An Insight into Uganda's New Sentencing Guidelines: A Replica of Individualization?

JULIET KAMUZZE

Ph.D. Candidate, School of Law, University of Strathclyde, Glasgow

Like in many other common law jurisdictions, sentencing in Uganda has been traditionally based on an individualistic approach. Judges and magistrates are permitted to determine appropriate sanctions based on the unique individual characteristics of a given case and offender. The scope of discretionary sentencing power is exercised within broad statutory maximum penalties, which leave sentencers with a multitude of sentencing options and a myriad of sentencing factors to consider before determining appropriate penalties. Given that there is no form of guidance as to how judges and magistrates can exercise their judicial sentencing discretion, each sentencer uses his or her own judgment to assess the relevance of different factors. This results in sentence outcomes that vary so widely that they create perceptions of injustice in Ugandan sentencing. In 2010, then Chief Justice of Uganda Benjamin Odoki publicly acknowledged that judicial sentencing discretion was being exercised inconsistently, resulting in wide disparities in sentencing of similarly placed offenders. The Chief Justice remarked that inconsistencies in Ugandan sentencing had undermined the public's confidence in the administration of justice in Uganda.[1]

Accordingly, the Chief Justice appointed a Sentencing Guidelines Taskforce (hereinafter, the Taskforce), currently the Sentencing Guidelines Committee, to develop sentencing guidelines. On November 30, 2011, the Taskforce produced its first draft of sentencing guidelines, which were officially issued as practice directions on April 26, 2013. The Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions of 2013 (hereinafter, the Guidelines or the Sentencing Guidelines) are undoubtedly the first meaningful step toward structuring judicial sentencing discretion in Uganda and offer the first benchmarks for publicly articulating consistency in Ugandan sentencing.

I. Nature of Discretionary Sentencing in Uganda

The task of sentencing in Uganda is placed on judges, who preside over criminal matters initiated in the High Court, particularly capital offenses, and on magistrates, who preside over criminal matters, excluding capital cases in lower courts). Both judges and magistrates are permitted to tailor sentences to fit individual offense and offender characteristics. Ugandan legislation confers loose or wide sentencing discretionary powers on these sentencers.

The most commonly used phrases in statutes conferring wide discretionary powers on Ugandan sentencers are "may" and "as the court thinks fit." These phrases leave the courts with discretion to impose any available penalty options except those that may be fettered by legislation, such as sentences declared by law to be unconstitutional or those sentences that may not be within the power of a given magistrate or judge to impose. The Trial on Indictments Act, Chapter 23 (hereinafter, the TIA), which regulates criminal trial proceedings in the High Court, offers good examples of loose phrases that confer broad discretionary sentencing powers on judges. Part 1, Section 2(1), provides that "The High Court may pass any lawful sentence combining any of the sentences which it is authorized by law to pass."

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 within the confines of the legal rules. For example, a judge faced with an offender convicted of murder under Sections 188 and 189 of Uganda's Penal Code Act, Chapter 120 (hereinafter, the PCA), has a number of sentencing options. The PCA, Section 189, prescribes the death penalty as the maximum sentence for this offence, leaving judges freedom to impose a number of sentence dispositions ranging from a community service order,[2] or probation, to the imposition of any length of custodial sentence, or a sentence of death. Accordingly, a judge will have the option of sentencing an offender to any sentence within the broad statutory limits, which are set by the death penalty. Although no empirical studies have been undertaken in Uganda to confirm the existence of unwarranted sentencing disparities, the Uganda Law Reform Commission (ULRC) and the Chief Justice have indicated the existence of wide disparities in sentences imposed by different judges and magistrates.

The judges and magistrates in Uganda not only enjoy wide discretionary powers in choosing from a wide range of sentence options, but whilst exercising these powers, the sentencers are permitted to take into consideration any factors that may relate to the offender's character, antecedents, age, mental health, familial responsibilities, prevalence of the offense in community, or any other factor that

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the court may deem relevant in arriving at a sentencing decision, and determine their relevance and weight on sentencing decisions. For instance, both the TIA, Section 98, and the Magistrates Courts Act (hereafter the MCA), Chapter 16, Section 133(2), require the court before passing any sentence "to 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. . . ." Other examples relate to the court's power to determine whether to impose a conditional discharge or to caution the offender. The TIA, Section 119(1), permits the court "to discharge an offender, after taking into account the offender's antecedents, character, age, mental health, or the trivial nature of the offense or any other extenuating circumstances. . . ." The triviality of the case is left to the sentencer to determine. Undoubtedly, the statutory provisions permit courts in Uganda to exercise wide discretionary powers in determining the weight and relevance of different sentencing factors. Thus, the freedom given to Ugandan judges and magistrates by the legal rules creates a potential for arbitrariness in sentencing decision making that is likely to foster dissimilar treatment of similarly placed offenders.

The TIA, Section 108(1), and the MCA, 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 sentencers wide discretionary powers to determine whether an individual case warrants a more lenient sentence. 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 offense. Given that there is no doctrinal justification for considering what constitutes relevant and important mitigating factors, the subjective weighting of mitigating factors by different sentencers is likely to result in variations in sentences that cannot be accounted for by legally relevant sentencing factors.

Ugandan jurisprudence has developed a number of sentencing purposes upon which Ugandan sentencers can justify their choice of sentences. The sentencing purposes include, among others: special and general deterrence, protection of society, incapacitation, rehabilitation, and retribution. The Ugandan sentencers are permitted to impose punishments aimed at achieving any one or several of these sentencing purposes. Although some will disagree that inconsistent application of penal philosophies has any influence on sentencing outcome, a number of studies have provided evidence to demonstrate the effect of philosophical differences among judges on sentencing consistency.[3] There is a lack of a clear rationale for sentencing in Uganda. Therefore, although sentencing can serve to fulfil different goals, the fact that these sentencing purposes conflict within and across each other means that their application without a primary rationale for determining punishment elevates the risk of occurrence of unwarranted disparities in sentencing.

The other important aspect of sentencing that is not adequately regulated is the impact of previous convictions on punishment severity. Judges and magistrates are expected to make inquiries about the offender's antecedents and criminal history, yet no guidance is provided about how much relevance courts are supposed to attach to previous convictions. The Supreme Court of Uganda has offered some guidance in that "maximum penalties should not be imposed on first time offenders."[4] However, this is the extent of the guidance. Sentencers are left with power to determine the impact prior convictions should have on sentence severity. Although some guidance is provided with respect habitual offenders, under the Habitual Offenders (Preventive Detention) Act, Chapter 118, this Act applies to a limited category characterized as habitual 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) offense, they are over thirty years of age. It is worth noting that even the determination of a sentence intended for preventive detention purposes is an exercise of discretionary power, as the sentencers are asked to impose a sentence ranging from five to fourteen years' imprisonment.

The Taskforce developed sentencing guidelines with the important goal of providing guidance to judicial officers in determining fair and just sentences consistent across different courts. This gave primacy to the goal of promoting greater consistency in sentencing. This article shows that the Taskforce has thus far failed to accomplish this primary goal. By failing to model Uganda's Guidelines on a meaningful definition of consistency, the Guidelines have not provided any meaningful change to the exercise of judicial sentencing discretion.

II. Historical Background of Uganda's Sentencing Guideline Reform

In 1997, Justice Benjamin Odoki (then a judge of the Supreme Court) made a proposal for penal reform in Uganda. In his paper,[5] Odoki called for the establishment of a sentencing council (attached to the Supreme Court of Uganda) that would have the mandate of developing sentencing guidelines for common offenses. However, no further steps were taken to implement this proposal (at least publicly), until 2001 (the same year Justice Odoki was appointed Chief Justice of Uganda), when the Uganda Law Reform Commission carried out a comprehensive study on the reform of the laws regulating offenses and sentencing. In its report, the ULRC recommended the establishment of a sentencing council. This recommendation was seemingly motivated by the ULRC's finding of inconsistencies in Ugandan sentencing. The ULRC discouraged judicially developed guidelines and encouraged the participation of other key players such as magistrates, probation officers, and correctional officers in the development of the sentencing guidelines. Even then, a sentencing council was not established, neither were guidelines developed until almost a decade later when the Chief Justice appointed a Taskforce to develop them.

The Chief Justice's decision to appoint a Taskforce followed the Ugandan Supreme Court decision in the case of Susan Kigula and 417 Others vs. The Attorney General of Uganda.[6] The *Kigula* case introduced a new era of discretionary (rather than mandatory) capital sentencing, which was a major sentencing reform for Uganda. Briefly, in 2003, 418 inmates on death row, led by Susan Kigula, petitioned the Ugandan Constitutional Court to declare the death penalty unconstitutional and to declare unlawful its mandatory imposition on persons convicted of capital offenses such as murder, aggravated robbery, and treason. The petitioners argued that a mandatory death penalty violated an offender's right to a fair trial as guaranteed by the 1995 Ugandan Constitution, and its imposition resulted in treating capital offenders differently than other offenders by denying capital offenders the right to mitigation. The court declared that "the mandatory (automatic) nature of the death penalty under Ugandan legislation was unconstitutional because it failed to provide the Court with the opportunity to take into account any individual mitigating circumstances that may make the death penalty an inappropriately severe punishment. It was further noted that the mandatory imposition of the death penalty obliged judges to impose the sentence of death merely because the law directed it to do so. Accordingly, the Constitutional Court declined to abolish the death penalty but declared the prescription of a mandatory death penalty unconstitutional. However, dissatisfied with this decision, the Attorney General lodged an appeal to the Supreme Court opposing the abolition of mandatory capital sentencing. On January 21, 2009, the Supreme Court concurred with the Constitutional Court decision abolishing mandatory capital sentencing, but retained the death penalty. The Court held that "although the death penalty did not constitute cruel, inhuman or degrading punishment its mandatory imposition was unconstitutional."

Following the Kigula case, all capital offenders who had previously been sentenced to death without being afforded the right of mitigation to their sentences were given the opportunity of a mitigation hearing. This required the recalling of all cases, and the determination of the relevance of any existing mitigating circumstances that would have warranted a lesser sentence than death, had a right of mitigation been previously offered to the offender. The High Court judges were therefore required to take such circumstances into consideration and impose an appropriate sentence after weighting them against the prevailing aggravating circumstances. Without any form of guidance with regard to determining what mitigating circumstances were relevant and the weight to attach to them, it became almost immediately apparent that judges were according different weight and relevance to frequently occurring sentencing factors. For instance, whilst some judges were taking into account the offenders' mitigating circumstances occurring during their placement on death row—whether the prisoner exhibited good conduct during his or her time on death row, engaged in educational programs, and so on—in other cases, different circumstances, such as the offender's remorsefulness at the time of sentencing, or the period spent on death row, were being taken into consideration.

The Chief Justice and the Principal Judge of the High Court (the third most senior judge in Uganda) observed that in an effort to avoid imposing the death penalty, some judges were opting for custodial sentences. This apparently resulted in a number of judges handing out different custodial sentences to capital offenders, an act that was grossly undermining consistency in Ugandan capital sentencing.[7] The Chief Justice also observed that in cases where the judges were opting for life imprisonment, the vagueness surrounding what constituted life imprisonment heightened the variation in sentences imposed on offenders after mitigation hearings. The *Tigo* case,[8] which was filed around the same time, demonstrated the extent of vagueness in the meaning of life imprisonment. In this case, the offender had been convicted of defilement and was sentenced by Court in the following words:

> I take in to 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, 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 for a custodial term of twenty years. The vagueness emanated from the wording of the Prisons Act Section 47(1), now amended by the Act of 2006 Section 85(1), which states that for purposes of calculating remission, a sentence of imprisonment for life is twenty years imprisonment. The Chief Justice noted that the meaning of "life imprisonment" had been one of the challenges that had necessitated the development of sentencing guidelines.[9] The decision in the *Tigo* case was critical to Uganda's sentencing particularly after the *Kigula* case because life imprisonment was perceived as the best alternative to the death penalty.[10]

Following these two landmark cases, the Chief Justice constituted the Taskforce 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."[11] The Chief Justice noted that the Sentencing Guidelines developed by the Taskforce were an interim measure pending the legislature's enactment of a Sentencing Reform Law establishing a sentencing council. With this background, it is clear that sentencing guideline reform in Uganda has been driven singly by a judicially led political interest without the involvement of other political constituencies and without public input about who should write the guidelines and how they should be written. This can be explained by the fact that the judiciary has de facto

ownership of sentencing authority in Uganda, and politicization of crime and punishment issues is uncommon.

III. Main Features of the Ugandan Sentencing Guidelines Framework Composition and Mandate of the Taskforce

The Chief Justice alone constituted the Taskforce, now the Sentencing Guidelines Committee. The Committee has thirteen members, including the chairperson, who is the Principal Judge of the High Court (and third most senior judge). The Committee's tenure is unknown, although the Chief Justice indicated that the arrangement is an interim measure pending the legislature's passage into law of the Sentencing Reform Bill, which will establish a sentencing council. The Committee membership includes 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 Committee is also reportedly assisted by a number of other judges. The other members include the president of the Uganda 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 organization, the Uganda People's Defence Force, the Uganda Prisons Service, the Uganda Police Force, the United Nations African Institute for the Prevention of Crime and Treatment of Offenders.

From a political context, the composition of the Committee is representative of a wide spectrum of political interests. Notably, however, the legislature and the executive are excluded from the process of developing guidelines. This is not an unusual path in Uganda because sentencing issues are mostly left in the hands of the judiciary. The Taskforce does not have the benefit of a research staff, except for one officer of the ULRC who serves as the head of the Secretariat. The head of the Secretariat is a trained lawyer whose duties include (among others) collecting data on past sentencing practices.

A. Scope of the Guidelines

The Guidelines issued thus far cover both felony and misdemeanor offenses, but most importantly, all capital offenses. The Taskforce started with capital offenses because of the perceived urgency to provide guidance to the High Court in its determination of sentences for capital offenders following the *Kigula* decision. Capital offenses in Uganda are: murder, treason, rape, aggravated defilement (i.e., sexual engagement with a child under fourteen years), aggravated robbery (i.e., using a deadly weapon, thereby causing death or grievous bodily injury), terrorism, and abduction with intent to murder. The Guidelines also cover a few noncapital felonies and misdemeanors like criminal trespass. The Taskforce started with frequently occurring noncapital felonies, particularly those that attract utmost public concern such as theft or theft-related offenses, robbery, corruption, embezzlement, causing financial loss, and other corruption-related offenses like abuse of office, bribery, false accounting by officer, and solicitation and/or receipt of gratification. Also, manslaughter (culpable homicide) and simple defilement were included. The Ugandan Sentencing Guidelines are applicable in the High Court and in Magistrates' Courts.

The Guidelines have a numerical and narrative component. Like the U.S. and sentencing guidelines of England and Whales, a range of penalties is provided for each offense (varying significantly depending on how the offense is defined and classified)m and starting ranges are provided for each category of offense. The Guidelines are also narrative; the bulk of the sentencing principles is provided in a narrative form. Criminal history does not contribute a consistent and predictable aggravation of punishment in Uganda Guidelines as it is the case in the U.S. guidelines.

The Taskforce has taken a gradual approach (although one that is dissimilar from the approach of the Sentencing Council of England and Wales) to developing Uganda's Sentencing Guidelines. The Taskforce took approximately fourteen months after its constitution to come up with the first draft, and another set of guidelines is expected soon. Reportedly, a few members of the Taskforce travelled to and consulted with the judiciaries in South Africa and England and Wales on the subject of developing sentencing guidelines.[12] The Taskforce also organized a workshop involving a number of stakeholders with the aim of building consensus on the findings. However, unlike a number of jurisdictions with well-developed sentencing guideline systems, Uganda's Sentencing Guidelines were not developed with openness. It is not publicly clear who amongst the criminal justice constituencies represented on the Taskforce, was involved or consulted in the development of the Guidelines. The only issue known to the public is the fact that the Chief Justice had the final say over the shape of the Sentencing Guidelines.

B. Binding Nature of the Guidelines

The first set of Guidelines was issued by the Chief Justice as a practice direction by virtue of the powers conferred on him by Article 133(1)(b) of the 1995 Ugandan Constitution. In Uganda, the practice has been for the Chief Justice to issue practice directions that are either obligatory or merely directive depending on the objective and context in which the practice directions are issued. The objective of the Sentencing Guidelines was to provide sentencers with guidance and not to make sentencing rules. Accordingly, the current Uganda Guidelines are voluntary and thus not binding on the judges or magistrates. The sentencers have the option of choosing to follow or not to follow the Guidelines, and the Guidelines do not impose obligations on the sentencers to provide written reasons for not following them. Reportedly, the strategy was to promote the concept of structured sentencing to the judges and magistrates before imposing binding obligations on them. Given the advisory nature of the Guidelines, they stipulate no departure standards. That said, there is a system of

appellate review of sentences, which allows persons aggrieved by a sentencing decision to appeal the decision. For instance, under the TIA, Section 132(1)(a), "any person convicted and sentenced by the High Court to the death penalty, has an automatic right of appeal to the Court of Appeal against sentence."

C. Pick and Mix Sentencing Purposes

Uganda's Sentencing Guidelines are not modelled on any explicit or predominant rationale, although the fact that the Taskforce has included desert limits to punishment severity means that desert plays a significant role in the determination of sentencing. The general language of the Guidelines also suggests that desert plays a significant although not a predominant role. 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 offense, including the degree of culpability of the offender, the nature of the offense, the need for consistency, the effect of the offense on the victim or 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 of the offense, any previous convictions of the offender, or any other circumstances the court considers relevant.[13]

Paragraph 5(2) of the Guidelines sets out the purposes of sentencing 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." The purposes of sentencing are more utilitarian than retributive, but the general wording of the Guidelines reflects a strong reliance on retributive purposes. Accordingly, judges and magistrates in Uganda are still at liberty to continue imposing sanctions that are intended to achieve one or a multiple of sentencing purposes, and because there is no restriction to the exercise of this freedom, the Taskforce has left Ugandan sentencers with the same degree of discretion exercised under the individualized sentencing approach.

D. Scaling of Offense Seriousness

Traditionally, criminal offenses in Uganda have been broadly defined and assessments of seriousness made depending on the maximum penalty prescribed for the offense. The statutory maximum penalty, which admittedly reflects the worst of cases within a given offense classification, tells us how serious that offense 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, and so forth, because the former allow a maximum penalty of death. However, what is not clear is why offenders being sentenced under the general offense category of, for example, aggravated defilement receive varying degrees of sentences ranging from three years to life imprisonment. Ugandan penal legislation defines offenses so broadly that the single offense classification of defilement can represent a wide range of degrees of seriousness.

Accordingly, the generation of scales of seriousness and classes of broadly similar seriousness should have been at the core of the Ugandan Guideline designers' 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 Ugandan Sentencing Guideline designers 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."[14] As motive, manner of perpetrating the crime, and the offender's level of participation remain undefined, one case may portray seriousness that warrants punishment toward the higher end of the sentence scale whilst the other could be at the bottom of that scale.

Different factual situations suggest varying levels of seriousness, yet the offense committed falls under the same broad legal headline definition. Using a more subtle example of the offense of theft, the offense 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."[15] 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 offense definition; otherwise, it would be presumed that all cases generated under a single offense type are broadly similar. If the offenses are left to be broadly defined, it creates questions about the overall proportionality of the system and may undermine the potential for generating equal punishments for equally placed offenders; in the absense 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.

Guideline systems vary significantly with regard to how they define and classify offenses. It is also recognized that there is no consensus on which some offenses should be considered more serious than others. The determination of

seriousness is a value judgment and, in the context of developing sentencing guidelines, is a product of political process. Nonetheless, the approach taken by the Taskforce to define offense seriousness based on broad legal offense definitions and statutory maximum penalties makes no difference whatsoever to Uganda's sentencing law and practice. For example, the Taskforce determined the seriousness of murder, rape, defilement, treason, aggravated robbery, and so on, based on their maximum penalty, thereby allocating a uniform starting point and sentencing range for all these offenses, which creates the impression that all cases falling under these broad offense categories are broadly similar in seriousness. Similarly, manslaughter and simple robbery are classified as broadly similar in seriousness because both offenses attract the maximum penalty of life imprisonment.[16] Manslaughter and robbery were prescribed a sentencing range of *three years to imprisonment for life*[17] despite the clear variation in the nature of these offenses and the variations in the levels of seriousness that either offense may manifest.

The Uganda Guidelines therefore do not offer a clear assessment of relative seriousness of different types of offenses. The offense seriousness rankings in the Uganda Guidelines have not resolved the problem of broad offense categorizations that exist in the individualized sentencing system. Sentencers still have wide discretionary powers to position a case at whatever level of severity they subjectively feel it falls.

E. Wide Sentencing Ranges

One of the most important features of a sentencing guideline system is the breadth of the sentencing range because that defines the degree of real authority sentencing guidelines exert on sentencers, with the outer limits of the sentencing ranges establishing the boundaries for consistency. In an individualized sentencing system, the ranges of penalties stretch out to the statutory maximum penalty, exerting an exceedingly light touch on judicial authority. This is what chiefly undermines the legitimacy of individualized 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 criticized for being too restrictive to account for relevant differences among cases, whilst broad ranges have been discouraged for their potential to render consistency meaningless. 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 individualization whilst recognizing relativities between cases.

Table 1 shows the starting points (discussed in detail in the next section) and sentencing ranges for all capital offenses.

The statutory penalty is used as the outer limit in the allocation of ranges of punishment for noncapital felonies as well. The starting point is the number in the middle of the overall sentencing range. For example, the offense 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 offense. For example, the offense of Abuse of Office, which carries a maximum penalty of *7 years* imprisonment is allocated a starting point of *3½ 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 one year given that this is a felony offense and not a misdemeanor.

Table 2 shows the starting points and sentencing ranges for a few occurring corruption and corruption-related offenses. The Taskforce seemingly began 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.

The Taskforce of Uganda adopted a broad approach to crafting sentencing ranges. The statutory maximum penalty for a given offense establishes the upper limit under the Uganda Guidelines, and the lower limit is set at the least possible minimum sentence for the offense. In light of that, the Taskforce has created a very wide definition of consistency, thereby creating guidelines that make no difference whatsoever to the existing exercise of judicial discretion in Uganda. 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 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, but instead establish a wide definition of consistency that performs no useful or meaningful function.

F. Starting Points

The Taskforce took two different approaches to allocating starting points. First, a "one size fits all" approach was adopted for all capital offenses; that is, *35 years imprisonment* is established as the basic sentence for a typical case in all the broadly defined capital offenses. Secondly, the middle point of the sentencing range is established as the starting point for a number of other offenses—including theft, simple robbery, and simple defilement-related offenses[18]—and for other cases where the middle point is difficult to ascertain, 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

Table 1. Sentencing Ranges for Capital Offenses

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 Ugandan Constitution (Sentencing Guidelines for Courts of Judicature) (Practice Directions) 2013.

Table 2. Sentencing Ranges for Selected Corruption and Corruption-Related Offenses

Offense category	Maximum sentence	Starting point	Sentencing range
False accounting by public officer	3 years custody	1½ years custody	6 months to 3 years
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. Sentencing Ranges for Selected Examples of Noncapital 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	From 1 to 18 years imprisonment

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

robbery, and a starting point of *15 years imprisonment* is established.

The "one size fits all" approach used for all capital offenses and the use of an indiscriminate number to establish a starting point for manslaughter and simple robbery are problematic for consistency. First, using 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 to be meaningful. Grounded in 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 offense under the category of capital offenses. *Thirty-five years imprisonment* does not provide an accurate representation of the variations in seriousness that can be manifested in each distinct capital offense type.

G. Aggravating and Mitigating Factors

Desert is strongly reflected in the aggravating and mitigating factors, just as in 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,"[19] 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 offense, 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 offense. 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 offense was motivated by hostility based on the victim's gender, disability, age or any other discriminating circumstance, and these factors heighten the possibility of the death penalty being imposed in a capital case.[20] Although other factors not directly linked to the seriousness of the offense, such as the impact of the crime on the victim's family, relatives, or community, are also included.[21] In addition, the courts are permitted to take into account any other factors they may consider relevant. Most of these factors appear as

aggravating factors for specific offense types such as robbery and manslaughter.[22]

The mitigating factors provided in the Uganda Guidelines cut across offense and offender characteristics. For instance, the offense-related factors mitigating a death sentence include taking a minimal role in the commission of the offense and injury less serious in the context of the offense; and the offender-related mitigating factors include "remorsefulness, advanced or youthful age of the offender, family responsibilities and so on."[23] This approach is applied across all the offenses.

H. 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 offenses. Without a clear rationale provided for sentencing, the Taskforce fails again to provide more guidance to the judges and magistrates. Not only is there an absence of guidance about the kinds of prior convictions that should be counted, and the weighting formulas and decay rules to be applied, but the Taskforce fails to provide a clear justification for why previous convictions should be used as an aggravating factor for some offenses and what kind of relevance to attach to them in the event they are taken into account under paragraph 6. In addition, paragraph 9(3)(g) states that "when determining whether to 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.[24] Accordingly, Uganda's Sentencing Guidelines have not offered any more guidance on the impact of previous convictions on sentence severity.

IV. Defining Consistency Meaningfully

Treating similarly situated offenders alike when sentencing is a fundamental tenet of the administration of criminal justice,[25] as well as being an important tool for building public confidence in the administration of justice. Because most sentencing systems are premised on the notion of individualized justice, consistency is often difficult to articulate. This difficulty does not arise from the fact that the approach of individualization of punishment pays no attention to consistency, but because consistency cannot be articulated without benchmarks for defining it. Sentencing guidelines can provide a definition of consistency.[26] Hutton's argument suggests that sentencing guidelines provide the benchmarks for articulating consistency in sentencing, which then enables a public understanding of the sentencing decision-making process and allows the courts to provide an account of how sentencing decisions are arrived at. To build on this argument, this article suggests that the definition of consistency provided by a given sentencing guideline ought to be meaningful. Unfortunately, the definition of consistency articulated by Uganda's Sentencing Guidelines is meaningless. Defining consistency in a meaningfully way would have required Uganda's Sentencing Guidelines to be modelled on a limiting retributivism justification.

A limiting retributivism justification would enable the construction of the sentencing guidelines on an ethically meaningful definition of proportionality, which will shape the construction of meaningful offense seriousness scales, breadth of sentencing ranges, starting points, and a principled approach to managing aggravating and mitigating factors. Overall, consistency does not serve a meaningful function in the Ugandan Sentencing Guidelines.

Notes

1 *See* Benjamin J. Odoki, Speech at the Launch of the Constitution (Sentencing Guidelines for Courts of Judicature), Practice Directions: Legal Notice No. 8 of 2013, at 4 (June 10, 2013) [hereinafter Odoki Speech].

2 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, 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." *See* H. Apunyo, *Husband killer gets community service*, The New Vision (newspaper), Oct. 11, 2014.

3 P.J. Hoffer, K.R. Blackwell, & B.R. Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90(1) J. Crim. L. & Criminology 239–306 (1999).

4 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); also Uganda v. Rwajekale Jamada, HCT-01-CR-SC-0086/2012 [Judgment of the High Court of Fort Portal] (the Court held that maximum sentences cannot be imposed on first time offenders).

5 *See* Benjamin J. Odoki, An Overview of Penal Reform in Uganda 17 (1997) (unpublished manuscript) (on file with author).

6 Constitutional Petition No. 06 of 2003 [Judgment of 10 June 2005].

7 This was said at the two-day residential training workshop for trial judges, organized by the Justice, Law and Order Sector (JLOS) on March 27–28, 2013, at Ridar Hotel, Seeta; *see* JLOS Pioneering Reform of Sentencing in Uganda, http://www.jlos.go.ug/index.php/component/k2/item/268-jlos-pioneering-reform-of-sentencing.

8 *See* Tigo Stephen v. Uganda (Criminal Appeal No 08/2009) [Judgment of 10 May 2011], http://www.ulii.org/ug/judgment/supreme-court/2011/7.

9 *See* Odoki Speech, *supra* note 1, at 3.

10 *Id*. at 3. The Supreme Court came out almost five months after the Susan Kigula case to clarify that "[l]ife 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 § 47(1) of the Prisons Act chapter, which provides, "For the purpose of calculating remission of

a sentence, imprisonment for life shall be deemed to be twenty years imprisonment." The Supreme Court clarified that this provision only applied when remission was granted to the offender.

[11] *Id*.

[12] *See* The 2010 Uganda Law Reform Commission Annual Report to the Legislature, at 28– 30, http://www.ulrc.go.ug/annual-report. *See also* Yorokamu Bamwine, Principles of Sentencing: A Global, Regional and National Perspective, at 2, speech at Munyonyo Commonwealth Resort Hotel, Kampala (Aug. 30, 2012).

[13] *See* The Constitution (Sentencing Guidelines for Courts of Judicature), Practice Directions: Legal Notice No. 1 of 2013 [hereinafter Uganda Guidelines], ¶ 6.

[14] *See id*., § 188.

[15] The Penal Code Act, Ch. 120, § 254.

[16] *Id*. at §§ 187 & 285–286, respectively.

[17] *See* Uganda Guidelines, *supra* note 12, at ¶ 27, Schedule Three, Part II, and ¶ 30, Schedule Three, Part III, respectively.

[18] *See id*. at ¶ 45, Part VII.

[19] *See* Odoki Speech, *supra* note 1, at 3.

[20] *See* Uganda Guidelines, *supra* note 12, at ¶ 20.

[21] *See id*. at ¶ 20(p).

[22] *See id*. at ¶¶ 28, 31.

[23] *See id*. at ¶ 21.

[24] *See id*. at ¶¶ 32(d), 36 (d), 40(c), and 48(f), respectively.

[25] S. Krasnostein & 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?*, J.L. & Contemp. Problems 266–88, 265.

[26] N. Hutton, *The Definitive Guideline on Assault Offences: The Performance of Justice*, *in* Sentencing Guidelines: Exploring the English Model 86–103, 91 (A. Ashworth & J.V. Roberts eds., 2013).