to the Lord Chancellor, who must lay this report detailing the Sentencing Councils activities before Parliament.[9] The report is also published by the Council and available publicly.

III. The Adoption Process for Guidelines

As noted above, the Sentencing Council is responsible for preparing sentencing guidelines. The Council initially identifies the priorities where guidelines should be revised or are needed. In some cases, statutes may also require the Council to examine a particular area of the law and produce guidance.[10] When drafting sentencing guidelines, the Council is required to take into account

(a) the sentences imposed by courts in England and Wales for offences;
(b) the need to promote consistency in sentencing;
(c) the impact of sentencing decisions on victims of offences;
(d) the need to promote public confidence in the criminal justice system;
(e) the cost of different sentences and their relative effectiveness in preventing re-offending;
(f) the results of the monitoring carried out under section 128.[11]

The Council then undertakes a policy and legal review and writes an initial draft, which is discussed internally. Once the Council agrees on a broad structure, it then consults the Lord Chancellor, as well as any other person he wishes to direct; the Justice Select Committee of the House of Commons; and any other person the Council considers appropriate.[12] This process

[6] *Id*.

[7] *Id*.

[8] *Id.*

[9] *Id.*

[10] *How Guidelines are Developed*, SENTENCING COUNCIL, http://sentencingcouncil.judiciary.gov.uk/guidelines/how-guidelines-developed.htm (last visited Mar. 24, 2014).

[11] Coroners and Justice Act 2009 c. 25, § 120(11).

[12] *Id*. § 120.

takes approximately twelve weeks. The Council then considers the responses and publishes the final guidelines. Publication is not the last step of the Council and it constantly monitors the application of the guidelines.[13]

IV. Sentencing Guidelines

The sentencing guidelines are made available publicly and include a number of common factors due to the requirements in the Coroners and Justice Act 2009. This Act requires the Council to specify a range of sentences in the guidelines (known as the sentence range) with a starting point, and to list any factors or mitigating circumstances that could affect the sentence (known as the category range). Such factors or circumstances should include, but are not limited to, the offenders' culpability in committing the crime, the degree of harm caused by the offense, and any aggravating or mitigating circumstances. The Council must also provide guidance to determine how previous convictions should affect any sentence that may be imposed.[14]

Sentencing guidelines are published for most of the significant offenses heard in the Magistrates' Court and a wide range of offenses heard in the Crown Court.[15] An overview of the structure of sentencing guidelines that apply for the offenses of rape,[16] aggravated burglary,[17] corporate manslaughter,[18] and manslaughter by provocation,[19] is provided below. There are guidelines in place for the offense of attempted murder,[20] but the structure of these vary slightly to the ones listed above. There are currently no guidelines for human trafficking or the smuggling of goods.

The guidelines apply for offenders age eighteen and older. Specific guidelines apply for youth sentencing.[21] The guidelines provide a step-by-step process in determining the sentence. Step one of the guidance provides that the court should determine the offense category—that is, how much harm was caused and the offender's level of culpability. Three categories are provided:

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[13] SENTENCING COUNCIL, *supra* note 2.

[14] Coroners and Justice Act 2009 c. 25, § 121.

[15] SENTENCING COUNCIL, *supra* note 2. A list of all sentencing guidelines in effect is available from the Sentencing Council's website. *Guidelines to Download*, SENTENCING COUNCIL, http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm (last visited Apr. 1, 2014).

[16] Sentencing Guidelines Council, *Sexual Offences Definitive Guideline* (effective Apr. 1, 2014), http://sentencingcouncil.judiciary.gov.uk/docs/Final_Sexual_Offences_Definitive_Guideline_content_(web).pdf.

[17] Sentencing Council, *Burglary Offences Definitive Guideline* (effective Jan. 16, 2012), http://sentencingcouncil.judiciary.gov.uk/docs/Burglary_Definitive_Guideline_web_final.pdf.

[18] Sentencing Guidelines Council, *Corporate Manslaughter & Health and Safety Offences Causing Death* (effective Feb. 15, 2010), http://sentencingcouncil.judiciary.gov.uk/docs/web__guideline_on_corporate_manslaughter_accessible.pdf.

[19] Sentencing Guidelines Council, *Manslaughter by Reason of Provocation* (effective Nov. 28, 2005), http://sentencingcouncil.judiciary.gov.uk/docs/Manslaughter_by_Reason_of_Provocation.pdf.

[20] Sentencing Guidelines Council, *Attempted Murder Definitive Guidance* (effective July 27, 2009), http://sentencingcouncil.judiciary.gov.uk/docs/Attempted_Murder_-_Definitive_Guideline_(web)accessible.pdf.

[21] Sentencing Guidelines Council, *Overarching Principles – Sentencing Youths Definitive Guideline* (effective Nov. 30, 2009), http://sentencingcouncil.judiciary.gov.uk/docs/web_overarching_principles_sentencing_youths.pdf.

Category 1: Greater harm and higher culpability
Category 2: Greater harm and lower culpability or lesser harm and higher culpability
Category 3: Lesser harm and lower culpability.[22]

A number of offense-specific factors are in the guidance that must be taken into account when determining which category the offender falls within. If the offense does not fit within a category, the guidelines require the court to consider each factor of the crime and make a decision as to which category is most appropriate.[23] The length of the sentence should then be considered, with the starting point varying according to the applicable offender category.[24]

Once the sentence range has been determined, factors that could lead to a reduction in the sentence should be taken into account, such as whether the offender has assisted the prosecution. Reductions are also available for those who have pled guilty. In cases where the offense is a specified serious offense the dangerousness of the offender should also be taken into account in determining whether the offender should be given a life sentence, receive an extended sentence, or be imprisoned for public protection.

The court is also required to consider the principle of totality—that is, whether the offender is being sentenced for multiple offenses or if the offender is already serving a sentence. If the offender is already serving a sentence, the total sentence must be just and proportionate to the offense(s) committed. The court must then consider whether to make an award of compensation or an ancillary order.[25]

Once the sentence has been determined the court must provide the reasoning for, and explain the effect of, the sentence. Any time that the offender has spent on remand or on bail should then be taken into account.[26]

[22] Sentencing Council, *Burglary Offences Definitive Guideline*, *supra* note 17, at 4.

[23] *Id*. at 4.

[24] *Id.* at 5.

[25] *Id.*

[26] *Id.* at 14.

India

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SUMMARY In India neither the legislature nor the judiciary has issued structured sentencing guidelines. Several governmental committees have pointed to the need to adopt such guidelines in order to minimize uncertainty in awarding sentences. The higher courts, recognizing the absence of such guidelines, have provided judicial guidance in the form of principles and factors that courts must take into account while exercising discretion in sentencing.

I. Absence of Structured Sentencing Guidelines

Currently India does not have structured sentencing guidelines that have been issued either by the legislature or the judiciary. In March 2003, the Committee on Reforms of Criminal Justice System (the Malimath Committee), a body established by the Ministry of Home Affairs, issued a report that emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences, stating,

> [t]he Indian Penal Code prescribed offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum may be prescribed. The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries guidance regarding sentencing option[s] is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimise uncertainty to the matter of awarding sentence. There are several factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body.[1]

The Committee advised further that, in order to bring "predictability in the matter of sentencing," a statutory committee should be established "to lay guidelines on sentencing guidelines under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative."[2] In 2008, the Committee on Draft National Policy on Criminal Justice (the Madhava Menon Committee), reasserted the need for statutory sentencing guidelines.[3] In an October 2010 news report, the Law Minister is quoted as having

[1] I GOVERNMENT OF INDIA, MINISTRY OF HOME AFFAIRS, COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM REPORT 170 (Mar. 2003), http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf.

[2] *Id.* at 171.

[3] *Id.* at 18–19.

stated that the government is looking into establishing a "uniform sentencing policy" in line with the United States and the United Kingdom in order to ensure that judges do not issue varied sentences.[4]

In 2008, the Supreme Court of India, in *State of Punjab v. Prem Sagar & Ors.*, also noted the absence of judiciary-driven guidelines in India's criminal justice system, stating, "[i]n our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts[,] except [for] making observations with regard to the purport and object for which punishment is imposed upon an offender, had not issued any guidelines."[5] The Court stated that the superior courts have come across a large number of cases that "show anomalies as regards the policy of sentencing,"[6] adding, "[w]hereas the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where [the] same sentence is imposed, the principles applied are found to be different. Similar discrepancies have been noticed in regard to imposition of fine[s]."[7] In 2013 the Supreme Court, in the case of *Soman v. State of Kerala*, also observed the absence of structured guidelines:

> Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges.[8]

However, in describing India's sentencing approach the Court has also asserted that "[t]he impossibility of laying down standards is at the very core of the Criminal law as administered in India, which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment."[9]

Sentencing procedure is established under the Code of Criminal Procedure, which provides broad discretionary sentencing powers to judges.[10] In a 2007 paper on the need for sentencing policy in India, author R. Niruphama asserted that, in the absence of an adequate sentencing policy or guidelines, it comes down to the judges to decide which factors to take into account and

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[4] *Govt for a Uniform Sentencing Policy by Courts*, ZEENEWS (Oct. 7, 2010), http://zeenews.india.com/news/nation/govt-for-a-uniform-sentencing-policy-by-courts_660232.html.

[5] State of Punjab v. Prem Sagar & Ors., (2008) 7 S.C.C. 550, para. 2, http://judis.nic.in/supremecourt/imgs1.aspx?filename=31541.

[6] *Id.* para. 8.

[7] *Id.*

[8] Soman v. State of Kerala, (2013) 11 S.C.C. 382, http://judis.nic.in/supremecourt/imgs1.aspx?filename=39837.

[9] *Jagmohan Singh* v. State of Uttar Pradesh, (1973) 2 S.C.R. 541, para. 26, *available at* http://indiankanoon.org/doc/1837051/.

[10] CODE OF CRIMINAL PROCEDURE, No. 2 of 1974, *available at* http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814340.pdf. Sentencing is covered under section(s) 235, 248, 325, 360 and 361 of the Code.

which to ignore. Moreover, he considered that broad discretion opens the sentencing process to abuse and allows personal prejudices of the judges to influence decisions.[11]

II. Crimes and Judicial Sentencing Guidance

In the Supreme Court's judgment in *Soman v. Kerala*, the Court cited a number of principles that it has taken into account "while exercising discretion in sentencing," such as proportionality, deterrence, and rehabilitation.[12] As part of the proportionality analysis, mitigating and aggravating factors should also be considered, the Court noted.[13]

In *State of M.P. v. Bablu Natt*, the Supreme Court stated that "[t]he principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with."[14] Moreover, in *Alister Anthony Pareira v. State of Maharashtra*, the Court held that

> [s]entencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of [an] appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of [the] crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: [the] twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.[15]

A. Murder

The punishment for murder under India's Penal Code is life imprisonment or death and the person is also liable to a fine.[16] Guidance on the application of the death sentence was provided by the Supreme Court of India in *Jagmohan Singh v. State of Uttar Pradesh*, where the Court enunciated an approach of balancing mitigating and aggravating factors of the crime when deciding on the imposition of capital punishment.[17] However, this approach was called into question first in *Bachan Singh v. State of Punjab* where the Court emphasized that since an

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[11] For a discussion on the deficiencies of the sentencing framework established in the Code, see R. Niruphama, Need for Sentencing Policy in India: Second Critical Studies Conference – "Spheres of Justice" Paper Presentation (Sept. 20–22, 2007), http://www.mcrg.ac.in/Spheres/Niruphama.doc.

[12] Soman v. State of Kerala, (2013) 11 S.C.C. 382, para. 13.

[13] *Id*. para. 14.

[14] State of M.P. v. Bablu Natt, (2009) 2 S.C.C. 272, para. 13, http://judis.nic.in/supremecourt/imgs1.aspx?filename=33425.

[15] Alister Anthony Pareira v. State of Maharashtra, (2012) 2 S.C.C. 648, para. 69, *available at* http://indiankanoon.org/doc/79026890/.

[16] PEN. CODE § 302, http://punjabrevenue.nic.in/crime1.htm.

[17] *Jagmohan Singh* v. State of Uttar Pradesh, (1973) 2 S.C.R. 541, *available at* http://indiankanoon.org/doc/1837051/.

amendment was made to India's Code of Criminal Procedure, the rule has changed so that "the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so."[18] The Court also emphasized that due consideration should not only be given to the circumstances of the crime but to the criminal also.[19] However, more recently the Court in *Sangeet & Anr. v. State of Haryana*, noted that the approach in *Bachan* has not been fully adopted subsequently,[20] that "primacy still seems to be given to the nature of the crime," and that the "circumstances of the criminal, referred to in *Bachan Singh* appear to have taken a bit of a back seat in the sentencing process."[21] The Court in *Sangeet* concluded as follows:

> 1. This Court has not endorsed the approach of aggravating and mitigating circumstances in [the 1971 case of] Bachan Singh. However, this approach has been adopted in several decisions. This needs a fresh look. In any event, there is little or no uniformity in the application of this approach.
>
> 2. Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of the mantra of aggravating and mitigating circumstances needs a review.
>
> 3. In the sentencing process, both the crime and the criminal are equally important. We have, unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing.
>
> 4. The Constitution Bench of this Court has not encouraged standardization and categorization of crimes and even otherwise it is not possible to standardize and categorize all crimes.
>
> 5. The grant of remissions is statutory. However, to prevent its arbitrary exercise, the legislature has built in some procedural and substantive checks in the statute. These need to be faithfully enforced.[22]

B. Theft

The punishment for theft is up to three years' imprisonment, a fine, or both.[23] No judicial guidance was found regarding sentencing for theft.

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[18] Bachan Singh v. State of Punjab, (1980) 2 S.C.C. 684, para. 165, *available at* http://indiankanoon.org/doc/909940/.

[19] *Id.*

[20] Sangeet & Anr. v. State of Haryana, (2013) 2 S.C.C. 452, paras. 29 & 52–54, http://judis.nic.in/supremecourt/imgs1. aspx?filename=39731 (citing the subsequent case of Machhi Singh and Others v. State of Punjab, (1983) 3 S.C.C. 470, http://judis.nic.in/supremecourt/imgs1.aspx? filename=9766, a post-*Bachan* decision that reaffirmed the balance sheet approach of weighing aggravating and mitigating circumstances of the crime).

[21] *Id*. para. 34.

[22] *Id*. para. 80 (citing Bachan Singh v. State of Punjab, (1980) 2 S.C.C. 684).

C. Manslaughter

Causing death by negligence is punishable by imprisonment of up to two years, a fine, or both.[24] Other crimes similar to manslaughter include punishment for culpable homicide not amounting to murder, addressed in section 304 of the Penal Code:

> Whoever commits culpable homicide not amounting to murder shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with [a] fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.[25]

The Supreme Court looked at the question of sentencing involving sections 304 and 304A in a drunken driving case and found that punishment must be commensurate with the crime and that deterrence was a primary consideration when deciding on the severity of the sentence where rash or negligent driving was involved.[26]

D. Rape

Recent changes have been made to the crime of rape in India's Penal Code. Absent any aggravating factors, the section stipulates a minimum punishment of imprisonment for seven years up to a maximum of life, and a mandatory fine. In situations where certain aggravated situations occur, punishment is for a minimum term of ten years up to a maximum of life imprisonment, and a mandatory fine. The new amended section on rape reads as follows:

> **Punishment for rape.**
>
> 376. (*1*) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.
>
> (*2*) Whoever,—
>
> (a) being a police officer, commits rape—
>
> (i) within the limits of the police station to which such police officer is appointed; or

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[23] PEN. CODE § 379.

[24] *Id.* § 304A.

[25] *Id.* § 304 (footnote in original omitted).

[26] Alister Anthony Pareira v. State of Maharashtra, (2012) 2 S.C.C. 648, para. 86–98, *available at* http://indiankanoon.org/doc/79026890/.

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape on a woman when she is under sixteen years of age; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.[27]

In the previous section on the crime of rape, there was a proviso that empowered the Court to award a sentence that was less than the minimum for adequate and special reasons stipulated in the judgment. The Supreme Court provided direction in several cases on how such discretion should be exercised.[28]

[27] PEN. CODE § 376, *amended by* Criminal Law (Amendment) Act, 2013, Gazette of India, section II(1) (Apr. 2, 2013), http://indiacode.nic.in/acts-in-pdf/132013.pdf.

[28] State of M.P. v. Bablu Natt, (2009) 2 S.C.C. 272, para. 14, *available at* http://www.indiankanoon.org/doc/1155765/.

E. Trafficking of Persons

The level of punishment under the new trafficking of persons crime set forth in section 370 of the Penal Code depends on the number of persons that have been trafficked, whether the victim was a minor, and whether the assailant was a public official:

> (2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.
>
> (3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.
>
> (4) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.
>
> (5) Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.
>
> (6) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.
>
> (7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.[29]

Other sections of the Code may also be used to prosecute traffickers, including sections 366A and 372. Section 5B of the Immoral Trafficking Prevention Act (ITPA) also punishes trafficking in persons with "rigorous imprisonment for a term which shall not be less than seven years and in the event of a second or subsequent conviction with imprisonment for life."[30]

[29] PEN. CODE § 370, *amended by* Criminal Law (Amendment) Act, 2013, Gazette of India, section II(1) (Apr. 2, 2013), http://indiacode.nic.in/acts-in-pdf/132013.pdf.

[30] Immoral Trafficking (Prevention) Act (ITPA), No. 104 of 1956, http://wcd.nic.in/act/itpa1956.htm.

South Africa

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SUMMARY In South Africa, sentencing is considered the primary prerogative of trial courts and they enjoy wide discretion to determine the type and severity of a sentence on a case-by-case basis. In doing so, they follow judge-made, broad sentencing principles known as the "triad of Zinn," which require that, when making sentencing determinations, judges consider three things: the gravity of the offense, the circumstances of the offender, and public interest.

Two forms of control that limit the discretion of trial courts are available. The first is the supervisory power of appellate courts, which can overturn sentences imposed by trial courts. However, this power is not routinely exercised in view of the fact that sentencing is understood as a primary function of trial courts. An appellate court will interfere with a sentence imposed by a trial court only if there is irregularity or misdirection, or if the sentence is disturbingly inappropriate. The second is a statutory mandatory minimum sentencing regime applicable to certain serious offenses including murder, rape, drug dealing, firearms smuggling, and human trafficking for sexual purpose. However, trial courts are permitted to depart from the prescribed minimum sentences whenever they find a "substantial or compelling circumstance" warranting a departure.

South Africa does not have a sentencing council. The mandatory minimum sentencing regime was enacted based on recommendations made by a committee established by the Minister of Justice. Following the conclusion of the work of the committee, the Minister of Justice appointed another committee to review the country's sentencing regime. This committee concluded its work in 2000 and its recommendations included the establishment of a Sentencing Council, which among other things would be tasked with developing and reviewing sentencing guidelines. The South African Parliament has yet to take up the matter.

I. Introduction

This report provides information on South Africa's sentencing regime. Most of the sentencing guidelines and principles currently in place in the country are judge made. Therefore, Part II of the report briefly summarizes the country's court structure in order to provide context regarding how these principles and guidelines are applied. Part III focuses on a general description of the current sentencing principles and guidelines, both judge made and statutory, and the mandatory statutory sentencing regime for specific offenses including murder, rape, compelled rape, and trafficking in persons for sexual purposes. The final part is dedicated to the existence and role of sentencing institutions.

II. Sources of Law and Court Structure

South Africa has what is known as an uncodified legal system consisting of various sources of law, including the Constitution, legislation (including statutory laws issued by national and provincial legislative bodies and subsidiary legislation), judicial precedent, customary law, common law (Roman-Dutch and English law), and international law.[1]

For the purposes of this report a brief explanation of judicial precedents as a source of law is warranted. The doctrine of *stare decisis* (the principle of judicial precedents) requires that South African courts, in addition to other sources of law indicated above, follow previous court decisions issued on cases with "materially similar facts."[2] Specifically, a South African court is bound by its own previous rulings on similar cases and rulings issued by higher courts unless the facts of the case before it are materially different or the previous decisions are "manifestly incorrect."[3]

The hierarchy of courts is crucial in the application of the doctrine of judicial precedents. The South African Constitution sets the hierarchy of courts with the Constitutional Court at the top.[4] It is the highest court in all constitutional matters and on questions of whether a matter raises constitutional issues, and must certify any order of constitutional invalidity issued by the Supreme Court of Appeal or a High Court before the order can take effect.[5]

Below the Constitutional Court in the hierarchy is the Supreme Court of Appeal.[6] The Supreme Court of Appeal functions only as a court of appeal; it may decide any matter on appeal and it is the highest court in the country on all matters other than constitutional issues.[7] Decisions of this Court are binding on all lower courts.[8]

Following the Supreme Court of Appeal are the high courts.[9] These include the high courts of appeal (including the Competition Appeal Court and the Labor Appeal Court) and other specialist high courts established by statute (such as the Labor Court, Land Claims Court, and

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[1] Amanda Barratt & Pamela Snyman (updated by Redson Edward Kapindu), *Update: Researching South African Law*, GLOBALEX (Mar. 2010), http://www.nyulawglobal.org/globalex/south_africa1.htm; INTRODUCTION TO LAW AND LEGAL SKILLS IN SOUTH AFRICA: JURISPRUDENCE 124–25 (Tracy Humby et al. eds., 2012).

[2] DUARD KLEYN & FRANS VILJOEN, BEGINNERS GUIDE FOR LAW STUDENTS 58 (2010).

[3] INTRODUCTION TO LAW AND LEGAL SKILLS IN SOUTH AFRICA: JURISPRUDENCE, *supra* note 1, at 198.

[4] *Id.* at 194; S. AFR. CONST., 1996, § 166, available on the South African government website, *at* http://www.gov.za/documents/constitution/1996/96cons8.htm#166.

[5] S. AFR. CONST., 1996, §§ 166 & 167.

[6] *Id*. §§ 166 & 168.

[7] *Id.* § 168; *About*, SUPREME COURT OF APPEAL OF SOUTH AFRICA, http://www.justice.gov.za/sca/aboutsca.htm (last visited Apr. 3, 2014).

[8] SUPREME COURT OF APPEAL OF SOUTH AFRICA, *supra* note 7.

[9] S. AFR. CONST., 1996, § 166.

Divorce Court).[10] The high courts are courts of first instance in matters beyond the jurisdiction of regional magistrates' courts and, "[e]xcept where a minimum or maximum sentence is prescribed by law, their penal jurisdiction is unlimited and includes handing down a sentence of life imprisonment in certain specified cases."[11]

At the bottom of the hierarchy are the district and regional magistrates' courts. The district courts have jurisdiction on all criminal matters except treason, murder, rape, and compelled rape, and may impose punishments of up to three years in prison and a fine of up to ZAR 60,000 (about US$5,647).[12] The regional courts enjoy jurisdiction on all criminal matters except treason and may impose penalties of up to life imprisonment and fines of up to ZAR 300,000 (about US$28,238).[13]

III. Sentencing Guidelines

South Africa's sentencing regime rests on a "fundamental premise that the trial judge [is] vested with the discretion to decide on a suitable sentence."[14] For instance the Criminal Procedure Law states that "a person liable to a sentence of imprisonment for life or for any period, may be sentenced to life imprisonment for any shorter period, and a person liable to a sentence of a fine of any amount may be sentenced to a fine of any lesser amount."[15] This is in large part necessitated by the need for individualizing sentences.[16] However, there are two controls on this discretionary power: control exercised by the appellate courts, and mandatory minimum sentences enacted by the legislature for a limited number of serious offenses.[17]

A. General Sentencing Principles

In exercising their discretion during sentencing, trial courts are required to consider broad, judge-made guiding principles known as the "triad of Zinn," named after the 1969 case of *S v. Zinn.*[18]

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[10] INTRODUCTION TO LAW AND LEGAL SKILLS IN SOUTH AFRICA: JURISPRUDENCE, *supra* note 1, at 194; *About Government: Judicial System*, SOUTH AFRICA GOVERNMENT ONLINE, http://www.gov.za/aboutgovt/justice/courts.htm#02high (last visited Apr. 3, 2014).

[11] INTRODUCTION TO LAW AND LEGAL SKILLS IN SOUTH AFRICA: JURISPRUDENCE, *supra* note 1, at 194; SOUTH AFRICA GOVERNMENT ONLINE, *supra* note 10.

[12] Magistrates' Courts Act 32 of 1944, §§ 89 & 92, version amended through 2010 available on the South Africa Department of Justice website, *at* http://www.justice.gov.za/legislation/acts/1944-032.pdf.

[13] *Id.* §§ 89 & 92; Criminal Law Amendment Act 105 of 1997 § 51, 9 BSRSA (updated through 2012), version amended through 2008 available on the Department of Justice website, *at* http://www.justice.gov.za/legislation/acts/1997-105.pdf.

[14] *S v. Pieters* 1987 (3) SA 717.

[15] Criminal Procedure Act 51 of 1977, § 283, 9 BSRSA (updated through 2012), version amended through 2010 available on the Department of Justice website, *at* http://www.justice.gov.za/legislation/acts/1977-051.pdf.

[16] A. ST. Q. Skeen, *Sentencing, in* 24 LAWS OF SOUTH AFRICA 405, 410 (2d ed. 2010).

[17] Stephan Terblanche, *The Discretionary Effect of Mitigating and Aggravating Factors: A South African Case Study, in* MITIGATION AND AGGRAVATION AT SENTENCING 261 (Julian V. Roberts ed., 2011).

[18] *S v. Zinn* 1969 (2) SA 537, 540, *discussed in* Terblanche, *supra* note 17, at 261;

In *Zinn*, the Supreme Court, Appellate Division, held that in imposing a sentence, "[w]hat has to be considered is the triad consisting of the crime, the offender and the interests of society."[19] This gave rise to three general guides in the development of a sentence: the seriousness of the offense, the personal circumstances of the offender, and public interest.[20] These factors must be considered equally and one should not be heavily relied upon over the others.[21]

With regard to the first leg of the triad, the offense, there is a constitutional requirement that the punishment imposed, including when it is set by statute, must not be disproportionate to the offense.[22] This is ascertained by looking at the applicable aggravating and extenuating circumstances. A number of aggravating factors relating to the crime may be considered. One such factor is the severity of the crime.[23] What severity means, as would be the case with other factors, depends on the offense in question. If the offense is one of drug possession, the aggravating factor may be the amount of the drugs involved. In 1969, the High Court, Natal Provincial Division, reversed a punishment imposed by a lower court and increased the sentence, stating that the sentence of the lower court was "unreasonably light" given the amount of dagga (marijuana) involved.[24] However, if the offense involves violence, the aggravating factors may be "the degree and extent of the violence used, the nature of any weapon, the brutality and cruelness of the attack, the nature and character of the victim, including whether the victim was unarmed, or helpless, and so on."[25] Other aggravating factors applicable to this leg of the triad may include the fact that the crime was planned or that the crime is difficult to solve because it may be difficult to apprehend the offender.[26]

There are a number of mitigating factors with regard to the first leg of the triad as well. These include instances in which the offender was convicted on an attempt charge (as opposed to a charge under a completed offense), the offense was merely technical, the offender's involvement in the commission of the offense was limited, and there is no direct intent on the part of the offender, as well as cases of entrapment in which the offender was induced to commit the offense.[27]

The second element of the triad, considering the personal circumstance of the offender (also known as individualization), requires that the sentence fit the offender. The sentence would be aggravated by a number of factors, including if the person is a repeat offender,[28] had a morally

[19] *Id.* at 540.

[20] Terblanche, *supra* note 17, at 263.

[21] *S v. Holder* 1979 (2) SA 70, 71.

[22] Terblanche, *supra* note 17, at 263; *Dodo v. S* 2001 (3) SA 381, para. 37, available on the Southern African Legal Information Institute (SAFLII) website, *at* http://www.saflii.org/za/cases/ZACC/2001/16.pdf.

[23] S.S. TERBLANCHE, THE GUIDE TO SENTENCING IN SOUTH AFRICA 213 (1999).

[24] *S v. Mabhongo* 1969 (3) SA 388, 390.

[25] TERBLANCHE, *supra* note 23, at 213.

[26] *Id*. at 214.

[27] *Id*. at 220–22.

[28] Criminal Procedure Act § 271 (4).

unacceptable motive such as greed, lacks remorse, committed the offense by abusing a position of trust, or is a professional criminal.[29] In the category of mitigating factors, although the most effective one is diminished capacity, factors such as age (both young and old age) and the fact that it is the offender's first offense may also result in a reduced sentence.[30] Other factors that may extenuate a sentence include conditioning,[31] bad health, having dependents, gainful employment, intoxication, positive motive (for example, mercy killing), diminished intelligence, lack of planning, remorse, a guilty plea, and a belief in witchcraft and religion.[32]

The third leg of the triad requires that a sentence serve the public interest. This incorporates the traditional purposes of punishment (deterrence, rehabilitation, protection, and retribution) into the sentencing considerations.[33] However, it could also be interpreted more widely to include additional considerations, such as restitution or payment of compensation that can help reestablish peace and security to society.[34] Public interest considerations can aggravate or mitigate a sentence. For instance, aggravating factors may include that the offender is dangerous and a long period of incarceration will protect the community, or the offense is so prevalent that a greater-than-usual punishment is appropriate as a deterrent.[35] The public interest may also result in an aggravated sentence if the victim was defenselessness (including children and adults with diminished capacity) or a law enforcement agent.[36] However, public interest considerations may mitigate a sentence if the economic and social cost of a long incarceration is not beneficial to the community.[37]

In addition to the triad of *Zinn*, there are a number of additional guidelines, including principles governing the imposition of custodial sentences. A general principle dictates that custodial sentences should not be imposed routinely, "especially if the objects of punishment can be met by another form of punishment, e.g. a fine with or without suspended imprisonment."[38] Others target certain classes of offenders; specifically, they require that alternatives to custodial sentences should be explored if the offender is young, old, or a first-time offender.[39]

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[29] TERBLANCHE, *supra* note 23, at 214–18.

[30] *Id*. at 222.

[31] In a 1991 case, the Supreme Court, Appellate Division, held that "modelling" or "desensitization," in which a person who is exposed to "a daily diet of violence" becomes desensitized to violence in that "his sensibilities are blunted and he is more ready to abandon the restraints which he would otherwise have against the use of violence," is a valid mitigating factor. *S v. Khandulu and Another* 1991 (127/90) [1991] ZASCA 15 at 33, *available at* http://www.saflii.org/za/cases/ZASCA/1991/15.html.

[32] TERBLANCHE, *supra* note 23, at 226–35.

[33] *Id*. at 174.

[34] *Id*. at 176.

[35] *Id*. at 174. Terblanche, *supra* note 17, at 264.

[36] TERBLANCHE, *supra* note 23, at 218–19.

[37] *Id*. at 174–77.

[38] *S v. Holder* 1979 (2) SA at 71.

[39] SOUTH AFRICAN LAW REFORM COMMISSION, SENTENCING: MANDATORY MINIMUM SENTENCES (Issue Paper 11) 14 (Mar. 1997).

The triad of *Zinn* has been the subject of much criticism. It has been called "elementary, vague and unsophisticated."[40] In particular, the ambiguity of the triad has often led to a situation in which judges impose sentences instinctively and use the guidelines established by the triad to justify the sentences.[41] In addition, the triad has also been criticized for failing to emphasize the role of victims.[42] According to the Law Reform Commission, this, coupled with the failure of the legislature and others "to provide a clear and unambiguous framework for the exercise of sentencing discretion," has created uncertainty and inconsistency in sentencing in the country.[43]

B. Limits to Sentencing Discretion

1. Judicial Controls

The sentencing powers of trial courts are not unfettered. Although sentencing is generally understood to be a primary prerogative of trial courts, improperly imposed sentences can be reversed on appeal.[44] The test for interference by an appellate court is clearly encapsulated in a 1975 decision of the Supreme Court, Appellate Division:

> 1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal—
>
> a) Should be guided by the principle that the punishment is "pre-eminently a matter for the discretion of the trial court"; and
>
> b) Should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".
>
> 2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.[45]

The Supreme Court, Appellate Division held in a 1989 case that the existence of a disparity in sentences does not necessarily warrant "interference," and upheld the disparate sentences imposed on two offenders who participated in the commission of the same offense in similar circumstances.[46] In a 1988 case, the Court noted that its authority to interfere with the sentence on appeal is limited unless the sentence in question is "vitiated by (1) irregularity, (2)

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[40] Julia Sloth-Nielsen & Louise Ehlers, *A Pyrrhic Victory? Mandatory and Minimum Sentences in South Africa* 3 (ISS Paper 111, July 2005), available on the International Relations and Security Network (ISN) website, *at* http://mercury.ethz.ch/serviceengine/Files/ISN/98757/ipublicationdocument_singledocument/4000ea3b-62c2-4ecc-b77d-fdbd4414e25d/en/PAPER111.pdf.

[41] Terblanche, *supra* note 17, at 263.

[42] SOUTH AFRICAN LAW REFORM COMMISSION, *supra* note 39, at 20.

[43] *Id.* at 21.

[44] Skeen, *supra* note 16, at 411.

[45] *S v. Rabie* 1975 (4) SA 855, 857; *S v. Sadler* [2000] 2 All SA 121 (A), *available at* http://www.saflii.org/za/cases/ZASCA /2000/13.pdf.

[46] *S v. Max* 1989 (1) SA 222, 223.

misdirection, or is one to which no reasonable court could have come, in other words, one where there is a striking disparity between the sentence imposed and that which this Court considers appropriate."[47] In a 1989 case, the Court summarized the test for interfering with a trial court sentence in more detail as follows:

> [t]he crucial question in an appeal against the imposition of the discretionary death sentence is whether the trial judge could reasonably have imposed the sentence which he did. If the answer to this is in the affirmative, that is the end of the matter. This question also forms the basis of the so called striking disparity test. In this respect the test is applied when the Appellate Division, relying on what appears from the record of the case, can form a definite opinion as regards the sentence which it would have imposed in the first instance and where there is a striking disparity between such sentence and that which the trial judge imposed. It would, however, be unrealistic not to acknowledge the fact that a specific period of imprisonment in a particular case cannot be determined according to any exact, objectively applicable, standard, and that there would frequently be an area of uncertainty wherein opinions regarding the suitable period of imprisonment may validly differ; in such a case, even if the Appellate Division was of the opinion that it would have imposed a considerably lighter sentence, it would nevertheless not interfere as the required conviction that the trial judge could not have reasonably have imposed the sentence which he did, was lacking.[48]

2. Statutory Controls

In 1998, South Africa enacted legislation prescribing minimum sentences for "certain serious offences."[49] These include murder; rape; compelled rape; trafficking in persons for sexual purposes; drug trafficking; smuggling of ammunition, firearms, explosives, and armaments; breaking and entering; and theft.[50] The purpose of this law was to curb rising crime rates and reduce disparities in sentencing for these crimes. This was articulated by the Supreme Court of Appeal in a 2001 case, in which the Court noted that the mandatory minimum sentences were a response to

> [7] . . . an alarming burgeoning in the commission of crimes of the kind specified resulting in the government, the police, prosecutors and the courts constantly being exhorted to use their best efforts to stem the tide of criminality which threatened and continues to threaten to engulf society. . . .

[47] *S v. Petkar* 1988 (3) SA 571, 574; *see also S v. N* 1988 (3) SA 450, 451; *S v. Holder* 1979 (2) SA at 71.

[48] *S. v. Pieters* 1989 (3) SA at 720; *see also S v. M* 1976 (3) 644, 645.

[49] Criminal Law Amendment Act 105 of 1997 § 51. This is not the first time that South Africa has enacted a law imposing mandatory minimum sentences. A number of previous laws imposed mandatory minimum sentences long before the 1997 Criminal Law Amendment Act was enacted, among them a 1952 law that imposed mandatory corporal punishment and a 1959 law that introduced mandatory custodial sentences for the prevention of crimes and rehabilitative training under certain circumstances. SOUTH AFRICA LAW COMMISSION REPORT, PROJECT 82, SENTENCING (A NEW SENTENCING FRAMEWORK) 12 (Dec. 2000), http://www.justice.gov.za/salrc/reports/r_prj82_sentencing%20_2000dec.pdf.

[50] Criminal Law Amendment Act § 51.

> [8] . . . In short, the legislature aimed at ensuring a severe, standardised, and consistent response from courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. . . ."[51]

The development of statutory minimum sentences was the legislature's response to a public outcry. Following South Africa's transition to democracy, there was wide public concern that courts failed to give serious offenders punishments commensurate to their crimes, and the end of the death penalty in 1995 created additional concerns regarding the punishment of the most serious offenses.[52] In addition, there was a widely held view that lenient parole policy allowed early release of serious criminals.[53] In 1996, the Minister of Justice and Constitutional Development sought to quell these concerns by establishing a project committee of the country's Law Reform Commission to investigate all sentencing practices and the desirability of putting in place a mandatory minimum sentencing regime.[54]

The Van de Heeven Committee, named after its chairwoman, Justice L. Van der Heeven, released its findings (Issue Paper 11) in March 1997.[55] In it, the Committee proposed six possible options for reforming the sentencing regime:

1. Presumptive sentencing guidelines, modeled after the Minnesota system. The Commission proposed as one option enacting a statute mandating a sentencing commission to develop guidelines that would provide specific principles (for instance, the gravity of the offense and the offender's criminal record) for determining presumptively correct sentences.[56] Although courts would be permitted to depart from presumptively correct sentences whenever "special circumstances" were present, they would be required to record such circumstances and their sentences would be subject to appeal.[57]
2. Voluntary sentencing guidelines. Under this option, advisory sentencing guidelines would be adopted.[58]
3. Adoption of legislative guidelines that assist in determining the choice and length of punishment. Based on the Swedish model, this option called for the legislature to determine the nature of punishment and the penal value.[59]

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[51] *S v. Malgas* (117/2000) [2001] ZASCA 30, paras. 7 & 8 (Mar. 19, 2001), *available at* http://www.saflii.org/za/cases/ZASCA/ 2001/30.html.

[52] Sloth-Nielsen & Ehlers, *supra* note 40, at 1.

[53] *Id.*

[54] *Id.*; Sandra M. Roth, Note, *South African Mandatory Minimum Sentencing: Reform Required*, 17(1) MINN. J. INT'L L. 155, 158 (2008), http://lawweb3.law.umn.edu/uploads/gV/8l/gV8lyrhMXKzaPTdE5enYZg/Roth-Final-Online-PDF-04.07.09.pdf.

[55] Roth, *supra* note 54, at 158; SOUTH AFRICAN LAW REFORM COMMISSION, *supra* note 39.

[56] SOUTH AFRICAN LAW REFORM COMMISSION, *supra* note 39, at 52.

[57] *Id.*

[58] *Id.* at 53.

[59] *Id.*

4. Enactment of principles of sentencing, including guidelines that determine the imposition of a custodial sentence. This option, which is based on proposals made by the Canadian Sentencing Commission, called for the development of sentencing principles mandating that the sentence a court imposes must be proportional to the degree of responsibility of the offender for the offense.[60] It included a number of factors for the court to consider in determining a sentence: aggravating and mitigating circumstances, the need for consistency in sentencing, the need for avoidance of excessive sentences, the need for avoiding the imposition of custodial sentences merely for the purpose of rehabilitation, instance in which custodial sentences would be appropriate, and the weighing of the general aims of punishment.[61]
5. Enactment of presumptive sentencing guidelines to guide the imposition of custodial and noncustodial sentences. This option called for the enactment of statutory ranges of predetermined sentences, allowing judges to depart from the adopted ranges in certain circumstances.[62]
6. Enactment of mandatory minimum sentences combined with the discretion to depart from sentences under certain conditions. This option called for the enactment of mandatory minimum sentences depending on different factors (including the offense and recidivism), with the authority for judges to depart from such prescribed sentences in special circumstances, in which case judges would be required to record the circumstances and provide written justification for departure.[63]

As noted above, the South African Parliament chose the sixth option and enacted legislation prescribing mandatory minimum sentences for certain offenses with the severity of the offense and the criminal history of the offender as key factors in determining a sentence (see Table, below).

In addition to the mandatory minimum sentences, the mandatory minimum sentencing regime also restricts the ability of judges to suspend parts of custodial sentences they impose. The Criminal Procedure Act provides that a court, after it convicts a person for a crime for which a prescribed minimum sentence is applicable, may suspend up to five years of the prescribed sentence on the basis of various conditions, including compensation, community service, submission to correctional supervision, good behavior, or any other condition that it deems fit.[64] The mandatory sentencing regime prohibits the suspension of a mandatory minimum sentence.[65]

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[60] *Id.*

[61] *Id*. at 53–54.

[62] *Id*. at 54.

[63] *Id*.

[64] Criminal Procedure Act § 297.

[65] Criminal Law Amendment Act § 51; Judicial Matters Amendment Act § 26, 583 GG No. 37254 (Jan. 22, 2014), http://www.justice.gov.za/legislation/acts/2013-042.pdf.

The legislation carves out some exceptions. For example, the mandatory minimum sentences do not apply to offenders under the age of eighteen.[66] Significantly, the legislation also permits courts to depart from the mandatory minimum sentences if they are "satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser [sentence]."[67]
Parliament has not provided any guidance regarding the meaning and application of the phrase "substantial and compelling." This has led courts to develop different standards as to when it is appropriate to depart from the minimum sentences prescribed by statute.[68] Some courts have taken the approach that the phrase leaves courts little, if any, discretion and that courts are by and large bound to impose the prescribed sentence(s) unless exceptional circumstances are present.[69] According to this interpretation, mitigating factors would result in departure only if they are of an "unusual and exceptional kind that Parliament cannot be supposed to have had in contemplation when prescribing standard penalties for certain crimes."[70] However, in a 2001 case, the Supreme Court of Appeal offered a complete opposite interpretation of the phrase, stating,

> The absence of any pertinent guidance from the legislature by way of definition or otherwise as to what circumstances should rank as substantial and compelling or what should not, does not make the task any easier. That it has refrained from giving such guidance as was done in Minnesota from whence the concept of "substantial and compelling circumstances" was derived is significant. It signals that it has deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case call for a departure from the prescribed sentence. In doing so, they are required to regard the prescribed sentences as being *generally appropriate* for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so. A departure must be justified by reference to circumstances which can be seen to be substantial and compelling as contrasted with circumstances of little significance or of debatable validity or which reflect a purely personal preference unlikely to be shared by many.[71]

The Court further noted that, in determining whether a departure from the prescribed sentences is warranted, courts should take into account all factors that they would normally consider when imposing a sentence, stating that it could "see no warrant for deducing that the legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders."[72]

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[66] Judicial Matters Amendment Act§ 26, Although the legislation excluded only offenders under the age of sixteen, in 2009 the Constitutional Court found the provision unconstitutional and ordered that it be read to exclude offenders under the age of eighteen. *Centre for Child Law v. Minister for Justice and Constitutional Development and Others 2009* (6) SA 632, *available at* http://www.saflii.org/za/cases/ZACC/2009/18.html.

[67] Criminal Law Amendment Act § 51.

[68] Roth, *supra* note 54, at 167.

[69] Sloth-Nielsen & Ehlers, *supra* note 40, at 6.

[70] *S v. Mofokeng* 1999 (1) SACR (W), *cited in* Roth, *supra* note 54, at 167–68.

[71] *S v. Malgas* (117/2000) [2001] ZASCA 30, para. 18, *available at* http://www.saflii.org/za/cases/ZASCA/2001/30.html (footnote in original omitted).

[72] *Id*. para. 9.

These two opposing interpretations of the phrase "substantial and compelling circumstances" is an illustration of how the mandatory minimum sentences prescribed in the 1997 legislation have failed to end disparities in sentencing, a key rationale for their enactment.[73] In addition, the ambiguity of the phrase is said to have resulted in a situation in which judges "exercise their discretion to circumvent the mandatory sentence in a relatively high proportion of cases."[74]

However, the inclusion of the phrase in the legislation has allowed mandatory minimum sentencing legislation to survive a constitutional challenge. The constitutionality of the legislation was challenged in a 2001 case where it was argued that the mandatory minimum sentences it prescribed violated an accused's constitutional right to public trial in an ordinary court because it deprived courts of the right to impose sentences they deemed fit and violated the principle of separation of powers.[75] In addressing the matter, the Constitutional Court tied the separation of powers issue to an accused's constitutional right "not to be . . . punished in a cruel, inhumane or degrading way."[76] The Court held that the legislation is constitutional because courts are free to depart from the mandatory minimum sentences the law prescribes whenever there are "substantial and compelling circumstances."[77]

3. Specific Statutory Guidelines

As noted above, the mandatory minimum sentencing regime is built around two key factors used to assign punishment: the gravity of the offense and the criminal history of the offender. To determine the appropriate punishment or depart from the prescribed minimum sentences, courts rely on any of the applicable traditional mitigating and aggravating circumstances.

[73] Roth, *supra* note 54, at 168.

[74] CANADA DEPARTMENT OF JUSTICE, RESEARCH AND STATISTICS DIVISION, MANDATORY SENTENCES OF IMPRISONMENT IN COMMON LAW JURISDICTIONS: SOME REPRESENTATIVE MODELS 22 (undated), http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05_10/rr05_1 0.pdf (last visited Apr. 9, 2014).

[75] *Dodo v. S* 2001 (3) SA 381, *available at* http://www.saflii.org/za/cases/ZACC/2001/16.pdf; AFR. CONST., 1996, § 35(3)(c).

[76] *Dodo v. S*, para. 12; S. AFR. CONST., § 12(1)(e).

[77] *Dodo v. S*, para. 40; Roth, *supra* note 54, at 172.

Table: Summary of Statutory Sentencing Guidelines

Offense	Aggravating Elements	Effect of Criminal History	Punishment
Aggravated Murder	Circumstances in which the act was premeditated or was committed during the commission of or attempt to commit rape, compelled rape, or aggravated robbery; the victim was a law enforcement officer or a state witness; the victim was killed for his body parts or as the result of removal of his body parts; or the act was related to the practice of witchcraft or similar practices.[78]	Inapplicable.	Life in prison.[79] (Note that anyone sentenced to life in prison is eligible for parole after serving twenty-five years of the sentence.[80])
Murder	In circumstances other than those stipulated above.	Penalty varies depending on whether it is the offender's first, second, third, or subsequent offense.	First-time offense is subject to at least fifteen years' imprisonment, second conviction results in at least twenty years' imprisonment, and third or subsequent conviction entails at least twenty-five years' imprisonment.[81]
Aggravated Rape	The victim was raped more than once by the offender, co-perpetrator, or accomplice; the victim was raped by more than one person as part of a conspiracy; the victim was raped by a person who has been convicted on two or more counts of rape or compelled rape, but has not been sentenced for those convictions yet; the victim was raped by a person who knows of his HIV/AIDS positive status; the victim was a vulnerable person due to young age or diminished mental or physical condition; or the rape involved infliction of a grave bodily harm.[82]	Inapplicable.	Same as for aggravated murder.[83]

[78] Criminal Law Amendment Act §51, sched. 2, pt. I.

[79] Criminal Law Amendment Act § 51.

[80] Correctional Services Act 111 of 1998, § 73, 28 BSRSA (updated through 2012), copy of original version available on the South African government website, *at* http://www.gov.za/documents/download.php?f=70646; A. Dissel & M. du Plessiss, *Prisons*, *in* 21 THE LAWS OF SOUTH AFRICA 121, 171 (2d ed. 2010); *Correctional Supervision and Parole Boards*, DEPARTMENT OF CORRECTIONAL SERVICES, http://www.dcs.gov.za/Services/CorrectionalSupervisionandParoleBoards.aspx (last visited Apr. 10, 2014). .

[81] *Id*. § 51.

[82] *Id*. § 51, sched. 2, pt. I.

[83] *Id*. § 51; Correctional Services A of 1998 § 73; Dissel & du Plessiss, *supra* note 80, at 171.

Offense	Aggravating Elements	Effect of Criminal History	Punishment
Rape	Involving circumstances other than those recited above.	Same as for murder.	First offense punishable by at least ten years in prison; second offense punishable by at least fifteen years in prison; third or subsequent offense punishable by at least twenty years' imprisonment.[84]
Aggravated Compelled Rape[85]	The victim was raped repeatedly by one or more persons, by a person convicted of two or more offenses of rape or compelled rape who has not yet been sentenced, or by a person who knows that he is HIV/AIDS positive; the victim is vulnerable due to young age or diminished mental or physical capacity; or the act resulted in the infliction of grave bodily harm.[86]	Inapplicable.	Same as for aggravated rape and aggravated murder.[87]
Compelled Rape	Under circumstances other than those stated above.	Same as for murder.	Same as for rape.[88]
Trafficking in Persons for Sexual Purpose[89]	Under any circumstance.	Inapplicable.	Same as for aggravated rape, aggravated compelled rape, and aggravated murder.[90]

[84] Criminal Law Amendment Act § 51, sched. 2, pt. III.

[85] This is defined as an act in which a person ("A") "unlawfully and intentionally compels a third person ('C'), without the consent of C, to commit an act of sexual penetration with a complainant ('B'), without the consent of B." Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, § 4, 8 BSRSA (updated through 2012), version updated through 2008 available on the Department of Justice website, *at* http://www.justice.gov.za/legislation/acts/2007-032.pdf.

[86] Criminal Law Amendment Act § 51, sched. 2, pt. I.

[87] *Id.* § 51; Correctional Services Act 111 of 1998, § 73; Dissel & du Plessiss, *supra* note 80, at 171.

[88] Criminal Law Amendment Act § 51, sched. 2, pt. III.

[89] A person who traffics another without his/her consent commits the offense of trafficking in persons for sexual purpose. Criminal Law (Sexual Offences and Related Matters) Amendment Act § 71. A person also commits this offense if he "orders, commands, organizes, supervises, controls, or directs trafficking; . . . performs any act which is aimed at committing, causing, bringing about, encouraging, promoting, contributing towards or participating in trafficking; or incites, instigates, commands, aids, advises, recruits, encourages or procures any other person to commit, cause, bring about, promote, perform, contribute towards or participate in trafficking." *Id.*

[90] Criminal Law Amendment Act § 51; Correctional Services Act 111 of 1998, § 73; Dissel & du Plessiss, *supra* note 80, at 171.

Offense	Aggravating Elements	Effect of Criminal History	Punishment
Smuggling of Ammunition, Firearms, Explosives, or Armaments[91]	Under any circumstance.	Same as for murder.	Same as for murder.[92]
Dealing in Drugs[93]	If the value of the drugs involved is more than ZAR 50,000 (about US$4,752); the value of the drugs is more than ZAR 10,000 (about US$956) and the offense was committed by a person(s), syndicate, or any enterprise in the furtherance of a common purpose or a conspiracy; or the offender is a law enforcement officer.[94]	Same as for murder.	Same as for murder.[95]
Any Offense Relating to Exchange Control, Extortion, Fraud, Forgery, Uttering, or Theft	Involving amounts of more than ZAR 500,000 (about US$47,821); involving amounts of more than ZAR 100,000 (about US$9,564) if the person, persons, syndicate or any enterprise acted in furtherance of a common purpose or a conspiracy; involving amounts of more than ZAR 10,000 (about US$956) if the offense was committed by a law enforcement officer; or any circumstance, regardless of the amount involved, if the offense was committed by a law enforcement officer acting as part of a group of persons, syndicate, or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.[96]	Same as for murder.	Same as for murder.[97]

[91] Criminal Law Amendment Act § 51, sched. 2, pt. II.

[92] *Id.* § 51.

[93] Dealing in drugs involves dealing in "any dangerous dependence producing substance or any undesirable dependence producing substance," unless authorized by law to do so. *Id.* § 51, sched. 2, pt. II; Drugs and Drug Trafficking Act 140 of 1992, §§ 5(b) & 13(f), version updated through 2002 available on the Department of Justice website, *at* http://www.justice.gov.za/legislation/acts/1992-140.pdf. Dealing in drugs includes "performing any act in connection with transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or export of the drug." Drugs and Drug Trafficking Act § 1.

[94] Criminal Law Amendment Act § 51, sched. 2, pt. II.

[95] *Id.* § 51.

[96] *Id.*

[97] *Id.*

Offense	Aggravating Elements	Effect of Criminal History	Punishment
Breaking and Entering with Intent to Commit a Crime	If the offender was armed with a firearm and intended to use it in the commission of a crime.[98]	Same as for murder.	First offense punishable by at least five years in prison; second offense punishable by at least seven years in prison; third or subsequent offense punishable by at least ten years' imprisonment.[99]

C. Sentencing Institutions

South Africa does not appear to have a sentencing institution in place. Following the conclusion of the work of the Van der Heeven Committee, the Minister of Justice appointed another project committee of the South African Law Commission in 1998.[100] Chaired by Professor Dirk van Zyl Smith, this Committee (the Smith Committee) was mandated to continue the research initiated by the Van der Heeven Committee regarding sentencing reform. It published its findings in a report titled *Sentencing (A New Sentencing Framework)*,[101] which included a draft Sentencing Framework Bill, in December 2000.[102] Among other things, the Smith Committee called for the establishment of a sentencing guidelines commission, which it referred to as the "Sentencing Council," and included in its report legislative language defining the mandate and operations of the proposed Sentencing Council, to be enacted as part of the Sentencing Framework Bill.[103] South Africa's Parliament has yet to take up the Bill.

The Smith Committee recommended that, to ensure that the Sentencing Council is agile and affordable, its membership should be kept small with heavy representation of judicial officers who collectively have to make sentencing decisions.[104] It recommended that the Minister of Justice appoint the following as members of the Sentencing Council:

[98] *Id*. § 51, sched. 2, pt. IV.

[99] *Id.* § 51.

[100] Sloth-Nielsen & Ehlers, *supra* note 40, at 14.

[101] SOUTH AFRICA LAW COMMISSION REPORT, *supra* note 49.

[102] Stephan Terblanche, *A Sentencing Council in South Africa*, *in* PENAL POPULISM, SENTENCING COUNCILS AND SENTENCING POLICY 191, 191–92 (Arie Freiberg & Karen Gelb eds., 2008).

[103] *Id*. at 191; SOUTH AFRICA LAW COMMISSION REPORT, *supra* note 49, at 46.

[104] SOUTH AFRICA LAW COMMISSION REPORT, *supra* note 49, at 46.

- Two judges of the Supreme Court of Appeal or the High Court
- Two magistrates
- The National Director of Public Prosecutions or his representative
- A representative of the Department of Correctional Services
- A sentencing expert, not employed by the state on a full time basis
- The Director of the office of the Council[105]

It recommended that the members be appointed for an initial five-year term with the possibility of renewal.[106] The Minister would have the power to remove any member of the Council for "misconduct, incapacity or incompetence."[107]

The Smith Committee also outlined the functions of the Sentencing Council. Its primary function would be to establish sentencing guidelines and to review existing guidelines.[108] Although the Council could carry out this function on its own initiative, it would be required to do so at the request of the Minister of Justice, the Minister of Correctional Services, or Parliament.[109] In addition to this primary function, the Council's mandate would also include facilitating the establishment of a program of judicial education on sentencing.[110]

The Smith Committee made various additional recommendations regarding the Council, accompanied by legislative language, including with regard to the issue of how the Council would be supported, its procedure, and its reporting mechanisms.[111]

[105] *Id*. at 47.

[106] *Id*.

[107] *Id*.

[108] *Id*. at 48.

[109] *Id*.

[110] *Id.*

[111] *Id*. 49–50.

Uganda

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SUMMARY The Chief Justice of the Supreme Court of Uganda recently issued advisory Sentencing Guidelines aimed at bringing uniformity, consistency, and transparency to the sentencing process in the country by establishing sentencing ranges and other sentencing guides. Although the Sentencing Guidelines cover only a limited number of offenses at present, they do provide general sentencing principles and various sentencing factors that are applicable to offenses not specifically covered. The Guidelines will be expanded to add more sentencing ranges and other guides for all criminal offenses.

Among the notable aspects of the Sentencing Guidelines is the emphasis on victim and community engagement in the sentencing process, restorative justice, and the promotion of noncustodial sentences.

The Chief Justice also established a Sentencing Council with a mandate to work on, review, and expand the Sentencing Guidelines; monitor their implementation; and establish a research, development, and oversight program on sentences and their effectiveness.

I. Introduction

This report provides information on Uganda's recently issued advisory sentencing guidelines, the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions. Part II briefly summarizes the country's court structure in order to provide context for the adoption and implementation of the Sentencing Guidelines. Part III focuses on a general description of the Sentencing Guidelines, including the process of their development, their general characteristics and purpose, as well as some notable provisions such as those emphasizing restorative justice and the promotion of noncustodial sentences. Part IV contains a chart highlighting some of the specific offenses (including theft, manslaughter, and murder) for which the Sentencing Guidelines provide sentencing ranges and mitigating and aggravating factors. The final part describes the Sentencing Guidelines Committee established to, among other things, develop additional sentencing guidelines and conduct public awareness campaigns.

II. Ugandan Courts

Uganda has a unitary, single hierarchy system of courts, which includes the Supreme Court, the Court of Appeal, the High Court, and subordinate courts.[1]

[1] BENJAMIN ODOKI, A GUIDE TO CRIMINAL PROCEDURE IN UGANDA 9 (2011); Brenda Mahoro & Lydia Matte, *Uganda's Legal System and Legal Sector* (Mar. 2013), GLOBALEX, http://www.nyulawglobal.org/globalex/uganda1.htm#thejud.

The Supreme Court is the final court of appeal.[2] With the exception of presidential election petitions in which it enjoys original jurisdiction, the Court only hears cases on appeal.[3] All other courts in the country are bound by the decisions of the Supreme Court.[4] The Supreme Court is composed of the Chief Justice and at least ten associate justices.[5]

The Chief Justice of the Supreme Court is the head of the judiciary and has a constitutional mandate to administer and supervise all courts in the country.[6] In this capacity, the Constitution authorizes the Chief Justice to "issue orders and directions to the courts necessary for the proper and efficient administration of justice."[7] It was under this authority that the Chief Justice issued The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions in 2013 (*see* Part III, Sentencing Guidelines, below).

Below the Supreme Court is the Court of Appeal/Constitutional Court. With the exception of petitions related to parliamentary or local government elections, for which it is the court of last resort, the Court of Appeal, duly consisting at any sitting of an uneven number of at least three judges, has appellate jurisdiction over matters adjudicated before the High Court.[8] In addition, the Court of Appeal, with a five-judge bench, serves as the Constitutional Court and enjoys original jurisdiction on constitutional law matters.[9]

Next in the hierarchy of courts is the High Court. This court, which has eight divisions, including a Criminal Division, has unlimited original jurisdiction throughout Uganda as well as appellate jurisdiction on matters adjudicated by all magistrates courts.[10]

Below the High Court are subordinate courts. These include magistrate courts,[11] family and children's courts,[12] and local council courts.[13]

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[2] CONSTITUTION OF THE REPUBLIC OF UGANDA, 1995 (as amended through 2006), § 132, available on the World Intellectual Property Organization (WIPO) website, *at* http://www.wipo.int/wipolex/en/text.jsp?file_id=170004; *see also Supreme Court*, THE JUDICIARY OF THE REPUBLIC OF UGANDA, http://www.judicature.go.ug/data/smenu/7//Supreme_Court.html (last visited Mar. 27, 2014).

[3] THE JUDICIARY OF THE REPUBLIC OF UGANDA, *supra* note 2.

[4] CONSTITUTION OF THE REPUBLIC OF UGANDA § 132.

[5] THE JUDICIARY OF THE REPUBLIC OF UGANDA, *supra* note 2.

[6] CONSTITUTION OF THE REPUBLIC OF UGANDA § 133.

[7] *Id.*

[8] Mahoro & Matte, *supra* note 1; Judicature Act of 1996 § 10, LAWS OF UGANDA, Cap. 13 (rev. ed. 2002).

[9] CONSTITUTION OF THE REPUBLIC OF UGANDA § 137.

[10] Mahoro & Matte, *supra* note 1; CONSTITUTION OF THE REPUBLIC OF UGANDA § 139; *see also* THE JUDICIARY OF THE REPUBLIC OF UGANDA, *supra* note 2.

[11] Magistrate Courts Act of 1971 § 3, LAWS OF UGANDA, Cap. 16 (rev. ed. 2000).

[12] Children Act of 1997 § 14, LAWS OF UGANDA, Cap. 59 (rev. ed. 2000).

[13] Executive Committees (Judicial Powers) Act of 1988 § 2, LAWS OF UGANDA, Cap. 8 (rev. ed. 2000).

III. Sentencing Guidelines

On April 26, 2013, Uganda's Chief Justice Benjamin Odoki issued The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions (the Sentencing Guidelines).[14] As noted above, the Sentencing Guidelines were developed on the basis of section 133 of the Constitution, which authorizes the Chief Justice to "issue orders and directions" to the courts in the country.[15] Specifically, the Sentencing Guidelines were developed by a twenty-five member task force of the Justice Law and Order Sector (JLOS),[16] which the Chief Justice established with the Supreme Court Principal Judge, Justice Yorokamu Bamwine, as chair, and with logistical support from the Ministry of Foreign Affairs of Denmark.[17]

The Sentencing Guidelines were developed to help mitigate various challenges that the country's judiciary faces during the sentencing phase of criminal cases. Of particular concern are chronically wide disparities in sentences in which charges under the same offense involving similar circumstances often result in greatly varying punishments, in part because of unfettered judicial discretion,[18] corruption, favoritism, and influence peddling.[19] Other challenges that may contribute to the disparities in sentencing include the nonexistence of documented precedents to guide the sentencing process, lack of benchmark factors for courts to consider as aggravating or mitigating circumstances, and heavy reliance on custodial sentences.[20] The Sentencing Guidelines seek to ameliorate these challenges by introducing uniformity and transparency to the

[14] THE CONSTITUTION (SENTENCING GUIDELINES FOR COURTS OF JUDICATURE) (PRACTICE) DIRECTIONS, 2013, CVI (26) LEGAL NOTICE SUPPLEMENT TO THE UGANDA GAZETTE (May 24, 2013) (hereinafter Sentencing Guidelines), *available at* http://www.judicature.go.ug/files/downloads/Sent encing%20Guidelines.pdf.

[15] CONSTITUTION OF THE REPUBLIC OF UGANDA § 133.

[16] JLOS is "a sector wide approach adopted by Government bringing together institutions with closely linked mandates of administering justice and maintaining law and order and human rights, into developing a common vision, policy framework, unified on objectives and plan over the medium term." *Our History*, JLOS, http://www.jlos.go.ug/index.php/2012-09-25-13-11-16/our-history (last visited Apr. 1, 2014). It comprises various government ministries and other institutions, including the Ministry of Justice and Constitutional Affairs, the Ministry of Internal Affairs, the Judicial Service Commission, the Ugandan Law Reform Commission, and the Ugandan Law Society, among others. *Id.*

[17] *Sentencing Guidelines*, JLOS, http://www.jlos.go.ug/index.php/2012-09-25-11-09-41/sentencing-guidelines (last visited Mar. 27, 2014); Edward Ssekika & Sulaiman Kakaire, *Order, Certainty in New Sentencing Guide*, OBSERVER (June 19, 2013), http://www.observer.ug/index.php?option=com_content&view=article&id=25938%3Aorder-certainty-in-new-sentencing-guide&catid=34%3Anews&Itemid=114.

[18] Most of the country's criminal laws provide only a maximum sentence for an offense. When they provide both maximum and minimum allowable sentences, the range between the two is often extremely wide (see Part IV, below).

[19] Anthony Wesaka, *New Guidelines Give Judges Less Freedom on Sentences*, DAILY MONITOR (June 12, 2013), http://www.monitor.co.ug/News/National/New-guidelines-give-judges-less-freedom-on-sentences/-/688334/1879754/-/11qw7bhz/-/index.html; Moses Sserwanga, *New Sentencing Guidelines a Litmus Test for Judicial Officers*, AFRICAN CONFIDENTIAL (July 31, 2013), http://africanconfidential.com/new-sentencing-guidelines-a-litmus-test-for-judicial-officers/; *Judiciary Introduces New Sentencing Guidelines*, NTV UGANDA (June 10, 2013), https://www.youtube.com/watch?v=CXlHN-hZySY.

[20] Benjamine J. Odoki, Speech at the Launch of the Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions Legal Notice No. 8 of 2013, at 3 (June 10, 2013), http://www.jlos.go.ug/index.php/document-centre/document-centre/doc_download/280-speech-by-the-chief-justice-at-the-launch-of-the-sentencing-guidelines.

sentencing process through sentencing ranges for specific offenses and other tools designed to standardize the process.[21] To this end, the Sentencing Guidelines aim

> (a) to set out the purpose for which offenders may be sentenced or dealt with;
> (b) to provide principles and guidelines to be applied by courts in sentencing;
> (c) to provide sentence ranges and other means of dealing with offenders;
> (d) to provide a mechanism for considering the interests of victims of crime and the community when sentencing; and
> (e) to provide a mechanism that will promote uniformity, consistency and transparency in sentencing.[22]

The Sentencing Guidelines further state that the purpose of sentencing is "to promote respect for the law in order to maintain a just, peaceful and safe society and to promote initiatives to prevent crime."[23] Accordingly, they direct judges to impose sentences aimed at achieving one or more of the following purposes:

> (a) denouncing unlawful conduct;
> (b) deterring a person from committing an offence;
> (c) separating an offender from society where necessary;
> (d) assisting in rehabilitating and re-integrating an offender into society;
> (e) providing reparation for harm done to a victim or to the community; or
> (f) promoting a sense of responsibility by the offender, acknowledging the harm done to the victim and the community.[24]

Despite the use of language that suggests otherwise, the Sentencing Guidelines are merely advisory rather than mandatory in nature.[25] According to Chief Justice Odoki, "[s]entencing guidelines should not override the discretion of the judicial officer. They should not direct but rather guide the judicial officer to arrive at a fair and just sentence which is consistent with that being passed by other judicial officers."[26] However, the advisory nature of the Sentencing Guidelines may change in the future: the task force that developed the Sentencing Guidelines has proposed a sentencing reform bill that, if taken up by the country's Parliament and enacted into law, may make the Sentencing Guidelines mandatory.[27]

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[21] *Id.*; Ssekika & Kakaire, *supra* note 17.

[22] Sentencing Guidelines § 3.

[23] *Id.* § 5.

[24] *Id.*; Yorokamu Bamwine, Principles of Sentencing: A Global, Regional and National Perspective, Presentation at the Munyonyo Commonwealth Resort Hotel, Kampala (Aug. 30, 2012), http://www.judicature.go.ug/files/downloads/PRINCIPALS%20OF%20SENTENCINT%20A%20GLOBAL%20REGIONAL%20%20NATIONAL%20PERSPECTIVE%20final.pdf.

[25] David Brian, Uganda's New Sentencing Guidelines: Introduction, Initial Assessment and Early Recommendations 2 & 7 (Jan. 2014) (unpublished manuscript), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1011&context=uculaw.

[26] Odoki, *supra* note 20, at 5; Anne Mugisa, *Legislature Told Reform Unconstitutional Laws*, NEW VISION (Dec. 25, 2012), http://www.newvision.co.ug/news/638414-legislature-told-reform-unconstitutional-laws.html.

[27] Odoki, *supra* note 20, at 5.

The Sentencing Guidelines do not set sentencing policy for any offense; they merely recommend sentencing ranges for certain offenses based on data collated from various court decisions issued over the years for each offense.[28] The task force reportedly did this by engaging a statistician to generate ranges of sentences through statistical models based on historic judicial practice.[29] This illustrates that the Sentencing Guidelines were not developed as a vehicle for making policy decisions on sentencing, but simply as a means of introducing certainty and consistency to the sentencing process in the country.[30]

The Sentencing Guidelines provide specific sentencing recommendations only for the following limited number of offenses: capital offenses (murder, rape, aggravated defilement, robbery, kidnapping with intent to murder, terrorism, and treason); manslaughter; robbery; defilement; trespass; corruption and related offenses; and theft and related offenses.[31] For these particular offenses, the Sentencing Guidelines provide a range of sentences including a minimum sentence for each offense and a list of aggravating and mitigating circumstances.[32] However, according to Justice Bamwine, the Sentencing Guidelines will be expanded to eventually incorporate similar recommendations for all offenses under the country's Penal Code.[33]

In addition to sentencing recommendations for the specific offenses noted above, the Sentencing Guidelines also provide courts with "general sentencing principles" that may be applied to all offenses, including those for which specific recommendations are not provided. These principles include the gravity and nature of the offense, the importance of ensuring that the sentence to be issued is in keeping with other sentences for similar offenses, and any other factors that courts deem appropriate.[34] The Sentencing Guidelines also provide various "general factors" for courts to consider in determining appropriate sentences for offenses. These factors include information that can help provide a context for an offense, including information on the customs prevailing in the area where the offense was committed and a host of other factors, such as the offender's remorsefulness, gender, motive, financial status, and sophistication.[35]

One of the most notable aspects of the Sentencing Guidelines is the focus on victim and community engagement in the sentencing process. The Sentencing Guidelines make the effect of a crime on the victim and the community part of the general sentencing principles that courts must take into account during sentencing.[36] The Sentencing Guidelines require that, when deliberating on the appropriate sentences, courts must consider factors and inquiries required by

[28] Bamwine, *supra* note 24, at 12.

[29] Brian, *supra* note 25, at 10.

[30] *Id.*; Gadenya Paul Wolimbwa, *JLOS Pioneering Reform of Sentencing in Uganda*, JLOS (Apr. 3, 2013), http://jlos.go.ug/index.php/component/k2/item/268-jlos-pioneering-reform-of-sentencing.

[31] Sentencing Guidelines §§ 17–22, 26–48.

[32] *Id.*

[33] Sserwanga, *supra* note 19.

[34] Sentencing Guidelines § 6.

[35] *Id.* § 14.

[36] *Id.* § 6.

other laws.[37] As part of this process, courts may order the prosecution to produce a victim impact statement[38] and a community impact statement.[39] The form for the victim impact statement in the Sentencing Guidelines (Form A) includes particulars of the physical, emotional, and financial impact on the victim, including any property loss or damage suffered as the result of the offense.[40] In addition, this form adopts a broad definition of the term "victim" to include the spouse and children of the victim, parents and/or guardians of a child victim, and legal guardians of a mentally or physically disabled victim.[41] Also provided in the Sentencing Guidelines is a community impact statement form (Form B), which includes particulars of the physical, emotional, and financial impact of the offense on the community, including the loss of or damage to public property caused by the crime, as well as the prevalence of the particular offense in the community.[42]

Another notable aspect of the Sentencing Guidelines is their emphasis on restorative justice.[43] The Sentencing Guidelines include restorative justice as part of the general sentencing principles, stating that "[e]very court shall when sentencing an offender take into account . . . any outcomes of restorative justice processes that have occurred, or are likely to occur, in relation to the particular case."[44] The Sentencing Guidelines also compel the prosecution to seek restorative justice. They state that whenever offenders or victims "express interest to reconcile in cases that are permitted under the law, the prosecution shall bring the matter to the attention of the court and shall request the court to give the parties an opportunity to settle such matters amicably."[45] The Sentencing Guidelines impose a similar duty on the defense, stating that "[w]here the offender wishes to reconcile with the victim, the defense shall state that expressly to the court and the prosecutor."[46] In addition, the Sentencing Guidelines impose on the prosecutor an affirmative duty to "promote and advocate for restorative justice as a viable means of dispute resolution where applicable."[47] This strong emphasis on restorative justice coupled with the advisory nature of the Sentencing Guidelines may provide considerable justification for judges to depart from the ranges set out by the Sentencing Guidelines.[48]

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[37] *Id*. § 14.

[38] A victim impact statement is "a written or oral account of the personal harm suffered by the victim." *Id*. § 4.

[39] A community impact statement is "a written or oral account of the general harm suffered by members of a community as a result of the offence." *Id.*; *see also* Brian, *supra* note 25, at 6.

[40] Sentencing Guidelines § 14.

[41] *Id*.

[42] *Id*.

[43] Restorative justice "means repairing the harm caused to the victim by the commission of the offence to the victim, transforming the offender, reconciling the offender with the victim and community." Sentencing Guidelines § 4.

[44] *Id*. § 6.

[45] *Id*. § 57.

[46] *Id*. § 60.

[47] *Id*. § 57.

[48] Brian, *supra* note 25, at 7.

Although they make various sentencing options available to courts, including custodial sentences, the Sentencing Guidelines encourage courts to avoid custodial sentences whenever possible and when dealing with certain classes of offenders. The Sentencing Guidelines provide a list of sentencing options for courts to choose from, including a custodial sentence, a simple warning, or any other legal sentence the courts deem fit.[49] However, the Sentencing Guidelines provide a number of considerations that courts must take into account before issuing custodial sentences, including "whether the purpose of sentencing cannot be achieved by a sentence other than imprisonment."[50] In addition, the Sentencing Guidelines specifically discourage courts from imposing custodial sentences if the offender is above the age of seventy-five, pregnant, underage, or terminally ill.[51]

Along similar lines, the Sentencing Guidelines provide a specific set of recommendations with regard to the sentencing of child offenders and offenders who have dependents. Where the offender is a primary caregiver, the Sentencing Guidelines require courts to take into account the effect of their sentences, particularly custodial sentences, on the dependents of the offender and strive to minimize them.[52] In addition, if the offender is under the age of eighteen, the Sentencing Guidelines recommend that courts consider a number of factors during sentencing, including the child's degree of participation in the commission of the offense, the best interest of the child, and noncustodial options offered under the Children Act.[53]

The Sentencing Guidelines also provide recommendations for imposing fines and community service.[54]

[49] Sentencing Guidelines § 10.

[50] *Id*. § 9.

[51] *Id.*

[52] *Id*. § 49.

[53] *Id*. § 50; Children Act of 1997 § 94, LAWS OF UGANDA, Cap. 59 (rev. ed. 2000).

[54] Sentencing Guidelines §§ 51–52.

IV. Specific Guidelines

Offense	Penalty Under Law	Guideline Sentencing Range	Considerations	Aggravating Factors	Mitigating Factors
Theft (felony)	Maximum of five years' imprisonment.[341]	One to ten years' imprisonment, with a presumed sentence of five years subject to aggravating and mitigating factors.[342]	Includes value of the property stolen, aggravating or mitigating circumstances, guilty plea by offender, reparations offered, or other factors the court deems relevant.[343]	Includes degree of loss, amount of money or quantity of items stolen, prevalence of the offense, relationship of offender and victim, recidivism, or other factors the court deems relevant.[344]	Includes lack of premeditation, guilty plea, remorsefulness, first-time offender, or other factors the court deems relevant.[345]
Obtaining Goods by False Pretense (felony)	Ten years' imprisonment.[346]	Six months' to five years' imprisonment, with a presumed sentence of two-and-a-half years subject to aggravating and mitigating factors.[347]	Same as for theft.	Same as for theft.	Same as for theft.

[341] PENAL CODE OF 1950 § 261, LAWS OF UGANDA, Cap. 120 (rev. ed. 2000), available on the WIPO website, *at* http://www.wipo.int/wipolex/en/text.jsp?file_id=170005. Note that the Penal Code provides for various forms of theft and related offenses, for which it prescribes varying penalties. *Id.* §§ 253–284. However, the offenses listed in this report are limited to those specifically addressed in the Sentencing Guidelines.

[342] Sentencing Guidelines § 45.

[343] *Id.* § 45.

[344] *Id.* § 47.

[345] *Id.* § 48.

[346] *Id.* § 305.

[347] *Id.*

Offense	Penalty Under Law	Guideline Sentencing Range	Considerations	Aggravating Factors	Mitigating Factors
Criminal Trespass (mis-demeanor)	One year imprisonment.[348]	A warning to one year imprisonment, with a presumed sentence of six months in prison subject to aggravating and mitigating factors.[349]	Includes nature and prevalence of offense, particular circumstances of offense, relationship between parties involved, or other factors the court deems relevant.[350]	Includes degree of premeditation; gravity of offense committed upon entry; general behavior of offender while on property; whether offender targeted victim because of age, gender, or disability; or other factors the court deems relevant.[351]	Includes absence of premeditation, diminished capacity, remorsefulness, or other factors the court deems relevant.[352]
Manslaughter (felony)	Life imprisonment.[353]	Three years' to life imprisonment (defined as the natural life of the offender), with a presumed sentence of fifteen years subject to	None provided.	Includes degree of injury to victim, part of victim's body harmed, degree of offender's intention or negligence, use and nature of	Includes lack of intention to cause death or culpable negligence, subordinate role of offender as member of

[348] *Id.* § 302. Note that the Penal Code provides for various forms of offenses under the heading of "Burglary, Housebreaking and Similar Offences" with varying penalties. *Id.* §§ 295–302. However, only the offense of criminal trespass, the sole offense for which the Sentencing Guidelines provide a sentence range, is included in this report.

[349] Sentencing Guidelines § 37.

[350] *Id.* § 38.

[351] *Id.* § 39.

[352] *Id.* § 40.

[353] PENAL CODE § 190.

Offense	Penalty Under Law	Guideline Sentencing Range	Considerations	Aggravating Factors	Mitigating Factors
		aggravating and mitigating factors.[354]		weapon, or other factors the court deems relevant.[355]	group or gang in commission of offense, element of self-defense, or other factors the court deems relevant.[356]
Murder	Death or life imprisonment.[357] (A 2009 Supreme Court decision held that mandatory death sentences are unconstitutional.)[358]	Thirty years' imprisonment to death,[359] with a presumed sentence of thirty-five years subject to aggravating and mitigating factors.[360]	Death imposed only in rare instances, such as when offense was premeditated; when victim was either a law enforcement officer or public servant killed while on duty, or a	Degree of premeditation, use and nature of weapon, vulnerability of victim, gratuitous degradation of victim, or other factors the court deems relevant.[363]	Lack of premeditation, subordinate role of offender as member of group or gang in commission of offense, guilty plea, provocation by victim, remorsefulness,

[354] Sentencing Guidelines §§ 4 & 27.

[355] *Id*. § 28.

[356] *Id*. § 29.

[357] PENAL CODE § 189.

[358] *Attorney General v. Susan Kigula & 417 Ors* (Constitutional Appeal No. 3 of 2006) [2009] UGSC 6, available on the Uganda Legal Information Institute website, *at* http://www.ulii.org/ug/judgment/supreme-court/2009/6. ("[Although t]he imposition of the death penalty does not constitute cruel, inhumane or degrading punishment . . .[,] [t]he various provisions of the laws of Uganda which prescribe a mandatory death sentence are . . . unconstitutional.").

[359] The Sentencing Guidelines reserve the imposition of a death sentence to what they call the "rarest of rare" cases, instances in which all other lesser sentences are "demonstrably inadequate." Sentencing Guidelines § 17. These include cases in which the commission of the crime was premeditated; the victim was a law enforcement officer or other public officer on duty at the time of the commission of the crime; the victim was a state witness; the offender caused the death of the victim while committing or attempting to commit murder, rape, defilement, robbery, kidnapping with intent to commit murder, terrorism, or treason; the offense was committed as part of a conspiracy; the victim was killed for the purpose of removing his/her body part, or the victim died as the result of the removal of a body part; or the victim was killed for human sacrifice. *Id*. § 18.

[360] Sentencing Guidelines § 19.

Offense	Penalty Under Law	Guideline Sentencing Range	Considerations	Aggravating Factors	Mitigating Factors
		A court may impose life imprisonment if it concludes the circumstances of case do not warrant a death sentence.[361]	state's witness; or when victim was killed in an act of human sacrifice.[362]		intoxication, or other factors the court deems relevant.[364]
Human Trafficking	Aggravated trafficking in children may be punishable by death.[365]	No range provided. However, a court may impose life imprisonment in lieu of death if it concludes the circumstances of the case do not warrant a death sentence.[366]	The general factors for sentencing included in Sentencing Guidelines and, when applicable, the guidelines included in Sentencing Guidelines on imposing a death sentence.[367]	Factors aggravating a death sentence listed in Sentencing Guidelines may be applicable.[368]	Factors mitigating a death sentence listed in Sentencing Guidelines may be applicable.[369]

[363] *Id*. § 20.

[361] *Id*. § 24.

[362] *Id*. § 18.

[364] *Id*. § 21.

[365] Prevention of Trafficking in Persons Act 7 of 2009 § 5, CII (52) ACTS SUPPLEMENT TO THE UGANDA GAZETTE (Oct. 23, 2009), available on the Way Forward Project website, *at* http://www.thewayforwardproject. org/file_uploads/U03%20Uganda%20Prevention%20of%20Trafficking%20in%20Persons%20Act.pdf; *see also Attorney General v. Susan Kigula & 417 Ors* (Constitutional Appeal No. 3 of 2006) [2009] UGSC 6. Note that the Prevention of Trafficking in Persons Act applies to a number of different offenses. Prevention of Trafficking in Persons Act §§ 3–10. However, only aggravated trafficking in children, for which there is a sentencing recommendation in the Sentencing Guidelines, is included in this report.

[366] Sentencing Guidelines § 24.

[367] *Id.* §§ 14, 17–18.

[368] *Id*. § 20.

[369] *Id*. § 21.

V. Sentencing Guidelines Committee

Parallel to the launch of the Sentencing Guidelines, Chief Justice Odoki also formed a Sentencing Guidelines Committee.[370] The Committee is chaired by the Principal Judge of the Supreme Court and comprises members representing

- the Supreme Court;
- the Court of Appeal;
- the High Court, Criminal Division;
- the Attorney General's Office;
- the Public Prosecutor's Office;
- the Office of the Inspector General of Police;
- the Uganda Law Reform Commission;
- the Justice Law and Order Sector;
- the Office of the Commissioner General of Prisons;
- the National Community Service Committee;
- the Uganda Judicial Officer's Association; and
- the general public (three representatives).[371]

The Committee includes a research arm headed by a member of the Ugandan Law Reform Commission.[372]

The Committee has a number of mandates, which include making recommendations for the development of additional sentencing guidelines, principles, and sentence ranges for offenses not covered under the current Sentencing Guidelines; conducting a review of the current Sentencing Guidelines; reviewing and revising penalties; conducting public awareness campaigns; monitoring the implementation of the Sentencing Guidelines; and establishing a research, development, and oversight program on sentences and their effectiveness.[373]

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[370] Andrew Khaukah, *Sentencing Guidelines Committee*, JLOS (May 24, 2013), http://www.jlos.go.ug/index.php/component/k2/item/287-sentencing-guidelines-committee; Gadenya Paul Wolimbwa, *Justice, Law and Order Sector in the Process of Developing Sentencing Guidelines*, JLOS (Nov. 9, 2011), http://www.jlos.go.ug/index.php/document-centre/news-room/archives/item/188-jlos-in-the-process-of-developing-sentencing-guidelines.

[371] Khaukah, *supra* note 84.

[372] *Id.*

[373] *Id*; Odoki, *supra* note 20, at 5.