



The Republic of Somaliland



Sentencing Policy and Guidelines for Judges

Criminal Justice Compendium
for Somaliland

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Part I:
National Sentencing Policy Framework

I

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National Sentencing Policy Framework

1. Introduction

1.1 Sentencing is the process of imposing a punishment or penalty for a criminal offence of which an accused person has been convicted following a trial or has pleaded guilty. Typical punishments include the loss of liberty (in the form of imprisonment), the loss of property (in the form of fines or compensation or restitution orders), or the loss or restriction of other rights and freedoms (for example, police surveillance). The product of the sentencing process is a sentence, which is an order of the court specifying the punishment or penalty to be meted out to a person who has been found guilty of, or has pleaded guilty to, committing a criminal offence. In Somaliland, there are two kinds of punishment: principal punishments and accessory penalties. The former are imposed by a judge upon conviction of an accused person; the latter are imposed by operation of law as a consequence of conviction. In other words, accessory penalties are imposed in addition to the principal punishments. More significantly, whereas the judge has a considerable measure of discretion over principal punishments, accessory penalties are not discretionary and must therefore be imposed where the Penal Code requires them.

1.2 This Policy Framework highlights the challenges faced by the Somaliland criminal justice system that impact on sentencing, establishes the objectives of sentencing, and identifies the policy principles that will ensure the realization of these objectives.

2. Statement of the Problem

2.1 The Somaliland criminal justice system faces a number of challenges that impact on sentencing. The principal challenges are:

- a) Judges enjoy considerable discretion when it comes to making sentencing decisions. There is a need to ensure that this discretion is not only exercised responsibly, equitably and with accountability, but also promotes consistency in sentencing.
- b) Mechanisms for coordinating the work of the various agencies of the criminal justice system do not function properly.
- c) Imprisonment is the predominant form of punishment, which puts significant pressure on the few available prisons, some of which are overcrowded and fail to meet international standards. Further, child offenders are not separated from adult offenders due to congestion in the prisons.
- d) The formal criminal justice system does not extend to some parts of the country. As a result, some criminal offences are handled by traditional and/or Islamic dispute resolution mechanisms.
- e) The criminal justice system lacks the capacity to manage non-custodial sentences.
- f) The prisons do not have rehabilitation programs, though vocational training programs exist in some prisons.
- g) Although the Penal Code gives the courts power to remit sentences, offenders do not often get remission for their sentences due to poor management of records in the prisons. Further, the courts have not been effective in their role of ascertaining the punishment meted out to offenders.

- h) The courts are not enforcing the provisions of the Penal Code dealing with the conversion of sentences.
- i) Prisoners do not receive proper health care. For example, they are not taken to hospital as they should.
- j) There are no standard procedures for handling matters such as warrants or arrest and committal warrants. There is therefore no means of verifying the validity of such warrants, which has led to variations between court sentences and committal warrants in many cases.
- k) Judicial officers have not maintained oversight of the administration of sentences as they are required to.

3. Objectives of the Policy Framework

3.1 Sentencing is a critical component of the criminal justice system and contributes to providing justice and protecting the public. It does so by seeking to prevent offenders from continuing with, or undertaking, future criminal activity. At the same time, it is important that sentencing should lead to punishments that are not only just but are also seen by the public to be just and contribute to reparations for the victims of crimes. Additionally, sentencing should contribute to offender rehabilitation.

3.2 This Policy Framework seeks to pursue the following objectives:

- a) Contribute to respect for the law and maintenance of a just, peaceful, and safe society by imposing punishments that are just, and fit the circumstances of the individual case.
- b) Contribute to the reduction of crime by denouncing criminal conduct and deterring offenders and potential offenders from committing crimes.
- c) Ensure consistency in sentencing.
- d) Achieve satisfactory punishments from the perspective of victims and communities, including providing reparations for and acknowledgement of the harm done to victims and communities.
- e) Contribute to rehabilitating offenders.
- f) Protect the public (especially vulnerable persons and communities) by separating offenders from society, where necessary.
- g) Ensure compliance with international human rights standards.
- h) Encourage collaboration among the criminal justice agencies.
- i) Ensure accountability in sentencing decision-making.

4. Policy Principles

- a) Just and Proper Punishment.
- b) Protecting the Public.
- c) Consistent, Transparent, and Accountable Sentencing.
- d) Justice for Victims and Acknowledgement of Harm.
- e) Rehabilitation of Offenders.
- f) Complying with Human Rights Standards.
- g) Efficient and Effective Sentencing System.

4.1 Just and Proper Punishment

4.1.1 The degree of punishment should be proportionate to the seriousness of the criminal conduct in question and the degree of responsibility of the convict. That is, a sentence should be no more severe than is necessary to achieve the purposes of the sentence. Longer sentences should be reserved for serious and dangerous offences, while lesser sentences should be reserved for less serious crimes. This requires judges to take into account the nature and seriousness of the offence and the offender's culpability and degree of responsibility for the offence.

4.1.2 The seriousness of criminal conduct should be determined by reference to factors such as the antecedent criminal conduct of the convict. Previous convictions are a strong indicator of risks of re-offending.

4.1.3 The severity of a sentence should increase where there are sufficiently recent and relevant previous convictions, and which show a continuing course of criminal conduct.

4.1.4 A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the convict. The Penal Code and the Sentencing Guidelines provide examples of aggravating and mitigating circumstances and how they should be taken into account in sentencing decision-making.

4.1.5 Where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

4.1.6 A convict should not be deprived of liberty where less restrictive sanctions would be appropriate in the circumstances. Accordingly, imprisonment should be reserved for cases that are so serious that no other form of punishment would be adequate.

4.1.7 In making a sentencing decision, a judge should be guided by a social inquiry report prepared by an authorized agency such as a probation service. The report should contain social information on the offender that is relevant to his or her pattern of offending and current offences. It should be factual, objective, and unbiased.

4.2 Protecting the Public

4.2.1 In deserving cases, judges may impose sentences that are not proportionate to the gravity of an offence in order to protect the public. Where an offender poses a risk of grave harm to the public, a judge should take that risk into account in sentencing. The sentence imposed should specifically be designed to protect the public from the risk of future serious harm from the offender, which is based on predictions of the likelihood that such an offender will commit dangerous offences in the future. Typically, predictions of future offending are primarily influenced by the level and type of the offender's past convictions. Thus an offender may receive additional punishment on account of past offences.

4.2.2 In imposing such sentences, the judge should take into account the right of the offender not to be subjected to torture or to cruel or degrading punishment. In addition, imposing a disproportionate sentence on the basis of predictions of future behavior is counter to the fundamental right to be presumed innocent until proven guilty. However, the fact that an offender has shown through past criminal conduct that he or she is capable of and highly likely to carry out extremely harmful actions justifies tipping the balance away from the offender's rights and towards the rights of his or her potential victims. A judge should take the following criteria into account in imposing a protective sentence:

- The nature of the criminal act and the circumstances in which it was committed;
- The gravity of the injury or danger caused to the party injured by the criminal act;
- The intensity of criminal intent or the degree of negligence; and
- The offender's criminal capacity, which is to be inferred from the motives and character of the offender, the criminal record of the offender, the conduct of the offender at the time of the offence or subsequent thereto, and the domestic and social conditions of life of the offender.

4.3 Consistent, Transparent, and Accountable Sentencing

4.3.1 Consistency or uniformity in sentencing is a matter of great importance in maintaining public confidence in the administration of justice. Sentences that are higher than usual create justifiable grievances in those who receive them. But inadequate sentences also give rise to a sense of injustice, not only in those who are the victims of the crimes in question but also in the general public. Inadequate sentences are also likely to undermine public confidence in the ability of the courts to play their part in deterring the commission of crimes.

4.3.2 Accordingly, there should be consistency in how judges approach sentencing with a view to ensuring that like cases result in like outcomes. Cases which are broadly similar should be treated similarly, and

cases which are broadly different should be treated differently. However, judges should consider the unique circumstances of each case, which means that the consistency of approach will not always lead to uniform outcomes.

4.3.3 Sentencing should not only be fair but should also be seen to be fair. Judges should therefore give reasons for their decisions in a language that will be understood by the offender, the victim, and the public.

4.3.4 The Judiciary will establish mechanisms to facilitate continuous monitoring and review of sentencing decision-making to facilitate consistency and accountability in sentencing. Sentences will be reviewed where the sentence is manifestly excessive or inadequate, where the judge gave insufficient weight to one or more relevant factors, or where the judge imposed a sentence that is disparate with the general level of sentences imposed for similar offences or with the sentence imposed on a co-offender. Where such errors are established, appellate courts will vitiate the sentence and impose a substitute sentence.

4.4 Justice for Victims and Acknowledgement of Harm

4.4.1 Crime should be seen as an injury or wrong done to another person or to society, rather than solely as a matter of breaking the law or offending the state. From this perspective, punishment should not only be concerned with responding appropriately to criminal behavior but also with reparation - that is, seeking to repair the damage caused by the crime, either materially or symbolically. For this reason, the victim and the offender should play active roles in resolving conflict through discussion and negotiation. This approach encourages offender accountability and the full participation of both victim and offender in the efforts to redress the injury or wrong that has been caused by a crime. Crime results in harm to victims, communities, and offenders, and they should all be actively involved in the justice process.

4.4.2 The objectives of reparation are to put the victim and the community back in the position they were in before the offence was committed, and to promote a sense of responsibility in the offender by encouraging him or her to acknowledge the harm she or he has done to victims and the community. Encouraging an offender to acknowledge the harm done to victims and to the community may reduce the likelihood of the offender committing crimes in the future.

4.4.3 From the perspective of reparation, sentencing should therefore contribute to the restoration of the rights of victims. In this respect, victim impact statements can make offenders empathetic towards victims and their families and promote reconciliation. In murder cases, for example, the sentencing court should take into account impact statements prepared by the deceased's family about him or her as a person and the impact of the death on the family, the employer (where he or she was employed), and the community.

4.4.4 Judges should include information regarding the impact of crimes on victims and communities in their reasoning accompanying a sentence.

4.4.5 The customary law and Sharia'h law systems are central in resolving disputes, including those related to crime. These systems of law will be integrated with the formal criminal justice system. The sentencing decisions of these non-state systems will be registered with the judiciary and enforced as orders of the courts,

provided that they are compatible with human rights standards and meet with the approval of the victims of crime.

4.5 Rehabilitation of Offenders

4.5.1 The aim of rehabilitation is to reduce future crime by changing the behavior, attitudes, or skills of the offender. It assumes that offending has specific causes, and seeks to identify and remedy these factors. Sentencing options are therefore assessed on the likelihood of re-socializing the offender so that he or she is less inclined to commit crimes, or to provide the offender with the skills to combat these inclinations.

4.5.2 Incarceration is sometimes ineffective at rehabilitating or deterring offenders. Keeping people out of prison is more conducive to achieving the goal of rehabilitation. A conditional sentence, which is a jail sentence that is actually served in the community, will therefore be more effective than sending a person to jail when considering the objective of rehabilitation. As a general rule, non-custodial sentences should therefore be preferred where the objective is to rehabilitate an offender.

4.5.3 Imprisonment should be reserved for serious offenders and should be avoided in the case of minor offences. For example, low-level drug offenders (who are found guilty of possessing rather than trafficking in drugs) should be diverted to community supervision and treatment.

4.5.4 The purpose of sentencing child offenders is to hold them accountable for the offences they have committed by imposing just sanctions that promote their rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

4.5.5 Rehabilitation is particularly appropriate to offenders whose criminal activity is related to addiction, especially drug addiction. Where the offending is the result of a drug addiction beyond the offender's control and other sanctions are unlikely to bring about a change in him or her, a rehabilitation program would be the appropriate sentence. However, even in such a case, the need to express community outrage at a particular crime or to impose a deterrent sentence may outweigh the public interest in that particular individual's early rehabilitation.

4.6 Complying with Human Rights Standards

4.6.1 International human rights standards emphasize the promotion of non-custodial measures in dealing with crime. However, non-custodial measures need to be applied in a manner that balances the rights of offenders, the rights of victims, and the concern of society for public safety and crime prevention. In selecting non-custodial measures, the court should take into account the nature and gravity of the offence, the personality and background of the offender, the purposes of sentencing, and the rights of victims.

4.6.2 Non-custodial measures are to be used in accordance with the principle of minimum intervention, which is founded on the humanitarian view that the pain of punishment should be minimized as far as possible. It requires the use of the least intrusive and least severe sanction possible, taking into account the circumstances of the offence and the offender and the goals of sentencing. In practice it means that, where possible, monetary penalties rather than community-based sentences should be imposed, community-based sentences should be used in preference to imprisonment, and where imprisonment is imposed, it should be as short as possible.

4.6.3 The right to privacy and the dignity of offenders subject to non-custodial measures should be respected and protected at all times.

4.6.4 An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances. Courts therefore need to consider the desirability of keeping offenders in the community when making sentencing decisions, provided it is practicable to do so and maintains the safety of the community.

4.6.5 However, non-custodial sentences should be accompanied by rigorous enforcement if they are to command public confidence. Judges should therefore consider the public interest in their sentencing decision-making. In other words, they should ensure that offenders are properly punished for their crimes and that the sentence is properly implemented and for everybody to see.

4.6.6 Child offenders should be treated less severely than adult offenders, and the best interests of the child should be the paramount consideration in taking decisions about sentencing options. Therefore, children should only be imprisoned as a last resort and for the shortest possible period of time. However, the protection of the rights of child offenders needs to be balanced with the protection of other members of the community from harm. Accordingly, community safety is also a relevant factor in sentencing child offenders. The treatment of the child offenders should reinforce their respect for the human rights and fundamental freedoms of others, with the aim of enabling the child to assume a constructive role in society. At the same time the sentence must be consistent with the promotion of the child's sense of dignity and worth, taking into account the child's age and the desirability of reintegration.

4.6.7 The objective of sentencing a child offender is to facilitate his or her rehabilitation and reintegration into society. Therefore, strictly punitive approaches are not appropriate, and the objective of retribution should be outweighed by the interest of safeguarding the well-being and the future of the child in question. Rehabilitation of child offenders also contributes to promoting community safety.

4.6.8 Child offenders should be involved in sentencing decision-making. They should be given a genuine opportunity to express their views freely. This requires the court to create an environment which is not intimidating, and to use language which is readily understood by the child offenders in question.

4.6.9 When sentencing, a judge may take into account the effect of different sentences on the welfare of dependants, although not to the exclusion of other factors.

4.7 Efficient and Effective Sentencing System

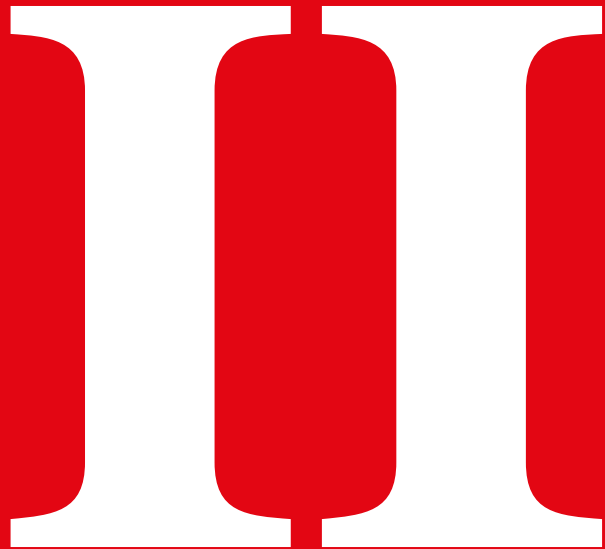
4.7.1 The sentencing system should be efficient and effective, in the sense of working well with minimum delay, achieving the desired results, and avoiding waste.

4.7.2 Sentences should make the most effective use of available resources. To make this possible, the criminal justice system should provide courts with pre-sentence reports.

4.7.3 Administrative tasks and procedures relating to sentencing should be simplified.

4.7.4 In order to be efficient and effective, the sentencing system requires strong collaboration among the institutions of the criminal justice system. To facilitate such collaboration, a coordination mechanism led by the judiciary should be established.

Part II: Sentencing Guidelines for Judges



Part II: Sentencing Guidelines for Judges

1. Introduction

1.1 Sentencing is the process of imposing a punishment or penalty for an offence of which an accused person has been convicted following a trial, or has pleaded guilty. The product of this process is a sentence, which is an order of the court specifying the punishment or penalty to be meted out to a person who has been found guilty of, or has pleaded guilty to, committing a criminal offence.

1.2 These Sentencing Guidelines seek to ensure that judicial discretion in sentencing is not only exercised responsibly, equitably and with accountability, but also promotes consistency in sentencing. In other words, the Guidelines seek to enhance the realization of the rule of law in sentencing. The Guidelines are designed to enable courts to achieve the purposes of sentencing, namely: punishing offenders, reducing crime, reforming and rehabilitating offenders, protecting the public, and ensuring reparation by offenders to persons affected by their offence. None of these purposes is more important than the other, and it is up to the sentencing court to determine the manner in which each applies. In imposing particular types of sentences, courts should also consider the surrounding circumstances and the capacity of the state to enforce them.

2. Jurisdiction of the Courts

2.1 Somaliland's court system consists of District Courts, Regional Courts, the Court of Appeal, and the Supreme Court at the top.

2.2 The criminal jurisdiction of the District Court is limited to offenses punishable under the Penal Code with imprisonment for a period not exceeding three years or a fine not exceeding SI. Sh. 3,000,000 or both.

2.3 The Regional Court has two divisions, the General Section and the Assize Section. The General Section has jurisdiction over crimes not within the jurisdiction of the District Court or the Assize Section. Conversely, the Assize Section has jurisdiction over crimes punishable with death, imprisonment for life, or imprisonment for not less than ten years.

2.4 The Court of Appeal also has two divisions, the General Appellate Section and the Assize Appellate Section. The General Appellate Section has jurisdiction over appeals against the judgments of the District Court and the General Section of the Regional Court.

2.5 The Supreme Court has jurisdiction over appeals against the judgments of any court and judgments given by any court from which appeals lie directly to it.

3. Sentencing Under the Penal Code (PC)

A. Punishments in General

3.1 The Penal Code provides for two kinds of punishments, principal punishments (Article 90 PC) and accessory penalties (Article 92 PC). In general, accessory penalties are imposed in addition to any of the

principal punishments. In other words, once the court imposes a principal punishment, in certain circumstances the Penal Code requires it to impose an additional accessory penalty.

3.2 The Penal Code (Article 15 PC) also distinguishes “*crimes*” (that is, major offences) from “*contraventions*” (that is, lesser or minor offences).

B. Principal Punishments

3.3 The principal punishments are death, imprisonment for life, imprisonment, fine for a crime, and fine for a contravention. The Penal Code provides that an offender can only be punished by a punishment that is prescribed for the offence he or she has committed. For example, an offender who has committed a contravention cannot be punished by death.

3.4 The punishment of death shall be carried out by shooting inside a prison, or in any other place prescribed by the Minister in charge.

3.5 The punishment of imprisonment for life shall be served in a prison, and is accompanied by compulsory labor; the prisoner must therefore engage in labor provided for him or her by the prison authorities.

3.6 The punishment of imprisonment ranges from five days to twenty-four years, and is also accompanied by compulsory labor.

3.7 The punishment of a fine for a crime consists of the payment to the State of a sum ranging from Sl. Sh. 1,000 to Sl. Sh. 500,000.

However, where the crime is inspired by motives of gain and the law only prescribes the punishment of imprisonment, the judge may impose an additional punishment of a fine ranging from Sl. Sh. 1,000 to Sl. Sh. 200,000. Assume, for example, that two persons, X and Y are partners in a business. X accuses Y of stealing money from the business, with the objective of getting Y imprisoned so that he can have the business to himself. Y is then charged with the offence of theft, but the court finds that there is no evidence that Y actually stole from the business, and establishes that X’s sole aim in accusing Y of theft was to get rid of Y from the business. In these circumstances, X would be liable to imprisonment for committing the offence of false accusation (Article 287 PC). This offence is punishable by imprisonment for a period ranging from two to six years. So X could be imprisoned for two years. But because the crime has been committed for motives of gain, the judge would in addition require him to pay a fine of, for example, Sl. Sh. 100,000.

Further, where it appears to the judge that the fine prescribed is ineffective owing to the financial position of the offender, the judge may increase the fine by up to three times the amount. In the above case, let us assume that X is a wealthy businessman, and that a fine of Sl. Sh. 200,000 would be ineffective. In that case, the judge can impose a fine of Sl. Sh. 600,000.

C. Accessory Penalties

3.8 The accessory penalties for crimes are: interdiction from public office (Article 101 PC), interdiction from a profession or trade (Article 103 PC), and legal interdiction (Article 105 PC). Conversely, the only accessory penalty for contraventions is suspension of the right to practice a profession or trade (Article 107 PC).

3.9 Interdiction from public office may be permanent or temporary. The rationale for this punishment is that the commission of certain kinds of offences renders the offender unfit to hold public office. A temporary interdiction may be imposed for a period of up to five years. However, in imposing the penalty of permanent or temporary interdiction, the court shall take into account the aggravating or mitigating circumstances surrounding the offence and the offender.

3.10 On the one hand, an offender will be permanently interdicted from public office where he or she:

- a) Has been sentenced to imprisonment for life; or
- b) Has been sentenced to prison for a term of not less than five years; or
- c) Has been declared a habitual offender; or
- d) Has been declared a professional offender.

However, this penalty will not be imposed where the crime was committed with negligence (Article 106(1) PC). That is, the additional penalty of permanent interdiction is reserved for crimes that are committed with intent, that is, involve a conscious decision by a public officer to commit the crime in question. For example, assume that D, a public officer, is driving to work and a pedestrian suddenly appears on the road. D tries to avoid the pedestrian, but hits him and the pedestrian dies immediately. D could be charged with the offence of death caused by negligence (Article 445 PC), and upon conviction could be sentenced to five years in prison. But because D did not consciously decide to hit the pedestrian, the additional penalty of permanent interdiction would not be imposed on D.

In contrast, assume, for example, that A, a revenue official of a local authority, takes Sl. Sh. 80,000 from the local authority's funds in his care. He is arrested and charged with peculation, in violation of Article 241 PC. In this scenario, the Penal Code requires the judge to punish A with imprisonment for a term ranging from three to ten years and a fine of not less than Sl. Sh. 100,000. In addition, A shall be permanently interdicted from public office. However, where there are circumstances which mitigate the commission of the offence – for example, A took the money to pay for his sick child's treatment – he would be sentenced to prison for a period of less than three years, which would also mean that his interdiction from public office would be temporary.

3.11 Permanent interdiction from public office has the effect of depriving the offender of the following rights:

- a) All political rights, including the right to vote or be elected;
- b) The right to hold public office;
- c) The right to act as the guardian or legal representative of any person;

- d) The right to academic positions, titles, decorations, or other public honors; and,
- e) The right to claim stipends, pensions and allowances from the State or public bodies.

3.12 On the other hand, an offender will be temporarily interdicted from public office where he or she has committed a crime and has been sentenced to prison for a term of not less than three years and not more than five years. In such a case, the offender will be interdicted for a period of up to five years.

3.13 Temporary interdiction from public office has the effect of depriving the offender of the rights stipulated in Paragraph 3.11 above during the period of interdiction.

3.14 A judge is required to interdict an offender who has committed a crime (and not a contravention), from a profession or trade where such an offender is practicing a profession, craft, industry, commerce or a trade that requires authorization (in the form of a license, certificate or permit) from the responsible administrative authority or professional body (Article 103 PC). This punishment deprives the offender of the right to practice the profession or trade for a temporary period (ranging from one month to five years), unless the law expressly provides for a longer period. The affected professions and trades include law, medicine, pharmacy, dentistry, architecture, engineering and veterinary medicine. This list is not closed, and can be expanded where a profession or trade requires an authorization or license from the responsible administrative authorities. However, the judge has discretion to impose any sentence within these limits, taking into account the gravity of the offense and the character of the offender, and the measures prescribed by the profession in question for dealing with the offense.

This provision could, for example, apply to an advocate who pretends to have influence with a judge (Article 301 PC). Assume, for example, that P and his neighbor S are involved in a boundary dispute, with P claiming that S has encroached on his land. L, an advocate, then solicits to represent P in court, and asserts that he has influence with the judge handling the case, and asks P to give him Sl. Sh. 100,000 which he plans to give to the judge to decide the case in P's favor. But the judge decides the case in favor of S, whereupon P complains to the Law Society, which launches an investigation and discovers that L kept the money for himself. The Law Society then requests the police to prosecute L with the offence of advocate pretending to have influence. Upon conviction, L could be interdicted from practicing law for a period, which would depend whether the Law Society also punishes him.

3.15 In addition, Article 104 of the Penal Code stipulates that offenders guilty of committing the following categories of offences shall be temporarily interdicted from public office or from practicing a profession or trade:

- a) Crimes committed with abuse of power, such as peculation (Article 241 PC), misappropriation to the prejudice of private person (Article 242 PC), extortion (Article 244 PC), corruption (Articles 245 – 248 PC), abuse of office (Article 250 PC);
- b) Crimes committed in violation of the duties attached to a public office or a public service, such as disclosure of state secrets (Article 204 PC) and disclosure of official secrets (Article 253);

- c) Crimes committed in violation of the office of guardian or legal representative, such as violation of duty towards family (Article 430 PC) or abandonment of minors or incapable persons (Article 448 PC);
- d) Crimes committed with abuse of any profession, craft, industry, commerce, or trade or in violation of duties attached thereto, such as abusive exercise of a profession (Article 274 PC).

However, this penalty will not be imposed where the crime was committed with negligence or where the punishment imposed is less than three years imprisonment or where only a pecuniary punishment is imposed. Similar to permanent interdiction (see paragraph 3.10 above), this penalty is therefore reserved for crimes that are committed with intent. Further, in these cases the additional penalty of temporary interdiction is only imposed where the convicted person has been sentenced to prison for a term of not less than three years and not more than five years.

3.16 A judge is obliged to impose the penalty of permanent legal interdiction where an offender has been sentenced to imprisonment for life (Article 105). A judge is also obliged to impose this penalty where the offender has been convicted for a crime for a prison term of not less than five years. In the latter case, the interdiction shall be imposed for the duration of the prison term. In either case, legal interdiction deprives the offender of the ability to administer or dispose of property, except where the crime was committed with negligence.

As in the case of permanent interdiction (see paragraph 3.10 above), the policy of the Penal Code is to impose the additional penalty of legal interdiction only for crimes committed with intent. In other words, it is deemed to be excessive to impose this additional penalty where the convict did not consciously decide to commit the crime in question.

3.17 Taken together, Articles 102 and 104 of the Penal Code have the following consequences:

- A convict who has been imprisoned for life shall also be permanently interdicted from public office, and permanently lose the ability to administer and dispose of property.
- A convict who has been imprisoned for a term of not less than five years shall also be permanently interdicted from public office, but shall only lose the ability to administer and dispose of property for the duration of his or her prison term.

3.18 Where the offender is guilty of committing a contravention, the judge is obliged to suspend him or her from exercising a profession or trade for a period ranging from fifteen days to two years (Article 107 PC). This provision means that persons convicted for contraventions can only be suspended (as opposed to “*interdicted*”) from exercising a profession or trade. Thus while interdiction is reserved for crimes, suspension is reserved for contraventions. As in the case of interdiction from a profession or trade, this penalty is only applicable where the offender is practicing a profession, craft, industry, commerce, or trade that requires authorization (in the form of a license, certificate, or permit) from the responsible administrative authority

or professional body. Although the judge has discretion to determine the length of the suspension, he or she must impose this penalty where the offender has committed a contravention.

D. Civil Sanctions and Security Measures

3.19 In addition to the principal punishments and accessory penalties, the Penal Code provides for civil sanctions and security measures.

3.20 The civil sanctions are restitution and compensation. The Penal Code provides that every offence entails the obligation to make restitution in accordance with the civil laws. Further, where an offence results in damage (for example, damage to property), the offender and other persons who are deemed by the civil laws to be responsible for his or her act have an obligation to make compensation.

3.21 The Penal Code therefore provides for restorative justice, with a view to repairing the harm caused by crimes. On the one hand, restitution is the restoration of lost or damaged property to the victim, or a contribution towards such restoration, by the offender. Restitution means recovery based on, and measured by, unjust enrichment. And since restitution grants recovery on the basis of unjust enrichment, it measures recovery by the offender's gain rather than the victim's loss. But restitution can also mean restoration of a specific thing that has been lost or taken away. In this sense, restitution includes remedies that restore to the victim the specific thing he or she has lost, or that undo disrupted transactions and restore both parties (offender and victim) to their original positions in kind. In other words, restitution of misappropriated property both restores the property to the rightful owner and deprives the offender of his or her unjust gain. It is for this reason that it is said that a victim who can trace the specific property that has been misappropriated gets a better remedy than one who cannot.

For example, suppose that D has stolen property belonging to P. But suppose further that D has already sold the stolen property to E, an innocent third party. Since the court can no longer order D or E to return the property, it may order D to pay restitution based on how much D made from selling the property in question.

3.22 On the other hand, compensation is the financial reparation to a victim by an offender for loss, injury, suffering or damage resulting from the commission of a crime or contravention. For example, the victim may be compensated for expenses such as medical treatment, rehabilitation (including psychiatric care or counseling), loss of capacity to be gainfully employed, care of a child or dependent, loss of support (for example, where the victim was the family's breadwinner), or funeral and burial expenses. Accordingly, restitution and compensation can be distinguished by the manner in which the monetary award is calculated. Whilst the award for restitution is calculated based on how much the offender gained from the crime, the award for compensation is calculated based on how much the victim lost.

3.23 Under Article 158 of the Penal Code, it is possible that an offender can be obliged to pay both restitution and compensation. Suppose, for example, that D has stolen property belonging to P, and sold it to E. Suppose further, that in the process of stealing the property D kills P, who is the sole breadwinner for his family. In these circumstances, the court may require D to pay restitution and compensation (for expenses such as loss of support, and funeral and burial expenses).

3.24 Article 131 of the Criminal Procedure Code envisages that the judge will hold a hearing on damages, consider the evidence of both the injured party and the accused concerning the claim for damages, and deliver a judgment on the matter. Further, this judgment will be enforced and executed as a civil law claim.

3.25 Suppose also that D in the above example did not commit the crime alone, but was assisted by F and G. In this scenario, Article 159 of the Penal Code states that D, F and G would be jointly and severally liable to pay restitution and compensation to P. This means that D, F and G would all be required to pay their share of the full amount due to P, and would also be individually responsible for the full amount due to P. So that P's family can go against one of the offenders for the entire amount (say D), and it would then be up to D to collect the shares representing the collective responsibility of F and G.

3.26 The Penal Code (Article 172) classifies security measures into two categories: those that are detentive and those that are not detentive. The former are: commitment to a hospital or nursing home, commitment to a mental health institution, and commitment to a reformatory. The latter are: police surveillance and expulsion of an alien from the state.

3.27 Security measures constitute a form of punishment in so far as they may be imposed against persons who are a danger to society and have committed a criminal offense. Both conditions must therefore be met. However, Article 163(2) of the Penal Code provides that security measures may also be applied against persons who are a danger to society on account of acts which are not made offenses by law. The rationale for imposing security measures is to prevent persons who are a danger to society from committing acts that will cause harm to others.

3.28 Whether or not a person is a danger to society is a matter to be determined by a judge. In making this determination, Article 164 of the Penal Code requires the judge to take the following factors into account:

- a) The nature of the criminal act and the circumstances in which it was committed;
- b) The gravity of the injury or danger caused to the party injured by the criminal act;
- c) The intensity of criminal intent or the degree of negligence, and,
- d) The offender's criminal capacity, which is to be inferred from the motives and character of the offender, the criminal record of the offender, the conduct of the offender at the time of the offence or subsequent thereto, and the domestic and social conditions of life of the offender.

These factors help the judge to determine whether, given the gravity of the offense and the character of the offender, he or she is likely to commit other crimes and thereby cause harm to individuals and damage to property. A person who is likely to do so is deemed to be a danger to society.

3.29 But there are cases where the law makes the presumption that a person is a danger to society. For example, Article 176(1) of the Penal Code states that a person who has committed an act which is made an offense by law, and is suffering from mental infirmity or chronic intoxication by alcohol or narcotic drugs is deemed to be a danger to society. And although such a person will not be held liable for the criminal act (due to mental infirmity or chronic intoxication), he or she will nevertheless be presumed to be a danger to society,

and shall be committed to a psychiatric hospital. In such cases, therefore, the judge does not have discretion and must impose the period of commitment specified by the Penal Code.

4. Imposition of Punishment

4.1 While the Penal Code requires judges to impose the principal punishments upon convicting an offender, the accessory penalties follow “*by operation of law*” as a consequence of conviction. That is, the judge enjoys some discretion in imposing the principle punishments but has no choice but to impose accessory penalties where an offender has been convicted.

Assume, for example, that a public officer has been found guilty of committing the offence of peculation – namely, converting money belonging to the Government for his own use – in violation of Article 241 of the Penal Code. Such an officer would be liable to imprisonment for a term ranging from three to ten years, and a fine of not less than Sl. Sh. 1,000,000. Once the judge imposes this principal punishment, Article 241(2) requires him/her to impose an additional accessory penalty, namely, permanently interdict the officer from public office – meaning that the officer cannot hold public office again. However, where there are circumstances that mitigate the seriousness of this offence of peculation, the Penal Code provides that the public officer would be subject to imprisonment for a period of less than three years. In this latter scenario, the judge would only impose the additional penalty of temporary interdiction.

4.2 The Penal Code (Article 94) provides that the punishment of death shall be carried out by shooting inside a penitentiary or other prescribed place, and the punishment of imprisonment for life shall include compulsory labor (Article 95). In other cases of imprisonment, a judge can impose a minimum sentence of five days imprisonment and a maximum sentence of 24 years imprisonment in the case of a crime. For contraventions, imprisonment varies from five days to three years (Article 98). Further, a judge can impose a minimum fine of Sl. Sh. 10,000 and a maximum fine of Sl. Sh. 50,000,000 for a crime (Article 97), and a minimum fine of Sl. Sh. 2,000 and a maximum fine of Sl. Sh. 10,000,000 for a contravention (Article 99).

4.3 However, Article 97 of the Penal Code gives judges the discretion to vary these minimum and maximum sentences:

First, where a crime is inspired by motives of gain, but the law only prescribes imprisonment, the judge may impose an additional fine ranging from Sl. Sh. 10,000 to Sl. Sh. 20,000,000. For example, assume that K and M are partners in Quick-Fit Auto Garage, a company whose business is to repair motor vehicles. Under the terms of their partnership, either K or M would assume ownership of the partner’s shares in the business should the partner be convicted or a criminal offence or die. Over the past one year, Quick-Fit Auto Garage has been purchasing motor vehicle parts from G, who is rumored in Hargeisa to be stealing motor vehicle parts from car-parking lots. At Quick-Fit Auto Garage, M is the partner responsible for procurement of goods and service. K sends an anonymous complaint to the Hargeisa Police, stating that M has been buying stolen motor vehicle parts. But K knows that M has done no such thing and is innocent. However, K wants M jailed so that he can have the entire business for himself. The Police arrest M, but do not charge him with

any offence, because there is no evidence against him. The police later discover that it is K who sent the false accusation. In this scenario, K can be charged under Article 287 of the Penal Code with the crime of false accusation. But the punishment for this crime is imprisonment from two to six years. The judge may therefore impose an additional fine since (1) the crime has been committed for motives of gain and (2) the punishment prescribed is only imprisonment.

Secondly, where the fine prescribed by law appears to be ineffective by reason of the financial position of the offender, the judge has the discretion to increase the fine by up to three times the amount (See the example in Paragraph 3.7 above). Further, the maximum limits on fines do not apply where the law requires the fine to be proportional to the injury or damage caused by the offense.

5. Specific Sentencing Guidelines

A. Power of Judge to Increase or Reduce Punishment

5.1 Typically, the Penal Code establishes minimum and maximum sentences for each offence. For example, the offence of extortion attracts imprisonment from three to ten years, and a fine from Sl. Sh. 5,000,000 to Sl. Sh. 20,000,000. In such cases a judge must pass a sentence that adheres to these limits (Article 109). However, the judge has discretion to impose any sentence within these minimum and maximum limits, but must justify the exercise of this discretion by giving reasons. As we shall see below, this discretion will be exercised depending on whether there are circumstances that either increase or reduce the seriousness of the offence.

For example, assume that T is convicted of the offence of carnal violence (rape) under article 398 of the Penal Code. He must be sentenced to term of imprisonment of between five and fifteen years. The judge must obey these prescribed limits. However, the judge has the discretion to impose any sentence within these limits. And so the judge could sentence T to six years in prison, but must then state why he or she has decided to impose this sentence. Further, assume that there were circumstances which aggravate this offence, for example, T committed an unnatural act in the course of carnal intercourse. Under Article 400 of the Penal Code, such an unnatural act would result in an increase of the punishment. The judge would therefore sentence T to six years under Article 398, and increase the sentence by a full one-third, to a total of nine years in prison.

In addition, where, as in the case of the offence of extortion (Article 485), the applicable sentence is imprisonment and payment of a fine, the judge must impose a sentence and a fine. He cannot impose either a sentence or a fine, nor can he go below or above the prescribed limits.

5.2 But in exceptional cases, the Penal Code only establishes minimum or maximum sentences. For example, under Article 480, the offence of theft shall be punished by imprisonment of up to three years and a fine of Sl. Sh. 300,000 to Sl. Sh. 5,000,000. In such cases, a judge must seek guidance from Articles 96, 97, 98 and 99 of the Penal Code, which are the general provisions that establish the minimum and maximum penalties for crimes and contraventions. Accordingly, depending on the prevailing aggravating or extenuating circumstances, a person convicted of theft will be imprisoned for a period ranging from 5 days to three years

(Article 96). Further, under Article 481, the presence of certain aggravating circumstances will mean that the offender will be imprisoned for a minimum period of one year. Such circumstances include (1) where the offender, in order to commit the crime, entered or remained in a house, or (2) the offender breaks the lock on a door. This means that before imposing a sentence, the judge must familiarize himself or herself with the general provisions of the Penal Code on minimum and maximum sentences, and the provisions that establish specific offences, and apply them together.

B. Power of Judge to Order Conversion of Sentence

5.3 A sentence of imprisonment can be converted into a fine if certain conditions are fulfilled. Under Article 109, a judge has the discretion to order the conversion of a sentence of imprisonment for a period not exceeding one year into the equivalent pecuniary punishment where:

- a) The offender has not previously been convicted of a crime committed with criminal intent; and
- b) The offender makes a request for such conversion of sentence. The judge should consult with the Attorney General and explain to the convict that he or she can make this request.

5.4 In exercising this discretionary power, the judge shall take the following Article 110 factors into account:

- a) The nature of the criminal act and the circumstances in which it was committed;
- b) The gravity of the injury or danger caused to the party injured by the criminal act;
- c) The intensity of criminal intent or the degree of negligence; and
- d) The offender's criminal capacity, which is to be inferred from the motives and character of the offender, the criminal record of the offender, the conduct of the offender at the time of the offence or subsequent thereto, and the domestic and social conditions of life of the offender. The judge should therefore give the offender an opportunity to state his or her domestic and social conditions. However, the judge should verify the truthfulness of the offender's statement from the Attorney General, the police, or other relevant person, including community elders, religious leaders, and relatives and neighbors of the offender.

Having considered these factors, the judge must therefore come to the conclusion that the offender deserves the conversion of the sentence of imprisonment into a fine.

5.5 For purposes of conversion of sentences of imprisonment into equivalent pecuniary punishment, Sl. Sh. 7,140 is equivalent to one day of detentive punishment (Article 112).

5.6 The offender will only benefit from the conversion if he or she (a) pays the amount due by reason of the conversion within the time prescribed by the judge and (b) discharges any civil obligation to make restitution or compensation to the injured party. Should the offender fail to meet these conditions, he or she will serve the jail term.

Consider the following example. V, a father of four children, recently lost his job as a teller in a supermarket in Hargeisa. Thereafter he goes back to the supermarket one day, and steals foodstuffs, including bread and

milk. V is arrested and charged with the offence of theft under Article 480(1) of the Penal Code. The judge sentences him to 15 days in jail and a fine of Sl. Sh. 10,000, under the provisions of Articles 96 and 97 of the Penal Code. V then requests the judge to convert the 15 days imprisonment into a fine under Article 109. The judge applies Articles 109 and 110 of the Penal Code, and established that V has no prior criminal record, has not been convicted of a prior crime with criminal intent, the applicable term of imprisonment is less than one year, and he has requested the conversion. Further, the judge established that V's motive was to provide for his family, having recently lost his only source of income, and that he has been a law-abiding member of his community. The judge therefore makes the determination that taking these factors into account, V deserves the conversion of the sentence of imprisonment into a fine. He therefore calculates the conversion according to Article 112, and sentences V to pay Sl. Sh. 107,100 (7140 x 15 days) plus the minimum fine for theft Sl. Sh. 300,000, or a total of Sl. Sh. 407,100. Further, the judge orders V to pay restitution to the owner of the supermarket under Article 158 of the Penal Code. And the judge further orders V to pay the fine of Sl. Sh. 407, 100 and restitution within one week. V is able to make these payments within this time limit. He is therefore able to benefit from the conversion.

5.7 Conversely, a fine can be converted into imprisonment. Under Article 113 of the Penal Code, where an offender is unable to pay a fine due to insolvency, the judge may order the conversion of the sentence into imprisonment for not more than three years in the case of a crime, and imprisonment for not more than two years in the case of a contravention. However, such an offender may obtain his or her release at any time by paying the amount of money owed, which is calculated by deducting the sum of money corresponding to the number of days served in prison.

Suppose, in the above example, V claims that he is unable to pay the Sl. Sh. 300,000 fine. Under Article 113, the judge can convert this fine into a prison term of 57 days – calculated as 15 days plus the converted fine (300,000/7140) which equals 42 days. But suppose further that after V has served 15 days of the jail term, his friends manage to raise Sl. Sh. 300,000 to pay his fine. The judge would order V's release.

5.8 Further, the period of detention served before the judgment has become final (including the period up to and including the final appeal) and shall be deducted from the total period of detentive punishment or from the amount of the pecuniary punishment imposed. Suppose, for example, that a person accused of carnal violence (rape) under Article 398 serves 60 days in jail prior to his conviction, this period of time must be deducted from his prison sentence. If therefore the offender is sentenced to prison for six years, he must serve five years and 305 days instead of a full six years.

C. Calculating Punishments Where There are Aggravating or Extenuating Circumstances

5.9 The circumstances surrounding the commission of an offence will determine the extent to which the offender may be punished. On the one hand, certain circumstances are deemed to make the commission of an offence worse, and therefore increase the punishment. These are the so-called aggravating circumstances. On the other hand, certain circumstances make the commission of an offence more tolerable or understandable from the society's viewpoint, even if they do not excuse the offence. These are the so-called extenuating circumstances.

5.10 An aggravating circumstance or factor is one that tends to increase the seriousness or severity of an offense and relates to the manner in which an offense was committed, the motivation behind the offense, or the tools used to commit the offense. Aggravating circumstances serve to increase the punishment to be imposed for an offense.

5.11 The Penal Code distinguishes between “ordinary” aggravating circumstances and “special” aggravating circumstances (Articles 39). An ordinary aggravating circumstance of an offense is one that is not a constitutive element (meaning it is not part of the definition) of an offense or a special aggravating circumstance of (another) offense.

For example, Article 435 defines the crime of infanticide for reason of honor as killing a newborn baby to protect the honor of the parents. Clearly, a newborn baby is helpless to defend itself from violence. Ordinarily, the fact that the victim is helpless would aggravate the crime of killing such a baby. However, the Penal Code does not deem it to be an aggravating circumstance since it is already part of the definition of the crime of infanticide for reason of honor.

Secondly, assume that T is convicted of the offence of carnal violence (rape) under article 398 of the Penal Code. Further, assume that T committed an unnatural act in the course of carnal intercourse. Under Article 400 of the Penal Code, such an unnatural act would constitute an aggravating circumstance and result in an increase of the punishment. In other words, committing such an unnatural act is a special aggravating circumstance of the offence of carnal violence.

5.12 An extenuating circumstance or factor is one that tends to mitigate or reduce the seriousness or severity of an offence. Extenuating circumstances serve to reduce the punishment to be imposed for an offense.

D. Aggravating Circumstances

5.13 Under Article 39 of the Penal Code, the following circumstances will constitute aggravating circumstances provided that they are neither constitutive elements nor special aggravating circumstances of any given offence:

- a) Acting for abject (that is depraved) or futile motives, meaning that the offender was motivated by an ill-motive, such as killing an innocent child;
- b) Committing an offense in order to commit or conceal another offense, such as breaking into the victim’s home with the intention of committing murder, or breaking into a bank in order to commit a robbery;
- c) Where a crime is committed with negligence, acting despite foreseeing the outcome of an action, such as lighting a fire on a windy day thereby causing a housing estate to burn;
- d) Using inhuman means or acting cruelly toward persons, such as burning a child’s hands for stealing a bottle of soda;

- e) Taking advantage of the circumstances of time, place or person to hinder public or private defense, such as stealing from a person who is asleep, or committing a theft in the middle of the night, or stealing from a child;
- f) Committing an offense while willfully evading arrest or imprisonment, such as a murder suspect against whom an arrest warrant has been issued committing the offence of theft;
- g) Causing serious damage to the property of the injured party in the case of crimes against property, such as causing serious damage to the victim's house while committing a theft;
- h) Aggravating or attempting to aggravate the consequences of the crime committed, such as making the consequences of the crime worse by committing the crime of rape and assaulting the victim;
- i) Committing an offense against a public officer or a person entrusted with a public service or against a diplomatic or consular agent of a foreign state, such as assaulting a judge who has sentenced the offender's brother to prison; and
- j) Abusing authority or a domestic relationship or one's position in office while committing the offense, such as a public officer inviting a subordinate female officer to his house and sexually assaulting her.

5.14 Under Article 117, where there are aggravating circumstances in a particular case, the judge must first determine the applicable penalty for the offence and then add the penalties due for the aggravating circumstances. For example, where the accused person has committed a crime punishable by three years imprisonment and there is one aggravating circumstance (such as destroying property in the course of theft), the judge's first duty is to impose a penalty for theft (a maximum of three years imprisonment). Next, the judge determines the appropriate punishment for the aggravating circumstance of destroying property. A single aggravating circumstance increases the punishment due by up to one-third. In the present case, the punishment would be increased by one year, meaning that the offender would therefore be sentenced to prison for a total of four years.

5.15 Where there is more than one aggravating circumstance, the judge is in the first place required to calculate the basic punishment, then add the penalty due for one aggravating circumstance. The penalty due for the second aggravating circumstance would be one-third of the total of the basic punishment (say three years) plus the punishment due for the first aggravating circumstance (say one year). This would mean that the offender would be imprisoned for 5 years and 4 months (that is four years plus one-third of four years).

5.16 However, the total punishment for an offense where there are aggravating circumstances cannot be greater than three times the maximum penalty. For example, the maximum penalty for theft is three years. Therefore, the offender in this instance can only be punished for a maximum of nine years where there are aggravating circumstances. In addition, under Article 120, the total punishment for an offense where there are aggravating circumstances cannot exceed thirty years in the case of a crime, or five years in the case of a contravention, or Sl. Sh. 100,000,000 or 20,000,000 respectively in the case of fines for crimes and contraventions. And where the judge increases a fine because it appears to be ineffective by reason of the financial position of the offender, the fine shall not exceed Sl. Sh. 300,000,000 in the case of a crime or Sl. Sh. 60,000,000 in the case of a contravention.

E. Extenuating Circumstances

5.17 Article 40 of the Penal Code requires the judge to consider the following extenuating circumstances when imposing sentences, provided they are not part of the definition, or are special extenuating circumstances, of an offense:

- a) Acting for motives which have a particular moral or social value, such as an offender assaulting a man he has caught in the act of committing adultery with his wife;
- b) Acting in a state of anger caused by the unlawful act of another, such as an offender “Z” assaulting a shop owner for falsely accusing Z’s son of stealing from the shop and beating him up;
- c) Acting under the influence of a mob, where the meeting or assembly is legal or authorized and the offender is not a habitual or professional offender, such as a university student participating in vandalizing public property following an assembly of students to protest against the increase of tuition fees;
- d) Causing negligible damage to the property of the injured party, such as breaking a window pane in the course of committing a theft;
- e) An act committed with criminal intent by the injured party has contributed in causing the event, such as the injured party inviting the offender to help him destroy contraband goods for fear of being found with the goods, but only the offender is found at the crime scene;
- f) The offender has, before trial, paid full compensation for the damage or effected restitution or taken measures to eliminate or reduce the injurious or dangerous consequences of the offense, such as an offender returning the goods he has stolen from the victim before the trial commences; or
- g) Any other circumstance that the judge considers to be such as to justify a lessening of the punishment, meaning that the judge has discretion to consider whether other circumstances might decrease the punishment of the offender since it is not possible to predict all such circumstances.

5.18 Where there is one extenuating circumstance, and the reduction of punishment is not fixed by law, Article 119 of the Penal Code requires the judge to reduce:

- a) The punishment of death to imprisonment for life, or imprisonment from 20 to 30 years;
- b) Imprisonment for life to imprisonment from 20 to 24 years.
- c) Other punishments by not more than one-third.

Suppose, for example, that 5 teenagers go to a shop and steal a soccer ball. J, the shop owner, only sees the teenagers as they are leaving the shop. He runs after them. As he is doing that, he sees W, who is also a teenager bouncing a ball that looks like the one just stolen from him. He accosts W and assaults him. W reports to Z, his father, who comes out of his house furious that J has falsely accused and assaulted his son. Z finds J at his shop and seriously assaults him. J is taken to hospital and later dies. Z is convicted of murder under Article 434, but he pleads for a lenient sentence on the ground that he acted in a state of anger caused

by J's unlawful act of assaulting his son. The judge accepts this mitigating circumstance and sentences Z to imprisonment for 20 years.

5.19 Where there is more than one extenuating circumstance, Article 121 of the Penal Code provides that the punishment shall not be less than:

- a) Fifteen years imprisonment where the law prescribes that the crime in question is punishable by death;
- b) Ten years imprisonment where the law prescribes that the crime in question is punishable by imprisonment for life.

In all other cases, the Penal Code requires the judge to impose a punishment that is at least one-quarter of the punishment prescribed by law.

Assume, for example, that the maximum penalty prescribed for a crime is twelve years in prison, and there are three extenuating circumstances. Here, the judge must impose a sentence of at least 3 years (that is one-quarter of 12 years).

F. Where Aggravating and Extenuating Circumstances Occur Together

5.20 Under Article 123 of the Penal Code, where aggravating and extenuating circumstances occur together and the judge finds that the aggravating circumstances outweigh the extenuating circumstances, the judge shall not consider the reductions of punishment prescribed in respect of the extenuating circumstances. Accordingly, the judge shall only apply the increases of punishment prescribed in respect of the aggravating circumstances.

Assume for example, that D's expectant wife is in labor and needs to be rushed to hospital. D approaches his neighbor N, and requests to borrow his car so that he can take his wife to hospital. N declines, telling D that he should first pay him the money he owes him. D gets upset, assaults N, and takes his car key by force. D then takes his wife to hospital in N's car. D is later arrested and convicted of the offence of grievous hurt under Article 440 since he broke N's leg. In this scenario, although there is an extenuating circumstance (D needed to urgently take his expectant wife to hospital), the aggravating circumstance of assaulting N and breaking his leg clearly outweighs the extenuating circumstance. The judge would not therefore consider the reductions of punishment prescribed in respect of the extenuating circumstances. But what would be D's sentence? Under Article 440, D is liable to imprisonment for up to 7 years for causing grievous hurt. In view of the aggravating circumstance, the judge must increase the prison term by one-third (two years and four months) to nine years and four months.

5.21 Conversely, where the judge finds that the extenuating circumstances outweigh the aggravating circumstances, the judge shall not consider the increases of punishment prescribed in respect of the aggravating circumstances. In the above example, suppose that when D went to N's house to borrow his car, he found that there was no one in N's house, but broke the door and took the car key. He then used N's car to take his

wife to hospital, and later returned it without damaging it. In this scenario, a judge could determine that the extenuating circumstance of taking an expectant wife to hospital outweighs the aggravating circumstance of breaking and entering into N's house and using his car without permission. Were the judge to reach this conclusion, he or she would not consider the increases of punishment prescribed in respect of the aggravating circumstances.

5.22 Where the judge finds that there is equivalence between the aggravating and extenuating circumstances, the judge shall impose the punishment that would have been imposed if the aggravating and extenuating circumstances had not occurred. It is then assumed that there were no aggravating or extenuating circumstances, in other words they become irrelevant. In the above scenario, the judge could equally determine that the extenuating circumstance of taking an expectant wife to hospital is equivalent to the aggravating circumstance of breaking and entering into N's house and using his car without permission. Were the judge to reach this conclusion, he or she would impose the punishment that would have been imposed if these aggravating and extenuating circumstances had not occurred.

5.23 However, where the offender is a recidivist, Article 124 of the Penal Code provides that the sentencing decision shall take into account the offender's tendency to relapse into criminal behavior, even where the extenuating circumstances outweigh the aggravating ones. As a general rule in cases of recidivism, the punishment shall be increased up to one-sixth of the sentence. Again, where the second offense is of the same character as the previous offense, or the second offense is committed within five years from the conviction for the first offense, or the second offense is committed while or after serving the sentence, or the offender has more than one prior conviction, then the punishment shall be increased up to one-third. But where more than one of these conditions occur, then the punishment shall be increased from one- to two-thirds.

Suppose, for example, that R is arrested and convicted of the offence of theft. He is sentenced to one year in prison and then released. Six months after being released, R commits the offence of carnal violence (rape), meaning that he is liable for imprisonment for a period ranging from five years to fifteen years. In this scenario, R is a recidivist (as defined in Article 61 of the Penal Code). Therefore, the judge must increase the punishment for rape by up to one-sixth. If the judge sentences R to six years for rape, he must increase this punishment by one year, meaning that R would serve a seven-year prison term.

G. Punishment of Offenders Who Plead Guilty

5.24 Article 108 of the Criminal Procedure Code provides that where an accused person pleads guilty to a charge and the judge has reason to believe that the plea of guilty corresponds to the truth, the judge may:

- a) Immediately pronounce judgment of conviction in accordance with the relevant provisions of the Criminal Procedure Code where the maximum punishment for the offense is imprisonment for less than ten years or a lesser punishment; or
- b) Order the trial to proceed in accordance with the relevant provisions of the Criminal Procedure Code where the maximum punishment for the offense is imprisonment for ten years or more or a more serious punishment.

H. Punishment for Attempted Crime

5.25 Article 17 of the Penal Code defines an attempted crime as one in which, although the act or omission of the offender is unquestionably directed toward causing the event, the act or omission has not been completed or the event has not resulted. It is important to note that under the Penal Code, although all offences (that is, both crimes and contraventions) can be committed, only crimes can be attempted. Thus contraventions cannot be attempted. An attempt is an act done toward the commission of a crime, one that clearly indicates the intention of the offender to commit the crime.

Suppose, for example, that H caught her husband T committing adultery with another woman in their home. H is extremely hurt and decides to kill her husband. She goes to a local store and buys rat poison. Four days later, she prepares beef stew for her husband and puts the rat poison in it. But the husband does not eat the food, saying that he is not hungry. He then decides to give the food to his dog, which he loves very much. A few minutes after eating the beef stew the dog begins convulsing and dies soon thereafter. T now becomes suspicious of his wife. He decides to take the dog to a veterinary doctor, who conducts a test and confirms that the dog died from ingesting rat poison. T then reports the matter to the police, who arrest H and charge her with committing the offence of attempted murder. Upon investigation, the police establish from the local store that it did in fact sell H rat poison. In this scenario, H is guilty of attempted murder because it is clear that she bought the rat poison to kill T, who had humiliated her by committing adultery.

5.26 Under Article 125 of the Penal Code:

- a) An offender who is guilty of an attempted crime that is punishable by death shall be punished with imprisonment for a period ranging from 20 to 30 years;
- b) An offender who is guilty of an attempted crime that is punishable by imprisonment for life shall be punished with imprisonment for not less than twenty years; and
- c) In all other cases, an offender who is guilty of an attempted crime shall be punished by a term of imprisonment of between one-third and two-thirds of the term prescribed by law for the crime.

In the above example, H could therefore be punished with imprisonment for 20 years, assuming there are no aggravating or extenuating circumstances. However, it could be argued that she acted in a state of anger caused by her husband's unlawful act. In that case, the term of 20 years in prison would be reduced by not more than one-third (that is six years and eight months), meaning that she would serve a prison term of thirteen years and four months.

I. Punishment in Case of Concurrence of Offenses

5.27 An offender can be convicted of more than one offence by a single judgment in various situations including the following:

- a) Committing a single act that constitutes more than one violation of the same provision of the law, for example, firing a gun intending only to kill A, but killing A, B and C.

- b) Committing a single act that constitutes more than one violation of different provisions of the law, for example, breaking into K's house, raping his wife, and stealing his property.
- c) Committing several acts that constitute a violation of the same provision of the law, for example, committing three different thefts on separate occasions.
- d) Committing several acts that constitute violations of different provisions of the law, for example committing a rape on one day, and a theft on another day.

These are all situations in which the law requires two penalties to be imposed. However, in some cases, it may not be possible to impose two penalties. For example, a person sentenced to two life-imprisonment terms cannot possibly serve both terms, since he or she only has one life to live. However, a way needs to be found to ensure that such a person is nevertheless punished adequately. For example, such a person should face a more serious penalty than one who has committed a crime that only warrants one life-imprisonment sentence.

5.28 Where an offender is convicted of more than one offense in a single judgment and:

- a) The offender is guilty of two or more crimes each of which is punishable with imprisonment for life, the correct sentence shall be imprisonment for life with separate confinement during daytime for a period ranging from one year to five years (Article 127(1));
- b) The offender is guilty of one crime punishable with imprisonment for life and a second crime punishable with imprisonment, the correct sentence shall be imprisonment for life with separate confinement during daytime for a period ranging from six months to four years (Article 127(2)).

This provision deals with a situation in which a person is convicted of crimes warranting two life-imprisonment sentences, or a life-imprisonment sentence and one for a term of years. In both cases, the punishment is enhanced by imposing a term of separate confinement during the day for a specified period of time. That is, the separate confinement ensures that such a person faces a more serious penalty than one who has committed a crime that only warrants one life-imprisonment sentence.

5.29 Under Article 128 of the Penal Code, where an offender is guilty of two or more crimes that are punishable with imprisonment of the same kind, the offender shall be sentenced to imprisonment for a term equivalent to the total duration of the punishment that would have been imposed for the separate offences. Similarly, the judge shall require the offender to pay the full amounts due in respect of pecuniary punishments. Further, where the offender is guilty of more than one crime, each of which is punishable with imprisonment for at least twenty-four years, the correct sentence shall be imprisonment for life (Article 128(2)).

For example, B steals F's car. Three days later, F establishes it is B who stole his car, and confronts B. B assaults F. B is arrested and charged with theft and injury to F. The sentence for theft (Article 480) is imprisonment of up to three years, and a fine ranging from SI. Sh. 300,000 to SI. Sh. 5,000,000. The penalty for simple hurt (Article 440) is imprisonment ranging from three months to three years. In sentencing B for the two crimes, the judge must first determine what sentences should be imposed for the individual offences

of theft and hurt. Assume, therefore, that the judge decides to sentence B to two years in prison for theft and one year for hurt. The judge would therefore impose a total sentence of three years imprisonment, plus the fine for the theft.

5.30 Under Article 129 of the Penal Code, where an offender is guilty of two or more offenses that are punishable with imprisonment of a different kind, the judge shall impose each punishment separately and in full. However, imprisonment for contraventions shall be executed last. This means that the punishment for the contraventions shall be served after the punishment for the crimes has been served.

This Article deals with situations where imprisonment for both a crime and a contravention is imposed. In such situations, the penalty for the crime shall be imposed in full and served first, and then the penalty for the contravention shall be served separately. Assume, for example, that J causes hurt to H. He is then arrested, but is found in possession of stolen property (Article 545). J is then charged with both offences. In this scenario, the judge could sentence J to one year for causing hurt and five months for the possession of stolen property. Since the two sentences are considered separate, J must first serve the year in prison for the crime, and then the five months for the contravention.

5.31 Under Article 130 of the Penal Code, where an offender is guilty of two or more offenses that are punishable with pecuniary punishment of different kinds, each punishment shall be imposed separately and in full. This means that a judge does not have the power to decrease a fine he intends to impose for a crime on the grounds that he or she is also imposing a fine for a contravention.

Assume, for example, that X assaults Y (Article 439). He is then arrested, but is found in possession of stolen property (Article 545). X is then charged with both offences. In this scenario, the judge could impose a fine of Sl. Sh. 2,000, 000 for the assault and Sl. Sh. 1,000,000 for the contravention. According to Article 130, X must pay each fine in full and separately.

5.32 Under Article 131 of the Penal Code, the punishment of imprisonment of the same kind (for example, where an offender is sentenced for two crimes) constitutes a single sentence for legal purposes such as amnesty or parole. For example, an offender sentenced to imprisonment for two years for committing theft and imprisonment for two years for committing hurt will be considered to be serving a single sentence of four years.

5.33 However, punishments of imprisonment or fines of different kinds (for example, imprisonment for a crime and imprisonment for a contravention) constitute a single punishment for the more serious of the offences. For example, if a person is imprisoned for one year for theft and one year for unlawful possession of altered keys (Article 545), the punishment of two years shall be considered as a single punishment for the crime of theft, which is the more serious of the two offences.

5.34 Article 133 of the Penal Code establishes the following limits for sentences in cases of concurrence of offences:

- a) Where there is a concurrence of offences which are punishable with imprisonment of the same kind, the total punishment cannot exceed 30 years for crimes, six years for contraventions, and not more than five times the term for the most serious offense if that is less than thirty years.
- b) In the case of accessory penalties, the maximum duration of temporary accessory penalties shall not exceed ten years in case of interdiction from public office or from a profession or craft, or five years in case of suspension from the exercise of a profession or craft.

Taken literally, Articles 128 and 129 require that the total number of years of each offence be added together. But this approach could result in imprisonment for a period of time greater than would be appropriate or humane. In other words, it would lead to excessive punishment. This explains why Article 133 therefore establishes limits for sentences in cases of concurrence of offences.

For example, B steals F's car. Three days later, F establishes it is B who stole his car, and confronts B. B assaults F, causing him very grievous hurt (Article 440(3)). B is arrested and charged with theft and causing very grievous hurt to F. The sentence for theft (Article 480) is imprisonment up to three years, and a fine ranging from Sl. Sh. 300,000 to Sl. Sh. 5,000,000. The sentence for causing very grievous hurt is imprisonment ranging from six to twelve years. But under Article 133, the offence of causing very grievous hurt is more serious than theft, and the judge could increase the penalty up to five times the maximum penalty, which is twelve years. It means B could be sentenced to sixty years in prison (5 x 12 years). But this would be excessive punishment. That is why Article 133 sets the limit for the punishment where there is a concurrence of offences requiring the same kind of punishment at thirty years. Thus in this example the judge could only impose a maximum penalty of thirty years.

5.35 Under Article 135 of the Penal Code, where an offender commits a subsequent offence before or after conviction, the judge shall deem that there is a concurrence of offences even though the offender will receive two different sentences as a result of two different trials. For example, assume that A is charged with theft against B, and released on bail. While on bail, A beats up C, and is charged with the offence of hurt. Here, although A will face two separate trials, the foregoing provisions of the Penal Code on sentencing where there is a concurrence of offences will nevertheless apply. In other words, the two crimes will be deemed to be concurrent for the purposes of sentencing.

J. Suspension of Sentences

5.36 A judge may order the suspension or the execution of the following sentences for a period of five years:

- a) A term of imprisonment not exceeding six months; or
- b) A fine that would be equivalent to a term of imprisonment not exceeding six months.

In either case, the judge can only order the suspension of the execution of the sentence if the convict is not a habitual or repeat offender and the judge considers that, taking the following factors into account, the convict will not commit another offense:

- a) The nature of the criminal act and the circumstances in which it was committed;
- b) The gravity of the injury or danger caused to the party injured by the criminal act;
- c) The intensity of criminal intent or the degree of negligence; and
- d) The offender's criminal capacity, which is to be inferred from the motives and character of the offender, the criminal record of the offender, the conduct of the offender at the time of the offence or subsequent thereto, and the domestic and social conditions of life of the offender.

5.37 Where a judge orders the suspension of the execution of the sentence, he or she may in addition order the convict:

- a) To take up some fixed employment;
- b) To undergo any necessary medical or psychiatric treatment;
- c) To refrain from frequenting certain places and consorting with certain persons; or
- d) Not to possess or carry any firearm or other dangerous weapon.

5.38 The judge shall automatically revoke a suspended sentence if:

- a) Within five years of the conviction the convict commits a crime or a contravention of the same kind as that for which he or she was convicted; or
- b) Fails to fulfill any of the civil liabilities towards the victim within the time limit set by the court.

5.39 The judge shall extinguish a suspended sentence where the convict fulfils the conditions of the suspended sentence.

K. Imprisonment of Minors

5.40 Child offenders (that is, offenders who have not attained eighteen years of age) shall, to the extent possible, serve imprisonment in establishments separate from those used for adults, or in separate sections of such establishments.

5.41 Child offenders shall be given instruction directed chiefly to moral rehabilitation.

L. Imprisonment of Women

5.42 Pregnant women and women who have just given birth to children shall not be punished for offenses until such time as the child has become strong and healthy.

M. Mentally Ill Offenders

5.43 Where a convicted offender becomes mentally ill before he or she begins serving his or her term of imprisonment, or during such term, or after the sentence of death has been imposed, the judge shall commit the offender to a mental hospital where the judge considers that the offender's mental illness is likely to hinder the execution of the punishment.

N. Pronouncement and Form of Judgment and Sentence

5.44 The judge must read the part of the judgment of the court relating to the question of guilt and the sentence in the presence of the accused person and the Attorney General.

5.45 Each judgment must contain the following essential information:

- a) A preamble in the name of Somaliland and the name of the court pronouncing the judgment;
- b) The personal details of the accused person;
- c) A statement of the facts and circumstances which form the case against the offender;
- d) A statement of the factual and legal grounds on which the judgment is based;
- e) Reference to the provisions of the law on which the judgment is based;
- f) The acquittal or conviction of the accused person in respect of each offence charged;
- g) The punishment imposed in respect of each offence in respect of which the accused has been found guilty together with any security measures which may be ordered; and
- h) The date and signature of the judge.

5.46 A judgment that does not contain the foregoing essential information shall be null and void.

O. Supervision of the Execution of Punishments

5.47 The judge shall have power to supervise the execution of punishments of imprisonment, including ascertaining that the imprisonment is being carried out properly and that the prisoner is not being abused.



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