THE EXIGENCY OF SENTENCING POLICY IN INDIA: AN ANALYTICAL APPROACH

By Vanshika Premani
Research Associate

INTRODUCTION

“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

The ultimate result of conviction is punishment. The purpose of imposing punishment is to attain social discipline, maintain law and order and to do justice. When an offense is proved against the accused, imposition of punishment upon the convict is what is said to give justice to the victim for all the harm and injuries borne by him/her. However, what if the punishment imposed is not proportionate to the crime committed or even if according to the sentencing authority it is proportionate, but in a similar subsequent case the punishment imposed is either far greater than or lesser than the former case, and not equal to or with minimal difference? Thus, if there is unjustness and unfairness in the punishment itself that may be due to unbridled and unregulated sentencing discretion vesting in the judiciary or biasedness applied intentionally by misusing the discretionary power, it would ultimately breed disrespect, contempt not only about the justice delivery system but also of the rule of law by violating it. This aspect of sentencing constitutes the subject matter of the current study.

The idea of sentencing in India has been such that it serves both sides of the table that is fair and just decision for the victim and fair trial and punishment for the convict proportionate to the crime done. However, there arises an issue when an individual judgment based on certain set of facts is compared with another judgment constituting strikingly similar set of facts and there appears an unreasonable difference in the punishment awarded. This difference lays both in cases of sentences awarded and in cases of awarding death penalty. The judges have been given wide discretion in awarding sentences since the law provides for either maximum or minimum sentence in most of the cases and the final quantum of punishment depends on the abstract terms such as ‘aggravating’, ‘mitigating’, circumstances which may not be the same for two different judges or bench deciding two similar cases. Thus, the main purpose of this study is to ascertain the existing sentencing criteria prevalent in India and to focus on the need to have structured guidelines for making fairer judgments. The study is done highlighting the discrepancies in body related offences and few property-related offences.

Presently, the laws in India that deal with sentencing or that come into operation when a hearing on sentencing takes place are the punitive provisions in Indian Penal Code, 1860 that provide for punishments and certain procedure related provisions in the Criminal Procedure Code, 1973. Section 53 under Chapter III of the Indian Penal Code,
1860 provides for the kinds of punishments that are allowed to be imposed in India. Those punishments are: Death Penalty, Imprisonment for Life, Imprisonment (Simple or Rigorous), Forfeiture of Property and Fine. What punishment is to be given in each offence in mentioned in the Penal Code. However, there are options given under each punitive provision. Such options are amongst the kinds given under section 53. The power of choosing which punishment to be imposed amongst those given punishment options is solely left at the disposal of the judges who gets to exercise the discretion as per their own beliefs in the punishment theories and related principles.

Certain other laws like pardoning power, commutation of sentences, remissions, parole, plea bargaining are prevalent in the statutes of India. These powers are wholly discretionary in nature and have been time and again applied without any guidance or direction. This unguided exercise of power is what crops in arbitrariness and biasedness. Arbitrariness or biasedness need not be intentional or willingly practiced. Sometimes it is the other way round. The unguided powers are brought into practice differently by the ones who are empowered, and this difference in the act of exercising such power makes it arbitrary. The analysis of a catena of cases shows this arbitrariness in the working of these laws even if each judge had judiciously applied its mind with complete fairness in their intentions.

The five kinds of theories of punishments are: Deterrent, Rehabilitative, Retributive, Reformative, Preventive. These theories constitute the reasons for giving punishments. It is natural that not every Judge will follow the same theory for imposing punishment and since the theories differ so does the quantum of punishment. It is evident from the case laws also that remarks have been made by the judges stating which theory they have followed and it has differed from one case to another.

The current status in India regarding guidelines is that there haven’t been any proper guidelines formulated to serve the purpose of getting fair just decision. The two bodies, the legislature and the judiciary, have always felt the urge to have such directions in the form of norms and rules but they have not been successful in their vision of having them as an integral part of our criminal justice system. Committees like Malimath Committee, Madhav Menon Committee stating to have foreseeability and predictability in important matters as sentencing and even the personal opinions of the post holders have made it evident that it is required to have our version of the guidelines. The Judiciary have these directions in a very minimal form that too scattered in various cases either as principles or factors that are to be taken into consideration. Since the directions regarding certain offenses have been mentioned in judgments which are acting as precedents today, yet it is pertinent to note here that those directions have been either case specific or have not been drafted to have covered most of the possibilities. Further, since these directions have been a part of a judgment coming from the judicial wing of the country, it doesn’t have the enforcement value as of the level that a law or a rule or norm coming from the legislative wing has.

In a large number of cases, as discussed further in this study, it has been acknowledged and mentioned that
punishment constitutes the heart of any conviction case and that it should be given primacy at the utmost level. However, in India, due to absence of any structured uniform established set of guidelines with respect to sentencing process, this fundamental aspect has been hugely neglected. The exercise of wide discretion in imposing sentence, since the law itself allows this, has been the general rule and never been questioned as such.

In psychological terms, it must be noted that an individual’s thought processes and mental cognition to perceive and adjudge a particular aspect can differ invariably. In this regard, it can be stated that on one hand law is all about interpretations and adjudging a set of facts and on the other hand when combined with this theory, there are bound to have disparities and differences in decision-making.

The challenge here is not just to bring up a set of guidelines that tend to make the entire process fair and just but to see, study and analyze that why the discretion is existing at the first place that is being exercised by the sentencing authorities and what should be the approach that should be followed of having such guidelines. The other challenge is to see that whether the guidelines would remove the anomalies that are being still faced today. The discretion exercised and removal of arbitrariness are the two important aspects that have to be analyzed and examined. The first challenge may be understood from the point of view given in Duke Law Journal. This Journal has philosophically and also in terms of psychology explained the reasons of discretion and how a judge behaves. According to author, Judges like physicians are performing duties which make people repose trust and confidence in them. The one similarity that is highlighted in the article is the exercise of ‘choices’ that both have to perform at some point or the other in their profession and that is what makes their job tough and thus, highly respectable. The exercise of choices is said to be tough because they focus on individualization of choices according to the facts and persons before them. The dissimilarity that is there between the two professions is that the power to exercise choices is still limited in case of Judges by way of prescriptions and limitations imposed by the statutory laws.

Richard L. Marcus in his article “Slouching toward Discretion” says that it is this discretionary power that has become a relevant topic of discussion, a bone of contention that has attained the arena of prominence. The second challenge has to be seen from the point of its implementation. It is important to consider that before bringing into or suggesting to bring into existence any such guidelines, what is more needed is to make a thorough analysis of the anomalies and the loopholes that exist in the law in theory and in practice. It is the identification of these issues and bottlenecks that can lead us to the formulation of a customized set of guidelines that are most suited to the Indian Criminal justice System.

Once the identification is done can we see the existing guidelines in other jurisdictions, for instance, USA, has its own set of sentencing guidelines that support and come into aide of the sentencing authorities while making
sentencing decisions. The analysis of these guidelines will help us understand the formulation and the working of the guidelines. In case there were similar issues and doubts, that our authorities have in respect of bringing into such norms, in these jurisdictions also before bringing into existence their norms, study of those similar issues, doubts, challenges and the modus operandi adopted to overcome those challenges or to bring a solution for the same. Thus, the requirement is to analyze the importance and the worth of formulating guidelines in line with that of USA or if not this, then at least have a policy/law conceptualizing this aspect objectively. The basic principle that is followed in sentencing is always that it should be in proportion to the crime committed. The principle of proportionality takes into account other factors like the facts and circumstances of the case, nature of the crime, the criminal history of the offender, the manner it was committed, and such other factors. However, the principle is not utilized in its true sense. Certain cases may give priority to one existing consideration over the other and that is where discrepancies start to arise. This cause and other related causes that lead to discrepancies may in my view call for a one stop solution. How far is this effective and how far relevant is what is to be analyzed in the following part.

SENTENCING AND THEORIES OF PUNISHMENT

Sentencing

The words ‘Sentence’ or ‘Sentencing’ has not been specifically defined in any statute, rule, enactment or any other related legal document. Interestingly, however, it is one of the most potent aspects of criminal trial.

Sentencing, in simple terms, can be explained as a modus operandi of dealing with a convict after his/her guilt has been proved beyond reasonable doubts or that plea guilt has been made. It is a concept wholly related to Criminal law arena. Sentencing is not a single act in law. Rather it is a complete process in itself which includes all the activities of law that follow once the accused who was charged of committing certain offenses has ceased to be one and has finally become a convict in the eyes of law.iii

Further, it can be stated that sentencing certainly includes the element of punishment such as imprisonment, fine, life sentence, etc. It also surely includes certain orders that act as an imposition upon the offenders, for instance, to provide compensation to the aggrieved person. Such orders are known as compensation orders.iv

The common practice in the process of sentencing is that on the hearing, there are generally three choices left to the courts. These are one the decision to impose imprisonment or any other allied punishment for instance probation, order some kind of service to the community or send the offender for some treatment program. The Second is that no sentence is decided to be imposed by the sentencing authorities. Instead, the courts prefer to suspend or put on hold the sentence.
and impose probation. The third option is that the courts do impose sentence but put on hold its execution and then release the offender on probation which is usually subject to certain terms and conditions.

**Punishment**

Punishment, is the suffering in person or property inflicted by society on the offender who has been adjudged guilty of crime under the law. It is the retribution due for the violation of the rules of society, which are made for its preservation and peace and the infraction of which is made punishable. Not only physical pain but also mental suffering, loss of freedom, loss of reputation and sometimes loss of property - are the consequences of punishment. The object of punishment is not simply one i.e., Punishment for the sake of punishment. As already discussed, there are various theories advanced by different writers.

**Theories of Punishment**

1. **Expiation:** According to this theory a man’s records against him are not taken into the account and the experts are reluctant to look to his past records after his discharge from prison.

2. **Restitution:** The theory of restitution is perhaps the most primitive of all the elements of punishment because in this theory the right of the victim comes into the picture. According to this view the criminal should make good to the damage or the loss he has inflicted upon the victim. In fact, eye for an eye and tooth for a tooth theory is the basis of restitution as the nature of punishment of the offender.

3. **Retribution:** Even retribution is considered as having the elements of expiation theory. In expiation, retribution theory is also concerned with restoring the moral balance which is distributed in society by the behaviour of the criminal. The criminal should make good to the damage or the loss he has inflicted upon the victim. The difference between these two theories is indicated by stating that both the right and the duty is the basis of expiation theory whereas retributive punishment is his desert.

4. **Deterrence:** The theory is based to deter the criminal so that he does not dare to commit the crime again as well as it’s a warning to all other in the society that they will be dealt with the deterrent punishment in case the commit some crime. The object of deterrent punishment is to instil in the individual a regard for the law because of the fear of punishment which will follow if he transgress the law.

5. **Reformation:** Such a trend of reformation or correction of the offender has gained much popularity and acceptance is many societies for about the last two centuries. This theory explains that the object of punishing the criminal is basically to reform or correct the criminal so that after having suffered the punishment, he returns as a reformed/normal person so that he can live as a useful member of the society.

6. **Just Deserts:** Again, there is revival or rebirth of ‘Just Deserts’ because the theory of rehabilitation and deterrence have not shown the impact in society and they are also not verifiable in their impact and therefore, it is felt that the punishment of the criminal should be according to the seriousness of the offence.

**INTERNATIONAL PERSPECTIVE USA**

**History of The Guidelines**

The situation in USA, before the coming into force of the guidelines, was uncertain in
respect of the quantum of sentence to be imposed upon the convict. This has been interestingly explained by Michael Goldsmith and James Gibson in their article. According to the, the convicts were of the view that “the law is whatever the judge had for breakfast”. The authors say that the culinary items used to determine the intensity of sentences whether lighter that is geared towards the theory of rehabilitation or stricter, harsher punishments based on the theory of retribution, deterrence, prostration, ct. cetera. They mentioned certain food items like eggs over easy, oats indicating the mood to give lighter punishment and hard-boiled eggs, meal made from bacon indicative of the mood of giving higher punishments.

The type of thinking that is suggested in this article clearly explains the plight of the convict while getting the punishment. Even if they knew it as a fact that all depends upon the mood of the judge, yet they couldn’t do much about it because the discretion was the rule, it had been in practice and was legally allowed since no guidelines were made then. They have acknowledged the fact that except for few restrictions provided in the statute, they enjoyed a wide latitude of discretionary powers without preferably any appellate review. The result of having such an open ended-system was that the sentencing authorities used to feel contended and satisfied that they have delivered justice, notwithstanding, the fact that the justice was meddled with in the form of granting mercy or gave a hardened punishment. Their judgment was considered acceptable with respect to the type and quantum of sentencing or was not a part of any meaningful, considerable appeal.

It was this situation as a whole that made things intolerable, especially when a nation is grounded in equal justice. The Congress responded to this situation by passing the Sentencing Reform Act of 1984. The Act aimed at (1) removing unnecessary disparities; and (2) producing “truth in sentencing” by making amendments with respect to certain aspects in law that gave wide discretionary powers to the judges like the concept of parole that straightaway amounted to lessening the sentence to only 1/3rd of the original sentence that was imposed. Thus, it was under this Act of 1984 that the US Sentencing Commission was formed. The Commission was then directed to formulate sentencing guidelines in which every offense should carry a fixed definite sentencing range. This range was permitted to be kept subjected to certain adjustments in respect of specific offense characteristics and the offender’s criminal history.

**Mandatory Minimum Punishment**

The expression “compulsory least punishment” according to US laws means a federal criminal legislation, that provides for the imposition of a fixed certain minimum term of sentencing upon judging that the requirements set out in that specific offense is fulfilled and upon affirmation of the conviction. The minimum penalties differ depending on the type of offense and the factors or criteria taken into consideration for awarding sentence. For instance, there is two years punishment provided for aggravated identity theft and life imprisonment for offences of drug abuse.

The statutory pattern that is followed to attract the rule of minimum mandatory punishment if classified into the following...
three types out of which atleast one is followed:

1. Penalties arising from the requisite characteristics and components of the offense liable to conviction
2. Penalties prompted by connecting to other underlying or fundamental offences
3. Penalties prompted by accused’s criminal past experiences and history.

In US, according to the US sentencing commission, which is the apex body for drafting sentencing policies in Unites States, the Congress by way of its federal laws have made an attempt to provide for a number of minimum mandatory penalties for the offences like child sexual abuse, child pornography, theft, drug abuse, arms related offences. In the cases of child sexual abuse, the penalties although were certain yet differed with the increase in the number of such cases.

This refers to the statutory recommended punishments and guidelines that have been formed keeping these in mind.

The Methodology Adopted
The main objective of these guidelines can be understood by understanding the rationale, keeping which in mind the Congress came forth with the Sentencing Reform Act of 1984. One such objective was to strengthen the criminal justice system to deal with crimes through an effective, fair, just and honest sentencing system. The Congress focussed on the necessity to get rid of the confusion and implied sham that was a result of unstipulated sentence of imprisonment that existed during the pre-sentencing guidelines era. Thus, the Congress set up parole commission to regulate and fix the sentence

an offender would serve. The other objectives were to bring in uniformity and lessen the extensive discrepancy in the quantum of sentence imposed upon similar criminals convicted of similar offences. Th Congress also aimed at getting proportionality in the sentence according to the severity in the offense committed.

Sentencing Reform Act, 1984
The statutory mission of this Act is to facilitate the fundamental purposes and objectives of criminal punishment policy i.e., causing deterrent effect, rehabilitation, just, fair, reasonable, proportionate punishment, incapacitation, in some cases even retribution. The Act formulates directions for the Commission to aide it in determining the sentences. One such basis provided by the Act for aiding the Commission in its task of preparing guidelines is to consider offense behaviour and offender characteristics. This could be understood by way of an example. A person, A, commits robbery at a bank by using a gun and stole Rs 10 lakhs. Also, it is known that A has been previously convicted for a similar kind of offense and has served a term for a certain number of years. In this example, the initial information comes under the category of offense behaviour and the latter information of previous conviction comes under the category of offender characteristics. Thus, the Commission has to frame sentencing guidelines for each such class of convicts by balancing out both these categories. According to 28 U.S.C § 994 (b)(2), the maximum range of imprisonment should not exceed minimum by more than the greater of 25% or 6 months. This indicates that the sentence of imprisonment is for the purpose of the guidelines.
According to section 18 U.S.C. § 3553(b) of the Act, the general rule is that the courts have to decide the sentences of the offense in issue according to the array or range given in the guidelines. However, the exception allows for diverting from the general rule in cases where special circumstances appear in which case the order has to be a speaking order, that is, proper reasoning has to be provided by the court justifying its decision of dissuading from the general rule. Further, another relevant section of the Act is 18 U.S.C. § 3742, which provides for the review of the order. If the sentence-imposed falls under the general rule, the appellate court would review considering the correctness of the applied guideline, whether it is in conformity with the given range. In case the sentence falls under the exceptions, then the consideration is whether it was just and reasonable to depart from the given range. The Act provides for the abolishment of the practice of parole and has made reductions and changes in the sentence modification aspect in cases of good behaviour. This would result in serving 15% of sentence for good behaviour.

**Guidelines**

When we talk of the guidelines-manual specifically, it is structured into total 8 Chapters. The first one is an introductory one. It provides for the principal authority, that is, United States Sentencing Commission and also lists down the General Principles to be followed by the authorities in the application of these guidelines, which in itself constitutes a separate section in itself.

The Second Chapter discusses the offense conduct, which is divided into parts. For the purpose of this study, the first two parts are discussed, specifically the body related and property related matters.

Part A of this Chapter lays down discussion on Offenses against Person, which means body related offenses and it includes, Homicide, Assault, Criminal Sexual Abuse and offense related to registration as Sex Offender, Kidnapping, Abduction and Unlawful Restraint, domestic violence, harassing, etc.

Part B of this Chapter lays down discussion on basic economic property related offenses such as theft, embezzlement, receipt of stolen property, property destruction, offenses involving fraud or deceit, robbery, extortion, burglary, trespass, etc.

The other Chapters that hold relevance in this study are:
- Chapter Three that provides for Adjustments
- Chapter Four that Criminal History and Criminal Livelihood
- Chapter Five provides for Determination of the Sentence
- Chapter Six constitutes Sentencing Procedures, Plea Agreements, and Crime Victim’s Rights
- Chapter Seven contains provisions related to Violation of Probation and Supervised Release.

The Connection amongst all is discussed in the following headings.

The numbering of the guidelines is done in the following way:
Thus, it would be written as § 1B1.4.

I. Relevant Provisions

§1B1.1. Under §1B1.1. of the guidelines titled, “Application Instructions”, the Commission has provided instructions as to how the guidelines have to be read. Clause (a) provides that these instructions help in attaining the ultimate result, that is, to ascertain the type and kind of sentences and the sentence guideline range which is provided in the guidelines by applying the provisions as enshrined in the guidelines. There are total 8 instructions that sum up the steps to be followed one after the other to reach the ultimate result of sentence range. The first step is to find out and ascertain the offence guideline section. Chapter two of the guidelines provide for the offense conduct, which mentions in detail different types of crime like murder, theft, assault, etc. Thus, it is important to know for which offence the sentence has to be imposed and it is pertinent to do so in pursuance of §1B1.2 which provides the Applicable Guidelines. Once the offense is found under chapter two, the next step is to know its base offense level and if there are certain specific characteristics, cross references, any special directions which are contained in the guideline in that chapter, which are applicable then apply them in the same order as listed. In addition to these, adjustments should also be applied which are specifically provided in Chapter 3, Parts A, B, and C. These may be related to role of victim, obstruction in the justice delivery system. For multiple counts, the above steps have to be re-followed and for adjustments Part D has to be followed after grouping the counts. Adjustments further to be made on the basis of the criminal’s acceptance of the guilt and responsibility for the crime. Ascertaining the criminal history and determining the criminal history category under chapter four becomes relevant. Both Parts A and B are stated for providing adjustments. It is finally after this step can the guideline range be found at the point where the offense level and the category of criminal history meets on the sentencing table. This is provided in Chapter Five, Part A. The sentence guideline range is finally known through parts B through G, after considering essentials like sentencing requirements, and possibilities of granting probation, restitution, applying supervision conditions, imposition of fines. Clause (b) of the provision states that in the end the sentencing authority shall look into Parts H and K of Chapter Five, for hearing on matters of specific characteristics and departures. The statute would then be looked into for applicable factors, if any, taken as a whole. The following sub-chapter helps in understanding the fundamentals of the overall instructions with the help of examples.

§1B1.2. Applicable Guidelines

According to clause (a) of this section the offense conducts in Chapter two has to be determined with respect to what charge/count of indictment the offender is convicted of. One has to refer to Appendix A in the statutory index to understand the guidelines given in chapter two, which is referenced in the index of the statute for the offense of conviction. Further if the offense involves incomplete offenses like attempt, solicitation, conspiracy then §2X1.1 (Attempt, Solicitation, or Conspiracy) has to be referred along with the guidelines of the main substantive offense that is committed, as referenced in the statutory index. In case
certain statutory provisions not listed in the guidelines then the rule is to follow the most analogous guidelines as provides in §2X5.1 (Other Offenses). The exception to the application of the guidelines is also provided in clause (a) of §1B1.2 which provides that the guidelines do not apply to §1B1.9 (Class B or C Misdemeanours and Infractions).

Clause(b) directs to follow §1B1.3 (Relevant Conduct) to determine the guideline range. The formula for determination of the guideline range has already been discussed. This provision of the guidelines lists down the acts and omissions that should be considered as relevant to determine the set of facts that ultimately constitute the offense.

Clause(c) talks of situations wherein additional offenses are established by certain stipulations made in the plea agreements. In such cases, it shall be deemed that the offender has been convicted of those additional counts charging the offender of those offenses. This would again be dealt with Chapter three Part D (Multiple Counts).

Clause(d) provides that if the conviction is made for count of conspiracy for committing two or more offences then it shall be considered as a separate count for each conspiracy. For example, if the count is for conspiring to commit three robberies, then for the purpose of these guidelines it would be calculated as three different counts of conspiracy each referring to one robbery.

Accomplice
According to §1B1.8., if a cooperation agreement is entered between the government and the offender, wherein the defendant agrees to provide certain information relating to the crime committed and the allied unlawful activities to the government and in return the government promises not to use such self-incriminating material against the defendant pursuant to this agreement, then the law says that such information shall not be used against him in determining the sentence range, except to the extent to which it is agreed upon in the cooperation agreement. However, clause (2) provides certain exceptions to clause (1). Information which was already in the knowledge of the government prior to the creation of the cooperation agreement, or which relates to the previous punishments and convictions for the purpose of determining the criminal history under §4A1.1 and Career Offender under §4B1.1, or in cases of prosecution for perjury or giving false evidence or if the agreement itself is broken or violated or for the purpose of determining the downward departure in relation to §5K1.1 Substantial Assistance to Authorities.

II. Working Of The Guidelines
A. The Commission highlighted two major factors to be considered for the essential functioning of the Guidelines. These are:
   1. Seriousness of the offence
   2. Criminal History of the offender

Once facts of the case have gone through these parameters in detail, the next step to follow is determining the guideline range and there are sub-steps to follow in this also.

1. Seriousness of the offense
The components of this step are:
   - Base Offense Level
   - Specific Offense Characteristics
   - Adjustments

The seriousness of offences in the guidelines are marked by levels. There are total 43 levels in the guidelines which are categorically arranged in ascending order, that is, from
least serious crimes to most serious ones. These levels in legal terms are known as base offence levels. Each crime is allocated this base level and this is the preliminary indication of the seriousness level of the offense. For instance, the offense of trespassing has lower base offense level which is 4, on the other hand, the offense of kidnapping is allocated higher base offense level which is 32.

Once the base offense level is known, matching the specific characteristics comes as the next step. Each offense level constitutes certain specific characteristics which may be present in one case and not in the other. Thus, it varies from case to case and are applied accordingly. However, the application of one or more such characteristics does affect the base offense level. It causes to increase or decrease the level, thereby, impacting the sentence to be awarded to the offender.

For example: The offense of fraud is put under base offense level 7 as per the statutory punishment which is kept 20 years or more. This is further increased based on the amount involved in the fraud. As provided in the manual also, if the fraud amount involved was $6000, the base offense level has to be increased by two levels bringing it up to level 9 and if the amount of loss is $50,000, there is increase in the level by 6 levels bringing it up to base offense level 13. Another example, say in the offense of robbery, the given base offense level is 20. One of the specific characteristics provided is the presence of firearms. The rule says that if the firearm was handled during the commission of the offense of robbery, then the increase would be by 5 levels bringing the total count of the base level to 25 and if it is discharged, then it will be increased by 7 counts in the base level, bringing the level to 27.

Adjustments, on similar lines like specific characteristics, affects the base level by increasing or decreasing its count. Adjustments, in simple terms, refers to such factors that are applied to an offense. Some of the examples of such factors are – factors which call for victim-related adjustments, the extent and nature of role of the convict in the crime, certain hindrance in the justice delivery system. Few examples of such factors leading to adjustments are – if the extent of participation of the offender is nominal, then the adjustment is made by decreasing the count of base offense level by 4. One example of victim related adjustment is that if the victim comes under the vulnerable category due to reason of its age, mental condition, physical ailment, and the offender had knowledge of this fact, then the level is increased by 2. In case there is obstruction in the justice delivery system due to the act of the offender, then the level is to be increased by 2.

However, the rules for adjustments in the cases of multiple counts are slightly different. The formula in such cases is to calculate a combined base offense level. The directions in the guidelines are given to determine the combined base offense level. The initial starting point is marked with the punishment provided for the most serious offense count. These rules further direct the increase in the punishment on the presence of additional counts. Incremental sentences are provided for every relevant addition of the criminal conduct in the same set of facts. Thus, the presence of these additional counts determines whether any and by how many levels the base level has to be increased.
In cases of pleading guilty in a case, which is also termed as accepting responsibility, there are rules of adjustments here also. This is the final stage of adjustment wherein if in the opinion of the sentencing authority the offender admits his guilt, the judge has discretionary power to reduce the base offense level by two counts. The guidelines provide certain factors which can be taken into consideration by the Judge to ascertain the question whether such reduction in sentence should be granted or not. These factors are:

a) Whether the offender truly and without any coercion accepted his guilt or participation in the crime.
b) Whether restitution was made by the offender before the sentencing court passed the guilty verdict against the convict.
c) Whether the offender pleaded guilty

The rule further provides that if the offender qualifies to receive the two level reduction based on above such factors, and if his total base offense level is greater than 15 counts then he may further be granted a further reduction by level 1, if the offender timely informs of his intention to plead guilty.

2. Criminal History

Chapter four is specifically dealing with the aspects of criminal history and criminal livelihood. There are total six categories of criminal history provided in the guidelines which varies from one another based on the extent of the past delinquency of the offender. Category I of the Criminal History constitutes the least serious crimes, and comprises a number of first-time offenders. On the other end, Category VI of Criminal History constitutes the most serious nature of crimes and comprises offenders carrying criminal records.

B. Relevant Conduct

According to §1B1.3(a) Relevant Conduct (Factors that Determine the Guideline Range) of the guidelines, the base offense level, the specific characteristics and cross references which are part of chapter two and adjustments which is provided under chapter three shall be determined according to the list of facts which are provided under this provision. This is the rule when nothing specific is provided in the guidelines with respect to these areas. The facts that would be considered relevant for the purpose of these matters are all acts, omissions whether committed by abettor or aided or directed or commanded or counselled, procured, or wilfully caused by the defendant. In case of a set of facts wherein the offenders undertook joint criminal liability by way of a plan, arrangement, scheme, endeavour, in concert with others, whether this was charged as conspiracy or not, all the acts and omissions that were within the ambit of the undertaken criminal activity, in continuance of such activity and rationally predictable in connection with such activity shall be considered relevant. In addition to this, the law clarifies that such acts or omissions can take place at any stage starting from preparation through commission to attempting to avoid the detection or responsibility for that offense. All harms that either were result of such acts and omissions or object of such acts or missions. The ambit of this provision was kept wide by putting in the last clause inclusive any other information as specified in the applicable guideline.
According to clause (b) of this provision, the determination of factors provided in Chapters Four and Five that go on to establish the guideline range be on the basis of the conduct and information specified in the respective guidelines.

C. Ascertaining the Guideline Range
Chapter five of the guidelines is wholly detailing about the sentencing table, the allied concepts like probation and finally the sentence that is to be imposed. This area in the guidelines makes the entire process of sentencing even more fair and just. This is the last stage which helps determine the exact sentencing range for the offense committed. There is a proper formula set for this stage and the formula constitutes the variables that have been discussed above. As per the formula, the point at which the final offense level (known after specific calculation) and the Category of Criminal History meet on the sentencing table formulated by the Commission, is the range of sentencing within which the offender is to be imposed sentence. The final offense level is calculated by adding or subtracting to the base offense level, the applicable specific offense characteristics and factors that allow for adjustments. It is at this stage only, as, mentioned earlier also, that departures can be granted. Once the sentence range is calculated using the formula, the sentencing authority may consider hearing on the fact that certain atypical unusual circumstances were also present which are aggravating or mitigating in nature. This empowers the authority to depart from the guideline range and to punish the offender above or below the calculated range. The principle of rule of law here is also sustained as the judge has to record reasons for his for departures.

D. Ascertaining the Sentence within the Range
§1B1.4. specifically states what kind of information to be Used in Imposing Sentence which includes selection of a point within the guideline range or rather departing from the guidelines, as per the requirement of the case. The provision empowers the sentencing authority to consider any information that may relate to the background, character and conduct of the defendant, without any limitations or restrictions, unless however if it has been prohibited by the law. This section has its basis on 18 U.S.C. § 3661. This section focusses on determining the sentence within the range which is different from determining the range which is done by following the formula discussed in ‘C’ sub-part above.

E. Exclusion of Certain Conduct
According to §1B1.9. Class B or C Misdemeanours and Infractions, the guidelines do not apply to any charge of conviction involving class B or C misdemeanour or infraction. This means and as also provided in the commentary to this section that the sentencing authority may impose any sentence that is provided in the statute for such types of offenses. Class B misdemeanour constitutes those offenses for which the maximum sentence is above 30 days not more than 6 months. Class C misdemeanour constitutes those offenses for which the maximum sentence is above 5 days but not more than 30 days. Infractions are those offenses for which the maximum sanctioned punishment is not more than 5 days or may be no sanctioned punishment at all. The reason given by the Commission for excluding these offenses from the ambit of application of the guidelines is because of keeping intact judicial economy.
The guidelines also do not apply upon the offender who has been held convicted of an offense and sentenced under the Federal Juvenile Delinquency Act (18 U.S.C. §§ 5031–5042). However, the rider here is that the sentence impose upon the juvenile as per the act should not surpass the maximum sentencing range as would have been determined for an adult committing the same offense, except through departures when the sentencing authority considers certain a factor aggravating enough to warrant an upward departure from the guideline range. In the case of United States v. R.L.C., 503 U.S. 291 (1992), the court held that determining the guideline range of an offense had the crime been committed by an adult is a necessary step in the process of deciding the sentence for the juvenile who has committed the same offense.

Thus, the guidelines also provide guidelines for the permission in the reduction of the sentence due to reasons concerning the age of the convict, his medical conditions, any family situations, etc and varied other legal aspects like references made to other guidelines, etc that makes the guidelines comprehensive and resourceful for the sentencing authorities to be guided by it in the process of determination of the sentence.

Case Laws
According to United States v. Booker XI, the application of these guidelines is directory in nature and not mandatory. However, the sentencing authority/judge who prefers to impose a certain sentence for a particular offense that is different or not in consonance with the range given, whether severer or more lenient than what is reached after calculation using the guidelines, has to mandatorily explain the decision by giving reasons for the same. This is akin to the concept of departures that is a relevant part of the guidelines and allows the judges to depart from the rules citing valid reasons for the same.

It has been found out that most of the judges have a very little or no experience or any kind of background or training which is otherwise essential for the process of selection and imposition of effective sentences. There is no doubt about the fact that the sentencing decisions had always echoed the personal viewpoints and opinions of the sentencing authorities or judge and are hardly been based upon scientific, objective consideration.

INDIAN SENTENCING SYSTEM

History of the Sentencing in India
In India, earlier, it was the King, who was the supreme decision-maker regarding the conduct and the crimes that were committed by the people of his kingdom. This has been mentioned in Shastras, that, are constitute one of the oldest religious literature of India. The king had the power and responsibility as two sides of the same coin. On one side he had the power to punish the wrong-doer. On the other side, he had the responsibility to protect the law-abider. The words used in the Shastras are Danda, which means punishment and Chhatra, which means the protector. These words were used by Manu.

Constitutional Perspective in Sentencing
The Indian Constitution, 1950 guarantees various fundamental rights in Part III. Two important fundamental rights that are relevant for this study are enshrined in the words of Articles 14 and 21. They talk of equality before law and equal protection of
laws and life of liberty and dignity. The disparity in sentencing doesn’t affect or harm the rights of victims in any way. However, they bring about a destructive impact for the offenders who are unintentionally treated differently. Their rights are already protected in the grundnorm of India in the form right to fair sentencing. There have been allied rights which have been judicially protected and read into fundamental rights like right to fair trial, right to fair hearing and so in this line of advancement, even the right to fair sentencing is a part of fundamental rights which needs to be protected at any length.

In very recent cases of Navtej Singh Johar v. Union of India\textsuperscript{12} and Common Cause v. Union of India\textsuperscript{13}, the Hon’ble Supreme Court gave its observation regarding the connection between sentencing and Article 21 of the Indian Constitution. It was stated that Sentencing process results into or that it involves the restriction of fundamentals right of liberty and freedom. The court further observed that Article 21 enshrines these rights but are subject to principle of Jus laws. The court focused on the punishment of death penalty particularly and stated that it inexorably affects the right to life of the accused and so should be granted with after considering proper modalities and specifications.

Another statute that comes into play while dealing with the conviction of the offender and sentencing him to certain punishment is the procedural law, that is, the Criminal Procedure Code, 1973. Under this the powers of the courts have been listed and it is discretionary in nature. Sections such as 235, 248, 325, 360 and 361 are the provisions that provide norms related to procedure of imposition of sentencing. These provisions provide wide discretionary sentencing powers to the sentencing authorities.

Indian Statutory provisions and Committee Reports on sentencing
In India, we have adopted many laws from various countries and some of the laws have been formulated while India was a under the British Dominion. The existence of many old laws even today, with comparable few amendments, highlights the quality and the precision with which the laws have been made. One such law is the Indian Penal Code, 1860. This code has been in the run since 1860 and inspite getting amended has stood the test of the time. It is a substantive law of India declaring certain acts or omissions as illegal and providing for the penalties if such prohibited acts or omissions are done. Thus, it can be said that the ultimate result of a crime if proved is the imposition of punishment as per the law. However, the law, if we analyze, gives a wide discretion to the judges in India because it provides for the elements of the crime and the wide sentencing range without specifying their applicability.

An analysis of a criminal case, the result of which is conviction by the court, shows that only the elements of a crime are not heard in the trial. Although, they constitute the core of the hearings and of the process of appreciation of the evidence, however, when the hearing on sentence is conducted, there are catena of factors that join in along with the main offense to aid the judge in determining a sentence. It is at this stage that wide discretion is exercised and this results into wide disparity in the pattern of giving sentences in cases with similar facts.

In the month of March, 2003, the Malimath Committee, which was the committee
constituted on Reforms of Criminal Justice System, established by the ministry of Home Affairs in its report issued, highlighted the need to introduce certain sentencing guidelines so as to minimize the unfairness and uncertainty in the process of awarding sentences. It stated in its report:

*The Indian Penal Code prescribed offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum may be prescribed. The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore, each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries, guidance regarding sentencing option[s] is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimize uncertainty to the matter of awarding sentence. There are several factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body.*

In furtherance of this acknowledgement by the Committee of the need of specific guidelines, it also recommended the modus operandi to bring about such a change in the dynamics of the criminal justice system. To attain the predictability in the sentencing, it was suggested to establish a statutory committee which would be solely responsible for formulating the sentencing guidelines. The Committee would be headed under the chairmanship of a retired Judge of Supreme Court or a former Chief Justice of High Court who has sufficient experience in criminal law. The other members of the committee may be representatives of the prosecution, from legal profession, police department, social worker in the field of criminal law, and mandatory women representation.

Yet again, in the year 2008, the Madhav Menon Committee, which was the Committee on Draft National Policy on Criminal justice reiterated the need for formulating the sentencing guidelines. In the month of October, 2010, the then Law Minister M. Veerappa Moily, also made a statement that they are working on the uniform sentencing policy which is in line with that of United States and United Kingdom. He further remarked 10 years ago, that the proposed sentencing policy will help ensuring that the sentencing authorities do not impose sentences discretely but rather follow the uniform standards laid down by the legislature.

**Judiciary acknowledging the need of guidelines**

In the case of *State of Punjab v. Prem Sagar & Ors.*, the Hon’ble Supreme Court emphasized and noted the lack of any structured guidelines in India and made a remark that in the our judicial system, the authorities have failed to come up with standard principles and norms for the purpose of fair sentencing.

In this case, at para 8, the court identified the anomalies which the court has faced so far in a large number of cases brought before it. It further stated: “*whereas the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where [the] same sentence is imposed, the principles applied are found to be*
In the year 2013, the hon‘ble Supreme Court in the case of *Soman v. State of Kerala* again highlighted the absence of proper structured guidelines. The observations made by the court was that the process of decision-making for the imposition of the punishment constitutes the heart of the criminal justice delivery system, however, in India 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 this case it is pertinent to substantiate on the fact that different principles have been applied to come to a sentencing decision. So, for instance the court cited the principles that they took into consideration to decide the sentence and those were, the principles of deterrence, proportionality and rehabilitation. The Court emphasized the consideration of aggravating and mitigating factors as a part of following the proportionality principle.

On the other hand, however, in the year 2009, the Hon‘ble Supreme Court in the case of *State of M.P. v. Bablu Natt* specified that the principle that governs the imposition of the sentence would vary depending on the facts and circumstances of the case. In this case and in many cases, this particular statement/principle makes it an easy escape for the judges from any reasonable and requisite supervision and authorizes them to use discretion extensively. This case also laid down that a crime against the morale of the society as a whole should be strictly dealt with.

SUGGESTIONS & CONCLUSION

Suggestions

I. Indian version of Sentencing Guidelines

As already discussed above, the presence of the loopholes in the legal system especially the punitive and procedural laws relating to the hearing on sentencing, the need of the hour to have a set of guidelines that deal with the matter of sentencing exclusively. So far, neither the legislature, nor the judicial system in India has brought up any specific, structured guidelines in this regard. There is no doubt about this fact that the need of such structured guidelines has been felt by various authorities, time and again. This is evident from the various governmental committees’ reports that point out to the need of having such guidelines for the major task of lessening the uncertainty and wide discretionary power that surrounds the
process of awarding sentences. There is no denying the fact that the need has been felt by the system long back. However, what is now required is the collective efforts of all the concerned authorities, that is, the executive department, judicial wing, parliament, academicians, legal analysts, students to come up with a definitive and appealing proposal to deal with the uncertainties and arbitrariness that has been prevailing in the system since quiet a long time.

II. Aiming Towards A Rationale Sentencing

The second most important aspect that has to be considered is that while drafting any such guidelines, the common aim and objective should be towards and of achieving a rationale sentencing. The existence of any set of norms won’t be suffice until there is substance and content in it and also the capacity and reasoning to mold the sentencing process to an objective level as far as possible and remove traces of subjectivity that has been entrenched in the system like a normal practice that sounds and appears legal but the impact is grave and devastating for the justice of the offenders is not being addressed. Thus, two most important points to be kept in mind are:

- Transforming the system from subjective level to objective level
- Thinking from the point of view of the offenders and not just the victim.

The objective outlook of the norms would make it more scientific, easy to keep under observation and analysis, to calculate and gauge its effectiveness and success in curbing the disparity.

Conclusion

Before getting to the conclusion, it is most relevant to discuss about the success or the failure of the guidelines in USA. This will help come to a reasonable logical conclusion by balancing out the pros, cons, ifs-buts, attached to the guidelines operational in USA. After analysis of various articles, it is found that the authors and legal analysts have a mixed opinion about the success and the effectiveness of the guidelines. Some are of the view that it has been an advantageous step towards the reformation of the criminal Justice system. Some more others are of the view that they have been a failure and a disaster in the process of exercising the art of judging. For this study, it is preferred to bring in views of both the sides and then conclude as to the requirement of guidelines in India.

When we talk of India, it is not to be forgotten that we have already spent almost 70 years after we got independence from the British rule, in sentencing criminals based on the existing laws. In this large span of time, there have been numerous cases, considering which the sentencing authorities, the judges, who are playing the primary role in dealing with these cases, have time and again realized the need and urgency of having sentencing policy in the form of guidelines. This will and intention have of the judges have been discussed in this study. In furtherance of this, two important committee reports, Malimath Committee report and Madhav Menon Committee Report, also have suggested and urged to constitute a set of such guidelines that is most suitable to the Indian Criminal System.

In addition to this, as suggested, what the Criminal Justice System needs is the Indian version of the guidelines and the major objective would be to aim towards filling the
vacuum that has been witnessed and felt in dealing with the cases. Also, the problems or the points about the guidelines that were criticized in the articles written on USA guidelines, the framers of the guidelines in

\[\text{\textsuperscript{iv}Ibid., p 6} \]

\[\text{\textsuperscript{v}Chander, Dr. Harish: The Indian Penal Code: A Critical Commentary (1st ed 2017) p 110-11} \]

\[\text{\textsuperscript{vi}United States Sentencing Commission Guidelines Manual (2018)} \]

\[\text{\textsuperscript{vii}Goldsmith, Michael and James Gibson: ‘The U.S. Sentencing Guidelines: A Surprising Success?’ Richmond.edu, 1998} \]

\[\text{\textsuperscript{viii}The United States Code, 18 U.S.C. § 3553(a).} \]

\[\text{\textsuperscript{ix}543 U.S. 20 (2005)} \]

\[\text{\textsuperscript{x}Government of India, Ministry of Home Affairs, Committee on Reforms of Criminal Justice System Report (Mar. 2003) p 170.} \]

\[\text{\textsuperscript{xi}Government of India, Ministry of Home Affairs, Committee on Reforms of Criminal Justice System Report 170 (Mar. 2003), p 171} \]

\[\text{\textsuperscript{xii}PTI: ‘Govt for a Uniform Sentencing Policy by Courts’ ZeeNews, 7 October 2010.} \]

\[\text{\textsuperscript{xiii}(2008) 7 SCC 550} \]

\[\text{\textsuperscript{xiv}(2009) 2 S.C.C. 272} \]

India will take them into account and will ensure that such problems are not experienced in India.

\[\text{\textsuperscript{vii}The United States Code, 18 U.S.C. § 3553(a).} \]

\[\text{\textsuperscript{xv}Government of India, Ministry of Home Affairs, Committee on Reforms of Criminal Justice System Report (Mar. 2003) p 170.} \]

\[\text{\textsuperscript{xvi}Government of India, Ministry of Home Affairs, Committee on Reforms of Criminal Justice System Report 170 (Mar. 2003), p 171} \]

\[\text{\textsuperscript{xvii}PTI: ‘Govt for a Uniform Sentencing Policy by Courts’ ZeeNews, 7 October 2010.} \]

\[\text{\textsuperscript{xviii}(2008) 7 SCC 550} \]

\[\text{\textsuperscript{xix}(2009) 2 S.C.C. 272} \]

\[\text{\textsuperscript{xx}(2012) 2 S.C.C. 648} \]