

Consistency in Sentencing: Exploring the Dichotomy between Judicial Judgments and Public Perception

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I. Deterrence Triumphs Rehabilitation

- 1 Singapore's judiciary came under heavy international criticism after the recently dismissed appeal *Nagaenthiran a/l K Dharmalingam v Public Prosecutor*.¹ Responding to international pleas to remove the "draconian" death penalty sentence for drug traffickers,² Law Minister K. Shanmugam unwaveringly responded, "I think the key thing is...protecting Singaporeans."³
- 2 The above statement evinces Singapore's utilitarian slant in criminal law. Consequently, the authors argue that deterrence is and has always been Singapore's primary sentencing principle, while notions such as rehabilitation and judicial mercy take a backseat. To that end, they posit that this slant can be attributed to socio-political and structural elements.

A. The Socio-Political Element

- 3 Universally, the criminal justice process can be condensed and analysed through two widely accepted ideologies, the Crime Control model and the Due Process model.⁴ The dominant objective of the Crime Control model is the repression of criminal conduct, which is seen as the determinant of social freedom.⁵ Conversely, the Due Process model prioritises the primacy of an individual.⁶ While Singapore shares characteristics

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¹ *Nagaenthiran a/l K Dharmalingam v Public Prosecutor* [2019] SGCA 26 ("*Nagaenthiran*").

² The Straits Times, "A single hanging of a drug trafficker is a tragedy; a million deaths from drug abuse is a statistic" 30 June 2022 <<https://www.straitstimes.com/opinion/a-single-hanging-of-a-drug-trafficker-is-a-tragedy-a-million-deaths-from-drug-abuse-is-a-statistic>> (accessed 30 June 2022).

³ *Ibid.*

⁴ Keith Jieren Thirumaran, "The Evolution of the Singapore Justice Process" ("*The Evolution of the Singapore Justice Process*") (2019) 31 SAcLJ 1042 at 1046.

⁵ *Id.*, at 1043.

⁶ *Ibid.*

belonging to both models, commentators have observed that its criminal justice process subscribes to the Crime Control model.⁷

- 4 The reasons for the above-mentioned slant can be explained through a keen introspection into the values that the nation holds dear. Singapore prides itself on being a safe country and boasts relatively low crime rates. To Singaporeans, the importance of security cannot be understated, with former Attorney-General V.K. Rajah describing it as a “societal right”.⁸
- 5 As Chief Justice Sundaresh Menon explained, Singapore’s primordial legislature worked with the judiciary to create a robust legal framework that sought to clean up the streets that were filled with robbers and gang violence.⁹ Resultantly, the country grew on the political belief that “deterrent penalties would help curb” the crime rates.¹⁰
- 6 In such a climate, it is unsurprising that the utilitarian concept of crime repression is preferred at the expense of personal liberties. In *Nagaenthiran*, pleas for rehabilitation and mental healthcare were insufficient to eclipse the principle of deterrence. This reflects how “[c]apital punishment serves the larger interest of Singapore society by ensuring our people’s fundamental human right to safety and security”.¹¹

B. The Structural Element

- 7 Next, the authors argue that Singapore’s sentencing method has matured into a phase where it is structurally restrictive for judges to opt for rehabilitation or grant mercy.
- 8 To effectively scrutinise Singapore’s sentencing methodology, one must understand the spectrum in which it operates. On one end, judges exercise unbridled discretion, and relevant sentencing considerations are entirely subjective. This end aligns with the

⁷ *The Evolution of the Singapore Justice Process*, *supra* n 4 at 1046.

⁸ V K Rajah, “Judicial Review - Politics, Policy and the Separation of Powers”, guest lecture at the Singapore Management University (24 March 2016).

⁹ Sundaresh Menon, Keynote Address at the 2017 Sentencing Conference, at 7.

¹⁰ *Id.*, at 8.

¹¹ Ministry of Foreign Affairs, “Singapore’s reply to joint urgent appeal from Special Procedures” [2021] <<https://www.mfa.gov.sg/Overseas-Mission/Geneva/Speeches-and-Statements--Permanent-Mission-to-the-UN/2021/11/Spore-Reply-to-joint-urgent-appeal-from-SP>> (accessed on 30 June 2022).

“instinctive synthesis” method.¹² On the other end, judges have no discretion and sentences are affixed by bodies outside the judiciary, such as the legislature. This aligns with the “staged process” method.¹³

- 9 Singapore is in the midst of transitioning from a stance that parallels the “instinctive synthesis” method, to one that likens the “staged process” method.¹⁴ Indeed, our first Chief Justice Wee Chong Jin was well known for instructing counsels who appeared before him to abstain from referring to precedent cases when sentencing offenders. He believed that “sentencing was always about the offender at hand and his or her unique individual circumstances”.¹⁵
- 10 However, it later became commonplace for courts to issue sentencing frameworks that accompanied their judgments. This was first observed in *Chia Kim Heng Frederick v Public Prosecutor*, where then-Chief Justice Yong Pung How established a minimum sentence of 10 years’ imprisonment with caning for a case of contested rape.¹⁶ This practice culminated in the formation of the Sentencing Council in 2013.¹⁷ Since its inception, the number of sentencing guidelines has grown rapidly.¹⁸
- 11 As such, judges are compelled to fit offences into the prescribed bands during sentencing. This dramatically hinders discretion to grant mercy or confer on offenders a chance to rehabilitate. Indeed, the current practice seems to be the antithesis of former Chief Justice Wee Chong Jin’s ‘blind’ approach.

II. Public vs Process

- 12 Since it has been established that deterrence has been, and still is the primary sentencing principle, one would naturally conclude sentencing in Singapore to be consistent. But perhaps we cannot blame the public should they think otherwise. Indeed, recent

¹² Benny Tan Zhi Peng, “Assessing the Effectiveness of Sentencing Guideline Judgments in Singapore Issued Post-March 2013 and a Guide to Constructing Frameworks” (2018) 30 SAcLJ at p 1007 (“*Guide to Constructing Frameworks*”).

¹³ *Ibid.*

¹⁴ *Id.*, at 1012.

¹⁵ John Koh, *The First Chief Justice: Wee Chong Jin – A Judicial Portrait* (Academy Publishing, 2010) at p 110.

¹⁶ *Chia Kim Heng Frederick v Public Prosecutor* [1992] 1 SLR(R) 63 at [20].

¹⁷ “*Guide to Constructing Frameworks*”, *supra* n 12, at 1012.

¹⁸ *Ibid.*

controversial court decisions have caught the attention of the public, most notably the case of *Public Prosecutor v Terence Siow Kai Yuan* (“**Terence Siow**”).¹⁹ A quick Google search would reveal two polarising judgments from the District Court and the High Court. To the untrained eye, this is a cookie-cutter case of inconsistency.

- 13 However, in the following paragraphs, the authors elucidate that the public’s perception of consistency is but a snapshot of a more complex working of the criminal justice system in Singapore.

III. Consistency Defined

- 14 Consistency is a fabled metric for assessing the efficacy and reputability of a judiciary. In *Public Prosecutor v UI*,²⁰ former Chief Justice Chan Sek Keong stated that, “inconsistency in sentencing...leads to loss of public confidence in the administration of justice”.²¹

- 15 Significantly, consistency comes in two main forms: consistency in approach and consistency in outcome.²² The former occurs when judges consider the same factors in sentencing, giving similar weight to those factors, whereas the latter arguably entails a balancing act between two ideals: equity and proportionality.²³

A. Consistency in Approach

- 16 The Halliday Report, formulated in the United Kingdom, emphasised that consistency ought to be measured by consistency of approach.²⁴ In other words, sentencing outcomes take a backseat to defensible, consistent approaches to determining the sentences in the first place. Further, this sect views disparity in outcomes as justified and necessary, granted the outcomes are not unduly disparate.²⁵

¹⁹ *Public Prosecutor v Terence Siow Kai Yuan* [2019] SGMC 69 (“*Terence Siow*”).

²⁰ *Public Prosecutor v UI*, [2008] 4 SLR(R) 500 (CA).

²¹ *Id.*, at [19].

²² *Guide to Constructing Framework*, *supra* n 12, at p 1022.

²³ *Ibid.*

²⁴ New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court: A Report of the New South Wales Sentencing Council* (June 2004) at p 15.

²⁵ *Ibid.*

- 17 To achieve consistency in approach, the above-mentioned two methods stand out. The “stage process” method includes “an initial stage whereby a ‘notional’ sentence is derived at”, before it is subjected to a final sentence that considers more subjective factors.²⁶ Conversely, the “instinctive synthesis” method “involves only one stage of reasoning, in which all the various factors are assimilated to arrive at a final sentence”.²⁷ Nonetheless, both approaches appear to attract criticism, with the former labelled “artificial and mathematical”, while the latter is perceived as lacking transparency.²⁸

B. Consistency in Outcome

- 18 Moving on to dissecting consistency in outcome, two concepts take centre stage: equity and proportionality.²⁹
- 19 Simply put, equity in this context concerns itself with equalising the “impact of the punishment on offenders with different financial circumstances”, with a pertinent example being a fine of the same amount imposed on two offenders with vastly different financial situations.³⁰ However, this idea is controversial, and rightly so, given that it runs counter to more established principles in sentencing, like proportionality.³¹ While the inquiry regarding equity focuses on comparing sentences in relation to the respective offenders’ financial situation, proportionality deals with whether sentences are “equalised in relation to the particular offences, their seriousness or the harm caused”.³²
- 20 As evidenced, widely differing and irreconcilable views exist even among those who argue that consistency should be measured based on sentencing outcomes.

²⁶ *Id.*, at p 16.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ John W Raine & Eileen Dunstan, “How Well Do Sentencing Guidelines Work?: Equity, Proportionality and Consistency in the Determination of Fine Levels in the Magistrates’ Courts of England and Wales” (“*How Well Do Sentencing Guidelines Work?*”) (2009) 48(1) *Howard J Crim Justice* 13 p 14.

³⁰ *Ibid.*

³¹ *Id.*, at p 16.

³² *How Well Do Sentencing Guidelines Work*, *supra* n 29 at p 16.

C. *Singapore's Stance*

- 21 Local jurisprudence on the tension between consistency in approach and consistency in outcome is scant. In *Public Prosecutor v Pang Shuo*,³³ Chan Seng Onn J observed that “[t]he concept of sentencing consistency extends to consistency in both *outcome* and *approach*”.³⁴ Thus, one can conclude that Singapore’s stance encompasses both sects of consistency.
- 22 Some local cases have addressed the idea of equity of outcomes, which falls under the consistency in approach sect. In *Yap Ah Lai v Public Prosecutor* (“*Yap Ah Lai*”),³⁵ the accused was convicted of evading excise duty by smuggling uncustomed tobacco products.³⁶ However, the fine payable by the accused pursuant to section 128L(4) of the Customs Act (Cap 70, 2004 Rev Ed) would be beyond his ability to pay.³⁷ Thus, the judge chose the option of imposing a term of imprisonment. This discretion seems to hint at an application of equity within the ‘consistency of outcome’ framework. Understandably, the universal fine imposed for the quantity of tobacco smuggled in would financially “hurt” the accused in *Yap Ah Lai* substantially more than an accused who can pay the fine.
- 23 Other case law alludes to the proportionality of outcomes. For example, in *Muhammad Saiful bin Ismail v Public Prosecutor* (“*Saiful*”),³⁸ the judge highlighted that while a lifetime ban would likely “better serve the objectives of deterrence and prevention than a ban of a shorter duration”, courts rarely impose such bans.³⁹ Evidently, this serves to respect the idea that the sentence must be commensurate with the gravity of the offence committed. It can hence be observed that the principle laid out in *Saiful* serves to promote consistency across all similar road traffic offences.

³³ *Public Prosecutor v Pang Shuo* [2016] 3 SLR 903 (HC).

³⁴ *Id.*, at [31(c)], emphasis as stated in the judgment.

³⁵ *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 (HC) (“*Yap Ah Lai*”).

³⁶ *Id.*, at [8].

³⁷ *Ibid.*

³⁸ *Muhammad Saiful bin Ismail v Public Prosecutor* [2014] 2 SLR 1028 (HC).

³⁹ *Id.*, at [21].

IV. The Favourable Metric for Measuring Consistency

- 24 The decisions and sentences meted out by the judiciary are inherently and intrinsically linked to notions of public perception and societal trends. Consequently, any discussion on consistency within the judiciary must include the perspective of the general public.
- 25 From the public's viewpoint, consistency is measured primarily based on sentencing outcomes, i.e., consistency in outcomes. If the sentences decided in two similar cases seem at odds with one another, the public may *prima facie* conclude that the process of sentencing is plagued by inconsistency. Laymen who peruse the brief account of a case's facts and the sentence meted out will gravitate towards an analysis that revolves around questions like "with sentences this mild, no wonder others will commit similar offences", or "why was he given a second chance?". Perhaps, unbeknownst to them, these questions are reformulations of the sentencing principles of deterrence and rehabilitation. Thus, the authors posit that the general public generally compares cases with similar facts based on whether deterrence or rehabilitation was the primary sentencing consideration.
- 26 Similarly, the judiciary also emphasises the need for consistency in terms of determining what the primary sentencing consideration should be for cases with similar fact patterns and offender profiles. For example, in the recent case of *Terence Siow*,⁴⁰ rehabilitation, particularly the accused's propensity to reform, was the subject of the Public Prosecutor's appeal.⁴¹ The accused, aged twenty-two, was found guilty of outraging a victim's modesty, with the relevant case law stating that for offenders above twenty-one, rehabilitation would not be the primary sentencing consideration "*unless* the particular offender concerned happens to demonstrate an **extremely strong** propensity for reform".⁴² Only in such circumstances can deterrence be justifiably displaced as the primary sentencing consideration. In the District Court, District Judge Jasvender Kaur ruled that given factors such as the accused's receptivity to his parents'

⁴⁰ *Terence Siow*, *supra* n 19.

⁴¹ *Public Prosecutor v Siow Kai Yuan Terence* [2020] 4 SLR 1412 (CA).

⁴² *A Karthik v Public Prosecutor* [2018] 5 SLR 1289 (HC), at [44] as italicised in the judgment. Emphasis added.

advice,⁴³ outstanding performance in school⁴⁴ and National Service,⁴⁵ as well as his timely confession,⁴⁶ he had adequately met the threshold regarding propensity for reform. Further, the rehabilitative sentence of 21 months' probation was adjudged to be appropriate given that "the accused [was] clearly not matured to handle his sexuality".⁴⁷

27 However, on appeal, Chief Justice Sundaresh Menon held that the accused's efforts to "curb his reliance on pornography"⁴⁸ existed alongside his "seemingly well-functioning outward persona".⁴⁹ Given that Judge Kaur utilised similar factors in determining that the threshold had been met, the authors opine that this was a matter of the respective justices' interpretation of the threshold set by the case precedent through the words "extremely strong propensity". However, *this does not mean that there have been inconsistencies in sentencing*.

28 This is where the judicial viewpoint diverges from the public's viewpoint. While the public is fixated on the outcome, the judiciary appears to prioritise consistency in *approach*. After all, the entire point of appeals in a common law system is to ensure guidelines and structures used in sentencing approaches are robust enough to set solid precedents for future cases. To achieve a healthily functioning judicial system, both consistency of outcomes *and* approach are required. Nevertheless, the authors opine that consistency of outcomes is desirable only insofar as approaches are consistent; the former cannot be achieved *at the expense of* the latter. Since cases are "rarely identical", the judiciary's focus rightly turns to "ensuring consistency of *approach* in dealing with different scenarios".⁵⁰

29 Why then, is there a discrepancy between the public's metric for measuring consistency and the judiciary's viewpoint of assessing the same? Simply put, when determining sentences, judges premise their reasoning on aspects of the case that are often hidden from public view. Such aspects consist of facts that turn a case on its head.

⁴³ Terence Siow, *supra* n 40, at [53].

⁴⁴ *Id.*, at [54].

⁴⁵ *Id.*, at [55].

⁴⁶ *Id.*, at [58].

⁴⁷ *Id.*, at [60].

⁴⁸ *Public Prosecutor v Siow Kai Yuan Terence*, *supra* n 41, at [72].

⁴⁹ *Id.*, at [75(e)].

⁵⁰ *How Well Do Sentencing Guidelines Work*, *supra* n 29, at p 15 as italicised.

Consequently, “since the precise circumstances of different cases are rarely reported in full”,⁵¹ the basis for the discrepancy is formed: the public rarely access the material facts that are highly pertinent to the judiciary’s approach towards sentencing.

- 30 While this appears imperfect, it is representative of the way society is structured. Laypersons cannot be expected to read the finer details of a case, and thus will seldom appreciate the reasoning behind why a particular sentencing consideration is *the* primary consideration that ultimately leads to the actual sentence reached. In the authors’ opinion, this rather superficial view of criminal sentencing is what leads to an assessment of consistency based on outcomes, i.e., whether the sentence was deterrent enough, or whether a rehabilitative sentence is deserved. Conversely, since the judiciary’s job necessitates the introspection of facts that relate to technicalities within the law, its preoccupation with consistency will naturally entail a focus on consistency in approach, i.e., whether the guidelines and benchmarks applied are robust enough to be applied in future cases.

V. Conclusion: Moving Forward

- 31 When addressing the creation of the new Sentencing Council in March 2013, Justice Chao Hick Tin emphasised the need to “achieve greater consistency and predictability...by providing clearer guidance on sentencing”.⁵² There is little doubt that consistency remains the hallmark of a respectable, dependable, and trustworthy judiciary. This article has explored what exactly consistency entails, as well as the various methods of assessing consistency, as seen from the perspective of the judiciary and the public. As espoused earlier, these two parties are part and parcel of every criminal justice system. After all, in any discussion pertaining to criminal sentencing, it is imperative to “consider all relevant aspects pertaining to an offence, including social policy”.⁵³

⁵¹ *How Well Do Sentencing Guidelines Work*, *supra* n 29 at p 20.

⁵² Justice Chao Hick Tin, “The Art of Sentencing – An Appellate Court’s Perspective” (“*The Art of Sentencing*”) speech at Sentencing Conference 2014: Trends, Tools & Technology (9 October 2014), at [3].

⁵³ *The Art of Sentencing*, *supra* n 52 at [3].

- 32 The different methods of assessing consistency as elucidated by both the public and the judiciary appears to be an irreconcilable difference. Nonetheless, if judges remain bound by sentencing guidelines and benchmarks that offer bridled discretion that accommodates consistency in sentencing approaches, the public's fascination with consistency in outcomes will not prove detrimental to the administration of justice.