

Sentencing Guidelines: Elements of an Ideal Regime

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SENTENCING
ACADEMY



Overview of Presentation

Diversity of
Guidelines

Key Elements

An
unresolved
question

Preliminary observations about guidelines and the need for more comparative research

- Guidelines are an evolving phenomenon (particularly outside the US) – this creates opportunities for refining existing systems and creating new forms of guidance;
- There is little learning from each other;
- Need for period meetings of commissions/ councils and scholars eg, National Association of Sentencing Commissions?

Why are guidelines useful or even necessary? The Limitations of the traditional approach to guidance: the void that a Sentencing Council can fill

Appellate review can only achieve so much;

Court of Appeal lacks: research function; community engagement; ability to 'road test' judgements; diversity;

Appellate review can correct judicial error and through guideline judgements issue guidance, but is party-driven in the issues it addresses;

CA reacts slowly to emerging problems in sentencing practice: e.g., Pandemic effect on prison overcrowding; court delays; racial disparities.

Some Examples of Guidelines

US federal Guidelines

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293

Minnesota

4.A. Sentencing Guidelines Grid

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Murder, 2nd Degree (Intentional; Drive-By-Shootings)</i>	11	306 261-367	326 278-391	346 295-415	366 312-439	386 329-463	406 346-480 ²	426 363-480 ²
<i>Murder, 2nd Degree (Unintentional) Murder, 3rd Degree (Depraved Mind)</i>	10	150 128-180	165 141-198	180 153-216	195 166-234	210 179-252	225 192-270	240 204-288
<i>Murder, 3rd Degree (Drugs) Assault, 1st Degree (Great Bodily Harm)</i>	9	86 74-103	98 84-117	110 94-132	122 104-146	134 114-160	146 125-175	158 135-189
<i>Agg. Robbery, 1st Degree Burglary, 1st Degree (w/ Weapon or Assault)</i>	8	48 41-57	58 50-69	68 58-81	78 67-93	88 75-105	98 84-117	108 92-129
<i>Felony DWI Financial Exploitation of a Vulnerable Adult</i>	7	36	42	48	54 46-64	60 51-72	66 57-79	72 62-84 ^{2, 3}
<i>Assault, 2nd Degree Burglary, 1st Degree (Occupied Dwelling)</i>	6	21	27	33	39 34-46	45 39-54	51 44-61	57 49-68
<i>Residential Burglary Simple Robbery</i>	5	18	23	28	33 29-39	38 33-45	43 37-51	48 41-57
<i>Nonresidential Burglary</i>	4	12 ¹	15	18	21	24 21-28	27 23-32	30 26-36
<i>Theft Crimes (Over \$5,000)</i>	3	12 ¹	13	15	17	19 17-22	21 18-25	23 20-27
<i>Theft Crimes (\$5,000 or less) Check Forgery (\$251-\$2,500)</i>	2	12 ¹	12 ¹	13	15	17	19	21 18-25
<i>Assault, 4th Degree Fleeing a Peace Officer</i>	1	12 ¹	12 ¹	12 ¹	13	15	17	19 17-22

Guidelines outside the US

- Most based on the offence-specific, step by step model which originated in England and Wales in 2004;
- Around 40 jurisdictions now operate some form of sentencing guidelines;
- Most systems are advisory in nature, but a significant minority are more binding on courts;
- Few systems have been evaluated

Robbery – street and less sophisticated commercial

Theft Act 1968 (section 8(1))

This is a serious specified offence for the purposes of section 224 of the Criminal Justice Act 2003.

Triable only on indictment
Maximum: Life imprisonment

Offence range: Community order – 12 years' custody

STEP ONE

Determining the offence category

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender's culpability.

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by one or more of the following:

A – High culpability	<ul style="list-style-type: none">• Use of a weapon to inflict violence• Production of a bladed article or firearm or imitation firearm to threaten violence• Use of very significant force in the commission of the offence• Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity
B – Medium culpability	<ul style="list-style-type: none">• Production of a weapon other than a bladed article or firearm or imitation firearm to threaten violence• Threat of violence by any weapon (but which is not produced)• Other cases where characteristics for categories A or C are not present
C – Lesser culpability	<ul style="list-style-type: none">• Involved through coercion, intimidation or exploitation• Threat or use of minimal force• Mental disability or learning disability where linked to the commission of the offence

Harm

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

Category 1	<ul style="list-style-type: none">• Serious physical and/or psychological harm caused to the victim• Serious detrimental effect on the business
Category 2	<ul style="list-style-type: none">• Other cases where characteristics for categories 1 or 3 are not present
Category 3	<ul style="list-style-type: none">• No/minimal physical or psychological harm caused to the victim• No/minimal detrimental effect on the business

STEP TWO

Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out on the next page.

Consecutive sentences for multiple offences may be appropriate – please refer to the *Offences Taken into Consideration and Totality* guideline.

Harm	Culpability		
	A	B	C
Category 1	Starting point 8 years' custody	Starting point 5 years' custody	Starting point 4 years' custody
	Category range 7 – 12 years' custody	Category range 4 – 8 years' custody	Category range 3 – 6 years' custody
Category 2	Starting point 5 years' custody	Starting point 4 years' custody	Starting point 2 years' custody
	Category range 4 – 8 years' custody	Category range 3 – 6 years' custody	Category range 1 – 4 years' custody
Category 3	Starting point 4 years' custody	Starting point 2 years' custody	Starting point 1 year's custody
	Category range 3 – 6 years' custody	Category range 1 – 4 years' custody	Category range High level community order – 3 years' custody

The table on the next page contains a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness

Rectangular Snip

Statutory aggravating factors:

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

Offence committed whilst on bail

Other aggravating factors:

High value goods or sums targeted or obtained (whether economic, personal or sentimental)

Victim is targeted due to a vulnerability (or a perceived vulnerability)

Significant planning

Steps taken to prevent the victim reporting or obtaining assistance and/or from assisting or supporting the prosecution

Prolonged nature of event

Restraint, detention or additional degradation of the victim

A leading role where offending is part of a group activity

Involvement of others through coercion, intimidation or exploitation

Location of the offence (including cases where the location of the offence is the victim's residence)

Timing of the offence

Attempt to conceal identity (for example, wearing a balaclava or hood)

Commission of offence whilst under the influence of alcohol or drugs

Attempts to conceal/dispose of evidence

Established evidence of community/wider impact

Failure to comply with current court orders

Offence committed on licence

Offences taken into consideration

Failure to respond to warnings about behaviour

Factors reducing seriousness or reflecting personal mitigation

No previous convictions **or** no relevant/recent convictions

Remorse, particularly where evidenced by voluntary reparation to the victim

Good character and/or exemplary conduct

Serious medical condition requiring urgent, intensive or long-term treatment

Age and/or lack of maturity where it affects the responsibility of the offender

Mental disorder or learning disability (where not linked to the commission of the offence)

Little or no planning

Sole or primary carer for dependent relatives

Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

STEP THREE

Consider any factors which indicate a reduction for assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FOUR

Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP FIVE

Dangerousness

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 224A or section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions, the notional determinate sentence should be used as the basis for the setting of a minimum term.

STEP SIX

Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

STEP SEVEN

Compensation and ancillary orders

In all cases the court should consider whether to make compensation and/or other ancillary orders.

Where the offence involves a firearm, an imitation firearm or an offensive weapon the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

STEP EIGHT

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP NINE

Consideration for time spent on bail

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Scotland

Rape
Sentencing guideline



Step 2: Select the sentencing range

12. Having determined the levels of culpability and harm, the court should use the following table to identify the appropriate sentencing range. This is the range of sentences within which the appropriate headline sentence for the offence appears to fall, having regard to the assessment of seriousness at step 1.

		CULPABILITY	
		LEVEL A	LEVEL B
HARM	LEVEL 1	10 - 13 years' custody	9 - 11 years' custody
	LEVEL 2	8 - 10 years' custody	7 - 9 years' custody
	LEVEL 3	6 - 8 years' custody	5 - 7 years' custody

Compare the Scottis Rape Guideline to this from England and Wales

Harm	Culpability	
	A	B
Category 1	Starting point 15 years' custody	Starting point 12 years' custody
	Category range 13 - 19 years' custody	Category range 10 - 15 years' custody
Category 2	Starting point 10 years' custody	Starting point 8 years' custody
	Category range 9 - 13 years' custody	Category range 7 - 9 years' custody
Category 3	Starting point 7 years' custody	Starting point 5 years' custody
	Category range 6 - 9 years' custody	Category range 4 - 7 years' custody



THE TANZANIA SENTENCING GUIDELINES, 2023

Tanzania

2. Grievous Harm

Name of Offence: GRIEVOUS HARM c/s 225 of Penal Code				
STEP 1: Maximum and Minimum Sentences in Law				
Maximum Sentence	Seven Years			
Minimum	None			
Other Statutory Guidance	Sentencing Jurisdiction			
STEP 2: Seriousness of the Offence and appropriate starting point and sentencing range for such offence				
			Sentence Range	Starting Point
High Level	<ul style="list-style-type: none"> • Serious multiple wounds • The offence was motivated by gang • The offence was intended to obstruct or interfere course of justice • Harm caused by domestic violence • Harm caused by sexual sadistic conducts • Causing permanent disability/ deformity • Vulnerability of the victim e.g. age, disability, gender • Use of weapon 		5-7 years	7 years
Medium Level	<ul style="list-style-type: none"> • Causing temporary disability/deformity • No use of weapon 		3-5 years	5 years
Low Level	<ul style="list-style-type: none"> • Applying excessive force in claim of right or self defence 		Conditional discharge to 3 years	3 years
STEP 3: Consider the relevant aggravating and mitigating factors which may increase or decrease the sentence within that range.				
Aggravating Factors		Mitigating Factors		
<ul style="list-style-type: none"> • The use and nature of any weapon • Motivated by revenge • Offence was motivated by the desire for financial gain. • A high degree of preparation and planning • The offender was an instigator or played a major role when the offence was committed by more than one person • Vulnerability of the part of the body towards which the 		<ul style="list-style-type: none"> • The offender was part of a group and clearly had a subordinate or lesser role when the offence was committed by one or more person • Remorse; for example, rushing the victim to hospital after the assault • An element of self-defence (not amounting to an absolute defence) 		

Uganda

Unlawful Act Manslaughter Section 187 of the Penal Code Act, Cap 120		
Maximum Sentence: Imprisonment for Life		
Bracket	Starting Point Sentencing Range	
Most serious: Very violent/use of a firearm; or Offender foresaw the risk of really serious harm; or Aggravating factors outweigh mitigating factors	15	13 years- life imprisonment
Medium: Some violence, with no foresight of death or serious harm; or No significant imbalance between the aggravating and the mitigating factors	10	7 years- 13 years
Less serious: Unlawful act was minor or unlikely to cause death; or Mitigating factors outweigh aggravating factors.	5	3 years- 7 years

South Korea

01 | RAPE (OF VICTIM THIRTEEN YEARS OF AGE OR OLDER)

TYPE	CLASSIFICATION	MITIGATED SENTENCING RANGE	STANDARD SENTENCING RANGE	AGGRAVATED SENTENCING RANGE
1	Standard Rape	1 yr. 6 mos. - 3 yrs.	2 yrs. 6 mos. - 5 yrs.	4 yrs. - 7 yrs.
2	Rape by Relative/Rape After Intrusion Upon Habitation, etc. /Special Rape	3 yrs. - 5 yrs. 6 mos.	5 yrs. - 8 yrs.	6 yrs. - 9 yrs.
3	Rape After Robbery	5 yrs. - 9 yrs.	8 yrs. - 12 yrs.	10 yrs. - 15 yrs.

Singapore

Offence	Prescribed Punishment
<p>(a) Section 55A(1)(a) read with s 55A(1)(b)(ii) punishable under s 55A(5)</p> <p>Offender enters into, or is otherwise concerned in, an arrangement by handing over control of his bank account to <i>B</i> without taking reasonable steps to ascertain <i>B</i>'s purpose of accessing, operating, or controlling the account.</p>	<p>Up to \$50,000 fine, OR</p> <p>Up to 3 years' imprisonment,</p> <p>OR Both</p>
<p>(b) Section 51(1A)(a) read with s 51(1A)(b)(ii) punishable under s 51(6)(b)</p> <p>Offender enters into, or is otherwise concerned in, an arrangement by <i>negligently</i> handing over control of his bank account to <i>B</i>.</p>	<p>Up to \$150,000 fine, OR</p> <p>Up to 3 years' imprisonment,</p> <p>OR Both</p>
<p>(c) Section 51(1A)(a) read with s 51(1A)(b)(i) punishable under s 51(6)(a)</p> <p>Offender enters into, or is otherwise concerned in, an arrangement by <i>rashly</i> handing over control of his bank account to <i>B</i>.</p>	<p>Up to \$250,000 fine, OR</p> <p>Up to 5 years' imprisonment,</p> <p>OR Both</p>
<p>(d) Section 51(1) punishable under s 51(5)</p> <p>Offender enters into, or is otherwise concerned in, an arrangement by handing over of control of his bank account to <i>B</i> knowing or having reason to believe that this would assist <i>B</i> to retain criminal benefits.</p>	<p>Up to \$500,000 fine, OR</p> <p>Up to 10 years' imprisonment,</p> <p>OR Both</p>

The sentencing guidelines should be used in the following manner:

- (a) Step 1: Identify the appropriate starting sentence with reference to the relevant CDSA offence.
- (b) Step 2: Adjust the starting sentence based on offence-specific and offender-specific factors, which distinguish the specific case from the archetypal case.
- (c) Step 3: Consider the use of a disgorgement fine in addition to imprisonment.

Archetypal case

The starting sentences set out below are pegged to an archetypal case with the following characteristics –

- (a) An offender who hands over control of an existing bank account⁶ to another person,
- (b) The offender does so with the mental element as stated in the relevant CDSA provision,
- (c) He hands over control of the bank account without any intention to derive a gain from his act, and
- (d) The bank account is later used to receive and transfer funds which are benefits from crime.

UPLIFT FOR SCAM OFFENCES INVOLVING VULNERABLE VICTIMS

In relation to cheating offences under s 420 of the Penal Code 1871 committed by scammers where the deception is communicated over the phone or online through a communication platform (such as WhatsApp) or website and induces the victim into delivering a pecuniary or financial benefit, it is recommended that an uplift be imposed where the victim is a vulnerable person.

"Vulnerable persons" are persons: (a) of or above the age of 65; or (b) who, by reason of mental or physical infirmity, disability or incapacity, are substantially unable to protect themselves from abuse, neglect or self-neglect.¹⁹

Scenario	Uplift ²⁰
If the offender specifically targeted vulnerable persons.	Uplift of at least 50% in the sentence
If vulnerable persons were affected by the scams (even if vulnerable persons were not specifically targeted and even if the offender did not know that vulnerable persons would be affected).	Uplift of at least 25% in the sentence

Some Key Elements of a Successful Regime

The Council should:

- Have a clear legislative foundation which clarifies the role and functions of the council as well as the compliance requirement for courts;
- Have a judicial majority – for reasons of legitimacy and effectiveness rather than expertise -- and interact regularly with the appellate court;
- Be **independent of government** but possibly overseen by Parliament;
- Have a significant research capacity and team;
- Membership which includes all key stakeholders,
- Conduct extensive public and practitioner consultations on all guidelines;
- Hold some meetings in public;
- Play an advisory role in assisting government and the legislature;
- Conduct equal impact analyses to ensure equal application of guidelines.



The Guidelines should:

- Be comprehensive: with specific recommendations and covering all key aspects of sentencing;
- Be prescriptive in nature and not just descriptive (simply reproducing current practice);
- Provide pre-calibrated sentencing alternatives to most prison sentences;
- Reflect the diverse nature of offences (ie must be offence-specific);
- Carry a compliance requirement **which allows adequate judicial discretion**;
- Be evidence-based, and dynamic: guidelines should be reviewed periodically and should reflect the latest research on the effectiveness of sanctions.

Key Unresolved Question:

- **Should the Council be mandated to control the prison population through its guidelines?**
- **If no**, who is going to do so, and prevent sentence inflation?
- **If yes**, how exactly should the Council use its guidelines? Guidelines should not reduce sentences to prevent prisons becoming crowded. But they can play some role in constraining the prison population.

Thank you for your attention..

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