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ASSESSING THE EFFECTIVENESS OF SENTENCING GUIDELINE JUDGMENTS IN SINGAPORE ISSUED POST-MARCH 2013 AND A GUIDE TO CONSTRUCTING FRAMEWORKS

Since the introduction of a sentencing council in Singapore five years ago in March 2013, the Singapore appellate courts have been issuing sentencing guideline judgments with increased frequency, comprehensiveness, and sophistication in analysis and methodology. This article reviews these judgments, discusses the effectiveness of the recent approach towards achieving goals such as consistency, transparency and coherence in sentencing, and proposes some modest suggestions moving forward. To assist lawyers who may be involved in proposing sentencing frameworks, the article ends with a guide to constructing frameworks, and a table of the 60-odd guideline judgments that have been issued in these past five years.

Benny **TAN** Zhi Peng*
LLB (Hons) (National University of Singapore);
Advocate and Solicitor (Singapore);
Sheridan Fellow, Faculty of Law, National University of Singapore.

I. Introduction

1 Even before former US Federal District Judge Marvin Frankel's quip some 25 years ago about his observation of lawlessness in sentencing,[1] jurisdictions around the world have responded to this alleged lawlessness by structuring sentencing discretion in various ways, and to differing extents. Singapore is no different. Although our criminal courts have applied different methods to structure discretion

* I am grateful to Jason Nim for his very helpful comments on an earlier draft of this article. All errors, however, remain mine.

1 Marvin E Frankel, "Sentencing Guidelines: A Need for Creative Collaboration" (1992) 101 Yale LJ 2043 at 2044; see also, generally, Marvin E Frankel, "Lawlessness in Sentencing" (1972) 41 U Cin L Rev 1. For a good sense of the possible explanations for this alleged lawlessness, see generally the chapters Loretta J Stalans, "Measuring Attitudes to Sentencing and Sentencing Goals", Birte Englich, "Heuristic Strategies and Persistent Biases in Sentencing Decisions" and Siegfried L Sporer & Jane Goodman-Delahunty, "Disparities in Sentencing Decisions" in *Social Psychology of Punishment of Crime* (Margit E Oswald, Steffen Bieneck & Jörg Hupfeld-Heinemann eds) (Wiley-Blackwell, 2009) at pp 231–254, 295–314 and 379–402 respectively.

since independence, it seemed that in the past few years there has been a palpable surge in the courts' interest, accompanied by an increased investment in time and resources, in sentencing methodology. The beginning of this particular development is arguably marked by the introduction of a sentencing council in Singapore in March 2013,[2] which was then followed by the issuing of guideline judgments by the High Court and Court of Appeal with raised frequency, comprehensiveness, and sophistication in analysis and methodology.

2 As we pass the five-year mark since the start of this development, it is a good juncture to pause, take a step back and review the developments thus far. In particular, how effective have our recent guideline judgments been in achieving the goals associated with sentencing? To what extent can it be said that we are moving in the right direction, and that our courts have found the most appropriate method to achieve the best balance between the various desired goals?

3 To help put things in perspective, this article starts by summarising and providing a flavour of the developments and options in sentencing methodology that have been applied in other major common law jurisdictions.[3] Part III[4] does the same with respect to here at home in Singapore. Part IV[5] then attempts to answer the crucial questions of whether Singapore is moving in the right direction and how effective our methods have been in achieving our goals. Conclusions that at present can already be drawn are considered, and potential challenges in the way of drawing further conclusions from herein on are also discussed. Part V[6] proposes, as food for thought moving forward, some suggestions *vis-à-vis* our approach towards formulating sentencing frameworks. The final part provides a broad step-by-step guide, amalgamating key pointers provided by our courts and the author's own thoughts, on how to go about proposing or constructing sentencing frameworks in Singapore.[7] It is hoped that the guide can be of assistance to those who may be involved in formulating such frameworks.

2 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at paras 2 and 4.
3 See paras 4–11 below.
4 See paras 12–19 below.
5 See paras 20–40 below.
6 See paras 41–53 below.
7 See paras 55–71 below.

II. Sketch of other common law jurisdictions' sentencing methodology

4 Each of the other common law jurisdictions' journey in devising and refining sentencing approaches is worthy of discussion in a treatise in itself, and it is not possible to do justice to them within this limited space.[8] One useful way, though certainly *not* the only way, to summarise the positions in other jurisdictions is to situate them along a spectrum anchored by the level of discretion a judge possesses in determining the sentence in a case.[9] At one extreme end of this spectrum, say the far left, is a sentencing methodology that accords a judge absolutely no discretion

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8 See generally Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at paras 19–26. For a good sense of the developments in the other major commonwealth jurisdictions:

(a) In Australia, see generally Nicholas Cowdery, "Guideline Judgments: It Seemed Like a Good Idea at the Time", paper presented at the International Society for the Reform of Criminal Law, 20th International Conference (2–6 July 2006) and Richard Edney & Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) at pp 15–42.

(b) In US, see generally Kate Stith, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (University of Chicago Press, 1998); Michael H Tonry, "Sentencing Guidelines and Sentencing Commissions – The Second Generation" in *Sentencing Reform: Guidance or Guidelines?* (Martin Wasik & Ken Pease eds) (Manchester University Press, 1987) at p 22; and Andrew Ashworth, "Techniques for Reducing Sentence Disparity" in *Principled Sentencing: Readings on Theory and Policy* (Andrew Von Hirsch, Andrew Ashworth & Julian Roberts eds) (Hart Publishing, 3rd Ed, 2009) at pp 249–252.

(c) In England and Wales, see generally Andrew Ashworth & Julian V Roberts, "The Origins and Nature of the Sentencing Guidelines in England and Wales" in Andrew Ashworth & Julian V Roberts, *Sentencing Guidelines – Exploring the English Model* (Oxford University Press, 2013) at p 1.

(d) In Hong Kong, see generally I Grenville Cross & Patrick W S Cheung, *Sentencing in Hong Kong* (LexisNexis, 7th Ed, 2015) at pp 279–289.

(e) In Canada, see generally Allan Manson *et al*, *Sentencing and Penal Policy in Canada – Cases, Materials and Commentary* (Emond Montgomery Publications, 3rd Ed, 2016) at pp 66–97 and Julian V Roberts, "Structured Sentencing: Lessons from England and Wales for Common Law Jurisdictions" (2012) 14(3) *Punishment & Society* 267.

(f) In Scotland, see generally Graeme Brown, *Criminal Sentencing As Practical Wisdom* (Hart Publishing, 2017) at pp 154–175.

(g) In New Zealand, see generally The Hon Justice Grant Hammond, "Sentencing: Intuitive Synthesis or Structured Discretion" [2007] NZ L Rev 211; Saul Holt, "Appellate Sentencing Guidance in New Zealand" (2006) (3) NZPGLEJ 1; and Warren Young & Andrea King, "The Origins and Evolution of Sentencing Guidelines: A Comparison of England and Wales and New Zealand" in Andrew Ashworth & Julian V Roberts, *Sentencing Guidelines – Exploring the English Model* (Oxford University Press, 2013) at p 202.

9 *Principled Sentencing: Readings on Theory and Policy* (Andrew Von Hirsch, Andrew Ashworth & Julian Roberts eds) (Hart Publishing, 3rd Ed, 2009) at p 233.

in deciding the sentence. This would basically be a jurisdiction where sentences for offences are already fixed by another body such as the Legislature, and a court has no choice but to impose that stipulated sentence once an offender is convicted of an offence. At the other extreme end – the far right – would be to accord a court full discretion in ascertaining the appropriate sentence, that is, there are no constraints to the court's decision, whether in terms of process, relevant sentencing considerations *etc*. Unsurprisingly, there exists no jurisdiction that adopts a position at either of these extreme ends for all offences. The former will inevitably lead to too much injustice given that courts cannot calibrate sentences in any way to address varying levels of blameworthiness of offenders.[10] The latter will also lead to too much injustice given that judges may sentence offenders based on their whims and fancy, with no bar to considering even extra-legal considerations.

5 The other common law jurisdictions' positions, in essence, rest at different points in between these two far ends of the spectrum. The US, at a federal level, as well as a dozen over American states, the most famous of which is Minnesota, require their courts to sentence based on a numerical grid-based system. The grid is anchored by two factors – offence severity and criminal history of the offender. A judge is to locate the case at hand at one of the boxes in the grid. The box prescribes a small range of possible sentences which the judge may pass. The grids are rigidly formulated, and the courts have relatively little room to manoeuvre outside the prescribed range. This gives rise to significant constraints severely curtailing the discretion of a sentencing judge. This system therefore lies quite close to the left extreme end of the above-mentioned spectrum.

6 Most of other remaining jurisdictions adopt positions that rest in between the US grid-based system and the far-right end. Two common sentencing methodologies that have evolved are the "staged process" method, and the "instinctive synthesis" method.[11] Here, things start to get complicated. For one, there is no clear consensus on the definitions

10 Andrew Ashworth, "Techniques for Reducing Subjective Disparity in Sentencing" in Council of Europe, *Disparities in Sentencing: Causes and Solutions – Reports Presented to the Eighth Criminological Colloquium* (1989) at pp 102–103.

11 For a succinct discussion on the debate as well as the pros and cons of each of these two approaches, see Terry Hewton, "Instinctive Synthesis, Structured Reasoning, and Punishment Guidelines: Judicial Discretion in the Modern Sentencing Process" (2010) 31 *Adelaide Law Review* 79; Austin Lovegrove, "Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments" (2002) 14(2) Curr Issues Crim Justice 182; The Hon Justice Grant Hammond, "Sentencing: Intuitive Synthesis or Structured Discretion" [2007] NZ L Rev 211; and generally Graeme Brown, *Criminal Sentencing as Practical Wisdom* (Hart Publishing, 2017).

of these two methods.[12] Suffice to say that the most basic feature of the staged process method is that judges decide sentences based on *structured, sequential* reasoning. Usually this requires a judge to first ascertain the objective severity of the offence committed, to arrive at a presumptive sentence, or range of sentences (or benchmark sentence, or starting-point sentence) before further adjusting to take into account other considerations, in particular offender-specific ones, to arrive at the final sentence to be passed. Guidance on the presumptive sentence may include guidance on when the custodial threshold is crossed. Often there are explicit rules on when and to what extent a judge can depart from the presumptive sentence. Variations of the staged process include those which involve more "mathematical" features, such as weighting the various sentencing factors in percentages. As will be seen below, there are many ways to manifest this staged process. In fact, the US grid-based system is conceptually a form of the staged process method.

7 The staged process method is commonly contrasted with the instinctive synthesis method. The latter, in its purest form, demands that there not be any step-by-step process, nor mathematical features such as weighting of factors, in the process of a judge deciding a sentence. Instinctive synthesis, as its name suggests, involves a judge taking into account all relevant sentencing considerations, and instinctively synthesising (or, more colloquially, "gut feeling") the appropriate sentence to be passed, focusing on the unique individual circumstances of the case at hand. It is theoretically incompatible with sentencing benchmarks, starting points and case comparisons, "other than where they might play a role in 'informing' the instinctive synthesis or assisting a court in determining which instance of an offence is more serious than another".[13] There are *much fewer directions* on how to arrive at the appropriate sentence, and, *most pertinently*, reasoning is made in a *holistic* and *global* manner. Therefore, relatively speaking, the staged process imposes more constraints on a sentencing judge's discretion compared to the instinctive synthesis method (at least in its purest form).

12 See for an excellent summary Sally Traynor & Ivan Potas, "Sentencing Methodology: Two-tiered or Instinctive Synthesis" *Sentencing Trends & Issues* No 25 (December 2002).

13 Sarah Krasnostein & Arie Freiberg, "Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?" (2013) 76(1) Law & Contemp Probs 265 at 269.

8 Seen in this light, one can place jurisdictions that adopt a staged process towards the left side of the spectrum, and those that adopt the instinctive synthesis method towards the right side. To be clear, *the staged process and instinctive synthesis methods are not dichotomous, and themselves exist on a spectrum that shade into one another*. Some variations of the staged process impose more constraints on sentencing judges than others, just as some variations of the instinctive synthesis method impose less. Indeed, most observers, including the present author, agree that within the different stages in the staged process method, judges still have to instinctively synthesise certain aspects of the relevant considerations. *The difference really comes down to how much of the sentencing process involves instinctive synthesis*. Further, the instinctive synthesis method, even in its purest form, still imposes some constraints on a sentencing judge, because it does still require that the judge only take into account relevant sentencing considerations. It is thus some distance away from the extreme right end of the spectrum. It is also worth re-emphasising that the definitions of the two methods are far from settled, and there are many variations of them each. Some commentators even argue that the difference between the two is really just one of semantics.[14]

9 For ease of reference, it may be helpful to visualise the above points in the following figure.[15]

14 See Terry Hewton, "Instinctive Synthesis, Structured Reasoning, and Punishment Guidelines: Judicial Discretion in the Modern Sentencing Process" (2010) 31 *Adelaide Law Review* 79 at 88–89 and 93 and *R v Valera* [2002] NSWCCA 50 at [9].

15 This method of visualising the different approaches adopted by the respective jurisdictions is inspired by Kevin R Reitz, "The Enforceability of Sentencing Guidelines" (2005) 58 Stan L Rev 155 at 156–160, Figure 1.

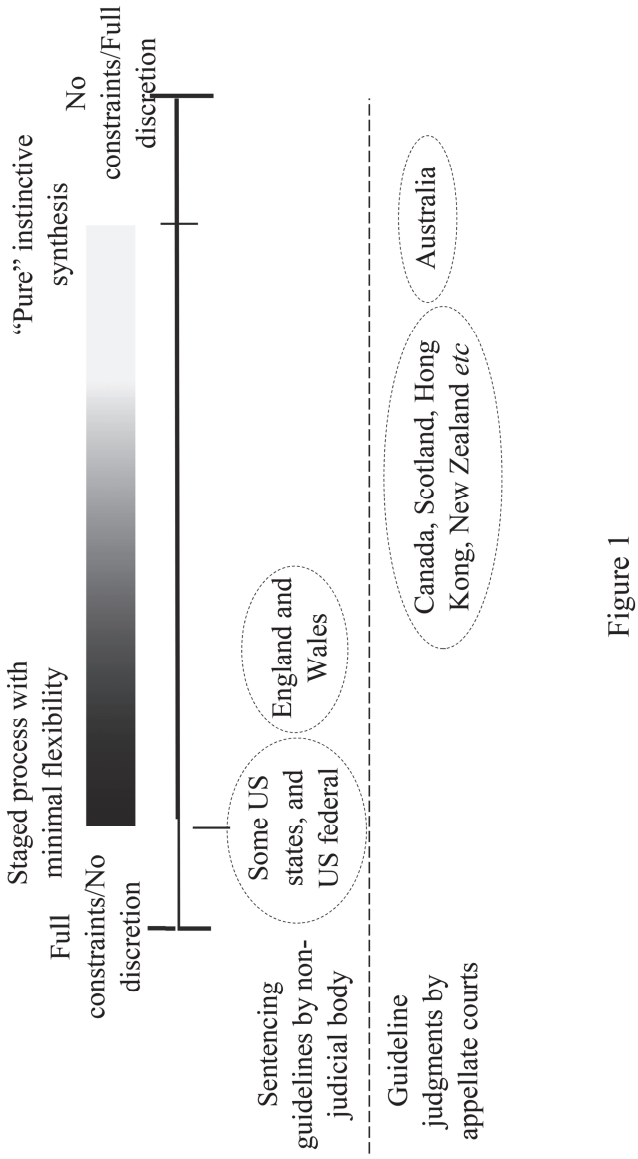

Figure 1

As mentioned, only over a dozen US states (and at the federal level) decide on sentences using a numerical grid-based system, which involves a form of staged process with a very significant degree of constraints at a sentencing judge's discretion. Jurisdictions such as England and Wales, Canada, Scotland, Hong Kong and New Zealand adopt a staged process for a varying number of offences. *Each of these jurisdictions have different blends of features of staged process and instinctive synthesis.* England and Wales, as far as one can tell, is the jurisdiction that has adopted this method for the most number of offences and assessed the objective level of seriousness of an offence by

reference to the level of culpability of the offender and the level of harm caused by him or her.[16]

10 The various states in Australia had an interesting journey of deciding between a preference for staged process and instinctive synthesis,[17] until the majority in the High Court of Australia in the 2006 case of *Markarian v Queen*[18] decided to disavow the staged process method in favour of a strong form of the instinctive synthesis approach. For present purposes, it suffices to note the two main reasons for the majority's decision.[19] First, the majority believed that sentencing is a highly individualised process that must take into account all the specific circumstances of each case. The staged process method seeks to promote a common reasoning process across many cases and hence is unable to sufficiently take into account all the very unique circumstances of each case. Only the instinctive synthesis method allows for this to be done. Further, the majority felt that different sentencing factors should be given different weight depending on the circumstances of each case. The presence of different facts may affect the weight to be given. The balance of sentencing considerations such as deterrence, rehabilitation, protection and retribution also shifts and pulls in different directions depending on the specific facts of each case. The staged process cannot capture the great degree of complexity in reasoning necessary and does not allow for such a high level of individualisation in the decision-making process. It is accordingly bound to lead to errors in sentencing. The instinctive synthesis method, on the other hand, is well able to achieve the required level of individualisation and is the only option in light of the complexity involved.

16 See Andrew Ashworth & Julian V Roberts, "The Origins and Nature of the Sentencing Guidelines in England and Wales" in Andrew Ashworth & Julian V Roberts, *Sentencing Guidelines – Exploring the English Model* (Oxford University Press, 2013) at pp 13–14 (Appendix).

17 For a summary of the developments, see Terry Hewton, "Instinctive Synthesis, Structured Reasoning, and Punishment Guidelines: Judicial Discretion in the Modern Sentencing Process" (2010) 31 *Adelaide Law Review* 79 at 83–86 and Nicholas Cowdery, "Guideline Judgments: It Seemed Like a Good Idea at the Time", paper presented at International Society for the Reform of Criminal Law, 20th International Conference (2–6 July 2006) at pp 4–14. Some of the key cases that deliberated on this controversy include *R v Williscroft* [1975] VR 292; *R v Young* (1990) 45 A Crim R 147; *R v Gallagher* (1991) 53 A Crim R 248; *R v Jurisic* (1998) 45 NSWLR 209; *AB v Queen* (1999) 198 CLR 111; and *R v Wong* (2001) 207 CLR 584.

18 (2005) 228 CLR 357.

19 Terry Hewton, "Instinctive Synthesis, Structured Reasoning, and Punishment Guidelines: Judicial Discretion in the Modern Sentencing Process" (2010) 31 *Adelaide Law Review* 79.

11 Things are further complicated because jurisdictions that adopt the staged process can be further subdivided into those that promulgate this method through appellate courts issuing sentencing guideline judgments, and those that do so by a separate sentencing body that comprises non-judges issuing sentencing guidelines. England and Wales and US are two of the few jurisdictions that belong to the latter. Canada, Scotland,[20] Hong Kong and New Zealand[21] currently fall into the former group, where the appellate courts issue guideline judgments for various offences in a piecemeal fashion.[22]

III. Singapore's journey in structuring sentencing discretion

12 For Singapore, it seemed that prior to the 1990s, our criminal courts, or at least one Supreme Court judge, arguably preferred to sentence based on the instinctive synthesis approach, though this preference was never explicitly articulated. This preference can instead be best gleaned from the sentencing approach of the then Chief Justice Wee Chong Jin, who was famous for informing counsels who appeared before him in criminal cases to not cite or refer to any precedent cases. He was interested in sentencing based only on the facts relating to the case and offender in front of him. This was because he felt that sentencing was always about the offender at hand and his or her unique individual circumstances;[23] thus, there was no utility in resorting to sentences passed in previous cases whatsoever for guidance. This approach seems to have parallels with certain features of a pure instinctive synthesis approach.

13 Post-1990s, without any sort of the complications experienced in Australia,[24] the Singapore criminal courts began to lean towards sentencing by a staged process, even prior to the inception of the sentencing council (in early 2013). Our courts started to issue guideline

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20 The Scottish sentencing council was formed in late 2015 and is in the process of consultation, with a view to issuing sentencing guidelines for consideration by the Scottish Appeal Court. See Graeme Brown, *Criminal Sentencing As Practical Wisdom* (Hart Publishing, 2017) at pp 160–162.

21 In New Zealand, a statute has already been passed and been in force for the creation of a Sentencing Council, but the body has yet to be established. See generally Warren Young & Andrea King, "The Origins and Evolution of Sentencing Guidelines: A Comparison of England and Wales and New Zealand" in Andrew Ashworth & Julian V Roberts, *Sentencing Guidelines – Exploring the English Model* (Oxford University Press, 2013) at p 202.

22 Andrew Ashworth, "Techniques for Reducing Sentence Disparity" in *Principled Sentencing: Readings on Theory and Policy* (Andrew Von Hirsch, Andrew Ashworth & Julian Roberts eds) (Hart Publishing, 3rd Ed, 2009) at p 244.

23 John Koh, *The First Chief Justice: Wee Chong Jin – A Judicial Portrait* (Academy Publishing, 2010) at p 110.

24 See para 10 above.

judgments advancing a staged process in sentencing. Many of these judgments not only set out benchmarks or starting-point sentences for specific offences but also go further to list and provide guidance on how to take into account the relevant sentencing considerations to further adjust the benchmark sentence upwards or downwards to arrive at the condign sentence to be passed. To provide a flavour, the following are some particularly notable guideline judgments. The first is the 1992 case of *Chia Kim Heng Frederick v Public Prosecutor*.[25] In that case, Yong Pung How CJ reviewed the sentencing practice for the offence of rape in England, Malaysia and Singapore and went on to hold that the starting-point sentence for a contested case of rape *simpliciter* without any aggravating or mitigating factor should be ten years' imprisonment, with caning. Three years later, Yong CJ stated in *Chandresh Patel v Public Prosecutor*[26] that for an offence of outrage of modesty *simpliciter*, the benchmark sentence is a custodial term of nine months with caning.[27] In the 2008 case of *Public Prosecutor v UI*,[28] Chan Sek Keong CJ elaborated on the sentencing framework for an offence of rape of a minor; in 2010, the same judge in *Public Prosecutor v AOB*[29] pointed out when the custodial threshold should be crossed in a case involving voluntarily causing hurt.

14 To be sure, the focus of this piece is on guideline judgments in the narrow sense,[30] which for present purposes will be taken to mean judgments which in some manner or form set out sentencing benchmarks or frameworks, or guidance on when a particular punishment (for example, imprisonment term, reformative training and the death penalty) should be imposed. Put another way, these are judgments that involve the *categorisation of offences into classes* as a means to provide guidance on how to structure sentencing discretion *in future cases*.[31]

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25 [1992] 1 SLR(R) 63 at [20].

26 [1995] 1 CLAS News 323; MA 357/1993.

27 For a more detailed compilation of then Chief Justice Yong Pung How's speeches and judgments on sentencing guidelines, see *Speeches and Judgments of Chief Justice Yong Pung How* (Audrey Lim *et al* eds) (SNP International Publishing, 2006) vol I at pp 155, 201–202, 277, 390, 447–448, 489 and 500–501, and vol II at pp 310–360.

28 [2008] 4 SLR(R) 500 at [23]–[26].

29 [2011] 2 SLR 793 at [11].

30 Thus, unless otherwise stated, references to "guideline judgments" in this article are to guideline judgments in the narrow sense.

31 Gavin Dingwall, "The Court of Appeal and 'Guideline' Judgments" (1997) 48(2) *Northern Ireland Legal Quarterly* 143 at 150; Martin Wasik & Ken Pease, "Discretion and Sentencing Reform: The Alternatives" in *Sentencing Reform: Guidance or Guidelines?* (Martin Wasik & Ken Pease eds) (Manchester University Press, 1987) at pp 2–3.

15 Guideline judgments may be defined more broadly to also include decisions where the appellate courts provide not (only) benchmarks or frameworks, but guidance relating to certain sentencing principles: for example, whether a particular fact is an aggravating, neutral or mitigating factor, when sentences should run consecutively or concurrently *etc*.[32] Two such cases include *Lai Oei Mui Jenny v Public Prosecutor*[33] and *Wong Hoi Len v Public Prosecutor*.[34] In the former case, Yong CJ provided guidance in holding that hardships suffered by an offender or his family do not amount to a mitigating factor save in exceptional circumstances.[35] In the latter case, V K Rajah JA surveyed a range of materials and held that intoxication of an offender at the time of committing an offence should ordinarily be viewed not as a mitigating (or even neutral) but an aggravating factor.[36]

16 Returning to guideline judgments in the narrow sense, the sentencing council was formed in March 2013, comprising a panel of Supreme Court judges and a Senior District Court judge.[37] A new practice since then has been to assign Magistrates' Appeal cases involving complex or novel sentencing issues to be heard by a specially constituted High Court bench with three judges[38] (Magistrate's Appeals are usually heard by a single High Court judge). A key benefit of this move is that the High Court is the highest appellate court hearing the vast majority of criminal cases in Singapore, and a three-member High Court bench acts as a *de facto* Court of Appeal hearing a matter,[39] lending added weight to its decision, and is especially useful where there are conflicting single High Court judge decisions on a particular sentencing issue.

17 Following the introduction of the Council, our appellate courts continued to issue guideline judgments for various offences. So what has

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32 See Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 41 and *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [25].

33 [1993] 2 SLR(R) 406.

34 [2009] 1 SLR(R) 115.

35 *Lai Oei Mui Jenny v Public Prosecutor* [1993] 2 SLR(R) 406 at [11]–[12].

36 *Wong Hoi Len v Public Prosecutor* [2009] 1 SLR(R) 115 at [27]–[49].

37 The sentencing council, in early 2014, then "embarked on a survey of the sentencing frameworks, sentencing guidelines and sentencing methodologies adopted in other jurisdictions": see Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at paras 2 and 4.

38 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at paras 35–38.

39 *Chew Eng Han v Public Prosecutor* [2017] 2 SLR 1130 at [47].

changed since the inception of the Council? To the author's mind, there are three main changes. The first is a clear increase in frequency of issuing of guideline judgments. Part 1 of Appendix A lists the High Court and Court of Appeal cases, with written grounds of decision issued, decided between March 2013 and March 2018, which may be labelled as guideline judgments that set out sentencing benchmarks and frameworks. There have been close to 60 such cases just in these past five years, and this number does not even include guideline judgments in the broad sense.[40]

18 The second change is the willingness of the appellate courts to experiment and formulate sentencing frameworks using different and even more sophisticated approaches. Before 2013, most of the guidelines judgments tended to provide narrative guidance[41] and methods used were mainly the more conventional approaches such as the single starting point and the benchmark sentence approaches.[42] Post-March 2013, our courts, doubtlessly inspired especially by developments in England and Wales,[43] have started to (a) use different methods such as the sentencing matrix and sentencing bands approaches; and (b) consistently determine sentence based predominantly on the objective level of seriousness of an offence having reference to the level of culpability of the offender and the level of harm caused, a position undergirded by the idea that retribution (or "just desserts")[44] is the dominant sentencing philosophy.[45] In some cases, the High Court has also provided guidance through plotted graphs.[46] The key features of

40 Part 2 of Appendix A lists the three-judge High Court cases that have ruled on such issues. Other notable examples of guideline judgments in the broad sense issue by a single-judge High Court in the past five years include *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 (guidance on when imprisonment terms should run consecutively or concurrently, and on the totality principle) and *Guay Seng Tiong Nickson v Public Prosecutor* [2016] 3 SLR 1073 (guidance on whether contributory negligence on the part of a victim is a mitigating factor).

41 As opposed to more visual or diagrammatic guidance that is found in the sentencing matrix approach.

42 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [6], citing *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [22].

43 See, for example, *Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892 at [74]–[78].

44 Or, more accurately, "limiting retributivism", an idea first propounded by Norval Morris. See generally Richard S Frase, "Limiting Retributivism: The Consensus Model of Criminal Punishment" in *The Future of Imprisonment in the 21st Century* (Michael Tonry ed) (Oxford University Press, 2003).

45 The beginnings of this approach in Singapore can be best traced to *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [32]–[34], which in turn relied on Andrew von Hirsch's seminal work "Deservedness and Dangerousness in Sentencing Policy" [1986] Crim LR 79 at 85. See also Andrew von Hirsch, "The Swedish Sentencing Law" in *Principled Sentencing: Readings on Theory and Policy* (Andrew Von Hirsch, Andrew Ashworth & Julian Roberts eds) (Hart Publishing, 3rd Ed, 2009) at p 261.

46 See cases in Part 1, Nos 35, 47 and 48 of Appendix A.

each of these approaches to formulate a sentencing framework have been very helpfully summarised by the Court of Appeal in *Ng Kean Meng Terence v Public Prosecutor*[47] ("*Ng Kean Meng Terence*"). Appendix B states the key features of these approaches and the type of cases for which each of them may be more appropriate. Overall, Singapore's present position lies within the same cluster as Canada, Scotland *etc*, but is quickly veering towards the England and Wales position and achieved through appellate courts issuing guideline judgments.[48]

19 It is further observed that accompanying an increased willingness to try new ways to formulate frameworks is an increased readiness of our appellate courts to grapple with and analyse even more deeply and rigorously difficult sentencing issues. The "young *amicus curiae*" scheme was introduced in 2010 to appoint young lawyers to assist the court in cases involving complex and novel issues of law. Most of the young *amici* appointed have been tasked to assist in Magistrate's Appeals to formulate sentencing frameworks and provide proposals and views especially in challenging areas of sentencing law.

IV. Assessing effectiveness of Singapore's sentencing methodology

20 The above-mentioned developments in the past five years, in particular the increased number of guideline judgments here in Singapore to structure sentencing discretion and the concomitant use of more varied approaches to formulating sentencing frameworks and rise in analytical rigour, sought to achieve several key goals. These are to:

(a) promote consistency in sentencing yet maintain an appropriate level of flexibility and discretion for sentencing judges;

(b) encourage transparency in reasoning; and

(c) create a coherent picture of sentencing for a particular offence, which presumably would include ensuring rationality and avoiding arbitrariness in sentencing.[49]

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47 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [26]–[37].

48 See Figure 1 at para 9 above.

49 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [23]. See also Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at paras 3 and 13. See also Austin Lovegrove, "Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments" (2002) 14(2) Curr Issues Crim Justice 182 at 182.

Are the recent developments headed in the right direction towards achieving these goals? To what extent is our appellate courts' new approach effective in achieving these goals? These must be some of the most important questions on everyone's minds.

A. Conclusions that can at present be drawn

21 There are three main conclusions that may currently be drawn, given presently available information. For one, as alluded to above, a review of the guideline judgments issued in the past five years shows that our appellate courts have put in a lot more time, effort and resources into grappling with and thinking through sentencing issues, figuring out the best way to formulate sentencing frameworks, as well as providing guidance for a wider range of offences. They have clearly been resolving sentencing issues with greater analytical rigour than ever before. This includes tackling complex philosophical arguments, and engaging in comparative analysis and drawing inspiration from other jurisdictions where appropriate. There has also been a concerted effort to calibrate sentences in different cases while keenly bearing in mind the need to use the full range of punishments prescribed by Parliament (though as will be discussed below,[50] this is not without potential difficulties).

22 Overall, these have no doubt led to a greater degree of coherence, particularly as regards cardinal proportionality,[51] rationality and strength in the positions taken in our sentencing regime. Further, although our courts have, in an *ad hoc* manner, been trying different approaches to formulating sentencing frameworks, they have in fact been quite consistent in how they do so. When the approximately 60 guideline judgments issued in the past five years are looked at as they are (that is, chronologically), one may get the impression that there is significant arbitrariness in which approach our appellate courts have adopted. However, as shown in Appendix A, when these judgments are sorted based, for example, on the type of offences they involve, there is in fact a remarkable level of coherence in our courts' approach. For example, for recent cases involving sexual offences, our courts' preference has been to use the sentencing bands method; for cases involving drug offences where there is an anchor factor with a fixed upper limit, our courts have consistently used the multiple starting point method; and for cases involving road traffic offences, our courts have applied the sentencing bands or matrix methods.

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50 See paras 41–53 below.

51 The High Court in *Xia Qin Lai v Public Prosecutor* [1999] 3 SLR(R) 257 at [28] defined cardinal proportionality as involving the question, "How serious is this particular offence of its type?".

23 Second, in terms of the direction of our sentencing methodology, it can also be said with confidence that our courts have been right to avoid the US grid-based system. There is widespread consensus that the US grid-based sentencing system, while ostensibly able to help to promote a high degree of consistency, leaves too little flexibility and room for judges to exercise their discretion.[52] Many relevant sentencing considerations cannot be accorded their due weight due to the rigid nature of the framework.[53] Too much focus is placed on the offence severity and the criminal history of the offender, to the neglect of many other equally important sentencing factors. Having observed the experience of the US states that adopt the grid-based system, and how the disadvantages significantly outweigh the advantages, no other jurisdictions have adopted a similar system. In fact, the England and Wales staged process method was designed in part to ensure the rigidities and limitations of the US grid-based system are not replicated in England and Wales.[54]

24 Third, a slightly more difficult conclusion to draw is whether our courts are also right to not adopt (or, for that matter, return to) a "pure" instinctive synthesis approach. After all, the highest courts in major jurisdictions such as Australia have favoured such an approach over the staged process method, and, as pointed out above,[55] before the 1990s, at least one of our Supreme Court judges seems to have favoured that approach. The strongest argument in favour of a "pure" instinctive synthesis approach, that is, its biggest advantage, as pointed out by the High Court of Australia and many other proponents of that approach, is that *it is far more suited to take into account the widely varied and unique individual circumstances of each and every case*. Each offender comes with his or her own story and background, and that necessarily affects: (a) the weight accorded to sentencing considerations of rehabilitation, retribution, prevention and (specific) deterrence; and (b) relatedly, the weight to be accorded to the various aggravating and mitigating

52 See generally Austin Lovegrove, "An Evaluation of Judicial Models for Sentencing Guidelines" in *Sentencing in Australia: Issues, Policy and Reform – Proceedings of a Seminar* (Ivan Potas ed) (Australian Law Reform Commission, 1987) at pp 215–217.

53 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 29; Chief Justice Sundaresh Menon, Opening Address at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 19.

54 Andrew Ashworth & Julian V Roberts, "The Origins and Nature of the Sentencing Guidelines in England and Wales" in Andrew Ashworth & Julian V Roberts, *Sentencing Guidelines – Exploring the English Model* (Oxford University Press, 2013) at p 2.

55 See para 12 above.

circumstances of the case.[56] Instinctive synthesis is very much predicated on the view that the objective severity of an offence to a large extent cannot be viewed in isolation from the individual circumstances, motivations and background of an offender.

25 In this author's considered view, the "pure" instinctive synthesis approach is hence more appropriate for a jurisdiction which sentencing philosophy includes a desire to accord a very significant degree of consideration of, including mitigating weight to, the individual circumstances of each offender. Additionally, it is when greater priority is to be given to rehabilitation and prevention (and also specific deterrence), which are *predictive* (that is, forward looking) and *offender*-focused considerations, that there is a need to look into the individual circumstances of the offender to such an acute extent, and courts should be more willing to tailor the type and quantum of sentence based on these circumstances.[57]

26 That does not, however, seem to be the position in Singapore, at least in relation to adult offenders (especially first-time ones).[58] In such cases, in our sentencing philosophy, priority is, broadly speaking, usually given to general deterrence and retribution.[59] These are *offence* and *society-wide* focused considerations. General deterrence is not so much about the offender at hand but about the punishment required to send a message to others in society to desist from similar offending, for the betterment of society as a whole. Retribution is predominantly about objectively how much harm was caused to a victim and the culpability of an offender (that is, backwards looking). Compared to a philosophy that focuses more on rehabilitation, prevention and specific deterrence, one that focuses more on general deterrence and retribution is bound to attribute *relatively* much less importance to the individual circumstances

56 Cyrus Tata, "Accountability for the Sentencing Decision Process – Towards a New Understanding" in *Sentencing and Society – International Perspectives* (Cyrus Tata & Neil Hutton eds) (Ashgate, 2002) at pp 411–413.

57 Andrew von Hirsch, "Guidance by Numbers or Words? Numerical *versus* Narrative Guidelines for Sentencing" in *Sentencing Reform: Guidance or Guidelines?* (Martin Wasik & Ken Pease eds) (Manchester University Press, 1987) at p 59.

58 With respect to sentencing young offenders (*ie*, 21 years and below), our courts have consistently taken the view that *prima facie*, rehabilitation should be the dominant sentencing consideration. See generally *Public Prosecutor v Mohammad Al-Ansari bin Basri* [2008] 1 SLR(R) 449; *Muhammad Zuhairie Adely bin Zulkifli v Public Prosecutor* [2016] 4 SLR 697; and *Praveen s/o Krishnan v Public Prosecutor* [2018] 3 SLR 1300. However, for a more nuanced view on this, see Chief Justice Sundaresh Menon, Keynote Address at Sentencing Conference 2017: Review, Rehabilitation and Reintegration (26 October 2017).

59 See especially *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [18]–[19]. For a recent example, see *Public Prosecutor v BDB* [2018] 1 SLR 127 at [55].

of an offender.[60] Indeed, the local case law shows that generally speaking, there is a disinclination to accord much weight to an offender's individual circumstances such as good character,[61] measures taken to reform post-offence,[62] consequences of punishment on offender and others[63] *etc*. This is in contrast to the position taken in other jurisdictions.[64] In this regard, although our courts have repeatedly stressed that even with sentencing frameworks individualised justice should be done,[65] the individuation is not as granular at that in some other jurisdictions. Therefore, all things considered, the "pure" instinctive synthesis approach preferred by the High Court of Australia is probably not as suitable or necessary for Singapore, in so far as our current sentencing philosophy remains.[66]

60 The author hastens to add that no value judgment is being made here in respect of whether Singapore's preference for general deterrence and retribution is justifiable (see paras 34–35 below). That topic remains outside the remit of this piece, though it is observed that this philosophy is very much aligned with Singapore's preference for communitarianism over individualism (see Lim Tin Seng, "Shared Values" *Singapore Infopedia* <http://eresources.nlb.gov.sg/infopedia/articles/SIP_542_2004-12-18.html> (accessed 5 June 2018) and *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [19]). The point is simply that taking Singapore's sentencing philosophy as it currently is, the "pure" instinctive synthesis approach favoured by the courts in jurisdictions such as Australia and Scotland is not particularly suitable for Singapore.

61 This is aside from an offender's clean record. See, for a recent example, *Stansilas Fabian Kester v Public Prosecutor* [2017] 5 SLR 755 at [80]–[111].

62 See, for a recent example, *Public Prosecutor v Koh Wen Jie Boaz* [2016] 1 SLR 334 at [66]–[67].

63 See, for example, *Lai Oei Mui Jenny v Public Prosecutor* [1993] 2 SLR(R) 406 at [11]–[12].

64 See generally, for Canada, Allan Manson *et al*, *Sentencing and Penal Policy in Canada – Cases, Materials and Commentary* (Emond Montgomery Publications, 3rd Ed, 2016) at pp 101–106; for Hong Kong, I Grenville Cross & Patrick W S Cheung, *Sentencing in Hong Kong* (LexisNexis, 7th Ed, 2015) at pp 337–406; and for Australia, Richard Edney & Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) at pp 148–202 and Mirko Bagaric, "Sentencing: From Vagueness to Arbitrariness: The Need to Abolish the Stain that Is the Instinctive Synthesis" (2015) 38(1) UNSW Law Journal 76 at 89–90.

65 See, for example, Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 13; *Dinesh Singh Bhatia s/o Amarjeet Singh v Public Prosecutor* [2005] 3 SLR(R) 1 at [24]; *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [20]; and *Tan Wei v Public Prosecutor* [2016] 3 SLR 450 at [1].

66 For a powerful critique of the instinctive synthesis approach, see Mirko Bagaric, "Sentencing: From Vagueness to Arbitrariness: The Need to Abolish the Stain That Is the Instinctive Synthesis" (2015) 38(1) UNSW Law Journal 76.

B. Potential challenges to drawing further and other more helpful conclusions

27 Given the above conclusions, the recent developments in our appellate courts' approach to structuring sentencing discretion is greatly welcomed and appreciated. However, these are just about the only conclusions that may at present be drawn. From herein on, what stands in the way of being able to draw further and other more helpful conclusions, especially whether our courts' approach is necessarily better than any of the other alternatives along the spectrum,[67] whether the use of one framework approach over another, or whether the promulgating of guidelines by a separate sentencing council body compared to that purely by the Judiciary, is more effective in achieving any of the sentencing goals? There are three key potential challenges. Until they are addressed, it will be tough to ascertain with more accuracy or precision the efficiency of our courts' approach. It is worth underscoring at the outset that most of these challenges are not unique to Singapore and are faced by many other jurisdictions elsewhere; neither are there easy solutions to many of these challenges.

28 To set the context before explaining the challenges, it is important to first understand that the efficacy of an approach cannot be assessed in a vacuum. It has always to be assessed in accordance with what goal(s) and to what extent that approach aims to reach that goal(s). This leads us to the first potential challenge in assessing whether our courts' recent approach is effective, and that is, how precisely the desired goals are set. There are numerous possible goals a jurisdiction may seek to reach in devising its approach towards sentencing. Apart from the three that have been highlighted in the context of Singapore – consistency balanced with flexibility, transparency, and coherence and rationality in sentence[68] – other goals that may be achieved through tweaking the sentencing approach that have been applied or mentioned elsewhere include: predictability in sentencing,[69] to control (usually reduce) prison population,[70] and to reduce number of appeals filed or number of sentencing decisions overturned on appeal.[71] These are all

67 As described at paras 4–11 above.

68 See para 20 above.

69 See *Public Prosecutor v Ong Eng Chua* [2018] SGHC 95 at [21]. See also New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court: A Report of the New South Wales Sentencing Council* (June 2004) at p 11.

70 Andrew Ashworth, "Techniques for Reducing Subjective Disparity in Sentencing" in Council of Europe, *Disparities in Sentencing: Causes and Solutions – Reports Presented to the Eighth Criminological Colloquium* (1989) at p 116.

71 Nicholas Cowdery, "Guideline Judgments: It Seemed Like a Good Idea at the Time", paper presented at International Society for the Reform of Criminal Law, 20th International Conference (2–6 July 2006) at pp 6–7 and 14.

worthy goals. The rule of law demands consistency, transparency, coherence and rationality in sentencing.[72] Predictability in sentencing and the ability to control prison population are important for setting wider policies. The reduction of appeals would lead to the saving of precious time and resources.

29 How accurately we can assess efficiency of an approach, however, is for one dependent on how clear we are on *what aspect* of that goal we are trying to achieve. Take consistency, for example, a goal often enshrined in the phrase "like cases should be treated alike". But that phrase betrays the vagueness that it possesses.[73] Consistency can come in many forms. At a most basic level, there is consistency in approach (that is, treated alike as in applying a similar approach) *versus* consistency in outcome (that is, treated alike as in a similar sentence should be passed). The former simply requires that judges apply a similar approach when determining the appropriate sentence in a case.[74] It has little regard for whether the outcomes are in fact consistent. When an approach is defined with less precision, there is a high chance that the outcomes reached will be inconsistent, even if the same approach is consistently applied. Consistency in outcome demands that a similar sentence be in fact passed in cases with similar facts. Furthermore, consistency in outcome itself can be categorised into consistent sentence in absolute terms *versus* consistent sentence in terms of equity, that is,

72 See *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [19] and *Tan Wei v Public Prosecutor* [2016] 3 SLR 450 at [1]. See also Sarah Krasnostein & Arie Freiberg, "Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?" (2013) 76(1) Law & Contemp Probs 265 at 265–266 and Geoff Hall, "Reducing Disparity by Judicial Self-regulation: Sentencing Factors and Guideline Judgments" (1991) 14 NZULR 208 at 215.

73 See Jose Pina-Sánchez & Robin Linacre, "Refining the Measurement of Consistency in Sentencing: A Methodological Review" (2016) 44 Int J Law Crime and Justice 68 at 70, where the authors made the same point: "A second problem that has hindered the progress of research on the topic is the lack of agreement on what is meant by 'consistency in sentencing' and the way it should be measured …" See also Sarah Krasnostein & Arie Freiberg, "Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?" (2013) 76(1) Law & Contemp Probs 265 at 270–271.

74 Austin Lovegrove, "An Evaluation of Judicial Models for Sentencing Guidelines" in *Sentencing in Australia: Issues, Policy and Reform – Proceedings of a Seminar* (Ivan Potas ed) (Australian Law Reform Commission, 1987) at p 212. For an excellent discussion on the meanings of the different kinds of "consistency", see New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court: A Report of the New South Wales Sentencing Council* (June 2004) at pp 11–23.

the same level of impact is felt by an offender.[75] A disabled offender will surely feel more pain going through a one-month jail term compared to an offender without any such disability. Should consistency in outcome take that into account? To be sure, there have been some cases where our Singapore courts were concerned about the equity of outcomes.[76] At present, it is not easy to discern which type of consistency we are trying to achieve.[77]

30 For another, how specifically or helpfully we can assess efficiency is further dependent on how accurately or precisely we can state *the extent* of the goals we are seeking to achieve. For example, thus far in Singapore, by and large when mention is made about the goals we hope to achieve through our sentencing approach, the goals have been mentioned in relative and rather vague terms. For example, the developments seek to achieve "broad consistency" or "some measure of consistency", or "ensure transparency and coherence" *etc*.[78] When goals are framed in such terms, as opposed to a more objective standard such as an increase of 20% in consistency, or to reach an overall consistency in sentencing of 90%, it is not possible to assess when those goals are reached. If the research reveals that the new approach has helped achieved 20% consistency in sentencing across offences, can this "measure of consistency" be equated with a goal achieved? Given the relative and vague nature of the stated goals, one can say that they are reached so long as it can be shown that there has been a non-zero increase in those goals. That would hardly be a helpful conclusion. This challenge is succinctly captured in the title of one of the earlier articles

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75 See generally *Principled Sentencing: Readings on Theory and Policy* (Andrew von Hirsch, Andrew Ashworth & Julian Roberts eds) (Hart Publishing, 3rd Ed, 2009) at pp 342–350 and John W Raine & Eileen Dunstan, "How Well Do Sentencing Guidelines Work?: Equity, Proportionality and Consistency in the Determination of Fine Levels in the Magistrates' Courts of England and Wales" (2009) 48(1) Howard J Crim Justice 13 at 14–21.

76 See, for example, *Chua Siew Peng v Public Prosecutor* [2017] 4 SLR 1247 at [100] and *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 at [46] and [57(a)].

77 There appears to be only one guideline judgment (issued in the past five years) which has mentioned with some precision the type of consistency to be achieved (see *Public Prosecutor v Pang Shuo* [2016] 3 SLR 903 at [31(c)], that "[t]he concept of sentencing consistency extends to consistency in both *outcome* and *approach*" [emphasis in original]).

78 See, for example, Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at paras 3, 34 and 43 and Chief Justice Sundaresh Menon, Opening Address at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at paras 17, 25 and 27. See also *Public Prosecutor v Pang Shuo* [2016] 3 SLR 903 at [28]; *Chan Chun Hong v Public Prosecutor* [2016] 3 SLR 465 at [118]; *Koh Yong Chiah v Public Prosecutor* [2017] 3 SLR 447 at [51(e)]; *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [23]; and *GBR v Public Prosecutor* [2018] 3 SLR 1048 at [26].

on sentencing guidelines – "If you don't know where you are going, you might not get there".[79]

31 The second potential challenge is that even if we can define these goals with precision, not all goals can be made in quantitative terms and thus lend themselves to assessment or measurement.[80] For example, consistency and level of reduction in appeals is a goal that may be expressed in quantitative terms. Goals such as transparency and coherence, on the other hand, cannot. That said, it is not impossible to devise means to at least assess approximately whether an approach has helped achieved a particular qualitative goal. Moreover, even goals that can be expressed quantitatively, such as consistency, can be extremely difficult to measure.[81] There are many experimental difficulties in measuring consistency. Put simply, even if we are able to define with precision the aspect and extent of goals we are attempting to achieve, there may be various challenges in accurately measuring how far those goals are achieved.

32 Indeed, it may be precisely that our courts are well aware of these two potential challenges that they have preferred to state the goals in vague terms.[82] Nonetheless, it is only when these potential challenges are addressed to some extent that useful empirical data can be gathered to assess the effectiveness of our courts' approach. As Neil Hutton has pointed out, "[w]e cannot begin to try to measure until we have a clear idea of what is it we are trying to measure and why".[83]

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79 Anthony Doob, "The United States Sentencing Commission Guidelines: If You Don't Know Where You Are Going, You Might Not Get There" in *The Politics of Sentencing Reform* (Chris Clarkson & Rod Morgans eds) (Oxford University Press, 1995).

80 See generally Nicola Padfield, "Exploring the Success of Sentencing Guidelines" in Andrew Ashworth & Julian V Roberts, *Sentencing Guidelines – Exploring the English Model* (Oxford University Press, 2013) at p 31.

81 One of the leading researchers in coming up with methods to assess whether sentencing guidelines and guideline judgments improve consistency in sentencing (in England and Wales) is Jose Pina-Sánchez. Some of his highly informative work include Jose Pina-Sánchez, "Defining and Measuring Consistency in Sentencing" in *Exploring Sentencing Practice in England and Wales* (Julian V Roberts ed) (Palgrave Macmillan, 2015) at pp 76–92; Jose Pina-Sánchez & Robin Linacre, "Sentencing Consistency in England and Wales – Evidence from the Crown Court Sentencing Survey" (2013) 53(6) Br J Criminol 1118; Jose Pina-Sánchez & Robin Linacre, "Enhancing Consistency in Sentencing: Exploring the Effects of Guidelines in England and Wales" (2014) 30(4) J Quant Criminol 731; and Jose Pina-Sánchez & Robin Linacre, "Refining the Measurement of Consistency in Sentencing: A Methodological Review" (2016) 44 Int J Law Crime and Justice 68.

82 See para 30 above.

83 Neil Hutton, "Sentencing As a Social Practice" in Catherine Fitzmaurice & Ken Pease, *Psychology of Judicial Sentencing* (Manchester University Press, 1986) at p 156.

33 This leads to the third potential challenge, and that is the generating of empirical data on effectiveness. To assess effectiveness, there needs to be data not only on the level of a desired goal after introducing the approach, but also on the pre-introduction level. To use consistency as an example, there is currently no good information on whether there has been inconsistency in approach or outcome before March 2013, and if so, to what extent the inconsistency was. Without such information, no useful comparison can be made. To be clear, producing data on sentencing is not only the responsibility of the courts. Devising a suitable method to measure empirical efficiency and producing such data probably requires a "many-hands" approach, with the involvement of the courts and other researchers with the relevant expertise.[84] However, for researchers to be able to assist to any worthwhile extent, they will require access to raw data and information. In Singapore, sentencing decisions without written grounds issued, which form the majority of criminal cases, are not made publicly available.[85] This will inevitably significantly curtail researchers' ability to produce reliable empirical data. The recently introduced Empirical Judicial Research Programme may be a possible avenue to gain access to the necessary data and information.[86]

C. Value judgment in selecting aspects and extent of goals

34 Flowing from the above discussion, it is imperative to highlight three additional points. The first is that what aspect or extent of goals Singapore, or any other jurisdiction for that matter, should strive for is ultimately very much a matter of value judgment. It is difficult to say that there are any super values or norms that intrinsically dictate that a jurisdiction must strive to achieve a particular aspect and extent of a sentencing goal. For example, while the rule of law, a super value which every jurisdiction seeks to have, requires that offenders be sentenced in a consistent manner, it does not go further to inform on whether consistency in approach, outcome in absolute sentence or outcome in equity of punishment is required. Neither does it inform on what extent of consistency is required.

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84 For a sense of the sort of data and information made publicly available in England and Wales, see Julian V Roberts & Mike Hough, "Empirical Sentencing Research: Options and Opportunities" in *Exploring Sentencing Practice in England and Wales* (Julian V Roberts ed) (Palgrave Macmillan, 2015) at pp 1–17.

85 See Mandeep Dhami & Ian Belton, "Using Court Records for Sentencing Research: Pitfalls and Possibilities" in *Exploring Sentencing Practice in England and Wales* (Julian V Roberts ed) (Palgrave Macmillan, 2015) at pp 25–26.

86 Singapore Judicial College, "About the Empirical Judicial Research Programme" https://www.supremecourt.gov.sg/sjc/empirical-judicial-research/about-the-empirical-judicial-research-programme (accessed 5 June 2018).

35 Equally importantly, the solution cannot be to simply say that we should achieve perfect consistency,[87] or maximum coherence *etc*, because every additional measure or unit of goal one seeks to achieve will almost always involve a trade-off. An extra extent of consistency will come with additional risk of lack of flexibility potentially leading to injustice.[88] For instance, some advocates of the staged process method have called for guidance in the form of the specific weights to be assigned to particular aggravating and mitigating factors, the justification being that it could lead to even more consistency in sentencing across cases.[89] Nevertheless, if this is done, the trade-off would be that there may be cases that arise where the existence of a particular fact, either by itself or when considered with another fact, requires that a different weight be assigned to a particular sentencing factor, and the judge may feel that it has insufficient discretion to make the appropriate adjustments to ensure justice in the case.[90] Goals such as increased transparency, coherence, rationality and even consistency will unavoidably require additional time and resources put into achieving them. Coherence in sentencing will require much time and resources put into attempting to resolve higher-level sentencing issues, which can be extremely complex and challenging to tackle.

36 Relatedly – and this is the third point – in making a value judgment on the appropriate sentencing method or approach and assessing the efficiency of an approach in achieving a goal, it is also useful to bear in mind that each approach to formulating a framework has its own strengths and limitations. Take the sentencing matrix approach as an illustration, the approach favoured by the Singapore appellate courts in many cases and by the sentencing council for England and Wales. That approach uses levels of harm and culpability as the two anchors to assess the core level of severity of an offence. For

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87 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 11.

88 Chief Justice Sundaresh Menon, Opening Address at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 25. See also Andrew Ashworth, "The Struggle for Supremacy in Sentencing" in Andrew Ashworth & Julian V Roberts, *Sentencing Guidelines – Exploring the English Model* (Oxford University Press, 2013) at p 30.

89 See Austin Lovegrove, "Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments" (2002) 14(2) Curr Issues Crim Justice 182 at 200 and Marvin E Frankel, "Lawlessness in Sentencing" (1972) 41 U Cin L Rev 1 at 47.

90 See Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 29. See also Austin Lovegrove, "A Decision Framework for Judicial Sentencing: Judgment, Analysis and the Intuitive Synthesis" (2008) 32 Crim LJ 269 at 276 and Nicola Padfield, "Intoxication As a Sentencing Factor: Mitigation or Aggravation" in *Mitigation and Aggravation at Sentencing* (Julian V Roberts ed) (Cambridge University Press, 2013) at p 82.

each level of harm and culpability, a starting-point sentence or sentence range is provided, and once an offence is located within a particular box, the judge should then make further adjustments based on other aggravating and mitigating factors.[91] Although this approach appears well able to promote coherence, transparency and consistency in sentencing, there are limits to the extent it can do so. In terms of coherence, the reality is that there is no objective measure of the seriousness of an offence.[92] Thus, how one places different levels of harm and culpability in the different boxes will at some level have to be a value judgment (that is, made by the gut instinct) of the sentencing judge – there will come a point beyond which there is no further rational basis upon which one can fall back on to justify why a certain combination of level of harm and culpability falls within a particular box.

37 In terms of transparency, a sentencing matrix approach (or indeed most other framework approaches) can never guarantee transparency in reasoning. As pointed out by many observers, sentencing frameworks can at most ensure that a sentencing judge uses the framework *to account for* the sentence decided. It does not ensure that that is how the judge in fact reasoned internally in his or her mind to arrive at that sentence. In short, it is well possible that a judge reasons through one approach, but justifies the decision in the written judgment using another approach.[93] For consistency, there will be a point beyond which consistency cannot be achieved so long as sentencing frameworks are formulated using terms that are subject to various interpretations.[94] For instance, if "high culpability" is defined as having a substantial level of premeditation, different judges will have different understanding of what "substantial" means. Worse, the research suggests that where a

91 See, for example, *Tay Wee Kiat v Public Prosecutor* [2018] SGHC 42 at [71]–[75].

92 See Malcolm Davies, Jukka-Pekka Takala & Jane Tyrer, "Sentencing Burglars in England and Finland: A Pilot Study" in *Sentencing and Society – International Perspectives* (Cyrus Tata & Neil Hutton eds) (Ashgate, 2002) at pp 257 and 272 and Gavin Dingwall, "From Principle to Practice: Reconstructing the Nature of Sentencing Guidance" [2006/2007] CIL 293 at 307–312. See also the highly illuminating debate on this issue in Julia Davies, "The Science of Sentencing: Measurement Theory and von Hirch's New Scales of Justice"; Andrew von Hirsch, "Scaling Punishments: A Reply to Julia Davies"; and Julia Davies, "Scaling Punishments: A Response to von Hirsch" in *Sentencing and Society – International Perspectives* (Cyrus Tata & Neil Hutton eds) (Ashgate, 2002) at pp 327–359, 360–365 and 366–368 respectively.

93 Cyrus Tata, "Accountability for the Sentencing Decision Process – Towards a New Understanding" in *Sentencing and Society – International Perspectives* (Cyrus Tata & Neil Hutton eds) (Ashgate, 2002) at pp 417–418.

94 Austin Lovegrove, "A Decision Framework for Judicial Sentencing: Judgment, Analysis and the Intuitive Synthesis" (2008) 32 Crim LJ 269 at 272, fn 20 and Barry Mitchell, "Sentencing Guidelines for Murder: From Political Schedule to Principled Guidelines" in Andrew Ashworth & Julian V Roberts, *Sentencing Guidelines – Exploring the English Model* (Oxford University Press, 2013) at p 59.

sentencing judge does not quite agree with a sentencing framework, he or she may be inclined to find ways to "manoeuvre" out of applying the framework in order to reach the sentence he or she desires to pass.[95] The limitations of the different approaches may go towards the extent of a goal a jurisdiction aims to accomplish.

38 Having reviewed the literature from around the world on structuring sentencing discretion, the present author is fully convinced that the above three points represent the reality that every jurisdiction has to face. Which exact approach to adopt must therefore depend on the priorities, values, goals, and social and political milieu of the jurisdiction in question.[96] This is a point that has also been made by eminent sentencing experts such as Andrew Ashworth[97] and Nicola Padfield[98] decades ago.

39 Any proposal for change in an approach to structuring sentencing discretion should ideally acknowledge and take into account these three points. By way of illustration, one commentator in a recent piece critiqued the approach that our appellate courts have taken in the past five years, and argued that Singapore should model itself after the England and Wales sentencing guidelines approach.[99] A crucial feature of the England and Wales model is that sentencing guidelines are

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95 Andrew Ashworth, "Techniques for Reducing Subjective Disparity in Sentencing" in Council of Europe, *Disparities in Sentencing: Causes and Solutions – Reports Presented to the Eighth Criminological Colloquium* (1989) at p 123; John W Raine & Eileen Dunstan, "How Well Do Sentencing Guidelines Work?: Equity, Proportionality and Consistency in the Determination of Fine Levels in the Magistrates' Courts of England and Wales" (2009) 48(1) Howard J Crim 13 at 29–30.

96 Nicholas Cowdery, "Guideline Judgments: It Seemed Like a Good Idea at the Time", paper presented at International Society for the Reform of Criminal Law, 20th International Conference (2–6 July 2006) at p 16.

97 Andrew Ashworth, "Techniques for Reducing Subjective Disparity in Sentencing" in Council of Europe, *Disparities in Sentencing: Causes and Solutions – Reports Presented to the Eighth Criminological Colloquium* (1989) at pp 101 and 110. See also for the same point The Hon Justice Grant Hammond, "Sentencing: Intuitive Synthesis or Structured Discretion" [2007] NZ L Rev 211 at 212.

98 Nicola Padfield, "Exploring the Success of Sentencing Guidelines" in Andrew Ashworth & Julian V Roberts, *Sentencing Guidelines – Exploring the English Model* (Oxford University Press, 2013) at pp 32 and 48. See also Tom O'Malley, "Living Without Guidelines" in Andrew Ashworth & Julian V Roberts, *Sentencing Guidelines – Exploring the English Model* (Oxford University Press, 2013) at pp 218 and 226–227.

99 Amardeep Singh s/o Gurcharan Singh, "Sentencing Reform in Singapore – Are the Guidelines in England and Wales a Useful Model?" (2018) 30 SAcLJ 175. Amardeep is by no means the only one who has advocated such a position in Singapore. Chan Seng Onn J has also made a similar call, both in the context of a case (*Ding Si Yang v Public Prosecutor* [2015] 2 SLR 229 at [36]) and extra-judicially (see Selina Lum, "A Less Adversarial System That Advances Public Interest" *The Straits Times* (9 November 2017)).

promulgated by a separate body, that is, a sentencing council.[100] The commentator rightly pointed out the advantages of having such a system,[101] the main one being that a separate sentencing council is much better placed to look at the overall picture and devise guidelines that are coherent across many offences, achieve a greater level of ordinal proportionality[102] in sentencing between offences, and is much more effective in promoting consistency in sentencing. The council will also be able to issue guidelines for any offences, while an appellate court can only issue guideline judgments if the appropriate case comes before it. He further elaborated that the England and Wales approach has been proven to promote more consistency, and is pessimistic that appellate courts issuing guideline judgments will be able to do the same.[103]

40 With respect, once one keeps in mind the realities and challenges to formulating a sentencing approach as discussed above,[104] one will notice several difficulties with his analysis. For one, the commentator's proposal assumes that Singapore desires or needs to achieve the same extent of consistency or, for that matter, any of the other goals as in England and Wales.[105] However, there is no intrinsic reason why that has to be so. What may be appropriate for one jurisdiction may not be suitable for another.[106] It may well be that Singapore simply wishes to achieve a relatively larger extent of the sentencing goals than it had in the past few decades, but not necessarily *the same extent* as in England and Wales. It may even well be that the level of consistency, depending on what lens one is looking through, that can be achieved with our current approach in fact does not pale in comparison to that that can be achieved in England and Wales with

100 See para 11 above.

101 Amardeep Singh s/o Gurcharan Singh, "Sentencing Reform in Singapore – Are the Guidelines in England and Wales a Useful Model?" (2018) 30 SAcLJ 175 at 218–222, paras 80–87. Some of these advantages have also been noted by Chao Hick Tin J, speaking extra-judicially in Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 27.

102 The High Court in *Xia Qin Lai v Public Prosecutor* [1999] 3 SLR(R) 257 at [28] defined "ordinal proportionality" as "measuring the seriousness of the offence in question against other offences".

103 Amardeep Singh s/o Gurcharan Singh, "Sentencing Reform in Singapore – Are the Guidelines in England and Wales a Useful Model"? (2018) 30 SAcLJ 175 at 196–198, paras 34–37.

104 See paras 27–38 above.

105 Amardeep Singh s/o Gurcharan Singh, "Sentencing Reform in Singapore – Are the Guidelines in England and Wales a Useful Model"? (2018) 30 SAcLJ 175 at 204–205, para 52.

106 This point has been made at para 38 above.

their sentencing guidelines.[107] For another, he omits to consider that there are trade-offs to adopting the England and Wales model,[108] the prime ones being that (a) even more time and resources will have to be invested if Singapore were to follow the England and Wales approach,[109] and that may not be something we are prepared or able to do; and (b) guideline judgments have the strength of being "developed by judges for judges … consequently they are more likely to be received enthusiastically by judges and adhered to".[110] Moreover, the position in England and Wales is far from being as positive as the commentator makes it out to be. For example, available empirical evidence fails to convincingly show with reliability that England and Wales' approach has indeed brought about greater consistency in sentencing.[111] Ultimately, as he himself suspected at one point in his piece, at this point any consideration of whether Singapore should follow the England and

107 This may be possible because Singapore is a small city-State where the lower court judges are not as large in numbers nor as geographically dispersed as other jurisdictions such as England and Wales. Hence, there are relatively less potential sources for disparity in sentencing. See Sarah Krasnostein & Arie Freiberg, "Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?" (2013) 76(1) Law & Contemp Probs 265 at 273, fn 76.

108 See also Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 28. See also Andrew Ashworth, "Techniques for Reducing Subjective Disparity in Sentencing" in Council of Europe, *Disparities in Sentencing: Causes and Solutions – Reports Presented to the Eighth Criminological Colloquium* (1989) at p 112.

109 Cyrus Tata, "The Struggle for Sentencing Reform: Will the English Sentencing Guidelines Model Spread?" in Andrew Ashworth & Julian V Roberts, *Sentencing Guidelines – Exploring the English Model* (Oxford University Press, 2013) at p 250.

110 Geoff Hall, "Reducing Disparity by Judicial Self-regulation: Sentencing Factors and Guideline Judgments" (1991) 14 NZULR 208 at 221.

111 In his piece, Amardeep cited the research in Jose Pina-Sánchez & Robin Linacre, "Sentencing Consistency in England and Wales – Evidence from the Crown Court Sentencing Survey" (2013) 53(6) Br J Criminol 1118 to support his point that the English sentencing guidelines have promoted consistency in sentencing in England and Wales. However, he omitted to consider two subsequent pieces by the same authors, where they casted quite strong doubts on whether this proposition is indeed true (see Jose Pina-Sánchez & Robin Linacre, "Enhancing Consistency in Sentencing: Exploring the Effects of Guidelines in England and Wales" (2014) 30(4) J Quant Criminol 731 at 744 and Jose Pina-Sánchez & Robin Linacre, "Refining the Measurement of Consistency in Sentencing: A Methodological Review" (2016) 44 Int J Law Crime and Justice 68 at 84. See generally Nicola Padfield, "Exploring the Success of Sentencing Guidelines" in Andrew Ashworth & Julian V Roberts, *Sentencing Guidelines – Exploring the English Model* (Oxford University Press, 2013) at p 31.

Wales' approach, *which by any measure is a major change*, is simply "premature".[112]

V. Suggestions for consideration moving forward

41 In the present author's view, until we are able to draw more helpful and precise conclusions about our current approach, it may not be very fruitful to consider any major or widespread change in our approach to structuring sentencing discretion. Many of the other jurisdictions that have considered such changes only do so after having quite extensively studied and understood their prevailing position.[113] To reiterate, the more accurately and precisely one wishes to assess the effectiveness of a sentencing approach towards achieving a particular goal, the more accurately and precisely one has to state which aspect and to what extent that particular goal is to be achieved. If goals are only stated in relative terms (instead of an objective standard), then effectiveness can correspondingly also only be measured in relative terms; accordingly, less help may be derived from any such study. Second, there is then need to design appropriate research methodology to measure, at least approximately, how effective the approach is towards achieving those stated goals. To do so, there is need for constant monitoring of sentencing decisions.[114] Ready access to information will also encourage more of such research. Furthermore, how rational and coherent a sentencing approach is also depends on how much we are able to resolve higher level sentencing issues, complex and vexed as they may be. Making changes to our sentencing approach *incrementally* may be helpful as researchers catch up in assessing effectiveness.[115]

42 Those aside, the present author respectfully offers several modest observations and suggestions as food for thought and points to keep an eye out for in the meantime. Firstly, there has recently been concerted and repeated exhortation by our appellate courts to consider

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112 Amardeep Singh s/o Gurcharan Singh, "Sentencing Reform in Singapore – Are the Guidelines in England and Wales a Useful Model"? (2018) 30 SAcLJ 175 at 218, para 80.

113 See, for example, New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court: A Report of the New South Wales Sentencing Council* (June 2004). See generally the materials cited at n 8 above and Geoff Hall, "Reducing Disparity by Judicial Self-regulation: Sentencing Factors and Guideline Judgments" (1991) 14 NZULR 208 at 210.

114 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 33.

115 See also Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 14.

the full range of punishment legislated by Parliament in locating a particular case within that range, and where appropriate, to maximise use of the entire range.[116] In the various cases where sentencing frameworks in the form of sentencing bands and matrices were promulgated, the varying levels of severity are spread out along the full range of punishment prescribed for the offence. At one level this is clearly a welcomed move that will promote coherence, because relying on the full range of legislated punishment provides another source of rational basis on which to anchor a sentence to be passed.[117] It also aids in achieving cardinal proportionality and in avoiding too much clustering of sentencing outcomes.[118] Some may point out that there is a degree of arbitrariness in that how offences are calibrated ultimately turns on what one defines as a worse version of the offence to be pegged to the maximum prescribed punishment[119] (and less serious ways of committing the offence will accordingly be calibrated downwards). That degree of arbitrariness is, to the author's mind, unavoidable.[120]

43 It is instead worth mentioning that relying on the range of legislated punishment as a conceptual basis to ascertain the appropriate sentence in a case is not a silver bullet in every case. That approach presupposes that there are enough ways in which one can commit an offence to be calibrated across the entire range of punishment or, put another way, that the range of punishment is matched by the number of ways an offence will likely be committed. Yet that is not always the case, especially in cases where a very wide range of punishment has been prescribed, but there are probably only a relatively small number of ways the offence can be committed. This may occur where the Legislature may have (a) at the time of legislating for the offence had in mind a number of ways an offence may be committed but for certain reasons it turns out it is unlikely anyone would ever commit what it thought were some of the most aggravated variations of the offence; (b) subsequently added alternative sentencing options outside of the statute an offence is found (*eg*, community sentences, probation *etc*); or (c) genuinely overestimated the levels of severity for which an offence can be committed.

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116 *Ong Chee Eng v Public Prosecutor* [2012] 3 SLR 776 at [24]; *Chan Chun Hong v Public Prosecutor* [2016] 3 SLR 465 at [85]; *GBR v Public Prosecutor* [2018] 3 SLR 1048 at [31].

117 Chief Justice Sundaresh Menon, Opening Address at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 10.

118 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [2] and [14].

119 See para 60 below.

120 Mirko Bagaric, "Sentencing: From Vagueness to Arbitrariness: The Need to Abolish the Stain That Is the Instinctive Synthesis" (2015) 38(1) UNSW Law Journal 76 at 111.

44 A possible example of (c) would be an offence of causing death by a negligent act under s 304A(*b*) of the Penal Code,[121] where the prescribed punishment is a fine, imprisonment term of up to two years or both. There is only one main form of harm for the offence – causing death, and there are only so many ways one can be negligent and only so many possible aggravating factors for such an offence, whether in the road traffic context or not.[122] The High Court in *Public Prosecutor v Hue An Li*[123] set the benchmark for the offence as a starting point of up to four weeks' incarceration.[124] If indeed the full range principle is to be applied unthinkingly, then very arguably this benchmark sentence would be too low, for when else would a sentence of close to two years ever be imposed if the starting-point sentence is only up to four weeks' imprisonment?[125]

45 In short, there is need to look out for and accept that there may be certain offences for which the higher range of the prescribed punishment may for legitimate reasons never, or very rarely, be appropriate to impose. Consequently, *there will be cases where it would not make much sense to argue that a higher sentence should be imposed in a particular case,*[126] *on the basis that otherwise the higher range of the prescribed punishment would never be imposed.* One needs to always examine the particular offence in question scrupulously and understand the above-mentioned points before raising or accepting such an argument.[127]

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121 Cap 224, 2008 Rev Ed.

122 It should be pointed out that even if an accused for such an offence has a string of related antecedents, then the appropriate punishment, rather than the higher range of punishment prescribed under s 304A(*b*) of the Penal Code (Cap 224, 2008 Rev Ed), could probably be corrective training or preventive detention under s 304 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

123 [2014] 4 SLR 661.

124 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [61].

125 For another illustration of this point, see *Tang Ling Lee v Public Prosecutor* [2018] 4 SLR 813.

126 See, for example, *Public Prosecutor v G S Engineering & Construction Corp* [2017] 3 SLR 682 at [52].

127 The High Court in *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 alluded to this point when it explained (at [87]) that:

> … [i]f a particular criminal provision prescribes a maximum sentence that seems unduly light or lenient in relation to the potential seriousness of offences that fall under it, meting out a near-maximum sentence is not warranted unless it is demonstrated by the prosecution that that particular offence figures among the worst type of cases falling within that prohibition. Thus, there must be a sense that the sentence is proportionate not only to the culpability of the offender but also in the context of the legislative scheme. [emphasis in original]

See also the New South Wales case of *R v Geddes* (1936) 36 SR(NSW) 554 at 555.

46 It is also observed that the courts have generally treated the "full range of legislated punishment" to refer only to the punishment prescribed for the offence at hand, most often fine or imprisonment (sometimes with caning). Nevertheless, it may be useful to underscore that the *true* full range of punishment prescribed for most offences in fact includes at the higher end corrective training and preventive detention and, perhaps more crucially, at the lower end of severity punishments such as community sentences. True fidelity to the full range principle would require noting that all of the levels of severity at which one can commit an offence can in fact be calibrated across the true full range and not only the range prescribed in the offence section.[128] This is all the more so in light of the recent amendments to the community sentences regime, the aim of which was to grant even greater flexibility and sentencing options to the courts.[129] A likely practical consequence of neglecting the true full range when formulating sentencing frameworks is that lower courts may be at a loss as to when the other punishments (not in the framework) should be ever imposed. By way of comparison, the English sentencing guidelines include, where appropriate, community orders as a possible starting-point sentence.[130]

47 It is further noted that in some cases in formulating sentencing frameworks, the appellate court calibrated the different levels of severity of an offence along the full range of the prescribed imprisonment term, but not so for the range of prescribed fines. This is less of an issue for offences where the legislated range of fines is relatively small; for example, up to $10,000. However, where the maximum fine is of larger amounts, one is hard-pressed to find a justification for slotting the entire range of fines into a disproportionately small section of the sentencing spectrum.[131] This is keenly seen in recent case of *Logachev*

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128 See Chief Justice Sundaresh Menon, Opening Address at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 18 ("… alternative forms of punishment should be considered where applicable").

129 *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Indranee Rajah, Senior Minister of State for Law and Finance).

130 See, for example, the definitive guidelines on the offence of assault occasioning actual bodily harm, issued in March 2011: Sentencing Council for England and Wales, *Assault: Definitive Guideline* (16 March 2011) at pp 11–14 ("Step Two: Starting point and category range") <https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_-_Crown_Court.pdf> (accessed 5 June 2018). See generally Sentencing Council for England and Wales, *Imposition of Community and Custodial Sentences: Definitive Guidelines* (1 February 2017) at pp 3–6 <https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive-Guideline-Imposition-of-CCS-final-web.pdf> (accessed 5 June 2018).

131 This is in particular in light of the High Court's comment in *Edwin s/o Suse Nathen v Public Prosecutor* [2013] 4 SLR 1139 at [17], that:

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Vladislav v Public Prosecutor[132] ("*Logachev*"), where the court formulated a framework through the sentencing matrix approach for the offence of cheating at play under s 172A(2) of the Casino Control Act.[133] There are nine grids in the matrix, representing permutations of low, moderate and high levels of harm and culpability.[134] The maximum prescribed jail term for the offence is up to seven years, and the fine is up to $150,000 (s 194 of the Act permits a District Court to impose up to this prescribed maximum). The latter is by any measure a very large sum. However, the range of fines is prescribed only for cases involving low harm and low culpability. Bearing especially in mind previous cautions by courts that a high fine can also effect a very significant level of deterrence and that a custodial term should not be lightly imposed,[135] it is tough to see why the framework should not peg the different levels of severity more evenly throughout the entire range of both fine and imprisonment. It seems more consonant with the spirit of applying the entire range of possible punishment by also stipulating a possible range of fines for cases involving, for example, low harm and moderate culpability, and low culpability and moderate harm.[136] It is envisaged that the current framework will leave lower courts struggling to figure out when high fines should ever be imposed for the offence. Another illustrative case is *Goik Soon Guan v Public Prosecutor*,[137] a case involving the offence of infringement of trademark under s 49(*c*) of the Trade Marks Act.[138] The prescribed punishment is an imprisonment term of up to five years, a fine of up to $10,000 for each infringing item, up to an aggregate of $100,000, or both. The court stipulated that cases of low involvement will attract a starting-point range of two to four months' jail.[139] As with *Logachev*, one might wonder whether a more steadfast application of the full range principle might be to calibrate cases of *low involvement* to have a starting sentence of a range of fines.[140]

> Parliament has provided a range of fines that the court may impose if it is satisfied that a custodial sentence is not warranted; and *the court should ordinarily utilize the full range of the permitted fines according to the gravity of the offence before it* … [emphasis added]

132 [2018] 4 SLR 609.

133 Cap 33A, 2007 Rev Ed.

134 *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [78].

135 See *Public Prosecutor v Cheong Hock Lai* [2004] 3 SLR(R) 203 at [42] and *Yang Suan Piau Steven v Public Prosecutor* [2013] 1 SLR 809 at [34].

136 Our courts have been able to calibrate a range of fines much more evenly across a spectrum. See, for example, *Public Prosecutor v G S Engineering & Construction Corp* [2017] 3 SLR 682 at [66].

137 [2015] 2 SLR 655.

138 Cap 332, 2005 Rev Ed.

139 *Goik Soon Guan v Public Prosecutor* [2015] 2 SLR 655 at [38].

140 For another example, see *Tay Wee Kiat v Public Prosecutor* [2018] SGHC 42 at [72]. *Contra Public Prosecutor v Yeo Ek Boon Jeffrey* [2018] 3 SLR 297 at [59].

48 Secondly, it is hoped that more guidance can be provided on when and to what extent a sentencing judge can depart from that prescribed by a sentencing framework. Save for a few cases where such helpful guidance has been given, albeit *vis-à-vis* the specific frameworks in those cases,[141] there has thus far not been more concerted consideration and clearer guidance on this.[142] The general stance is that guideline judgments may be departed from if there are good reasons to do so.[143] But does this mean, for instance, that once a sentencing judge locates a particular case within a particular band or box in a sentencing framework, he or she is permitted to move outside of that starting-point range by dint of other aggravating and mitigating circumstances, or must any adjustments be within the prescribed range?[144] In one guideline judgment, the court went so far as to state that lower courts may, without providing reasons, depart from the framework issued in that case.[145]

49 Without a more uniform position on when departures such as this may be made, it is likely difficult to attain the level of consistency and coherence that we are trying to have.[146] Sentencing experts have pointed out that specific guidance on when departures may be made are particularly essential where there exists a risk that lower court judges may not quite agree with the sentencing frameworks issued. In the absence of clear guidance on departures, it becomes all too easy for lower court judges to find ways to "manoeuvre" out of the prescribed sentencing framework,[147] rendering the framework in substance otiose.

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141 See, for example, *Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892 at [79]; *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [39(b)] and [62]; and *Public Prosecutor v G S Engineering & Construction Corp* [2017] 3 SLR 682 at [70].

142 See, however, the interesting discussion on what departure means in *Ding Si Yang v Public Prosecutor* [2015] 2 SLR 229 at [32]–[34].

143 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 37.

144 For a sample of less clear guidance, see *Public Prosecutor v Ganesan Sivasankar* [2017] 5 SLR 681 at [57] and *Public Prosecutor v BDB* [2018] 1 SLR 127 at [61].

145 *Ding Si Yang v Public Prosecutor* [2015] 2 SLR 229 (Annex A at [3]).

146 See for a discussion of this point in the English context, see Andrew Ashworth, "C & JA 2009 – Sentencing Guidelines and the Sentencing Council" [2010] Crim LR 389 at 394–397.

147 Andrew Ashworth, "Techniques for Reducing Subjective Disparity in Sentencing" in Council of Europe, *Disparities in Sentencing: Causes and Solutions – Reports Presented to the Eighth Criminological Colloquium* (1989) at p 123; John W Raine & Eileen Dunstan, "How Well Do Sentencing Guidelines Work?: Equity, Proportionality and Consistency in the Determination of Fine Levels in the Magistrates' Courts of England and Wales" (2009) 48(1) Howard J Crim Justice 13 at 29–30.

50 Thirdly, it is also hoped that more guidance can begin to be provided on sentencing offenders with antecedents. Presently, most of the sentencing frameworks in guidelines judgments issued by the appellate courts leave an offender's antecedents as a stage-two aggravating factor.[148] These frameworks are clearly geared towards providing guidance for cases involving first offenders. Placing antecedents as a stage-two factor arguably gives the impression that it is secondary in importance, at least relative to the offence-specific considerations such as level of harm and culpability.[149] Such an approach is well justified if the philosophy is that retribution should be given more weight over specific deterrence in cases involving repeat offenders. But is that in fact the intended effect? There have also been a number of cases involving repeat offenders, putting aside sentencing frameworks, where the tendency is to sentence while focusing primarily on the antecedents of the offender and how much more severe a punishment is needed to specifically deter him or her.[150] That approach prioritises specific deterrence over retribution. All but two[151] of the recent guideline judgments involve first-time offenders; thus, there is no clear guidance on which the preferred approach should be. In the two cases involving repeat offenders, it *seems* that retribution is given priority.[152] This issue needs to be considered in more detail at the next appropriate opportunity.[153] It may be that separate and general guidance that applies

148 See, for example, *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 140 at [56] and *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [64(b)].

149 See for a related discussion with respect to the English position Julian V Roberts, "Structured Sentencing: Lessons from England and Wales for Common Law Jurisdictions" (2012) 14(3) *Punishment & Society* 267 at 277–278. See also *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [46].

150 See, for example, *Public Prosecutor v Loo Pei Xiang Alan* [2015] SGDC 89.

151 *Loo Pei Xiang Alan v Public Prosecutor* [2015] 5 SLR 500; *Pua Hung Jann Jeffrey Nguyen v Public Prosecutor* [2017] 5 SLR 1120. The latter High Court case, more accurately speaking, is not a guideline judgment, but rather a case that had to directly apply the framework issued in a previous guideline judgment to an offender with an antecedent.

152 Though it is difficult to say if the positions taken in these two cases may be extended for *general application*. In *Loo Pei Xiang Alan v Public Prosecutor* [2015] 5 SLR 500, that less weight was given to specific deterrence by dint of the offender's antecedent (see [25] and [35]) might well have been strongly influenced by the fact that (a) the antecedents were very dated (close to two decades prior); and (b) there was a mandatory minimum imprisonment term and caning prescribed for the offence in question. In *Pua Hung Jann Jeffrey Nguyen v Public Prosecutor* [2017] 5 SLR 1120, the court had to take into account the unique quandary arising from the statutory framework in respect of the offences under ss 67(1) and 68(2) of the Road Traffic Act (Cap 276, 2004 Rev Ed).

153 For some excellent discussion on this issue, see Julian V Roberts & Jose Pina-Sánchez, "Paying for the Past: The Role of Previous Convictions at Sentencing in the Crown Court" in *Exploring Sentencing Practice in England and Wales* (Julian V Roberts ed) (Palgrave Macmillan, 2015) at pp 154–172 and Martin Wasik,

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to most, if not all, offences needs to be given on how to sentence repeat offenders.

51 Next, practitioners (that is, both prosecutors and defence counsels) may view sentencing guidelines as potentially having another aim, and that is the saving of time. They may expect that where there are sentencing guidelines for a particular offence, in their making submissions to the court, there is thus less need to spend so much time searching for and referring extensively to a large number of precedent cases. Otherwise, they may naturally get the impression that the existing sentencing framework is as good as otiose. Is that expectation correct? Contrariwise, to what extent is it legitimate for practitioners to continue to inundate courts with a legion of cases when there is already a sentencing framework in place?

52 The fourth suggestion therefore is that it may be helpful for the appellate courts to make clearer the extent to which practitioners are still required to scour and refer to precedent cases, where there already exists a sentencing framework for the particular offence. Is a goal of the appellate courts in issuing sentencing frameworks indeed to help practitioners and lower courts save time? If this is indeed such a goal, then in the author's view, as a rule of thumb, the more detailed a sentencing framework has been formulated, the less need there is to refer so extensively to precedent cases. A more detailed framework may be said to refer to a framework devised based on having surveyed a wide range of precedents, and that includes fairly specific guidance on how to locate the appropriate starting-point sentence, as well as the weight of key aggravating and mitigating factors. Where an appellate court has taken pains to formulate such a detailed sentencing framework, precedent cases recede into the background and play a supplementary role, though they still may be important. Where a less detailed framework is formulated, precedent cases would then still have to play a co-equal role, for instance, in assisting a court in appropriately locating the case in question along the starting-point ranges, or providing a better idea of how aggravating or mitigating a sentencing consideration should be. In any event, where a framework was formulated superseding certain aspects of precedent cases, such as the actual sentence passed, then *those aspects* of the precedent cases should not be relied on in future.

53 The final suggestion is that hopefully in more cases can defence counsels play a more active role in assisting the courts in formulating

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"Guidance, Guidelines and Criminal Record" in *Sentencing Reform: Guidance or Guidelines?* (Martin Wasik & Ken Pease eds) (Manchester University Press, 1987) at p 105.

sentencing frameworks. It is observed that in most guideline judgments in Singapore, only the Prosecution (and the young *amicus curiae*, if appointed) actively submitted to the court proposals on the appropriate sentencing framework.[154] This is the case even where offenders are represented by counsel. To be clear, defence counsels do not share the same duty of the Prosecution to act in the public interest[155] and hence do not have the same extent of duty to assist the court to formulate sentencing frameworks.[156] They may also be in an invidious position where they have to act in the best interests of their client while assisting the court in formulating sentencing frameworks.

54 However, it is respectfully submitted that there are good reasons for encouraging defence counsels to play a more active role, even if it means that they propose frameworks while focusing (only) on the best interests of their client. The common law is based on an adversarial system, rooted in the belief that judges are more informed and make the best decisions when counsels representing both parties respectively make their best arguments.[157] There is no reason why this does not apply to the sentencing stage, or more specifically, in cases where courts intend to formulate sentencing frameworks. Appellate courts can make better value judgments. At the very least, defence counsels may alert judges to other sentencing options such as community sentences. Around the world, observers have noted that sentencing guidelines tend to lead to an increase in sentences passed across the board for the offence in question.[158] It appears that this has also been the case in

154 See, for example, *Public Prosecutor v G S Engineering & Construction Corp* [2017] 3 SLR 682 at [63] and Pram Nair v Public Prosecutor [2017] 2 SLR 1015 at [142].

155 For the Prosecution's duty, see Chief Justice Sundaresh Menon, Opening Address at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at paras 34–40.

156 Nicholas Cowdery, "Guideline Judgments: It Seemed Like a Good Idea at the Time", paper presented at International Society for the Reform of Criminal Law, 20th International Conference (2–6 July 2006) at p 1.

157 See New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court: A Report of the New South Wales Sentencing Council* (June 2004) at p 69 for the point that:

> … [i]n criminal matters, the case is presented by the prosecutor and the defence to the judicial officer; an impartial and disinterested third party with the power to impose an authoritative determination. As such *the quality of the representations to the judicial officer are most important*. [emphasis added]

See generally Ellen E Sward, "Values, Ideology, and the Evolution of the Adversary System" (1989) 64(2) Ind LJ 301.

158 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 39.

Singapore.[159] If this is unintended, then defence counsels playing a more active role can help to mitigate such a consequence.

VI. How to construct sentencing frameworks

55 Given that it is envisaged that an increasing number of lawyers may be involved in assisting the courts in formulating sentencing frameworks, it might be useful to consolidate here our appellate courts' pointers,[160] and what in the author's view are some other important considerations, to keep in mind when formulating such frameworks.

56 For a start, the process of formulating sentencing frameworks is almost always a challenging and very time-consuming one.[161] The least difficult types of offences to formulate frameworks are those (a) which have easily quantifiable anchor(s); (b) coupled with a definite upper limit to the anchor(s); and (c) with no need to decide on the custodial threshold. The best example is the offence of drug trafficking under the Misuse of Drugs Act.[162] There is little doubt that the weight of drugs trafficked is an anchor consideration in calibrating the spectrum of starting-point sentences, and the Act provides clear applicable upper limits. There is also only one available form of punishment, which is imprisonment. To devise a framework for such offences, one simply needs to calibrate the entire range of anchor element (weight of drugs trafficked) to the entire range of possible imprisonment length. It becomes far more difficult or extremely difficult to formulate frameworks where one or more of these three ingredients do not exist, for instance:

> (a) where the key anchors determining severity of an offence are qualitative in nature (one will have to find ways to describe and divide up those anchors);
>
> (b) where there is no upper limit to the anchors (one will have to try one's best to find a rational basis to peg a particular level of severity as the upper limit and often beyond a point this is a value judgment that has to be made); and
>
> (c) where there is need to determine when the custodial threshold is breached (likewise, often beyond a point this is also a value judgment that has to be made).

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159 Based on the author's casual observation from the 60-odd guideline judgments issued in the past five years.

160 See, for example, *Public Prosecutor v Pang Shuo* [2016] 3 SLR 903 at [27]–[31].

161 Nicholas Cowdery, "Guideline Judgments: It Seemed Like a Good Idea at the Time", paper presented at International Society for the Reform of Criminal Law, 20th International Conference (2–6 July 2006) at p 17.

162 Cap 185, 2008 Rev Ed.

In short, the most challenging types of offences to formulate frameworks are those with no easily quantifiable anchors, where those anchors have no clear upper limit, *and* where the possible range of punishment includes both fine and imprisonment.

57 The difficulty in formulating framework can be compounded where there are either too few or too many precedent cases for the offence in question. Where there are too few precedents, one may have to take the extra effort to think of a wide range of possible ways the offence can be committed and which represents different levels of severity.[163] Where there are too many precedents, one has to try one's best to take as many of them into account when formulating the framework, and possibly having to come to the to the (uncomfortable, but necessary) realisation that the sentences imposed in a number of these past cases cannot fit snugly into the formulated framework.

58 The author proposes the following as the key steps in attempting to formulate a sentencing framework to effect the two-staged process method. *In each of the steps, it is important to have regard to the legislative intent behind the enactment of the offence in question,*[164] *as it may reveal useful information on how to formulate the framework.*

A. Step 1 – Selecting the appropriate approach

59 The first step is to select an appropriate approach to formulate the framework. As highlighted by the Court of Appeal in *Ng Kean Meng Terence*, there are five *main* options – single starting point approach, multi-starting point approach, benchmark sentence approach, sentencing matrix approach and sentencing band approach.[165] There is in effect one other possible approach, and that is guidance solely in the form of when a particular threshold, usually the custodial one, is breached. Each of these approaches have their own distinctive features. Appendix B summarises what these are and provides, based on a review of the guideline judgments issued in the past five years, a sense of the key factors to consider when deciding which of these approaches is

163 *Public Prosecutor v Chow Chian Yow Joseph Brian* [2016] 2 SLR 335 at [46].

164 *Mehra Radhika v Public Prosecutor* [2015] 1 SLR 96 at [27]–[28]; *Chan Chun Hong v Public Prosecutor* [2016] 3 SLR 465 at [37].

165 There is also the plotted graph approach, though it appears relatively unlikely that our appellate courts will adopt such an approach. It should be noted that outside of Singapore, various commentators have proposed other possible (and to the author's mind, very fascinating) ways to formulating sentencing frameworks. See, for example, Austin Lovegrove, "Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments" (2002) 14(2) Curr Issues Crim Justice 182 and Austin Lovegrove, "A Decision Framework for Judicial Sentencing: Judgment, Analysis and the Intuitive Synthesis" (2008) 32 Crim LJ 269 at 273.

likely more appropriate. One should also keep a lookout for whether there are already sentencing frameworks formulated for related or similar offences (especially where an offence is being prosecuted for the first time).[166] If there are, they may be a useful model on how a framework may be designed for the present offence. It is also pertinent to keep in mind frameworks for these other offences in order to maintain ordinal proportionality.[167]

B. Step 2 – Filling in the content of the framework

60 The next step is to approximate what the upper and lower limits of the offences are, that is, what is roughly the worst case that deserves the upper limit of the prescribed punishment, and the least serious case for the lower limit.[168] Thereafter, taking reference from the upper and lower limits, a suitable way should be found to calibrate key ways of committing the offence along the spectrum of severity, and peg them to different points along the range of possible punishments (in doing so, it may be valuable to keep in mind the points highlighted above).[169] This can be done by providing starting-point sentences, an indicative range of sentences or both.[170] This is necessary when formulating frameworks using the multiple starting points, sentencing matrix or sentencing bands approach, as the framework would articulate multiple reference points as appropriate to the respective methods. If the single starting point or benchmark approach is adopted, the framework would only need to explicitly indicate a single reference point, though it may be helpful to still visualise different ways of committing the offence along the full range of punishment in order to better locate what the reference point should be.

166 *Ghazali bin Mohamed Rasul v Public Prosecutor* [2014] 4 SLR 57 at [50].

167 Gavin Dingwall, "From Principle to Practice: Reconstructing the Nature of Sentencing Guidance" [2006/2007] CIL 293 at 312. Nevertheless, when attempting to formulate frameworks by drawing comparisons between related offences, it is important to understand the nuances (*eg*, sentencing range) between them: see *K Saravanan Kupusamy v Public Prosecutor* [2016] 5 SLR 88 at [4].

168 *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [84]–[88]; *Public Prosecutor v Sakthikanesh s/ o Chidambaram* [2017] 5 SLR 707 at [63]. See also *Chan Chun Hong v Public Prosecutor* [2016] 3 SLR 465 at [85].

169 See paras 42–47 above.

170 For an example of a case that provided both, see *Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892. For some preliminary guidance on when it is appropriate to provide both, see *Public Prosecutor v G S Engineering & Construction Corp* [2017] 3 SLR 682 at [71]–[74].

61 As far as possible, the calibrated points should be evenly spread out.[171] However, there may be instances where there is good reason to calibrate the points unevenly.[172] For the multiple starting points, sentencing matrix and sentencing bands approaches, the highest and lowest reference or notional case in the framework should be some distance away from the maximum and lowest possible punishment, to leave room for further adjustments upwards or downwards in light of other aggravating and mitigating factors respectively.[173]

62 If the custodial threshold has to be decided, there is need to search for possible rational bases to ground the decision. Nonetheless, if one cannot be found, a value judgment will have to be made as to when the threshold is crossed. Especially where a high maximum fine is prescribed, it is useful to keep in mind the courts' comment that a high fine can also effect a strong deterrent effect, and that a custodial term should not be lightly imposed.[174]

63 In calibrating the different points, local precedent cases are often valuable in giving an idea of the different principal ways in which the offence may be committed and the appropriate sentence for differing levels of severity.[175] Nonetheless, there may well be cases where sentencing outcomes derived from a formulated framework cannot be reconciled with the sentences passed in precedents.[176] This may occur when the sentences passed in precedent cases were set too high or too low.[177] Notably as well, precedent cases without written grounds of decision will usually be of limited value.[178]

64 Foreign precedents are useful as a source of inspiration in terms of how to calibrate the different points, but are usually not helpful as a guide on what actual punishment should be pegged to the various points.[179] This is because the sentencing philosophy of another jurisdiction may be quite different from that in Singapore.[180] The best

171 Though the evenness is not always perfect. See, for example, the framework in *Edwin s/o Suse Nathen v Public Prosecutor* [2013] 4 SLR 1139 at [22] and *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 186 at [46].

172 *Public Prosecutor v Sakthikanesh s/ o Chidambaram* [2017] 5 SLR 707 at [66] and [87].

173 *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 140 at [46].

174 See *Public Prosecutor v Cheong Hock Lai* [2004] 3 SLR(R) 203 at [42] and *Yang Suan Piau Steven v Public Prosecutor* [2013] 1 SLR 809 at [34].

175 *Public Prosecutor v Chow Chian Yow Joseph Brian* [2016] 2 SLR 335 at [44].

176 *Edwin s/o Suse Nathen v Public Prosecutor* [2013] 4 SLR 1139 at [21].

177 *Public Prosecutor v Marzuki bin Ahmad* [2014] 4 SLR 623 at [45].

178 *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 186 at [11(d)], citing *One Chee Eng v Public Prosecutor* [2012] 3 SLR 776 at [33].

179 See *AQW v Public Prosecutor* [2015] 4 SLR 150 at [13].

180 *Chan Chun Hong v Public Prosecutor* [2016] 3 SLR 465 at [87].

example is that in England and Wales, it is legislatively provided that a custodial term must not be imposed unless there are no other better sentencing options.[181] This will integrally affect when offences are pegged to custodial terms in sentencing frameworks. However, that position on custodial terms is not applicable in Singapore, or at least not in such strong terms.

65 One important decision to make when formulating frameworks for any offence is to decide whether it applies to guilty plea cases or to cases where an offender is convicted following a trial. Inspiration on this aspect may be drawn from *Ng Kean Meng Terence*.[182]

C. Step 3 – Deciding on relevant aggravating and mitigating factors

66 Thereafter, the other aggravating and mitigating factors that justify a further adjustment from the starting-point sentence should be decided on. There should be conceptual clarity on why and in what way the factors justify the adjustment. These factors should not be those already considered in the first stage, to avoid double counting. If a particular fact would invariably be present in *every* case of the offence, then conceptually it can be neither an aggravating nor mitigating factor, but is merely a neutral factor.[183]

67 As far as possible, some guidance, even if broad or in qualitative rather than quantitative terms,[184] should be given as to how to ascertain the weight of these factors.[185] Where the sentencing matrix or band approach is used, more precise guidance on weight may be given by way of stating how the presence of a particular number of aggravating or mitigating factors will move the presumptive sentence up to the next grid or band.[186] However, if one intends to do so, it is critical to bear in mind that *this should only be done if the particular factor usually*

181 Criminal Justice Act 2003 (c 44) (UK) s 152(2).

182 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [40]–[41].

183 *Mohammed Ibrahim s/o Hamzah v Public Prosecutor* [2015] 1 SLR 1081 at [40].

184 Neil Morgan & Belinda Murray, "What's in a Name? Guideline Judgments in Australia" (1999) 23 Crim LJ 90 at 105 ("… it is erroneous to suggest that *no* guidance is possible because of factual variations; limited guidance may be possible and may be preferable to no guidance" [emphasis in original]).

185 See, for example, *Mehra Rahdika v Public Prosecutor* [2015] 1 SLR 96 at [58]–[59]. See for some very helpful suggestions Austin Lovegrove, "Writing Quantitative Narrative Guideline Judgments: A Proposal" [2001] Crim LR 265.

186 For an excellent example of this, see the framework promulgated in *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [47]–[61].

manifests itself in only a few fairly standard ways, and these ways will generally always justify the same proportion of weight to be given.[187]

68 It is also crucial to think carefully of what one places as the stage-one factors and as stage-two factors. This is because as pointed out above,[188] the general impression that will be given is that stage-two factors are less important than stage-one factors in affecting the ultimate overall sentence to be passed. Additionally, it may be useful to point out factors which may not or will not be relevant in sentencing.[189]

D. Step 4 – Holistic check for coherence and fairness and providing example cases

69 The final step is to take a step back and perform a "holistic check", which is to consider various hypothetical ways in which the offence in question may be committed and apply the draft sentencing framework. Is the sentence derived applying the framework sensible and acceptable? Often in the midst of formulating a framework one focuses too much on the details and there is risk that one misses the woods for the trees. If anything does not feel quite right, there is probably need to go back and tweak the draft framework further.

70 It is further cautioned that in formulating frameworks, it is prudent to guard against reasoning backwards in that one starts with a particular sentence one desires for a particular variation of an offence that is not at the upper or lower limits, and then manipulates the numbers, anchors and end limits such that that sentence may be derived by applying the framework. Such an approach is susceptible to unprincipled reasoning and may to lead to intractable problems down the line.

71 As a supplement to the framework, it can be extremely helpful if example cases are provided to give a sense of the kinds of cases which would fall into the various sentencing bands (*eg*, Band 1, Band 2 *etc*)[190] or grids in the matrix (*eg*, low harm with low culpability, moderate harm with high culpability *etc*),[191] represent the different levels of aggravation or mitigation of a factor, or both. These example cases can be actual

187 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [18].
188 See para 50 above.
189 See, for example, *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [45].
190 See, for example, *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [50]–[60].
191 See, for example, *Public Prosecutor v Ganesan Sivasankar* [2017] 5 SLR 681 at [58]–[64].

precedent cases (where available), or hypothetical cases one crafts for illustration purposes.

VII. Journey into the next five years and more

72 All that said, formulating a sentencing framework is a complex and time- and resource-consuming task.[192] It is by no accident that there is universal consensus that sentencing is a difficult task.[193] To design frameworks that are coherent and useful, a firm understanding of sentencing controversies, concepts and issues is required. And apart from the least difficult types of offences to formulate a framework for, to attempt to formulate one for a more challenging offence in a rush of a few days or even a full week is a likely recipe for disaster.[194]

73 We have much to thank our appellate courts for: the immense amount of time and resources invested in formulating better sentencing frameworks to help structure sentencing discretion, as well as resolving some very vexed sentencing issues. The author envisages that this positive trend is likely to carry on in the near future, as our appellate courts continue to try to find the best balance between structuring yet not constraining a sentencing judge's discretion too much, and providing guidance in an even wider range of offences.[195] Indeed, in the past our courts have held back from providing frameworks in certain offences, in particular for murder and culpable homicide not amounting to murder, which they felt could be committed in a wide array of

192 Geoff Hall, "Reducing Disparity by Judicial Self-Regulation: Sentencing Factors and Guideline Judgments" (1991) 14 NZULR 208 at 224; Andrew von Hirsch, "Guidance by Numbers or Words? Numerical *versus* Narrative Guidelines for Sentencing" in *Sentencing Reform: Guidance or Guidelines?* (Martin Wasik & Ken Pease eds) (Manchester University Press, 1987) at p 51.

193 See, for example, Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 8. See also Cyrus Tata, "Accountability for the Sentencing Decision Process – Towards a New Understanding" in *Sentencing and Society – International Perspectives* (Cyrus Tata & Neil Hutton eds) (Ashgate, 2002) at pp 408–415 and Sally Traynor & Ivan Potas, "Sentencing Methodology: Two-tiered or Instinctive Synthesis" *Sentencing Trends & Issues* No 25 (December 2002) under "Introduction".

194 Andrew Ashworth, "Devising Sentencing Guidance for England" in *Sentencing Reform: Guidance or Guidelines?* (Martin Wasik & Ken Pease eds) (Manchester University Press, 1987) at p 81 ("[t]he true test of whether sentencing guidance can be devised lies in the attempt to do so: the task would take a considerable investment of time and resources").

195 From Appendix A below, it can be seen that in 2013, there were three guideline judgments (in the narrow sense), in 2014 there were seven, in 2015 there were 14, in 2016 there were eight, and in 2017 there were 21.

ways.[196] However, in the past five years this hesitation has gradually subsided – where an offence may be committed in a wide variety of ways, instead of formulating a framework for a host of variations, they have provided broad guidance on the appropriate sentence for specific forms of the offence, with the careful caveat that such guidance may require review and revision as new cases and developments arise.[197]

74 The author also urges patience and understanding if there appears to be inconsistencies in approach taken by the courts.[198] For instance, there have been cases where the court rejected framework proposals from the Prosecution by dint of apparent arbitrariness in certain aspects of the framework,[199] but yet in other cases the same apparent arbitrariness could arguably be said of the framework issued by the court.[200] Instead of feeling frustrated, it should be remembered that in terms of our journey to find the best way to structure sentencing discretion, we are presently in the experimental, exploratory and discovery phase.[201] In fact, the author is of the view that when it comes to an area such as sentencing, this might well be the only phase that any jurisdiction may ever be in. In such a phase, everyone, the courts no less, is trying to figure their way around, and apparent inconsistencies are simply par for the course. But precisely because we are in the experimental and exploratory phase, there is no doubt so much one can look forward to, as we tackle the challenges described above, assess the effectiveness of our methods, and chart our path moving forward in striking the best possible balance.[202]

196 *Public Prosecutor v Tan Kei Loon Allan* [1998] 3 SLR(R) 679 at [33] and for a much more recent case *Dewi Sukowati v Public Prosecutor* [2017] 1 SLR 540 at [15].

197 See, for example, *Public Prosecutor v G S Engineering & Construction Corp* [2017] 3 SLR 682 at [70].

198 Gavin Dingwall, "From Principle to Practice: Reconstructing the Nature of Sentencing Guidance" [2006/2007] CIL 293 at 317–318.

199 *Tan Gek Young v Public Prosecutor* [2017] 5 SLR 820 at [59]–[62].

200 See, for example, the framework in *Public Prosecutor v Ganesan Sivasankar* [2017] 5 SLR 681 at [55], where it is not entirely clear why (a) the presumptive starting range for Category 1 starts at three months' jail; and (b) the ranges are of disproportionate lengths.

201 Justice Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective", speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014) at para 39.

202 Sarah Krasnostein & Arie Freiberg, "Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?" (2013) 76(1) Law & Contemp Probs 265 at 288.

Appendix A – Table of Guideline Judgments Issued March 2013 to March 2018

Part 1

S/N	Case name	Court	Date	Sentencing guidelines	Guideline type
Offences occasioning bodily harm					
1	*Public Prosecutor v Hue An Li*[203]	HC(3) – MA	September 2014	Offence of traffic-related negligent act causing death under s 304A(*b*) of Penal Code[204]	Benchmark
2	*Public Prosecutor v Kho Jabing*[205]	CA(5)	January 2015	When to impose death penalty for murder under s 300(*c*) of Penal Code	Death penalty threshold
3	*Public Prosecutor v Lim Choon Teck*[206]	HC – MA	October 2015	Offence of rash act endangering lives (by cycling) under s 336(*a*) of Penal Code	Custodial threshold
4	*Chua Siew Peng v Public Prosecutor*[207]	HC – MA	May 2017	Offence of wrongful confinement under s 342 of Penal Code	Benchmark and custodial threshold
5	*Public Prosecutor v Ganesan Sivasankar*[208]	HC – MA	July 2017	Offence of traffic-related rash act causing death under s 304A(*a*) of Penal Code	Sentencing matrix
6	*Public Prosecutor v Yeo Ek Boon Jeffrey*[209]	HC(3) – MA	November 2017	Offence of voluntarily causing hurt to public servant (police officers or similar officers) under s 332 of Penal Code	Sentencing bands

203 [2014] 4 SLR 661.
204 Cap 224, 2008 Rev Ed.
205 [2015] 2 SLR 112.
206 [2015] 5 SLR 1395.
207 [2017] 4 SLR 1247.
208 [2017] 5 SLR 681.
209 [2018] 3 SLR 1080.

7	*Public Prosecutor v BDB*[210]	CA	November 2017	Offence of voluntarily causing grievous hurt (death or multiple fractures) under s 325 of Penal Code	Series of benchmarks (multiple starting points)
8	*Public Prosecutor v Lim Yee Hua*[211]	HC – MA	December 2017	Offence of voluntarily causing hurt under s 323 of Penal Code in a road rage context	Custodial threshold
9	*Tang Ling Lee v Public Prosecutor*[212]	HC – MA	January 2018	Offence of traffic-related negligent act causing grievous hurt under s 338(*b*) of Penal Code	Sentencing matrix
10	*Tay Wee Kiat v Public Prosecutor*[213]	HC(3) – MA	March 2018	Offences relating to maid abuse under s 323 read with s 73 of Penal Code	Sentencing matrix
11	*Public Prosecutor v Goh Jun Hao Jeremy*[214]	HC – MA	March 2018	Offence of affray under s 267B of Penal Code	Sentencing matrix and custodial threshold

Sexual offences

12	*Poh Boon Kiat v Public Prosecutor*[215]	HC – MA	September 2014	Offence of procuring, receiving or harbouring a prostitute under ss 140(1)(*b*) and 140(1)(*d*) of Women's Charter;[216] living on immoral earnings under s 146; managing a brothel under s 148; and managing a place or assignation under s 147 of the same Act	Sentencing matrix

210 [2018] 1 SLR 127.
211 [2018] 3 SLR 1106.
212 [2018] 4 SLR 813.
213 [2018] SGHC 42.
214 [2018] SGHC 68.
215 [2014] 4 SLR 892.
216 Cap 353, 2009 Rev Ed.

13	*Public Prosecutor v Chong Hou En*[217]	HC – MA	March 2015	Offence of insulting/intruding modesty of a woman under s 509 of Penal Code, using recording device	Custodial threshold
14	*Public Prosecutor v Yap Weng Wah*[218] (to be read with *Public Prosecutor v BAB*[219] below)	HC – Trial	March 2015	Offence of sexual penetration of minor (under 14 years) under s 376A(3) of Penal Code (anal intercourse and fellatio)	Benchmark
15	*AQW v Public Prosecutor*[220] (to be read with *Public Prosecutor v BAB* and *Pram Nair v Public Prosecutor*[221] below)	HC – MA	May 2015	Offence of sexual penetration of minor sexual penetration of minor (below 16 and above 14) under s 376A(1)(*c*) (punishable under s 376A(2)) of Penal Code; and sexual exploitation of child (in specific circumstances) under s 7 of Children and Young Persons Act[222]	Benchmark
16	*Chan Chun Hong v Public Prosecutor*[223]	HC – MA	April 2016	Child-sex tourism related offences under s 376D of Penal Code	Benchmark and sentencing bands
17	*Public Prosecutor v BAB* (to be read in light of *Pram Nair v Public Prosecutor* below)	CA	January 2017	Offence of sexual penetration of minor under ss 376A(2) and 376A(3) of Penal Code, where there is element of abuse of trust	Benchmark

217 [2015] 3 SLR 222.
218 [2015] 3 SLR 297.
219 [2017] 1 SLR 292.
220 [2015] 4 SLR 150.
221 [2017] 2 SLR 1015.
222 Cap 38, 2001 Rev Ed.
223 [2016] 3 SLR 465.

18	*Ng Kean Meng Terence v Public Prosecutor*[224]	CA	May 2017	Offence of rape under s 375(1)(*b*) of Penal Code	Sentencing bands
19	*Public Prosecutor v BLV*[225] (to be read in light of *GBR v Public Prosecutor*[226] and *Kunasekaran s/o Kalimuthu Somasundara v Public Prosecutor*[227] below)	HC – Trial	July 2017	Offence of (aggravated) outrage of modesty against minor under s 354(2) of Penal Code, where private parts intruded	Benchmark
20	*Pram Nair v Public Prosecutor*	CA	September 2017	Offence of sexual assault by penetration (penile-vagina penetration only) punishable under s 376(3) of Penal Code	Sentencing bands
21	*GBR v Public Prosecutor*	HC – MA	November 2017	Offence of (aggravated) outrage of modesty against minor under s 354(2) of Penal Code, where private parts intruded	Sentencing bands
22	*Kunasekaran s/o Kalimuthu Somasundara v Public Prosecutor*	HC – MA	January 2018	Offence of outrage of modesty *simpliciter* under s 354(1) of Penal Code	Sentencing bands

Misuse of Drugs Act*[228] *offences

23	*Vasentha d/o Joseph v Public Prosecutor*[229]	HC – MA	July 2015	Offence for trafficking in diamorphine (0–9.99g) under s 5 of Misuse of Drugs Act	Multiple starting points

224 [2017] 2 SLR 449.
225 [2017] SGHC 154.
226 [2018] 3 SLR 1048.
227 [2018] 4 SLR 580.
228 Cap 185, 2008 Rev Ed.
229 [2015] 5 SLR 122.

24	*Loo Pei Xiang Alan v Public Prosecutor*[230] (see also *Pham Duyen Quyen v Public Prosecutor*)[231]	HC – MA	August 2015	Offence of trafficking in methamphetamine (167–250g) under s 5 of Misuse of Drugs Act	Multiple starting points
25	*Public Prosecutor v Tan Thian Earn*[232]	HC – MA	April 2016	Offence of manufacture, supply, possession, import or export of controlled equipment, materials *etc* useful for manufacture of controlled drug under s 10A(1) of Misuse of Drugs Act	Sentencing matrix
26	*K Saravanan Kuppusamy v Public Prosecutor*[233]	HC – MA	August 2016	Offence of overseas abetment of Misuse of Drugs Act offences under s 13(*aa*) of the same Act	Sentencing matrix[234]
27	*Suventher Shanmugam v Public Prosecutor*[235]	CA	April 2017	Offence of trafficking in cannabis (330–500g) under s 5 of Misuse of Drugs Act	Multiple starting points
28	*Public Prosecutor v Tan Lye Heng*[236]	HC – MA	July 2017	Offence of trafficking in diamorphine (10–15g) under s 5 of Misuse of Drugs Act	Multiple starting points
29	*Amin bin Abdullah v Public Prosecutor*[237]	HC(3) – MA	August 2017	Offence of trafficking in diamorphine (10–14.99g) under s 5 of Misuse of Drugs Act	Multiple starting points

230 [2015] 5 SLR 500.
231 [2017] 2 SLR 571.
232 [2016] 3 SLR 269.
233 [2016] 5 SLR 88.
234 The court only pointed out the principal factual elements to consider in determining the appropriate sentence, without proposing presumptive or starting-point sentences.
235 [2017] 2 SLR 115.
236 [2017] 5 SLR 564.
237 [2017] 5 SLR 904.

				When imprisonment term in lieu of caning is appropriate, and the length of such term	

Road Traffic Act*[238] *offences

30	*Edwin s/o Suse Nathen v Public Prosecutor*[239]	HC – MA	September 2013	Offence of driving under influence of drink under s 67(1)(*b*) of Road Traffic Act, where no hurt or property damage was caused	Multiple starting points
31	*Chong Jiajun Eugene v Public Prosecutor*[240]	HC – MA	November 2015	Offence of exhibiting false licence plate on vehicle under s 129(2)(*d*) of Road Traffic Act	Benchmark and custodial threshold
32	*Public Prosecutor v Koh Thiam Huat*[241]	HC – MA	May 2017	Offence of dangerous driving under s 64 of Road Traffic Act	Sentencing matrix
33	*Stansilas Fabian Kester v Public Prosecutor*[242]	HC – MA	July 2017	Offence of driving under influence of drink under s 67(1)(*b*) of Road Traffic Act, where hurt or property damage was caused	Custodial threshold and sentencing matrix
34	*Public Prosecutor v Aw Tai Hock*[243] (development of framework in *Public Prosecutor v Koh Thiam Huat* above)	HC – MA	October 2017	Offence of dangerous driving under s 64 of Road Traffic Act	Sentencing matrix

238 Cap 276, 2004 Rev Ed.
239 [2013] 4 SLR 1139.
240 [2016] 1 SLR 365.
241 [2017] 4 SLR 1099.
242 [2017] 5 SLR 755.
243 [2017] 5 SLR 1141.

Corruption offences

35	*Ding Si Yang v Public Prosecutor*[244]	HC – MA	Janauary 2015	Football match-fixing, offence under s 5 of Prevention of Corruption Act[245]	Plotted graph
36	*Tjong Mark Edward v Public Prosecutor*[246] (see also *Public Prosecutor v Marzuki bin Ahmad*)[247]	HC – MA	April 2015	Offence of corruptly obtaining gratification as agent under s 6(*a*) of Prevention of Corruption Act	Custodial threshold
37	*Public Prosecutor v Syed Mostafa Romel*[248]	HC – MA	April 2015	Public and private sector corruption, offence under s 6(*a*) of Prevention of Corruption Act	Custodial threshold

Other offences

38	*Public Prosecutor v Quek Li Hao*[249]	HC – MA	August 2013	Offence of harassment on behalf of unlicensed moneylender under s 28 of Moneylenders Act,[250] where innocent victims were targeted	Benchmark
39	*Idya Nurhazlyn bte Ahmad Khir v Public Prosecutor*[251]	HC – MA	November 2013	Offences of making or giving false/ misleading statements in connection of Singapore passport/travel documents under s 39(1) of Passports Act,[252] and cheating *simpliciter* under s 417 of Penal Code	Single starting point for making false statement offence; custodial threshold for cheating offence

244 [2015] 2 SLR 229.
245 Cap 241, 1993 Rev Ed.
246 [2015] 3 SLR 375.
247 [2014] 4 SLR 623.
248 [2015] 3 SLR 1166.
249 [2013] 4 SLR 471.
250 Cap 188, 2010 Rev Ed.
251 [2014] 1 SLR 756.
252 Cap 220, 2008 Rev Ed.

40	*Yap Ah Lai v Public Prosecutor*[253]	HC – MA	April 2014	Offence of importation of more than 2kg of duty unpaid cigarettes under s 128F of Customs Act[254]	Multiple starting points
41	*Ghazali bin Mohd Rasul v Public Prosecutor*[255]	HC – MA	July 2014	Offences under reg 6(1) of Estate Agents (Estate Agency Work) Regulations 2010[256]	Benchmark
42	*Tan Beng Chua v Public Prosecutor*[257]	HC – MA	July 2014	Offence of submitting false statement to Official Assignee under s 137(*a*) of Bankruptcy Act[258]	Custodial threshold
43	*Mehra Radhika v Public Prosecutor*[259]	HC – MA	October 2014	Offence of arranging or assisting in arrangement of marriage of convenience under s 57C(2) of Immigration Act[260]	Custodial threshold
44	*Mohd Ibrahim s/o Hamzah v Public Prosecutor*[261]	HC(3) – MA	December 2014	Offence of failing to report for registration for National Service, under s 3(1) of Enlistment Act,[262] where period of default is two years or less	Custodial threshold

253 [2014] 3 SLR 180.
254 Cap 70, 2004 Rev Ed.
255 [2014] 4 SLR 57.
256 S 644/2010.
257 [2014] 3 SLR 1274.
258 Cap 20, 2009 Rev Ed.
259 [2015] 1 SLR 96.
260 Cap 133, 2008 Rev Ed.
261 [2015] 1 SLR 1081.
262 Cap 93, 2001 Rev Ed.

45	*Goik Soon Guan v Public Prosecutor*[263] (see also *Tan Wei v Public Prosecutor*)[264]	HC – MA	January 2015	Offence of infringement of trademark under s 49(*c*) of Trade Marks Act[265]	Series of benchmarks
46	*Public Prosecutor v Ng Sae Kiat*[266]	HC(3) – MA	July 2015	Offence of engaging in act, practice or course of business which operates as fraud/deception under s 201(*b*) of Securities and Futures Act[267]	Custodial threshold
47	*Public Prosecutor v Chow Chian Yow Joseph Brian*[268] (superseded by *Public Prosecutor v Sakthikanesh s/o Chidambaram*[269] below)	HC – MA	February 2016	Offence of National Service defaulter remaining overseas without valid exit permit under s 32(1) (punishable under s 33(*b*)) of Enlistment Act	Plotted graph
48	*Public Prosecutor v Pang Shuo*[270]	HC – MA	April 2016	Offence of unloading (delivery, loading *etc*) duty unpaid cigarettes under s 128H of Customs Act	Plotted graph
49	*Koh Yong Chiah v Public Prosecutor*[271]	HC(3) – MA	November 2016	Offence of giving false information to public servant under s 182 of Penal Code	Custodial threshold
50	*Public Prosecutor v G S*	HC – MA	December 2016	Offence of breach of duty as employer to take necessary	Sentencing matrix

263 [2015] 2 SLR 655.
264 [2016] 3 SLR 450.
265 Cap 332, 2005 Rev Ed.
266 [2015] 5 SLR 167.
267 Cap 289, 2006 Rev Ed.
268 [2016] 2 SLR 335.
269 [2017] 5 SLR 707.
270 [2016] 3 SLR 903.
271 [2017] 3 SLR 447.

	Engineering & Construction Corp[272]			measures to ensure safety of employees under s 12 of Workplace Safety and Health Act[273]	
51	*Abdul Ghani bin Tahir v Public Prosecutor*[274]	HC – MA	May 2017	Officer of body corporate committing offences (in particular negligently) under s 47 of Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act[275] (read with s 59 of the same Act) Offence of breach of duty to exercise reasonable diligence under s 157(1) of Companies Act[276]	Custodial threshold
52	*Keeping Mark John v Public Prosecutor*[277]	HC – MA	July 2017	Offence of abetment of cheating by personation (in the context of people smuggling by syndicates) under s 419 of Penal Code	Benchmark
53	*Public Prosecutor v Sakthikanesh s/o Chidambaram*	HC(3) – MA	July 2017	Offence of failing to comply with further reporting orders for National Service, under s 39 of Enlistment Act, where period of default is above two years	Multiple starting points
54	*Tan Gek Young v Public Prosecutor*[278]	HC – MA	August 2017	Offences relating to the illicit supply or sale of cough	Custodial threshold

272 [2017] 3 SLR 682.
273 Cap 354A, 2009 Rev Ed.
274 [2017] 4 SLR 1153.
275 Cap 65A, 2000 Rev Ed.
276 Cap 50, 2006 Rev Ed.
277 [2017] 5 SLR 627.
278 [2017] 5 SLR 820.

				preparations under Poisons Act,[279] Medicines Act[280] *etc*	
55	*Logachev Vladislav v Public Prosecutor*[281]	HC – MA	January 2018	Offence of cheating at play under s 172A of Casino Control Act[282]	Sentencing bands

Other threshold guidance

56	*Public Prosecutor v Koh Wen Jie Boaz*[283] (see also *Public Prosecutor v Ong Jack Hong*)[284]	HC – MA	October 2015	Choosing probation or reformative training for young offenders	Threshold
57	*Sim Yeow Kee v Public Prosecutor*[285]	HC(3) – MA	September 2016	Circumstances in which corrective training should be imposed	Threshold
58	*Public Prosecutor v Teo Chang Heng*[286] (read with *Sim Wen Yi Ernest v Public Prosecutor*)[287]	HC – MA	December 2017	Threshold for imposing community sentences (short detention order)	Community sentence (short detention order) threshold

279 Cap 234, 1999 Rev Ed.
280 Cap 176, 1985 Rev Ed.
281 [2018] 4 SLR 609.
282 Cap 33A, 2007 Rev Ed.
283 [2016] 1 SLR 334.
284 [2016] 5 SLR 166.
285 [2016] 5 SLR 936.
286 [2018] 3 SLR 1163.
287 [2016] 5 SLR 207.

Part 2

Other HC(3) guidance cases[288]

S/N	Case name	Date	Issue decided
1	*Mohamad Fairuuz bin Saleh v Public Prosecutor*[289]	December 2014	Meaning of "fixed by law", "mandatory minimum sentence" and "specified minimum sentence"
2	*Chew Soo Chun v Public Prosecutor*[290]	January 2016	Principles for reducing sentence for ill-health, on basis of judicial mercy

Legend:

CA	Court of Appeal of Singapore, with three judges hearing the matter
CA(5)	Court of Appeal of Singapore, with five judges hearing the matter
HC	High Court of Singapore, with a single judge hearing the matter
HC(3)	High Court of Singapore, with three judges hearing the matter
MA	Magistrate's Appeal

288 There is one other HC(3) case, which is *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983. That case did not involve any sentencing issue but rather the issue of what the elements under reg 12(*b*) of the United Nations (Sanctions – Democratic People's Republic of Korea) Regulations 2010 (S 570/2010) are.

289 [2015] 1 SLR 1145.

290 [2016] 2 SLR 78.

Appendix B – Main Approaches to Formulate Sentencing Framework

I. Relationship and overlap among the five main framework approaches

1 There is no bright line between the five main framework approaches, and there are overlapping features among the approaches.[291]

2 For a start, the benchmark approach is in fact not truly a standalone approach. A benchmark sentence, as it is commonly understood, is simply a presumptive sentence for an archetypal case or a series of archetypal cases, defined based on a stipulated set of factual matrix for an offence.[292] Seen in this light, the benchmark approach is simply the *genus* approach, under which the other four main approaches are *species* or subsets:

(a) The single starting point approach is simply a benchmark approach that sets a presumptive sentence without first considering any factual elements of the case.

(b) The multiple starting points approach, as it is defined in *Ng Kean Meng Terence v Public Prosecutor*[293] ("*Ng Kean Meng Terence*"), is a form of benchmark approach where multiple presumptive sentences are fixed for multiple factual matrices, anchored by a *single* metric.

(c) The sentencing matrix approach involves the same, except that the multiple presumptive sentences are anchored by (at least) *two* fixed principal factual elements that can *respectively* be categorised into varying levels of harm caused and culpability of the offender.

(d) The sentencing bands approach is similar to the sentencing matrix approach, save that the multiple presumptive sentences are anchored by different factual matrices (for example, the number of aggravating factors) but which are not calibrated across the spectrum based on explicit references to *fixed* levels of harm and culpability.[294]

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291 Hence, it was not always easy to classify in Appendix A the guideline judgments issued in the past five years based on which framework approach adopted. The reader might legitimately classify some of the cases differently.

292 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [31].

293 [2017] 2 SLR 449.

294 In *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [37], the court suggested that a key difference between the sentencing bands and the sentencing

(*cont'd on the next page*)

It can thus be seen that the multiple starting points, sentencing matrix and sentencing bands approaches are in essence *a series of* benchmark sentences for notional cases. The difference really lies in how each notional case is defined.

3 That said, the categorisation and labelling of these main approaches, as was done in *Ng Kean Meng Terence*, does provide a useful means for one to figure out which is the most appropriate approach to use. This article will denote the benchmark approach[295] not as a form of *genus* but rather as the approach that involves setting a presumptive sentence (or range of sentences) for an archetypal case or a series of archetypal cases, defined based on a stipulated set of factual matrix for an offence, *and which does not have the full features of the other four main approaches*.

II. Key features of the approaches and when each may be more appropriate[296]

4 Examples of each of the main approaches and their key features may be gleaned from the respective cases listed in Appendix A.

5 The starting point method simply involves setting a notional starting-point sentence (or range of sentences) which applies *in any case* involving the offence in question, that is, *without first considering any specific facts of the case*. The ultimate sentence to be passed is then derived by adjusting upwards or downwards the starting-point sentence to take into account all relevant aggravating and mitigating factors.

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matrix approaches is that the former draws a distinction between offence-specific and offender-specific factors. With due respect, that seems questionable. It is true that the *England and Wales' model* of issuing sentencing guidelines using the sentencing matrix approach does not separate the two kinds of factors in Steps 1 and 2 of the approach. Conceptually, however, there is nothing barring one from formulating a framework using the sentencing matrix method in a way that *also places offence-specific factors in the first step of analysis* (*ie*, locating the appropriate starting-point sentence within the stipulated presumptive range) *and offender-specific factors in the second step* (see, for example, *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [76]–[80]). It is largely a matter of preference whether one wishes to do so, as is the case for the sentencing bands approach, based on how much emphasis one wants to place on the different factors.

295 In particular in Appendix A.

296 As regards providing guidance solely by indicating when the custodial threshold may be crossed, this approach may be particularly appropriate for offences involving (a) a narrow sentencing range (*eg*, up to one year's imprisonment); but yet (b) there is a wide variety of factual circumstances in which the offence may be committed; and (c) it is difficult to categorise principal factual elements for the offence: see *Koh Yong Chiah v Public Prosecutor* [2017] 3 SLR 447 at [45] and [48].

6 This approach is likely to only be appropriate in rare cases. It is suitable where "the offence in question almost invariably manifests itself in a particular way and the range of sentencing considerations is circumscribed".[297] Such might be the case for a regulatory offence.

7 Where an offence may be manifested in a wide variety of circumstances, it may be more appropriate to adopt either the multiple starting points, sentencing matrix and sentencing bands approach. In choosing between these three approaches, some key factors to consider include (a) how many core anchors (that is, principal factual elements) there are that affect the level of severity of the offence; (b) whether those anchors are quantitative or qualitative in nature; (c) whether the anchors can be quantified in any reliable way; and (d) whether there is a rational upper limit for these anchors.

8 The multiple starting points approach is more appropriate for an offence that "is clearly targeted at a *particular* mischief which is measurable according to a single (usually quantitative) metric that assumes primacy in the sentencing analysis" [emphasis in original].[298] Examples of such offences are drug trafficking and cigarette smuggling. For these offences, there is *one main anchor* (such as weight of drugs or cigarette involved) that can be measured quantitatively, and can, as a starting point, be rationally used to calibrate varying levels of severity at which one commits the offence *without first considering other main anchors (*eg*, offender's culpability)*.[299] Moreover, this approach will probably (though not always) not be suitable where it is difficult to pin down any *rational* upper limit to the said anchor.[300]

9 Where there is more than one main anchor, the anchor is not readily quantifiable, or there is no rational upper limit for the anchor, it may be more appropriate to adopt the benchmark, sentencing matrix or sentencing bands approach in formulating a framework.[301] An important consideration in deciding between the latter two approaches is whether it is possible to identify *at least two anchors* that affect the levels of severity of the offence, usually the level of harm caused and the

297 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [27]–[28].

298 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [29]–[30].

299 For an illustrative case where the court found that this approach was not suitable because there must rationally be more than one main anchor, see *Liew Zheng Yang v Public Prosecutor* [2017] 5 SLR 1160 at [9]–[16].

300 *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [50]. For a good example of a case where the court adopted the multiple starting point approach because it could identify a rational upper limit to the main anchor, see *Public Prosecutor v Sakthikanesh s/o Chidambaram* [2017] 5 SLR 707 at [62].

301 See *Logachev Vladislav v Public Prosecutor* [2018] 4 SLR 609 at [71]–[84].

level of culpability of the offender.[302] If it is so possible, *and the relevant sentencing considerations can generally be conceptually categorised as affecting either only the level of harm or the level of culpability*, then the sentencing matrix approach may be more appropriate. Where it is difficult to identify at least two fixed anchors to calibrate levels of severity, or the considerations often go towards *affecting both of these anchors*,[303] the sentencing bands approach is probably the preferable approach.[304]

10 Pertinently, however, the sentencing matrix or sentencing bands approach is not always the ideal or most practicable approach. The benchmark approach (and the custodial threshold approach) may instead be more suitable where one intends only to, or indeed, can only provide guidance on a narrow range of manifestations of an offence. This would mainly *include* situations where: (a) due to a lack of precedents, it is very difficult to visualise the ways in which the offence may be committed across the entire range of levels of severity or their corresponding appropriate starting point punishment; or (b) it is observed that lower courts thus far only require some guidance for certain manifestations of an offence, for instance, because the vast majority of cases involving that offence are committed within a relatively narrow range of circumstances.

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302 *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [33]–[34].

303 See, for example, *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at [43]–[44], where many of the key considerations listed by the court cannot cleanly be categorised into factors that affect either only the level of harm or level of culpability.

304 On this point, see the author's comment at Appendix B, n 294 above.