

**PRINCIPLES OF SENTENCING: A GLOBAL, REGIONAL AND NATIONAL  
PERSPECTIVE:**

**30<sup>TH</sup> OF AUGUST 2012**

**MUNYONYO COMMON WEALTH RESORT HOTEL, KAMPALA**

**PRESENTATION BY THE HON. THE PRINCIPAL JUDGE, HIS LORDSHIP JUSTICE,  
YOROKAMU BAMWINE**

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My Lord the Hon Chief Justice,

My Lord Judges of the High Court,

The Director of Public Prosecutions,

The Chairman, Uganda Law Reform Commission,

The Development Partners Group, JLOS,

Your Worship the Chief Registrar,

Your Worships Registrars & Magistrates,

Distinguished Guests,

Ladies and Gentlemen,

I have been requested to focus my presentation on the Global, Regional and National perspectives of sentencing principles.

Any judicial officer when assessing sentence considers:

- How to punish the offender
- How to protect the public
- How to reform and change an offender's behaviour
- How to ensure an offender does something to make up for his/her crime
- How to reduce future criminal activity by the offender.

In the wake of the **Kigula and Tigo** decisions, there exist serious contradictions in approaches to sentencing which need to be resolved especially as regards:-

- (i) problems arising from “life means life”;
- (ii) denials of remissions in life sentences which imply that prisoners are incapable of reform;
- (iii) post conviction rehabilitation not being taken into consideration at the time of sentencing, especially as regards the post Kigula case.

On the global perspective, I will make reference to the United Kingdom and America, and for the regional perspective, South Africa. We interacted with their Judiciary (**South Africa and United Kingdom**) on the subject of sentencing guidelines during our benchmarking tour. From the National perspective, we all know that Uganda has not had formal sentencing guidelines as is the case with other jurisdictions considered in our study. This is not to say that Courts have not developed sentencing jurisprudence over the years. Cases like **Susan Kigula**<sup>1</sup> and **Tigo Vs Uganda**<sup>2</sup>, say a lot about our sentencing regime. Considering the sentences disparities, however, we are far from attaining a clear sentencing policy in Uganda.

My Lords and fellow participants, before a judicial officer imposes a sentence on the offender in any given case, he or she is at pains to determine which sentence is appropriate under the relevant law. It is the duty of the court to evaluate all the relevant evidence in order to arrive not only at a suitable but also a fair and just sentence. This can only be done bearing in mind the age long regarded sentencing principles and purpose of sentencing.

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<sup>1</sup> Constitutional Appeal No. 03 Of 2006 Court held that the various provisions of the laws of Uganda which prescribe a mandatory death sentence are inconsistent with Articles 21, 22(1), 24, 28, 44(a) and 44(c) of the Constitution and, therefore, are unconstitutional.

<sup>2</sup> Supreme Court Criminal Appeal No 8 of 2009, the Supreme Court held that: “life imprisonment means imprisonment for the natural life term of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned.

## **Purpose of Sentencing**

The fundamental purpose of sentencing is to enhance the respect of the law and maintenance of a just, peaceful and safe society by imposing sanctions that have one or more of the following objectives:-

- (i) to denounce unlawful conduct;
- (ii) to deter the offender and other persons from committing offences;
- (iii) to separate offenders from society where necessary;
- (iv) to assist in rehabilitating offenders;
- (v) to provide reparations for harm done to victims or to the community;
- (vi) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community; and re-integrate the offender into society

## **Principles of Sentencing**

There are five general aims or justifications of punishment:

### **1. DETERRENCE**

This is one of the cardinal notions of punishment. It may take either of the two forms, namely, **specific or general deterrence**. It aims at deterring the offender from re-offending and/or other would be offenders.

#### **Specific deterrence**

This is concerned with punishing an individual offender in the expectation that he or she shall not offend again.

#### **General deterrence**

This is premised on the basis that people in general will be deterred from committing crime by the threat of punishment if they are caught. This is among other reasons why prison sentence/long prison sentence and death penalties are imposed. This same

school of thought is also shared by America with claims that, every one execution deters seven or eight other would be murderers.

Although deterrence is very important aspect of punishment, it has been shown to be an over-simplification. Research in the United Kingdom has revealed that most serious punishments do not necessarily deter further offending. According to a Home Office study, 58% of all sentenced prisoners discharged in 1995 were reconvicted of a serious offence within two years of being released. Among young offenders, 76% were reconvicted (Reconviction of Offenders Sentenced or Released from Prison in 1995, April 1999).

Supporters of the deterrent punishment in the UK opine that for deterrent punishments to be effective at least two issues should be present:-

- 1) The punishment must be sufficiently severe.

This assertion was tested by examining an instance where the level of punishment was altered. In 1965, the death penalty was abolished as a punishment for murder. Research indicates that this change had no readily definable impact on the rate of murders. A recent Home Office report concludes that there is no basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects<sup>3</sup>.

- 2) The punishment should be such that it makes potential offenders weigh up the rewards and risks associated with crime. However, the extent to which people believe they might be caught is probably more important than the actual risk of detection, or the level of punishment. The Home Office paper, **Criminal Deterrence and Sentence Severity**, suggests that for at least some classes of potential offenders, their perceptions of the risks of being apprehended and punished (when they are aware of such risks) affect their reported choices of whether to offend.

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<sup>3</sup> See Criminal Deterrence and Sentence Severity: An Analysis of Recent Research, 1999.

On the whole, it can be said that social ties (or the lack of them), affect the deterrent effects of the criminal justice policies, with persons having strong social ties (that is to say strong links to families, local communities), being more easily deterred by prospects of being apprehended than those without. Persistent offenders with weak social ties, such as persistent burglars, often act impulsively, and in circumstances that they themselves define as a situation of pressing need. Such impulsivity may reduce these offenders' amenability to being deterred through increased penalties<sup>4</sup>.

## **REHABILITATION**

Rehabilitation involves offering an offender help to overcome problems which he or she faces, thereby making it easier for him or her to avoid future offences that may arise out of that need. This may include various types of assistance provided in prison or in the course of a probation order which are intended to help the offender to improve his or her social skills, employment prospects or even capacity to obtain welfare benefits. Rehabilitative ideals can be seen in the official terms of reference of some of those dealing with offenders after conviction. The duty of the Prison Service is to treat inmates with humanity and to help them lead law abiding lives in custody and after release.

The viability of rehabilitation has been challenged in the United Kingdom as seen from the recent Home Office study report that found that there was no discernible difference between reconviction rates for custody and community penalties. 56% of offenders who commenced community penalties were reconvicted within two years in comparison with 58% of all sentenced prisoners<sup>5</sup>. Evaluating the effectiveness of sentences in reducing re-offending is difficult. The fact that someone is not reconvicted does not mean he has stopped offending.

Although we can see what happens to an offender after he has been through a programme of rehabilitation, we cannot predict what would have happened if his

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<sup>4</sup> Criminal Deterrence and Sentence Severity, 1999.

<sup>5</sup> Reconviction of Offenders Sentenced or Released from Prison in 1995, April 1999

sentence had not contained such elements. Offenders may experience social problems after completing their sentence. Two researchers, Bottoms & McClintock, attributed a social problem score to ex-Borstal trainees in 1973. Only 18% of those with the lowest scores were reconvicted, whereas 82% of those with the highest scores were reconvicted. In practice, those who had made the poorest social adjustment after their release were most likely to become recidivists.

Adult offenders with multiple social problems (accommodation, employment, alcohol, drugs and finance) are more likely to be reconvicted (Explaining reconviction following a community sentence: the role of social factors, Home Office 1999). Also, reconviction rates are higher for those with more previous convictions<sup>6</sup>

Rehabilitation should be pursued as a purpose of punishment only if the sentence actually has the potential to achieve it. In the case of very serious crime, where long-terms of imprisonment are appropriate, it is not an important consideration.

## **PROTECTION OF THE PUBLIC**

Protection of the public is one of the major justification claims for punishment. For example, imprisonment leads to the incapacitation of offenders so that they are prevented (at least temporarily) from offending against the public at large. This aim is effected through death penalty, custodial (long and short sentences) and non custodial sentences. With respect to the death penalty the execution of an offender will obviously protect the public from that offender.

Mass Killer Breivick found sane by the Norwegian Court recently was sentenced to 21 years jail term under their preventive detention, a special prison term for criminals considered dangerous to society.

Imprisoning an offender will prevent him from committing crimes against members of the public. However, the situation is not that simple, the experience of prison in the UK

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<sup>6</sup> See *Reconviction of Offenders* Home Office report 1999.

may be such that the offender is more likely to re-offend after release, and perhaps to commit more serious crimes. If this is so, crimes are not prevented, but merely deferred. Some prisoners may continue to commit offences, including serious assaults and homicides, while in custody.

In the UK some Offenders who are never caught will not be affected by the imprisonment of less elusive offenders. Some now believe that recorded crime rates would not be substantially affected if fewer offenders were sent to prison<sup>7</sup>.

Nevertheless, the incapacitation of an individual offender, who poses a danger to the public, can protect the public from that particular offender for the time they are away from the public.

## **RETRIBUTION**

Retribution rests on the notion that if a person has knowingly done wrong, he or she deserves to be punished. In the UK this idea was at the heart of the previous Conservative Government's White Paper "**Crime, Justice and Protecting the Public**" (1990). The UK Government's aim was to ensure that convicted criminals receive their 'just deserts'. This is effected through a tariff sentence, punishing offenders satisfies the requirement that where a rule imposes a penalty for its own breach, that penalty must be imposed when the rule is broken.

Retribution as an expression of society's outrage at the crime has been held not to be as important as it was in the past but may nevertheless be of great importance depending on the facts of the case. Thus, if the crime is viewed by society with resentment, the sentence should also reflect this abhorrence. Retribution can also be related to the requirement that the punishment should fit the crime, or that there should be a proportional relationship between the punishment and the crime.

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<sup>7</sup> This was acknowledged in the Home Office Handbook, The Sentence of the Court (1986).

Another quotation shows that the retributive theory finds justification for punishment in the past, whereas the other theories find their justification in the future “in the good that will be produced as a result of the punishment”.<sup>8</sup>

In ***R v Karg***<sup>9</sup>, it was contended by the appellant that the trial judge had overemphasized the retributive aspect of sentencing by stating that the court’s sentence should not tempt aggrieved people to seek private vengeance, and that it should do justice to the community and to those aggrieved. The reaction of Schreiner JA has been quoted in countless subsequent decisions:-

*“While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment”.*

Retribution appears to be at the heart of Uganda’s current sentencing policy. If any such policy exists.

The above findings are mostly in the UK and America. One other justification for imposing penalties is that they denounce particular types of behavior, and reaffirm the validity of moral attitudes to that behavior. The previous Conservative Government’s White Paper suggested several times that punishment can denounce criminal behavior and express public repugnance of it.

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<sup>8</sup> At 862B, a quotation from Gordon Criminal law of Scotland (1967) 50.

<sup>9</sup> *R v Karg* 1961 (1) SA 231 (A)



At the level of sentencing, judicial officers' world over are supposed to hand down sentences in light of these principles and purpose of sentencing and applying them to the facts of each case. This was stated by Holmes JA<sup>10</sup>, were the court held that the judgment on sentencing begins by stating seven general guidelines:

- 1) The punishment should fit the crime. This is related to the retributive aspect of punishment.
- 2) In 1959<sup>11</sup> the appeal court pointed out that the punishment should fit the criminal as well.
- 3) The interests of society as noted in ***R v Karg and S v Zinn***.
- 4) [Mercy] has nothing in common with sentimental sympathy for the accused. While recognizing that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality though it tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society. An appropriate sentence is not reduced in order to make provision for mercy.
- 5) The concept of mercy is not a recent development.
- 6) "The main purposes of punishment are deterrent, preventive, reformatory and retributive.
- 7) "It remains only to add that, while fair punishment may sometimes have to be robust, an insensitively censorious attitude is to be avoided in sentencing a fellow mortal, lest the weighting in the scales be tilted by incompleteness".

Mercy is contained within a balanced and humane approach to consideration of the appropriate punishment. This appropriate punishment is not reduced in order to provide for mercy. There is no room for a vindictive and vengeful attitude from the sentencing officer. Despite being trite, most of these considerations are beset with misinterpretation, misconception and other difficulties.

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<sup>10</sup> S v Rabie 1975 (4) SA 855 (A)

<sup>11</sup> In R v Zonele 1959(3) SA 319(A) at 330E. This is probably not quite accurate – see *Ex parte Minister of Justice: In re R v Berger* 1936 AD 334 at 339 (all the circumstances affecting the accused must be taken into consideration). See also R v Swanepoel 1945 AD 444.

In light of this, this is a summary of the basic principles according to which a sentence is imposed globally, regionally and nationally:

The sentencing court has to impose an appropriate sentence based on all the circumstances of the case. The sentence should not be too light or too severe. In the case of **S v Holder**<sup>12</sup> a decision by Rumpff CJ, he stated thus,

”the approach that imprisonment ought not to be lightly imposed, especially if the objects of punishment can be met by another form of punishment, e.g. a fine with or without suspended imprisonment, is a healthy approach. In the application of this approach the under-emphasizing of either the particular person (the accused), or the crime or society must, however, not only be guarded against, but also the over-emphasizing of one of these three elements. An appropriate sentence, according to the demands of the time, must be strived for, and an appropriate sentence will always be a sentence which is based on a balanced consideration of the three elements. In the application of this approach a Court of appeal is also still bound by what has repeatedly been said in the Appellate Division, namely that on appeal the sentence will be interfered with only if there was misdirection or if the sentence is found to be too heavy. A magistrate of Judge imposing sentence must, therefore, be permitted to exercise his discretion within reasonable limits.”

The decision can in some respects be seen as a reaction against the judgment in *S v Scheepers*, which was considered as having eroded the sentencing discretion of the trial courts.

The judgment in **S v Holder** begins by supporting the approach that imprisonment should not be imposed lightly, especially if another form of punishment will satisfy the purposes of punishment. However, none of the offender, the offence or society should be over or underemphasized in this process:

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<sup>12</sup> 1979 (2) SA 70(A)

“An appropriate sentence, in accordance with the demands of the times, should be strived for, that is a sentence which is based on a balanced consideration of the triad of factors (crime, criminal and society)”.

Rumpff CJ stressed that a sentence which is too light is as wrong as one which is too severe. Having stated the principle that imprisonment should be avoided if possible, he held that in the case of any serious crime the element of punishment must come to the fore, if punishment in the criminal law is to have any meaning. Society expects that a serious crime should be punished, but also expects that mitigating circumstances should be taken into account and that the offender’s particular position should receive proper consideration. Rumpff CJ thought that this was sentencing in accordance with the demands of the time.

An appropriate sentence should reflect the severity of the crime, while at the same time giving full consideration to all the mitigating and aggravating factors surrounding the person of the offender; in other words, the sentence should reflect the blameworthiness of the offender, or be in proportion to what is deserved by the offender. These two factors, the crime and the offender, are the first two elements of the triad emphasized in *R vs Zinn*<sup>13</sup>.

An appropriate sentence should also have regard to/serve the interest of society, the third element of the *Zinn* Triad. The interest of society can refer to the protection of society needs or the order or peace it may need, or the deterrence of would be criminals but it does not mean that public opinion be satisfied. In the interest of society, the purposes of sentencing are deterrence.

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<sup>13</sup> The three legs of the triad are, the crime, criminal and the interests of the society

Prevention as a separate purpose of punishment is rarely discussed any longer though as we have seen, in Norway they still highly regard it.

## **NATIONAL POSITION**

### **Constitutional principles**

There are two constitutional principles that a court of law must consider when exercising judicial authority. The first principle is contained in Article 126(1) of the Constitution of Uganda that enjoins courts of law to apply their judicial power in accordance “with the law and with the norms, values and aspirations of the people.” Secondly, Article 126(2) sets out the principles that courts should apply while adjudicating cases of a criminal nature, that is; the award of compensation to victims and promoting reconciliation between parties. These constitutional principles reaffirm the community based sentencing options that are available to the court.

Despite the constitutional principles on the adaptation of norms and values of society, the present sentencing regime reflects the complexity of weaving together a sentencing framework that accommodates constitutional principles of law, local customs and international norms all in one legal system. This scattered sentencing framework that fails to draw on constitutional principles of community based penalties and conformity with the law, norms and values of the people reflects the haphazard manner in which sentencing legislation has developed in Uganda from its colonial roots through to the 21<sup>st</sup> century.

### **Way Forward**

The sentencing guidelines collate the different principles of sentencing already laid down in judgments of the superior courts of record. These are the principles of proportionality, degree of harmfulness or risked harmfulness of the offence and the degree of culpability of the offender for the offence committed.

Additionally, this will enable the courts to promote consistence and cognisance of human rights imperatives and Uganda's constitutional principles and seek to combine them in an optimal way while:-

- (i) restoring the rights of victims of the offence;
- (ii) protecting society against the offender;
- (iii) giving the offender the opportunity to lead a crime-free life in the future; and
- (iv) re-integrating the offender back in the community.

Regarding the place of consistence, in any criminal justice system it is a fundamental principle of justice that like cases be treated alike.

Consistence, an important aspect in sentencing has two components:-

- i) It requires that similar sentences should be imposed when similarly placed offenders commit similar crimes, and
- ii) Perpetrators of more serious crimes be sentenced more severely than those of lesser crimes.

Consistency does not require that exactly the same sentence be imposed in similar cases. Rather it emphasises that there should not be any wide variance in the sentences imposed in similar instances. This should appeal to any reasonable person's sense of fairness and justice. Hence the taskforce's emphasis on a uniform approach to sentencing rather than uniform sentencing per se.

The Judicial officer imposing the sentence should therefore provide an explanation for the sentence he or she decides upon. These reasons should also explain to the public and the victims why the court acts with some restraint while imposing sentence. The presiding officer is expected not to act emotionally and with his or her eye on only the past but to look at the future, the victim, the offender and the public. The presiding officer should also explain especially if there is a big difference between his or her

sentence and that proposed by the defence, a probation officer or other pre-sentence report, why such suggested sentence was inappropriate<sup>14</sup>.

In English law consistency has been promoted by Guidelines judgments issued by the Court of Appeal concerning a particular category of offence.

It considers the basic framework applicable to sentencing in general and to the offence in particular. It then provides a fairly exhaustive list of aggravating and mitigating factors associated with the offence. It further provides for starting points of sentences for certain sub-categories of the particular offence.

Guideline judgments also substantially affect sentencing in a number of countries with English common law as source of law of procedure, notably Canada, Australia and New Zealand.

Andrew Ashworth, one of the most prominent sentencing scholars commented on guideline Judgements as follows:-

***“guideline judgments are an innovation of which the senior judiciary can rightly be proud. They show how guidance can be fashioned, in a judge-friendly way, based on experience, and shaping discretion without constraining it too tightly. It might also be claimed that guideline judgments are capable of changing judicial sentencing practices ..... although where there is a strong judicial culture the guideline judgment may be less than fully successful in altering sentencing practice.”***

We look forward to the sentencing guidelines Sentencing under process being embraced by all.

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<sup>14</sup> See S v Martin 1996 (2) SACR 378(w) at Pg 381; S v Lewis 1986 (2) PHH 96 (a) at Pg 110.

## CONCLUSION

My Lords and fellow participants, the most difficult time in criminal proceedings is the sentencing time. The conviction may be proper but if the sentence amounts to a travesty of justice, the whole process will be considered a flop. I want to believe that together we can make the sentencing process easier, less stressful and well appreciated by the consumers of justice.

Having said so, the penal policy in Uganda is indeed an issue of great public importance. Its formulation must be jointly shared by Parliament, the Executive and the Judiciary. It is the duty of the State to pass laws to stamp out crime and to control criminality in society.

Crime rates are increasing at alarming rate. Some people rape, maim, rob, defile or kill others with arrogant impunity. It is our duty to judge and punish these people who absolutely have no respect for the fundamental rights and interests of others.

As we deliberate on these issues, I look forward to the sacred power of sentencing being exercised righteously by all judicial officers with a true sense of purposeful justice and accountability at all times. This is when we shall, I submit, meet the public expectations as to “the values, norms and aspirations” under **Article 126(1)** of the constitution through an improved and reformed sentencing regime nationally and regionally

I thank you very much for listening to me.