CHAPTER - III

SENTENCING DISCRETION IN INDIA: ARBITRARY SENTENCING AND MODALITIES TO ARREST ARBITRARINESS- A COMPARATIVE STUDY

“The Judge even when he is free is still not wholly free. He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in social life.’”

Benjamin N. Cardozo

3.1 Introduction

Judges like physicians are trained minds reposed with confidence and trust. Though both hold different fields, the exercise of ‘choices’ at given point of time makes them highly respectable, for both try to individualize the ‘choices’ to the persons before them. Unlike physicians, the choices of judges are however, limited by legislative prescriptions. Enacted laws confer choices known as ‘discretion’ in employing punishments. It is this discretion that has become the bone of contention worldwide and acquired the field of prominence. Sentencing cannot be a product of computer programming for there are number of human factors that invariable

influence the choice of punishment. The jurisdictions worldwide, therefore, confer
discretion – sometimes wild, sometimes regulated, sometimes unstructured and
sometimes very limited on the presiding officers. The sentencing discretion has been
paradoxically debated as some treat is as ‘constitutional requirement’\(^5\) whereas others
treat it as violation of rule of law.\(^6\) Irrespective of meta-abstract discourses, it has been
universally experienced that sentencing discretion has not yielded convincing results
calling for disciplining and structuring it. Since sentencing process is human process
disparity and inconsistency are inherent parts of it. Judges are only human, and will
analyse a case consistent with their personal beliefs and experiences.\(^7\) The personal
philosophy of the Judges also adds to the uncertainty and inconsistency in views.\(^8\)
Exactly how much punishment an offender deserves is something of a metaphysical
mystery.\(^9\) Shlomo Shoham observes that\(^10\)

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\(^5\) In Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009 (6) SCC 498) S.B. Sinha, J.
observed

\["\text{"Frequent findings as to arbitrariness in sentencing \ldots may violate the idea of equal protection clause implicit under Article 14 and may also fall foul of the due process requirement under Article 21, Equal protection clause [is] ingrained under Article 14 [and] applies to the judicial process at the sentencing stage.\"}\]

In the context of rape sentencing policy in India Prof. Mrinal Satish mentions that

\["\text{"The current sentencing regime provides unbridled discretion to sentencing judges. In the absence of guidelines or principles, this leads to discrimination and arbitrariness. When tested against the foundational principles in Article 14 and 21 of the constitution of India, the present regime does not pass the test of constitutionality.\"}\]

See Mrinal Satish Discretion, Discrimination And The Rule of Law (Delhi: Cambridge University Press 2017), p 202

\(^6\) In Jagmohan Singh v. The State of U. P 1973 AIR 947 the constitutional bench observed that

\["\text{"The policy of the law in giving a very wide discretion in the matter of punishment to the Judge has its origin in the impossibility of laying down standards,\ldots. The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused.\"}\]

\(^7\) Hall aptly articulates this weakness:

\["\text{"Sentencing is not a rational mechanical process; it is a human process and subject to all the frailties of the human mind. A wide variety of factors, including the Judge’s background, experience, social values, moral outlook, penal philosophy and views as to the merits or demerits of a particular penalty influence the sentencing decision.\"}\]


\(^8\) Benjamin Cardozo in The Nature of the Judicial Process – Lecture I, put it aptly thus:

\["\text{"There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direct ion in thought and act ion. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions \ldots. It is often through these sub-conscious forces that Judges are kept consistent with themselves, and inconsistent with one another.\"}\]


“the sentence imposed upon an offender is influenced by three complex factors: the offence and its circumstances; the offender and his background; the third factor is most elusive and indefinite element in any sentencing policy, namely, the attitude of the trial judge.”

Professor Ronald Dworkin, who continues to have faith in the ability of the "Herculean judge" to distinguish between law and politics and find the correct legal answer, admits that objectivity is more of an ideal than a reality. Most observers of the criminal justice system agree that there are unfair disparities in the sentences meted out in the courts. A truism of sentencing research is that sentences should vary according to the seriousness of the crime and the dangerousness of the offender, but that "unwarranted disparity" is undesirable and unfair. The consensus worldwide has, therefore, been reached that in order to safeguard the rule of law, sentencing discretion must be limited, structured, and controlled.

The aim of this chapter, therefore, is to find out what patterns of discretion exist in India. Some notable examples of arbitrary sentencing and disparity in sentences are explored. Methods to arrest arbitrariness, practices in other countries, and what India can borrow from western jurisdiction to regulate sentencing discretion is also investigated upon and tried to be explored here.

3.2 Theorizing Sentencing ‘Disparity’, ‘Discrimination’, and ‘Inconsistency’

The entire debate over sentencing discretion surrounds over, disparity in sentencing, discrimination in sentencing and inconsistency in sentencing. It is apt, therefore to theorize what these three variables are. To begin with, sentencing disparity occurs when two similar offenders are dissimilarly punished or two dissimilar offenders are similarly punished. Cassia Spohn has laboriously tried to encapsulate sentencing disparity and discrimination. He mentions

“[applied to the sentencing process, disparity exists when similar offenders are sentenced differently or when different offenders receive the same sentence. It exists when judges impose different sentences on two offenders

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with identical criminal histories who are convicted of the same crime, when judges impose identical sentences on two offenders whose prior records and crimes are very different, or when the sentence depends on the judge who imposes it or the jurisdiction in which it is imposed.” 16

Mallett, Sean J. also observes that

“[o]ne of the fundamental principles of the criminal law is consistency: like offenders must be treated alike. However, research has shown that when it comes to sentencing...there is in fact substantial...disparity in the penalty imposed on similarly situated offenders.” 17

Sentencing is inherently discretionary and that discretion leads to disparity.18 Disparity per se is not objectionable however. Disparity at times may even be a dream of criminal!19 The distinction, therefore, needs to be made between justified and unjustified disparity, as disparity between sentences may be clearly justified on the grounds of seriousness of the offence, number of previous convictions, youth or a multitude of other considerations. Thus a differential treatment between a person who is seventeen and half and nineteen and half as far as treatment and punishment is concerned, is justified. Such justified treatment are in fact sanctioned and approved by the legislature and judiciary as well.20 Unjustified disparity, however, is a matter of

16 Somewhat with similar scale and language William Rhodes describes a working definition of disparity as under

“... a sentence is disparate when (1) two defendants who are identical in all ways that should affect the sentence nevertheless receive different sentences, or (2) two defendants who are identical except for one or more factors that should affect the sentence receive the same sentence, or (3) a sentence is imposed that is too severe or is too lenient given accepted sentencing criteria.”


19 Gabriel Hallevy notes

“Disparity between courts in similar cases leads to a social subculture that enforcement of the law de jure is different from enforcement de facto. This difference serves as an incentive to offend. When one court panel is excessively lenient with offenders whereas another panel hands down harsh punishments, the mechanism that deters offenders from reoffending (balancing the expected values of the benefits and punishments), the identity of the panel becomes a consideration and offenders will make efforts to be sentenced by one panel and not by the other. At times this can be beneficial to the offender, at other times not.”

See Gabriel Hallevy The Right To Be Punished (London: Springer Heidelberg, 2013), p108

20 In the Indian context, legislations have classified offenders on the basis of their age. Thus juveniles would be treated under juvenile justice Act, 2015, first time offenders would be treated under probation of offenders Act, 1958 even though same or similar offences may have been committed. As an extension of this differential treatment courts also employ individualised punishments like probation, community services compensation etc to treat offenders differently. However such different treatments do not attract the disparity clause in the sense it is debated upon.
It is unjustified disparity\textsuperscript{22} that is cause of action in every debate on structuring sentencing discretion. When all ingredients are equally fulfilled in both the case and yet sentences differ in an apparently unjustified way, unjustified disparity in sentence is said to have occurred. Thus if age or chances of reformations are seen as mitigating factor in one case and the same are denied as mitigating factor in another case, unjustified disparity is established. In the context of death penalty the young age of the accused was not taken into consideration or held irrelevant in \textit{Dhananjoy Chatterjee} \textsuperscript{23} aged about 27 years, \textit{Jai Kumar} \textsuperscript{24} aged about 22 years and \textit{Shivu & another} \textsuperscript{25} aged about 20 and 22 years while it was given importance in \textit{Amit v. State of Maharashtra},\textsuperscript{26} \textit{Rahul},\textsuperscript{27} \textit{Santosh Kumar Singh},\textsuperscript{28} \textit{Rameshbhai Chandubhai Rathod (2)}\textsuperscript{29} and \textit{Amit v. State of Uttar Pradesh.}\textsuperscript{30}

The possibility of reformation or rehabilitation was ruled out, without any expert evidence, in \textit{Jai Kumar},\textsuperscript{31} \textit{B.A. Umesh} \textsuperscript{32} and \textit{Mohd. Mannan} \textsuperscript{33} in much the same manner, without any expert evidence, as the benefit thereof was given in \textit{Nirmal Singh},\textsuperscript{34} \textit{Mohd. Chaman},\textsuperscript{35} \textit{Raju},\textsuperscript{36} \textit{Bantu},\textsuperscript{37} \textit{Surendra Pal Shivbalakpal},\textsuperscript{38} \textit{Rahul} \textsuperscript{39} and

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\textsuperscript{22} The Victorian Sentencing Committee in their 1988 report provided a definition of unjustified disparity:

“Unjustified disparity in sentencing is the imposition of dispositions of differing severity or the same disposition but of differing severity on two or more individuals who have, or the same individual who on two or more occasions has, committed an offence of the same degree of seriousness where that difference in disposition is caused by a factor other than the one which gives a legitimate reason for differentiating the dispositions in the manner which has occurred.”

\textsuperscript{23} \textit{Dhananjoy Chatterjee v. State of West Bengal} (1994) 2 SCC 220
\textsuperscript{24} \textit{Jai Kumar v. State of Madhya Pradesh} (1999) 5 SCC 1
\textsuperscript{25} \textit{Shivu & Anr. v. Registrar General, High Court of Karnataka} (2007) 4 SCC 713
\textsuperscript{26} (2003) 8 SCC 93
\textsuperscript{27} \textit{Rahul v. State of Maharashtra} (2005) 10 SCC 322
\textsuperscript{28} \textit{Santosh Kumar Singh v. State} (2010) 9 SCC 747
\textsuperscript{29} \textit{Rameshbhai Chandubhai Rathod (2) v. State of Gujarat} (2011) 2 SCC 764
\textsuperscript{30} In \textit{Amit v. State of Uttar Pradesh} (2012) 4 SCC 107
\textsuperscript{31} \textit{Jai Kumar v. State of Madhya Pradesh} (1999) 5 SCC 1
\textsuperscript{32} \textit{B.A. Umesh v. Registrar General, High Court of Karnataka} (2011) 3 SCC 85
\textsuperscript{33} \textit{Mohd. Mannan v. State of Bihar} (2011) 5 SCC 317
\textsuperscript{34} \textit{Nirmal Singh v. State of Haryana} (1999) 3 SCC 670
\textsuperscript{35} In \textit{Mohd. Chaman v. State (NCT of Delhi)} (2001) 2 SCC 28
\textsuperscript{36} \textit{Raju v. State of Haryana} (2001) 9 SCC 50
\textsuperscript{37} In \textit{Bantu v. State of Madhya Pradesh} (2001) 9 SCC 615
\textsuperscript{38} \textit{Surendra Pal Shivbalakpal v. State of Gujarat} (2005) 3 SCC 127
\textsuperscript{39} \textit{Rahul v. State of Maharashtra} (2005) 10 SCC 322
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Amit v. State of Uttar Pradesh. Indian death penalty jurisprudence is, therefore, full of such unjustified disparity which would be unfolded in the coming chapter.

Tonry in his book Sentencing Matters points out that unstructured discretion may have an association with unwarranted disparity. The goal of sentencing uniformity -treating like defendants alike and reflecting relevant differences among defendants through proportional differences in sentences - reflects basic human instincts of fairness and justice.

Disparity, therefore, simply put, is a difference in sentencing which cannot be justified. But without a single over-riding policy or approach to say what is or isn't justified, it is very difficult to say that disparity exists. Disparity depends on one's theory of sentencing. Disparity in sentencing leads to a breakdown of confidence in the system, particularly by the public at large. The problem of disparity creates hostile attitudes in the mind of the offender and reduces the chances of his socialization as he would feel that he is being discriminated.

However, in the absence of coherent yardstick to measure it is difficult to point out disparity in the sentencing. There is no single policy or approach in our system, and therefore, like cases may be treated differently, and justifiably so. Two judges suggesting different sentences for an identical case might both be right (or, for that matter, wrong) if one accepts the legitimacy of different priorities being given to

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41 See chapter IV on “A Critical Analysis Of Capital Sentencing: Riddles, Riders And Resolutions”
48 Forst comments:

“Anyone who wants to show disparity in sentencing… must demonstrate that sentences meted out … cannot be justified by reference to some legally relevant variables…This is a tall order to fulfil, since the aims of the criminal law are rarely clearly articulated.”

different approaches to sentencing.\textsuperscript{49} Disparity would be enormously difficult to detect because almost any factor can be of relevance to one of the alternative objects of sentencing.\textsuperscript{50}

Sentencing discrimination, on the other hand, occurs when irrelevant criteria, such as race, gender, or social class are taken into consideration at the time of sentencing either as mitigating or aggravating factors. There is difference between disparity and discrimination too. As Cassia Spohn puts it\textsuperscript{51}

“[a]llegations of lawlessness in sentencing reflect concerns about both disparity and discrimination. Although these terms are sometimes used interchangeably, they do not mean the same thing. Disparity is a difference in treatment or outcome that does not necessarily result from intentional bias or prejudice. Discrimination, on the other hand, is differential treatment of individuals based on irrelevant criteria, such as race, gender, or social class.\textsuperscript{52} Mr. Niamh Maguire notes with illustration that,\textsuperscript{53}

[.]sentencing discrimination exists when legally irrelevant characteristics of a defendant affect the sentence that is imposed after all legally relevant variables are taken into consideration. It exists when … male offenders receive more punitive sentences than comparable female offenders, and when poor offenders receive harsher sentences than middle-class or wealthy offenders.”\textsuperscript{54}

The variables like race, gender, social class, poverty\textsuperscript{55} etc have also considerable influenced the outcome of the judgments at times. Unlike other jurisdictions no exhaustive studies have been accomplished in India to state authoritatively that variable like mentioned above have been instrumental in influencing the decisions. Poverty,\textsuperscript{56} illiteracy, caste etc\textsuperscript{57} have been considered as variables in sentencing policy by trial courts which have been rightly corrected by the

\textsuperscript{50} Supra note 44 p 6
\textsuperscript{51} See Cassia Spohn, \textit{How Do Judges Decide? The Search For Fairness And Justice In Punishment}, 2\textsuperscript{nd} ed., (California: Sage publication, 2009)
\textsuperscript{52} Ibid
\textsuperscript{53} Ibid
\textsuperscript{54} See State of Gujarat v. Jaydip Damjibhai Chavda available at http://www.livelaw.in/poverty-is-not-a-mitigating-factor-for-lesser-punishment-gujarat-hc-read-jt/ where the courts held that poverty cannot be a mitigating factor as held by the trial courts in awarding lenient punishment in rape cases.
\textsuperscript{55} In the context of death penalty Justice Bhagwati in his dissenting opinion found the death penalty necessarily arbitrary, discriminatory and capricious on one of the ground that “it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape, from its clutches.” See Bachan Singh v. State of Punjab (1982) 3 SCC 24 (J. Bhagwati, dissenting), at para 81.
\textsuperscript{56} In the State of Karnataka v. Krishnappa, (2000) 4 SCC 75, sentence of 10 years rigorous imprisonment imposed was by the Trial Court for rape of 8 years old girl. The Division Bench of the High Court, however, interfered with the sentence imposed by the Trial Court and reduced from 10 years R.I. to 4 years R.I. on the ground that “an unsophisticated and illiterate citizen belonging to a weaker section of the society, having committed various offences while in a state of intoxication.”
Supreme Court. These variables unfortunately have also weighed with constitutional powers like pardon and remission.\textsuperscript{58} In the absence of stated philosophy of the punishment in India, such kind of ‘creeping in’ of ‘such variables’ is bound to occur.

‘Inconsistency in sentencing’, on the other hand, occurs when sentencers make the choice as to the particular approach upon which to base their choice of sentence. The worst type of inconsistency is inconsistency in the way in which sentencers decide on which approach to adopt when making the sentencing decision. One sentencer may decide that a particular offender should receive a short sentence on the grounds of rehabilitation whereas another sentencer may decide that the same offender should receive a lengthy sentence on the grounds of deterrence. This eventuality leads to an unequal treatment of offenders by the criminal justice system. The existence of such inconsistency is easily determined by taking a look at the perceptions of those who sentence and the actual results of their sentencing dispositions.\textsuperscript{59} Sean J. Mallett argues that Consistency is required at two levels:

“[I]ndividual consistency for the particular judge dealing with like offenders who appear before them; but also consistency between judges generally in dealing with like cases within the same jurisdiction.\textsuperscript{60} The more cases being heard in that jurisdiction, the more difficult it is to ensure that the same sentencing practices are being followed. While we can expect a judge to be personally consistent in his or her approach to sentencing, the difficulty arises when trying to achieve consistency between adjudicators.”\textsuperscript{61}

Consistency in sentencing is of fundamental importance to the criminal justice system. What is needed is parity: like offenders must be treated alike, a maxim that has

\textsuperscript{58} See chapter VI on “Clemency, Concessionary and Short Sentencing: Executive Interference in Judicial Process; Two Sides of the Same Coin or Tug of War Between?” for detailed discussion

\textsuperscript{59} Palays and Divorski describe the results of a Canadian exercise

“The study was conducted by furnishing over 200 Provincial Court judges with the same basic facts relating to the offence and the characteristics of the offender in five hypothetical specimen cases. The judges were individually asked to indicate the sentence they would recommend in each case and the reasons for their conclusions. In all cases there was inconsistency in the sentences recommended – in many the degree of inconsistency was quite dramatic. The study revealed the way in which sentencing judges differ in their philosophical approach to sentencing – some choosing rehabilitative approaches and others choosing retributive ones. Those sentencers who were generally more lenient tended to rely on rehabilitative reasoning while those who were more severe emphasised the seriousness of the crime.”

See Palays and Divorski, \textit{Judicial Decision Making: An Examination of Sentencing Disparity Among Canadian Provincial Court Judges} in Muller, Blackman and Chapman (eds), \textit{Psychology and the Law}, (Chichester: Willy, 1984), summarised by the Canadian Sentencing Commission in its Report, p75. Quoted in \textit{Supra} 44 p66

\textsuperscript{60} Supra note 21

\textsuperscript{61} Supra note 17 see also Sean J. Mallett “Judicial Discretion in Sentencing: A Justice System that is No Longer Just?” \textit{VUWLR}, Vol.46, 2015
its origins in the works of Aristotle. If offenders are not treated alike, it is acknowledged that the resulting disparity “can result in injustice to an accused person and may raise doubts about the even-handed administration of justice”. Conversely, dissimilar cases should not be treated in a like fashion. Both of these situations would lead to injustice and erode public confidence in the legal system. The consistency is constitutional requirement too. It is to be noted however

“that the mandate of equality clause applies to the sentencing process rather than the outcome. The comparative review must be undertaken not to channel the sentencing discretion available to the courts but to bring in consistency in identification of various relevant circumstances.”

States like England and USA have undertaken researches to measure inconsistency in sentencing either vertically or horizontally in their respective domains concluding that inconsistency did exist. They also resolved to appoint this malady with solutions like sentencing councils. However, in India no such attempts have been done till date though we find academic discourses here and there.

3.3 Patterns of Discretion

As mentioned in the second chapter, each of the four punishments provided by section 53 of IPC, confers wide discretionary powers on the sentencing judge.

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63 Supra note 53 at p 39
64 The Supreme Court of India in Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009) 6 SCC 498 observed “equal protection clause ingrained under Article 14 applies to the judicial process at the sentencing stage.”
Wherever death penalty is imposable, life imprisonment has also been made available as alternative punishment. Wherever, life imprisonment has been provided, lesser sentences are also provided making life imprisonment the highest. In respect of other imprisonments, huge discretion is conferred upon the judges to choose from few months imprisonment to 20 years imprisonment. Judges have limited discretions in respect of fine and therefore much disparity is not talked of in respect of fines though Supreme Court has expressed its dissatisfaction for non liberal use of this salutary provision.

The main accusation, therefore, against the judiciary is that sentencing judges arbitrarily sentence the accused choosing the sentence from the wide range of minimum to maximum. The disparity in sentences is widely known, judicially acknowledged and silently suffered.

With only exception of section 303 of IPC which was declared unconstitutional. However, the Anti-Hijacking Act 2016 makes death penalty as only punishment even with the background that the mandatory death penalty is declared (being declared) as unconstitutional. Section 311 of IPC provides “Whoever is a thug, shall be punished with imprisonment for life, and shall also be liable to fine.”


See forthcoming discussion on how non common law countries have been constrained to establish sentencing councils to discipline sentencing disparity. The 20th century has been a century of experiments in sentencing policies worldwide.


A Full Bench of the Madras High Court in Athapa Goundan’s case (AIR 1937 Mad. 695) sentenced the accused to death. He was duly executed as also several others on the ratio of that ruling. The Full Bench decision was, however, over-ruled 10 years later by the Privy Council in 1947 P.C. 67. Had it been done before Goundan was gallowed many judicial hangings could have been halted. “But dead men tell no tales and judicial ‘guilt’ has no temporal punishment.”

By the virtue of judgment in Ravji @ Ram Chandra v. State of Rajasthan (1996 AIR 787), Ravji Rao was executed on May 4, 1996, for killing five people, In 2009, 13 years after his death, the Supreme Court, in the case of Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra (2009 (6) SCC 498), declared the Ravji case “per incuriam” Again by virtue of Dhananjay Chatterjee v. State of W.B (1994 SCC (2) 220), Dhananjay Chatterjee was hanged for rape and murder in 2004 nearly after 14 years from the date of his conviction by a trial court. The ratio of the case held the filed for long time till 2013 when the Supreme Court in Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546, doubted the ratio and death sentence itself! The police investigation in the case was subsequently proved to be faulty on the basis of which he was convicted. This fact was seconded by The former Supreme Court judge, Asok Kumar Ganguly as “mostly acceptable.” See staff Reporter “Execution of Dhananjay erroneous: PUDR” The Hindu, July 15, 2015 available at http://www.thehindu.com/todays-paper/tp-national/execution-of-dhananjay-erroneous-pudr/article742904.ece
Apart from the Indian Penal Code which is the launching pad of punishment, progressive and welfare legislations like Probation of Offenders Act, 1958, admonition provision under Code of Criminal Procedure, 1973 and Juvenile Justice Act 2015 also empower the sentencing judge to sentence the accused in concessionary way. The choice of these benefits, however, depends a lot on the personality of the judges. Orthodox and conservative judges may not use such salutary provisions though on the other hand, progressive, liberal and reformatory judges may often have recourse to such beneficial provisions.\(^74\) Though uniformity in all forms of sentencing is expected as constitutional mandate,\(^75\) nothing much is lost in respect of small sentences if disparity persists. However, disparity in sentences where accused is sentenced for long incarcerations, the life and liberty may be arbitrarily lost.

The power to fix sentences to run sentences concurrently or consecutively has also conferred wide discretion on the sentencing courts resulting in disparity in the sentences.\(^76\) The powers of remissions and pardon have also been central point of attack in respect of arbitrary exercise of powers.\(^77\) The disparity and arbitrariness in sentencing has brought a sense of dissatisfaction towards the institution of judiciary so much so that the discretion in sentencing has even been criticised as fertile ground for corruptions!\(^78\) How this sentencing discretion has been inconsistently and arbitrarily used is unfolded in the coming discussion.

### 3.4 Sources of Inconsistency and Disparity in the Indian Sentencing System

Following reasons can be cited as source of inconsistency and disparity in the Indian sentencing system

\(^{74}\) See Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009 (6) SCC 498)

\(^{75}\) See Jagmohan Singh v. The State of U. P (1973 AIR 947) where it was contended that “the uncontrolled and unguided discretion in the Judges to impose capital punishment or imprisonment for life is hit by Article 14 of the Constitution. Because two persons found guilty of murder on similar facts are liable to be treated differently--one forfeiting his life and the other suffering merely a sentence of life imprisonment.”

\(^{76}\) See section 31 of IPC, 1860

\(^{77}\) See Bikram Jeet Batra “‘Court’ of Last Resort A Study of Constitutional Clemency for Capital Crimes in India” WORKING PAPER SERIES, Centre for the Study of Law and Governance Jawaharlal Nehru University, New Delhi, available at http://www.jnu.ac.in/CSLG/workingPaper/11-Court%20(Bikram) .pdf

\(^{78}\) S M Solaiman and Abu Noman Mohammad Atahar Ali argued in the context of sentencing policy in respect of The Food Safety and Standards Act 2006 and the Food Act 2003 (FA-NSW) offences that “[p]aying heed to numerous corruption allegations which could not be reasonably ruled out by anyone, it would be wise to limit the discretion of adjudicating officers by prescribing a minimal penalty relating to offenses specified…” (p 110)

3.4.1 Individualised Sentencing System

As mentioned elsewhere, individualized sentencing systems by their very nature always give rise to a certain degree of inconsistency and disparity. Differences in case factors means that no two cases are ever precisely the same and this results in small but often noticeable differences in sentencing outcomes between two seemingly similar cases. India inherited its individualised system of sentencing on independence from British legal system though the predecessors have gone miles ahead in framing consistent sentencing policy. Rather than reject this system and replace it with a new one, the Indian courts have incrementally embraced it. Though individualisation of punishment has its own advantage, taken together on the larger scale disparity and inconsistency are inherent vices in individualisation of punishment.

3.4.2 No Coherent Sentencing Aims

According to Ashworth, one of the major reasons for sentencing disparity are the different penal philosophies amongst judges and magistrates. This problem would be magnified exponentially in a situation whereby sentencing judges had unlimited discretion to impose a sentence according to their subjective intuition. Intuitions will invariably differ, and can be plagued by bias, ignorance and prejudice. A single, clearly defined sentencing rationale – such as rehabilitation or retribution – would ensure that judges are exercising their discretion in the pursuit of a common goal.

Unlike other jurisdictions as discussed elsewhere, in India, there is no single

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79 In Rajesh Chander Katiyal v. Rashid Ali (available at https://indiankanoon.org/doc/91907083/ ) Justice Sh. Bharat Chugh observed “[o]nce guilt is established, punitive dilemma begins goes the saying... By deft modulation the sentencing should be stern where it should be, and tempered with mercy where it warrants to be.”

80 See 2 chapter on “Conceptualizing sentencing policy in India: Problems and Perspectives” point 3.6


82 Mirko Bargaric “Sentencing: The Road to Nowhere” Sydney L. Rev., Vol. 21, 1999, p 609

83 Supra note 17

84 See section 3A Crimes (Sentencing Procedure) Act 1999 which sets out the purposes for which a court can impose a sentence. Similarly see The Criminal Justice Act 2003 (for England and Wales ) for purposes of sentencing.
unifying sentencing aim that judges must give priority to when passing sentences. Instead, Indian judges may choose any of the different sentencing aims including deterrence to suit the offender. This leads to the proposition that different judges can legitimately adopt different sentencing approaches when sentencing the same case. In other words, they can treat like cases differently and can justify their decisions according to sentencing law.

In the pursuit of justice and just desert, courts have adopted fluctuating variables of elusive aims of sentencing in India. Sometimes, deterrence has held the field whereas reformation has played part in some of the cases. Society’s cry for justice has also held the field especially for heinous crimes. Public abhorrence, preferred retributions, corrections “collective conscience, etc have all played decisive roles in sentencing policy. The point of debate here is in the absence of stated goal of justice and aim of sentencing a wide disparity in sentencing has been witnessed. Cases like Dhananjoy Chatterjee v. State of WB and Ravji v. State of Rajasthan which proceeded on the premise of ‘deterrence’ and ‘shocking the collective conscious of the society’ etc have been subsequently overruled bringing enough embracement for the judiciary since enough damage has been done to the sentencing philosophy on the basis of those judgments. Even intra-judicial disparity in pursuing goals of sentencing policy have also been documented whereas lowers courts based their decision on reformation or deterrence and in appeal the apex courts ruled exactly opposite of it! Disparity and inconsistency is noted so much so that even judges on the

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85 Supra note 53 at p 19
“Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes, it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes, the desirability of keeping him out of circulation, and sometimes even the tragic results of crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.”
87 See “punishment” in essays on Indian penal code by JILI, Pp 244-245 (available at http://14.139.60.114:8080/jspui/bitstream/123456789/742/18/Punishment.pdf)
88 While conferring the benefits of probation justice Krishna Iyer in Dilbag Singh v. State of Punjab (1979 AIR 680) observed:
“The human consequences of the confinement process… will be no good to society... Our prison system, until humane and purposeful reforms pervades, surely injures, never improves.”
89 Cf sentencing Act 2002 of Newsland and Coroners and Justice Act 2009 of England Wales for aims of sentencing policy
90 (1994) 2 SCC 220
91 1996 (2) SCC 175
same bench have differed on the quantum of sentences because of their personal belief in the varied philosophy of sentencing policy. Absence of coherent sentencing aims, therefore, has become a fertile source of disparity in sentencing.

3.4.3 Judicial Variability

Inconsistency in sentencing is likely to happen in India because of judicial variability. Judicial variability refers to the individual differences between judges in terms of their approach to sentencing that occur naturally by virtue of their own individuality. A certain amount of judicial variability will always exist in every sentencing system. Penalties like life imprisonment and death sentences have been dependent upon the prediction of judges to the greater extent. As has shown elsewhere, personal philosophies of the judges greatly reflect on the kind and quantum of sentence. In respect of life imprisonment, few judges have handed down life imprisonment of 20/21/25/30/35 years in some cases whereas in other similar cases other judges have specifically mentioned that life imprisonment shall be subject to remission! This kind of judicial variability is linked with the propensity of the judges which cannot be totally eliminated though attempt can be made to regulate it.

3.4.4 Lack of Guidance

Lack of guidance is to be understood in the context of available factors to be considered by the courts. In India neither legislative guidelines nor judicially developed guidelines are available to the judiciary to base their decisions on. In USA and England and Wales, the sentencing councils have laid down statutory aggravating and mitigating factors that need to be taken into consideration mandatorily by the courts before they proceed to sentence. As a consequence, it is fair to say that Indian judges exercise a relatively broad sentencing discretion in the context of a virtual legislative vacuum. In the absence of specific and detailed guidelines (and therefore some level of agreement) on how to apply the principle of proportionality in practice, there is a chance that the system of review may fall prey to the perils of subjectivity: the trial judge (applying the principle of proportionality) believes that a 4-year sentence is proportionate whereas the appellate (also applying the proportionality principle) believes that a 2-year sentence is proportionate. Further appeal may lead to
one year conviction again on the basis of proportionality principle. The point is not that this happens all the time in practice, but that there is no mechanism (specific guidelines) through which it is apparent that this is not happening.

3.5 Examples of Disparity and Arbitrary Sentencing – Routine and Exceptional!

As mentioned elsewhere, disparity cannot be eliminated from the sentencing process on the mathematical scale with baroscopic view. However it is unwarranted disparity and arbitrary sentencing that is the bone of the contention. Though all ‘objectionable decisions’ of Indian courts cannot be cataloged on the scale of disparity, inconsistency, and arbitrariness, few glaring examples may be noted to drive the point home.

Before cases are noted, it would be appropriate to adhere to the caveat that the examples here are confined to the disparity in sentencing approach rather than the differences in the appreciation of facts. In other words, the outcome of the case may substantially differs in all the three courts on the basis of facts appreciation. However, once the guilt is proved in the lower courts and upheld by the higher courts, question of sentencing only remains. It is this sentencing examples that are highlighted here as examples.

The example that forefronts in the arbitrary sentencing is of OMA @ Omprakash & Anr. v. State of Tamil Nadu. Appellants, herein, were awarded death sentence by the trial court after having found them guilty under Sections 395, 396 and 397 of IPC. The trial court granted life imprisonment under Section 395 and fine of Rs. 1,000/- and they were sentenced to death for the offence under Section 396 IPC. They were also sentenced for RI for 7 years under Section 397 IPC. The High Court, converted the sentence of death to life imprisonment under Section 396 IPC and rest of the sentence on other heads were confirmed. The interesting part of the judgment of trial court was the reasons forwarded for death penalty! The trial court after noticing that, the accused persons came from a State about 2000 k.m. away from

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93 In Ramashraya Chakravarti v. State of Madhya Pradesh (1976 AIR 392) for misappropriation of a sum of 500 and forged entries in the bills, the accused was convicted under section 409 and section 467 IPC by the Sessions Judge for four years' rigorous imprisonment and to a fine of Rs. 500/- in default to rigorous imprisonment for six months. The High Court on appeal maintained the conviction but reduced the sentence to two years' rigorous imprisonment maintaining the fine. Supreme Court opined that it will meet the ends of justice if the appellant's sentence is reduced to one year's rigorous imprisonment only

94 Supra note 53 at p 26

95 (2013)3SCC440
Tamil Nadu, held as follows:

“Therefore, this court is of the opinion that the death sentence that would be imposed on them would create a fear amongst the criminals who commit such crime and further this case is a rarest of rare case that calls for the imposition of death sentence.”

Apart from the above reasoning the learned trial court based his decision on a lecture he heard at public platform and declared that only weapon in the hands of judiciary under the prevailing law to help eliminate the crime, and imposed death penalty! Neither the principles of Bachan Singh nor the other ruling of the Supreme Court were referred to for imposing death! Only one judgment was cited

96 The court noted

“21. Criminal Court while deciding criminal cases shall not be guided or influenced by the views or opinions expressed by Judges on a private platform. The views or opinions expressed by the Judges, jurists, academicians, law teachers may be food for thought. Even the discussions or deliberations made on the State Judicial Academies or National Judicial Academy at Bhopal, only update or open new vistas of knowledge of judicial officers. Criminal Courts have to decide the cases before them examining the relevant facts and evidence placed before them, applying binding precedents. Judges or academicians opinions, predilection, fondness, inclination, proclivity on any subject, however eminent they are, shall not influence a decision making process, especially when judges are called upon to decide a criminal case which rests only on the evidence adduced by the prosecution as well as by the defence and guided by settled judicial precedents. National Judicial Academy and State Judicial Academies should educate our judicial officers in this regard so that they will not commit such serious errors in future.” [Emphasis supplied]

97 The Supreme Court further noted thus

“19. Learned trial judge has also opined that the imposition of death sentence under Section 396 of the IPC is the only weapon in the hands of judiciary under the prevailing law to help to eliminate the crime. Judiciary has neither any weapon in its hands nor uses it to eliminate crimes. Duty of the judge is to decide cases which come before him in accordance with the constitution and laws, following the settled judicial precedents. A Judge is also part of the society where he lives and also conscious of what is going on in the society. Judge has no weapon or sword. Judge’s greatest strength is the trust and confidence of the eople, whom he serves. We may point out that clear reasoning and analysis are the basic requirements in a judicial decision. Judicial decision is being perceived by the parties and by the society in general as being the result of a correct application of the legal rules, proper evaluation of facts based on settled judicial precedents and judge shall not do anything which will undermine the faith of the people.”


99 The Supreme Court expressed its frustration thus:

“12. We are unhappy in the manner in which Sessions Court has awarded death sentence in the instant case. The tests laid down by this Court for determining the rarest of rare cases in Bachan Singh v. State of Punjab (1980) 2 SCC 684 and Machhi Singh & Ors. v. State of Punjab (1983) 3 SCC 470 and other related decisions like Jagmohan Singh v. State of U.P. (1973) 1 SCC 20, were completely overlooked by the Sessions Court. The Sessions Court had gone astray in referring to the views expressed by the then Chief Justice of Madras in a lecture delivered at Madurai, which advice according to the Sessions Judge was taken note of by another learned Judge in delivering a judgment in rowdy panchayat system. Sessions Judge has stated that he took into consideration that judgment and the provision in Section 396 of the Indian Penal Code to hold that the accused had committed the murder and deserved death sentence. Further, the trial court had also opined that the imposition of death sentence under Section 396 IPC is the only weapon in the hands of the judiciary under the prevailing law to help to eliminate the crime and the judgment of the trial court should be on that ground.”
that too without citation!  

Coming heavily on the judgment, Supreme Court acquitted all accused (High Court had awarded life imprisonment!) and passed pertinent remarks as under:

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14. We cannot countenance any of the reasons which weighed with the Sessions Judge in awarding the death sentence. Reasons stated in para 36(b) and (e) in awarding death sentence in this case exposes the ignorance of the learned judge of the criminal jurisprudence of this country.

We are disturbed by the casual approach made by the Sessions Court in awarding the death sentence. The ‘special reasons’ weighed with the trial judge to say the least, was only one’s predilection or inclination to award death sentence, purely judge-centric. Learned judge has not discussed the aggravating or mitigating circumstances of this case, the approach was purely ‘crimecentric’.

[Emphasis supplied]

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16. We are really surprised to note the “special reasons” stated by the trial judge in para 36(b) of the judgment. We fail to see why we import the criminal jurisprudence of America or the Arab countries to our system. Learned trial judge speaks of sentence like “lynching” and described that it has attained legal form in America.

The judges’ inclination to bring in alleged system of lynching to India and to show it as special reason is unfortunate and shows lack of exposure to criminal laws of this country.

Learned judge lost sight of the fact that the Criminal Jurisprudence of this country or our society does not recognize those types of barbaric sentences.

[Emphasis supplied]

17. We are also not concerned with the question whether the criminals have come from 20 km away or 2000 km away. Learned judge says that they have come to “our state”, forgetting the fact that there is nothing like ‘our state’ or ‘your state’. Such parochial attitude shall not influence or sway a judicial mind. Learned judge has further stated, since the accused persons had come from a far away state, about 2000 km to “our state” for committing robbery and murder, death sentence would be imposed on them. Learned judge has adopted a very strange reasoning, needs fine tuning and proper training.”

[Emphasis supplied]

In Raj Bala for conviction under Section 306 IPC, the sessions court
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101 The Supreme Court noted
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“18. Learned trial judge in para 36(f) has also referred to a judgment of the High Court rendered by a learned Judge of the High Court on “rowdy panchayat system”. Learned trial judge has stated that he has taken into consideration that judgment also in reaching the conclusion that death sentence be awarded. We are not in a position to know how that judgment is relevant or applicable in awarding death sentence. Learned trial judge has also not given the citation of that judgment or has given any.”

102 Section 306 of IPC reads
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306. Abetment of suicide.

“If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

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sentenced the convict for rigorous imprisonment for a period of three years each with a fine of Rs.3,000/- each and in default of payment thereof to undergo R.I. for six months. On appeal the High Court gave the stamp of approval to the conviction but as regards the sentence, it held thus:-

“As regards the quantum of sentence of imprisonment, this Court, hereby, refers to the jail custody certificates, as per which each of the appellants has undergone a period of 4 months and 20 days. They are not found to be involved in any other criminal case.

In view of the totality of the circumstances, this Court is of the considered view that no useful purpose will be served by sending the appellants back to jail for remaining sentences of imprisonment. Ends of justice would be amply met if their substantive sentences of imprisonment are reduced to the one already undergone by them.”

Hearing the appeal on the touchstone of sentencing policy, the Supreme Court, per justice Dipak Misra, observed

“…it is really unfathomable how the High Court could have observed that no useful purpose would be serve[d] by sending the accused persons to jail for undergoing their remaining sentences of imprisonment, for the High Court itself has recorded that the appellants therein had remained in custody only for a period of four months and twenty days…”

“…The approach of the High Court, as the reasoning would show, reflects more of a casual and fanciful one rather than just one…”

Expressing displeasure at the appreciation of the case the Supreme Court observed that trial Judge has miscalculated the mitigating factors and the learned Single Judge has remained quite unmindful and unconcerned to the obvious. Commenting on the discretion and sentencing policy, the court observed,

“… The legislature in its wisdom has conferred discretion on the Court but

103 Bench consisting of Dipak Misra and Prafulla C. Pant. Justice Dipak Misra writing the judgment for the bench.
104 The Supreme Court noted
“…The learned trial Judge has, on the basis of the appreciation of the evidence on record, come to the conclusion that the deceased was assaulted and being apprehensive of further torture, he committed suicide. The mitigating factors which have been highlighted by the learned trial Judge are absolutely non-mitigating factors and, in a way, totally inconsequential for imposing a sentence of three years…”

105 The Supreme Court further observed
“12. In the instant case, we are constrained to say that the learned Single Judge while dealing with the appeal preferred by the respondents has remained quite unmindful and unconcerned to the obvious and, therefore, the reduction of sentence by the High Court to the period already undergone is set aside and the sentence imposed by the learned trial Judge is restored.”
13. We may hasten to add though we have commented on the approach of the learned trial Judge, we cannot change the scenario in the absence of any appeal either by the State or the persons aggrieved in that regard. Though a revision preferred by the informant has been dismissed by the High Court, the same did not pertain to the challenge to the quantum of sentence as it could not have.
the duty of the court in such a situation becomes more difficult and complex. It has to exercise the discretion on reasonable and rational parameters. The discretion cannot be allowed to yield to fancy or notion. A Judge has to keep in mind the paramount concept of rule of law and the conscience of the collective and balance it with the principle of proportionality but when the discretion is exercised in a capricious manner, it tantamounts to relinquishment of duty and reckless abandonment of responsibility. One cannot remain a total alien to the demand of the socio-cultural milieu regard being had to the command of law and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the society and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the patience is wrecked. It is the duty of the court not to exercise the discretion in such a manner as a consequence of which the expectation inherent in patience, which is the “finest part of fortitude” is destroyed…”

In the State of Karnataka v. Krishnappa, for a rape of a little girl, who was about 8 years of age, conviction under Section 376 IPC (repealed and recast in 2013), took place. A sentence of 10 years rigorous imprisonment was imposed by the Trial Court. The Division Bench of the High Court, however, interfered with the sentence imposed by the Trial Court. The Division Bench while commenting upon the imposition of sentence by the Trial Court observed:

“...reading that part of the judgment in which the learned Trial Judge has examined the question as to what would be the proper sentence we find that the learned Trial Judge, while considering the proper sentences to be imposed on the accused for the offence of rape was swayed and moved by the fact that rape was committed on the young girl aged about 7 or 8 years and the conduct attributed and proved against the accused, both before during and after the commission of the offences.”

Both the accused and the prosecutrix belong to Scheduled Caste. On 5th of May, 1991, between 8.00 and 9.00 p.m. while the prosecutrix and her brother, Ramesh were playing in the Chavani of their house, the respondent went there and called out for Honnaiah. PW-4 father of the prosecutrix. Parvathi, PW-5 was at that time preparing chapattis in the kitchen. She answered back to say that her husband was not in the house. On hearing this, the respondent went inside the house and asked Parvathi, PW-5 to sleep with him, since her husband was not present in the house. She protested. The respondent made obscene gestures and pulled her breasts and on her further protest, the respondent beat her up. Parvathi, PW-5 managed to somehow escape and ran out of the house and went towards the house of her mother in law, Ramaji. Both the prosecutrix and her brother, after observing the incident also made an attempt to run away. The respondent, however, caught hold of the prosecutrix by her right hand and dragged her to room no. 3 of houses in collie line. The respondent closed the door and forcibly made prosecutrix to lie on the floor. The protest of the prosecutrix and her effort to free herself from the hold of the respondent led to the respondent beating her on her upper lip which started bleeding. The prosecutrix fell on the ground. The respondent had forcible sexual intercourse with her. She sustained bleeding injuries on her private parts also and was exhausted. The respondent then left the room and locked it from outside. PW-4, father of the prosecutrix, had in the mean while returned home. He learnt that the respondent had taken the prosecutrix towards the collie line. He went to the house of PW- 12, but was assaulted and threatened with dire consequences in case he disclosed about the occurrence to anyone. In the early house of the morning, PW-4 and 5 went to room No. 3 in the coolie line and rescued the prosecutrix.
The Division Bench of the High Court, however, interfered with the sentence imposed by the Trial Court and reduced 10 years R.I. to 4 years R.I. For reducing the sentence, the High Court observed:

“of course the question of sentence is a matter within the sound discretion of the Trial Judge. But when the discretion is not properly exercised or is exercised without taking into consideration the relevant factors or when the discretion is shown to have been exercised to express sense of disapprobation intensively, there will be a case for interference when the facts brought on record require alteration in the sentence by reduction. In this case, we find facts warranting interference.

In our considered view having regard to the age of the accused his social status, personal circumstances and financial condition the fact alleged by the prosecution itself that the accused was a chronic addict to drinking there is a case for a substantial reduction in the extent of the sentence of imprisonment.

The Division Bench found that it was a case 'for showing leniency' to the accused in the matter of punishment because the accused was "49 year of age" and "at the time of occurrence", he had an old mother, wife and children to look after. The Division Bench took note of the fact that when questioned by the learned Trial Judge on the question of sentence, he had stated that he was deaf by one year, that all the members of his family were depending on him for their livelihood and that if he was sent to jail, his family would be ruined and observed:

Here is a case of an unsophisticated and illiterate citizen belonging to a weaker section of the society, having committed various offences while in a state of intoxication. It is common knowledge that when a man goes in a state of intoxication whether voluntarily or involuntarily, his reason would be unseated. He would indulge in acts knowing not the consequences of his acts which he forgets soon after he returns to a normal state.”

Reversing the judgment of the High Court, the Supreme Court made remarkable observation on the sentencing policy adopted by the High Court. It observed

“12. The approach of the High Court in this case, to say the least, was most casual and inappropriate. There are no good reasons given by the High Court to reduce the sentence let alone "special or adequate reasons". The High Court exhibited lack of sensitivity towards the victim of rape and the society by reducing the substantive sentence in the established facts and circumstances of the case. The Courts are expected to properly operate the sentencing system and to impose such sentence for a proved offence, which may serve as a deterrent for the commissions of like offences by others.

… the reasons given by the High Court are wholly unsatisfactory and even irrelevant. We are at a loss to understand how the High Court considered that the "discretion had not been properly exercised by the Trial Court". There is no warrant for such an observation. …Socio-economic status religion race caste or creed of the accused or the victim are irrelevant considerations in

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108 Constitutional bench consisting of A Anand, R Lahoti, S Variava. Justice A Anand wrote the lead judgment
sentencing policy. Protection of society and deterring the criminal is the
avowed object of law and that is required to be achieved by imposing an
appropriate sentence.”

In *State of Karnataka v. Puttaraja* the accused was charged for commission
of offence punishable under Section 376 of the IPC. He was found guilty by the trial
Court which imposed sentence of 5 years imprisonment, (though the minimum
sentence prescribed is 7 years) and fine of Rs.2000. What seems to have weighed with
the trial Court for inflicting a lesser sentence was age of accused's parents his
dependent sisters, wife and two young children. Accused questioned correctness of
the conviction and sentence before the Karnataka High Court.

While the conviction was maintained, the sentence was reduced by a learned
Single Judge to period of custody already undergone i.e. 46 days. The only reason
indicated by the High Court for awarding sentence lesser than prescribed minimum
was that the accused is a *cooli and agriculturists, young man aged 22 years old and
requires sympathy.*

Holding the “adequate and special reasons” given by the High Court as
“insulting to ratiocination” and restoring the sentence of trial court, the Supreme
Court, commenting in detail on philosophy of sentencing policy, observed that

“In the background … the inevitable conclusion is that the High Court was not
justified in restricting the sentence to the period already undergone, which is 46
days. Leniency in matters involving sexual offences is not only undesirable but
also against public interest. Such types of offences are to be dealt with severity
and with iron hands. Showing leniency in such matters would be really a case of
misplaced sympathy. The acts which led to the conviction of the accused are not
only shocking but outrageous in their contours…”

Similar views have been expressed by the Supreme Court in number of other
cases, where sentencing leniency in rape or sexual offence sentencing was
disapproved.110

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109 https://indiankanoon.org/doc/46627/
110 Sevaka Perumal etc. v. State of Tamil Naidu (AIR 1991 SC 1463), Dhananjoy Chatterjee v. State of W.B.
Om Prakash AIR 2002 SC 2235, Karnataka v. Krishnappa (2000) 4 SCC 75, Dinesh @ Buddha v. State of
In State of Madhya Pradesh v. Surendra Singh, the JMFC, convicted the respondent-accused for the offence punishable under Sections 279, 337, 304-A of the IPC and sentenced him to undergo six months and two years rigorous imprisonment respectively with fine of Rs.2,500. The High Court was moved for Revision. The High Court allowed Revision Petition but maintained the conviction with the modification “that the jail sentence awarded to the accused is reduced to the period already undergone subject to depositing further compensation of Rs.2,000, payable to the widow/mother of the deceased Vijay Singh.” On appeal the Supreme Court observed that “We are of the opinion that the trial court has not committed any illegality in passing the order of conviction and in the appeal preferred by the accused findings of the trial court were affirmed.” The Supreme Court however heavily came on the High Court by observing that

“…However, without proper appreciation of the evidence and consideration of gravity of the offence, learned Single Judge of the High Court shown undue sympathy by modifying the conviction to the period already undergone…

…In our considered opinion, the High Court while passing the impugned order has completely failed to follow the principles enunciated by this Court in catena of decisions…

After surveying authorities on appropriate sentencing policy, the court observed,

“We again reiterate in this case that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed…Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counterproductive in the long run and against the interest of the society.”

In State of Punjab v. Prem Sagar & Ors, respondents were convicted for one year imprisonment under Section 61(1) of the Punjab Excise Act for carrying 2000 litres of rectified spirit. The High Court gave the benefits of Probation of Offenders Act, 1958 even without calling the report of probation officer. Calling High Courts move as

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111 Available at http://rajasthanjudicialacademy.nic.in/docs/juds/42080.pdf
113 Available at https://indiankanoon.org/doc/1889684/
114 The High Court observed

"...The accused have suffered lot of agony of protracted trial. They having joined the main stream must have expressed repentance over the misdeed done by them about 19 years back….in the absence of any of their bad antecedents, it will not be appropriate to deny them … the benefit of probation under the Probation of Offenders Act, 1958…”
“serious error” the Supreme Court set aside the judgment and ordered the respondent to undergo simple imprisonment for a period of six months and pay a fine of Rs. 5,000 and in default to undergo imprisonment for a further period of one month.

In State of Punjab v. Bawa Singh, the trial court convicted the respondents under sections 323 and 326 IPC r/w section 34 IPC to rigorous imprisonment for 3 years with fine of Rs.1000/- for offence punishable u/s 326 IPC and rigorous imprisonment for 1 year with fine of Rs.500/- for offence punishable under section 323 IPC.

The Sessions Court set aside the conviction of the accused u/s 326 IPC but upheld their conviction u/s 323 IPC upholding other findings of the trial court. The Sessions Judge also noted that Labh Kaur was an old lady, who herself had not caused any injury to the complainant and was a first time offender and released her on probation on a bond of Rs.20,000/- after setting aside her sentence of imprisonment with fine. The respondent was however sentenced to imprisonment of one and half years with fine of Rs.1000/-.

In the Revision petition the High Court noted that “the respondent had been in jail for 4 months with remission of 15 days” the trial went for 9 years. The court therefore, “granted the prayer of the respondent subject to payment of Rs.20,000, to the complainant within two months.” On further appeal to Supreme Court, the court observed that

“… the trial court has not committed any illegality in passing the order of conviction …However, without proper appreciation of the evidence and consideration of gravity of the offence, learned Single Judge of the High Court has taken lenient stand, if not casual and shown undue sympathy by modifying the conviction to the period already undergone…In our considered opinion, the High Court while passing the impugned order has completely failed to follow the principles enunciated by this Court in catena of decisions.

Perusal of the impugned order passed by the High Court would show that while reducing the sentence to the period already undergone, the High Court has not considered the law time and again laid down by this Court.”

[Emphasis supplied]

In case of rape and murder of a 7 year old girl, The Sessions Judge sentenced the appellant to death, which conviction and death penalty was confirmed by the Madhya Pradesh High Court. It is interesting to note that High Court denounced the judge centric approach to death penalty yet adhered to “society centric

view” and upheld the death penalty.  

On appeal, Supreme Court commuted the sentence to rigorous imprisonment for the remainder of his natural life and observed:

“Time and again this court has held that the imposition of the death penalty should be the only option available to the Court and the question of any another sentence must be unquestionably foreclosed so as to justify the extreme penalty.”

The State of Gujarat v. Navalkishor Damodardas Patel is a classical example of different sentences.

The mill-owner was charged for an offence under the Prevention of Food Adulteration Act, 1954. The Judicial Magistrate, First Class Bhavnagar, convicted the opponents-accused and sentenced each of them to suffer six months rigorous imprisonment and to pay a fine of Rs. 1000. The opponents appealed to the Sessions Court which allowed the appeal and acquitted the opponents. The matter came up for hearing before a Division Bench of the High Court. High Court set aside the order of acquittal but instead of passing an order on merits directed a re-trial. The matter was retried by learned magistrate. The opponents pleaded guilty to the charge. The learned Magistrate imposed a sentence of imprisonment till rising of the Court and a fine of Rs. 1000/- on each of the opponents-accused.

On notice the substantive sentence imposed on him was enhanced from that of imprisonment till rising of the Court to one of one year's rigorous imprisonment!

High Court observed:

“The learned Judicial Magistrate, First Class, Bhavnagar appears to hold the view that it is easier for a camel to pass through the eye of a needle than for an owner of an oil mill who sells adulterated oil in packed tins and pleads guilty to it to enter the gates of a jail. This view has been taken by the learned Magistrate...

117 Upholding the death penalty, the Madhya Pradesh High Court had observed:

‘While awarding death sentence, the Court has to apply the ‘rarest of rare’ test depending upon the perception of the society i.e... A society centric view has to be taken and not a judge centric view. It has to be seen as to whether society will approve awarding of the death sentence to certain type of crime and if the society centric view is applied to the ‘rarest of rare’ test, in the present set of circumstances, we have no hesitation in holding that this is a fit case where the capital sentence can be imposed...’

118 The Court found that the young age of the accused (26 years); the conduct of the accused in custody; the absence of any previous criminal history; the social-economic strata of the accused as extenuating circumstances which would not justify the death penalty.

119 (1974) 15 GLR 736

120 The learned Sessions Judge, Bhavnagar, came to the conclusion that the sanction for the prosecution on the basis of which the prosecution was lodged was defective.

121 The opponents were served with a notice in exercise of powers under Section 439 of the Code of Criminal Procedure to show cause why the sentence imposed by the learned trial Magistrate should not be enhanced.
The sentence of imprisonment till the rising of the Court (it is my painful duty to frankly say) is an eye-wash. It is illusory and a fraud on the concept of imprisonment. The accused comfortably sits in the Court-room and usually he does not even wait till the rising of the Court either. He never sees the gates of jail. He never experiences the discomfort of jail life. Nor does he suffer the indignity or social stigma attached to jail-going which operates as a deterrent to himself and to those others who are similarly inclined. Neither their self-esteem, nor the esteem or estimation of society for them in lowered. It will not be surprising if they themselves scoff and laugh at the illusory sentence and the society also mocks at it. Does it subserve any conceivable penological purpose? None. It pleases neither the deferent, nor the reformative, nor the retributive platform…

It is a part of the function of the Court to create an ethical climate by its decisions. These decisions mould the public opinion and create an appropriate ecology. What the Courts approve and disapprove, what the Courts view with indignation, and what with indulgence, shapes the contours of public opinion and public mores…

They must be made to realise that the moving finger writes and having written moves on. And that the message is: "Thy days are numbered". It is difficult to comprehend why the Courts should hesitate in imposing sentence of imprisonment even though the Legislature has proclaimed its will by prescribing a minimum sentence of six months. True, a proviso has been enacted, and discretion has been conferred on Courts. That surely does not mean that whenever the proviso is attracted the Courts must always lean in favour of imposing a lesser sentence. The question must also in the same breath be asked why the maximum sentence should not be imposed if the question is asked why less than the minimum sentence should not be imposed…

While the purpose of the sentencing policy is not to terrorize unwary persons, it certainly is to strike terror in the evil-eyed avaricious offenders to ensure that it has its desired deterrent effect…

It requires to be considered by the Legislature whether the jurisdiction to try such offences should not be exclusively vesting the Sessions Court. It also requires to be considered whether the relevant legislation should not prescribe a minimum sentence with the rider that if a sentence lowers than the minimum is sought to be imposed, a reference must be made to the High Court seeking its prior approval. These comments hold good in cases arising out of Prevention of food Adulteration Act, Essential Commodities Act, Customs Act and in tax-evasion matters and foreign exchange violation matters. (This suggestion requires to be placed before the Law Department and the Law Commission to whom a copy of this judgment may be forwarded)…”

Similar stand have been taken by courts in many cases, speaking diagonally opposite of what lower courts have done. This tendency undoubtedly underscores

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122 In the case of State v. Dahyabhai Desaibhai [1977] 18 GLR 232, this Court enhanced the sentence from imprisonment till rising of the Court to rigorous imprisonment for a period of three months and strongly condemned the following reasons given by the learned Judge for imposing lenient sentence:

“Moreover the accused is a poor man. He is repenting for this offence. He assured for not to commit such offence again. There are 12 members in his family. He has small children and except himself there is no earning member in his family. Now-a-days he is not doing well with his business. His family has to starve without his income because these days are very hard days as it is an year of famine and hence the accused has prayed for mercy. Considering the mitigating circumstance of the accused I think that the sentence of T.R.C. [till rising of the court] and heavy fine will meet the ends of justice and serve the purpose.”
the fact that no uniform sentencing policy is prevalent across the hierarchy. Appeal courts have functioned like moderators of lower courts albeit facts and circumstances! Though appeal courts have made use of proviso which allow them to reduce the sentence below the minimum prescribed, the exercise of the same powers by lower courts have not been allowed citing “every cause has its martyr and Parliament and Government not the Court must be disturbed over the search for solutions of these problems.”

The higher judiciary commented adversely upon the attitude of some trial courts for not punishing the offenders and for not playing the role that has been assigned to them under the Code of Criminal Procedure, 1973. The higher judiciary has had occasions to criticise the role of different functionaries in the criminal justice system. For example, both the sessions judges and senior police officers were criticised by the Madhya Pradesh High Court in State of M.P. v. Gyan wherein two accused charged with murder were granted anticipatory bail on the plea of suffering from hypertension. The court was so unhappy that it went on record, "Indeed this court thinks that there are sufficient reasons to doubt the honesty and integrity of the... Sessions Judge.” Though lowers courts are under the scanner of the higher judiciary, there is no mechanism to deal with erratic judgments of the Supreme Court. In many instances the Supreme Court judgments which held the field for considerable time were overruled by the same institution as per incuriam!

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123 See A. Lakshminath “Criminal Justice In India: Primitivism To Post-Modernism” Journal of The Indian Law Institute Vol. 48 : 1, 2006, p 30, wherein he observes “The higher judiciary in particular has been exercising their power to modulate the sentences on the basis of the fact situation or on the basis of the circumstances that prompted the offender to commit the crime.”

124 Dahyabhai Shanabhai Rathod v. Rameshchandra Sakalchand Patel 1986 GLH 392

125 KN. Chandrasekharan Pillai “Annual Survey of Indian Law Criminal Procedure” Vol. XXVIII, 1992, p 110

In State of Karnataka v. Shivappa (1992 Cri LJ 3264), the court did not punish the offender though he was found to be guilty of bribery. The Karnataka High Court warned: “The viewpoint of the.... Sessions Judge that a conviction was for some reason not merited despite a finding to the contrary by him, indicates a tendency to run away from responsibility and we would say, of a duty that rested on him in dealing with white collar culprits. We do hope that the... Judge will not be guilty of such remissness again.”

126 1992CriLJ 192

3.6 Defending Discretion- Individualization of Punishment: Manifestation of Sentencing Discretion

Though sentencing discretion may, at times, result into arbitrary, disparity and inconsistent sentencing, in the absence of better modules, the sentencing discretions has been upheld by the courts and academia. The models adopted in western countries in respect of arresting arbitrary sentencing have their own problems to offer with no exact solutions. American grid system guidelines have been seen with too restrictive in nature. The fact that the court held such sentencing guidelines to be only voluntary and not mandatory itself indicate that ‘fact situations’ of the case are of myriad kind requiring different solutions with combination of deterrence and mercy. Sentencing guidelines therefore have not been universally accepted as solutions to arbitrary sentencing. Prof. A. Lakshminath opines that the sentencing discretion is indispensible in the sentencing system without which the process of sentencing would be reduced to computer programming. He observes

“...[t]he structure of the criminal law underlines the policy that when the legislature has defined an offence with sufficient clarity and prescribed the maximum punishment thereof, a wide discretion in the matter of punishment should be allowed to the judge. Any exhaustive enumeration of aggravating or mitigating circumstance is impossible. The impossibility of laying down standards is at the very core of the criminal law, as administered in India, which invests the judges with a very wide discretion in the matter of fixing the degree of punishment that discretion in the matter of sentence is liable to be controlled by superior courts. Laying down standard to the limited extent possible, as was done in the model judicial code, would not serve the purpose. The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused.”

There are several arguments that defend the individualization of punishment and advocate against standardization of sentencing namely

1. There is no thermometer to fix relevant and irrelevant information regarding crime and criminal.

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129 See Supra 123 at p 46
130 Ibid
131 Ibid p 46

"[T]here is little agreement among penologists and jurists as to what information about the crime and criminal is relevant and what is not relevant for fixing the quantum of punishment for a person convicted of a particular offence. It may be argued that crimes are only to be measured by the injury done to society. But how is the degree of that culpability to be measured? Can any thermometer be devised to measure its degree? This is a very baffling, difficult and intricate problem."
2. There are no set-behaviourist patterns of criminal cases. Variables in criminal cases are beyond the anticipatory capacity of the human calculus.  

3. Standardization of the sentencing process tends to sacrifice justice at the altar of blind uniformity.  

4. Standardization of sentencing discretion is a policy matter that belongs to the sphere of legislation and only Parliament should provide for it.  

5. Individualization of ‘acts’ and not of ‘human beings’ is possible.  

6. Once offences are specified with sufficient clarity wide discretion in the matter of fixing the degree of punishment should be allowed to the Judge.  

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132 *Ibid* p 46

“[C]riminal cases do not fall into set-behaviourist patterns. Even within a single category offences there are infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations, which are beyond the anticipatory capacity of the human calculus. Simply in terms of blame worthiness of desert, criminal cases are different from one another in ways that legislatures cannot anticipate and limitation of language prevent the precise description of differences that can be anticipated. This is particularly true of murder. There is probably no offence that varies so widely both in character and in moral guilt as that which falls within the legal definition of murder.”

133 *Ibid* p 46

“[S]tandardization of the sentencing process, which leaves little room for judicial discretion to take account of variations in culpability within single-offence category, ceases to be judicial. It tends to sacrifice justice at the altar of blind uniformity. Indeed, there is a real danger of such mechanical standardization degenerating into a bed of procrustean cruelty.”

134 *Ibid* p 47

“[S]tandardization or sentencing discretion is a policy matter that belongs to the sphere of legislation. Recently, for instance, there were fears in the USA that the establishment of a sentencing commission would take away the powers of the American Congress. When our Parliament as a matter of sound legislative policy, did not deliberately restrict, control or standardize the sentencing discretion any further than that is encompassed by the broad contours delineated in section 354 (3) of the Cr PC, the court ought not, by over-leaping its bounds, rush to do what Parliament, in its wisdom, warily and sensibly refused to do. At this juncture, it must be stated that the Malimath Committee has made a strong case for the statutory committee to be constituted to lay down sentencing guidelines to regulate the discretion of the court in imposing sentences for various offences under the IPC and special local laws. However, it is submitted that in light of the arguments mentioned above, standardization of sentencing policy in India would lead to a great deal of discomfiture in the operation of our judicial machinery.”


"Legislative prescription (in advance) of detailed degrees of offences is individualization of acts and not of human beings and is therefore, bound to be inefficient. Judicial individualization, without adequate facilities in aid of the court is bound to deteriorate into a mechanical process of application of certain rules of thumb or of implied or expressed prejudices".

136 The structure of our criminal law which is principally contained in the Indian Penal Code and the Criminal Procedure Code underlines the policy that when the Legislature has defined an offence with sufficient clarity and prescribed the maximum punishment therefore, a wide discretion in the matter of fixing the degree of punishment should be allowed to the Judge. See *Jagmohan Singh v. The State of U. P* 1973 AIR 947

8. The policy of the law in giving a very wide discretion in the matter of punishment to the Judge has its origin in the impossibility of laying down standards, and therefore, must be maintained ante quvo.\footnote{In \textit{Jagmohan Singh v. The State of U. P} 1973 AIR 947 it was observed:} "take, for example, the offence of criminal breach of trust punishable under section 409--IPC. The maximum punishment prescribed for the offence is imprisonment for life. The minimum could be as low as one day's imprisonment and fine. It is obvious that if any standards were to be laid down with regard to several kinds of breaches of trust by the persons referred in that section, that would be an impossible task. All that could be reasonably done by the Legislature is to tell the Judges that between the maximum and minimum Prescribed for an offence. They should, on balancing the aggravating and mitigating circumstances as disclosed in the case, judicially decide what would be the appropriate sentence. Take the other case of the offence of causing hurt. Broadly, that offence is divided into two categories-simple hurt and grievous hurt. Simple hurt is again sub-divided: simple hurt caused by a lethal weapon is made punishable by a higher maximum sentence-section 324. Where grievous hurt is caused by a lethal weapon, it is punishable under section 326 and is a more aggravated form of causing grievous hurt than the one punishable under section 325. Under section 326 the maximum punishment is imprisonment for life and the minimum can be one day's imprisonment and fine. Where a person by a lethal weapon causes a slight fracture of one of the unimportant bones of the human body, he would be as much punishable under section 326-IPC as a person who with a knife scoops out the eyes of his victim. It will be absurd to say that both of them, because they are liable under the same section should be given the same punishment. Here too, any attempt to lay down standards why in one case there should be more punishment and in the other less punishment would be an impossible task."}

9. Sentences under judicial discretion are subject to corrections by upper courts.\footnote{The exercise of judicial discretion on well-recognized principles is, in the final analysis, the safest possible safeguard for the accused. Further, the discretion of judicial officers is not arbitrary and the law provides for revision by superior courts of orders passed by the Subordinate courts.}

11. A sentencing process without discretion may be more consistent, but will also be equally arbitrary for ignoring relevant differences between cases. In such a system sentencing is likely to be severely unfair and would definitely not remain a judicial function.\textsuperscript{141}

Thus sentencing discretion has strongly been defended and rather, at times, advocated for. The believers in sentencing discretion argue that the sentencing is a human process and therefore should be allowed to be exerted influence over the outcomes in the given legislative parameters of ‘minimum to maximum’. Disparity if any, they argue, are the natural fallouts which should be ignored in the better interest of justice.

3.7 Judicial Underscoring For Rational Sentencing Policy

Apart from the penologists who studied judiciary as institution of justice and equity, academicians have also engaged in mapping the judicial patterns of sentencing policy. Other than these two who are dispassionately keeping track of sentencing policy, Indian judiciary itself has, at times, commented on the lack of sentencing policy in India.

The courts have highlighted the failure of both legislature and judiciary in bringing constancy in sentencing policy. Often times the courts have held that the legislature has not provided any guidelines to proceed on in the sentencing policy. The courts have also expressed their complacency in not developing guideline judgments with coherent principles of sentencing process. The observations are abundant some of which may be noted as below.

In *Mohammad Giasuddin*\textsuperscript{142} Justice Krishna Iyer lamented

\begin{quote}
“[t]he humane art of sentencing remains a retarded child of the Indian criminal system...

If every saint has a past, every sinner has a future, and it is the role of law to remind both of this. The Indian legal genius of old has made a healthy contribution to the world treasury of criminology. The drawback of our criminal process is that often they are built on the bricks of impressionist opinions and dated values, ignoring empirical studies and deeper researches…”
\end{quote}

\textsuperscript{141} Law commission of India, 262\textsuperscript{nd} Report on ‘death penalty in India’ 2015, p 170

\textsuperscript{142} *Mohammad Giasuddin v. State of Andhra Pradesh* 1977 AIR 1926
In *Shiva Prasad* the Kerala High Court observed

"[c]riminal trial in our country is largely devoted only to finding out whether the man in the dock is guilty. It is a major deficiency in the Indian system of criminal trials that the complex but important sentencing factors are not given sufficient emphasis and materials are not presented before the court to help it for a correct judgment in the proper personalised, punitive treatment suited to the offender and the crime..."

“Whereas in various countries, sentencing guidelines are provided, statutorily or otherwise, which may guide Judges for awarding specific sentence, in India we do not have any such sentencing policy till date. The prevalence of such guidelines may not only aim at achieving consistencies in awarding sentences in different cases, such guidelines normally prescribe the sentencing policy as well namely whether the purpose of awarding punishment in a particular case is more of a deterrence or retribution or rehabilitation etc.”

In *Narinder Singh & Ors v. State of Punjab* Justice A.K.Sikri observed:  

“18. In the absence of ... guidelines in India, Courts go by their own perception about the philosophy behind the prescription of certain specified penal consequences for particular nature of crime. For some deterrence and/or vengeance becomes more important whereas another Judge may be more influenced by rehabilitation or restoration as the goal of sentencing. Sometimes, it would be a combination of both which would weigh in the mind of the Court in awarding a particular sentence. However, that may be question of quantum.”

In *State of Punjab v. Prem Sagar & Ors* S.B. Sinha, J. very succinctly observed

“ In our judicial system, we have not been able to develop legal principles as regards sentencing...The superior courts except making observations with regard to the purport and object for which punishment is imposed upon an offender, had not issued any guidelines. Other developed countries have done so. At some quarters, serious concerns have been expressed in this behalf. Some Committees as for example Madhava Menon Committee and Malimath Committee have advocated introduction of sentencing guidelines...What would be the effect of the sentencing on the society is a question which has been left unanswered by the legislature. The Superior Courts have come across a large number of cases which go to show anomalies as regards the policy of sentencing. Whereas the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where same sentence is imposed, the principles applied are found to be different. Similar discrepancies have been noticed in regard to imposition of fine.”

In *Satya Prakash v. State*, Justice J.R. Midha of Delhi High Court thus wrote:

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143 1969 Ker. L.T. 862
145 (2008) 7 S.C.C. 550
146 https://indiankanoon.org/doc/135464464/
“[i]n India, the Government has not yet evolved a sentencing policy and there is no legislation that provides guidelines in sentencing. The only guidelines available to Trial Courts are through judgments of the High Court and Supreme Court.”… A uniform sentencing policy has many benefits, namely, to reduce judicial disparity in sentencing; promote more uniform and consistent sentencing; project the amount of correctional resources needed; prioritize and allocate correctional resources; increase punishments for certain categories of offenders and offenses; decrease punishment for certain categories of offenders and offenses; establish truth in sentencing; make the sentencing process more open and understandable; encourage the use of particular sanctions for particular categories of offenders; encourage increased use of non-incarceration; reduce prison crowding; provide a rational basis for sentencing and increase judicial accountability. Existence of a well laid sentencing policy also proves instrumental in improving… safety and reducing … offences/ casualties…”

In *Soman v. State of Kerala*, the Supreme Court laid down principles and guidelines for determination of sentence. The relevant portion of the judgment is

“Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges.”

In *Rameshbhai Chhaganbhai Navapariya v. State of Gujarat* Justice R.M.Chhaya of Gujrat High court thus observed:

“15. Whereas in various countries, sentencing guidelines are provided, statutorily or otherwise, which may guide Judges for awarding specific sentence, in India we do not have any such sentencing policy till date. The prevalence of such guidelines may not only aim at achieving consistencies in awarding sentences in different cases, such guidelines normally prescribe the sentencing policy as well namely whether the purpose of awarding punishment in a particular case is more of a deterrence or retribution or rehabilitation etc.”

In *State GNCT of Delhi v. Mukesh* Justice S.Ravindra Bhat of Delhi High Court noted:

“Penology and sentencing in our country has remained an underdeveloped concept. In several jurisdictions across the world, sentencing choices are guided not only by the subjective "facts of the case" but a whole variety of factors, such as social investigation of the offender, his family background, his social environment, behaviour, tendencies, etc. These are apart from the more "traditional" factors such as the history of previous offences or

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148 2012 (12) SCALE 719
149 https://indiankanoon.org/doc/146065626/
150 https://indiankanoon.org/doc/1956456/
convictions, subjective facts pertaining to the offender, such as age, gender, gravity of the offence, circumstances leading to the offence, etc. More often than not, these are factored into a set of codified rules or regulations, which in some cases, prescribe great details, and even mandate separate hearings, where the judge is obliged to consider evidence presented in that regard. Sadly, courts in this country do not have the benefit of such specialized assistance. As a result, courts have to fall back on judicially evolved standards and ad-hoc notions of penology and theories while exercising discretion in relation to offences where sentencing choices span a wide spectrum of penalties and prison terms…

In State v. Raj Kumar Khandelwal, Justice Pradeep Nandrajog of Delhi High Court observed:

“…We find no sentencing policy in India. Much of the debate on the sentencing policy has centered around the issue as to when the extreme penalty of death has to be imposed, wherever permitted by law vis-à-vis the lesser sentence of imprisonment for life. But what about most offences punishable under the Penal Code, where the legislature has either prescribed a maximum sentence, with no lower limit prescribed, or where the legislature has provide a range between a minimum and a maximum sentence. We find no uniformity in sentences imposed by Courts in India.”

In Sangeeta & Ors v. State of Haryana the Supreme Court observed in the context of death penalty that

“[i]n the sentencing process, both the crime and the criminal are equally important. We have, unfortunately not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing.”

In respect of death penalty cases, the Court has acknowledged that the subjective and arbitrary application of the death penalty has led “principled sentencing” to become “judge-centric sentencing”, based on the “personal"
predilection of the judges constituting the Bench.” The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results.

The Committee on Reforms of the Criminal Justice System, 2003 recommended to the government as under:

“It had observed that the judges were granted wide discretion in awarding the sentence within the statutory limits. It was also of the opinion that as there was no guidance in selecting the most appropriate sentence in the fact situation thereof, there was no uniformity in awarding sentence as the discretion was exercised according to the judgment of every judge. Thus, the committee emphasized the need for having sentencing guidelines to minimize uncertainty in awarding sentences. It recommended the appointment of a statutory committee to lay down the sentencing guidelines.”

3.8 Modalities to Arrest Arbitrariness in Sentencing

Though sentencing disparity has equally hunted all the jurisdictions, common law countries such as Canada, Australia, New Zealand and South Africa, have not implemented a formal guidelines. On the other hand, many countries have tried to regulate sentencing discretion by evolving their own standard – standards some of which have stood the test of time whereas many have withered away with passing time. Andrew Ashworth is of the opinion that four techniques have been used to reduce disparity and promote consistency in judicial sentencing namely establishing statutory sentencing principles secondly establishing sentencing guidelines thirdly re-imposing judicial self regulation and lastly prescribing mandatory minimum sentencing. Of the four techniques and other which are in vogue, three techniques are relevant for our discussion as under.

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155 Supra note 141
156 See Swamy Shraddananda@Murali v. State of Karnataka available at https://indiankanoon.org/doc/989335/, where the Supreme Court discussing the disparity in death sentences and the deficiencies in the criminal justice system, observed at para 34 that

“Thus the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied.”

158 Julian V. Roberts et al “Structured Sentencing In England And Wales: Recent Developments And Lessons For India” National Law School of India Review, Vol. 23(l), 2011, p 28
3.8.1 Sentencing guidelines

In 1972, Judge Marvin Frankel mooted the idea of sentencing commissions which would develop rules or guidelines for sentencing, thus in effect vesting discretion not in the legislature or the sentencing court, but in an appointed commission.

Inspired by this countries such as Sweden, Finland, England and Wales, USA, Canada and Australia saw the establishment of sentencing commissions, councils and panels, charged with enhancing consistency in sentencing.

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166 Daubney and Parry, An Overview of Bill C-41 (The Sentencing Reform Act), in Roberts and Cole (eds.), Making Sense of Sentencing (Toronto Canada: University of Toronto Press, 1999) p31

by, *inter alia*, the introduction of various forms of sentencing guidelines.\textsuperscript{168} Basically there are three types of Sentencing guidelines namely- presumptive, statutory, advisory or voluntary.

### 3.8.1.1 Presumptive Sentencing Guidelines\textsuperscript{169}

Presumptive sentencing guidelines specify an appropriate or "normal" sentence for each offense to be used as a baseline for a judge when meting out a punishment. Presumptive sentencing guidelines are contained in or based on legislation, which are adopted by a legislatively created body, usually a sentencing commission.

Presumptive sentencing guidelines set a range of penalties for an offense on two measurements - the severity of the offense and the criminal history of the offender. The point on the grid where these two measurements intersect is where the presumptive (recommended) sentence can be found.

In the Presumptive sentencing guidelines the trial court may increase or decrease a presumptive term of imprisonment depending on the presence of fixed aggravating or mitigating factors. The prior criminal history of the defendant matters a lot in the Presumptive sentencing. Higher the prior convictions, higher would be the chance for higher penalties for the second conviction. However only specified categories of prior convictions are considered in the criminal history. Though courts are entitled to depart from the set Presumptive guidelines, special reasons must be stated for it. Departures under presumptive sentencing guidelines are subject to review by appellate bodies.\textsuperscript{170}

Presumptive sentencing substantially restricts judicial sentencing discretion by specifying in advance the presumptive term of imprisonment that the typical defendant convicted of an offense should receive.\textsuperscript{171}

\begin{footnotes}
\item[168] \textit{Supra} note 53 at p 15
\item[169] States in USA which follow Presumptive sentencing guidelines are (States and in bracket the effective date of implementation of Presumptive guidelines) Minnesota (May 1980), Pennsylvania (July 1982), Washington (July 1984), Federal Courts (November 1987) Oregon (November 1989), Tennessee (November 1989), Ohio (Presumptive narrative guidelines (no grid)) 9 February 1991), Kansas (July 1993), North Carolina (October 1994), Michigan (January 1999), Oklahoma (July 1999), Massachusetts (1994)
\end{footnotes}
Prior to the Court’s ruling in *Booker*, the federal sentencing guidelines were recognized as presumptive, rather than statutory, advisory or voluntary. However after *booker* case all presumptive guidelines are only voluntary.

### 3.8.1.2 Statutory Sentencing Guidelines.

Statutory sentencing guidelines are created by a legislative body. Statutory sentencing guidelines should not be confused with presumptive sentencing guidelines. Though both types of guidelines are ultimately authorized by a legislative body, statutory sentencing guidelines are *directly* authorized by a legislative body, whereas presumptive sentencing guidelines are established by a *sentencing commission* which is usually legislatively created.

### 3.8.1.3 Advisory or Voluntary Sentencing Guidelines

The *Booker* ruling now makes the federal sentencing guidelines advisory. Under an advisory or voluntary sentencing guideline scheme, judges are not required to follow the sentences set forth in the guidelines but can use them as a reference.

### 3.8.2 Guideline judgments

Judgments handed down by appeal courts setting out principles of sentencing and the range of penalties that may be applied to a given offence are known as guideline judgments. Guideline judgments were also described as a “mechanism for

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173 Supra note 170
175 Supra note 170
176 Gleeson CJ explained the concept and purpose of guidelines in *Wong v. The Queen*[2001] 207 CLR 584 at [5]–[6]: as

“[t]he expressions “guidelines” and “guidelines judgments” have no precise connotation. They cover a variety of methods adopted by appellate courts for the purpose of giving guidance to primary judges charged with the exercise of judicial discretion. Those methods range from statements of general principle, to more specific indications of particular factors to be taken into account or given particular weight, and sometimes to indications of the kind of outcome that might be expected in a certain kind of case, other than in exceptional circumstances.

One of the legitimate objectives of such guidance is to reduce the incidence of unnecessary and inappropriate inconsistency. All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.”
structuring discretion, rather than restricting discretion”. Guideline judgments are however intended to act as a relevant indicator, rather than binding in the formal sense.177

Guidelines judgments have been used in a number of jurisdictions as a mechanism for guiding discretion. The English Court of Appeal has been issuing guidelines judgments since the 1970. The English guidelines normally set a tariff, and differentiate between, as well as analyzing aggravating and mitigating factors in relation to the relevant offence.178 Canada and New Zealand179 have also issued sentencing guideline judgments. Both Western Australia and New South Wales have enacted legislative provisions for guideline judgments, in 1995180 and 1998181 respectively182.

Though guideline judgments may help reduce disparity, they suffer from several major flaws. The first is that such judgments only exist for the most serious offences on the criminal calendar, with the appellate courts providing no guidance on the use of discretion for the mass of less culpable offences dealt with daily in the lower courts.183

Furthermore, the appellate courts are inherently ill-placed to undertake the sort of systematic research required to guide meaningful sentencing policy. They do not

181 Originally the legislative provision enabling this was contained in the Criminal Procedure (Sentencing Guidelines) Act 1998 (NSW), which inserted the provisions in the Criminal Procedure Act 1986 (NSW). This was later replaced by the Crimes (Sentencing Procedure) Act 1999 (NSW), Part 3 Division 4. See in particular s 37(1), which empowers the Court of Criminal Appeal to give a guideline judgment on the application of the Attorney-General. Note also that these provisions were amended in late 2001, adding a new definition of ‘guideline proceedings’ in s 36, and new sections 37A, 37B, 39A and 42A. See later discussion on the reason for these amendments. See Supra note 21 p 85
182 Note also that South Australia is also in the process of introducing such legislation, see Criminal Law (Sentencing) (Sentencing Guidelines) Amendment Bill 2002 (read a first time in the SA Legislative Council 28 August 2002). The Bill amends the Criminal Law (Sentencing) Act 1988, and allows the Full Court to give a judgment establishing sentencing guidelines. See Supra note 21
183 Supra note 7
have the resources or time to undertake substantive empirical research, nor can they investigate the wider impact of sentencing policy like the legislature can.\textsuperscript{184}

Finally, guidelines judgments are predominantly obiter dicta. It is impossible for an appellate judge to make general sentencing policy without this being so, as only comments relevant to reaching a decision in the case at hand form binding precedent.\textsuperscript{185}

\textbf{3.8.3 Minimum mandatory sentences}

These sentences are based on the premise that the sentencer shall not come down below the statutory limit fixed by the legislature even for good reasons in order to minimize the sentencing disparity and ensure the sufficient punishment to offenders. Not all offences carry minimum mandatory sentences. Selective incapacitation is the primary goal of the minimum mandatory sentencing.\textsuperscript{186} These sentences suffer, however, from the drawback that they do not take into account the first time offender who may lose the chance of reformatory treatment. Since individualisation of punishment is out of place in mandatory sentencing, first time offenders profile may turn heavier on account of mandatory punishment. However, as said earlier, only serious crimes with recurrence are subject matter of mandatory sentencing. All most all countries have adopted mandatory sentencing in their statute books with varying degrees of prescriptions.\textsuperscript{187} American states have introduced the

\begin{itemize}
\item \textsuperscript{184}\textit{Law Commission Sentencing Guidelines and Parole Reform} (NZLC R94, 2006) at 39
\item \textsuperscript{185}Ibid.
\item \textsuperscript{186}Russell Hogg in the context of US sentencing policy observes “In the US, the introduction of mandatory sentencing laws federally and in a majority of States are primarily justified by reference to the goal; of selective incapacitation. This philosophy rests on the assumption that the substantial majority of the crimes like robbery, burglary and assault are the work of a relatively small proportion of offenders. Accurate identification and long years of their criminal careers will, it is reasoned, harvest a significant reduction in crime. The object is not to exact retribution for wrongs done or even simply to take active offenders out of circulation.” The most well known of these measures are the ‘three strikes and you’re out’ laws that have been introduced federally and in many States (often by popular initiative). These laws treat an offender’s prior criminal records as the best predictor of their future contribution to the crime rate and hence the basis for mandating long prison sentences for second and subsequent convictions. In some cases (such as California) a third felony conviction under the ‘three strikes’ law results in a mandatory prison sentence of 25 years of life” See Russell Hogg “Mandatory sentencing laws and the symbolic politics of law and order” \textit{UNSW Law Journal}, Vol. 22 (1) 1999, p 266-267
\item \textsuperscript{187}For historical background of minimum mandatory sentences, arguments for and against and early development of in minimum mandatory sentences America see Craig Turner, “Kant’s Categorical Imperative and Mandatory Minimum Sentencing”, 8 \textit{Wash. U. Jur. Rev.} Vol. 8, 2016, at 235 Available at: http://openscholarship.wustl.edu/law_jurisprudence/vol8/iss2/8
\end{itemize}
three strike laws and extreme variant of minimum mandatory sentences.\textsuperscript{188} It may be noted here that India has also subscribed to the minimum mandatory sentences.

\textbf{3.9 Attempted Reforms in India}

Indian legal system has also tried its hand on structuring sentencing disparity by adopting few methods. Though sentencing council could not be enacted which thought is rigorously now advocated for, methods like mandatory sentencing, gradation of punishment, sue generis three strike laws, guideline judgments etc have been tried.

\textbf{3.9.1 Minimum mandatory punishments}

As elsewhere, the prescription of ‘minimum sentence’ is an important issue in the sentencing policy and legislative measures for penalties for offences in India too.\textsuperscript{189} Though of late, increased number of minimum mandatory sentences are being prescribed, in the mid of 20\textsuperscript{th} century, certain minimum mandatory sentence were prescribed with power to deviate from such minimum sentence by providing special and adequate reasons.\textsuperscript{190} However, such powers were also inconsistently used thereby resulting in the noticeable and unwarranted disparity\textsuperscript{191} as noted in the last discussion. To avoid such disparity now the parliament has been coming with précised categorization of punishment with limited discretion to choose between few options. The recently enacted Criminal Law Amendment Act, 2013 and Protection of Children Form Sexual Offences Act, 2012 may be noted in this respect.

\textbf{3.9.2 Gravity of offence vs. gradation of punishment}

Utilitarianism and just desert are the two weighing factors in the dispensation of criminal justice. The crime shall be proportionate to the guilt whereas the punishment should also be useful.\textsuperscript{192} This twin object can be achieved by befitting gradation of crimes. Though every crime cannot be graded with mathematical

\textsuperscript{188} For the development of three strike laws in the states see Elsa Chen “Impact of Three Strikes and Truth in Sentencing on the Volume and Composition of Correctional Populations”, March 6, 2001 available at \url{https://pdfs.semanticscholar.org/ad0c/f4409c27a8e1d9b9b034ece227e690ffaf9.pdf}

\textsuperscript{189} See \textit{State of Gujarat v. Natwar Harchandji Thakor} 2005 Cri LJ 2957

\textsuperscript{190} See for example un-amended section 376 of Indian penal Code, 1860 providing for special and adequate reasons to reduce the sentence below minimum.

\textsuperscript{191} \textit{Supra} note 5 where Mrinal Satish, describes as to how sentencing discretion has been inconstantly used in sentencing rape offenders.

precision, which problems in turn advocates for sentencing discretion, possibly crimes can sufficiently be graded with severity and sufferance. The recently enacted Criminal Law Amendment Act, 2013 has, to possible extent, tired to grade some of offences with extreme simplicity. Section 354A brings sufficient clarity in terms of offence and punishment to be awarded. It reads

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354A. (1) A man committing any of the following acts—
    (i) physical contact and advances involving unwelcome and explicit sexual overtures; or
    (ii) a demand or request for sexual favours; or
    (iii) showing pornography against the will of a woman; or
    (iv) making sexually coloured remarks,

shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.
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Similarly, Section 370 also sufficiently advocates for gradation as under

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370. (1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by—
    First.— using threats, or
    Secondly.— using force, or any other form of coercion, or
    Thirdly.— by abduction, or
    Fourthly.— by practising fraud, or deception, or
    Fifthly.— by abuse of power, or
    Sixthly.— by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

Explanation 1.— The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Explanation 2.— The consent of the victim is immaterial in determination of the offence of trafficking.

(2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

(3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(4) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(5) Where the offence involves the trafficking of more than one minor, it
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193 See Gopal Singh v. State of Uttarakahand (2013) 7 SCC 545
shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years but which may extend to imprisonment for life, and shall also be liable to fine.

(6) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

(7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.”

The gradation of offences in the way mentioned above simplifies the entire sentencing policy leaving less scope for disparity in sentences.

3.9.3 Second convictions- sue generis three strike laws

Indian sentencing policy is now trying the typical American ‘two strike and three strikes law and you are out policies’. Though not in the same fashion as exists in the USA, somewhat of sue generis ‘strike laws’ have been introduced in India to declare its “tough on crime” policy. The theoretical justification for such three strikes and you’re out, is grounded in the punitive ideologies of deterrence, incapacitation, and or just deserts. Take for example Section 354C of Criminal Law Amendment Act, 2013 which provides

“354C. Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.”

194 If a person has one previous serious or violent felony conviction, the sentence for any new felony conviction (not just a serious or violent felony) is twice the term otherwise required under law for the new conviction. Offenders sentenced by the courts under this provision are often referred to as “second strikers.”

If a person has two or more previous serious or violent felony convictions, the sentence for any new felony conviction (not just a serious or violent felony) is life imprisonment with the minimum term being 25 years. Offenders convicted under this provision are frequently referred to as “third strikers.”

195 Repetition of offences has been viewed seriously in states of United States which are either dealt with under habitual felon statute, as for example, habitual felon statute of New York, or under three-strikes laws as are existing in Twenty-eight states of the United States. The federal government enacted three-strikes laws in 1995. The first true “three-strikes” law was passed in 1993 by Washington followed by California passed in 1994. Under all the three-strike laws mandatory life imprisonment without parole is prescribed. The Supreme Court in Ewing v. California (2003) decided that three strikes laws are constitutional and do not violate the Eighth Amendment.
Section 376E of Criminal Law Amendment Act, 2013 provides

“376E. Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.”

Section 14 of the Protection of Children from Sexual Offences Act, 2012 provides as under

“14. Punishment for using child for pornographic purposes: (1) Whoever, uses a child or children for pornographic purposes shall be punished with imprisonment of either description which may extend to five years and shall also be liable to fine and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also be liable to fine.

(2) If the person using the child for pornographic purposes commits an offence referred to in section 3, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.”

As in the states of United States, even in India also sue generis three strikes laws are enacted for sexual offences and other socially abhorrent crimes.

3.9.4 Guidelines judgment

In the absence of sentencing council, apex courts have tried to structure and discipline the sentencing disparity of lower courts in the form of sentencing guidelines. Not for all offences, however, that the Supreme Court has laid guideline judgment. The sentencing policy for few offences like murder, dowry death, rapes, etc has been tried by the Supreme Court. The practice, however speaks more

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of problems than the solution. Guideline judgments have failed India for three main reasons. Firstly, Guideline judgments are limited to only few cases leaving the vast array of offences unguided. In State of Punjab v. Prem Sagar & Ors\textsuperscript{199} S.B. Sinha, J. very succinctly observed

“...In our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts except making observations with regard to the purport and object for which punishment is imposed upon an offender, had not issued any guidelines. Other developed countries have done so...”

Secondly lowers courts have not received the Guideline judgments in their same pristine form. The “doctrine of rarest of rare” for example has become infamous in the hands of subsequent courts under which indiscriminately death penalties are awarded.\textsuperscript{200}

Thirdly, higher courts who issue Guideline judgments do not have any fixed pattern consistently followed for a long period of time. In other words, frequent overruling of their own judgments and ‘distinguishing’ their own case form their own prior judgments have considerably reduced the respect for their judgments in terms of precedential value.

Fourthly, lower courts are often unable to distinguish between \textit{ratio decideni} of the case from \textit{obiter dicta}.

The Guideline judgments, therefore, have not been substantially able to reduce to disparity in sentencing in India though attempts in the periphery of the problems have been made here and there.

\textbf{3.10 Sentencing Practice in Two Models}

As noted earlier, sentencing disparity has hunted every jurisdiction. However, western countries were quick to respond whereas commonwealth countries have been waiting for time to ripe to introduce sentencing guidelines. Judge Marvin E. Frankel is considered to be a father of sentencing discipline in the form sentencing guidelines.\textsuperscript{201} But for his efforts that western jurisdictions have gone for establishing sentencing

\textsuperscript{199} (2008) 7 S.C.C. 550
\textsuperscript{200} See chapter IV on death penalty to understand how the ‘rarest of rare doctrine’ which was coined by the court did not remain in its pristine form and became a rolling snow ball of bleeding disparity.
councils and other allied methods to discipline sentencing disparity. For the purpose of present study we shall refer to two jurisdictions namely United States and England and Wales as how sentencing policy in the respective jurisdiction has been tried to be structured.

3.10.1 Position in United States

The position in United States in respect of judicial sentencing, before guidelines were brought in, is best explained by Gertner as

[i]n fact, judges had no training in how to exercise their considerable discretion. Whatever the criminological literature, judges did not know about it. Sentencing was not taught in law schools; and to the extent there was any debate about deterrence and rehabilitation … it was not reflected in judicial training. “It was as if judges were functioning as diagnosticians without authoritative texts, surgeons without Gray’s Anatomy.”

Beginning in the early 1970s a widespread disaffection with indeterminate sentencing began which revolutionized sentencing laws in this country. The wide

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“Since "lawlessness" was the fundamental problem in discretionary sentencing systems, Frankel urged the development of a "code of penal law" which would " prescribe guidelines for the application and assessment" of "the numerous factors affecting the length or severity of sentences. Moreover, Frankel suggested creating new institution in the form of a special agency-a "Commission on Sentencing"-to help address lawlessness in sentencing. Embracing the spirit and substance of Frankel's ideas, many experts and scholars soon came to propose or endorse some form of sentencing guidelines to govern sentencing determinations, and urged the creation of specialized sentencing commissions to develop the sentencing law called for by the "guidelines model."

These calls for reform were soon heeded. Through the late 1970s and early 1980s, a few states adopted a form of sentencing guidelines when legislatures passed determinate sentencing statutes which abolished parole and created presumptive sentencing ranges for various classes of offenses. Minnesota became the first state to turn Frankel's ideas into a full-fledged reality in 1978, when the Minnesota legislature established the Minnesota Sentencing Guidelines Commission to develop comprehensive sentencing guidelines.”


Supra note 140 at p 26 notes that

“law faculties had long regarded sentencing as a ‘soft’ sub-specialty of criminal law, populated primarily by aficionados of psychiatry, sociology, social work, and other such branches of the ‘social’ sciences.”


disparity in sentencing augmented the popular will against the arbitrary sentencing which resulted in the sentencing commission, an administrative agency, entrusted with generating sentencing standards. With the establishment of U.S. Sentencing Commission the Federal Sentencing Guidelines were adopted after passage of the bipartisan Sentencing Reform Act of 1984 to emphasize fairness, consistency, punishment, incapacitation and deterrence in sentencing. The guidelines of the commission became effective from 1987.

Even before the federal sentencing guidelines, Minnesota was the first state to develop sentencing guidelines way back in May 1980 followed by Pennsylvania. The sentencing commission proposal was first adopted by four States; Minnesota, Oregon, Washington and Pennsylvania. By 1996, 25 States had created sentencing commissions, and sentencing guidelines were either in effect or development in 20 States. Guidelines for the United States federal jurisdiction were introduced by the United States Sentencing Commission in 1987.

Under the Guidelines established by the U.S. Sentencing Commission, criminals with similar backgrounds and similar crimes receive similar sentences, irrespective of their race, socioeconomic status, or geographic location.

Federal sentencing guidelines are contained in the guidelines manuals. There

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213 Supra note 21 p 79.

214 Available at https://www.justice.gov/archive/opa/docs/United_States_v_Booker_Fact_Sheet.pdf.
is difference between Minnesota model and federal guidelines model, though both are presumptive guidelines. Minnesota uses 11 levels of crimes whereas federal grid uses 43 levels. The sentencing court has to work its way through up to five different stages.

The compass of the federal sentencing Guidelines is a one-page table. The table has vertical and horizontal axis. The vertical axis provides a forty-three-point scale of offense levels, and the horizontal axis lists six categories of criminal history, and the body provides the ranges of months of imprisonment for each combination of offense and criminal history. A sentencing judge has to use the guidelines, policy statements, and commentaries contained in the Guidelines Manual to identify the relevant offense and history levels. He then has to refer to the table to identify the proper sentencing range. Though in all cases a sentence must be at or below the maximum sentence authorized by statute for the offense, in certain circumstances the Guidelines allow for both upward and downward departures from the sentence that would otherwise be recommended. The typical grid is as under.  

<table>
<thead>
<tr>
<th>Offense Level ↓</th>
<th>Zone A</th>
<th>Zone B</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>I (0 or 1)</td>
<td>II (2 or 3)</td>
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<tr>
<td>Zone A</td>
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<tr>
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<td>2</td>
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<tr>
<td>8</td>
<td>0-6</td>
<td>4-10</td>
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<td>Zone B</td>
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<td>6-12</td>
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<td>9</td>
<td>4-10</td>
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<td>10</td>
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<td>292-365</td>
<td>324-405</td>
<td>360-life</td>
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<td>360-life</td>
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</table>
After being struck in *Booker* case\(^\text{216}\) The Guidelines are not mandatory, because they may result in a sentence based on facts not proven beyond a reasonable doubt to a jury, in violation of the Sixth Amendment \(^\text{217}\) However, judges must consider them when determining a criminal defendant's sentence. When a judge determines within his or her discretion to depart from the Guidelines, the judge must explain what factors warranted the increased or decreased sentence. When a Court of Appeals reviews a sentence imposed through a proper application the Guidelines, it may presume the sentence is reasonable.

However, within only one year of the *Booker* decision, the number of sentences imposed within the Guidelines has dropped to 62.2 percent. This is largely attributable to judges exercising their increased discretion under *Booker*, although there has been a small increase in government sponsored departures as well.\(^\text{218}\)

Although the US guideline systems have been successful to an extent in regulating sentencing discretion, there is a perception around the world that sentence ranges are too narrow and the compliance requirement too restrictive; perhaps for this reason the US schemes have proven unpopular in other countries. Federal judges themselves have described the Guidelines as “a dismal failure,” “a farce,” and “out of whack;”\(^\text{219}\) “a dark, sinister, and cynical crime management program” with “a certain Kafkaesque aura about it;”\(^\text{220}\) and “the greatest travesty of justice in our legal system in this century.”\(^\text{221}\)

The operation of the United States federal guidelines in particular have been subject to detailed scrutiny. Much of the comment on the federal guidelines has been

\(^{218}\) https://www.justice.gov/archive/opa/docs/United_States_v_Booker_Fact_Sheet.pdf  
\(^{221}\) Ibid p. 21
critical\textsuperscript{222} Tonry has summarized the criticisms into a number of grounds, which are: policy (undue narrowing of judicial discretion and the shift of discretion to prosecutors);\textsuperscript{223} process (they are being circumvented by prosecutors and judges);\textsuperscript{224} ethics (forcing key decisions behind closed doors and fostering hypocrisy); technocratic grounds (too complex and hard to apply accurately); fairness (because only the offence or offence behaviour and criminal record is taken into account,\textsuperscript{225} not other circumstances); on outcome and normative grounds, for the reasons that they have not in fact reduced sentencing disparity,\textsuperscript{226} and they are too harsh.\textsuperscript{227}

3.10.2 England and Wales

Guidelines in United Kingdom have traveled the test and time from 1980\textsuperscript{228} to 2010.\textsuperscript{229} Criminal offences in England and Wales are very broadly defined and can have different levels of seriousness. Guidelines help to ensure that courts across England and Wales are consistent in their approach to sentencing.

The system of guidelines developed in England and Wales aims to assist sentencers in determining the most appropriate sentence outcome by reference to a structured decision-making process that incorporates all of the legal factors that need to be considered in each case.\textsuperscript{230}

\textsuperscript{222} See Supra note 42 chapter 3.


\textsuperscript{226} For a discussion on disparity under the federal guidelines, see Paul Hofer, Kevin Blackwell and Bany Ruback, “The Effect of the Federal Sentencing Guidelines on Inter judge Sentencing Disparity” Journal of Criminal Law and Criminology Vol. 90, 1999, at 239, where it is stated that despite there being no consensus on whether the federal guidelines have reduced unwarranted disparity, the guidelines have had a modest but meaningful success at reducing disparity. See Supra note 21.

\textsuperscript{227} See Supra note 42 p 72.

\textsuperscript{228} For the origin and development of Guidelines in United Kingdom see State of Punjab v. Prem Sagar & Ors (2008) 7 SCC 550.


According to the Coroners and Justice Act 2009, when sentencing an offender for an offence committed on or after 6 April 2010, a court must follow any relevant sentencing guidelines, unless it is contrary to the interests of justice to do so. When sentencing an offender for an offence committed before 6 April 2010, the courts must have regard to any relevant sentencing guidelines. Sentencing guidelines are available for most of the significant offences sentenced in the magistrates’ court and for a wide range of offences in the Crown Court.

The task of preparing sentencing guidelines is vested in the sentencing council. The Sentencing Council is an independent and non-departmental body of the Ministry of Justice. It was established in 2009 by the Coroners and Justice Act and is responsible for issuing guidelines for sentencing that must be followed by the courts unless it is contrary to the interests of justice to do so. Its role includes

- developing sentencing guidelines and monitoring their use;
- assessing the impact of guidelines on sentencing practice; and
- promoting awareness amongst the public regarding the realities of sentencing and publishing information regarding sentencing practice in Magistrates’ and the Crown Court.

When conducting the above functions, the Sentencing Council must take into account the impact of sentences on victims of crime, monitor how the guidelines are applied in practice, and help increase public confidence in the sentencing and criminal justice system. A sentencing guideline may be general in nature or limited to a particular offence, particular category of offence or particular category of offender. 231

Section 120 (11) of the Coroners and Justice Act 2009 provides that

“When exercising functions under this section, the Council must have regard to the following matters—

(a) the impact of sentencing decisions on victims of offences;
(b) the need (a) the sentences imposed by courts in England and Wales for offences;
(c) the need to promote consistency in sentencing; to promote public confidence in the criminal justice system;
(d) the cost of different sentences and their relative effectiveness in preventing re-offending;
(e) the results of the monitoring carried out under section 128.”

231 Section 120 (2) of Coroners and Justice Act 2009
The definitive guidelines issued by the council for Aggravated burglary under Theft Act 1968 (section 10) can be taken as example a show sentencing guidelines operate. There are nine steps provided as under

**STEP ONE: Determining the offence category-**

The court should determine the offence category using the table below.

- **Category 1:** Greater harm and higher culpability
- **Category 2:** Greater harm and lower culpability or lesser harm and higher culpability
- **Category 3:** Lesser harm and lower culpability

Factors which should be considered by the courts are also provided by the council before hand which must be weighted by the courts.

**STEP TWO: Starting point and category range-**

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step 1, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, for burglary.

<table>
<thead>
<tr>
<th>Offence Category</th>
<th>Starting Point (Applicable to all offenders)</th>
<th>Category Range (Applicable to all offenders)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Category 1</td>
<td>10 years’ custody</td>
<td>9–13 years’ custody</td>
</tr>
<tr>
<td>Category 2</td>
<td>6 years’ custody</td>
<td>4–9 years’ custody</td>
</tr>
<tr>
<td>Category 3</td>
<td>2 years’ custody</td>
<td>1–4 years’ custody</td>
</tr>
</tbody>
</table>

Statutory aggravating factors and Other aggravating factors include provided by the council should be weighted with Factors reducing seriousness or reflecting personal mitigation.

**STEP THREE: Consider any factors which indicate a reduction, such as assistance to the prosecution-**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005232 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may

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receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FOUR: Reduction for guilty pleas-

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the Guilty Plea guideline

STEP FIVE: Dangerousness-

An aggravated burglary is a serious specified offence within the meaning of chapter 5 of the Criminal Justice Act 2003 and at this stage the court should consider whether having regard to the criteria contained in that chapter it would be appropriate to award a life sentence, imprisonment for public protection or an extended sentence. Where offenders meet the dangerousness criteria, the notional determinate sentence should be used as the basis for the setting of a minimum term.

STEP SIX: Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour.

STEP SEVEN: Compensation and ancillary orders-

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233 An extended sentence may given to an offender aged 18 or over when:

- the offender is guilty of a specified violent or sexual offence;
- the court assesses the offender as a significant risk to the public of committing further specified offences;
- a sentence of imprisonment for life is not available or justified; and
- the offender has a previous conviction for an offence listed in schedule 15B to the Criminal Justice Act 2003 or the current offence justifies an appropriate custodial term of at least four years.

These sentences were introduced to provide extra protection to the public in certain types of cases where the court has found that the offender is dangerous and an extended licence period is required to protect the public from risk of harm. The judge decides how long the offender should stay in prison and also fixes the extended licence period up to a maximum of eight years. The offender will either be entitled to automatic release at the two thirds point of the custodial sentence or be entitled to apply for parole at that point. If parole is refused the offender will be released at the expiry of the prison term. Following release, the offender will be subject to the licence where he will remain under the supervision of the National Offender Management Service until the expiry of the extended period. The combined total of the prison term and extension period cannot be more than the maximum sentence for the offence committed. In 2015, a total of 668 offenders were given an extended sentence.

234 A just and proportionate sentence is one which (a) Reflects the overall seriousness of the criminality when all the offences are considered together and (b) takes into account the overall effect of the sentence on the offender.

In all cases, courts should consider whether to make compensation and/or other ancillary orders.\(^{235}\)

**STEP EIGHT: Reasons-**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.\(^{236}\)

**STEP NINE: Consideration for remand time-**

Sentencers should take into consideration any remand time served in relation to the final sentence at this final step. The court should consider whether to give credit for time spent on remand in custody or on bail in accordance with sections 240 and 240A of the Criminal Justice Act 2003.

### 3.10.3 How binding are the English sentencing guidelines

Coroners and Justice Act, 2009, c. 25, § 125 imposes a duty on the sentencing court to follow sentencing guidelines unless the court is satisfied that it would be contrary to the interests of justice to do so.\(^{237}\) In the absence of compelling reasons, therefore, courts are unlikely to deviate from the sentencing guidelines. This adherence ensures warranted consistency in sentencing.

Similarly in the federal sentencing formula of United States also departures from the set guidelines are permitted. A sentencing court must follow the three-step

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\(^{235}\) See http://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/ancillary-orders/

\(^{236}\) Section 174 (1) requires that the court passing sentence on an offender—

a) must state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed, and

b) must explain to the offender in ordinary language—

(i) the effect of the sentence,

(ii) where the offender is required to comply with any order of the court forming part of the sentence, the effects of non-compliance with the order,

(iii) any power of the court, on the application of the offender or any other person, to vary or review any order of the court forming part of the sentence, and

(iv) where the sentence consists of or includes a fine, the effects of failure to pay the fine.

The court must—

- identify any definitive sentencing guidelines relevant to the offender's case and explain how the court discharged any duty imposed on it by section 125 of the Coroners and Justice Act 2009,

- where the court did not follow any such guidelines because it was of the opinion that it would be contrary to the interests of justice to do so, state why it was of that opinion.

\(^{237}\) (1) Every court—

a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and

b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of that function, unless the court is satisfied that it would be contrary to the interests of justice to do so…
process set forth by Gall v. United States.\textsuperscript{238} Firstly, the court must determine the guideline range.\textsuperscript{239} Secondly, the court must determine whether to apply any departure policy statements to adjust the guideline range. Thirdly, the court must consider all the factors set forth in 18 U.S.C. § 3553(a) as a whole, including whether a variance—a sentence outside the advisory guideline system—is warranted.

Departures from the sentencing guidelines in the federal system can take three forms: substantial assistance departures,\textsuperscript{240} other downward departures\textsuperscript{241} and upward departures.\textsuperscript{242} Thus, departures are lawful tools in the hands of courts even where strict sentencing guidelines regime prevails.\textsuperscript{243}

A number of jurisdictions are actively contemplating adopting more structured sentencing regimes, including some form of guidelines. The guidelines in England represent a useful model for consideration in this respect.\textsuperscript{244}

### 3.11 What India Can Barrow

There is much to borrow from the western jurisdictions which have experimented all the methods under the sun to arrest arbitrary sentencing. Following may be tried on experimental basis.

\begin{itemize}
  \item \textsuperscript{238} 552 U.S. 38 (2007) (the district court should begin all sentencing proceedings by correctly calculating the applicable guideline range, and that “to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark”). See also USSG §1B1.1(a)-(c) (Application Instructions).
  \item \textsuperscript{239} 18 U.S.C. § 3553(a)(4).
  \item \textsuperscript{240} A defendant’s assistance to authorities in the investigation is recognized as a mitigating sentencing factor. Downward departure from the guidelines can be had if the government states that the defendant has provided substantial assistance in the investigation or has assisted in prosecution of another person who has committed an offense.
  \item \textsuperscript{241} The policy statement provides that a downward departure may be warranted
    
    “[i]f reliable information indicates that the defendant’s criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.” Such a departure may be warranted “if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.”
  \item \textsuperscript{242} An upward departure may be warranted
    
    “[i]f reliable information indicates that the defendant’s criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes (§4A1.3(a)(1))”
  \item \textsuperscript{244} Supra note 158 at p 23
\end{itemize}
3.11.1 India can try sentencing councils

Jurisdictions worldwide have different experiences with sentencing councils. Some are successful, some have difficulties and others are still in the process of understanding the experience of sentencing councils. Though USA and England and Wales have sentencing councils of different models and modules, the working experience of both the jurisdiction is different. Irrespective of experiences, the common thread that runs in between all jurisdictions is that sentencing disparity is regulated to the possible extent by the establishment of sentencing councils. Furthermore, sentencing councils have been responsible for framing national policy for sentencing including the aims and objectives of the punishment and alternatives to imprisonment.

The fact that recommendations in favour of establishing sentencing councils and acknowledgment by the law minister once, underlies the fact that, it’s time that, India should experiment sentencing councils. The apprehension of believer in the judicial discretion, that by the establishment of sentencing councils is interfered with, is unwarranted and uncalled for. Sentencing councils only lay down general guidelines from which courts are free to differ from and adopt ‘context specific approach’ if the needs of the case in hand requires them to do so. The sentencing disparity is, therefore minimized yet the courts have ‘need based discretion’ with them. The crux of the departure from the sentencing guidelines lies in the fact that, the sentencing courts have to furnish reasons for the departure from the set guidelines. It

245 Supreme Court advocate K.T.S. Tulsi says. "Justice should not depend on the subjective view of the judge. We need comprehensive guidelines on sentencing."
The Committee on Reforms of Criminal Justice System stated that in order to bring "predictability in the matter of sentencing," a statutory committee should be first established "to lay guidelines on sentencing guidelines under the chairmanship of a former judge of the Supreme Court or a former chief justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative". In 2008, the Madhava Menon Committee on “Draft National Policy on Criminal Justice” emphasized the need for statutory sentencing guidelines. The then law minister M. Veerappa Moily (2010) had also stated that the government was looking into establishing a “uniform sentencing policy” in line with the US and the UK to ensure that judges do not issue varied sentences. Available at http://www.telegraphindia.com/1150902/jsp/opinion/story_40175.jsp
246 “We are working on a uniform sentencing policy,” Moily [then law minister] told reporters here. The proposed policy will ensure that judges do not hand down different sentences on the same crime but follow the standards laid down in it, he said. “We are working on the uniform sentencing policy which is on the lines of the ones in place in United States and the United Kingdom,” Moily told reporters here on Saturday. “The draft for uniform sentencing is in its final stages and the ministry will place it before the Cabinet soon,” he added. Available at http://zeenews.india.com/news/nation/centre-working-on-finalising-uniform-sentencing-policy-moily_660763.html
is here that unanimity in sentencing can be expected. The compulsory reasons for the
departure from the set guidelines makes the sentencing judge to explore all the
possibilities before him and then try something different which may, in his opinion
individualises the punishment.

3.11.2 India needs to try mandatory pre-sentencing reports

Establishment of sentencing council, true, requires the complete overhauling
of sentencing policy in India. The fact that India had enough opportunity to go for
sentencing councils yet did not take any steps towards that directions itself indicate
that, the water is still being tested. In the absence of this big leap small efforts can be
surely made in the directions of regulating sentencing disparity. Sentencing disparity
results, inter-alia, on the grounds of lack of socio-economic background of the
offender. A full dressed comprehensive report would surely help the sentencing judge
to individualisation the punishment.

England and Wales and States of United States have gone far ahead in
eliciting the information of the criminals in the form of mandatory pre-sentencing
report. India however, lacks it. Though a little effort is made to elicit the
information of accused in respect of extension of Probation of Offenders Act, 1958 no
comprehensive jurisprudence has developed in India to that effect. Courts have
read, however, in a limited way and limited to cases, that pre-sentencing report may
be generated as a requirement of section 354 of the Criminal Procedure Code, 1973. This limited reading suffers from two major drawbacks- firstly the pre-
sentencing reports can be generated only for warrant trials and eventually, summons

248 48th Report the Law Commission, recommended introduction of mandatory hearing on sentence but did not press for pre-sentence report. The Commission observed
"45. It is now being increasingly recognised that a rational and consistent sentencing
policy requires the removal of several deficiencies in the present system. One such
deficiency is the lack of comprehensive information as to the characteristics and
background of the offender. The aims of sentencing themselves obscure - become all
the more so in the absence of information on which the correctional process is to
operate. The public as well as the Courts themselves are in dark about judicial
approach in this regard.”
The recommendations of Law Commission were incorporated in Sub-section (2) of Section 235 for
trial before Court of Session and in Sub-section (2) of Section 248 for trials of warrant cases, of the
trials and summery trials are excluded. Secondly, even not in every case that falls under the warrant trial that pre-sentencing report is called for. Effectively, therefore, pre-sentencing report is nonexistent in India except for Probation Reports.

Pre-sentencing reports work wonder for they provide the social milieu to punishment intended. The importance of such report has been underlined way back in 1979 in *Dilbag Singh v. State of Punjab*. This was a case where Dilbag Singh was sentenced to rigorous imprisonment for one year and a fine of Rs. 200/-. He was held vicariously guilty under ss. 324/34 I.P.C. and awarded two years' rigorous imprisonment and a fine of Rs. 1000/-. In addition he was convicted under s. 323 I.P.C. for causing hurt to the daughter of the deceased and on this count punished with R.I. for one year together with a fine of Rs. 200/-. On appeal in Supreme Court, Chief Probation Officer was assigned to study and report. Convinced by the positive report by the probation officer, the court directed release of the appellant forthwith on a bond of Rs. 1000/- to keep the peace, be of good behaviour, to abjure alcohol and not to commit offence for a period of three years and to appear and receive sentence, if called upon in the meantime. Justice Krishna Iyer in his inimitable style then observed:

“[t]he social milieu, the domestic responsibilities, the respect for the former Sarpanch he shows, the general goodwill he commands are plus points. The tragic fact of his father's murder and the running misfortune of his young daughter's paralysed limbs are sour facets of his life. The circumstance that he is gainfully employed as agriculturist and his brothers, though in diverse occupations, remain joint family members, are hopeful factors. The aggressive episode which led to his conviction was induced by the company of his cousin who serves a seven year sentence and the inebriation due to drinking habit. This simple villager responsible and gentle, sad and burdened, repentant and drained of his little wealth by the criminal case, has a long way to go in life being in his early thirtys. The drinks vice was the minus point. Many a peaceable person, on slight irritation, suffers bellicose switch-over under alcoholic consumption.”

In spite no legislative mandate obligating the Court to hear the accused on the question of sentence be it a summons trial or a summary trial, the Andhra High Court went a step ahead in *Dilip Kulkarni And Ors. v. Bahadurmal Chowdary And Sons* (2005 (2) ALD Cri 171) wherein T.Ch. Surya Rao, J. observed:

“Having due regard to the above purpose and object behind the sentencing policy, there is no reason as to why it shall be limited to Sessions cases and warrant cases alone. When it is said that the criminal but not the crime must figure prominently in shaping the sentence and that it has a beneficial purpose, I am of the considered view that the benefit shall equally be extended to the criminal who has been tried following the summons procedure and as a matter of that summary trial procedure. Therefore, it seems imperative to hear the accused on the question of sentence even in summons cases or summary trial cases since no appropriate sentence can be passed without hearing the accused and in the absence of relevant criteria which make the sentence adequate and appropriate. For the above reasons, the accused shall be heard before passing the sentence in all criminal cases notwithstanding the procedure to be adopted in trying the said cases. Therefore, the Court below has not committed any illegality in adjourning the case to hear the accused on the question of sentence.”

1979 AIR 680
How does judicial discretion operate in this skew of circumstances? To jail him is mechanical farewell to the finer sentencing sensitivity of the judge of salvaging a redeemable man by non-institutionalised treatment. The human consequences of the confinement process here will be no good to society and much injury to the miserable family and, above all, hardening a young man into bad behaviour, with prestige punctured, family injured, and society ill-served. Nor was the crime such, so far as his part was involved, as to deserve long deterrent incarceration. Our prison system, until humane and purposeful reforms pervades, surely injures, never improves. Prison justice has promises to keep, and ethological changes geared to curative goals are still alien-from dress and bed, refusal of frequent parole and insistence of mechanical chores, bonded labour, nocturnal tensions, and no scheme to reform and many traditions to repress-such is the zoological institutional realism and rehabilitative bankruptcy which inflict social and financial costs upon the State. It is wasted sadism to lug this man into counter-productive imprisonment for one year.”

Delhi High Court has, of late, made pre-sentencing report compulsory in respect of death penalties. Only after obtaining the pre-sentencing report that bench would decide the death penalty reference. This procedure can be generalized for all offences. A suitable amendment can be carried out to Criminal Procedure Code, 1973 to that effect. Pre-sentencing report can be made compulsory until comprehensive sentencing policy is brought to force in India.

3.11.3 Choice of punishment – needs re-hauling

What India needs to unfold for different punishment is best described by

253 The high court has made it mandatory that the death penalty shall be confirmed only after mandatory pre-sentencing report (PRS) which report eliminates the rehabilitation of the offender and indicates that the offender needs to be physically liquidated. Though PRS is not binding on the courts, it must be given due respect. See chapter IV for further discussion
254 Section 235 may be amended as follows (proposed amendment text in italics)

235. Judgment of acquittal or conviction -
(1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.
(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360 hear the accused on the question of sentence, and then pass sentence on him according to law.

Provided that no sentence shall be passed by the Judge, unless a pre-sentencing report generated by the Probation Officer appointed under this Act or under probation of offenders Act, 1958, is considered by the judge.

Provided further that the pre-sentencing report may not be binding on the judge.

Provided further that the judge shall state with reasons as to how the pre-sentence report was evaluated in separate paragraphs of the judgments.

255 See the observations of the United States Supreme Court in Williams v. New York (337 U.S. 241, 249) lay the right stress on pre-sentence reports:
“have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guess-work and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation.”
Justice Krishnaiyer, V.R. when he observes

“18. Unfortunately, the Indian Penal Code still lingers in the somewhat compartmentalised system of punishment viz. imprisonment, simple or rigorous, fine and, of course, capital sentence. There is a wide range of choice and flexible treatment which must be available with the Judge if he is to fulfil his tryst with curing the criminal in a hospital setting. Maybe in an appropriate case actual hospital treatment may have to be prescribed as part of the sentence. In another case, liberal parole may have to be suggested and, yet in a third category, engaging in certain types of occupation or even going through meditational drills or other courses may be part of the sentencing prescription. The perspective having changed, the legal strategies and judicial resources, in their variety, also have to change. Rule of thumb sentences of rigorous imprisonment or other are too insensitive to the highly delicate and subtle operation expected of a sentencing Judge. Release on probation, conditional sentences, visits to healing centres, are all on the cards. We do not wish to be exhaustive. Indeed, we cannot be.”

3.11.4 Stated philosophy of punishment

As mentioned elsewhere, Indian sentencing policy needs to define the stated philosophy of the punishment in the first place and then find mechanism to pursue it in its sincerity. In the absence of stated philosophy of the punishment, Indian courts have tired their own sentiments resulting in conspicuous disparity in sentencing. Other countries have defined their purposes of sentencing followed by choices of punishment. This tendency brings confidence and faith in the sentencing policy of

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256 In Mohammad Giasuddin v. State of Andhra 1977 AIR 1926
257 As for example, Section 7 and 8 of Sentencing Act 2002 of New Zealand elaborately describes the Purposes and principles of sentencing as under

Section 7: Purposes of sentencing or otherwise dealing with offenders
(1) The purposes for which a court may sentence or otherwise deal with an offender are—
(a) to hold the offender accountable for harm done to the victim and the community by the offending; or
(b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
(c) to provide for the interests of the victim of the offence; or
(d) to provide reparation for harm done by the offending; or
(e) to denounce the conduct in which the offender was involved; or
(f) to deter the offender or other persons from committing the same or a similar offence; or
(g) to protect the community from the offender; or
(h) to assist in the offender’s rehabilitation and reintegration; or
(i) a combination of 2 or more of the purposes in paragraphs (a) to (h).
(2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

8 Principles of sentencing or otherwise dealing with offenders
In sentencing or otherwise dealing with an offender the court—
(a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
(b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
any nation at any given point of time.

3.12 Conclusion

Sentencing discretion is unavoidable evil. It can only be structured, regulated and disciplined. It cannot be taken away! In the context of sentencing policy as G.Kameswari observed

“[a]n excessive sentence defeats its own objective and tends to undermine the respect for law. On the other hand, an unconscionably lenient sentence would lead to miscarriage of justice and undermine the people’s confidence in the efficacy of the administration of criminal justice.”

Sentencing consistency is, therefore, an indispensable element of sentencing policy. Western countries have tried sentencing councils and sentencing guidelines to structure sentencing discretion. Common law countries have also developed their own methods of disciplining sentencing discretion. India however, does not share any of these methods except mandatory sentencing for some offences. India needs sentencing councils and re-hauling of sentencing policy to match the contemporaries in the sentencing policy.

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(c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
(d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
(e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and
(f) must take into account any information provided to the court concerning the effect of the offending on the victim; and
(g) must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A; and
(h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and
(i) must take into account the offender’s personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and
(j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

258 Supra note 47