

# SENTENCING THEORY AND PRACTICE

**A Comparison Of  
Pakistani Legislation  
And Case Law With Practice**

**DECEMBER, 2017**

**By Haya Emaan Zahid**



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## A COMPARISON OF PAKISTANI LEGISLATION AND CASE LAW WITH PRACTICE

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<sup>1</sup> The authoring of this research paper could not have been possible without the support of Professor MOEEN CHEEMA (AUSTRALIAN NATIONAL UNIVERSITY), JUSTICE NASIR ASLAM ZAHID (CHAIRPERSON OF THE LEGAL AID SOCIETY AND COMMITTEE FOR THE WELFARE OF PRISONERS –LAO), JUSTICE ARIF HUSAIN KHILJI (DIRECTOR GENERAL OF THE SINDH JUDICIAL ACADEMY), MS. MENAAL MUNSHEY, MR. SHAHZAD KHURRAM, MR.SAADAT BAKHTIAR KHILJI, MS. ERUM AND MS. JAWZIYA ZAMAAN. THEIR GUIDANCE AND VALUABLE INPUT AT VARIOUS STAGES OF THIS RESEARCH PLAYED AN INSTRUMENTAL ROLE IN COMPLETION OF THIS WORK.

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*If criminal law as a whole is the  
Cinderella of jurisprudence  
then the law of sentencing is  
Cinderella's illegitimate baby<sup>3</sup>.*

**Nigel Walker**

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<sup>3</sup>Nigel Walker, 'Sentencing in a Rational Society' (1969).

# 1. INTRODUCTION

Theories of punishment and sentencing have shifted considerably over time. In the last century, there has been a move away from ‘punitive’ and ‘retributivist’ models of justice towards ‘therapeutic’ or ‘restorative’ models instead.<sup>4</sup> The convict, once seen as a dysfunctional and malicious deviant to be punished, has transformed into a product of societal shortcomings and in need of rehabilitation. The latter approach is pragmatic; it is based on the belief that society as a whole benefits from law-abiding and economically productive citizens.

Retributive and reformatory responses to criminality have overlapping components and objectives. In both, judges are given wide ranging discretionary powers while also being expected to impose ‘judicious’ sentences that take into account the nature of the offence and the circumstances of the offender.<sup>5</sup> Limits on judicial discretion are often imposed through statutory tariffs, precedential judgments of higher courts, and in some jurisdictions, directives from sentencing guideline councils<sup>6</sup>. Although sentencing is widely recognized as an art rather than a precise science, guiding standards and principles are necessary to prevent inconsistent sentences between offenders with similar backgrounds who commit offences. Research shows that consistency in sentencing ensures fairer outcomes and greater accuracy in prison population projections.<sup>7</sup>

Amidst shifting global paradigms on sentencing policies, Pakistan has inherited a criminal justice system from Britain that emphasizes retribution over rehabilitation. The Pakistan Penal Code (“PPC”) of 1860 defines a majority of crimes and sanctions and the few amendments made have done little to reduce the Code’s retributivist overtones. The Criminal Procedure Code of 1898 (“CrPC”) consolidates laws relating to the criminal procedure, while numerous special laws tackle arms and ammunition,<sup>8</sup> terrorism,<sup>9</sup> and narcotic substances,<sup>10</sup> and also provide a range of penalties.

<sup>4</sup> Girish Kathpalia, ‘Criminology and Prison Reforms’, Lexis Nexis, Page 104-105

<sup>5</sup> Bachan Singh v State of Punjab, AIR 1980 SC 898

<sup>6</sup> Lowenstein, Allard K, ‘A Most Serious Crime: Pakistan’s Unlawful Use of the Death Penalty.’ (2016).

<sup>7</sup> Andrew Ashworth and Julian V Roberts, ‘The Origins and Nature of the Sentencing Guidelines in England and Wales’ page 1.

<sup>8</sup> The Sindh Arms Act, 2013

<sup>9</sup> Anti-Terrorism Act, 1997

<sup>10</sup> Control of Narcotic Substances Act, 1997

Despite upper limits on imprisonment and monetary fines, the body of law still emphasizes punishment and control over reformation. This leads to an overreliance on custodial sentencing and remand sentences which commence at the pre-trial stage, and explains Pakistan's exceptionally high pre-trial detention rates and prison occupancy rate which is currently estimated at 173 percent.<sup>11</sup> Gross overpopulation is possibly one of the biggest human rights violations facing the criminal justice system of Pakistan today but law reform reports and efforts have largely focused on improvements at the guilt adjudication rather than the sentencing phase.

In light of the above, this paper seeks to shed light on the much-neglected area of sentencing jurisprudence in Pakistan. It summarizes Pakistani criminal procedure and then examines legislation and judicial decisions to determine courts' awareness of theories of punishment. It then analyzes trial court judgments across the province of Sindh to determine whether principles of 'fairness' and 'consistency' are applied to sentencing decisions, and points to gaps in the current judicial practice.<sup>12</sup>

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<sup>11</sup>Nida Paracha, Genn Ross and Haya Emaan Zahid, 'Training Needs Analysis report for Prison Constables in Pakistan', Legal Aid Office publication (May 2016).

<sup>12</sup>The reference to fairness entails the notion that sentences are clear, predictable and proportionate.

## 2. PAKISTAN'S COURT STRUCTURE, CRIMINAL PROCEEDINGS, AND SENTENCING

The judiciary in Pakistan consists of subordinate courts, high courts, and the Supreme Court. The subordinate courts are further subdivided into Magistrates Court and Sessions Courts, and the CrPC determines subject matter and sentencing jurisdiction.<sup>13</sup> Generally, the former is the lowest tier court and the latter is higher, with each district generally having one Sessions Court headed by a Sessions Judge.

First class magistrates may pass sentences of up to three years imprisonment and fines not exceeding PKR 45,000; second class magistrates up to one year and fines not exceeding PKR 15,000; and third class magistrates up to 1 month and fines not exceeding PKR 50.<sup>14</sup> Sessions Court Judges and Additional Sessions Court Judges are empowered to pass any sentence independently, but death sentences are subject to the confirmation of the High Court. Assistant Sessions Court Judges may pass any sentence besides death and life imprisonment.<sup>15</sup>

Criminal proceedings commence when an individual files a First Information Report (FIR) with the police upon commission of an offence. The police conducts an investigation and files a charge-sheet (initial investigation report) before the Magistrate. The Magistrate may forward the case to the court with jurisdiction and if a prima facie case exists, the court will frame a charge against the accused. The accused can either plead guilty or not guilty. If he pleads guilty, the Judge determines a sentence and if he pleads not guilty, a trial is held. Both, the defense and prosecution are given the opportunity to present evidence and cross-examine the other side's witnesses. The defendant is then asked to give an explanation, and after hearing both sides, a verdict is announced. If the judge is convinced of guilt beyond a reasonable doubt, he convicts the accused or otherwise he orders an acquittal. Following conviction, the judge determines a sentence and the trial terminates.

Two distinctive features emerge from the above procedure. First, in contrast to many other jurisdictions, guilt is adjudicated and the sentence determined in a single hearing. Neither side can submit pleadings or present evidence about aggravating or mitigating circumstances, or make an argument about the type of sentence to be awarded. The conjoint nature of the decision does not give the court enough time to obtain a pre-sentencing report, which would ensure that the sentence is equitable. Second, there are no provisions in the CrPC for plea bargaining, which means that many offenders enter guilty pleas outside a formal framework or safeguards in the hopes of what is perceived as lenient sentencing.

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<sup>13</sup> Section 31 and 32, CrPC

<sup>14</sup> Section 32, CrPC

<sup>15</sup> Section 31, CrPC

Many criminal cases are compoundable which means that a compromise by defined categories of people is permissible leading to a pardon, however this is not available in all categories of offences and does not adequately supplant the need for an effective plea bargaining regime. In contrast, India has amended its code of criminal procedure to bifurcate hearings on conviction and sentencing, and has also recognized a plea bargaining system through amendments to the law.

The PPC<sup>16</sup> provides for ten forms of punishment that can be imposed after a finding of guilt. These include death (capital punishment), imprisonment for life, rigorous (imprisonment with hard labour) or simple imprisonment, forfeiture of property, fine, qisas<sup>17</sup>, diyat<sup>18</sup>, arsh<sup>19</sup>, daman<sup>20</sup> and tazir.<sup>21</sup> It perpetuates a punitive theory of punishment that has fast become obsolete in other jurisdictions which instead focus on reform and restitution in delivering sentences. However, the Probation of Offenders Ordinance of 1960 ("POO") mitigates the PPC's harshness by making provisions for conditional discharges<sup>22</sup> (for offences with a maximum sentence of two years) and the release of offenders on probation<sup>23</sup> for certain categories of cases. Nevertheless, the Ordinance is silent about the theories of criminal justice it intends to promote, and does not indicate the legal and policy objectives it is designed to achieve.

In contrast, the Criminal Justice Act of 2003<sup>24</sup> in England and Wales provides at the outset that courts must take into account the multifold purpose of sentencing, including (a) punishment of the offender, (b) reduction of crime (including reduction by deterrence), (c) reform and rehabilitation of offenders, (d) protection of the public and (e) making of reparation by offenders to persons affected by their offences. The absence of such a corresponding provision in the legal landscape in Pakistan creates confusion and uncertainty about the purpose of sentencing. This in turn creates inconsistency in the approach and outcome of sentencing in different cases.

The PPC provides maximum tariffs (and in some cases minimum tariffs) and affords the judge discretion to determine the appropriate sentence within the given range. Other special laws such as the Control of Narcotics Substances Act<sup>25</sup> and the Sindh Arms Act<sup>26</sup> provide similar sentencing ceilings within which judges are seemingly free to navigate their sentencing decisions.

<sup>16</sup> Section 53

<sup>17</sup> Section 299 (k): "qisas" means punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed qatl-iamd in exercise of the right of the victim or a Wali.

<sup>18</sup> Section 299 (e): "diyat" means the compensation specified in Section 323 payable to the heirs of the victim.

<sup>19</sup> Section 299(b): "arsh" means the compensation specified in this Chapter to be paid to the victim or his heirs under this Chapter.

<sup>20</sup> Section 299(d): "daman" means the compensation determined by the Court to be paid by the offender to the victim for causing hurt not liable to arsh;

<sup>21</sup> Section 299 (l) "ta'zir" means punishment other than qisas, diyat, arsh, or daman

<sup>22</sup> Section 4, POO

<sup>23</sup> Section 5, POO

<sup>24</sup> Section 142 (1)

<sup>25</sup> 1997

<sup>26</sup> 2013

Consequently courts in Pakistan generally enjoy wide discretion in determining sentences and are restricted only by broad statutory limits in which there are a small number of minimum sentences and a high number of maximum sentences. Judges therefore do not understand the theoretical principles behind sentencing, what factors to take into account when determining punishment, and why.

There have been positive developments in Punjab regarding sentencing. The Law Department is reviewing a bill that proposes factors courts should consider when determining appropriate punishments. It is anticipated that the draft bill establishes a sentencing council that issues sentencing guidelines and research on sentencing trends. Similar councils have been established in England and Wales, parts of Australia and the United States. India has followed suit, as well. The Malimath Commission of 2003 and the N.R. Madhava Memon Commission of 2007 both called for an expert statutory body to develop sentencing guidelines. While the recommendations have not yet been adopted, the appellate judiciary continues to provide thoughtful guidance on sentencing principles. In fact various jurisdictions such as Belgium, New Zealand, Western Australia, South Korea and South Africa have also endorsed proposals for sentencing guidelines yet only the United States<sup>27</sup> and England and Wales<sup>28</sup> have adopted a formal guideline scheme which prescribes sentence ranges for specific crimes as well as guidance on generic issues.<sup>29</sup>

However, there maybe certain drawbacks to implementing sentencing guidelines according to Reinaganum's research. She argues sentencing guidelines bring in structural changes into the judicial system and creates tensions between the various divisions of the judicial hierarchy. This conflict is seen to persist even if the judicial system as a whole is in agreement with the guidelines<sup>30</sup>. According to Reinaganum this is a 'natural' reaction by the lower courts, who see their power weakened by the guidelines<sup>31</sup>. Furthermore, rather than encourage more lenient and consistent punishments, the author's research found after the implementation of guidelines, punishments were harsher than they would have been under a judge's discretion.<sup>32</sup>

<sup>27</sup> The States of Minesota and Oregon provide the well-documented guidelines which follow the two dimensional sentencing grid formula which looks at crime seriousness and criminal history and each cell of the grid contains a range of sentence length. R Frase, 'Sentencing Guidelines in Minesota', 1978-2003 in M Tony (ed) 'Crime and Justice' (2005), R Frase 'Sentencing Policy under the Minnesota Sentencing Guidelines' in A Von Hirsch, A Ashworth and JV Roberts (eds) 'Principled Sentencing : Readings on Theory and Policy' (2009).

<sup>28</sup> The UK has the Sentencing Council of England and Wales since 2010 which replaced the Sentencing Guidelines Council, which retains a judicial majority amongst its members and issues guidelines on areas such as burglary, drug offences and assault offences.

<sup>29</sup> Andrew Ashworth and Julian V Roberts, 'The origins and nature of the sentencing guidelines in England and Wales' page 2.

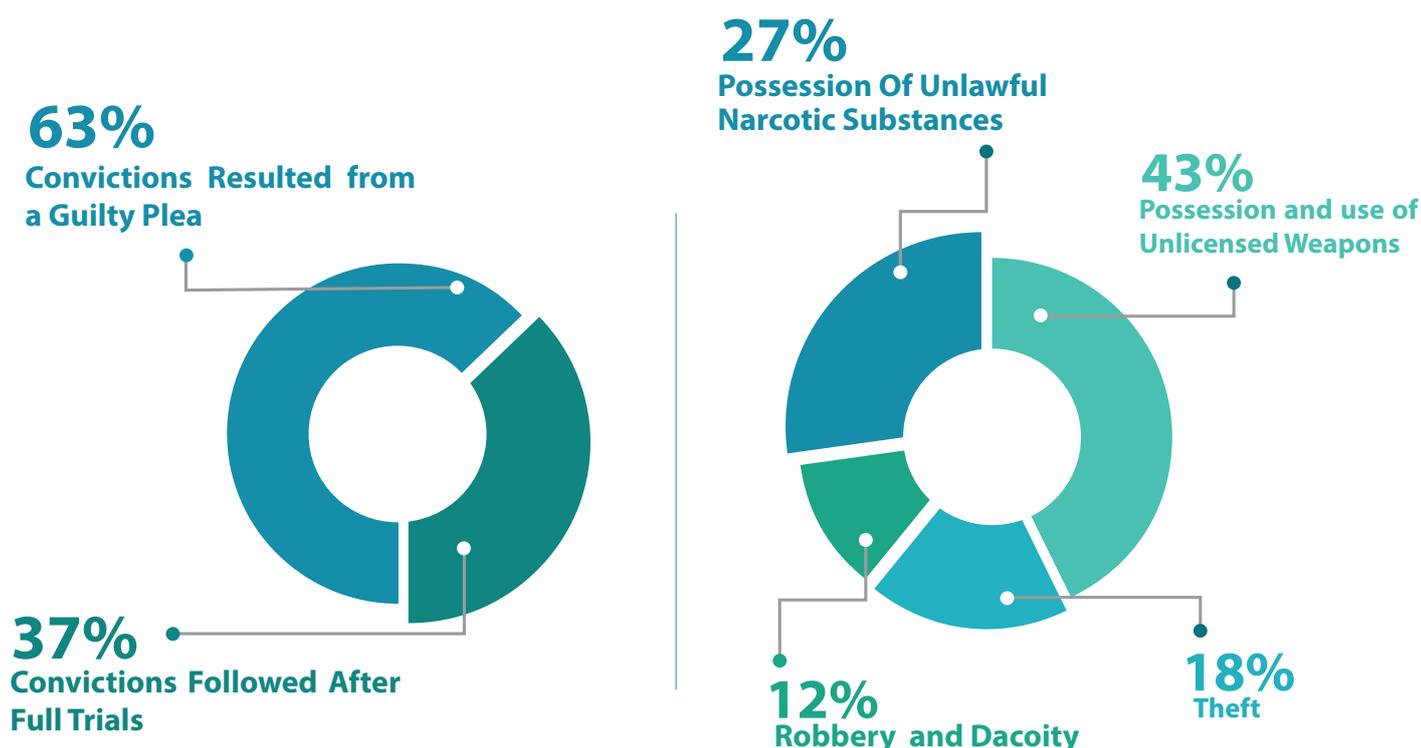
<sup>30</sup> Reinganum, 2000

<sup>31</sup> Reinganum, 2000

<sup>32</sup> Reinganum, 2000

### 3. METHODOLOGY

The research seeks to make an original contribution through analysis of judgments from higher courts in Pakistan to elucidate sentencing principles and dicta which guides judges in sentencing and review of two hundred and forty two judgments from trial courts. The judgments were selected on the basis of purposive sampling techniques from across Sindh and the accused in each case was provided legal representation by the Legal Aid Office -Committee for the Welfare of Prisoners ("LAO-CWP").<sup>33</sup> The LAO-CWP helped obtain attested copies of judgments from the subordinate courts. This method was chosen due to time and budget constraints. Since the sampled cases were concluded between December 2012 and December 2016, the explanatory findings should not be generalized beyond this timeline. The category of crimes represented in the selected judgments are the possession and use of unlicensed weapons (43%);<sup>34</sup> theft (18%);<sup>35</sup> robbery<sup>36</sup> and dacoity<sup>37</sup> (12%); and possession of unlawful narcotic substances (27%).<sup>38</sup> In 37% of these cases, convictions followed after full trials and in the remaining 63%, convictions resulted from a guilty plea.



<sup>33</sup> CWP-LAO is an organization providing free legal aid and representation to underprivileged first time petty offenders in 21 prisons in Sindh . It was established in 2004 under the chairpersonship of Justice Nasir Aslam Zahid by the Home Department of the Government of Sindh.

<sup>34</sup> These calculations are based on the case files from LAO-CWP

<sup>35</sup> These calculations are based on the case files from LAO-CWP

<sup>36</sup> These calculations are based on the case files from LAO-CWP

<sup>37</sup> These calculations are based on the case files from LAO-CWP

<sup>38</sup> These calculations are based on the case files from LAO-CWP

The research tracked each offender's age, gender, socioeconomic background, past convictions, and dependents, where possible. This information was gathered from the interview forms developed by LAO-CWP.<sup>39</sup> Data on occupational backgrounds was available for 79% of offenders. Of these, 53% were laborers or blue collar workers engaged in non-permanent employment. Other categories included salesmen, drivers and mechanics. Information related to past earnings was available for 84% of offenders. The average income per month was PKR 9,833. Of all the offenders, 57% earned between PKR 5,000-10,000 per month and 47% earned between PKR 10,001 – 15,000 per month. This indicates that the majority earned less than the minimum wage stipulated in the province. In addition it was noted that the offenders had an average number of five dependents.

The above data was thematically analysed to "[look] for common themes in the data either across instances with one individual or across individuals."<sup>40</sup> The judgments were also reviewed to explore whether judges used mitigating and aggravating factors; the social context of the offender; and legislative guidelines and binding precedent where applicable. The process for apportioning reduction in sentences after a guilty plea was also explored.

The research objective was to determine whether courts are being consistent in awarding sentences in similar crimes and to similarly placed offenders, to shed light on areas where improvement is needed, and to serve as a starting point for practical policy recommendations. The remainder of this section analyses trends across different categories of crime to evaluate consistency in sentencing.

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<sup>39</sup> These calculations are based on the case files from LAO-CWP

<sup>40</sup> <https://smpncilebak2011.files.wordpress.com/2011/11/essential-guide-to-qualitative-in-organizational-research.pdf> Essential guide to qualitative methods in organizational research, Edited by Catherine Cassell and Gillian Symon

## 4. SENTENCING IN PAKISTANI APPELLATE COURTS: PRINCIPLES AND PRACTICES

In the absence of a comprehensive legislative framework addressing theories of punishment, a review of case law from the appellate courts provides clarity on how judges grapple with these in their cases. The judgments studied show that judges debate recurring theories of criminal justice (retributive, preventive, and rehabilitative) while also utilizing principles of consistency, fairness, and proportionality when making sentencing determinations.

### 4.1. GENERAL PRINCIPLES

In **Amjad Ali v The State**,<sup>41</sup> the court acknowledged that modern theories of punishment emphasize that the sentence must fit the individual and that in the absence of “hard and fast rules,” courts must exercise a great deal of discretion in sentencing and carefully weight various theories of punishment. It explained, “judges have [therefore] consciously or unconsciously been influenced by the one or other theory in reaching their conclusions as regards appropriate sentence in particular cases.” Further analysis of case law reveals that judges are also engaging with the idea that legal processes evolve over time to reflect cultural shifts in society. In **Muhammad Siddique v the State**,<sup>42</sup> the court defines law as a “dynamic process” and a “catalyst for social change.” It explains that laws must “be in tune with the ever changing needs of society, and that serious crimes merit serious punishments to foster deterrence: A justice system of crime and punishment, bereft of its purposive and deterrent elements loses its worth and credibility ... The court has to draw a line between [serious] offences [with] ... graver social ramifications and [less serious] offences ... In the former category ... acquittal pursuant to compromise may encourage the social trends which led to those crimes whereas upholding a conviction would convey a social disapproval through the majesty of law. In the offences of the latter kind, however a compromise and the resultant acquittal may promote goodwill and social harmony.”

Similarly, in **Faqeer Muhammad v The State**,<sup>43</sup> the court reasoned that sentencing is meant to “create ... deterrence for the people, who had inclination towards crime” and in order to reform offenders, a sentence should “neither [be] so severe that offenders could, out of frustration, become desperate and hardened criminals, nor should it be so mild that it encouraged the offender to commit the offence again.”

In addition to deterrence, courts are also aware of other theories of sentencing. One court identified retribution, protection of society, and reformation of the offender as meaningful sentencing goals. See **Mrs Munasingh Arachchige v the State**.<sup>44</sup> The goal of rehabilitation or reformation is particularly important when dealing with first-time offenders or

41 2017 YLR 594

42 PLD 2002 Lahore 444

43 2016 PCrLJ 1854

44 1990 PCrLJ 62 (Karachi) The court in this case also emphasizes that “sentences should not be so lenient as to make crime lucrative and the object of awarding [a] sentence is to provide a deterrent effect on others.”

teenagers.<sup>45</sup> Depending on the nature of the crime and the circumstances of the offender, courts must weigh competing – and sometimes conflicting – theories to arrive at a fair sentence. For instance, in **Amjad Ali v The State**,<sup>46</sup> the court explained that although the purpose of sentencing was to reform and rehabilitate, that does not allow courts “to let hardened criminals be released in the name of leniency.” Such an outcome would supplant the retributive aspect of sentencing, which is “to make the hardened criminal an example for others so that sense prevailed in minds of masses that a criminal would receive his due if he committed a crime.”

Despite the emphasis on rehabilitation and deterrence, some court decisions take a decidedly punitive approach to sentencing. In **Dadullah v State**,<sup>47</sup> for instance, the court awards the maximum punishment for a preplanned bank dacoity and murder and firmly states that “when a court ... relaxes its grip over the hardened criminal ... [it would allow] ... habitual recidivists to run scot free or .... bringing the administration of criminal justice to ridicule and contempt. Courts could not sacrifice such deterrence and retribution in the name of mercy and expediency. Courts should not hesitate in awarding the maximum punishment in cases like the present one, where it had been proved beyond any shadow of doubt that the accused was involved in the offence.”

## 4.2. CONSISTENCY, CONTEXT, AND PROPORTIONALITY

Judges seem to be cognizant of the principle that consistent sentences across courts for similar offences lends legitimacy to judicial decision-making and reduces the perception that the criminal justice system is arbitrary and unfair to offenders and victims alike. Judges are also aware that there must be consistency in approach and outcome. This point was emphasized in the case of **Ghulam Murtaza and another versus the State**,<sup>48</sup> where Justice Asif Saeed Khan Khosa held:

“[J]ustice ... should be dispensed according to some codified or stipulated standards so as to render the outcome consistent and reasonably predictable. Predictability of judicial response ... is important, because ... people ... adapt ... their conduct ... [to] the law of the land and a probably judicial reaction to their actions or inactions. ... [J]ustice should not vary with the size of the Chancellor’s foot ... Uniformity and standardization of judicial response to similar legal situations cannot, thus, be overemphasized.”

This case dealt with contraband narcotic substances and the court made a critical note that in cases where offenders are convicted of similar offences, sentences have been “hideously variable” and “oscillate and fluctuate between unduly lenient and grossly oppressive.<sup>49</sup>” Judge Khosa’s decision also went on to provide prescribed thresholds for sentences for different quantities of contraband narcotic substances by pre-categorising the offence according to its gravity. He suggested a corresponding sentence range within the maximum tariff set by the statute. Standards were also prescribed for previous convicts, women and children. The judgment provides that in special circumstances courts may depart from prescribed standards however the reasons for doing so must be recorded.

45 Amjad Ali v. The State, 2017 YLR 594

46 2017 YLR 594

47 2015 SCMR 856

48 PLD 2009 Lahore 362

49 Id.

In addition to consistency, courts have also considered the context within which the crime took place. This includes an assessment of the gravity of the offense and the circumstances of the offender. In **Muhammad Ashraf v the State**,<sup>50</sup> the court explained that courts “are not supposed to be mechanical at the time of awarding sentence. They are supposed to think and consider what a proper sentence ought to be. They should use their perceptions keeping in view the circumstances of the case, the society and the hardships which confront the accused.”

This emphasis on reasoned judicial decision-making can also be found in **Muhammad Rafiq v the State**.<sup>52</sup> Here, the Pakistani Supreme Court critiques the Arms Ordinance’s silence on theories of punishment, and points to the judge’s discretionary power in sentencing: “...Section 13 of the Arms Ordinance provides the maximum and the fixed minimum sentence of imprisonment and this is the only legislative contribution to the sentencing policy in the context of the tariff ... [it] affords no other guidance for the exercise of that discretion. Nor does [it] contain a general statement of the aims in terms of different theories of punishment such as the “protection of the public”, the “prevention of crime” and the “reform of the offender” ... Judges think in terms of a range of sentences appropriate ... The ranges vary according to the gravity of the offence, that is the sentence must be proportionate to the offender’s culpability and must have some relation to the gravity of the offence. Included in them, of course, are offences which are known to be rampant at the present time and are grave and insidious form of crime which must call for very severe sentences. In such cases law abiding citizens ... expect that criminals who prey on the community or violate its fundamental values ... imperil the average citizen’s sense of security and confidence in law and order, [and believe that they] should be made themselves to suffer in requital for the harm they have done to others.”<sup>54</sup>

This case is instructive for advocates and judges because it lists factors a court should consider during sentencing, including the period for which the accused is detained in custody already. Courts are bound under statute<sup>53</sup> to consider the pre-sentence period served in jail, and the decision affirms this principle as an important limitation on judicial discretion. Another case helpfully adds the following factors to consider in sentencing decisions: the degree of the offence, the degree of the deliberation shown by the offender, and his age, antecedents and character.

In addition to consistency and context, the principle of proportionality is also critical in establishing fair sentencing practices.<sup>55</sup> In **Zahid Imran versus the State**,<sup>56</sup> the court stated that “the sentence must be weighed in golden scales as it were, properly balanced, to punish the offender in proportion to the character and extent of his guilt, to be deterrent for him and rest of society without being unnecessarily hard or needlessly indulgent.

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<sup>50</sup> 2006 P Cr. LJ 431

<sup>51</sup> Id.

<sup>52</sup> 1995 SCMR 1525

<sup>53</sup> Section 382-B CrPC

<sup>54</sup> Hakeem Khan v. The State, PLD 1958 WP Peshawar 33

<sup>55</sup> Fazal Haq Versus State 2014 YLR 2109 , Ghulam Rasool Versus The State 2015 YLR 1465

<sup>56</sup> PLD 2006 SC 109

### 4.3. MITIGATING AND AGGRAVATING FACTORS

Pakistani courts are cognizant that mitigating and aggravating factors should influence their sentencing decisions. In **Bonifacio A Burayag versus the State**,<sup>57</sup> the court explains the importance of balancing the competing interests of the convict, the victim, and society: “[consider] extenuating circumstances[,] ... the nature of the offence committed, its effects on the victim and the society and rule of leniency ... it is hardly conducive ... to give an impression that the courts are more concerned with the welfare of convicts rather than that of society.”

Mitigating factors such as the young age<sup>58</sup> or old age of the accused<sup>59</sup>, the weak financial position of the accused<sup>60</sup> and hardship in the form of economic loss or loss of a job<sup>61</sup> are cited to justify reduced sentences. However, a claim to indigence must be supported by substantiating evidence for the court to consider it.<sup>62</sup> The offender’s mental distress at the protracted nature of the trial has been cited as a factor deserving leniency.<sup>63</sup> First-time offenders are also entitled to some judicial leniency.<sup>64</sup> In **Tahir Mahmood versus The State**,<sup>65</sup> for instance, a death sentence was converted to life imprisonment because the convicts were first-time offenders with no prior criminal history.<sup>66</sup> In some instances, first-time offenders are also awarded probation over incarceration.<sup>67</sup>

An offender’s role in the commission of the offense is also relevant in sentencing. In **Fakhar Zaman versus the State**,<sup>68</sup> in addition to considering the accused’s young age his role as a carrier of narcotics rather than a smuggler warranted lesser punishment. His sentence was reduced from life imprisonment to ten years of rigorous imprisonment. In the same vein, the offender’s role can also be an aggravating factor. In **Muhammad Rafique v the State**,<sup>69</sup> the court critiqued the appellate court’s faulty logic in giving the highest punishment possible to a drug carrier, because fairness dictates that smugglers and racketeers deserve harsher sentences.

<sup>57</sup> PLD 1991 SC 988

<sup>58</sup> Muhammad Noman versus The State 2017 PCrLJ 335, Murid Abbas versus the State 1992 SCMR 338, Fazal Qadeem versus the State 1990 MLD 1199 Qadir Baksh Versus The State

<sup>59</sup> Khalida Akram Versus The State 2013 MLD 176- Old age of the accused deemed as deserving leniency – the accused was also a female and a first timer and sentence was reduced from life imprisonment to 10 years and fine was reduced from 300,00 to 100,000. Ghulam Muhammad Versus The State 2014 YLR 1087 - Where the accused was 60 years of age, had no previous criminal record and had undergone the agony of the pendency of the appeal since 2006 the sentence was reduced to one that was undergone.

<sup>60</sup> Naseeb gul Pathan versus the State 2015 MLD 424

<sup>61</sup> Abdul Majeed Soomro versus The State 1993 PCrLJ 490 Nasir Mehmood Versus The state 2013 YLR 717

<sup>62</sup> Muhammad Anwar versus The State 1986 PCrLJ 2164

<sup>63</sup> Ghulam Nabi versus The State 1995 PCrLJ 100, - sentence was reduced due to the agony faced by the accused who was engaged in a protracted trial.

Muhammad Baksh versus The State 1986 PCrLJ 936

<sup>64</sup> Sentence of imprisonment was altered to a fine due to the agony suffered by accused in connection with protracted trial.

MSt. Deeba Khanum versus The State 1986 PCrLJ 790 -accused had faced agony of a protracted trial and sentence of imprisonment was altered to a fine.

<sup>65</sup> YAr Muhammad versus The State 2016 YLR 1081, Hai Muhammad Iqbal versus The State 2016 MLD 1931, Sarwat Versus The State

<sup>66</sup> 2017 YLR 524

<sup>67</sup> See also: Jamshed Khan versus The State, in which the accused was a first time offender and this was considered as a mitigating circumstance with regards to the quantum of the sentence, and extreme penalty of death was regarded as being too harsh as the accused was a first timer with no past criminal record. The death sentence was converted to one of life imprisonment on the basis of this reasoning. 2016 PCrLJ 1882.

<sup>68</sup> Abdul Hussain versus the state 2013 MLD 1822 Sirajdin versus The State 1987 MLD 1153

<sup>69</sup> 2014 MLD 690

<sup>69</sup> 1990 SCMR 602

Child victims are also seen as an aggravating factor in sentencing. In **Abdul Hafeez versus The State**,<sup>70</sup> the court upheld the death penalty for a convict who kidnapped and tortured a four or five-year-old girl. Combined with the mental distress of the victim's parents, the crime was considered especially heinous because of the victim's age.

Guilty pleas, and expressions of remorse and repentance by the accused are also mitigating factors.<sup>71</sup> At least one court has cautioned against excessive leniency in guilty plea cases: "the extent of such leniency in awarding sentence [and] considering the accused as friend of the court should not ... frustrate the ends of justice ... rather such leniency should ... [keep] in view over all impacts of the crime because any extraordinary leniency towards the accused in offences, particularly affecting the society at large may increase the ratio of crimes tremendously." **The State through Advocate General of NWFP versus Khalil**.<sup>72</sup>

The analysis of the case law cited above shows that even though Pakistan's body of legislation is silent on sentencing guidelines and theories of punishment to guide courts on decision-making processes, individual judges have consciously grappled with the complexities of sentencing. Courts routinely weigh and balance sentencing objectives, mitigating and aggravating factors, and background information about the offender – without proclaiming that their analysis or dicta amounts to "sentencing guidelines" as such. However, the ensuring gap in legislative guidance translates to wide judicial discretion, and the judgments fall short of a cohesive theory of punishment that can uniformly be applied across courts.

#### 4.4. CONSISTENCY IN ACTUAL SENTENCES

Article 10 A of the Constitution provides the right to a fair trial, the hallmark of which is fairness in the adjudication of guilt and consistency in sentencing. This section, therefore, turns from the judicial principles of punishment to a qualitative and quantitative analysis of 242 judgments to determine whether the Constitutional right to a fair trial is being upheld. These judgments were selected to explore the question of whether an application of the above-analysed principles is leading to consistent and predictable sentences in convictions for similar crimes and of similarly placed offenders. All data was collected and analyzed in an ethical manner.

<sup>70</sup> PLD 1979 Lahore 695

<sup>71</sup> The State through Regional Director ANF versus Ikramullah PLD 2013 Pesh 35, Ikenna versus The State 1995 PCrLJ 1296, Nick Kajtazi versus the State PLD 1977 Karachi 1049

<sup>72</sup> 2016 YLR 851

## 5. FINDINGS

### 5.1. UNLICENSED WEAPONS

For offences relating to the possession and use of unlicensed weapons, there is a maximum ceiling of a prison term of 14 years which is provided by legislation.<sup>73</sup> Broadly speaking, the fact pattern was similar in these cases, with a weapon of either 32/30 bore pistol or a 9 mm pistol being found on the offender<sup>74</sup>. In most cases, the police was the only witness. In a majority of the cases the offender was spot checked based on random police patrolling or for behaving suspiciously and an unlicensed weapon was found on the offender. In a handful of cases the accused was arrested and charged after receipt of 'spy information' or being pointed by a victim of a robbery. Since the weapons in question were more or less the same, no conclusive determination could be made about the significance of the type of weapon or ammunition on the sentencing decision.

The average penalty imposed on an offender on the whole was 20.7 months (1.73 years) and the average fine imposed was PKR 6,864. Fines ranged from PKR 500 to PKR 100,000, with 69% of fines being less than PKR 5,000. Non custodial sentencing in the form of release on probation was granted in only 6% of cases, which shows that courts heavily favored custodial sentences and fines for this category of offense.

Although courts are more lenient in sentencing juvenile offenders, their decisions were divided into two types – ones that actively considered age as a mitigating factor and ones that did not and were almost age-neutral. The latter did not discuss the offender's age or how it was determined, his background, or prior criminal history, if any. In fact, by referring to juvenile as a "poor man," courts virtually negated status as a juvenile. Age was determined in this research through the interview forms provided by the LAO-CWP as judgements did not record this. In such cases, the only mitigating circumstance mentioned was a guilty plea entered free of coercion or pressure. No special mention was made of age brackets within the limit of being under 21. Also missing was a discussion of the reasons and context within which the crime was committed. The other type of judgement in which age of the offender was emphasized and discussed included the adverse impact of imprisonment on a juvenile. In at least 3 cases, the convict was sentenced to probation over incarceration to protect him from "prison conditions and to safeguard his future". Of the 105 cases in this category, mitigating circumstances were cited in 52 judgments. Mitigating factors included the age of the offender guilty plea, first-time offender, sole bread-winners, and repentance. It is noteworthy that no aggravating circumstances were recorded in any of the judgments.

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<sup>73</sup> This was previously 7 years under the former legislation which was applicable in 3 out of the 104 cases in the sample which the subject of this research.

<sup>74</sup> The nature of the arms and ammunition involved was specified in only 63% of judgments.

Sentencing maximum tariffs were only mentioned in 6 judgments and only 2 cases included case law citations of higher courts. There were only 4 cases that considered the objectives and purposes of sentencing specifically and these were mentioned as reformation and rehabilitation. None of the remaining judgments explicitly aligned the quantum or type of sentence meted to the accused with an overarching sentencing philosophy.

## **5.2. POSSESSION AND USE OF NARCOTICS**

In this category, 66 cases were reviewed and divided by the amounts recovered: under 100 grams<sup>75</sup> and over 100 grams but less than 1,000 grams. The former has a maximum sentencing tariff of 2 years and the latter 7 years. Adult convicts received 17 months imprisonment on average while juveniles received 3 months imprisonment on average for similar amounts of recovered substances. Judges therefore exercised their discretion in a positive manner by giving younger offenders lenient sentences. The sentences were also longer for offenders who pled guilty (4 months) than for those whose cases went to trial (24 months). Once again, reasoning and apportionment process could not be deciphered as the judgements were silent as to the stage at which the guilty plea was entered and its resulting impact on reduction in sentence.

Sentences were also shorter on average for quantities less than 100 grams (4 months) and quantities exceeding 100 grams (11 months). Fines were imposed in 47 cases with an average amount of PKR 6,553. Fines were in the range of PKR 500 and PKR 50,000. Probation and conditional discharges were granted in 6 cases, indicating a preference for custodial sentencing with an accompanying monetary fine.

Disturbingly, the quantity of the narcotic substance was only noted in 32 cases and missing from the remaining 34. This is particularly worrying since the strictness or lenience of the sentence should be linked to the quantity recovered, and it is therefore difficult to determine whether penalties were proportionate or not.

Mitigating factors were cited in 39 cases, including the age of the offender; guilty pleas and saving the court's time; prior criminal history; sole bread-winner; repentance; and socioeconomic status of the offender. Time already spent in prison was also treated as a mitigating circumstance. No aggravating circumstances were recorded in any of the judgments, even in a case where the convict was found in possession of drugs near a primary school.

Sentencing philosophy was only discussed in 6 cases in which conditional discharges or probation was awarded. These judgments discussed the importance of a second chance and rehabilitation, and warned against the dangers of exposing first-time offenders to hardened criminals in prison. Case law was cited in only 10 cases in which courts exercised leniency for first-time offenders and those who pled guilty. Sentencing maximum tariffs and guidelines were stated in only 4 judgments. In almost all cases, judges employed the 'undergone' principle and awarded the defendant the benefit of Section 382-B.

<sup>75</sup> Section 9 (a), Control of Narcotic Substances Act, 1997

### 5.3. THEFT

In this category, 43 judgments were reviewed which related to simple theft<sup>76</sup>, theft in a dwelling<sup>77</sup>, theft of a car or other motor vehicle<sup>78</sup> and theft after preparation made for causing death, hurt or restraint in order to commit theft<sup>79</sup>. The upper limits on penalties range from 3, 7, and 10 years respectively. Items stolen were listed in 63% of cases out of which mobile phones were stolen in 28% of cases and motorbikes in 33% of cases; and cash and other miscellaneous items in the remaining.

The average penalty imposed was 10 months of imprisonment. The average fine imposed (in 19 cases) was PKR 2,621 and fines ranged from PKR 3,000 to PKR 10,000. The judgments did not provide enough information to determine whether sentences varied significantly with the item stolen, or with a guilty plea versus a full trial. Mitigating circumstances were mentioned in 29 cases, and recurring factors were age, no prior criminal history, guilty plea, sole bread winner status, an

On average juveniles received 5 months imprisonment while adults received 14 years, which indicates that age is heavily weighted in sentencing decisions. Sentencing objectives were mentioned in only six cases, all of which had juvenile defendants. These cases mentioned rehabilitation and cautioned against placing juveniles in a prison environment where they would interact with hardened criminals. Judgments referred to the potential that the offender had to mend his ways if given a second, dangers of incarceration in terms of exposing first timers to hardened elements and the preference of reform objectives over retribution and deterrence in such cases.

Case law was cited in one case relating to the plea of guilt warranting a lenient approach. Sentencing guidelines and tariffs were cited in 4 cases in which 3 cases led to probation orders for juveniles.

d repentance. It is noteworthy that no aggravating circumstances were recorded in any of the judgments.

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<sup>76</sup> Section 378 and 379

<sup>77</sup> Section 380

<sup>78</sup> Section 381-A

<sup>79</sup> Section 382

## 6. CONCLUSION

This article presents a preliminary insight into the exercise of judicial discretion in sentencing and is not meant to provide a comprehensive analysis. Based on the research conducted, it is principally suggested that prevailing practices and the quality of justice dispensed through the criminal justice system in Sindh would benefit from being grounded in a more structured sentencing framework similar to other jurisdictions such as England and Wales and Australia. Although the review of trial court judgments reflect that there is a level of consistency and proportionality followed by judges in treating like cases alike and like offenders alike, a structured approach is suggested. The passing of sentencing legislation would clarify the purposes of sentencing and provide statutory recognition to principles such as proportionality and consistency which would in turn amplify the exercise of these principles.

It was also noted from the review of the trial court judgments that only the minority of judges that awarded probation aligned their choice of sentencing within a broader sentencing policy framework, reasoning and rationale. This alignment of quantum and type of sentence with sentencing objectives and purposes was amiss from the majority of decisions which awarded custodial sentences and fines which leaves a question mark as to what purpose a judge deems his sentences serve. Similarly there is no narrative discussion or explanation of how an amount of fine is determined and whether it takes into account the economic standing of the accused and whether it is meant to play a deterrent or symbolic role.

The new scheme proposed should include obligations whereby courts are bound to clearly align their sentence within a sentencing purpose and explain the effect of the sentence and the manner in which the nature and length of the sentence has been determined. This will allow the reasoning and exercise of judicial discretion to be easily understood by all concerned. The statute should also consolidate existing forms of punishment from legislation and expand the traditional options to include newer sentences such as reparation, community service, compensation, prohibition from driving or working, public censure etc which are more in line with the needs of society.

In addition it is suggested that a statutory body on sentencing be established that would be tasked with ensuring consistency in sentencing. The body would also be tasked with managing data on sentencing so that a repository of sentencing statistics can be developed to assist in formulation of guidelines and comparable information through an information system that would be developed with an easy to use interface that can be used by various stakeholders to get an indication of the type and length of sentences that can be expected.

In terms of procedure, it is essential for the trial to be bifurcated so that separate hearings are conducted for sentencing which would allow parties to a case to raise mitigating and aggravating factors and their associated burdens of proof adequately. In addition, background reports from probations personnel can also be requested and reviewed with diligence. Such a quasi-trial for determination of sentencing may also give the defendant a chance to speak and participate in the process of the sentencing by addressing the court and also giving the court material information as to background and mitigating circumstances etc.