FINE TUNING UGANDA'S SENTENCING GUIDELINE FRAMEWORK: LESSONS FROM SENTENCING GUIDELINE SYSTEMS IN SELECTED COMMON LAW JURISDICTIONS

A thesis submitted in fulfillment of the requirements for the

DEGREE of DOCTOR OF PHILOSOPHY

of

THE UNIVERSITY OF STRATHCLYDE

by

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March 2015

Abstract

This study explores the different approaches that could be adopted in designing meaningful sentencing guidelines for Uganda. The study argues that the primary function of sentencing guidelines is to enable a public articulation of meaningful consistency. The study also argues that sentencing guidelines modelled on a limiting retributivism model offer the most appropriate liberal approach to achieving meaningful consistency in sentencing. The primary aim of the study is to offer an integrated set of proposals for the improvement of Uganda's sentencing guidelines and statutory sentencing framework. This is accomplished by means of a literature review and empirical analysis of guideline systems in selected common law jurisdictions as well as an analysis of Uganda's first set of voluntary sentencing guidelines. The insights drawn from the literature review and experiences in other jurisdictions assist in identifying theoretical and normative weaknesses in Uganda's sentencing guidelines and in finding an integrated set of proposals for their improvement. The study specifically focuses on how some structural features of a sentencing guideline can be designed to articulate meaningful consistency in sentencing including: the guidelines' binding nature, scaling offence seriousness, sentencing ranges, aggravating and mitigating factors, departures, the role of previous convictions and discounts for multiple offence sentencing. The recommendations made in the study are particularly intended for a Ugandan context, although the set of proposals can also find application in any jurisdiction seeking to develop sentencing guidelines. The study offers an immediate practical guide to policy makers in Uganda and will be of great and particular interest to the judicial system in Uganda.

Declaration

I, Juliet Kamuzze, declare that '**Fine tuning Uganda's Sentencing Guideline Framework: Lessons from Sentencing Guideline Systems in Selected Common Law Jurisdictions** is original, except where indicated by special reference in the text and that it has not been submitted for any degree or examination in any other University or Institution.

Acknowledgements

To begin with, I am grateful to the Commonwealth Scholarship Commission for fully funding my doctoral studies at the University of Strathclyde.

I would also like to express my deepest and sincere gratitude to my primary supervisor, Professor Neil Hutton, for his excellent guidance, trusted mentorship, and patience in reading the innumerable drafts I presented to him in the course of my research and for providing prompt and constructive advice on each and every draft. Professor Hutton's unwavering support, inspiration and motivation consistently kept me in the right direction, and provided me with an excellent atmosphere for doing my research. Thank you to Professor Cyrus Tata, my second supervisor and Dr. Claire McDiarmid, my reviewer for their detailed and constructive comments on the drafts I presented for my annual review meetings.

Thank you to my colleagues, the PhD Law students at the University of Strathclyde for making Strathclyde such a stimulating place of study, and to all the members of staff of HASS Graduate School, particularly Ms. Patricia Bunce, for her gentle advice whenever it was needed. To my colleagues Jonans Tusiimire, Nicola Zoumidou, Dr. Uzuazo Etemire, Jingjing, Dr. Bode Adesola Kheinde and Jean De Dieu, thank you for your endless support and motivation. .

Special thanks go to Professor Manisuli Ssenyonjo of Brunel University London for reading and providing advise on my drafts. Dr. Mike Okumu, of the University of St Andrews, and Mrs. Alice Lane for your extra dose of motivation whenever it was needed. As always, for unceasing encouragement, thank you to my sisters Harriet, Stella and Gertrude. Thank you for filling the

gap in my house during the duration of my study, and most especially for loving and caring for Jayden.

Finally, a very special thank you to my husband John, and my son Jayden, for letting me pursue my dream.

Dedication

To my husband John and my son Jayden, with lots of love and thanks.

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List of Abbreviations

ALLER	=	All England Law Reports
art	=	Article
Ch	=	Chapter
CJA	=	Criminal Justice Act
COJA	=	Coroners and Justice Act
E.A	=	East Africa Law Reports
ed./eds/edn.	=	Editor/Editors/Edition
e.g	=	For example
HCB	=	High Court Bulletin
KALR	=	Kampala Law Reports
n	=	Note
N.w.2d	=	North Western Reports, Second Series
NSWCA	=	New South Wales Court of Appeal
NSWCCA	=	New South Wales Court of Criminal Appeal
No	=	Number
para/paras	=	Paragraph/paragraphs
PCA	=	Penal Code Act
SACR	=	South Africa Criminal Law Reports
§	=	Section, in respect to United States of America legislations
s	=	Section

TIA	=	Trial on Indictment Act
UGCA	=	Uganda Court of Appeal
UGCC	=	Uganda Constitutional Court
UGSC	=	Uganda Supreme Court
UGHC	=	Uganda High Court
UGHCACD	=	Uganda High Court Anti Corruption Division
UGHCCRD	=	Uganda High Court Criminal Division

List of Selected Legislation

Uganda

Anti Terrorism Act 14 of 2002

Constitution of the Republic of Uganda, 1995

Habitual Criminals (Preventive Detention) Act, Chapter 118

Judicature Act, Chapter 13

Magistrates Courts Act, Chapter 16

National Youth Council Act of Uganda, Chapter 319

Penal Code Act, Chapter 120

Penal Code (Amendment) Act, 2007

Prisons Act, Chapter 17

Probation Act, Chapter 122

Trial on Indictment Act, Chapter 23

Uganda Law Reform Commission Act, Chapter 25

Subsidiary Legislation

Magistrates Courts (Magisterial Areas) SI 16-1

England and Wales

Coroners and Justice Act, 2009

Criminal Justice Act, 2003

Theft Act, 1968

Scotland

Criminal Justice and Licensing (Scotland) Act, 2010

United States of America

Code of Virginia, Chapter 8

District of Columbia Official Code, Chapter 1 (2001)

District of Columbia Official Code, Chapter 1 (2014)

Minnesota Statutes 2013, Chapter 609

North Carolina General Statutes 2012, Chapter 15A

Sentencing Reform Act, 1981 (as amended by the Washington Revision Code, Chapter 9.94A (2011)

Chapter One

Introduction

1.1 Statement of Research

The primary aim of this study is to offer an integrated set of proposals for the further development of Uganda's sentencing guidelines and statutory sentencing framework. The study makes proposals for the improvement of Uganda's sentencing guidelines, in view of practices on guideline sentencing from selected common law jurisdictions as well as academic literature on the subject. The study explores the individualised sentencing system of Uganda prior to sentencing guideline reform, and looks into who and what precipitated sentencing guideline reform in Uganda. It also shows how the evolution of sentencing guideline reform in Uganda has failed to contribute meaningful change to existing sentencing practices. It explores how Uganda's sentencing guidelines can be reviewed in line with sentencing practices from other countries to enhance its potential to articulate meaningful consistency in sentencing. The study then makes a proposal for the establishment of a Sentencing Council for Uganda which is believed to be an appropriate vehicle for the further development of the country's sentencing guideline framework.

The study argues that the primary function of sentencing guidelines is to enable a public articulation of meaningful consistency in sentencing. Grounded on this argument, the study demonstrates that Uganda's new sentencing guidelines have been constructed on a loose definition of consistency, which has inhibited the guidelines potential to publicly articulate meaningful consistency in sentencing. The study draws on experiences from other jurisdictions

(namely Minnesota, North Carolina, England and Wales) to make proposals for the further development of Uganda' sentencing guideline framework. Most importantly, it suggests that consistency would have served a meaningful function under Uganda' sentencing guidelines, had the guidelines been modelled on a limiting retributivism justification. The hypothesis of this study is therefore that the status quo of individualised sentencing has simply been reaffirmed in the new sentencing guidelines.

This study adds to the growing literature on sentencing guideline reform by providing the first detailed discussion of Uganda's new sentencing guidelines. The study provides the first instructive perspective on how Uganda' sentencing guidelines can be developed to enhance their potential to deliver a public articulation of meaningful consistency. The study offers the first original historical analysis of the development of Uganda's sentencing guidelines. It also provides the first detailed critique of the nature and content of Uganda's sentencing guidelines. The detailed discussion of the historical development leading to sentencing guideline reform in Uganda, its process of development, and the detailed critique of the sentencing guidelines is the first scholarship on this subject in both Ugandan and international literature.[1] In respect to academic scholarship on the subject in general, the discussion of the historical factors leading to the development of sentencing guideline reform in Uganda brings a new interesting insight into the understanding of the politics of sentencing reform. In all the selected jurisdictions and most other western jurisdictions, sentencing is perceived as a matter of political interest and debate. However, this study of the historical developments leading to Ugandan sentencing guideline

[1] J Kamuzze, 'An Insight into Uganda's New Sentencing Guidelines: A Replica of Individualisation?' (2014) 27 Federal Sentencing Reporter 45. This article provides the first brief overview of Uganda' sentencing guidelines.

reform, shows that depending on the local conditions of a given jurisdiction, sentencing guidelines can be developed with a single judicially led interest without interference from other political constituencies.

The study also highlights the importance of having sentencing guidelines modelled on a meaningful definition of consistency. This study shows that much as sentencing guidelines offer benchmarks for defining consistency, so long as consistency is loosely defined, it will serve a meaningless function under the guidelines. Even though the study focuses on themes that have been extensively discussed by leading commentators in the field, the detailed discussion of how these themes may play from a Ugandan perspective, is an addition to the growing literature on structuring judicial sentencing discretion. Most importantly, the study will be of great and particular interest to the judicial system in Uganda.

The central research question is: how can Uganda's sentencing guideline framework be refined to enable an articulation of meaningful consistency? In order to answer this question, the following sub-research questions are developed:

(1) What was the nature of individualised sentencing in Uganda prior to sentencing guideline reform? This question is significant as its discussion provides a prelude to the general background on the policy drivers that precipitated the development of sentencing guidelines in Uganda.[2] The discussion of this question also offers a platform for demonstrating the importance of structuring judicial sentencing discretion in Uganda.

[2] These include the need to reduce unwarranted sentencing disparities; the need to restore public confidence in the administration of criminal justice; the need for transparency in sentencing decision making process; and the need for consistency in sentencing.

(2) Who and what shaped sentencing guideline reform in Uganda? The answer to this question provides a better understanding of the de facto ownership of sentencing authority by the judiciary in Uganda. The answer also provides an insight into the differences between historical perspectives to sentencing guideline reform in Uganda and other western jurisdictions.

(3) Why and how has the Constitution (Sentencing Guidelines) for Courts of Judicature (Practice) Directions 2013[3] (hereafter 'the Uganda Guidelines) failed to deliver a public account of meaningful consistency? The discussion of this question sets the platform for highlighting the weaknesses in the Uganda Guidelines and helps to identify the key features in the Uganda Guidelines that require improvement. The question also provides a basis for the argument that a meaningful definition of consistency requires a limiting retributivism justification.

(4) What lessons can be drawn from sentencing practices and experiences from other countries? The discussion to this question enables the identification of the integrated set of proposals for the improvement of Uganda Guidelines and the sentencing framework as a whole.

(5) What kind of institutional framework is more likely to further the development of sentencing guideline reform in Uganda?

A unifying thread running throughout the study is the idea of making proposals which can further develop Uganda's sentencing guideline framework in a way that is theoretically and normatively acceptable.

1.2 Research Problem

The individualised sentencing approach in Uganda, permits judges and magistrates wide discretionary powers. Judges and magistrates can balance all unique considerations of an offence

[3] Legal Notice No 8 of 2013.

and individual offender, and make subjective judgment about the relevance and weight to be attached to myriad sentencing factors, before arriving at an appropriate sentence. Usually the sentence options fall within a wide breadth of discretion only constrained by broad maximum penalties. The individualised approach to sentencing does not provide any benchmarks for articulating consistency. As such it is not only a recipe for unwarranted disparities in sentencing, but also increases the perception that sentencing is inconsistent in Uganda.[4] In an effort to address the problems associated with the exercise of unstructured sentencing discretion by Ugandan sentencers, the then Chief Justice of Uganda, Benjamin Odoki appointed a Sentencing Guidelines Taskforce ('Taskforce') in 2010 to develop sentencing guidelines for Uganda. Like sentencing guideline schemes in other jurisdictions,[5] the principal goal of Uganda's sentencing guidelines was to: 'promote consistency in sentencing and increase public confidence in the criminal justice system'.[6]

On 30 November 2011, the Taskforce, which was and is still chaired by the third most senior judge —the Principal Judge of the High Court of Uganda, Justice Yorokamu Bamwine produced its first draft sentencing guidelines. The guidelines were officially issued as practice directions on 26 April 2013 under the title: 'The Constitution (Sentencing Guidelines) for Courts of Judicature (Practice) Directions 2013. The Uganda Guidelines are undoubtedly the first meaningful step towards structuring judicial sentencing discretion in Uganda, and thus offer the first benchmarks for publicly articulating consistency in sentencing. However, as shall be shown

[4]BJ Odoki, 'Keynote Address at the Launch of the Constitution (Sentencing Guidelines) for Courts of Judicature (Practice) Directions, Legal Notice No 8 of 2013' (Kabira Country Club, Kampala, 10 June 2013).
[5]JV Roberts, 'Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales' (2011) 5 British Journal of Criminology 997.
[6] Odoki, 'Keynote Address' (n 4). Also, Uganda Guidelines, para 3.

in this study, the Uganda Guidelines have been constructed on a loose definition of consistency that fails to produce an account of meaningful consistency.

To begin with, Uganda Guidelines, paragraph 5(2) (a) provides that:

the court shall in accordance with the sentencing principles,[7] pass a sentence aimed at:(a) denouncing unlawful conduct (b) deterring a person from committing an offence (c) separating an offender from society (d) assisting in rehabilitating and re-integrating an offender into society (e) providing reparation for harm done to the 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.

This provision could be seen as the first step towards providing a public statement of the primary purposes of sentencing in Uganda. However, the provision of conflicting and competing aims of punishment without clarification of the predominant rationale of sentencing does not offer much assistance. Some leading scholars such as Ashworth have criticised the approach as one taken by Uganda noting that it tends to allow a cafeteria of pick and mix sentencing that invites inconsistent sentencing.[8] This is because the pick and mix sentencing aims allow sentencers wide discretionary powers to choose from myriad sentencing purposes for which they most likely have no knowledge, skill or information regarding their efficacy in achieving their presumed goals. The embodiment of competing and contradictory sentencing purposes encourages the pursuit of sentencing goals based on individual philosophical preferences of sentencers and this sometimes leads to variations in sentencing. The approach known as limiting retributivism, recently developed and articulated by Frase, is a means of resolving the irrationality of the cafeteria

[7] Uganda Guidelines, para 6. It provides that 'every court shall when sentencing an offender take into account—the gravity of the offence including the degree of culpability of the offender, the nature of the offence, the need for consistency, any information provided to the court concerning the effect of the offence on the victim or the community, the offender's personal, family, community or cultural background, any outcomes of restorative justice processes that have occurred, the circumstances prevailing at the time when the offence was committed, up to the time of sentencing, any previous convictions of the offender, any other circumstances court considers relevant'.

[8] A Ashworth, *Sentencing and Criminal Justice* (5th edn, Cambridge University Press 2010).

approach by asserting desert as the primary rationale for sentencing with other aims operating within boundaries set by the principle of proportionality. This study argues that the anomaly in the Uganda Guidelines can be settled if the Guidelines are modelled on a limiting retributivism justification. Otherwise, the enumeration of conflicting sentencing purposes in the Uganda Guidelines, without further guidance on the primary rationale of sentencing has done little to articulate meaningful consistency.

Secondly, traditionally, offence seriousness in Uganda is defined primarily by the statutory maximum sentence recommended for the offence. Accordingly, this method of assessment of seriousness is based on a worst case scenario criterion without taking into account representations of least serious categories of cases within that offence type, or the comparative seriousness between offences with the same maximum penalty. For example, although the maximum penalty for rape and murder is death, the death penalty would undoubtedly be perceived as excessively severe for a person convicted of rape in the absence of serious aggravating circumstances[9] in comparison with a person convicted of a pre-meditated murder. Therefore, the method used to assess offence seriousness under the Ugandan individualised sentencing approach does not offer the sentencer an opportunity to assess the comparative seriousness of different categories of offences within an offence classification. This enhances the risk of treating a less serious offence more seriously than a more serious one, or treating cases of differing gravity similarly simply because the statutory maximum penalty is the same.

[9]For example, see *Kennedy v Louisiana* 554 US 407 (2008) and *Coker v Georgia* 433 US 584 (1977). The United States (US) Supreme Court declared that rape is not a capital crime where the victim is not killed, and as such capital punishment would be disproportionately severe.

Looking at say, theft, it presents a continuum of different degrees of seriousness under the Ugandan Penal Code Act Chapter 120 (hereafter 'PCA 120). Thus, under the PCA 120, sections 254 and 256, the penalty for theft could range from an absolute discharge, to imprisonment for 10 years. The Uganda Guidelines have made no difference to this sentencing anomaly. Offence seriousness has been defined using the legal offence definitions in the statutes.

Thirdly, the breadth of sentencing ranges prescribed in the Uganda Guidelines have left judges and magistrates the same breadth of discretion as existed under the individualised sentencing approach. The lower limits to sentence severity have been fixed by minimum penalties and the upper limits defined by maximum penalties. For instance, a judge or magistrate has broad statutory discretionary powers to impose any sentence (within the maximum boundary of life imprisonment) to any person who has been convicted of manslaughter.[10] Similarly, a broad sentencing range of 3 years to imprisonment for life has been prescribed for manslaughter in the Uganda Guidelines. The sentencing range in the guidelines is as wide as the breadth of discretion conferred by statute.

In addition, for some offences, particularly capital offences, the bottom limit of the sentencing range has been set at a uniform range of 30 years imprisonment and the top of the sentencing range set as the sentence of death across the board. This approach does not only fail to provide meaningful improvement to existing sentencing practices, but prima facie, it tends to create the impression that the standard minimum sentence for any capital offence is 30 years imprisonment. This increases the risk of disproportionate sentencing as less serious examples of capital cases may be punished as severely as the more serious ones.

[10] PCA 120, s 190. This section prescribes life imprisonment as the maximum penalty for manslaughter.

The then Chief Justice said that determining the relevance and weight of aggravating and mitigating factors was one of the challenges that were faced by courts in Uganda and that the sentencing guidelines were intended to address this challenge.[11]Nonetheless, the Uganda Guidelines have failed to provide a uniform approach to determining the impact of some arguably problematic aggravating and mitigating factors. Judges and magistrates can still take into consideration myriad sentencing factors in the absence of a clear uniform approach to the consideration of their relevance. In addition, a number of ambiguous factors have been included without a clear clarification of the rationale for invoking these factors at sentencing. Consequently, the Taskforce has failed to handle aggravating and mitigating factors with a degree of sufficient subtlety, an act that has maintained the status quo.

The issue of previous convictions has also not been handled sufficiently in the Uganda Guidelines. The role of previous convictions at sentencing has been left to be determined by judges and magistrates. For some specific offences, previous convictions have been added to the list of aggravating factors, but their impact on severity of sentence has not been articulated. The voluntary nature of the Uganda Guidelines is also viewed as a factor that could undermine the pursuit of meaningful consistency in sentencing practices in Uganda. This is because of the considerable independence traditionally enjoyed by Ugandan judges and magistrates, as well as the judicial culture which would render the implementation of voluntary guidelines unlikely. Furthermore, the development of Uganda Guidelines, without positive endorsement of the sentencing guidelines by the legislature inhibits their democratic legitimacy and is likely to curtail their successful implementation.

[11] Odoki, 'Keynote Address' (n 4) 3.

1.3 Motivation for the Study and Research Aims

This study is motivated by several factors, but most importantly, my intense interest in making meaningful contribution to the further development of Uganda's sentencing guideline framework. As a teacher of criminal law and procedure in Uganda, I have often been faced with the challenging question of 'what criteria do judges use to determine sentences particularly in capital sentencing'. How do they decide who should live or die?. Unfortunately, the answer has neither been provided in the statute books nor in jurisprudential work. All that Ugandan jurisprudence says is that judges and magistrates are to determine sentences based on the individual circumstances of each case.[12] This neither answers the question nor provides any form of structured approach to capital sentencing in Uganda. The 2009 Supreme Court decision in the Constitutional Petition of *Attorney General v Susan Kigula and 417 Others* on death row in Uganda (a case which nullified the mandatory imposition of the death penalty)[13] further stirred my interest in the topic. The Supreme Court decision resulted in the recalling of all cases on death row for mitigation, which raised the same question: how were judges going to determine the weight to attach to a myriad of mitigating factors and arrive at mitigated sentences within such wide parameters of sentencing options? Indeed, the exercise became problematic for the judges, as inconsistencies were reported in the mitigation exercise.[14]

Again, the sentencing decisions in two distinctive although not necessarily locus classicus cases in 2011 further advanced my motivation for finding a set of defensible principles for crafting

[12] See, e.g., *Jackson Kalibobo v Uganda* Criminal Appeal No 45 of 2001 (5 December 2001); *Yanus Wanaba v Uganda* Criminal Appeal No. 156 of 2001 (22 July 2003) [2001-2005] HCB 252.
[13]Constitutional Appeal No 03 of 2006 (21 January 2009).
[14]Justice Y Bamwine, 'Presentation on Principles of Sentencing: A Global, Regional and National Perspective' (Munyonyo, Kampala 30 August 2012)
<http://www.judicature.go.ug/files/downloads/PRINCIPALS%20OF%20SENTENCINT%20A%20GLOBAL%20REGIONAL%20%20NATIONAL%20PERSPECTIVE%20final.pdf> (accessed 13 May 2014).

sentencing guidelines for capital sentencing in Uganda. In these two cases, each sentenced by a different judge, Akbar Hussein Godi a 28-year old male, then a member of parliament, and a first-time offender, was sentenced to 25 years imprisonment for brutally murdering his estranged wife, whom he had allegedly pursued for weeks, and purportedly managed to lure into a meeting with him, subsequently killing her by shooting.[15] In another case Tom Nkurungira, a 35-year old male, heir to a big family fortune, and a first-time offender was convicted for killing his girlfriend under unknown circumstances and disposing of her body in a sewerage discharge tank. Tonku (as he was known) was sentenced to death.[16] Given that the offenders were sentenced within an individualised sentencing framework, no benchmarks were available to measure the extent of similarity between these cases. However, prima facie, the cases appear strikingly similar and it is difficult to understand how the different sentences can be justified.

Even though the sentencing decisions did not attract public debate, perhaps because sentencing matters are left to the judiciary in Uganda, the sentencing decisions increased my interest in finding clear and defensible principles for guiding judicial sentencing discretion in Uganda. Why was Tonku sentenced to death and Akhbar to 25 years imprisonment? What criteria had the judges in the different cases used to arrive at their sentencing decisions? Weren't these cases really similar? In my view, the cases appeared strikingly similar, and there was no indication of what differences could have justified such a wide variation in the two sentences. Given that my claim for the disparity in these sentences was simply anecdotal, my motivation to find an appropriate structured approach to discretionary sentencing in Uganda was further stirred.

[15] *Uganda v Godi Akbar Hussein* Criminal Session Case No 124 of 2008 (10 February 2011).
[16] *Uganda v Thomas Nkurungira and Fred Ssempijja* Criminal Session Case No 426 of 2010 (11 August 2011).

During the first months of my doctoral study, as I was pondering over, whether consistency in Ugandan sentencing would be better achieved through the use of sentencing guidelines or simply through an information sharing system for judges (Sentencing Information System) or through a more intrusive Court of Appeal that would develop guideline judgments, the Taskforce which had been appointed in 2010, came up with its first draft sentencing guidelines on 30 November 2011. From the title of my study —**'Fine-tuning Uganda's Sentencing Guideline Framework: Lessons from Sentencing Guideline Systems in Selected Common Law Jurisdictions'** — two aspects are evident. First, there is a sentencing guideline framework in Uganda. Second, the sentencing guideline framework needs fine tuning. Therefore, although the draft Uganda Guidelines assisted in the narrowing of my research question, to simply the examination of how sentencing guidelines could be constructed to articulate meaningful consistency in Ugandan sentencing, a review of the draft guidelines made it clear to me that the draft guidelines failed to make sentencing any more transparent than it was under the individualised sentencing framework.

Accordingly, my second motivation for the study was shaped by what I understood to be the primary function of sentencing guidelines. In the author's view, sentencing guidelines define consistency and therefore are a starting point towards publicly articulating meaningful consistency. Over the years (during the research period), I have come to appreciate the notion that sentencing under an individualised approach is not necessarily inconsistent. However, it is the lack of clear benchmarks for articulating consistency to the wider public that makes consistency difficult to define and measure under an individualised approach. When I reviewed the Uganda Guidelines over and over, with the numerous drafts I wrote, I got to realise that much

as the Uganda Guidelines had provided benchmarks for defining consistency, for example, through developing sentencing ranges for capital offences which were not existent in the individualised sentencing approach, the definition of consistency produced by the Guidelines was not all that meaningful. It is true that the Guidelines had defined consistency in that way, however, where they really articulating consistency in a meaningful way? This took me back to the argument that individualisation of punishments does not necessarily lead to inconsistent sentencing but it is the absence of clear and meaningful benchmarks for articulating consistency that increases the wider perception that sentencing is inconsistent. For this reason, I was inclined to examine whether the Uganda Guidelines had articulated consistency in any better way than under the individualised sentencing approach. The findings were that the Guidelines had done very little to the existing exercise of sentencing discretion and therefore had maintained the status quo.

Accordingly, discovering that the draft Uganda Guidelines had hardly made any differences whatsoever to the existing exercise of judicial discretion, I was motivated to study the sentencing practices of other countries to explore how they have designed their sentencing guidelines. Whilst I was learning from other jurisdictions, the first set of Uganda Guidelines was officially issued as practice directions. The Uganda Guidelines had been issued under the control and authority of the then Chief Justice, without the involvement of other key political constituencies in the criminal justice system. My examination of guideline systems elsewhere had revealed that sentencing guideline reform was typically a result of prolonged political debates. Why was it different in Uganda? This question motivated me to trace the historical perspectives of sentencing guideline reform in Uganda and other jurisdictions. The analysis enabled me to

understand the influences shaping sentencing guideline reform in Uganda, and why choices taken in Uganda are uncharacteristic of those taken in other jurisdictions.

A further motivation for the study stemmed from the nature, form and content of the Uganda Guidelines. The Uganda Guidelines had clearly been developed on a very loose definition of consistency. The pick and mix sentencing purposes, the wide sentencing ranges, the inadequate definition of broadly similar seriousness, the excessively high starting points, lack of departure standards, an inclusion of problematic aggravating and mitigating factors, the passive role attached to previous convictions, all drew me to the conclusion that Uganda's Guidelines had not been modelled on a clear and persuasive theory of sentencing. My work then focused on filling this gap. It makes clear and defensible proposals for the revision of the Uganda Guidelines to enable them to provide a public account of meaningful consistency.

The study argues that the provisions and remit for the Taskforce were inadequate and this had a negative impact on the quality of the Uganda Guidelines. Accordingly, this study sets out proposals for the establishment of a Ugandan Sentencing Council. Sentencing guidelines developed by permanently established independent sentencing commissions/councils have been successfully established elsewhere in the world. Such sentencing commissions/councils have the capacity to develop sentencing guidelines which articulate consistency in a meaningful way thereby assisting in the pursuit of consistent sentencing practices.

The primary aim of this study is to highlight the weaknesses in Uganda's new sentencing guidelines and to make recommendations for the revision of these guidelines by incorporating what have been identified as good practices in other jurisdictions.

1.4 Scope and Methodology

There are of course other mechanisms such as sentencing information systems (SIS) as well as the use of appeal court guideline judgments and legislation, which may be used to deliver greater consistency in sentencing. However, because Uganda has specifically chosen sentencing guidelines, as the mechanism for structuring its discretionary sentencing this study is only concerned with examining how sentencing guidelines can best be deployed to effectively articulate consistency in sentencing and lead to more consistent sentencing practices. It will be all but impossible to evaluate the utility of Uganda Guidelines in reducing unwarranted disparities and promoting a principled approach to sentencing since no data has been collected on compliance. Moreover, so loose is the definition of consistency adopted by the guidelines, that they fail to provide a meaningful benchmark against which disparity might be measured. This study therefore makes no attempt to evaluate the guidelines or measure their impact on sentencing practice. Rather the study aims to assess the Uganda Guidelines effectiveness in providing an articulation of meaningful consistency and to provide proposals to improve and enhance the Guidelines in the light of international best practice.

The methodology adopted is as follows: two informal semi-structured interviews were conducted in Uganda with the Executive Secretary of the Uganda Sentencing Guidelines Taskforce in January and February 2014. The aim of the interviews was to provide an understanding of what

could have shaped the choices made by the Taskforce regarding the nature and content of Uganda Guidelines. The key purpose of the interview was to find out what shaped the choices made by the Taskforce about the binding nature of the Guidelines, the sentencing ranges, starting points and aggravating and mitigating factors. The dates of the interviews/discussions appear in the relevant footnotes of this study.

Given that the principal aim of this study is to offer an integrated set of proposals for the further development of Uganda's sentencing guidelines and statutory sentencing framework, the research is heavily grounded on critical analyses of guideline sentencing practices from other jurisdictions. Accordingly, the study examines primary and secondary sources of information including: legislation, sentencing guideline manuals and commentaries, official publications of sentencing commissions/councils such as their annual reports to the respective legislatures, sentencing commissions' meeting minute notes, compliance and departure statistics, and judgments of superior courts. The study also surveys secondary literature in the form of books, journal articles, newspaper articles, official speeches, and official websites.

The primary objective of this study is to make proposals for the revision of Uganda's sentencing guideline framework based on academic literature and experiences of guideline sentencing from other jurisdictions. To achieve this objective, the study adopts a comparative review approach involving guideline systems in a number of jurisdictions, so as to find good practices which can be of relevant application to Uganda. The comparative review is based on those guideline systems which have been identified by commentators such as Frase and Reitz as being the best established and most effective.

In the United States of America (US) Minnesota, Washington and North Carolina are given particular attention but other schemes in Virginia and the District of Columbia are also considered. These guideline systems comprise the oldest and most monitored sentencing guideline schemes in the US. Minnesota, in particular, attracts the biggest volume of literature on state sentencing guidelines. Secondly, the websites of the Commissions in these jurisdictions offer detailed and useful information a researcher requires to understand how these guideline systems operate. For example, information on historical developments, implementation and monitoring as well as on the composition structure and profiles of commission members is readily provided. Washington and North Carolina are selected, not only because they fall in the category of Minnesota as jurisdictions with well-established sentencing guideline schemes, but also because: (a) the Washington Sentencing Guidelines Commission (now the Washington Caseload Forecast) has produced guidelines that have eliminated unwarranted sentencing disparities, despite the Commission's advisory role and (b) North Carolina's perceptively restrictive sentencing guidelines attract high rates of compliance, which make the system a viable one for examination.

Reference is also made to the guideline systems of Virginia and the District of Columbia but only relatively briefly and primarily because they have adopted guideline systems which despite being voluntary, have achieved (at least according to the judicial compliance statistics) consistency in sentencing. The sentencing guideline scheme of England and Wales is examined because Uganda's legal system is based on the English legal system and most reforms in Uganda are grounded on English approaches. However, most importantly, England and Wales is selected because it is the only jurisdiction which offers a formal alternative to the US grid style

sentencing guideline model—the offence specific narrative approach. From time to time, examples are drawn from other jurisdictions such as Scotland, New Zealand, and South Africa.

This study identifies a number of key structural features of sentencing guidelines. The study then explores how these features have been developed in well-established sentencing guidelines systems in a way that enables the articulation meaningful consistency. It also considers how these features can be drawn upon to improve the Uganda Guidelines. The aim is not to discuss each and every aspect of each guideline system, but to identify those aspects that are critical to answering the research questions set out above. The structural features identified include: the extent to which guidelines are presumptive or voluntary; the definition of seriousness; the breadth of sentencing ranges; how aggravating and mitigating factors are taken into account; rules and standards for departures; the role of previous convictions, and the totality principle (sentencing multiple offences). In addition, the study makes proposals for the constitution and composition of a sentencing commission/council, and for the relationship between this body and the other key constituents in criminal justice. [17]

1.5 Outline of the Chapters

This study is set out in seven chapters. Chapter One is the introduction and covers the following issues: the statement of research, research problem, motivation for the study, scope and methodology of the study as well as the outline of the chapters. Chapter Two focuses on the nature of discretionary sentencing in Uganda. Uganda's statutory sentencing framework is

[17] See RS Frase, *Just Sentencing: Principles and Procedures for a Workable System* (Oxford University Press 2013). Also, K Reitz, 'Comparing Sentencing Guidelines: Do US Systems Have Anything Worthwhile to Offer England and Wales?' in A Ashworth and JV Roberts (eds.), *The Sentencing Guidelines: Exploring the English Model* (Oxford University Press 2013); A Von Hirsch, 'Structure and Rationale: Minnesota's Critical Choices' in A Von Hirsch, KA Knapp and M Tonry (eds.), *The Sentencing Commission and its Guidelines* (North-eastern University Press 1987).

discussed in detail in so far as it applies to the exercise of broad sentencing discretionary powers by Ugandan judges and magistrates. The author relies on a substantial body of empirical studies conducted in western jurisdictions and devoted to the investigation of sentencing inconsistencies to demonstrate that without sentencing guidelines, sentencing is likely to be inconsistent. In addition, in an attempt to provide prima facie support for the Chief Justice of Uganda's acknowledgement of the existence of disparities in Ugandan sentencing, a small number of defilement cases are reviewed and placed in Appendix A of this study.

Chapter Three deals with the evolution of sentencing guideline reform in Uganda. Three issues are focused on: the historical development of the guidelines, the distribution of sentencing authority in Uganda, which helps explain the choices made in the development of Uganda Guidelines and, the process of developing the guidelines. A brief overview of Uganda Guidelines is also offered as a background to chapters Four and Five. Chapter Four discusses in detail the major weaknesses in the Uganda Guidelines. The aim is to show that Uganda Guidelines have been modelled on a loose definition of consistency and that this has given consistency a meaningless function under the Guidelines. The chapter focuses on some key structural features of the Uganda Guidelines including the sentencing purposes, scaling of offence seriousness, the breadth of sentencing ranges, starting points, aggravating and mitigating factors, departures, the role of previous convictions and multiple offence sentencing.

Chapter Five focuses on the lessons that can be drawn from some selected common law jurisdictions to improve Uganda's sentencing guidelines. The author relies on literature review and a limited empirical analysis of guideline systems in selected common law jurisdictions, accompanied by an analysis of Uganda Guidelines to arrive at an integrated set of proposals for

the improvement of Uganda Guidelines. Chapter Six, makes a proposal for the establishment of a Sentencing Council for Uganda. Two issues are focused on: the nature of structural independence that is likely to best suit a Sentencing Council for Uganda and the relationship between the Sentencing Council and other key players in the criminal justice system. Although each chapter, where necessary, includes inbuilt recommendations, Chapter Seven draws the general conclusion and brings together all the major recommendations made in the study.

Chapter Two

The Nature of Discretionary Sentencing in Uganda

2.0 Introduction

Like in many other common law jurisdictions, sentencing in Uganda has traditionally been based on an individualised sentencing approach. This sentencing approach enables judges and magistrates (hereinafter 'Ugandan sentencers') to exercise a high degree of subjectivism in determining appropriate punishments for offenders. For instance, a Ugandan judge faced with an offender convicted of murder under sections 188 and 189 of the Uganda Penal Code Act ['hereafter the PCA 120'] or rape, aggravated robbery, treason, kidnap with intent to murder, terrorism and aggravated defilement[1]is permitted to determine an appropriate punishment by taking into consideration the individual circumstances pertaining to the given offence and the offender and determining how these circumstances impact on the severity of the offence. Also, the judge is permitted to weigh these unique circumstances against the main objectives of sentencing in order to impose a punishment that best achieves one or a multiple of punishment purposes that have been recognised over the years.[2] In other words, courts are permitted to individualise punishments in each criminal case by ensuring that punishments imposed are

[1] The Penal Code Act, Chapter 120 (Laws of Uganda 1950), ss 123 and 124 (rape), ss 285 and 286(2) (aggravated robbery), s 25 (treason), s 243 (kidnap with intent to murder), ss 129, 130 and 133 as amended by the Penal Code (Amendment) Act of 2007 (aggravated defilement) and The Anti-Terrorism Act 14 of 2002 (Laws of Uganda), s 6 (Terrorism).

[2] This principle has been recently stated in the case of *Uganda v Charles Sekamatte* Criminal Session Case No 170 of 2012 (20 September 2012). Also *Jackson Kalibobo v Uganda* Criminal Appeal No 45 of 2001 (5 December 2001), *Yanus Wanaba v Uganda* Criminal Appeal No 156 of 2001 (22 July 2003, reported in 2001-2005 HCB 252), *Attorney General v Susan Kigula and 417 Others* Constitutional Appeal No 03 of 2006 (21 January 2009).

tailored to fit the individual circumstances of each individual offence and offender.[3] However, since there has not been any guidance provided as to how individual circumstances weigh in across different cases, different sentencers end up weighing factors differently across different criminal cases. This, combined with broad maximum penalties prescribed by the criminal statutes leaves Ugandan sentencers with a broad scope of discretion in terms of sentence options they can impose within stretched out statutory maximum penalties. For instance, the PCA 120 prescribes the death penalty as the maximum sentence for all capital offences. This means that judges can impose whatever dispositional or durational sentence falling within the range of a community service order,[4] or probation, to a custodial sentence of any stipulated term including imprisonment for life up to the death penalty.

Similarly, the PCA 120 designates high maximum penalties for other non-capital offences, thereby setting wide boundaries for the exercise of discretion in sentencing for such offences. For example, when determining an appropriate punishment in cases involving theft, housebreaking, receiving stolen goods, to list just a few of them, magistrates are left with a relatively broad degree of discretionary power in arriving at an appropriate sanction.[5] Moreover, despite the significance surrounding the articulation of the purposes of punishment,

[3] See *Kigula* (n 2) 41. The Supreme Court held that: 'The process of sentencing a person is part of the trial, and it requires Court to take into account the evidence, the nature of the offence and the circumstances of the particular offence in order to arrive at an appropriate sentence'. See *Uganda v Thomas Nkurungira and Fred Ssempijja* Criminal Session Case No 0426 of 2010 (11 August 2011).

[4] Recently, a 24- year old woman, mother of three children, who pleaded guilty to murdering her husband of nine years was sentenced to three months of community service. The presiding judge, Justice Winifred Nabasinde of the High Court of Lira, reportedly said that: "the offender deserved mercy and support than punishment because her deceased husband had married her at an early age of 15 years and had infected her with HIV, the offenders' two children who were born with HIV needed their mother's care". see, H Apunyo, 'Husband Killer gets Community Service' The *New Vision* Newspaper (11 October 2014) < http://www.newvision.co.ug/news/660620-husband-killer-gets-community-service.html> (accessed 11 October 2014).

[5] PCA 120, ss 254 and 256 prescribes imprisonment of not more than 10 years as the maximum penalty for theft. The PCA 120, s 295 prescribes 7 years imprisonment as the maximum penalty for house breaking and receiving stolen goods. The PCA 120, s 314 prescribes 14 years imprisonment as the maximum penalty for receiving stolen goods.

Ugandan legislation does not explicitly articulate the objectives which are to be achieved from sentencing. Consequently, Ugandan sentencers are often left with the responsibility of answering the question of "why punish?" which some scholars like Spohn[6] have advised requires an answer before one can appropriately determine the type and quantum of punishment appropriate in any given case. Research on the subject has shown that the rationale of sentencing most likely provides direction to which sentencing factors are relevant for the determination of sentence.[7] Thus, the absence of any guidance on the question regarding why Uganda punishes inevitably leaves Ugandan sentencers with the freedom to exercise a high degree of subjectivism in answering this question.

Given that Ugandan sentencers are permitted to tailor punishments to fit the specific individual circumstances of each given offence and offender, without any rules to govern sentencing decision making, more often, sentencing in Uganda passes off as an unpredictable and inconsistent process. In confirmation of this perception, in August 2010, then Ugandan Chief Justice, Benjamin Odoki publicly acknowledged that: "judicial discretion has sometimes been exercised inconsistently leading to public outcry about injustices in the administration of justice"[8]The Chief Justice further noted that: "the severity of sentence imposed in a particular case was very much dependent upon the whims of individual judicial officers before whom an individual accused person appeared and this resulted in the different sentencing of seemingly similarly placed offenders.[9]Justice Benjamin Odoki accordingly appointed a Sentencing

[6] C Spohn, *How Do Judges Decide: The Search for Fairness and Justice in Punishment* (Sage 2002).
[7] AL Anderson and C Spohn, 'Lawlessness in the Federal Sentencing Process: A Test for Uniformity and Consistency in Sentence Outcomes' (2010) 27 Justice Quarterly 362, 364.
[8] BJ Odoki, 'Keynote Address at the Launch of the Constitution (Sentencing Guidelines) for Courts of Judicature (Practice) Directions, Legal Notice No 8 of 2013' (Kabira Country Club, Kampala, 10 June 2013).
[9] ibid 4.

Guidelines Committee to develop sentencing guidelines. The current Constitution (Sentencing Guidelines) for Courts of Judicature (Practice Directions), Legal Notice No. 8/2013 were therefore designed to principally curb discretion and reduce unwarranted disparities in Ugandan sentencing.

Against this background, this chapter sets out to provide a brief overview of the nature of Uganda's discretionary sentencing approach. This is important as it not only highlights the nature of the problem that Uganda's sentencing guidelines are intended to address, but also provides a prelude to the proposals for the development of a meaningful sentencing guideline framework for Uganda. The chapter begins with a discussion of the general understanding of the concept of judicial sentencing discretion, and then goes on to critically examine how the Ugandan statutory sentencing framework (at least theoretically) confers broad discretionary powers on Ugandan sentencers. Sentencing reform in other jurisdictions as well as in Uganda has been stirred by the need to curb discretion and reduce unwarranted sentencing disparities. Yet there is no empirical study undertaken in Uganda to demonstrate the link between the exercise of sentencing discretion and unwarranted disparities. Therefore, the author relies on a substantial body of empirical research conducted in western jurisdictions and devoted to the investigation of sentencing inconsistencies to demonstrate that without sentencing guidelines, sentencing is likely to be inconsistent. In addition, a small study based on 37 Ugandan defilement cases is undertaken, to provide prima facie support to the then Chief Justice of Uganda, Benjamin Odoki's acknowledgment of the existence of inconsistent sentencing in Uganda.

This study does not purport to demonstrate the existence of unwarranted disparities across Ugandan sentencing (as the study is methodologically limited by size and approach). However,

the study of 37 defilement cases provides prima facie support for the then Chief Justice's acknowledgement of the existence of disparities and provides some useful information about the range of sentencing for this offence. It attempts to show that without meaningful sentencing guidelines or guidance, sentencing is likely to be inconsistent. The chapter concludes by reinforcing the need for the development of a meaningful sentencing guideline framework for Uganda, which delivers a public account of meaningful consistency and enables an articulable understanding of Uganda's sentencing decision making process.

2.1 General Understanding of Sentencing Discretion

Discretion as a concept evokes a number of meanings depending on the context and perspective from which it is viewed.[10]From the sentencing perspective, its conception mainly connotes to the power of a sentencer to impose a penalty within broad statutory limits that are set by legislative rules and common law principles of sentencing.[11] Broadly speaking, sentencing decisions are influenced by a number of other key players in the criminal justice system.[12] One commonly occurring example relates to the implication of prosecutorial discretion on sentence outcomes. When exercising this discretion, the prosecution's decision over the type of charges to prefer against an offender has an influence on the kind or even quantum of punishment ultimately imposed on the offender. On the other hand, the correctional officials' decision on whether the offender is eligible for parole after serving a specified portion of his/her punishment ultimately determines the time served by an offender. Be that as it may, the scope of this study only extends

[10] K Hawkins, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in K Hawkins (ed.), *The Uses of Discretion* (Oxford University Press 1992) 12.
[11] SN Casey and JC Wilson, 'Discretion, Disparity or Discrepancy: A Review of Sentencing Consistency' (1998) 5 Psychiatry, Psychology and Law 237.
[12] A full discussion of how other key players in the criminal justice system influence sentencing decision making in Uganda is provided in chapter 3 of this study.

to the judges and magistrates' exercise of discretionary powers in determining an appropriate sanction for offenders in criminal matters. Accordingly, the concept of discretion will only be viewed as relating to the power and authority exercised by sentencers in arriving at their sentencing decisions.

Hawkins suggests that the way legal scholars understand discretion is different from the way it is conceived by social scientists.[13] The author argues that legal philosophers are concerned with the relationship between rules and discretion and the extent to which rules authorise discretionary behaviour, yet social scientists see discretion in terms of decision making.[14] The author notes that legal philosophers understand discretion in relation to a set of standards or rules, and accordingly construe discretion as a creation of statute, and a derivative of authoritative standards.[15] This implies that mostly from a legal analytical perspective, discretion is likely to be viewed in its abstractness and not by its practical application. This is consistent with the conceptualisation of discretion by some other scholars. For instance, Ronald Dworkin, one of the leading legal philosophers classified judicial discretion into strong and weak discretion, and the purpose was to make an argument that most discretionary powers are weak and not strong because the scope of discretionary powers is always constrained by legal rules.[16]

Using the metaphor of a hole in a doughnut, Dworkin argued that 'discretion does not exist except as an area left open by a surrounding belt of restriction'.[17] In Dworkin's view, discretion

[13] Hawkins (n 10) 13.
[14] ibid.
[15] ibid.
[16] SJ Shapiro, 'The Hart-Dworkin Debate: A Short Guide for the Perplexed' (2007) 77 Public Law and Legal Theory Working Paper Series, University of Michigan.
[17] ibid 1.

exists only to the extent permitted by legal rules, and his argument was that because there are legislative constraints which serve to limit the exercise of discretionary power, sentencing discretion is reasonably broad but it is not completely unfettered.[18] Accordingly, Dworkin' s argument was that sentencers only enjoy weak but not strong discretion. Other scholars like Gelsthorpe and Padfield[19] defined discretion as "the freedom, power, authority, decision or leeway of an official, organization or individual to decide, discern or determine to make a judgment, choice, or decision, about alternative courses of action or inaction". The definition by Gelsthorpe and Padfield suggests that judicial discretion is exercised within wide parameters. Accordingly, discretion could be understood to mean the exercise of the decision maker's individual free choice in arriving at a decision subject to constraints set by legislation. This by implication reflects discretion as mostly broad but not completely unconstrained.[20]

Using the example of South African judge, Justice Stegmann, Van Zyl Smit provided a new perspective to the conceptualisation of judicial discretion and the determination of the scope of its application.[21] The author notes that in interpreting the scope of their discretion under the Criminal Law Amendment Act of 1997, Justice Stegmann interpreted substantial and compelling circumstances to mean circumstances of an exceptional nature. This interpretation, Van Zyl Smit argues, narrowed rather than broadened the judges' scope of downward departures under the legislation because exceptional circumstances called for a higher standard of departure than substantial and compelling circumstances.[22] Briefly, under the South African Criminal Law

[18] ibid.
[19] L Gelsthorpe and N Padfield, *Exercising Discretion: Decision Making in the Criminal Justice System and Beyond* (Willan Publishing 2003).
[20] Casey and Wilson (n 11) 238.
[21] D Van Zyl Smit, 'Mandatory Sentences: A Conundrum for the New South Africa?' in C Tata and N Hutton (eds.), *Sentencing and Society: International Perspectives* (Ashgate 2002).
[22] ibid.

Amendment Act, 1997, mandatory minimum sentences had been legislatively prescribed for serious offences such as rape and murder. The 1997 Act allowed courts to depart from the mandatory minimum sentence if they found substantial and compelling reasons that justified a sentence below the mandatory minimum sentence prescribed by the Statute. Although the judges had the choice of developing jurisprudence that broadened the scope of their discretion to depart from the mandatory minimum sentences, the judges instead interpreted the departure standard very restrictively, thereby narrowing their departure powers.

The South African approach suggests that even within broad statutory limits, sentencers can choose to define the scope of their discretion, narrowly. This argument appears to provide some support to scholarship that has suggested that sentencers sometimes have a 'going rate' for custodial sentences in given cases.[23] Nevertheless, following on the literature on the subject, the scope of interpretation of the extent of discretionary power is often constrained by legal rules and principles that define the broader limits of discretion. Hence, sentencing discretion is not completely unfettered, but its scope of application is often broad. Because of this, its exercise has been characterised as lawless, unpredictable, disorderly and capricious.[24]

Discretion from a sociological perspective does not entail the exercise of individual free will. However, the exercise of discretion is socially structured.[25] Baumgartner notes that the exercise of judicial discretion is not as broad as legal scholars sometimes want to portray it, but is structured by social and organisational structures. Baumgartner argues that discretion is far from

[23] see, e.g., CGB Nicholson, *The Law and Practice of Sentencing in Scotland* (W Green & Sons 1981).
[24] Hawkins (n 10) 12-13.
[25] M Baumgartner, 'The Myth of Discretion' in K Hawkins (ed.), *The Uses of Discretion* (Oxford University Press 1992).

unpredictable and it is therefore clear, patterned and consistent.[26] This is because in her view decision makers do not base their decisions on unknown peculiarities of individual cases but on general constructions which are influenced by a number of factors including social conditions and internal organisations.[27] Baumgartner's view tends to be in contradistinction with the legal rational approach that views the exercise of discretion as inconsistent, unpredictable and irrational. The author's view suggests that decision makers do not exercise as much discretionary power as legal scholars suggest. According to the author, discretionary outcomes are highly predictable and grounded on social conditions.

Critics of discretionary sentencing like Marvin Frankel were sceptical of sentencers' exercise of unstructured sentencing discretion. Frankel was particularly concerned about the degree of discretion that was given to judges under the indeterminate sentencing system, which he maintained led to lawlessness in sentencing.[28] Criticism of unfettered discretion often follows from the absence of sufficient structures and coherence in the exercise of sentencing discretion. Some scholars like Miller portrayed sentencing as 'a mysterious and hidden process of decision making'.[29] Also, Tata noted that because the sentencing decision making process is not grounded on explicable reasoned explanations, many view its lack of openness and or accountability as unjust.[30] This study takes the view that sentencers exercise broad discretionary powers at least theoretically, which is not necessarily unfettered but is so wide as to permit a degree of arbitrariness in sentencing decision making. Although it is likely that sentencing discretion is

[26] ibid 129.
[27] ibid.
[28] M Frankel, 'Lawlessness in Sentencing' (1972) 41 University of Cincinnati Law Review 1.
[29] M Miller, 'Guidelines Are Not Enough: The Need for Written Sentencing Opinions' (1989) 7 Behavioral Science and the Law 3.
[30] C Tata, 'Accountability for the Sentencing Decision Making Process: Towards a New Understanding', in C Tata and N Hutton (eds.), *Sentencing and Society* (Ashgate 2002) 399, 400.

socially structured by organisational norms or internal social practices within the courts,[31] the fact that there are no sufficient benchmarks for articulating this structure leads one to question the veracity of this argument.

That said, it is incontrovertible that the exercise of judicial sentencing discretion is axiomatic to the administration of criminal justice.[32]However, when exercised without restraint, it is often linked to widespread sentencing disparity. To begin with its undeniable relevance, the exercise of judicial discretion is necessary from the point of view that each criminal case is unique in its own way, and that no two criminal cases are alike. If one is to agree with the axiom that offences and their offenders differ enormously, then it would be necessary to accept the argument that each offence and offender requires to be responded to in a different way, and the only logical way in which this can be done is through bestowing sentencers with broad discretionary power which would provide sentencers with the flexibility to take into consideration the idiosyncrasies of any particular case.[33] Otherwise, similarly treating crimes and offenders that are broadly different would undermine the widespread agreement that a fair (and therefore just) criminal justice system should limit unwarranted disparities in sentencing.[34] More so, the notion that fairness in sentencing calls for individualisation of sentences to fit particular circumstances of a given case

[31]D McBarnet, *Conviction: Law, State and the Construction of Justice* (Martin Robertson 1981).
[32] Even strong critics of judicial sentencing discretion, conversely, supporters of structured approaches to sentencing recognise that a degree of judicial discretion is necessary when dealing with atypical cases. That is why, departures from guideline ranges are allowed in some circumstances, even in sentencing guideline frameworks that are considered strongly restrictive of the exercise of judicial discretion.
[33] SL Sporer and JG Delahunty, 'Disparities in Sentencing Decisions', in S Bieneck, ME Oswald, JH Heinemann (eds.), *Social Psychology of Punishment of Crime* (Wiley-Blackwell 2009) 379.
[34] BD Johnson, 'Sentencing' in M Tonry (ed.), *The Oxford Handbook of Crime and Criminal Justice* (Oxford University Press 2011) 696.

and offender is considered one of the fundamental premises of a just sentencing system.[35] In this regard, some scholars like Casey and Wilson[36] have suggested that the exercise of judicial discretion generally enables the sentencers to interpret the law and extend its scope to the complexities of facts of each case. In other words, the exercise of judicial discretion facilitates the individualised application of abstract legal rules to specific real life cases.

However, the exercise of broad discretionary powers, inextricably allows for unpredictability, uncertainty, arbitrariness, capriciousness, and all other things that denote to disorderliness.[37] Some critics like Judge Marvin Frankel suggested that the exercise of unconstrained judicial discretion leads to lawlessness in sentencing.[38] In the same breadth, a number of studies have shown that unconstrained judicial discretion is inextricably linked to unwarranted sentencing disparities.[39]Accordingly, the competing relevancies of exercising individualisation against encouraging consistency in sentencing, have led some scholars to conclude that 'individualism and consistency are two fundamental, but competing notions of a fair sentencing system'.[40] As a result of this tension, and particularly concerns at least in some part, about lawlessness in sentencing resulting from the exercise of unfettered judicial discretion, a number of western jurisdictions have witnessed a wave of sentencing reforms attempting to structure judicial discretion.

[35]See, e.g., S Krasnostein and A Frieberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 10 Law and Contemporary Problems 265.
[36] Casey and Wilson (n11) 237.
[37]See, e.g., Anderson and Spohn (n 7) 362. Also, HJ Albrecht, 'Sentencing and Disparity: A Comparative Study' (1996) 2 European Journal on Criminal Policy and Criminal Research 98; A Lovegrove, *Judicial Decision Making, Sentencing Policy and Numerical Guidance* (Springer-Verlag 1989).
[38] M Frankel, *Criminal Sentences* (Hill and Wang 1972).
[39] see, e.g., the studies examined in section 2.3 of this chapter.
[40] see, Krasnostein and Frieberg (n 35) 265.

2.2 An Overview of the Nature of Discretionary Sentencing in Uganda

The Supreme Court of Uganda has developed jurisprudence that emphasises an individualised approach to sentencing. Similarly, the same Court has continued to encourage the equal treatment of similarly placed offenders. For example, the judgments emanating from *Kalibobo Jackson v Uganda*[41] and *Yanus Wanaba v Uganda*[42] set expectations of individualisation and consistency in Ugandan sentencing. In the cases of *Kalibobo* and *Wanaba*, the Supreme Court stated that: "...sentences must fit the offence and the offender while maintaining the uniformity of sentence..." In the later judgment of the Supreme Court of Uganda in the landmark case of *Susan Kigula and 417 Others v The Attorney General of Uganda*,[43]which held the mandatory death penalty in Uganda to be unconstitutional, the importance of individualised sentencing in Uganda was further emphasised. In the *Kigula* case, the Supreme Court held that:

> 'imposing a sentence of death merely because the law directs the Court to do so is an intrusion by the legislature into the realm of the Judiciary ....by doing this, the Court is denied the exercise of its function to individualise punishments because the sentence of death has already been pre-ordained by the legislature.[44]

The judgment in the *Kigula* case and judgments in other cases have consistently emphasised the individualistic approach to sentencing in Uganda and its fundamentality. Accordingly, justice in Ugandan sentencing is supposedly achieved when punishments are imposed in a manner that enables them to fit the facts and circumstances of a specific case.

[41] *Kalibobo* (n 2).
[42] *Wanaba* (n 2) 252. See also, Odoki, 'Keynote Address' (n 8).
[43] *Kigula* (n 2).
[44] ibid 41.

The other predominant tradition in Ugandan sentencing is the eclectic approach to sentencing that permits sentencers to exercise their individual judgment in determining the appropriate purpose of punishment in each given case. Ugandan criminal statutes are generally silent on the purposes for which punishment is intended to serve. One exception is the Uganda Prisons Act 17 of 2006 which has prescribed objectives that the Uganda Prison Services should seek to achieve when implementing individual sentences passed by the courts, which are: protection of the society; reintegration; social rehabilitation and reformation of the offender.[45]Clearly, the objectives stipulated in the Uganda Prisons Act are for purposes of implementing individual sentences. As a result, a number of sentencing purposes have been recognised in Ugandan jurisprudence including, among others: specific and general deterrence (sometimes enounced under the need for protection of society), rehabilitation, reformation, punishment (or retribution) and incapacitation. For example, in the *Kalibobo case* the Court stated that: 'courts have a duty to protect society, especially members of society who are vulnerable, by deterring culprits like the offender from committing future crimes'.[46] In a more recent High Court decision of *Uganda v Jenesio Okorboth* the Court stated that: 'the purpose of the law is to protect weak, defenceless children. This purpose is to be achieved by imposing punishments which keep culprits like the offender out of circulation long enough to teach them a lesson and to reform them'.[47] In this case, the Court used deterrence, incapacitation and reformation as the justifications for punishing the offender.

In another High Court decision in *Uganda v Swaibu Kikonyogo* the Court imposed a penalty that would achieve deterrent purposes. The Court stated: 'a crime committed by a father on his own

[45] The Prisons Act No 17 of 2006 (Laws of Uganda), s 3.
[46] *Kalibobo* (n 2).
[47] Criminal Session Case No 056 of 2008 (07 September 2009). The offender was 41 years of age, married with six children. He was convicted of having unlawful sexual intercourse with a girl suffering from a mental illness and aged 11.

baby daughter was a heinous one and warrants a deterrent sentence'.[48] In yet another case involving a young man, Court said: "I note that the convict is a young man capable of reform and hanging (referring to the death penalty) does not amount to reform".[49] In this case the court imposed a sentence that would serve to achieve reformation goals.

Retribution, sometimes referred to as punishment is also one of the purposes of sentencing which Ugandan courts have consistently pursued when determining appropriate punishment. For example, in the judgment of the Supreme Court of Uganda in *Tinkamalirwe v Uganda* the Supreme Court implicitly acknowledged punishment as a penal justification. The Court noted that: '...the circumstances of the offence merit severe punishment...'[50] This suggested that owing to the nature of the offence, the penalty imposed needed to be proportionate to the gravity of the offence. Given that the purposes of sentencing recognised in Ugandan jurisprudence emerge from fundamentally different schools of thought, their aims are often conflicting. Since the onus is left on the Ugandan sentencer to weigh the relevance of the competing aims of punishment against the circumstances of individual cases and offenders when deciding on the most appropriate penalty to impose, even in cases where sentencers adopt the same sentencing purpose, the difference in emphasis placed on divergent sentencing purposes is likely to have an implication on sentence outcome. Casey and Wilson note that sentencing inconsistency is likely to be precipitated by the absence of information on what works.[51] The authors note that most sentencers have the desire to impose punishments that will reduce the likelihood of future reoffending (despite new empirical studies that have questioned the deterrent effects of criminal sanctions), and others have their own individual preferences for certain sentencing purposes.

[48] *Uganda v Swaibu Kikonyogo* Criminal Session Case No 23 of 2002 (21 March 2002).
[49] *Uganda v Moses Bwire* Criminal Session Case No 56 of 2010 (19 April 2011).
[50] *Serapio Tinkamalirwe v Uganda* Criminal Appeal No 27 of 1989, reported in (2002) IV KALR 20.
[51] Casey and Wilson (n 11).

A number of empirical research studies on consistent sentencing have provided evidence linking inconsistent sentencing to differences in philosophical ascriptions of judges. For example, John Hogarth's study of sentencing outcomes of over 200 Canadian judges empirically justified the view that a lack of agreement as to the purposes that punishment should serve, coupled with absence of information and evidence on the effectiveness to achieve these punishment purposes accounts for the variation in sentence outcomes imposed by different judges.[52] Hoffer, Blackwell and Ruback also confirmed the view that philosophical differences among judges have implications on sentence outcomes.[53]Although the new developments of hybrid sentencing theories such as limiting retributivism which justify the use of retributive proportionality as a primary rationale for determining sentence severity and enable the utilisation of other penal philosophies within retributive limits, have managed to moderate the potential conflicts created when each penal philosophy is singly applied. Otherwise, without such hybrid theories, the possibility for inconsistent sentencing is eminent. Casey and Wilson note that in order to maintain consistency in sentencing, sentencers ought to operate within a sentencing framework that reduces the possibilities for variations in sentence outcomes.[54] On the other hand, Von Hirsch[55] observed that the articulation of a primary rationale for sentencing ensures greater consistency in sentencing in the sense that it determines what features of the offence and the offender ought to be emphasised in the determination of punishment.[56]Therefore, although punishments can be imposed to serve different goals, the fact that these punishment purposes

[52] J Hogarth, *Sentencing as a Human Process* (University of Toronto Press, 1971) 6.
[53]PJ Hoffer, KR Blackwell and BR Ruback, 'The Effect of the Federal Sentencing Guidelines on Inter Judge Sentencing Disparity' (1999) 90 Journal of Criminal Law and Criminology 239.
[54] See Casey and Wilson (n 11) 238.
[55]A Von Hirsch, 'The Sentencing Commission's Functions' in A Von Hirsch, KA Knapp and M Tonry (eds.), *The Sentencing Commission and its Guidelines* (North eastern University Press 1987) 10.
[56]ibid.

conflict within and across each other means that their application without an explication of a primary predominant rationale is more likely to elevate the occurrence of sentencing inconsistencies.

Like in many other common law jurisdictions, sentencing law and practice in Uganda permits sentencers to tailor sentences to fit individual offender and offence characteristics. Indeed the Ugandan legislators have not interfered with this notion of sentencing. Instead, the legislature has stopped at drafting laws which theoretically at least, confer reasonably broad discretionary powers on the Ugandan sentencers. The principal sentencing legislations including the Trial on Indictment Act, Chapter 23[57] ('herein after the TIA 23') and the Magistrates' Courts Act, Chapter 16[58] ('herein after the MCA 16') embody loose phrases that leave Ugandan sentencers with broad discretionary powers to make sentence choices. The TIA 23 is one example of the legislations that use 'loose' vocabulary to confer discretionary sentencing powers on judges. The TIA 23 is the law that sets out (among other things) the sentencing powers of High Court judges and it provides mainly the procedure of trying and hearing capital cases in Uganda. Part I, section 2 (1) of the TIA 23 provides that: 'The High Court *may* pass *any* lawful sentence combining *any* of the sentences which it is authorized by law to pass'.[59]

This provision prima facie confers very wide discretionary powers on the High Court judge, to impose whatever dispositional or durational sentence she or he deems fit from a wide range of sentence options, provided the sentence chosen by the judge is lawful. That is, provided it falls

[57] The Trial on Indictment Act Chapter 23 (Laws of Uganda 1971, as amended by Act No 23 of 2008) is an Act that consolidates the law relating to the trial of criminal cases in the High Court. The High Court is the only Court that has unlimited original jurisdiction to try and hear capital cases as well as all other non-felony cases.
[58]The Magistrates Courts Act Chapter 16 (Laws of Uganda 1971, as amended by Act No 7 of 2007) is an Act that consolidates the law relating to the trial of criminal cases in the Magistrates Courts. Magistrates in Uganda do not have jurisdiction to try and hear cases for which the death penalty is prescribed as the maximum penalty.
[59] Emphasis added.

within the confines of the legal rules. Although the use of the phrase 'which it is authorized by law to pass' conforms with the argument that the exercise of sentencing discretion is constrained by legal rules, it is redundant in practice because the High Court is authorized to pass any lawful sentence up to a death sentence.[60] This provides broad sentencing options for sentencers. To give just one example, if the judge is determining sentence in a murder case, his/her limit of discretionary power will be the death penalty.[61]Accordingly, a judge will have the option of sentencing an offender to any sentence within the broad statutory limits including the death penalty, life imprisonment,[62] any length of custodial sentence, or even other dispositions such as community service or probation.

The other commonly used phrases in the sentencing statutory framework which suggest the exercise of broad discretionary sentencing powers by Ugandan sentencers are enunciated as: 'may' or 'as the court thinks fit'. These phrases at least from a legal theoretical perspective leave the Ugandan sentencers with open authority to interpret the scope of their discretionary powers. In addition, such phrases leave the sentencers with a relatively wide degree of discretion to (a) determine which characteristics of the cases before them warrant more attention than others and (b) what relevance and weight to attach to each characteristic. The sentencers are also left with discretion to interpret myriad competing sentencing principles embodied in legislations and jurisprudence and to determine their application to specific cases. In other words, the loose language used in the sentencing statutory framework enables Ugandan sentencers to exercise a

[60]The High Court is not authorised to pass any sentence amounting to torture, inhuman or degrading treatment since this is prohibited by the Constitution. See, The 1995 Constitution of Uganda, article 24. Examples of punishment held as amounting to inhuman or degrading treatment in Uganda include corporal punishment and banishment. See, *Simon Kyamanywa v Uganda*, Constitutional Reference No 10 of 2000 (14 December 2001) and *Salvatori Abuki and Another v Attorney General* Constitutional Petition No 02 of 1997 (12 June 1997).

[61] See PCA 120, s 189.

[62]This means a whole life order. In the case of *Stephen Tigo v Uganda* Criminal Appeal No 170 of 2003 (22 March 2009). The Supreme Court clarified that life means the whole natural life of an offender.

high degree of subjectivism over a multitude of issues during the sentencing decision making process.

The TIA 23, section 98 of and the MCA 16, section 133(2) confer on courts, broad discretionary powers to make such inquiries as the courts consider necessary, before arriving at their sentencing decisions. These sections provide that:

> the court before passing any sentence may make such inquiries as it thinks fit in order to inform itself as to the proper sentence to be passed, and may inquire into the character and antecedents of the accused person.

Although the foregoing provision does not place any binding obligations on the courts to make inquiries as to the character and antecedents of the offender, Ugandan case law has developed to the effect that making such inquiries is fundamental to the determination of an appropriate sentence. In the judgment of *Uganda v Katende Kasmoni*, court held that 'courts oughtto make inquiries into the accused's character and antecedents before arriving at their decisions'.[63] Ayume[64] also seemed to agree that any court dealing with the assessment of an appropriate sanction had to fully inform itself of the offender's personal history and antecedents. Other legislations such as the Community Service Act chapter 115, section 3 and the Probation Act chapter 122, section 2, permit the courts to take into account the character and antecedents of the offender before determining the offender's eligibility form a community service order or probation respectively.

[63] *Uganda v Katende Kasemoni* Criminal Session Case No 2 of 1999 (25 august 1999).
[64] FJ Ayume, *Criminal Procedure and Law in Uganda* (Longman Kenya Ltd 1986) 154.

The above provision leaves sentencers with broad discretionary powers to exercise individual judgment on what ought to be encompassed within the two broad considerations of character and antecedents. The statutory framework does not provide guidance on what constitutes character and antecedents. Ugandan jurisprudence on the subject is not concrete. Johnson J, in the case of *R v Gent* said that, good character could mean a clean criminal record or simply an offender's good works and contributions to the community.[65]Additionally, the weight to be attached to good character may vary according to the nature of the offence committed. The ambiguity about the expression character opens room for a highly subjective interpretation of the law, and creates greater room for exercise of discretionary powers. For example, the Ugandan courts have interpreted the expression character to mean different things under different circumstances. For instance, in the case of *Livingstone Kakooza v Uganda*, the judge interpreted the offender's failure to show the slightest remorse for killing his own mother as an expression of his hardened character, even though the offender was a first offender.[66] In this case, the lack of remorse for killing one's own mother was interpreted as bad character and it was used as a factor aggravating the offender's sentence. Moreover, in an earlier case of *Mattaka v Republic*[67]the Court of Appeal for East Africa held that: 'an offender did not have to show remorse in order to expect leniency from the Court'.

In another case of *Sula Kasiira v Uganda* the Court of Appeal observed that:

> the offender who was a police officer but had engaged in aggravated robbery instead of enforcing the law and protecting people and their property against criminals had displayed

[65] *R v Gent* NSWCCA 370 (2005).
[66] *Livingstone Kakooza v Uganda* Criminal Appeal No. 3 of 1993 (20 February 1994, reported in 1994 KALR 18).
[67] [1971] EA 495.

bad character which made the sentence of 10 years imprisonment imposed on him appropriate.[68]

In this case, bad character was interpreted contextually, in that because the offender had undermined society's expectations of him as a police officer, he had displayed bad character and accordingly the 10 years prison term was an appropriate sentence. In another case of *Uganda v Balikamanya Patrick*, the High Court took into account the fact that the offender was a member of the military forces of Uganda, a profession which is renowned for its high levels of discipline as a factor that portrayed bad character on the part of the offender.[69] This was consistent with the observations made in the *Kasiira* case. Antecedents is also interpreted as widely as can be conceived.[70] It is certainly wide enough as to include all aspects, favourable and unfavourable, to an offender's background, past life, personal, family, social, employment and so many other things. The determination of the relevance and impact that character and antecedents of an offender have on the severity of sentence is left on the courts.

It has long been recognised that sentencing decisions can be influenced by both legal and extra legal factors, and both these categories of sentencing factors account for the diverse range of penalties handed down. Hoffer, Blackwell and Ruback distinguished between legally relevant and extralegal factors by defining legally relevant factors as those which are linked to the attainment of a sentencing purpose, whilst extra-legal ones were defined as those which are

[68] [1994] V KALR 115.
[69] *Uganda v Patrick Balikamanya* Criminal Case No 025 of 2012 (9 January 2014).
[70] In the case of *R v Vallet* [1951] 1 All ER 231, 232, Lord Goddard said that that the word antecedents is so wide as to include all aspects, favorable and unfavorable to an offender's background, past life, family, socio- economic status like employment, vocational circumstances, current way of life and inter action with the lives and welfare of others.

based on legally impermissible grounds that are irrelevant to the purpose of sentencing.[71] A number of scholars have argued that unwarranted disparity in sentencing is commonly associated with the consideration of extra-legal factors at sentencing. Schulhofer, for example notes that disparity in sentencing is justified by real differences in culpability or other penologically relevant factors but unjustified if irrelevant extra-legal factors are considered to arrive at a different sentence for similarly placed offenders.[72] Bushway and Piehl argue that disparity is warranted if the variation in sentence outcome is due to legally relevant factors, such as criminal history, crime type and crime severity.[73] The authors agree and further emphasise that sentence variation based on irrelevant legal factors such as gender and race, amounts to unwarranted disparity. Consistent with other scholars, Spohn avers that unwarranted disparity, which the author views as discrimination exists when legally irrelevant offender characteristics affect the sentence that is imposed after all legally relevant variables are taken into consideration.[74]

Again, the provisions of the TIA 23, section 98 and the MCA 16, section 133(2) leave Ugandan sentencers with broad discretionary powers to determine the relevance and impact of extra legal factors at sentencing. The TIA 23, section 119 (1) also permits Courts in the exercise of their powers to determine whether to impose a conditional discharge, or caution on the offender, to 'take into consideration the offender's antecedents, character, age, mental health, or the trivial nature of the offence or any other extenuating circumstances'. The determination of triviality is left on the sentencer. The statutory provision goes further to permit the courts to consider any other extenuating circumstances. Clearly, the statutory sentencing framework leaves broad

[71] Hoffer, Blackwell and Ruback (n 53) 242, 243.
[72] SJ Schulhofer, 'Assessing the Federal Sentencing Process: The Problem is Uniformity not Disparity' (1992) 29 American Criminal Law Review 833.
[73] SD Bushway and AM Piehl, 'Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing' (2001) 35 Law and Society Review 734.
[74] Spohn (n 6) 129.

discretionary powers on the sentencers to determine severity of sentence based on any factors including, gender, ethnicity, social and employment factors which creates room for apportionment of different weight to the myriad factors that a sentencer may deem relevant to the case.

The legislations do not provide any form of guidance on the criteria to adopt in assessing the impact myriad extenuating circumstances should have on severity of sentence. The sentencer is left with the discretion to make individual assessments of the weight to attach to different individual circumstances. The convict's character, criminal history and antecedents are a major guiding determinant of sentence outcome in Uganda and the sentencer is encouraged to make inquiries in that regard as well. However, the relevant criminal law does not offer any guidance on what form the inquiries should take and which characteristics and antecedents weigh favourably as mitigating or aggravating factors. This leaves the sentencer with a wide range of factors to choose from including but not limited to the offender's past life, personal, family, social, employment and vocational circumstances, period spent on remand and age. The availability of a wide range of legal and extra legal factors to choose from is likely to increase the occurrence of inconsistent sentencing since different judges will apportion different weight to similar and differing circumstances. This is worsened by the wide range of sentencing options which range from caution[75], community service[76], probation[77], conditional discharge[78], fine,[79]

[75]The TIA 23, s 119(1) permits the High Court to discharge an offender if 'after taking into account the offender's antecedents, character, age, and mental health, or the trivial nature of the offence or any other extenuating circumstances, the court finds it inexpedient to inflict any punishment'.

[76] The Community Service Act Chapter 115 (Laws of Uganda 2000), s 3 (1) permits the Court where a person is convicted of a minor offence, to (instead of sentencing that person to prison) make a community service order, and before passing a community service order, to consider the circumstances, character and antecedents of the offender and ask him or her whether he or she consents to the order.

any custodial term ranging from as low as one month imprisonment (for contempt of court contrary to PCA 120, section 107) to life imprisonment and the death penalty.

The only exception is that a sentence of death can only be imposed in capital cases by a judge in the High Court, but even then, the process of determining whether or not to impose a sentence of death is highly discretionary. In addition, sentencers discretion is rarely constrained by mandatory minimum or maximum sentences in Uganda. The *Kigula* case ended the era of mandatory penalties when the mandatory death penalty was abolished. Most offences are prescribed a maximum penalty but not mandatory punishments. Also, mandatory minimum penalties are not common. For example, before corruption related offences were amended by the Anti Corruption Act, No 6 of 2009, out of over three hundred and sixty offences created by the PCA 120, only three offences had a prescribed mandatory minimum sentence of 3 years imprisonment These were: (1) Embezzlement which was formerly created under PCA 120, section 268. (2) Causing financial loss created under the PCA 120, section 269 and (3) Exportation without a licence created under the PCA 120, section 318. However, after the promulgation of the Anti Corruption Act in 2009, the mandatory minimum sentences for embezzlement and causing financial loss were scrapped, thereby leaving one offence under the PCA 120 with a mandatory minimum sentence.

[77]Probation Act Chapter 122 (Laws of Uganda, 1963), s 1(a) permits the court to make a probation order where a person has been convicted of any offence the sentence for which is not fixed by law. (Jurisdiction is conferred upon the High Court and Magistrates of all grades).

[78]TIA 23, s 120 (1) permits the Court where a person is convicted by court to (instead of passing sentence) discharge the offender upon him or her entering a recognizance of a sum of money determined by the court with or without sureties that he will appear and receive judgment when called upon within twelve months and that during the period of discharge, he will keep the peace and be of good behaviour'. The discharge is abdicated if the offender reoffends within the twelve months period.

[79]TIA 23, s 110(a) permits the Court to take into account among other factors, the means of the offender so far as they are known to the court…'

The PCA 120 also does not provide definitive classifications of offences. Instead, it creates broadly defined offences hence leaving Ugandan sentencers with broad discretionary powers to make subjective assessments of seriousness of cases. For example in a case of housebreaking, which is committed when a person breaks and enters into a building, tent or vessel used as a human dwelling with intent to commit a felony[80] in it, the determination of seriousness for purposes of determining sentence severity may vary depending on several factors. These include whether the house breaking was planned, whether a high value property was stolen, or simply an opportunistic break in where low value property was stolen. Nonetheless, variations in perceptions of seriousness of particular offence types may, as previous research has suggested result in variations in sentence outcomes for similarly placed offenders. For example, Maguire in her study of consistency in Irish sentencing found that judges who imposed the most severe penalties tended to view the offence more seriously than those who tended not to regard the offence as particularly serious, and this difference in perceptions obviously resulted in variations in sentence outcomes for similarly placed offenders.[81]

The TIA 23, section 108(1) and the MCA 16, section 178(1) state that: 'a person liable to imprisonment for life or any other person may be sentenced to a shorter term.' This section also, explicitly confers on Ugandan sentencers wide discretionary powers to determine whether a given case warrants a more lenient sentence, than another based on the unique circumstances of each case. The implication is that the sentencers may choose to impose a much more lenient sentence on some offenders than on others who have committed the same offence. Given that there is no doctrinal justification for considering what constitutes relevant and important mitigating factors that would warrant a Ugandan sentencer to impose a shorter sentence in

[80] PCA 120, s 295(1) (a).
[81] N Maguire, 'Consistency in Sentencing' (2010) 2 Judicial Studies Institute Journal 14.

substitution for a longer custodial term, the sentencers exercise individual value judgments in arriving at these decisions. As a result, variations in sentences are likely to occur which are not reasonably explicable by legally relevant sentencing factors. Nevertheless, the requirement that sentencers make note of: 'the sentence passed together with the reasons for the sentence when there are special reasons for passing a particular sentence'[82]provides some form of redress, in that in the event of a review of sentence, the Appellate court will be able not only to correct the particular sentence under review, but also provide some guidance as to the appropriate sentences for particular types of sentences. Be that as it may, although the appellate system provides mechanisms for controlling the exercise of judicial sentencing discretion, the extent of control by an Appellate court is dismal, in that not every case is appealed, and appeals are ordinarily against decisions imposed for serious offences.

The other important aspect of sentencing which is not adequately regulated is the role of previous convictions at sentencing. Francis Ayume,[83]who was one of Uganda's leading sentencing scholars once posited that 'it is difficult to see how the court can hope to arrive at the appropriate sentence without informing itself fully on the accused's personal history'.[84] Indeed, whilst making inquiries about the offender's antecedents during sentencing proceedings, the Ugandan sentencers as a matter of principle often inquire from the prosecution about the offender's prior criminal history. Although in some judicial reasoning the sentencer will make mention of the offender's criminal record, either to portray the offender's dangerousness or simply to show that there is a lapse in the offender's behaviour, it is often difficult to articulate the weight that the sentencers attach to previous convictions or their absence. The sentencers are

[82] TIA 23, s 86(4) and the MCA 16, s 136(5) respectively.
[83]Ayume (n 64) 154.
[84] ibid.

left with wide discretionary powers to determine the weight and relevance of an offender's previous convictions to the severity of the offender's sentence for the current offence. The Supreme Court of Uganda has offered some guidance that 'maximum penalties should not be imposed on first time offenders'.[85]However, this is the extent of the guidance. Sentencers are left with power to determine the scope of enhancement in sentence as a result of an offender's prior convictions. Although some guidance is provided with respect to habitual offenders under the Habitual Criminals (Preventive Detention) Act, chapter 118. However, this Act applies to a small category of offenders, who are defined in the Act as persons with three previous convictions since attaining the age of sixteen, provided by the time they commit the new (fourth) offence, they are over thirty years of age.[86] It is worth noting that even the determination of a sentence intended for preventive detention purposes involves the exercise of wide discretionary powers, as the sentencers are permitted to impose sentences ranging from five to fourteen years imprisonment.[87]

Thus, from the discussion above, and so many other statutory examples, it is deducible at least theoretically that a wide breadth of discretion is conferred on Ugandan sentencers. This means that sentencers have a wider range of sentencing options, and can legitimately adopt different sentencing approaches when sentencing the same case. In addition, sentencers are at liberty to determine and weigh the relevance of multitude sentencing factors in each individual case. The lack of legislative guidance and the inherent weaknesses in the Ugandan Appellate review system does little to ensure that sentencing inconsistencies are minimised. The decisions of the Court of Appeal and the Supreme Court of Uganda have done little in structuring judicial

[85]*Livingstone Kakooza v Uganda* [1994] KALR 18, the Supreme Court reduced the sentence of a first time offender from life imprisonment to 10 years imprisonment saying that the sentence of life imprisonment was manifestly excessive for a first time offender, and noted that maximum sentences should not be imposed on first time offenders.
[86] Habitual Criminals (Preventive Detention) Act Chapter 118 (Laws of Uganda, 1951) s 1.
[87] ibid, s 1(1) (b).

discretion. Just to give one commonly recurring issue —the role of previous convictions at sentencing, the Court of Appeal and the Supreme Court have a number of times emphasised that maximum penalties should never be imposed on a first offender.[88] However, little is done to provide more explicable guidance on how this significant sentencing factor is to be dealt with. Another challenge concerns the volume of criminal cases that make it to the Court of Appeal and the Supreme Court.

Accordingly, Ugandan sentencers exercise wide discretionary powers in sentencing which are only moderately confined by legislature mainly through stretched out statutory maximum penalties. That said, this assertion is mindful of the arguments that the exercise of judicial discretion is sometimes structured by internal organisation norms.[89] Be that as it may, this study is motivated by the desire to find a set of proposals for the improvement of Uganda's sentencing guidelines in terms of their potential to meaningfully articulate consistency in sentencing. Accordingly, whether the exercise of judicial sentencing discretion is plausibly socially structured, the mysteriousness and obscurity with which the exercise of sentencing discretion is enjoyed under an individualised sentencing approach, makes it hard for consistency to be publicly articulated.

[88] see, e.g, *Sekamatte* (n 2). The Court of Appeal held that the maximum sentence of death was not warranted for a convict who was a first offender. In another case of *Livingstone Kakooza v Uganda*, Supreme Court Criminal Appeal No. 17 of 1993 [1994] V KALR 54, the Supreme Court stated that it is wrong to depart from the rule of practice that the maximum sentence should not be imposed on a first offender.

[89]M Feldman, 'Social Limits to Discretion: An Organisational Perspective' in K Hawkins (ed.), *The Uses of Discretion* (Oxford University Press 1992) 163. Also, a colleague who happens to be a judge from Thailand once advised that 'judges do not exercise the degree of discretion that academics assume they do'. He advised that in Thailand, a unique mechanism called the '*Yee-Tok'* adopted internally by the judiciary (and not accessible by members outside the judiciary) ensures that judges' discretion is structured in a manner that encourages consistency and accountability (to themselves) in arriving at sentencing decisions. He advised that neither judicial compliance nor departures with the *'Yee-Tok'* are monitored. However, the social and internal organizational controls shape the way the *Yee-Tok* is enforced. This was a clear example of how judicial discretion may perhaps be structured within the broad confines of legal rules that create it. S. Yampracha, PhD candidate, University of Strathclyde, and Thai Judge (2014).

As noted in the Ugandan jurisprudence highlighted in this section, consistency is one of the fundamental premises upon which sentencing is founded in Uganda. However, it is unlikely that sentencing will be consistent without any form of meaningful guidance to sentencers on how to exercise their discretionary powers at sentencing. In Uganda, no research has been devoted to the investigation of whether and to what extent the exercise of discretionary sentencing may likely result in inconsistent sentencing. However, numerous studies have been conducted in western jurisdictions, which have confirmed that the exercise of unstructured sentencing discretion is associated with occurrences of inconsistent sentencing. The next section reviews some of these studies and provides prima facie support for the author's view that without meaningful guidance, sentencing is likely to be inconsistent.

2.3 Review of Selected Studies on Sentencing Inconsistencies in Other Jurisdictions

The exercise of judicial sentencing discretion and its links to inconsistent sentencing is an area that has received tremendous scholarly attention in western jurisdictions. Moreover, it has received very little contemporary academic attention in Uganda, except for a few recent scholarships specific on this subject.[90] In addition there is one known Government report on sentencing in Uganda, which highlighted the urgent need for sentencing reform in Uganda and called for the establishment of a sentencing council that would formulate sentencing guidelines for Uganda.[91] The lack of academic scholarship on the subject of judicial sentencing discretion

[90] J Kamuzze, 'An Insight into Uganda's New Sentencing Guidelines: A Replica of Individualization?'(2014) Federal Sentencing Reporter 45. Also, E Fitzgerald and K Starmer, 'A Guide to Sentencing in Capital Cases in Uganda' (The Death Penalty Project Ltd 2007); O Fernandez, *Towards the Abolition of the Death Penalty in Uganda: The Civil Coalition on the Abolition of the Death Penalty in Uganda* (Fountain Publishers 2008); JD Mujuzi, 'How Should the Most Evil of Law Breakers be Punished? The Death Penalty Versus Life Imprisonment in Uganda 1993-2009' (2011) 17 East African Journal of Peace and Human Rights 429.

[91] The Uganda Law Reform Commission, *Study Report on Offences and Sentencing Legislation in Uganda* (Justice Law and Order Sector of Uganda 2006). The Report recommended that sentencing guidelines be developed to help

and its concomitant sentencing disparities has perhaps led to the underdevelopment of this field of criminal justice in terms of theory, policy and practice in Uganda. On the contrary, sentencing reform in other jurisdictions, particularly reform which contemplates the adoption of a structured approach to sentencing has more often been preceded by empirical research that highlights the problems of exercising unfettered judicial discretion.

In a number of jurisdictions, studies have been conducted which have provided strong evidence that ties the exercise of unfettered judicial discretion to the existence of unwarranted sentencing inconsistencies. Depending on the methodology used and the type of cases examined, these studies have suggested that the exercise of unfettered judicial discretion enables the consideration of extra legal factors such as offender's race, gender, and socio economic class, which consequently result in the different treatment of otherwise similarly placed offenders. These studies have also attempted to demonstrate a causal link between judge effects/characteristics (commonly known as the judge factor) and how it impacts on consistent sentencing. The studies have attempted to examine both the relative influence of legal and extra legal factors on sentence outcomes, and most recent studies undertaken in jurisdictions with sentencing guidelines have revealed that with sentencing guidelines, inconsistent sentencing becomes more reasonably attributable to legally relevant sentencing factors than to extra legal factors such as race, gender, socio economic status.[92]

eliminate 'inconsistency and injustice, abuse of due process, unfair punishments and unnecessary incarceration and to ensure the courts apply established and standardised guidelines in passing sentences'.

[92] see, e.g A Patridge and WB Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit* (1974) 36 Federal Judicial Center.

The empirical studies have been based not only on simulation, but also with real judges. A number of studies have suggested that variations in sentence outcomes are more often attributed to legally relevant sentencing factors although it has long been recognised that even non legal factors, sometimes referred to as legally irrelevant factors do account for the diverse range of penalties meted out to offenders.

Many studies have focused on the impact that taking account of so-called extra-legal factors such as race, ethnicity, age, gender, and social background has on sentence outcomes, even after the implementation of sentencing guidelines in those jurisdictions.[93] Most of these studies are valuable in demonstrating that without a structured approach to sentencing, sentencing is likely to be inconsistent. For example, Maguire's simulation study which adopted semi structured interviews and sentencing vignettes to explore the degree of consistency among Irish judges and the reasons for inconsistency in the Irish sentencing system, found that on the whole, there was inconsistent sentencing amongst different district court judges in Ireland.[94] The sentencing vignettes dealt with four different offence types including assault, theft, road traffic and burglary.[95] In the assault case, there were thirteen different sentencing outcomes ranging from a probation order to 4 months imprisonment term.[96] That is, the sentences imposed included: probation, compensation order, a fine, community service order, suspended sentence and a prison term.[97]

[93] See, e.g, BS Blackwell, D Holleran and MA Finn, 'The Impact of the Pennsylvania Sentencing Guidelines on Sex Differences in Sentencing' (2008) 24 Journal of Contemporary Criminal Justice 339. Also, C Bond and S Jeffries, 'Indigeneity and the Judicial Decision to Imprison' (2011) 51 British Journal of Criminology 256; PM Kautt, 'Location, Location, Location: Inter-District and Inter-Circuit Variation in Sentencing Outcomes for Federal Drug-Trafficking Offenses' (2002) 19 Justice Quarterly 633.
[94] Maguire (n 81) 51, 52.
[95] ibid 31.
[96] ibid 42.
[97] ibid 42.

The findings suggested that in the assault case where a majority of judges considered imposing a non custodial sentence, there was considerable variation between judges regarding which type of non custodial sentence to impose. When it came to those cases where the judges were in agreement about the type of sentence to impose in a particular case, the judges significantly disagreed on the quantum.[98] For example, in the traffic case, the fines ranged from £100 to £2000 and the number of hours of community service in the same case varied considerably from sixty to two hundred hours.[99]

Maguire's vignettes were also designed to capture the reasons associated with inconsistency in sentencing among Irish judges. The researcher's findings were that inconsistencies were related to differences in judicial variability in assessment of seriousness of the case and weighting the impact of different aggravating and mitigating factors, as well as judicial differences regarding the suitability of different penalties for certain offenders and offences.[100]The findings in Maguire's study are consistent with the wide perception that sentencing disparity is inextricably tied to the exercise of judicial discretion. Permitting sentencers to apply penalties within broad parameters that offer sentencers a broad range of sentence options without any guidance as to sanction hierarchy, is likely to permit a range of divergent sentencing options for similar cases, thereby increasing the possibility of sentencing inconsistencies. The author found that inconsistencies in sentencing are attributable to the very broad sentencing discretion which Irish judges exercise with very little guidance from the legislature or from the Courts. The breadth of

[98] ibid 43.
[99] ibidc44.
[100] ibid 47, 48. For example, the researcher noted that the judges disagreed about the suitability of the community service order for offenders with drug addictions and were divided on issues of appropriateness of fines in relation to unemployed offenders.

discretion the judges enjoy produces wide ranges of sentencing. Courts can legitimately adopt a number of varying approaches when arriving at sentencing decisions in similar cases. In a previous study conducted on community service orders in Ireland by Welsh and Sexton,[101] considerable variations between judges both in relation to the length of community service orders and length of alternative prison sentences imposed were found. Welsh and Sexton's survey found that Courts in the rural areas were using community service orders much more frequently for young offenders than their urban counterparts, and that in rural areas, courts tended to impose slightly shorter community service orders than their urban counterparts.

Most recently, Goodall and Durrant undertook an empirical study on the regional variations in sentencing of aggravated drink drivers in New Zealand's District Circuit Courts.[102]Using administrative data from their Ministry of Justice, the researchers reviewed nine thousand thirty nine cases decided in seventeen New Zealand Circuit Courts.[103]The aim was to investigate the extent of variation in the use of imprisonment for offenders convicted of aggravated drink driving. The study found significant variations in the use of imprisonment across the different District Circuit Courts. It was found that after controlling for legally relevant sentencing factors, that is, offence seriousness and criminal history, as well as other offender demographic variables such as age, sex, and race, similar offenders were being sentenced differently between court circuits depending on the locality where one was sentenced.[104] For example, the researchers observed that the odds of incarceration in the most severe circuits, were 16 times higher than the

[101]D Walsh and P Sexton, *An Empirical Study of Community Services Orders in Ireland* (Dublin Stationery Office 1999).
[102] W Goodall and R Durrant, 'Regional Variation in Sentencing: The Incarceration of Aggravated Drink Drivers in the New Zealand District Courts' (2013) 1 Australian and New Zealand Journal of Criminology 1.
[103] ibid 10.
[104] ibid 20.

odds of incarceration in least severe circuits, with the lowest incarceration rates.[105] The researchers further observed that even in circuits with significantly higher odds of incarceration, the odds of incarceration varied substantially from 1.59 to 81.29, indicating that the threshold for imprisonment was set at different levels in different regions. The researchers attributed the wide variation in the use of imprisonment across different circuits to the breadth of sentencing discretion exercised by the judges and its interaction with the challenges of the sentencing process. The researchers argued that individual judges form personal perceptions about offences, and these constructs are influenced by individual judges' backgrounds and the norms and attitudes of the communities in which the judges operate.[106]

In 1987, Palys and Divorski[107] demonstrated prima facie, that there were disparities in sentencing amongst the two hundred and six Canadian judges who participated in their simulation exercise based on a standard set of five cases. In this simulation exercise involving real judges, the researchers gave the judges a standard set of facts involving six offenders. The judges were asked to (a) indicate the facts which were relevant to sentence (b) indicate the relevant importance of these case facts in determining sentence (c) identify the important sentencing objective, and impose a sentence for each offender. The objective of the study was to examine the extent to which the sentences imposed by these judges would exhibit variability and to examine the extent to which the sentencing variability would be attributed to judicial variability in terms of their personal demographic attributes, sentencing environments, subscription to a particular legal objective and perception of important case factors. The findings suggested that there was substantial inconsistencies in sentences imposed by the different judges, which

[105] ibid 18.
[106] ibid 20.
[107] TS Palys and S Divorski, 'Explaining Sentence Disparity' (1986) 28 Canadian Journal of Criminology 347.

differences could only be attributed to the judge factor. A great deal of variation emerged in response to the five cases.

For example, in response to a case of assault causing bodily harm, the severity of sentence ranged from a fine of $ 500 to 5 years imprisonment.[108] In response to impaired driving sentences imposed ranged from a fine of $300 to 2 years imprisonment.[109] In response to armed robbery (during which the offender committed indecent assault and was in possession of a weapon) the severity of sentence ranged from a suspended sentence to 13 years imprisonment.[110] Given that case factors were held constant, thereby minimising the consequences of variation in seriousness which is a challenge faced in a number of methodologies, any variation in sentencing would be explained by judicial variability. The researchers found that philosophical differences among judges was one of the factors that strongly explained the sentencing inconsistencies, followed closely by the differences in the importance attached to case factors.

What is particularly noteworthy about Palys and Divorski' study is the observation that the amount of judicial discretion per se that judges were allowed did not necessarily account for the inconsistencies in sentence outcomes. That is, in the case where the judges theoretically had the broadest discretion to impose a maximum sentence of life imprisonment (the break and enter case) judges showed the least disparity by imposing sentences ranging from a suspended

[108] ibid 354. In the assault case, the judges were faced with an employed offender without a prior criminal record, but who had committed an unprovoked violent assault resulting in the loss of the victim's eye. The offender had not expressed any remorse for committing the offence.
[109] ibid 354. The facts of the case were that a highly successful, self employed business man with no prior criminal record, caused a traffic accident which resulted in the death of two children. The offender had chosen to drive home despite being heavily drunk.
[110] ibid 354.

sentence to one year in jail.[111] On the other hand, there was a wide variation in sentencing in the case of impaired driving where the possible sentence range was the narrowest. Seemingly, the breadth of discretion did not necessarily produce the widest range of sentencing. According to the researchers differences/disagreements among judges over the objectives of punishment to be achieved in a particular case was a major source of sentencing inconsistency in the simulation study[112]and the researchers recommended a legislation of these objectives.

In 1995, Tata and Hutton explored the custodial sentencing practices in three Sheriff Courts in Scotland.[113] The study attempted to find the extent of variation in the custodial sentencing practices of ten sheriffs[114]within the same sheriffdom. The aim of the study was to compare sentencing of cases of broadly similar seriousness so as to find out the extent to which the exercise of unstructured judicial discretion would result in wide disparity and also to find out whether informal communication between sentencers within a geographical area would produce consistency in sentencing. The researchers developed, in consultation with the sheriffs participating in the research, two scales of offence seriousness reflecting their perceptions of the relative seriousness of different offences. Details of one thousand two hundred eighty one cases previously sentenced by the participating sheriffs over a two year period were used in the study. Each case was categorised according to its perceived seriousness. The researchers created a table with three grades of seriousness: less serious, serious and very serious. The findings showed that

[111] ibid 358.
[112] ibid 360.
[113] C Tata and N Hutton, 'What Rules in Sentencing? Consistency and Disparity in the Absence of Rules' (1998) 26 International Journal of the Sociology of Law 339.
[114] Trial judges who deal with the majority of civil and criminal cases, except murder, rape and treason are known as sheriffs in Scotland.

there was modest variation between the ten sheriffs in the length of custodial sentences passed for offences that were regarded as being of broadly similar seriousness.[115]

The research showed that the overall mean average length of sentences passed under summary procedure by most of the sheriffs clustered around one half of a month from the mean of the aggregate of all sheriffs which suggested a degree of consistency in the custodial sentencing patterns of all sheriffs. However, the research also showed that while some sheriffs sentenced close to the overall mean, some were shown to impose shorter periods of custody and some were shown consistently to impose longer periods of custody.[116] Although the study provided evidence of broad consistency in the sentencing patterns of the participating sheriffs, there was a clear indication of disparity in the finding that one sheriff consistently passed significantly higher sentences than his colleagues in cases which were broadly similar in seriousness.

The study by Patridge and Eldridge[117] is noteworthy, as it has been consistently acknowledged in a number of studies on the subject.[118] The researchers conducted a study with real judges of the United States Second Circuit Courts based on simulated case facts. The judges were sent actual pre-sentence reports for twenty defendants representing a range of typical offences and asked what sentence they would impose. The study found wide disparity in the sentences imposed by different judges presented with identical case facts. The study showed large differences in the

[115] Tata and Hutton (n 113) 347-348.
[116] ibid.
[117] Patridge and Eldridge (n 92).
[118] see, e.g., Hoffer, Blackwell and Ruback (n53) 264; J Anderson, J Kling and K Stith, 'Measuring Inter-judge Sentencing Disparity: Before and After the Federal Sentencing Guidelines' (1999) 42 Journal of Law and Economics 276; RW Scott, 'Inter-judge Sentencing Disparity After Booker: A First Look' (2010) 63 Stanford Law Review 7; A Payne, 'Does Inter Judge Disparity Really Matter? An Analysis of the Effects of Sentencing Reforms in Three Federal District Courts' (1997) 17 International Review of Law and Economics 340.

length of prison terms imposed in the same case.[119] For example in case 1 (which involved an employed offender with three previous convictions and six other arrests unrelated to the current offences of conviction —nine counts of extortionate credit transactions and related income violations), the severity of sentences ranged from 3 years to 20 years imprisonment. At least six judges imposed prison terms of 15 years imprisonment or longer while at least six judges imposed 5 years or shorter.[120] Wide variations in durational terms were common as was shown in their table 1 representing the sentences in the twenty cases.[121]Patridge and Eldrige found that variation was explained by a number of factors including the general tendency of some judges (as a result of personality) to be more severe or more lenient than their colleagues, but even more disparity arose from differences in ideologies about the assessment of seriousness of particular offences and the purposes of sentencing in specific offence types.

Many other studies have been conducted and accordingly suggested that it's not the amount of discretion per se which gives rise to disparity, but the differences in judges subjective perceptions of how seriousness ought to be assessed,[122]or the influence of extra-legal factors such as the judge effect (differences in judges' attitudes towards the role of punishment in society or difference in attitudes towards particular types of offences), race, age, gender and socio economic factors on determining sentencing severity. Regarding the issue of determining sentence severity based on a host of extra-legal factors, a fairly persistent finding in sentencing

[119]Patridge and Eldridge (n 92) 6, 7.
[120] ibid.
[121] For example in case 2, sentencing severity ranged from 5 years to 18 years imprisonment; and so on.
[122] see, for e.g., Tata and Hutton (n 113) 347, and appendices 1 and 2. The researchers found that there were 'minor detailed disagreements, amongst the Sheriffs regarding the assessment of seriousness of particular classes of offence. When asked to develop both a narrative and numerical scaling of offence seriousness for 1,281 cases used to measure seriousness in the research, there was disharmony between the narrative and numerical scale of offence seriousness which suggested that there were variations in attitudes of the Sheriffs towards the assessment of seriousness of some offences.

literature is that female offenders are treated far more leniently than their male counterparts, after all other factors are controlled. Daly[123] found that gender plays an important role in the determination of sentence severity. The researcher found that female offenders received more lenient treatment than their male counterparts. Using a data set comprised of two thousand four defendants (11 percent of whom were female) the study found that men were 9 per cent more likely than women to be subjected to pre trial detention and 19 per cent more likely than women to receive a harsher type of non custodial sentence. A study by Spohn[124] also confirmed that the odds to receive a prison sentence were two and one half times greater for male offenders than their female counterparts, after controlling for legally relevant factors. A study by Polk and Tait[125] of sentencing patterns in an Australian court found that the employment status of a defendant at the time of sentencing had a significant relationship with the sentence imposed, showing that offenders who were unemployed at the time of sentencing were at least twice as likely to receive a prison sentence than employed offenders.

Internationally, the perceived existence of disparity has been one of the main driving forces behind sentencing reform, and post-sentencing guideline studies have suggested that sentencing guidelines in the different jurisdictions have (at least modestly) reduced unwarranted sentencing disparities. The study by Anderson, Kling, and Stith[126] attempted to examine the extent of inter-judge sentencing disparity in the average length of prison sentences of offenders in federal district courts before and after the implementation of the United States Sentencing Commission

[123] K Daly, 'Discrimination in the Criminal Courts: Family, Gender, and Problems of Equal Treatment' (1987) 66 Social Forces 152.
[124] Spohn (n 6) 152.
[125] K Polk and D Tait, 'The Use of Imprisonment by the Magistrates' Courts' (1998) 21 Australian and New Zealand Journal of Criminology 31.
[126] Anderson, Kling and Stith (n 118) .

Guidelines. The study examined a sample of cases from approximately twenty five district offices nationwide. The study was focused on inter-judge sentencing disparity[127] and not unwarranted sentencing disparity. The researchers noted that other kinds of disparity may have been exacerbated by the guidelines and that the guidelines may have introduced unwarranted uniformity in sentencing. However, the study concluded that 'inter-judge disparity in nominal sentencing is less pronounced in the Guidelines era than it was in the era of discretionary sentencing'.[128] The study noted that in terms of months, for the period 1986-1987, the expected inter-judge difference in the mean length of sentence imposed by any two judges was 4.9 months, which fell to 3.9 months in 1988-1993 under the guidelines era.[129]

In a study by Hoffer, Blackwell and Ruback[130]the authors aimed at comparing the extent of inter-judge disparity before and after the implementation of the United States Sentencing Commission Guidelines. The authors premised their study on the argument that differences in sentencing philosophies among judges were the primary source of unwarranted sentencing disparity in the pre guideline era.[131]The study defined inter-judge disparity as differences in the average sentences among judges who receive comparable caseloads.[132]Thus the study was measuring the judge effect (the tendency of some judges imposing more lenient or more severe sentences than their counterparts). The study concluded that the United States Sentencing Commission Guidelines had achieved modest but meaningful success in their goal of reducing unwarranted

[127]ibid 274. The authors adopted a definition of disparity that considered differences in sentence outcomes arising from variation in legally permissible factors as proportionality and taking variations in sentence outcomes as a result of legally impermissible factors as disproportional variations. The authors therefore adopted a definition of disparity that considers solely the variation in sentencing outcomes attributed to the identity of the decision maker.
[128] ibid 303.
[129] ibid 294.
[130] Hoffer, Blackwell and Ruback (n 53).
[131] ibid 246.
[132] ibid 282.

sentencing disparity among judges in the sentencing of similar offences and offenders.[133] The study found that in the pre guideline era, the identity of the sentencing judge accounted for 2.32 per cent of the variation in sentences. However, under the guideline period of 1994-1995, a reduction of almost by half to 1.24 per cent was indicated suggesting that the guidelines, despite their weakness and the small percentage of variance, had created a positive effect on reducing inter judge sentencing disparity.[134]

2.4 Empirical Review of Ugandan cases

There is no empirical evidence to demonstrate the existence of unwarranted disparities in sentencing in Uganda. The only evidence available is the then Chief Justice, Benjamin Odoki's public acknowledgement of the existence of disparities in Ugandan sentencing, which he associated with the exercise of wide discretionary powers by Ugandan sentencers. In an attempt to provide some prima facie support for the Chief Justice's public acknowledgement of the existence of unwarranted disparities in Ugandan sentencing, the author reviewed a small sample of Ugandan defilement cases. The study does not purport to demonstrate the existence of unwarranted disparities across all Ugandan sentencing because it has the following methodological limitations. First, the sample size is too small to allow the findings to be generalised to Ugandan sentencing, or even sentencing for defilement cases. Two, the analysis is based on a single offence of defilement, yet the PCA 120 alone creates over three hundred broad offences. Thirdly, the analysis is based on a simplistic definition of similarity which does not account for a number of case characteristics that could explain variation in sentence outcomes.

[133] ibid. The authors pointed out that the success was uneven in that disparities in sentencing outcomes still existed in some offense types, and in some cities.
[134] ibid 288.

Due to its limitations, the detailed discussion of the findings is placed in appendix A to this study.

Nevertheless, despite its limitations, the study provides some prima facie support for the then Chief Justice of Uganda's acknowledgement[135]of the existence of sentencing disparities in Uganda, and the Uganda Law Reform Commission's findings.[136] The wide variation in sentences imposed in the small sample of cases which range from 3 years imprisonment to imprisonment for life also provides some useful information about the range of sentencing for this type of offence.

2.5 Conclusion

This chapter set out to provide a brief overview of the nature of Uganda's discretionary sentencing approach. The chapter also set out to demonstrate that a substantial body of empirical research devoted to the investigation of sentencing inconsistencies has been conducted in western jurisdictions and that this research has provided prima facie support for the assertion that without sentencing guidelines, sentencing is likely to be inconsistent. Although some research has shown that even with sentencing guidelines, a degree of sentencing variability may exist, this research has shown that the causes of sentencing variability under guidelines is mostly accounted for by differences in legally relevant sentencing factors. Accordingly, because Ugandan sentencers exercise broad discretionary sentencing powers the existence of unwarranted

[135] As noted above, the existence of unwarranted disparities in sentencing in Uganda was acknowledged by the Chief Justice of Uganda (although without any form of empirical study) who said that 'there was need to make sentencing more principled because of the wide disparities in sentencing between different judges and magistrates for similar offences'. See Odoki, 'Keynote Address' (n 8).
[136] Uganda Law Reform Commission Study report (n 91).

disparities is likely. The chapter provides a general background to the primary problem that motivated sentencing guideline reform in Uganda —unstructured discretion, and its concomitant unwarranted disparities in sentencing, and to reaffirm the need for a meaningful sentencing guideline framework for Uganda. The Chief Justice recognised the need for a principled approach to the exercise of judicial discretion when he appointed a Sentencing Guidelines Taskforce to develop sentencing guidelines for Uganda. The sentencing literature on post guidelines sentences in some jurisdictions suggests that sentencing guidelines are more likely to reduce the occurrences of sentencing inconsistencies resulting from legally irrelevant factors. Accordingly, the path taken by the Ugandan judiciary to develop sentencing guidelines for Uganda is a positive one. The Taskforce has issued its first guidelines. However, what exactly motivated this initiative needs to be understood, before looking at the content of the guidelines. This is what the next chapter seeks to examine—the origin of sentencing guideline reform in Uganda, and how the historical perspectives influenced the final shape of the guidelines.

Chapter Three

A New Approach to Sentencing in Uganda: The Evolution of Sentencing Guideline Reform

3.0 Introduction

Traditionally, Ugandan sentencers have exercised wide discretionary sentencing powers. In 2010, the then Chief Justice, Benjamin Odoki acknowledged the existence of unwarranted disparities across Ugandan sentencing. In his key note address at the inauguration of the Uganda Guidelines, Odoki commented that judicial sentencing discretion was sometimes exercised 'unfairly, thereby leading to public outcry about injustices in the criminal justice system'.[1] He noted further that because of the exercise of unstructured sentencing discretion, 'sentencers were handing down different sentences to seemingly similarly placed offenders'.[2] It was against this background that justice Odoki appointed a Taskforce in August 2010 to develop sentencing guidelines for magistrates and judges in Uganda. In 2013, the Constitution (Sentencing Guidelines) for Courts of Judicature (Practice) Directions 2013 (hereafter 'the Uganda Guidelines) were issued by the Taskforce. Odoki said that the Uganda Guidelines were a necessary tool for the control against 'sentencers meting out sentences depending upon the whims of the individual judge or magistrate handling the criminal case'.[3]

This chapter traces the historical developments that set the stage for sentencing guideline reform in Uganda. It attempts to show a link between the distribution of sentencing authority in Uganda

[1]BJ Odoki, 'Keynote Address at the Launch of the Constitution (Sentencing Guidelines) for Courts of Judicature (Practice) Directions, Legal Notice No 8 of 2013' (Kabira Country Club, Kampala, 10 June 2013) 4.
[2] ibid 4.
[3] ibid.

and the path taken towards sentencing guideline reform in Uganda. That is, the chapter attempts to throw some light on the contextual background explaining the development of Uganda Guidelines with a single judicially led political interest. The chapter provides an insight into why the then Chief Justice of Uganda was able to have absolute control over who wrote and how the guidelines were written. It also explores why the Uganda Guidelines could be promulgated without positive endorsement from the legislature. This chapter sets the platform for understanding the nature of distribution of sentencing authority in Uganda, and how this shapes the politics of sentencing reform in Uganda.

The chapter is divided into four sections. Section 3.1 makes an analysis of the historical developments preceding the issuance of the Uganda Guidelines. The aim is to show that by and large, the path taken towards sentencing guideline reform in Uganda is quite different from that taken in other common law jurisdictions. This discussion provides a new perspective to the widely held view that sentencing guideline reform is traditionally typically highly politicised. Section 3.2 examines the distribution of sentencing authority in Uganda. The discussion in sections 3.1 and 3.2 enable a better understanding of why Uganda Guidelines have been developed with a single judicially led political interest. Also, to understand what shaped the choices made about the process of developing Uganda Guidelines and their final shape. The sections prima facie highlight that the judiciary has de facto ownership of sentencing authority in Uganda.

Section 3.3 explains the process of developing the Uganda Guidelines. The discussion shows that these Guidelines were developed without the involvement of the legislature or other key political

constituencies. Lastly, section 3.4 provides a brief overview of the Uganda Guidelines and this offers an introduction to the critical analysis of the Uganda Guidelines in chapter four.

3.1 Historical Background of Uganda's Sentencing Guideline Reform

3.1.1 The Uganda Law Reform Study Report of 2001

Uganda Guidelines, which have now been in operation since June 2013, have a history dating back to 1997. In that year, Benjamin Odoki (then a judge of the Supreme Court) made a proposal for penal reform in Uganda. In his paper,[4] Justice Odoki called for the establishment of a sentencing council attached to the Supreme Court of Uganda. His vision was of a sentencing council that would have the mandate of developing sentencing guidelines for common offences. However, no further steps were taken to implement this proposal (at least publicly). However, in 2001, the same year Justice Odoki was appointed Chief Justice of Uganda, the Uganda Law Reform Commission (ULRC)[5] with the support obtained from the Justice Law and Order Sector (JLOS) of the Ministry of Justice[6]conducted a study on the reform of the sentencing statutory framework of Uganda.[7] In its report, the ULRC recommended the establishment of a sentencing

[4] BJ Odoki, 'An Overview of Penal Reform in Uganda' (unpublished 1997) 17.
[5] ULRC was established by the Uganda Law Reform Commission Act, Chapter 25 to promote the reform of the Law in Uganda. Section 3 of this Act gives the president of Uganda powers to appoint commission members on the advice of the Attorney General (who is a Minister of Justice and Constitutional Affairs and is appointed by the president).
[6] The Justice Law and Order Sector is a sector wide approach adopted by the Government bringing together institutions closely linked to the mandate of administration of justice and maintaining law and order. It focuses on improving access to justice. Justice Law and Order Sector comprises of a number of Government Institutions including the Ministry of Justice and Constitutional Affairs, the Uganda Law Reform Commission, The Department of the Director of Public Prosecutions, Judicial Service Commission and so on. <http://www.jlos.go.ug/index.php/2012-09-25-13-11-16/our-history> (accessed 11 November 2014).
[7] Justice Law and Order Sector, 'A Study on Sentencing and Offences Legislation in Uganda' (2001) <http://www.commonlii.org/ug/other/UGJLOS/report/R5/5.pdf> (accessed 11 November 2014).

council.[8] This motivation was seemingly stirred by the ULRC's finding of inconsistencies in Ugandan sentencing. The ULRC noted that Ugandan sentencers were exercising wide discretionary sentencing powers and that this had resulted in inconsistent sentencing practices.[9] The ULRC took note of the guideline schemes in the United States of America (US) and England and Wales and proposed the development of narrative sentencing guidelines that would address less serious offences commonly handled in the lower courts in Uganda.[10]

The ULRC discouraged judicially developed guidelines noting that guidelines developed with a single judicial perspective without involvement of other key players in the criminal justice system such as magistrates, probation officers and correctional officers would be implausible.[11] The report also made recommendations for the establishment of a sentencing council attached to the Supreme Court as had earlier been envisioned by Justice Odoki. Even then, a sentencing council was not established, neither were guidelines developed until almost a decade later when Odoki appointed a Taskforce to develop sentencing guidelines for all offences and all courts in Uganda. Odoki's decision to appoint a Taskforce followed the Supreme Court decision in the case of *Attorney General v Susan Kigula and 417 Others.* [12]The *Kigula* case introduced a new era of discretionary sentencing in capital cases, which was a major sentencing reform for Uganda.

[8] ibid 25-31.
[9]Interview with Andrew Khaukha, Senior Legal Officer, ULRC (Kampala Uganda, 31 January 2014). The interviewee confirmed that although the findings were never made public the ULRC in conjunction with the JLOS had conducted a study on sentencing patterns which revealed inconsistencies in sentencing.
[10]JLOS Report (n 7) 27, 29.
[11] ibid.
[12]Constitutional Appeal No 03 of 2006 (21 January 2009) <http://www.ulii.org/ug/judgment/supreme-court/2009/6> (accessed 12 November 2014).

3.1.2 The *Kigula* case

The Supreme Court of Uganda's decision in the *Kigula* case ended a ten year constitutional challenge against capital punishment in Uganda. The Supreme Court's decision followed the Attorney General of Uganda's appeal against the Constitutional Court's declarations that a mandatory death penalty and a delay on death row for more than three years violated Uganda's 1995 Constitution. Briefly, in 2003, four hundred and eighteen inmates on death row, led by Susan Kigula had petitioned the Constitutional Court challenging the constitutionality of the death penalty in Uganda.[13]The driving force of the challenge in the *Kigula* case focused on the constitutionality of the death penalty, positing that the death penalty in itself constituted a form of cruel, inhuman and degrading punishment in violation of article 24, of the 1995 Constitution of Uganda. The petitioners further argued that, alternatively (in the event that the death penalty was found to be constitutional) the mandatory nature of the imposition of the death penalty was unconstitutional. First, because it apparently violated an offender's right to a fair trial, and secondly, it undermined the principle of equality under the law. In addition, other challenges were raised, that is, the inordinate delay on death row, which the petitioners argued amounted to cruel, inhuman and degrading punishment, as well as the unconstitutionality of hanging as a method of execution.

The Constitutional Court dismissed the challenge in respect to the constitutionality of the death penalty. The Court noted that because the death penalty was provided for in the 1995 Constitution of Uganda, another provision in the Constitution on the prohibition of inhuman punishment could not be invoked to oust the legality of the death penalty as a limitation to the

[13] Constitutional Petition No 06 of 2003 (10 June 2005).

right to life. [14] In other words, the principle of harmonious interpretation was invoked, which discourages the use of one provision in the constitution to destroy another part of the constitution.[15] Similarly, the challenge to hanging as a method of execution was dismissed. The Court noted that pain and suffering was an inherent part of the death penalty.[16] However, the Constitutional Court accepted the alternative challenge against the mandatory nature of the death penalty pronouncing it unconstitutional on the ground that it denied the convict the right to appeal against the sentence, breached the right of equality before the law (the right to mitigation of sentence which was accorded to offenders in other cases) and the right to a fair hearing as provided in the Constitution.[17]

The Attorney General lodged an appeal against the Constitutional Court's declarations that a mandatory death penalty was unconstitutional and a delay on death row of more than three years violates the 1995 Constitution. The respondents, led by Susan Kigula cross appealed the Constitutional Court's declarations that the death penalty is constitutional and that hanging was an appropriate and therefore a constitutional method of execution. The Supreme Court dismissed both the appeal and the cross appeal and confirmed that the death penalty in itself was not unconstitutional. However, its mandatory nature was declared to be a violation of the principles of the Constitution. The Court held that: 'although the death penalty did not constitute cruel, inhuman or degrading punishment its mandatory imposition was unconstitutional…'

The Supreme Court emphasised that the mandatory nature of the death penalty violated the principle of separation of powers, as it deprived the judiciary of its right to exercise discretion in sentencing. The Supreme Court's proclamation created a new era of discretionary capital

[14] ibid.
[15] ibid.
[16] ibid.
[17] The 1995 Constitution of Uganda, articles 21, 22(1), 24, 28, 44(a) and 44(c).

sentencing for murder,[18]treasonous acts[19] aggravated robbery[20] and terrorism.[21] Also, as part of the proclamation against the mandatory death penalty, those who had been on death row for more than three years but had not completed the appeal system were granted the opportunity to have their cases remitted to the High Court for resentencing, as a measure of providing the offenders an opportunity to mitigate their sentences. Without a doubt, the events following the *Kigula* case triggered the urgency for the serious consideration of a structured approach to judicial sentencing discretion in Uganda. The new era of discretionary capital sentencing for these particular offences was not expected to create any public controversy given that judges were in the practice of exercising discretion when sentencing for other capital cases.[22]However, all capital offenders who had previously been sentenced to death without being afforded the right of mitigation of their sentences were offered the chance of a mitigation hearing. Apparently, there were significant variations in sentences meted out after the resentencing hearings. This precipitated the need for some form of guidance to make mitigation hearings more structured.[23] In the mitigation hearings, the courts were required to take into consideration the mitigating circumstances that would have warranted a lesser sentence than death, had a right of mitigation been offered.

[18]Penal Code Act Chapter 120 (Laws of Uganda, 1950) (hereafter 'PCA 120'), s 188 and 189.

[19] See ibid, s 23 (1) to (4) (Treason, which is classified into 9 different treasonous acts, six of which attracted the mandatory death penalty under s.23 (1)(a-b) and (2) (a-b). The offences that carried the mandatory death penalty involved acts of levying war against the Government, causing or attempting to cause the death of the president, conspiring to overthrow the Government; aiding and abetting the mentioned acts; and forming an intention to overthrow the Government. The rest of the treasonous acts such as instigating or advising someone in the armed forces, police forces and any other security force to commit mutiny or desert carried the sentence of death as the maximum penalty-leaving the discretion with the judge.

[20] See ibid, s 286(2) before it was amended by The Penal Code (Amendment) Act of 2007 (aggravated robbery).

[21] The Anti-Terrorism Act No 14 of 2002 (Laws of Uganda), s 7(1) (a) set the mandatory death penalty for terrorism acts that result in the death of others.

[22] See PCA 120, s 129 (2) (as amended by the Act of 2007) (aggravated defilement); PCA 120, s 123 (rape); PCA 120, s 319 (smuggling) and PCA 120, s 243 (kidnap with intent to murder).

[23]E Fitzgerald and K Starmer, 'A Guide to Sentencing in Capital Cases' (The Death Penalty Project 2007). Also, Odoki, 'Keynote Address' (n 1) 3. see also, Justice Y Bamwine, 'Principles of Sentencing: A Global, Regional and National Perspective' (Munyonyo, Kampala 30 August 2012).

Without any form of guidance with regard to determining what mitigating circumstances were relevant and their impact on the mitigation of the sentence of death, it became immediately apparent that different judges were attaching different weight and relevance to myriad sentencing factors. Whilst some judges were focussing on factors of mitigation as existing at the time of initial sentencing, others were placing emphasis on mitigating circumstances manifesting during the period the offender was on death row. For instance, some judges were taking into account the prisoner's conduct during his/her time on death row,[24]and others were basing their decisions on the period the prisoner had served on death row.[25]In other cases, judges were only taking into consideration, factors in mitigation at the time of the commission of the offence. This resulted in wide variations in sentences imposed on former death row inmates which as has already been mentioned, stirred the Chief Justice to make a call for some sentencing guidance.

The Chief Justice and the Principal Judge of the High Court, Justice Yorokamu Bamwine observed that in an effort to avoid imposing the death penalty, some judges were automatically opting for custodial sentences, and because of the variation in the custodial terms imposed on a number of offenders, there was a rise in concerns of consistency in capital sentencing.[26] The then Chief Justice also observed that in cases where the judges opted for life imprisonment, the

[24] Like the petitioner — Susan Kigula had had their sentences reduced to custodial terms of 20 years imprisonment and 16 years imprisonment for her co accused. The judge depended on the factors of mitigation exhibited by the offenders during their incarceration, such as the courses that Susan Kigula had attended and successfully completed during her incarceration. It was argued that Susan Kigula was no longer a threat to society and had demonstrated full reformation through her attendance of diploma courses during her incarceration. Such courses were A Diploma in New Life**,** a course that is designed to give a new and fulfilled life to those who accept Jesus Christ as Saviour and Lord and to follow his commandments, A Certificate in Biblical counselling, a course offered by Uganda Biblical Counselling Ministry, Uganda Advanced Certificate of Education from Luzira Upper Prison in which she got four principal passes, A Diploma in Practical Theology.

[25] Hon. Lady Justice Anna Magezi in the case of Uganda Vs Bwengye Patrick (Criminal session case no. 190 of 1996). This was the first case to be referred for resentencing after the Kigula case. In this case, Justice Magezi revoked the death sentence of Patrick Bwengye who had been convicted of stabbing his wife to death and throwing her body in a burning house but had already served 16 years in prison. Justice Magezi sentenced Bwenge instead to two additional years in prison one of which was to be undertaken as parole.

[26] This was said at the two day residential training workshop for trial judges, organised by JLOS on 27-28 March 2013 at Ridar Hotel, Uganda. see also, JLOS Pioneering Reform of Sentencing in Uganda <http://www.jlos.go.ug/index.php/component/k2/item/268-jlos-pioneering-reform-of-sentencing>.

vagueness surrounding what constituted a sentence of life imprisonment heightened the variation in the sentences imposed on offenders after the mitigation hearings. The case of *Tigo Stephen v Uganda*[27]which was filed in the period immediately preceding the Supreme Court's decision in the *Kigula* case, demonstrated the need for an interpretation of the meaning of life imprisonment. In the *Tigo* case, the offender had been convicted of defiling an eight year old girl and was sentenced by Court in the following words: '…I take into account the fact that you have been on remand for 2 years, so taking that into account, I sentence you to life imprisonment (20 years)…' Tigo appealed to the Court of Appeal and later to the Supreme Court objecting to the uncertainty of the sentence imposed on him by the High Court. He claimed that the sentence was illegal because it was not clear if the judge had intended for him to be incarcerated for the rest of his life (which is what life imprisonment literally meant) or to imprisonment for 20 years, which was the duration of time stipulated under the Uganda Prisons Act, 17 of 2006. The Prisons Act, section 47(1) now amended by the Act of 2006, section 85(1) states that for purposes of calculating remission, a sentence of imprisonment for life is 20 years imprisonment. On the other hand, in practice, courts were in some cases imposing custodial terms longer than 20 years imprisonment, which caused confusion as to what was meant by life imprisonment.

The interpretation of life imprisonment was important for Ugandan sentencing because life imprisonment was conceived as the most appropriate alternative to the death penalty.[28] It was,

[27]Criminal Appeal No 08 of 2009 (10 May 2011)<http://www.ulii.org/ug/judgment/supreme-court/2011/7> (accessed 9 February 2014).

[28] ibid. The Supreme Court clarified that 'Life imprisonment which had become the next most severe and probably the most effective alternative to the death sentence following the Susan Kigula case meant the whole natural life of the offender'. The position of life imprisonment was unclear because whilst some judges considered life imprisonment to be 20 years in prison others were sentencing offenders to custodial sentences longer than 20 years. The confusion was coming from the provision in section 47(1) of the Prisons Act chapter which provides that: 'For the purpose of calculating remission of a sentence, imprisonment for life shall be deemed to be twenty years

therefore, necessary to provide judicial interpretation as to the meaning of life imprisonment in Uganda. On 10 May 2011, the Supreme Court came up with a clear position on the meaning of life imprisonment, holding that 'life imprisonment means the imprisonment for the natural life of the convict'.[29]In his key note address at the launch of the Uganda Guidelines, Odoki noted that the meaning of life imprisonment had been one of the challenges that had necessitated the development of sentencing Guidelines.[30]

Following these two landmark cases, the then Chief Justice constituted a Taskforce on the development of sentencing guidelines (currently the Sentencing Guidelines Committee) to spearhead the development of sentencing guidelines that would 'guide judicial officers in determining fair and just sentences consistent with sentences passed by judicial officers in different courts'.[31] The then Chief Justice noted that the Sentencing Guidelines developed by the Taskforce would be an interim measure pending the legislature's enactment of the Sentencing Reform Bill establishing a Sentencing Council. The Taskforce had thirteen members, and was chaired by justice Bamwine, the principal judge, of the High Court of Uganda. The other members included the head of the criminal division of the High Court (representing judges of the High Court), the Registrar of the criminal division of the High Court (representing registrars of the High Court), and a Chief Magistrate (representing magistrates). The Taskforce was assisted by a team of seven other judges who were not official members of the Taskforce but participated in the guideline development.[32] The other official members included; the president of the Uganda

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imprisonment'. The Supreme Court clarified that this provision only applied when remission was granted to the offender.

[29] ibid 1.

[30] Odoki, 'Keynote Address' (n 1) 3.

[31] ibid.

[32] ibid.

Law Society (representing the private legal practitioners), the commissioner of community service, the head of the Justice, Law and Order sector, and representatives of the media, an ex-prisoners organisation, the Uganda Peoples' Defence Force, the Uganda Prisons Service, the Uganda Police Force, as well as the United Nations African Institute for the Prevention of Crime and Treatment of offenders.

From a political point of view, the composition of the Taskforce was politically diverse. However, notably, the legislature and the executive (except through executive appointees such as the commissioner of community service) were excluded from the process of developing Uganda Guidelines. This was not an unusual path in Uganda in view of the politics of sentencing in Uganda. The public was represented through the media representative. The Taskforce did not have the benefit of a research staff, except for one senior officer of the Uganda Law Reform Commission (who is a trained lawyer) served as the Executive Secretary. The Executive Secretary single handily reviewed a number of judicial decisions for purposes of ascertaining past sentencing and led the drafting exercise. On 30 November 2011 the Taskforce handed over to the then Chief Justice a draft sentencing guideline and a draft Sentencing Reform Bill.[33] The draft guidelines were on 26 April 2013, signed into Practice Directions[34] by the then Chief Justice and became operational in Uganda's Courts of Judicature. Whilst addressing judges at the 15th Annual Judges Conference, the then Chief Justice noted that Uganda Guidelines are intended to streamline sentencing and bring confidence in the administration of justice.[35]

[33] Uganda Law Reform Commission, '2011 Annual Report to the Legislature' <http://www.ulrc.go.ug/?p=125> (accessed 2 April 2014). The Sentencing Reform Bill drafted by the Taskforce is found in appendix C of this study.
[34] The 1995 Constitution of Uganda, article 133(1)(b) permits the Chief Justice to issue orders and directions to the courts necessary for the proper and efficient administration of justice.
[35] BJ Odoki, ' Keynote Address at the 15th Annual Judges Conference' (Hotel Africana Kampala , 14 January 2013) <http://www.judicature.go.ug/files/downloads/Chief%20Justice's%20Speech.pdf> (accessed on 10 April 2014).

The historical traces of sentencing guideline reform clearly suggest that the incentive to structure sentencing discretion in Uganda came from within the judiciary. Thus, although the membership of the Taskforce was politically diverse, the first set of Uganda Guidelines have been developed by a judicially led political interest without any challenge from other branches of government. Be that as it may, it is too soon to determine how much interest other constituencies will have in the development of sentencing guidelines in Uganda, since the mere creation of a sentencing body may not commit the interested constituencies too much, until the guidelines begin to take shape and the constituencies see that the product is not to their liking. However, the development of sentencing guidelines in Uganda seems to be an aspiration of the then Chief Justice, and their successful implementation is of great interest to him.[36] Looking briefly at what happened in other jurisdictions, the path to reform taken by Uganda is quite different from that taken by most other jurisdictions.

For instance, Martin[37]writing about the politics of sentencing guideline reform in Minnesota and Pennsylvania suggests that prolonged political debates preceded guideline development in these states, which is reportedly explained by the politicisation of issues of crime and sentencing in most western democracies.[38] It is reported that in Minnesota, which was the first jurisdiction to adopt legally binding sentencing guidelines,[39]the initiative for guideline reform in that jurisdiction began in the 1970's when critics from a wide spectrum of political interest groups

[36] Interviews with Andrew Khaukha, Executive Secretary of the Sentencing Guidelines Committee, (ULRC offices, Kampala , 31 January 2014, 12 February 2014 and 13 February 2014).

[37] SE Martin, 'Interest and Politics in Sentencing Reform: The Development of Sentencing Guidelines in Minnesota and Pennsylvania' (1983) 29 Villanova Law Review 21. The author provides an account of how sentencing guideline Reform in Minnesota and Pennsylvania was highly politicised.

[38]RS Frase, 'Comparative Perspectives on Sentencing Policy and Research' in M Tonry and RS Frase (eds.), *Sentencing and Sanctions in Western Jurisdictions* (Oxford University Press 2001). Also, A Bottoms, 'The Philosophy and Politics of Punishment and Sentencing' in R Morgan and C Clarkson (eds.), *The Politics of Sentencing Reform* (Oxford University Press 1995).

[39]RS Frase, 'Sentencing Guidelines in Minnesota, 1978-2003' (2005) 32 Crime and Justice 131.

criticised both the system of indeterminate sentencing and the rehabilitative theory which underpinned it.[40] Subsequent to these concerns in 1975, a bill proposing the abolition of parole boards and creating flat time sentencing for felonies was presented in Senate.[41] The Bill was not passed but the issue was debated again until 1977 when another senator presented a Bill that was proposing the establishment of a sentencing guidelines commission of five judges who would develop sentencing guidelines subject to approval by the Supreme Court.[42]The Bill was debated for another year and in 1978, a Bill which was in favour of a single legislatively authorised guideline commission was presented and approved by the governor.[43]

The immediate impetus to replace indeterminate with structured sentencing in the United States federal sentencing system came from a number of interest groups including academics and liberal politicians. Stith and Koh[44]note that by the 1950s, liberal reformists had begun questioning the efficacy of the indeterminate sentencing system and that by the mid-1970s there was overwhelming scholarly work critical of this system of sentencing. It is recounted that some of the leading scholars including one of the most influential critics of indeterminate sentencing Marvin Frankel, were hosted by senator Edward M Kennedy to a dinner —which media viewed as a dinner organised to convince the senator to sponsor the sentencing reform legislation.[45] The Senator presented the Bill in 1975 and following extensive debate, nine years later, in 1984, the Sentencing Reform Bill, establishing the United States Sentencing Commission (USSC) as an independent agency of the judicial branch of the Federal Government of the United States was

[40] Martin (n 37).
[41] ibid 34.
[42] ibid 37.
[43] ibid 38.
[44]K Stith and SY Koh, 'The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines' (1993) 28 Wake Forest Law Review 223. Also, K Stith and JA Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (University of Chicago Press 1998).
[45] ibid.

passed with overwhelming majority and signed by President Reagan into Law. The brief historical overview suggests that the US guideline reform movement was driven by a number of stakeholders from a diverse political spectrum including academics and politicians.

In England and Wales, the development of sentencing guidelines is stretched as far back as 1901 when reportedly the Lord Chief Justice and a committee of judges met and drew up sentencing levels for a few categories of offences.[46]Wasik notes that by early 1980s the judiciary had started developing its own sentencing guidelines.[47] In 1998, the Sentencing Advisory Panel (SAP) was established by the Crime and Disorder Act, 1998. The SAP was established to draft and consult on proposals for guidelines and refer them back to the Court of Appeal for their consideration. The Court of Appeal had the option of implementing the SAP's proposal or not.[48] Following the creation of the SAP, the Halliday Report 2001 recommended the establishment of The Sentencing Guidelines Council [SGC], a body which had authority to issue guidelines after receiving advice from the SAP without engaging the Court of Appeal. Ashworth[49]notes that establishing the SGC was the first step by Government to reduce the extent of judicial autonomy in the formulation of sentencing standards. Reportedly, the later establishment of the Sentencing Council of England and Wales was a result of the government's concern about the increasing prison populations.[50]

[46] A Ashworth and JV Roberts, 'The Origins and Nature of Sentencing Guidelines in England and Wales' in A Ashworth and JV Roberts (eds.), *Sentencing Guidelines: Exploring the English Model* (Oxford University Press 2013).
[47]M Wasik, 'Sentencing Guidelines in England and Wales —State of the Art?' (2008) 4 Criminal Law Review 253.
[48] The Crime and Disorder Act, Chapter 37 (Laws of England, 1998) s 81.
[49] A Ashworth, 'Coroners and Justice Act 2009: Sentencing Guidelines and the Sentencing Council' (2010) 5 Criminal Law Review 389.
[50] Sentencing Commission Working Group (SCWG), 'Sentencing Guidelines in England and Wales: An Evolutionary Approach' (SCWG London 2008a).

The immediate impetus to structure judicial sentencing discretion in Scotland first came from the judiciary, when the Lord Justice Clerk with the support of the Lord Justice General, spearheaded the first move towards promoting greater consistency in sentencing by approaching academics at the University of Strathclyde, who he requested to examine the feasibility of a judicial sentencing decision support system for Scotland.[51] Even then, it is suggested that the initiative to create the sentencing information system was precipitated by 'political pressure from the conservative ministers who were planning to introduce mandatory minimum sentences in the form of two strike laws'.[52] That notwithstanding, the judicial sentencing support system collapsed. The Sentencing Commission for Scotland reported that by 2006, the system 'was not widely used' and 'had largely fallen into abeyance'.[53] Indeed, when the Scottish Parliament passed the Criminal Justice and Licensing (Scotland) Act 2010 establishing the Scottish sentencing council, responsible for developing comprehensive and formal sentencing guidelines, it is reported that the legislation was received with 'fierce resistance from the judiciary'.[54]

Clearly, in a number of jurisdictions, sentencing guideline reform was an initiative of all branches of government [55] and was met with some form of judicial opposition.[56]In Uganda, other

[51] C Tata, 'Neutrality, Choice and Ownership of the Construction, Use and Adaptation of Judicial Decision Support Systems, (1996) 6 The International Journal of Law and Information Technology 143.

[52] N Hutton and C Tata, 'A Sentencing Exception? Changing Sentencing Policy in Scotland' (2010) 22 Federal Sentencing Reporter 272, 275.

[53]The Sentencing Commission for Scotland, 'The Scope to Improve Consistency in Sentencing' (2006) para. 4.17, 16 < http://www.scotland.gov.uk/Resource/Doc/925/0116783.pdf> (accessed on 15 April 2014).

[54]C Tata, 'The Struggle for Sentencing Reform: Will the English Sentencing Guidelines Model Spread?' in a Ashworth and JV Roberts (eds.), *Sentencing Guidelines: Exploring the English Model* (Oxford University Press 2013) 238.

[55] P HyungKwan, 'The Basic Features of the First Korean Sentencing Guidelines' (2010) 22 Federal Sentencing Reporter 262. For a discussion of the history of sentencing guideline reform in Korea. The author notes that the president of the Republic of Korea and the Chief Justice of the Supreme Court initiated the debate on sentencing reform in Korea in 2003 and this resulted in the establishment of the Presidential Commission for Judicial Reform in 2004 which recommended to the National Assembly, the establishment of a sentencing commission. Similar to other jurisdictions, the sentencing guideline reform process took a considerably long time and it was not until 2007 that the Korean Sentencing Commission promulgated its first guidelines.

[56]See, e.g., South African Law Commission, 'Report Project 82 Sentencing (A New Sentencing Framework)' (December, 2000) 21 where it is noted that judges of the Orange Free State and Witwatersrand Division of the High

branches of government, as well as other political constituencies, such as the prosecutors' office, legal practitioners, academics, human rights bodies, public interest groups and so many others, have not demonstrated any interest in the development of the Uganda Guidelines. Additionally, the Uganda Guidelines have been developed with the support of senior members of the judiciary which is unlike the path taken in a number of other jurisdictions. Suffice to say that Uganda Guidelines have been developed without prolonged political debates about who should write the guidelines and how they should be written. Hence, the movement to sentencing guideline reform has been driven by a judicially led political interest. For instance, despite the broad discretionary powers exercised by Ugandan sentencers, as at the time of writing, there is one known academic scholarly work on the topic of judicial sentencing discretion.[57] It is easy to attribute this attitude to the fact that crime and punishment issues are not politicised in Uganda as it is in other jurisdictions. The distribution of sentencing authority in Uganda provides a better understanding of how and why sentencing guidelines could be developed with the exclusion of the executive and the legislature.

3.2 Distribution of Sentencing Authority in Uganda

To understand why efforts towards a structured approach to sentencing came with the support of the most senior members of the judiciary and why these senior judicial officers have succeeded in steering the development of sentencing guidelines without attracting any form of opposition from other key political players in the criminal justice system, one needs to understand how

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Court objected to the idea of sentencing guidelines developed by a sentencing council arguing that sentencing depended on the experience and human moral judgment and good sense of judicial officers. Also, SCWG (2008 a) (n 50). Also, Sentencing Commission Working Group, 'A Summary of Responses to the Sentencing Commission Working Group's Consultation Paper', (London SCWG 2008b) for the judiciary's opposition to the introduction of numerical grids in England and Wales.

[57] J Kamuzze, 'An Insight into Uganda's New Sentencing Guidelines: A Replica of Individualization?'(2014) Federal Sentencing Reporter 47.

sentencing authority is distributed amongst the different political constituencies in Uganda. Like in many other jurisdictions, sentencing authority — which is understood as 'the power to develop sentencing policy and make sentencing decisions'[58] is legally distributed amongst the executive, legislature and the judiciary. The executive through initiation of criminal proceedings, granting of presidential pardons, and making social inquiry reports, remissions, and granting probation in a way influences sentencing decision making. On the other hand, the legislature exercises sentencing authority through its legitimate function of promulgating laws that define the elements of crime, prescribe mandatory minimum and maximum penalties as well as prescribe the jurisdiction of different courts to hear and try cases. The judiciary has authority to make sentencing policy through jurisprudence which is developed through the judiciary's application of legislation to real life cases.

However, practically de facto sentencing authority is left in the hands of the judiciary in Uganda. Generally, sentencing in Uganda does not come across as an issue of political interest. Except in some cases such as: (i) those involving the trials of opposition leaders perceived to be a threat to the government in power,[59](ii) issues concerning bail, where President Museveni has publicly questioned the judges' decision to grant bail to criminal suspects[60]and (iii) other post sentencing

[58] N Hutton, 'Institutional Mechanisms for Incorporating the Public in the Development of Sentencing Policy' in A Frieberg and K Gelb (ed.), *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press 2008).

[59] One of the commonly cited examples is that involving the Executive's interference with the decision of the court to grant bail to opposition leader Dr. Kiiza Besigye in 2005. The opposition leader was charged with rape, treason, terrorism and unlawful possession of firearms just a few months before his nomination in the presidential race. The High Court granted him Bail twice but the suspect was forced back to prison by the military. The most controversial day was November 16, 2005 when the High Court premises in Kampala were siege by military men in uniform who barred the suspect from being released on bail even after the court had made a decision for his release on bail.

[60] T Kahungu and E Ninsuuma E, 'Scrap Bail, Museveni says again' The *Daily Monitor Newspaper* (Kampala, 31 January 2013) <http://www.monitor.co.ug/News/National/Scrap-bail--Museveni-says-again/-/688334/1680164/-/42h9ji/-/index.html> (accessed 10 May 2014); "Deny Bail to Crime Suspects"— President Museveni, *State House of Uganda News* (Kampala 22 November 2013)

issues such as presidential pardons attracting sometimes but not always public scrutiny. That notwithstanding, sentencing authority is distributed amongst the three branches of government in the following manner.

3.2.1 The Executive's Role

The 1995 Constitution of Uganda recognises the doctrine of separation of powers through its distribution of governmental functions amongst three institutions: the executive, legislature and the judiciary. Each branch of government is bestowed with its own functions. However, when it comes to sentencing authority, every branch of government plays a role in the determination of sentence and development of sentencing policy. The first execution of sentencing authority begins with the power to initiate criminal proceedings which falls under the executive branch.[61] Although initiation of criminal proceedings is not a sentencing matter per se, decisions made at that stage have a significant influence on the ultimate sentencing decision. The executive, through the office of the Director of Public Prosecutions is permitted by the Constitution to commence investigations, and make decisions on whether to institute criminal proceedings against the suspect or not, and what kind of offence and evidence to lead during prosecution.[62] The criminal charges the prosecution chooses to prefer against the accused will have an impact on the nature of sentence the accused, if convicted, will ultimately serve.

<http://www.statehouse.go.ug/media/news/2013/11/22/%E2%80%9Cdeny-bail-crime-suspects%E2%80%9D-%E2%80%93-president-museveni>; Y Mugerwa and M Nalugo, 'MPs Support Museveni on Scrapping Bail for Sodomy Suspects' *The Daily Monitor Newspaper* (Kampala, 21 March 2014) <http://www.monitor.co.ug/News/National/MPs-support--Museveni-on-scrapping-bail-for-sodomy-suspects/-/688334/2205536/-/qsweey/-/index.html> (accessed 21 March 2014).

[61] The 1995 Constitution of Uganda, article 120.

[62] ibid, article 120(3) (a) to (d).

For example, if the prosecutor chooses to charge the offender with theft instead of receiving stolen goods, the prosecutor would have set the ground for the range of penalty within which court will find an appropriate sanction to impose on the offender. Say, if the prosecution chooses theft which carries a maximum penalty of ten years imprisonment, this will expose the offender to that range of punishment instead of 14 years imprisonment which is the maximum penalty for receiving stolen goods.[63]The decisions made by the Director of Public Prosecutions when choosing who, when, and for what to prosecute in Uganda, are insulated against 'the direction or control of any person'.[64]Ex facie, this is interpreted to mean that even courts cannot review the decision of the Director of Public Prosecutions, in choosing to initiate, withdraw or discontinue criminal proceedings.

Additionally, the executive exercises sentencing authority through the clemency powers conferred on the president under the Constitution of Uganda, article 121(4). The president's clemency power includes the authority to temporarily or permanently stay execution of a criminal sentence, or reduce a sentence imposed upon conviction by substituting it with a less severe sentence, including the authority to remit, or reduce, the amount of a fine otherwise payable to Government. Although the presidential clemency powers are triggered only when a criminal sentence has been imposed on an offender, thus making it post sentencing authority, the possibility of a presidential pardon creates room for the executive to exercise some authority in sentencing. The president of Uganda has exercised this power in a number of occasions, where

[63] PCA 120, s 254 and 261 for theft and PCA 120, s 314 for receiving stolen property.
[64] The 1995 Constitution of Uganda, article 120(7).

he has granted reprieve to death row inmates, including to convicts of some of the most controversial cases.[65]

Through remissions, release on licence, parole and the power of the Minister of Justice to review sentences, the executive continues to be a key player in the exercise of sentencing authority in Uganda. The Prisons Act, 2006 confers powers of remission, release on licence, parole and review on the Commissioner General of Prisons (hereafter 'the Commissioner General') or the Minister of Justice. The Commissioner General can grant a prisoner remission of one third of his/her sentence if he demonstrates good conduct during his period of incarceration.[66] The power to grant remission is one of the ways in which the executive exercises sentencing authority. The Prisons Act also permits the Commissioner General to release any habitual offender on licence,[67] who has been sentenced to imprisonment for 3 years or more.[68] If the offender reoffends during his or her time on licence, the licence is cancelled and the offender is incarcerated for the remaining duration of his or her sentence. Additionally, the Minister of Justice and Constitutional Affairs has powers to review prisoners sentences by imposing lesser custodial durations. Eligibility applies to prisoners who have been sentenced to life imprisonment or to a term exceeding seven years.[69] The review of the prisoner's sentence is based on social reports

[65] C Ariko and F Kagolo, 'Museveni Pardons Rwakasisi, Fadhul' *The New Vision Newspaper* (Kampala, 20 January 2009) <http://www.newvision.co.ug/D/8/12/668719> (accessed on 20 November 2013); P Mudoola 'President Museveni Pardons Sharma Kooky' *The New Vision Newspaper* (Kampala, 27 March 2012) <.http://www.newvision.co.ug/news/629895-629895-president-museveni-pardons-sharma-kooky.html> (accessed 20 November 2013). Women Lawmakers under the Uganda Women Parliamentary Association demonstrated demanding that the president rescinds his decision pardoning Kooky.
[66] The Prisons Act, Chapter 17 (Laws of Uganda, 2006) s 84 (1) and (2).
[67] ibid, s 87 (1) a habitual offender is for purposes of the Act defined as a person who has been sentenced on four separate occasions to imprisonment for any offence contained in chapters XXV to XXXVIII of the Penal Code Act or for any attempt of conspiracy to commit any such offence.
[68] ibid.
[69] ibid, s 88 (1) (a).

filed every four years in respect of the prisoner's possibility of reintegration into the community.[70]

Lastly, the executive through the Commissioner can release a prisoner serving a sentence of more than four years or more on parole, except that parole can only be granted within six months to the date of the prisoner's release.[71]Admittedly, the executive has sentencing authority in Uganda.

3.2.2 The Role of the Legislature

The role of the legislature in sentencing is widely known. Article 91 of the 1995 Constitution of Uganda categorically confers on Parliament the power to make laws. In the context of criminal justice this means that the legislature makes the primary policy decisions in regard to criminal sentencing. The legislature performs the legitimate function of promulgating sentencing legislation that defines conduct which constitutes criminal behaviour, prescribing mandatory minimum or maximum penalties for those conducts, as well as determining the criminal jurisdiction of each court of judicature. The legislature's sentencing authority is therefore exercised at the instance of promulgation of criminal laws. For example, by setting 10 years imprisonment as the maximum penalty for theft the legislature is constraining the breadth of discretion for magistrates in theft cases to 10 years imprisonment. The judiciary is simply required to interpret and apply the applicable statutory provisions by weighing the evidence and circumstances of each case and fitting it within the legislative formula, even if the judge does not agree with the range of punishment options provided by the legislature.

[70] ibid, s 88(1)(c).
[71] ibid, s 89 (1).

The doctrine of separation of powers under which the three branches of Government perform their sentencing authority provides safeguards against abuse of power in criminal sentencing, by creating a forum for each of the three branches to participate in criminal sentencing.[72]

3.2.3 The Judiciary

Sentencing authority is undoubtedly distributed amongst the three branches of government in Uganda. However, as earlier noted, the judiciary in Uganda performs its sentencing authority without much interference from other political constituencies. Given that sentencing is not politicised in Uganda as it is in other jurisdictions, this perhaps confers on the judiciary absolute authority over sentencing issues including sentencing policy making. The absence of public controversy in sentencing is more likely to explain why sentencing reform in Uganda is perceived as the judiciary's responsibility. The 1995 Constitution, chapter 8 empowers the judiciary to interpret law and its application through the exercise of discretion. Most notable is article 128(1) which grants the judiciary independence from interference of any person in exercising their judicial functions. This means that at least in the context of criminal sentencing, the judiciary's power to impose criminal sanctions is not subjected to any form of political interference, with the exception of being bound by statutory maximum or minimum sentences.

The sentencers' decisions are thus only constrained by the statutory maximum penalties set for each offence category. For instance, the PCA 120, section(s) 254 and 256 prescribes 10 years imprisonment as the maximum penalty for theft. The judge is therefore constrained to pass a sentence within these statutory limits, and any sentence imposed is final except if reviewed by a

[72] K Riley, 'Trial by Legislature: Why Statutory Mandatory Minimum Sentences Undermine the Separation of Powers Doctrine' (2010) 19 Public Interest Law Journal 285, 310.

higher court, or where the executive uses its sentencing authority to provide remission, review, parole or presidential clemency. These are the only known legal interferences by the executive or legislature. The judiciary's sentencing powers are, therefore, rarely subjected to other political interferences. The media also rarely gives attention to crime and punishment issues, except in high profile murder trials involving a known politician, or socialite when the media gives full daily updates on the trial proceedings and seeks the public's views on the cases.[73] With the exception of such cases, judicial decision making in criminal matters is hardly appraised by the media or the public. Even in cases where such appraisals are made, it is not particularly evident that the media coverage imparts any 'pressures' on the judges.

Supposedly, the few times when pressure is perhaps exerted on the judiciary in crime and punishment issues is when the executive and the legislature enact legislation that is specifically aimed at increasing punishment of a particular group of offenders. Again, this is a legitimate authority that the legislature and the executive have over promulgating laws in Uganda over the judiciary. For example, the enactment of the Penal Code Amendment Act, 2007 making the offender's HIV status an aggravating factor that justifies imposition of the death penalty in defilement cases, or the enactment of the Anti-Homosexuality Act, 2014 imposing life imprisonment sentences on people in same-sex relations.[74] Such legislative intrusion could be interpreted to be imparting indirect pressure on the judiciary to impose harsher sentences on

[73]Some examples of criminal cases that attracted wide media and public attention in Uganda include: (1) the case of *Uganda v Akhbar Godi* Criminal Case No 124 of 2008 (10 February 2011). The offender a member of parliament murdered his estranged wife in cold blood. (2) The case of *Uganda v Thomas Nkurungira and Another* Criminal case No 426 of 2010 (11 August 2011). The offender a well known member of the elite class in Uganda murdered his girlfriend in cold blood and disposed of her body in a sewerage disposal tank. (3) The case of *Uganda v Kato Kajubi* (Criminal Session Case No 28 of 2012 (26 June 2012). The offender a wealthy Ugandan businessman allegedly conspired with others to kill a young boy for rituals. (4) The case of *Uganda v Geoffrey Kazinda* Criminal Case No. 138 of 2012 (19 June 2013). The offender, a former Principal Accountant to the Ministry of Finance is alleged to have embezzled huge sums of money.

[74] The Anti-Homosexuality Act, 2014 was declared unconstitutional because it was passed without quorum in parliament. See *Prof J Oloka-Onyango & 9 Others v Attorney General*, Constitutional Petition N0. 08 of 2014 (1 August 2014).

particular categories of offenders. Again, indirect interferences such as the recent resolution to have the constitutional right to bail scrapped for persons charged with homosexuality, rape and defilement[75]also tends to suggest indirect pressure on the judiciary to consider these offences particularly abhorrent.

Other than the foregoing, the judiciary in Uganda seems to have insurmountable sentencing authority. Given the distribution of sentencing authority, and the unconverted power one organ of government —the judiciary has over other branches of government, perhaps the development of sentencing guidelines has not yet been viewed by other political constituencies as a threat to the distribution of sentencing authority, but as a privilege the judiciary enjoys over making sentencing policy. It is not the first time the Chief Justice has passed practice directions. By virtue of powers conferred upon the Chief Justice by the Constitution, the Chief Justice is entitled to issue orders and directions to the courts necessary for the proper and efficient administration of justice.[76] Perhaps the issuance of the sentencing guidelines is only perceived by the other political constituencies, as a necessary tool for the courts administration of justice. That is why, the Taskforce's initial agenda focuses on first selling the concept of guideline sentencing to the judiciary, subsequent to which, the executive through the Minister of Justice and Constitutional Affairs will be engaged to spearhead the tabling of the Sentencing Reform Bill before Parliament.[77]

The appraisal demonstrates that sentencing authority is distributed amongst a number of actors. Therefore, the development of sentencing guidelines should have been of interest to other political constituencies because considering investing sentencing authority in an independent

[75]Y Mugerwa and M Nalugo, 'MPs Support Museveni on Scrapping Bail for Sodomy Suspects' (n 60).
[76] The 1995 Constitution of Uganda, article 133(1)(b).
[77] Interview with Andrew Khaukha, Executive Secretary, Uganda Sentencing Guidelines Committee (ULRC offices, Kampala, 12 February 2014).

sentencing institution, as the Chief Justice has envisioned,[78]requires an account of how this authority will fit into the existing practice and framework of distribution of authority over sentencing. This is not to say that sentencing reform instigated singly by the judiciary is less credible. However, for as long as sentencing authority is distributed amongst the three branches of Government, cooperation and involvement of all stake holders will ensure that all political interests are addressed.

The move towards sentencing guideline reform has emanated from the judiciary as a result of a perception that judicial discretion is being exercised inconsistently. Only time will tell if other political constituencies will develop interest in the development of the sentencing guidelines. However, currently, the judicially led political interest has shaped the process of developing Uganda's new sentencing guideline framework, and as will be shown, this approach has inhibited the extent of ambition of the guidelines.

3.3 The Process of Developing Uganda's Sentencing Guidelines

Transparency is one of the primary purposes of the Uganda Guidelines. Transparency, in the sentencing context, means providing the public with a clearer understanding of the sentencing decision making process. The then Chief Justice of Uganda in his keynote address at the 15th Annual Judges Conference in January 2013 noted that 'one of the purposes of the sentencing guidelines was to restore the public's confidence in the criminal justice system'.[79] Odoki reckoned that by making sentencing decision making clearer to the public, confidence in the

[78] see, Odoki, 'Keynote Address' (n 1) 7. The Chief Justice implored the Sentencing Guidelines Committee to engage with members of parliament to fast track the passage of the Sentencing Reform Bill establishing a sentencing council for Uganda.

[79]BJ Odoki, Keynote Address at the 15th Annual Judges Conference' (Hotel Africana, Kampala Uganda, 14 January 2013)<http://www.judicature.go.ug/files/downloads/Chief%20Justice's%20Speech.pdf> (accessed on 15 March 2014).

criminal justice system may be regained. As noted by Hutton[80] transparency in the context of sentencing guidelines suggests a potential of clarity of vision. With guidelines, the policy makers and the general public should be able to assess the fairness of a sentence in a given case. Young and King accordingly rightly propose that given that the intention of guidelines is to provide transparency, there should be a process of 'extensive public involvement and consultation' before guidelines are developed.[81] Young and King were supporting Tonry's assertion that ideally 'open and wide political and public consultations' should be conducted before guidelines are passed. [82]

Sentencing guidelines are "law like"[83] and therefore need to be developed with a degree of democratic accountability from those engaged in developing the guidelines. Democratic accountability could be achieved either by requiring legislative approval of the proposed guidelines or by requiring that the guidelines are presented to the legislature for passive review. In Uganda, judges exercise discretion over individual sentencing decisions and also have de facto authority over sentencing. This means that sentencing policy in Uganda is mostly developed without any form of democratic accountability because sentencers are not publicly elected officials. This is what is chiefly missing in an individualised sentencing system. Therefore, this thesis forms the preliminary view that setting sentencing policy through guidelines requires

[80] N Hutton, 'The Definitive Guideline on Assault Offences: The Performance of Justice' in A Ashworth and JV Roberts (eds.), *Sentencing Guidelines: Exploring the English Model* (Oxford University Press 2013).
[81] W Young and A King, 'The Origin and Evolution of Sentencing Guidelines: A Comparison of England and Wales and New Zealand' in A Ashworth and J V Roberts (eds.), *Sentencing Guidelines: Exploring the English Model* (Oxford University Press 2013).
[82]M Tonry, 'Setting Sentencing Policy through Guidelines' in S Rex and M Tonry (eds.), *Reform and Punishment: The Future of Sentencing* (Willan Publishing 2002).
[83] ibid 85.

democratic accountability. Young and King note that a statutory obligation to publicly consult on the guidelines can remedy the democratic deficit.[84]

3.3.1 Practices From Other Countries

The 1978 Minnesota Laws, Chapter 723 establishing the Minnesota Sentencing Guidelines Commission (hereafter 'Minnesota Commission') mandated the Minnesota Commission to give 'substantial consideration to existing sentencing and releasing practices…' A close reading of the Act suggests that the Minnesota Commission was permitted to give substantial regard to past judicial practices, but its mandate was not restricted to developing guidelines simply based on past sentencing practices.[85]Frase notes that the new guidelines were not expected to 'simply model and perpetuate past judicial and parole decisions' but were intended to be 'norm changing and not norm reinforcing'.[86]The Commission is thus reported to have made independent policy choices on the extent past practices would be reflected in its sentencing guidelines. The policy choices included adopting a modified just desert rationale, which was considered the most appropriate approach that would reflect past practice of determining sentence based on two influential factors: conviction offence seriousness and prior criminal record.[87]

Additionally, the Minnesota Commission used an open access process to guideline development. According to Parent[88] all organisations and interested individuals were allowed to join in the Commission's deliberations and to influence its decisions. To date, the open process approach to

[84] See Young and King (n 81) 202.
[85] KA Knapp, 'Impact of the Minnesota Sentencing Guidelines on Sentencing Practices' (1985) 5 Hamline Law Review 237, 239.
[86] See Frase, 'Sentencing Guidelines in Minnesota' (n 39) 146.
[87] KA Knapp, 'What Sentencing Reform in Minnesota Has and Has Not Accomplished' (1984-1985) 68 Judicature 181, 185.
[88] D Parent, 'What Did the United States Sentencing Commission Miss?' (1992) 101 Yale Law Journal 1773, 1775.

guideline development is still adopted in Minnesota. The Minnesota Commission meets on the 3rd Thursday of each month, and all meetings are open to the public.[89] It is important to point out that Minnesota has an open meeting legislation which mandates governmental agencies, like the Minnesota Commission, to hold public meetings as a way for affording the public an opportunity to present their views on decision making by a public body.[90]The statute obliges governmental agencies to publish their meeting dates and agendas in advance. For instance, the dates of the forthcoming Minnesota Commission meetings are already published and the meeting materials and agendas are publicly available a week prior to the meeting.[91]The Minnesota legislature recognised the importance of democratic accountability, thereby requiring that the Minnesota Commission guidelines are submitted to the legislature for passive review and take effect after a designated period unless rejected.[92]

The Coroners and Justice Act 2009 (COJA 2009) establishing the Sentencing Council of England and Wales, places a statutory obligation on the Sentencing Council to publicly consult on its draft sentencing guidelines. Section 120 (6) requires the Sentencing Council to publish draft guidelines which must be subject to public consultation for a period of 12 weeks. After identifying work plan priorities (which could be based on existing guidelines or on statutory mandate), the Sentencing Council undertakes policy and legal research, upon which an initial draft guidelines is created. The Council then consults the statutory consultees, criminal justice

[89]See, The Minnesota Sentencing Guidelines Commission website <http://mn.gov/sentencing-guidelines/meetings/>.
[90]Minnesota Statutes, Chapter 13D.O1 (2013). Note that in 1980 when the guidelines were first developed, the Law was Minnesota Statutes (1980) § 471.705.
[91]Minnesota Sentencing Guidelines Commission, 'Upcoming Meetings'<http://mn.gov/sentencing-guidelines/meetings/ > (accessed on 10 March 2014) where the dates of 17 April, 2014; 22 May 2014 and 12 June 2014 are the dates fixed for the next public meetings.
[92]See Chapter 6 of this study for a detailed discussion of Minnesota Sentencing Guidelines Commission's rule making authority.

professionals and the wider public.[93] The address of a contact person including the postal address, and email are availed on the Sentencing Council website enabling an easy access to consultation documents by the members of the public.

Any person including a professional in the criminal justice system, or any academic or any one with experience of the criminal justice system can give their views on sentencing.[94]A consultation questionnaire is issued with a draft guideline. Young and King note that guidelines should ideally be consulted on. Obviously public consultation enables the development of sentencing policy based on open discussions of broader policy issues as well as affording the public with a greater understanding of how and why sentencing policy is developed in the fashion it is. This is important for sentencing guideline development because it is consistent with the main aim of sentencing guidelines which is to enable transparency in the process of developing sentencing policy.

Additionally, with regard to an open process approach to developing guidelines under the English guideline system, once the 12 weeks consultation period has lapsed, the Sentencing Council considers the responses to the consultations[95] and issues the guidelines as definitive guidelines in accordance with the COJA 2009, section 120(7). The guidelines are not subjected to a full legislative approval process, which gives the Sentencing Council absolute rule making authority (see chapter 6). However, the Sentencing Council is mandated to publicly consult a

[93] The Coroners and Justice Act 2009 (COJA 2009) s 120(6).
[94]Sentencing Council, 'Closed Consultations' <http://sentencingcouncil.judiciary.gov.uk/get-involved/consultations-closed.htm>(accessed on 10 March 2014).
[95] See, e.g., Sentencing Council, 'Assault Guideline: Public Consultation' (October 2010) the sentencing council indicated that it had considered case law on assault and evidence on current sentencing practices <http://sentencingcouncil.judiciary.gov.uk/docs/ASSAULT_Public_web.pdf> (accessed on 16 March 2014).

number of constituencies including the Lord Chancellor, or such persons as the Lord Chancellor directs, as well as the Justice Select Committee of the House of Commons. [96]This in a sense provides remedy to the democratic deficit which would have otherwise been created if the guidelines were developed by a democratically unaccountable Sentencing Council.

Similarly, in other jurisdictions, for example in South Africa (SA), public consultations were made before the South Africa Law Commission made recommendations for a new sentencing framework that would see the establishment of a Sentencing Council for South Africa. A discussion paper to obtain views from the public and other key players in sentencing was widely circulated to key players including judges, magistrates, prosecutors, academics, the Director of Public Prosecutions, private legal practitioners, government departments, and international experts in the law of sentencing. The discussion paper was also made available on the internet to enable members of the public to give their comments on the paper. Comments were received from members of the public and international experts on sentencing. Some of the experts that commented on the discussion paper included Professor Ashworth, Professor CMV Clarkson and Professor Von Hirsch.[97]Four public regional workshops were also organised[98] to stimulate further discussion on the paper. The workshops also attracted some of the leading international sentencing commentators like Professor Arie Frieberg and Professor Rod Morgan.[99]Notably present at all workshops was Professor D Van Zyl Smit, a leading sentencing commentator and the SA sentencing project committee leader appointed by the Minister of Justice in 1998. Like

[96] COJA 2009, s 120 (6) (a) (b) and (c).
[97] See South Africa Law Commission Report (n 56) 133.
[98]ibid 20. Following the closing date (May 31 2000) for consultations on the discussion paper, four regional workshops were organised between June 12-15, 2000 in Pretoria, Durban, Cape Town and Bloemfontein to stimulate further discussion. The workshop of June 28-30 2000 was attended by some of the leading commentators on sentencing including.
[99] ibid 145.

other jurisdictions, there was an extensive consultation process undertaken by the SA Law Commission before coming up with its draft Sentencing Framework Bill, 2000.

Thus, given that sentencing policy making is a social function, a number of processes should be followed in its development. Experiences from other jurisdictions show that sentencing policy is made by engaging in public and political debates about the approach to sentencing. Accordingly, openness in sentencing guideline development may serve to enhance public confidence in the criminal justice system, in that the public will better understand how and why particular approaches to sentencing are taken. The primary purpose of transparency in sentencing decision making is better achieved through an open approach to formulating sentencing policy.

3.3.2 What Did the Uganda Taskforce Miss Out?

The Uganda Taskforce took fourteen months after its composition to come up with the first draft guideline. Apparently, a few members of the Taskforce travelled to and consulted with the judiciaries in SA and England and Wales on the subject of sentencing guidelines.[100]The Taskforce also organised a workshop involving a number of stakeholders with the aim of building consensus on sharing findings and to agree on a way forward.[101] The Taskforce apparently designed some of the basic features of the Guidelines — sentencing ranges, starting points and aggravating factors using empirical evidence that they had collected from the study of past sentencing practices in the courts.[102]The Taskforce randomly selected a sample of 1,000

[100] ULRC, '2010 Annual Report to the Legislature' 28- 30. Also, Justice Y Bamwine, 'Principles of Sentencing: A Global, Regional and National Perspective' (Munyonyo Commonwealth Resort Hotel Kampala, 30 August 2012) <http://www.judicature.go.ug/files/downloads/PRINCIPALS%20OF%20SENTENCINT%20A%20GLOBAL%20REGIONAL%20%20NATIONAL%20PERSPECTIVE%20final.pdf> (accessed on 15 March 2014).
[101] ULRC, '2011 Annual Report' (n 33) 12.
[102] Interviews with Andrew Khaukha (n 36).

court judgments representing 10 headline conviction offences (100 cases per headline conviction). A professional statistician was engaged to generate the suggested punishment ranges. The Executive Secretary first of all identified the most influential aggravating and mitigating factors associated with a particular headline offence. The statistician was then asked to apply a statistical model which would take one factor, say, habitual offending, determine how many times this factor occurred as an aggravating factor in say defilement cases. That is to say, if a factor appeared a certain number of times a weight of 0.05 would be given and anything below that was considered an irrelevant factor to sentencing for that given offence category, and so on.[103]

The result was the incorporation of sentencing factors basing on a criteria of how many times it appeared as an aggravating or mitigating factor in a given offence type. This approach was clearly problematic to aiding consistency as shall be discussed throughout this thesis. Whilst basing sentencing guidelines on past sentencing practice is arguably ideal for designing some features of the guideline, such as determining ranges of punishment for a particular offence classification, past sentencing practices are less likely to offer a good approach for determining the guidelines' overall sentencing policy. This is because guidelines simply based on past sentencing practices may 'freeze past practice into sentencing policy'.[104] For instance, the Taskforce clearly did not take a principled approach to determining the relevance and weight to be attached to numerous aggravating and mitigating factors. Using past sentencing practices to determine which aggravating and mitigating factors to apply to sentencing without an explicit

[103] ibid.
[104] A Von Hirsch, 'Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Sentencing Guidelines Commission' (1982) 5 Hamline Law Review 164, 173.

sentencing rationale meant that old practices and their concomitant inconsistencies were incorporated into the sentencing policy.

A number of jurisdictions with well-developed sentencing guideline systems, approach the formulation of sentencing policy with openness, as this provides democratic accountability for sentencing policy making. However, it is not clear how the Uganda Guidelines were made, and who Ugandans should hold accountable for their making. Publicly, the Taskforce was constituted by the Chief Justice to develop Uganda's sentencing guidelines. Beyond that, it is not clear who amongst the criminal justice constituencies, was practically involved or consulted in the development of the guidelines. The only issue within public knowledge is the fact that the then Chief Justice had the final say over the shape of the sentencing guidelines, since they were issued as practice directions.

The Taskforce purports to have conducted benchmarking exercises in the United Kingdom and SA with the view of getting good working practices.[105] However, it is unclear why the Taskforce did not draw on some of the experiences from other countries in formulating the Uganda Guidelines. Guideline development seems to have been driven more by judicial perspectives. Legislative approval or consultation typifies the development of most guideline schemes, and it is not only important for democratic accountability, but the positive endorsement by the legislature of the sentencing guidelines can give the guidelines greater democratic legitimacy. Excluding any form of democratic accountability in the formulation of Uganda Guidelines undermines the primary essence of setting sentencing policy through guidelines, which is to make sentencing policy making more accountable.

[105] Interviews with Andrew Khaukha (n 36); Also, ULRC, '2010 Annual Report to the Legislature' (n 100) 28-30 and Bamwine, 'Principles of Sentencing' (n 100).

3.4 Form and Content of the Uganda Guidelines

3.4.1 Narrative or Numerical

Briefly summarised, the first set of Uganda Guidelines (a) adopt both a numerical and narrative form, (b) cover both felony and misdemeanour offences, and are (c) neither offence specific nor comprehensive. To begin with the first feature, the Uganda Guidelines have a numerical and a narrative component. In order to understand this better, it is germane to state that commentators have described the United States (US) typical grid style guidelines as examples of a numerical guideline.[106]The US sentencing guidelines have been tagged 'numerical' because the guidelines are typically summarised on a grid containing a sentence severity level scale which ranks offences according to their relative gravity, and a prior criminal record score, and the grid is filled with sentence dispositions (in numbers, not words). Technically, what makes a US grid numerical is the consistent and predictable quantified impact of criminal history on sentence severity.

On the other hand, the definitive guidelines of England and Wales (hereafter 'English definitive guidelines') have been described as 'the alternatives to the US grid based systems'.[107]It appears that what makes the English definitive guidelines narrative is their description of sentencing principles more in words, with less numbers as compared to numerous examples of US grids. Roberts[108]recently described the approach by England and Wales as providing 'numerical, prescriptive, yet flexible guidelines'. Indeed, because the English definitive guidelines include a narrative discussion of the offence category tables, and a list of aggravating and mitigating

[106] A Von Hirsch, 'Guidance by Numbers or Words: Numerical versus Narrative Guidelines for Sentencing' in K Pease and M Wasik (eds.), *Sentencing Reform: Guidance or Guidelines?* (Manchester University Press 1987).
[107] JV Roberts, 'Structured Sentencing: Lessons from England and Wales for Common Law jurisdictions' (2012) 14 Punishment and Society 267, 267.
[108] ibid 281.

factors appears beneath the table is not to say that the English definitive guidelines are all purely narrative. Similar to the English definitive guidelines, the US guidelines have a narrative component in their detailed guideline manuals and commentaries.[109] Equally, like on a typical US grid, the English definitive guidelines have a numerical component, in the form of offence ranges, consistent and cumulative impacts on sentencing for guilty pleas,[110] and consistent and cumulative starting points for all offence categories. The only difference is that in England and Wales, the impact of criminal record is always aggravating in theory but not quantified in practice.

That said, the Uganda Guidelines have a numerical and a narrative component. The Uganda Guidelines' numerical component is found in the ranges of punishment prescribed in the Guidelines as well as the starting points. For each offence, there is a sentencing range and corresponding starting point. However, the Uganda Guidelines are equally narrative. Most of the sentencing principles are detailed in a narrative form. Criminal history does not contribute a consistent and predictable aggravation of punishment under the Uganda Guidelines.

Another major characteristic is that the Uganda Guidelines cover both felony and misdemeanour offences. They encompass all capital offences,[111]a few other felony offences and misdemeanours. A felony offence under PCA 120 is defined as one which is 'without proof of previous convictions punishable by death or imprisonment of 3 years or more', unless it is

[109] For example, the Minnesota Sentencing Guidelines Commission, 'Guideline Manual and Commentary 2013' is 127 pages and it provides detailed commentary on how the guidelines are to be applied <http://mn.gov/sentencing-guidelines/images/2013%2520Guidelines.pdf>(accessed on 10 January 2014).

[110]The Criminal Justice Act 2003 (CJA 2003), s 144. Also, the Sentencing Guidelines Council, 'Revised Definitive Guideline on Reduction in Sentence for a Guilty Plea' (23 July 2007) <http://sentencingcouncil.judiciary.gov.uk/docs/Reduction_in_Sentence_for_a_Guilty_Plea_-Revised_2007.pdf> (accessed on 10 January 2014).

[111] Murder; rape; aggravated defilement; kidnap with intent to murder; terrorism; treason and robbery.

specifically declared to be a misdemeanour.[112]A misdemeanour offence is one which is not a felony.[113]The Uganda Guidelines thus cover all capital felonies, non-capital felonies and misdemeanours such as criminal trespass. This means that these Guidelines are applicable in all courts of judicature in Uganda including the High Court and all courts constituted under the Magistrates' Courts Act chapter 16. Briefly, the guidelines cover, murder, treason, rape, defilement, robbery, terrorism, abduction with intent to murder, as well as manslaughter, simple defilement, theft or theft related offences, corruption, embezzlement, causing financial loss, and other corruption related offences such as abuse of office, bribery, false accounting by officer and solicitation and/or receipt of gratification.

Additionally, the Uganda Guidelines are neither comprehensive nor offence specific. To understand this difference, a brief overview of what constitutes a comprehensive or offence specific set of guidelines is important. The Minnesota guidelines are a typical example of a comprehensive guideline. The said guidelines divide all serious offences into eleven categories of relative gravity, allowing the implementation, monitoring and revision of the guidelines as a comprehensive package. Comprehensive formulation of guidelines enables an easier assessment of the overall cost effectiveness of the guidelines, and their full impact on sentencing practice and penal resources.[114] On the other hand, the definitive English guidelines are developed in an incremental offence by offence basis. Each definitive guideline, therefore, addresses a specific offence classification.[115]The offence specific guideline development minimises the potential for unwarranted uniformity which could result from a comprehensive formulation of guidelines.

[112] PCA 120, s 2(e).
[113]ibid, s 2(n).
[114] Young and King (n 81) 206.
[115] COJA 2009, s 125 (3) - (4).

Unwarranted uniformity could occur, if two distinctive offences are classified under the same offence category.

The first Uganda Guidelines are neither comprehensive nor offence specific. The Guidelines are developed iteratively, addressing a number of general offence classifications at a time. For example, the first Uganda Guideline has addressed all capital offences and just a handful of felony offences, with criminal trespass, which is a misdemeanour. The second set of guidelines will address a number of felony offence classifications, and so on.

3.4.2 A Voluntary Approach

Uganda Guidelines take the form of voluntary guidelines. The Guidelines were issued as practice directions in the exercise of the powers conferred on the Chief Justice by article 133 (1) (b) of the 1995 Constitution of Uganda.[116]Although the Uganda Guidelines have legal authority by virtue of their being issued as practice directions pursuant to powers conferred on the Chief Justice by the Constitution, they do not possess legislative force. They are therefore merely directory not mandatory.[117]The fact that the practice directions are advisory rather than mandatory is not all that surprising. In Uganda, not all practice directions are binding. Ordinarily, the tone of the language used in the practice directions and their contextual background communicates the binding nature of the practice directions. Normally, when a practice direction is sanctioned based,[118]that is, where some form of liability is incurred for non

[116] See, The Constitution of Uganda 1995, article 133(1)(b).
[117] Email to the Author from Yorokamu Bamwine, Principal Judge of the High Court of Uganda and Chairperson of the Uganda Sentencing Guidelines Committee (3 November 2014).
[118] For example, the Constitution (Commercial Court) Practice Directions, Legal Notice 5 of 1996 which regulates the procedure and practice of commercial courts in Uganda is sanction based. Para. 7 of these practice directions permits a judge in a commercial action to refuse to extend any period of compliance with an order of the court or to

compliance with the practice direction, that direction creates binding obligations on the parties to whom it assigns responsibilities. On the other hand, if the practice direction is without any sanctions, then it is merely informative. For example, the Constitution (Commercial Court) Practice Directions, Legal Notice 5 of 1996, which regulates the procedure of filing and settling disputes in commercial courts in Uganda, paragraph 7 permits a judge in a commercial action to:

> refuse to extend any period of compliance with an order of the court or to dismiss the action or counterclaim in whole or in part, or to award costs if the judge thinks fit where a party to the claim fails to comply in a timely manner with any order made by the judge under the practice directions.

Briefly, the contextual background to the commercial court practice directions shaped the tone of the language and mandatoriness of these practice directions. The purpose of establishing a commercial court for Uganda was to deal with delays in disposing of commercial disputes. Because of this problem, a solution was required to ensure that litigants and their lawyers adhered to times and procedures stipulated by the practice directions to avoid mala fide delays in the litigation of commercial cases. Liability was imposed for litigants who fail to comply with the rules of the commercial court and as such, the commercial court practice directions provide a good example of a binding practice direction. On the other hand, the contextual background to the Uganda Guidelines was different in terms of its objectives. The then Chief Justice of Uganda emphasised that the focus was on developing 'sentencing guidelines and not sentencing rules'.

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dismiss the action or counterclaim in whole or in part, or to award costs at the judge thinks fit where a party to the claim fails to comply in a timely manner with any order made by the judge. Also, Practice Direction No 1 of 2006 on Jurisdiction of Magistrates Courts in Land matters, Legal Notice No. 20 of 2006 was made for purposes of directing magistrates courts to handle land matters after the expiry of contracts of chairpersons and members of district land tribunals. In order to continue with the process of adjudicating land disputes, and to minimise case backlog, the Chief Justice made a direction which enabled magistrates courts to exercise jurisdiction over land matters until new members of the district land boards could be appointed. Another example is of the High Court (Anti Corruption) Practice Direction No. 1 of 2013, Legal Notice No. 12 of 2013. This practice direction was made to establish a specific division of the High Court to deal with corruption related cases. In the direction, the Chief Justice appointed judicial officers who would serve in this specific division of the High court who included magistrates.

Odoki further emphasised that the guidelines are intended to 'guide rather than direct the judicial officer.'[119] With this the then Chief Justice wanted to emphasise that the guidelines were to offer directions and (not directives) to judicial officers in the exercise of their sentencing discretion. In a recent email conversation between the author and Justice Bamwine, who is the principal judge of the High Court of Uganda and the Chairperson of the Sentencing Guidelines Committee (and the former Taskforce), Justice Bamwine confirmed that the Taskforce "tried as much as possible to avoid use of *shall* which connotes mandatoriness and used *may* which is permissive".[120]...the Uganda Guidelines are not by any means binding on judicial officers lest they take away discretion. A judicial officer who wants to impose sentence outside the guidelines is at liberty to do so...'[121]Justice Bamwine also noted: "in our jurisdiction directions are directions. They are not law and therefore not mandatory".[122] Although Justice Bamwine may not have addressed the issue of whether the Uganda Guidelines could be presumptive (which is a commonly used term for sentencing guidelines that create some degree of binding obligations on sentencers) his communication was explicit on the non-binding nature of the Uganda Guidelines. Also, as noted above, the then Chief Justice also publicly acknowledged that Uganda Guidelines are mere guidelines not rules, thereby also further confirming their non-binding nature.

In this light, the objective of Uganda Guidelines is to guide judicial discretion in a voluntary manner, rather than impose binding obligations on them to follow the Guidelines. Therefore, judicial officers could simply choose to ignore the Guidelines by passing a sentence outside the Guidelines. It is not stipulated anywhere in the Guidelines that the courts should provide reasons

[119] Odoki (n 2) 5.
[120] Email to the Author from Justice Bamwine (n 117). (Emphasis added).
[121] ibid.
[122] Email to the Author from Justice Bamwine (31 October 2014).

for choosing not to follow the Guidelines, neither is a right of appeal granted on the ground that the court refused to follow the guidelines. That said, there is a system of appellate review of sentences in Uganda. Any person convicted and sentenced to death by the High Court, has an automatic right of appeal to the Court of Appeal against sentence.[123]

3.4.3 Sentencing Purposes

The Uganda Guidelines are not modelled on any explicit rationale, although the fact that the Taskforce has designed guidelines means that desert plays a significant role in the determination of sentencing. The language of the Uganda Guidelines also suggests that desert plays a significant role, although utilitarian goals are also given prominence. For instance, paragraph 6 of the Uganda Guidelines identifies the sentencing principles as:

> the gravity of the offence including the degree of culpability of the offender, the nature of the offence, the need for consistency, the effect of the offence on the victim or community, the offender's personal family community or cultural background, any outcomes of restorative justice processes that have occurred, circumstances prevailing at the time of committing the offence, any previous convictions of the offender; or any other circumstances court considers relevant.[124]

Briefly summarised, sentencing decisions under the Uganda Guidelines can be influenced by offence seriousness; the impact the offence has had on victims (which is desert if it is being considered in terms of harm) and community impact (purely utilitarian); cultural and family background; previous convictions, and so on. These principles incorporate both retributive and

[123] The Trial on Indictments Act Chapter 23 (Laws of Uganda 1971, as amended by Act 23 of 2008), s 132(1)(a). For other convicts, a right of appeal is present except that the convict must apply for leave of Court to Appeal.
[124] Uganda Guidelines, para 6.

utilitarian principles of sentencing (see chapter 4 for a detailed discussion). Paragraph 5 (2) sets out the objectives of punishment as:

> denouncing unlawful conduct; deterring future crime; separating an offender from society; rehabilitating and reintegrating the offender into society; reparation and promoting a sense of responsibility from the offender acknowledging the harm done to the victim and the community.[125]

Although the sentencing objectives summarised above are all valid and widely recognised, they often conflict with each other[126] and require an explicit and overall coherent rationale for them to be utilised in a reconcilable manner.[127]

3.4.4 Starting Points and Sentencing Ranges

The Uganda Guidelines prescribe uniform starting points and sentencing ranges for offences with the same statutory maximum penalty. The nature of starting points and sentencing ranges suggests that the Taskforce uses statutory maximum penalties to define sentencing ranges. As such a uniform starting point of thirty five years and a sentencing range of (thirty years imprisonment to death penalty) are allocated to all capital cases. Also, all capital offences are ranked on the same severity scale using criteria based on the maximum penalty prescribed for all these offences. This suggests that all capital offences are defined as broadly similar in seriousness. Accordingly, the Taskforce prescribed uniform starting points and ranges of penalties for all capital offences.

[125] ibid, para 5 (2).
[126] RS Frase, 'Punishment Purposes' (2005) 58 Stanford Law Review 67.
[127] Chapter 4 of this study discusses the preferred rationale in detail.

Table 3.1 below shows the starting points (discussed in detail in the next section and in chapter four) and sentencing ranges for all capital offenses.

Table 3.1: Sentencing Ranges for Capital Offences

Offense category	Maximum sentence	Starting point	Sentencing range
Murder	Death	35 years	30 years to death
Rape	Death	35 years	30 years to death
Aggravated defilement	Death	35 years	30 years to death
Aggravated robbery	Death	35 years	30 years to death
Kidnap with intent to murder	Death	35 years	30 years to death
Terrorism	Death	35 years	30 years to death
Treason	Death	35 years	30 years to death

Source: Third Schedule, part I of the Constitution (Sentencing Guidelines) for Courts of Judicature (Practice) Directions 2013.

The statutory penalty is used as the outer limit in the allocation of ranges of punishment for non-capital felonies as well. The starting point is the number in the middle of the overall sentencing range. For example, the offence of false accounting by an officer which carries a maximum penalty of 3 years imprisonment has been allocated a starting point of 1½ years imprisonment. Like in capital cases, a uniform starting point and sentencing range is allocated to offense types that attract a similar statutory maximum penalty. When prescribing the ranges of punishment, the outer limit of the range is the statutory maximum, and the lower limit tends to be the least possible punishment for the offence. For example, the offence of abuse of office, which carries a maximum penalty of 7 years imprisonment, is allocated a starting point of 3 ½ years and a sentencing range of 1 to 7 years imprisonment. It is difficult to imagine a sentence that will go below the lower limit of 1 year given that this is a felony offence and not a misdemeanour.

Table 3.2 shows the starting points and sentencing ranges for a few occurring corruption and corruption-related offenses. The Taskforce seemingly started with the six most commonly

occurring offences under the Anti Corruption Act No 6 of 2009. Otherwise, the Anti Corruption Act creates over twenty offences in total.

Table 3.2: Sentencing Ranges for Selected Corruption and Corruption-Related Offences

Offence category	Maximum sentence	Starting point	Sentencing range
False accounting by public officer	3 years custody	1½ years custody	6 months to 3 years custody
Embezzlement	14 years custody	7 years custody	2 to 14 years custody
Causing financial loss	14 years custody	7 years custody	2 to 14 years custody
Solicitation and/or receipt of gratification	12 years custody	6 years custody	3 to 12 years custody
Bribery of a public official	12 years custody	6 years custody	3 to 12 years custody
Abuse of office	7 years custody	3½ years custody	1 to 7 years custody

Source: Third Schedule, Part VI of the Constitution (Sentencing Guidelines) for Courts of Judicature (Practice) Directions 2013.

Table 3.3: Sentencing Ranges for a Selection of Examples of Non-capital Felonies

Offense category	Maximum sentence	Starting point	Sentencing range
Theft	10 years imprisonment	5 years imprisonment	1 to 10 years imprisonment
Criminal Trespass	1 year imprisonment	6 months imprisonment	From a caution to 1year imprisonment
Simple Robbery	10 years imprisonment	5 years imprisonment	From 1 to 10 years imprisonment
Aggravated Robbery	Life imprisonment	15 years imprisonment	From 3 years to life imprisonment
Manslaughter	Life imprisonment	15 years imprisonment	From 3 years to life imprisonment
Attempted Defilement	18 years imprisonment	9 years imprisonment	1 to 18 years imprisonment

Source: The Constitution (Sentencing Guidelines) for Courts of Judicature (Practice) Directions 2013.

3.4.5 Aggravating and Mitigating Factors

The then Chief Justice at the sentencing guidelines inaugural ceremony noted that one of the challenges sentencers were grappling with in Uganda was the absence of 'clear benchmarks as to which factors were relevant to aggravation and mitigation and the weight to be attached to those factors'.[128] He noted that the Uganda Guidelines were intended to address this challenge. Desert is strongly reflected in the aggravating and mitigating factors, just as other sentencing factors that can be justified by utilitarian purposes. Although the Chief Justice listed the lack of clear benchmarks for weighting the relevance of a myriad of sentencing factors as one of the challenges that the courts are grappling with when sentencing, the Taskforce left the weighting of sentencing factors to the judges and magistrates. Instead, the Taskforce provided a nonexclusive list of aggravating and mitigating factors for each offence, and made provision for any other aggravating and mitigating circumstances that the court may deem relevant in a given case.

The aggravating factors include factors that indicate higher culpability and harm caused or threatened by the offence. Such factors include, for example, the degree of injury or harm, the part of the victim's body affected, the degree of meticulous premeditation, use and nature of a weapon, repeated violence against the victim, the target of a specifically vulnerable victim (one who is physically or mentally disabled), whether the offence was motivated by hostility based on the victim's gender, disability, age or any other discriminating circumstance, and these factors

[128] See Odoki, 'Keynote Address' (n 2) 3.

heighten the possibility of the death penalty being imposed in a capital case. [129] Although other factors not directly linked to the seriousness of the offence such as the impact of the crime on the victim's family, relatives or community, prevalence of the offence in community, remorsefulness, family responsibilities and so on are also included.[130] In addition, sentencers are permitted to take into account any other factors they may consider relevant.

The mitigating factors provided in the Uganda Guidelines cut across offence and offender characteristics. For instance, the offence related factors mitigating a death sentence include taking a minimal role in the commission of the offence and the fact that injury was less serious in the context of the offence. The offender-related mitigating factors include: 'remorsefulness, plea of guilty, advanced or youthful age of the offender, family responsibilities and so on'.[131]This approach is applied across all the offences. There is also a general principle on custodial sentencing. Paragraph 9 (4) provides that the court may not sentence an offender to a custodial sentence where the offender (a) is of advanced age; (b) has a grave terminal illness certified by a medical practitioner; (c) was below the age of 18 years at the time of the commission of the offence; or (d) is an expectant mother. The Guidelines define advanced age as being 75 years and above.[132]

3.4.6 Previous Convictions

Paragraph 6(h) of the Uganda Guidelines provides that previous convictions ought to be taken into account when sentencing an offender. Further, the Guidelines list previous convictions as an aggravating factor for some offences. Paragraph 9(3)(g) states that 'when determining whether to

[129]See Uganda Guidelines, para 20.
[130] ibid, para 20(p).
[131] ibid, para 21.
[132] ibid, para 4.

impose a custodial sentence, previous convictions ought to be taken into account.' Being a first offender is also listed as a mitigating factor in sentencing for robbery, defilement, criminal trespass, and theft.[133]The Uganda Guidelines do not offer any explicit policy on the role of previous convictions to sentencing. Given that the Taskforce did not apply an explicit and coherent overall policy to guideline development, the Uganda Guidelines provide no clear stance on the role of previous convictions to sentencing. It is difficult to coherently articulate the role previous convictions play at determining the severity of sentence without consensus on the rationale of sentencing in the given framework. Amongst other sentencing principles, paragraph 6 (h) of the Uganda Guidelines states that previous convictions ought to be taken into account by the court when sentencing an offender. Being a first offender is also listed as a mitigating factor in sentencing for robbery, defilement, criminal trespass and theft.[134]

3.4.7 Sentencing for Multiple Current Convictions

The Uganda Guidelines embody the totality principle which is that 'court first identifies the: 'material part of the conduct giving rise to the commission of the offence', and impose a sentence that is proportionate to the culpability of the offender.[135] Although the principle of totality as articulated in this provision is relatively vague compared to say, the way the English Definitive Guideline on Totality is clearly defined and articulated,[136] the provision suggests the general principle that when sentencing for multiple offending courts should ensure that the

[133] ibid, para 32(d), 36 (d), 40(c) and 48(f) respectively.
[134]ibid.
[135]ibid, para 8.
[136] See a detailed discussion in chapter five of this study.

severity of the sentence for the multiple offences does not exceed the culpability expressed by the primary current offence.

The Uganda Guidelines provide for other general aspects of sentencing such as principles for making a community service order, [137]special guidance on sentencing primary care givers, and child offenders, [138]the duties of prosecution and defence at sentencing,[139] and principles for amicable settlement and restorative justice[140]which although are important aspects of procedural sentencing, they do not directly relate to the articulation of consistency in sentencing, and are accordingly not within the scope of this study.

3.5 Conclusion

This chapter set out to trace the historical developments setting the stage for sentencing guideline reform in Uganda. In addition, to demonstrate the link between the distribution of sentencing authority in Uganda and what shaped the processes of developing Uganda's Guidelines as well as their final shape. The discussion has shown that the historical developments preceding guideline reform in Uganda were precipitated by challenges faced by the judiciary and not by a general political consensus for sentencing reform, as it were in many other jurisdictions with guideline systems. As such, the development of sentencing guideline reform in Uganda has been driven by a judicially led political interest, which has shaped the choices made over who has written and how the guidelines have been written. The Uganda Guidelines have therefore been developed with a modest ambition towards structuring judicial discretion, and their process of development has lacked democratic accountability and legitimacy. The next chapter attempts to

[137] Uganda Guidelines, part IX paras. 52- 54.
[138] ibid, paras 49 and 50.
[139] ibid, part XII para 55- 60.
[140] ibid, para 57.

show how the Uganda Guidelines have made no difference to the exercise of existing judicial discretion, and how this has inhibited the guidelines' potential to publicly articulate meaningful consistency.

Chapter Four

A Critique of Uganda' Sentencing Guidelines in view of Practices from other Jurisdictions

4.0 Introduction

The Constitution (Sentencing Guidelines) for Courts of Judicature (Practice) Directions, Legal Notice No 8 of 2013 (hereafter 'Uganda Guidelines') were developed with the primary goal of promoting greater consistency in sentencing. This followed a perception that judicial discretion in sentencing was sometimes being exercised inconsistently resulting in wide disparities in sentences imposed on similarly placed offenders'.[1]Like most other sentencing guideline schemes in other jurisdictions, consistency in sentencing[2] and transparency in the sentencing decision making process[3] are at the core of Uganda's sentencing guideline reform. The then Chief Justice of Uganda, Justice Benjamin Odoki emphasised that the Guidelines would help rebuild public confidence in the administration of justice[4]among other things.[5]Indeed, the Sentencing Guidelines Taskforce (hereafter 'Taskforce'), which was mandated to develop Uganda Guidelines, attempted to include a number of structural features in the Guidelines which were intended to improve the wider understanding of the sentencing decision making process and provide an articulation of meaningful consistency in sentencing. These structural features are: the

[1]BJ Odoki, 'Keynote Address at the Launch of the Constitution (Sentencing Guidelines) for Courts of Judicature (Practice) Directions, Legal Notice No 8 of 2013' (Kabira Country Club Kampala, 10 June 2013).
[2] ibid 2,3.
[3] ibid 4. The Chief Justice emphasised that 'there was public outcry about injustices in the administration of criminal justice arising from the inconsistent exercise of judicial discretion'. This means that the need to enhance public confidence in the sentencing process was paramount, which could better be achieved through providing the public with information of how sentencing decisions are made.
[4] ibid.
[5]Uganda Guidelines, para 3(e). The other objectives are: (a) setting out the purpose for which offenders may be sentenced, (b) providing courts with principles to apply in sentencing, (c) providing sentencing ranges, (d) providing a mechanism that ensures that the interest of victims of crime and community are considered when sentencing.

provision of sentencing purposes, using desert (although meaninglessly) to set permissible ranges of punishment, generating classes of broadly similar seriousness, prescribing sentencing ranges for given offence classifications and their starting points, providing nonexclusive lists of aggravating and mitigating factors, and an articulation of the totality (multiple offence sentencing) principle. Nonetheless, arguably, the Uganda Guidelines neither provide a wider public understanding of the sentencing decision making process nor an articulation of meaningful consistency. The structural features which define Uganda's Guidelines, are designed on a loose definition of consistency, thereby giving consistency a meaningless function under the Guidelines. Grounded on the argument that the primary function of sentencing guidelines is to deliver a public account of meaningful consistency, this chapter aims at demonstrating that the definition of consistency produced by the Taskforce is too loose as to be meaningful, and as such the Uganda Guidelines have failed to make any meaningful difference to the existing exercise of judicial discretion in Uganda.

The chapter has seven main sections. Section 4.1 generally examines the theory of limiting retributivism, and what makes it the best model for defining meaningful consistency under a sentencing guideline framework. The other sections 4.2 to 4.7 attempt to highlight the theoretical and normative weaknesses in Uganda Guidelines. The main aim is to show that the Guidelines have been modelled on a loose definition of consistency as to make consistency meaningless. The main argument in the chapter is that for meaningful consistency to be delivered, the Uganda Guidelines ought to have been modelled on a limiting retributivism justification with an ethically meaningful definition of proportionality.

4.1 Defining Meaningful Consistency

Treating similarly situated offenders alike is a fundamental tenet of the administration of criminal justice[6] as well as being an important tool for building public confidence in the administration of justice.[7] Therefore, the mantra that 'like cases should be treated in a like manner' is commonly used. However, beyond that, there is no clear benchmark for defining consistency in an individualised sentencing approach. Premising sentencing on individualised justice makes it difficult to articulate consistency. This is not so much because an individualised sentencing approach pays no attention to consistency, but that individualisation of punishments requires that each case be treated individually. Thus, this leaves no benchmark for defining similarity because criminal cases are decided distinctively from each other. Accordingly, sentencing guidelines, come in to provide this definition of consistency. Commentators such as Hutton have argued that consistency is defined by the guidelines themselves.[8] This means that the definition of consistency used by the designers of the guidelines through their political deliberations is what defines the standards for measuring consistency. This chapter argues that the definition of consistency produced by a sentencing guideline, must be meaningful.[9] It points out that this is still lacking in Uganda Guidelines. The chapter takes the view that a definition of meaningful consistency is produced when sentencing guidelines are modelled on a limiting retributivism justification, and proportionality is meaningfully defined. The discussion on

[6] See, e.g., S Krasnostein and A Frieberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If you Know Where You're Going, How Do You Know When You've Got There?' (2013) 76 Law and Contemporary Problems 265, 265.
[7] J Kamuzze, 'An Insight into Uganda's New Sentencing Guidelines: A Replica of Individualization?'(2014) Federal Sentencing Reporter 47, 54.
[8] N Hutton, 'The Definitive Guideline on Assault Offences: The Performance of Justice', in A Ashworth and JV Roberts (eds.), *Sentencing Guidelines: Exploring the English Model* (Oxford University Press 2013) 89.
[9] Kamuzze (n7) 54.

limiting retributivism below indicates why limiting retributivism is used as the benchmark for defining meaningful consistency.

Limiting retributivism provides a transparent public statement of the aims of sentencing/punishment, and justifies the use of desert as the primary rationale for determining punishment severity. It is argued that the justification for modelling Uganda's Guidelines on a limiting retributivism model stems from what lies at the core of sentencing decision making in Uganda. The Ugandan sentencers have the task of weighing often competing aims of punishment before arriving at an appropriate sentencing decision. There are four main instrumental aims of punishment commonly considered by Ugandan sentencers[10]namely, deterrence (general and specific), rehabilitation, protection of the community or incapacitation (selective and general) and retribution (commonly justified with the principle that punishment should fit the case). These aims are often in conflict with and across each other. Given the lack of research and scholarship on Ugandan sentencing in general and the crime preventive impact of penal sanctions in Uganda, Ugandan sentencers most probably have limited skill and or information on how their sentencing decisions are supposed to accomplish the stated punishment purposes. Consequently the sentencers end up pursuing punishment goals with predictable failure. The Taskforce has followed suit by failing to ensure that sentencing in Uganda is guided by an explicit sentencing rationale. That is, even though the Taskforce has made a public statement of the sentencing aims,[11]its failure to articulate the predominant sentencing rationale has inhibited its usefulness. Ugandan Sentencers have still been left with the liberty to make impressionistic conclusions about how their sentencing decisions meet the stated punishment goals in each individual case.

[10] See Appendix A, figures 2.3 and 2. 4 to the study.
[11] Uganda Guidelines, para 5 (2).

4.1.1 Overview of the Pick and Mix Sentencing Purposes

Punishment goals ordinarily fall into two major groups: the retributive and utilitarian group. In the retributive theorist's view, if a person has knowingly done wrong, s/he deserves to be punished.[12] The Retributive philosophy rests on the notion that 'criminal behaviour constitutes a moral violation and requires payment of some kind'.[13]The Utilitarian philosophy on the other hand, tends to view punishment as the means to achieving a goal, [14] and the goal is ordinarily, crime control.[15]Accordingly, the utilitarian approach permits the use of mechanisms such as: general/specific deterrence, rehabilitation, and protecting the public (incapacitation) to list just a few common ones[16]to prevent or lessen future offending by the punishment of the offender and/or would be offenders. Each of these mechanisms depends on certain assumptions and conditions for its effectiveness. For example, general deterrence is premised on the assumption that would-be-offenders will be discouraged from offending in the future for fear of being punished in the manner in which the offender being sentenced was punished. On the other hand, special deterrence works to dissuade the offender being sentenced from offending in the future for fear of being punished again. Bottoms and Von Hirsch define deterrence as 'the prevention of wrongdoing through fear of penal sanctioning'.[17] Bottoms and Von Hirsch further distinguish general from specific deterrence by classifying specific deterrence as a reductivist goal which

[12] A Von Hirsch, 'Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much?" (1990) 1 Criminal Law Forum 259.
[13] A Von Hirsch, *Censure and Sanctions* (Oxford University Press 1993).
[14] A Bottoms and A Von Hirsch, 'The Crime Preventive Impact of Penal Sanctions' in P Cane and H Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010).
[15]See e.g., ibid. See also, RS Frase, 'Punishment Purposes' (2005) 58 Stanford Law Review 67, 70; S Eaton and C Piper, *Sentencing and Punishment: The Quest for Justice* (Oxford University Press 2005); M Bargaric, *Punishment and Sentencing: A Rational Approach* (Cavendish Publishing 2001).
[16] ibid.
[17] Bottoms and Von Hirsch (n 14) 98.

aims at 'reducing the offender's inclination to offend whilst general deterrence aims at discouraging members of the public generally from offending'.[18]

General deterrent effects depend on a number of factors, such as the severity of the punishment, the target groups perception of the severity of punishment, and the extent to which the target groups believe that they will be caught and punished. According to Bottoms[19] and Frase,[20] for general deterrence to be realisable, there must be awareness by potential offenders that penalties have been enhanced, that the enhancement would apply to them if they are caught, that their offence will be detected, and above all, the offenders must be willing to refrain from reoffending. Therefore, although deterrence is an important punishment goal, which is still widely recognised in Uganda, and elsewhere, research has shown its use to be an over simplification. Bottoms and Von Hirsch noted that most serious punishments do not necessarily deter future offending and that it is almost impossible that potential offenders will be in position to weigh up the rewards and risks associated with crime, because very few people actually believe they will be caught. Bottoms and Von Hirsch[21] note that severity of punishment appears to be only very weakly linked to crime rates. Similarly, most jurisdictions regard protection of the public (however temporary) from serious and violent offenders as an important function of punishment and it is commonly pursued under the utilitarian mechanism of incapacitation.

Incapacitation is premised on the assumption that future crimes can be prevented by punishing offenders with an elevated risk of reoffending more harshly, so that they are physically restrained

[18] ibid.
[19] A Bottoms, 'Empirical Evidence Relevant to Sentencing Frameworks' in A Bottoms, S Rex and G Robinson (eds.), *Alternatives to Prison: Options for an Insecure Society* (Willan Publishing 2004).
[20] Frase, 'Punishment Purposes' (n 15) 71.
[21] Bottoms and Von Hirsch (n 14) 121.

for a given period of time from committing future crimes against the public at large.[22] This helps to protect the public (at least temporarily) from the offender's criminal activity. Incapacitation is achieved by mostly enhancing the severity of punishment for a particular group of offenders with an elevated risk of reoffending. This means that sentencers are left with broad discretionary powers to determine whether the offender poses a risk of reoffending, and if so, what additional punishment is required to be imposed on the offender to offset the risk of reoffending. In Uganda, preventive detention sentences are commonly imposed in addition to the offender's sanction.[23] The effectiveness of incapacitation mechanisms depend on the reliable assessment of individualised offender risk.

Bottoms and Von Hirsch advise that for incapacitation, the question is 'how many more crimes the offender would have committed if s/he was not to be incarcerated?' This is a difficult question to answer because of the complexities surrounding the determination of future dangerousness. Some scholars like Morris and Miller suggest that making predictions about an offender's future dangerousness is problematic because it is difficult to define and prove future dangerousness.[24] Bottoms and Von Hirsch argue that it is more difficult to estimate the length of duration a high risk offender will require to suppress his residual criminal careers.[25] Also, both the offender who is apt to commit a single minor offence and the one who is likely to commit a series of serious offences are grouped together as recidivists.[26] The potential inaccuracy involved in the determination of dangerousness renders the goal of incapacitation difficult to pursue

[22] ibid 113. See also, Frase, 'Punishment Purposes' (n 15) 70.
[23] The Habitual Criminals (Preventive Detention) Act Chapter 118 (Laws of Uganda, 1951).
[24] N Morris and M Miller, 'Predictions of Dangerousness'(1985) 6 Crime and Justice 1. See also N Morris and M Miller, 'Predictions of Dangerousness: An Argument for Limited Use' (1988) 3 Journal of Violence and Victims 263.
[25] Bottoms and Von Hirsch (n 14) 121.
[26] ibid 114.

because the assumption is that punishment can prevent recidivism,[27]yet defining recidivism can be surrounded with inconsistency and uncertainty. The question that arises is whether a dangerous offender becomes completely treated after serving an incapacitative sanction, or does the sanction only restrain him from reoffending for the period he or she is restrained?[28] The logical argument would be that the offender will only be prevented from reoffending for the time he or she will be confined.

Rehabilitation is the other utilitarian mechanism through which crime control is believed to be achieved. Punishments are imposed so as to provide an offender with treatment for his/her afflictions, thereby preventing him/her from future offending. Therefore, the goal of criminal sanctions is treatment for the causes of the risk of offending not punishment. Rehabilitative measures include the use of different treatment programs such as educational programs that equip the offender with a skill, or drug use, mental health or anger management programs that aim to treat the offender's afflictions. In Scotland problem solving courts have been established which encourage the treatment of the offender by identifying the offender's problem (e.g., drug addiction) and tackling the problem by putting the offender on drug testing and treatment programs.[29]

Rehabilitation is therefore undoubtedly viewed as a morally and ethically valuable mechanism for crime control purposes. However, like incapacitation the sentencer exercises wide discretion

[27]G Halley, *The Right to Be Punished* (Springer 2013) 52-3.
[28]AR Piquero and A Blumstein, 'Does Incapacitation Reduce Crime?' (2007) 21 Journal of Quantitative Criminology 267.
[29] G McIvor, 'Therapeutic Jurisprudence and Procedural Justice in Scottish Drug Courts' (2009) 9 Journal of Criminology and Criminal Justice 29. See also G Berman and J Feinblatt, 'Problem Solving Courts: A Brief Primer' (2001) 23 Law and Policy 125.

in determining the degree of risk posed by the offender, what causes the risk of offending, and how the causes can best be effectively treated through non incarceration methods, if not, through incarceration. This enhances the risk of unequal treatment since similarly placed offenders may be subjected to different sentences. Accordingly, instead of responding to the false optimism that presumes that rehabilitation, deterrence and so on, can result in crime control, this view should be replaced with an embrace of just deserts.

Retribution is the most widely recognised retributive sentencing philosophy and it is premised on the notion that offenders should be punished in proportion to the degree of seriousness of their offences. Seriousness is measured by assessing the offender's culpability (degree of blameworthiness) and the harm caused (risked) by the offence. Harm may be composed of components such as physical harm (injury to the victim), psychological harm (mental injury such as the distress suffered by a victim after an offence of sexual violence), or economic harm (loss of monetary value). The offender's responsibility, or culpability, as it is commonly referred to, comprises of the offender's participation in the commission of the offence, which indicates whether the offender wilfully or intentionally committed the offence, was negligent or reckless, or simply played a minimum role which renders him/her less culpable than the other offenders being charged with the offence.

Retribution regained prominence after the 'growing loss of false belief that incapacitation, deterrence and rehabilitation facilitated crime reduction'.[30] Scholars such as Von Hirsch[31] re-examined retribution as a viable justification of punishment, and advised that offenders should be

[30] J Braithwaite, 'Challenging Just Deserts: Punishing White Collar Criminals'(1982) 73 Journal of Criminal Law and Criminology 723.
[31] A Von Hirsch, *Doing Justice: The Choice of Punishment* (Northeastern University Press 1986).

punished because they deserve to be punished and not because they were characterised as having an elevated risk of reoffending. Accordingly, retribution can serve as a justification for punishment and as a limitation on penalties imposed to achieve other purposes.[32] Retribution as a justification of punishment rests on the notion of fairness.[33] It is simply fair (and therefore just) that offenders are punished in proportion to their blameworthiness and fair to the victim and the victim's family that the criminal law seeks vengeance on their behalf.

On the other hand, retribution as a limiting principle, defines a range of permissible punishments for any given case. The retributive limits define the minimum acceptable penalty ranges by setting limits to punishment severity based on the theory of just deserts.[34] A core tenet within the theory of just deserts is the principle of proportionality.[35] Retributive theorists such as Von Hirsch[36] argue that the severity of the penal sanction should be proportional to the seriousness of the offence committed.[37] Like the retributive justification of punishment, concerns of fairness are reflected in the limiting principle of just deserts.[38] That is, it is unfair to the offender if s/he is punished more severely than s/he deserves, and it is also unfair to the victim and the victim's family if, an offender is punished more leniently than the seriousness of the offence warrants. Van Zyl Smit and Ashworth took the view that because punishment, particularly imprisonment, prima facie deprives an offender of his/her right to liberty, the principle of proportionality of sentences to the seriousness of an offence is a fundamental principle that goes to the core of

[32] Frase, 'Punishment Purposes' (n 15) 73.
[33] A Von Hirsch and A Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press 2005).
[34]RS Frase, 'Theories of Proportionality and Desert' in J Petersilia and K Reitz (eds.), *Oxford Handbook of Sentencing and Corrections* (Oxford University Press 2012).
[35] ibid.
[36] A Von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 Crime and Justice 55.
[37] ibid.
[38]Frase, 'Theories of Proportionality and Desert' (n 34).

human dignity.[39] Retributive punishment is therefore based on the notion of allocating punishment that is not overly severe or unduly lenient as to diminish the essence of justice in sentencing. This is not to say that the concept of proportionality is an exact one. Like Von Hirsch notes, how ordinal proportionality is graded and cardinal proportionality anchored depends on what is normatively acceptable.[40] That said, desert oriented sentencing which premises on proportionate sentencing has gained much influence over the years, including in jurisdictions like the United States, England and Wales.[41]

4.1.2 Conflicts Within and Across Sentencing Purposes

The instrumental sentencing purposes provided by the Taskforce are all valid and widely recognised. Although they often conflict within and across each other, and therefore their multiple utilisation fails to aid consistency. If left to be singly applied, these sentencing purposes can produce varying results in sentence outcomes. To start with, consistency which is largely premised on the principle of proportionality, requires that offences which are relatively broadly similar in seriousness are ranked in ordinal proportion with each other. This is intended to ensure that equally blameworthy offenders receive similar punishments and those that are less culpable receive punishments reflecting the degree of gravity of their offences.

The several purposes of punishment conflict with this principle in a number of ways. For example, from a retributive perspective, two equally culpable offenders are expected to receive equally severe sentences, despite the elevated risk of reoffending by (either or both) of the

[39] D Van Zyl Smi and A Ashworth, 'Disproportionate Sentences as Human Rights Violations' (2004) 67 Modern Law Review 541, 542.
[40] Von Hirsch, *Censure and Sanction* (n 13) 18, 19.
[41] Von Hirsch and Ashworth (n 33) 5.

offenders. However, from an incapacitation perspective, incarcerating the offender who has a lower risk of reoffending uses scarce prison space. Accordingly, a sentencer inclined to this sentencing purpose is likely to argue that a harsher punishment will be more appropriate for the offender with an elevated risk of reoffending.[42] If a retributivist approach is taken, consistency will be enhanced. However, if a utilitarian approach is taken, disparity will occur, but whether this disparity is unwarranted will depend on the values one shares about the best priority for sentencing. In the context of this review, the utilitarian approach would be inconsistent with the principle of proportionality, and therefore would result in unfair and unjust sentencing[43].

Similarly, the retributive theorists will argue that if a crime is serious, a low risk offender should be punished in equal proportion to the seriousness of his/her offence. This is justified on the basis that putting the low risk offender on a community service order, undermines the one of the widely accepted message intended to be conveyed by punishment which is censure.[44]This may be the same argument raised by a utilitarian seeking a sentence for deterrent purposes. However, if both offenders are placed on rehabilitative treatment, with one being socially disadvantaged and another not, and one having a lower risk of reoffending and another not, from a retributive perspective, although the equally culpable offenders are treated similarly, the sentences will be disproportionate if they fall outside the boundaries of what is expected for offences of that seriousness category. From an incapacitation perspective, placing a high risk offender on a rehabilitation programme will undoubtedly undermine the purpose of protecting the public (at least temporarily) from the high risk offender. If the crime is serious placing a high risk offender on a rehabilitation programme fails to provide appropriate general deterrence to would-be-

[42] Frase, 'Punishment Purposes' (n 15) 75, 76.
[43] ibid.
[44] Von Hirsch, *Censure and Sanctions* (n 13).

offenders. From a rehabilitative point of view, rehabilitation treatment may only be appropriate for the socially disadvantaged offender, and not the other. Similarly, efforts to provide reparation for harm done to the victim or the community (which is one of the sentencing objectives in Uganda Guidelines) may result in punishment which, from a retributive standpoint is either too severe or too lenient than deserved. This might arise if the victim or the community insist on higher or lower mechanisms of reparation. For example, insisting on compensation from an offender who has committed a grave offence (instead of incarceration) or the victim or community's insistence on incarceration for a less serious offence. From a crime control standpoint, insisting on reparation for harm done may not necessarily enhance general deterrence effects.[45]

Conversely, all the instrumental aims of punishment are widely accepted as viable justifications of punishment in Uganda's criminal sentencing system. Therefore, no single theoretical framework emphasizing the primacy of one instrumental aim over another could stand a chance of being implemented without resistance. Given that there is no single best hierarchy of instrumental aims applicable in all criminal cases, a sentencing theory that embodies all these instrumental aims provides a sound platform for the exercise of judicial authority only within the limits of deserts. For instance, some categories of cases such as offences of a violent nature may require retribution and incapacitation, whilst some kinds of property crimes such as embezzlement or corruption may require restitution to the crime victim and specific deterrence. For some offences falling at the bottom end of the severity scale, such as criminal trespass, restorative sentences that address the victim and community needs, may be viable. Since these instrumental aims of punishment often conflict within and across each other, thus heightening the

[45] Frase, 'Punishment Purposes' (n 15) 76.

occurrence of inconsistency in sentencing, the theory of limiting retributivism, which has been widely adopted,[46] offers the best solution to the integration of all conflicting instrumental aims of punishment within a single sentencing framework. Thus, it permits their utilization without damaging the consistency established by the guidelines. The theory of limiting retributivism enables the imposition of a particular sentence for reasons of rehabilitation, deterrence or incapacitation, but within limits of proportional just deserts.

4.1.3 Ideas of Limiting Retributivism

Limiting retributivism stems from the need to find a hybrid model which addresses the conflicts within and across different aims of punishment and appeals to both utilitarian and retributive philosophies.[47]Although limiting retributivism is not the only hybrid theory of criminal punishment proposed by modern day philosophers,[48] it is the most widely endorsed and adopted hybrid model of criminal punishment.[49]Initially developed by Norval Morris[50] and now expanded by Frase, limiting retributivism seeks to create a system of criminal punishment in which retributive proportionality principles set the boundaries within which other instrumental aims of punishment (such as deterrence, incapacitation and rehabilitation) are pursued.[51]Frase recommends the theory as the most appropriate justification of punishment in a liberal

[46]See RS Frase, *Just Sentencing: Principles and Procedures for a Workable System* (Oxford University Press 2013) 12-3. See, M Haist, 'Deterrence in a Sea of Just Deserts: Are Utilitarian Goals Achievable in a World of Limiting Retributivism?' (2009) 99 Criminal Law and Criminology 789. See also, Frase, 'Punishment Purposes' (n 15) 76; RS Frase, 'Limiting Retributivism' in M Tonry (ed.), *The Future of Imprisonment* (Oxford University Press 2004) 83, 112.
[47]Haist (n 46) 792.
[48] Frase, *Just Sentencing* (n 46) 89-111 for a full discussion of other hybrid theories of punishment.
[49] Limiting retributivism is the procedural model adopted by sentencing commissions in well-established sentencing guideline systems of Minnesota, Washington, North Carolina, Oregon, Kansas, Pennsylvania, even in England and Wales.
[50]N Morris, 'Punishment, Desert and Rehabilitation' in H Gross and A Von Hirsch (eds.), *Sentencing* (Oxford University Press 1981) 257.
[51] Frase, 'Punishment Purposes' (n 15) 76.

democracy because it justifies the use of desert as a primary rationale and offers the best procedural model for balancing the conflicts between retributive and utilitarian theories of punishment.[52] Although Haist believes that a limiting retributivism system of punishment will not have great deterrence levels than a utilitarian system,[53]the author acknowledges that permitting the pursuit of utilitarian concerns within reasonable desert limits, forestalls the dangers of excessive utilitarianism. In light of this, limiting retributivism becomes persuasively an appropriate justification of sentencing in a just sentencing system.

Limiting retributivism includes three main ideas: (a) Outer limits —the retributive considerations of desert establish outer limits of punishment beyond which any punishment for a particular crime is unjustly severe or unduly lenient. (b) Instrumental aims —within the boundaries set by desert, other punishment purposes of deterrence, incapacitation, rehabilitation, protection of the public, et.al can be utilised. (c) Parsimony —also, within those limits, the least severe punishment should be imposed unless a more severe punishment would demonstrably achieve public benefit, but even then, proportionality is the primary aim and must be adhered to. The first and perhaps most important concept of limiting retributivism is that it justifies the use of just desert as the primary rationale of punishment.

Limiting retributivism justifies the use of desert as the primary rationale which sets outer limits on punishment, and defines a range of permissible punishments for any given case.[54] In terms of the fairness arguments, rather than justify punishment based on crime control goals, which are

[52] Frase, 'Limiting Retributivism' (n46) 121.
[53] Haist (n 46) 819.
[54] Frase, 'Limiting Retributivism' (n 46) 121.

highly unrealisable,[55] and offer false optimism about crime control benefits, it is better that punishment is at least allocated fairly and proportionately. Limiting retributivism encourages setting limits to punishment severity based on the principle of just deserts (in other words retributive proportionality) and with just deserts setting the limits to punishment, proportionality and fairness in sentencing is reinforced. Desert is more idealistic because, it is based on the notion that punishment must fit the seriousness of the offence. This is much better than premising punishment on the little evidence that it will rehabilitate, or deter an offender from reoffending. Proportionality ensures that —punishments are allocated in direct proportion to the relative seriousness of the offence, and offenders who are similarly placed, receive comparable sentences.

Accordingly, proportionality ought to be the guiding principle in the allocation of punishment[56]because nothing is more corrosive of public confidence in the administration of justice than a perception that punishments are allocated unfairly and unequally.[57] Often, from the public view point at least, there are likely to be concerns in the following situations. First, if sentences are perceived to be in excess of the range of punishments anticipated to be the 'correct' punishment because they are either too severe or too lenient in comparison with the degree of offence seriousness. Second, if offenders who seem to have committed similar offences receive widely disparate sentences that cannot be simply accounted for by permissible differences between the cases. For example, two offenders convicted of domestic burglary receive sentences of six and thirty years' imprisonment respectively. Consistency would have been undermined because of the disparity in sentencing of these offenders, and proportionality, which is the tenet

[55] Bottoms and Von Hirsch (n 14).
[56] Von Hirsch, 'Proportionality in the Philosophy of Punishment: From Why Punish to How Much?' (n 12).
[57] ibid.

of consistency, will be undermined because of either the perceived aggravation of punishment for one of the offenders.

By justifying the use of desert limits to punishment severity, limiting retributivism provides a procedural model which sets limits to overly excessive, or unduly lenient sentences that are not proportionate to offence seriousness[58] (at least in so far as it is normatively acceptable). The permissible ranges of punishment can be designed to reflect politically and normatively acceptable limits to punishment, thereby providing a transparent public statement of the permissible ranges of punishment. All these seek to make sentencing decision making more transparent and provide a public account of meaningful consistency.

Limiting retributivism provides a transparent public statement of the instrumental aims of punishment, by acknowledging the importance of all the aims of punishment and permitting their utilisation within a single sentencing framework[59]. This means that, within the boundaries set by desert, a sentencer will exercise discretion to pursue any competing and contradictory instrumental aims of punishment without damaging the primary consistency established by the guideline ranges. That is, permissible ranges of punishment are prescribed, with outer limits set within strict proportionality standards, and within those limits, a judge may pursue other instrumental aims such as public protection, restorative justice, deterrence, denunciation, provided the proportionality of the punishment is not damaged.

There can be two interpretations on how the instrumental aims can be utilised within boundaries set by limiting retributivism, without damaging the primary consistency established by the

[58] Frase, 'Punishment Purposes' (n 15) 76.
[59] ibid 68.

guideline ranges. The first interpretation is that instrumental aims may be pursued within the desert limits only to the extent that they achieve proportionality. That is, within the boundaries set by desert, a judge may position a case at a point within the range, purely on desert grounds, and then state that the sentence is imposed for reasons of rehabilitation, deterrence or incapacitation, so long as the subordinate sentencing purpose is not used to determine the severity of punishment within the penalty range. This could mean that punishments are imposed strictly on retributive proportionality grounds. The second interpretation is that so long as the outer limits are set by desert, a judge may determine sentence severity based on either one or all of the subordinate sentencing purposes, provided the sentence remains within the limits set by desert. That is, proportionality will dictate the extent that those utilitarian concerns will be utilised. For instance, if the range of penalty for burglary is 1 to 13 years imprisonment, and an offender has a number of relevant and recent previous convictions, the Court may position the case towards the upper end of the range for purposes of achieving deterrent aims, provided the sentence does not depart from the range, and the sentence imposed is proportional to desert limits of that case. Using the second interpretation would mean that within the sentence parameters set by desert limits, a sentencer can factor in utilitarian concerns such as incapacitation and deterrence to increase or decrease the severity of punishment.[60] This is the interpretation adopted in this study. Accordingly, the limiting retributivism system of punishment will enable the determination of an appropriate range of possible punishments based on principles of retributive proportionality, whilst permitting the consideration of a number of utilitarian factors to determine the appropriate position to fit the case within the range of punishment. It is for this reason, among others, that this thesis advocates for a sentencing model based on limiting retributivism as the most appropriate for Uganda's sentencing guideline system.

[60] Frase, 'Punishment Purposes' (n 15) 76.

Limiting retributivism also encourages the use of parsimony as a guiding principle in the determination of a proportionate punishment within the range set by retributive proportionality. Parsimony advocates for the imposition of the least severe punishment that is necessary to achieve proportionality and other punishment purposes.[61] The purpose is to find the least severe punishment that is necessary to achieve any given sentencing purpose within retributive proportionality limits. Given that desert is imprecise as to the specific punishment an offender deserves within a range of punishments,[62] applying the principle of parsimony provides sentencers with a prima facie starting point. Briefly summarised, limiting retributivism offers the best model for producing a meaningful definition of consistency in two respects. First, the model prevents gross disparities in sentencing by using just deserts to define the ranges of permissible punishments for offenders who are similarly defined based on criteria of culpability and harm caused (risked) by the offence. This ensures that similarly defined offenders are sentenced within an allowable range of sanctions. Secondly, it integrates all competing and contradictory instrumental aims of punishment, thereby preventing gross disparities in sentencing that are precipitated by the conflicts within and across punishment purposes and principles.[63]

4.2 Absence of a Primary Sentencing Rationale

To begin with, at no point does the Taskforce claim that the Uganda Guidelines are modelled on a limiting retributivism justification. Consequently, Uganda Guidelines are not explicitly modelled on desert as the primary rationale of sentencing. Although the fact that the Taskforce has included desert limits to punishment severity means that desert plays a significant role in the

[61] Frase, *Just Sentencing* (n 46) 11.
[62] ibid 14.
[63] ibid 9,10.

determination of sentences under the Guidelines.[64] The general language of the Guidelines also suggests that desert plays a significant although not a predominant role. The Guidelines are strongly embedded in retributive proportionality principles. In the same breadth, utilitarian purposes are also given a significant role in the Guidelines. For instance, paragraph 6 of the Guidelines requires courts when sentencing an offender to take into account:

> the gravity of the offence, including the degree of culpability of the offender, the nature of the offence, the need for consistency, the effect of the offence. on the victim or community, the offender's personal family and community or cultural background, any outcome of restorative justice processes that have occurred, the circumstances prevailing at the time of the offence, any previous convictions of the offender, or any other circumstances the court considers relevant.[65]

This provision per se does not explicitly give primacy to the principle of retributive proportionality, but it suggests that proportionality is a principal determining factor at sentencing. In addition, the provision is clear on the relevance of utilitarian purposes in the determination of sentences under the Guidelines. Further still, aggravating and mitigating factors provided for specific offences covered by the Uganda Guidelines are heavily embedded on desert principles of culpability and harm. For instance, factors such as the degree of injury or harm, the part of the victim's body where harm or injury was occasioned, the degree of meticulous premeditation, use and nature of a weapon, repeated violence against the victim, the target of a specifically vulnerable victim — one who is physically or mentally disabled, whether the offence was motivated by hostility based on the victim's gender, disability, age or any other discriminating circumstance, and so on heighten the possibility of the death penalty being

[64] Kamuzze (n 7) 51.
[65] Uganda Guidelines, para 6.

imposed in a capital case.[66] Although other factors not directly linked to the seriousness of the offence such as the impact of the crime on the victim's family, relatives or community are also included.[67]

Similarly, some of the mitigating factors emphasise reduced culpability. For instance, factors mitigating a death sentence include taking a minimal role in the commission of the offence, injury less serious in the context of the offence, the fact that there was a single or isolated act or omission, lack of premeditation, mental disorder or disability linked to the commission of the offence, and so on.[68]Although other offender related mitigating factors such as remorsefulness, plea of guilty, advanced or youthful age of the offender, family responsibilities so on are also included. Clearly, retributive principles play an important role in the determination of sentences, although their primacy is destroyed by the equal significance given to utilitarian purposes of punishment, which tend to trump over the prominence of just deserts. That notwithstanding, it can be argued that by crafting Guidelines which have prescribed ranges of penalties that are set by desert outer limits, the Taskforce was recognising desert as a significant factor for determining punishment severity under the Guidelines. However, the outer limits of punishment severity established by the Taskforce are consistent only with a weak version of the outer limits idea of limiting retributivism. This is so because, the outer limits of the sentencing ranges in Uganda Guidelines are disproportionately severe than is necessary for the relative seriousness of a variety of cases which may fall within the boundaries of their so called proportionality. As a result, offences of a relatively lower degree of seriousness are allocated penalty ranges similar to those allocated for offences of a higher degree of seriousness.

[66]Uganda Guidelines, para 20.
[67] ibid, para 20 (p).
[68]ibid, para 21.

Secondly, the Uganda Guidelines permit the consideration of sentencing factors which are not directly justifiable by desert principles. For instance, the offender's personal, family, community, or cultural background; or any other circumstances court considers relevant.[69]Permitting the consideration of such offender specific characteristics and offence considerations which are not directly linked to retributive principles further weakens the importance of the principle of proportionality, and enhances the potential for unfairness and disproportionality in sentencing.

Within the broad outer limits, courts are permitted to pursue instrumental aims of punishment including: 'denunciation, deterrence, incapacitation, rehabilitation, reparation and promoting a sense of responsibility by the offender acknowledging the harm done to the victim and the community'.[70]Although, limiting retributivism premises on the notion that other instrumental aims of punishment can be pursued within the limits set by desert, the fact that the utilitarian sentencing purposes are given primacy distorts the applicability of the theory of limiting retributivism. That is, permitting courts to pursue any or a multiple of the conflicting aims of punishment under paragraph 5(2) of the Uganda Guidelines, without premising the Guidelines on a primary rationale of desert, reflects an even weaker version of limiting retributivism.

Literally interpreted, the Uganda Guidelines are consistent with an even weaker version of parsimony. Paragraph 9 (2) is an example of a reflection of parsimony in the Uganda Guidelines. It provides that: 'the court shall before imposing a custodial sentence consider — (a) whether the purpose of sentencing cannot be achieved by a sentence other than imprisonment'. Also,

[69] ibid, para 6 (e),(f),(h) and (i).
[70]ibid, para5 (2).

paragraph 9(5) encourages courts not to sentence first time offenders of minor offences to imprisonment. It provides that: 'when sentencing a first time offender, the court shall consider that imprisonment is not a desirable sentence for a minor offence'. However, the starting points prescribed for a number of offence categories set undeservedly severe punishment options for offence classifications that are reflective of less serious manifestations. For example, the starting point of five years for theft, or a starting point of six months for criminal trespass. Even thirty five years as a starting point for rape. As a whole, the Uganda Guidelines are consistent with only weak versions of limiting retributivism, which if strengthened, the overall proportionality and fairness of the system would be enhanced. Given that the pursuit of multiple instrumental aims of punishment still finds political acceptance within Uganda's sentencing framework, allowing the pursuit of these instrumental aims (at the discretion of the court) within limits set by proportionality, will facilitate a just and fair sentencing system, whilst allowing consistency to be articulated in a meaningful way.

4.3 Meaningless Gradations of Offence Seriousness

Traditionally, criminal offences in Uganda have been broadly defined and assessments of their seriousness made depending on the maximum penalty prescribed for the offence. The statutory maximum penalty which admittedly reflects the worst of cases within a given offence classification, tells us how serious that offence is in relation to others for which a less severe penalty is prescribed. For example, murder, rape, defilement, robbery (with aggravation), and treason, are more serious than manslaughter, simple robbery, burglary, criminal trespass and so forth because the latter allow the maximum penalty of death whilst the former are prescribed less severe sentences, for example criminal trespass is punishable by a maximum penalty of one

years' imprisonment term.[71] However, what is not clear is why offenders being sentenced under the general offence category of, for example, aggravated defilement receive varying degrees of sentences ranging from 3 years to life in prison. It is difficult to articulate because Uganda criminal legislation defines offences so broadly so that a single offence classification of defilement can represent a wide range of seriousness.

Accordingly, the generation of offence seriousness scales and classes of broadly similar seriousness should have been at the core of the Taskforce's mandate to develop sentencing guidelines that enable a public articulation of meaningful consistency. To provide the public with a clear vision of why sentences are imposed in a particular way, the Taskforce should have established classes of broadly similar seriousness and distinguished similar cases from dissimilar ones. This would have alleviated uncertainties about the definition of similarity and improved the pursuit of consistency in sentencing. To give only a few examples, murder is broadly defined as 'causing the death of another person by an unlawful act or omission with malice aforethought'.[72]As motive, the manner of perpetrating the crime, and the offender's level of participation remain undefined. Consequently, one case may portray seriousness that warrants punishment towards the higher end of the sentence scale, whilst the other could be at the bottom of that scale.

From this broad definition, a continuum of seriousness is represented whereby cases within that offence definition could portray seriousness from a level suggesting deliberate killing, all through to felony murder, which may be committed without any intention but during the course

[71] The Penal Code Act, Chapter 120 (Laws of Uganda, 1950) ('hereafter PCA 120') s 302.
[72] ibid, s 188.

of committing another felony. This means that whilst offenders at either sides of the continuum may be guilty of murder, the seriousness of the offence at one end of the continuum may merit the maximum penalty whilst the one at the other extreme may merit a much lesser sentence.

That is so because the broad offence definition does not distinguish between murders committed for gain, for hire, by shooting, for human sacrifice, nor does it distinguish between the participatory roles of the offenders in the commission of the murders. That is, was the offender the principal perpetrator, a member of a gang, or did the offender only perform a minimal role of aiding and abetting. It could encompass other things such as how the murder was committed. That is, whether it was committed with a deadly weapon, poison, through torture, through mob justice, and the purpose for which it was committed. Different factual situations suggest varying levels of seriousness, yet the offence committed falls under the same broad legal headline definition. Using a more subtle example of the offence of theft, the offence is committed when 'a person who fraudulently and without a claim of right takes anything capable of being stolen is said to steal that thing'.[73] Shoplifting, high-value theft from a shop, small- value theft from a convenience store, and professionally planned theft of high-value property, all fit within the definition of theft, and for that reason, one offender could easily get a fine or discharge whilst the other gets the maximum penalty.

Public accountability is required when different punishments are imposed on offenders committing cases within the same legal offence definition; otherwise, it would be presumed that all cases falling under a single offence type are broadly similar. If the offences are left to be broadly defined, it creates questions about the overall proportionality of the system and may

[73] ibid, s 254.

undermine the potential for generating equal punishments for equally placed offenders: in the absence of clear classes of broadly similar seriousness, a simple pickpocket may be punished more severely than high value theft at a shop. Equally important is that the public will not know why a shoplifting is treated similarly as a theft in breach of trust or why one offender convicted of manslaughter receives a sentence at the upper end of the statutory penalty range, whilst another receives sentence at the bottom range. The wide sentencing ranges make it even harder to account for the differences in sentences. Von Hirsch advises that classes of relative similarity in seriousness can be established by the strict adherence to principles of ordinal proportionality.[74] The principle of ordinal proportionality enables the categorisation of offences or classes of offences into degrees of seriousness which reflect comparative seriousness between different categories of offences. That is, that, violent assault is more serious than theft of a small value property. This categorisation then facilitates a clear definition of similarity and aids consistency in sentencing.

Generally, crimes involving violence are viewed as more serious than property offences. Therefore in ordinal proportionality terms, the relative seriousness of capital offences is higher than that of property crimes. Von Hirsch advised that a scale of seriousness must reflect in ordinal terms, systematic spacing between violent offences and non violent ones.[75]That is, that murder is more heinous than robbery, or that murder which is premeditated and involves multiple victims, is more serious than that which is committed without planning. Simply stated, more severe sentences will be prescribed for more serious crimes, and less severe sanctions will be prescribed for less serious offences, thereby defining proportionality in a more ethically

[74] Von Hirsch 'Proportionality in the Philosophy of Punishment: From Why Punish to How Much' (n 12) 76,77.
[75] Von Hirsch,' Proportionality in the Philosophy of Punishment' (n 36) 55, 82.

meaningful way. Von Hirsch explains that when punishments are not prescribed in a manner that corresponds to the gravity of offences, the effect will be to view the punishments as inefficient and unfair.[76]

It is recognised that guideline systems vary significantly on how offences are defined and classified. This is because assessments of ordinal and cardinal proportionality might differ in different social and cultural contexts depending on what is normatively acceptable as boundaries of proportionality. For example, whilst the death penalty is the statutory maximum penalty for murder in Uganda, its maximum penalty in England and Wales is life imprisonment,[77] thereby making the overall anchoring of penalty severity in cardinal proportionality terms more severe in Uganda than in England and Wales. It is also recognised that the definition of broadly similar seriousness will vary from one person to another depending on one's own value judgment about what constitutes similarity. In the context of developing sentencing guidelines, it is a product of political deliberation by the institution bestowed with authority to craft sentencing guidelines. Nonetheless, this study is of the view that articulation of meaningful consistency requires defining similarity based on ethically meaningful proportionality. For example, although death is the maximum penalty for murder, it is not normatively acceptable as a proportionate sanction for a variety of cases falling within this offence type and neither is it normatively acceptable for offences for which death is not a direct consequence, such as rape, defilement and robbery.

That said, in England and Wales, where criminal offences are broadly defined,[78]the Sentencing Council establishes three or four grades of seriousness within each offence classification to take

[76] ibid 70.
[77] Murder (Abolition of Death Penalty) Chapter 71 (Laws of England and Wales, 1965) s 1(1).
[78] See chapter 5.

care of the relativities between factual situations in a single crime.[79] This enables the sentencer to easily locate the level of seriousness at which the version of the facts most closely belong and if the version of facts cannot be positioned at some point within any of the categories of seriousness, the sentencer is permitted to take the case outside the offence classification, because imposing a sentence within the recommended penalty range will be contrary to the interests of justice and therefore will be either unduly lenient or overly severe.

The English approach enhances proportionality in sentencing in that ranges of penalties are allocated to matching levels of seriousness. It also provides the public with a clearer understanding of why different punishments may be imposed for cases falling within a single offence classification. The approach taken by the Taskforce to define offence seriousness based on broad legal offence definitions and statutory maximum penalties makes no difference whatsoever to Uganda's sentencing policy and practice. For example, the Taskforce determined the seriousness of murder based on its maximum punishment and offence definition thereby prescribing a sentencing range of thirty years to the death penalty. This creates the impression that all cases which could be fitted within this sentencing range are broadly similar in seriousness; yet, the broad offence definition creates classes of crimes that widely vary in degree of seriousness, and permitting the judges to make subjective assessments of seriousness of cases is likely to open room for disparate sentencing. Tata[80] notes that the legal headline conviction offence may be of limited relevance to sentencing because the nature and seriousness of cases vary widely.[81] Similarly, Von Hirsch[82] suggests that sentencing based on these broad offence

[79] See, e.g., Sentencing Council, 'Assault Definitive Guideline' (13 June 2011). Within the offence classification of causing grievous bodily harm, three categories of seriousness are created.
[80] C Tata, 'Conceptions and Representations of the Sentencing Decision Process'(1997) 24 Journal of Law and Society 395, 398.
[81] ibid.

categorisations may substantially conceal the variations in gravity of cases and result in giving conduct of substantially varying gravity the same normally recommended sanction. For instance, although a number of cases can be fitted within one offence classification, it does not mean that these cases represent broadly similar seriousness.

As regards the scaling of offence seriousness: murder, rape, defilement, treason, terrorism, kidnap with intent to kill and aggravated robbery, have all been classified as broadly similar in ordinal proportionality terms, simply because they all attract the same statutory maximum penalty of death under the Ugandan Penal Code Act. Similarly, manslaughter and simple robbery are classified as being of broadly similar seriousness because both offences attract the maximum penalty of life imprisonment.[83]Manslaughter and robbery were prescribed a sentencing range of three years to imprisonment for life[84]despite the clear variation in the nature of these offences and the variations in the levels of seriousness that either offence may manifest.

The Uganda Guidelines, therefore, do not offer a clear assessment of relative seriousness of different types of offences. That is, in order to determine that murder is broadly similar to rape, defilement or aggravated robbery, or that murder is more heinous than theft, corruption, or simple defilement, the Taskforce used broad statutory maximum penalties to define the rankings, thereby producing offence seriousness rankings that do not represent ethically meaningful proportionality. Subsequently, the Taskforce failed to rank offences in a manner that reflects comparative seriousness of different categories of offences. Accordingly, the definition of similarity adopted by the Taskforce undermines a public account of meaningful consistency, and

[82] A Von Hirsch, 'Structure and Rationale: Minnesota's Critical Choices' in A Von Hirsch, KA Knapp and M Tonry (eds.), *The Sentencing Commission and its Guidelines* (Northeastern University Press 1987) 84, 97.
[83]PCA 120, ss 187, 285 and 286 respectively.
[84] Uganda Guidelines, para 27, Schedule three, part II and para 30, Schedule three, Part III respectively.

inhibits the potential of the Uganda Guidelines to achieve consistency in sentencing. The offence classifications in the Uganda Guidelines have not resolved the problem of broad offence categorisations that exists in the individualised sentencing system. Like before, sentencers still have wide discretionary powers to position a case at the level of severity they feel the case falls, within wide sentence parameters. Additionally, sentencers are left with wide discretionary powers to make individual assessments of offence seriousness within broad offence legal definitions. Accordingly, the Uganda Guidelines have simply restated the provisions of the PCA 120.

The non-statutory status of the Taskforce may help to explain why classes of broadly similar seriousness were not generated from the broad legal offence definitions. Perhaps the members of the Taskforce did not see themselves as having the legitimate authority to create what might be seen as effectively new crimes.[85]From the author's personal communication with the Executive Secretary of the Taskforce[86]it was revealed that the Taskforce had initially considered adopting the approach of establishing categories of seriousness within offence classifications, as done under the sentencing guideline system of England and Wales, but they abandoned this approach after concern that assigning separate seriousness ratings for each offence category would tantamount to 'amending' statutory offence definitions. Obviously, if the Taskforce attempted to go beyond statutory definitions to devise its own subcategories within existing statutory offense classifications, then this argument would be valid. However, if it were simply a matter of establishing different levels of offence seriousness within each broad statutory definition, then

[85]See M Tonry, 'Setting Sentencing Policy through Guidelines' in S Rex and M Tonry (eds.), *Reform and Punishment: The Future of Sentencing* (Willan Publishing 2002) 91,92.
[86]Interviews with Andrew Khaukha, Executive Secretary of the Sentencing Guidelines Committee, in ULRC Offices, Kampala (31 January 2014, 12 February 2014 and 13 February 2014).

this would not be a refinement of the definitions provided by the legislature in the PCA 120. By creating different levels of seriousness, the Taskforce would only be seeking to provide a transparent public statement of the factors which increase or decrease culpability (and the degree of harm) in the commission of a given offence category.

Grading offences is not a result of an arithmetic exercise, but requires legal reasoning and value judgment. Different people may hold different views on whether a single premeditated murder should be placed in the same category as multiple random murders; or that rape is broadly similar to murder and aggravated robbery. Ultimately, it is a matter of political judgement of the guideline designers informed by either public debate, consensus, or by some set of procedures approved by the legislature. That said, although it is practically impossible to accurately capture all varying situations of criminal conduct into distinct classes of relatively similar seriousness, a structure that attempts to provide a degree of clarity and certainty by generating classes of broadly similar seriousness will be more valuable and most of all fair. At least, experience has shown that other sentencing commissions elsewhere have done it.

4.4 Wide Sentencing Ranges

One of the most important features of a sentencing guideline system is the breadth of the sentencing ranges[87] because this breadth defines the degree of real authority sentencing guidelines exert on sentencers, with outer limits of the sentencing ranges establishing the boundaries for consistency. In an individualised sentencing system, the ranges of penalties stretch out to the statutory maximum penalty, exerting an exceedingly light touch on judicial

[87] Kamuzze (n 7) 52.

authority. This is what chiefly undermines the legitimacy of individualised sentencing. Accordingly, although not all guidelines are created equal, in that some guidelines establish tightly restrictive ranges whilst others set broad sentencing ranges that are loosely restrictive on the exercise of judicial discretion, very narrow ranges have been criticised for being too restrictive to account for relevant differences between cases,[88] whilst broad ranges have been discouraged for their potential to render consistency meaningless.[89]That said meaningful consistency is produced when the outer limits of the sentencing ranges are defined in a manner that does not render consistency meaningless, but permits a degree of individualisation whilst recognising relativities between cases.

The Taskforce of Uganda adopted a broad approach to crafting its sentencing ranges. That is, the upper limit of sentencing ranges under the Uganda Guidelines is established by the statutory maximum penalty for that offence, and the lower limit is set at the least possible minimum sentence for the offence. Accordingly, the Taskforce has created a very wide definition of consistency, thereby creating guidelines which make no difference whatsoever to the existing exercise of judicial discretion in Uganda. For example, perhaps unmindful of the significance of proportionality in sentencing, the Taskforce established a sentencing range of 3 years to imprisonment for life[90]for a broadly defined offence of manslaughter (culpable homicide). The statutory maximum penalty for the offence of manslaughter —life imprisonment, is prescribed as the upper limit for its sentencing range[91]and 3 years is technically the least possible sentence

[88] E Luna, 'Misguided Guidelines: A Critique of Federal Sentencing', Policy Analysis No 458 (November 2002) <http://www.cato.org/sites/cato.org/files/pubs/pdf/pa458.pdf> (accessed 20 December 2014).
[89]A Ashworth, 'Coroners and Justice Act 2009: Sentencing Guidelines and the Sentencing Council' (2010) 5 Criminal Law Review 389, 396.
[90] Uganda Guidelines, para 27, schedule three part II.
[91] PCA 120, s 187.

which can be imposed in this felony charge. Similarly, using the maximum penalty as the upper limit a sentencing range of one to ten years imprisonment[92]is established for theft, and a three years to imprisonment for life[93] is established for simple robbery. The range for attempted defilement is 1 year to 18 years imprisonment[94], and so on. This approach is problematic to defining meaningful consistency in the following respects.

First, the upper limits motivated by statutory maximum penalties fail to represent the relativities in seriousness across different categories of cases. Sentencing guidelines are intended to articulate consistency by generating sets of offence classifications representing broadly similar classes of seriousness and to prescribe ranges of penalties that represent the variation in seriousness of each and every classification. In that respect, outer limits set by a statutory maximum penalty fail to represent seriousness, because statutory maximums are mostly intended for the worst case scenarios. Instead the outer limits establish a wide definition of consistency which gives consistency a meaningless function. For example, assuming liberal trial judge X imposed a 3 year custodial term on an offender convicted of manslaughter, and tough judge Y imposed a life imprisonment term on another offender convicted of the same offence. Furthermore assume that the class of manslaughter committed by the offender sentenced by judge X, was less serious than that committed by the offender sentenced by judge Y. How is judge Y going to account for the wide variation in sentence between what s/he has imposed on the offender and what Judge X has imposed on another offender? Can the cases at either end of the ranges normatively be defined as similar? By positioning these extremely variant cases within the same guideline classification, the Taskforce has defined consistency in a way that

[92] Uganda Guidelines, para 5, part VII.
[93] ibid, para 30, part III.
[94] ibid, para 33, Part IV.

categorises these two offences as similar. This chapter suggests that these are actually very different cases, and their categorisation as similar is based on a meaningless definition of consistency.

That notwithstanding, within a sentencing range of 3 years imprisonment to life imprisonment it would be impossible to imagine a case which would not fall within that penalty range. The sentencing ranges have been defined so broadly in the Uganda Guidelines that the balance between structure and individualised sentencing remains balanced excessively in favour of individualised sentencing. The breadth of penalty ranges only further reaffirm the extent of judicial authority that judges and magistrates exercised under an individualised sentencing system. In other words, judges and magistrates still have a wide myriad of sentencing options, falling within very broad sentencing ranges. This approach simply replicates existing law and practice and does not make meaningful contribution to Uganda's sentencing framework, at least in terms of consistency.

Secondly, the design of the sentencing ranges allows for penalties to overlap into each other, which undermines the principles of retributive proportionality. Since cardinal proportionality has not been defined in a way that is ethically meaningful, that is, the overall penalty severity scale was misconceived in that the 'desert' based upper limits of clearly more culpable offences, overlap into the lower and upper limits of far less serious offences. For example, a sentencing range of three years imprisonment to life imprisonment for manslaughter means that a person convicted of manslaughter can be sentenced similarly as a person convicted of a more serious murder. This is due to the fact that a big part of the sentencing range of manslaughter overlaps

into the sentencing range of murder, and all other capital offences. Similarly, a person sentenced for theft, within a sentencing range of one to three years imprisonment, can easily receive the same sentence as a person sentenced towards the bottom sentencing range of manslaughter. The two cases are distinctively dissimilar yet, because of the design and operation of the overlapping sentencing ranges established by the Taskforce, the two can be easily treated similarly.

In summary, the breadth and structure of the sentencing ranges in the Uganda Guidelines are problematic to a meaningful definition of consistency. Commentators like Frase[95] have advised that in order to achieve consistency, the penalty ranges should be set by definite and asymmetrical desert limits and they should also not be too wide. In his 'Limiting Retributivism' article,[96]Frase argues that broad sentencing ranges may be problematic if sentencers decide to spread their sentences across the entire range. This would sacrifice uniformity and proportionality. In the same light, Ashworth criticised the Coroners and Justice Act for diluting the 'duty on courts to follow the guidelines' with the provision under section 125(3) that permits sentencing within very broadly defined offence ranges.[97] Although not categorical about the breadth that an appropriate range should have, Hutton suggests that a wide sentencing range may make it difficult to make useful comparison of cases if punishments are imposed at either end of the range without requiring courts to provide explanations for such deviation.[98] The Taskforce's sentencing guidelines ranges are too wide as to provide consistency a meaningful function and they significantly undermine the overall proportionality of Uganda's sentencing guideline system.

[95] Frase, *Just Sentencing* (n 46) 47.
[96] Frase, 'Limiting Retributivism' (n 46) 106.
[97] Ashworth (n 89) 395.
[98]Hutton (n 8) 92.

4.5 Disproportionate Starting Points

A starting point may also be conceived as the basic sentence for a typical case within that guideline classification. That is, it is the first point of reference, from which, if the circumstances of the case portray (unusualness) from the typical case, a court will move downwards or upwards, depending on whether the circumstances disclose less or serious typification of the case. Therefore, a starting point provides a sort of benchmark against which more or less serious cases within that classification can be measured. The upward and downward adjustments from the starting point do not constitute a departure in a number of guideline systems,[99] and in sentencing guideline systems where starting points are not provided, the sentencer exercises discretion in locating the exact point where to begin the sentencing exercise. One of the ideas of limiting retributivism is that the sentencer begins at a parsimonious point within the range, which is towards the bottom of the sentencing range.

The sentencing guidelines model of England and Wales provides an example of a guideline scheme with starting points. A starting point under this model is a point not too far from the middle point of the recommended category range. For example, a starting point is assigned for each of the three categories of seriousness for the offence of aggravated burglary in the burglary definitive guideline.[100] Accordingly, within the total offence range of 1 to 13 years imprisonment, three starting points are provided which suggest the basic sentence for a typical case within the category range classification. The variation between the starting point at category one and three

[99] Sentencing Council, 'Assault Definitive Guideline' (13 June 2011) 4 <http://sentencingcouncil.judiciary.gov.uk/docs/Assault_definitive_guideline_-_Crown_Court.pdf> (accessed 10 April 2014) 2 defines a starting point as 'the position within a category range from which to start calculating the provisional sentence'.

[100] Sentencing Council, 'Burglary offences Definitive Guideline' (16 January 2012) <http://sentencingcouncil.judiciary.gov.uk/docs/Burglary_Definitive_Guideline_web_final.pdf> (accessed 10 November 2013) 5.

of aggravated burglary (10 and 2 years) respectively represents the clear relativities between classes of crimes of aggravated burglary under this offence classification. As a result, it is easier for the public to understand how and why different types of punishments are handed down to offenders falling within the same offence classification.

It is recalled that under the sentencing guideline model of England and Wales, a starting point within a category range can be adjusted at step two of the nine step approach to sentencing if the court finds that aggravating or mitigating factors place the offence in a category below or above the category range suggested at step one. That notwithstanding, it appears that desert principles guide the determination of starting points within offence classifications. This is so because there is a consistent cumulative effect on the starting point to match the increasing level of offence seriousness. Although under the English guidelines, a starting point is only technical but not necessarily indicative of the point at which each sentencer will begin positioning a case. This is explained by the role previous convictions play in the aggravation of sentences under the English guidelines. Given that under section 143 of the Criminal Justice Act 2003[101], 'each and every previous conviction is required to aggravate a sentence, if it is recent and relevant to the current conviction offence', this automatically means that a clean record will mitigate a sentence. Hence, a case where one or more previous convictions are present will most likely be positioned upwards from the starting point whilst a clean record case will most likely be positioned downwards from the starting point.

The Uganda Guidelines display two different approaches to allocating starting points. First, a one size fits all approach was adopted for all capital offences, that is, 35 years imprisonment is established as the basic sentence for a typical case in all the broadly defined capital offences.

[101] Criminal Justice Act, Chapter 44 (Laws of England and Wales, 2003).

Second, the middle point of the sentencing ranges is established as the starting point for a number of other offences —including theft, simple robbery and simple defilement-related offences[102]and for other offences where the middle point is not readily calculable, particularly in cases where life imprisonment is prescribed as the upper limit of a sentencing range, an indiscriminate number is set as a starting point. Such cases include manslaughter and simple robbery, and a starting point of 15 years imprisonment is allocated.[103]

The one size fits all approach used for all capital offences, and the use of a random number to prescribe a starting point for manslaughter and simple robbery are problematic for consistency in a few respects. First, the one size fits all starting point across the board of all capital cases further confirms that the definition of consistency produced by the Taskforce is too loose as to be meaningful. Grounded on the argument that a starting point provides a basic sentence for typical cases within that guideline classification, it is inconceivable that the Taskforce regarded 35 years imprisonment as the basic sentence for typical cases falling within each and every distinct and broadly defined offence under the category of capital offences. 35 years imprisonment does not provide an accurate representation of the variations in seriousness that can be manifested in each distinct offence type. For example, the small unrepresentative empirical study in appended A to this study showed that judges on average imposed sentences ranging between 3 and 19 years imprisonment. Out of the thirty seven judicial decisions reviewed, none of the offenders received a sentence close to 35 years imprisonment (in terms of custodial length), which in these circumstances, has been established as the basic sentence for typical cases of defilement. That notwithstanding, 35 years imprisonment across the board, still establishes excessively high starting points for some classes of seriousness within distinct offence classifications.

[102] Uganda Guidelines, para 45 part VII.
[103] See Appendix B to this study, for details of starting points for these offences.

Similarly, a starting point of 15 years imprisonment for manslaughter, which does not seem to be justified by desert, or sentencing practice is excessively high to enable a full range of less serious manifestations of manslaughter to be calibrated within the broadly defined offence categories. In light of the above, setting uniform starting points for all capital cases increases the risk of unwarranted disparity in sentencing in the sense that a disproportionately high starting point is established for a range of less serious offences.

This is not to say that other jurisdictions do not provide starting points in these ranges. For example, for the offence of 2nd degree murder with six or more previous criminal records, the Minnesota Commission prescribes a fixed presumptive term of (426 months), which is equivalent to 35 and one half years.[104] This 'starting point' is undoubtedly a long custodial term however, considering that in Minnesota, offences are not as broadly defined as in Uganda's Penal Code Act and that under the Minnesota guidelines, previous convictions have a consistent and cumulative impact on sentence severity, a starting point of 426 months may be justified in the circumstances, particularly since it represents a prior record level of 6+ points. Under the English model, although starting points as high as 25, 30 and a whole life order are applied in the case of murder, which carries a mandatory life sentence,[105]the fact that murder is classified into five different levels of seriousness and a different starting point is provided for each class of murder, the use of relatively high starting points is somewhat justified. For instance, cases manifesting lower degrees of seriousness within the offence classification of murder are allocated relatively low starting points.

[104] Minnesota Sentencing Guidelines Commission, 'Sentencing Guidelines Grid' (1 August 2013) < http://mn.gov/sentencing-guidelines/images/2013%2520Standard%2520Grid.pdf> (accessed 20 November 2014).
[105]The Criminal Justice Act (n 100), schedule 21, para 5 sets 35 years imprisonment as the starting point for determining a minimum term (tariff) in murder cases that display a 'particularly high' degree of seriousness. The starting point for determining a minimum tariff for murder cases of an 'excessively high' degree of seriousness is a whole life order.

Likewise, cases manifesting severe degrees of seriousness are allocated higher starting points, thereby delivering fairness and equality. Accordingly, the sentencing guideline system of England and Wales provides an account of why high starting points are used. Although 35 years imprisonment is merely a starting point and 30 years imprisonment is simply the bottom of a broad sentencing range, the assumption may be created that 30 years is perhaps the mandatory baseline punishment for capital offences. Obviously, the use of the phrase mandatory is out of context particularly if one is referring to purely advisory guidelines. However, it would not be surprising if the Uganda Guidelines send a misleading signal to judges that this is a minimum mandatory sentence under the sentencing guidelines.[106]

4.6 Unprincipled Aggravating and Mitigating Factors

Typically, designers of sentencing guidelines provide non exclusive lists of aggravating and mitigating factors. In England and Wales, a generic non exclusive list of relevant aggravating and mitigating factors which have application across all offences is provided in the Sentencing Guideline Council's definitive guideline on Overarching Principles in respect to Seriousness.[107] In addition, specific aggravating and mitigating factors are provided in each offence specific guideline.[108]In most American sentencing guideline systems, two lists containing generic

[106] E Ssekika and S Kakaire, 'Order and Certainty in New Sentencing Guidelines' *The Observer Newspaper* (19 June 2013) <http://www.observer.ug/index.php?option=com_content&task=view&id=25938&Itemid=114> (accessed 20 December 2014). In this article, the authors understood the prescribed starting points to be the minimum sentences for all capital offences.

[107] Sentencing Guidelines Council, 'Definitive Guideline on Overarching Principles, Seriousness' (December 2004) < http://sentencingcouncil.judiciary.gov.uk/docs/web_seriousness_guideline.pdf> (accessed 16 January 2014). In this guideline, the Sentencing Council provides a total of thirty one generic aggravating factors that reflect a higher culpability and greater harm and these factors include both statutory and non statutory aggravating factors. In addition a non exclusive list of mitigating factors is provided.

[108] See, e.g., Sentencing Guidelines Council, 'Sexual offences Definitive Guideline' (1 April 2014) < http://sentencingcouncil.judiciary.gov.uk/docs/Final_Sexual_Offences_Definitive_Guideline_content_(web).pdf>

aggravating and mitigating factors which cut across all offences are provided.[109]The role of aggravating and mitigating factors varies across sentencing guideline schemes. In England and Wales, some aggravating factors which are commonly referenced as principal factual elements of the offence, are used as determinants of offence seriousness. An additional list of aggravating and mitigating factors (which are not found on the general list of principal factual elements) is provided which guide the sentencer in placing the offence at the appropriate position within the total offence range.[110]

Elsewhere, particularly in most American sentencing guideline schemes, aggravating and mitigating factors generally justify the imposition of a sentence outside the offence guideline range. In North Carolina, the sentencing guidelines provide three sentencing ranges, and the list of aggravating and mitigating factors provided in their guidelines is intended to guide the imposition of a sentence within the aggravated or mitigated sentencing ranges. The North Carolina General Statute provides that 'a court may impose a sentence from the aggravated range if when weighed against the present mitigating factors, aggravating factors are more significant than the mitigating factors, and vice versa'.[111]It is noted in the North Carolina Structured Sentencing Training and Reference Manual that: 'the decision to impose a sentence from the aggravated or mitigated range is upon the discretion of the court'.[112]

(accessed 13 January 2015) provides a number of offence specific non-exclusive aggravating factors and mitigating factors.

[109] For example, Minnesota Sentencing Guidelines Commission, 'Minnesota Guidelines Manual and Commentary' (1 August 2013) 43-46 <http://mn.gov/sentencing-guidelines/images/2013%2520Guidelines.pdf> (accessed 20 November 2013) provide a non exclusive list of mitigating and aggravating factors that can be used as reasons for departure from the presumptive sentence range.

[110]see, e.g., Assault Definitive Guideline (n 98).

[111] See, North Carolina General Statute, Chapter 15A, s 1340.16(b).

[112] See, North Carolina Sentencing and Advisory Commission, 'Structured Sentencing Statistical Report for Felonies and Misdemeanours' (March 2014) 19 <http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt_fy12-13.pdf> (accessed 13 April 2014).

Typically, the lists of aggravating and mitigating factors provided in the different sentencing guideline schemes mostly reflect desert based (indicating levels of culpability and harm) sentencing factors as they exist at the time of committing the offence. Some sentencing guideline schemes like that of England and Wales (in line with the statutory objectives enumerated in the Criminal Justice Act, 2003) also provide for aggravating and mitigating factors that are linked to utilitarian/crime control philosophies. At the same time, factors that could be considered ambiguous because of lack of consensus on the extent of their application to retributive or utilitarian philosophies are included. [113] These factors, which include remorse, intoxication, family responsibilities, terminal illness etc are relevant mostly because they can be justified on social grounds. Scholars such as Roberts have tagged these factors like remorse, 'ambiguous factors'.[114] They are ambiguous because their application is likely to generate conflicting opinions among sentencers. On the other hand, Young and King[115] described factors such as 'prevalence of the offence in community' as problematic sentencing factors because of the divergent views that may emerge as to the rationale for invoking such a sentencing factor. Almost similar to guideline authorities in other jurisdictions, the Taskforce of Uganda provided lists of non exclusive aggravating and mitigating factors. Whilst the majority of factors can be directly linked to retributive and utilitarian purposes, a number of others are either ambiguous or problematic because of the potential conflict in opinion which their application is likely to invoke.

[113] Sentencing Guidelines Council, Overarching Principles Definitive Guideline (n 106) paras 1.27 and 1.39 provide for the consideration of factors such as remorse, and prevalence of offence in the community respectively as determinants of offence seriousness.
[114] JV Roberts, 'Punishing More or Less: Exploring Aggravation and Mitigation at Sentencing' in JV Roberts (ed.), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011) 1, 15.
[115] W Young and A King, 'Addressing Problematic Sentencing Factors in the Development of Guidelines' in JV Roberts (ed.), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011) 208, 219.

This section identifies those ambiguous and or problematic extra legal sentencing factors that the Ugandan Taskforce has included in the lists of non exclusive aggravating and mitigating factors. The section attempts to examine the link between these factors and retributive or utilitarian philosophies. This discussion then helps to highlight the ambiguity of these factors and sets a platform for the re-evaluation of their relevance at sentencing in Uganda. Factors which can quickly be linked to retributive and utilitarian purposes such as premeditation, planning, offender's role in the commission of the crime, degree of harm inflicted on the victim, value of property stolen etc, are not included in this discussion.

To begin with, scholars such as Roberts have emphasised the significance of adopting a principled approach to aggravating and mitigating factors at sentencing. He notes that the impact aggravating and mitigating factors have on the type and duration of sentence imposed on an offender calls for a principled approach towards their application.[116] Under most American sentencing guideline schemes, direction is provided as to the factors that ought to be excluded as sentencing factors. For instance, the Minnesota Sentencing Guidelines and Commentary, explicitly excludes the use of factors such as race, sex, employment factors (including employment at the time of offence or at the time of sentencing), and social factors (such as educational attainment, living arrangements, length of residence or marital status) as reasons for departure.[117]

Otherwise, typically, under most sentencing guidelines, the non exhaustive lists of aggravating factors contain factors that reflect a higher level of culpability and greater harm and the lists of mitigating factors contain factors that arise from a lower level of culpability and less harm. For

[116] JV Roberts, 'Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application' (2008) 4 Criminal Law Review 264, 265.
[117] Minnesota Sentencing Guidelines Commentary (n 108), s 2D.105.2 and 2D.105. 3, pp 41- 46 provide factors that should not be used as reasons for departure and factors that may be used as reasons for departure.

example, the fourteen aggravating factors and the six mitigating factors listed in the Minnesota sentencing guidelines and commentary,[118]all arise from the two factors of increased or reduced culpability and harm. The mitigating factors include, the victim was an aggressor in the incident; the offender played a minor or passive role in the commission of the offence; the offender's physical or mental impairment negated their substantial judgement in the commission of the offence (the voluntary use of intoxicants, drugs or alcohol is explicitly excluded from the application of this factor). It is reasonably deducible that the Minnesota Commission relied on desert as the rationale for the invocation of aggravating and mitigating factors.

It is recalled that the first set of the Uganda Guidelines covers all capital offences and a selection of a few occurring non capital offences. The Taskforce accordingly provided two broad categories of aggravating and mitigating factors. One that applies to the imposition of the death sentence and others that apply to specific offences. That is, the first set of sentencing factors apply when the court is considering whether to impose a sentence of death, and these are listed as 'factors aggravating or mitigating a death sentence'.[119]Then, the Uganda Guidelines provide a non exclusive list of aggravating and mitigating factors specifically for each offence covered by the Guidelines. Many of the aggravating and mitigating factors listed in the Uganda Guidelines have a bearing on the indication of harm and culpability. This section focuses on other factors, which may be termed problematic in order to distinguish them from factors related to offence seriousness. These factors are considered relevant by most sentencing schemes, but they require an explicable justification by the sentencing authority.

[118] ibid.
[119] Uganda Guidelines, paras 20 and 21.

Looking specifically at the factors aggravating the imposition of a death sentence, it is inferred that the rationale for invoking any of the specific factors is offence seriousness. On the contrary, the list of factors mitigating the imposition of a death sentence contains some factors that cannot readily be linked to the indication of reduced culpability and harm. Some of these factors include, '...remorsefulness of the offender, whether the offender pleaded guilty, family responsibilities, some element of intoxication, or any other relevant factor the court considers relevant'.[120]Reading further on, Uganda Guidelines, paragraph 31 which contains a list of factors aggravating a sentence of robbery, provides for factors that indicate higher culpability and greater harm. However, the list of aggravating factors also includes circumstances such as:

> ...the rampant nature of the offence in the community, whether the offence was committed under the influence of alcohol or drugs, whether the offender is remorseful, or any other factor as the court may consider relevant.

Similarly, paragraph 32 which provides the factors mitigating a sentence for robbery, contains (to list just a few of them) factors that are directly linked to reduced culpability and lesser harm such as:

> lack of premeditation, the subordinate role of the offender in the commission of the offence, the offender's mental disorder or disability, the offender's being a first offender (which is frequently connected with reduced culpability), remorsefulness, family responsibilities, or any other factor as the court may consider relevant.

The same approach is applied in almost all the other offence specific aggravating and mitigating factors.[121]

[120] ibid, para 21 (i), (k), (m), (n) and (o).
[121] See Appendix B to this study for factors mitigating a sentence for defilement.

It is recalled that the sentencing objectives under Uganda Guidelines, paragraph 5 include both retributive and utilitarian purposes. Therefore, the provision of sentencing factors that refer to factors indicating increased or reduced culpability or greater or lesser harm (which could be more directly linked to desert theory) as well as the inclusion of other sentencing factors linked to other sentencing objectives other than retributive objectives is not problematic per se. However, what is problematic is the inclusion of factors, whose relevance may ultimately result in conflicting opinions, without providing a clear rationale for their relevance at sentencing. It is not disputable that these factors have been widely accepted to be of relevance, and therefore cannot be ignored.[122]However, it is important to identify these factors and bring them to the attention of the sentencers. This will enable the sentencers to re-evaluate their relevance in each individual case before attaching any weight. These factors are likely to heighten sentencing variability if clarity is not provided as to their relevance and application.

To begin with intoxication, this factor can lead to conflicting opinions amongst sentencers in the following ways. On the one hand, from a retributive perspective, one sentencer may be led to accept that intoxication reduced the offender's culpability. That is, that the offender is not the kind of person who would engage in such activity if s/he was in a sober state. Therefore that s/he deviated from his/her true character when s/he committed the offence.[123] On the other hand, another sentencer with a utilitarian perspective may be of the view that the very fact that the offender engaged in excessive drinking and thereafter committed a crime, s/he is not to be excused for his or her reprehensible behaviour.[124] The relevance of intoxication as a sentencing factor can therefore be grounded on both utilitarian and retributive philosophies. In addition, its

[122] A Ashworth, 'Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing' in JV Roberts, *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011) 21, 22.
[123] B Bjerregaard, MD Smith, SJ Fogel and WR Palacios, 'Alcohol and Drug Mitigation in Murder Capital Trials: Implications for Sentencing Decisions' (2010) 27 Justice Quarterly 517, 520.
[124] ibid.

application could have policy implications on whether intoxication should be an aggravating or mitigating factor or whether it should have any relevance at all.[125]For example, a sentencer who subscribes to the deterrent effects of punishment might be comfortable with considering intoxication as an aggravating factor. This is so because general deterrence generally seeks to send a message to the community that a certain kind of anti social behaviour is forbidden. Also to discourage potential offenders from offending.[126] Thus, severely punishing an alcoholic offender may be perceived as a deterrent to would be potential problem drinkers. [127] In addition, a person who subscribes to deterrence as a punishment goal might equate intoxication to future dangerousness. From a retributive perspective, an offender who impulsively commits a crime, say during a fight in a club might be considered less culpable because of the state of his or her mind at the time of committing the crime. [128] Intoxication may therefore be considered a mitigating factor from a retributive point of view.

Although where the intoxication precedes a clearly made out plan to commit a crime, then its relevance from a retributive philosophy may shift from mitigation to aggravation. Having said that, scholars such as Dingwall and Koffman argue that from a retributive perspective, intoxication is only likely to pass as a mitigating factor if it is shown that the offender's behaviour and the intoxication were both uncharacteristic and as such reduced the offender's culpability, particularly for first time offenders.[129] Dingwall and Koffman note, however, that it is difficult to find a persuasive retributive justification for intoxication as an aggravating factor because by punishing an intoxicated offender more harshly than his or her sober counterpart

[125] CJ Felker, 'A Proposal for Considering Intoxication at Sentencing Hearings: Part I' (1989) 53 Journal of Correctional Philosophy and Practice 3, 5.
[126] Bottoms and Von Hirsch (n 14).
[127] ibid.
[128]G Dingwall and L Koffman, 'Determining the Impact of Intoxication in a Desert-Based Sentencing Framework' (2008) 8 Journal of Criminology and Criminal Justice 335.
[129] ibid 339.

would mean that intoxication increased the seriousness of the offence.[130] They note that from a retributive perspective, intoxication would pass as a mitigating factor for first offenders but not for repeat offenders because 'an individual who has previously offended while intoxicated is expected to know the likely consequences for his or her intoxication'.[131]

Intoxication is explicitly excluded as a reason for a downward departure in the United States Sentencing Commission Guidelines.[132] Also, the Sentencing Act, 2002 of New Zealand excludes intoxication as a mitigating sentencing factor. [133] On the other hand, the Sentencing Council definitive guideline in respect to Overarching principles on seriousness 2004, paragraph 1.22 provides that "intoxication by alcohol or drugs is an aggravating factor" and this is because intoxication is perceived to increase the seriousness of an offence.

Seemingly, by looking at the above provisions, intoxication is not favoured as a mitigating factor. This is perhaps because, particularly from a retributive stance, punishment is seen as deserved because people are perceived as having a choice whether to break the law, and if they choose to do so, they should not be allowed to avoid criminal responsibility by raising intoxication as a mitigating factor. Scholars such as Padfield argue that if the penal aim is to reduce reoffending, then recognising intoxication as a sentencing factor could be the only way to help suitable offenders who need treatment.[134] The author further argues that the courts ought to

[130] ibid 343.
[131] ibid 346.
[132]United States Sentencing Commission, 'Guidelines Manual' (1 November 2013) 369 < http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013_Guidelines_Manual_Full.pdf> (accessed 12 February 2014) 446, s 5H1.4. It is provided that drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure.
[133] The New Zealand Sentencing Act No. 9 of 2002, s 9 (3) The Act provides: 'despite the provision of subsection (2)(e) (which permits the diminished intellectual capacity and understanding as a mitigating factor) the court must not take into account by way of mitigation the fact that the offender at the time the offence was committed was affected by the voluntary consumption or use of alcohol or any other drug'.
[134] N Padfield, 'Intoxication as a Sentencing Factor: Mitigation or Aggravation?' in JV Roberts (ed.), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011) 81, 82.

be left with discretion to 'help suitable offenders with less punitive and more rehabilitative sentences'.[135] Clearly, there is general disagreement about the impact, if any, that intoxication should have on determining severity of sentence and there is no clear consensus as to whether intoxication ought to be regarded as a mitigating or aggravating factor. Accordingly, a more uniform approach is necessary which would either permit the consideration of intoxication as a mitigating factor for first time offenders but without applying the converse. Looking at the Uganda Guidelines, paragraph 21(n), intoxication is a mitigating factor for a sentence of death. Conversely, intoxication is an aggravating factor for other offences such as robbery under paragraph 30(r). In addition, sentencers are permitted to consider any other relevant factors when determining sentence. A more uniform approach is necessary[136] in order to avoid the unfairness associated with the disagreement on the impact intoxication should have on severity of sentence.

Regarding remorse as a sentencing factor, some scholars like Tudor,[137]even Bargaric and Amarasekara[138](whose central argument is that remorse is not a relevant sentencing factor) note that the recognition of remorse as a mitigating factor is a settled principle in sentencing law in many jurisdictions. In Uganda, remorsefulness has consistently been recognised as a factor that mitigates sentence.[139] However, lack of remorse, although sometimes used as an aggravating factor, its application has been discouraged by the Supreme Court of Uganda.[140] Nevertheless,

[135]ibid.
[136] Roberts, 'Punishing More or Less (n 114) and Dingwall and Koffman (n 127).
[137] S Tudor, 'The Relevance of Remorse in Sentencing: A Reply to Bargaric and Amarasekara (and Duff)' (2005) 10 Deakin Law Review 760, 761.
[138] M Bargaric and K Amarasekara, 'Feeling Sorry? — Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing' (2001) 40 The Howard Journal 364.
[139] See, e.g. *Uganda v Charles Sekamatte* Criminal Session Case No 170 of 2012 (20 September 2012, unreported). In this case, the accused was convicted of murder and sentenced to death. He appealed against the sentence and amongst the factors that the Court of Appeal relied on to reverse the sentence of death and substitute it with an imprisonment term of 32 years was the fact that the convict had commenced self help courses while in custody, an act that demonstrated the convict's remorsefulness and willingness to reform.
[140] See e.g., *Livingstone Kakooza v Uganda* Criminal Appeal No 3 of 1993 (20 February 1994) [1994] KALR 18. The Supreme Court held that: 'It was not proper for a trial court to take into account lack of remorse when

the Taskforce included the absence of remorse or its presence as an aggravating or mitigating factor across a number of dispositions and offences.[141]For example, under paragraph 9(i) offender remorsefulness is one of the factors that could result in the imposition of a non custodial sentence. Further still, Uganda Guidelines, paragraph 21(i), lists offender remorsefulness as a factor that could lead the judge into imposing a custodial sentence rather than a death sentence.. Furthermore, remorsefulness is provided as a mitigating factor for the offences of robbery,[142]defilement,[143]criminal trespass[144]and theft.[145]

The absence of remorse is then listed as constituting an aggravating factor for some offences, even those where its presence is considered a mitigating factor. For example, in paragraph 31(s), the absence of remorse is an aggravating factor for the offence of robbery. Also, the offender's lack of remorsefulness is an aggravating factor when sentencing for theft.[146]The inclusion of remorsefulness as a mitigating, as well as an aggravating factor for some offences under the Uganda Guidelines raises interesting penological issues. First, remorse is undoubtedly a post offence matter[147]because it occurs after the crime has been committed. Accordingly, from a strict retributive perspective, remorsefulness may be difficult to find persuasive application at sentencing. Bargaric and Amarasekara argue that remorse being a post offence behaviour change in an offender, finds no equation in a desert based sentencing framework which concerns itself with the imposition of proportional punishments based on current offence seriousness. They

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sentencing because this could compromise the convict's chances of appeal'. The Supreme Court further stated that: 'by taking into the accused' lack of remorse, the Trial Court had erred on a principle of law'.

[141] Uganda Guidelines, para 9(i) remorsefulness or conduct of the offender is one of the factors that could be a determinant for substituting a custodial sentence with a non imprisonment disposition.

[142]ibid, para 32(g).

[143]ibid, para 36 (c).

[144]ibid, para 40 (d).

[145]ibid, para 48(e).

[146]ibid, para 47 (e).

[147] Ashworth, 'Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing' (n122) 34.

further argue that even under a utilitarian model, remorse is not justifiable as a mitigating factor because there is lack of evidence to support the notion that repentant offenders are less likely to reoffend.[148] Other scholars such as Tudor[149] disagree. Tudor argues that remorse should ordinarily be treated as a mitigating factor. The author's proposition is grounded on the assumption that 'an offender whose remorsefulness is genuine is less likely to commit a relevantly similar offence in future than s/he would be if s/he were not remorseful'.[150]Tudor makes it clear that the assumption is not based on the remorseful offender relative to another non remorseful one, because there is no empirical support for the assumption that non remorseful offenders are more likely to reoffend than remorseful offenders. However, the assumption is based on the remorseful offender in his or her individual capacity. Similarly, Ashworth notes that although remorse is a post offence phenomenon, it is associated with the offence and its aftermath and therefore requires some degree of recognition.[151]On the other hand, Roberts[152]points out that because the public is more likely to be sympathetic towards offenders who apologise, the recognition of remorse as a mitigating factor is undeniable. Nonetheless, Roberts[153]lists remorse as an ambiguous sentencing factor and warns that if the asymmetry of effect between its application as a mitigating factor and converse recognition as an aggravating factor is not clarified, conflicting opinions regarding its impact on severity of sentence may arise consequently undermining consistency.

[148] Bargaric and Amarasekara (n 138).
[149] SK Tudor, 'Why should Remorse be a Mitigating Factor in sentencing?'(2008) 2 Criminal Law and Philosophy 241-257.
[150] ibid 244.
[151] Ashworth , 'Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing' (n 122) 34.
[152]JV Roberts, *Punishing Persistent Offenders*: *Exploring Community and Offender Perspectives* (Oxford University Press 2007)76, 77.
[153] Roberts, 'Punishing More or Less' (n 114) 15.

Evidently, remorse is a relevant sentencing factor. However, there is some degree of disagreement about the impact, if any, that remorse should have on sentencing decisions and whether remorse is an aggravating, mitigating or neutral factor. Penologically, one could assume that if the general purpose of sentencing is to equate punishment to the seriousness of the offence, then the direct link between remorse and retributive philosophies may be difficult. This is because, remorse is a post offence factor and therefore its impact on the seriousness of the offence committed is difficult to trace.[154]Unless one expands the notion of culpability to include post offence matters, by showing that the offender demonstrated a high level of remorse immediately after the time of the offence, and therefore his or her culpability ought to be lesser compared to a non repentant counterpart.[155] Having said that, from a utilitarian concern, if the main sentencing purpose is to rehabilitate or reform the offender, then the remorseful offender could be considered a more suitable candidate for rehabilitation. This is so, because s/he would have already recognised the wrongfulness of his/her action. Also, if one is to accept the notion that repentant offenders are less likely to reoffend, then remorsefulness may be a plausible mitigating factor in the pursuit of utilitarian goals.

However, remorsefulness may not necessarily fit well with other utilitarian aims, such as incapacitation. For example, if the remorseful offender is considered to be a dangerous offender who poses a high risk of reoffending, whether the offender is remorseful or not, this factor may not be of greater relevance at sentencing.

Another issue concerns recognising remorse both as an aggravating and mitigating factor. From a Ugandan perspective, the failure to clarify the asymmetry of effect between lack of remorse as

[154] Bargaric and Amarasekara (n 138) 368.
[155] Tudor, 'The Relevance of Remorse in Sentencing' (n 137) 764.

an aggravating factor and its application as a mitigating factor may be problematic to the pursuit of equality in sentencing. Typically, offenders who maintain their innocence throughout the trial, will be less likely to express remorse. This is because these offenders either genuinely believe themselves to be innocent or just wish to exercise their constitutional right to the presumption of innocence. Therefore, for such an alleged offender to be put to choice of being remorseful and get a more lenient sentence or maintain his/her innocence and heighten his chances of getting a more severe sentence (because lack of remorse is also an aggravating factor) would undermine the pursuit of equality in sentencing. More so, the differential effect of sentence on those who are remorseful and those who demonstrate a lack of contrition would undermine consistency in sentencing. As Roberts argues, 'controversial factors of this nature require clarification of the asymmetry of effect where by remorse may mitigate but not necessarily aggravate sentences'.[156]

Under the Uganda Guidelines, the fact that the offender has family responsibilities is a mitigating factor when court is making a decision whether or not to impose a sentence of death.[157]This factor is also provided as mitigating a sentence for robbery and criminal trespass.[158] In addition, Uganda Guidelines, paragraph 6(e) lists the offender's personal, family, community or cultural background as one of the general sentencing principles which the court must take into account when sentencing an offender. Sizeable research has been conducted to investigate whether ties to children and other family members influence sentencing decisions. Daly's[159]study of reasoning processes used by court officials in sanctioning male and female defendants, found that familied offenders (offenders with children and other familial relations) were more likely to be treated more leniently than non familied offenders. That the effect was stronger for women than men.

[156] Roberts, 'Towards Greater Consistency' (n 116) 265.
[157] Uganda Guidelines, para 21(m).
[158] See ibid, para 32(j) (mitigating a sentence of robbery); para 40 (e) (mitigating a sentence for criminal trespass).
[159] K Daly, 'Structure and Practice of Familial Based Justice in a Criminal Court' (1987) 21 Law and Society Review 267.

However, Daly also found that there was a high likelihood of treating familied offenders differently depending on the gender and the nature of offence committed.[160] That is, although familied offenders were less likely to be incarcerated than their non familied counterparts, the former were as likely to be jailed if previously convicted of an offence of a serious or violent nature.[161] More so, some offences such as sexual abuse offences and prostitution were more likely to indicate bad character on the familied offender thus increasing the likelihood of incarceration for these offenders.

Other research on the subject which suggests that offenders' family circumstances work towards mitigating their sentences include Eaton's case study of a magistrates' court in England. Eaton found that fifty six of sixty three pleas for mitigation of a sentence were based on the familial responsibilities of the offender.[162] Flavin's study also found that 86 per cent of women who lived with a child and 77 per cent of those who lived with a child and family member did not receive imprisonment terms compared to between 49 per cent and 68 per cent of women in other family living arrangements respectively.[163]Taking into account one's family ties as a mitigating factor raises a number of conflicting opinions in respect to its penological justification. For instance, when the purpose of sentencing is to impose punishments that are proportional to offence seriousness, familial responsibilities may play a dismal role, if at all. Although, depending on the nature of crime committed, if it is shown, for example, that the offender's motivation to offend was precipitated by the need to provide for his or her family, this may reduce the degree of culpability for the offence and could reduce the sentencer's perception of the offender as

[160] ibid 285.
[161] ibid.
[162] M Eaton, *Justice for Women? Familly, Court and Social Control* (Open University 1986).
[163] J Flavin, 'Of Punishment and Parenthood: Family-Based Social Control and the Sentencing of Black Drug Offenders' (2001) 15 Gender and Society, 611, 624.

dangerous.[164] However, familial responsibility may sometimes work against an offender, in a retributive or utilitarian model. For example, an offender's having a family especially children may have him or her perceived as dangerous in a utilitarian model.

Having said that, recognising family responsibilities as a mitigating or aggravating factor may heighten the danger of differential treatment of similarly placed offenders. For example, although saving a familied offender from incarceration and instead allowing them to continue undertaking their familial duties may complement the offender's rehabilitative process, it may result in treating non familied offenders differently based on an extra legal factor. In her study, Daly observed that court officials thought of the differential treatment of familied and non familied members not as discrimination but as legitimate and pragmatic justice because the officials believed that familied offenders were more informally socially bound. This was based on the understanding that familied offenders were less likely to reoffend because of what they risked to lose if they reoffended.[165]

The case of *Uganda v Twebaze and Another* [166]demonstrates the dangers of not having a clear and logical approach to considering the relevance of factors such as family responsibilities. In this case, two co-offenders received widely distinct sentences following their conviction for the murder of the same victim under a single transaction. Making clear reference to the seriousness of the offence, the judge stated:

> …the deceased died a cruel and painful death at the hands of both offenders…perpetrators of such serious crimes must never be allowed to walk freely in our communities. Accused no. 1 is sentenced to 30 years imprisonment. Accused no. 2, because of your terminal illness and

[164] MA Logue, 'Downward Departures in U.S Federal Courts: Do Family Ties, Sex, Race and Ethnicity Matter?' (2011) 34 Ethnic and Racial Studies 683, 702.
[165] Daly (n 159) 385.
[166] Criminal Session Case No 123 of 2011 (11 September 2013).

> the death of your wife, the court shall exercise compassion and give you an opportunity to spend the time you have left on earth with your children. I sentence you to 6 years imprisonment. [167]

Whilst the court was mindful of the gravity of the offence committed by the offenders, as well as the fact that the offenders committed the offence jointly, one offender was sentenced to 30 years imprisonment whilst his co offender was sentenced to 6 years imprisonment. The judge exercised compassion and imposed custodial sentences that ensured that the offender, whose children had just lost a mother served a shorter custodial sentence than his counterpart so that he could go back and raise his children.

The above discussion highlights the importance of having a more coherent approach, which sets out in a clear and logical manner, when and why the fact that an offender has or does not have a family should apply as a mitigating factor. This would be helpful to avoid variation in sentencing treatment — between familied and non familied, and between familied men and women, and also in order to minimise disparities arising from differences in opinions among sentencers regarding whether family responsibilities should (or should not) mitigate a sentence, and the extent to which it should mitigate a sentence. The Unite States Sentencing Commission addressed this concern through stating that: 'family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted'. The guidelines commentary explains that, the court ought to look at (among other things) the likely danger to the offender's family members as a result of the offence, before making a departure based on familial ties and responsibilities.[168] Such an explicit statement in the guidelines is to be welcomed as it directs the

[167] ibid.
[168] United States Sentencing Commission, Guidelines Manual (n 132) 762.

sentencers to re evaluating the rationale for invoking this sentencing factor as a relevant mitigating or aggravating factor at sentencing.

Terminal illness or even advanced age are other factors which impact a sentence, yet their link to retributive and utilitarian philosophies is controversial. Offenders who are terminally ill or of advanced age are likely to find custody considerably more difficult than would otherwise be the case, and because of this, these factors are ordinarily used in mitigation of sentence. Nevertheless, how should a judge sentence a 70 year old HIV positive sex offender? Although his reduced life expectancy or relative old age may indicate a lesser risk of reoffending, this can raise difficult questions from both retributive and utilitarian philosophies. For example the offender's rehabilitative potential may be perceived as higher when s/he is given a lenient sentence, because this will be perceived as a second chance to life. However, the application of such factors is more likely to disadvantage the offender who is in good health. The nature of seriousness of the offence or the offender's previous pattern of offending may assist the sentencer when weighing up mitigation. Ashworth notes that confronting the conflicting principles and policies underlying the application of such factors would be a good first step for a guideline authority.[169] For instance, explaining clearly why terminal illness is a mitigating factor would enable an articulation of its penological and or practical justification. This would address the likely public misunderstanding which is likely to develop from a sentencer' application of such a factor.

In addition, the Uganda Guidelines, paragraph 6 (e) provides that:

> when sentencing, the court is required to take into account the offender's personal, family, community or other cultural background

[169] Ashworth, 'Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing' (n 122) 34.

The above provision could be interpreted to entitle mitigation to an offender who presents himself or herself with a socially disadvantaged background arguing that the social or cultural disadvantage minimised the offender's options to abide by the law, or to aggravate the sentence of an offender who belongs to a group which is associated with privilege on the basis that the offender had better options than his or her socially disadvantaged counterpart. The inclusion of such factors could elevate the unfairness associated with disparate treatment of similarly placed offenders. Additionally, such factors can be treated as aggravating rather than mitigating and vice versa in some cases, which heightens the risk of their inconsistent application. Therefore their relevance as aggravating or mitigating factors should first be evaluated before they are included in the Uganda Guidelines.

The failure by the Taskforce to provide a principled approach to aggravation and mitigation arguably undermined the articulation of meaningful consistency in the Uganda Guidelines. Whilst desert plays a significant role in determining the severity of punishment, utilitarian purposes were similarly given a predominant role at sentencing. In addition, a number of other problematic factors were included in the Uganda Guidelines. Even though these problematic factors are widely accepted as relevant sentencing factors, their inclusion required an articulation of the rationale for their relevance in order to avoid ambiguity in their application at sentencing. The considerable disagreement about their impact on severity of sentence necessitated a uniform approach to their application. This is not to suggest that the other aggravating and mitigating factors whose direct link to retributive or utilitarian purposes is incontrovertible didn't require a uniform approach. Rather, that, due to the nature of the ambiguity of the problematic factors, consistency could have been better defined if they were explicitly identified as problematic factors and the rationale for their inclusion clearly articulated, as well as their asymmetry of

effect across all offences. Scholars such as Bargaric and Amarasekara note that 'moral norms or virtues that can be disregarded with total impunity (such as pregnancy, family responsibilities, and others) ought not to have legal recognition'.[170] This study differs from Bargaric and Amaserakara's recommendation and argues that such factors may be given legal recognition, however, the justification for their being considered relevant sentencing factors ought to be articulated.

4.7 Defining Departures Out of Existence

Departures are widely known as sentences that do not fall within the guidelines' recommended sentencing ranges.[171] Almost all sentencing guidelines systems —including voluntary systems[172] allow a judge to depart from the recommended sentence when certain unusual circumstances are displayed in the actor's criminal conduct. What constitutes a departure, however, varies from one guideline system to another. Departures in a guideline scheme are the 'window of discretion'[173] because it is the only avenue that the courts have to impose a 'proportionate' sentence outside the guideline classification, based on what the court deems are the unique individual circumstances of the case.[174]

[170] Bargaric and Amarasekara (n 15) 373.
[171] See, e.g., A Ashworth, 'Departures from Sentencing Guidelines'(2012) 2 Criminal Law Review 81.
[172]See, The District of Columbia Voluntary Sentencing Guidelines and Virginia Discretionary Sentencing Guidelines, which include provisions for judges to sentence outside the recommended sentencing options (see chapter 5).
[173] See, A Alschuler, 'Departures and Plea Agreements Under the Sentencing Guidelines'(1988) 117 West's Federal Rules Decision 459.
[174] JH Kramer and JT Ulmer, 'Sentencing Disparity and Departures from Guidelines'(1996) 13 Justice Quarterly 82.

Some commentators have argued that departures are crucial for the success of a guideline system[175] and that without departures, the source[176] and balancing[177] of judicial discretion is curtailed.

Under most guideline schemes, a window of discretion is availed through departure to allow sentencers exercise discretion in finding appropriate sentences for atypical cases. In the English guideline scheme, sentencers will exercise departure power if they 'are satisfied that it would be contrary to the interests of justice to follow the sentencing guidelines'.[178] In Minnesota, courts are permitted to impose sentences outside the guideline classification if they 'find identifiable, substantial and compelling circumstances to support a sentence outside the appropriate range on the applicable grid'.[179] The departure standard varies from jurisdiction to jurisdiction, and its interpretation is guided by Appellate court jurisprudence.

Given that in most jurisdictions, maximum penalties are set by the legislature, guideline designers usually leave a considerable gap between the top of the offence range and the maximum penalty. The gap between the top range and the maximum sentence is the window of discretion for courts to individualise sentences in cases that in the sentencer's opinion are not covered within the guideline classification. However, there are guideline systems where (in some specific offences) the top of the sentencing range goes up to the statutory maximum penalty and the bottom goes to the least possible minimum sentence. Ashworth argues that with

[175]D Parent, 'Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines'(Butterworth Legal Publishers 1988) (stresses that departure rules will determine, in large measure, the guidelines' success); see, also, M S Gelacak, HI Nagel and B Johnson, 'Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis' (1996) 81 Minnesota Law Review 299, 303 (explains that departure power has important implications for the implementation of the guideline system).
[176] Gelacak (n 175) 303.
[177]DA Berman, 'Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines' (2000) 76 Notre Dame Law Review 21, 23.
[178]The Coroners and Justice Act 2009, Chapter 25 (Laws of England and Wales) s 125.
[179] Minnesota Sentencing Guidelines Commentary (n 109) 39.

such a structure, upward or downward departures from the guidelines will be rendered impossible.[180]

Under the Minnesota guidelines, a departure sentence is one that falls outside the applicable grid but within the limits set by statute. Although for most of the offences a considerable gap is left between the top of the highest range and the statutory maximum penalty, in some offences on the top of the severity scale, there is no such gap. For instance, the offence of 2nd degree murder which carries a statutory maximum of not more than 40 years imprisonment, the top of the highest range for an offender with 6+ prior criminal record points, goes up to the statutory maximum.[181] However, for other offences on the standard grid, such as 2nd degree murder, 1st degree assault and burglary, there is a considerable gap between the top of the highest 'category' range and the statutory maximum penalty.[182]This gives judges leeway to individualise sentences in cases that are not properly calibrated within the guideline classification. The Minnesota Supreme Court advised that the aggravated departure sentence cannot exceed twice the presumptive term.[183]

Under the English model, a departure sentence is one that falls outside the overall offence range, which means that any movement from one category range to another does not constitute a departure.[184] In a few definitive guidelines, the top of the highest category range goes up to the statutory maximum. Although in the majority of the guidelines, there is a considerable gap between the top of the offence range and the statutory maximum. For example, the maximum

[180] Ashworth, 'Departures from Guidelines' (n 171) 83.
[181] Minnesota Criminal Code , Chapter 609, s 609.19 (1); which states that the offence must carry a sentence of not more than 40 years imprisonment. The sentencing range for this offence for an offender with 6+ criminal records is (363 to 480 months).
[182]ibid. The statutory maximum penalty for 3rd degree murder is 'not more than 40 years imprisonment' § 609.19 subd.2 and the highest category range is(204 months to 288 months-24 years); which leaves a considerable gap between the top highest range and the statutory maximum.
[183]*State of Minnesota v Evans* 311 N.W.2d 481 (1981) Supreme Court of Minnesota.
[184]COJA 2009, section 125(3).

penalty for domestic burglary is 14 years custody, whilst the top of the highest range is 6 years.[185] The statutory maximum for aggravated burglary is life imprisonment whilst the top of the highest category range is 13 years.[186] The structure of leaving considerable gap between the top range and the statutory maximum is a source of discretion for sentencers, and besides providing a source of contention to sentencers that their discretion is not fully constrained by the guidelines, enables the appropriation of proportionate sentences in cases that are not covered within the guideline classification.

The current Uganda Guidelines do not address the issue of departures at all. By their advisory nature, it is understandable that the Taskforce found it unnecessary to address departures given that sentencers can choose to or not to follow the guidelines without any requirement for justification. However, notwithstanding the advisory nature of guidelines, commentators like Von Hirsch argue that adequate guidelines need to address departures.[187] Otherwise, it would be difficult to control disparity and to develop sentencing policy. Departures are a necessary feature of guidelines, because they leave substantial scope for sentencers to impose sentences that are proportionate to the offence in each and every circumstance. If departures are defined out of existence, then it would mean that atypical cases will be forced into the guideline classifications for the sake of consistency. Such a structure would threaten proportionality and genuine consistency in sentencing.

Thus, in order to promote a fair and just sentencing system, a degree of flexibility needs to be left for sentences to find appropriate proportionate penalties in extraordinary cases as well.

[185]Theft Act Chapter 60 (Laws of England and Wales, 1968) s 9. See also, the Sentencing Council, Burglary Offences Definitive Guideline (n 100).
[186] ibid, s. 10.
[187] Von Hirsch, 'The Enabling Legislation' in A Von Hirsch, K A Knapp and M Tonry (eds), *The Sentencing Commission and its Guidelines* (Northeastern University Press 1987) 71.

Experience from other jurisdictions has shown that even in advisory guideline schemes, departures are addressed for purposes of providing a full set of an adequate and constructive sentencing guideline framework.

In the current form, the Uganda Guidelines have defined departures completely out of existence. The lack of departure power for courts stems from the fact that the Taskforce has established sentencing ranges that are so wide that it is impossible that any case will not fall within the broad sentencing ranges. The broad sentencing ranges, whose upper limits are shaped by statutory maximum penalties, leave sentencers with no room to depart. That said departure rules could not be expected from a set of guidelines, which have been modelled on such a wide definition of consistency. The very broad sentencing ranges that stretch out from the least possible minimum sentence (at the bottom of the range)—particularly in non-capital cases[188] to the statutory maximum sanction (at the top of the range) in theory leaves no room for departures. Technically, there is no room left for upward departures, even if departure standards were provided. The top range of the sentencing range is capped by the statutory maximum penalty term. For felonies other than capital felonies, downward departures are in most cases capped because the bottom of the sentencing range leaves no lesser possible sentence.[189] No window of opportunity is left to the judges to impose a sentence outside the broad ranges.

In capital cases, the bottom of the sentencing range is set at 30 years imprisonment. This in theory means that downward departures are possible because there is a wide range of sentence options that could fall between the bottom of the sentencing range and anywhere short of the

[188] The lower limit for capital cases is 30 years imprisonment. This is not the lowest possible sentence in capital cases. In practice, sentences as low as 3 years —defilement and rape or 6 years imprisonment —murder are imposed for these offences.

[189]Uganda Guidelines, para 33, Part IV. The sentencing range for permitting defilement is set at (three months to 5 years imprisonment); paragraph 37, Part V. The sentencing range for criminal trespass is set at (a caution to 1 year imprisonment).

least possible sentence under the PCA 120. This in essence could leave judges in capital cases with considerable flexibility to impose downward departure sentences. The challenge, however, is that there is no obligation on the sentencers to justify their downward or upward sentences. Without such obligation, and in the absence of any guidance as to the departure grounds, Von Hirsch[190] warns that judges could apply principles and grounds that are wholly at variance with the underlying rationale. The absence of a departure standard, failure to stipulate departure grounds and the allocation of broad sentencing ranges that go up to the statutory maximum sentence does little to address the problems associated with the exercise of wide sentencing discretionary powers that the Uganda Guidelines intended to solve. Although the Uganda Guidelines have enabled a debate on consistency to exist, which did not exist under an individualised sentencing approach, the debate is almost meaningless.

The Uganda Guidelines do not provide a clear policy on previous convictions. Paragraph 6 (h) of the Uganda Guidelines provides that: 'every court shall when sentencing an offender, take into account—any previous convictions of the offender…' Accordingly, despite the relevance of previous convictions at sentencing in Uganda, the Taskforce has left the Ugandan sentencers with discretionary powers to determine the relevancy and weight to be attached to previous convictions.

4.8 Conclusion

This chapter set out to make a critical evaluation of the Uganda Guidelines in view of their principal goal to promote greater consistency in sentencing. Grounded on the argument that the

[190] Von Hirsch, 'The Enabling Legislation' (n 187) 71.

principal function of sentencing guidelines is to provide a public account of meaningful consistency, the chapter showed that the Uganda Guidelines do not perform this function because they are modelled on a loose version of limiting retributivism which undercuts the construction of the guidelines on a meaningful definition of consistency. The chapter argues that a meaningful definition of consistency is one which is constructed on a limiting retributivism justification, and a normatively acceptable definition of proportionality. It has been argued that the Taskforce's construction of Uganda Guidelines on a relatively weak version of limiting retributivism undermined the potential to design the Uganda Guidelines on proper principles of desert. As a result, sentencing standards have been constructed on a mixture of desert and other conflicting rationales of sentencing which have inhibited the articulation of meaningful consistency to the public. For example, it is shown that the absence of an explicit desert rationale undermined the generation of classes of broadly similar seriousness, thereby destroying the Guidelines' principal goal of promoting consistency.

The chapter examined other key structural features of the Uganda Guidelines, and shows that the broadly crafted sentencing ranges weaken the definition of meaningful consistency and thereby, fail to make a difference whatsoever to the existing exercise of judicial discretion. The Taskforce's approach of stretching out the outer limits of sentence severity to the least possible sentence and the statutory maximum penalties reaffirmed, but did not structure the existing exercise of judicial discretion. The excessively high and uniform starting points established by the Uganda Guidelines failed to represent varying degrees of seriousness across offences, and the absence of a uniform approach to aggravating and mitigating factors means that the impact on sentencing of problematic aggravating and mitigating factors as well as other factors can still be subjectively determined by sentencers. Overall, consistency does not serve a meaningful function

under the Uganda Guidelines. In the author's view Uganda Guidelines are not guidelines in anything but name. The next chapter seeks to draw some lessons for Uganda from selected common law jurisdictions.

Chapter Five

Lessons from Sentencing Guideline Systems in Selected Common Law Jurisdictions

"*The most important fact about guideline systems is that they have survived and multiplied*."[1]

5.0 Introduction

The principal goal of all sentencing guidelines is to reduce unwarranted disparities in sentencing.[2] Such disparities are difficult to articulate under an individualised sentencing framework, because of the absence of clear benchmarks for defining consistency.[3] Consequently, sentencing guidelines come in to provide a clear vision of these benchmarks by providing a meaningful definition of consistency. Experience from common law jurisdictions, like Minnesota[4] which has a fully developed sentencing guideline system, suggests that sentencing guidelines can in fact articulate consistency in a meaningful way. However, in order to achieve this goal, it is critical (among other secondary things) that the key structural features of the guideline such as the definition of broadly similar seriousness, the breadth of sentencing ranges, the starting points, departure rules and principles, the application of aggravating and mitigating

[1]RS Frase, 'Sentencing Guidelines in the States: Lessons for State and Federal Reformers' (1993-994) 6 Federal Sentencing Reporter 123, 125.
[2] JV Roberts, 'Structured Sentencing: Lessons from England and Wales for Common Law Jurisdictions' (2012) 14 Punishment & Society 267. Also, A Ashworth, *Sentencing and Criminal Justice* (Weidenfeld and Nicolson 1992) 183.
[3] C Tata and N Hutton, 'What Rules in Sentencing: Consistency and Disparity in the Absence of Rules' (1998) 26 International Journal of the Sociology of Law 339, 340.
[4] Minnesota was the first State in the United States to promulgate formal grid based sentencing guidelines in 1980. See Minnesota Statutes 1978 chapter. 723, which created the Minnesota Sentencing Guidelines Commission (Minnesota Commission) and directed the Commission to promulgate guidelines for the district courts. On 1 January 1980, the Minnesota Commission submitted its guidelines to the Legislature which became effective on 1 May 1980.

factors, the role of previous convictions and sentencing for multiple current convictions are all designed in a fashion that generates meaningful consistency in sentencing. Chapter 4 demonstrated that the form and contents of Uganda Guidelines fail to enable the generation of meaningful consistency, because of the loose definition of consistency on which the guidelines are modelled. It was argued that a meaningful definition could be produced if the Uganda Guidelines are modelled on a limiting retributivism justification. Accordingly, this chapter sets out to examine sentencing guideline schemes that are modelled on a limiting retributivism justification, so as find lessons that Uganda can draw from their experiences. This is accomplished by means of a comparative review of primary legislation and sentencing guideline manuals and commentaries of selected jurisdictions. In the United States (US), lessons are drawn from particularly Minnesota, Washington and North Carolina, which are not only widely proclaimed as examples of good sentencing guideline systems[5] but they are arguably modelled on a limiting retributivism justification. England and Wales is also examined as it is the only jurisdiction that currently offers the only alternative to the US grid style sentencing guideline system.[6]

In the US, other jurisdictions like the District of Columbia, and Virginia are examined, not only because of their ability to generate high rates of compliance despite their voluntary nature, but also because Uganda has presently adopted a voluntary approach. The chapter is presented in themes representing key structural features of sentencing guidelines across all common law

[5] See e.g., RS Frase, *Just Sentencing: Principles and Procedures for a Workable System* (Oxford University Press 2013). Also, K Reitz, 'Comparing Sentencing Guidelines: Do US Systems Have Anything Worthwhile to Offer England and Wales?' in A Ashworth and JV Roberts (eds.), *The Sentencing Guidelines: Exploring the English Model* (Oxford University Press 2013); A Von Hirsch, 'Structure and Rationale: Minnesota's Critical Choices' in A Von Hirsch, KA Knapp and M Tonry (eds.), *The Sentencing Commission and its Guidelines* (Northeastern University Press 1987).
[6] Roberts (n 2) 267.

jurisdictions. These structural features have also been widely recognised as key features by leading commentators.[7]

The other widely perceived key structural feature that has been suggested in scholarly literature particularly on the US guideline systems is appellate review of mostly departure sentences.[8] Perhaps, this structural feature attracts so much attention in American scholarly literature because appellate review of sentences was not a feature of most criminal justice systems in the US[9] prior to the replacement of indeterminate sentencing with structured sentencing. However, in the Ugandan context, a discussion of appellate review of sentences would add modest value to this research since with or without sentencing guidelines, the right to appellate review of sentences is recognised by primary legislation in Uganda.[10]

The chapter is divided into seven sections discussing: the legal enforceability of guidelines (presumptive or voluntary); determination of broadly similar seriousness; breadth of sentencing ranges; aggravating and mitigating factors; setting departure rules and standards; the role of previous convictions, and sentencing multiple offences—the totality principle.

5.1 Binding Nature of Guidelines

Guidelines are generally categorised as voluntary or presumptive. This categorisation, to use Reitz's words, is what tells us "how many teeth the guidelines have, and how sharp the teeth

[7] see e.g., Frase (n 5); JV Roberts, 'Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues' (2013) 76 Law and Contemporary Problems 1; K Reitz, 'The Enforceability of Sentencing Guidelines'(2005) 58 Stanford Law Review 155; Von Hirsch (n 5); JV Roberts, 'Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application' (2008) 4 Criminal Law Review 264.
[8] See, e.g., Frase (n 5) and Reitz (n 5).
[9] K Stith and JA Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (University of Chicago Press 1998).
[10] See The Judicature Act Chapter 13 (Laws of Uganda, 1996) s 5.

are".[11] In their current form, the Uganda Guidelines have been issued as voluntary guidelines. Through a comparative review of enabling statutes, sentencing guideline manuals and/or commentaries, as well as other conditions in successful voluntary guideline states in the US, this section examines whether Uganda's loosely advisory guidelines are likely to facilitate the promotion of greater consistency in sentencing in Uganda. Given that voluntary guidelines have been successful in some US jurisdictions of Virginia and the District of Columbia (DC), the aim is to assess whether there is anything comparable between the two common law jurisdictions and Uganda, which would make a voluntary guideline scheme a viable model for Uganda.

5.1.1 Voluntary Guidelines

Generally speaking, the major difference between some voluntary guideline schemes, and presumptive ones is that presumptive guidelines provide legal closure to guideline sentencing (in terms of their provision of appellate review of sentences imposed outside the sentencing guidelines whilst the sentencers' discretion to impose a sentence within or outside a voluntary guideline scheme is unreviewable. Otherwise, some voluntary schemes such as Virginia's discretionary scheme are not so different than a loosely presumptive guideline system. This is so because, sentencers are required to consider the suitability of the guidelines and provide a written explanation for electing not to follow the guideline recommendation. That said, other voluntary schemes are so loosely advisory that they do not exert any pressure on the trial courts to consider the suitability of guideline recommendations, and it is such voluntary guidelines that make critics of voluntary guideline schemes sceptical about their efficacy. Reitz notes that the US voluntary guideline systems range from being purely advisory (with no legal requirement to provide

[11] Reitz, 'The Enforceability of Sentencing Guidelines' (n 7) 157.

written explanations) to loosely presumptive (with some legal requirements as to their consideration).[12] However, the common characteristic of all voluntary guideline systems is that they provide no legal closure to sentencing (in terms of appellate closure).

This section reviews the voluntary nature of the sentencing guidelines of Virginia and DC, (two in a number) of voluntary guideline jurisdictions in the US that are identified as offering viable models for their kind in the US.[13] The question is: what factors make those voluntary guideline systems comparable or [not] to Uganda Guidelines, and how would these comparisons play in Uganda?

The DC voluntary guidelines are derived from an Act of Parliament, known as the DC Code Title 3 Chapter 1. The Advisory Commission on Sentencing Establishment Act of 1998, (DC. Code) section 3-101 (1998) established the Advisory Commission on Sentencing, now the District of Columbia Sentencing and Criminal Code Revision Commission (hereafter the DC Commission) as an independent agency within DC "to promulgate, implement and devise a system of voluntary guidelines".[14] Title 3, chapter ,1 section 3-105 (a) of the DC Code states that "the voluntary sentencing guidelines promulgated by the DC Commission are not binding on judges".[15] The Code also states that "judges in an individual case may impose any sentence outside the guidelines so long as the sentence does not exceed statutorily prescribed maximum penalties".[16]

[12] ibid 162.
[13] see e.g., JF Pfaff, 'The Vitality of Voluntary Guidelines in the Wake of Blakely v Washington: An Empirical Assessment' (2007) 19 Federal Sentencing Reporter 202. Also, K Hunt and M Connelly, 'Advisory Guidelines in the Post-Blakely Era' (2005) 17 Federal Sentencing Reporter 233.
[14] DC Official Code (2001) Title 3 chapter 1, s 3-101 (b)(1).
[15] ibid, s 3-105 (a).
[16] ibid, s3-105 (b).

Section 3-105(c) provides that the "voluntary sentencing guidelines do not create any legally enforceable rights on any party", which means that an offender cannot appeal against the court's decision in the event the guidelines are [not] followed. However, the judges are expected to " acknowledge that they have followed the guidelines or to provide the departure reason(s) used to sentence outside the box, or to state why they did not use the guidelines". This is pursuant to the DC Superior Court Administrative Order of 2004[17]which was passed when the guidelines were first issued as a pilot program in 2004.[18] The Order which was issued by the Board of Judges requires the judges to provide reasons for not sentencing within the guidelines. Briefly stated, the DC voluntary guideline scheme is purely voluntary, with no appellate review mechanism, and no legislative requirements that judges provide written explanations. The requirement to provide written explanation for sentencing outside the guidelines is pursuant to a Superior Court administrative order, which is akin to a practice direction.

The DC Commission is legislatively mandated to promulgate, implement and devise a system of voluntary sentencing guidelines for use in the DC superior Court.[19] The voluntary guidelines are, therefore, developed for use within a single Court system. The DC has a unified court structure, with a single court of first instance. The court system comprises of the DC Superior Court, which is the only court of first instance, with general jurisdiction to hear all matters including criminal, civil, domestic, probate, tax, and family, land lord and tenant, small claims and so on.[20] The DC

[17] Superior Court of the District of Columbia Administrative Order 04-11 (signed by Chief Judge Rufus G. King III 9 June 2004) <http://www.dcappeals.gov/internet/documents/0411.pdf > (accessed on 30 January 2015).
[18] DC Commission, '2003 Annual Report' (30 November 2003) 18 <http://www.scdc.dc.gov/acs/frames.asp?doc=/acs/lib/acs/pdf/Chapter_II.pdf > (accessed on 12 September 2013).
[19] DC Official Code (2014) Title 3, chapter 1, s 3-101 (1).
[20] see, the DC Courts website at <http://www.dccourts.gov/internet/superior/main.jsf> (accessed on 13 October 2014).

Court of Appeals is the other court, which is a court of appeals and the court of final resort. Accordingly, the DC Superior Court is the only trial court for criminal cases, and it is hosted in a single court house building.[21] This court structure makes the DC court system relatively unified because with a single trial court of first instance, it means that the voluntary sentencing guidelines are implemented within a single Court. This more likely makes it easy to 'market' the sentencing guidelines.

Additionally, the Superior Court (and all its divisions) and the Court of Appeals, are housed in a single court house building. Weisberg and Hunt [22] point out that the single court house setting enables frequent contact between judges. Indeed, the DC Commission relied on the DC single court house setting (which enabled judges frequent contact with each other) as one of the factors of utmost relevance in their decision to adopt a voluntary guideline system.[23] The small number of judges within the Superior Court also makes marketing of the guidelines a little easier. The DC Superior court is reported to have a total of 61 Associate Judges, and these judges are assisted by 24 magistrates, as well as retired judges. The DC unified court structure could be expected to generate relatively higher rates of judicial compliance with the guidelines. Also, the fact that the guidelines were issued under the administrative order of the Board of Judges of the superior court[24] the same court where these guidelines are used possibly bolsters the support of the voluntary sentencing guidelines by the Superior Court judges.

[21] see, DC Courts, 'Annual Report' (2013) <http://www.dccourts.gov/internet/documents/2013-Annual-Report-narative.pdf> (accessed on 30 January 2015).
[22] F Weisberg and K Hunt, 'Voluntary Sentencing Guidelines in the District of Columbia: Results of the Pilot Program' (2007) 19 Federal Sentencing Reporter 208, 209.
[23] DC Commission, '2003 Annual Report' (n 18) 16.
[24] see DC Administrative Order 04-11 (n 17).

The rates of judicial compliance with the guidelines reportedly average above 90 per cent since the guidelines' implementation in 2004. In 2011, 95.6 per cent of the sentences imposed were within the guideline range and 96.3 per cent in 2012.[25] The 2009 DC Commission Annual report indicates that since 2006, rates of judicial compliance with the guidelines has consistently been in the range of 90 per cent with a rate of 90.1 per cent in 2006, 89.5 per cent in 2007, 89.8 per cent in 2008, and 88.1 per cent in 2009.[26] This is why commentators like Hunt and Connelly have concluded that advisory guidelines like those adopted in DC and Virginia achieve results comparable to their presumptive counterparts in promoting consistency.[27]

Virginia discretionary sentencing guidelines are derived from an Act of Parliament; vide the Code of Virginia, Title 17. Section 17.1-800 establishes the Virginia Criminal Sentencing Commission (hereafter Virginia Commission) within the judicial branch as an agency of the Supreme Court of Virginia. The Virginia Commission was mandated to develop discretionary guidelines, and the guidelines are indeed discretionary. However, the Code of Virginia requires sentencers to "review and consider the suitability of the applicable discretionary sentencing guidelines established pursuant to Chapter 8 section 17.1-800".[28] Pursuant to section 19.2-298.01(B), the sentencer is required to:

> state for the record that such review and consideration of the guidelines was made and fill out a worksheet explaining why a greater or lesser sentence than that indicated by the

[25]DC Commission, '2011 Annual Report' (27 April 2012) 51 <http://www.scdc.dc.gov/acs/frames.asp?doc=/acs/lib/acs/pdf/Annual_Report_2011.pdf> (accessed 30 October 2014).
[26]ibid 38.
[27]Hunt and Connelly (n 13) 235.
[28] Code of Virginia Title 17.1 Chapter 8, s 19.2-298.01 A.

discretionary sentencing guidelines was imposed. The court is then required to make the worksheet part of the record of the case and leave it open for inspection[29]

However, the failure by the court to follow any or all of the provisions of chapter 8, section 19.2-298.01 (A) of the Virginia code is not reviewable on appeal.[30]

Briefly summarised, the Virginia voluntary guideline scheme is established by an Act of Parliament. Their sentencing guidelines are discretionary although there are extra-legal requirements imbued on sentencers. These include the legal requirement to consider the suitability of the guidelines and to state reasons for not following the guidelines. The written explanation is provided on a worksheet, which is made part of the court record and is open for public inspection. This is what makes the Virginia guidelines loosely presumptive. However, an appellate review of sentence is not available on ground of a judge's failure to follow the guidelines, or his/her following the guidelines. The exclusion of a legal enforcement mechanism is what makes the Virginia scheme, purely voluntary.

The Virginia Commission is charged with developing, implementing and administering sentencing guidelines governing felony sentencing in Circuit Courts throughout the State.[31] The guidelines, therefore, cover only felony offences and they are only useable in the Circuit Courts. The Virginia Court structure varies widely from say, the DC single unified court system,[32] yet the two jurisdictions record comparable rates of judicial compliance with the sentencing guidelines. Unlike Virginia's court system is hierarchical with courts at different levels of the hierarchy— the Supreme Court (highest court of record), the Court of Appeals (intermediate courts), the Circuit Courts (equivalent of High Court in other jurisdictions) and the Magistrates

[29] ibid, A(ii).
[30] ibid, chapter 8, s 9.2-298.01 F.
[31] see Virginia Code, s 17.1-800.
[32] see later discussion.

Courts. Virginia's court structure is different from the DC court structure, yet high rates of judicial compliance are recorded in Virginia as well. Therefore, other factors such as the scope of the guidelines application may help to explain the high judicial compliance rates in Virginia. Like in DC, the Virginia discretionary guidelines are only applicable in a single court— Circuit Court in respect to felony offences.[33] However, unlike the DC, Virginia has over 120 Circuit courts in over 31 districts; therefore, the limitation of the guidelines application to felonies only, may not be as narrow as it would be in the DC context.

Nevertheless, the scope of application of the guidelines (in terms of felony offences and one single court) is more likely to facilitate successful implementation of the guidelines because the guidelines are applicable in the Circuit Court which is the only court with jurisdiction to try felony cases.[34] This factor is unlikely to stand on its own; other factors such as the judiciary's perception of the guidelines as a useful guide, may further explain the high rates of compliance with the guidelines. The 2013 Virginia Commission Annual Report states that for the past ten years, Virginia has consistently recorded judicial compliance rates of around 80 per cent, and in 2013,[35] judges continued to agree with the sentencing guideline recommendations in approximately 79 per cent cases.[36]

Noteworthy is the fact that the Virginia Commission was created within the judicial branch.[37] As a Supreme Court agency, it is highly likely that the Virginia Commission closely relates with the

[33] ibid.
[34] see, Virginia Courts in Brief, <http://www.courts.state.va.us/courts/cib.pdf>.
[35] see, Virginia Commission, '2012 Annual Report to the Legislature' (1 December 2012) <http://www.vcsc.virginia.gov/2012VCSCAnnualReport.pdf> (accessed 28 June 2013). It is reported that between FY 1995 and 1998, the overall compliance rate remained around 75 per cent, increasing between FY 1999 and FY 2001, but then slightly decreasing in FY 2002. To be exact, in 2002 the compliance rate was 77.8 per cent which is almost comparable to FY 2012's compliance rate of 78.4 per cent.
[36] Virginia Commission, '2013 Annual Report' (1 December 2013) 18 <http://www.vcsc.virginia.gov/2013AnnualReport.pdf> (accessed 30 January 2015).
[37] Code of Virginia Title 17.1, Chapter 8, s 17.1.800.

Supreme Court and other Courts of judicature, as judges will less likely perceive the commission's work as impositions from other branches of government. In addition, the Commission offices and staff are located on the Supreme Court building[38]which undoubtedly creates good lines of communication between the judiciary and the commission.

Nevertheless, a number of other reasons have been posited as facilitating judicial compliance with voluntary guidelines in Virginia. The method of selection of circuit court judges is claimed to be one of the extra-legal conditions which favour the successful implementation of Virginia's voluntary guidelines. Because Circuit Court judges are selected by the legislature[39]some commentators suggest that this exerts modest pressure on the judges to comply with the guidelines because departure from the guidelines is internally perceived by judges as disapproved by the legislature.[40] In addition, since guideline sentencing decisions are open to inspection by the public, and sentencing guideline decisions are published along with the name of the judge imposing such decision. Reitz[41] as well as Hunt and Connelly[42] suggest that this could work as an enforcement mechanism in that the judges may not want to be seen as the ones sabotaging the implementation of the guidelines, particularly where compliance with the sentencing guidelines is perceived as the desired norm.

As already explained, a number of reasons may explain the high judicial compliance rates in voluntary guideline systems in those jurisdictions, and no single reason can be advanced to support the success of a voluntary guideline system. Other factors concerning the structural design of the guidelines may influence judicial support of the guidelines. For example, it could

[38]100 North, Ninth Street, Richmond VA, <http://www.vcsc.virginia.gov/> (accessed 28 June 2013).
[39]see, Website of the American Judicature Society <http://www.judicialselection.com/judicial_selection/index.cfm?state=VA> (accessed 22 April 2013).
[40] Reitz, 'Enforceability of Sentencing Guidelines' (n 7) 166.
[41] Reitz, 'Comparing Sentencing Guidelines' (n 5) 196.
[42] Hunt and Connelly (n 13) 238.

be that the judges perceive the breadth of sentencing ranges as appropriate. To give the DC guideline ranges as an example, the judges have a wide array of sentencing options within the broad sentencing ranges. For instance, in the case of group 1 offences without previous convictions, the range is (360 months to 720 months), for group 2 offences without previous convictions is (144 months to 288), [43] and so on. It is almost improbable that one would find a case that falls outside the broad sentencing ranges provided by the guidelines. For that reason, it is reasonable to supposed that the said broad sentencing ranges are acceptable to the DC judges since they do not constrain the judges' exercise of judicial discretion in a practical sense. Also, in a jurisdiction like Virginia, where voluntary guidelines have been operational since 1994, it is reasonable to suppose that the acceptance of the voluntary guidelines is further enabled by the longevity of the said guidelines. That is, perhaps because a number of Virginia judges have spent a big part of their careers consulting the guidelines, it is reasonable to suppose that the judges may for a prolonged period of time have accustomed themselves to consulting these guidelines, and therefore normalised their use in their sentencing decision making. Nevertheless, it is argued that if advisory guidelines are clogged by several other weaknesses as are identified in the Uganda Guidelines in chapter 4 of this study, the jurisdictional local conditions may do very little to assist the meaningful implementation of the sentencing guidelines.

Unlike Virginia and DC, whose voluntary guidelines are derived from Acts of Parliament, Uganda Guidelines are practice directions issued by virtue of powers conferred on the Chief Justice by the 1995 Constitution of Uganda. The guidelines, therefore have legal authority but do not have legislative force or endorsement, which seemingly undermines their democratic

[43] see DC Commission, 'DC Voluntary Sentencing Guidelines Manual' (17 June 2013) 57 <http://scdc.dc.gov/sites/default/files/dc/sites/scdc/publication/attachments/2013VoluntarySentencingGuidelinesManual.pdf> (accessed 13October 2014).

legitimacy. On the other hand, DC and Virginia voluntary schemes have this democratic legitimacy. Additionally, there are no extra-legal requirements imposed on Ugandan sentencers to consider the suitability of the guidelines. For instance, if a trial judge opts not to impose a sentence within the guideline classifications (which is impossible in view of the breadth of the sentencing ranges which stretch out to the statutory maximum penalties) s/he will not be expected to provide any explanation for choosing a sentence outside the recommended range. Nevertheless, a modest incentive on the courts to consider the suitability of the guidelines and to provide explanations for electing not to follow the guidelines could perhaps have exerted some modest pressure on the Ugandan sentencers to follow the guidelines. Without democratic legitimacy and in the absence of any extra legal requirements, the Ugandan guidelines become simply a set of sentencing principles. As Reitz suggests, the extra legal requirement on Virginia judges to provide written explanations for not following the discretionary guidelines perhaps, imposes "a modest cost in time and trouble on judges" to follow the guidelines.[44] This is not to say that extra legal requirements per se will persuade a sentencer to follow a system of guidelines that the sentencer does not believe in. However, the usefulness of such factors cannot be ignored.

Guidelines are not to be measured by their legal enforcement mechanism because ultimately, voluntary or presumptive, it is the guideline's potential to meaningfully define and articulate consistency that ought to hold primacy. That said, the legal enforcement mechanism of the guideline system is also important because if the key structural features of the guideline system are meaningfully designed to promote greater consistency in sentencing but the guidelines have no "teeth", then their utility may be undermined. Therefore, an evaluation of conditions that would make voluntary guidelines more favourable in Uganda is paramount. The Uganda

[44] Reitz, ' Enforceability of Sentencing Guidelines (n 7) 162.

Guidelines are applicable in the High Court and the Magistrates Courts, for both felonies and misdemeanours. Thus, unlike Virginia and DC, where guidelines apply to single trial courts, the Uganda Guidelines are applicable in a number of trial courts. Consequently, the scope of application of sentencing guidelines is much wider in Uganda than in the two voluntary guideline jurisdictions examined in this chapter.

The Ugandan court structure is hierarchical and for purposes of this analysis, only courts concerned with handling criminal matters are mentioned. At the top of the hierarchy is the Supreme Court of Uganda (the court of final resort in criminal appeals). The Court of Appeals is an intermediate court and it hears criminal appeals directly from the High Court. The High Court is the third highest court of judicature and a first court of instance in criminal matters, with exclusive jurisdiction to try capital offences, and general jurisdiction to try felony or misdemeanour offences under any written law of Uganda.[45] Below the High Court are the Chief Magistrates' Courts which is divided into three: — Chief Magistrates Courts, Grade I Magistrates Courts and Grade II Magistrates Courts. All the three levels of Magistrate Courts are courts of first instance in criminal matters, and hear criminal cases in accordance with the statutory powers conferred on them to try those cases. For instance, the Chief Magistrates can try all felony and misdemeanour offences except capital offences.[46] The Magistrate Grade I can try all criminal cases except capital cases and felony cases which attract a statutory maximum

[45] The Trial on Indictment Act Chapter 23 (Laws of Uganda, 1971) ('hereafter the TIA Cap 23') as amended by Act No 23 of 2008, s 1.
[46] The Magistrates Courts Act Chapter 16 (Laws of Uganda, 1971) ('hereafter the MCA Cap 16') as amended by Act No 7 of 2007, ss 161 and 162.

penalty of life imprisonment.[47] Magistrates Grade II can hear any misdemeanour offence not listed in the first schedule of the Magistrates' Courts Act.[48]

With such a court structure, in which criminal cases can be instituted at four different levels, Uganda Guidelines apply on a broader perspective. Currently, the High Court has approximately sixty judges,[49] and there are over twenty seven magisterial areas located in twenty six different districts. There is a total of twenty seven chief magistrates, over two hundred magistrates Grade I and three hundred magistrates Grade II.[50] Therefore, unlike in the DC where the Superior Court is the only trial court of general jurisdiction, in Uganda the High Court, Chief Magistrate Courts, Magistrates Grade I courts and Magistrates Grade II courts all hear criminal cases, both a mix of felonies and misdemeanours. It becomes almost impossible to envision how the Taskforce will monitor the implementation of purely voluntary guidelines across all these courts.

Firstly, marketing of the Uganda Guidelines is more likely to be tedious. Although the Uganda Guidelines have been developed by the judiciary, it is noteworthy that the drive has been steered by a few members of the senior bench.[51]Also, it is common knowledge that senior bench and lower bench members rarely have face to face interaction because of the way in which the Uganda Court system is structured. For instance, the High Court building where most senior bench members (judges of the High Court) sit is in Kampala, and magistrates' courts are spread

[47] ibid, s. 161 (2).
[48] ibid, s. 161(3). The first schedule to the MCA Cap 16 provides a list of all criminal matters that a Grade II magistrate does not have jurisdiction to try. These are mostly offences that are punishable by a maximum of three years imprisonment or less..
[49]see The Judiciary of Uganda website <http://www.judicature.go.ug/data/incourt/16/The_Honorable_Judges_of_The_High_Court.html>.
[50] The Magistrates Courts (Magisterial Areas) Statutory Instrument 16-1, Laws of Uganda, 1997) paras 2 and 3. See also, The Office of the Chief Registrar, 'Official list of Magistrates Grade I and Grade II' <http://www.judicature.go.ug/files/downloads/List%20of%20Magistrates%20grade%20I%20and%20II%20as%20at%20march%202014.pdf> (accessed 13 January 2015).
[51] In Uganda, judges of the High Court, Court of Appeal and Supreme Court are commonly referred to as members of the senior bench, whilst magistrates are referred to as members of the lower bench.

out in magisterial areas across twenty six districts. Even, those few magistrates courts located in Kampala are in different court house buildings not close to the High Court building. Therefore, frequent interactions between lower bench members is also almost impossible because of the same structure. Such a court structure renders marketing of voluntary guidelines, which have no legislative force more difficult. Experiences from DC suggest that the single court house and unified court system facilitates interaction between judges, which gives them opportunity to discuss their sentencing practices. One could argue that Virginia, has over one hundred and twenty circuit courts spread out in thirty one districts, yet judges comply with the voluntary guidelines. The possible answer to this would be that other factors which have been listed above, such as informal social controls may better explain why there are high judicial compliance rates in those jurisdictions.

Assuming the Uganda Guidelines are accepted by the sentencers because they are viewed as a useful tool to guiding sentencing discretion, in the author's view, the court structure and judicial culture (with five different courts of first instance, and clear distinctions between senior and lower bench members), and almost no informal social controls that would modestly incentivise sentencers —particularly magistrates to abide by the guidelines recommendations, would still disfavour the adoption of purely voluntary guidelines. Perhaps a presumptive guideline framework may offer a more suitable mechanism for promoting consistent sentencing. This is not to argue that voluntary guidelines would fail, as they have been successful in other jurisdictions, but rather to note that they may be faced with greater enforcement challenges.

5.1.2 Presumptive Guidelines

Relying on and agreeing with Reitz's observation that there are "many shades and degrees of presumptiveness of sentencing guidelines,"[52]it is reasonable to aver that the degree of presumptiveness of sentencing guidelines depends on the degree of restriction to deviate from the guidelines. Like voluntary guideline schemes, presumptive schemes vary in their degree of presumptiveness. It has been suggested that the approach taken by appeals courts towards handling appeals against sentence decisions in a given legal system sometimes shapes the degree of presumptiveness of that jurisdiction's guidelines. That is, if the appeals court system is deferential towards sentences imposed outside the guidelines, in that it often reverses such sentence decisions, the degree of presumptiveness of the sentencing guidelines will be expectedly higher than say, in jurisdictions where the appellate courts are supportive/ preferential towards sentences imposed outside the guidelines[53] Presumptive guideline schemes have received considerable criticism regarding their degree of restriction on judicial discretion. Wasik[54] asserts that because of their expectedly high degrees of presumptiveness, the "US grid style guidelines leave little room for judicial creativity or flexibility", whilst Roberts and Rafferty assert that the "US guidelines strongly discourage departures".[55]

However, some leading American scholars disagree with these observations. For instance, Reitz categorically dismisses the generalised negative criticisms of American presumptive guideline schemes saying that they are simply "stereotypes that deprive policy makers elsewhere of objective judgment of some of America's good presumptive guideline schemes".[56] Additionally,

[52] Reitz, 'Enforceability of Sentencing Guidelines' (n 7) 157.
[53] ibid 168.
[54]M Wasik, 'Sentencing Guidelines in England and Wales - State of the Art?' (2008) 4 Criminal Law Review 253, 261.
[55] JV Roberts and A Rafferty, 'Sentencing Guidelines in England and Wales: Exploring the New Format' (2011) 9 Criminal Law Review 681, 682.
[56] Reitz, 'Comparing Sentencing Guidelines' (n 5) 194-5.

all the five sentencing guideline schemes identified by Frase as fully developed schemes, Minnesota, North Carolina, Kansas, Washington and Oregon[57] adopt presumptive sentencing guidelines. Some celebrated commentators like Frase[58] even take the view that presumptive guidelines are superior to voluntary guidelines, although this view is contested by other scholars.[59]

A variety of reasons may explain the preference for presumptive guidelines over voluntary guidelines. As already shown, there are so many other extra-legal factors that compliment successful implementation of voluntary guidelines. However, the ability to impose legally binding obligations on the courts to follow the guidelines, and the availability of appellate review of departure sentences perhaps makes presumptive guidelines a more preferable mechanism although there is no clear evidence that suggests that legal enforcement mechanisms are what makes presumptive guidelines effective. Formal legal enforcement mechanisms are more likely to make even those practitioners who would have wished to stray from the norm, follow the guidelines. Secondly, the fact that the court's discretion to depart from the guidelines is subject to appellate review perhaps incentivises some judges to follow the guidelines. In the author's view, one of the persuasive arguments in favour of presumptive guidelines over voluntary ones is that which avers that the availability of appellate review of both sentencing guideline departure sentences and non departure ones enables the development of a common law on sentencing particularly sentencing outside the guidelines.[60] Such a policy helps in ensuring consistency in

[57] Frase, *Just Sentencing* (n 5) 4.
[58] ibid 45.
[59] see, e.g., Hunt and Connelly (n 13) 236 and Pfaff (n 13) 203.
[60] Frase, *Just Sentencing* (n 5) 45.

sentencing outside the guidelines as well.[61] A number of jurisdictions including Minnesota, Washington, North Carolina, Oregon, even England and Wales, have given statutory powers to permanent independent sentencing commissions to specify presumptive sentences through presumptively binding guidelines. In jurisdictions such as Minnesota, North Carolina, and Washington, the guidelines have been effective in achieving their principal goal of promoting consistency, which is measured by the number of sentences falling within the guidelines. This is not to say that voluntary guidelines are not effective in achieving this goal. It is essential to note that despite their perceived strict restrictions on the exercise of judicial discretion, courts in presumptive guideline systems willingly comply with their guidelines.

The question arising at this point is whether the enforcement mechanism of presumptive sentencing guidelines is the key to their attainment of the goal of reducing unwarranted disparities in sentencing. The answer to this question is not straight forward because of the lack of sufficiently strong evidence that suggests that enforcement mechanisms in isolation of other variables enhance the effectiveness of presumptive guidelines in reducing unwarranted sentencing disparities. However, even the proponents of advisory schemes caution that these schemes may contain weaknesses as compared to presumptive systems, particularly the absence of appellate review enforcement mechanisms.[62] That said, the answer to the question concerning which of the two systems may be more effective than the other perhaps depends on the principal objective for which the guideline system is to achieve. To begin with, if the sentencing system is focused on the coordination of sentencing policy with correctional resource capacity, presumptive guidelines may be more effective at providing predictability because the restraints

[61] ibid.
[62] Hunt and Connelly (n 13) 236.

imposed on sentencing outside the sentencing guidelines may enable the relatively accurate prediction of the rates of judicial compliance. Frase notes that presumptive guidelines permit "accurate resource and demographic impact assessments",[63] which advisory guidelines are indisposed to provide because of the uncertainties involved in making assessments of the rates of judicial compliance with the guidelines. Additionally, if the guideline scheme is aimed at principally reducing unwarranted sentencing disparities, then presumptive systems may be more effective in curbing inconsistencies in sentencing than voluntary guidelines because judges under an advisory system are less likely to be restricted in the exercise of their discretion than those under presumptive systems. Nevertheless, depending on the degree of judicial acceptance of the guidelines, advisory schemes may be just as effective as presumptive guidelines in promoting consistency. However, for those who take the view that without formal mechanisms, practitioners will stray from the norm, presumptive guidelines systems offer a viable model for keeping sentencers within the guideline norms.

All in all, for those who argue that guidelines are principally aimed at providing a public account of meaningful consistency, like in presumptive guidelines, a public account of meaningful consistency could be enabled in an advisory system provided that the sentencing guidelines are crafted on a meaningful definition of consistency. Nevertheless, generating consistency may be undermined in practice if compliance with the guidelines is left at the whims of individual practitioners. Therefore any sentencing guideline system requires some kind of presumptiveness.

Experience from multiple jurisdictions tells us that a combination of informal and extra-legal factors define the success of voluntary guideline systems in a number of jurisdictions. Some of

[63] Frase, *Just Sentencing* (n 5) 45.

the extra-legal factors have been examined in the Ugandan context. It has been shown that Uganda's court system or culture is unfavourable for a voluntary guideline scheme. This is because in Uganda, original jurisdiction to try and hear criminal cases is exercised by a number of courts at different levels. The court system is also somewhat disconnected that relying on collegial cooperation amongst judges and magistrates for high rates of compliance with the Guidelines is more likely to be difficult to achieve. That said, given the heavy reliance on informal social controls for greater compliance with voluntary guidelines, the safest, and not necessarily the best approach would be to develop presumptively binding sentencing guidelines for Uganda. With presumptive guidelines, an obligation will be placed on judges and magistrates to impose a sentence within the recommended guideline ranges or provide reasons for departing from those sentences, which decision will be subject to review by an appellate court.

5.2 Defining Scales of Offence Seriousness

It is recognised that the task of creating scales of offence seriousness is a difficult one because it is based on value judgement and/or political choice. Although proportionality is a viable guiding principle, the concept is not precise as to what is (not) disproportionate. Therefore, normal acceptable standards for measuring what is proportionate are required to be set by the sentencing guideline designers, if the guidelines are to serve a meaningful purpose. For instance, the process of developing the Minnesota grid offence severity reference table took four months of deliberations and during this period, the Minnesota Commission members deliberated on several matters. These included: (a) the major categories of commonly occurring felonies which they categorised into—property crimes, crimes against persons, sex offences, drug offences, arson

offences and a miscellaneous category; (b) the offences that fall under these six categories; and (c) the overall ranking of severity for each offence within the respective categories. Each commission member was given six decks (one for each major category), which contained a total of 104 cards, and the members were asked to sort the cards in each deck in order of decreasing severity.[64] The members then held group discussions to determine which of the six cards represented the most severe average rank within the respective decks, and through those discussions, consensus was reached on the overall severity of the offences.[65]

The exercise was tedious, but necessary for an articulation of ethically meaningful proportionality. Otherwise, if the guidelines had generated classes of broadly dissimilar seriousness, which they represented as broadly similar, proportionality would not have served a meaningful function in the guidelines and consequently a public account of meaningful consistency would be impossible. Two approaches have been commonly adopted in ranking offence seriousness in guideline systems. In the United States (US), offence seriousness has been defined by using legal offence definitions to rank offences on a severity scale that represents violent offences as more serious than non-violent ones.[66] On the other hand, in England and Wales, classifications are established within an offence type to represent different levels of seriousness within that offence.[67] In all guideline systems, broadly similar seriousness has been defined on criteria based on proportionality.

[64] see Summary Report on the Development and Implementation of Minnesota's Sentencing Guidelines (30 January 1982), 7-8.
[65] ibid.
[66] see, e.g, Minnesota Sentencing Guidelines Commission, 'Sentencing Guidelines Grid' (1 August 2014) <http://mn.gov/sentencing-guidelines/images/Standard%2520Grid%25202014.pdf> (accessed 25 November 2014).
[67] see, e.g, Sentencing Council, 'Burglary offences Definitive Guideline' (16 January 2015) <http://sentencingcouncil.judiciary.gov.uk/docs/Burglary_Definitive_Guideline_web_final.pdf> (accessed 25 November 2014).

5.2.1 Using Offence Legal Definitions

Using the 2013 Minnesota Standard Grid[68]as an example, the offence severity reference table contains eleven severity levels. In order of decreasing severity, the offences are ranked from one to eleven. Broadly similar seriousness is established by the aggregation of relatively broadly defined offences within groups of perceived similarity in seriousness, and comparative seriousness of different categories of offences is established using the harm based approach. For example, 2nd degree murder (intentional), murder of unborn child (with intent but without premeditation) and adulteration[69] are ranked at level eleven as representing broad similarity in seriousness.[70]At severity level ten, the offence of: fleeing a peace officer (causing death), murder in the second degree (unintentional), murder of unborn child 2nd degree (unintentional during commission of another felony), 3rd degree murder (unintentional with recklessness) and 3rd degree murder of unborn child (unintentional with recklessness) are broadly categorised as similar in seriousness. The sale of simulated controlled substance[71] is at severity level one and clearly very distinct (in terms of harm it causes or threatens) from say, 2nd degree murder which is at the top highest severity level of eleven.

Some commentators like Alschuler[72]have criticised Minnesota Commission's approach calling it an act of "excessive aggregation". Alschuler argues that by grouping cases based on a few characteristics, there is a likely potential for treating unlike cases similarly. The author argues

[68]See Minnesota Sentencing Guidelines Commission, 'Minnesota Standard Grid' (1 August 2013) <http://mn.gov/sentencing-guidelines/images/2013%2520Standard%2520Grid.pdf> (accessed 29 October 2014).

[69] See Minnesota Criminal Code 2013, s 609.687, sub-d.3(1) "Adulteration" is the intentional adding of any substance, which has the capacity to cause death, bodily harm or illness by ingestion, injection, inhalation or absorption, to a substance having a customary or reasonably foreseeable human use."

[70] Minnesota Sentencing Guidelines Commission, 'Minnesota Guidelines Manual and Commentary' (1 August 2013) 77-94 <http://mn.gov/sentencing-guidelines/images/2013%2520Guidelines.pdf> (accessed 29 October 2014).

[71] This which means the sale of a substance that is purported to be a controlled substance, but is chemically different from the controlled substance it is purported to be.

[72]AW Alschuler, 'The Failure of Sentencing Guidelines: A Plea for Less Aggregation' (1991) 58 University of Chicago Law Review 901, 952.

that 'grouping offences based on general elements of the offence rather than on specific instances making these offences similar or dissimilar, contributes to unwarranted uniformity'.[73] However, it must be recalled that the Minnesota Criminal Code [74](unlike other criminal codes like Uganda's Penal Code Act) does not broadly define its criminal offences.

The Minnesota Criminal Code divides criminal offences into degrees which represent the different levels of seriousness within a single offence classification. For example, murder is divided into three degrees —1st 2nd and 3rd degree murder. Again, 2nd degree murder is further classified into intentional and unintentional murder.[75]Additionally, burglary which generally deals with breaking and entering a building with intent to commit a felony or misdemeanour, is divided into four classes of —1st, 2nd, 3rd and 4th degree burglary.[76] Again, burglary in the 1st degree is further divided into two classes —burglary in the 1st degree (with a weapon or assault) and burglary in the 1st degree (without a weapon or assault). Generally, offences are more narrowly defined in the Minnesota Criminal Code than in most typical criminal codes.

The abstract legal definitions of offences in the Minnesota Criminal Code attempt to highlight the differences in the range of behaviours which can be portrayed within a single offence type. In fact, some commentators like Von Hirsch [77]note that the narrow legal definitions of offences under the Minnesota Criminal Code more likely eased the Minnesota Commission's task of

[73]AW Alschuler, 'The Failure of Sentencing Guidelines: A Plea for Less Aggregation' (1992) 4 Federal Sentencing Reporter 161.
[74] Minnesota Statutes 2013, Chapter 609.
[75] ibid, chapter 609, s 185 (a) creating murder in the 1st degree. Ch. 609 s 19 sub- d (1) creates 2nd degree intentional murder. Ch. 609 s 19 sub- d (2) creates 2nd degree unintentional murder and Ch. 609 s 195 (a) creates 3rd degree murder.
[76] Minnesota Statutes 2013, s 582 1 (a) creates 1st degree burglary of an occupied dwelling without a weapon or assault; s 582 1 (b) creates 1st degree burglary with a weapon or assault; s 582, sub-d. 2(a) (1) & (2), 2(b) creates 2nd degree burglary without a weapon/unoccupied dwelling; s 582, sub-d. 2(a) (3) creates (3rd degree burglary of a non-residential building and s 582, sub-d. 2(a) (4) creates 4th degree burglary, with intent to commit a misdemeanour other than to steal).
[77]Von Hirsch, 'Structure and Rationale' (n 5) 97.

establishing the offence severity reference table. Since the gravity of criminal conduct had already been established through categorisations made by the legislature, the commission was able to use the significant distinctions drawn by statutory definitions to arrive at the offence ratings.[78]

Accordingly, applying the harm based approach, the Minnesota Commission ranked offences of a violent nature higher than non-violent offences. For example, burglary in the 1st degree (with a weapon and accompanied by assault) carries the same statutory maximum penalty of not more than 20 years imprisonment as burglary in the 1st degree (without a weapon or assault). The two offences also fall under the same offence legal definition of offences against property. Nonetheless, the Minnesota Commission placed these two offences at different severity levels, using a criteria based on harm. Burglary in the 1st degree (with a weapon) was perceived to be two times more serious than burglary without a weapon.[79]

Nonetheless, using offence statutory definitions to generate classes of broadly similar seriousness is problematic in so far as articulating meaningful consistency and promoting consistency when legal offence definitions are broad. It is more likely to facilitate the giving of conduct that substantially varies in degrees of gravity the same normally recommended penalty. For example, one single class of burglary can embrace a number of factual situations that could result in conduct of substantially varying degrees of seriousness. Two offenders, each convicted of an offence under the same broad classification, one of whom committed his crime with considerable planning, while the other acted spontaneously, may be criminally responsible under the same offence classification but they are certainly not equally blameworthy. Although the degree of

[78] ibid.
[79] Minnesota Guidelines Manual and Commentary 2013 (n 70) 77.

harm caused by both their offences is also a determining factor of the level of the gravity of their respective conduct, if the harm caused by the less culpable offender is lower, then a system that recommends the uniform punishment of these offenders is more likely to be perceived as unjust (and therefore unfair) to the less culpable offender.

5.2.2 Creating Different Classes of Seriousness

Different from Minnesota, criminal offences are said to be "very broadly defined"[80] in England and Wales. For example, the Theft Act 1968, section(s) 9 and 10 which create the offence of burglary, divide this offence into two broad classifications of aggravated and domestic burglary. A single category of aggravated burglary encompasses all forms of burglary[81]during which the offender has a firearm in his possession or an imitation of a firearm, or any weapon of offence or any explosive, regardless of whether the offender uses the offensive weapon or not. Using such broad categories as the basis for generating classes of broadly similar seriousness is more likely to undermine relativities between classes of cases as it would be more difficult to capture the relevant and important differences between different cases. Thus, the Sentencing Council of England and Wales (hereafter 'Sentencing Council') used a different approach to determine broad seriousness.

The Sentencing Council refined the offence classifications by establishing categories of seriousness within each single offence classification, thereby demonstrating a determined effort towards portraying the variations in seriousness of cases falling within a single broadly defined

[80] See Sentencing Council of England and Wales website <http://sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.htm> (accessed 20 November 2014).

[81] The Theft Act 1968, s 9. Burglary encompasses an act of entering into a building or part of a building as a trespasser, with intent to steal or inflict on any person therein, grievous bodily, or cause damage to the building, whether an occupant is present or not, or property is stolen or not.

offence. Similarity was, therefore, defined based on the degree of culpability and harm manifested within an offence classification.[82] For example, the offence of causing grievous bodily harm with intent to do harm has three categories of seriousness. Under each category, a specified range of sanctions is assigned for cases representing broad similarity.[83]Developing offence seriousness categories perhaps moderates the potential of grouping unlike cases together. The Sentencing Council simply identifies typical behaviour that portrays different levels of seriousness within an offence type.

For the offence of domestic burglary, the principal factual elements of the offence which assist with determining that the offender falls within category one — which requires higher culpability and greater harm include: "theft of property causing a significant degree of loss to the victim (whether economic, personal or sentimental loss), soiling, ransacking or vandalism of property, consequences of intrusion, violence against the victim, a significant degree of planning, carrying a knife or other weapon and so on".[84]These factors do not tamper with the general definition of the offence of domestic burglary, but are all encompassing of behaviour that is normally displayed when this type of offence is committed.

Similar to England and Wales, criminal offences can be reasonably perceived as broadly defined under Uganda's Penal Code Act chapter 120 ('hereafter PCA 120).[85] It was discussed in chapter 4 that a single legal offence definition under the PCA 120 could encompass a wide range of factual situations which could manifest different degrees of broad similarity within one single offence

[82] See Sentencing Council, 'Assault Definitive Guideline' (13 June 2011) 4 < http://sentencingcouncil.judiciary.gov.uk/docs/Assault_definitive_guideline_-_Crown_Court.pdf> (accessed 10 April 2014).
[83] ibid.
[84] ibid 8.
[85] The Penal Code Act Chapter 120 (Laws of Uganda, 1950) as amended by Act No 8 of 2007.

classification. Yet the Taskforce on developing sentencing guidelines for Uganda (hereafter 'the Uganda Taskforce') used broad offence definitions to generate broadly similar seriousness and used criteria based on statutory maximum penalties to determine the relativities between those broadly defined offences. As is assumedly widely known, maximum sentences only tell us what to expect as sentence for the most serious cases, but says nothing about what to expect for sentences in the middle.[86]Accordingly, even though offences of aggravated defilement, murder, rape, aggravated robbery and treason are subject to a similar statutory maximum penalty of death in Uganda, this does not mean that all these offences are broadly similar in seriousness.

It is therefore reasonable to aver that the Uganda Taskforce, erred in using statutory maximum penalties and broad offence definitions to generate classes of broadly similar seriousness, as this undermined the Uganda Guidelines' potential to deliver an account of meaningful consistency.

5.2.3 Recommendations for Uganda

The approach taken by England and Wales was considered by the Uganda Taskforce. However, the Taskforce apparently chose to abandon this approach out of concerns that they lacked the legitimate authority to create sub categorisations out of statutory offence definitions.[87]Notably, experience from England and Wales suggests otherwise. The Sentencing Council creates different classifications of seriousness out of one general offence categorisation and this is done without the designers necessarily redefining the statutory offence definitions. What in the author's view would tantamount to redefining the offence would include creating different

[86] For example, in *Uganda v Rwajekale Jamada* Criminal Session Case No 86 of 2012 (15 September 2013). The High Court held that maximum penalties cannot be imposed on first time offenders because the court perceived the maximum penalty as a sentence reserved for worst cases. See also, FJ Ayume, *Criminal Procedure and Law in Uganda* (Longman Kenya Ltd 1986) 149.

[87]Interviews with Andrew Khaukha, Executive Secretary of the Sentencing Guidelines Committee, (ULRC offices, Kampala , 31 January 2014, 12 February 2014 and 13 February 2014).

degrees of offence categorisations which would require the conviction of offenders under those created degrees. In that case, these acts would be unconstitutional.[88] However, the mere creation of classes of seriousness in the author's view only assist in the location of the case at a position where its facts are most closely linked. The Uganda Taskforce therefore most likely misunderstood the nature of task that was before them.

Having said that, using the findings in appendix A of this study, this section attempts to make suggestions as to how classes of broadly similar seriousness could have been generated for the offence of defilement using the England and Wales approach. The author starts by identifying three categories of seriousness. The categorisation is based on what the author considers to be the three most important principal factual elements of the offence of defilement. (a) Victim's vulnerability (including victim's age and physical or mental illness). (b) The offender's relationship with the victim and (c) the offender' criminal history and health status.

It is assumed that regarding victim vulnerability, the younger the victim, the more vulnerable and thus the greater the culpability of the offender. Similarly, the closer (in biological terms) the victim and offender relationship is, the greater the culpability of the offender. With regard to harm, the transmission of a sexually transmitted disease indicates greater harm, as much as the impregnation of the victim.

The Uganda Taskforce or any other body which may be established to develop sentencing guidelines for Uganda could start by identifying factual situations that portray greater harm and higher culpability. Then, classify those situations into classes that represent a clear variation in their levels of seriousness. For example, factual situations that portray greater harm and higher

[88] It is unconstitutional in the sense that it may be akin to sentencing a person for an offence which does not constitute a criminal offence under the laws of Uganda. See the Constitution of Uganda 1995, article 28(7).

culpability could be placed on a scale higher than that which portrays lesser harm and lower culpability.

Table 5.1 below provides an example of how these classes could be developed.

Table 5.1 Proposed Table for Determining Levels of Seriousness for Defilement

Category 1	Greater harm (serious injury must normally be present such as pregnancy or transmission of HIV) and higher culpability.
Category 2	Greater harm and lower culpability; or lesser harm and higher culpability.
Category 3	Lesser harm and lower culpability.

Consequently, Table 5.2 below provides the principal factual elements of the offence of defilement which it is believed would enable sentencers to position the case within the category that the version of the facts most closely relate to. With the generation of such classes of broadly similar seriousness, the sentencing decision making may be made more accountable to the public.

Table 5.2 below provides a list of some of the factors that could be considered as principal factual elements for the offence of defilement (incl. aggravated defilement). The presence of one or more factors could result in the movement from one position on the scale of seriousness to another.

Table 5.2 Proposed Principal Factual Elements for Defilement

Factors that could indicate higher culpability	**Factors that could indicate greater harm**
▪ Extreme tender age of the victim (victim below the age of 14) ▪ Offender's knowledge of his/her HIV/AIDs status ▪ Offender's taking advantage of the victim's mental or physical impairment ▪ Offender is the victim's biological father, guardian or person in authority ▪ Offender has previous conviction for the offence of defilement or other sexual offences	▪ Transmission of HIV/AIDs to the victim ▪ Pregnancy as a result of defilement ▪ Repeated abuse against the victim by the same offender
Factors that could indicate lower culpability ▪ Offender's lack of knowledge of HIV/AIDs status ▪ Offender and victim are not related by blood, kinship ▪ Offender and victim are relatively of similar advanced ages (15-18 years)	**Factors that could indicate lesser harm** ▪ No physical injury sustained or repeated injury to the victim ▪ No pregnancy or transmission of any sexually transmitted disease as consequence of offence

▪ Offender and victim are in private consensual relationship ▪ The victim is of relatively advanced age (between 15 and 18 years of age)	

It is understood that with the guidance such as the one provided in table 5.2 above, a meaningful articulation of consistency would be delivered which would consequently also likely improve the public's understanding of the sentencing decision making process.

5.3 Determining the Breadth of Sentencing Ranges

After establishing classes of broadly similar seriousness and ranking comparative seriousness, the Taskforce could assign specific sanctions to each class of broadly similar seriousness. In desert terms, the specific ranges of sanctions will reflect the relativities between single classes of seriousness, and the overall penalty severity, should reflect a difference between cases at either end of the ranges. Von Hirsch [89] notes that the ordinal ranking must show a systematic spacing between classes of cases. Desert is imprecise about how wide or narrow the breadth of a sentencing range must be.[90] Nevertheless, criticism of broad or narrow sentencing ranges is common place (as chapter 4 of this study showed). Broad sentencing ranges technically undermine the meaningful function of consistency, whilst restrictively narrow ranges could take away the discretion that judges require to determine appropriate sentences for unusual cases. Chapter 4 of this study shows that the Uganda Taskforce prescribed very broad sentencing

[89] A Von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 Crime and Justice 55, 82.
[90] Frase, *Just Sentencing* (n 5) 131.

ranges which leave judges at sea in evaluating the variations in seriousness of different classes of cases within a single legal offence definition. Grounded on theoretical contexts and inter jurisdictional experiences, this section seeks to assess whether Uganda can draw on experiences of other jurisdictions to construct meaningful and constructive sentencing ranges, based on proportionality rather than statutory maxima.

5.3.1 Examining the Minnesota Approach

A typical US guideline grid has a vertical and horizontal axis. The horizontal axis sets out the criminal history scores. Previous convictions have a consistent and cumulative impact on sentence severity (see table 5.3 below).[91] The vertical axis typically sets out the offence severity levels. In the US presumptive guideline systems, the recommended sentence is deemed to be correct unless articulable reasons exist to warrant sentencing outside the recommended range. On the US grid, the recommended sentence is found in the grid cell where the applicable criminal history score and offence severity level intersect. A typical grid will have a sentencing range for each combination of offence severity and criminal history. Consequently, several sentencing ranges will be recommended for different combinations of offence severity and criminal history within the same grid row. The overall range for the full expanse of the offence sometimes creates a gap twice as wide between the lower limit and the upper limit of the guideline grid row. The implication is that offenders at the high end of previous convictions sometimes receive sentences which are twice as severe as their counterparts at the low end level.

A common feature of most of the grids is the overlapping of penalty ranges. This kind of overlap results in the likely potential to punish high record offenders convicted of a less serious crime

[91] Table 5.3 is just an extract from the 2013 Minnesota Standard Sentencing Guidelines Grid.

more harshly than a low record offender convicted of a more serious offence. Frase notes that the overlapping ranges are common in the US grids because of the weight that is given to criminal history.[92] Table 5.3 below is an extract from the Minnesota Standard Sentencing Guidelines Grid of 2013. It offers a good example of what constitutes a grid cell sentencing range and a guideline row range. It is typical of a US grid with the exception of the fixed presumptive term (or the cell midpoint) which is not prescribed in some guideline grids.[93]The sentencing grid has a fixed presumptive term (in months) and a range of term attached to it (in months). Under the Minnesota guidelines model, a sentencer is permitted to impose a sentence within the applicable grid cell by adjusting the sentence within the grid cell, only up to plus or minus 20 per cent and 15 per cent respectively.[94] Any sentence that falls outside the applicable grid cell is a departure sentence.

[92] Frase, *Just Sentencing* (n 5) 49.
[93] See DC, Oregon as examples of grids without presumptive fixed terms. Washington State on the other hand also has presumptive fixed terms.
[94] See Minnesota Statues 2013, s 244.09 sub-d 5(2).

Table 5.3 Minnesota Standard Grid

CRIMINAL HISTORY SCORE

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offences listed in italics)		0	1	2	3	4	5	6 or more
Murder, 2nd degree (intentional murder, drive by- *shootings)*	**XI**	306 261-367	326 278-391	346 295-415	366 312-439	386 329-463	406 346-480	426 363-480
Murder, 3rd degree, Murder 2nd degree (unintentional murder)	**X**	150 128-180	165 141-198	180 153-216	195 166-234	210 179-252	225 192-270	240 204-288
Assault, 1st Degree, Controlled substance crime 1st Degree	**IX**	86 74-103	98 84-117	110 94-132	122 104-146	134 114-160	146 125-175	158 135-189
Aggravated Robbery, 1st Degree Controlled Substance Crime, 2nd Degree	**VIII**	48 41-57	58 50-69	68 58-81	78 67-93	88 75-105	98 84-117	108 92-129
Felony DWI	**VI**	36	42	48	54 46-64	60 51-72	66 57-79	72 62-84

Interpretation

At offence severity level 10, the fixed presumptive term is 150 months (for an offender with no prior criminal record) and 240 months (for an offender at the upper end of criminal history record). The fixed presumptive term for the high end criminal record offender is almost twice as wide as that of a low end criminal record offender. Additionally, the ranges of term attached to the fixed presumptive terms within each grid cell overlap into adjacent grid cells. For example, at severity level X, an offender at the high end of the guideline grid row has the same recommended sentence as an offender with a low end criminal record score at the higher offence severity level. In essence, proportionality is not meaningfully defined in the Minnesota guidelines (at least in so far as overlapping penalties are concerned). Offenders committing more serious offences could receive the same sentence as those committing less serious ones. In addition, offenders committing offences regarded as broadly similar in seriousness could receive sentences of varying severity simply because one's prior history level is higher.

For example, the recommended sentence for an offender with the lowest criminal record committing an offence at severity level VIII is 48 months yet a sentence of 108 months is recommended for one convicted of an offence at the same level, but with 6+ criminal records. Although some commentators have argued that criminal history indicates higher culpability for an offender (see later discussion), the wide disparity between sentences imposed at the low and high end of the grid rows undermines the articulation of a meaningful definition of consistency. It is difficult to assert that cases at either side of the guideline grid row are of broadly similar seriousness.

Practical solutions have been devised by Frase to the problem of overlapping sentencing ranges.[95] In his expanded limiting retributivism model, Frase suggests that 'the lower limit of the penalty range in an upper guideline grid row should be set by the upper limit of the guideline grid row at the lower severity level'.[96] For example, the upper limit of offences at severity level IX (on the Minnesota grid) could set the lower limit of offence severity level X. Thus, instead of having the lower limit for severity level X as 150 months, it could start at 158 months. Frase supports the overlap within a guideline grid row, which he notes "could provide more flexibility to the sentencers to adjust penalties for utilitarian reasons". [97]

Minnesota's sentencing ranges do not necessarily offer an articulation of meaningful consistency. The overlapping penalty ranges undermine the articulation of meaningful consistency in the sense that the breadth between the lower and upper limit of the guideline grid row is so wide as to give consistency a meaningful function. Even if one was to accept the position that previous convictions enhance the culpability of an offender, the variation in sentences imposed on offenders on either side of the continuum (guideline grid row) are so wide that they make the cases at the opposite sides of the guideline row widely distinct. Be that as it may, Minnesota's grid approach is not likely to be a favourable option for Uganda because of the broad nature of legal offence definitions under Ugandan laws, which would make it difficult to place offences (in their broad form) on a single scale of seriousness. Hence, although Frase' s practical approach to overlapping penalty ranges could rectify some of the problems with Minnesota's sentencing ranges, the proposals would be more relevant for grid style sentencing

[95] Frase, *Just Sentencing* (n 5) 50 and 137.
[96] ibid 50.
[97] ibid.

guidelines, where offences are ranked on a single severity scale, and it is clear which offence (in ordinal proportionality terms) is ranked more severely than another.

5.3.2 Examining the England and Wales' Approach

Looking at the construction of sentencing ranges under the English model, the sentencing Council is required to specify:

> the range of sentences (the offence range) which in the opinion of the Council, is appropriate for the court to impose on an offender convicted of that offence; specify different sentences for each category of seriousness (category ranges) and specify starting points for each category range.[98]

Therefore, the definitive guideline must prescribe an overall offence range for a single offence classification, and also category ranges for each level of seriousness as well as starting points for each category range. Table 5.4 is an extract of the sentencing ranges for the offence of aggravated burglary under the sentencing guidelines of England and Wales.

Table 5.4 Aggravated Burglary

Offence Category	**Starting Point**	**Category Range**
Category 1	10 years' custody	9-13 years' custody
Category 2	6 years' custody	4-9 years 'custody
Category 3	2 years' custody	1-4 y ears' custody

Source: Sentencing Council, 'Burglary Offences Definitive Guideline' (16 January 2012)

[98] The Coroners and Justice Act 2009 ('hereafter the COJA 2009'), s 121 (4) and (5).

Interpretation

Table 5.4 above shows that the overall offence range for aggravated burglary is one to thirteen years imprisonment. This is the range within which a court may impose a sentence for aggravated burglary. The table also shows that there is a specific sanction for each level of broadly similar seriousness, and this tends to articulate the relativities between cases at different categories of seriousness. For example, a category range of 1 to 4 years imprisonment is specified for category three. Whilst a category range of 4 to 9 years imprisonment is specified for cases falling under category two. At category one, which is the highest level of severity for this offence, a category range of 9 to 13 years imprisonment is specified. Even the starting points vary according to the level of seriousness of the case. This approach undoubtedly gives consistency a meaningful function. That broadly similar seriousness is narrowly defined through a clear articulation of the differences between classes of seriousness gives consistency a better function than under Uganda's Guidelines. It is clear that cases falling under category three are less serious than those falling under category one.

However, this meaningful articulation of consistency is diluted by the provision of the COJA 2009, section 125 (3). Ashworth rightly argues that the fact that only a sentence outside the offence range rather than the category range is considered a departure dilutes the duty imposed on courts to follow the guidelines. [99] Accordingly, the development of classifications of seriousness is meaningful. However, the breadth of discretion permitted within the offence range undermines the meaningful function of consistency. The definition of broad similarity can be broadened within the offence range. Cases which are ordinarily positioned within the category of

[99] A Ashworth, 'Coroners and Justice Act 2009: Sentencing Guidelines and the Sentencing Council' (2010) 9 Criminal Law Review 389.

least seriousness can be moved up to another category of seriousness without the sentencer having to justify their decision. The breadth of discretion could therefore likely damage the consistency established by the guidelines because the guidelines have already defined broad similarity by positioning these classes of cases within particular groups. So, are the sentencing ranges under the English model too wide?

Like the Minnesota guidelines where an offender at the high end of the grid row may serve a sentence twice as severe as a low record offender, in the English guidelines, the sentencing range (looking at aggravated burglary) could result in the imposition of punishments that render cases within this offence classification completely distinct. For example, an offender in the highest category of seriousness could receive a sentence which is three times more severe than the sentence imposed on an offender in the bottom category range. This would have been permissible, considering that offences in England and Wales are considered to be broadly defined such that cases at either side of the range could be genuinely different. However, the fact that the sentencer can impose a sentence within the total offence range, irrespective of the position where the case was originally located raises concerns over whether cases which demonstrate broadly similar seriousness will be treated similarly under the total offence range. Also, whether sentencing within the total expanse of offence range provides a meaningful definition of consistency.

That said it is unreasonable to suggest that offence ranges under the sentencing guidelines of England and Wales are generally wide across the board. Some offence ranges provide a relatively meaningful representation of seriousness across the offence classification. For example, in the case of aggravated burglary, the range of 1 to 13 years imprisonment is arguably not so wide, particularly considering the broad nature of the offence of aggravated burglary. That

is, a single offence of aggravated burglary may manifest substantially varying levels of seriousness.[100]The Definitive guideline relating to burglary offences is clear on the principal factual elements that warrant the positioning of a case in a given category. Therefore, if courts were required to provide written explanations for departing from one category range to another, the English guidelines would have been greatly enhanced.

However, there is some degree of overlap in sentencing ranges. For example, in ordinal proportionality terms, aggravated burglary is perceived to be more serious than domestic burglary. However, the total offence range for domestic burglary ranges from a low level community order to 6 years custody term.[101]This means that a category one domestic burglary offender may be punished twice as much as a low end category three aggravated burglary offender. Nevertheless, there are no severe overlaps as portrayed in the Minnesota grid.

The disapproval of the English approach to sentencing ranges is based mainly on the provision of the COJA 2009, section 125(3). However, the generation of classes of broadly similar seriousness is meaningful. In addition, the allocation of specific ranges of punishment for each category is welcomed. Therefore, arguably, the sentencing ranges are not so broad. It is the breadth of discretion permitted within the total expanse of offence range that is likely to be problematic because it may arguably produce a wide range of sentencing for this offence. Assuming the sentencers were required to give reasons for moving from one category to another, then the offence ranges would probably give consistency a meaningful function. Accordingly, in view of the broad legal offence definitions under Ugandan statutes, the approach of allocating specific sentencing ranges for each created class of seriousness would provide an ethically

[100] The Theft Act 1968, s 10.

[101] Sentencing Council, 'Burglary Offences Definitive Guideline' (13 October 2011) 9 <https://www.sentencingcouncil.org.uk/wp-content/uploads/Burglary_Definitive_Guideline_web_final.pdf> (accessed 21 January 2015) .

meaningful definition of proportionality, and could offer a viable model for articulating meaningful consistency.

5.3.3 Recommendations for Uganda

Chapter 4 of this study shows that the sentencing ranges specified in the Uganda Guidelines are too wide as to give consistency a meaningful function. For instance, in capital cases, the Taskforce designed sentencing ranges that provide an upper limit which is set at the statutory maximum penalty of each given offence. On the other hand, the lower limit is set at a uniform bottom range of 30 years imprisonment.[102]In other cases, the Taskforce employed the least possible minimum sentence as the bottom limit and stretched the upper limit to the statutory maximum sentence. An example of manslaughter, which is prescribed a range of 3 years imprisonment to imprisonment for life comes as a good example. It was argued in chapter 4 that the sentencing ranges do not give consistency a meaningful function, because cases at either side of the ranges cannot be defined as normatively similar.

Using the findings in appendix A to this study, as well as incorporating the classes of broadly similar seriousness established in table 5.1 of this chapter, this section attempts to provide some steps that the Uganda Taskforce could follow in the development of meaningful sentencing ranges. To begin with, the findings in appendix A to this study provide some useful information about the range of sentencing for defilement. According to the findings, the range is 3 years imprisonment to imprisonment for life. Assuming this provides a relatively accurate

[102] The cases reported in recent newspapers indicate a punitive sentencing pattern for defilement cases. See, e.g., O Draga, 'HIV Positive Man Gets 30 Years for Defilement,' The *New Vision Newspaper* (12 December 2013) <http://www.newvision.co.ug/news/640469-hiv-man-gets-30-years-for-defilement.html> (accessed 25 November 2014). Also, B Abaho, 'Two Sentenced to 62 Years over Defilement in Kasese' The *New Vision* Newspaper (16 October 2013); 'Man Handed Life Imprisonment for Defilement', The *New Vision* Newspaper (20 May 2014).

representation of sentencing for defilement and relying on evidence from existing judicial practice which suggests that the death penalty has never been imposed on defilement offenders. One could reasonably argue that 30 years imprisonment which is prescribed as the uniform bottom range for all capital cases will be relatively disproportionately excessive for some classes of defilement. Looking at the small study in appendix A, the findings suggest that the majority of cases (basing on the sample size) fell within the range of 3 to 19 years imprisonment. Although the empirical study does not purport to demonstrate sentencing practices across all defilement casese, it provides useful information about the relative range of sentences for this offence. Knapp warns that empirical studies of past sentencing practices need to be based on recent practice and ought to encompass at least "a year of that practice" to safeguard against relying on seasonal variations.[103]

Accordingly, the Taskforce could begin by collecting data on recent sentencing patterns, after which the Taskforce could determine the broad range of sentences for the offence type. In addition, depending on the classifications of offence seriousness, the Taskforce could proceed to deliberate on category ranges for each level of seriousness. For example, the DC Commission collected data on past sentencing practices and got a fairly clear idea of the custodial ranges within which particular crimes were normally falling. The DC commission then excluded 25 per cent of the higher end of prison sentences and 25 per cent of the low end of prison sentences to shape the new ranges of penalty under their guidelines.[104]

For instance, if past practices indicated that 45 years imprisonment was the longest imprisonment term imposed on offenders committing armed robbery and 3 years was the least sentence the plus

[103] KA Knapp, 'Implementation of the Minnesota Guidelines: Can the Innovative Spirit be Preserved?' in A Von Hirsch, KA Knapp and M. Tonry (eds)., *The Sentencing Commission and its Guidelines* (Northeastern University Press 1987) 127, 109.
[104]See DC Commission, '2003 Annual Report' (n 18) 21.

and minus 25 per cent from the lower and upper limit respectively would make the sentencing range for that offence approximately 3 years and 9 months (as the bottom range) to 34 years imprisonment (as the upper limit). The sentencing range would be narrower than the range within which custodial sentences were imposed for offenders committing robbery in the past. However, it would still be arguably wide. This may explain why sentencing ranges on the DC grid are relatively wide. The DC approach provides a quick arithmetic solution but in the author's view is likely to undermine the production of a meaningful definition of consistency. Having said that, the findings in appendix A to this study could provide a modest but more plausible idea of what the lower and upper limits of sentencing ranges for defilement could look like (its methodological limitations notwithstanding). That is, although the findings cannot generally be taken to be representative of Uganda's sentencing patterns, they modestly provide a fairly clear idea of the range of sentencing for defilement which is suggested to be 3 years to life imprisonment. Clearly, this range is too wide as to provide a meaningful definition of consistency.

Therefore, the Taskforce could choose to further narrow the range by identifying the average range of penalty within which a typical case of defilement was normally positioned. In the context of the empirical analysis, the majority of cases fell within the range of 3 to 19 years imprisonment. Thus, the sentencing range could be narrowed to this range or it could be increased to an upper limit of say, 20 years imprisonment to allow for more serious offences. The bottom range could be reduced to say, 1 or 2 years imprisonment to include cases manifesting a lower degree of severity. This range could allow for more serious manifestations to be dealt with outside the guidelines. This would place the average starting point at around 8 years imprisonment.

The total offence range of 2 to 20 years imprisonment would arguably be considered appropriate in view of the variation in the ranges of potential seriousness that would fall within a general offence classification of defilement. The range, therefore would reflect desert but also leave space for reflection of both the variation in seriousness within the range and variation in severity of the sanctions to achieve instrumental aims. Cases falling under category one represent classes of defilement where the culpability is high and the harm is great whilst those in category three portray less serious manifestations of this offence —lower culpability and lesser harm. The systematic spacing in the ranges of punishments modestly represents the seriousness of each offence level relative to the other.

Table 5.5 below is an example of how the offence range and category ranges for defilement would look like.

Table 5.5 Proposed Sentencing Ranges of Defilement (including Aggravated Defilement)

	Starting points	**Category range**
Category 1	16 years' custody	14—20 years' custody
Category 2	10 years' custody	8 —14 years' custody
Category 3	4 years' custody	2 — 8 years' custody

The offence and category ranges table 5.5 above are justifiable for two reasons. First, each category range is wide enough as to permit the consideration of relative differences in cases falling within that category range. For example, a case at the lower end of category three will reasonably be different than the one at the upper end (2 to 8 years imprisonment) although cases at either side of the category range could be normatively defined as broadly similar. The discussion on departures in section 5.5 enhances this argument further by proposing that any

movement from one category range to another requires a written explanation from the judge, although such movement will not constitute a departure. Secondly, the sentencing range does not permit an overlap between category ranges. That is, the upper limit of the lower category range, defines the lower limit of the next upper category range.

5.4 Aggravating and Mitigating Factors

The relevance of aggravating and mitigating factors at sentencing is incontrovertible. Yet, most sentencing guideline schemes and sentencing statutory frameworks widely adopt a "laissez-faire"[105] approach to the consideration of these factors. It is also observed that the literature on the subject is theoretically underdeveloped[106] leaving the determination of the relevance of aggravating and mitigating factors "largely without structure, unbridled and untamed."[107]Because of this, there is considerable disagreement about the impact on sentence severity, if any, and the rationale for invoking some factors in aggravation and mitigation of sentence. Some of the advocates of strict retributivism argue that only factors which are directly linked to the determination of culpability and harm caused (or threatened to be caused) by the offence should be accepted as aggravating and mitigating factors, [108] except where the circumstance is so exceptional that it outbalance the seriousness of the offence. In addition, others such as Bargaric and Amarasekara posit that only factors that diminish the offender's culpability should be taken into account as mitigating and all other moral norms or virtues that can be disregarded with total

[105] JV Roberts, 'Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application' (2008) 4 Criminal Law Review 264, 274.
[106] ibid.
[107] A Ashworth, 'Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing' in JV Roberts (ed.), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011) 21, 21.
[108]S Eaton and C Piper, *Sentencing and Punishment: The Quest for Justice* (Oxford University Press 2008) 211.

impunity ought not to be given legal recognition.[109] It is largely argued that a lack of shared standards on the relative impact sentencing factors should have on sentence severity is likely to undermine the public's understanding of the sentencing decision making process.[110] Scholars such as Ashworth argue that the re-evaluation of the justifications for considering aggravation and mitigation at sentencing prior to designing sentencing guidelines is required.[111]

This research is premised on the argument that limiting retributivism offers the most appropriate model for designing meaningful sentencing guidelines. In that regard, and in respect to the consideration of the relevance of aggravating and mitigating factors, it is noted that sentencing guidelines modelled on a limiting retributivism justification permit sentencers to have regard to a number of sentencing aims. However, the choice of disposition depends on the retributive concept of offence seriousness. This means that when determining where to position a case on a continuum of seriousness, the sentencers are required under a limiting retributivism model of sentencing to assess both the harm, and crucially the offender's culpability. Consequently, aggravating and mitigating factors which are more directly linked to offence seriousness will ordinarily be the crucial determinants of at least, the category of seriousness of the offence as well as the initial disposition. Nonetheless, factors which are justifiable on utilitarian grounds ultimately find their way into the equation as determinants of the severity of sentence within desert based limits. In view of this, the question of real practical importance for the sentencing guideline designers should be whether a given sentencing factor should affect sentence severity on retributive or utilitarian grounds, and, if so, whether the factor should be taken as an aggravating or mitigating factor. If the rationale for invoking these factors is evaluated from the

[109] M Bargaric and K Amarasekara, 'Feeling Sorry? —Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing' (2001) 40 The Howard Journal, 364, 373.
[110] Roberts, 'Aggravating and Mitigating factors at Sentencing' (n 105) 265.
[111] Ashworth, 'Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing' (n 107) 21.

onset, then a uniform approach to their application would more likely be agreed upon. The guideline designers could do one or all three of the following. One, completely exclude sentencing factors that they consider problematic to the pursuit of equality under the law. Two, be explicit as to the rationale for invoking factors which are considered problematic to aggravating and mitigating sentence. Three, harmonise the asymmetry of effect of these sentencing factors to ensure that a factor listed as an aggravating factor does not appear as a mitigating factor. As noted in chapter 4, the Sentencing Council of England and Wales provided a uniform approach to the relevance of intoxication at sentencing. The Overarching principles definitive guideline 2004 decrees that "intoxication by alcohol or drugs should be treated as an aggravating factor". Although using intoxication as a basis for increasing offence seriousness (that is from a desert based approach) may be problematic as discussed in chapter 4, the Sentencing Council's uniform approach to this matter is welcomed. A uniform approach is largely viewed as the best way of ensuring that greater consistency in sentencing is achieved. Roberts advises that by providing a clear rationale for invoking some aggravating and mitigating factors, sentencers are directed to the question of relevance.[112] Roberts further warns that even the most prescriptive guideline system will fail to achieve consistency unless aggravating and mitigating factors are considered with sufficient subtlety.[113] Roberts notes that 'for purposes of ensuring community satisfaction, it is important that the relevance of a sentencing factor is out rightly made clear'.[114]

The importance of making clear the relevance of a sentencing factor was much highlighted in Uganda after the High Court of Uganda decision in the case *of Uganda v Hussein Hassan Agad*

[112] Roberts, 'Aggravating and Mitigating Factors at Sentencing' (n 105) 264.
[113] ibid.
[114] ibid 265.

and 13 others.[115] Justice Alphonse Owiny Dollo imposed a sentenced of 25 years imprisonment to a one Idris Nsubuga one of a number of perpetrators in the 11 July 2010 terrorist attacks in Kampala that left over 70 people dead and many injured. The judge noted that his decision to impose a custodial sentence rather than the death penalty (which is the maximum penalty for the offence of terrorism) was based on the offender's clear manifestation of contrition which he demonstrated through entering a plea of guilty and the offender's public appeal for forgiveness from the public.[116]Following this decision, it was reported in some Ugandan newspapers that a number of victims families found the sentence too light, compared to the enormity of the crime.[117] The comments from most of the victims' families centred around why the offender was excused from the death penalty simply because he pleaded guilty. The public did not understand the relevance of a plea of guilty. This was so perhaps because the sentencing statutes do not provide the public with a clear understanding of the relative weight of a guilty plea or the impact it should have on sentence outcome. The lack of clarity as to the impact such factors should have on the severity of sentence is likely to present itself with controversy, particularly in respect to the principle of equality before the law.

On the basis of the factors provided by the Taskforce as aggravating and mitigating a robbery sentence under the Uganda Guidelines, the author sought to identify the factors which are (1) directly linked to retributive and utilitarian purposes and (2) factors which are likely to be problematic and therefore require re-evaluation of their justification. The exercise is based on factors that aggravate and mitigate a robbery sentence under Uganda Guidelines, paragraphs 31

[115]Criminal Session Case No 1 of 2010 (16 September 2011)<http://ulii.org/files/ug/judgment/high-court/2011/200/uganda_vs_hussein_hassan_agad_ors_pdf_21971.pdf> (accessed 1 December 2014).
[116] ibid 9.
[117] See, Observer Media Ltd, 'July 11 Terrorists face Justice: Owiny Dollo's Judgment' *The Observer Newspaper* (18 September 2011) < http://observer.ug/index.php?option=com_content&view=article&id=15098:july-11-terrorists-face-justice-owiny-dollos-judgment&catid=34:news&Itemid=114> (accessed 24 November 2013).

and 32. The author is of the view that with such clarification, the exercise of discretion in invoking aggravating and mitigating factors is likely to be more consistent, and the public 's understanding of the relevance of these factors may be improved. The criteria for distinguishing problematic/ambiguous factors from factors directly linked to retributive proportionality and utilitarian purposes is derived from the author's discussion of aggravating and mitigating factors in chapter 4.6. That is, all factors which are incontrovertibly linked to offence seriousness, and other utilitarian goals are placed in the important category. On the other hand, factors which could attract conflicting opinion as to their impact on severity of sentence are placed in the problematic category. The basis for placing these factors in the problematic category is twofold. First, there is no uniform approach throughout the Uganda Guidelines as to whether they are only considered as an aggravating factor and as mitigating factors. For example, intoxication is an aggravating factor at sentencing for robbery yet it is a mitigating factor for a death sentence. Clearly, the Taskforce has not adopted a uniform approach to applying this factor. In addition, remorsefulness is both an aggravating and mitigating factor at sentencing for robbery. This means that the fact of remorsefulness is to be regarded, presumably, as increasing or diminishing an offender' culpability or future dangerousness depending on the philosophical justification. Accordingly offenders who lack remorse will be treated more harshly than those who are remorseful, an approach which enhances unfairness associated with disparity. Secondly, the factors categorised as problematic in table 5.6 can result in conflicting opinions as to their penological justifications as discussed in chapter 4. Accordingly, a more uniform approach to their application as relevant sentencing factors is welcomed.

Table 5.6 Aggravating and Mitigating Factors for Robbery Offences

Aggravating factors	Mitigating factors
Important factors ▪ degree of injury or harm ▪ the part of the victim's body where harm or injury was occasioned ▪ repeated injury or harm to the victim ▪ use and nature of the weapon ▪ whether the offender deliberately caused loss of life in the course of commission of the offence ▪ whether the offender deliberately targeted a vulnerable victim ▪ whether the offender was part of a group or gang and the role of the offender in the group, gang or commission of the offence ▪ whether the offence was motivated by or demonstrates hostility based on the victim's age, gender, disability or any other discriminating characteristics ▪ the nature of the deadly weapon used during the commission of the offence ▪ the gratuitous nature of violence against the victim including multiple incidents of harm or injury ▪ the manner in which death occurred during the commission of the offence	Important factors ▪ lack of premeditation ▪ whether the offender had a subordinate or lesser role in a group or gang involved in the commission of the offence ▪ mental disorder or disability ▪ whether there was a single or isolated act or omission occasioning fatal injury ▪ whether there was no injury or harm occasioned or no threat of death or harm ▪ whether the offender is a first offender with no previous conviction or no relevant or recent conviction ▪ the value of the property or amount of money taken during the commission of the offence ▪ whether property or money was retuned or recovered **Problematic** ▪ Remorsefulness of the offender ▪ Familial responsibilities of the offender

▪ the value of the property or amount of money taken during the commission of the offence ▪ commission of other criminal acts such as rape or assault ▪ degree if pre-meditation, planning or concerted act ▪ whether the offence was committed in the presence of other children, spouse of victim or relatives ▪ whether the offender is a habitual offender ▪ previous incidents of violence or threats to the victim by the offender ▪ evidence of impact on the victim's family relatives or the community ▪ the rampant nature of the offence in community **Problematic factors** ▪ whether the offence was committed under the influence of alcohol or drugs ▪ whether the offender was remorseful	

Chapter 4 provides a detailed discussion of why remorsefulness of the offender , influence of alcohol or drugs and family responsibilities are considered problematic factors that require a clear re-evaluation of their justification as factors of aggravation and mitigation in the Uganda Guidelines.

5.5 Sentencing Outside the Guidelines: Departures

5.5.1 Meaning of departure

Although a guideline departure is generally understood to mean a downward or upward deviation from a recommended guideline sentence, what constitutes departure in a given jurisdiction varies from one guideline system to another. For example, in England and Wales, an upward or downward departure will only occur when a court imposes a sentence outside the offence range, and not the category range.[118] This approach has been criticised for allowing loose flexibility to courts to impose sentences within broad sentencing ranges. In fact, Ashworth projected that departures under the English guidelines would be rare because courts would be able to properly calibrate a range of cases within the 'very broad' offence ranges.[119] Reitz noted that the Coroners and Justice Act, 2009, made departures 'formally impossible' within the full expanse of offence range.[120]

Indeed, the Crown Court Sentencing Surveys statistics for 2011 (June-December) indicates a judicial compliance rate of an average of over 90 per cent. The Sentencing Council for England and Wales Annual publication report of 2011[121] indicates that there was a 98 per cent compliance with the guidelines for the offence of actual bodily harm for the period of October 2010 to March 2011. The 2012 report[122] indicates a compliance rate of 96 per cent for the offence of assault occasioning actual bodily harm.

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[118] See COJA 2009, s 125(3).
[119] A Ashworth, 'Departures from Sentencing Guidelines' (2012) 2 Criminal Law Review 81, 95.
[120] Reitz, 'Comparing Sentencing Guidelines' (n 5) 195.
[121] Sentencing Council of England and Wales, 'The Crown Court Sentencing Survey Annual Publication Report' (24 May 2012) <http://sentencingcouncil.judiciary.gov.uk/docs/CCSS_Annual_2011.pdf> (accessed 26 June 2013).
[122] Sentencing Council of England and Wales, 'The Crown Court Sentencing Survey Annual Publication Report' (30 May 2013)<http://sentencingcouncil.judiciary.gov.uk/docs/CCSS_Annual_2012.pdf> (accessed 26 April 2014).

In Minnesota, any sentence that falls outside the applicable grid cell and not the total guideline grid row range is a departure sentence.[123]A departure becomes operational at that point because every grid cell covers a different type of offender committing an offence at the same severity level. Permitting judges to impose sentences anywhere within the total guideline grid row range would therefore make the sentencing ranges so broad that a meaningful function of consistency would be lost, if the judicial window of discretion stretched from one end of the guideline grid row to the other. The Minnesota guidelines provide a list of impermissible grounds for departure,[124] as well as permissible grounds which include a non-exhaustive list of mitigating and aggravating factors mainly based on retributive proportionality.[125]The Minnesota Commission rate of compliance hovers around 75 per cent. The Minnesota Commission reports a judicial compliance rate that hovers around 70 per cent. For example, in 2011, compliance was at the rate of 73.5 per cent and 74.7 per cent in 2010.[126]

In North Carolina, departures are technically impossible because any sentence imposed within the three sentencing guideline ranges provided within each grid cell is deemed to be a guideline compliant sentence. Even though, judges are expected to cite legally valid reasons for imposing a

[123] Minnesota Sentencing Guidelines Commission, 'Minnesota Guidelines Manual and Commentary' (1 August 2012), s 2.D.1.

[124] ibid, s 2D.2. Factors that should not be used as departure reasons: race, sex, employment and social factors.

[125]ibid, s 2.D.2.3. Factors that may be used as reasons for a mitigated departure include: whether the victim was an aggressor, played a minor or passive role in the crime, the offender's physical or mental impairment in so far as it diminishes the offender's capacity for judgment excluding the voluntary use of intoxicants; etc. Factors that may be used as reasons for an aggravated departure include: the victim's vulnerability particularly due to age, infirmity, or reduced physical or mental capacity, and the offender's knowledge of this vulnerability, the treatment of the victim with particular cruelty for which the individual offender is held responsible, the fact that the current conviction is for a criminal sexual conduct offense, or an offense in which the victim was otherwise injured, and is the offender has a prior felony conviction for a criminal sexual conduct offense or an offense in which the victim was otherwise injured, etc .

[126]Minnesota Sentencing Guidelines Commission, 'Annual Report to the Legislature' (1 January 2013) <http://mn.gov/sentencing-guidelines/images/2013%2520Legislative%2520Report.pdf> (accessed 10 October 2014).

sentence within the mitigated and aggravated range.[127] This explains why North Carolina has consistently reported 100 per cent judicial compliance rates. For example in fiscal year 2012/13, the North Carolina Sentencing and Policy Advisory Commission (hereafter 'North Carolina Commission') reported that 69 per cent of all active sentences fell within the presumptive range, 27 per cent fell within the mitigated range and 4 per cent were within the mitigated range.[128] In fiscal year 2011/12, 68 per cent of all active sentences fell within the presumptive range, 27 per cent fell within the mitigated range and 5 per cent were within the mitigated range.[129]

Departure rules, therefore, depend on the definition of acceptable departure by the relevant sentencing body (commission, council, committee, or taskforce). For example, the DC Commission's approach of narrowing the ranges of punishments in the past sentencing practices by 50 per cent (25 per cent from the top upper range and bottom range respectively) suggests that the DC Commission perceived 50 per cent departures as acceptable. Since departures operate outside, and not within the sentencing guidelines, there are different techniques of ensuring that the degree of departure by the courts does not exceed what is politically acceptable within a guideline system.

Under the English model, the degree of upward and downward departure will depend on the 'custodial zone'[130] between the upper end of the range and the statutory maximum (for upward departures) and the width between the bottom range and the least minimum penalty (for downward departures). For instance, the total offence range for assault occasioning actual bodily

[127]North Carolina General Statute Chapter 15A, s 1340.16 (c).
[128] See, North Carolina Sentencing and Advisory Commission, 'Structured Sentencing Statistical Report for Felonies and Misdemeanours' (March 2014) 16-17 <http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt_fy12-13.pdf> (accessed 13 April 2014).
[129] ibid, (February, 2013) 15-16.
[130]Roberts, 'Sentencing Guidelines in England and Wales' (n 7) 13. The author refers to the width left between the upper limit of an offence range and the statutory maximum as a custodial zone.

harm runs from a band A fine up to 3 years custodial term.[131] Yet the maximum penalty for this offence is 5 years imprisonment.[132]This means that there is an upward departure custodial zone of approximately 2 years imprisonment. Obviously, for more serious offences the custodial zone between the upper end of the range and the statutory maximum becomes greater. For example, in cases of aggravated burglary, the upward departure custodial zone is 13 years imprisonment to imprisonment for life. Having said that, some definitive guidelines do not leave custodial zones. This ultimately constrains the exercise of judicial discretion, even within the guideline range. For example, the total offence range for common assault is a discharge to 26 weeks custody.[133]The statutory maximum penalty is 26 weeks custody[134]when tried summarily. The total offence range for assault on a police constable executing duty is a band A fine to a 26 weeks custodial term.[135]The statutory maximum penalty when the offence is tried only summarily is 26 weeks custodial term.[136]

In Minnesota, the Appeals Courts have developed jurisprudence that "the upper limit of an upward departure should not be more than double the presumptive sentence length". For example, in the case of *State v Evans*,[137]the defendant was involved in at least eight separate street robberies, and court entered convictions on two. The court then sentenced the defendant to two 20 year custodial sentences which were to run consecutively. The defendant had no prior criminal record and the recommended sentence for a first offender under the guidelines was 48 months. Court imposed a sentence of 360 months in total on the ground that the defendant had

[131] Sentencing Council of England and Wales, 'Assault Definitive Guideline' (13 June 2011) 12 < http://sentencingcouncil.judiciary.gov.uk/docs/Assault_definitive_guideline_-_Crown_Court.pdf> (accessed 10 April 2014).
[132] Offences Against the Person Act (Laws of England and Wales, 1861) s 47.
[133] See, Assault Definitive Guideline (n 131) 24.
[134] The Criminal Justice Act Chapter 33 (Laws of England and Wales, 1988) s 39.
[135] See, Assault Definitive Guideline (n 131) 21.
[136] The Police Act Chapter 48 (Laws of England and Wales, 1996) s 89.
[137] 311 N.W.2d 481 (1981), Supreme Court of Minnesota.

specifically targeted vulnerable victims (elderly women and men) and he had inflicted injuries on them. The Supreme Court held that:

> a sentence that would translate into punishing an offender of aggravated robbery more severely than sentences served by some offenders convicted of first degree murder was an excessive departure, which would only be justified in unusually compelling circumstances.

In Minnesota, therefore, the degree of departure is advised to be kept at a minimum not exceeding twice or more of the length of the upper limit stated at the higher end of the guideline range. That said, the doubling principle in the *Evans* case is not absolute. The Supreme Court of Minnesota noted that it could confirm the sentence even where the departure sentence is more than double the upper limit, provided the circumstances warrant such confirmation. [138]In North Carolina, departures are managed within the guidelines.

The Uganda Taskforce has not set a departure standard, although technically, the degree of upward departures has been made formally impossible because statutory maximums were set as the upper limits to the offence ranges. Also, the very broad sentencing ranges that stretch from the least possible sentence to the maximum penalty render departures under the Uganda guidelines impossible. This is so because, as has been the practice under the individualised sentencing approach, the broad range of criminal conduct can be calibrated in the wide sentencing guideline range.

5.5.2 Departure Standards in Other Jurisdictions

[138] ibid.

Different departure standards are set by different jurisdictions. Under the Minnesota guideline system, the court is permitted to pronounce a sentence within the applicable range unless there exists 'compelling and substantial circumstances' that support a sentence outside the guidelines.[139]The Court is required to disclose in writing, the particular substantial and compelling circumstances. The Minnesota departure test has been considered too restrictive to the exercise of judicial discretion. It is reported that The Gage Sentencing Commission Working Group in 2008 rejected the Minnesota departure test on the ground that the said test was 'far too restrictive of judicial discretion for it to be adopted in England'.[140]However, Reitz criticises the stereotyping of all American guidelines and notes that those who are familiar with how the Minnesota system works will conclude that the system is not restrictive on judicial discretion.[141] Reitz suggests that judges freely exercise their departure freedom and notes that in fact, downward departures are never reversed in Minnesota while upward ones are reversed only in a few cases where the Evans doubling principle is violated.[142] Therefore, although the Minnesota departure test has been considered far too restrictive on judicial discretion, the practice in Minnesota seems to suggest that departures, particularly downward departures are frequent.[143]

The Minnesota legislation has not defined 'substantial and compelling circumstances' so the interpretation of this departure standard is derived from case law. The legal test for substantial

[139] See Minnesota Sentencing Guidelines Commission, 'Minnesota Guidelines Manual and Commentary (1 August 2013), s 2D1(c). Also, Minnesota Criminal Procedure Court Rules, r 27. 03 sub-div 4(c).
[140]Sentencing Commission Working Group, 'Sentencing Guidelines in England and Wales: An Evolutionary Approach' (Sentencing Commission Working Group, 2008a) 25.
[141] Reitz, 'Comparing Sentencing Guidelines' (n 5) 194-5.
[142] ibid.
[143] Frase, *Just Sentencing* (n 5) 130.

and compelling circumstances been set by the Court of Appeal. In the case of *State v Edwards,*[144] the Court held that:

> substantial and compelling circumstances are those showing that the defendant's conduct was significantly more or less serious than that typically involved in the commission of the offence in question.[145]

The Court has stated that individual circumstances such as the offender's amenability to probation can be a substantial and compelling circumstance. For instance in the case of *State v Amos Erving LaDuke* [146]the Court of Appeals of Minnesota confirmed the durational and dispositional departure sentence of the district court on the ground that the defendant would be harmed or killed if he were sent to prison to face members of the gang that he formerly belonged to. South Africa adopted Minnesota's 'substantial and compelling circumstances departure standard' for its Criminal Law (Amendment) Act 105 of 1997. The Criminal Law (Amendment) Act provided legislative mandatory minimums for a large number of serious offences including rape, murder, aggravated robbery, some drug offences; and offences involving the use of firearms or ammunitions.[147]The departure rule was created to enable judges deviate from the mandatory minimum and impose a lesser sentence where they found substantial and compelling circumstances. The South African Court of Appeal first interpreted the departure standard in *S v Mofokeng*[148] when Stegmann J said that:

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[144] 774 N.W.2d 596, 601 (Minnesota 2009) < http://caselaw.findlaw.com/mn-supreme-court/1501195.html>.
[145] ibid.
[146]Minnesota 2011 (unpublished)<http://cases.justia.com/minnesota/court-of-appeals/a12-376.pdf?ts=1396127481> (accessed 13 January 2014). It was found that the appellant's history of altercations with his former gang and his later role as a federal witness against members of the gang was a substantial and compelling circumstance, as he would likely be killed or harmed if he went to the same prison as the members of the gang he had testified against.
[147] The Criminal Law (Amendment) Act 105 of 1997 (Laws of South Africa) s 51 and 52.
[148]1999 (1) SACR 502 (T).

the facts of the given case must present circumstances that are so exceptional in nature that a mandatory minimum sentence will be unjust.

Van Zyl Smit [149] notes that the South African Court interpreted the departure standard far more restrictively than its Minnesota counterparts. Van Zyl Smit suggests that it is because the Court confused exceptional circumstances with substantial and compelling circumstances.[150]

It is recalled that North Carolina (unlike Minnesota and Washington) leaves no window of discretion in so far as the degree of departure from the sentence guidelines is concerned. A judge is permitted to deviate from the presumptive standard range and impose a sentence within the aggravated sentence range if s/he finds that the aggravating factors outweigh any mitigating factors that are present and vice versa.[151]The choice of departure standard in North Carolina could be attributed to the fact that North Carolina's guidelines originated in and continue to maintain a strong emphasis on correctional resource management. At the time when prison populations were exploding and indeterminate sentencing criticised, the North Carolina (NC) General Assembly enacted the Fair Sentencing Act of 1981 which set presumptive prison sentences for felonies but judges could depart from these sentences. It is reported that judges departed in more than half of the cases.[152]Thus when designing the sentencing guidelines, the NC Commission tried to avoid loose departure rules having considered past experiences.

[149] D Van Zyl Smit, 'Mandatory Minimum Sentences and Departures from them in Substantial and Compelling Circumstances'(1999) 15 South African Journal on Human Rights 270, 275.
[150] ibid.
[151] North Carolina General Statute, Chapter 15A, s 1340.16(b).
[152] RL Lubitz, 'Offender Characteristics and Departures under North Carolina's Sentencing Guidelines'(1996) 9 Federal Sentencing Reporter 132.

The COJA 2009, section 125(1) permits courts to deviate from the sentencing guidelines if they find that "it would be contrary to the interests of justice, for them not to do so". Roberts suggests that the standard of interest of justice requires that the facts of the particular case manifest conduct that is "quite unlike offending seen in the same offence type".[153] It has been suggested that in some cases, it will be impossible for courts to impose an upward departure sentence because the high end of the top category range is set by the statutory maximum penalty, making departure practically impossible.

After proposing an amendment to the language in the Criminal Justice Act 2003 (CJA 2003) section 172 from requiring "every court to have regard to any guidelines…" to "every court must..." which is now enumerated in COJA 2009 section 125 (1), the Gage commission pondered over the kind of departure test that would be acceptable by the courts considering that the duty of the courts to follow the guidelines had been made more robust than the earlier requirement to merely have regard to the guidelines.[154] The Gage Commission settled for the present departure rule.[155]The Commission was reportedly of the view that the said departure test would give judges more flexibility to tailor sentences to suit individual circumstances than the Minnesota departure test. Although one could probably argue that the essence of guidelines is to minimise sentencing discretion, flexibility in sentencing is permitted because a strict departure test would mean that dissimilar offences would be forcibly sentenced within a framework that

[153] JV Roberts, 'Points of Departure: Reflections on Sentencing outside the Definitive Guideline Ranges' (2012) 6 Criminal Law Review 439, 443.
[154] Ashworth, 'Departure from Guidelines' (n 119) 392. The author argues that the failure to require a court to explain why it has moved from one category range to another appears to have been a response to judicial opposition to the duty to follow. This argument could also apply to the Sentencing Commission Working Group's recommendation for a relatively loose departure test.
[155] See Sentencing Commission Working Group (n 139) para 9.12.

does not cover them. Also, it was a test that the courts of England and Wales were familiar with as it had been used in a number of other statutory provisions.[156]

From a theoretical point of view, the wording of the COJA 2009 makes the possibility of departure from the English guidelines very rare. COJA section 125 permits the courts to move from one category range to another without having to give reasons for the movement, provided the sentence is still within the offence range. It is like permitting a judge under the Minnesota guideline system, to move from one grid cell to another within the same offence severity level, without requiring him/her to give reasons for this adjustment, because this would amount to a departure in Minnesota. One possible way of determining whether the departure test poses any practical difference on sentencing practices is by determining whether the judges operating under considerably "restrictive departure standards", comply with the guidelines much more commonly than those in guideline systems that have considerably looser departure standards — England and Wales or even non-binding guidelines — like DC which adopts voluntary guidelines. Theoretically, the loose departure test for England and Wales and the non-binding nature of the DC voluntary guidelines would be expected to result into less compliance rates than Minnesota or North Carolina, where departures are controlled by strict departure standards and active appellate review. However, the results show no relationship between the two. Thus a departure standard may not have a greater bearing on the guideline implementation so long as there is judicial acceptance of the guidelines, and the sentence ranges are broad enough to leave considerable room for judges to exercise some degree of individualisation.

[156] ibid, para 7.18.

5.5.3 Recommendations for Uganda

Most guideline systems allow considerable opportunity for individualisation within the sentencing guideline ranges. However, where a court is of the view that the case has been placed in the wrong category, that is, that the seriousness of the case defined by harm and culpability appears to the court to place the case in a lower or higher classification, a court will depart from the guidelines. This is necessary for achieving meaningful consistency. Thus, a number of guideline systems achieve this by refraining from undue rigidity that would prevent courts from tailoring sentences to fit individual circumstances of offences and offenders particularly in cases which the guidelines did not adequately address.

Given that Uganda's statutory maximum penalties are in some cases stretched out to sentences such as death (in capital cases) upward departures could be kept within limits for such cases and principles provided as to the extent the upward departure can go. For example in capital cases, the sentencing authority devising the degree of departure permitted by the guidelines would have to first deliberate on the custodial zone between the upper limit of the penalty range and the maximum penalty of death. An upper limit to the degree of departure may deliver meaningful consistency. For instance, if a sentencing range of 2 years to 20 years imprisonment is adopted for the offence classification of defilement, obviously, the custodial zone between 20 years imprisonment and the death penalty (which is the upward departure zone) could be problematic to consistency. This is due to the very wide window of discretion within which judges would exercise discretion outside the guidelines. Accordingly, a rule such as restricting the degree of

departure to not more than twice the length of term stated at the higher end of guideline range would serve a meaningful function of consistency.

The different departure tests adopted by different guideline jurisdictions determine when and how much individualisation can be exercised. As pointed out, departure from the definitive English guidelines is permitted when the court is satisfied that it would be contrary to the "interests of justice" if the guidelines are complied with. The question that arises is whether the test permitting departures in the "interests of justice" permits a meaningful construction of consistency. From a retributive point of view, the test of departing on the ground of interests of justice is theoretically plausible because the principle of proportionality which underlies sentencing under a desert based framework requires that the measurement of punishment be equated to the seriousness of the offence. This explicitly supports justice as the principle upon which punishment ought to be founded. Therefore, if it is considered that a punishment will be less just (and therefore fair) than deserved or excessively severe, then the courts should be permitted to exercise discretion to find a punishment that can be justified on grounds of proportionality.

However, this departure standard may be problematic due to the breadth of subjectivity with which justice may be construed. For example, it is noted that following the aftermath of the August 2011 riots in England, courts were imposing substantially diverse sentences on rioters in different parts of the country. Roberts notes that custody rates increased from 33 percent for

similar offences in 2010 to 85 per cent for offences committed during the riot.[157]Perhaps the courts did not have a systematic approach to departures and this was aggravated by the departure test of interests of justice, which could be interpreted very broadly because of the subjectivity with the interpretation of the concept of justice.[158] The emphasis that the interests of justice departure test gives to the exercise of judicial discretion in determining what is justice could threaten the meaningful function of consistency. This is why the New Zealand Commission rejected it as a departure test noting that it "puts too much emphasis upon the exercise of individual discretion at the expense of the guidelines."[159]The New Zealand Commission considered the departure tests of: "manifestly unjust"' or "inappropriate due to special circumstances". Both of them were rejected for being "too inflexible". The New Zealand Commission ultimately settled for a departure test allowing judges to depart where the judge is satisfied that complying with the guidelines would be contrary to "public interest"'.[160]

Given that departures are governed outside the guidelines, the appeal court plays a critical role in developing a common law of departure sentencing, which can include defining the scope of application of departures and their magnitude, just like the Minnesota Criminal Appeals Courts have done. Thus, no single departure test can be recommended because how a departure test is interpreted depends on the interpretation it is given by court jurisprudence. For example, as the South Africa/ Minnesota experiences suggest, a similar departure standard can be interpreted differently in different jurisdictions. As noted above, Van Zyl Smith suggests that the same departure standard used in Minnesota has been restrictively interpreted by South African

[157] Roberts, 'Points of Departure' (n 153) 441.
[158] It could mean fairness, mercy, compassion, equity, generosity and so on. See also, Ashworth, 'Departures from Guidelines' (n 119) 85. The author notes that the Court of Criminal Appeal has in a number of cases accepted 'mercy' as a ground for downward departure.
[159] New Zealand Commission, 'Report 94 on Sentencing and Parole Reform' (Law Commission August 2006) 43.
[160] ibid.

Courts.[161] Yet Reitz suggests that the Appeals court in Minnesota have given judges a "far more latitude than the requirement of compelling circumstances suggested".[162]

Nonetheless, a systematic approach to departure sentencing is required for Uganda to safeguard against courts using departures in a manner that threatens consistency and proportionality. For instance, the Minnesota Court of Appeals jurisprudence that upper limits of upward departures must be kept within the limits of not more than double the presumptive sentence length is more likely to provide a consistent approach to departure sentencing, and would keep departure sentences within desert limits.

5.6 Relevance of Previous Convictions

Despite very diverse approaches towards punishing repeat offenders, a sentence enhancement for previous offending (a practice known as recidivist sentencing premium) is common practice in all, if not most, of the guideline systems. In fact, Roberts states categorically that punishing repeat offenders more harshly is a universal practice in both common law and civil law jurisdictions.[163]However, despite the universality of the practice, there is no consensus on the theoretical and normative justification for enhancing punishment severity because of the presence of previous convictions. To begin with, previous convictions can impact on sentence severity in different ways depending on the sentencing purpose being pursued. For instance, if a sentence is imposed to achieve incapacitation effects, repeat offending may warrant sentence enhancement because recidivists are widely perceived as having an elevated risk of reoffending.

[161] Van Zyl Smit (n 149).
[162] Reitz, 'Comparing Sentencing Guidelines' (n 5) 194.
[163]JV Roberts, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (Oxford University Press 2008) 468.

From a retributive perspective, enhancement of sentence severity based on previous convictions is likely to lead to disproportionate sentencing because offence seriousness is the key determinative factor in a retributive sentencing framework. Therefore, since prior record enhancements cause controversy under a retributive framework, an understanding of the theories advanced for recidivist premium sentencing is significant for this study.

In ordinal proportionality terms, a less culpable offender must be punished less severely than a more culpable offender. Consequently, sentence enhancements for prior criminal records is problematic. Except if one can justify the enhancement on grounds of culpability, which is a notion that is rejected by pure desert theorists. Nonetheless, the intuition that persistent offenders deserve to be punished more harshly than first time offenders is common practice, rendering their complete disregard impracticable.[164] The notion that an offender relinquishes his right to mitigation as s/he accumulates more previous convictions —progressive loss of mitigation is the commonly advanced justification for prior record enhancements under a retributive desert sentencing framework. Based on the lapse theory, advocates for progressive loss of mitigation note that a first offender deserves some form of mitigation/discount which is progressively lost as s/he progressively accumulates prior record points. The first offender credit is offered out of recognition that a human being is prone to lapse into offending, at least once.[165]Wasik and Von Hirsch note that the progressive loss of mitigation holds that once the offender's mitigation is used up —that is after his/her repetition at reoffending, "the ceiling for the offence is reached and all the mitigation is used up".[166]

[164] Frase, *Just Sentencing* (n 5) 181.
[165] A Ashworth, *Sentencing and Criminal Justice* (4th edn, Cambridge University Press 2005).
[166]M Wasik and A Von Hirsch, 'Section 29 Revised: Previous Convictions in Sentencing'(1994) Criminal Law Review 409, 410.

This theory does not suggest that first offenders are less culpable than repeat offenders or that repeat offending enhances the offender's level of culpability. What the theory posits is less uncertain. Is it that a second chance should be given to first, second, third offenders? There is no consensus on the number of convictions after which the severity of sentence should become noncumulative. Ashworth suggests that mitigation should be exhausted after the accumulation of two convictions.[167] Roberts wonders how extending mitigation to first offenders and withdrawing it from repeat offenders would promote desert principles of parity and proportionality.[168]Withdrawing mitigation from repeat offenders, ultimately punishing them based on the level of seriousness of their current conviction is consistent with proportionality. However, it undermines consistency in the sense that first, second, third and so on offenders will be offered mitigation for being first offenders, whilst their counterparts with cumulative previous convictions will be denied the same opportunity. This makes the use of recidivist sentencing premiums problematic in a desert based sentencing framework.

A number of statutory sentencing frameworks as well as sentencing guideline schemes suppose that previous convictions enhance the offender's culpability level. For example, the Sentencing Guidelines Council, overarching principle with respect to seriousness guideline provides previous convictions as one of the factors indicative of a higher level of culpability.[169]Some of the American sentencing guideline manuals like the United States Sentencing Commission (USSC) [170] specifically describe "a defendant with a record of prior criminal behaviour as more

[167] Ashworth, *Sentencing and Criminal Justice* (n 165).
[168] Roberts, *'Punishing Persistent Offenders* (n 163) 59.
[169] Sentencing Guidelines Council, 'Definitive Guideline on Overarching Principles, Seriousness' (December 2004) 6 < http://sentencingcouncil.judiciary.gov.uk/docs/web_seriousness_guideline.pdf> (accessed 16 January 2014).
[170] United States Sentencing Commission, 'Guidelines Manual' (1 November 2013) 369 < http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013_Guidelines_Manual_Full.pdf> (accessed 12 February 2014).

culpable than a first offender and thus deserving of greater punishment".[171] However, the USSC manual specifically indicates that the aggravation of punishment is based on the need for general deterrence of repeated criminal conduct. The manual asserts that a "clear message needs to be passed to society that repeated criminal behaviour aggravates punishment with each recurrence".[172]

Some commentators like Frase note that the argument that an offender's culpability for the current offence is reduced because of his being a first offender or increased because of his prior convictions are unconvincing.[173] For instance, there is a widely shared perception (although not necessarily logical)[174] that a domestic burglar who has twenty previous convictions of domestic burglary, or shop lifting, is likely to be more culpable than a first time offender convicted of aggravated burglary. This is based on the assumption that recidivists, however petty their offences, make more deliberate decisions about reoffending than first offenders. This perception is illogical because a recidivist of a petty offence such as shoplifting is not necessarily more deliberate in his offending than a first time offender of aggravated burglary. That said punishing the recidivist domestic burglar ten times more than the aggravated burglar, would amount to giving a higher culpability score for the previous convictions than the deserts of the offender's conviction offence.

[171] ibid.
[172] ibid.
[173] Frase, *Just Sentencing* (n 5) 50.
[174] Logically, it does not stand because the fact that someone has chosen to offend 20 times before does not mean that their decision to commit the next offence was any more deliberate than an offender who chooses to commit a first offence. A petty recidivist may be less able to make deliberate decisions than a high end first offender.

Roberts[175] proposes a culpability- based justification for considering previous convictions at sentencing. Roberts notes that previous convictions are relevant to ascriptions of culpability because members of the public and practitioners generally subscribe to the broader model that the offender's criminal antecedents should be used to evaluate the extent to which the offender should be considered blameworthy. Roberts warns that the criminal antecedents should not provide a context to judge the seriousness of the offence and as such, suggests that the score given to the offender's level of culpability based on previous convictions should not be the same as that given to the seriousness of the offence.[176] Roberts' assertion suggests a distinction between culpability and offence seriousness. In his view, culpability which he interprets as "the degree to which blame may reasonably be ascribed to the offender" is secondary to crime seriousness, and that it is only when culpability is given more weight than the seriousness of the offence that ordinal proportionality will be undermined.

Seriousness is widely perceived to constitute a combination of harm and culpability. Therefore, Roberts' distinction of the two concepts offers a new perspective to the understanding of offence seriousness. The author seems to be arguing that harm should always be given more weight than culpability in assessing offence seriousness. The author argues that although previous convictions ought to be excluded from the consideration of seriousness of the offence, "they should enter the sentencing equation through the determination of the offender level of culpability". [177]The author therefore supports at least a modest enhancement in sentence on account of previous convictions, particularly because of the enduring appeal recidivist premiums have from the public. Robert's culpability based justification could offer a good starting point for

[175]JV Roberts, 'Punishing Persistence: Explaining the Enduring Appeal of the Recidivist Sentencing Premium' (2008) 48 British Journal of Criminology 468, 475.
[176]ibid, 475.
[177] ibid 476.

justifying prior record enhancements within a retributive sentencing framework. The culpability based score would be premised on the notion that the level of culpability assumed from previous convictions will not be used to determine the extent of seriousness of the current offence. Accordingly, prior record culpability scores will be determined distinctively from the determination of culpability and harm in the current conviction offence. Scores accrued from previous convictions would, therefore, not enhance the level of punishment severity beyond what is defined as the permissible desert limit for the current offence.

Different sentencing guideline systems adopt varying approaches to the role previous convictions play in the determination of sentence severity. In the United States sentencing guideline systems, previous convictions have a consistent and cumulative impact on sentence severity and in England and Wales, previous convictions (which must be relevant and recent) statutorily aggravate a sentence, to levels that are not provided.[178] The Uganda Guidelines, also recognise the importance of previous convictions by asserting in paragraph 6 that "courts shall take into consideration any previous convictions of the offender" when determining sentence.

5.6.1 Previous Convictions as a Secondary Determinative Factor

Sentencing grids of fully developed guideline systems in the states of Minnesota, North Carolina, Washington, and also at the Federal level (see United States Sentencing Commission Guidelines, 2013, chapter four) readily demonstrate that prior criminal record levels have a consistent and cumulative impact on sentence severity. Table 5. 3 contains the grid employed by the Minnesota Sentencing Commission. On that grid, although ordinal proportionality is observed in the sense

[178] CJA 2003, s 143(2).

that offences are ranked in their degrees of relative seriousness, previous convictions widen the sentencing gap between first offenders and those with criminal history records. For example, at severity level VIII, a presumptive term of 48 months is fixed for offenders with no prior record level, whilst a term of 108 months is fixed for offenders with more than six criminal record points. Undoubtedly, the criminal record points enhance punishment severity under the Minnesota scheme, but can this be justified on culpability grounds?

If Minnesota was using criteria based on culpability to enhance punishment severity for offenders with previous convictions, offenders at the higher end of previous convictions would be expected to be punished more severely than those at the low end. However, punishing them equally like those whose offences are more severe would suggest that the previous convictions scores are exceeding the gravity (set by desert) of the current conviction offence. This threatens the meaningful purpose of ordinal proportionality. On the other hand, the Minnesota grid loosely reflects the theory of progressive loss of mitigation. This is so because, punishments are consistently enhanced as the prior criminal history record points accumulate, meaning that the offender loses his mitigation as s/he accumulates more points. After accumulating six or more points, the cumulative effect under the Minnesota Guidelines stops. The Minnesota commission also set a felony decay factor of fifteen years,[179] which means that upon the lapse of fifteen years, since the commission of the offence, previous convictions stop counting. That notwithstanding, the Minnesota guideline scheme is modelled on a limiting retributivism justification, which justifies the use of desert as the primary rationale of sentencing. Accordingly, the prior record enhancements under this model could not (if based on strict retributive proportionality principles) be allowed to go beyond the limits set by desert. In fact, Frase views

[179] Minnesota Guidelines Manual and Commentary (n 70) 12, section 2.B.1.(c).

the criminal history enhancements in the Minnesota guidelines as "somehow greater than called for"[180]in his expanded limiting retributivism model and advocates for limited sentence enhancements for prior convictions, proposing that "no matter how extensive the offender's prior criminal record, no offender should receive a sentence more severe than the statutory maximum for his current offence".[181]

The problem with Frase's proposition is that it provides an open ended solution which could enhance the exercise of judicial discretion within a guideline classification. For instance, suppose the sentencing range of defilement is 2 to 20 years imprisonment, but the statutory maximum for the offence is death. It means that judges would be permitted to impose a sentence beyond the desert limits of a given offence, towards a sentence recommended for broadly dissimilar cases. Hence, imposing a sentence towards say, 30 years imprisonment because the offender is a habitual offender, would undermine the core tenet of the retributive punishment justification which is that the offender should be punished for what they have done, and not for who they are.

That said, sentencing guideline systems found across the United States, apply different scores to previous convictions. The commonest approach is to assign record points depending on the offence severity level of the previous conviction. For instance, higher record points are assigned to offences involving violence and lower records to nonviolent offences.

Table 5.7 below contains the prior felonies score employed by the Minnesota Commission.

[180] Frase, *Just Sentencing* (n 5) 135.
[181]ibid 190.

Table 5.7 Minnesota prior felonies score

GENERAL OFFENCE ON STANDARD GRID	SEVERITY LEVEL	POINTS
	1-2	**½**
	3-5	**1**
	6-8	**1½**
	9-11	**2**
	Murder 1st Degree	**2**
	A	**2**
	B-E	**1½**
	F-G	**1**
	H	**½ for first offence** **1 for subsequent offence**

In North Carolina, each prior conviction is assigned a point based on its offense class.[182] There are six prior record levels, which are constructed based on the gravity of the previous offence.[183] For example, a class A felony (which is the severest and highest felony offence) is assigned 10 points, class B1 felony is assigned 9 points, whilst class B2, C and D felonies are assigned 6 points, and so on. In all, an offender can receive as many points as 18 and more. To give an example, an offender A, who commits a B1 felony with a prior record of a B1 offence, and two previous convictions of a C felony offence, will be placed at prior record level VI on the North Carolina Grid, the last level of prior criminal record which assigns 18+ points. The offender

[182] North Carolina General Statute, s 15A-1340.14(b).
[183]North Carolina Sentencing and Policy Advisory Commission, 'Structured Sentencing Training and Reference Manual' (1 December 2009) 11< http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/sstrainingmanual_09.pdf> (accessed 10 December 2013).

would have received 21 criminal record points, although 18 points seems to be the ceiling for prior record points.

5.6.2 Previous Convictions as an Aggravating Factor

The role of previous convictions in determining sentence severity has evolved in England and Wales. The Criminal Justice Act 1991, section 29(1) provided that "an offence *shall not* be regarded as more serious…by reason of any previous convictions of the offender…"[184] This meant that any prior record enhancements were supposed to be made within the severity limits of the current offence. The Criminal Justice Act 1993 amended that section to provide: "in considering the seriousness of any offence the court *may* take into account any previous convictions of the offender…"[185] Presently, section 143 of the Criminal Justice Act 2003, states that "in considering the seriousness of an offence, the court must treat each previous conviction as an aggravating factor if the previous conviction is considered relevant and recent".

Although the obligation on English courts to use previous convictions in determining sentencing has evolved from "shall not", to "may take"' to "must treat", the legislature has always assumed a strong association between previous convictions and offence seriousness. That is why the definitive guideline in respect to seriousness recognises previous convictions as indicating higher culpability in the determination of the seriousness of the offence. Thus, a court may make an upward adjustment to the offence category level to reflect an increase in the level of offender culpability, if it finds that the offender's previous convictions are relevant and recent to the current offence. This is closer to the US grid approach to incorporating previous convictions in

[184] Emphasis added.
[185] Emphasis added.

sentencing. That is, if each previous conviction is treated as an aggravating factor, then an enhancement in sentence will be almost certain.

5.6.3 Recommendations for Uganda

Paragraph 6 of the Uganda Guidelines provides that previous convictions ought to be taken into account when sentencing an offender. Further, the guidelines list previous convictions as an aggravating factor for some cases, without providing any explanation as to why they are relevant or any indication of the weight that should be attached to previous convictions. However, considering the role of previous convictions to sentencing in Uganda, and that sentencing guideline systems elsewhere have handled its application in a desert based model in an inconsistent and unconvincing manner, it is important to examine how the culpability score approach would work towards producing meaningful consistency under the Uganda Guidelines. It is suggested that before culpability scores are assigned, the permissible desert limits for each case of broad similarity must be fixed. This will help to ensure that practically, no matter how extensive the offender's prior criminal record, an offender does not receive a sentence enhancement that results in a punishment more severe than the upper limit set by desert for the current conviction offence. For example, suppose the sentencing range for defilement is 2 to 20 years imprisonment, the previous conviction enhancements should not lead to a sentence beyond imprisonment for 20 years.

Secondly, it is suggested that the culpability score assigned to previous convictions ought to be derived only from those offences that are relevant and recent. This would be in accordance with the law and sentencing practice in Uganda. The TIA 23, section 59, requires that "only previous

convictions proved by the prosecution or admitted by the offender, will be taken into account during sentencing". The practice has been for the courts to determine whether the previous convictions show a disposition to commit the same kind of offence as the current conviction offence.[186] The closely related the previous conviction is to the current conviction offence in terms of both being offences of a similar nature or kind, the greater the weight that has been attached to that previous conviction, although not in any structured manner.[187] The law and practice is that:

> After conviction the prosecution is required to state whether the accused has any previous convictions and if so, their dates, nature and sentence imposed when the accused was last released from prison.[188]

This is intended to restrict the aggravation of sentence based on previous convictions to only criminal history that is relevant and recent to the current offence. Additionally, in order to preserve proportionality and uniformity, no matter how extensive the offender's prior criminal record, if the cases fall in a group of highly similar or equal severity, the punishment for the recidivist offender should not be more than twice as severe as a similarly placed offender with no previous conviction. If such disparity is permitted, then the retributive justifications of punishment will be undermined. The Court of Appeal of Uganda stated:

> "...great disparities between sentences imposed upon first offenders and upon those jointly convicted and who have previous convictions should, as far as possible, be avoided. "[189]

In the same light, sentencing scholars like Tonry have disproved of the wide disparity in sentences between offenders with and without previous convictions. Tonry suggests that

[186] FJ Ayume, *Criminal Procedure and Law in Uganda* (Longman Kenya Ltd 1986) 157.
[187] See *Republic v Musa* (1962) EA. 499.
[188] Ayume (n 186) 155-6.
[189] *Mohamed & two Others v Uganda* Criminal Appeal No 167, 170 and 171 of 1996 (30 September 1998) (emphasis added).

sentence enhancements for previous convictions "no matter their number or relevancy should never justify a custodial sentence above 50 per cent longer than that recommended by the guideline".[190]Using Tonry's suggestion, supposing a culpability score attached to previous convictions in Uganda is set at less than 25 per cent of the total offence range. The figure is based on the author's view that anything above 25 per cent may create substantial disparity between sentences imposed on offenders with and without previous convictions. If, but for the relevant and recent previous conviction(s), an offender was supposed to receive a sentence of 6 years imprisonment, a culpability score of 1½ years imprisonment would be added to the recommended sentence. That is, if the previous conviction(s) are more serious than the current offence. The term of 1½ years imprisonment derives from 25 per cent of 6 years imprisonment. However, no culpability score would be allowed to bring a sentence outside the offence range, as this would mean punishing the offender more severely than is proportionate to the seriousness of the current conviction offence.

Using the offence range developed in table 5.5 above, a culpability score that would result in the imposition of a sentence outside the total offence range of 2 to 20 years imprisonment would not be permitted. In such cases, the judge would have to show that the previous convictions bring the case outside the typical guideline classification. What this means is that the enhancement will not be based on the concept of progressive loss of mitigation but on a culpability justification based on retributive proportionality.

[190] M Tonry, 'Setting Sentencing Policy through Guidelines' in S Rex and M Tonry (eds.), *Reform and Punishment: The Future of Sentencing*, (Willan Publishing 2002) 96.

The courts have on occasion emphasised that despite the fact that the offender, had a previous conviction a sentence had to be reasonably proportionate to the actual offence.[191]

Table 5.8 below contains a proposal for how the culpability scores could be allocated using the information gathered from the empirical analysis on defilement cases. The culpability score is calculated at 25 per cent of the recommended sentence. The total sentence outcome is the recommended sentence plus the culpability score. It must be recalled that being a "serial offender"[192] is a statutory aggravating factor in the case of defilement. Therefore, all previous convictions for the offence of defilement or aggravated defilement are included in the determination of the category range. Nevertheless, this culpability score applies to defilement offenders who are not serial offenders but have previous convictions of an offence that is comparably ranked as defilement in ordinal proportionality terms or is ranked as more heinous. However, all other relevant but minor previous convictions can be dealt with using lower culpability scores than those suggested. As in Minnesota, it would be very valuable to specify a decay period after the lapse of which, previous convictions would cease accumulating culpability scores.

[191] See, *Ali Kiggundu v Uganda* Criminal Appeal No 283 of 1973. In this case, the Supreme Court held that the sentence of 5 years imprisonment was greatly out of proportion with the previous sentence of a fine of Ushs 100 or one month imprisonment in default.

[192] The Penal Code Amendment Act 2007, s 129 (7) defines a serial offender as a person with a previous conviction for the offence of defilement and aggravated defilement.

Table 5.8 Proposal for Accumulation of Culpability Scores for Defilement Cases

	RECOMMENDED SENTENCE (prison term in years)	CULPABILITY SCORES (<)	MAXIMUM TOTAL SENTENCE
Defilement	**20**	5 years	Departure
	16	4 years	20 years
	12	3 years	15 years
	10	2 ½years	12 ½ years
	8	2 years	10 years
	6	1 ½years	7 ½ years
	4	1 year	5 years
	2	6 months	2 ½years

The problem with culpability indexing in table 5.8 above is that the penalty severity scale will be greatly enhanced simply based on previous convictions. Yet punishments for offenders at the bottom of the penalty scale will greatly differ from those imposed on offenders at the top of the range, creating something that is very similar to the US grid prior record enhancements. Additionally, imposing a consistent and cumulative culpability score on previous convictions is more likely to violate the doctrine of double jeopardy.[193]That is, by imposing say, an additional 1 year (as a culpability score) to an offender whose current offence conviction attracts a 4 year imprisonment term means that the offender is being punished twice for an offence that s/he has been previously punished. Therefore, although the culpability scores are justified by desert, and are seemingly logical, the indexing is only a matter of value judgment.

[193] The 1995 Constitution of Uganda, article 28(9).

Accordingly, since the study proposes a limiting retributivism justification, instead of proposing a culpability index, previous conviction could simply be made an aggravating factor which courts weigh and determine its relevance within proportional desert limits. Accordingly, like subordinate sentencing purposes (rehabilitation, deterrence and incapacitation) previous convictions would play a role in determining sentence severity, except that this will be done within proportional desert limits of the current conviction offence. With this approach, numerical or cumulative indexing of previous convictions and their potential to enhance inconsistencies will be avoided.

5.7 Sentencing for Multiple Current Convictions

The practice of multiple offence sentencing has been a long standing convention in Uganda's criminal justice system. It is given statutory footing in the TIA cap 23, section 2(2) which provides that:

> where a person is convicted at the same trial of two or more distinct offences, the high court may sentence him or her for those offences to the several punishments prescribed for them. If it is imprisonment, one may commence after the expiration of the other or the court may direct that the punishments run concurrently.

Jurisprudential interpretation of the section emerged to specifically discourage the imposition of omnibus sentences—that is single aggregate sentences that encompass all series of crimes. The Court of Appeal declared such sentences illegal and said that a court must impose separate sentences on each count, and decide whether the sentences should run consecutively or concurrently.[194]Accordingly, Ugandan sentencers have often exercised wide discretion to

[194] *Uganda v Pampilio Edebu* [1979] HCB 209.

sentence the crimes consecutively (resulting in separate cumulative sentences) or concurrently, in which case the longest sentence becomes the upper limit of the punishment. Sentencing for multiple current offences is an important issue in sentencing because of its capacity to reflect unfairness in a sentencing framework. For example, offenders with multiple convictions are more often sentenced to less severe punishments than their counterparts who are sentenced sequentially for the same crimes. This is so because, whilst offenders sentenced for multiple convictions are offered bulk discounts, those who are sentenced sequentially are allocated a recidivist premium because the offences are regarded as previous convictions.

Sentencing of multiple current offences is therefore an important aspect for the articulation of consistency in sentencing. The challenging issue is that from a retributive perspective, it is not clear how courts should go about making a decision on a proportionate sentence in such cases where an offender has committed a series of identical or separable offences, whether committed within the same course of transaction or in different series of transactions. The greatest concern is that this offender is apprehended and charged, convicted on all of the crimes at the same time, but the current offences are treated as a single offence. The law requires that each crime is responded to with an individual punishment, yet it is common practice that in considering the overall punishment, courts are cautioned against imposing a cumulative sentence which could expose an offender to a punishment that exceeds the totality of the offending behaviour.

This is how the principle of totality in sentencing comes in. The key principle of totality, which is common place in most jurisdictions, is generally that when sentencing for multiple offending, the court must impose a sentence that reflects the seriousness of the totality of the offending

behaviour.[195]That is, the overall sentence imposed on a multiple offender must be just and proportionate. Paragraph 8 (2) of the Uganda Guidelines asserts that in calculating the totality of a sentence for multiple offenders, "the total sum of the cumulative sentence shall be proportionate to the culpability of the offender". The provision makes it clear that the totality principle within the Uganda Guidelines system is defined by the principle of proportionality. However, no further guidance is given as to the extent to which proportionality defines the totality of the sentence.

The discussion of the principle of totality from a desert based perspective thus becomes of critical importance. Ashworth,[196]Jareborg [197]and Bottoms[198] support the view that courts should adopt a bulk discounting approach based on parsimony and mercy when sentencing for multiple offending. Jareborg [199] argues that courts must first of all fix the upper limit of the overall sentence severity (which could be fixed using the recommended sentence for the most serious offence) and then make penal reductions from additional punishment for each series of additional crime. For example, suppose an offender is being sentenced for a middle range rape whose recommended sentence is 4 years imprisonment; 4 domestic burglaries each with a recommended sentence of 2 years imprisonment; and a motoring offence which has a recommended sentence of 9 months. The court will begin by fixing the upper limit to sentence severity which in this case will be set by the recommended sentence for rape (4 years) and then

[195] see Sentencing Council, 'Definitive guideline on Offences Taken into Consideration and Totality' (11 June, 2012) 5 < http://sentencingcouncil.judiciary.gov.uk/docs/Definitive_guideline_TICs__totality_Final_web.pdf> (accessed 10 June 2014).
[196] Ashworth, *Sentencing and Criminal Justice* (n 165).
[197]N Jareborg, 'Why Bulk Discounts in Multiple offence Sentencing' in A Ashworth and M Wasik (eds), *Fundamentals of Sentencing Theory* (Oxford University Press 1998), 129.
[198] A Bottoms, 'Five Puzzles in Von Hirsch's Theory of Punishment' in A Ashworth and M Wasik (eds), *Fundamentals of Sentencing Theory* (Oxford University Press 1998) 53.
[199] Jareborg (n 197) 139.

increments of penal reductions will be given for each additional crime, by making punishment for each additional crime contribute very modestly to the overall punishment maximum.

Therefore, instead of responding to the four counts of domestic burglary in a purely cumulative manner (that is, by imposing a cumulative sentence of 8 years for the four separate counts), Jareborg [200] proposes that each additional count of domestic burglary attracts a discount by decreasing its contribution to the overall punishment until the punishment ceiling is reached. For instance, Db_1, Db2, Db3 and Db4 may contribute 9 months, 6 months, 3 months and 1 month respectively, to the overall punishment. The motoring offence could contribute 7 months to arrive at the overall total of 4 years prison term, with rape having made the greatest contribution of 2 years imprisonment. What counts is that the more serious offence makes the greatest contribution to the overall punishment maxima and that parsimony is the guiding principle.

Ashworth supports the bulk discounting idea and avers that "any calculation which results in a close approximation of sentence between a more serious offence and a moderate number of less serious ones goes against common sense".[201] Using the hypothetical example given above to explain Ashworth's argument, strictly applying the cumulative sentencing approach would mean that the overall punishment for the domestic burglaries would exceed the recommended punishment for the more serious offence (rape). Parsimony requires that the least severe punishment necessary to achieve the purpose of sentencing is imposed. On the other hand, Bottoms observes that the exercise of mercy is the most justificatory rationale that can be used to

[200] ibid 139.
[201] Ashworth, S*entencing and Criminal Justice* (n 165) 210.

support bulk discounting in multiple sentencing.[202] Bottoms asserts that the court should be inclined towards imposing a sentence that will not deprive the multiple offender of enjoying part of his prime life, simply out of pity and compassion.

From a retributive perspective, bulk discounting suffers from the same defects as the theory of progressive loss of mitigation. First, it is difficult to justify the double treatment afforded to multiple offenders, because the same is not afforded to similarly placed offenders committing a single offence or those sentenced sequentially. Secondly, it is difficult to articulate why a punishment ceiling is created in multiple offending. Deserts should go beyond ceilings to find what is proportionate. Thirdly, why should each new punishment contribute less to the overall punishment? The first concern will be addressed by those who argue that focusing on proportionality in its strictest form may lead to more severe sentences than deserved.

According to Ryberg [203] parsimony and mercy are both untenable in a desert based framework. The author notes that parsimony makes no difference when added to a desert theory because finding a sentence within a desert based framework cannot only be guided by proportionality. Ryberg argues that it would be unjust to impose a lesser than proportionate sentence. As regards mercy, the author states that setting an upper limit of sentence based on what is perceived to be in the interest of saving an offender from spending a long part of his prime life as a result of punitive intervention is problematic. Ryberg thus concludes that simply doing the arithmetic as prescribed by a cumulative approach may be the only way out of this problem particularly for strict desert theorists.

[202] Bottom (n 198) 65.
[203] J Ryberg, 'Retributivism and Multiple Offending' (2005) 11 Res Publica 213, 218.

Obviously, a cumulative approach to sentencing multiple offenders is practically and morally unacceptable in a world where multiple offending is often discounted. It would be practically impossible to implement a system of cumulative sentencing, say in Uganda, where the practice has been to impose concurrent sentences for multiple offending.[204] Therefore, compromise would have to be reached over the extent to which proportionality applies in multiple sentencing.

5.7.1 Multiple Current Convictions in Selected US Guideline Systems

The North Carolina General Statute provides that 'in the event of multiple convictions, the court is required to impose a separate sentence for each individual crime and decide whether to impose consecutive or concurrent sentences or to consolidate offences for judgment.[205] There is a general rule that all sentences imposed for multiple offending are to run concurrently unless the court specifically states that the sentences are to run consecutively.[206]On the North Carolina grid, the three sentencing ranges ascribed for each grid cell provide a presumptive minimum sentence range.[207] For example table 5.9 below is an enlargement of the grid cell for a Class B offender in prior record level I. The sentencing ranges provided are for the judge to choose a minimum sentence. The maximum sentence is set at 120 per cent of the minimum sentence length except for offense classes F through I.

[204] See *Uganda v Geoffrey Kazinda* Criminal Session Case No. 0138 of 2012 (19 June 2013) The Anti-Corruption Unit of the High Court of Uganda convicted the offender, the Principal Accountant in the Ministry of Finance on a total of twenty nine counts. He was convicted on twenty five counts of forgery and two counts of unlawful possession of Government stores, as well as on a count of abuse of Office, and making a document without authority. The Court imposed separate sentences for each 29 counts and arrived at an aggregate sentence of 64 years imprisonment. The Count then ordered that the sentences be served concurrently and because the offender had been sentenced to five years imprisonment on the count of the most serious crime, he was ordered to serve an aggregate of five years prison term.

[205] North Carolina General Statute, s 15A-1340.15. See also, North Carolina Guidelines Reference Manual (n189) 31.

[206]North Carolina General Statute, s 15A-1340.15 (a).

[207] ibid, s 15A-1340.17(c). See also North Carolina Guidelines Reference Manual (n189) 24.

Thus in the case of concurrent sentencing, the minimum and maximum sentence length will be based on the longest of the individual minimum and maximum terms.

Table 5.9 North Carolina Grid Cell

	I 0-1 Point	
B1	A 240-300	Aggravated minimum sentence range
	192-240	Standard Minimum sentence range
	144-192	Mitigated minimum sentence range

Looking at table 5.9 above, suppose an offender, with a prior record level I, is convicted of a class B1 offence and a class C offence (which has a sentencing range of (73-92 aggravated range; 58-73 standard range and 44-58 mitigated range). If the court chooses to impose a concurrent sentence, then the minimum term will be determined by the sentence imposed for the felony class B1 offence and 120 percent of the minimum sentence length will be the maximum term. The totality principle will also apply to cases where the court elects to impose a consecutive sentence.

In the event of consecutive sentencing, the minimum and maximum lengths of an active sentence are determined by the sum of all the active minimum sentences imposed consecutively less nine months for each two or subsequent sentences imposed for class B1, B2, C, D or E offences.[208]Thus, in the above scenario, if the court imposes 240 months as the minimum sentence for class B1 felony and a minimum of 58 months for the class C felony, the total consecutive minimum term shall be 240 months + 58 months = 298 months. The total maximum cumulative term shall be 120/100 × 298 = 358 months. It must be stated that the North Carolina Annual Structured Sentencing Statistical Reports[209] suggest that consecutive sentences are never imposed.

Under the Washington sentencing guideline scheme, multiple current offences can be added to the offender's criminal history score during the sentencing process, depending on the nature of the current multiple offences. For example, if the current multiple offences do not include two or more serious violent offences arising from separate and distinct criminal conduct, the multiple offense scoring points shall be calculated by treating each current offence as a prior conviction to the other offence. For example, assume that an offender is convicted of one count of theft in the first degree and one count of forgery, with both offenses arising from separate and distinct criminal conduct, and that the offender's criminal history consisted of one conviction for burglary in the second degree. The theft and forgery will be separately scored by including the prior burglary and current forgery in the offender score for the theft, resulting to an offender score of two and a sentencing range of 3 to 9 months. In the same breadth, the prior burglary and the current theft will be included in the offender score for the forgery, resulting in an offender

[208] North Carolina Guidelines Reference Manual (n 183) 31.
[209] See, The North Carolina Court System website at <http://www.nccourts.org/Courts/CRS/Councils/spac/Publication/Statistical/Annual/Default.asp>.

score of two and a sentencing range of 2 to 5 months. The sentence for each offence will run concurrently.[210]

However, if the offences of forgery and theft were committed in a circumstance where both counts encompassed the same criminal conduct, and the offender had no prior criminal history, the other current offence will not be counted in the offender score because under the law, where current offences are found to encompass the same criminal conduct, those current offences shall be counted as one crime. The Washington guidelines do not apply a cumulative approach (consecutive sentencing), but neither does it offer bulk discounting to the offender who is being sentenced for multiple offences. The guideline requires that each offence is treated separately, one being treated as a prior conviction to the other, but the offences are sentenced concurrently. On the other hand, if the sentencing involves say, two violent offences. That is, kidnapping and assault, both in the 1st degree, with a prior criminal history of one assault in the 3rd degree. The crime at the highest severity level will be scored first. The prior assault in the 3rd degree will then become the criminal history score for that most severe offence of current conviction. The other less severe violent offence, in this case kidnapping, will be scored using a criminal history of zero. The three sentences will then run consecutively.

5.7.2 Multiple Current Convictions in England and Wales

The definitive guideline with respect to totality states that: "the total sentence for multiple offending must reflect all offending behaviour and must be just and proportionate".[211] The

[210]See Washington State Sentencing Guidelines Commission, 'Adult Felony Sentencing Guidelines Manual' (2013) 60-1 < http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2013.pdf> (accessed 13 May 2014).

Sentencing Council further explains that it is ordinarily impossible to arrive at a just and proportionate sentence through adding together all the notional single sentences. This suggests that the approach to multiple offences sentencing under this guideline system is more in favour of a bulk discounting than a cumulative approach. The totality guideline provides some general approach to sentencing multiple offenders. The court must first determine a sentence for each individual crime, and then make a decision on whether the case calls for a concurrent or consecutive sentence. Concurrent sentences are deemed appropriate where the series of offences arise from a similar incident or facts, for example where in a single incident of dangerous driving, injuries are inflicted on multiple offenders. On the other hand, consecutive sentences are deemed appropriate in cases where offences arise out of unrelated facts or incidents.[212]For example, an offender commits two distinct offences on two separate occasions.

This approach is very close to the practice of sentencing multiple offenders in Uganda. In the *Kazinda* case,[213]the reason for the court's imposition of concurrent and not consecutive sentences was based on the fact that the different counts of forgery and associated offences were committed based on the same facts. The practice is and has always been for courts to order concurrent sentences in cases where the offender committed the series of crimes in the same transaction, for example, a case of a man who forges a cheque to obtain money by false pretences.[214]Conversely, consecutive sentences are imposed in cases where the offender commits two completely separate and unrelated offences.[215]

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[211] See, Sentencing Council, 'Definitive guideline on Totality' (n 195).
[212]ibid.
[213] *Kazinda* (n 204).
[214] See *Republic v Oyunya* [1970] EA 78; *Muinin v Republic* [1973] HCB 86; *Shikowaya v Republic* [1970] HCB 399; *Kagube Mohammed v Uganda* (1995) VI KALR 1.
[215]See *Godfrey Peter Jeils v Republic* [1971] HCB 468; *Robert s/o Nyangau v Republic* [1967] HCB 20; *Kisherile Dhamirani Agganwal v Republic* [1968] HCB 281.

5.7.3 Recommendations for Uganda

The theories advanced to support bulk discounting for multiple offence sentencing raise challenges for the Ugandan guidelines. It has been suggested by leading commentators that cumulative sentencing of multiple offenders, which is what would be required in a desert based framework could result in more severe punishments than would be ordinarily imposed in circumstances calling for sequential sentencing. Strictly interpreted, the principle of proportionality, to which Uganda's guidelines ought to be based, would require that the totality of the sentence for a multiple offender is calculated based on the culpability of that offender for the different series of crimes committed. The Uganda Taskforce indeed took this strict view when drafting paragraph 8(2) of the Uganda Guidelines, which requires that proportionality to offence seriousness is used to determine the overall punishment. That is, the total sum of the cumulative sentence shall be proportional to the culpability of the offender.

This restrictive and high standard is plausible in a desert based framework but could have practical difficulties. Therefore, it is important to address the question of how the respective culpability in a series of crimes should contribute proportionately to the overall punishment. The issue of multiple sentencing is addressed in all the fully developed guideline systems. Therefore, drawing on their experience may offer some valuable lessons for Uganda.

The requirement that sentences for multiple offending should be kept just and proportionate is difficult to achieve in a desert based sentencing framework without using a cumulative

sentencing approach. However, it is important to distinguish between ordinal proportionality — which concerns relativities between single crimes, that is whether rape is more serious than robbery, and overall proportionality in multiple offence sentencing which concerns itself with ensuring that sentences remain within the limits of desert of the offender's culpability. In relation to this point, Tonry suggests that "the aggregate sentence should keep within the range which would otherwise be justified for the most serious offence".[216]For example, in overall proportionality terms, if an offender is sentenced to 24 counts of domestic burglary and 10 counts of shoplifting, the aggregate sentence should not be equivalent to the sentence an offender would receive for aggravated robbery. This is because this would be imputing a higher degree of culpability on the offender than theoretically justifiable, but the sentence should remain within the limits necessary for the punishment of the most serious of the two offences, which is domestic burglary. Frase opts for a general presumption in favour of concurrent sentencing and proposes that if consecutive sentencing is adopted, the severity of the consecutive sentence must not exceed twice the length of the applicable recommended sentence for the most serious current offence.[217]

Concurrent sentencing in a desert framework may be considered problematic because it could result in the imposition of sentences that are too lenient as to render proportionality meaningless. For example, if an offender commits separate counts of violent crimes, but s/he is only intercepted after the third or fourth crime, because there was no intervening conviction between the times s/he committed the first, second and third crime, this does not lessen the offender's culpability. In this case, concurrent sentencing may result in punishment that is unduly lenient to

[216] Tonry, 'Setting Sentencing Policy through Guidelines' (n 190) 95.
[217] Frase, *Just Sentencing* (n 5) 203.

fulfil the objectives of desert. However, if in a single incident or course of conduct, an offender commits a number of separate offences, for instance, s/he grossly negligently, rams into another car leaving five people dead. Although the killing of each person is in law considered a separate and distinct offence; and the harm is aggregately excessively great, the offender's commission of all these offences was as a result of one single act that was completely outside the control of the offender. Accordingly, imposing separate sentences which are ordered to run consecutively, one after the other is more likely to exceed desert limits of a single offence of manslaughter.

Under the RCW, each additional count will be treated as a previous conviction for the other offence in the multiple offences committed in the first scenario. However, in the scenario concerning manslaughter, the additional counts will not be treated as previous convictions because the offence is committed in a single transaction. Nevertheless, in either case, the sentences will be made to run concurrently. Accordingly, the presumption is highly in favour of concurrent sentencing when multiple current offences arise out of a single behaviour incident in which a number of separate offences are committed. When multiple current offences arise out of separate and distinct courses of transactions, the presumption would be highly in favour of consecutive sentencing particularly where the offender's criminal conduct suggests that his/her culpability was higher, although s/he was lucky not to be intercepted by police earlier than his subsequent offences. This proposal certainly creates double standards for single transaction offences and offences committed in separate and distinct transactions. However, sentencing guidelines are not really about providing an objectively defensible scale, but about providing benchmarks on which consistency can be measured and articulated. Accordingly, it is appropriate to articulate that multiple offences committed in a single course of transaction

portray broad similarity in seriousness in terms of culpability. Also that concurrent sentencing limited by the severity of punishment of the most serious offence is appropriate in such cases. Thus, the Uganda guideline could benefit from the articulation of such principles instead of leaving the totality principle loosely broad, which fails to provide a public account of justice in sentencing.

5.8 Conclusion

This chapter set out to explore sentencing guideline models that are constructed on a limiting retributivism justification to assess what lessons Uganda can learn from their experiences. The chapter started with a discussion of the two commonest forms of sentencing guideline frameworks—voluntary and presumptive guidelines with a view of assessing which one of the two would be better implemented in Uganda. Given that the Taskforce opted for a voluntary guideline scheme, the chapter began by analysing some of the conditions that likely explain the successful implementation of voluntary guideline schemes in other jurisdictions. The analysis revealed that legislative force, extra legal requirements, scope of the guidelines, the court structures and judicial tradition are some of the factors that could enable a successful implementation of voluntary guidelines. It was shown that Uganda's court structure and judicial tradition is one of the factors that would render the "marketing" of voluntary guidelines difficult in Uganda. The chapter shows that although voluntary guidelines schemes elsewhere have reported results comparable to presumptive guidelines, a presumptive guideline scheme would be a better approach for Uganda.

The chapter also reviewed the two commonest approaches to defining broadly similar seriousness. It was shown that under the US grid style guideline schemes, broad similarity is

defined by aggregating offences perceived to be of similar seriousness into “like” groups and ranking the offences in ordinal proportional terms. In England and Wales, similarity is defined by generating classes of seriousness within a single offence classification. Given that offences are so broadly defined under Ugandan law, the approach taken in England and Wales was recommended as it enables the varying manifestations of seriousness within an offence to be taken account of. The breadths of sentencing ranges in other jurisdictions were also reviewed. It was revealed that in Minnesota, for example, sentencing ranges are relatively narrow in each grid cell; however, the total breadth of the penalty range within a guideline grid row is so wide as to enable an articulation of meaningful consistency. The sentencing ranges were also seen to overlap within and across guideline grid row ranges. Although the window of discretion within which to impose an appropriate sentence was found to be wide in terms of the full expanse of offence range under the English model, it was argued that the offence ranges for some offences are not too wide. It was noted that sentencers need to provide written explanations for moving a case from one category range to another. With such terms, the English model approach was found to be a viable option for Uganda because it does not contain overlaps across category ranges, and specific sanctions are allocated to each category of seriousness.

As regards aggravating and mitigating factors, it was recommended that the question of real practical importance for the sentencing guideline designers should be whether a given sentencing factor should affect sentence severity on retributive or utilitarian grounds, and, if so, whether the factor should be taken as an aggravating or mitigating factor. If the rationale for invoking these factors is evaluated from the onset, then a uniform approach to their application would more likely be agreed upon. The guideline designers could do one or all three of the following things. One, completely exclude sentencing factors that they consider problematic to the pursuit of

equality under the law. Two, be explicit as to the rationale for invoking factors which are considered problematic to aggravating and mitigating sentence. Three, harmonise the asymmetry of effect of these sentencing factors across all offences to ensure that a factor listed as an aggravating factor does not appear as a mitigating factor. As noted in chapter 4, the Sentencing Council of England and Wales provided a uniform approach to the relevance of intoxication at sentencing. The Overarching principles definitive guideline 2004 decrees that "intoxication by alcohol or drugs should be treated as an aggravating factor". Although using intoxication as a basis for increasing offence seriousness (that is from a desert based approach) may be problematic as discussed in chapter 4, the Sentencing Council's uniform approach to this matter is welcomed. A uniform approach is largely viewed as the best way of ensuring that greater consistency in sentencing is achieved.

Departure standards across different jurisdictions were examined. It was revealed that the degree of upward and downward departure permitted under the English model, depends on the "custodial zone" between the upper end of the range and the statutory maximum (for upward departures) and the width between the bottom range and the and least minimum penalty (for downward departures). It was shown that such breadth enables the court to exercise some discretion in cases which it finds not to fit within the guideline classification.

However, for purposes of generating a common law of sentencing, it was found that upper limits to the degree of departure, as incorporated under the Minnesota scheme would provide a good platform for articulating consistency, even outside the guidelines. It was proposed that custodial zones be left between the outer limits of sentencing ranges and the statutory maximum penalties, to allow for the individualisation of cases which do not fit within the guidelines. Given that

Uganda's statutory maximum penalties are in some cases stretched out to sentences such as death (in capital cases) it was proposed that the degree of departure be kept within limits by providing principles articulating the extent the upward departure can go. As regards, legal departure standards, it was argued that any standard of departure, either permitting a departure only where "compelling and substantial circumstances exist", or "in the interest of justice"', or for "public interest", would suffice, since the scope of application of a departure standard is a matter for court interpretation.

Given the importance of previous convictions in sentencing, and the lack of consensus on a single approach that would enable the incorporation of previous convictions in a desert based framework without causing theoretical and normative problems, the chapter recommended that the use of previous convictions as an aggravating factor which is weighted within boundaries set by proportional desert limits would deliver more meaningful consistency than incorporating culpability scores or adopting the unconvincing theory of progressive loss of mitigation. Concerning sentencing for multiple current offence convictions, the theory of bulk discounting which appears to be incorporated in most sentencing guideline systems was considered, which implies that each individual case is sentenced separately but sentences are made to run concurrently rather than consecutively. In order to try to keep in line with the current laws of Uganda, it was proposed that multiple current convictions are not cumulatively sentenced. Principles enabling the cumulative sentencing for multiple current offending arising out of offences committed in separate and distinct transactions should be devised, whilst those which are committed in a single incident or course of conduct, wherein the offender's culpability is generally the same in all offences, should be considered for bulk discounting.

Chapter Six

Redress to Institutional Incompetence: Considering a Sentencing Council for Uganda

6.0 Introduction

The substantive deficiencies in the first set of the Constitution (Sentencing Guidelines) for Courts of Judicature (Practice Directions) 2013 (hereafter 'Uganda's Guidelines') and the procedural irregularities in their development could be strongly linked to the weakness in the remit of the Uganda Sentencing Guidelines Taskforce (hereafter the 'Taskforce') and its composition. Briefly, the Taskforce's remit came directly from the then Chief Justice and it was to:

> make recommendations to the Chief Justice for the development of sentencing guidelines, provide principles and ranges for sentencing, review guidelines and provide a framework for setting penalties and sentencing ranges, revise penalties, advise on the use of the guidelines, establish a research, monitoring and development program on sentences and their effectiveness, and monitor the implementation of the guidelines.[1]

The membership of the Taskforce is drawn from various stakeholders within the criminal justice system, including the Principal judge (who is chair of the Taskforce), and having representation of a judge of the Supreme Court, Court of Appeal, High Court, Chief Registrar of the Courts of Judicature, Director of Public Prosecutions, Commissioner General Prisons, Inspector General of

[1] BJ Odoki, 'Keynote address at the Launch of the Constitution (Sentencing Guidelines) for Courts of Judicature (Practice) Directions, Legal Notice No 8 of 2013' (Kabira Country Club, Kampala, 10 June 2013).

Police, and a member of the public appointed by the Chief Justice. The Chief Justice can appoint more members to the Taskforce as and when it becomes necessary.[2]

This study forms a preliminary view that the 'powerlessness' and weaknesses in the remit and composition of the Taskforce negatively impacted on the quality (in terms of the capacity of the Taskforce to contribute meaningful sentencing reform to Uganda) of Uganda Guidelines. Accordingly, this chapter calls for the establishment of a Sentencing Council for Uganda, which in the author's view would be an appropriate vehicle for developing, monitoring and implementing meaningful sentencing guidelines that will make a difference to the existing exercise of individualised sentencing and provide a public account of meaningful consistency. The chapter therefore identifies the key structural issues that the Ugandan reformers would have to bear in mind when determining an appropriate institutional structure for the proposed Sentencing Council of Uganda.

Recent and previous literature in the field supports the concept of a sentencing commission/council, citing the major advantages of a well-established sentencing commission as: being able to waver and separate politics from sentencing policy making; invest time, expertise and manpower to develop meaningful sentencing reform; their ability to use their expertise to collect data on sentencing practices and develop guidelines that take account of existing sentencing practices; being positioned to strategise and lobby (where necessary) for the successful implementation of the guidelines and monitor the impact of sentencing guidelines on existing sentencing practices, and so on.[3] Therefore, although it is also recognised that more

[2] Interviews with Andrew Khaukha, Executive Secretary of the Sentencing Guidelines Committee, (ULRC offices, Kampala , 31 January 2014, 12 February 2014 and 13 February 2014).

[3] See, e.g., RS Frase, *Just Sentencing: Principles and Procedures for a Workable System* (Oxford University Press 2013); W Young and A King, 'The Origin and Evolution of Sentencing Guidelines: A Comparison of England and Wales and New Zealand' in A Ashworth and JV Roberts (eds.), *Sentencing Guidelines: Exploring the English*

sentencing commissions have failed than succeeded in promulgating guidelines embodying meaningful sentencing reform,[4] experiences in some jurisdictions suggest that independent sentencing commissions/councils properly constituted (in terms of institutional capacity) have proven value in improving consistency and rationality in sentencing policy.[5]

Experiences in other jurisdictions show that setting up a sentencing commission/council by itself is not enough. Accordingly, this chapter aims among others, at (i) identifying the key structural features which are likely to shape the success of a sentencing commission/council; (ii) examining how these key structural features have been designed in other jurisdictions; (iii) exploring whether political culture shaped the choices made over the shape of those institutional features; and (iv) how these can play out in Uganda. Based on literature in the field and experiences in a few jurisdictions, the chapter makes recommendations to the Ugandan reformer, about the most appropriate institutional structure for a Sentencing Council for Uganda.

The three key structural features identified are — (1) structural independence, (2) the interplay between a sentencing commission and other branches of government and (3) the institutional composition of sentencing commissions/councils. These in my view shape the success of any sentencing institution, as shall be shown in the discussion to follow.

This chapter serves two main purposes. First, is to highlight the justifications for establishing a Sentencing Council for Uganda, and secondly, to suggest key questions that Ugandan reformers

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Model (Oxford University Press 2013) 202; M Tonry, 'Setting Sentencing Policy through Guidelines' in S Rex and M Tonry (eds.), *Reform and Punishment: The Future of Sentencing* (Willan Publishing 2002) 75; A Von Hirsch, 'The Sentencing Commission's Functions' in A Von Hirsch, KA Knapp and M Tonry (eds.), *The Sentencing Commission and its Guidelines* (North-eastern University Press 1987) 23; and M Tonry, 'Sentencing Guidelines and Sentencing Commissions: The Second Generation' in K Pease and M Wasik (eds.), *Sentencing Reform: Guidance or Guidelines* (Manchester University Press 1987) 3.

[4] For example, out of the twenty three (23) sentencing commissions in the United States (including the sentencing commissions of the District of Columbia and the United States Sentencing Commission), only a handful of sentencing commissions are recognised as having achieved their sentencing objectives.

[5] See, e.g., the Minnesota and Washington Sentencing Guidelines Commissions.

will need to address in determining an appropriate institutional structure for the Ugandan Sentencing Council. In order to make practicable and meaningful recommendations, this chapter examines literature in the field as well as institutional arrangements of sentencing commissions/councils in other jurisdictions with a view of assessing any implications for Uganda. Making note of the likely influence political culture may have on shaping institutional arrangements of sentencing commissions/councils, the chapter attempts to show that whilst political culture may shape some of the institutional structural choices, some choices need to be made based on normatively acceptable principles imperative for developing meaningful sentencing policy. Thus, before proceeding, it is necessary to establish a definition and assumptions on what political culture means in this chapter.

The concept of political culture is used in this chapter to mean attitudes, beliefs, assumptions or rules which govern behaviour of political leaders and citizenry in a political system.[6] In the context of the discussions in this chapter, political cultures are characterised into: —moralistic and individualistic political cultures, using the classifications adopted by Elazar in his formulation of political cultures in America.[7] Briefly stated, Elazar characterised a moralistic political culture as one within which citizens tend to view government as a means to achieve a good community through positive political action. Elazar identified the key characteristics in this culture as being 'the encouragement of citizen and interest group participation in government policymaking'.[8] According to Elazar, Gray and Spano, Minnesota is the epitome of a moralistic

[6] This definition is close to the definition of political culture provided in the International Encyclopedia of the Social Sciences.
[7] D Elazar, V Gray and W Spano, *Minnesota Politics and Government* (University of Nebraska Press 1999).
[8] D Elazar, 'Minnesota: The Epitome of Moralistic Political Culture' (Jerusalem Center for Public Affairs, Daniel Elazar Papers Index pp. 1-12).

political culture.[9]On the other hand, the individualistic political culture is characterised as one where politics is generally regarded as a business of professionals. The key characteristic in an individualistic political culture is that politics and policymaking is viewed as a job of professionals which translates into limited citizen participation in political decision making. Professor Elazar categorised Pennsylvania as having an individualistic political culture.[10]

Elazar's formulations of American political cultures have received recognition from commentators, particularly those writing about the politics of American sentencing reform.[11]The most recent citation of Elazar's work in Vanessa Barker's book demonstrates the continued relevance of Elazar's political culture formulations. This chapter does not aim at proving or disproving Elazar's classification of Minnesota, Pennsylvania or any other American states political cultures (which is outside the scope of this study). However, basing on the assumption that Elazar's classifications continue to relevantly define the political subcultures of some of the American states studied in this chapter, the chapter attempts to make a link between how political cultures are likely to stand out as influences in shaping the institutional design of a sentencing commission/council.

Elazar's political culture formulations are therefore deemed relevant to this chapter particularly with respect to the determination of citizen and public interest representation on a sentencing commission, which in this chapter is considered to be a key factor in the formulation of sentencing policy. Relying on Elazar's classifications, two major hypotheses are developed.

[9]See Elazar, Gray and Spano (n 7) 19. See also, SE Martin, 'Interest and Politics in Sentencing Reform:cThe Development of Sentencing Guidelines in Minnesota and Pennsylvania' (1983) 29 Villanova Law Review 21. The author recognised Elazar's political culture formulations. Other commentators have also directly or passively acknowledged Elazar's political formulations. For example, see, V Barker, *The Politics of Imprisonment: How the Democratic Process Shapes the Way America Punishes Offenders* (Oxford University Press 2009); JC Green, JM Rozell and C Wilcox (eds,)., *The Christian Right in American Politics: Marching to the Millennium* (Georgetown University press 2001). Also, Tonry, 'Sentencing Guidelines and Sentencing Commissions' (n 3).
[10] ibid.
[11] ibid.

First, that a higher level of citizen and interest groups involvement in the institutional composition of a sentencing commission/council is closely associated with a moralistic political culture whilst low levels or complete exclusion of citizen and public interest groups involvement in key policy decision making is characteristic of an individualistic political culture. Secondly, maximum political independence of a sentencing commission will be associated with moralistic political culture while higher levels of political control will be associated with individualistic culture.

The chapter is divided into four sections. Section 6.1 discusses the significance of establishing a Sentencing Council for Uganda. Section 6.2 explores the kind of structural independence that would be appropriate for a Sentencing Council for Uganda, in view of experiences from some other countries. Section 6.3 discusses the different kinds of relationship between sentencing councils and other political constituencies, and how a Sentencing Council for Uganda is likely to relate with other political constituencies. Section 6.4 discusses the skills and qualities of an ideal membership of a sentencing council.

6.1 Why a Sentencing Council for Uganda?

Proposing the establishment of a Sentencing Council for Uganda, at a time when it is apparent that a set of guidelines have been formulated by a small manned Taskforce,[12] under the direction of one person within a single branch of government without any interference from other branches of government or interest groups may sound conjectural to a sceptic. It may sound academic because one will wonder why a sentencing council is necessary considering that the process of

[12]The Taskforce is referred to as 'small manned' because it came to my notice that the guidelines were actually developed by not more than three members of the Taskforce.

developing guidelines has thus far been handled by a much smaller body (with ease) and no political stress. Some of the questions that could be asked are: what makes a sentencing council a more appropriate vehicle than a Taskforce, if a Taskforce has already been set up? If the Taskforce has failed to craft meaningful sentencing guidelines, why can't the Judiciary develop its own sentencing guidelines? If the judiciary is indisposed, isn't there an existing administrative agency such as the Uganda Law Reform Commission ('hereafter the ULRC') that can do the job? One or a combination of all three questions results in answers that will either support or discourage the establishment of a Sentencing Council for Uganda.

It is repeated that legislative input in sentencing policymaking in Uganda is confined to provision of maximum penalties (intended to be imposed on the worst class of cases in an offence type). The statutory maximum penalties prescribed by the legislature are negligible and less specific towards providing any meaningful guidance for sentencers. For example, the statutory maximums do not provide guidance regarding who goes to prison and for what duration of time. Neither does it offer meaningful guidance as to the kind of behavioural conduct which would suggest the imposition of non-custodial sentences instead of custodial ones. Experience in other jurisdictions teaches that such questions can be answered through extensive effort and deliberations of a well-equipped independent sentencing commission, and given that the legislature has to perform many other legislative functions, it is less likely that they will be able to invest the time and manpower required for the formulation of meaningful sentencing guidelines. Accordingly, with a sentencing council, the legislature can take advantage of the time and expertise of an independent institution, while still maintaining control over the process of developing sentencing policy for Uganda.

Given that the legislature in Uganda is sometimes swayed by shifts in public/presidential opinion to develop criminal laws (which although not necessarily sentencing issues) it is advisable that the development of sentencing policy is freed from such potential electoral politics. For example the recent promulgation of the Anti-Homosexuality Act, 2014 is a good example of how public whims can influence the creation of criminal laws in Uganda. Also, the Penal Code (Amendment) Act, 2007 making, an offender's HIV status an aggravating factor in defilement cases resulted from the demand by local civil society organisations for a law to severely punish men with HIV who engaged in sexual violence against children. As Hutton notes, relief from such electoral politics can be provided by the establishment of a sentencing institution.[13]

In the context of this study, one can say that, since the judiciary (which clearly has judicial ownership over sentencing in Uganda) has opted to constitute a Taskforce, rather than seek for the establishment of a fully-fledged independent sentencing council, then there is probably no need for a Sentencing Council for Uganda.

6.1.1 The Taskforce

To this, the author answers that, from the outset, the Taskforce realised the importance of establishing a Sentencing Council for Uganda.[14]The Chief Justice also mentioned at the ceremony inaugurating the Uganda Guidelines that the Taskforce was simply a temporary body, and appealed to the Sentencing Guidelines Committee (which is the new name given to the

[13]N Hutton, 'Institutional Mechanisms for Incorporating the Public in the Development of Sentencing Policy' in A Frieberg and K Gelb (eds.), *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press 2008) 210.

[14]According to the Secretary of the Taskforce, the Taskforce drafted a Sentencing Reform Bill proposing the establishment of a Sentencing Council for Uganda. However, the aforesaid 'bill' has not been tabled before Parliament for consideration, neither has it been presented to the Minister of Justice and Constitutional Affairs for his secondment to Parliament. The Taskforce plans to give it to the Minister sometime in future.

Taskforce) to 'fast track the quick passage of the Sentencing Reform Bill into Law as a long term solution for the reform of sentencing in Uganda'.[15] The proposed Sentencing Reform Bill[16] in its draft form has its own shortcomings. However, its existence is evident of the realisation by the sentencing reformers that the function of developing long term meaningful sentencing guidelines, is a function which can only be effectively executed by a sentencing council, and not a powerless and inadequately resourced Taskforce.

The previous chapter demonstrated that developing sentencing guidelines is not an easy task. Experience from other jurisdictions suggests that the formulation of meaningful guidelines can take no less than a year,[17]because of the intensity of the work involved and the procedural processes which the sentencing commissions/councils normatively ought to follow in developing meaningful sentencing guidelines such as public hearings and consultations with key stakeholders in the criminal justice system. Based on literature and experiences in other jurisdictions using commission based sentencing guidelines, there seems to be general consensus that developing meaningful sentencing guidelines requires time, technical and professional expertise and experts in criminal justice issues, data collection and extensive research on past sentencing, frequent meetings, public hearings and consultations, judicial and other stake holder trainings, research and practical projections on the impact of sentencing guidelines on sentencing practices, implementation, monitoring, to mention just a few important ones.

[15]Odoki, 'Keynote Address' (n 1) 7.
[16] See Appendix C for a copy of the draft Sentencing Reform Bill.
[17] Conference Summary, 'Sentencing Guidelines Commissions: How Does a Commission Function and Would such a Commission work in California?' (21 March 1983) 19. Dona Schram, the first Chair of the Washington Sentencing Guidelines Commission, said that it took the Commission approximately one year to establish offence seriousness rankings. In respect to Minnesota Sentencing Guidelines Commission, the Commission reports that it took them four months to develop its offense severity reference table. See, Minnesota Sentencing Guidelines Commission, 'Summary Report on the Development and Implementation of Minnesota's Sentencing Guidelines' (30 January 1982) 7-9 obtained from the Minnesota Commission (11 April 2014).

Accordingly, the remit of developing sentencing guidelines requires a legally constituted, democratically accountable, permanent sentencing body composed of members from a broad range of interest groups, with relevant professional experience in criminal justice matters. In view of the normative errors in the procedural processes followed in developing the 'inaugural' Uganda Guidelines; and the conceptual flaws in the Uganda Guidelines; the preliminary view is that the inadequacies in the institutional' set up of the Taskforce inhibits it from formulating meaningful sentencing guidelines. It is argued that the success of a sentencing guideline system is contingent on the sentencing body that formulates the sentencing guidelines. For example, if the body does not attract credibility in the eyes of the judges, public or other branches of government, it is less likely that that institution will succeed in performing its functions.

Therefore, even though, the Taskforce was constituted by the most senior judge in Uganda, a fact which is more likely to increase the credibility of the Taskforce before the judges, its lack of legal authority within Uganda's criminal justice system is likely to affect its credibility before other political constituencies. Also notable is that, the sentencing guideline reform movement in Uganda is one which is more of a one-man initiative —the Chief Justice, whose quest for developing sentencing guidelines for Uganda has been described as a personal dream. It is therefore more likely that, the successes of the sentencing guideline system of the kind currently set up in Uganda will not stand the test of time, if say, Chief Justice Benjamin Odoki retires.[18] Therefore, leaving a powerless and inadequately resourced Taskforce with the social function of

[18]Hon Justice Benjamin Odoki is currently retired de jure, having reached his mandatory retirement age of 70 years on 23 June 2013. However, ignoring the recommendation given by the Judicial Service Commission regarding the appointment of a new Chief Justice, President Museveni of Uganda reappointed Hon Justice Benjamin Odoki as Chief Justice. On 4 August 2014 the Constitutional Court held that the re-appointment of Hon. Justice Benjamin Odoki as the Hon. Chief Justice after he clocked the retirement age of 70 was unconstitutional. In a majority judgment of 4-1, the court observed that there is no single provision in the 1995 Constitution that provides for the re-appointment of a retired Chief Justice to the same position. See *Hon. Gerald Kafureeka Karuhanga v Attorney General*, Constitutional Petition No 39 of 2013 (4 August 2014).

developing sentencing guidelines in Uganda renders the pursuit for meaningful sentencing reform almost meaningless because a new Chief Justice of Uganda is soon to be appointed, and it is difficult to determine whether s/he will have the same enthusiasm and good will for sentencing guidelines as Justice Benjamin Odoki.

The Scottish sentencing information system offers good lessons. Tata seems to suggest that the retirement of Lord Ross and Lord Hope's appointment to the House of Lords (who were the two most senior judges who took the initiative for an SIS) may have led to the 'withering away' of the Scottish sentencing information system[19] because perhaps the remaining judges were not as enthusiastic about an SIS as its initial supporters. Thus, since developing sentencing guidelines is a long term process that does not end at formulating guidelines but requires the execution of further functions such as implementation and monitoring, designing useful sentencing policy through guidelines will require a legally established sentencing council that is equipped with the relevant expertise to developing a rational sentencing policy.

6.1.2 The Judiciary

Given that the initiative towards formulating sentencing guidelines in Uganda was steered by the judiciary, and sentencing is also generally perceived as a function of the judiciary, it would be understandable for one to assert that the limitations of the legislature or the Taskforce in developing meaningful sentencing policy can be overcome, if the judiciary is empowered to develop Uganda's sentencing guidelines. This assertion would be problematic based on the following premises. First, sentencing guidelines developed by the judiciary will more likely be as

[19]C Tata, 'The Struggle for Sentencing Reform: Will the English Sentencing Guidelines Model Spread?' in A Ashworth and J V Roberts (eds.), *Sentencing Guidelines: Exploring the English Model* (Oxford University Press 2013) 247.

meaningless as the sentencing guidelines which the judicially dominated Taskforce has developed. That is, it will not be surprising if sentencing ranges are left so broad to permit reasonable flexibility in determining sentence outcomes, which could be as a result of direct or indirect sensitivities to the exercise of judicial discretion. Also, the sentencing guidelines will most likely be developed from a single judicial perspective, without due consideration of other perspectives such as the need to coordinate sentencing policy with available correctional resources.

To begin with the most obvious, the very broad sentencing ranges, which have been prescribed in Uganda's inaugural guidelines, suggest that rather than improving sentencing policy and practices, judicially dominated sentencing guidelines will more likely lean over maintaining judicial sentencing discretion. As Tonry rightly observed, judicially developed sentencing guidelines are unlikely to produce guidelines of 'sufficient ambition' to effect major changes to sentencing practices.[20] A critique of Uganda's sentencing guidelines in chapter 4 revealed that perhaps; the Taskforce's only contribution to sentencing policy was its development of starting points, which were also found to be excessively high in terms of proportionality. Ultimately, the objective of improving consistency and proportionality in sentencing requires sufficient ambition in changing existing sentencing practices. Looking at the set of guidelines that have been developed within the judiciary's direct control, it is doubtful that the judiciary will be able to develop meaningful guidelines. There is no excuse for the judges' inauguration of sentencing guidelines, which prescribe very broad sentencing ranges that will permit substantial disparities to occur even within the guidelines.

[20]Tonry, 'Setting Sentencing Policy through Guidelines' (n 3) 80.

Additionally, Ashworth notes that a judicial body cannot be trusted with the social function of creating sentencing guidelines because engaging them with such responsibility creates a democratic deficit.[21]Democratic deficit occurs when unelected officials formulate policy without any degree of democratic accountability. Accordingly, considering that judges in Uganda are unelected officials who are not democratically accountable to the public, they lack democratic credibility necessary for performing the social function of developing sentencing guidelines. Accordingly, formulating sentencing guidelines through a democratically accountable sentencing council is the only way Ugandan reformers will be able to ameliorate this democratic deficit. Although sentencing commission/council membership usually comprises of unelected members, the fact that sentencing guidelines can be subjected to legislative veto, approval or overview rectifies the democratic deficit. Experiences from other jurisdictions suggest that 'democratic deficit' can be rectified in a sentencing commission model in a number of ways. First, through subjecting commission based sentencing guidelines to legislative approval before their promulgation.[22]Secondly, through incorporating legislators or other elected local county or district officials in the institutional composition of the sentencing commission/council.[23] Thirdly, the procedural processes for developing the guidelines could require an open process that mandates consultations with specified political constituencies.[24]

Judges are not the only actors in sentencing matters in Uganda. Therefore, permitting other key political interest groups to participate in the development of sentencing policy is important, not

[21] A Ashworth, *Sentencing and Criminal Justice* (4th edn Cambridge University Press 2005) 57.
[22]See the later discussion on rule making authority in section 6.2 of this chapter.
[23]See the later discussion on the institutional composition of the Sentencing Commissions of Washington State and North Carolina in section 6.3 of this chapter.
[24] The Coroners and Justice Act 2009 (COJA 2009) s 120(7). In England and Wales, the Sentencing Council issues draft guidelines and public and political consultations are conducted before the guidelines are issued as definitive; see, also The Minnesota Commission website at <http://mn.gov/sentencing-guidelines/meetings/which displays public> notices for Commission meetings further confirming the open process nature of formulation of sentencing guidelines in Minnesota.

only for a broader representation of a number of stakeholders within the criminal justice system, but because representation from different interest groups broadens the scope of sentencing policy, making it more compatible with a broad range of major criminal justice demands. Suffice to say that empowering the judiciary to develop detailed sentencing guidelines which embody broad perspectives of sentencing policy is likely to be difficult for judges.

6.1.3 Existing Administrative Agency

Similarly, developing sentencing guidelines through an existing governmental agency is likely to be problematic. To start with, at the executive level the existing agency that readily comes to mind as having a mandate that would be most closely related to sentencing policymaking is the ULRC.[25]However, this institution was established to perform a specific remit of 'studying and constantly reviewing all laws of Uganda with a view of making recommendations for their systematic improvement and amendment'[26]This mandate clearly does not envisage the development of sentencing policy of the kind offered by sentencing guidelines. That notwithstanding, the institutional structure of the ULRC does not envisage democratic accountability of its members to the public. First of all, the commission members are solely appointed by the president[27] with approval of the Attorney General.

[25]The Uganda Law Reform Commission (ULRC) was established by the 1995 Constitution of Uganda, article 248(1).
[26] The Uganda Law Reform Commission Act chapter 25 (Laws of Uganda), ss. 10 & 11(c) permit the ULRC to make recommendations to the Attorney General for the review or reform of Acts or any other laws comprising the laws of Uganda. Upon approval of the recommendations by the Attorney General, the ULRC may formulate drafts in form of bills for consideration by the Government and the parliament.
[26] ibid, s 5(9).
[27] ibid, s 3 gives the president of Uganda powers to appoint ULRC members on the advice of the Attorney General (who is a Minister of Justice and Constitutional Affairs and is appointed by the president).

Although the ULRC has played a major role in the quest towards developing sentencing guidelines in Uganda,[28] which is evident by their active involvement through the Executive Secretary of the Taskforce who is an employee of the ULRC, the ULRC membership composition is not representative of a broader base of expertise and representation from a wide range of stakeholders required for development of sentencing policy.[29] It may, therefore, be difficult to use such an agency to garner judicial support, and legislative approval particularly if there is no satisfaction that different interest groups have partaken in the guideline formulation. Frase posits that an institutional design that includes representation from major constituencies is one of the reasons accounting for the legislature's easy approval of the Minnesota 'inaugural' sentencing guidelines.[30]Although other factors other than interest groups representation also account for the success of sentencing commissions, the importance of engaging interest group participation is undisputable.

In light of the foregoing, only an agency established for the sole purpose of developing and promulgating sentencing guidelines, with a membership legislatively structured to meet particular specifications such as experience and expertise in different areas of sentencing and criminal justice, would be able to develop sentencing guidelines that will achieve the primary sentencing objectives of consistency and transparency in sentencing. For past decades, the permanent sentencing institution has gained wide acceptance and legitimacy, with commentators

[28] Chapter 3 of this study provides a detailed role of the ULRC towards sentencing guideline reform in Uganda.
[29] Uganda Law Reform Commission Act chapter 25, s 3 states that 'the ULRC is composed of a chairperson and six commissioners, four of whom must be qualified as a retired judge, or a judge or a practicing lawyer, or senior teachers of law at the University, and the other two must be persons who are not lawyers or judges but have experience relevant to the functions of the commission'.
[30] RS Frase, 'State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues' (2005) 105 Columbia Law Review 1190.

now categorically arguing that only guidelines implemented and monitored by an independent sentencing commission have proven value in achieving important sentencing policy objectives.[31]

6.2 What Kind of Structural Independence

By structural independence the author means the degree of power which a sentencing commission/council is given by the legislature over developing sentencing guidelines. Structural independence is considered a key feature since the degree of structural independence given to a sentencing commission/council greatly shapes the extent to which the sentencing commission/council is held democratically accountable for its sentencing guidelines. Experiences from some domestic jurisdictions suggest that substantial variations exist in the degree of power over developing sentencing guidelines granted to sentencing commissions/councils by different legislatures. Whether the degree of power depends on the political cultures of a jurisdiction is arguable, but first, the author considers the notable forms of structural independence in four jurisdictions and explore how each form of structural independence shapes democratic accountability of sentencing commissions/councils.

Four typical examples come to mind. First, is the form of structural independence that the Minnesota Sentencing Guidelines Commission (hereafter 'the Minnesota Commission') has over developing sentencing guidelines. The Minnesota Commission has authority to promulgate guidelines, which become effective unless the legislature takes action to reject them. Second, is

[31] Frase, *Just Sentencing* (n 3) 17. See also, K Reitz, 'Comparing Sentencing Guidelines: Do US Systems Have Anything Worthwhile to offer England and Wales?' in A Ashworth and JV Roberts (eds.), *Sentencing Guidelines: Exploring the English Model* (Oxford University Press 2013) 201; Young and King (n 3) 205; Tonry, 'Setting Sentencing Policy through Guidelines' (n 3) 85; A Von Hirsch, 'The Enabling Legislation', in A Von Hirsch, KA Knapp and M Tonry (eds.), *The Sentencing Commission and its Guidelines* (North-eastern University Press 1987) 63.

the structural independence of the Washington State Caseload Forecast Council[32] (hereafter 'the Washington Commission') which has authority to make recommendations to the legislature in form of sentencing guidelines, and the legislature has the final authority to pass the sentencing recommendations into law. Third, is the structural independence of the Sentencing Council of England and Wales which has authority to promulgate sentencing guidelines that are not subjected to any legislative overview. Lastly, the Scottish Sentencing Council (here after 'the Scottish Council') which has the authority to promulgate sentencing guidelines that are subject to the approval of the High Court of Justiciary.

6.2.1 Minnesota Commission's rule making authority

The Minnesota Commission offers a good example of a commission with some degree of rulemaking authority. The Minnesota Commission has legal authority to promulgate sentencing guidelines for the district courts,[33]although before the sentencing guidelines can become effective, they must be submitted to the legislature for legislative review, and not approval. It is considered to be legislative review since the sentencing guidelines take effect after seven months if the legislature does not take action on them, and not if the legislature approves them. That is, the Minnesota Commission submits the proposed guidelines on 15thJanuary of every year, subsequent to which the legislature has up to 1st August of the same year to take action on them, failure of which, the guidelines become effective on 1st August^{t}.[34] In other words, the Minnesota Commission has structural independence over developing its sentencing guidelines only to the

[32] The Sentencing Reform Act 1981 (SRA Washington 1981) established the Washington State Sentencing Guidelines Commission. However, with effect from 1 July 2011, this Commission was eliminated as an independent agency and became the Washington Case Forecast Council. The Washington Commission now operates under the Office of Financial Management in the State's Executive branch.
[33] Minnesota Statutes (2013), s 244.09 (5).
[34] ibid, s 244 .09 (12).

extent that the legislature does not take action on the guidelines. The Minnesota Commission does not therefore enjoy independence in the strict sense. The historical events during the existence of the Commission also attest to this fact. The Minnesota legislature has a tendency of taking an active role in setting sentencing policy through enacting punitive penalties and directing the Minnesota Commission to make specific changes to the guidelines.

For instance, it is suggested that in the late 1980s Minnesota saw increases in the rates of violent crimes, particularly sex crimes.[35] This forced the Minnesota legislature to consider the enactment of a number of 'get tough' legislations. One of those enacted was the 1989 Omnibus Crime Bill. This bill set mandatory minimum terms for recidivist murderers and sex offenders and increased the statutory maximum for other violent crimes and sex crimes.[36] Subsequently, the Minnesota Commission was forced to make specific changes to the guidelines by increasing the sentencing ranges for those offences.[37] The author reviewed the Minnesota Standard grids for the period 1980 to 1990 and found that there were in fact significant changes effected in the sentencing ranges. That is, from 1980 all through to 1988 (with the exception of 2nd degree murder whose sentencing ranges slightly changed in 1983, and 1987), the sentencing ranges for other violent crimes like aggravated robbery and criminal sexual assault remained the same throughout that period. For example, in the case of aggravated robbery, the guideline grid row range in terms of fixed presumptive terms was 24 —97 months and the range for 1st degree criminal sexual assault was 43—132 months.[38] However, in 1989, sentencing ranges for murder, aggravated robbery and criminal sexual assault almost doubled. For instance, the guideline grid row range for 1st degree

[35] See, for example, RS Frase, 'The Role of the Legislature, the Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines' (1993) 28 Wake Forest Law Review 345; RS Frase, 'Sentencing Guidelines in Minnesota, 1978-2003' (2005) 32 Crime & Justice 131; RE Barkow, 'Administering Crime' (2005) 52 University of California Los Angeles Law Review 715, 774.
[36] Frase, 'The Role of the Legislature' (n 35) 360.
[37] ibid.
[38] See website of Minnesota Sentencing Guidelines Commission < http://mn.gov/sentencing-guidelines/>.

sexual assault became 86—158 months, and murder became 306—406 months, a significant difference from the previous sentencing range of 216—336 months in 1987. This leads Barkow to note that perhaps sentencing commissions cannot be expected to have absolute dominance over sentencing.[39]

However, when compared to other state sentencing commissions, it offers an example of a sentencing institution that was created with a relatively modest degree of political independence.[40] Minnesota Commission's political independence is mainly demonstrated by its exemption from the applicability of the Minnesota Administrative Procedure Act[41] whose primary purpose is to provide oversight of powers and duties delegated to administrative agencies. The above notwithstanding, the legislative review of Minnesota Commission's guidelines places a certain degree of responsibility on the Minnesota legislature. This provides a kind of democratic accountability onto the formulation of the guidelines. Strictly speaking, since all the members of the Minnesota Commission are unelected, subjecting their guidelines to a seven months legislative review allows the legislature to exert authority if it does not like the proposed guidelines. Also, perhaps the check facilitates promoting rational sentencing policy.

The decision to delegate the promulgation of sentencing guidelines to the Minnesota Commission, subject only to a passive legislative review can be explained by a number of factors, including the political culture and context within which the Minnesota Commission was established. First, commentators like Barkow suggest that the high levels of politicisation of

[39] Barkow (n 35) 774.
[40] ibid 772.
[41] The Minnesota Administrative Procedure Act chapter 14 (APA ch. 14) s 14. 03 states that: 'sections 14.001 to 14.69 of the Minnesota Administrative Procedure Act do not apply to the promulgation of sentencing rules. Briefly, the rules require an administrative agency with rule making authority to adhere to procedures such as: 'having a rule first submitted to a chief administrative law judge for approval, or having their rules subjected to judicial review and so on.

crime and sentencing at a time when prison populations were overflowing gave legislators the impetus to establish politically insulated sentencing commissions.[42] This enabled the formulation of rational sentencing policy without the inclusion of electoral politics in this process.[43] According to Garland[44] increases in violent crime and the public's response in search of order, made crime a key political issue in the United States (at least in the 1970s). Thus, by 1973, when Marvin Frankel proposed the establishment of an independent sentencing commission, the reformers knew that the best way was to establish a sentencing commission that was insulated from populist politics. Frase recounts that this was one of Minnesota legislature's goal — 'to make sentencing policy more coordinated and less subject to short term political pressure'.[45]

Supposing one wished to relate one of Elazar's political culture characterisations to the Minnesota legislature's decision to delegate rule making authority to the Minnesota Commission, this approach would comfortably fall within Elazar's moralistic political culture categorisation. Commentators such as Frase[46] note that the decision by the legislature was facilitated by the political culture of Minnesota (up to that time at least) which encourages direct citizen participation in government decision making and involves interest groups in policy making.[47] Thus, the legislature wanted to exclude itself from this social function of formulating sentencing policy and delegate it to the citizens, which Martin suggests is consistent with Minnesota's moralistic political culture. To prove this tradition, the author reviewed the Minnesota

[42] Barkow (n 35) 747.
[43] For discussions on how sentencing policy making is detached from electoral politics as a result of establishing sentencing commissions, see M Tonry, 'The Politics and Processes of Sentencing Commissions.' (1991) 37 Crime & Delinquency 307.
[44] D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2001) 1-26.
[45] Frase, 'The Role of the Legislature' (n 35) 334.
[46] Martin (n 9) 28, 29. Also, RS Frase, 'Minnesota Sentencing Guidelines', in A Frieberg and K Gelb (eds.), *Penal Populism, Sentencing Councils and Sentencing Policies* (Willan Publishing 2008) 85-9.
[47] ibid.

Commission meeting records, for the period running from 12 June 2012 to 20 March 2014. It was discovered that in all these meetings, general members of the public other than Minnesota Commission members attended some of the meetings. Notably, on 15 October 2013 the Minnesota Commission invited more than fifty members from the general public to participant in its deliberations.[48] This revelation suggested that there is still a culture of citizens and interest groups participation in formulation of sentencing policy in Minnesota.

The open meeting legislation is another example of this initiative.[49]Open meetings facilitate direct participation of the citizenry in developing public policy. Consequently, the Minnesota Commission has adopted an open process approach to developing its guidelines. That is, public meetings and consultations are held before modifications are made to the guidelines.[50]With such deliberative decision making processes, passive legislative approval of the guidelines could pass as the extensive public consultations and involvement in the development of the sentencing guidelines ensures that there are opportunities for members of the public to express their views.

Nevertheless, assuming that the culture of enabling citizen participation in policymaking decisions shaped the degree of rulemaking authority the legislature gave to the Commission, the Minnesota Commission does not have absolute powers over developing its guidelines. Other factors such as democratic accountability perhaps shaped the legislature's decision. Even in a political culture where citizen participation is not necessarily incorporated in public policymaking, an ideal structure for responsible policy development requires the provision of a

[48] See Minnesota Commission Approved Round Table Meeting Minutes (15 October 2013) <http://mn.gov/sentencing-guidelines/images/ApprovedMSGCOctoberRoundTableMinutes2013.pdf>(accessed 15 January 2014).

[49]Minnesota Statutes 2013, chapter 13D.O1 provides that 'all meetings of the executive branch and local governments must be open to the public'.

[50] See, e.g., General Commission Meeting Information < http://mn.gov/sentencing-guidelines/meetings/meetinginfo/>.

degree of oversight of powers exercised by unelected members of a sentencing citizenry. This is necessary for the rectification of democratic deficit and it is what the Minnesota legislature did. The Legislature set boundaries within which the Commission operates and oversees its work.

6.2.2 Washington Commission's Advisory Role

The Washington Commission is an example of a sentencing commission whose role is to simply make recommendations to the legislature, and it is only when the legislature approves the recommendations, that they become effective as sentencing guidelines. Washington's Commission was established by the Washington State Sentencing Reform Act (RCW) of 1981. The Commission was established to make recommendations to the governor and the legislature on issues relating to juvenile and adult sentencing.[51]Therefore, unlike its Minnesota counterpart which has a relatively high degree of political insulation and rulemaking authority, the Washington Commission is under the direct control of the legislature.[52]Except that the Washington Commission can revise and adopt sentencing guidelines without the approval of the legislature, pursuant to a gubernatorial declaration of a prison capacity emergency.[53] Otherwise, the Washington Commission's recommendations only become law if approved and passed as such by the legislature.[54] The development of Washington State' sentencing policy legislation is therefore controlled by the legislature.

Washington State' experience with sentencing guidelines provides an example of an intrusive legislature and a sentencing commission that almost has no structural independence. Boerner

[51] (SRA Washington 1981), as amended by the Revised Code of Washington (RCW) Title 9, Chapter 9.94A, s. 9.94A.860 (1) (2011).
[52] K Stith, 'Principles, Pragmatism, and Politics: The Evolution of Washington State' Sentencing Guidelines' (2013) 76 Law and Contemporary Problems 105.
[53] RCW, s. 9.94A.875 (1) & (2).
[54] RCW, s. 9.94A.865.

asserts that in Washington State structured sentencing reform has predominantly been accomplished by legislative intervention.[55] In fact, Boerner characterises Washington's Commission as 'an agent of the Washington legislature, and not as an independent agency both in structure and practice'.[56] On the other hand, Barkow asserts that the Washington Commission is "simply an advisor to the legislature".[57] A number of other commentators have called it a 'purely' advisory entity[58] with Stith recently suggesting that the Washington legislature simply wanted to have 'a team of experts developing the State' sentencing policy, whilst it retained the final authority on shaping of the guidelines'.[59] This leaves substantial control over sentencing policy development to the legislature which is a legitimate way of ensuring democratic accountability in sentencing policymaking.

Garland has argued that in the 1970s, prior to sentencing guideline reform in the US, crime and sentencing were highly politicised. This motivated legislatures to establish permanent independent sentencing commissions so as to at least partially detach sentencing policymaking from politics. Therefore, it is somewhat surprising that the said politicisation of crime and sentencing did not shape the choices over the structural independence of Washington as it did in Minnesota. Senator Dick Hemstad, the author of the Washington Commission legislation and one of the first nonvoting members of the Commission said that the purpose of having the legislature approve the guidelines developed by the Washington Commission was to 'provide

[55]D Boerner, 'The Role of the Legislature in Guidelines Sentencing in the "Other Washington"' (1993) 28 Wake Forest Law Review 381.
[56] ibid 381-2.
[57] Barkow (n 35) 59.
[58]D Boerner and R Lieb, 'Sentencing Reform in the other Washington' (2001) 28 Crime and Justice 71.
[59] Stith (n 52) 110.

authenticity to the work of the Commission, and provide reassurance to the legislators and place some degree of responsibility on the legislature'.[60]

Others have explained that at the time the Washington Commission was established, the state prison system was overcrowded.[61] Indeed one of the explicit goals of the Washington legislature was to 'become better informed about its incarceration resources and expenditures'.[62]Boerner and Lieb suggest that the legislature wanted to retain substantial control over matters regarding the capacity of the state's correctional capacity vis-à-vis increasing prison populations because this issue impacts on capital and operating expenses.[63] The legislature found it imperative to have the final say about sentencing guidelines which they were aware would contribute substantially to managing the overcrowded prison estate. Indeed, the Washington Commission is required to make biennial reports to the legislature on the capacity of state and local prisons. Therefore, the aspiration to rectify the prison crisis in Washington appears to have been one of those pertinent issues for the Washington legislature.

Other than correctional capacity concerns, the choices made over the status of the Washington Commission perhaps can be explained by the political culture of Washington. According to Barker, political authority in Minnesota is highly democratised, in that authority is shared across all political branches, and ordinary people have a relatively high degree of access to decision making.[64] Professor Elazar's political culture theory would place Washington under a mix of individualistic and moralistic political culture. Barker notes that policy making processes in

[60] Senator Dick Hemstad made these remarks at a conference organised by the California Senate Office of Research on 21 March 1983. The conference was organised to try and seek views from the commission members and directors of sentencing commissions of Washington and Minnesota in respect to how sentencing commissions function and whether such a commission would work in California. See, Conference Summary (n 17) 12 <http://www.njcrs.gov/pdffiles1/Digitication/113593NCJRS.pdf> (accessed 18 January 2014).
[61] See Barkow (n 35) 61.
[62] RCW, s. 9.94A.040.
[63] Boerner and Lieb (n 58) 388.
[64] Barker (n 9) 89-96.

Washington always incorporate the governor, the state legislature, criminal justice professions as well as citizen councils, citizen representatives and so on.[65] Indeed, the citizens of the state of Washington can change sentencing policy using a ballot initiative.[66] Accordingly, one can argue that in a political structure where policymaking is a deliberative process encouraging citizen participation and power sharing across different branches of Government, a politically insulated sentencing commission be an ideal structure. On the other hand, it could be argued that the legislature probably perceived an advisory commission as one which would be perceived by the electorate as appropriate, and which would allow the legislature to use the guidelines to control corrections expenditure. The purpose of the Washington Sentencing Reform Act is 'to make the criminal justice system accountable to the public'.[67]

The Washington approach suggests that sentencing commissions do not necessarily have to be politically insulated for them to be perceived as legitimate in terms of developing rational sentencing policy. Therefore, it is suggested that external control by the legislature over the promulgation of sentencing guidelines is less likely to affect the successful operation of a sentencing commission. So long as the legislature incorporates a more deliberative process in sentencing policymaking. For example, the process of developing Washington's sentencing guidelines involves wide consultations of different members of the citizenry.[68] The commission membership is larger and more professionally diverse, which Stith points out facilitates the incorporation of more voices and serves a greater number of interests.[69]In any case, the

[65] ibid 107.
[66] Recently, the voters of Washington enacted initiative 502 (a law that removes criminal sanctions for anyone 21 or older possessing smaller amounts of cannabis for personal use); see: LL Myers 'Marijuana goes Legal in Washington State amid mixed messages', *Reuters* (07 December 2012) <http://www.reuters.com/artucle/2012/12/07/us-usa-marijuana-washington->(accessed 15 November 2014).
[67] RCW, s. 9.94A.010.
[68] Washington Commission website <http://www.ofm.wa.gov/sgc/meetings/default.asp>.
[69] Stith (n 52) 112.

Washington and Minnesota Commissions have consistently been jointly proclaimed as good examples of commissions that have developed meaningful guidelines,[70] yet the Washington Commission plays a purely advisory role and the Minnesota Commission has 'political insulation'.

6.2.3 The Sentencing Council of England and Wales

Unlike its American counterparts, the Sentencing Council of England and Wales has authority to develop guidelines that are not subjected to legislative override or approval. The sentencing Council has authority to issue definitive guidelines after consulting on them. It is important to point out that the Sentencing Council is by statute required to publish draft guidelines which must be subjected to public consultation.[71]The guideline consultations are meant to seek the public's views on a number of issues sometimes including the perceived seriousness of offences, or proposed category ranges and starting points.[72] The Sentencing Council is required to consider the responses and subsequently issue the guideline as a definitive guideline.[73]The guideline automatically becomes definitive once consultations and amendments are completed.[74]The statutory consultees include, the Lord Chancellor, such persons as the Lord Chancellor may direct, the justice Select Committee of the House of Commons, and such other persons as the

[70]See, e.g., Frase, *Just Sentencing* (n 3). See also, M Tonry, 'Sentencing Guidelines and Their Effects', in A Von Hirsch K A Knapp and M Tonry (eds.), *The Sentencing Commission and its Guidelines* (Northeastern University Press 1987) 16.
[71] COJA 2009, s 120(6).
[72]See Sentencing Council, 'Assault Guideline: Public Consultation' (October 2010) <http://sentencingcouncil.judiciary.gov.uk/docs/ASSAULT_Public_web.pdf> (accessed on 16 March 2014).
[73]The Coroners and Justice Act 2009, Section 120 (5), (6) (7) & (8).
[74] See COJA 2009, s 120 (8). The Council may after making amendments publish the draft guidelines as definitive guidelines.

council considers appropriate.[75] The Sentencing Council often consults professionals and the wider public before issuing a definitive guideline.[76] Like its counterparts in Minnesota, the Sentencing Council for England and Wales can get a waiver of the consultations if considering the urgency of the matter, it is impractical to make consultations over a twelve week period.[77]

The rule making authority of the Sentencing Council of England and Wales (at least functionally) is broader than that of the Minnesota or Washington Commissions. That is, whilst the Washington Commission's role is merely advisory to the legislature, and the Minnesota Commission's guidelines are subject to passive approval from the legislature, the Sentencing Council of England and Wales enjoys a relatively substantial degree of independence in the formulation of its guidelines. The COJA 2009, section 120 (3) instructs the Sentencing Council to prepare guidelines on any matter. Section 120(5) then instructs the Sentencing Council to publish them as draft guidelines for purposes of making consultations with the statutory appointees under section 120(6). Once the consultations are made, and the responses to the consultations are considered, the Sentencing Council issues the guidelines as definitive guidelines. The guidelines are therefore not issued pursuant to legislative approval, which makes the Sentencing Council's rule making authority relatively broader. This is not in any way suggesting that the Sentencing Council is fully politically independent from the legislature or other political pressures. However to suggest that at least functionally, its rule making authority is more insulated than that of other commissions.

[75] ibid, s 120 (6) (a)-(d).
[76] See Sentencing Council of England and Wales < http://www.sentencingcouncil.org.uk/about-sentencing/about-guidelines/> (accessed 23 January 2015).
[77] COJA 2009, s 123 (1) & (2).

6.2.4 Subjection to Judicial Approval: The Scottish Council

The Criminal Justice and Licensing (Scotland) Act of 2010, section 1 establishes the Scottish Sentencing Council. The Scottish Sentencing Council is instructed to 'from time to time prepare for the approval of the High Court of Justiciary, guidelines relating to the sentencing of offenders'.[78] Thus, unlike the Minnesota Commission which prepares guidelines subject to the passive approval of the legislature, the Scottish Council is expected to make guidelines which are subjected to judicial approval. The approval is expected from the Scottish High Court of Justiciary, which sits as the court of first instance or trial court in Scotland. This court has exclusive jurisdiction to try the most serious crimes such as murder and rape and is the only court of criminal appeal in Scotland. The Scottish Council's rule making model is unique to models existing elsewhere in the world. It also adopts a different structure not supported by commentators such as Knapp, Tonry, Young and King.[79] It leaves the final authority with the courts rather than a sentencing council or the legislature. It also notable that democratic deficit is left intact under the Scottish model which may turn out to be problematic to rational sentencing policy making.

6.2.5 Approach for Uganda

Experiences from other jurisdictions show that there are different ways in which sentencing commissions with the power to develop sentencing guidelines can be related to the branches of government. Minnesota and Washington are subject to the final authority of the legislature although Minnesota less directly than Washington. England and Wales has independence subject

[78]The Criminal Justice and Licensing (Scotland) Act 2010, s 3(1).
[79] KA Knapp, 'What Sentencing Reform in Minnesota Has and Has not Accomplished' (1984-85) 68 Judicature 181. Also, Tonry, 'Setting Sentencing Policy through Guidelines' (n 3) and Young and King (n 3).

only to consultation requirements and in Scotland, the Council is subject to the authority of the High Court of Justiciary and is therefore completely under judicial control.

Legislative overview or approval of sentencing guidelines is ideally good, because it conforms to democratic ideals about the formulation of public policy which should be the function of an elected legislature. Although previous and current literature in the field supports the establishment of independent sentencing commissions with absolute political autonomy of sentencing institutions,[80] it is suggested here that the pursuit of political autonomy of sentencing commissions/councils ought not to be generalised. In the Ugandan context, the reformers ought to first of all, adequately conceptualise the concept of political independence of sentencing commissions/councils. Notably, the political context and origin of Uganda's sentencing guideline reform is incomparable in many ways, to those of Minnesota and Washington, for example. It is repeated that the initiative for sentencing guideline reform in Uganda was steered by the most senior judge genuinely committed to reducing inconsistencies in sentencing which he perceived were as a result of arbitrary exercise of judicial discretion. As experience from other jurisdictions suggests, judges initiative to do something about sentencing may sound unusual for a number of judiciaries in other jurisdictions. However, it is not necessarily surprising in Uganda given the reluctance the legislature has in interfering with the judges' sentencing authority.

Sentencing reform in Uganda is also, not motivated by a demand to de-escalate overcrowded prisons although prison overcrowding is one of the challenges of Uganda's criminal justice system.[81] Issues like penal moderation, decrease of parole discretion and so on, which could

[80] See, e.g., literature in (n 3).

[81] Human Rights Watch, 'Even Dead Bodies Must Work' (14 July 2011) 4 <http://www.hrw.org/sites/default/files/reports/uganda0711webwcover.pdf> accessed (18 July 2013). Human Rights Watch reported that there is miserable overcrowding in Uganda prisons. The report shows that of the 16 prisons visited by the Human Rights Watch, all but one were significantly over their official holding capacity with one

attract the attention of other political constituencies are not part of Uganda's sentencing guideline reform agenda. For example, in jurisdictions like Washington where the role of promulgating sentencing guidelines was preserved for the legislature, the goal of the legislature was to retain substantial control over the formulation of the guidelines because of the interest the legislature had in managing correctional capacity. Accordingly, the differences in the political origins and contexts of sentencing reform in Uganda and the western jurisdictions, may suggest that the kind of political autonomy typically proposed for a sentencing commission/council in the US is not the same that is likely to be politically acceptable for Uganda.

What kind of political interference are we looking at from a Ugandan context? Interference in the context of developing sentencing guidelines is a very broad term. For example, elected legislatures have always been able to enact sentencing laws and it is an entirely legitimate function for them. Therefore, the legislature's continued enactment of sentencing laws alongside the sentencing commission's development of sentencing guidelines should not be construed as constituting interference from the legislature. A commission can develop guidelines and the legislature can direct the commission to achieve particular policy ends. For example, legislatures can require a commission to design guidelines to achieve a particular ceiling on prison capacity. Ultimately, the legislature could repeal and disband any sentencing commission. Thence, in real terms, the legislature always has control over a commission even one like the Scottish Council

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prison having inmate population of 3200 per cent over its capacity. See also, Uganda Prisons Service (UPS), 'Summary of UPS Prisoners Statistical returns' (February 2009). The report shows that Uganda has 223 prisons country wide, designed for a holding capacity of 13,373 inmates. However, in February 2009, the congestion level in the penal institutions was at 213 per cent, with 28,507 inmates in total. See also, The Uganda Bureau of Statistics website, where it is reported that in 2005 there were 18,691 inmates in prison, 19,135 inmates in 2006, 18,800 in 2007, 19,659 in 2008 and the number had doubled in 2009 with 40,805 inmates in total, which is a clear manifestation of overcrowding in Uganda's prisons. The Commissioner General of Uganda Prisons projects that the prison population will more than double by 2019. See JOR Byabashaija, 'Unclogging Prison Congestion! Whose Responsibility?' (presented at the 15th Annual Joint JLOS Government of Uganda and Development Partners Annual Review Conference) (Kampala 4 October 2010).

which is controlled by the courts. Therefore, the legislature's refusal to adopt sentencing guidelines because they do not conform to what is perceived as rational sentencing policy, or their revision of sentencing laws which prescribe harsher sentencing standards than envisaged by the sentencing guidelines is not interference per se since the legislature would be performing an entirely legitimate function. However, interference which may be fundamental in developing sentencing guidelines could come from the executive or judiciary. For example the Scottish Council's decisions may be interfered by the High Court of Justiciary, when the Court refuses to approve the guidelines or approves them with modifications.[82]

In a Ugandan context, the most likely interference with a sentencing council's establishment (and not necessarily its legitimate functions) may come from the indirect external control of the President who may clearly wish to exercise authority to appoint members of the sentencing council, which is a tradition and law that has been in existence for many years.[83] The protection from at will removals from membership of a sentencing commission/council is one of the features that give the sentencing commission/council members a feeling of independence from political interference and pressure. Yet, in Uganda, the decision to determine the tenure of membership to most national agencies is at the discretion of the president. Therefore, the kind of political independence that should be aspired for by reformers looking at establishing a Sentencing Council for Uganda is insulation against at will presidential appointments and removal from commission membership. Permitting such authority would facilitate politicisation in the appointment of members in that the members appointed to the sentencing council may have to represent one side of Uganda's political spectrum. The Sentencing Council should be

[82]The Criminal Justice and Licensing (Scotland) Act 2010, s 5.
[83] See, e.g., The 1995 Constitution of Uganda, article 142(3) states that 'a Supreme Court, Court of Appeal or High Court judge's appointment may be revoked by the president upon recommendation of the Judicial Service Commission'.

protected against at will removal and appointments by the president.[84] That notwithstanding, the enabling statute could provide insulation to the Sentencing Council by minimising the president's role in appointing commission members. Otherwise, indirect executive political interference is difficult to avoid.

The approach of requiring judicial approval of the guidelines could be the more politically favourable approach for Uganda. However, this approach is also problematic for Uganda in that the broader sentencing policy issues such as coordinating sentencing policy and practice with correctional capacity may be undermined. Also, giving the judiciary authority over the final shape of the sentencing guidelines is likely to undermine rationality in formulating sentencing policy. Tonry observed that empowering judges with such authority would in effect be equivalent to restricting the formulation of sentencing guidelines only in the form the judiciary approves.[85] One could argue that if the commission/council has a representative membership model, and judges are made the bare majority, the non-judicial members may succeed with reducing the excessive or poorly reasoned contentions of judges. However, if the judges are given the final authority to approve or reject the guidelines, the non-judicial members are likely to be defeated in the long term. This suggests that there needs to be accountability on the part of the judges for the rejection of a set of guidelines proposals. Accordingly, the Criminal Justice and Licensing (Scotland) Act, 2010 requires accountability from the High Court of Justiciary.

[84]See R Wanambwa, 'Museveni gives Odoki Two more years as CJ,' *The Monitor Newspaper* (22 July 2013) <http://www.monitor.co.ug/News/National/Museveni-gives-Odoki-two-more-years-as-CJ/-/688334/1922420/-/14fyucuz/-/index.html > (accessed 23 July 2013). The president had ignored the Judicial Service Commission nomination of Justice Bart Katureebe as new Chief Justice and instead ordered an extension of tenure for Chief Justice Benjamin Odoki who had retired in march upon reaching the mandatory retirement age of 70 as provided by the 1995 Constitution of Uganda, article 144(1)(a). This is an example of the degree of interference that the president of Uganda can have over at will appointments and removal of members of the Sentencing Council.

[85] Tonry, 'Setting Sentencing Policy through Guidelines' (n 3) 87.

Section 5(4) provides that: 'where the High Court of Justiciary rejects any of the proposed guidelines or modifies any of them, the Court must state its reasons for doing so'.

The Scottish approach to developing sentencing guidelines is likely to be appealing to judges in Uganda. However, the judiciary is not the only constituency whose interests need to be voiced in Uganda's criminal justice system. As Young and King observe, guidelines will fail if there is lack of broad political and community support of the body formulating the guidelines.[86] Although there seems to be a perception that external control over a sentencing commission/council is bad, this thesis suggests that external control to support the formulation of normatively and politically acceptable guidelines is needed. In reality, no sentencing commission/council is able to boast of absolute political insulation. As Hough and Jacobson[87] rightly argued, expecting total independence from parliamentary approval for sentencing guideline promulgation is unrealistic. For instance, in the US, the Minnesota Commission can boast of having a relative degree of political insulation, however, occasionally, the commission has succumbed to public pressure and electoral politics.

Nevertheless, even with a degree of political independence, a guideline body will fail to produce meaningful guidelines if the members are not committed to the concept of the guidelines,[88] or if the commission/council is not able to effectively market the guidelines to judges, legislators, and

[86] Young and King (n 3) 206.
[87] M Hough and J Jacobson, 'Creating a Sentencing Commission for England and Wales: An opportunity to address the Prisons Crisis' (Prison Reform Trust 2008) <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Creating%20a%20sentencing&20commision%20for%20England%20and%20Wales.pdf> (accessed 9 December 2014).
[88] See, e.g., Members of the South Carolina Sentencing Guidelines Commission, Maine Sentencing Guidelines Commission and Connecticut Sentencing Commission apparently decided early on that their jurisdictions did not need sentencing guidelines, and because of the lack of good will from commission members themselves, guideline sentencing failed in those jurisdictions. See M Tonry, 'Sentencing Guidelines and Sentencing Commissions' (n 3) 30.

other interest groups, both state and non-state actors. The Sentencing Commission/Council therefore needs to have a good working relationship with all political constituencies.

6.3 Relationship Between the Sentencing Council and other Branches of Government

The relationship between the Sentencing Council and other constituencies is important since the function of making sentencing policy is not one that can be performed by a single body in the exclusion of other key players in sentencing that this thesis has already identified.[89] Experience from other jurisdictions has shown that most sentencing commissions/councils sit somewhere between the executive, judiciary and parliament. This is so because authority over sentencing is generally understood to be distributed and shared among different constituencies. These constituencies include the executive, legislature, judiciary and other criminal justice agencies including law enforcement, corrections and parole administrators, prosecutions and so on. Therefore, the Ugandan reformers will need to determine the interplay between the sentencing council and the other key constituencies. The relationship between a sentencing commission/council and other constituencies is legally crafted by the choices made over the institutional design of the sentencing commission/council. The choices over the institutional design will be influenced by the political culture and other local conditions of the jurisdiction. However, it is also notable that common features have emerged in institutional designs of almost all sentencing commissions/councils. This section attempts to examine the common features in the institutional designs and explore the factors that could have influenced the choices and how these can play out in Uganda.

[89] See discussion in chapter three.

Before proceeding, it is important to note that individual personalities of the commission members may shape the relationship between sentencing institutions and other key players in sentencing. For instance, it is suggested that the individual personality of the first chair of the Minnesota Commission Jan Smaby, her lobbyist skills and good lines of communication with the legislature enabled the legislature's approval of Minnesota's 'inaugural guidelines in 1980 and the acceptance of the guidelines by key constituencies in criminal justice.[90] Similarly, the political ties and lobbyist skills of Donna Schram, who was the first chair of the Washington Commission, are suggested to have shaped the good lines of communication between Washington Commission and other players. That notwithstanding, the first feature that shapes the relationship between the sentencing institution and the other key players within the criminal justice system is the institutional composition of a sentencing commission/Council.

6.3.2 Institutional Composition

Sentencing guideline commentators have given attention to the institutional compositions of a sentencing commission/council, which offers useful insight into the questions that reformers ought to consider when making choices about an institutional composition that will facilitate interplay between the sentencing institution and other players. For example, Young and King have recently confirmed Tonry and Knapp's observations that a sentencing commission ought not to be judicially dominated.[91] Frase notes that a wide representation of major constituencies affected by the guidelines is likely to encourage support of the sentencing guidelines.[92] Others like Knapp warn that the membership should not be comprised of elites only since a sentencing

[90] See, e.g., M Tonry, 'The Politics and Processes of Sentencing Commissions' (1991) 37 Crime and Delinquency 307, 318.
[91] Young and King (n 3) 202.
[92] RS Frase, 'Sentencing Guidelines in Minnesota, 1978-2003', (2005) 32 Crime and Justice 131, 150.

institution with such composition is less likely to receive credibility among other key players in criminal justice agencies.[93]

Experience in other jurisdictions shows that although there are some variations in the compositions of sentencing commissions/councils across jurisdictions, such as the exclusion of members of the legislature or members of the public from some membership compositions, what is significant is that sentencing institutions are established in a manner that permits the distribution of sentencing policymaking across different constituencies. An analysis of enabling statutes of different sentencing commissions/councils suggests that a more professionally diverse or representative membership model which incorporates more voices and serves a greater number of interests is the most commonly adopted approach to shaping the relationship between the sentencing institution and other constituencies.

A representative membership model is one which enables members from different branches of government as well as non-state actors such as law enforcement, correctional and parole officials, prosecutors, lawyers, citizen representatives, and professional experts to take part in the deliberations leading to the formulation of sentencing guidelines. Jurisdictions like Minnesota, Washington, North Carolina, Pennsylvania, and England and Wales, to mention just a few of them, utilise the representative membership model. Accordingly there seems to be consensus that a representative membership model offers a viable option for jurisdictions considering establishing a sentencing commission/council. Nonetheless, there is an area of considerable disagreement as regards the legislature's membership on a sentencing commission/council's institutional composition. Experience in jurisdictions with guideline systems tends to suggest a

[93] Knapp (n 79) 118.

variation in the approaches taken in respect to the legislature's representation on the commission membership.

The Minnesota commission's membership does not include the Minnesota legislature. The eleven members of the commission are drawn from the judiciary, and other criminal justice constituencies, some of which represent the executive branch.[94] That is, the commission has three judges, two lawyers (a public defender, and a county attorney), the commissioner of corrections, a peace officer, probation or parole officer, and three members from the general public one of whom must be a felony crime victim.[95] For avoidance of doubt, a county attorney's is an equivalent of a state prosecutor,[96]or a state attorney as they are referred to in Uganda. On the other hand, a peace officer is a member of the Law enforcement of the state of Minnesota. The institutional composition of Minnesota's Commission enables the judiciary, and non-state actors acting under the executive branch, as well as members of the public to contribute to developing sentencing guidelines. The legislature is technically excluded from the deliberations leading to the formulation of sentencing guidelines.

In order to confirm whether the Minnesota legislature actually do not contribute to these deliberations, the author reviewed the Minnesota Commission meeting minutes for the period June 14, 2012 to January 16, 2014.[97] It is recalled that Minnesota has an open meetings Law, which obliges state agencies like the Minnesota Commission to hold open meetings. Therefore, it was important to explore the mechanisms that a member of the legislature of Minnesota may use

[94]Minnesota Statutes 2013, s 244.09 (2).
[95]ibid, s. 244.09 (1). See also, the Minnesota Commission website <http://mn.gov/sentencing-guidelines/meetings/previous/> (accessed 23 January 2015).
[96] The Constitution of the State of Minnesota, article 125(3). The duties are: prosecuting criminal matters in the county where the attorney is stationed, but on behalf of the State of Minnesota.
[97] This information is publicly available and can be found at the Minnesota Commission website < http://mn.gov/sentencing-guidelines/meetings/previous/>.

to contribute to these deliberations, since the meetings of the commissions are open to the public and the public includes members of the legislature. From the fifteen meetings minute notes I was able to access, one was attended by a member of the legislature. Laura Taken- Holtze, a member of the Minnesota House of Representatives attended the Commission's meeting of November 21, 2013. However, unlike all the others, in this particular meeting, the Minnesota Commission's agenda was recommending changes to the legislature regarding the controlled substance threshold. At the time, she was a member of the House of Representatives Public Safety Committee.[98] Therefore her attendance could be explained by the relationship between controlled substances and public safety. Nevertheless, the minutes suggest that the legislator did not make contributions to the debate.

Be that as it may, what could explain the legislature's exclusion from the institutional composition of the Minnesota commission? The primary goal of the Minnesota legislature in creating an independent sentencing commission was to insulate sentencing policymaking from electoral politics. It is more likely that the legislature's exclusion from the commission's membership was in furtherance of this goal. Additionally, the moralistic political culture of Minnesota could explain this choice. As already pointed out, the culture of incorporating public participation in decision making may have shaped this choice. The government believes that members of the public are the right constituency to make decisions about social policy.

The Washington Commission comprises of twenty voting members and four nonvoting members. Sixteen of the voting members are appointed by the Governor and the remaining four members serve in an ex officio capacity by virtue of their positions in State government. These

[98]See, Minnesota Commission website <http://mn.gov/sentencing-guidelines/images/ApprovedMSGCMeetingMinutesNovember2013.pdf> (accessed 20 November 2014).

include the secretary of corrections, Assistant Secretary of Department of Social and Health Services – Juvenile Rehabilitation Administration, the chair of the indeterminate sentencing review board and the director of the office of finance management. The non-voting members are appointed by the legislative branch (two by the president of the senate and two by the speaker of the House of Representatives).[99] The sixteen voting members appointed by the Governor include: four Superior Court judges, two county prosecuting attorneys, two defence attorneys, one sheriff or police chief, one juvenile court administrator, one elected county official, one elected city official, and four citizens (including one victims' advocate).[100]

The Washington Commission membership reflects a representative membership model which clearly incorporates major constituencies' participation in the formulation of sentencing guidelines. The relationship between the commission, judiciary as well as the executive and the general public is structurally evident. The Washington Commission, like the Minnesota Commission, has lawyers, judges, law enforcement and members of the public. However, unlike the Minnesota Commission, the Washington Commission has four nonvoting members from the legislature. That is, although they take part in the Commission's meetings, the legislators cannot take a vote on the decisions taken by the Washington Commission. Senator Dick Hemstad said that the intention to have four members of the legislature on the Washington Commission was to enable close contact between the Commission and other legislators and to authenticate the work of the commission.[101] At the same conference, Dona Schram, the first Washington Commission

[99]RCW, Title 9, Chapter 9.94A. s 860(2).
[100]See Washington Commission website <http://www.ofm.wa.gov/sgc/members/default.asp> (accessed 15 April 2014).
[101] Conference summary (n 16) 12.

chairperson said the legislator's presence on the commission facilitated the legislative adoption process.[102]

The approach to have the Washington legislators on the membership of the Commission could be expected as the Washington legislature from the outset expressed its role in developing the sentencing guidelines. Senator Dick Hemstad who drafted the Revised Code of Washington explicitly stated that the legislature needed reassurance that sentencing policy was being developed rationally, which reassurance they could only get through legislative approval of the guidelines and legislative representation at the Commission. The involvement of the Washington legislature at the commission could be explained by a mix of individualistic and moralistic political culture, which Elazar's formulation revealed about Washington. However, it is also suggested that the public has high influence over governmental decision making in Washington. For example, the public can create law through various direct democratic mechanisms such as referendums and ballot initiatives.[103] This supports Barker's assertion that in Washington, public voice is given much attention.[104] Therefore, the involvement of the legislature on the Commission could be explained by the degree of influence that the legislature wished to have over developing sentencing guidelines and not by political culture alone.

Similarly, the Pennsylvania Commission on Sentencing ('Pennsylvania Commission') has eleven commission members who include four judges, four legislative appointees (two members of the house of representatives and two members of the senate), and three gubernatorial appointees (including a district attorney, a defence attorney and a professor of law or criminologist). This

[102] ibid 13.
[103] Barker (n 9) 97.
[104] ibid 99.

makes two lawyers and an academic.[105] Membership of the Pennsylvania Commission is representative, although to a degree less diverse than other commissions. Several other major criminal justice constituencies such as law enforcement, corrections and parole, victims, and so on are technically not represented on the Pennsylvania Commission. Although upon reviewing the historical list of Commission members,[106] the author found out that victims were once represented by a victim advocate on the Commission in 2008 and 2013. Similarly, in 2008, 2011 and 2013, a member of the board of probations and the department of corrections secretary sat on the Pennsylvania Commission.

One could probably argue that the exclusion from public involvement of citizens and interest groups on the Pennsylvania Commission is consistent with Pennsylvania's individualistic political culture which according to Professor Elazar, minimises the participation of 'lay' citizenry in decision making processes. Whilst developing its first set of guidelines, the Pennsylvania Commission members rejected the idea of having open meetings and discussions with representatives of interest groups, arguing that this would result in the politicisation of the Commission's choices.[107] As already stated, in an individualistic political culture decision making is a job of the beaurocrats.

The Sentencing Council of England and Wales comprises of fourteen members, eight of whom must be judicial members, that is a judge of the Court of Appeal, High Court District Court (Magistrates' Court), circuit court or a lay justice; and six of whom are non-judicial members

[105]Pennsylvania Statutes 2014, Title 42, Chapter 21, Subchapter F s. 2152. Also, the website of the Pennsylvania Commission on Sentencing <http://pcs.la.psu.edu/about-the-commission/members-and-staff> (accessed 19 January 2015).
[106]Pennsylvania Commission on Sentencing, 'Historical List of Commission Members' <http://pcs.la.psu.edu/about-the-commission/members-and-staff/historical-listing-of-commission-members/view > (accessed 19 January 2015)
[107] Martin (n 9).

who could be highly authoritative experts in different areas of criminal justice.[108] The judges comprise the majority. The Lord Chief Justice (who is the most senior judge) has the title of 'President of the Council'[109]and the chair of the sentencing council must be a judicial member.[110]The current chairman is Lord Justice Treacy, a Lord Justice of Appeal. Some of the non-judicial members include: a solicitor and a barrister, a professor of criminology, a chief constable, the chief executive of Victim Support, and the chief officer for probation in greater Manchester.[111]

The institutional composition is widely representative and excludes the participation of parliament or the executive from developing sentencing guidelines, although representatives from the executive branch can be members of the Council, (for example, the Director of public prosecutions).[112] The exclusion of members of the legislature and executive is likely explainable by the fact that the Sentencing Council has been regarded more as an agency of the judicial branch is consistent of the origins of sentencing guideline reform in England and Wales. As an agency of the judicial branch, control by the other branches of government may be perceived as a violation of the independence of the judiciary. It is evident from the institutional composition of the sentencing council that the judiciary has dominance, which is unlike of other sentencing commissions elsewhere. The contribution of the legislature to developing definitive guidelines is

[108] COJA 2009, schedule 15 (4) (1) & (2). A person is eligible for appointment as a non-judicial member if the person appears to the Lord Chancellor to have experience in one or more of the following areas —(a) criminal defence (b) criminal prosecution (c) policing (d) sentencing policy and the administration of justice (e) the promotion of the welfare of victims of crime (f) academic study or research relating to criminal law or criminology (g) the use of statistics (h) the rehabilitation of offenders and the Director of Public Prosecutions.
[109] ibid, schedule 15 (1), the Lord chief justice is not a member of the Sentencing Council.
[110] ibid, schedule 2(a).
[111]See the Sentencing Council of England and Wales website <http://sentencingcouncil.judiciary.gov.uk/about/council-members.htm> (accessed 19 January 2015).
[112] COJA 2009, Schedule 15 (4) (2).

accordingly more or less limited to consultations on draft guidelines, made to the Justice Select Committee of the House of Commons.[113]

The Criminal Justice and Licensing (Scotland) Act, 2010 establishes the Scottish Council and prescribes nine members for the Scottish Council.[114]That is, three judicial members, three legal members and three lay persons. The institutional composition of the Scottish Council is representative of a diverse membership model, like all other sentencing commissions in other jurisdictions. However, notably, unlike other enabling statutes, the Criminal Justice and Licensing (Scotland) Act, 2010 has explicitly disqualified members of the Scottish Parliament, House of Commons, European Parliament, any member of the Scottish Executive, Scottish Ministers and a councillor of any council from serving on the Scottish Council.[115] Structurally, the Scottish Council has little relationship with the executive or the legislature, except that the Scottish ministers are consulted by the Lord Justice General over the appointment of the judicial and legal members and also, the Scottish Ministers appoint the 'lay' persons.[116] The Scottish Council is a relatively good example of a sentencing council that has no legislative and executive representation.

Briefly stated, although the extent of involvement of public and interest group participation as well as the legislature's participation in formulating sentencing guidelines varies widely, the

[113] ibid, s 120 (6). It is noted further that the House of Commons in England and Wales is the lower house of Parliament comprising of an elected body of members known as members of parliament. The Justice Select Committee is one of the nineteen select committees, related to Government departments and appointed by the House of Commons pursuant to standing order number 152. The Justice Select Committee examines the expenditure, administration and policy of the Ministry of Justice and associated bodies. See the UK Parliament website < http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/role/>(accessed 06 June 2014).
[114] The Criminal Justice and Licensing (Scotland) Act 2010, schedule 1 (1).
[115] ibid, schedule 1(3).
[116] ibid, schedule 1 (2) (2).

significant point is that the representative model is generally adopted, and it facilitates the interplay between the sentencing institutions and other political constituencies.

6.3.3 Distribution of Authority to Appoint Commission Members

In both jurisdictions of the United Kingdom, the authority to appoint sentencing council members is shared between the executive and the judiciary. In England and Wales, the authority to appoint commission members is distributed between the Lord Chancellor[117] and the Lord Chief Justice. Although the Coroners and Justice Act, 2009 does not specify the capacity in which the Lord Chancellor (as a cabinet minister (executive branch) and Member of parliament (legislature) exercises his appointing authority, it is logical that the Lord Chancellor acts in an executive capacity as the State Secretary for Justice.

In the United States, the distribution of the authority to appoint members of sentencing commissions varies widely. For example in Washington State, out of the twenty voting members of the Washington Commission, sixteen are gubernatorial appointees[118] and the remaining four voting members serve by virtue of their holding ex officio positions in the Washington government.[119] The Executive has an indirect control over the representation of the ex officio members, in the sense that all the ex officio members of the Washington Commission are

[117] The Constitutional Reform Act, 2005 made arrangements to modify the Office of the Lord Chancellor. Although the Lord Chancellor was previously a Government Minister, the speaker of the House of Commons and a judge, under the Constitutional Reform Act, the Lord Chancellor ceased being the speaker of the House of Commons and a judge. The Lord Chancellor is now a cabinet minister (State Secretary of Justice) and also a member of the House of Commons. That is, he is both a cabinet minister (executive branch) and Member of the House of Commons and the House of Lords (Legislature). Although the COJA 2009 does not specify in what capacity the Lord Chancellor performs duties under this Act, it is more likely that the Lord Chancellor acts in an executive capacity.

[118] See RCW, s. 9.94A.860(2).

[119] These are: 'the Secretary of Corrections; Assistant Secretary of Department of Social and Health services, the Chair Indeterminate Sentence Review Board and the Director of Office of Financial Management.

gubernatorial appointees.[120] In Minnesota, members of the Minnesota Commission are appointed by the judiciary and the executive. That is, the three judicial members of the Minnesota Commission are appointed by the Chief Justice of the Supreme Court whilst the remaining members of the Commission, including the Commission chair are gubernatorial appointees.[121]

The selection of the members of the Pennsylvania Commission is done by all three branches of government. The Chief Justice of Pennsylvania appoints four members; the President Pro Tempore of the Senate appoints two members (one from each caucus); the House of Representatives also appoint two members (one from each caucus) and the remaining three members are gubernatorial appointees.[122] In North Carolina, power to appoint Commission members is shared amongst all three branches of government and the chair of the North Carolina Commission. Out of the twenty eight members, eleven are statutory designees, two members are appointed by the Chief Justice of North Carolina supreme court, three members are appointed by the Governor, two are appointed by the lieutenant governor, four by the speaker of the House of representatives, four by the president pro tempore of the senate, and two members are appointed by the chairman of the Commission.[123]

All in all, there is no apparent consensus on the approach of distributing authority to appoint sentencing commission members across jurisdictions. However, there is a common trend of having more than one branch of government appointing commission members. Even in jurisdictions where there sentencing councils enjoy considerable independence, authority to

[120]RCW s 43.20 A.040, the Secretary of Corrections is the Executive head of the Washington Department of Corrections and is appointed by the Governor with the consent of the state senate; see, also, RCW s. 43.20A.040, the Assistant Secretary of Department of Social and Health services is appointed by the Governor with the consent of the State Senate.
[121] Minnesota Statutes 2013, s. 244.09.
[122] Pennsylvania Statutes 2014, s 42. 2152 F.
[123] The North Carolina General Statute, article 4, s. 164-37.

appoint commission members is more often shared. For instance in Scotland both the executive and the judiciary share the responsibility of appointing the Scottish Council members.

There seems to be general acceptance of the need to encourage public participation in developing sentencing policy. For example the Minnesota statute 2013 provides for three members from the general public including a victim of crime.[124]Although the incorporation of the public seems uncontroversial, some enabling statutes such as the Pennsylvania General statute did not incorporate public representation. As discussed in later sections, the incorporation of public participation does not mean participation of ordinary people randomly selected. Experience suggests that 'lay' involvement in sentencing policymaking comes from those with relevant expertise.

6.3.3.1 What Approach for Uganda

The issue of the relationship between sentencing commissions/councils and other political constituencies is of significant value given that like in a number of jurisdictions, sentencing authority in Uganda is distributed and shared amongst different actors in criminal justice agencies. Accordingly, a number of constituencies are likely to be affected (whether directly or indirectly) by promulgation of sentencing guidelines, as such a representative model would be an ideal structure.

The distribution of authority to appoint sentencing commission members is one issue that would obviously attract some attention in Uganda, since hundreds of appointments to the various boards, national agencies and commissions are made by the President of Uganda, with approval

[124] Minnesota Statutes 2013, s. 244.09(9). See also, The website of the Minnesota Commission (n 96).

of the legislature or the Attorney General. There is a wide perception in Uganda that the President uses his appointing authority to reward political supporters, a practice known as patronage, or to build support and accomplish political goals by placing allies in strategic positions.[125] Accordingly, appointments to a sentencing institution are less likely to pass without the interference of the executive.

To give just a few examples of the Presidential appointing authority to key constituencies, the judiciary is the first to come to mind. Judges of the High court, the Court of Appeal and the Supreme Court are all appointed by the President upon recommendation from the Judicial Service Commission, and approved by parliament.[126] The Director of Public Prosecutions is appointed by the President on the recommendation of the Public Service Commission, with approval of Parliament.[127] The Commissioner of Prisons and his deputy are appointed by the President, with approval of Parliament.[128]The Inspector General of Police and his/her deputy are appointed by the President.[129]The members of the Judicial Service Commission are appointed by the President, with the approval of parliament.[130] The commissioners of the Uganda Law Reform Commission are appointed by the President on the advice of the Attorney General, [131]and so on.

[125] See, e.g., IN Ssemujju, 'The Forces Behind Museveni's Power' *The Observer Newspaper* (Kampala, 11 May 2011) < http://www.observer.ug/index.php?option=com_content&task=view&id=13387&Itemid=59> (accessed 13 June 2013); A Mwenda, 'Why Museveni's System will Endure' *The Independent* (Kampala, 8 February 2014) < http://www.independent.co.ug/the-last-word/the-last-word/8673-why-musevenis-system-will-endure> (accessed 10 March 2014) ; S Kittata, 'Sam Njuba Book reveals Museveni Secrets', *The Observer Newspaper* (22 December 2013) < http://www.observer.ug/index.php?option=com_content&task=view&id=29274&Itemid=116> (accessed 10 January 2014).
[126] The 1995 Constitution of Uganda, article 142.
[127] ibid, article 120(1).
[128] ibid, article 216 (1).
[129] The Uganda Police Act Chapter 303 (Laws of Uganda, as amended by Act of 2006), s 5.
[130]The Judicial Service Act Chapter 13 (Laws of Uganda), s 2(1).
[131]The Uganda Law Reform Commission Act Chapter 25, s 3. It confers on the president of Uganda powers to appoint commission members on the advice of the Attorney General (who is a minister of justice and constitutional affairs and is appointed by the president).

Accordingly, by tradition, the President of Uganda has direct control over appointments to governmental agencies, commissions and boards. It is recalled that the Sentencing Guidelines Committee, has been constituted by the Chief Justice. This has been possible because as noted earlier, the said Committee does not have any legal authority, and its operations have perhaps not been perceived as having direct impact (up to this time at least) over government policies. This is not to say that having the President of Uganda as the only authority appointing members of the Ugandan Sentencing Council is the only legitimate approach. Rather, this brief background is meant to emphasise that the Chief Justice cannot independently make the appointments. On the other hand, excluding the judiciary from participating in the selection of Council members would be ideally wrong because judges are evidently the more interested group in sentencing policymaking in Uganda. Experience in other jurisdictions suggests that the Chief Justice usually participates in appointing sentencing commission/council members.

Assuming that the Ugandan sentencing Council will adopt a representative model, adopted by the Chief Justice in the Sentencing Guidelines Committee, that is, —fifteen members, including four judges (with the Principal Judge) as the chair, the enabling statute could confer authority to appoint judicial members on the Chief Justice of Uganda. The non-judicial members could be ex officio members, holding positions at the Council by virtue of their offices or be presidential appointees with knowledge of criminal justice issues. These appointees could be approved by the Chief Justice as is done in England and Wales as well as Scotland.

It is thus arguable that the non-judicial posts created in the Sentencing Reform Bill may be occupied by the constituencies represented on the Sentencing Guidelines Committee. The distinct feature of the composition of the Sentencing Guidelines Committee is that the non-judicial seats are occupied by mostly those members that have been appointed by the President to

their respective posts. For example, the Attorney General, Director of Public Prosecutions, the Inspector General of Police, the Commissioner General of Prisons, commissioners of the Uganda Law Reform Commission, are all statutorily appointed by the presidency. This leaves the assumption that the drivers of the sentencing guidelines movement were aware of the significance of having a strong executive representation on the sentencing guidelines committee or Council, besides other well-known advantages of having people of their expertise on the Sentencing Guidelines Committee.

The Uganda Taskforce in addition to developing 'inaugural' sentencing guidelines crafted a Sentencing Reform 'Bill'.[132]The 'Bill' proposes the establishment of a fifteen member Sentencing Council. The members include five judicial members (judges from the Supreme Court, Court of Appeal, High Court, a Chief Magistrate, and the Chief Registrar of the courts of Judicature in Uganda), and ten non- judicial members whose constituencies have not been specified except that it is suggested that the Chief Justice will identify the institutions from which non judicial members will be appointed,[133] and appointments will be made by the judicial members of the Sentencing Council. [134].

The membership model of the proposed Sentencing Council of Uganda seems quite different from what happens in the other sentencing commissions/councils which have been discussed. For instance, the appointing authority is vested in the Chief Justice and the judicial members of the Sentencing Council. In no other jurisdiction are the judges/judicial members given this

[132] The word Bill is in quotes because although the draft document is referred to as the Sentencing Reform Bill, it is not a bill in legal terms because it has not been presented to Parliament, and is still hanging in the shelves. The Sentencing Reform Bill is appended to this thesis and marked appendix C.

[133]Sentencing Reform Bill, s 7 (1) (a)-(g). The divisions are: a Justice of the Supreme Court appointed on the recommendation of the Chief Justice, a Justice of the Court of Appeal appointed on the recommendation of the deputy Chief Justice, a Judge of the High court appointed on the recommendation of the Principal Judge, a Court Registrar appointed on the recommendation of the Chief Registrar, a Chief Magistrate appointed on the recommendation of the Chief Registrar and a representative from any institution as the Chief Justice may deem fit'.

[134] ibid.

absolute power to make appointments of commission members. For instance, even in Scotland where the High Court of Justiciary is empowered with final authority over the shape of the sentencing guidelines (which is very different from what happens in other jurisdictions and a clear acknowledgement of judicial ownership of sentencing by the legislature) the commission members are appointed by the Lord Justice Clerk and the Scottish Ministers, just to rectify the democratic deficit that would be created by leaving judges with the absolute power to make decisions regarding sentencing policy. At least the executive's appointees may provide a balanced and broader perspective to developing sentencing policy.

For reasons already given regarding the tradition of having most appointments to commissions or national administrative agencies made by the Ugandan President, the appointing structure enounced in the Sentencing Reform 'Bill' is likely to curtail the development of rational sentencing policy. A sentencing council chaired by the Principal Judge and having senior judges of the Supreme Court and Court of Appeal, as well as the Chief Registrar is likely to influence the formulation of sentencing policy that is germane to the interests and values held by judges. Suffice to say that members appointed by the judicial members of the sentencing council are less likely to make deliberations and decisions that take account of non-judicial views, out of respect for the most senior judges on the sentencing council. It is repeated that irrespective of judicial ownership of sentencing, judges need to acknowledge that other branches of government have stake in sentencing policy making. Thus, giving sentencing a single judicial perspective will undermine the formulation of sentencing policy which takes into perspective other interests and values.

It is repeated here, that the judiciary can have majority representation on the proposed Sentencing Council (as is the case in England and Wales). However the Ugandan reformers

should not ignore the value that comes with the involvement of public participation in formulation of sentencing guidelines. Whilst it might make sense for the Chief Justice to have the authority of appointing members of the Sentencing Council, s/he does not have the comparative advantage to select members from other constituencies of whom the Chief Justice is less likely to have contact and personal experience with. Accordingly, if Uganda is to develop a meaningful guideline system, bifurcated appointment powers would be the ideal, where by the authority to appoint could be shared among different actors, to enable the selection of Sentencing Council members who will have the technical capacity and professional expertise relevant to developing sentencing guidelines.

6.4 Qualities and Skills of Commission Members

A number of commentators have noted that success of a sentencing guideline system goes hand in hand with effective membership and leadership capacity of a sentencing commission.[135] This section aims at examining the skills, competencies and abilities of members in sentencing commissions/councils in other jurisdictions with a view of understanding the kind of technical and professional competencies that are likely to enhance the sentencing commission/council success. The section is divided into two major themes: membership and leadership capacity respectively.

6.4.1 Membership Capacity

[135] Young and King (n 3); Frase, 'The Role of the Legislature' (n 35); Barkow (n 35); Tonry, 'Setting Sentencing Policy through Guidelines' (n 3); Tonry, 'Guidelines and Commissions' (n 3); Knapp (n 80); Martin (n 9).

The representative membership model which is utilised by most jurisdictions takes different sizes. Therefore, does size of a sentencing commission/council matter? This is the first question that comes to mind when considering the membership capacity of a proposed sentencing commission/council. The sizes of sentencing commissions/councils vary across jurisdictions. Accordingly, looking at sizes of different commissions as a way of determining how big or small the Ugandan Sentencing Council should be, does not offer much assistance. Is size of a sentencing commission/council shaped by the local conditions of a given jurisdiction? For example, the extent to which citizen and interest groups involvement in decision making processes is encouraged. For instance, if the local tradition encourages interest group representation, what is the extent of representation required? Knapp suggested that a sentencing commission comprising of fewer than seven members is too small whilst more than eleven members was too large to be manageable.[136] It is notable that at the time of writing her article, Knapp had been the Executive/ Research Director of the Minnesota Commission and a Staff Director of the United States Sentencing Commission (USSC). Both these Commissions have relatively small numbers of commissioners. To be exact, Minnesota Commission was comprised of eleven members and the USSC had seven voting members.[137] Perhaps Knapp made a subjective judgment of an 'appropriate' size of commission membership based on the experience she had had with smaller commissions. For example, the Washington State Commission has had twenty members, but the size of its membership has not inhibited its successful operations or at least no one has publicly made this judgment of the Commission.

Experience shows that a commission such as the North Carolina Commission, which has twenty eight commission members achieves goals comparable to its counterparts with smaller

[136] Knapp (n 79) 120.
[137] See, the Sentencing Reform Act 1984 establishing the United States Sentencing Commission.

compositions. It is likely that this will be a political compromise, and costs are likely to be an issue. That said, Knapp suggests that a number below seven may be too small. In the context of Uganda, perhaps a commission that is represented by judicial officers from all tiers of the court system is likely to be acceptable. For example, one judges from the High Court, Court of Appeal and Supreme Court respectively, registrars from at least the High Court; three magistrates representing the three levels of magistracy. That is, a Chief Magistrate, Magistrate grade I and II. Accordingly, simply from a judicial point of view, a reasonable number of judicial members would be at least eight members.

In light of above, considering that all interest groups cannot be represented on a sentencing council, and logically, smaller groups of members are more likely to be manageable than larger ones in terms of consensus building, and funding, the maximum size of a sentencing commission should not matter, although the lower minimum may depend on local conditions of a given jurisdiction.

Professional diversity of commission members has consistently been advanced as one of the important features that will increase odds that a sentencing commission/council will succeed.[138] For example, the Washington State Commission, which has succeeded in producing guidelines that have achieved greater consistency in sentencing than existed before guidelines adopts a diverse membership model, representing a wide interest group. One of the reasons highlighted as accounting for its exemplary performance is the professionally diverse commission membership that facilitates hearing of the public voice.[139] The same representative membership model is used by Minnesota and acknowledged as one which enables representation of different interest

[138] Young and King (n 3).
[139] Stith (n 52) 112.

groups.[140] However, this is not to say that sentencing commissions with similar diversity in membership have not failed. For example, the New York State Committee on Sentencing Guidelines established in 1985, and the largest and best funded sentencing commissions[141] in America, with well experienced and sophisticated members failed to have its guidelines approved by the legislature because of inside interest group politics.[142] In addition, with its diverse membership model including legislators, judges, lawyers and professors of law, the Pennsylvania Commission has partially succeeded in achieving its objective of reducing unwarranted disparities.[143]

Nonetheless, there is wide consensus on the importance of having a diverse commission membership. It is widely accepted that a wide diversity in membership of a sentencing commission/council enables the formulation of sentencing policy that takes account of different practical perspectives of sentencing. Even though there is no consensus on how diverse such membership ought to be. There has been consistent encouragement for the selection of professionals such as judges, lawyers, prosecutors, law enforcement officials, agents, parole administrators, correctional officers and private citizens. Indeed, most sentencing commissions/councils have the generic categories of membership as listed here. For example, experience in other jurisdictions shows that generic categories such as judges, prosecutors, defence lawyers, law enforcement, and correctional administrators typically form the membership of a sentencing commission/council.

[140] See, e.g., Martin (n 9); Boerner and Lieb (n 58) and Barkow (n 9).
[141] M Tonry and C Hatlestad, 'Sentencing Reform outside the United States' in M Tonry and C Hatlestad (eds.), *Sentencing Reform in Overcrowded Times: A Comparative Perspective* (Oxford University Press 1997) 122.
[142]See, e.g., Tonry, 'Sentencing Guidelines and their Effects' (n 69) 32; Tonry, 'The Politics and Processes of Sentencing Commissions' (n 43) 316.
[143] ibid.

There is no single sentencing council/commission that does not have judges, prosecutors, and lawyers for example. Accordingly there is general agreement that judges, prosecutors, lawyers; correctional administrators should be included in a representative membership model. However, the only important question concerning diverse membership, perhaps concerns the question of selecting from categories such as private citizens, former inmates or victim representation. Given the importance that perspectives from 'lay' members such as private citizens, former inmates or victim representatives will have on formulation of sentencing policy, and the fact that there seems to be diversity in the selection of those categories of members in different jurisdictions, a discussion of these categories is deemed relevant for this study.

By 'lay' members, the author is referring to members of the public who do not belong to the judicial or legal category (judges, magistrates, chief registrars, state attorneys, defence lawyers). The author's definition also excludes law enforcement officials (constables, police), corrections and parole administrators, legislators. Although people falling within this category are lay members, experience has suggested that their inclusion in the development of sentencing policy is uncontroversial. This discussion therefore focuses on the scope of the meaning of public participation. Does it include lay members of the public without expertise on relevant aspects of criminal justice, or only experts?

The Sentencing Council of England and Wales currently has two 'lay' members —Javed Khan and Professor Julian Roberts.[144]Javed Khan is the Chief Executive of victim support and has a wealth of experience of working with local governments and community leaders. Professor Roberts is a professor of criminology at the University of Oxford. The Criminal Justice and

[144] See Website of the Sentencing Council of England and Wales < http://www.sentencingcouncil.org.uk/about-us/council-members/> (accessed 23 January 2015).

Licensing (Scotland) Act, 2010 creates membership seats for 'one member with knowledge of the issues faced by victims of Crime' and 'one member who is not qualified to be a judicial or legal member'. These two positions are likely to be filled by persons with similar profiles as the 'lay' members on the sentencing council of England and Wales. It is unlikely that a person, who has been a victim of crime in its practical sense, will be appointed on the Scottish Sentencing Council, unless they have a wealth of experience on victim support issues.

In the United States, some enabling statutes specifically require the representation of 'lay' members on sentencing commissions. For instance, the Minnesota General Statute[145]provides that: 'the Minnesota Commission membership composition shall include three public members appointed by the Governor, one of whom shall be a victim of a felony crime'. The Revised Code of Washington, 1981 states that the Washington Commission shall have "four members of the public who are not prosecutors, defence attorneys, judges, law enforcement officers, one of whom is a victim of crime or a crime Victims advocate".[146] The said provisions give the impression that Minnesota and Washington give ordinary lay citizens a chance in developing sentencing policy. Indeed, commentators like Martin suggested that the tradition of citizen participation in government policymaking facilitated the development of a consensus on a new state sentencing policy in Minnesota.[147]

In respect to Washington, Barker noted that the political culture of Washington favours deliberative democracy,[148] a mode of governance that emphasises citizen participation, discussion, compromise and self-governance. However, experience from these commissions

[145] See Minnesota Statutes § 244.09 (9).
[146] Revised Code of Washington, 1981, § 9.94A.860(2) (i).
[147] Martin (n 9) 29.
[148] Barker (n 9) 97.

suggests that citizen participation does not mean the recruitment of ordinary citizens without any relevant expertise in criminal justice. Knapp advises that the 'commission should not have to provide on job training of practical civics'.[149] As a matter of fact, the profiles of the 'lay' members on the Minnesota and Washington commissions prove that representation from members of the general public only incorporates people with relevant expertise.

For instance, the current[150] two (one position vacant) members of the Minnesota Commission—Sarah Catherine Walker and YamyVang are highly authoritative in their respective fields. Sarah Catherine Walker is the president of Coalition of Impartial Justice, a leading coalition ensuring a fair and impartial judiciary in Minnesota. She has extensive experience in issues of politics, inequality, criminal justice reform and interest group rights and social movements. YamyVang is an attorney with the second largest municipal law office in Minnesota —the St Paul City Attorney's office, who once run for office of district judge in 2010. The current citizen representative on the Washington Commission is Professor David Boerner, a Professor of Law at the Seattle University School of Law.[151]

According to the North Carolina General Statute, section 167-37; the North Carolina Commission has four seats for 'lay' members. That is, one seat for a member of the academic community, one for a rehabilitated former prison inmate, and one for a victim support advocate, as well as one for a member of the business community. The current North Carolina Commission has three citizen representatives, Keith Shannon (whose profile could not be accessed), Dr. Harvey McMurray (who is the chair of the Department of Criminal Justice at the North Carolina

[149] Knapp (n 79) 119.
[150] Unlike the website of the Pennsylvania Commission on Sentencing, the Minnesota Commission website does not have a historical list of commission members.
[151] Washington Commission website <http://www.ofm.wa.gov/sgc/members/default.asp> (accessed 19 January 2015).

Central University); and Iona Kasa (a member of the North Carolina Victim Assistance Network).[152]

All the 'lay' members mentioned are persons with relevant expertise. Accordingly, experience with sentencing commissions in America and England and Wales, suggests that the calibre of the members of the commission in terms of ability and intelligence in criminal justice matters is very important. The incorporation of 'lay' members into the development of sentencing guidelines means including members with relevant expertise to major constituencies of criminal justice. Ability to offer technical and professional expertise to a sentencing commission/council is important. Local conditions of a jurisdiction play in shaping the scope of public incorporation in sentencing policymaking. For instance, the moralistic political culture of Minnesota and Washington encourages citizen participation in decision making process, which explains why such 'lay' members are included in the institutional composition of their sentencing commissions. On the other hand, the individualistic political culture of Pennsylvania which is less emphatic on citizen participation explains the absence of 'lay' citizens on the membership of the Pennsylvania commission.

Several commentators have commended the political skill and good will of the initial members of different sentencing commissions as characteristics that enhanced or inhibited the successful drafting and approval of sentencing guidelines in those jurisdictions. A number of commentators[153] have coalesced political skills of the commission members to initial successes of sentencing guidelines in their jurisdictions. The individual personalities of Jan Smaby of

[152]The North Carolina Court System website <http;//www.nccourts.org/Courts/CRS/Councils/SPAC/Members.asp> (accessed 7 May 2014).
[153]Tonry, 'The Politics and Processes of Sentencing Commissions' (n 43); Tonry, 'Setting Sentencing Policy through Guidelines' (n 3); Barkow (n 35); Martin (n 9); Boerner (n 55) and Stith (n 52).

Minnesota Commission and Donna Schram as well as commission member Prosecutor Norm Maleng of Washington State have been noted. Accordingly, there seems to be general consensus that the commission/council should have good lines of communication with the legislature and that it helps if the key figure (not necessarily the chair) is a politically powerful figure.

Similarly, the good will of the members of the Commission coupled with the experience of the commission staff most likely accounted for the successful implementation of the Minnesota Guidelines. For example, Douglas Amdahl (Minnesota Supreme Court judge) was reportedly a strong and effective proponent of the guidelines, which apparently worked to make guidelines work. Dale Parent and Kay Knapp, the initial executive and research directors respectively, were highly experienced and competent. Knapp is recognised as probably the most knowledgeable expert on sentencing guidelines in America.[154]

6.4.2 Leadership of the Sentencing Council

The question of the leadership of the sentencing commission has arisen a few times. That is, should the chair of the commission be a judge or another member representing a non-judicial constituency. Experience in other jurisdictions suggests that the success of a system of guidelines does not depend on a judge being chair of a sentencing commission. Therefore, the decision of who should or should not be chair can be made depending on the political choices of a given jurisdiction. For example in England and Wales, the chair of the sentencing council is designated by statute. Schedule 15 (2) (a) of the Coroners and Justice Act provides that: 'the Lord Chief Justice in agreement with the Lord Chancellor shall appoint a judicial member to chair the

[154] Tonry, ' The Politics and Processes of Sentencing Commissions' (n 43) 319.

Council'. On the other hand, the Criminal Justice and Licensing (Scotland) Act, 2010; schedule 1 (1) (2) specifically designates the Lord Justice Clerk as the chair of the Scottish Sentencing Council.

Elsewhere, for example in Minnesota, the Minnesota Statute, section 244.09, sub division 2 provides that: 'the Governor shall appoint one of the members of the commission as chair'. The current chair of the Minnesota Commission is Jeffrey Edbald, an Isanti county attorney. Jan Smaby the first chair of the Minnesota Commission, whose work has been widely commended, was a citizen representative, who had high political ties, and ambition. In 2003, many years after her replacement at the Minnesota Commission in 1982, a Former Fillmore County Sheriff, Neil Haugerud described Smaby as 'a political activist with high priority on the social conscience of party politics'.[155]The Washington Sentencing Reform Act, 1981, section 9.940A.860 (2) states that: 'the Governor shall appoint one of the members as the chair of the Washington Commission. The current chair is a citizen representative, a professor of Law—Professor David Boerner. The first chairperson of the Washington Commission, Donna Schram was a citizen representative, whose political acumen is undisputed. The Pennsylvania statute provides that: 'the commission shall select a chair and executive director from its members'.[156] The historical list of its members shows that since 1979, seven judges have been appointed as Chair to the Pennsylvania commission, one member of the House of Representatives, and two members of senate. The current chair is a professor of Law —Professor Steven L. Chanenson, who has been chair since 2012.

[155]See 'Where Does a Twin Cities Celebrity go to retire?', Fillmore County Journal (15 August 2003) <http://fillmorecountyjournal.com/single.php?article_id=14573> (accessed 19 January 2015).
[156]Pennsylvania Statutes, Title 42, Chapter 21, Subchapter F § 2152(2).

Although literature in the field, both old and new generally discourages judicial dominance of sentencing commissions, there doesn't seem to be consensus on whether the chair should be a judge or not. However, except in Scotland and England and Wales, where the enabling statutes specifically provide that the chair is to be a judicial member, the statutes establishing sentencing commissions in the US jurisdictions considered here left the decision to the Governor, in both Minnesota and Washington. On the other hand, the Pennsylvania statute left this decision on the Commission, which seems to be the most advisable and feasible approach for appointing a commission chair, since it defends against the politicisation of appointments to the position of chair if it was left, say to Presidential appointment.

The statutes establishing non-governmental agencies in Uganda do not often state the eligibility requirements of the members intended to serve on the bodies and do not state the sectors from which they are to come. For example, the Uganda Human Rights commission Act[157] establishing the Uganda Human Rights Commission is silent on the constituencies that commission members are to represent. Be that as it may, the current commission members include: lawyers; a retired commissioner General of Prisons, a University Lecturer and a former employee of the Uganda Peoples Defence Force,[158] there is no participation from ordinary citizenry. The Uganda Law Reform Commission Act[159] specifically states that the members shall be judges, lawyers or senior teachers of law.

International experience has shown that a more representative membership model tends to be a more viable model for a sentencing commission/council membership because of the value diversity in perspectives and experience has towards formulation of rational sentencing policy.

[157] The Uganda Human Rights Commission Act Chapter 24.
[158] The profiles of the commissioners are available on the Uganda Human Rights Commission website <http://www.uhrc.ug/?page_id=1979> (accessed 19 January 2015).
[159] The Uganda Law Reform Commission Act, Chapter 25.

Therefore, the question is not whether Uganda needs to adopt a representative membership model for the Ugandan Sentencing Council, but rather whether, there is necessity to exclude some political constituencies from the membership of the Sentencing Council. Experiences from other jurisdictions suggest, for example that, the legislature, and ordinary members from the public may not necessarily be part of the composition of a sentencing council.

Briefly stated, jurisdictions such as Minnesota, Scotland, England and Wales, where the legislature is excluded from involvement in the sentencing commission/council represent jurisdictions where: (a) the political independence of the sentencing commission was given major prominence (in Minnesota); (b) jurisdictions where the judiciary was intended to maintain substantial control over the development of sentencing policy with minimum checks and balances (England and Wales and Scotland). Even then, in all these jurisdictions, the legislature was left with a function, such as legislative overview of the sentencing guidelines (in Minnesota) or a consultative role (England and Wales).

Accordingly, experience with sentencing commissions in America and England and Wales, suggest that the calibre of the members of the commission in terms of the relevancy of their expertise in criminal justice is very important. The inclusion of 'lay' members into the development of sentencing guidelines enables the development of rational sentencing policy and irrespective of the local conditions of a jurisdiction; public participation in developing sentencing guidelines is valuable. Accordingly, Uganda reformers need to consider the involvement of lay persons in the development of Uganda's sentencing guidelines. Also, exclusion of the legislature may be ideal but of little practical significance. This is so because, irrespective of the degree of structural independence, the legislature will always play its legitimate function to create sentencing policy.

6.5 Conclusion

This chapter has given an account of the justification for the use of sentencing commissions/councils as an appropriate 'vehicle' for developing meaningful sentencing guidelines. The chapter has explained that in order for the sentencing commission/council to be in position to develop meaningful sentencing guidelines, the commission/council must have a degree of structural independence that facilitates its formulation of sentencing guidelines without executive and judicial control. Although the legislature's legitimate function of developing sentencing policy can never be overridden. In addition, it is argued that the institutional composition of the sentencing commission/council must be designed in a way that permits a diversity of professional and wider public participation as well as in a way that enables a good interplay between the sentencing institution and other branches of government.

Having said that, a Sentencing Council for Uganda is likely to have its members appointed by the President with the approval of the Attorney General, or the legislature. Accordingly, Council membership is likely to comprise of beaurocrats. More like England and Wales and Scotland, judges are very likely to retain substantial control over the developing the guidelines. In addition, the chair of the Sentencing Council is likely to be a judge. In that regard, the sentencing guidelines are more likely to be developed with the approval of the judiciary and not the legislature. Lastly, professional expertise, particularly in the legal field is likely to be emphasised. That said in my view, ideally, the authority to appoint sentencing council/commission members should be distributed amongst all the different branches of government. This from a Ugandan context would more likely safeguard against constituting a sentencing council which will become a lobbyist for the existing government's political interests. The Sentencing Council for Uganda requires to have a diverse membership that represents wider

interests. Although judicial ownership of sentencing authority in Uganda is almost uncontroverted, the development of the sentencing guidelines ought to be subjected to legislative approval. This would work as a measure for safeguarding against the democratic deficit that is currently present in the formulation of sentencing policy.

Chapter Seven

General Conclusion and Recommendations

This study explored the different approaches that could be adopted in designing meaningful sentencing guidelines for Uganda. The primary aim of the study was to offer an integrated set of proposals for the development of Uganda's sentencing guidelines and statutory sentencing framework. This was accomplished through an extensive review of existing scholarly literature on the subject of structuring judicial discretion as well as an empirical review of sentencing guideline schemes of selected common law jurisdictions. The study also conducted a detailed review of Uganda's current sentencing guideline scheme and statutory sentencing framework. It was primarily argued that the primary function of sentencing guidelines is to enable a public articulation of meaningful consistency. The author's argument was that consistency is not necessarily absent in an individualised sentencing approach. However, what is lacking are the clear benchmarks for articulating consistency. Therefore, sentencing guidelines come in to play to define and publicly articulate consistency. Upon conducting an empirical review of sentencing guideline systems in some selected jurisdictions and making a critical analysis of Uganda's sentencing guidelines, the study concluded that Uganda's sentencing guidelines fail to define consistency meaningfully. It was primarily argued that sentencing guidelines modelled on a limiting retributivism justification offer the most appropriate model for defining consistency meaningfully. A number of recommendations were made in each chapter. This chapter draws these recommendations and conclusions together.

In chapter two, the nature of discretionary sentencing in Uganda was examined and how it is likely to impact on the articulation of consistency in sentencing. A detailed overview of Uganda's statutory sentencing framework was given. This established that Ugandan sentencers generally enjoy broad sentencing discretionary powers, which are only subjected to dismal legislative restrictions. In addition, a review was made of a substantial body of empirical research devoted to the investigation of sentencing inconsistencies conducted in western jurisdictions. The review of this literature helped to demonstrate that without sentencing guidelines, sentencing is likely to be inconsistent. In addition, a small study based on 37 defilement cases decided by courts in Uganda was undertaken and placed in appendix A to this study. The purpose of the analysis of these cases was not to purport to demonstrate the existence of unwarranted disparities across all sentencing in Uganda. However the study provided some prima facie support for the then Chief Justice's acknowledgement of the existence of disparities in Ugandan sentencing. It also provided some useful information about the ranges of sentencing for the offence of defilement, as well as demonstrating how difficult it is to meaningfully articulate consistency under Uganda's individualised sentencing approach.

The second key point that emerged from the study is in chapter three. Contrary to practices in other jurisdictions (where judicial opposition to sentencing guidelines is almost a norm), the movement towards sentencing guideline reform in Uganda was driven and motivated by the senior members of the judiciary. The key point highlighted in this chapter was that the degree of judicial ownership of sentencing in a given jurisdiction is likely to influence the shape of the jurisdiction’s sentencing guideline

reform and if, other political constituencies do not take political interest in the development of sentencing guidelines, sentencing guideline reform may make a modest contribution to the existing exercise of judicial discretion. Accordingly, whether the judiciary has de facto authority over sentencing in a given jurisdiction, sentencing guidelines ought to be developed not from a single judicially led political interest.

From the outset, the study emphasised that the principal function of sentencing guidelines is to provide a public account of meaningful consistency. The study emphasises meaningful consistency because it is strongly believed that simply issuing a set of sentencing guidelines to guide sentencers in their sentencing decision making is not enough. It is important for the guidelines to also publicly articulate consistency in a meaningful way. Accordingly, the key point in chapter four was that constructing sentencing guidelines on a limiting retributivism justification enables the formulation of sentencing guidelines that articulate consistency meaningfully. It was argued that limiting retributivism justifies the use of desert as the primary rationale which sets the boundaries within which competing subordinate aims of punishment can be pursued. This facilitates the pursuit of all important but competing sentencing purpose without necessarily damaging the primary consistency established by the guidelines. Another key point was that sentencing guidelines ought to be modelled on meaningful and normatively acceptable standards of proportionality. Although the concept of proportionality is not precise, and therefore there is bound to be subjectivism on what punishment is or is not proportional, an ethically meaningful definition of proportionality is necessary.

In chapter five, the key point was that no single well established sentencing guideline scheme provides a sample set of guidelines that another jurisdiction can adopt in their entirety. Good practices need to be drawn from different guideline systems. For example, although the guideline systems reviewed in this study are modelled on a stronger version of limiting retributivism than Uganda's, some of these schemes do not give consistency a meaningful function. An example of Minnesota's overlapping sentencing ranges was given to show how these sentencing ranges give consistency a meaningless function.

In chapter six, the key point that emerged was that much as political insulation of a sentencing commission/council is necessary, absolute political insulation is impossible. The legitimate function of the legislature to make sentencing policy cannot be overridden by any form of structural independence of a sentencing commission/council.

From the outset, the study was motivated by a resolve to offer an integrated set of proposals for the development of Uganda's sentencing guidelines and statutory sentencing framework. Accordingly, the search for normatively and practically acceptable principles for revising Uganda's sentencing guidelines shaped the grounding of this study on experiences in other common law jurisdictions. The author was of the view that the experiences from other jurisdictions would provide meaningful lessons for Uganda. Hence, based on those experiences and scholarly literature on the subject, this study makes the following key recommendations.

First, Uganda's sentencing guidelines should be modelled on a limiting retributivism justification. This proposal is based on three main justifications. First, limiting

retributivism provides a transparent public statement of the sentencing aims of a given jurisdiction. Secondly, limiting retributivism justifies the use of desert as the primary rationale of sentencing. Desert then sets the boundaries within which the subordinate aims of punishment are pursued. With this, consistency is delivered by the desert basis of the guidelines as other important but competing sentencing aims are utilised within the desert limits. Limiting retributivism thus allows competing and contradictory aims of punishment to be pursued at the discretion of the sentencer without damaging the primary consistency of the guidelines. This is important to the extent that a number of competing sentencing principles and purposes, both retributive and utilitarian, can be pursued within proportional desert limits.

Desert is more idealistic because it is premised on the notion that punishment must be proportional to the seriousness of the offence. Proportionality ensures that punishments are allocated in direct proportion to the relative seriousness of the offence, and similarly placed offenders receive comparable sentences. By justifying the use of desert limits to punishment severity, limiting retributivism provides a procedural model which sets limits to overly excessive, or unduly lenient sentences that are not proportional to offence seriousness. The permissible ranges of punishment can be designed to reflect politically and normatively acceptable limits of punishment, thereby providing a transparent public statement of the permissible ranges of punishment. All these seek to make sentencing decision-making more transparent and provide a public account of meaningful consistency.

Secondly, Uganda's sentencing guidelines should be presumptively binding on Ugandan sentencers for a number of reasons. Uganda's court organisational structure permits the institution of criminal proceedings in a number of courts. That is, the High Court as well as the magistrates courts at different levels of the court system have original (first instance) trial jurisdiction to hear criminal cases. This is unlike other voluntary sentencing guideline schemes in jurisdictions like the District of Columbia and Virginia, which have a unified court structure or a single court with original criminal jurisdiction. This means that in Uganda, sentencing guidelines have to be marketed on a broader platform which is likely to make the marketing of these guidelines much more difficult. In addition, the geographical location of the different Ugandan courts, particularly magisterial courts, is likely to render the monitoring of purely advisory guidelines difficult. It was the author's view that having some form of legal enforcement mechanism may persuade even the reluctant sentencer to consider applying the guidelines.

Academic literature in the field of sentencing as well as sentencing experiences from other countries suggest that voluntary guidelines like presumptive guideline can achieve the same goals. Provided that voluntary guidelines are properly managed and constituted. Although it was recognised that articulating meaningful consistency and promoting greater transparency in sentencing may require something more than making the guidelines presumptive, it was revealed that normally some extra-legal conditions shape the proper implementation of voluntary guidelines. When some of these conditions were analysed in the Ugandan context, it was established that without formal

mechanisms requiring compliance, some sentencers —particularly magistrates might stray from applying the guidelines. That said, it was recognised that the some voluntary guidelines such as those that require written explanation for a sentencer's failure to consider the guidelines' may be as good as presumptive guidelines. However, experiences from jurisdictions using voluntary guidelines revealed that this mechanism mostly works in jurisdictions where either judicial selections are subject to legislative scrutiny or electoral politics, which is not the case in Uganda. Other factors were considered such as the judicial culture in Uganda of senior and lower bench distinctions. The discussion led to the conclusion that presumptively binding sentencing guidelines will be more favourable for Uganda.

Thirdly, Uganda should adopt the approach in England and Wales of creating classes of broadly similar seriousness within a broad offence classification. This recommendation is made based on the nature of legal offence definitions under Uganda's sentencing statutory framework. Offences in Uganda are so broadly defined, that a single offence definition may encompass different factual situations that may disclose varying degrees of seriousness. Therefore , a scaling of broadly similar seriousness as portrayed on sentencing guideline grids of most jurisdictions in the United States of America (US) was found to be unfavourable.

Fourthly, it is recommended that Uganda's sentencing guideline ranges be designed in a manner that represents ordinal relativities in seriousness between different classes of cases. That offence X is more severe than Y, should be clearly reflected in the scaling of

penalties for those offences. With this approach, the author is of the view that Uganda's sentencing guidelines will generate greater and more meaningful consistency in sentencing. Accordingly, the study discourages the use of statutory maximum penalties as the upper limit to sentencing ranges of offences with similar maximum penalties across the board. The study also recommends the use of non overlapping sentencing ranges as overlapping sentencing ranges fail to provide consistency a meaningful function as sometimes less culpable offenders are treated similarly as more culpable ones and vice versa.

Fourthly, it is recommended that all aggravating and mitigating factors which are justified on retributive and utilitarian philosophies are relevant. This conclusion is arrived at based on the understanding that under a limiting retributivism model, desert is the primary rationale upon which mitigation and aggravation of sentence is justified. However, within desert limits, sentences can be aggravated or mitigated based on utilitarian purposes. Having said that, it is further recommended that other factors which can be linked to one or more sentencing philosophies, but are ordinarily ambiguous such as remorsefulness, family responsibilities, terminal illness, intoxication, advanced age should be identified, and sentencers specifically required to consider (and articulate) the rationale for their invoking such sentencing factors whenever the need for their application arises. That is, where these factors are found to be relevant, after consideration of their applicability from either a retributive or utilitarian perspective as discussed in chapter 4, then sentencers should be required to provide a written explanation for their relevance. This would work as a measure for making their

relevance clear to the public, and for purposes of developing a common approach to their consideration.

Fifth, as regards departure standards and principles, it is recommended that a custodial zone be left between the upper end of the range and the statutory maximum (for upward departures) and the width between the bottom range and the and least minimum penalty (for downward departures). The current set of Uganda's sentencing guidelines leaves no such custodial zones and this has defined departures out of existence. It is further recommended that for purposes of generating a common approach to sentencing outside the guidelines, upper limits to the degree of departure should be adopted such as Minnesota's no doubling principle. That is, sentences cannot be imposed which are twice more severe than the sentence recommended by the guideline range. As regards, legal departure standards, it was proposed that any standard of departure, either permitting a departure only where 'compelling and substantial circumstances exist', or 'in the interest of justice', or for 'public interest', would suffice, since the scope of application of a departure standard is a matter for court interpretation.

In addition, it emerged that in a number of sentencing guideline systems, previous convictions could either serve as a secondary sentencing factor —whereby enhancements to sentence severity will be consistent and cumulative to the level of previous convictions (US grid style). On the other hand, they could simply be regarded as an aggravating factor (as in England and Wales). The importance of previous convictions in sentencing, and the lack of consensus on a single approach that would enable the incorporation of previous convictions in a desert based framework without causing theoretical and normative problems was considered. The study recommended

the use of previous convictions as an aggravating factor which is weighted within boundaries set by proportional desert limits. This proposal was arrived at after a detailed examination of the theory of progressive loss of mitigation and the culpability based justification for previous conviction enhancements. As regards previous convictions resulting to a progressive loss of mitigation of the offender, it emerged that there are unpersuasive notions about the theory. For example, the theory does not suggest that first offenders are less culpable than repeat offenders or that repeat offending enhances the offender's level of culpability. However, the theory posits that a second chance should be given to first, second, third offenders, etc, although there is no consensus on the number of convictions after which the severity of sentence should become noncumulative which undermines equal treatment of otherwise similarly placed offenders.

The culpability based justification was also reviewed. The culpability based justification for previous conviction enhancements supports the approach that a culpability score is assigned to each previous conviction so long as the assigned culpability scores do not exceed the degree of seriousness of the current offence. The author interpreted the culpability based justification to mean that a consistent and cumulative culpability score is assigned to each relevant and recent previous conviction. Consequently, the author devised an index of culpability which assigned a culpability score calculated at 25 per cent of the recommended sentence, thereby making a total sentence outcome for each offender with a previous conviction increase within the limits of 25 per cent of the recommended sentence. That is, if the offender's recommended sentence is 20 years imprisonment, but the offender has a recent and relevant previous conviction, 5 years

imprisonment will be the range of culpability score for the offence. Hence if court determines that the offender's previous conviction greatly increased his or her culpability for the current offence five years imprisonment could be added to his or her recommended total sentence term of twenty years imprisonment. Although this approach was found to be logically justifiable, an index of culpability scores produced a penalty scale which is very close to Minnesota's scale that provides for consistent and cumulative enhancements for previous convictions. This approach is unlikely to work for Uganda because of its likely potential to increase sentence severity based on an elevated misconception about previous offenders being more dangerous.

Thus, since the study proposes a limiting retributivism justification, instead of making repeat offending an index of culpability, previous convictions could be allowed to contribute some enhancement to sentence severity but within a range allowed for each offence severity level, just as instrumental aims of punishment are pursued within those limits. For example, the court could be allowed to allocate weight to criminal history within guideline ranges as an aggravating factor. With this, an account of consistency in sentencing will be provided, and in cases where court perceives the previous convictions to position the case outside the guideline classification (that is as being less or more serious than the guideline classification), a departure will be made and articulable reasons provided.

Concerning sentencing for multiple current offence convictions, the theory of bulk discounting which appears to be incorporated in most sentencing guideline systems was considered. This theory implies that each individual case is sentenced separately but sentences are made to run concurrently rather than consecutively. In order to try to keep

in line with the current laws of Uganda, it was proposed that multiple current convictions are not cumulatively sentenced. Principles enabling the cumulative sentencing for multiple current offending arising out of offences committed in separate and distinct transactions should be devised. Whilst offences which are committed in a single incident or course of conduct, where the offender's culpability is generally the same in all offences, should be considered for bulk discounting.

When multiple current offences arise out of separate and distinct courses of transactions, the presumption would be highly in favour of consecutive sentencing particularly where the offender's criminal conduct suggests that his/her culpability was higher. Although s/he was lucky not to be intercepted by police earlier than his subsequent offences, this proposal certainly creates double standards for single transaction offences and offences committed in separate and distinct transactions. However, sentencing guidelines are not really about providing an objectively defensible scale. They are mainly about providing benchmarks upon which consistency can be measured and articulated. Accordingly, it is appropriate to articulate that multiple offences committed in a single course of transaction portray broad similarity in seriousness, and that concurrent sentencing limited by the severity of punishment of the most serious offence is appropriate in such cases. Thus, the Uganda's sentencing guidelines could benefit from the articulation of such principles instead of leaving the totality principle loosely broad, which fails to provide a public account of justice in sentencing.

Finally, the study recommended the establishment of a Sentencing Council for Uganda. It was proposed that the Sentencing Council should have authority to promulgate sentencing guidelines that are subject to positive endorsement by the legislature. This

proposal emerged from the fact that sentencing guidelines are law-like and their development is a social function. Therefore, a degree of democratic accountability is required from the persons promulgating sentencing guidelines. Also, positive endorsement of the sentencing guidelines by the legislature gives greater democratic legitimacy to the guidelines. It has been proposed that the Sentencing Council for Uganda should have a professionally diverse membership. It has been further recommended that the authority to appoint members of the Sentencing Council should be distributed amongst the three branches of government to avoid having Council members who will be more interested in representing biased political interests. As regards the chair of the Council, it is envisioned that a Judge would be likely and more suitable to be the chair given the nature of distribution of sentencing authority in Uganda.

The development of sentencing guidelines for Uganda is undoubtedly a positive development in terms of guiding judicial sentencing discretion and attempting to publicly articulate consistency in sentencing. The development of sentencing guidelines by the Ugandan judiciary suggests a willingness on the part of the judiciary to make sentencing more rational. Accordingly, presumably, it is unfortunate that this study highlights the reformers' major weaknesses, rather than their strength in developing sentencing guidelines for Uganda. However, the author is of the view that it is through an early identification of weaknesses in the initial sentencing guidelines for Uganda that properly constituted and well managed sentencing guidelines will gradually be developed. The purpose of this study was to provide an integrated set of proposals for the improvement of Uganda's sentencing guidelines and sentencing statutory framework.

This study has attempted to offer those proposals which will further improve Uganda's sentencing guideline reform. It is better to acknowledge the failures of the current Uganda Sentencing Guidelines Taskforce, than to watch the sentencing guideline reform movement muddle.

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Appendix A: Empirical Analysis

The following pages contain a detailed analysis of the findings drawn from an empirical study of 37 Ugandan cases on defilement. As pointed out in chapter two of this study, the findings from this analysis do not purport to demonstrate the existence of unwarranted disparities across all Ugandan sentencing. However, the study provides prima facie support for the then Ugandan Chief Justice's acknowledgement of the existence of disparities in Ugandan sentencing and provides some useful information about the range of sentencing for this offence.

Justification for Reviewing Defilement Cases

Although the Penal Code Act Chapter 120 (Laws of Uganda) ('hereafter the PCA 120') creates hundreds of offences, defilement was preferred for a number of reasons. First, since sentencing is underpinned on an individualistic justice approach, the absence of standards for measuring similarity made the analysis of aggravated defilement cases easier. This is so because the PCA 120[1] explicitly states the factors which aggravate this offence. This makes it relatively easier to identify aggravating factors and make judgment on comparative seriousness between different kinds of defilement. For example, it is easier to tell that an offender's culpability is highest where the victim is of a tender age below 14 years. Again, it is easier to determine that when the offender has a familial relationship with the offender, his culpability is considered higher.

[1] As amended by The Penal Code (Amendment) Act, 2007.

Additionally, unlike other offences such as murder, the offence of defilement typically involves a male offender and a young female victim.

The focus on defilement was also motivated by the offence's prevalence in Uganda. The most recent (2013) Uganda Police: Annual Crime Report indicates that this offence was the second most leading crime in Uganda as of 2012/2013,[2] and this has been the trend.[3] Also statistics show a total of 7,690 defilement cases reported in 2011 compared to 1,987 murder cases and 520 rape cases and the statistics show that it is the most common serious crime of all the serious crimes committed in 2011.[4] Additionally, the fact that the offence attracts the maximum penalty of death means that theoretically the breadth of discretion is broader when judges are determining an appropriate sentence for a defilement offender.

Analysis

The offence of defilement is committed when 'a person engages in sexual intercourse with a child below 18 years'.[5] The offence is aggravated when the following circumstances are present. (1) The victim was a child under 14 years. (2) The offender was suffering from the Human Immunodeficiency Virus (HIV). (3) The offender is a

[2] Uganda Police, 'Annual Crime and Traffic/Road Safety Report (2013) <http://www.upf.go.ug/download/publications(2)/Annual_Crime_and_Traffic_Road_Safety_Report_2013(2).pdf> accessed (20 January 2015).

[3] Uganda Police, 'Annual Crime and Traffic/Road Safety Report (2011) 4 < http://www.upf.go.ug/download/publications(2)/Annual_Crime_and_Traffic_Road_Safety_Report_2011(2).pdf> (accessed 15 January 2013). It is indicated that out of 9 leading crimes, defilement was the second with a total of 7,690 defilement cases reported to police.

[4] Uganda Bureau of Statistics, '2012 Statistical Abstract' (June 2012) 33 < http://www.ubos.org/onlinefiles/uploads/ubos/pdf%20documents/2012StatisticalAbstract.pdf> (accessed 20 January 2015).

[5] The PCA 120, s 129.

parent or guardian of or a person in authority over, the person against whom the offence is committed. (4) The victim suffers from mental disability. (5) The offender is a serial offender.[6]The maximum penalty for defilement is the death sentence. Accordingly, the vulnerability of the victim in terms of age, the familial relationship of the offender and the victim, the mental or physical disabilities of the victim and the offender's criminal record are what constitute principal factual elements of the offence of defilement.

Methodology

The empirical analysis is of sentences handed down in thirty seven defilement cases. Although defilement is reportedly the most common serious offence in Uganda (thus making thirty seven cases a very small sample), the online database where the cases were retrieved only had thirty seven full judgments. By full judgments, I mean decisions which contained a summary of the proceedings, the conviction and sentence (sometimes with reasons for sentence). The judicial decisions were searched and accessed via the Uganda Legal Information Institute (ULII) database[7], which holds judgments for the High Court of Uganda and is acknowledged by the Ugandan judiciary as a database that provides 'legally significant decisions of the courts'.[8] The selection of thirty cases is not random. I analysed all the judicial decisions the author found on the database for the period between 1990 and 2011.

[6] The Penal Code Amendment Act of 2007, ss 129(3) & (4) (a)(b)(c)(d) & (e).
[7] ULII website <http://www.ulii.org/ug/judgment/high-court>.
[8]See, Uganda Judiciary website <http://www.judicature.go.ug/data/smenu/25/LawReporting.html>.

The systematic and comprehensive analysis was shaped by the following questions, which were intended to draw conclusions on determination of levels of culpability in defilement cases.

- The age of the victim at the time of commission of the offence
- Whether the victim and the offender have a familial, or any other kind of relation
- Whether the victim contracted any sexually transmitted diseases especially HIV
- Whether the victim had a mental illness or any other kind of vulnerability
- Whether the offender was a second or multiple offender.

The judgments were interpreted as follows. Offence seriousness was categorised into three groups based on the number of aggravating factors present in an individual case. The values of (0, 1, and 2) were given as follows.

- 0 represents a case where no statutory aggravating factor was found
- 1 represents a case where only one statutory aggravating factor was present
- 2 represents cases where a multiple of statutory aggravating factors were present.

The simplistic assumption was that cases where no statutory aggravating factor was present were to be considered of less seriousness than those where one or more statutory aggravating factors were present. This simplistic assumption helps to assess the relative impact the sentencing factors had on the choice of sentence. The sentencing range in all the reviewed cases was 3 years to imprisonment for life which suggested a wide variation in sentences between those offenders at the bottom of the range and those at the top.

The sentences were categorised into 5 groups as follows:

- 3 to 7 years custodial terms were placed under group 0
- 8 to 13 years custodial terms were placed under group 1

- 14 to 19 custodial sentences are under group 2
- 20 to 25 custodial sentences are under group 3
- Life imprisonment was placed under group 4.

The author moved from the custodial range of 20 to 25 years imprisonment in group 3 to life imprisonment in group 4 because there were no custodial term exceeding 25 years imprisonment. 25 years imprisonment was the second longest custodial term. Thus, the author did not want to create sentence ranges that would be rendered redundant in the data set. It is important to note that although there was no durational term imposed in excess of 25 years imprisonment there is no restriction under the law over the durational term of a custodial sentence. Judges can impose custodial terms of say, 30, 40, 45, 50 or 100 years imprisonment. 3 years imprisonment was the least sanction imposed in all the cases reviewed.[9]

The age difference between the offender and the victim appeared to have a modest significance on the sentence imposed. For this reason, the author found it relevant to evaluate the impact of the offender's age on the sentence outcome. In order to organise the data set to reflect this factor, offenders ages were categorised into three groups.

- 18 to 30 years
- 31 to 43 years
- 44 years and above.

The approach used to categorise offenders' ages into three was based on three factors. The first group of 18 to 30 years was categorised based on the fact that in almost all the

[9] PCA 120, s 2(e) defines a felony as 'an offence which is declared by law to be a felony or, if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death or with imprisonment for three years or more'.

judicial decisions reviewed, offenders aged between 18 and 30 years were considered by the different judges to be young or youthful. Also, according to the National Youth Council Act of Uganda, a youth is a person aged between 18 and 30 years.[10] The next group categorisation involves offenders aged between 31 and 43 years. The last category of 44 years and above was created because offenders in this age group were mostly considered 'very old' by the judges and this almost always led to imposition of harsher sentences on them.

The case review also suggested that the purpose(s) of punishment aimed to be achieved by the sentence sometimes had a modest impact on the sentence outcome. The four general aims of punishment often cited were: reformation, protection of society, special and general deterrence and retribution. In order to fit them into the data set, the purposes of punishment were categorised into four groups.

- 0 represents the cases where aim of punishment was reformation/rehabilitation
- 1 represents the cases where the aim of punishment was protection of society
- 2 represents the cases where the aim of punishment was deterrence —general and specific
- 3 represent the cases where retribution was cited as the aim of punishment.

The empirical analysis also considered the judge factor —that is, the question of the impact gender differences may have on sentence outcomes was examined. All observations retrieved from the judicial decisions were inserted into a data set in an excel format.

[10]The National Youth Council Act of Uganda Chapter 319 (Laws of Uganda) s 2.

Accordingly, in respect to similarity, it is assumed that a case is more serious and therefore broadly similar in seriousness with one with which the same number of aggravating factors are present. Therefore, an offence with more aggravating factors is However, given that judges are also permitted to take into consideration myriad sentencing factors it was critical to identify the normally recurring aggravating and mitigating factors, and examine how their presence or absence impacts on sentence outcomes imposed by different judges. It was relatively easy to identify the recurring aggravating factors in the cases. However it was much more difficult to assess the relative impact these factors do have or should have on the choice of sentences. This is so because although simplistically one may assume that the more aggravating factors, the more severe the sentence should be, in the real world, one aggravating factor may carry greater weight than two others. Accordingly, the findings in figure 2.1 Accordingly, the findings in figure 2.1 confirm that sentence severity does not necessarily depend on the number of aggravating factors present in a given case but on other case characteristics which the sentencer may weigh more significantly than two or more aggravating factors.

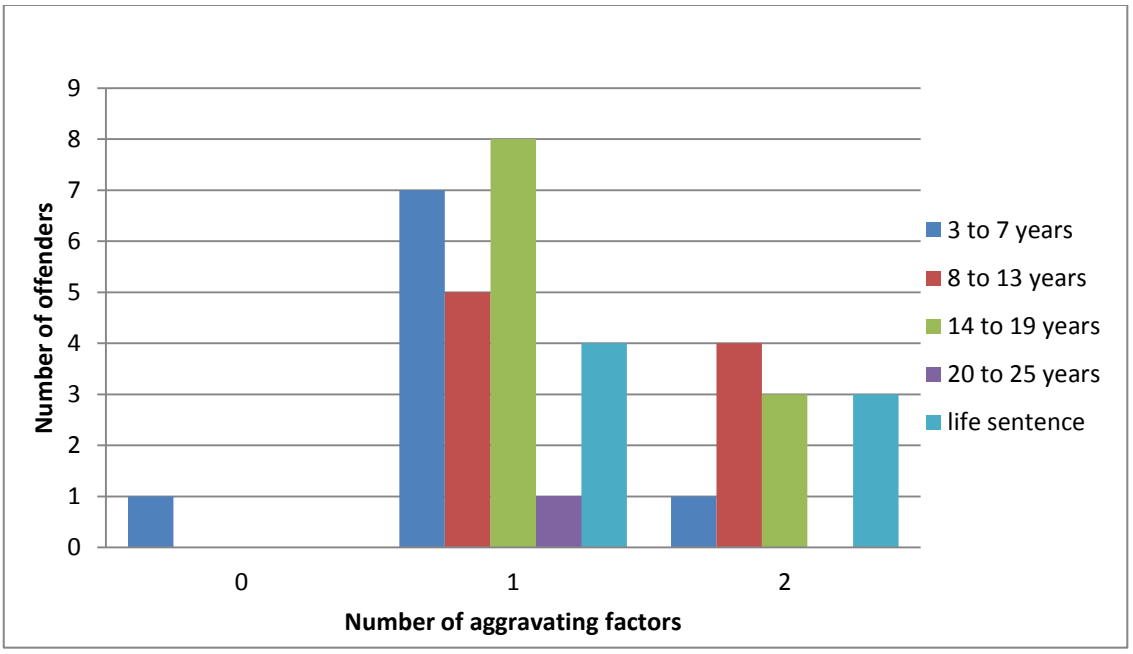

Figure 2.1. **Sentence outcome and aggravating factors**

Interpretation

Figure 2.1 above represents the sentence outcomes for offenders based on the number of aggravating factors present in the case. In this figure, it is shown that out of twenty five offenders with one aggravating factor, seven offenders were sentenced within the range of 3 to 7 years imprisonment. Five offenders were sentenced to 8 to 13 years imprisonment. Eight offenders were sentenced to 14 to 19 years imprisonment. One offender to 25 years imprisonment and four offenders were sentenced to life imprisonment. Furthermore, in some cases where two or more aggravating factors were present, offenders received less severe sentences than those cases where one aggravating factor was present. For example, eight offenders in cases where one aggravating factor was identified received sentences within the range of 14 to 19 years imprisonment. This was a more severe penalty range than that of offenders in cases where two or more

aggravating factors were identified. For example, as shown in figure 2.1 above, one offender in a case with two aggravating factors received a sentence of 3 years imprisonment whilst four offenders in cases with one aggravating factor received sentences within 8 to 13 years imprisonment.

For instance, it is difficult to articulate why one offender, a boyfriend of the victim was sentenced to life imprisonment[11]as an offender who was the biological father of a victim aged 20 months.[12] It is also difficult to articulate the similarity between these two cases. Whilst in the case involving the victim's biological father, the said victim was of extreme tender age, the victim in the case involving a boyfriend was 15 years old. Also, there was a gap in the offenders ages in the two cases. The only discernible similarity in these two cases was that the judges in both cases were female. Nonetheless, other case characteristics could have had a greater impact on the choice of sentence in each case such as the offender's HIV status in one case. In another case involving the paternal uncle of a 13 year old victim, the offender was sentenced to 7 years imprisonment.[13]Yet a brother in law of a 16 year old girl in another case (who conceived in the course of the sexual assault) was sentenced to 4 years imprisonment.[14]Only the fact that judges attached different weight to different case characteristics is likely to explain the differences in sentence outcomes of arguably similar cases. Accordingly, although it was easy to identify the aggravating factors, it was difficult to assess the relative impact these

[11]*Uganda v Abdu Bonyo* Criminal Session Case No 17 of 2009 (22 October 2009).
[12]*Uganda v Swaibu Kikonyogo* Criminal Appeal No.27 of 2002 (26 September 2005). The court said: 'the offence committed by the appellant on his own baby daughter was a heinous one and warrants a deterrent sentence.'
[13] *Uganda v Moses Bwire* Criminal Session Case No 56 of 2010 (19 April 2011).
[14]*Uganda v Martin Tangit* Criminal Session Case No 288 of 2006 (3 February 2007]

factors had on sentencing. The wide range of 3 years imprisonment to life imprisonment in cases where one aggravating factor was identified demonstrates how difficult it is to articulate consistency under the Ugandan individualised sentencing approach.

There was a clear pattern of punishing older offenders more severely than youthful ones. This perhaps lays consistently with the wide view that younger offenders are less culpable than their older counterparts. Nonetheless, there was no consistent approach to considering age as a mitigating or aggravating factor. Sometimes younger offenders were punished equally as their older counterparts. For example, in the cases where only one aggravating factor was present life imprisonment was imposed on a 22-year old offender just like his 63- year old and 65- year old counterparts. However, there was consistency to the fact that older offenders were sentenced within more severe penalty ranges than their younger counterparts. Figure 2.2 below attempts to examine the relationship between offender age and the sentence outcome.

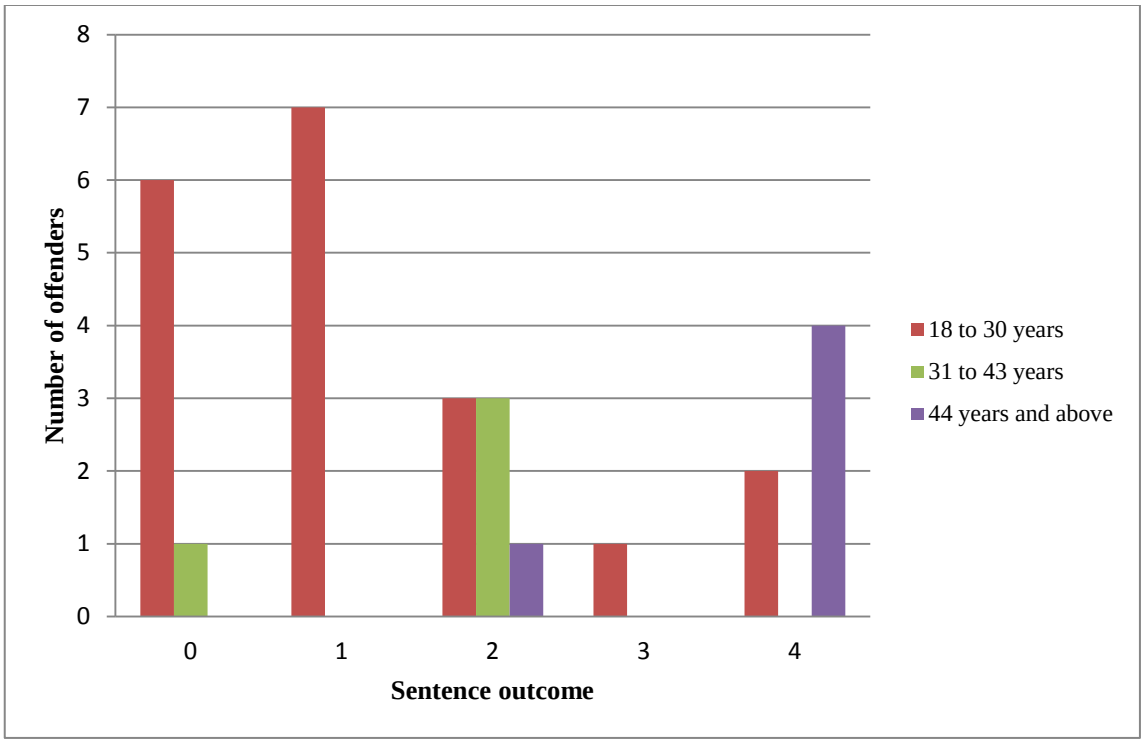

Figure 2.2. **Offender age and sentence outcome**

Interpretation

To begin with, out of the thirty seven cases reviewed, nineteen offenders were aged between 18 and 30 years. Four offenders were aged between 31 and 43 years. Five offenders were aged above 44 years. The ages of nine offenders are not known, and therefore not included in the data set. Figure 2.2 above shows that out of the nineteen offenders aged between 18 and 30 years, six offenders were sentenced within the range of 3 to 7 years imprisonment. Seven offenders were sentenced within the range of 8 to 13 years. Three offenders were sentenced within the range of 14 to 19 years and one offender was sentenced to 25 years imprisonment. The other remaining two offenders were sentenced to life imprisonment. The offenders who were aged above 44-years were sentenced within 14 to 19 years imprisonment and life in prison.

The analysis suggests that offender's age may serve to mitigate sentence, although the presence of an aggravating factor such as the tender age of the victim tends to modestly weigh down the significance of young age as a mitigating factor. For example two offenders aged 22 and 27 years were both sentenced to life imprisonment. The extreme young age of the victim (2 years and six months) in the case involving a 22 year old offender [15]may explain the judge's imposition of a life sentence. Similarly, in the case involving a 27 year old offender[16], the extreme young age of the victim who was just 20 months old, and the fact the offender was the victim's biological father is likely to have had a significant impact on the choice of sentence. Therefore, the findings modestly suggest that age is not necessarily a mitigating factor in sentencing for defilement. Depending on the nature of existing aggravating factors, judges may give age a greater or modest mitigating significance.

[15]*Uganda v Muzamiru Guloba* Criminal Session Case No. 4 of 2003 (24 July 2004).
[16]*Uganda v Swaibu Kikonyogo* (n 12).

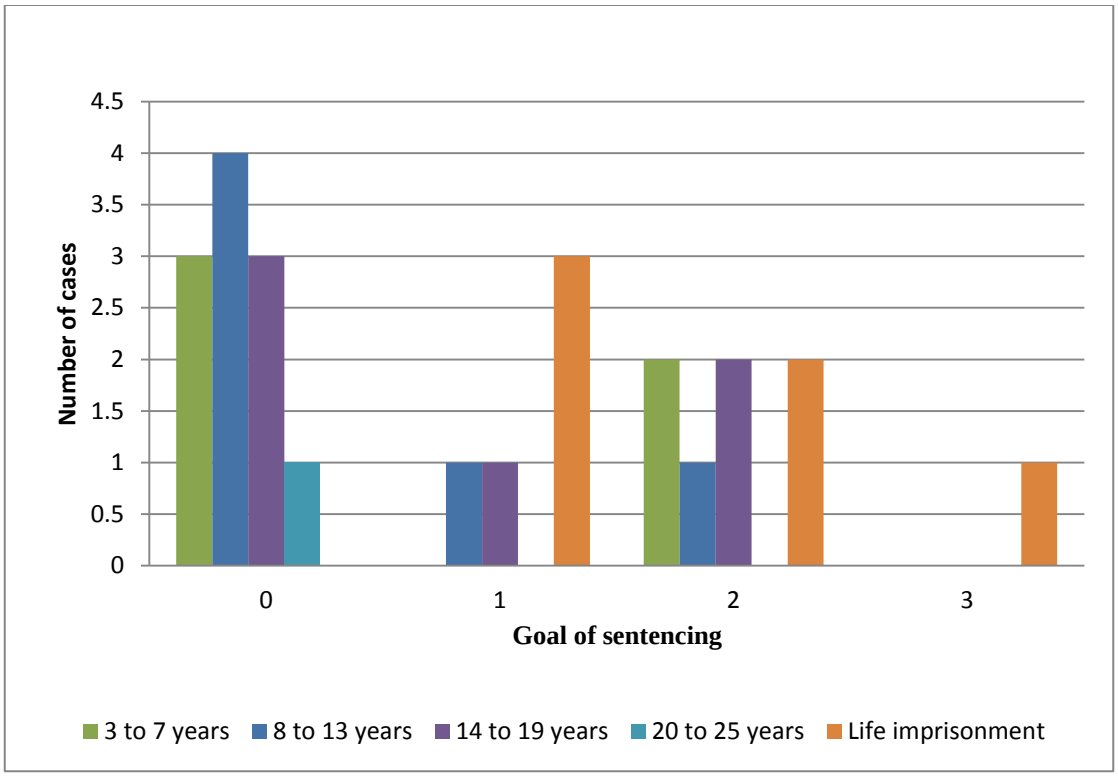

Figure 2.3. **Sentencing goal and sentence outcome**

Interpretation

Out of the thirty seven cases reviewed, the judges explicitly mentioned the sentencing goal in 24 cases. Thus the empirical analysis in figure 2.3 above indicates the impact of the applied goal of sentencing on sentence outcome in twenty four cases. Figure 2.3 above shows that in cases where judges mentioned rehabilitation or reformation as the goal to be achieved from the punishment imposed, sentences imposed ranged from 3 to 25 years imprisonment. In cases where protection of society was mentioned as the purpose of punishment, sentences imposed ranged from 3 to 19 years imprisonment as well as life imprisonment. In cases where deterrence was mentioned as the purpose of punishment, sentences ranging from 3 years to imprisonment for life were imposed.

Lastly, in the one case where retribution was mentioned, the offender was sentenced to life imprisonment. The majority of cases falling within the least severe custody threshold of 3 to 13 years imprisonment, the judges intended for the punishment to achieve rehabilitative goals. More severe custodial terms were imposed to achieve deterrent goals. This is not to argue that long custodial terms were not imposed to achieve rehabilitative goals. It is shown that a sentence falling within the custody threshold of 20 to 25 years imprisonment was imposed to achieve rehabilitative goals. Also, a number of sentences imposed for deterrent purposes fell within the shorter custodial threshold of 3 to 7 years imprisonment. What can be inferred is that sentencing goals are pursued differently by different judges. Yet the choice of sentencing purpose may have a significant impact on sentence severity. Another inference that could be drawn is that there is no explicable coherency between sentencing goal and sentence outcome. Thus, although the purposes of punishment were in most cases referred to by the judges, the judges probably did not attach great significance on them or didn't try to comprehend their likely impact on sentence severity. Nonetheless, there was a clear tendency for judges to impose shorter custodial terms where they applied the goal of reformation. Although longer custodial terms were imposed in some cases where reformation was indicated as a goal. For example, in one case where the judge imposed 19 years imprisonment he said that: 'the purpose of the law is to protect weak, defenceless children against the brutal and heartless adults of this kind. This purpose will be achieved by keeping such culprits out of circulation long enough to teach them a lesson and to reform them'.[17] Consistent with some studies conducted in other jurisdictions the

[17]*Uganda v Jenesio Okarboth* Criminal Session Case No 56 of 2008 (07 September 2009). The offender was 41 years of age, married with six children

findings in figure 2.3 above modestly suggest that philosophical differences among judges over the legal objectives of punishments may have implications on sentence severity. Almost consistent with other studies such as Palys and Divorski[18] who in their study found that rehabilitative goals were typically associated with non prison or relatively short prison terms, in the small sample of Ugandan cases reviewed, the penal objective pursued by the judge sometimes had a modest impact on the severity of sentence. Rehabilitative goals were typically associated with shorter custodial terms.

Furthermore, the author attempted to investigate the correlation between sentencing purposes and the age of the offender. The findings are explained in figure 2.4 below.

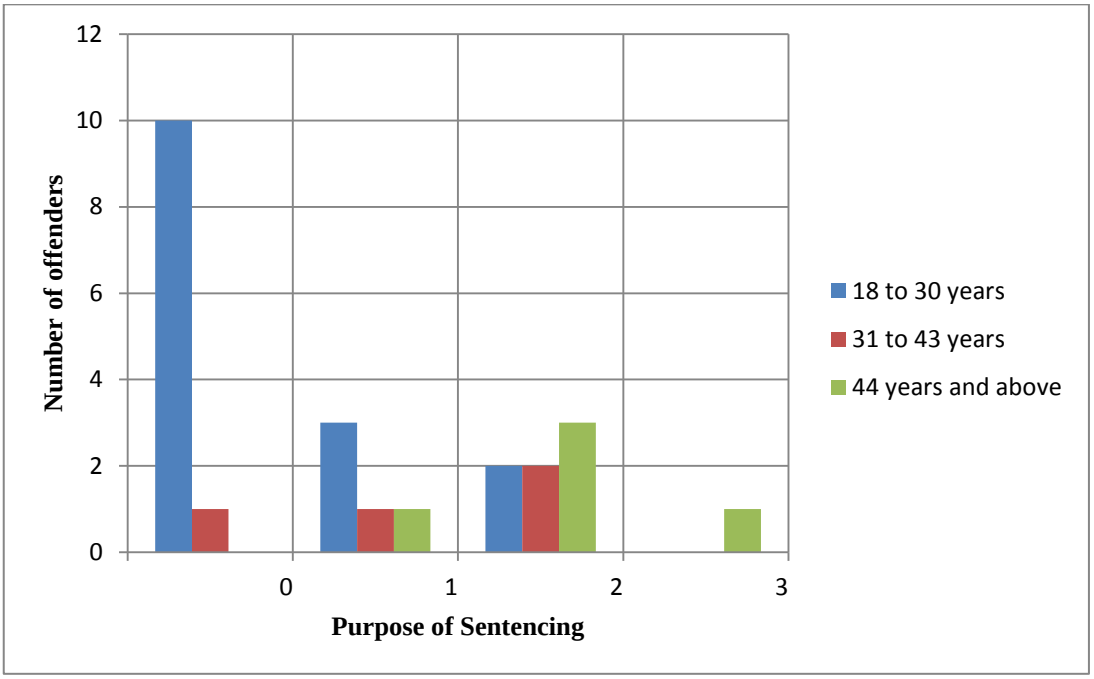

Figure 2.4. **Offender age and sentencing goal**

Interpretation

Figure 2.4 shows that out of twenty four cases, eleven offenders received sentences that the judges believed would reform them. Out of the eleven offenders, ten were aged

[18] TS Palys and S Divorski, 'Explaining Sentence Disparity' (1986) 28 Canadian Journal of Criminology 347.

between 18 and 30 years and one offender was 37 years old. Of the five offenders sentenced with the goal of protecting the society, three were aged 18 to 30 years, one offender was within the age bracket of 31 to 43 years and one above 44 years. Out of the seven offenders sentenced with the goal of specific or general deterrence, two offenders were aged 24 and 30 years respectively, two were aged 33 and 41 years and 3 offenders were aged above 44 years. There was one offender sentenced with the goal of punishing him proportionately with the seriousness of his offence. This offender was 63 years old.

The analysis makes several suggestions about the correlation between the age of the offender and the sentencing goal. First, that youthful offenders are mainly punished with the goal of reforming them. The judges in most of the cases involving youthful offenders (except for the two cases where life imprisonment was imposed), emphasised the need to reform the offender because he is a 'young man', [19]or that 'despite the offender being a second offender, court should not impose a deterrent sentence against him because he is a young man', [20]or that 'the accused is a very young man who should be given a chance to reform…, i don't think a long custodial sentence will serve any purpose'.[21]In another case involving a young man, the court said: 'I note that the convict is a young man capable of reform and hanging (implying imposing the death penalty) does not amount to reform'.[22]

The second suggestion is that older offenders are punished mainly for the purpose of deterring them from committing further crimes or for purposes of protecting society

[19] *Uganda v Akandida* Criminal Session Case No 0038 of 2004 (14 September 2005).
[20] *Uganda v Andrew Akankwasa* Criminal Session Case No 131 of 2003 (01 September 2005).
[21] *Uganda v Martin Tangit* (n 14).
[22] *Uganda v Moses Bwire* (n 13).

from their criminal activities. For example, in one case involving a 63 year old offender, the court said that 'the offender was not fit to return to the society where he was still capable of committing the same crime against young girls in his village'.[23]In another case involving a 50 year old offender, the judge said: '…the offence is rampant in this country and in the district where the victim comes from i shall pass a deterrent sentence'.[24] When affirming the sentence of life imprisonment that had been imposed on a 65 year old man, the Court of Appeal said: 'that the appellant who was aged 70 and married with three wives, could even think of having sex with a 6 year old girl was not only unthinkable but morally repulsive. We think the trial judge properly exercised her discretion in imposing a sentence of life imprisonment which is a 'deserving deterrent'.[25]

However, this is not to say that youthful offenders were never sentenced with a deterrent purpose.[26] However, it is worth noting that in such cases where youthful offenders were sentenced for deterrence purposes, the circumstances surrounding the offence indicated a higher degree of culpability on the offender; such as where the offender and the victim had a familial relationship or where the victim was of extreme tender age which suggested a higher level of vulnerability.[27]

The study conducted involved a very small number of judges and with such a small number of judges, any variation in sentence outcomes could not be readily attributed to gender differences because such variations could have been a result of differences in

[23] *Uganda v Weitire Asanansio* Criminal Session Case No 46 of 2006 (27 January 2012).
[24]*Uganda v Musa Nsiyaleta* Ciminal Session Case No 316 of 2010 (6 September 2010). The offender was sentenced to 25 years imprisonment.
[25] *Uganda v Joseph Bukenya* Criminal Session Case No 148 of 2001 (21 November 2003).
[26] *Uganda v Guloba Muzamiru* (n 15).
[27] *Uganda v Kikonyogo Swaibu* (n 12).

case characteristics. To begin with, out of the thirty seven cases, only seven cases were sentenced by female judges. This means that the study cannot make meaningful findings about gender differences in sentencing of defilement offenders. Nonetheless, the analysis in figure 2.5 below makes some interesting suggestions about sentencing patterns of female judges in defilement cases.

Figure 2.5 **Sentence outcomes by gender of judge**

Interpretation

Figure 2.5 above shows that out of seven cases receiving life imprisonment, six of those cases were handed down by female judges. Also, the longest custodial sentence of 25 years was imposed by a female judge. The figure shows that male judges imposed sentences ranging from 3 to 19 years imprisonment and one male judge imposed a sentence of life imprisonment. The small analysis thus reveals that female judges

imposed harsher sentences than their male colleagues regardless of the offender's age. For example the youngest offenders receiving life imprisonment were both sentenced by female judges, although youthful age had almost consistently been considered as a mitigating factor. It is noteworthy that some studies have found that offenders sentenced by female judges received significantly harsher sentences than comparable offenders sentenced by male judges.[28]

Despite the limitations of this study, it modestly suggests that the absence of sentencing guidelines/guidance is more likely to result in sentencing consistencies in Uganda, confirming the Chief Justice, Benjamin Odoki's observation.

[28] J Gruhl, C Spohn and S Welch, 'Women as Policy Makers: The Case of Trial Judges' (1981) 25 American Journal of Political Science 308; C Spohn, 'Decision Making in Sexual Assault Cases: Do Black and Female Judges Make a Difference? (1991) 2 Women and Criminal Justice 83; See also, D Steffeinsmeier and C Herbert, 'Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?'(1999) 77 Social Forces 1163.

Appendix B: Uganda Guidelines

THE CONSTITUTION (SENTENCING GUIDELINES) FOR COURTS OF JUDICATURE) (PRACTICE) DIRECTIONS, LEGAL NOTICE NO. 8/2013

THE CONSTITUTION (SENTENCING GUIDELINES FOR COURTS OF
JUDICATURE) (PRACTICE) DIRECTIONS, 2013
ARRANGEMENT OF PARAGRAPHS

Paragraph

18. The "rarest of the rare" cases.
19. Sentencing ranges in capital offences.
20. Factors aggravating a death sentence.
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22. Sentence of death in rape or defilement cases.

PART VII- IMPRISONMENT FOR LIFE

23. Imprisonment for life.
24. Imprisonment for life in capital offences.
25. Imprisonment for life in non-capital offences.

PART VIII - SENTENCING IN SPECIFIC NON - CAPITAL OFFENCES

26. Sentencing options for manslaughter , robbery or defilement.

Manslaughter

27. Sentencing range for manslaughter.
28. Factors aggravating a sentence for manslaughter.
29. Factors mitigating a sentence for manslaughter.

Robbery

30. Sentencing range for robbery.
31. Factors aggravating a sentence for robbery.
32. Factors mitigating a sentence for robbery.

Defilement

33. Sentencing range for defilement.
34. Considerations in determining a sentence for defilement.
35. Factors aggravating a sentence for defilement.
36. Factors mitigating a sentence for defilement.

Criminal trespass

37. Sentencing range for criminal trespass.
38. Considerations in determining a sentence for criminal trespass.
39. Factors aggravating a sentence for criminal trespass.
40. Factors mitigating a sentence for criminal trespass.

Corruption and related offences

41. Sentencing range for corruption and corruption related offences.
42. Considerations in determining a sentence for corruption and related offences.
43. Factors aggravating a sentence for corruption or a corruption related offence.
44. Factors mitigating a sentence for corruption or a related offence.

THE CONSTITUTION (SENTENCING GUIDELINES FOR COURTS OF JUDICATURE) (PRACTICE) DIRECTIONS, 2013

(Under article 133(1)(b) of the Constitution)

IN EXERCISE of the powers conferred upon the Chief Justice by article 133 (1) (b) of the Constitution, these Practice Directions are issued this **26th day of April, 2013.**

PART I – PRELIMINARY

1. Title.

These Practice Directions may be cited as The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013.

2. Application.

These Practice Directions shall apply to all courts of judicature

3. Objectives of these Practice Directions.

The objectives of these Practice Directions are—

(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.

4. Interpretation.

In these Practice Directions, unless the context otherwise requires—

"advanced age" means 75 years and above;

"child offender" means an offender below the age of eighteen years;

"community" means the residents of the locality where the victim or the offender lived at the time the offence was committed or where the offence was committed;

''community impact statement" means a written or oral account of the general harm suffered by members of a community as a result of the offence;

"community service order" means a sentence imposed under the

Community Service Act;
“currency point” has been defined in the fourth schedule;
“custodial sentence” means longterm, midterm or shortterm imprisonment;
“court” means a court of judicature established by or under the authority of the Constitution;
“imprisonment for life” means imprisonment for the natural life of an
offender;
“long term imprisonment” means a custodial sentence ranging from 30 to 45 years;
‘’mid-term imprisonment’’ means a custodial sentence ranging from 15 to 29 years;
“minor offence” means an offence for which a court may pass a sentence not exceeding two years imprisonment;
“pre-sentence report” means information on the social background of the offender intended to assist the court in arriving at an appropriate sentence;
“primary care-giver“ means a person who takes primary responsibility of a child below 4 years;
“responsible officer” means probation and social welfare officer, community development officer or any other person designated by the court;
“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 the community;
‘’sentencing range’’ means the bracket within which a sentence is given by the court;
‘’short term imprisonment “means a custodial sentence ranging from 15 years and below;
“victim “means a person directly or indirectly affected by the commission of the offence or omission of a lawful duty;
“victim impact statement” means a written or oral account of the personal harm suffered by a victim of crime;
“youthful age” means the age between 18 to 35 years.

PART II –PURPOSE OF SENTENCING

5. Purpose of sentencing.

(1) 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.

(2) For the purposes of subparagraph (1), the court shall in accordance with the sentencing principles pass a sentence aimed at -

(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.

PART III - SENTENCING PRINCIPLES

6. General sentencing principles.

Every court shall when sentencing an offender take into account—

(a) the gravity of the offence, including the degree of culpability of the offender;

(b) the nature of the offence;

(c) the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances;

(d) any information provided to the court concerning the effect of the offence on the victim or the community, including victim impact statement or community impact statement;

(e) the offender's personal, family, community, or cultural background;

(f) any outcomes of restorative justice processes that have occurred, or are likely to occur, in relation to the particular case;

(g) the circumstances prevailing at the time the offence was committed up to the time of sentencing;

(h) any previous convictions of the offender; or
(i) any other circumstances court considers relevant.

7. Sentencing of co-accused persons or multiple offenders.

The court shall consider the specific circumstances of each offender before sentencing co-accused persons or multiple offenders.

8. Calculating the totality of a sentence.

(1) Where the court imposes consecutive sentences, the court shall first identify the material part of the conduct giving rise to the commission of the offence and determine the total sentence to be imposed.
(2) The total sum of the cumulative sentence shall be proportionate to the culpability of the offender.

9. Custodial sentences.

(1) A custodial sentences, may be imposed where the circumstances do not meet the considerations for a sentence of imprisonment for life.
(2) A custodial sentence may be—
(a) long-term imprisonment;
(b) mid-term imprisonment; or
(c) short-term imprisonment.
(3) The court shall before imposing a custodial sentence consider—
(a) whether the purpose of sentencing cannot be achieved by a sentence other than imprisonment;
(b) the values, norms and aspirations of the people within the community;
(c) the character and antecedents of the offender;
(d) the circumstances and nature of the crime committed;
(e) the ruthlessness with which the offender committed the offence;
(f) the health and mental state of the offender;
(g) previous conviction record;
(h) the age of the offender;
(i) remorsefulness or conduct of the offender;
(j) whether the offender may be a danger to the community;
(k) views of the victim's family or community; or
(l) any other matter that court considers relevant.

(4) The court may not sentence an offender to a custodial sentence where the offender—
(a) is of advanced age;
(b) has a grave terminal illness certified by a medical practitioner;
(c) was below 18 years at the time of the commission of the offence; or
(d) is an expectant woman.
(5) The court shall when sentencing a first time offender consider that imprisonment is not a desirable sentence for a minor offence.

PART IV - SENTENCING OPTIONS AND ORDERS

10. Sentencing options.

The court may impose any of the following sentencing options—
(a) death penalty;
(b) imprisonment for life;
(c) imprisonment for a specified period of time;
(d) a fine;
(e) community service;
(f) probation;
(g) a caution and discharge without punishment; and
(h) any other lawful sentence option.

11. Sentencing Orders.

The court may make any of the following orders when sentencing an offender—
(a) conditional discharge;
(b) costs;
(c) compensation;
(d) restitution;
(e) forfeiture; or
(f) any other lawful sentencing order.

PART V - SENTENCING PROCEDURES

12. Time to consider sentence.

The court shall upon conviction, allow a reasonable period not exceeding seven days to determine the appropriate sentence for the offender.

13. Indication of sentence.

The court may, before imposing a sentence or during the sentencing hearing, ask the offender and the prosecution to indicate to the court an appropriate sentence in respect of the offence.

14. General factors to consider at sentencing.

(1) In order to determine the appropriate sentence, the court shall take into account matters required to be taken into account by any law, and shall make the inquiry, in the case of—

(a) the High Court, under section 98 of the Trial on Indictments Act; or

(b) a Magistrate's court, under sections 133, 164 or 165 of the Magistrates Courts Act.

(2) For the purposes of paragraph (1), the court may require the prosecution to produce to the court—

(a) a victim impact statement specified in Form A of the First Schedule; and

(b) a community impact statement specified in Form B of the First Schedule.

(3) The court may summon and examine any person to give evidence regarding—

(a) any custom prevalent in any area;

(b) the way of living of any community; or

(c) the background against which the alleged offence was committed.

(4) The inquiry under sub paragraph (1) may include—

(a) consideration of the employment, earning ability, financial resources and assets of the offender at present or in the future, including any circumstance that may affect the ability to make reparation, pay compensation or a fine; or (b) information relating to any benefit, financial or otherwise, derived directly or indirectly, as a result of the commission of the offence.

(5) The court shall take into account the matters specified in the Second Schedule and the considerations specified in respect of each offence.

15. Remand period to be taken into account.

(1) The court shall take into account any period spent on remand in determining an appropriate sentence.

(2) The court shall deduct the period spent on remand from the sentence considered appropriate after all factors have been taken into account.

16. Commencement of custodial sentence.

Except where a custodial sentence is in default of payment of a fine, every custodial sentence shall be effective from the date of conviction.

PART VI - SENTENCING IN CAPITAL OFFENCES

17. Imposing a sentence of death.

The court may only pass a sentence of death in exceptional circumstances in the "rarest of the rare" cases where the alternative of imprisonment for life or other custodial sentence is demonstrably inadequate.

18. The "rarest of the rare" cases.

The "rarest of the rare'' cases include cases where—

(a) the court is satisfied that the commission of the offence was planned or meticulously premeditated and executed;

(b) the victim was--

(i) a law enforcement officer or a public officer killed during the performance of his or her functions; or

(ii) a person who has given or was likely to give material evidence in court proceedings;

(c) the death of the victim was caused by the offender while committing or attempting to commit--

(i) murder;

(ii) rape;

(iii) defilement;

(iv) robbery;

(v) kidnapping with intent to murder;

(vi) terrorism; or

(vii) treason;

(d) the commission of the offence was caused by a person or group of persons acting in the execution or

furtherance of a common purpose or conspiracy;
(e) the victim was killed in order to unlawfully remove any body part of the victim or as a result of the unlawful removal of a body part of the victim; or
(f) the victim was killed in the act of human sacrifice.

19. Sentencing ranges in capital offences.

(1) The court shall be guided by the sentencing range specified in Part I of the Third Schedule in determining the appropriate custodial sentence in a capital offence.
(2) In a case where a sentence of death is prescribed as the maximum sentence for an offence, the court shall, considering the factors in paragraphs 20 and 21 determine the sentence in accordance with the sentencing range.

20. Factors aggravating a death sentence.

In considering imposing a sentence of death, the court shall take into account—
(a) the degree of injury or harm;
(b) the part of the victim's body where harm or injury was occasioned;
(c) sustained or repeated injury or harm to the victim;
(d) the degree of meticulous pre-meditation or planning;
(e) use and nature of the weapon;
(f) whether the offender deliberately caused loss of life in the course of the commission of another grave offence;
(g) whether the offender deliberately targeted and caused death of a vulnerable victim;
(h) whether the offender was part of a group or gang and the role of the offender in the group, gang or commission of the crime;
(i) whether the offence was motivated by, or demonstrated hostility based on the victim's age, gender, disability or other discriminating characteristic;
(j) whether the offence was committed against a vulnerable person or member of a community like a pregnant woman, child or person of advanced age;
(k) whether the offence was committed in the presence of another person like a child or spouse of the victim;
(l) whether there was gratuitous degradation of the victim

like multiple incidents of harm or injury or sexual abuse;
(m) whether there was any attempt to conceal or dispose of evidence;
(n) whether there was an abuse of power or a position of trust;
(o) whether there were previous incidents of violence or threats to the victim;
(p) the impact of the crime on the victim's family, relatives or the community; or
(q) any other factor as the court may consider relevant.

21. Factors mitigating a sentence of death.

In considering imposing a sentence of death, the court shall take into account the following mitigating factors—
(a) lack of premeditation;
(b) a subordinate or lesser role in a group or gang involved in the commission of the offence;
(c) mental disorder or disability linked to the commission of the offence;
(d) some element of self-defense;
(e) plea of guilt;
(f) the fact that the offender is a first offender with no previous conviction or no relevant or recent conviction;
(g) the fact that there was a single or isolated act or omission occasioning fatal injury;
(h) injury less serious in the context of the offence;
(i) remorsefulness of the offender;
(j) some element of provocation;
(k) whether the offender pleaded guilty;
(l) advanced or youthful age of the offender;
(m) family responsibilities;
(n) some element of intoxication; or
(o) any other factor the court considers relevant.

22. Sentence of death in rape or defilement cases.

In rape or defilement cases, the court shall consider imposing a sentence of death where the offence was committed under any of the following circumstances—
(a) where the victim was raped or defiled repeatedly whether by the offender or by a co-accused, co-perpetrator or an

accomplice;
(b) by more than one offender, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
(c) by an offender who has been convicted of an earlier offence of rape or defilement;
(d) by an offender knowing or having reasonable cause to believe that he or she has acquired HIV/AIDS;
(e) repeatedly by an offender who is supposed to take primary responsibility of the child victim;
(f) where the victim was gang raped or gang defiled; or
(g) where the victim:
(i) is physically disabled and due to her physical disability, is rendered vulnerable;
(ii) is mentally challenged;
(iii) has sustained serious injuries arising from the infliction of grievous bodily harm; or
(iv) any other extremely grave circumstances.

PART VII - IMPRISONMENT FOR LIFE

23. Imprisonment for life.

Imprisonment for life is the second gravest punishment next to the sentence of death.

24. Imprisonment for life in capital offences.

(1) In capital offences, the court shall consider imposing a sentence of imprisonment for life where the circumstances of the offence do not justify a sentence of death.
(2) In determining whether the circumstances of an offence or offender justify imposing a death sentence or imprisonment for life, court shall consider the factors aggravating or mitigating a death sentence.

25. Imprisonment for life in non-capital offences.

In non-capital offences, the court shall consider imposing a sentence of imprisonment for life where any other custodial forms of punishment is inadequate.

PART VIII - SENTENCING IN SPECIFIC NON - CAPITAL OFFENCES

26. Sentencing options for manslaughter , robbery or defilement.
The court may sentence an offender convicted of manslaughter, robbery or defilement to—
(a) imprisonment for life;
(b) a custodial sentence other than imprisonment for life; or
(c) any other sentence authorised by law.

Manslaughter

27. Sentencing range for manslaughter.
(1) The court shall be guided by the sentencing range specified in Part II of the Third Schedule in determining the appropriate sentence for manslaughter.
(2) The court shall, considering the aggravating or mitigating factors in paragraphs 28 and 29, determine the sentence in accordance with the sentencing range.

28. Factors aggravating a sentence for manslaughter.
In considering imposing a sentence for manslaughter the court shall be guided by the following aggravating factors—
(a) degree of injury or harm;
(b) the part of the victim's body where harm or injury was occasioned;
(c) repeated injury or harm to the victim;
(d) degree of intention to cause death or culpable negligence;
(e) use and nature of the weapon;
(f) the role of the offender in a group or gang or mob involved in the commission of the offence;
(g) whether the offence was motivated by an intention to cause bodily harm;
(h) whether the offence is a result of culpable negligence to discharge a duty tending to the preservation of life; or
(i) any other factor as the court may consider relevant.

29. Factors mitigating a sentence for manslaughter.
In considering imposing a sentence for manslaughter, the court shall take into account the following mitigating factors—
(a) lack of intention to cause death or culpable negligence;
(b) whether the offender had a subordinate or lesser role in a group or gang involved in the commission of the offence;

(c) the mental disorder or disability where linked to the commission of an offence;
(d) some element of self-defence; or
(e) any other factor as the court may consider relevant.

Robbery

30. Sentencing range for robbery.

(1) The court shall be guided by the sentencing range specified in Part III of the Third Schedule in determining the appropriate custodial sentence for robbery.
(2) The court shall, using the factors in paragraphs 31 and 32 determine the sentence in accordance with the sentencing range.

31. Factors aggravating a sentence for robbery.

In considering imposing a sentence for robbery, the court shall be guided by the following aggravating factors—
(a) degree of injury or harm;
(b) the part of the victim's body where harm or injury was occasioned;
(c) whether there was repeated injury or harm to the victim;
(d) use and nature of the weapon;
(e) whether the offender deliberately caused loss of life in the course of the commission of the robbery;
(f) whether the offender deliberately targeted or caused death of a vulnerable victim;
(g) whether the offender was part of a group or gang and the role of the offender in the group, gang or commission of the crime;
(h) whether the offence was motivated by, or demonstrates hostility based on the victim's age, gender, disability or such other discriminating characteristics;
(i) the nature of the deadly weapon used during the commission of the offence;
(j) the gratuitous nature of violence against the victim including multiple incidents of harm or injury;
(k) the manner in which death occurred during the commission of the offence;
(l) the value of the property or amount of money taken during the commission of the offence;

(m) commission of other criminal acts such as rape or assault;
(n) whether the offence was committed as part of a pre-meditated, planned or concerted act and the degree of pre-meditation;
(o) the rampant nature of the offence in the area or community;
(p) whether the offence was committed in the presence of other persons such as children, a spouse of victim or relatives;
(q) whether the offender is a habitual offender;
(r) whether the offence was committed while under the influence of alcohol or drugs;
(s) whether the offender is remorseful;
(t) previous incidents of violence or threats to the victim by the offender;
(u) evidence of impact on the victim's family, relatives or the community; or
(v) any other factor as the court may consider relevant.

32. Factors mitigating a sentence for robbery.

In considering a sentence for robbery, the court shall take into account the following mitigating factors —
(a) lack of pre-meditation;
(b) whether the offender had a subordinate or lesser role in a group or gang involved in the commission of the offence;
(c) mental disorder or disability;
(d) whether the offender is a first offender with no previous conviction or no relevant or recent conviction;
(e) whether there was a single or isolated act or omission occasioning fatal injury;
(f) whether there was no injury or harm occasioned or no threat of death or harm;
(g) remorsefulness of the offender;
(h) the value of the property or amount of money taken during the commission of the offence;
(i) whether property or money was returned or recovered;
(j) family responsibilities of the offender; or
(k) any other factor as the court may consider relevant.

Defilement

33. Sentencing range for defilement.

(1) The court shall be guided by the sentencing range specified in Part IV of the Third Schedule in determining the appropriate sentence for defilement.

(2) The court shall, using the factors in paragraphs 34, 35 and 36, determine the sentence in accordance with the sentencing range.

34. Considerations in determining a sentence for defilement.

The court shall take into account the following factors in considering a sentence for defilement—

(a) the age of the victim and the offender;

(b) the nature of the relationship of the victim and the offender;

(c) the violence, trauma, brutality and fear instilled upon the victim;

(d) the remorsefulness of the offender;

(e) operation of other restorative processes; or

(f) the HIV/AIDS status of the offender.

35. Factors aggravating a sentence for defilement.

In determining a sentence for defilement, the court shall be guided by the following aggravating factors—

(a) the degree of injury or harm;

(b) whether there was repeated injury or harm to the victim;

(c) whether there was a deliberate intent to infect the victim with HIV/AIDS;

(d) whether the victim was of tender age;

(e) the offender's knowledge of his HIV/AIDS status;

(f) knowledge whether the victim is mentally challenged;

(g) the degree of pre-meditation;

(h) threats or use of force or violence against the victim;

(i) knowledge of the tender age of the victim;

(j) use or letting of premises for immoral or criminal activities;

(k) whether the offence was motivated by, or demonstrating hostility based on the victim's status of being mentally challenged; or

(l) any other factor as the court may consider relevant.

36. Factors mitigating a sentence for defilement.

In considering a sentence for defilement, the court shall take into account the following mitigating factors—

(a) lack of pre-meditation;

(b) whether the mental disorder or disability of the offender was linked to the commission of the offence;
(c) remorsefulness of the offender;
(d) whether the offender is a first offender with no previous con viction or no relevant or recent conviction ;
(e) the offender's plea of guilty;
(f) the difference in age of the victim and offender; or
(g) any other factor as the court may consider relevant.

Criminal trespass

37. Sentencing range for criminal trespass.

(1) The court shall be guided by the sentencing range specified in Part V of the Third Schedule in determining the appropriate sentence for criminal trespass.
(2) The court shall, using the factors in paragraphs 38, 39 and 40 determine the sentence in accordance with the sentencing range.

38. Considerations in determining a sentence for criminal trespass.

In considering a sentence for criminal trespass, the court shall take into account the following factors—
(a) the nature and prevalence of the offence;
(b) the circumstances surrounding the commission of the offence;
(c) the relationship between the parties and the conduct of the offender; or
(d) any other factor as the court may consider relevant.

39. Factors aggravating a sentence for criminal trespass.

In considering imposing a sentence for criminal trespass, the court shall be guided by the following aggravating factors—
(a) the degree of pre-meditation;
(b) intimidating, insulting or annoying language or behaviour;
(c) nature and gravity of the offence committed upon entry on property;
(d) use or threat of use of force or violence while on the property;
(e) that the offence is motivated by, or demonstrates, hostility based on the victim's age, gender, disability or such other discriminating characteristics; or
(f) any other factor as the court may consider relevant.

40. Factors mitigating a sentence for criminal trespass.

In considering a sentence for criminal trespass, the court shall take into account the following mitigating factors—

(a) lack of pre-meditation;

(b) whether the mental disorder or disability of the offender was linked to the commission of the offence;

(c) whether the offender is a first offender with no previous con viction or no relevant or recent conviction ;

(d) remorsefulness of the offender;

(e) family responsibilities of the offender; or

(f) any other factor as the court may consider relevant.

Corruption and related offences

41. Sentencing range for corruption and corruption related offences.

(1) The court shall be guided by the sentencing range specified in Part VI of the Third Schedule in determining the appropriate sentence for corruption or a corruption related offence.

(2) The court shall, taking into account the factors in paragraphs 42 and 43 determine the sentence in accordance with the sentencing range.

42. Considerations in determining a sentence for corruption and related offences.

In considering a sentence for corruption or a corruption related offence, the court shall take into account the following factors—

(a) the method used in the commission of the offence;

(b) breach of trust and nature of trust or office abused;

(c) the relationship between the offender and the aggrieved organization;

(d) the amount of money involved or potential prejudice;

(e) the status of the individual receiving the monies;

(f) the degree of sophistication involved in the corrupt act;

(g) the impact of the corrupt act to the victim organization, the state and society as well as to the administration of justice; or

(h) any other factor as the court may consider relevant.

43. Factors aggravating a sentence for corruption or a corruption related offence.

In considering imposing a sentence for corruption or a corruption related offence, the court shall be guided by the following aggravating factors—

(a) a corrupt intent or knowledge of effect of the act or omission to act;

(b) abuse of office for personal or third party benefit;

(c) the prejudicial nature of the corrupt act to the organization or public body;

(d) whether the offence was committed in respect of a contract, sub-contract or proposal for a contract with an organization or public body;

(e) the degree of pre-meditation;

(f) the degree of sophistication involved in the corrupt act;

(g) whether there was a deliberate intent to cause financial loss;

(h) whether the offence was committed in respect of essential goods or services;

(i) the role of the offender in a group or conspiracy involved in commission of the offence; or

(j) any other factor as the court may consider relevant.

44. Factors mitigating a sentence for corruption or a related offence.

In considering imposing a sentence for corruption or a corruption related offence, the court shall take into account the following mitigating factors—

(a) lack of pre-meditation;

(b) whether the act is a result of non-deliberate neglect of duty;

(c) the subordinate or lesser role of the offender in a group or conspiracy involved in the commission of the offence;

(d) the offender's plea of guilty;

(e) refund of money or items misappropriated; or

(f) any other factor as the court may consider relevant.

Theft and theft related offences

45. Sentencing range for theft and theft related offences.

(1) The court shall be guided by the sentencing range specified in Part VII of the Second Schedule in determining the appropriate sentence for theft or a theft related offence.
(2) The court shall, taking into account the factors in paragraphs 46, 47 and 48 determine the sentence in accordance with the sentencing range.

46. Considerations in determining a sentence for theft and theft related offences.

In considering a sentence for theft or a theft related offence, the court shall take into account the following factors—
(a) the value of the property stolen;
(b) prevalence of the offence in the community;
(c) the circumstances surrounding the commission of the of fence;
(d) the impact of the offence on the victim and the community;
(e) any breach of trust where the offender is an employee, relative, neighbour or a person in a position of trust;
(f) any aggravating or mitigating factors;
(g) antecedents of the offender;
(h) plea of guilty by the offender;
(i) any reparation offered;
(j) the operation of restorative justice processes; or
(k) any other factor as the court may consider relevant.

47. Factors aggravating a sentence for theft or a theft related offence.

In considering imposing a sentence for theft or a theft related offence, the court shall be guided by the following aggravating factors—
(a) the degree of loss that is serious in the context of the offence;
(b) the amount of money lost or quantities of goods taken during the commission of the offence;
(c) the rampant nature of the offence in the organization or public body;
(d) the offender being in a position of financial or fiduciary trust or both;
(e) offender's lack of remorsefulness;
(f) habitual offending;

(g) conversion of the property for use of self or other person;
(h) deliberate or reckless taking of money in excess of limits of authority or in disregard of procedure;
(i) significant degree of premeditation;
(j) playing a leading role in a group or conspiracy involved in the commission of the offence; or
(k) any other factor as the court may consider relevant.

48. Factors mitigating a sentence for theft or a theft related offence.

In considering imposing a sentence for theft or a theft related offence, the court shall take into account the following mitigating factors—
(a) lack of pre-meditation;
(b) lack of knowledge of ownership;
(c) the subordinate or lesser role of the offender in a group or gang involved in the commission of the offence;
(d) the offender's plea of guilty;
(e) the remorsefulness of the offender;
(f) whether the offender is a first offender with no previous conviction or no relevant or recent conviction; or
(g) any other factor as the court may consider relevant.

PART IX – SENTENCING PRIMARY CARE GIVERS AND CHILD OFFENDERS

49. Sentencing a primary care-giver.

(1) Where it is brought to the attention of the court that an offender is a primary care-giver, the court shall consider the following—
(a) the effect of a custodial sentence to a child if such a sentence is passed;
(b) whether the child will adequately be cared for while the care giver is serving the custodial sentence;
(c) the importance of maintaining the integrity of family care by protecting innocent children from avoidable harm.
(2) For the purposes of sub-paragraph (1), the court shall—
(a) recognise each child as an individual with a distinct personality; and

(b) shall strike a fair balance between the circumstances of the care-giver and the circumstances of the case.
(3) Where the appropriate sentence is clearly non custodial, the court shall determine the sentence bearing in mind the interests of the child.
(4) Where there is a range of sentences available to the court, the court shall use the welfare principle as provided for under section 3 of the Children Act in deciding which sentence to impose.
(5) In determining a sentence for an offender who is a primary care-giver, the court shall ensure that the sentence is the least damaging sentence to the interest of the child.

50. Sentencing of child offenders.

(1) When making an order against a child offender, the court shall consider the following—
(a) the degree of participation of the child;
(b) best interests of the child;
(c) protection of the community from harm and ensuring people's personal safety;
(d) rehabilitation of the child;
(e) any non custodial options provided for in section 94 of the Children Act;
(f) the shortest appropriate period of detention where that is the only appropriate sentencing option; or
(g) detention as a last resort if in all the circumstances it is the most appropriate sentence.
(2) Subject to sub paragraph (1), the court shall—
(a) consider the effect of a custodial sentence on the child;
(b) where the appropriate sentence is clearly non custodial, determine the sentence bearing in mind the interests of the child;
(c) use of the welfare principle as a guide in determining the appropriate sentence to impose; and
(d) ensure that the appropriate sentence is the least damaging sentence to the interests of the child.

PART X - FINES

51. Determining a fine.

(1) A person liable to imprisonment may be sentenced to pay a fine in addition to or instead of imprisonment.

(2) Where a fine is imposed under any law, the court shall take into consideration among other things, the means of the offender so far as they are known to the court and in the absence of express provisions relating to a fine, the following shall apply—

(a) where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited , but shall not be excessive;

(b) in the case of an offence punishable with a fine or imprisonment, the imposition of a fine or a period of imprisonment shall be a matter for the discretion of the court with reasons;

(c) in the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, and in every case of an offence punishable with a fine only in which the offender is sentenced to a fine, the court passing sentence may—

(i) direct by its sentence that in default of payment of the fine, the offender shall suffer imprisonment for a certain period, which imprisonment shall be in addition to any other imprisonment to which he or she may have been sentenced or to which he or she may be liable under a commutation of sentence and;

(ii) issue a warrant for the levy of the amount on the immovable and moveable property of the offender by distress and sale under warrant except that if the sentence directs that in default of payment of a fine the offender shall be imprisoned, and if the offender has undergone the whole of the imprisonment in default, no court shall issue a distress warrant unless for special reasons to be recorded in writing court considers it necessary to do so;

(d) the period of imprisonment ordered by the court in respect of non-payment of any sum of money adjudged to be paid by a conviction or in respect of the default of a sufficient distress to satisfy any such sum shall be such term as in the opinion

of the court will satisfy the justice of the case but shall not exceed in any case the maximum fixed by the scale set out in the Fourth Schedule.

(e) the imprisonment which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law.

PART XI - COMMUNITY SERVICE

52. Making a community service order.

(1) The court that makes a community service order shall use the basic grid provided in the Community Service Regulations.

(2) Where the court deviates from the basic grid, the court shall give reasons taking into consideration the following—

(a) the nature of punishment;

(b) the age of the offender;

(c) history of the offender's previous compliance or non-compliance;

(d) the purpose of the punishment;

(e) the nature of work to be performed by the offender;

(f) the value of the work to be performed; or

(g) the physical and health condition of the offender.

53. Other matters to take into account.

(1) Before making a community service order, the court shall satisfy itself that—

(a) community service work is suitable for the offence;

(b) it is appropriate in all circumstances that a community service order is the best order for the offender; or

(c) the offender has consented to undertake community service in the form prescribed by the Community Service Regulations, to comply with his or her obligations under the community service order.

(2) In addition to the matters under the Community Service Act and the Community Service Regulations, the court shall before granting an order for community service, consider—

(a) whether the work is community related;

(b) the skills and experiences of the offender;

(c) the views of the victim or the victims regarding the referral of the offender to the community for community service;

(d) restoring the rights of the victims of the offence;
(e) the history of the offender's previous compliance or non-compliance;
(f) whether the offender is suffering from any adverse health conditions;
(g) the likely benefit of the community service to the community;
(h) the age of the offender; or
(i) any other factor as the court may consider relevant.

54. Pre-sentence report.

(1) For the purposes of determining whether community service is the appropriate sentence or making a community service order, the court may require the prosecution, the offender or any other person to make a pre-sentence report in respect of the offender.
(2) A pre-sentence report may contain—
(a) a recommendation of the orders and conditions on which the sentence may be imposed;
(b) a recommendation on how the conditions can be used to achieve the objectives of the sentence;
(c) the reasons indicating that the offender is suitable to undergo community service;
(d) the likely benefits of the sentence to the offender taking into consideration the interests of the victim;
(e) the safety of the victim, offender and the community during the serving of the sentence;
(f) the skills or any other useful abilities of the offender to the community; and
(g) any matter that court may request the social worker or other designated person to provide.

PART XII – DUTIES OF THE PROSECUTION AND DEFENCE AT SENTENCING

General duties of the prosecution

55. Duty of the prosecution.

(1) During sentencing, the prosecution shall present to the court the following—
(a) increase in the incidence of certain offences which may include crimes against women and children, economic or white collar crimes, as well as crimes against humanity;

(b) the applicable penalty provisions for statutory offences;
(c) reported decisions concerning sentences;
(d) sufficient facts to enable the court impose an appropriate sentence; or
(e) any relevant information relating to the offender.
(2) For the purposes of sub-paragraph (1) information relating to an offender includes—
(a) the circumstances under which the offence was committed;
(b) the offender's background;
(c) the offender's family;
(d) the offender's past criminal record;
(e) the responsibilities the offender has in society and whether the offender is a primary care giver;
(f) the offender's means of livelihood;
(g) the offender's social status;
(h) the likelihood of the offender to reform; or
(i) any other relevant information.
(3) The prosecution shall present to the court all relevant information relating to—
(a) the impact of the crime on the victim, family members of the victim and the community, including the impact statements relating to the victim and the community;
(b) statistics regarding the frequency and relative seriousness of the offence;
(c) the degree of preparedness with which the crime was committed;
(d) the problems encountered in trying to prevent the commission of the crime in question; and
(e) any other aggravating factors that may be relevant to the facts of the case.
(4) The prosecution shall present sufficient facts before court to show any aggravating or other relevant factors under which the offence was committed.
(5) Upon conviction, the prosecution shall summarize to the court any aggravating factors arising from any inquiry or report, the victim

impact statements and community impact statements to assist the court to
determine the most appropriate sentence.
(6) For the purposes of sentencing, the prosecution shall when making any submissions to the court, have a fair balance of the interest of the victim and the general public interest.

Specific duties for the prosecution

56. Indication of sentence.

The prosecution shall indicate to the court the sentence which in the opinion of the prosecution is appropriate for the offence.

57. Amicable settlements and restorative justice.

(1) Where parties 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.
(2) The prosecution shall promote and advocate for restorative justice as a viable means of dispute resolution where applicable.

58. Ancillary, compensatory and related orders.

(1) The prosecution shall apply for ancillary,
compensatory and confiscation orders in all appropriate cases.
(2) When considering which ancillary orders to apply for, the prosecution shall have regard to the needs of the victim including protection of the victim.

59. Adducing evidence to disprove mitigation.

The prosecution shall disprove beyond reasonable doubt any assertion made by the defence in mitigation.

Duty of the defence

60. Duty of the defence.

(1) During sentencing, it is the duty of the defence to inform the court about—
(a) the offender's social background and social status;
(b) details about the offender's family including dependants,
if any;
(c) any responsibilities of the offender, including whether the offender is a primary care-giver;
(d) the offender's sources of income and financial status;
(e) the likelihood of the offender to reform;

(f) remorsefulness of the offender; or
(g) any other mitigating factors that may be relevant to the case.
(2) Where the offender wishes to reconcile with the victim, the defence shall state that expressly to the court and the prosecutor.

SCHEDULES
Paragraph 14

FIRST SCHEDULE
FORMS
Republic of Uganda
FORM A
Victim impact statement
Part I
Particulars of offence

1. Offence_____
2. Date of commission of offence_____

Part II
Particulars of the victim

3. Name of vic_____
4. Marital status_____
5. Age_____
6. Address_____
7. Number of children_____

Part III
Financial impact

8. How has the offence or crime affected the victim financially?
(a) is there any loss of income_____
(b) if Yes, how much _____
(c) jobs or job opportunities lost:_____
(d) description of financial support to the victim after the offence _____
9. Expenses incurred by the victim as a result of the crime or offence *(include all the actual costs involved such as medical expenses, funeral expenses, costs for therapy)*

_____
_____

Part IV

Physical Impact

10. Injuries sustained during the commission of the crime or offence

_____

_____

11. Injuries sustained after the offence

_____

_____

Emotional Effect

12. Description of the emotional distress and psychological effect of the crime or offence_____

_____

13. Description of any counseling or psychological treatment

_____

_____

Part V

Property lost or damaged

14. Description of property lost or damaged during the commission of the crime or offence

_____

_____

Date: _____

Name: _____

Signature: _____

** Victims may include a spouse, children, parents and guardians of minor victims, siblings, all legal guardians of mentally or physically incapacitated victims.*

*** The victim impact statement may be filled by –*

(a) the prosecutor;

(b) the investigator;

(c) the victim;

(d) medical personnel;

(e) a probation and social welfare officer;

(f) a member of the community;

(g) the parent or guardian of a child victim, a spouse, or a dependant or close relative of a victim who is unable to make the statement; or

(h) any other person with information to that effect.

Republic of Uganda

FORM B

Community impact statement

Part I

Particulars of offence

1. Offence_____
2. Date of commission of offence_____

Part II

Particulars of community where crime or offence was committed

3. Village _____
4. Parish/ ward _____
5. Sub county/Division _____
6. County _____
7. District/City _____

Part III

Financial impact

8. How has the offence or crime affected the community financially?
(a) is there any loss of income_____
(b) if Yes, how much_____
(c) investment or business opportunities lost: _____
(d) description of financial support to the victim or other members of the community after the offence _____
_____

9. Expenses incurred by the community as a result of the crime or offence *(include all the actual costs involved such as meetings to warn or address members of the community, medical, funeral expenses, costs for therapy)*

_____
_____
_____

Part IV

Physical Impact

10. Injuries sustained by members of the public or community during the commission of the crime or offence

_____

_____

Emotional Effect

11. Description of the emotional distress and psychological effect of the crime on the community

_____

_____

12. Description of any counseling or psychological treatment within the community

_____

_____

Part V

Property lost or damaged

13. Description of community or public property lost or damaged during the commission of the crime or offence

_____

_____

Part V

Prevalence of particular crime in community

14. Statement on prevalence of this crime in the area since the commission of the offence

_____

_____

Date: _____

Name: _____

Signature:

_____

Position in community, e.g. local council, traditional or religious leader:

_____

** The Community impact statement may be filled by*

(a) the local council officials;

(b) the traditional leaders;

(c) any interested member of the community; or
any other person with information to that effect.

Paragraph 14

SECOND SCHEDULE

Factors to take into consideration when sentencing.

When determining a sentence, the court shall take into account the following—

(a) antecedents of the offender or habitual offender or first offender;
(b) gravity or nature of the offence;
(c) brutality or nature of weapon used;
(d) time spent on remand;
(e) remorsefulness of the offender;
(f) age;
(g) health;
(h) gender;
(i) prevalence of the offence;
(j) social status, family status and background;
(k) intention or motive;
(l) impact on society;
(m) cost of imprisonment to the State;
(n) financial status;
(o) domestic violence;
(p) stage of the trial and the circumstances within which a plea of guilty was made;
(q) the harm caused, the harm intended to be caused, or the harm that might have foreseeably been caused (value of property involved and loss occasioned to victim);
(r) complexity and sophistication of the offence;
(s) amount of personal profit;
(t) education or employment background;
(u) accused's relations with the community;
(v) role of the offender in the commission of the offence; or
(w) any other factor that the court may consider relevant.

Paragraph 19

THIRD SCHEDULE
Sentencing ranges
Part I
Sentencing range in capital offences

Offence	Maximum sentence	Starting Point	Sentencing range*(Appropriate Sentence to be determined after taking into account the factors aggravating or mitigating sentence in each case)*
1. Murder *(Sections 188 and 189 Penal Code Act, Cap. 120*	Death	35 years	From 30 years up to death
2. Rape (Sections 123 and 124 *of the penal code Act Cap 120*	Death	35 years	From 30 years up to death
3. Aggravated defilement *(Sections 129, 130 and 133 of the Penal Code Act, Cap. 120 as amended by*	Death	35 years	From 30 years up to death

the Penal Code (Amendment) Act 2007)			
4. Robbery *(sections 285 and 286(2) of the penal code Act Cap*	Death	35 years	From 30 years up to death
5. Kidnap with intent to murder *Section 243 of the Penal Code Act Cap 120*	Death	35 years	From 30 years up to death
6. Terrorism *Section 6 of the Anti-Terrorism Act, No.14 of 2002*	Death	35 years	From 30 years up to death
7. Treason *Section 25 of the Penal Code Act Cap 120*	Death	35 years	From 30 years up to death

Paragraph 27

Part II

Sentencing range for manslaughter

Offence	Maximum sentence	Starting Point	Sentencing range*(Appropriate Sentence to be determined after taking into account the factors aggravating or mitigating sentence in each case)*
Manslaughter *(Section 187) of the Penal Code Act Cap 120*	Imprisonment for life	15 years	From 3 years up to imprisonment for life

Paragraph 30

PART III

Sentencing ranges for robbery

Offence	Maximum sentence	Starting Point	Sentencing range*(Appropriate Sentence to be determined after taking into account the factors aggravating or mitigating sentence in each case)*
1. Robbery *(Sections 285 and 286(1)) of the Penal Code Act Cap 120*	10 years Imprisonment for life	5 years 15 years	From one year up to 10 years imprisonment From 3 years up to imprisonment for life
2. Attempted Robbery *(Section 287) of the Penal Code Act Cap 120*	7 years imprisonment	3 and a half years	From 9 months up to 7 years imprisonment

Paragraph 33

Part IV

Sentencing range for defilement

Offence	Maximum sentence	Starting Point	Sentencing range*(Appropriate Sentence to be determined after taking into account the factors aggravating or mitigating sentence in each case)*
1. Simple Defilement *(Sections 129,130* life *and 133) of the Penal Code Act Cap 120*	Imprisonment for life	15 years	From 3 years up to imprisonment for life
2. Attempted defilement (Section 129(2) of the Penal Code Act Cap	18 years' imprisonment	9 years	From one year up to 18 years
3. Defilement of idiots or imbeciles *(Section 130) of the Penal Code Act Cap 120*	14 years' imprisonment	7 years	From 8 months up 14 years
4. Permitting Defilement *(section 133) of the Penal Code Act Cap 120*	5 years' imprisonment	2 and a half years	From 3 months up to 5 years

Paragraph 37

Part V

Sentencing range for criminal trespass

Offence	Maximum sentence	Starting Point	Sentencing range*(Appropriate Sentence to be determined after taking into account the factors aggravating or mitigating sentence in each case)*
Criminal trespass *(Section 302 of the Penal Code Act, Cap. 120)*	one year imprisonment	6 months	From a caution up to one year imprisonment

Paragraph 41

Part VI

Sentencing range for corruption and corruption related offences

Offence	Maximum sentence	Starting Point	Sentencing range*(Appropriate Sentence to be determined after taking into account the factors aggravating or mitigating sentence in each case)*
1. False accounting by a public officer *(section 22) Anti-Corruption Act, No. 6/2009)*	3 years' imprisonment	One and a half years	From 6 months up to 3 years' imprisonment
2.Embezzlement *(section 19) Anti-Corruption Act, No. 6/2009*	14 years' imprisonment	7 years	From 2 years up to 14 years' imprisonment
3. Causing financial loss *(Section 20) Anti-Corruption Act, No. 6/2009)*	14 years' imprisonment	7 years	From 2 years up to 14 years' imprisonment
4. Solicitation and/or receipt of gratification *(Sections 2 and*	12 years' imprisonment	6 years	From 3 years up to 12 years' imprisonment

26)Anti-Corruption Act, No. 6/2009)			
5. Bribery of a public official *(Section 5 and 26) Anti-Corruption Act, No. 6/2009)*	12 years' imprisonment	6 years	From 3 years up to 12 years' imprisonment
6. Abuse of office *(Section 11) Anti-Corruption Act, No. 6/2009)*	7 years' imprisonment	3 and a half years	From one year up to 7 years imprisonment

Paragraph 45

Part VII

Sentencing range for theft and theft related offences

Offence	Maximum sentence	Starting Point	Sentencing range*(Appropriate Sentence to be determined after taking into account the factors aggravating or mitigating sentence in each case)*
1. Obtaining goods by false to pretence *(Section 305) Penal Code Act Cap 120*	5 years' imprisonment	2 and a half years	From 6 months up 5 years imprisonment
2. Theft *(Sections 254 and 261) Penal Code Act Cap 120*	10 years' imprisonment	5 years	From one year up to 10 years' imprisonment

Paragraph 51

FOURTH SCHEDULE
Scale for determination of fines.

Amount	Maximum Period
Not exceeding 0.5 of a currency point	7 days
Exceeding 0.5 of a currency point but not exceeding one currency point	14 days
Exceeding one currency point but not two currency points	One month
Exceeding two currency points but not three currency points	6 weeks
Exceeding three currency points but not six currency points	3 months
Exceeding six currency points Currency point is equal to twenty thousand shillings.	12 months

B.J. ODOKI,
CHIEF JUSTICE

CROSS REFERENCES.

Children Act, Cap 59.
Community Service Act, Cap.115
Community Service Regulations, SI No.55 of 2001
Constitution of the Republic of Uganda, 1995
Magistrates Courts Act, Cap. 16
Penal Code Act, Cap.120
Trial on Indictments Act, Cap. 23
The Revision (Fines and Other Financial Amounts in Criminal Matters) Act No.14, 2008

Appendix C: The Sentencing Reform Bill

THE SENTENCING REFORM BILL, 2011

MEMORANDUM

1. Policy and principles of the Bill

The policy behind this Bill is to provide for the establishment of a sentencing council that will develop sentencing principles, guidelines and articulate sentencing options and provide for the procedures necessary for the implementation of sentencing guidelines with a view to promoting uniformity, consistency and transparency in sentencing.

Sentencing is an integral part of the judicial power vested in the courts of law by the Constitution. It is also a sacred judicial function that must be discharged with the fullest sense of Justice and responsibility. A sentence is a form of punishment for a wrong done to another person and to the community. A sentence must be just and should befit the offence and the offender. The community must be protected from serious and dangerous offending. Society loses confidence in the courts of law if sentences are a travesty of justice.

2. Defects in the existing law

The current law governing sentencing is unsatisfactory. A sentencing law is necessary to reforming sentencing in Uganda so as to attain consistency, uniformity and transparency in sentencing offenders. The council will periodically review the sentencing guidelines and provide a framework for setting maximum penalties and ranges developed under the Act.

3. Remedies in the proposed Bill

The intention of the Bill therefore is to establish a sentencing council to develop sentencing guidelines, principles and ranges of sentencing for specific offences and categories so as to attain uniformity, consistency and transparency in sentencing.

Provisions of the Bill

4. PART I OF THE BILL – PRELIMINARY

Part I deals with commencement and interpretation. According to clause 1, the Bill is to be brought into force by the Minister by statutory instrument and clause 2 provides for the application of the Bill. The Bill applies to all courts of judicature.

5. PART II OF THE BILL –ESTABLISHMENT OF THE SENTENCING COUNCIL

This Part deals with the establishment and functions of the sentencing council. Clause 4 establishes the council and in the performance its functions, the council is to be guided by the principles of criminal law as provided in clause 5.

Clause 6 provides for considerations in developing sentencing guidelines. The council shall ensure that a sentence to be imposed on a person found guilty of an offence is proportionate to the seriousness of the offending behaviour.

Under clause 7, the council shall comprise not more than 15 members – who have expertise and knowledge in one or more of the following areas: criminal justice, policing and assessment of risk, re- integration of prisoners into society, promotion of the welfare of victims of crime, community issues affecting courts and the penal system.

Under clause 8, the council shall have a secretariat to assist it in carrying out its objects and functions under the Act.

Clause 9 provides for the appointment, quality and tenure of the office of the Secretary and clause 10 provides for the functions of the Secretary.

Clause 11 provides for other staff of the council. The council shall employ such other staff as may be necessary for the proper and efficient discharge of the functions of the Secretariat under the Act.

Clause 12 provides for the remuneration of the Secretary and other staff.

6. PART III- FINANCE

Clause 13 provides for the funds and resources of the council and clause 14 provides for the borrowing powers of the council.

Clause 15 provides for the estimates which shall be presented and submitted to the Minister for submission to the Minister responsible for finance for approval.

Clause 17 provides for the council to keep proper books of account for all its income and expenditure and proper records in relation to them.

Clause 18 provides for the accounts for the council to be audited by the auditor General or by an auditor appointed by him or her.

Clause 19 provides for the funds of the Council not immediately required for my purpose under the Act to be invested in such a manner as the council may with the approval of the Minister after consultation with the Minister responsible for finance, determine.

7. PART IV- GENERAL PROVISIONS

Clause 20 provides for the protection of members and staff from personal liability.

Clause 21 provides for annual reports of the council to be submitted to the Minister within three months after the end of each financial year in respect of the activities of the council of that financial year.

Clause 22 provides for the Minister to make regulations for better carrying in to effect of the provisions of the Act and clause 23 provides for the amendment of the schedule by statutory instrument.

HON. KAHINDA OTAFFIRE (MP),
Minister of Justice and Constitutional Affairs.

THE SENTENCING REFORM BILL, 2011
ARRANGEMENT OF CLAUSES

A Bill for an Act

ENTITLED

THE SENTENCING REFORM ACT, 2011

AN ACT to provide for the establishment of a sentencing council and to provide for its composition, objects, functions, and for other related matters.

BE IT ENACTED by Parliament as follows-

PART I - PRELIMINARY

1. Commencement

This Act shall come into force on a date appointed by the Minister by statutory instrument.

2. Application

This Act shall apply to the courts of judicature.

3. Interpretation

In this Act, unless the context otherwise requires-

"Court" means the court of judicature;

"deterrence" this is intended primarily at the goal of discouraging members of society from committing criminal acts out of fear of punishment;

"incapacitation" means rendering an offender incapable of committing further offences in order to protect the community from offenders likely to re-engage in serious criminal conduct;

"Minister" means the minister responsible for Justice and Constitutional Affairs;

"persistent absenteeism" means the failure of a member of the council to attend meetings three consecutive times without valid reason;

"reconciliation" means to restore harmony between persons that have been in conflict;

"rehabilitation" means to reform offenders by bringing about change in their future behavior both in the interests of society and the offenders;

"retribution" refers to the idea that offenders should be punished for committing crimes when they deliberately violate existing legal norms or provisions.

"Sentencing Council" means the council established under section 4.

PART II - ESTABLISHMENT OF THE SENTENCING COUNCIL

4. Establishment of the Council

(1) There is established a council known as the Sentencing Council.

(2) The council shall be a body corporate and shall have perpetual succession and a common seal and may sue or be sued in its corporate name.

(3) The council may, for and in connection with its objects and functions under this Act, purchase, hold, manage and dispose of property, whether movable or immovable, and may enter into such contracts and other transactions as may be expedient and may do any other act or thing as in law may be done by a body corporate.

5. Objects and functions of the council

(1) The objects of the council are to-

(a) develop sentencing, guidelines and promote a consistent approach to the sentencing of offenders;

(b) provide for the procedures necessary for the implementation of the sentencing guidelines;

(2) For the attainment of the objects in sub -section (1), the council shall perform the following functions -

(a) develop sentencing guidelines, principles and ranges of sentencing for specific offences and categories to attain uniformity, consistency and transparency in sentencing;

(b) periodically review sentencing guidelines and provide a framework for setting maximum penalties and ranges of sentencing developed under this Act;

(c) make recommendations regarding the revision of maximum penalties, the nature of particular offences and the categorization of offences as to the degree of seriousness;

(d) conduct public educative programs to inform the public about sentencing and to promote public understanding of sentencing practices and procedures;

(e) provide advice on any issue relating to the use of the sentencing guidelines; and

(f) establish a research and development program, collect and disseminate information regarding the sentences imposed and the effectiveness of sentences.

(3) In the performance of its functions as specified under subsection (2), the council shall be guided by principles of criminal law which include:-

(a) retribution;
(b) rehabilitation;
(c) reformation
(d) deterrence;
(e) incapacitation;
(f) reconciliation and;
(g) Compensation.

(4) Notwithstanding subsection (2) in developi ng the guidelines the council shall be guided by the following principles-

(a) sentences must be proportionate to the seriousness and nature of the offence committed;

(b) sentences should be determined by the degree of harmfulness or risked harmfulness of the offence;

(c) the prevailing circumstances; and

(d) the degree of culpability of the offender for the offence committed.

(5) Subject to the principle of proportionality, sentencing principles and public perception, sentences must seek to offer the optimal combination of -

(a) restoring the rights of victims of the offence;

(b) protecting society against the offender;

(c) giving the offender the opportunity to lead a crime-free life in the future and;

(d) re-integrating the offender back in the community.

(6) The existence of previous convictions is relevant when sentencing.

(7) The Council shall collaborate with institutions of higher learning and departmental training institutions to integrate the guidelines in the training curriculum.

(8) Any person may move the Council to review the guidelines.

(9) The findings and recommendations of the council shall be prepared and submitted to Uganda Law Reform Commission in form of a report.

(10) This Act does not limit any discretion that a court may have in determining a sentence.

6. Considerations in developing Sentencing guidelines

(1) In developing sentencing guidelines, the council shall ensure that the sentence to be imposed on a person found guilty of an offence is proportionate to the seriousness of the offending behavior.

(2) In seeking to achieve the purpose specified in sub-section (1), the council shall give due consideration to the-

(a) harm caused by the commission of the offence;

(b) public concern generated by the offence;

(c) current incidence of the offence;

(d) the seriousness of the offending behavior;

(e) the need to prevent crime and promote respect for the law by-

(i) providing for the sentencing guidelines that are intended to deter the offender or the other persons from committing offences of the same or a similar character;

(ii) providing for sentencing guidelines that facilitate the rehabilitation of offenders;

(iii) providing for sentencing guidelines that allow a court to denounce the type of conduct in which the offender engaged; and

(iv) providing guidelines that ensure that an offender is only punished to the extent justified by-

(a) the nature and gravity of the offence committed;

(b) his culpability and degree of responsibility for the offence; and

(c) the presence of any aggravating or mitigating factor concerning the offender and of any relevant circumstances.

7. Composition of the council

(1) The council shall be constituted by the Chief Justice comprising not more than 15 members consisting of:-

(a) a Justice of the Supreme Court on the recommendation of the Chief Justice;

(b) a Justice of the Court of appeal on the recommendation of the deputy Chief Justice;

(c) a Judge of the High Court, appointed on the recommendation of the Principal Judge;

(d) a Registrar appointed on the recommendation of the Chief Registrar;

(e) a Chief Magistrate appointed on the recommendation of the Chief Registrar; and

(f) a representative from any institution as the Chief Justice may deem fit.

(2) The council may co-opt one or more persons with expertise in an area under investigation.

(3) The persons co-opted under subsection (2) shall be persons who have expertise and knowledge in one or more of the following areas: criminal justice, policing, assessment of risk, re-integration of prisoners into society, promotion of the welfare of victims of crime, community issues affecting courts and the penal system.

(4) The Judge referred to under sub-section (1) (a) shall be the Chairperson of the council and the members of the council shall elect a Vice Chairperson from amongst themselves.

(5) A member of the council shall serve for three years and may be re-appointed for one more term only.

8. Secretariat

(1) The council shall have a secretariat to assist it in carrying out its objects and functions under this Act.

(2) The secretariat shall be composed of a secretary and other staff of the council.

9. Appointment, qualifications and tenure of office of the Secretary

(1) The Secretary shall be appointed by the Chief Justice on the advice of the council.

(2) A person appointed Secretary shall be a lawyer with considerable practical, professional and administrative experience.

(3) Subject to this Act, the Secretary shall hold office on a full-time basis and on such terms and conditions as are specified in the instrument of appointment.

(4) The Secretary may resign his or her office, by writing under his or her hand, addressed to the Chief Justice through the Council.

(5) The Chief Justice, on the advice of the council may remove the Secretary from office for inability to perform the functions of his or her office as a result of infirmity of body or mind or for misbehavior or for any other cause.

(6) In case of removal from office of the Secretary under sub-section (5), the Secretary shall, before removal, be given an opportunity to be heard on the allegations made against him or her.

(7) The Secretary shall not be removed from office under this section on the ground of inability to perform the functions of his or her office as a result of infirmity of body or mind unless the fact of the infirmity of body or mind has been proved and certified by at least two medical practitioners appointed by the director of medical services for that purpose.

(8) Where the office of Secretary becomes vacant, the council shall notify the Chief Justice, as soon as possible, of the vacancy.

(9) Where the secretary is temporarily incapacitated from the performance of the functions of his or her office, the council may, in consultation with the Chief Justice, in writing, authorize one of the other members of the staff with qualifications for appointment to the office of the Secretary to perform the functions of the Secretary for the duration of the incapacity.

10. Functions of the Secretary

(1) The Secretary shall be the Chief Executive Officer and also the accounting officer of the council.

(2) Subject to the general control of the council, the Secretary shall —

(a) act as secretary at meetings of the council and record the minutes of the council of those meetings;

(b) be responsible for the implementation of the policy decisions of the council and for the day –to-day administration of the affairs of the council and control of the other staff of the council; and

(c) Perform such other functions as may be assigned to him or her by the council.

(3) Where the office of the Secretary is vacant or where the Secretary is unable to perform the functions of his or her office by reason of illness, absence or other reason, the council may designate an officer of the council qualified in terms of section 9 to perform those functions until the vacancy in that office is filled or until the Secretary is able again to perform those functions.

11. Other staff of the council

(1) The council shall employ such other staff as may be necessary for the proper and efficient discharge of the functions of the secretariat under this Act.

(2) The council shall regulate the manner of the appointment, terms and conditions of service and the discipline of its staff appointed under this section.

(3) The Chief Justice shall have the following functions in relation to the staff of the council:—

(a) establish posts for lawyers, accountants, other professionals and other staff as the council may from time to time require for the efficient carrying out and discharge of its functions;

(b) appoint and promote suitably qualified persons to occupy the posts established under paragraph (a);

(c) make rules and regulations governing the terms and conditions of service of the persons appointed under paragraph (b);

(d) ensure that reasonable provision is made for the welfare of the staff of the council and other matters; and

(e) discipline the staff of the council including dismissal.

12. Remuneration of the Secretary and other staff

The council may pay the Secretary and other staff such remuneration and allowances as it deems fit and may grant pension or retirement benefits or gratuity to them at such rates as the Minister may, after consultation with the Minister responsible for finance, determine.

PART III – FINANCE

13. Funds of the council

(1) The funds and resources of the council shall consist of –

(a) such sums from the Consolidated Fund as may, from time to time, be appropriated by Parliament for the purpose of the council;

(b) any monies accruing to the council in the discharge of its functions under this Act; and

(c) grants, gifts or donations to the council.

(2) All income and monies of the council shall be deposited to the credit of the council in a bank approved by the Minister and shall not be withdrawn except with the approval of and in a manner determined by the council.

14. Borrowing powers

(1) The council may, with the prior approval of the Minister after consultation with the Minister responsible for finance, borrow by way of overdraft or otherwise from a banker or any other person, such sums as may be necessary for meeting the obligations of the council and for carrying out the objects and functions of the council.

(2) The council may, with the prior approval of the Minister for the purpose of any borrowing under subsection (1), charge any asset or property of the council with the repayment of any money borrowed under the section.

15. Estimates

(1) The council shall, within three months before the end of each financial year, cause to be presented and submitted to the Minister for submission to the Minister responsible for finance for the approval estimates of the income and expenditure of the council for the next ensuing year.

(2) Expenditure shall not be made out of the funds of the council unless the expenditure has been approved by the Minister.

16. Financial year of the council

The financial year of the council shall be in respect of any accounting period, the period of twelve months ending on the 30th day of June.

17. Accounts

(1) The council shall keep proper books of account of all its income and expenditure and proper records in relation to them.

(2) Subject to any directions given by the Minister responsible for finance, the council shall cause to be prepared in respect of each financial year, a statement of account which shall include a report on the performance of the council during the financial year comprising:–

(a) a balance sheet, a statement of income and expenditure and a statement of surplus and deficit; and

(b) any other information in respect of the financial affairs of the council as the Minister responsible for finance may require.

18. Audit

(1) The accounts of the council shall, in respect of each financial year, be audited by the Auditor General or by an auditor appointed by him or her.

(2) The council shall ensure that within four months after the expiry of each financial year a statement of account described in section 17 is submitted to the Auditor General for auditing.

(3) The Auditor General and an auditor appointed by him or her shall have access to all books of account, vouchers and financial records of the council and be entitled to have any information and explanation required by him or her in relation to them as the Auditor General may think fit.

(4) The Auditor General shall, within two months after receipt of the statement of account under subsection (2), audit the accounts and deliver to the council a copy of the audited accounts of the council together with his or her report on them stating any matter which in his or her opinion shall be brought to the attention of the Minister.

(5) The Auditor General shall also deliver to the Minister a copy of the audited accounts together with his or her report on them.

19. Investment of surplus funds of the council

The funds of the council not immediately required for any purpose under this Act shall be invested in such manner as the council may, with the approval of the Minister, after consultation with the Minister responsible for finance determine.

PART IV- GENERAL PROVISIONS

20. Protection of members and staff from personal liability

A member of the council or an employee of the council acting on its behalf shall not be personally liable for any act done by him or her in good faith for the purpose of carrying into effect the provisions of this Act.

21. Annual reports

The council shall, within three months after the end of each financial year, submit to the Minister a report on the activities of the council in respect of that financial year, and the report shall include its achievements during that financial year and its future plans.

22. Regulations

The Minister may, after consultation with the council, by statutory instrument, make regulations for better carrying into effect the provisions of this Act.

23. Amendment of the Schedule

The Minister may, by statutory instrument, amend the Schedule to this Act.

SCHEDULE

Seal and meetings of the Council

1. Common seal of the council

(1) The common seal of the council shall be such device as the council may determine and shall be kept in the custody of the secretary.

(2) The common seal shall, when affixed onto any document, be authenticated by the signatures of the chairperson and the secretary of the council.

(3) In the absence of the chairperson, the vice chairperson shall authenticate the seal in place chairperson; and in the absence of the secretary, the person performing the functions of the secretary shall authenticate in place of the secretary.

(4) The signatures of the chairperson, secretary or other members of the council under this paragraph shall be independent of the signing by any other person as a witness.

(5) A contract or instrument which if entered into or executed by a person not being a body corporate would not be required to be under seal may be entered into or executed without seal on behalf of the council by the secretary or any other person authorized in that behalf by the council.

(6) Every document purporting to be-

(a) an instrument issued by the council and sealed with the common seal of the council, authenticated in a manner prescribed in this paragraph; or

(b) a contract or instrument entered into or executed under sub paragraph (5);

Shall be received in evidence without further proof as an instrument duly issued or contract or instrument duly entered into or executed unless the contrary is proved.

2. Meetings of the council

(1) The chairperson of the council shall preside over the meetings of the Council.

(2) In the absence of the chairperson, the vice chairperson shall preside over the meetings.

(3) In the absence of the chairperson and the vice chairperson, the council shall choose one of its members present to chair the meeting(s).

(4) Meetings of the council shall be held at least four times a year.

(5) The council shall regulate its own procedure.

(6) The quorum of the council meetings shall be two thirds of the council membership.

(7) Every decision of the council shall be by consensus. Where there is no consensus, decisions shall be by a 1/3 majority of all members present.

(8) The council shall call for extra ordinary meetings whenever need arises.

(9) In case of any vote, each member of the council shall have one vote and only the chairperson shall have a second or casting vote.

(10) The Chief Justice upon being moved by the members may remove the Chairperson of the Council on any of the following grounds-

(a) misconduct;
(b) incapacity;
(c) persistent absenteeism; or
(d) Incompetence.

Reports and Information

(1) The Council shall submit quarterly reports to the Chief Justice.

(2) The reports shall include the following:-

(a) a statistical overview of all sentences that have been imposed, and those still in force;

(b) an assessment of compliance with the sentencing guidelines;

(c) information on the efficacy of sentences in reducing crime;

(d) projections of the estimated cost of continuing to implement

such sentences in the future; and

(e) any other proposal for reform.

(3) The Council shall publish on quarterly basis, electronically or otherwise, information on sentencing, including a consolidated list of updated sentencing guidelines.