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# **SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL**

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## TRIBUTE TO AKHO NTANJANA



Why should young and promising eagles suddenly perish and be taken away from us forever? I am gutted and unable to understand why.

Akho Ntanjana was on a meteoric rise – he was excelling in his career and slowly transforming into a trailblazer in his own unique way. He was a quiet, focused, forward looking young man and destined to reach great heights.

Akho worked tirelessly on the accreditation of this journal by the Department of Higher Education and Training – a long and arduous process. The receipt of the accreditation letter made him smile – he was relieved and fulfilled when he achieved his objective. He reminded us all that the real work was about to begin to maintain the accreditation.

Akho will be sorely missed by his SAJEI colleagues, the SAJEI Editorial Board members, the authors, the JUTA team and, more specifically, by his mother, wife, and siblings. May his soul rest in peace and rise in glory.

DR. GOMOLEMO MOSHOEU

*Production editor*

Well done, Akho!

You have run your race; now, it is for us to take the baton  
and continue on your well-defined route.

*Thank you for being our guiding light.*



## CONTENTS

### ARTICLES

A Closer Look at the Reviews and Appeals in South Africa <i>Justice John Eldrid Smith</i> .....	1
Addressing sentencing disparities in Nigeria through the implementation of sentencing guidelines: A model for reform in South Africa <i>Mr Polycarp Chibueze Okorie Esq</i> .....	29
'Less severe alternative' in the context of private defence: Is there a need for a clear roadmap? <i>Mr Boyane Tshehla</i> .....	50
The challenges faced by lecturers and students during Eskom's load shedding: a research based on the experiences in higher education in South Africa <i>Adv Themba Mathebula</i> .....	62
Upholding judicial independence: A critical review of the executive conduct in Malawi <i>Justice Redson Edward Kapindu</i> .....	83

### CASE NOTES

An attempt by a trade union to ignore its own constitution, a discussion of: <i>National Union of Metal Workers of South Africa v Lufil Packaging (isithebe)</i> (2020) 41 ILJ 1846 (CC) and <i>Afgri Animal Feeds (a division of PhilAfrica Foods</i> (Pty) Limited) v <i>National Union of Metalworkers South Africa and others</i> [2024] ZACC 13 <i>Dr Fanelesibonge Mabaso</i> .....	105
An examination of the employee's right to strike and repercussions for participating in an unprotected strike as demonstrated in the case of <i>Ngobeni v Interspray Durban</i> (JS739-18) [2024] ZALCJHB 80 (21 February 2024) <i>Mr Thukwe Solly Mmakola, Adv Lufuno Tokyo Nevondwe and</i> <i>Mr Konanani Happy Raligilia</i> .....	119
Automatic rehabilitation, not so automatic: <i>Engelbrecht No v Naidoo</i> [2023] ZAGPJHC 866 (3 August 2023) <i>Dr Zingapi Mabe and Prof André Boraine</i> .....	133
The concurrence of actions tug of war continues: <i>Trio Engineering</i> <i>Products Inc v Pilot Crushtec International (Pty) Ltd</i> [2019] JOL 41120 (GJ) <i>Adv Mark Morgan</i> .....	156
The deferment of payment of beneficiary claim pending the outcome third party investigative processes: A review of <i>Ncube v Liberty Life</i> [2024] 2 LL SA 861 (GJ) and <i>Basdeo v Discovery Life Ltd</i> [2024] ZAGPPHC 884 (10 September 2024) <i>Prof Tumo Charles Maloka and Mr Thiruneson Padayachy</i> .....	168

Reinforcing water governance through purposive interpretation: A Commentary on <i>Minister of Water and Sanitation and Others v Lotter No and Others; Minister of Water and Sanitation and Others v Wiid and Others; Minister of Water and Sanitation v South African Association for Water Users' Associations</i> (CCT 387/21) [2023] ZACC 9; 2023 (6) BCLR 763 (CC); 2023 (4) SA 434 (CC) (15 March 2023) <i>Prof Dejo Olowu</i> .....	179
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## GREAT REFLECTIONS IN CELEBRATION OF 100 YEARS OF WOMEN IN LAW

<i>100 Years Of Women in Law In South Africa – A Century of (Slow) Progress and Change for Women in the Practice of Law</i> <i>Adv Sesi Baloyi (SC)</i> .....	191
<i>A Life of Purpose</i> <i>Ms Hlaleleni Kathleen Matolo-Dlepu</i> .....	194

## BOOK REVIEWS

<i>Applied Military Justice for Practitioners</i> (Michelle Nel, Sonja Els and Vukile Sibiyi) by Dr Arthur van Coller.....	197
<i>Constitutional Review of the Republic of Namibia</i> (Sakeus Akweenda) by Dr Ntandokayise Ndlovu and Dr Arthur van Coller.....	200
<i>Employment Rights</i> (John Grogan) by Dr Kim-Leigh Loedolf .....	203
<i>Labour Litigation and Dispute Resolution</i> (John Grogan) by Ms Katlego Mmakosha Mthelebofu .....	205
<i>Medico-legal Aspects of Cerebral Palsy – A Handbook for Legal and Healthcare Practitioners</i> (Ravin Kumar Ramdass) by Mr Daniel Humpel.....	210
<i>Sexual Harassment in South Africa: A critical analysis of vicarious liability of an employer</i> (Yondela Ndema) by Dr Yvonne Jooste .....	212
<i>The Development of SADC Community Law in Member States</i> (MR Phooko, LT Chigowe and H 'Nyane) by Dr Tinyiko Ngobeni.....	214
<b>EDITORIAL POLICY</b> .....	219
<b>NOTES TO PROSPECTIVE AUTHORS AND CONTRIBUTORS</b> .....	223



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# *ADDRESSING SENTENCING DISPARITIES IN NIGERIA THROUGH THE IMPLEMENTATION OF SENTENCING GUIDELINES: A MODEL FOR REFORM IN SOUTH AFRICA*

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## Abstract

Sentencing in criminal trials is a critical component of the justice system, as it serves as the primary means through which accountability is realised. The efficacy of justice hinges on the perception that the ultimate sentence is fitting and appropriate following a thorough trial and conviction of a defendant. In the contemporary context, an appropriate sentence is one that is predictable and foreseeable. It is only when this predictability is achieved that the discretionary powers exercised in judicial sentencing can be considered equitable. Unfortunately, sentencing practices in many jurisdictions often lack this anticipated predictability, leading to disparities and inconsistencies in the imposition of sentences under similar circumstances by courts. These discrepancies can foster a negative public perception that justice is not being duly served, posing a formidable challenge to the administration of criminal justice.

This article emphasises the significance of a careful and thoughtful approach to sentencing in criminal proceedings and expounds on the need for sentencing guidelines to ensure fairness and uniformity in the judicial system, thereby addressing the issue of sentencing disparities. It argues that the adoption of such guidelines serves as a crucial tool in promoting consistency and transparency, guaranteeing that similar offences receive comparable punishments irrespective of the individual involved. The paper discusses the efforts in Nigeria to rectify sentencing inequities through the implementation of sentencing guidelines, outlining the potential impact of these measures on achieving predictable and fair sentencing. It also highlights the necessity for the development of tailored sentencing guidelines in South Africa, with the aim of providing judges with a structured framework to consider relevant factors when determining appropriate sentences. The article concludes that by establishing clear and transparent guidelines, more consistent and equitable sentencing practices will be established, ultimately contributing to a fair and just administration of the criminal justice system in South Africa.

## I INTRODUCTION

Sentencing is arguably the most crucial phase of a criminal trial through which the offender's primary objective of accountability is realised. The efficacy of justice is contingent upon the perception that the ultimate sentence, following a thorough trial and the conviction of a defendant, is fitting or appropriate. In the contemporary context, an appropriate sentence is one that is predictable, allowing legal counsel to anticipate the probable punishment to be imposed by the court, based on the available facts and applicable principles. It is only when this predictability is attained that the discretionary powers exercised in judicial sentencing can be deemed equitable.

Regrettably, the sentencing practices in numerous jurisdictions, notably Nigeria and South Africa, often lack the anticipated predictability, evident in recurrent disparities and inconsistencies in the imposition of sentences under similar circumstances by courts. The ramifications of such discrepancies are profound, potentially fostering a negative public perception that justice is not being duly served, thereby posing a formidable challenge to the administration of criminal justice.

Disparities and inconsistencies in sentencing are inherent in any jurisdiction due to the broad discretion involved, coupled with the absence of clear, predetermined, or universally agreed-upon principles to guide the exercise of this discretion in specific instances or individual cases. Recognising this deficiency, many jurisdictions have endeavoured to address it by adopting sentencing guidelines. Nigeria stands as one such jurisdiction that has taken strides in this direction, having implemented sentencing guidelines in the Federal Capital Territory and several States of the Federation. Other African Countries that have adopted sentencing guidelines include Ethiopia and Tanzania.<sup>1</sup>

This article undertakes a concise examination of the justification for the adoption of sentencing guidelines in Nigeria and elucidates the key provisions of the prevailing sentencing guidelines. The objective is to underscore their benefits, thereby fostering consideration for the potential adoption of similar guidelines in South Africa.

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<sup>1</sup> There are other countries in Africa with legislation on sentencing but which do not strictly qualify as sentencing guidelines in the context of our discussion in this article. For example, Zimbabwe in 2023 adopted the Criminal Procedure (Sentencing Guidelines) Regulations, Statutory Instrument 146 of 2023. Though this Regulation provides a general guidance in terms of the principles to be considered in sentencing, it does not contain clear guidelines on how to arrive at specific sentences in given circumstances and therefore does not qualify as sentencing guidelines as recommended by this article.

## II SENTENCING PRIOR TO THE ADOPTION OF SENTENCING GUIDELINES IN NIGERIA

The evolution of sentencing practices in Nigeria can be categorised into two distinct periods: the Pre–2015 era and the Post–2015 era following the enactment of the Administration of Criminal Justice Act of 2015 (ACJA). The procedural and guiding principles that governed sentencing during these periods are briefly summarised below.

**Pre–2015 Period:** In the Pre–2015 period, statutory provisions related to sentencing were sparse in criminal procedure statutes, resulting in an overreliance on judge–made rules. These rules aimed to address inconsistencies in sentencing but lacked a cohesive statutory foundation. Notable sentencing principles established by case law within this period included the following:

- (a) Separate offences charged together must each receive a separate sentence but if they all form part of the same criminal action, the sentence will be concurrent;<sup>2</sup>
- (b) A fine must not be too heavy for the offender to pay;<sup>3</sup>
- (c) Separate fines imposed on different counts at the same trial are to be cumulative but the aggregate must be within the Court’s jurisdiction;<sup>4</sup>
- (d) Age of the offender,<sup>5</sup> being a first offender and pleading guilty to the charge<sup>6</sup> should be considered as mitigating factors in sentencing;
- (e) Previous conviction,<sup>7</sup> the prevalence of the offence,<sup>8</sup> the seriousness of the offence,<sup>9</sup> the non–repentant attitude of the offender<sup>10</sup> and the adverse effect of the offence on the victim<sup>11</sup> should be considered as aggravating factors in sentencing;
- (f) An appeal court should not interfere with a sentence which is the subject of an appeal merely because the judges of the Court of Appeal might have passed a different sentence if they had tried the case in the first instance;<sup>12</sup>

<sup>2</sup> *Anowele v The State* (1965) AII N.L.R. 100.

<sup>3</sup> *Akite Gbila v C.O.P* (1965) N.N.L.R. 67.

<sup>4</sup> *Fashusi v Police* (1953) 2 N.L.R.126.

<sup>5</sup> *Odidika v State* (1977) 2 S.C.1.

<sup>6</sup> *Kuriakos v Board of Customs and Excise* (1967) F.N.L.R.1.

<sup>7</sup> *R v Enahoro* 12 W.A.C.A. 194.

<sup>8</sup> *R v Olagbaie* 1956 3 W.A.C.A. 81.

<sup>9</sup> *R v Okeke* 1936 3 W.A.C.A 1.

<sup>10</sup> *Adeyeye v The State* (1968) N.M.L.R. 48.

<sup>11</sup> FIE Ukattah: ‘Sentencing and Probation’ in Judicial Lectures: Continuing Education for the Judiciary, 1992, N.J.I., 188 at 196.

<sup>12</sup> Per Ademola, CJN in *Adeyeye & Anor v The State* (1968) N.M.L.R. 87.

- (g) An appeal court should review only a sentence that is manifestly excessive or inadequate or wrong in law.<sup>13</sup>

Despite these judicial pronouncements which still subsist as sentencing principles in Nigeria, disparities in sentencing persisted, largely due to the discretionary and non-contextual nature of these guidelines.

**Post–2015 Period:** The Post–2015 period witnessed a significant shift with the enactment of the ACJA on 13 May 2015, replacing existing federal criminal procedure statutes. The ACJA, subsequently adopted as Administration of Criminal Justice Laws (ACJLs) across various states, introduced more comprehensive provisions on sentencing. Key innovations in the Act include<sup>14</sup> the establishment of a separate sentencing hearing,<sup>15</sup> the introduction of diverse non-custodial sentences,<sup>16</sup> and the incorporation of factors and principles to guide sentencing decisions<sup>17</sup> which encompass considerations such as the objectives of sentencing,<sup>18</sup> the interests of the victim, convict, and community,<sup>19</sup> and the appropriateness of non-custodial sentences.<sup>20</sup> Other considerations include<sup>21</sup> the importance of treating each

<sup>13</sup> *State v Hassan Audu* (1972) 1 AII N.L.R.(PT.2) 197.

<sup>14</sup> See ss 311, 401 and 416 ACJA. The purpose of these provisions is to ensure that the court gives adequate consideration to the sentencing of a convict and that an appropriate and fair sentence is imposed in all cases bearing in mind the interest of the defendant, the victim, and the society.

<sup>15</sup> Section 310 ACJA.

<sup>16</sup> For example, fine, compensation (s 321(a) ACJA and s 78 Penal Code), restitution (s 321(a) ACJA), probation (s 454 ACJA), suspended sentence (s 460(1) ACJA), community service (s 460 (2) ACJA), deportation (s 439 ACJA), and other non-custodial sentence as may be prescribed by an Act of the National Assembly. See generally ss 453–468 ACJA

<sup>17</sup> Sections 311(2)–(3) and 416 ACJA.

<sup>18</sup> These objectives are stated in s 401(2) ACJA and include: prevention (persuading the convict to give up committing offences in the future because the consequences of crime are unpleasant); restraint (keeping the convict from committing more offences by isolating him from society); rehabilitation (providing the convict with treatment or training that will make him into a reformed citizen); deterrence (warning others not to commit offence by making an example of the convict); education of the public (making a clear distinction between good and bad conduct by punishing bad conduct); retribution (giving the society or the victim revenge); and restitution (compensating the victim or family of the victim of the offence).

<sup>19</sup> Section 311(2)(b) ACJA.

<sup>20</sup> Section 311(2)(c) ACJA.

<sup>21</sup> See generally s 416 ACJA.

case on its merit,<sup>22</sup> necessary aggravating and mitigating factors,<sup>23</sup> previous convictions,<sup>24</sup> the need to conduct an inquiry into the convict's antecedents,<sup>25</sup> first offenders not to be subject to maximum sentence,<sup>26</sup> and factoring in time spent in prison custody awaiting trial.<sup>27</sup>

While the ACJA regime marked a substantial improvement by providing a more detailed framework for sentencing, it, like its predecessors, lacked specific guidelines for individual cases. Consequently, the potential for addressing disparities and inconsistencies in sentencing remains a challenge, as the implementation of the legislation may not yield substantially different results.<sup>28</sup>

### III SENTENCING IN SOUTH AFRICA

The position of the law on sentencing in South Africa is not materially different from that of Nigeria. In South Africa, the law and practice of sentencing are primarily governed by the Criminal Procedure Act of 1977 (CPA).<sup>29</sup> Section 276 of the Act provides the courts with the discretion to

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<sup>22</sup> Section 416(2)(a) ACJA.

<sup>23</sup> See s 311(3) ACJA. However, the provision does not specify these factors. A few of them may, however, be gleaned from other provisions of the Act, for example, being a first offence which constitutes a mitigating factor under s 416(2)(d) ACJA.

<sup>24</sup> Section 311(2)(d) ACJA.

<sup>25</sup> Section 416(2)(f) ACJA.

<sup>26</sup> See section 416(2)(d) ACJA; *Maina v FRN* (2022) LPELR-58942 (CA).

<sup>27</sup> Section 416(2)(e) ACJA.

<sup>28</sup> See for example, *Auwal v FRN* (2022) LPELR-57318 (CA). In this case, the defendants pleaded guilty and were convicted on the count of criminal misappropriation contrary to s 309 of the Penal Code. They were each sentenced to two years on this count and a fine of N1,000,000 and in default, two years imprisonment to run consecutively. The Court of Appeal held that the sentence of four years was excessive having regard to the plea of guilty which was a mitigating factor and consequently reduced the sentence to two years without option of fine. The sentence might well have been excessive but the question is how did the appellate court determine the appropriate credit that the accused were entitled to, based on their guilty pleas? What is the guarantee that the sentence will not be further reduced or increased if appealed to the Supreme Court? In effect, the discretion remains at large. It is submitted that the appeal court essentially in this case, has simply substituted its view of what the sentence should have been rather than determine the appropriate sentence by reference to agreed guidelines. This example applies to almost all cases where sentences of trial courts have been substituted on appeal.

<sup>29</sup> See generally ss 274–299A of the Act.

impose various types of sentences, including imprisonment, fines, community service, and probation. The CPA also outlines the factors that should be taken into consideration by the courts when determining an appropriate sentence, such as the seriousness of the offence, the personal circumstances of the offender, and the need for rehabilitation and reintegration into society.<sup>30</sup>

In addition to the CPA, the Constitution of South Africa<sup>31</sup> also plays a crucial role in shaping the law and practice of sentencing. The Constitution guarantees the right to a fair trial and the right to be treated equally and with dignity, which have implications for the sentencing of offenders.<sup>32</sup> The Constitution also emphasises the need for the criminal justice system to be responsive to the needs of the victims of crime and the community as a whole, which should be considered in the sentencing process.

While the statutory enactments (the CPA and the Constitution) provide a framework for sentencing, there is a lack of specific sentencing guidelines that can help ensure consistent and fair sentencing practices. The jurisprudence around sentencing provisions and principles, as is the case in Nigeria, make limited impact on the actual exercise of sentencing discretion.<sup>33</sup> The absence of clear guidelines is a key factor that contributes to disparities in sentencing outcomes because it allows for subjective and inconsistent sentencing practices, leading to perceptions of unfairness and inequality in the criminal justice system.

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<sup>30</sup> Examples of other factors and considerations for sentencing under the CPA include: provisions for sentencing hearing (s 274), power of the court to fix the non-parole period where it orders concurrent sentences (s 276B), provision for sentences for different offences to run consecutively unless the court otherwise directs (s 280), the prohibition of imprisonment with hard labour by the court (s 281), and prohibition of the court from imposing sentence to imprisonment for a period of less than four days (s 284).

<sup>31</sup> Constitution of the Republic of South Africa Act 1996.

<sup>32</sup> It has been contended that s 12(1)(e) of the Constitution creates a relatively permissible framework for punishment as it confers wide powers on the state to punish except where such punishment would result in torture or cruel, inhumane or degrading treatment. See D van Zyl Smith & C Ballard 'Sentencing and Punishment' in S Woolman et al (eds) *Constitutional Law of South Africa* 2ed (Juta, 2018) Chap 49, 49ff.

<sup>33</sup> In *R v Mopumulo* 1920 AD 56, 57, the court maintained that sentencing was 'pre-eminently a matter for the discretion of the trial Court'. This case and other cases were cited in D van Zyl Smith & C Ballard (note 32 above), 49ff.

#### IV SENTENCING IN THE UNITED KINGDOM (UK)

The laws governing sentencing in the UK are primarily found in the Criminal Justice Act 2003 (CJA)<sup>34</sup> and the sentencing guidelines made by the Sentencing Council.<sup>35</sup>

The CJA sets out the general principles of sentencing in the UK. The Act stipulates that the court must have regard to the aims of sentencing, which include punishment, the reduction of crime, the reform and rehabilitation of offenders, the protection of the public, and the making of reparation to those affected by the crime. The Act also provides for the use of custodial and non-custodial sentences, as well as the imposition of ancillary orders such as fines, compensation orders, and community sentences.

The sentencing guidelines are both general and offence specific.<sup>36</sup> They are designed to ensure that similar offences are punished in a consistent manner and that the sentence reflects the seriousness of the offence, the harm caused by the crime, the culpability of the offender, and any aggravating or mitigating factors.

In addition to the Sentencing Council's guidelines, the procedure for sentencing by the courts in the UK is also governed by the Criminal Procedure Rules.<sup>37</sup> These rules set out the process that the courts must follow when sentencing an offender, including the consideration of pre-sentence reports, victim impact statements, and any other relevant information. The court must also give the offender an opportunity to make representations about the appropriate sentence and must consider any mitigating or aggravating factors before reaching a decision.<sup>38</sup>

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<sup>34</sup> See particularly ss 142 to 146 of the Criminal Justice Act 2003 (UK).

<sup>35</sup> The Sentencing Council is an independent body that produces guidelines for the courts to use when sentencing offenders. The Council was established by s 118(1) of the Coroners and Justice Act 2009. In exercising its functions, the Council is statutorily required to have regard to the sentences imposed by the courts, the need to promote consistency in sentencing, the impact of sentencing decisions on victims of offences, the need to promote public confidence in the criminal justice system, the cost of different sentences and their relative effectiveness in preventing re-offending, and the results of the monitoring carried out by the Council on the operation and effect of its guidelines. See s 120(11) of the Coroners and Justice Act 2009.

<sup>36</sup> Section 120(2) of the Coroners and Justice Act 2009 provides that 'sentencing guideline may be general in nature or limited to a particular offence, particular category of offence or particular category of offender'.

<sup>37</sup> Criminal Procedure Rules and Criminal Practice Directions (2025).

<sup>38</sup> See Rules 24.11 and 25.16 Criminal Procedure Rules 2020 (UK).

## V ADOPTION OF SENTENCING GUIDELINES IN NIGERIA

In alignment with prevalent practices observed in numerous developed jurisdictions, particularly the United Kingdom, Nigeria has taken steps to implement sentencing guidelines aimed at rectifying disparities in sentencing which persist despite extant case law and commendable provisions within the Administration of Criminal Justice Act (ACJA).

The integration of sentencing guidelines in Nigeria was preceded by comprehensive studies, research endeavours, and consultations, all of which illuminated the judiciary's inclination towards mandatory sentencing guidelines to foster uniformity in sentencing practices. Two studies conducted by the National Judicial Institute (NJI)<sup>39</sup> and the Nigerian Law Reform Commission (NLRC)<sup>40</sup> played a pivotal role in shaping this trajectory.

The NJI's research spanned judiciaries across the 36 States of the Federation and the Federal Capital Territory, involving a total of 199 respondents who were judicial officers. The research report revealed that 70.85% of the respondents strongly concurred that the current sentencing paradigm necessitated alteration. Moreover, 68.34% affirmed the paramount importance of instituting sentencing guidelines, with 21.11% indicating a perception of its relative importance.

These research findings served as a catalyst for the adoption of sentencing guidelines in Nigeria since 2016, with the primary objective of ensuring consistency, predictability, and parity in sentencing. The incorporation of mandatory sentencing guidelines into the criminal justice system has been effectuated through the issuance of Practice Directions.<sup>41</sup> These Practice Directions were a product of a series of workshops and wide consultations with stakeholders in the administration of criminal justice including the Judiciary, the Federal Ministry of Justice, all federal prosecuting agencies in Nigeria, the Bar Association, the Legal Aid Council of Nigeria and private legal practitioners. Many States of the federation such as the Federal Capital Territory, Abuja, Cross River State, Lagos State, Anambra State, Edo State, Adamawa State, Katsina State, and Kaduna State, have embraced these sentencing guidelines. Additionally, subject-specific sentencing guidelines pertaining to corruption and drug-related cases have been established in the Federal High Court.

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<sup>39</sup> Report of the Research on the Need for Sentencing Guidelines for Judicial Officers in Nigeria, n.d. (unpublished report).

<sup>40</sup> Nigerian Law Reform Commission's Report on Stakeholders Meeting on Sentencing Guidelines in Nigeria, 2012 (unpublished report).

<sup>41</sup> A Practice Direction has force of law like Rules of Court. See *Oraegbunam v Chukwuka & Ors* (2009) LPELR-4796 (CA). Cf *UNILAG v Aigoro* (1984) 11 SC152. A Practice Direction should not however be inconsistent with statute.

## VI OVERVIEW OF KEY PROVISIONS OF THE SENTENCING GUIDELINES

The extant sentencing guidelines in Nigeria exhibit substantial similarity, particularly concerning the sentencing procedure and the foundational principles guiding sentencing considerations. The discussion in this article, however, is based on the provisions of the Federal Capital Territory Courts (Custodial and Non-Custodial Sentencing) Practice Directions, 2020 (PD or the guidelines), which is one of the most comprehensive sentencing frameworks in Nigeria. Its development was conceived with the intent of serving as a model for replication by states lacking sentencing guidelines.

The primary objectives of the guidelines are twofold: the first is to institute apt standards and guidelines for sentencing, and the second is to define the requisites and procedures governing the imposition of custodial and non-custodial sentences. These objectives aim to forestall abuse and ensure uniformity, proportionality, parity and equity in sentencing practices. It is imperative to note that these guidelines are applicable to all Federal Capital Territory Courts exercising criminal jurisdiction, with the exception of cases involving individuals below the age of 18 (children).<sup>42</sup>

### (a) *General guiding principles and factors in sentencing*

In the determination of sentences to be imposed upon a convict, the court is mandated by the guidelines to consider all principles and factors outlined in the Administration of Criminal Justice Act (ACJA),<sup>43</sup> as previously discussed. Specifically addressing non-custodial sentences, the guidelines articulate the following guiding principles for the courts:<sup>44</sup>

1. A non-custodial sentence is precluded when the statute prescribes a mandatory sentence or a minimum custodial sentence.
2. In all other cases, the court is empowered to impose non-custodial sentences as provided under the ACJA.
3. The court may prescribe a non-custodial sentence even in instances where the statute defining the offence is silent on or does not expressly provide for non-custodial punishment.
4. A non-custodial sentence shall not be imposed if the statute creating the offence explicitly prohibits such a sentence. In this scenario, the court shall disregard the expressly disallowed non-custodial sentence

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See *Kelly v FRN* (2020) 14 NWLR (Pt.1745) 479 (CA).

<sup>42</sup> Order.1 Rule.2 PD.

<sup>43</sup> Sections 311, 401(2) and 416(1) of the ACJA.

<sup>44</sup> See O.1 R.3 PD.

but may still consider other non-custodial options not expressly disallowed by the statute.

5. The court is restricted to imposing a non-custodial sentence only when the offence is categorised as a 'Low Culpability Offence' and a 'Limited Harm Offence', and when other mitigating factors are present.
6. Before imposing a non-custodial sentence, the court must ensure, among other considerations, that the interests of the victim, the convict, and the community are taken into account; the imposition of a non-custodial sentence is appropriate in the specific case as an alternative to imprisonment; there exist necessary mitigating factors, evidence, information, or circumstances justifying the imposition of the non-custodial sentence; and the convict is not a habitual offender and will not pose a danger to the community through the imposition of a non-custodial sentence.
7. A non-custodial sentence, if deemed suitable based on the relevant provisions of the PD, shall be imposed exclusively as an alternative to imprisonment or other custodial punishments and not in addition to a custodial sentence.
8. Should a convict not meet the criteria for a non-custodial sentence, the court, in imposing a custodial sentence, may also impose a fine, contingent on the gravity and circumstances of the offence, provided the statute explicitly allows both imprisonment and a fine for the offence.
9. In all cases where the court convicts a defendant, whether the sentence is custodial or non-custodial, the court may additionally order compensation, restitution, or other ancillary reliefs in accordance with section 321 and other pertinent provisions of the ACJA.
10. When imposing non-custodial sentences, the court shall be guided by the provisions of the ACJA and other relevant laws concerning such sentences, and the availability of facilities for the implementation of the non-custodial sentence.
11. The court, before imposing a specific non-custodial sentence, may request advice or a report from the National Committee on Non-Custodial Measures or the Nigerian Correctional Service to ascertain the available facilities, or from a social worker or any other expert, to determine the appropriate non-custodial sentence for the convict or other related purposes.

(b) *Conduct of sentencing hearing*

Pursuant to the guidelines, the court is obligated to promptly conduct a sentencing hearing, as mandated by the ACJA, following a conviction or within a period not exceeding fourteen (14) days from the date of conviction.

The sentencing hearing serves the purpose of providing the convict with the opportunity to adduce evidence of mitigation strictly for sentencing purposes, to aid the court in determining an appropriate sentence for the convicted individual.<sup>45</sup>

While awaiting the sentencing hearing, the convict shall be detained in a correctional centre, unless imprisonment is not a prescribed penalty for the offence, or if the convict has been detained for a duration surpassing the maximum term of imprisonment stipulated for the offence.

During the sentencing hearing, the court shall inquire whether the convict wishes to summon any witnesses to testify regarding their character or any other mitigating factors not previously presented during the trial. Witnesses called by the convict shall be subject to the general rules of evidence, encompassing examination-in-chief, cross-examination, and re-examination.

Following the testimony of any such witnesses, the convict shall be given the opportunity to make a statement or present any evidence or information in mitigation of punishment.

If deemed necessary, the prosecutor may call witnesses or introduce evidence to counter any facts or evidence presented by or on behalf of the convict in mitigation of punishment, unless such evidence has already been introduced.

Witnesses summoned by the prosecution shall undergo examination-in-chief, cross-examination, and re-examination.

Subsequently, the court may proceed to pronounce the sentence on the convict or adjourn for further consideration. The sentence shall be delivered in open court, accompanied by a rationale for the decision.

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<sup>45</sup> It has however been held that failure to conduct a sentencing hearing is not fatal to the sentence unless it resulted in a miscarriage of justice. See *Ukoh v State* (2022) LPELR-56711 (CA). It is submitted that there will be a miscarriage of justice where there are facts that would have affected the sentence which the defendant was prevented from introducing by reason of failure to conduct a sentencing hearing. The question is at what point and by what means would the defendant bring such facts to the attention of the appellate court for the purpose of determining that there has been a miscarriage of justice? It appears however that where such facts are before the appellate court, the latter can impose the appropriate sentence based on such facts and need not remit the case to the trial court for sentencing. See *Maina v FRN* (2022) LPELR-58942 (CA).

In instances where a convict has been afforded the opportunity to present mitigating evidence but declines or fails to avail themselves of such an opportunity, the court reserves the right to sentence the convict in accordance with the guidelines, relying on the evidence already presented during the trial.<sup>46</sup>

(c) *Procedure for sentencing*

Sentence pronouncement follows a comprehensive procedural framework outlined in the relevant Order,<sup>47</sup> corresponding to distinct offence categories. The process comprises nine sequential steps:

1. Determining Discretionary and Non-discretionary Punishment
2. Determining Offence Category
3. Determining Starting Point and Category Range
4. Adjustment based on Aggravating and Mitigating Factors
5. Consideration of Guilty Plea and Potential Reduction of Sentence
6. Totality Principle
7. Compensation, Restitution, Restoration, and Ancillary Orders
8. Consideration of Period Spent in Custody or Remand
9. Reason for Sentence.

*Step One: Determining Discretionary and Non-discretionary Punishment*

The court will assess whether the statute permits discretionary sentencing for the specific offence. In cases where discretion is disallowed (eg, capital offences), the court will adhere to statutory punishment and proceed to steps 7 and 9 (ancillary orders and reason for sentence). If discretionary sentencing is allowed, the court will diligently follow all the procedural steps outlined in the sentencing guidelines.<sup>48</sup>

*Step Two: Determining the Offence Category (Culpability and Harm Categories)*

In this step, the court is tasked with categorising the offence into two distinct categories: culpability and harm. This categorisation is pivotal, as the severity of the prescribed punishment hinges on the allocated category.

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<sup>46</sup> O. 1 R. 6 PD.

<sup>47</sup> O. 2–8 PD.

<sup>48</sup> See O. 2 R. 1; 3.1; 4.1; 5.1; 6.1; 7.1; and 8.1. PD.

### Culpability Category (High Culpability or Low Culpability)

Under the culpability category, the court must assess whether the offence exhibits high or low blameworthiness. The guidelines provide factors to aid this determination, focusing on the convict's actions. These actions are scrutinised across four levels of intent:

1. **Intentional Harm:** The convict deliberately intended to cause harm.
2. **Recklessness:** The convict acted recklessly, regardless of the potential harm.
3. **Knowledge of Risk:** The convict did not intend harm but was aware of the risk posed by their actions.
4. **Negligence:** The convict's actions were negligent, leading to unintended harm.

Even in strict liability offences where proving culpability is unnecessary, it remains a consideration for sentencing. Factors considered for high culpability offences include prolonged activity, weapon use, property damage, premeditation, deliberate targeting of vulnerable victims, leading role in the offence, and death resulting from the offence. Conversely, low culpability factors include lack of premeditation, subordinate role, mental or emotional disorders, and expressions of remorse.

### Harm Category (Serious Harm, Substantial Harm, or Limited Harm)

The court is also required to categorise the harm resulting from the offence as serious, substantial, or limited. Factors guiding this classification are centred on the impact of the convict's actions on the victim or society.

Factors indicating serious harm include ongoing effects on the victim, offences against public sector workers, serious economic, social, or environmental impact, resulting in death, permanent or grievous bodily injury, or property damage. Substantial harm may be indicated by factors such as significant psychological trauma, coercion, duress, or social stigma. Limited harm is associated with offences that have a minimal impact on the victim.

The nature of harm considers both personal characteristics and the circumstances of the victim, as well as the broader impact on the community. The court must weigh these factors carefully to accurately classify and assess the harm associated with a particular offence.<sup>49</sup>

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<sup>49</sup> See O. 2 R. 2; 3.2; 4.2; 5.2; 6.2; 7.2; and 8.2. PD.

*Step Three: Starting Point and Category Range*

Following the determination of the convict's culpability and the severity of harm caused, the court must then apply the corresponding starting points of sentencing, utilising the table of starting points and category ranges outlined in the relevant schedules to the guidelines. Illustrated below is the schedule for offences against persons:

- High Culpability/Serious Harm – Start 90% – Range 80% to 100%
- High Culpability/Substantial Harm – Start 80% – Range 60% to 90%
- High Culpability/Limited Harm – Start 50% – Range 40% to 60%
- Low Culpability/Serious Harm – Start 50% – Range 40% to 60%
- Low Culpability/Substantial Harm – Start 40% - Range 30% to 50%
- Low Culpability/Limited Harm – Start 25% – Range Fine and other non-custodial – 30%.

For offences demonstrating both low culpability and limited harm, with or without mitigating factors, a starting point of 25% of the prescribed sentence is imposed. This may be increased up to a maximum of 30% with the presence of aggravating factors, or reduced to 1% with mitigating factors.

Non-custodial sentences are reserved for offences categorised as low culpability and limited harm. A non-custodial sentence is mandatory in cases where there are two or more factors demonstrating low culpability and limited harm, along with two or more mitigating factors or the presence of a guilty plea.

However, in compelling circumstances, a non-custodial sentence may be imposed if at least one factor demonstrates low culpability, one factor demonstrates limited harm, and at least one mitigating factor is present.

For offences with a prescribed minimum sentence, the court must not impose less than that minimum sentence, regardless of the starting point set out in the relevant schedule. The starting point applies universally to all convicts, irrespective of pleas of guilt or records of previous convictions.

If a convict's culpability is qualified by multiple features, an upward adjustment from the starting point may be considered under this step before further adjustments for aggravating or mitigating features under step four. Additionally, circumstances listed for determining culpability/harm categories should not be reconsidered when determining aggravating/mitigating factors.<sup>50</sup>

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<sup>50</sup> See O. 2 R. 3; 3.3; 4.3; 5.3; 6.3; 7.3; and 8.3. PD.

*Step Four: Adjustment Based on Aggravating and Mitigating Factors*

After establishing the starting point, the court will then assess whether an upward or downward adjustment is warranted based on evidence of aggravating or mitigating factors. These factors, while not exhaustive, include those listed in the guidelines for various offences.

Common aggravating factors may involve previous convictions; inducing another to participate in the crime; lack of remorse; offences against vulnerable victims; weapon use; violence; group action; abuse of position or power; offences committed while on bail; planned offences; or offences rooted in discrimination.

Mitigating factors typically include the absence of previous convictions, a guilty plea, demonstration of remorse, good character or exemplary conduct, cooperation with the investigation, isolated incidents, the age of the convict, mental disorders/learning disabilities/impaired capacity, the convict being the sole breadwinner for dependant relatives, or the absence of premeditation.<sup>51</sup>

*Step Five: Special Consideration of Guilty Plea*

The guidelines emphasise the court's obligation to weigh any guilty plea entered by the convict, considering the timing of such a plea during the proceedings. However, the reduction in the sentence attributable to a guilty plea should not surpass one-third of the legally prescribed punishment.<sup>52</sup>

*Step Six: Totality Principle*

When sentencing a convict for multiple offences or when the convict is currently serving a sentence, the court is mandated to assess whether the overall sentence aligns with the principles of justice and proportionality concerning the offender's behaviour.

- In instances of convictions for multiple offences stemming from the same transaction, the sentences are to run concurrently.
- In cases of convictions for multiple offences not arising from the same transaction, the court must deliberate and declare whether the sentences will be served concurrently or consecutively.<sup>53</sup>

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<sup>51</sup> See O. 2 R. 4; 3.4; 4.4; 5.4; 6.4; 7.4; 8.4. PD.

<sup>52</sup> See O. 2 R. 5; 3.5; 4.5; 5.5; 6.5; 7.5; 8.5. PD.

<sup>53</sup> See O. 2. R. 6; 3.6; 4.6; 5.6; 6.6; 7.6; 8.6. PD.

*Step Seven: Compensation, Restitution, Restoration, and Ancillary Orders*

In every case, the court is required to deliberate on the necessity of issuing orders for compensation, restitution, restoration, rehabilitation, treatment of the victim, or other ancillary measures. This determination should align with the stipulations outlined in the applicable laws.<sup>54</sup>

*Step Eight: Time Spent in Remand*

The duration spent in custody while awaiting or undergoing trial is a pertinent factor in sentencing. The court must factor in and calculate this period when determining the overall sentence for the convict.<sup>55</sup>

*Step Nine: Reason for Sentence*

The court is obligated to provide explicit reasons justifying the imposed sentence. This step ensures transparency and accountability in the sentencing process, offering a clear rationale for the decisions made by the court.<sup>56</sup> The requirement of giving a reason for the sentence in the judgement or the sentencing ruling calls for a demonstration of how and why a particular sentence is being imposed. This is achieved by stating the factors considered by the court in arriving at the final sentence, the idea being to ensure that the judges are conscious of the requirements of the guidelines and that the sentence is consistent with the guidelines.

It is instructive to note that the focus of the sentencing guidelines is on how to determine appropriate sentence in specific circumstances and not necessarily the procedure for writing a judgment or ruling on sentencing.

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<sup>54</sup> See O. 2 R. 7; 3.7; 4.7; 5.7; 6.7; 7.7; 8.7 PD.

<sup>55</sup> See O. 2 R. 8; 3.8; 4.8; 4.8; 5.8; 6.8; 7.8; 8.8. PD.

<sup>56</sup> O. 2 R. 9; 3.9; 4.9; 4.9; 5.9; 6.9; 7.9; 8.9 PD; In *Agbanyi v State* (1995) 1 NWLR (Pt.369) 1 (CA), it was held by the Nigerian Court of Appeal that it is desirable when exercising his discretion over sentence, for a trial judge to state in his judgment the factors that influenced his decision. But in *Ezekiel v Federal Republic of Nigeria* (2017) 12 NWLR (Pt. 1578)1, the Supreme Court appears to have taken the position that the trial judge is not bound to give reason for exercising his or her discretion on sentencing. This decision is however not a good authority for the stated principle because it was based on a trial conducted prior to the enactment of the ACJA (2015) and the Sentencing Guidelines (2020). Section 308(1) of ACJA requires the court to give reason for its judgment/decision. Although judgment or decision is not defined in ACJA, s 318(1) of the Constitution of Federal Republic of Nigeria 1999 defines the decision to include sentence. Moreover, the sentencing guidelines now expressly require the court to give a reason for its sentence. See Orders 2-8 Rule 9 PD.

The latter still follows the standard practice and procedures as prescribed by relevant legislation and case law.

## VII APPLICATION OF SENTENCING GUIDELINES

To illustrate how sentencing guidelines as discussed above can be used in a predictable and objective manner to achieve consistency, uniformity, parity and fairness in sentencing, this article will now analyse its application to the specific offence of theft.

The maximum punishment for the offence of theft under section 287 of the Penal Code (PC)<sup>57</sup> is five years imprisonment while the minimum is a fine. The court is at liberty to impose both imprisonment and a fine on the same convict. As previously argued, without specific guidance as to when to impose the maximum or the minimum sentence prescribed in section 287 PC, this provision is seriously prone to abuse as it will be difficult for the judge to objectively and in a predictable manner, determine or ascertain the appropriate sentences for convicts in specific circumstances or instances. It will also be difficult to determine with certainty when the maximum or minimum sentence should be imposed. This is however possible with the sentencing guidelines.

Under the relevant provisions of the guidelines<sup>58</sup> the three main steps for determining or calculating the exact sentence to be imposed on the convict for theft are as follows:

First is to categorise the offence according to the level of culpability of the convict and severity of harm caused by the offence using the factors listed in the guidelines.<sup>59</sup> The second step is to apply the starting point prescribed for each offence category<sup>60</sup> while the third step is to make an upward or downward adjustment (based on aggravating or mitigating factors) from the starting point within the prescribed sentence range for that category.<sup>61</sup>

As previously discussed in this article,<sup>62</sup> there are six possible categorisations that can be made by the judge which are the determinants of the punishment to be imposed on the convict. The possible categories are: high culpability/serious harm; high culpability/substantial harm; high culpability/limited harm; low culpability/serious harm; low culpability/substantial harm; low culpability/limited harm.

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<sup>57</sup> Penal Code Act, Cap. 532, Laws of the Federal Capital Territory of Nigeria.

<sup>58</sup> O.7 PD (Offence against Property).

<sup>59</sup> O. 7 R. 2 PD.

<sup>60</sup> O. 7 R. 3 PD.

<sup>61</sup> O.7 R. 4 PD.

<sup>62</sup> See Procedure for Sentencing, (particularly Steps 2 to 4).

Some of the factors to be considered in determining these categorisations in the case of theft include:

- (a) High Culpability: playing a leading role in the planning of the offence, targeting vulnerable victims, abusing position of trust;
- (b) Low Culpability: involvement through coercion or intimidation or exploitation, offence not motivated by personal gain, convict acting on misleading or inaccurate advice;
- (c) Serious Harm: high value of the stolen goods, where the theft involved serious physical or psychological harm to the victim, where the offence occurred at night or in the presence of a child or family members;
- (d) Substantial harm: goods stolen were of significant economic or commercial or sentimental or personal value to the victim, the theft caused a significant degree of harm or loss to victim, the offence involved damage to the building or anything in it; and
- (e) Limited harm: stolen property was of low economic, commercial, sentimental or personal value to the victim, the theft had a limited detrimental impact on the victim, the property stolen is of little or no benefit to the convict, where there was a voluntary restitution to the victim by the convict.

Each of these six categories contains a starting point and a category range for the sentence. Once a convict is placed in a particular category, the judge is bound to start the computation or consideration of their sentence from the prescribed starting point and is required not to exceed the range of sentence for that category. For instance, where a convict is categorised as high culpability and serious harm which is the highest category, the guidelines prescribe a starting point of 90% and sentence range of between 80% and 100%. This means that the judge is required to start his or her determination of the convict's sentence for theft from 90% of the five-years maximum sentence which is 54 months (four years and six months). After applying the starting point, the judge will then consider whether there are aggravating or mitigating factors based on the list of factors stated in the guidelines which may include the following:

- Aggravating Factors: previous conviction, attempt to conceal or destroy evidence, use of weapon in committing the offence, use of violence or threat of violence, victim is vulnerable, preventing victim or witnesses from cooperating with investigation;
- Mitigating Factors: no previous conviction (first offender), guilty plea, show of remorse, no premeditation, good character, offence motivated by altruistic purpose.

Where there are aggravating circumstance, the judge may make an upward adjustment and impose as high as 100% of the sentence which is 60 months (five years) and where there are mitigating circumstances, the judge may make a downward adjustment and impose as low as 80% of the sentence which is 48 months (four years). The judge is not permitted to impose less than the prescribed minimum for each category or more than the prescribed maximum for the category.

Similarly, where the judge has categorised the offence under low culpability and limited harm which is the lowest category, the guidelines prescribe a starting point of 25% and sentence range of between fine/non-custodial sentence and 30% of the maximum sentence. This means that the judge is required to start their determination or computation of the convict's sentence for theft from 25% of the prescribed maximum punishment which is 15 months (one year and three months). Where there are aggravating circumstances, the judge may make an upward adjustment and impose a sentence as high as 30% of the sentence which is 18 months (one year and six months) and where there are mitigating circumstances, the judge may make a downward adjustment and impose a sentence as low as fine or other non-custodial measures. The judge, however, is mandated to impose a non-custodial sentence where there are multiple factors demonstrating low culpability and limited harm in addition to multiple mitigating factors or the presence of a guilty plea.

The same principles with the exception of non-custodial sentences, apply to all the other categories in determining the appropriate sentence for a convict in a fair, consistent and predictable manner.

The procedure and considerations described above are essentially similar to what is applicable in the UK as contained in the Theft Offences Definitive Guideline 2016, except that there are three categories of culpability (rather than two)<sup>63</sup> and four categories of harm (rather than three) which are all based on the value of the goods stolen and the consideration of additional harm.<sup>64</sup> Nevertheless, all categories contain starting points and category ranges<sup>65</sup> which are the basic harmonising factors in ensuring consistency, parity and predictability.

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<sup>63</sup> High culpability, medium culpability and lesser culpability.

<sup>64</sup> Category 1-Very high value goods stolen (above £100,000) or high value with significant additional harm to the victim; Category 2-High value goods stolen (£10,000 to £100,000) and no significant additional harm or Medium value with significant additional harm to the victim or others; Category 3-Medium value goods stolen (£500 to £10,000) and no significant additional harm or Low value with significant additional harm to the victim or others; Category 4-Low value goods stolen (up to £500) and little or no significant additional harm to the victim or others.

<sup>65</sup> The actual sentences prescribed by sentencing guidelines as starting point and category ranges differ according to jurisdictions to reflect their sentencing priorities.

## VIII SENTENCING OF CHILDREN

As previously discussed, the applicability of sentencing guidelines, including the conventional sentencing regime, is not extended to children, defined as individuals below 18 years of age. The adjudication of cases involving children in conflict with the law is governed by the Child Rights Act 2003 (CRA) which is currently operative in all states of the federation.

A synthesis of the guiding principles within these laws underscores the paramount importance of the child's best interest in determining disposition orders. Custodial or institutional measures are mandated to be invoked only as a last resort and for the minimum duration feasible. The court is empowered to prescribe such measures exclusively in cases of serious offences involving violence against another person or when the child has persistently committed other grave offences, and there exists no alternative response that ensures public safety.

Similar to the ACJA, the CRA comprises only general provisions and guidelines pertaining to disposition orders (sentencing) for children. Adhering to these overarching principles alone is likely to yield outcomes comparable to those observed under the ACJA/ACJL regime, unless specific guidelines are established to ascertain appropriate disposition orders for individual cases.

Ongoing endeavours are underway to institute disposition guidelines for family courts in the Federal Capital Territory, aimed at mitigating disparities in this context. Simultaneously, there is a call for jurisdictions (states) that have adopted the CRA to formulate adjudication guidelines specifically concerning disposition orders, thereby fostering consistency and fairness in the treatment of juvenile offenders.

## IX CONCLUSION

Sentencing is a matter of the utmost gravity and demands a judicious approach.<sup>66</sup> As articulated by His Lordship, Idoko, J, in the case of *Onyilokwu v COP*:<sup>67</sup>

*The stage of sentencing in criminal proceedings calls for the interplay of ratiocination, human touch, and an appreciation of the pulse of the convict and the public. It is not an occasion where, by acting on a hunch, the judge merely looks at the maximum*

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<sup>66</sup> This much was acknowledged by the Court of Appeal in *Obazee v State* (2019) LPELR-48288 (CA), when Her Lordship, Nwosu-Iheme, JCA, stated that: 'Sentencing is a very serious business and the future of a human being at that moment is dependent on the sentencing. Sentencing should therefore be very clear, unambiguous and very specific. We who sit in judgment over others should therefore take sentencing very seriously and give it the maximum attention which it deserves.'

<sup>67</sup> (1981) 2 NCR 49.

*punishment provided for the offence and apportioned out what he thinks he should give to the convict. The maximum punishment is just a guide, and the fact that the court is not straight-jacketed by the provision of a minimum sentence is a good reminder that the legislature has given the court enough amplitude in which to operate. This necessitates that sentencing must be administered within the known principles if it is not to be taken as a sport or as an unbridled stage in criminal proceedings.*

This article has demonstrated the indispensability of sentencing guidelines to ensure uniformity and equity in sentencing. The adoption of such guidelines is pivotal in addressing the issue of sentencing disparities by the courts. This methodology ensures much-needed consistency and transparency in the judicial system, guaranteeing that analogous crimes receive commensurate punishments regardless of the individual involved.

Through the incorporation of sentencing guidelines, the judiciary can actively contribute to the establishment of a legal system characterised by fairness and equality. The discussion within this article has highlighted the specific measures undertaken in Nigeria to rectify sentencing disparities through the implementation of sentencing guidelines. Additionally, it has elucidated the fundamental provisions of a model or typical set of guidelines in Nigeria, emphasising their potential to engender predictable and fair sentencing.

The imperative for the development of sentencing guidelines tailored to the specific circumstances of South Africa is underscored. Such guidelines would furnish judges with a structured framework to consider various factors when determining an appropriate sentence. By articulating clear and transparent guidelines, the objective is to foster more consistent and equitable sentencing practices, thereby contributing to the fair and just administration of the criminal justice system in South Africa.