

RESEARCH ARTICLE

# Sentencing Reform in Tanzania: Moving from Uhuru to Ubuntu?

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## Abstract

The scholarly literature on sentencing reform has largely overlooked the African continent. The paucity of legal scholarship is particularly striking with respect to Tanzania, one of Africa's largest and most populous countries. This article explores the first significant sentencing reform in Tanzania's history. In 2020, the Tanzanian judiciary issued a comprehensive set of sentencing guidelines for courts to follow. Until this point, sentencing was a highly discretionary stage of the criminal process, and the Tanzanian penal code offered very little guidance with respect to the exercise of that discretion. After providing a brief summary of the new sentencing regime, we explore the innovative guidance contained in the reforms. In the conclusion we discuss the extent to which the Tanzanian reforms reflect core African values of Ubuntu, or more specifically in the case of Tanzania, Ujamaa, the philosophy popularized by Tanzania's first president, Julius Nyerere.

**Keywords:** Sentencing reform; sentencing in Tanzania; restorative justice; Ujamaa; Ubuntu

## Introduction

The scholarly literature on sentencing (and sentencing reform) has grown rapidly in recent years. However, almost all of this work has explored a small number of western jurisdictions, particularly the United States, England and Wales, and Germany.<sup>1</sup> Regrettably, scholars have overlooked important developments across the African continent. Moreover, the limited African scholarship has focused on South Africa,<sup>2</sup> and far less is known about neighbouring countries in Southern and Eastern Africa.<sup>3</sup> The paucity of legal scholarship is particularly striking with respect to Tanzania, one of Africa's largest and most populous countries. This said, a wealth of important scholarship is available in the library repository of the University of Dar es Salaam School of Law and the repository of the Open University of Tanzania. Unfortunately, only some of these research publications are available online.

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1 For recent scholarship on these jurisdictions, see K Ambos (ed) *Sentencing: Anglo-American and German Insights* (2019, Göttingen University Press); M Tonry (ed) *Sentencing Policies and Practices in Western Countries: Comparative and Cross-National Perspectives* (2016, Oxford University Press); C Spohn and P Brennan (eds) *Handbook on Sentencing Policies and Practices in the 21st Century: Corrections and Sentencing* (2019, Routledge); and J Roberts and L Harris "Sentencing guidelines outside the United States" in C Spohn and P Brennan (eds) *Handbook on Sentencing Policies and Practices in the 21st Century: Corrections and Sentencing* (2019, Routledge) 68.

2 See for example S Terblanche "Sentencing in South Africa" (2020) 33 *South African Journal of Criminal Justice* 4.

3 J Roberts and S Terblanche "Sentencing practice, policy, and reform in Southern and East Africa" (2020) 43 *South African Journal of Criminal Justice* 1. For the first collection of essays exploring sentencing in Southern and Eastern Africa, see the June 2020 special issue of the *South African Journal of Criminal Justice*.

Tanzania is a multicultural, multilingual, democratic society which warrants far more attention from legal scholars. In 2020, the United Republic of Tanzania adopted its first major sentencing reform. The initiative – originating in the judiciary rather than the legislature – consists of an integrated package of changes to the highly discretionary sentencing regime in operation since the country gained its independence. Now is a timely moment to examine sentencing in Tanzania, as 2021 marked the 60th anniversary of independence: the former Tanganyika attained its independence (‘Uhuru’) from the United Kingdom in 1961, and union with Zanzibar took place in 1964, thereby creating the United Republic of Tanzania. The year 2021 also marked 50 years since publication of the first – and so far only – legal sentencing text in this jurisdiction, Slattery’s *A Handbook on Sentencing in Tanzania*.<sup>4</sup> The significance of this volume for sentencing in Tanzania is evidenced by the fact that it is one of only three sources cited by the *Tanzania Sentencing Manual for Judicial Officers* (“TSM”).

At the heart of the reform is a sentencing guidelines scheme. Tanzania is therefore the latest African jurisdiction to adopt guidelines for courts to apply at sentencing. The TSM contains a comprehensive and integrated set of reforms, including offence-specific guidelines for courts.<sup>5</sup> These are the first formal sentencing guidelines in this country. Indeed, as the country’s Chief Justice noted, it is “the first practical guidance on sentencing to be provided to the courts in Tanzania”.<sup>6</sup> The guidelines are based on those developed in England and Wales over the past decade, but are significantly adapted to the context of courts and judicial culture in Tanzania. Drawing as they do on the accumulated experience of other countries, the Tanzanian guidelines offer a viable model for other African jurisdictions. Unlike those created in other African states, such as Ethiopia or Uganda,<sup>7</sup> the Tanzanian guidelines are more easily adaptable and accordingly more likely to be adopted elsewhere.

### Overview of essay

The first section of this essay summarizes the sentencing regime in Tanzania. We note the main sanctions available to courts and the very limited statutory guidance regarding the purposes and principles of sentencing. The second part discusses the origins and objectives of the recent sentencing reform, while the third section describes and explores the guidelines. Since the Tanzanian guidelines are based on the English guidelines, we make some limited comparisons between the two systems. The TSM notes that it is the “start of the process of improving sentencing in Tanzania and it is envisaged that the guideline will be reviewed from time to time”;<sup>8</sup> the fourth section therefore offers some suggestions to improve the guidelines and identifies several research priorities. We conclude with some brief reflections on the degree to which these reforms are consistent with, or actively promote, indigenous African values.

### The Sentencing Framework in Tanzania

Over 30 years ago, an early analysis of sentencing in Tanzania concluded that “[t]he Law does not provide sufficient guidance on how the courts should proceed with sentencing”.<sup>9</sup> This statement

4 B Slattery *A Handbook on Sentencing in Tanzania* (1971, East African Literature Bureau).

5 The guidelines are contained in Judiciary of Tanzania *Tanzania Sentencing Manual for Judicial Officers* (2020, The Judiciary of Tanzania) (TSM), which states the law as in effect on 31 December 2019.

6 Id at 1.

7 K Molla “Sentencing in Ethiopia: Sanctions, guidelines and reform” (2020) 43 *South African Journal of Criminal Justice* 148; J Kamuzze “From discretionary to structured sentencing in Uganda” (2020) 43 *South African Journal of Criminal Justice* 126.

8 TSM, above at note 5 at 1. The manual further notes at 3 that the document “will not remain stagnant”.

9 N Kimaro *Problems of Sentencing in Tanzania: A Case Study of Dar Es Salaam Magistrates’ Courts* (1990, University of Dar es Salaam).

accurately describes the current state of affairs with respect to sentencing in Tanzania, and underlines the need for greater direction in the form of guidelines. We begin, then, with a brief description of sentencing in this country.

### *Jurisdiction and appellate review*

The jurisdiction of courts to impose sentence is established by the Criminal Procedure Act (Cap 20 RE 2002), which provides under section 298(2) that “[i]f the accused person is convicted, the judge shall pass sentence on him according to law”. The law regulates how sentences are imposed by the courts. The Court of Appeal decided in *Fortunata Fulgence v R* that the trial court has the discretion to determine sentence.<sup>10</sup> At sentencing, the trial court’s principal duty is to assess the aggravating factors which may push the sentence upwards and the mitigating factors which may reduce the sentence.

In most common law jurisdictions, courts apply statutory purposes and principles of sentencing. Section 718 of the Canadian Criminal Code, for example, articulates the *purposes* of sentencing and identifies key *principles* for courts to follow. Sentencing purposes identify the goal the sentence is designed to achieve; sentencing principles regulate the ways in which different sentences are deployed. For example, the proportionality principle requires that the severity of sentences corresponds to the seriousness of crimes for which they are imposed. The traditional sentencing purposes include deterrence, incapacitation, punishment and rehabilitation; the principles include proportionality, parity and restraint. Part 23 of the Canadian code also enumerates important aggravating factors at sentencing. Other jurisdictions provide even more in the way of legislative guidance for sentencers. For example, the Sentencing Law in Israel provides categories and lists of aggravating and mitigating factors, guidance on sentencing procedure and much else.<sup>11</sup>

In contrast to these jurisdictions, courts in Tanzania must sentence offenders without the benefit of guidance from the legislature with respect to the purposes, principles and factors that should be considered and applied at sentencing. No single policy document addresses the issues of sentencing in the country; the only guidance is provided in judicial pronouncements as reflected in scattered case law. Until now, Tanzanian courts have not benefited from a guideline scheme such as those found in many other common law jurisdictions.<sup>12</sup> Schedules to the Criminal Procedure Act<sup>13</sup> and the Minimum Sentences Act<sup>14</sup> respectively provide only limited guidance to magistrates and judges. Finally, the sentencing regime is oriented towards punishment, not offender rehabilitation or restoration, although both latter perspectives are consistent with the country’s traditions. As will be seen, the 2020 reforms provide some redress for this imbalance.

### *The Criminal Procedure Act*

The Criminal Procedure Act (CPA) is the key statute containing a summary of almost all penal statutes that provide for a jail term or fine or both after the offender is found guilty and convicted. Judges and magistrates use the CPA to guide them at sentencing. However, the Act fails to specify any purposes or principles of sentencing, or provide the other kinds of guidance found in sentencing statutes in other jurisdictions. In this respect, Tanzanian courts have been at a disadvantage relative to their counterparts in other countries. Although it is not a codified sentencing principle, the fundamental principle of proportionality between the gravity of the offence and the offender’s degree of

10 Criminal Appeal no 170 of 2007 (unreported).

11 J Roberts and O Gazal-Ayal “Sentencing reform in Israel: An analysis of the statutory reforms of 2012” (2013) 46 *Israel Law Review* 455.

12 Roberts and Harris “Sentencing guidelines”, above at note 1 at 68.

13 Act 9 of 1985 as amended.

14 Act 1 of 1972, cap 90 as amended periodically.

criminal responsibility is respected by courts in Tanzania. Yet courts are also left with discretion to determine the appropriate sentence depending on the circumstances of a particular case.

### *Sentencing options in Tanzania*

The sentences available to courts in Tanzania include probation;<sup>15</sup> fines; short-term incarceration; suspended sentences (that only take effect if the offender fails to meet certain conditions); restitution;<sup>16</sup> community service; and drug and alcohol treatment for minor crimes. More severe sentences include long-term incarceration; life imprisonment; the death penalty<sup>17</sup> (for capital offences); and mandatory minimum sentences. Each category of court has its jurisdiction with respect to the imposition of a sentence. For instance, the District Court and courts of resident magistrates cannot impose a sentence of over ten years' imprisonment. Similarly, certain offences carry minimum sentences as a result of the Minimum Sentences Act.<sup>18</sup> For example, theft of property owned by the government or a public corporation is punishable by imprisonment of not less than five years. In such cases, the court has no authority to impose a term of imprisonment below five years. This Act has come under criticism from academicians and jurists for taking away the necessary discretion of the courts at sentencing. If the statute specifically prescribes a fine as an alternative to imprisonment, courts will usually offer the accused the option of a fine and / or imprisonment in the event of the accused defaulting on payment of the fine. In addition, the value of the fine imposed must reflect the offender's ability to pay.

Corporal punishment is imposed for only a few very serious offences, such as rape.<sup>19</sup> District and resident magistrates can impose corporal punishment (up to twelve strokes) only as specified in section 170(2) CPA. Any additional strokes have to be confirmed by the High Court,<sup>20</sup> as specified in sections 168(4) and 171(1) CPA. The Corporal Punishments Act provides other conditions for the imposition of this sentence.<sup>21</sup> There is no limit on the compensation that may be awarded; generally, however, courts rarely award compensation in criminal cases. The imposition of other sentences may also be appropriate. For instance, the court may order that stolen property be restored to the owner, as noted in section 357(a) CPA. In other cases (such as traffic offences), the court may confiscate the individual's driving licence.<sup>22</sup>

Another prominent sentencing option is the conditional or unconditional discharge (found in section 38(1) of the Penal Code).<sup>23</sup> Discharges may be imposed if the offence was trivial. The court may discharge the accused unconditionally or may release the accused on condition that s/he should not commit further offences for a particular period. Suspended sentences resemble a conditional discharge. Section 326(1) CPA<sup>24</sup> provides that when a person is convicted of any offence (other than an offence specified in the Sixth Schedule to the Minimum Sentences Act) and a previous conviction is proved against the accused, the court may impose imprisonment. However, the whole order or any part of it may be suspended for up to three years.

Probation orders are designed to promote the rehabilitation of offenders. A probation order places a person under the supervision of a probation officer, and all courts may issue probation orders. The eligibility for a probation order is provided in section 3 of the Probation Offenders Act. This provision states that after convicting a person of an offence other than a crime scheduled

15 Probation Offences Act, sec 4, cap 17.

16 CPA, sec 348.

17 Penal Code, sec 25(1) and sec 26, cap 16.

18 Act 1 of 1972.

19 Cap 16 RE 2002. Amended by Sexual Offences Special Provisions Act of 1998.

20 Cap 20 RE 2002.

21 Cap 16 RE 2002.

22 Road Traffic Act 12 of 2002 as amended by Act 21 of 2016 revised and amended by Act 18 of 2018.

23 Cap 16 RE 2002.

24 Cap 20 RE 2002.

under the Minimum Sentences Act, the court should consider the character of the offender, his or her family background, health status, the nature of the offence, and any other mitigating circumstances before imposing a probation order.

### Summary

In light of the wide range of sentencing options – and the lack of statutory guidance as to how these options may be deployed – a lack of consistency across Tanzanian courts appears inevitable. Moreover, the mandatory sentencing provisions are unsatisfactory because they undermine individualized justice.<sup>25</sup> Mandatory sentences shift discretion from judges to the police and prosecutors, who determine the appropriate charges and hence the penalty imposed. Sentencing guidelines, appropriately constructed to permit sufficient judicial discretion, offer a way forward.

## Origins of the Tanzanian Sentencing Guidelines

### Sentencing guidelines in other jurisdictions

Originally proposed in Victorian England,<sup>26</sup> sentencing guidelines were first introduced in several US states in 1980 and have since proliferated across that country.<sup>27</sup> The most popular model of guidance in the US is the two-dimensional sentencing grid found in Minnesota, Pennsylvania and other states as well as at the federal level.<sup>28</sup> Most US guidelines incorporate two primary dimensions (offence seriousness and criminal history). Under this arrangement, offenders receive a criminal history score based on the number and nature of prior convictions. The sentence imposed is then determined by the seriousness level of their offence and their criminal history score. For example, under the Minnesota guidelines, an offender may have been convicted of an offence at seriousness level 8 and with a criminal history score of 2; the grid will then provide a sentence range for this combination. In this example, the offender is presumed to be committed to prison for a term no less than 58 and no more than 81 months. The Minnesota guidelines provide very little additional guidance on sentencing factors or other considerations, such as sentencing for multiple convictions and plea-based sentencing discounts. Despite its popularity within the US, the grid-based approach has proven an unsuccessful penal export; to date, no other country has adopted such a two-dimensional matrix structure for its guidelines.<sup>29</sup> The principal alternative to the US approach to guidance is found in England and Wales, where sentencing guidelines have been evolving since 2004. In addition, the English offence-specific approach to guidelines has now been adopted (and adapted) in a number of other jurisdictions, including (now) Tanzania.

### Origins of the Tanzanian guidelines

The TSM notes that the guidelines follow “good practice ... observed from other jurisdictions”,<sup>30</sup> and indeed the Tanzanian guidelines are adapted from the sentencing guidelines devised and implemented in England and Wales.<sup>31</sup> Two key differences between the systems relate to the legal status

25 M Tonry *Doing Justice, Preventing Harm* (2020, Oxford University Press) at 11.

26 See J Roberts “The evolution of sentencing guidelines: Comparing Minnesota and England and Wales” (2019) 48 *Crime and Justice* 187.

27 R Frase and K Mitchell “Sentencing guidelines in the United States” in Spohn and Brennan (eds) *Handbook*, above at note 1 at 43.

28 R Frase “Forty years of American sentencing guidelines: What have we learned?” in M Tonry (ed) *American Sentencing* (2019, University of Chicago Press) 79.

29 Roberts and Harris “Sentencing guidelines”, above at note 1 at 68.

30 TSM, above at note 5 at 1.

31 The English guidelines can be found on the Sentencing Council’s website, available at: <<https://www.sentencingcouncil.org.uk/research-and-resources/>> (last accessed 28 July 2022). For discussion, see A Ashworth and J Roberts “The origins

and origins of the guidelines. First, the guidelines in England and Wales rest on a clear statutory foundation. The Coroners and Justice Act 2009 defines the guidelines, creates the Sentencing Council as an independent statutory body, and specifies its duties, as well as courts', with respect to the guidelines. Second, the guidelines are administered by the Sentencing Council.

Unlike England and Wales, Tanzania does not operate a Sentencing Council, and there is no statutory basis for the guidelines or the other elements of the TSM. The guidelines were devised and issued by the Tanzanian judiciary. The TSM notes that the guidelines have been created to "assist the courts at every level to adopt sentences which are consistent, proportionate, fair and just".<sup>32</sup> This statement emphasizes the importance of proportionality in sentencing. Although the Tanzanian penal code does not explicitly articulate proportionality as a sentencing principle, the appellate courts have underlined the importance of this near-universal principle. The TSM explicitly identifies three purposes of the reform, namely to:

- promote transparency and predictability in the administration of justice;
- promote public confidence and awareness of the sentencing process;
- minimize the abuse of judicial discretion in the sentencing process.

It is important to recognize that the TSM provides much more than a package of offence-specific guidelines for the most common offences. The manual also contains a number of other elements, including guidance on key procedural elements of sentencing; a flow chart to guide sentencers and ensure a common approach to the sentencing exercise; advice on the imposition of sentencing options available to courts; and a section discussing the distinct approach to sentencing juvenile offenders. (Although we do not discuss it here due to space constraints, the guidance regarding the sentencing of child offenders (Appendix D of the TSM) is one of the most innovative elements of the manual.) The TSM also contains specific examples throughout the text to guide courts in the application of its constituent elements. The TSM therefore offers more detailed (and practical) guidance for courts than analogous sentencing manuals in other jurisdictions. It incorporates elements of guideline manuals such as those employed across the US as well as sentencing handbooks in jurisdictions without guidelines, such as Trinidad and Tobago.<sup>33</sup> A single article cannot review the manual's entire contents; accordingly, this article focuses on the most critical component of the package of guidance, namely the offence-specific guidelines.

Finally, we note an important commonality between sentencing in Tanzania and England and Wales that justifies the use of guidelines rather than a more discretionary regime. Laypersons play a key role at sentencing in both jurisdictions. In England and Wales, over 90 per cent of all sentences are imposed in the magistrates' courts by lay magistrates. In Tanzania, lay assessors assist courts of first instance, sitting with a magistrate or judge. Lay participants in both countries lack the training or experience of a legal professional, and this may give rise to concern about principled decision-making, fairness and consistency at sentencing.<sup>34</sup> Jurisdictions with a high degree of lay participation in sentencing are particularly likely to benefit from a structured sentencing system involving guidelines. Professional judges with considerable experience as advocates and judges

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and evolution of sentencing guidelines in England and Wales" in A Ashworth and J Roberts (eds) *Sentencing Guidelines: Exploring the English Model* (2013, Oxford University Press) 1. Several other African jurisdictions have also adopted and adapted the English guidelines. See K Yilma "Sentencing in Ethiopia: Sanctions, guidelines and reform" (2020) 33 *South African Journal of Criminal Justice* 148; J Okoth "The pursuit of consistency in sentencing: Exploring Kenya's sentencing guidelines" (2020) 33 *South African Journal of Criminal Justice* 106.

32 TSM, above at note 5 at 2.

33 Available at: <[http://www.ttlawcourts.org/jeibooks/books/SHB2016\\_new.pdf](http://www.ttlawcourts.org/jeibooks/books/SHB2016_new.pdf)> (last accessed 3 August 2021).

34 N Kilekamajenga *Restorative Justice: A New Approach to Contemporary Criminal Justice in Tanzania* (2018, University of Pretoria) at 249.

will be less likely to need guidance, and accordingly will be more resistant to following guidelines at sentencing.

### Judicial compliance and the guidelines

One key question relates to the legal status of the Tanzanian guidelines: are they binding on courts or merely advisory, as in some US regimes? Systems of guidance will be successful in promoting principles such as proportionality only if courts apply the guidelines faithfully. Proportionality requires that the severity of assigned sentences should reflect the seriousness of the crimes for which they are imposed: more serious crimes should attract more severe penalties. The principle derives from the retributive sentencing philosophy, as advocated by scholars such as Andrew von Hirsch and Andrew Ashworth.<sup>35</sup> A purely advisory scheme is unlikely to contribute more than the limited guidance emanating from the appellate courts. Research on purely advisory guidelines in the US has shown that they fail to change sentencing practices as effectively as presumptively binding schemes; guidelines need to be enforceable and need to be enforced.<sup>36</sup> Judicial compliance is therefore necessary to achieve significant change.

In England and Wales, the statutory compliance requirement with respect to the guidelines is found in section 125(1) of the Coroners and Justice Act 2009, which states that:

- “(1) Every court –
- (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and
  - (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of that function, unless the court is satisfied that it would be contrary to the interests of justice to do so.”

There is no such statutory duty on courts in Tanzania; the authority of the guidelines derives from their origins in the senior judiciary. That said, the TSM adopts robust language to encourage judicial compliance: “In sentencing persons for an offence which has a specific guideline, a judicial officer shall comply with the guidelines.”<sup>37</sup> The manual further states that if a court “considers that the facts of a particular case merit [the court] deviating from the guidance, they must expressly record the reasons”.<sup>38</sup> Thus, although the guidelines are not statutorily binding, it seems likely that courts will follow the guidance provided by the TSM. One of the critical questions for researchers in coming years will be to determine the degree of judicial compliance with the guidelines. We return to the issue of compliance in the conclusion of this essay.

### Structure of the Tanzanian Guidelines

As with the English approach (and unlike the US schemes), the Tanzanian guidelines are offence-specific: each offence has its own bespoke guideline. This approach is better than the grid-based model, which applies across all crimes, because many sentencing factors are offence-specific, and the guidance can focus on the unique characteristics of particular crimes. However, courts need guidance on more than simply the sentencing factors and sentence ranges appropriate for specific offences.

35 A von Hirsch and A Ashworth *Proportionate Sentencing* (2005, Oxford University Press); A von Hirsch *Doing Justice* (1976, Hill and Wang).

36 G Edwards, S Rushin and J Colquitt “The effects of voluntary and presumptive sentencing guidelines” (2019) 98 *Texas Law Review* 1 at 65; M Tonry *Sentencing Matters* (1996, Oxford University Press).

37 TSM, above at note 5 at 3, emphasis in original.

38 *Ibid.*

In recognition of this, the Sentencing Council of England and Wales has also issued a series of generic guidelines which supplement the offence-specific ones – for example, on the appropriate reductions for a guilty plea as well as the ways of sentencing offenders with multiple convictions.<sup>39</sup> In England and Wales, a court sentencing an offender who has pleaded guilty to multiple offences will have to consult more than simply the guideline specific to the principal or “lead” offence of conviction. It is possible that in a complex case, a sentencing court will have to consult several relevant guidelines.

In contrast, the TSM incorporates guidance regarding these matters directly within the offence-specific guidelines. The guidelines are therefore completely self-contained. The Tanzanian approach greatly simplifies the sentencing exercise in this regard, and as a result judicial compliance with the new guidelines is likely to be enhanced. This innovative approach, integrating forms of guidance, is likely to prove attractive to other jurisdictions contemplating adopting guidelines, and is one of the advances that the TSM makes upon guidelines developed elsewhere.

### *Example of a Tanzanian sentencing guideline*

We illustrate the guidelines by discussing the offence of “Assault Causing Grievous Harm”.<sup>40</sup> This offence carries a maximum sentence of seven years, and the Tanzanian guideline for this offence, presented in the [Appendix](#), contains nine substantive steps, the same number as its English counterpart. However, an important difference is established at Step 1. Most English guidelines contain three levels of harm and three of culpability;<sup>41</sup> courts assign the case to one level of harm and one of culpability, and then proceed to the next step of the guidelines. This means that courts must employ two sets of three levels of harm and culpability. The TSM guidelines are simpler in structure, and it is significant that the Tanzanian structure has now been followed in other jurisdictions.<sup>42</sup>

#### *Steps 1 and 2*

Step 1 of the guideline reminds the court of the statutory restrictions on sentencing this offence. At Step 2, a court must assign the case to one of three levels of offence seriousness. The TSM identifies three key elements of seriousness: the gravity of the offence; the offender’s culpability for the offence; and “the extent of harm, injury or damage that was caused, intended or might foreseeably have been caused to the victim or society”.<sup>43</sup> Courts employ the factors provided in the guideline to assign the case to one of the three levels of seriousness. There are two sources of guidance to assist a court in determining the appropriate level of seriousness. First, the TSM provides “generic” definitions of low, medium and high seriousness, along with a reminder that the level of seriousness

39 Sentencing Council of England and Wales *Offences Taken into Consideration and Totality Definitive Guideline* (2017, Sentencing Council of England and Wales) at 5, available at: <<https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/totality/>> (accessed 4 August 2022).

40 Tanzania Penal Code, sec 225.

41 The assault guideline issued in 2011 adopts a different approach which combines harm and culpability into three levels of seriousness. However, this format has been criticized by practitioners. In guidelines issued since then, the Council has moved to the two-dimensional model with three levels of harm and three levels of culpability, as discussed here. The Council has announced its intention to revise the original assault guideline and is likely to replace it with the two independent dimensions found in other guidelines; see for example the guideline for robbery. All English guidelines are available at: <<https://www.sentencingcouncil.org.uk/>> (last accessed 8 January 2022).

42 The Scottish Sentencing Council has issued a guideline which follows this simpler structure; see <<https://www.scottish-sentencingcouncil.org.uk/news-and-media/news/sentencing-process-guideline-approved/>> (last accessed 23 September 2021).

43 TSM, above at note 5 at 19. The language is based on section 63 of the Sentencing Act 2020 in England and Wales, which states that “[w]here a court is considering the seriousness of any offence, it must consider (a) the offender’s culpability in committing the offence, and (b) any harm which the offence (i) caused, (ii) was intended to cause, or (iii) might foreseeably have caused”.



should correlate with the degree of severity of the sentence imposed.<sup>44</sup> Courts thus receive a timely reminder of the proportionality principle at sentencing.

Second, the offence-specific guideline for this crime provides case characteristics to assist in placing the case in the appropriate level of seriousness. For example, if one or more of eight “high harm” factors is present, the court should assign the case to the high-seriousness category. Two factors define medium seriousness (“causing temporary disability” and “no use of weapon”). Low seriousness is defined by a single factor, namely “applying excessive force in claim of right or self defence”. As with the English guidelines, each level of seriousness carries its own sentencing range and starting-point sentence; for example, the medium-seriousness level has a five-year starting point and a range of three to five years’ custody.

The use of only three categories of seriousness is likely to achieve greater consistency than the more complex six-cell structure found in most English guidelines (three levels of harm and three levels of culpability). On the other hand, the six-cell configuration may be more effective at achieving distinctions between cases of different harm and / or culpability. English courts will be able to make more fine-grained distinctions between offenders. Which approach to providing guidance is superior? As with so many decisions relating to guideline structures, it is a question of balance.

In our view, the approach taken in Tanzania is preferable, in part because it is simpler and more likely to appeal to sentencers who might reject a more complex or mechanistic structure. The vast majority of sentences in England and Wales are imposed in the magistrates’ courts, and magistrates were applying guidelines for many years before the Council’s new guidelines were introduced. Accordingly, there was less resistance to the new guidelines. Judges in Tanzania have long operated with only limited appellate guidance; the more complex two-dimensional guideline would likely have triggered judicial resistance, with a deleterious effect on compliance rates.

### *Step 3: Consider relevant aggravating and mitigating circumstances*

Having selected a seriousness range, the court considers all relevant mitigating and aggravating factors which “may increase or decrease the sentence within that range”.<sup>45</sup> As with its English counterpart, the guideline provides examples of both types of factors. In addition, the TSM elsewhere enumerates the most common mitigating and aggravating factors that apply across a wide range of cases. These include common factors such as premeditation, prior convictions, and any mental or physical health conditions experienced by the offender. Once again, having all this information in the same guideline facilitates the judicial task at sentencing; in England and Wales courts must consult a number of other guidelines which address issues such as multiple offence sentencing, reductions for a guilty plea, the sentencing of offenders with a mental disorder and the use of the principal sanctions. Finally, the lists of sentencing factors provided by the guidelines are not exhaustive. Advocates will identify other relevant factors in their submissions at sentencing.

### *Step 4: Consider the offender’s personal circumstances and other factors*

Some practitioners have criticized the English guidelines for undermining personal mitigation at sentencing. Factors related to personal mitigation are located within the general mitigating factors, and it has been suggested that this diminishes the importance of this key element of sentencing.<sup>46</sup> In contrast, consideration of personal mitigation constitutes a separate step in Tanzania, and this should ensure it retains its central role at sentencing. Step 4 directs sentencers to “consider the accused’s personal circumstances, and other individual factors relevant to sentence”.<sup>47</sup> The factors

44 Eg “High seriousness – these are offences at the highest end of the scale of seriousness for the offence. They must attract the highest level of sentence.” TSM, above at note 5 at 19.

45 Id at 53.

46 J Cooper “Nothing personal: The impact of personal mitigation at sentencing since creation of the Council” in Ashworth and Roberts (eds) *Sentencing Guidelines*, above at note 31 at 157.

47 TSM, above at note 5 at 54.

enumerated at this step include the accused's age and health, any physical or mental disability, and their level of income. Once again, in addition to the factors listed in the offence-specific guideline, the TSM also contains personal circumstances that apply across all cases.<sup>48</sup> By highlighting personal mitigation, the Tanzanian approach is likely to be more effective at ensuring the offender's individual circumstances are thoroughly considered.

*The impact of sentences on third parties.* This step of the guidelines also includes an important consideration absent from the guidelines in England and Wales, and, to our knowledge, from any other sentencing guidelines. There is growing awareness around the world of the adverse consequences that sentences may have upon innocent third parties – the offender's dependents. These may include vulnerable children, elderly relatives or other individuals for whom the offender is the primary carer. Certain sanctions – most notably imprisonment – create additional hardships for these dependents. Since third-party impact is not generally considered relevant to the components of a proportional sanction (crime seriousness and offender culpability), the impact of the sentence has historically been overlooked. However, at this step of its guidelines the TSM directs courts to consider “the family circumstances of the accused and the likely impact of the sentence on dependents [of the offender]”.<sup>49</sup> This direction takes a clear step towards ensuring that the interests of the offender's dependents are taken into account when determining sentence, and should result in a reduction in the use of custody for offenders caring for dependents. The guidelines in England and Wales contain the mitigating factor of “sole or primary carer for dependent relatives”, but the wording in the TSM is clearer and draws the court's attention to the question of the impact of any sentence on innocent third parties.

Application of these factors will modify still further the sentence based on the starting point adopted at Step 2. This step also requires a court to account for any other offences for which the offender is being sentenced. The guideline directs courts to consider the “totality” principle, according to which the total sentence(s) must reflect the totality of offending. This approach is consistent with the appellate jurisprudence on this issue in Tanzania.

*Multiple convictions.* Multiple sentences imposed for multiple crimes should, according to the guidelines, normally be served concurrently. A trial court should only impose consecutive sentences in “exceptional circumstances”.<sup>50</sup> Beyond reference to case law, the TSM does not enumerate the circumstances which might justify the use of consecutive rather than concurrent sentences. This issue is one where greater guidance may be needed: sentencing multiple crimes complicates the sentencing exercise, and if courts diverge in the extent to which they inflate sentences to reflect multiple convictions or in their use of concurrent versus consecutive sentences, consistency will decline. The English Sentencing Council has issued a stand-alone guideline providing advice on this issue,<sup>51</sup> although it has been criticized for failing to provide sufficient guidance.<sup>52</sup> It nevertheless contains more than the TSM, which, for example, only identifies a number of circumstances where consecutive offences “will ordinarily be appropriate”.<sup>53</sup> In our view, the issue of sentencing multiple crimes is one for which the TSM should provide greater direction.

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48 Id at 21.

49 Id at 1.

50 Id at 22.

51 Available at: <<https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/reduction-in-sentence-for-a-guilty-plea-first-hearing-on-or-after-1-june-2017/>> (last accessed 12 January 2022).

52 Ashworth and Wasik assert that the current guideline “says nothing about the proper role of the totality principle and gives no clues as to how the court should assess totality in any particular case”; A Ashworth and M Wasik “Sentencing the multiple offender” in J Ryberg, J Roberts and J de Keijser (eds) *Sentencing Multiple Crimes* (2017, Oxford University Press) 211 at 220.

53 TSM, above at note 5 at 7.

### *Step 5: Establish a pre-plea reduction sentence*

The TSM again departs from the English guidelines at this step. After reminding the court of the preceding steps taken, the TSM introduces a new consideration: “the views of the victim’s family”. (This issue is addressed in more detail later in this essay.) In addition, this step also requires a court to give reasons for the sentence being imposed.

### *Step 6: Apply sentence reduction for any guilty plea(s)*

All common law jurisdictions award sentence reductions to offenders who plead guilty.<sup>54</sup> Step 6 formalizes this reduction by noting that a court should award the appropriate level of reduction consistent with a sliding scale based on the timing of the plea. Early pleas should attract a reduction of up to one-third, and the reduction should decline “the closer it was given to trial”.<sup>55</sup> This sliding-scale approach to reductions is also consistent with the advice in the English guidelines and other common law countries.<sup>56</sup> The difference, as noted, is that the guidance on the magnitude of the reduction appears directly in the Tanzanian guideline; in England and Wales a separate stand-alone guideline regulates plea-based sentence reductions. In our view, incorporating this guidance directly into each guideline is more likely to achieve greater consistency, and represents another improvement over the English guidelines.

### *The remaining steps of the guideline*

The three remaining steps require a court to pronounce sentence in open court and provide reasons for the sentence (Step 7); to deduct from any custodial sentence time served in custody pre-trial (Step 8); and to issue any ancillary orders relating to court costs, compensation, forfeiture, reparation and restitution (Step 9). These steps replicate similar stages in the English guidelines. The requirement to give reasons is a particularly important step in order to promote transparency and to ensure that defendants, victims and other interested parties are aware of the factors contributing to sentencing decisions.

## **Proposals for Reforming the Guidelines**

While in our view the guidelines represent a very important step towards more consistent and principled sentencing in Tanzania, a number of elements require further consideration and possibly amendment.

### *Starting-point sentences and sentence ranges*

Almost all guidelines – whether offence-specific or grid-based – provide courts with sentence ranges and starting-point sentences. The English guidelines provide starting-point sentences for all sentence ranges. Under the Minnesota guidelines and other US sentencing grids, the midpoint of the grid’s sentence ranges serves as the starting point.<sup>57</sup> Both elements (starting points and sentence ranges) are vital to promote consistent and proportionate sentencing. Without a defined sentence range, courts will impose sentences based upon ranges which will differ from judge to judge. Without a defined starting point, individual judges will start from different sentences, and will end by imposing custodial terms of very different durations. Starting-point sentences are, in the

54 J Gormley, J Roberts, J Bild and L Harris *Sentence Reductions for a Guilty Plea* (2021, Sentencing Academy).

55 TSM, above at note 5 at 54.

56 J Roberts and E Baker “Sentencing structure and reform in common law jurisdictions” in S Shoham, O Beck and M Kett (eds) *International Handbook of Penology and Criminal Justice* (2008, Taylor and Francis) 551 at 567.

57 See <<https://mn.gov/sentencing-guidelines/>> (last accessed 12 January 2022).

words of Mbori, “invaluable for the actualisation of uniformity, impartiality, accountability and transparency”.<sup>58</sup>

The English guidelines set their starting-point sentences at, or just below, the midpoint of the associated sentence range. For example, the highest level of seriousness in one common guideline carries a sentence range of one to three years’ imprisonment and a starting-point sentence of 18 months. The location of the starting point permits a court to move up towards the ceiling of the range as well as down to the floor. For reasons which are unclear, the starting points in the Tanzanian guidelines occupy the top of the range. Thus, the sentence range for the high-seriousness level of the grievous harm guideline is five to seven years and the starting point is seven years. The starting points for the other two levels are also the ceiling of the respective sentence ranges. As a result, courts have no discretion to move above the starting point for the most serious category (since the guideline ceiling is also the statutory maximum). For the lesser levels, a court can only move above the starting point to reflect aggravating circumstances by changing seriousness categories. In short, the guideline structure places a cap on the effect of aggravating circumstances and requires a court to start the sentencing exercise from a position of maximal severity.

This feature of the guidelines should be amended. Compared to other countries in Southern Africa, Tanzania has a relatively low imprisonment rate and prison population.<sup>59</sup> However, the country’s prisons are currently overcrowded; the most recent statistics revealed that occupancy level in the prison system exceeded capacity and there are concerns about conditions in institutions.<sup>60</sup>

The African Court on Human and Peoples’ Rights (AFCHPR), located in Arusha, Tanzania, has jurisdiction over all human rights abuses on the continent, including prisoners’ appeals relating to Tanzania. Amnesty International notes that Tanzania accounts for approximately 40 per cent of all cases handled by the court. However, in November 2019 Tanzania (under the late President John Pombe Magufuli) signed a notice of withdrawal from the declaration which had been made on 14 November 2019 under Article 34(6) of the African Court Protocol; this notification was sent to the African Union on 21 November 2019. The Tanzanian government’s withdrawal of the right of individuals and NGOs to directly file cases against it at the AFCHPR denies the people of Tanzania a vital avenue to justice.

In *Ramadhani v Tanzania* the AFCHPR declared that the respondent state had violated Article 7(1)(c) of the Charter for failing to provide the applicant with legal assistance. Consequently, the court reiterated its finding in *Arex Thomas v The United Republic of Tanzania* that “when the Court finds that any of the rights, duties and freedoms set out in the Charter are curtailed, violated or not being achieved, this necessarily means that the obligation set out under Article 1 of the Charter has not been complied with and has been violated”.<sup>61</sup> The court released the applicant from jail and ordered reparation in his favour. President Samia Suluhu Hassan (who succeeded President Magufuli) is actively considering reversing the withdrawal of Tanzania from the jurisdiction of the AFCHPR. While this is under consideration, NGOs and individuals have two other avenues to seek remedy for abuse of human rights in Tanzania: the African Commission on Human and Peoples’ Rights, and the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of Persons with Disabilities.

58 Writing about the Kenyan sentencing guidelines; see H Mbori “Discreet discretion and moderate moderation in judicial sentencing: A commentary on Kenya’s sentencing guidelines” (2017) 3 *Strathmore Law Journal* 89 at 107.

59 There are 58 prisoners per 100,000 population. The rates in Uganda, Zambia and Zimbabwe are all significantly higher, with over 100 per 100,000; see Institute for Criminal Policy Research *World Prison Brief* (12th ed, 2020, ICPR) at Table 1.

60 In 2015, the official capacity of the prison system of 29,552 prisoners represented 116% of official capacity; see <<https://prisonstudies.org/country/tanzania>> (last accessed 8 June 2021). The 2020 Tanzanian Human Rights Report notes that “[p]risons and prison conditions remained harsh and life threatening due to food shortages, gross overcrowding, physical abuse, and inadequate sanitary conditions” (2020, Legal and Human Rights Centre) at 4.

61 Application no 010/2015, [2018] AFCHPR 9 (11 May 2018).

To conclude, prison conditions and prisoners' rights are a current priority for reform in Tanzania. In light of this, the guidelines should encourage courts to reduce the volume and duration of terms of custody to the minimum necessary to achieve the objectives of the sentence. In order to achieve reductions in the use of custody as a sanction, the guidelines need to promote alternatives to imprisonment. Most western nations have sought to reduce courts' traditional reliance on custody,<sup>62</sup> but the need is more pressing in a jurisdiction where correctional budgets are very limited. Tanzania faces a particular challenge in this regard since research suggests that there is limited public support for alternative sanctions such as community service programmes.<sup>63</sup> Mgumiro's research found that the Tanzanian populace were unaware of the conditions of community service; the perception that community work was a lenient option reflected a lack of knowledge of the sanction. The author concluded that "lack of awareness of community service programmes contributes to negative attitudes [towards them]".<sup>64</sup>

Research in other jurisdictions has found that informing people about the specific requirements of community penalties significantly increases support for these sanctions.<sup>65</sup> If the public do not support alternative sanctions, courts will be less likely to impose community penalties, for fear of provoking criticism. The sentencing guidelines have a role to play in promoting public awareness as well as the judicial use of community sanctions; one way of achieving this would be to highlight noncustodial sanctions in the guidelines. At present, the only reference to community service is to note that "[i]n deserving cases the Court may also sentence an accused person to community service instead of imprisonment".<sup>66</sup> A stronger affirmation of the utility of community-based sanctions is desirable,<sup>67</sup> and the guidelines are the obvious means by which to communicate this message.

### *Categorization of cases to seriousness levels*

The TSM uses specific case characteristics to define categories of crime seriousness, an approach which was initially employed (but subsequently rejected) in the English guidelines. One difficulty with this is that it offers courts no guidance if the case does not contain any enumerated factors. In addition, it restricts a court's use of categories. For example, the lowest level appears reserved for cases of corporal punishment by parents, or individuals acting in loco parentis, where the application of force was deemed "reasonable" yet still illegal. The restrictive use of two factors may result in very few cases being assigned to the low level of seriousness; the distribution of cases will then become lopsided, with higher numbers appearing at the higher levels of seriousness.

The distribution of assault cases naturally follows a pyramid structure – it is reasonable to expect the number of cases to decline as the facts become more serious. Put simply, there are far more cases of common assault, or assault simpliciter, than the aggravated forms of assault. The Tanzanian guideline may have the effect of distorting this distribution if cases are placed at a level which cannot be justified by their actual level of seriousness. Many less serious cases may be "uplifted" to the medium level of seriousness, thereby attracting a much more severe sentence than is warranted. The punishment of less serious cases by a sentence in the higher (medium) category range

62 J Roberts "Reducing the use of incarceration: A review of recent international experiences" (2006) 5 *Judicial Studies Institute Journal* 41.

63 B Mgumiro *Community Attitudes Towards Community Service Programmes for Offenders in Tanzania: A Case Study of Kinondoni Municipality* (2015, Open University of Tanzania). For a discussion of alternative sanctions in the early years of the Tanzanian Republic, see G Boehringer "Aspects of penal policy in Africa, with special reference to Tanzania" (1971) 15 *Journal of African Law* 182.

64 Mgumiro, *ibid* at vii. The author also highlights the need for the Tanzanian Community Service Department to allocate more funds to promoting community awareness, at 40.

65 See J Roberts and M Hough *Understanding Public Attitudes to Criminal Justice* (2005, Open University Press) at 80.

66 TSM, above at note 5 at 37.

67 For discussion of alternative sanctions see A Magalla *Alternative Punishments and their Role in Improving Socio-Economic and Political Outcomes in Tanzania* (2017, Repository of the Open University of Tanzania).

would undermine the principle of proportionality in sentencing, and would frustrate one of the goals of the sentencing guidelines, namely promoting more proportionate sentencing outcomes.

### *Victim input at sentencing*

In its general guidance the TSM notes that “[i]t is good practice for the court to seek from the prosecution any information regarding the impact of the offence ... This information may be provided through the prosecutor and / or, at the invitation of the court, the victim themselves if this is considered appropriate.”<sup>68</sup> The individual guidelines go further and direct a court at Step 6 to consider the views of the victim’s family. It is unclear whether this refers to the family’s views of the offence, the offender or the appropriate sentence. If the latter, we see it as problematic. The introduction of the views of the victim’s family on the appropriate sanction may undermine proportionality and consistency, and may limit the benefits of the new guidelines. Third parties’ views on the sentence will vary from case to case, and if courts allow these views to significantly influence sentencing, outcomes will become less consistent.<sup>69</sup> The recognition of the relevance of victim-related input reflects a long-standing sensitivity to the role of the victim in Tanzanian sentencing.

Should victims’ views affect the nature of the sentence imposed – leading to imposition of a fine instead of imprisonment, for example? Or should the effect be restricted to influencing the quantum of punishment? Courts across Tanzania will need guidance as to the weight that should be accorded victim input; the guidelines offer none at present. In England and Wales, victim input is generally restricted to informing the court about the impact of the crime upon the victim (and the victim’s family). This input is structured by the Victim Personal Statement, the equivalent of victim impact statements found across most common law jurisdictions.<sup>70</sup> Tanzania does not operate a formal victim input scheme; the reference to the victim in the guidelines is therefore the primary means to permit victim input into the sentencing process.

Victim input at sentencing is one of several aspects of the guidelines which the Tanzanian Court of Appeal will need to address. A productive relationship between the apex court and the guidelines is vital to the success of any guidelines regime. This is particularly true in Tanzania, where the guidelines will not receive ongoing review and research by a statutory body such as a sentencing council. The Sentencing Council in England has a statutory duty to monitor the impact of its guidelines, which it does periodically; in addition, it encourages practitioner and legislative feedback during official consultations. As a consequence, Council revises and re-issues existing guidelines. While the TSM notes that its guidelines “will be reviewed from time to time”, no formal mechanism or timetable is indicated; as a result, the existing guidelines will likely remain in their current form for some time. For this reason, the Court of Appeal should play an active role in filling any gaps and clarifying any ambiguities in the advice offered by the guidelines. The precise role of victim input is a good example of an area where additional guidance is required.

### *Plea-based sentence reductions*

As noted, the TSM provides guidance about plea-based reductions within the offence-specific guidelines and gives a clear rationale for awarding sentence reductions. These are the same as those used to justify this practice in other jurisdictions, namely to save the time and expense of a trial, to recognize contrition on the part of the offender, and to spare victims and witnesses

68 TSM, above at note 5 at 22.

69 J Roberts “Listening to the crime victim: Evaluating victim input at sentencing and parole” in M Tonry (ed) *Crime and Justice* (2009, University of Chicago Press) 347.

70 L Harris and S Walker *Sentencing Principles, Procedure and Practice* (2021, Thomson Reuters) at 198; and J Roberts “Crime victims, sentencing and release from prison” in K Reitz and J Petersilia (eds) *The Oxford Handbook of Sentencing and Corrections* (2012, Oxford University Press) 104.

from having to testify at trial. The TSM encourages courts to be explicit about the magnitude of reductions awarded: courts are required to state the sentence that would have been imposed had the defendant been convicted following a contested trial.

The goal of the guidance is to reduce the number of trials which proceed despite “overwhelming evidence” of the offender’s guilt. In his foreword to the TSM, the Chief Justice of Tanzania notes that the low guilty plea rate has been one of the principal causes of the case backlogs in the country’s criminal courts. The approach to plea-based sentence reductions emulates that found in England and Wales: early pleas attract a more generous sentence reduction. A maximum reduction of one-third is permitted in both jurisdictions. The TSM states that this level of reduction is “usually” reserved for cases where a guilty plea was entered at the first stage of the criminal proceedings. The language suggests that courts may have some discretion to award the maximum one-third for later pleas if exceptional circumstances exist. If the guilty plea is entered after the defendant’s first court appearance, the reduction should be reduced to one-quarter. In the event that the plea is entered only on the day of trial, it should be restricted to one-tenth, and once the trial has begun, a change of plea may result in no reduction being awarded. These levels mirror those found in England and Wales, the only other jurisdiction to operate a formal regime of plea-based sentence reductions.<sup>71</sup>

Tanzania appears to have followed the English model of plea-based sentence reductions for several reasons. First, the English approach is unique in that it makes the levels of reduction transparent and clear to all participants. In other common law jurisdictions, trial courts exercise their discretion in determining what level of reductions to award defendants who plead guilty, which makes it hard for lawyers to advise clients who are contemplating pleading guilty.<sup>72</sup> Greater certainty about reductions also enhances fairness in sentencing outcomes. Second, a formal scheme of plea-based sentence reductions helps to ensure that protections are in place to protect vulnerable or unrepresented litigants from being disadvantaged with respect to their pleas.

The clear guidance will ensure that sentence reductions awarded by courts across Tanzania become more predictable and transparent. The sliding scale may also encourage defendants who accept their responsibility for their offence to enter a plea in a timely fashion. However, the TSM overlooks several key considerations. First, late disclosure and other issues related to the prosecution are common causes of late pleas in England and Wales, and likely in Tanzania as well. Until and unless the defendant has a clear understanding of the case against him / her, it is unreasonable to expect a plea to be entered. Second, knowledge of the prosecution’s case is insufficient; the defendant has a need for, and a right to, legal counsel.<sup>73</sup> The defendant may accept responsibility for some action but may be unaware of the complexities of the case, or of any legal defences available to him / her. Timely disclosure and adequate legal advice are critical to ensuring that defendants with legal representation do not enter a guilty plea out of ignorance. Third, some defendants may lack the mental capacity or level of maturity to fully understand their plea options. Defendants who are vulnerable in some way may be more likely to enter a wrongful guilty plea.<sup>74</sup> For all these reasons, any guideline should preserve some judicial discretion to accommodate exceptional circumstances which may explain pleas entered later in the criminal process.

A defendant who enters a plea after first appearance in court but before the trial opens may be entitled to a full one-third discount, rather than the one-quarter specified in the guideline, if for some reason it was unreasonable to expect them to plead earlier – for example, if they had received late disclosure of the Crown’s case against them. The guideline regulating plea-based sentence

71 Sentencing Council of England and Wales *Sentence Reductions for a Guilty Plea: Definitive Guideline* (2017, Sentencing Council of England and Wales).

72 D Cole and J Roberts “What’s the point of pleading guilty?” *Criminal Reports* 44.

73 For example, as per Article 6 of the European Convention of Human Rights.

74 Scholars have warned of the possibility of wrongful convictions arising from vulnerable defendants; see R Helm “Conviction by consent? Vulnerability, autonomy and conviction by guilty plea” (2019) 83 *The Journal of Criminal Law* 161.

reductions in England recognizes these issues by creating exceptions to the prescribed levels of reduction. Where a court is satisfied that the defendant's ability to understand what was alleged made it unreasonable to expect him / her to enter an earlier plea, the maximum reduction should be awarded, even for pleas entered after first appearance.<sup>75</sup> In practice, courts often allow reductions which are higher than those specified in order to recognize the reality that it may be unreasonable to expect some defendants to enter their guilty plea at the first court appearance.

The TSM is silent about matters relating to defendants' vulnerabilities. It is important to sensitize courts to the circumstances surrounding a defendant's plea, and to ensure that all defendants are equally aware of the full consequences of pleading guilty. We recommend that the TSM adopts wording similar to that found in the English guideline and to permit (or encourage) courts to recognize exceptional circumstances, where appropriate. This recognition may lead them to award higher reductions in some cases, a practice which occurs in England and Wales.<sup>76</sup>

### *Judicial compliance and the guidelines*

A last word about judicial compliance and institutional legitimacy is in order. The authority of the Tanzanian guidelines derives from their source: the senior judiciary. Whether, and to what degree, courts follow the step-by-step approach of the guidelines consistently will determine whether the goals of the reform are achieved. However, it would be beneficial for the Tanzanian legislature to place the guidelines (and possibly other elements of the TSM) on a statutory footing. This could be accomplished by legislating a compliance requirement for the courts regarding the guidelines, and possibly also by codifying key elements contained in the TSM. The Tanzanian penal code contains almost no guidance for courts at sentencing, which reflects the fact that it derives from colonial-era Tanganyika. However, today, many jurisdictions with similar histories have revised their penal statutes to incorporate the key purposes and principles of sentencing. Such a step would also confer an important degree of democratic legitimacy upon the manual's contents and specifically upon the guidelines, which at present are a product of only the judicial branch of government.

The TSM is a judicial product, devised by and for the judiciary. Tanzania lacks a sentencing body analogous to the Sentencing Council of England and Wales, the Minnesota Sentencing Guidelines Commission or the Sentencing Advisory Council of Victoria. One consequence is that the Tanzanian guidelines will not be subject to formal review by, or in consultation with, practitioners (including the Tanzanian Bar) or other key stakeholders. Guidelines in other jurisdictions are routinely reviewed by legislative committees and periodically amended as a result; this review and feedback is important to ensure greater public and professional acceptance of the guidelines. Fiscal restraints suggest that Tanzania is unlikely to create a statutory body to assume carriage of developing and updating the guidelines. However, it may be feasible to create a broader-based committee located within the judiciary and to invite wider stakeholder participation.

### *The TSM and the promotion of indigenous African values (Ubuntu / Ujamaa)*

Finally, we conclude briefly by returning to our title, which raises the question of the extent to which the Tanzanian reforms reflect core African values of Ubuntu, or more specifically in the case of Tanzania, Ujamaa. First, it is important to clarify the relationship between these two terms or concepts. Ubuntu is a multidimensional concept which is hard to define with any precision, but it may be broadly described as an Afrocentric philosophy of legal punishment. Ndjodi Ndeunyema

75 See <<https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/reduction-in-sentence-for-a-guilty-plea-first-hearing-on-or-after-1-june-2017/>> (last accessed 12 January 2022).

76 J Roberts and B Bradford "Sentence reductions for a guilty plea: New empirical evidence from England and Wales" (2015) 12 *Journal of Empirical Legal Studies* 187.



provides a useful description which emphasizes “the core values of African ontologies: interconnect- edness, common humanity, collective sharing, solidarity, communalism, dignity and responsibility to each other”.<sup>77</sup> The most thorough exploration of Ubuntu as it applies to sentencing may be found in a recent article by Thaddeus Metz, who contrasts the collectivist approach to sentencing advo- cated by Ubuntu with the more individualist philosophies espoused by western sentencing philoso- phies.<sup>78</sup> Applied to the context of sentencing, Ubuntu privileges the goals of reconciliation, restoration and reparation. Perhaps the key distinction between the two philosophies is that western punishment regimes stress individual culpability and blame, while Ubuntu eschews such retributive perspectives in favour of restoration and compensation.

Ujamaa refers to a version of democratic communitarianism espoused by Tanzania’s first presi- dent, Julius Nyerere.<sup>79</sup> The concept stresses the importance of human dignity and engages established principles of socialism and individual interdependence. Translated into the context of sentencing, Ujamaa emphasizes the importance of community-based responses to individual offending. As can be seen, the two concepts of Ujamaa and Ubuntu share common aims and objectives.

The concept of Ubuntu – or Ujamaa as espoused in Southern and Eastern Africa – is largely the same in eastern and western parts of Africa. Ibrahim Anoba notes that Kenneth Kaunda and Julius Nyerere, former leaders of Zambia and Tanzania, shared a common approach, one which is oper- ated by consensus.<sup>80</sup> Similarly, Julius Nyerere noted that “[i]n African society, the traditional method of conducting affairs is by free discussion”.<sup>81</sup> Anoba further explains that:

“*Ubuntu* ... is the bedrock of sound human relations in traditional African life. It is the col- lective conscience of intra-human relations and the essence of social morality. It is the foun- dation of African morality and social interaction. *Ubuntu*, from a wider perspective, reflects the African understanding of humanism, dignity, respect, and proper conduct. Augustine Musopole, Malawian theologian and authority on African culture, noted the communal dimension when he defined [*Ubuntu*] as the total of human integrity and an essential element of social harmony with strong communal dimensions.”<sup>82</sup>

The contemporary use of the term Ubuntu is more entrenched and apparent in Pan-African move- ments, which have influenced nationalist struggles for independence across sub-Saharan Africa. Conflicts are resolved by consensus as manifested in restorative justice, which is considered the most effective way of healing the wounds of crimes. This is accomplished by involving the victims and members of the community in the justice process, and the Tanzanian reforms reflect this approach.

During the immediate post-independence period, little was done to reform or update the senten- cing regime in Tanzania. This is reflected in the absence of scholarship from the post-independence period. One explanation for this failure to develop sentencing is that the British colonial adminis- tration had bequeathed a deterrent-based approach to sentencing, one which places emphasis on the use of incarceration as a sanction. This legacy of the colonial administration is slowly being replaced, in part by the ongoing sentencing reforms in Tanzania which we have discussed in this article. Over

77 N Ndeunyema “Reforming the purposes of sentencing to affirm African values in Namibia” (2019) 63 *Journal of African Law* 329 at 342.

78 T Metz “Reconciliation as the aim of a criminal trial: Ubuntu’s implications for sentencing” (2019) 9 *Constitutional Court Review* 113.

79 For further information about Nyerere’s philosophy see J Nyerere *Ujamaa: The Basis of African Socialism* (1962, Government Printer of Tanzania); O Otunnu “Mwalimu Julius Kambarage Nyerere’s philosophy, contribution, and leg- acies” (2015) 13 *African Identities* 18; and J Nyerere “African socialism: Ujamaa in practice” (1971) 2 *The Black Scholar* 2.

80 I Anoba *Communism in Africa: On Ubuntu and Nationalism* at 1, available at: <<https://www.africanliberty.org/2018/11/19/communism-in-africa-ubuntu-nationalism/>> (last accessed 15 January 2022).

81 Quoted in O Taiwo “Post-independence African political philosophy” in Q Wiredu (ed) *A Companion to African Philosophy* (2003, Blackwell) 243 at 252.

82 Anoba *Communism in Africa*, above at note 80 at 3.

time, and as the jurisprudence around the reforms evolves, the TSM will progressively incorporate and implement Ujamaa or Ubuntu approaches to sentencing, which privilege and promote restorative and communitarian responses to offending. To a degree, the direction of reform brings the country full circle, aligning sentencing with pre-colonial values. The Kadume case discussed by Edward Hoseah is a typical example of the pre-colonial justice system that reflected the values of the people of Tanzania; this is what Ubuntu or Ujamaa values entail.<sup>83</sup> This case, from pre-colonial Tanzania, involved a dispute over the inheritance of land and was eventually settled by dividing the land equally between both claimants. This “win-win” situation for both parties is an example of the predominant approach to conflict resolution in pre-colonial Tanganyika. The indigenous justice system allowed all parties to the conflict to participate and settle their disputes in an amicable manner and allowed the wounds of conflict and confrontation to heal rapidly.

Defined broadly, restorative justice is central to the past and the future of sentencing in Tanzania. Ntemi Kilekamajenga, who has researched restorative justice in Tanzania, contends that “[r]estorative justice fundamentally aims at restoring shattered relationships between individuals, and initiates a healing process. In the process, the victim’s needs are addressed and the offender acknowledges responsibility and is given an opportunity to empathise with the victim and apologise for wrongdoing.”<sup>84</sup> Tanzania has evolved from independence (Uhuru) in 1962 to a more indigenous approach (Ubuntu) today; this evolution will strengthen the sentencing system and contribute to a more indigenous and restorative system of criminal justice in Tanzania.

The penal codes and sentencing regimes of many nations across the African continent have evolved away from colonial-era statutes and towards arrangements more sympathetic to core African concepts and values. The Tanzanian reforms engage with the communitarian and reparative elements of Ubuntu / Ujamaa in several ways. For example, the sentencing manual contains a clear direction to consider any relevant information provided by the crime victim and also promotes the use of compensation, noting that the awarding of damages to victims of sexual violence is mandatory.<sup>85</sup> However, the regime falls short of representing a fundamental overhaul of the ethos of sentencing in Tanzania along the lines advocated by Ndeunyema.<sup>86</sup> And, as noted by Kilekamajenga, the Tanzanian sentencing regime is amenable to restorative justice interventions in ways which have yet to be fully implemented. It is to be hoped that legal scholars in Tanzania will explore the structure and utility of the guidelines over the next few years.

## Conclusion

The *Tanzania Sentencing Manual* introduces a clear, structured approach to sentencing for courts to follow. The guidelines are a hybrid of the western experience of structuring judicial discretion and the indigenous traditions and approaches to legal punishment in Tanzania and Africa more broadly. Over time, the guidelines should generate more consistent and proportionate sentencing patterns, and sentencing may well also evolve further towards the values espoused by the concept of Ujamaa. By requiring courts to articulate the reasons for sentences and explain key decisions, the guidelines will also greatly enhance the transparency and predictability of sentencing decisions across this large and diverse jurisdiction. This, in turn, should enhance public understanding of sentencing and promote confidence in the judiciary. The Tanzanian guidelines and the judicial experience in this country may well serve as a useful model for other jurisdictions across the African continent, and indeed further afield.

**Conflicts of interest.** None

83 E Hoseah “Reflections on sentencing in Tanzania” (2020) 33 *South African Journal of Criminal Justice* 89.

84 N Kilekamajenga “Learning from contemporary examples in Africa: Referral mechanisms for restorative justice in Tanzania” (2018) 63 *South African Crime Quarterly* 17 at 19.

85 TSM, above at note 5 at 22.

86 Ndeunyema “Reforming the purposes”, above at note 77 at 329.

## Appendix

## Example of a Tanzania Sentencing Guideline

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

<b>STEP 4: Consider the accused's personal circumstances and other individual factors relevant to sentence including totality principle, co-accused sentence, any co-operation with the authorities, the views of the victim</b>	
<ul style="list-style-type: none"> <li>• Age and Health</li> <li>• Any physical or mental disability</li> <li>• Family circumstances, dependants and the impact of any sentence upon them</li> <li>• Previous conviction or any breach of court orders; for example to jump bail</li> <li>• Community work, other good works or indication of good character</li> <li>• The accused income</li> <li>• Other offences to be sentenced (if any)</li> <li>• Co-accused sentence (if any)</li> <li>• Co-operation with authorities (if any) – the court should be provided with reliable information from the prosecution that the offender provided substantial cooperation in relation to this offence or the disruption of other offences. If substantial this could result in substantially reduced sentence.</li> <li>• Views of the victim's family</li> </ul>	
<b>STEP 5: Fix the Sentence within the Appropriate level range (High, Medium, Low)</b>	
(vi)	The level of seriousness of the offence - High, Medium or Low;
(vii)	The aggravating and mitigating factors within that range (or exceptionally which may take the offence to a higher or lower range)
(viii)	The accused person personal circumstances, the prevalence of the offence he views of the victim or members of the family fix the sentence within the appropriate level range.
(ix)	The views of the victim's family
(x)	Announce the Sentence by giving reasons
<b>STEP 6 : Reduce the sentence for any guilty plea (if applicable)</b>	
Apply appropriate level of reduction in accordance with general guidance on reduction of sentences for a guilty plea. The amount should reduce the closer it was given to trial. The court should state what the sentence would have been if the case had been contested at trial and the amount of reduction (or credit) for this guilty plea. NB: A reduction <b>cannot</b> take a sentence below a statutory minimum sentence.	
<b>STEP 7: Pronounce the Sentence giving reasons</b>	
<b>STEP 8 Deduct any time served in custody</b>	
<ul style="list-style-type: none"> <li>• The prison service, prosecution and offender should agree with the court the amount of days the offender has served in custody at the police station and prison before sentence</li> <li>• The court should not deduct this amount from the actual sentence it orders. Instead, the court should order that this time is taken by the prison service as time already served towards sentence.</li> </ul>	
<b>STEP 9: Ancillary Orders</b>	
<ul style="list-style-type: none"> <li>• Costs</li> <li>• Compensation, forfeiture, reparation, restitution</li> <li>• Order of destruction of noxious substances</li> <li>• Before making any financial order consider the offender's ability to pay</li> </ul>	

Source: *Tanzanian Sentencing Manual for Judicial Officers* (2020), 51–52

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