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PRESENTATION ON

SENTENCING GUIDELINES: REFLECTIONS ON THE FUTURE OF THE CRIMINAL JUSTICE SYSTEM IN ZIMBABWE

PRESENTED ON THE OCCASION OF THE JUDICIAL CONFERENCE ON SENTENCING GUIDELINES

KADOMA RAINBOW CONFERENCE CENTRE

by

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THEME: PROMOTING CONSISTENCY IN SENTENCING

INTRODUCTION

Criminal law is central to the concerns of any society because it serves to protect the interests of the public as a whole, as opposed to civil law which primarily protects the interests of the individual. Criminal law is primarily focused on the preservation of social order and stability. It is in respect of the sentencing of offenders that the courts' judicial authority is made prominent.

As such, the effect of sentencing on the perception of the role of the Judiciary in society cannot be understated. No other branch of the Judiciary's mandate has greater potential to undermine or enhance support for the administration of justice. In addition, depending on the crime in question, sentencing bears significant consequences on liberty and, in appropriate circumstances, the continued right to life of convicted persons.

Common law jurisdictions have long accorded Judges seemingly unfettered discretion with regard to the issue of sentencing in criminal matters. The presiding judicial officer is charged with the mandate to assess the commensurate sentence by taking into account the gravity of the offence and the identity of the perpetrator as well as the overarching interests of society. The jurisdiction in Zimbabwe has not been an exception to this approach. The authority of Judges in this respect may only be interfered with on limited grounds on review or appeal. The exercise of judicial discretion in the field of sentencing under criminal law has received mixed reviews. Of note is the criticism of disparate

sentencing, where the same criminal conduct is punished differently depending on the personal views of the presiding officer. This has given rise to the need for the consideration and adoption of uniform sentencing guidelines in the absence of a codified sentencing regime.

The Legislature, cognisant of the existing inconsistencies in the sentencing of criminal offenders, enacted section 334A of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Act"). The law creates the avenue for the Judiciary's transition to a guided sentencing regime. The object of this paper is to contextualise the objectives and the purpose of the Judicial Conference on the formulation of sentencing guidelines.

THE PROCEDURE OF SENTENCING

Sentencing is a process within the criminal justice system in which a person who has been convicted of a crime, following due process, is punished for his or her offence. It is a process of assessing the appropriate punishment. The process is required at law to involve the investigation of all the relevant circumstances against which a sentence in a particular case must be assessed and determined.

Sentencing is an integral part of the penal system of any modern society anchored on the rule of law. This is because where the rule of law exists, there are legal rules to which all citizens are accountable. The fact that the law may require a punishment to be imposed on a person who would have breached it is significant. It spells out that the sentence

that is imposed on an offender is one that is to be determined through the law itself and not by the individual judicial officer. However, in most cases, the law does not set out the specific sentence that must be imposed on an offender in a particular case.

Given that the sentence that ought to be imposed on a person who has been convicted of committing a crime is contemplated by law and that the law does not always fix the sentence, the procedure of sentencing directs the court to the factors the law requires to be taken into account in arriving at the sentence contemplated by the law. Notwithstanding the fact that a court may have discretion in determining a sentence, the punishment imposed on an offender must be of the degree of severity intended by the law.

Sentences imposed as punishment on offenders are a means to an end. The theories of punishment suggest that sentences are imposed on offenders for the purpose of achieving one or more of the following objectives – general deterrence, special deterrence, prevention, reformation and retribution.

When a judicial officer metes out a sentence, he or she has to bear in mind that the theory of retribution is an inherent feature of the criminal justice system. This means that when the sentence is imposed by the Judge after conviction, he or she ought to give effect to society's disdain for the deviant conduct of the perpetrator. The classical purpose of criminal law is to punish the offender who violates the social order within the confines of the law. This acts as a guard against the state of

nature theory which Hobbes articulated as characterised by the "war of every man against every man", a constant and violent condition of competition in which each individual has a natural right to everything, regardless of the interests of others.[1]

The State, through the Judiciary, is endowed with the authority to balance the scales when a sentence is imposed upon a duly convicted person. A contemporary view of retribution as a theory of punishment that sheds light on the role of the Judiciary in sentencing is perfectly summed up as follows:[2]

> "And while it is nonutilitarian, retribution is one of the obvious and fundamental social purposes of sentencing. We punish to vindicate a moral sense; we make the offender suffer for his having made the victim of his crime suffer. While it may make society and the individual victim feel better, retribution by itself serves no useful purpose. Nevertheless, while it may not be utilitarian, as a fundamental tenet of criminal law it is necessary, because most societies believe it is right."

Deterrence is generally regarded as one of the most important purposes of sentencing. The rationale behind deterrence as a purpose of sentencing is the belief that "criminal penalties do not just punish violators, but also discourage other people from committing similar offences".[3] The United Nations Office on Drugs and Crime provides

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[1] Lloyd, Sharon A. and Susanne Sreedhar, "Hobbes's Moral and Political Philosophy", *The Stanford Encyclopaedia of Philosophy* (Fall 2022 Edition), Edward N. Zalta & Uri Nodelman (eds.), URL = <https://plato.stanford.edu/archives/fall2022/entries/hobbes-moral/>.

[2] I. J. "Cy" Shain," The Judge's Role in Sentencing: Basic Considerations for Effective Sentences", Judicial Council of California, 42nd Seminar Course.

[3] Ben Johnson, "*Do Criminal Laws Deter Crime? Deterrence Theory in Criminal Justice Policy: A Primer*", Minnesota House Research Department, at p. 2. Available at: https://www.house.leg.state.mn.us/hrd/pubs/deterrence.pdf. Accessed on 28 November 2022.

the helpful distinction between general deterrence and special deterrence as being that: "*General deterrence* is directed at preventing crime among the general population, while *specific deterrence* is aimed at preventing future crimes by a particular offender".[4] In penalogical theory, deterrence is generally considered to be one of the main purposes of sentencing. In *S* v *B* 1985 (2) SA 120 (A) at 124D–J, VILJOEN JA said:

> "In support of his first submission counsel referred this Court to the recent decision in *S v Khumalo and Others* 1984 (3) SA 327 (A) where, at 330D-E, NICHOLAS JA, in the course of his majority judgment, said:
>
> > 'In the assessment of an appropriate sentence, regard must be had *inter alia* to the main purposes of punishment mentioned by DAVIS AJA in *R v Swanepoel* 1945 AD 444 at 455, namely deterrent, preventive, reformative and retributive (see *S v Whitehead* 1970 (4) SA 424 (A) at 436E - F; *S v Rabie* 1975 (4) SA 855 (A) at 862).
> >
> > Deterrence has been described as the "essential", "all important", "paramount" and "universally admitted" object of punishment. See *R v Swanepoel* (*supra* at 455). The other objects are accessory.'
>
> The learned Judge of Appeal remarked that in modern times retribution was considered to be of lesser importance and referred to the very dictum which the magistrate quoted from *R v Karg* (*supra*) adding, however, the following sentence which was omitted by the magistrate: 'Naturally, righteous anger should not becloud judgment.' NICHOLAS JA also referred to the following dictum by HOLMES JA in *S v Rabie* 1975 (4) SA 855 (A) at 862A-B:

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[4] United Nations Office on Drugs and Crime, "Module 10: Sentencing and Confiscation in Organised Crime", United Nations Office on Drugs and Crime. Available at: https://www.unodc.org/e4j/zh/organized-crime/module-10/key-issues/intro.html#:~:text=Deterrence%3A%20As%20a%20purpose%20of,crimes%20by%20a%20particular%20offender.

> 'The main purposes of punishment are deterrent, preventive, reformative and retributive: see *R v Swanepoel* 1945 AD 444 at 455. As pointed out in Gordon Criminal Law of Scotland (1967) at 50:
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> > "**The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation ... The other theories, reformative, preventive and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment**."
>
> It is therefore not surprising that in *R v Karg* 1961 (1) SA 231 (A) H at 236A SCHREINER JA observed that, while the deterrent effect of punishment has remained as important as ever, "the retributive aspect has tended to yield ground to the aspect of prevention and correction".'
>
> ... Whereas formerly, particularly in ancient and medieval times and even in the more enlightened period thereafter, the emphasis was on retribution, the outlook has gradually changed. In his *De Jure Belli ac Pacis* 2.20.4.1 Grotius said: *nemo prudens punit quia peccatum sed ne peccatur*. But while this is true, retribution, as SCHREINER JA said, is by no means absent from the modern approach. What importance the component of retribution should be accorded in a sentence depends upon the circumstances." (the emphasis is mine)

It is worthwhile to reiterate that deterrence has been pushed to the forefront as a viable alternative to retribution, because retribution is often limited due to the fact that there is no way to undo the harm which has already taken place in most instances where criminal law becomes relevant. The threat of criminal sanctions such as the death penalty acts as a deterrent to society's inclination to subvert the law. It prevents citizens from taking the law into their own hands when relating with other members of their respective communities.

The very threat of imprisonment is presumed to compel citizens to conform to the established laws. For those who are sentenced to custodial prison terms, deterrence operates on the presumption that upon their reintegration into society they will shy away from deviant behaviour due to the threat of another term behind bars. Accordingly, the Judiciary plays a role in imposing deterrent sentences that discourage would-be offenders.

The effectiveness of criminal law as a deterrent is, however, highly contentious. This is because of the high rate of recidivism in addition to continued incidences of criminal activity. The often doubtful effect of deterrent sentences, in turn, undermines the role and importance of the Judiciary in sentencing. Zimring and Hawkins posit the following on this disputed facet of deterrence as a theory of punishment:[5]

> "On the one hand, there is a potent, ubiquitous, seemingly irrefutable thesis that attaching unpleasant consequences to behavior will reduce the tendency of people to engage in that behavior ... Moreover, despite fashionable scepticism about the efficacy of legal controls there is in some areas impressive evidence of the effectiveness of criminal law enforcement as a means of social defense. On the other hand, there are areas in which attempts to control or suppress behavior by means of threats of punishment seem, to many observers, to be hopeless failures ... the application of criminal enforcement and penal sanctions in the field of drug control is often said to have met with similar lack of success. Thus, the President's Crime Commission Task Force on Narcotics and Drug Abuse reported that despite the application of increasingly severe sanctions to marijuana the use and traffic in that drug appears to be increasing... But the truth is that, like so many dialectical arguments, the antithesis upon

[5] Franklin E. Zimring and Gordon J. Hawkins, *"Deterrence, the Legal Threat in Crime Control",* (1973), pp.3-5.

> which this one rests is false. **It is a matter of common observation that men seek to avoid unpleasant consequences and that the threat of punishment tends to be deterrent. It is equally indisputable that not all criminal prohibitions are completely effective. But these propositions are not mutually exclusive or contradictory**." (the emphasis is mine)

From a practical perspective, the deterrence argument is also impugned by the high rate of robberies that are being witnessed throughout the country. This is despite the equally high number of convictions and sentences imposed by the courts in robbery cases. Thus, while criminal law may serve an effective deterrent purpose in some instances, this general objective may be frustrated especially through repeat offenders. This suggests that, in sentencing, the Judiciary has an obligation to give effect to the most appropriate purpose of sentencing. Thus, it has been said that some of the most effective forms of deterrence such as the death penalty lend themselves closer to the theory of retribution because of their selective application.

The discussion brings to the fore theories of reformation and rehabilitation. Although some scholars draw a distinction between rehabilitation and reformation, Lisa Forsberg and Thomas Douglas observe that a distinction may not always be drawn between rehabilitation and reformation. Their discussion of the two concepts is helpful in understanding what both the theories of rehabilitation and reformation refer to. They posit thus:

> "Some authors are careful to distinguish between 'reform' and 'rehabilitation'. As some characterise this distinction, reform

seeks to alter character traits, motivations or dispositions, whereas rehabilitation aims at ‘improvement of … skills, capacities, and opportunities’. Others understand reform as the historically prior practice of providing ‘opportunities for education and contemplation in support of the reform of one’s moral character’ and rehabilitation as the more recent (twentieth century) practice of using (primarily psychological) interventions aimed at ‘correcting offenders’ personality traits, behaviours or attitudes’. But not all employ this distinction or indeed agree that such a distinction can or should be made.”[6]

The theory of rehabilitation finds expression in section 227(1) of the Constitution of Zimbabwe (“the Constitution”), which states:

“**227 Prisons and Correctional Service and its functions**

(1) There is a Prisons and Correctional Service which is responsible for —

(a) the protection of society from criminals through the incarceration and **rehabilitation of convicted persons** and others who are lawfully required to be detained, and their reintegration into society; and

(b) the administration of prisons and correctional facilities.” (the emphasis is mine)

The United Nations Office on Drugs and Crime, commenting on the theory of rehabilitation, observed that:

“Increasingly the world over, the concept of rehabilitation is winning ground over that of punishment when dealing with prisoners. Penitentiaries around the globe are striving to effect change by providing inmates with opportunities during their sentence, so that they can more easily be reintegrated into society

[6] Forsberg, Lisa, and Thomas Douglas. "What is criminal rehabilitation?." *Criminal law and Philosophy* (2020): 1-24 at p. 6.

> and become, once again, active and fulfilled members of their communities."[7]

Section 334A(6)(d) of the Act reveals the centrality of the rehabilitation of offenders in the purposes of punishment. The provision states that: "In formulating draft sentencing guidelines, a judicial conference shall pay regard to — the cost of different sentences and their relative effectiveness in rehabilitating offenders and reducing crime". The increasing recognition of sentencing as a vehicle for rehabilitating offenders was highlighted in a decision of the European Court of Human Rights, which was quoted in the case of *Makoni* v *Commissioner of Prisons & Anor* 2016 (2) ZLR 196 (CC) at 201D-F:

> "In *Dickson* v *The United Kingdom* (2007) ECHR (44362/04), the Grand Chamber underscored the role of rehabilitation as follows:
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> > 'In recent years there has been a trend towards placing more emphasis on rehabilitation, as demonstrated notably by the Council of Europe's legal instruments. While rehabilitation was recognised as a means of preventing recidivism, more recently and more positively it constitutes rather the idea of re-socialisation through the fostering of personal responsibility. This objective is reinforced by the development of the "progression principle": in the course of serving a sentence, a prisoner should move progressively through the prison system thereby moving from the early days of a sentence, when the emphasis may be on punishment and retribution, to the latter stages, when the emphasis should be on preparation for release.'"

[7] United Nations Office on Drugs and Crime, *Promoting prison-based rehabilitation programmes and post-release services to foster prisoners' social reintegration*, UNODC. Available at: https://www.unodc.org/dohadeclaration/en/crimecongress14/events/8MarPrisons.html.

Judicial sentencing expert Shain posits the following on this principle:[8]

> "Rehabilitation manifestly constitutes one of the important goals or purposes of punishment. As a society we would like the correctional experience to be beneficial and hope that it will bring the offender to his (or her) senses and act to resocialise and rehabilitate him. After all, punishment alone is *not* enough. If the offender emerges from prison more dangerous than when he entered, then admittedly we have produced a socially counterproductive result. If every convicted offender sentenced by a judge, irrespective of the nation in which the criminal proceeding took place, was deterred from further offences and emerged a more socially responsible person, then, the criminal law would indeed have fulfilled its purpose. But unfortunately, this outcome is not always the case."

The above purpose of sentencing of ensuring the rehabilitation of offenders is also applied within our jurisdiction as set out in the case of *Mharapara* v *The State* 2017 (2) ZLR 126 at 129C-D wherein MAFUSIRE J made the following observation:

> "Sentencing is undoubtedly a complex exercise. It is a balancing act between the interests of the accused and those of society. From time to time jurists have espoused brilliant philosophies around sentencing. Guidelines have been developed. The legislature sometimes weighs in with mandatory minimum sentences for certain offences. However, there are certain fundamentals in all these philosophies or principles. One of them is that the penalty must fit the crime. The interests of the offender must be balanced against those of justice. It is not right that someone who has wronged society should go scot free, or escape with a trivial sentence. **But at the same time he should not be punished beyond what his misdeed deserves. Punishment should be less retributive and more rehabilitative**." (the emphasis is mine)

[8] I. J. "Cy" Shain," The Judge's Role in Sentencing: Basic Considerations for Effective Sentences.

Rehabilitation focuses on reintegration of offenders into society. It focuses on inculcating skills and traits in the offender that render him or her suitable to be reintroduced into society and to co-exist peacefully with other people.

The purposes of sentencing, which are reflected in the foregoing theories, overlap. For this reason, it is rarely a simple task for a court to identify the applicable purpose of sentencing in each case and endeavour to arrive at the most appropriate sentence using a single theory. The observation was rightly made by the High Court of Australia in the case of *Veen* v *The Queen (No 2)* (1988) 164 CLR 465, where it is stated that:

> "However, sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. **The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.** And so a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter. These effects may balance out, but consideration of the danger to society cannot lead to the imposition of a more severe penalty than would have been

> imposed if the offender had not been suffering from a mental abnormality." (the emphasis is mine)

It is evident that sentencing plays a critical role in the fulfilment of the purposes of criminal law. In this regard, the Judiciary has the power to sentence offenders and it superintends sentencing procedures to ensure that they achieve their purpose. However, there are certain inherent conflicts in the underlying principles that militate against this process. Judicial officers at the sentencing stage are representative of society's interest to sanction proven criminal conduct. However, in the same vein, they are expected to remain neutral arbiters whose sole concern is the delivery of justice. The fine line between these roles is often blurred with some judicial officers failing to overcome personal convictions when administering the appropriate sentence.

In addition, the aforementioned underlying purposes of sentencing such as retribution, rehabilitation and deterrence have certain limitations that weaken their utility. To address these weaknesses, sentencing guidelines come into effect to establish rational, consistent and just sentencing practices. They ensure that there is a balance between the competing interests of criminal law.

SENTENCING GUIDELINES IN GENERAL

I have deliberately decided to discuss the nature of sentencing guidelines after discussing sentencing in general. This is because the procedure for sentencing must first exist before sentencing guidelines are considered necessary. To understand sentencing guidelines, one

must first appreciate what sentencing, as a judicial process, entails. Only when the process and purpose of sentencing have been outlined, can sentencing guidelines be properly understood.

In basic terms, sentencing guidelines are general principles providing guidance to a court on the factors that should be taken into account in determining a sentence.[9] The Merriam-Webster Dictionary defines a sentencing guideline as:

> "… one of a set of rules for computing sentences that is promulgated by a commission on sentencing and that typically provides classifications (such as offences or offenders), scales (as of severity of crimes), and suggested punishments."[10]

Richard Frase and Kelly Mitchell define sentencing guidelines as "a set of standards that are generally put in place to establish rational and consistent sentencing practices within a particular jurisdiction".[11] In the United States of America, "guidelines were conceived as a way to guide judicial discretion in accomplishing particular sentencing and correctional objectives".[12]

There are several features present in almost all sentencing guidelines the world over. Most sentencing guidelines significantly consider the

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[9] See, for example, *About Sentencing Guidelines*, Sentencing Council for England and Wales. Available at: https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-the-sentencing-council/. Accessed on 27 November 2022.

[10] *Merriam-Webster Dictionary,* s.v. "Sentencing guideline", Available at: https://www.merriam-webster.com/dictionary/sentencing%20guideline. Accessed on 27 November 2022.

[11] See R. S. Frase and K. L. Mitchell, "*What are sentencing Guidelines?*", University of Minnesota, Robina Institute of Criminal Law and Criminal Justice, 21 Mar. 2018. Available at: https://robinainstitute.umn.edu/articles/what-are-sentencing-guidelines.

[12] Robin L Lubitz and Thomas W Ross, "Sentencing Guidelines: Reflections on the Future", *Sentencing and Corrections – Issues for the 21st Century*, No. 10, June 2021 at p. 1. Available at: https://www.ojp.gov/pdffiles1/nij/186480.pdf.

culpability of the offender as the basis for recommending an appropriate sentence. The Sentencing Council for England and Wales states that:

> "Culpability is assessed with reference to the offender's role, level of intention and/or premeditation and the extent and sophistication of planning.
>
> - The court should balance these factors to reach a fair assessment of the offender's overall culpability in all the circumstances of the case and the offender.
> - The mere presence of a factor that is inherent in the offence should not be used in assessing culpability.
> - [For example] Deliberate or gratuitous violence or damage to property, over and above what is needed to carry out the offence will normally indicate a higher level of culpability."[13]

Karen Lutjen provides an overview of the significance of an offender's culpability during the process of sentencing in any criminal justice system. In an article focusing on culpability in the sentencing of offenders under federal sentencing guidelines, the author observed that:

> "Since 1791, **the United States Constitution has offered some assurance that sentences would be neither cruel nor unusual, excessive nor disproportionate**. This protection stems from the Eighth Amendment and provides the Constitutional background against which sentences are to be judged. **Culpability, or the moral blameworthiness of an offender, lies at the centre of this analysis. In a rational and fair system of sentencing, culpability is assessed within the context of both the offence and the offender**. A truly proportionate sentence looks beyond the circumstances of a particular case to the circumstances which gave rise to the offence, and the relevant conduct and criminal

[13] *Culpability*, Sentencing Council for England and Wales. Available at: https://www.sentencingcouncil.org.uk/droppable/item/culpability/#:~:text=Culpability%20is%20assessed%20with%20reference,the%20case%20and%20the%20offender. Accessed on 28 November 2022.

history of the offender. **If this link between culpability and the punishment imposed is severed, then the foundations upon which the criminal justice system are based are rendered morally suspect**."[14] (the emphasis is mine)

In this jurisdiction, the considerations of culpability are implied by the definition of "presumptive penalty" in section 334A(1) of the Act. They are also implied in the definition of "table of presumptive penalties". The definition of "presumptive penalty" focuses on an "augmented penalty which may be imposed in aggravating circumstances" and a "diminished penalty which may be imposed in mitigating circumstances". The aggravating and mitigating circumstances referred to in the definition all relate to the degree of culpability.

Determining sentences on the basis of culpability among other approaches defies a straitjacket approach to sentencing. Where culpability is considered, the aggravating or mitigating factors are properly considered for the purpose of arriving at an appropriate sentence. Given that most sentencing guidelines take the offender's culpability into account, there is reasonable scope to conclude that most sentencing guidelines will pay regard to the culpability of an offender for every offence in respect of which guidelines are provided.

Another common feature of all sentencing guidelines is to be found in their purpose. Generally, the purpose or objective of sentencing guidelines in most jurisdictions is similar. The need to attain

[14] Karen Lutjen, *Culpability and Sentencing under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 Notre Dame J.L. Ethics & Pub. Pol'y 389 (1996) at p. 389. Available at: http://scholarship.law.nd.edu/ndjlepp/vol10/iss1/10.

uniformity in the sentencing of offenders is a universal purpose of sentencing guidelines. As already noted above, the purpose of the sentencing guidelines is to establish rational and consistent sentencing practices within a particular jurisdiction. A number of States regard consistency and uniformity as the major purposes of sentencing. For example, the Massachusetts Sentencing Commission states that:

> "A just system of punishment: ... provides predictability and fairness by: promulgating comprehensive sentencing guidelines and necessary improvements in procedures for probation revocations; **avoiding unwarranted disparities among defendants**."[15] (the emphasis is mine)

Similarly, the Sentencing Advisory Council (Victoria, Australia) provides for "parity" as one of the sentencing principles, which it defines as the basis of sentencing decisions.[16] In respect of the principle of parity, the Sentencing Advisory Council states that "similar sentences should be imposed for similar offences committed by offenders in similar circumstances".[17] The Scottish Sentencing Council also provides comparable purposes for its sentencing guidelines. It states that the sentencing guideline is designed, among other objectives, to "increase transparency by providing the public with an understanding of the approach taken by judges when deciding sentences [and] promote consistency in the approaches taken by judges

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[15] See Massachusetts Government, *Sentencing Guidelines Mission and Purposes*, Massachusetts Sentencing Commission, 26 April 2019. Available at: https://www.mass.gov/info-details/sentencing-guidelines-mission-and-purposes. Accessed on 29 November 2022.

[16] Sentencing Advisory Council, "*Sentencing Principles, Purposes, Factors*," State of Victoria, Australia, 2022. Available at: https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-principles-purposes-factors.

[17] *Ibid*.

to sentencing".[18] Thus, it becomes self-evident that the general purpose of sentencing guidelines is to introduce parity and consistency in sentencing.

The final common characteristic of sentencing guidelines in general is that they allow judicial officers to depart from the presumptive sentence in appropriate cases. Two authors note that:

> "A *departure* is simply a sentence that is something other than the sentence recommended under the guidelines. It may be harsher than called for in the guidelines (e.g., imposing prison when the guidelines call for probation, or imposing a longer prison sentence than recommended) or it may be less harsh than called for in the guidelines (e.g., imposing probation when the guidelines recommend prison, or imposing a shorter prison sentence than recommended). If the crime or the offender is truly 'atypical', meaning there is something about the way this crime was committed or about the particular offender that is different enough from a typical case of this type, then a departure sentence may be more appropriate than the recommended sentence."[19]

Sentencing guidelines appreciate the certainty and frequency of material variations in the circumstances of an offender and the commission of a crime. As a result, it will not always be fair, just and practical to insist that a court should simply sentence an offender to the recommended sentence under the guidelines.

The provision for departure in sentencing guidelines underscores the impact the guidelines will have on the manner in which appellate courts

[18] Scottish Sentencing Council, "Principles *and purposes of sentencing guideline*", Scottish Sentencing Council. Available at: https://www.scottishsentencingcouncil.org.uk/sentencing-guidelines/guidelines-in-development/principles-and-purposes-of-sentencing-guideline/.

[19] R. S. Frase and K. L. Mitchell, "*What are sentencing Guidelines?*", *op cit*.

assess the reasonableness of sentences. The guidelines will result in new approaches to assessing reasonableness. Appellate courts will have to consider whether a trial court paid due regard to the guidelines. Not only will a trial court be required to state why it considered it necessary to depart from the presumptive penalty, it will also be required to demonstrate that upon the consideration of the facts and sentencing guidelines, the presumptive sentence was indeed appropriate. Sentencing guidelines are not a substitute for exercising discretion and they are not applied in isolation from the facts. Courts should not take a tariff approach to sentencing guidelines. The remarks of KORSAH JA in *S* v *Dube & Anor* 1995 (2) ZLR 321 (S) at 326 B-C, though made in a different context, remain relevant. The learned JUDGE OF APPEAL said:

> "It has been said time and again in our courts that the punishment should not only fit the crime, it should fit the person as well. If that is to be, there can be no place for a tariff sentence in respect of any crime with regard to which the courts' discretion is not fettered by statute law; for the circumstances of the offender and other factors of mitigation or aggravation may vary infinitely. Be it as serious as murder, the sentencing authority is enjoined to consider all factors, both in aggravation and mitigation of sentence and, in the exercise of its discretion, to impose a just punishment. A sentence based on a tariff is indicative of an abortion of judicial discretion, which is tantamount to a misdirection."

In the application of sentencing guidelines, courts will be required to exercise their discretion judiciously "within the bounds of the principles of the law".[20]

CONSTITUTIONAL BASIS FOR SENTENCING GUIDELINES

The Constitution does not specifically provide for the development and formulation of sentencing guidelines. It, however, has provisions that have a bearing on the nature, procedure and purpose of sentencing, which may be interpreted as necessitating the formulation of sentencing guidelines.

The first significant provision of the Constitution that has a bearing on sentencing is section 53, providing for the freedom from torture or cruel, inhuman or degrading punishment. The section reads:

> "No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment."

The freedom from cruel, inhuman or degrading treatment or punishment is based on an acknowledgement of the fact that certain forms of punishment may be cruel, inhuman or degrading, especially if they are unchecked and unregulated. The protection against cruel, inhuman and degrading punishment is a fundamental human rights norm. In terms of section 86(3)(c) of the Constitution, no law may limit and no person may violate the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment.

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[20] See *Mbatha* v *Ncube & Anor* S–121–22 at p. 6.

The import of the provisions of section 53 of the Constitution has been explained in a number of cases. In the case of *Makoni* v *Commissioner of Prisons & Anor supra* at 206F, the Constitutional Court held that a life sentence without the possibility of parole or release on licence was a violation of human dignity and amounts to cruel, inhuman and degrading treatment in breach of sections 51 and 53 of the Constitution. The Constitutional Court stated that:

> "Having regard to our own constitutional provisions, *viz.* ss 50 and 227(1) of the Constitution which establish revised liberal guidelines on the treatment of prisoners and the rehabilitative responsibilities of correctional institutions, I see no reason to depart from the foreign and international jurisprudence that has developed on the subject over the past sixty years. I accordingly conclude that an irreducible life sentence without the possibility of release in appropriate circumstances, constitutes a violation of human dignity and amounts to cruel, inhuman or degrading treatment or punishment in breach of ss 51 and 53 of the Constitution."

Earlier in the judgment, the Constitutional Court, after considering relevant international law and decisions from foreign jurisdictions, stated at 206C-E that:

> "Similarly, all the international instruments alluded to above, *viz.* the 1976 Covenant and the Standard Minimum Rules of 1957 and 2015, capture the essentially twofold purpose of penal servitude as it has developed over the years within the broad framework of societal protection: firstly, the infliction of a punishment that is condign to the nature and gravity of the crime committed; secondly, the rehabilitative reorientation of the offender to render him fit and suitable for societal reintegration as a law-abiding and self-supporting citizen. These two objectives are intrinsically

> interconnected, so that the unavoidable cruelty of incarceration without the correlative beneficence of rehabilitation would unnecessarily aggravate and dehumanise the delivery of corrective justice. In short, every prisoner should be able to perceive and believe in the possibility of his eventual liberation after a period of incarceration befitting his crime and his capacity for reformation."

In the case of *S* v *Chokuramba* 2019 (2) ZLR 12 (CC) at 46C-D, the Constitutional Court made the finding that:

> "Imprisonment is not an inherently cruel, inhuman or degrading punishment. An excessive punishment, however, becomes cruel, inhuman or degrading if its severity or length is greatly or grossly disproportionate to the circumstances of the offender, the nature and gravity of the crime, the culpability of the offender, and the interests of society. …
>
> For treatment or punishment to be humane, it must be appropriate to age and legal status. The vulnerability and immaturity of juvenile offenders render them more susceptible to cruel, inhuman or degrading punishments, which will in turn have a much more profound impact on the body and mind of a developing child than an adult. See '*Just Sentences for Youth: "International Human Rights Law"*' Human Rights Watch *supra*."

The provisions of section 53 of the Constitution restrict the extent and nature of punishment that the law may impose. Punishment must not be cruel, inhuman and degrading. If the punishment imposed on a person exceeds the boundaries set out by section 53 of the Constitution, then the punishment would be unconstitutional. In light of the constitutional underpinnings of the criminal justice system, the prohibition against the imposition of cruel, inhuman and degrading

punishment necessitates that judicial officers must be provided with support and guidelines to ensure that they impose sentences that would be constitutional.

There are other provisions of the Constitution that are indicative of the nature of punishment desired by the Constitution. For good measure, section 227(1) provides for the Prisons and Correctional Service and states that it is responsible, among other things, for the rehabilitation of convicted offenders. The fact that the Constitution points to the rehabilitation of convicted persons as one of the functions of the Prisons and Correctional Service demonstrates that rehabilitation is a factor that must be taken into account in sentencing. However, the Constitution does not guide the courts on the manner of sentencing offenders.

In light of the fact that the Constitution has provisions that have a bearing on the forms of sentences that courts may impose or on the purpose of sentencing, a requirement for a standard that assists the courts to impose sentences that fall within the constitutional parameters is inevitably created. That standard is found in section 334A of the Act, the provisions of which were introduced in 2016. In brief, the section directs the Judicial Service Commission to convene a judicial conference for the purpose of formulating draft sentencing guidelines that, in due course, may be published by the Minister of Justice, Legal and Parliamentary Affairs as regulations.

It is tempting to believe that the statutory requirement to formulate and publish sentencing guidelines is novel, having been recently introduced by Parliament. However, a close analysis of the statute books will readily reveal that the Legislature has already been providing guidelines for the sentencing of particular offences.

Section 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] – "the Criminal Law Code" – provides for the crime of rape. Subsection (1) provides that a person who is guilty of rape is liable to imprisonment for life or any definite period of imprisonment. Subsection (2) provides for the factors that the court must take into account in sentencing a person convicted of rape. It states as follows:

> "(2) For the purpose of determining the sentence to be imposed upon a person convicted of rape, a court shall have regard to the following factors, in addition to any other relevant factors and circumstances —
>
> (a) the age of the person raped;
>
> (b) the degree of force or violence used in the rape;
>
> (c) the extent of physical and psychological injury inflicted upon the person raped;
>
> (d) the number of persons who took part in the rape;
>
> (e) the age of the person who committed the rape;
>
> (f) whether or not any weapon was used in the commission of the rape;
>
> (g) whether the person committing the rape was related to the person raped in any of the degrees mentioned in subsection (2) of section seventy-five;
>
> (h) whether the person committing the rape was the parent or guardian of, or in a position of authority over, the person raped;

> (i) whether the person committing the rape was infected with a sexually transmitted disease at the time of the rape."

The above factors are essentially an instance of guidelines provided by the Legislature for sentencing offenders. The guidelines are intended to guide courts in determining the appropriate sentence for a person convicted of rape.

Section 65 of the Criminal Code is not the only instance where the Legislature has provided guidelines for sentencing. Section 48(2)(a) of the Constitution provides that" "A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and — the law must permit the court a discretion whether or not to impose the penalty".

The law contemplated by section 48(2(a) of the Constitution was introduced by Part XX(8) of the General Laws Amendment Act, 2016, which repealed and substituted subsections (2) and (3) of section 47 of the Criminal Law Code. The two provisions set out the factors that a court must regard as aggravating circumstances in deciding whether to impose the death sentence. They read:

> "(2) In determining an appropriate sentence to be imposed upon a person convicted of murder, and without limitation on any other factors or circumstances which a court may take into account, a court shall regard it as an aggravating circumstance if —
>
> (a) the murder was committed by the accused in the course of, or in connection with, or as the result of, the commission of any one or more of the following crimes, or of any act constituting an essential element of any such crime (whether or not the accused was also charged with or convicted of such crime) —

(i) an act of insurgency, banditry, sabotage or terrorism; or

(ii) the rape or other sexual assault of the victim; or

(iii) kidnapping or illegal detention, robbery, hijacking, piracy or escaping from lawful custody; or

(iv) unlawful entry into a dwelling house, or malicious damage to property if the property in question was a dwelling house and the damage was effected by the use of fire or explosives; or

(b) the murder was one of two or more murders committed by the accused during the same episode, or was one of a series of two or more murders committed by the accused over any period of time; or

(c) the murder was preceded or accompanied by physical torture or mutilation inflicted by the accused on the victim; or

(d) the victim was murdered in a public place or in an aircraft, public passenger transport vehicle or vessel, railway car or other public conveyance by the use of means (such as fire, explosives or the indiscriminate firing of a weapon) that caused or involved a substantial risk of serious injury to bystanders.

[Subsection substituted by Part XX of Act 3 of 2016]

(3) A court may also, in the absence of other circumstances of a mitigating nature, or together with other circumstances of an aggravating nature, regard as an aggravating circumstance the fact that —

(a) the murder was premeditated; or

(b) the murder victim was a police officer or prison officer, a minor, or was pregnant, or was of or over the age of seventy years, or was physically disabled."

The final illustration may be drawn from section 126 of the Criminal Law Code, which prescribes the factors a court must take into account

when assessing an appropriate sentence for a person convicted of robbery. The section provides:

> "(2) A person convicted of robbery shall be liable —
>
> (a) to imprisonment for life or any definite period of imprisonment, if the crime was committed in aggravating circumstances as provided in subsection (3); or
>
> [Paragraph amended by Part XX of Act 3 of 2016]
>
> (b) ...
>
> (3) For the purposes of subsection (2), robbery is committed in aggravating circumstances if the convicted person or an accomplice of the convicted person —
>
> (a) possessed a firearm or a dangerous weapon; or
>
> (b) inflicted or threatened to inflict serious bodily injury upon any person; or
>
> (c) killed a person; on the occasion on which the crime was committed."

The above examples direct a sentencing court to factors it must take into account to impose an appropriate sentence. This is essentially what sentencing guidelines do.

OBJECTIVES OF THE SENTENCING GUIDELINES

Sentencing is an integral part of criminal proceedings. As such, it is a matter governed by procedural law. The sentencing guidelines contemplated by section 334A of the Act are inherently transformative and forward-looking. Not only are they intended to give effect to the sentences prescribed by the Legislature in a statute but also to achieve a criminal justice system that imposes punishment that is just to society,

vindicative of the interests of the victims of crimes, and commensurate with the nature of the crime and the offender. The imposition of just and commensurate punishment is an ideal of justice and fairness that all criminal justice systems are designed to guarantee.

By prescribing a sentence that is presumed, on a consideration of the guidelines, to be appropriate in given circumstances, the sentencing guidelines ensure that sentences resemble the ideal form of punishment in the given circumstances. Where the sentencing guidelines are properly and consistently relied on, the sentencing guidelines transform the criminal justice landscape by producing punishment that is consistently commensurate. Sentencing guidelines remove opportunities of abuse of judicial discretion driven by consideration of corrupt interests.

In considering the purpose and objectives of the sentencing guidelines, sight must not be lost of the role of the Judicial Conference in coming up with the draft guidelines. In convening the Judicial Conference, the Judicial Service Commission, by implication, is required to bring in representatives of all interested stakeholders, organisations and bodies. The guidelines are, thus, a product of the views of all stakeholders in the criminal justice system. As a result, they may be regarded as being representative of society's conceptions of an appropriate sentence for particular offences.

The ultimate purpose of developing and formulating objectives, policies and criteria for sentencing is to protect the public. The courts

are not created to sentence offenders on the basis of their own conceptions of justice. Similarly, it is not acceptable for the courts to carry out sentencing on the basis of their own understanding of the objectives and policies of crime and the penalties for committing a crime. Sentencing is intended to achieve the protection of the public, as may be gleaned from the theories of punishment such as deterrence, prevention and reformation. For this reason, judicial officers may not base choice of sentences on subjective standards, but rather on objective standards designed to lead to the protection of public safety.

It is generally accepted that a court sentencing an offender exercises discretion in arriving at the appropriate sentence. In the case of *S* v *McGown* 1995 (2) ZLR 81 (S) at 85, citing the case of *R* v *Rowesayi* 1969 (1) RLR 140 (A), it was reiterated that: "Sentence is a matter of discretion, and there is always room for difference of opinion". The discretionary nature of sentencing is evidenced by the reluctance of review and appellate courts to interfere with a sentence imposed by a trial court. The position was recently reiterated in the case of *S* v *Chihota* S–124–22 at p 11 thus:

> "Even before the amendments on the imposition of a death sentence were introduced, the court *a quo* retained the discretion to impose it in appropriate circumstances. An appeal court will only interfere with the exercise of discretion in limited circumstances. See *Barros & Anor v Chimpondah* 1999 (1) ZLR 58 (S). In respect of sentencing, it is pre-eminently the discretion of the trial court which an appeal court is loath to interfere with except in glaring situations of irrationality or unreasonableness."

Recent trends in sentencing dishearteningly suggest that the discretion accorded to trial courts in common law has been subject to misapplication and abuse. As a result, the purposes of sentencing have been distorted and there are increasing inconsistencies in sentencing. It is for this reason that the Legislature saw it necessary to introduce sentencing guidelines.

It has been noted earlier that one of the most common purposes of sentencing guidelines is to achieve consistency and uniformity in sentencing. Consistency and uniformity require that offenders convicted of the same offence committed in similar circumstances must essentially be punished in the same way. There are important public policy considerations behind this. Inconsistency in sentencing is a direct attack on the concepts of justice and fairness. There cannot be justice and fairness where persons convicted of the same crime committed in similar circumstances are punished in markedly different ways. This distorts justice in sentencing.

Sentencing guidelines are also intended to produce efficiency in sentencing. The objective of achieving efficiency in sentencing is also a result of the consistent and uniform imposition of sentences. Efficient sentencing is aimed at ensuring that persons convicted of crimes are punished appropriately and that the overall sentencing regime operates uniformly and consistently so as to inspire public confidence in the system. Thus, where there is a sentencing guideline, there is a readily available, accessible and intelligible framework against which a sentence may be assessed.

Given the desirability of attaining uniformity and consistency in sentencing as well as the need for efficiency, sentencing guidelines then provide a list of recommended sentences and guidelines, called presumptive penalties. They are presented in table form and they are supplemented with additional guidelines addressing the factors set out in section 334A(5) of the Act. Sentencing guidelines also provide for classes of offences deserving of different treatment during sentencing. Thus, the process of the formulation of sentencing guidelines also results in the synthesis of time-honoured principles of sentencing.

Another key objective of sentencing guidelines is that they are designed to address the problem of lenient sentences. As already observed, sentencing is a process inspired by different purposes including ensuring the protection of the public. Periodically there are concerns over lenient sentences that lack a deterrent effect or the potential to protect the public from dangerous criminal offenders. To address the problem of lenient sentences, sentencing guidelines provide presumptive penalties which generally meet and satisfy the penalty that is regarded as appropriate for the particular offence.

The long-recognised position is that imprisonment prevents a convicted person from committing further crimes while in prison. According to Donald Ritchie:

> "The incapacitative effect of imprisonment presents a compelling logic: while in prison, an offender cannot offend in the community. Consequently, the incapacitation of an offender may be expected to

prevent crime that an offender would commit were he or she at liberty in the community."[21]

In light of the earlier objective of sentencing guidelines of addressing lenient sentences, sentencing guidelines also improve public safety by ensuring that notorious criminals are not let free in the community.

Significantly, sentencing guidelines put the purposes of punishment into proper perspective. They incorporate the theories of punishment such as restitution, incarceration, retribution, rehabilitation and deterrence into the considerations of the appropriate sentence. The purposes of punishment are not always specifically or expressly identified in the sentences given by the courts. At times they are disregarded. Hence, sentencing guidelines incorporate the purposes of punishment as part of the considerations of the recommended sentences.

Finally, it is also worth noting that sentencing guidelines develop victim-centric criteria for sentencing. Generally, in most sentencing exercises the victim of the crime plays little or no role in arriving at the sentence. Victims of crime are either not properly consulted or they are not consulted at all. The guidelines, thus, usher in a new approach to sentencing that comprehensively assesses all the circumstances of the case.

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[21] Donald Ritchie, "How much does imprisonment protect the community through incapacitation?", *Sentencing Matters*, July 2012 (Sentencing Advisory Council) at p. 1. Available at: https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/How_Much_Does_Imprisonment_Protect_the_Community_Through_Incapacitation.pdf.

SENTENCING GUIDELINES UNDER SECTION 334A OF THE ACT

Sentencing guidelines made under section 334A of the Act have several characteristics. It is necessary to briefly discuss some of them.

The first is that the sentencing guidelines provide for presumptive penalties. A presumptive penalty is defined in section 334A(1) of the Act as follows:

> "'presumptive penalty' means a penalty expressed as a specific amount of a fine or a specific period of imprisonment or both that is midway between an augmented penalty which may be imposed in aggravating circumstances (whether or not these circumstances are specified in the enactment concerned), and a diminished penalty which may be imposed in mitigating circumstances (whether or not these circumstances are specified in the enactment concerned)."

The best way to perceive a presumptive penalty is to regard it as a point along a spectrum of penalties. It is a median penalty determined by identifying the mid-point between the augmented penalty which may be imposed in aggravating circumstances and the diminished penalty which may be imposed in mitigating circumstances. The presumption of the appropriate penalty rests on the practical likelihood that crimes will be committed in substantively similar circumstances by similarly positioned persons, thus requiring similar punishments to be imposed on them on the grounds of fairness and equality before the law. The additional consideration is that sentencing guidelines are designed to take the diverse views of all actors, who include the public, in the criminal justice system into account. Thus, considering that the

guidelines arise from the deliberations of a diverse group of people, the guidelines are intended to reflect a presumptive penalty that any fair-minded person in any sector of the criminal justice system would regard as appropriate.

The second feature of sentencing guidelines is that they carry the force of law. They are published in the form of a statutory instrument. Needless to say, a statutory instrument is "any proclamation, rule, regulation, by-law, order, notice or other instrument having the force of law, made by the President or any other person or body under any enactment".[22] Sentencing guidelines fall under the category of regulations. In terms of section 334A(9) of the Act:

> "(9) As soon as practicable after approving the draft sentencing guidelines, with or without amendments, the Judicial Service Commission shall, subject to subsection (10), **submit them to the Minister for publication as regulations in terms of section 389**, and upon such publication the courts shall pay due regard to the applicable sentencing guidelines when sentencing offenders and, while not being bound by the guidelines, must, when departing from them in any case, record the reasons for doing so." (the emphasis is mine)

Although in terms of the subsection the courts have the discretion to depart from sentencing guidelines in appropriate circumstances, they must pay due regard to the applicable sentencing guidelines when sentencing offenders. The guidelines are not simply optional standards.

[22] See section 2(3) of the Interpretation Act [*Chapter 1:01*].

On the contrary, they are prescriptive and must be followed unless there is a legal basis justifying departure from them.

Section 334A(5) of the Act sets out the nature of the sentencing guidelines that are formulated at a judicial conference:

> "(5) Draft sentencing guidelines may relate to all matters relating to the sentencing of offenders and, in particular, to — ... **and they may be formulated so as to be general in nature or so as to apply to particular offences or classes of offences or to particular classes of offenders**." (the emphasis is mine)

The determination of whether to formulate sentencing guidelines generally or particularly in respect of a class of offences or offenders is dependent on a number of factors, including convenience and the necessity of providing specific guidelines for specific offences or offenders.

The related consideration is the presentation of the sentencing guidelines upon formulation. Even though section 334A(7) of the Act allows the Judicial Conference to present the sentencing guidelines using a different format, sentencing guidelines are generally supposed to be in the form of a table of presumptive penalties supplemented by additional guidelines addressing the factors referred to in subsection (5) of section 334A, depending on whether or not the factors are relevant to each offence or class of offence included in the table.

The final aspect to be discussed under this heading is the appropriate structure and form of a sentencing judgment, which is made a feature of the draft sentencing guidelines. In terms of section 334A(5)(d) of the

Act, “draft sentencing guidelines may relate to all matters relating to the sentencing of offenders and, in particular, to — principles and criteria which will assist in promoting consistency in sentencing and the equitable administration of criminal justice in Zimbabwe”. The structure and the form of the judgment providing for the sentence is one of the aspects that ought to be related to in the sentencing of offenders as it assists in promoting consistency in sentencing.

The structure and form of the sentencing judgment are important because the judgment determines the stages that a court goes through in the exercise of sentencing discretion. Typically, a judicial officer fully applies his or her mind to the case before him or her and seeks to clarify the facts and the law when he or she is writing the judgment. Therefore, by providing a systematic way of formulating the typical sentencing judgment, the guidelines focus on refining judicial officers’ thought processes in sentencing.

THE TRIAD OF FACTORS AS A COMPONENT OF SENTENCING GUIDELINES

Consistent with the foregoing discussion, the sentencing guidelines themselves, when appropriately defined, relate to a means to guide judicial discretion in accomplishing a particular sentencing. They do not take away the judicial discretion of the judicial officer because it is intrinsically tied to the independence of his or her office but merely ensure that it is exercised within reasonable parameters. In this form,

the sentencing guidelines have a descriptive form as opposed to a prescriptive form that may fail to take into account the specific circumstances of each case. They serve to ensure that there is proportionality and uniformity regarding the application of the sentencing procedures available to the courts.

The sentencing guidelines are premised upon a triad of factors. This involves first an assessment of the identity of the offender. This has an obvious influence on the sentence that is imposed because of the underlying principles of criminal law. Retribution might not be in the interests of justice where the perpetrator of the offence is a minor or a person of relative youth. Measures such as custodial sentences may have the result of hardening their propensity for crime.

The distinction between sentencing for adults and minors or relative youths was highlighted in *S* v *Munukwa* 2002 (1) ZLR 169 (H) at pp 172-173, wherein the court said:

> "A comprehensive analysis of the modern approach to the treatment of juvenile or young offenders was made in *S* v *Tendai & Anor* 1998 (2) ZLR 423 (H). In that case, GILLESPIE J strongly disapproved of routine imprisonment of young offenders. He stated at 432F-433B as follows:
>
> > 'The next most frequently imposed sentence - imprisonment - combines retribution with temporary prevention. **<u>It may be thought to involve a degree of deterrence although that should be the subject of some doubt. None of these address the primary objective of rehabilitation. In the absence of programmes of counselling and management within the prison environment, no degree of rehabilitation can be hoped for. An adult prison is</u>**

> **completely unsuitable for a juvenile. A prison which has as its inmates only young adults might be less objectionable, but cannot be as well-calculated as a juvenile "boot camp", combining enforced discipline with education, training and counselling.** Actual imprisonment does at least have the advantage that the offender will temporarily be removed from society. Nevertheless, his incarceration will end. And it will end with the release into the community without any further supervision of an offender whose carnal appetite can be expected to have been heightened by long denial. Imprisonment of young first offenders is, at best, a necessary evil to be imposed as a last resort.'" (the emphasis is mine)

CHINHENGO J added the following at p 175:

> "The facts in the present case are quite similar to the facts in *S* v *Dube* 1996 (1) ZLR 77 (S). In that case, the appellant, an adult male, had made a proposition to the complainant which was rejected. He had seized the complainant, thrown her to the ground and tried to remove her pants but he then got up and desisted from further attack because he discovered that she was menstruating. The Supreme Court set aside a sentence of imprisonment of 3 years and substituted it with one of imprisonment for 3 years of which one year was suspended for 3 years. The court held that it was desirable to suspend a portion of the sentence because of the 'rehabilitative and salutary effect' of such a suspension. The court, it must be emphasised, was dealing with an adult male. That distinguishes that case from the present case where a youthful offender is the subject. The respondent's counsel conceded that this court may interfere with the sentence. I consider that the age of the appellant, the absence of persistent violence in his conduct, the genuine contrition, and that he is a first offender are weighty factors in any judicious assessment of the appropriate sentence. The cases which I have cited are solid precedent for the proposition that the imprisonment of a youthful

> offender such as the appellant would not serve any useful purpose. A custodial sentence is not appropriate. The appellant must be given an opportunity to reform and rehabilitate."

The sentencing guidelines also take into account the specific nature of the crime in question. This is an important consideration because certain criminal offences attract mandatory minimum sentences. The mandatory minimum sentences are stipulated in the provisions of the law. In addition, the gravity of the offence may also preclude the practicability of sentencing measures such as fines and community service. This aspect has long been recognised as part of our jurisprudence and is carried over as a crucial component of the sentencing guidelines.

The case of *S* v *Mpofu (2)* 1985 (1) ZLR 285 (HC) states the following regarding the importance of assessing the offence:

> "In an attempt to assess an appropriate sentence in this case, it is necessary to examine the various pertinent factors in some depth. A balance has to be struck between the interests of society and those of the offender, or, as RUMPFF JA expressed it in *S* v *Zinn* 1969 (2) SA 537 (AD) at 540G:
>
> > 'What has to be considered is the triad consisting of the crime, the offender and the interests of society.'
>
> I shall consider each of these elements in turn as far as this may be possible. The multiple offences committed here are inherently serious in that a large total sum has been stolen by an employee who has abused the position of trust that he occupied. The facts disclosed a persistent course of misconduct over a period of nearly twelve months. **In all multiple crime cases, the courts pay regard to what Thomas describes as the totality principle. '(The court) must look at the totality of the criminal**

> **behaviour and ask itself what is the appropriate sentence for all the offences**.' Thomas Principles of Sentencing, 2nd Ed p 56)." (the emphasis is mine)

Finally, the most significant principle that undergirds the sentencing guidelines relates to the interests of society. Criminal law's primary purpose is to protect the interests of society. As such, courts ought to ensure that, when handing down sentences, the demands for ensuring public safety are met. J Reid-Rowland notes the following regarding the sensitivity of this aspect when contrasted with the interests of the accused:[23]

> "On the one hand is the need to punish and on the other are the interests of the accused. Reaching the correct balance is always a taxing exercise and one that must be approached humanely and rationally. The same punishment does not weigh the same with all people. **A sentence that is heavily weighted in favour of the needs of society without paying adequate attention to the interests of the offender is invariably harsh and appears draconian, while a sentence that underplays the interests of society while overemphasising the interests of the offender is invariably lenient and ineffectual in curbing crime.** While it is not practical that in each case the court should identify and articulate the two competing interests that it seeks to balance, this is a prudent way of approaching the exercise. If this is done, it will assist the court to view whether it has overplayed any of the interests at the expense of the other. It will also assist any superior court that will be reviewing the sentence to see whether the competing interests have each been fairly considered." (the emphasis is mine)

[23] Geoff Feltoe, "*Judges Handbook For Criminal Cases*", 2016, page 207.

THE APPLICATION OF SENTENCING GUIDELINES IN ZIMBABWE

The idea of sentencing guidelines is not entirely novel in this jurisdiction. The courts have tried to give effect to the idea of presumptive sentencing. This was especially highlighted in the case of *S* v *Chokuramba supra*. In that case, the Constitutional Court was seized with the question of whether section 353 of the Act was constitutional. The section authorised the imposition of a sentence of moderate corporal punishment on a male person under the age of eighteen years who had been convicted of any offence.

After confirming the order of constitutional invalidity of the law as pronounced by the court *a quo*, the Constitutional Court went further and provided guidelines for sentencing juveniles after the abolishment of corporal punishment. The necessity of guidelines in the aftermath of its decision was considered as follows:

> "It is necessary to examine available resources to determine whether there are indeed appropriate sentencing options which the State can employ in the punishment of male juvenile offenders that would comport with their human dignity and physical integrity, whilst achieving the objectives and purposes of punishment sanctioned by the Constitution.
>
> **The choice and assessment of an appropriate sentence or disposition for a juvenile offender is a scientific process with specific objectives, undertaken in accordance with principles defined and prescribed by law in the interests of justice**.
>
> The Act prescribes a range of sentences which may be imposed by the courts on convicted offenders to achieve the objectives of punishment in the criminal justice system. The sentencing options

> provided by the legislation may be applied to any person convicted of an offence, including a juvenile offender who would have been processed through the criminal justice system." (the emphasis is mine)

In addition to affirming the need for judicial officers to impose sentences consistent with the objectives and purposes of the punishment, the above dictum illustrates that sentencing guidelines ought to be grounded in the law. They guide the exercise of judicial discretion in a manner that gives effect to the law. In that case, the Constitutional Court went on to provide the standard that magistrates should rely on when sentencing juveniles by proposing the following principles:

> "Three fundamental principles of the administration of juvenile justice having a direct bearing on the issues of sentencing and disposition of juvenile offenders in the criminal justice system deserve mentioning. There are, of course, many other principles of international law that relate to the processes and procedures of adjudication of cases involving juvenile offenders that are not pertinent to the purposes of highlighting the relevant law to be applied in the choice and assessment of an appropriate sentence for or disposition of a juvenile offender.
>
> The first fundamental principle is one contained in the provisions of Article 3.1 of the *CRC*. It is to the effect that in all actions concerning children, the best interests of the child shall be a primary consideration. Section 81(2) of the Constitution also provides that 'a child's best interests are paramount in every matter concerning the child'. See also Article 4(1) of the *ACRWC*.
>
> The best interest of the child is the most important principle laid down by the *CRC* which conditions the consideration of issues relating to the choice and assessment of appropriate sentences or dispositions for juvenile offenders. …

The second principle to be considered by courts in the choice of sentence options and assessment of appropriate punishment or disposition for juvenile offenders is that children have special rights that reflect their unique vulnerabilities and needs and the concomitant responsibility of government to protect them. The effect of the principle is that a juvenile offender's culpability should not be measured by the same standard as that of an adult. The reason is that during the formative years of childhood and adolescence minors often lack the experience, perspective and judgment expected of adults. In the early and middle teen years, adolescents are more vulnerable, more impulsive and less self-disciplined than adults. See *S v Lehnberg and Anor* 1975 (4) SA 553 (A) at 560.

Crimes committed by juveniles may be just as harmful to victims as those committed by older persons. When an individual of any age can be held responsible for his or her actions, failure to bring them to account would deny justice to the victim. Children deserve less punishment because they may have less capacity to control their conduct and think in long-range terms than adults. Moreover, juvenile crime, as such, is not exclusively the offender's fault. Offences by juveniles also present a failure by family, school and the social system, which share responsibility for the development of the youth. Actions of a child are less likely to be evidence of irretrievable depravity. …

The last principle to guide a court in the choice of sentence options and assessment of appropriate punishment for juvenile offenders is the principle of proportionality. It is a precept of justice that punishment for a crime should be graduated and proportioned to the offender being punished. The *Beijing Rules* provide guidance which is relevant to the sentencing process. Rule 17.1 ensures that the reaction to a juvenile offender shall be in proportion not only to the circumstances and needs of the juvenile offender but also to the needs of society. …

<u>**The courts have to play a new role in the promotion and development of a new culture in juvenile sentencing, founded on the recognition of human rights enshrined in the**</u>

> **<u>Constitution. Sentencing policies have to be influenced by both the Constitution and international law</u>**." (the emphasis is mine)

Against this background, it is evident that the standards articulated in the case are influenced by the Constitution and international law. This approach is mirrored in the proposed sentencing guidelines. This ensures that where the presiding judicial officer departs from the established guidelines which set a presumptive sentence, compelling reasons for departing from the standard ought to be furnished. In addition, the sentences imposed must always bear in mind the import of the fundamental right and freedoms stipulated in Chapter 4 of the Constitution.

ANTICIPATED OUTCOMES AND PROSPECTS FOR THE FUTURE

With a view to the future, the present Judicial Conference, which features various stakeholders of the criminal justice sector, will play a fundamental role in refining the prospective sentencing guidelines. Taking into account the input of the cornerstones of the criminal justice system that extend beyond the confines of the Judiciary ensures that the objectives of section 334A of the Act are achieved. This engagement process will lead to the development of a sentencing regime that achieves the principal objectives of a fully functional criminal justice system which results in the imposition of deserved punishments and the prevention of crime.

Equally important is the potential of the Judicial Conference to conscientise the public through the various stakeholders present to the symbiotic relationship that exists between the punitive nature of sentencing and restorative justice which is an emerging concept in the criminal justice system. Restorative justice promotes reparation over retribution. It vests sentencing authority in the community rather than the State. It substitutes consensus and joint resolution for conflict and adversarial proceedings. It emphasises the accountability of the offender to the victim and the victimised community rather than simply to the State.[24] This is in line with the contemporary approach that is being advocated worldwide in other jurisdictions.

Thus, the proposed sentencing guidelines support the role of criminal law as extending beyond mere punishment to ensuring the rehabilitation of convicted persons where possible. Custodial sentences should be a measure of last resort. Where appropriate, the courts ought to consider community service as an alternative to effective imprisonment. This is not to imply a laxity of the need to deter criminal conduct but ensures that judicial officers embrace a holistic approach which balances the competing interests of the convicted persons and society.

The adoption of the proposed sentencing guidelines and the convention of the relevant stakeholders in the criminal justice system feeds into the

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[24] An elaboration of the concept of restorative justice was published in the Sentencing & Corrections: Issues for the 21st Century series. See Leena Kurki, "Incorporating Restorative and Community Justice Into American Sentencing and Corrections", Research in Brief, Washington, DC: U.S. Department of Justice, National Institute of Justice/Corrections Program Office, September 1999, NCJ 175723

Judicial Service Commission’s mission to facilitate the attainment of world-class justice. The Judicial Service Commission is the administrative arm of the Judiciary. As such, it is responsible for the interaction of judicial officers with the public. Part of this obligation means that it has to deal with public complaints regarding sentencing by judicial officers. The complaints are largely premised upon the criticism of the human element in sentencing.

However, the sentencing guidelines ought not to be construed as taking away the discretion of judicial officers entirely, as judicial officers, in the exercise of their discretion, may depart from the sentencing guidelines on justifiable grounds. The point to note in such instances is that because of the sentencing guidelines, the judicial officers are under the obligation to provide cogent reasons that necessitate a departure from the presumptive penalties. Continued adherence to the standard prescribed in the sentencing guidelines will greatly aid public confidence in the efficacy of the criminal justice system and the Judiciary as a whole.

THE IMPACT OF SENTENCING GUIDELINES ON TRANSFORMATIVE CONSTITUTIONALISM

Finally, I discuss the impact of the sentencing guidelines on transformative constitutionalism. Transformative constitutionalism is simply the adherence to fundamental constitutional values, including respect for human rights, which are entrenched in a country’s constitution as a means of facilitating social and political change.

Invariably, transformative constitutionalism results in significant economic, social or political growth and advancement. This is because transformative constitutionalism is based on the desire to attain collective social, economic or political goals that were envisioned by a group of people when they set out to enact a constitution.

Transformative constitutionalism is critical to the sustenance of any nation that is founded on constitutional democracy. It operationalises the communal aspirations of a people for their own good. The concept of transformative constitutionalism must be understood within the context that the constitution has been regarded as a living document.[25] A constitution is always speaking and remains relevant to the aspirations of the people in any era. Therefore, any step that is taken with the aim of furthering the ethos and goals embedded in the Constitution, including the area of the punishment of convicted persons, has a transformative impact.

There are several provisions of the Constitution that accord it its transformative character. Chief among these are the founding values and principles in section 3 of the Constitution; the national objectives in Chapter 2 of the Constitution; and the declaration of rights in Chapter 4 of the Constitution. When these provisions are respected and fulfilled, they undoubtedly lead to positive social, economic or political change. However, for transformative constitutionalism to be achieved, there is significant scholarly consensus that it requires the courts to

[25] See, for example, the cases of *Chironga & Anor* v *Minister of Justice, Legal and Parliamentary Affairs & Others* CCZ–14–20 at p. 2 and *S* v *Chokuramba supra* at p. 38E.

reimagine the manner they adjudicate and change their legal culture. According to Kibet and Fombad:

> "This ... requires courts to liberate themselves from previously self-imposed restraints that undermined their position in the equilibrium of governmental power. These restraints include legal culture, particularly how judges and lawyers appreciate the spirit of the Constitution and its purposes. In addition, it also entails how judges perceive their role to be in a democracy. As Klare notes, legal culture affects how lawyers and judges see the law and relate it to politics and society. **Thus, a failure by judges to appreciate the breadth of their role and that of the law could undermine transformative aspirations of the Constitution. In the context of transformative constitutionalism, judges must commit to doing more with the law. They must be aware of the prominence that they enjoy and society's expectations of the courts**. In *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*, the Supreme Court of Kenya recognised that '[t]he judiciary has been granted a pivotal role in midwifing transformative constitutionalism and the new rule of law in Kenya'. While the text of the Constitution is the vehicle for political, economic and egalitarian social transformation, the judiciary enjoys the powerful and influential position of being the driver of this vehicle. Thus, the potential of change through the Constitution cannot amount to much unless the courts live up to the task in the adjudication of rights and their enforcement in real cases."[26] (the emphasis is mine)

The spirit behind transformative constitutionalism requires the courts to properly and justly adjudicate in all forms of court proceedings, whether civil or criminal in nature. During adjudication, the courts enforce laws, which are ultimately underpinned by the Constitution. If laws are wrongly enforced, they cannot achieve the purpose for which

[26] Kibet, Eric, and Charles Fombad. "Transformative constitutionalism and the adjudication of constitutional rights in Africa." *African Human Rights Law Journal* 17, no. 2 (2017): 340-366.

they were put in place. Thus, for transformative constitutionalism to be operationalised, all courts must properly and consistently apply the law. This includes applying the law relating to the sentencing of offenders.

There are several provisions of the Constitution that impose specific obligations on the Judiciary and the Judicial Service Commission to take steps that result in the transformation of the constitutional democracy. For good measure, section 8(2) states that regard should be paid to the national objectives in interpreting the State's obligations under the Constitution or any other law. Further, section 46(1) requires a court interpreting the Constitution, among other things, to give full effect to the rights and freedoms enshrined in Chapter 4 and to promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and, in particular, the values and principles set out in section 3. In particular, section 44 requires the Judiciary, as an arm of the State, to respect, protect, promote and fulfil the rights and freedoms set out in Chapter 4 of the Constitution. Section 165(1)(c) requires members of the Judiciary to be guided by the principle that the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law. Finally, section 190(2) of the Constitution requires the Judicial Service Commission to "promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice in Zimbabwe".

Taken together, the foregoing provisions of the Constitution impose an obligation on the courts to give full effect to the various provisions of

the Constitution during adjudication. The reason for specifically requiring the courts to pay regard to the provisions of the Constitution is to guarantee that the courts will always ensure that the Constitution achieves its transformative purpose. Considering the supremacy of the Constitution and the oneness of the system of laws, from the Constitution to Acts of Parliament and to the common law, the obligation of the courts to give full effect to the transformative agenda of the Constitution does not change even if a court is determining a non-constitutional matter. The Constitution remains the ultimate source of law, breathing life into all subsidiary legislation.

Given the above, section 334A of the Act may thus be regarded as a statutory tool for achieving transformative constitutionalism. Section 334A is intended to result in a respectable criminal justice system that sentences offenders appropriately and consistently. Undoubtedly, a well-functioning criminal justice system anchors the rule of law, peace and order, which are all transformative constitutional values. Therefore, when an efficient sentencing system is in place, as supported by sentencing guidelines, it will lead to beneficial adherence to transformative constitutional values such as the rule of law.

It must also be remembered that one of the purposes of sentencing is to engender the protection of the public and its safety by rehabilitating offenders and deterring would-be offenders. The protection of the public and its safety is another transformative constitutional value that, in turn, imbues sentencing guidelines with transformative strength.

Thus, it may be said that constitutional values of public protection and safety remain at the heart of section 334A of the Act.

CONCLUSION

In summation, the proposed sentencing guidelines and the present pioneering Judicial Conference represent a stepping stone into a brighter future for the criminal justice system. The sentencing guidelines will facilitate improvement in the administration of justice as the disparity in sentencing for similar criminal offences is lessened. In addition, judicial officers will benefit from the initiative due to the availability of a common standard upon which they can assess the exercise of their judicial discretion. It is also important to remember that the adoption of the sentencing guidelines is in line with the transformative vision outlined in the Constitution. Therefore, every stakeholder in the criminal justice system must endeavour to play their role in securing the endorsement of the sentencing guidelines.