STRUCTURED SENTENCING IN ENGLAND AND WALES: RECENT DEVELOPMENTS AND LESSONS FOR INDIA

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ABSTRACT

The Indian judicial system follows the traditional common law formula for sentencing: courts are provided with wide discretion to determine a fit sentence, with appellate review constituting the only institutional mechanism to promote consistency, fairness and principled sentencing. Though the United States has recently moved away from this system by evolving a set of sentencing guidelines and consequently reducing the discretion available with the judge, in other common law countries such as Canada, Australia, New Zealand and South Africa, trial courts have long enjoyed, and continue to enjoy, considerable freedom to determine sentence in the absence of any formal guidelines. None of these jurisdictions has to date implemented a formal guideline system for sentencers. However, this state of affairs has now changed in England and Wales, where courts must now follow a system of guidelines which has slowly evolved over the past decade. This essay looks into the guideline system that has thus evolved.

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Sentencing in India falls squarely within the tradition of common law jurisdictions: courts are provided with wide discretion to determine a fit sentence, with appellate review constituting the only institutional mechanism to promote consistency, fairness and principled sentencing. Until relatively recently, this arrangement existed in every common law country except the United States, where formal, numerical guidelines were introduced in the late 1970s. The US guidelines are usually in the form of a two dimensional sentencing grid, with the dimensions being crime seriousness and criminal history. Each grid contains a narrow range of sentence length and courts must sentence within this range – or justify “departures”, i.e., sentences outside the range. The compliance requirement is that “The sentencing judge must find, and record, substantial and compelling reasons why the presumptive guidelines sentence would be too high or too low in a given case.”2 Guidelines have proliferated in that country and now can be found in most states and at the federal level.

Elsewhere, in other common law countries such as Canada, Australia, New Zealand and South Africa, trial courts have long enjoyed, and continue to enjoy, considerable freedom to determine sentence in the absence of any formal guidelines. None of these jurisdictions has to date implemented a formal guideline

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system for sentencers. However, this state of affairs has now changed in England and Wales, where courts must now follow a system of guidelines which has slowly evolved over the past decade. This guideline system is the subject of this essay.

**PURPOSE AND OVERVIEW OF THE ARTICLE**

In this article, we explore the relevance and potential utility of sentencing guidelines and of a sentencing guidelines authority (such as the Sentencing Council of England and Wales) for India, drawing upon recent experience in England and Wales. The article is structured as follows: Part I provides some preliminary comments about sentencing under the adversarial model of justice followed in common law countries. Although differences exist across criminal justice systems in different jurisdictions, with respect to sentencing there are many common elements. This section is followed in Part II by a brief discussion of sentencing structures in India today. Part III contains a description of the English sentencing guidelines which have been in existence for a decade now, and we conclude in Part IV by drawing some lessons for the sentencing process in India.

**I. SENTENCING AND ADVERSARIAL JUSTICE**

Sentencing in the common law world has long been characterised by its discretionary nature. In most jurisdictions, offences carry unrealistically high maximum penalties, many of which were derived from the late 19th century, and which bear little relation to the seriousness of the crimes for which they may be imposed. For example, even a first conviction for domestic burglary in England and Wales (and other countries such as Canada) is punishable by any sentence up to and including life imprisonment. This wide range of potential sentences creates much discretion for a sentencing court. Under an adversarial model the two parties depose conflicting sentence submissions and the court ultimately decides on the sanction. In all jurisdictions except England and Wales, the State prosecutor submits a clear, often detailed, sentence recommendation to the sentencing court. Prosecutors in England generally identify important sources of aggravation but do not generally comment on the appropriate disposal or make a specific sentencing recommendation.

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In countries such as the US and Canada, plea bargaining is commonplace. Guilty pleas account for up to 90% of all cases, with the result that a contested trial is rare. Most guilty pleas in North America arise out of an agreement between counsel; the defendant offers to plead guilty in return for some benefit. The benefit might take the form of a common submission on sentence (a joint submission), an agreement about the facts to be considered by the sentencing court, or an agreement by the State to accept a plea to a less serious charge. These are known, respectively, as fact and plea bargaining.

Even in jurisdictions where plea discussions play a more modest role, such as in England and Wales, the existence of a powerful discount for a guilty plea plays an important role in resolving cases. The English guidelines stipulate that a reduction of one-third is the appropriate discount for offenders who plead guilty at the first opportunity to do so.4

**Appellate Review of Sentencing**

Counsel obviously draw upon precedent in their sentencing submissions, but the case law can often sustain conflicting prior sentencing decisions. Sentencers are guided by the appellate courts as both parties enjoy the right of appeal. However, numerous academic commentators and Commissions of Inquiry have over the years identified the limitations on appellate guidance as means of ensuring consistent sentencing. Most sentence appeals address a specific point of law or provide a test for whether the sentence imposed was “manifestly unfit”. Nigel Walker, for example, described the degree of guidance from the English Court of Appeal in the following way: “What emerges is the unsystematic approach of the Court of Appeal, resulting in contradictory decisions and special pleading.”5 Elsewhere, the Canadian Sentencing Commission noted that “Research undertaken by the Commission has shown that a significant number of judgments just enumerate factors without specifying whether they are considered to be aggravating or mitigating”6. More recently, the Court of Appeal in England and Wales has provided detailed guidance for sentencers,7 but this is less often the case in other common law jurisdictions.

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7 See, e.g., R. v. Saw and Others, 2009 EWCA Crim. 1 (which sets out a list of factors for the offence of domestic burglary).
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Appellate review of sentencing, however, has long been subject to criticism on a number of grounds. First, few sentences are appealed; this means that the Court of Appeal has few occasions on which to issue guidance by means of a guideline judgment. The reason for the relatively low rate of appeal by the offender or the prosecutor can be found in the high standard of review. Throughout the common law world a consistent position has emerged: an appellate court should not interfere with a sentence imposed by a court of first instance unless there has been an error in law or the sentence imposed was “manifestly unfit”. This creates what may be termed a “high standard of review” and protects decisions by courts of first instance from frequently being overturned on appeal. A disagreement between the Court of Appeal and the trial court sentence is insufficient ground to overturn the sentence; it must be clearly out of the range. Secondly, appellate courts review only cases brought on appeal by one of the parties. This means that the appellate caseload is party-driven and this further limits the ability of appellate review to develop guidelines. Thirdly, few decisions of the courts of appeal may be considered “guideline” judgments; usually they address the sentence on appeal without providing broader guidance.

This state of affairs has long been criticised by sentencing scholars and practitioners for failing to ensure consistency of approach at sentencing. Over the years, repeated calls for legislatures to create a more structured environment for sentencers have been made — calls which have passed unheeded in many common law countries such as Canada, South Africa, and the Caribbean states. More recently, however, some jurisdictions have introduced significant reforms. New Zealand recently legislated for a sentencing council and the Law Commission in that jurisdiction has devised a comprehensive set of sentencing guidelines, although these have yet to be implemented. In some Australian states such as Victoria and New South Wales sentencing advisory bodies have been created with a mandate to provide guidance to sentencers and information to the general public. However, the most radical reforms (outside the United States) have

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8 In 2009/2010, 2,136 sentence appeals were heard by the Court of Appeal, an infinitesimal fraction of all sentences imposed within a jurisdiction of 65 million. Of these appeals, 44% were dismissed. See, Court of Appeal Criminal Division, Review of the Legal Year, 2009/2010, Royal Courts of Justice (2010).

9 For further information, see, W. Young and A. King, Addressing problematic sentencing factors in the development of guidelines, in MITIGATION AND AGGRAVATION AT SENTENCING (J.V. Roberts ed., 2011); and W. Young and C. Browning New Zealand’s Sentencing Council, Crim. L. Rev. 287-298 (Apr., 2008).

emerged, somewhat improbably, in England and Wales. We shall return to describe these guidelines later in this article.

II. SENTENCING IN INDIA

Indian criminal law largely has been, and indeed largely is today, based on British criminal law as it was introduced to India in the mid-19th century. It must be acknowledged that with a plethora of “localisation” through amendments over the years, Indian criminal law has acquired a more Indian character, but notwithstanding any changes, the underlying basis is still very much a creation of British law.

India’s first systematic penal code was drafted in the 1830s by the First Law Commission, chaired by Lord Macaulay. The draft code subsequently underwent extensive examination and revision by Sir Barnes Peacock, Chief Justice of the Calcutta Supreme Court, before being passed into law on October 6, 1860 as the Indian Penal Code 1860. In terms of criminal procedure in India, one of the earlier vestiges of a British criminal procedure code (although by no means the earliest criminal procedure per se) was the Regulating Act 1773, which, inter alia, established various supreme courts around India (for example Calcutta, Madras and Bombay) to adjudicate upon the cases of British citizens using British procedure. The accompanying criminal procedure statute to the Indian Penal Code 1860 was the Indian Criminal Procedure Code 1861 and, like the 1860 Code in regard to substantive criminal law, it was very much the bedrock of Indian criminal procedure for over 100 years before it was replaced by the Criminal Procedure Code 1973, following successive consultations and reports from the Indian Law Commission (1958, 1967 and 1969).

However, even with the revisions to the criminal procedure codes subsequent to 1861 (the major ones being in 1969 and then the 1973 replacement), the sentencing system in India does not appear to have modernised in either of the two classic directions used today- namely the flexible guideline system (as is in force in, for example, England and Wales and which is described below) or the more restrictive grid-based system (as used, for example, in the state of Minnesota, USA). Indeed, the Indian sentencing system appears to have somewhat stagnated

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and, with an infrequent caveat here or there, is very much more akin to the British sentencing model of the early to mid-19th century that was imported into India, namely one of wide unfettered discretion in which various minima and maxima are provided for with little by way of guidance between these two poles.

A preliminary observation to make on the sentencing regime in India, indicative of its nascent and underdeveloped state, is that sentencing does not have a separate or distinct chapter under the provisions of the Criminal Procedure Code 1973, resulting in the precise procedure being scattered around the 1973 Code - a Code that contains 484 sections, 2 schedules, and 56 forms. There are several such provisions related to sentencing. Collecting these provisions together within a single statute would, in our view, might prove to be very beneficial.

A. Sentencing Framework in India

The general procedure for post-conviction hearings on sentence is set out in section 235 of the 1973 Code, which provides that:

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.

This is consistent with sentencing procedure in most jurisdictions where the offender has the opportunity to make representations to the sentencing judge (whether or not he is the trial judge), prior to the sentence being imposed, in order to mitigate the sentence that they will ultimately receive. The effect of this section (namely sentence post conviction and after representations from the convicted individual) is mirrored in other parts of the 1973 Code. The sentencing judge is instructed to “hear” the accused on the issue of sentence and then must pass the sentence in accordance with the statutory punishments as set out for the range of criminal offences. It is thus for the judge to adjudicate upon relevant mitigating factors and aggravating factors, with little or no guidance other than judicial experience and limited submissions from counsel.

S. 325 provides for the committal of the convicted person for sentence to a Chief Judicial Magistrate if the sentencing judge is of the opinion that his or her
legal powers of sentence are not great enough to provide for the imposition of a sufficiently severe sentence. S. 325 of the 1973 Code provides that:

325. Procedure when Magistrate cannot pass sufficiently severe sentence.(1) Whenever a Magistrate is of the opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or, being a Magistrate of the second class, is of opinion that the accused ought to be required to execute a bond under section 106, he may record the opinion and submit his proceeding, forward the accused, to the Chief Judicial Magistrate to whom he is subordinate.

However, as under s. 235, there is no guidance as to how a magistrate may form such an opinion, namely that the powers of sentence available to them are insufficient to adequately punish the convicted person.

S. 360(1) of the 1973 Code legislates for situations in which the offender has no previous convictions and (a) the offender is under 21 years of age and the offence is one punishable with less than life imprisonment or the death penalty, or (b) the offender is a woman and the offence is one punishable with less than life imprisonment or the death penalty, or (c) where the offender is over 21 and the offence is one punishable with seven years imprisonment or less. In such situations, the sentencing judge may, having regard to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, release the offender with a bond (with or without sureties) to keep the peace if it appears to the court that it is expedient to do so. Section 360(3) legislates for situations in which a first-time offender is convicted of theft, theft in a building, dishonest misappropriation, cheating or any other offence under the Indian Penal Code 1860 punishable with not more than two years imprisonment or any offence punishable with a fine only. In such situations the court may, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, release the offender after “due admonition”.

Finally, s. 361 of the 1973 Code imposes a duty on the sentencing judge to provide reasons for the sentence that they have elected to impose in cases in which the offender might have been dealt with under the Probation of Offenders Act 1958, or the Children’s Act 1960. Both of these Acts provide for alternative sentences rather than the conventional sentences in accordance with the statutory
minima and/or maxima as set out by statute, with the 1958 Act providing for sentences of probation/supervision for certain offenders in some circumstances at the discretion of the court, and the 1960 Act providing for detention in special schools, safe custody, and the sentencing of delinquent children.

B. Judicial implementation

What is apparent from the foregoing is that aside from the limited restrictions created by statutory maxima and/or minima, sentencing judges essentially exercise unfettered discretion with regard to the choice of sentence they wish to impose on an offender after hearing any pleas in mitigation on their behalf or aggravation as against them. Indeed, where there is a primary alternative disposition available in relation to an offender, for example as can be seen in ss. 360(1) and (3) of the 1973 Code where the judge has a prerogative to award an alternative sentence other than the norm, there is no guidance as to how that prerogative can and should be exercised. These issues can be illustrated by examining, for example, s. 379 of the Indian Penal Code 1860, which provides for the offence of theft that “Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with a fine, or with both.”

With the lack of judicial guidance for this offence, two similar first-time offenders perhaps having been found guilty of joint-enterprise theft may easily be sentenced to vastly differing sentences in terms of punitiveness, with Offender A, say, given 3 years imprisonment, and Offender B released to keep the peace without a surety. That is not to say that this discretion automatically offends the principles of sentencing per se. In our example, one offender may have significant mitigation which may render an appreciably lower sentence entirely appropriate. However, the lack of guidance as to levels of severity (as is present in the England and Wales guidelines system, for example in cases of robbery – see subsequent sections of this paper) and mitigation, may result in an offender with the same or very similar profile as Offender B being sentenced to 3 years imprisonment by another judge in another court.

The system of unfettered discretion leaves the sentencing system open to the vagaries of individual judges, negating nationwide or even courthouse-wide consistency - the consistency that is a cardinal aim in any sentencing model. It thus seems that the primary controlling influence on sentences that are imposed by Indian trial courts is that of appellate review, as provided for in the 1973 Code in circumstances in where a sentence passed is excessive, where a sentence is insufficient, or where there has been an error of law in the sentencing process.
This is consistent with the high standard of review at sentencing found in all common law jurisdictions (see earlier sections of this paper).

The considerable discretion enjoyed by courts at sentencing has also meant that it takes a long time before a case is resolved. Judicial officers are keen to satisfy themselves that they have paid close attention to every evidential aspect of the case before a decision is taken. This also affords the defence ample opportunity to delay trials by insisting that courts deliberate over even the minutest details of the criminal act in question. This state of affairs has resulted in a huge backlog of cases and a judicial logjam that has assumed near epic proportions.\textsuperscript{12} It can take up to five years before a case has its first appearance before a trial court. If the accused is detained in custody he stands to lose several years of his freedom even if he is ultimately found not guilty. Efforts to remedy the situation have been made at several levels, all of which have had a bearing on both sentencing procedure and doctrine.

The most significant step in this direction was the Criminal Law (Amendment) Act 2005, passed in the winter session of the current Parliament, which for the first time introduced the concept of plea bargaining in India through the formal, statutory recognition of a discount for offenders who plead guilty. It is interesting that the reform was introduced despite signs that judicial opinion was opposed to the concept. In \textit{State of Uttar Pradesh} v. \textit{Chandrika},\textsuperscript{13} the Supreme Court said: "It is settled law that on the basis of plea bargaining courts cannot dispose of criminal cases. The court has to decide it on merits. If the accused confesses to guilt, appropriate sentence is required to be implemented." The court further held in the same case: "Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused [claim] that since he is pleading guilty the sentence be reduced."

However, in 2005, the Government added sections 265-A to 265-L to the Code of Criminal Procedure 1973 to provide for plea bargaining in certain types of cases. Currently, it is applicable only in respect of those offences for which punishment of imprisonment is up to a period of 7 years, but does not apply to offences that affect the socio-economic condition of the country, or which have been committed against a woman or a child below the age of 14 years.

\textsuperscript{12} In March 2010, 54,864 cases were pending in the Supreme Court, 41,08,555 in various High Courts and 2,73,74,908 in subordinate courts. \textit{Full data available} http://164.100.47.132/LssNew/psearch/QResult15.aspx?qref=99860.

\textsuperscript{13} \textit{State of Uttar Pradesh} v. \textit{Chandrika}, AIR 1999 SC 164 (Supreme Court of India).
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An accused who enters a guilty plea can expect to serve as little as one-fourth of the minimum sentence associated with his offence. First-time offenders can also be released on probation. Enthusiastic support for the concept of a guilty plea discount has come from prisoners and the judiciary alike, with a serving judge of the Bombay High Court even visiting a local prison to encourage individuals to take advantage of this criminal law reform. That the change has been well received was evident in the observation of a division bench of the Gujarat High Court in State of Gujarat v. Natwar Harchanji Thakor where it said: “The very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases…”

At this point we review developments in sentencing in England and Wales.

III. STRUCTURED SENTENCING IN ENGLAND AND WALES

In 1998, the Crime and Disorder Act created a statutory body to devise sentencing guidance for the Court of Appeal. The Sentencing Advisory Panel issued its first guideline in 1999, and further guidelines were issued over the next decade. In 2009, sweeping reforms to the sentencing guideline arrangements were made, and these changes are the subject of the rest of this article.

Sentencing in England and Wales entered another era in 2010 as a result of reforms introduced by the Coroners and Justice Act 2009. A new statutory body, the Sentencing Council for England and Wales, headed by Lord Justice Leveson, replaces two previous organisations, the Sentencing Advisory Panel and the Sentencing Guidelines Council. The creation of a single guidelines authority will undoubtedly promote more effective development and dissemination of guidelines. A great deal has changed as a result of the latest legislation – for example, the Sentencing Council has a significantly wider range of duties than its predecessors (see below). These reforms are a creation of the Coroners and Justice Act 2009.

A. Recent Developments

The reforms introduced by the Coroners and Justice Act 2009 may be traced to two recent developments. First, the high and rising prison population in

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15 HC judge tells inmates to take plea bargaining route to freedom, THE TIMES OF INDIA, Nov. 16, 2009.
England and Wales prompted the government to commission a review of the use of imprisonment and of sentencing guidelines. The second development was a Working Group which recommended a revamp of the current arrangements rather than adoption of a completely new system of guidelines. US-style sentencing grids were rejected by the Sentencing Commission Working Group as being inappropriately restrictive for sentencing in this country.

(i) Duties of the Sentencing Council

Sentencing guidelines authorities around the world have functions and responsibilities far beyond providing guidance for courts, and the English Council is no exception. The Coroners and Justice Act 2009 imposes a wide range of duties on the new Council in addition to the obvious function of producing guidelines. The Council also has to publish a resource assessment of, as well as monitor the operation and effects of its guidelines. In addition it must draw conclusions about the factors which influence sentences imposed by the courts, the effect of the guidelines on consistency in sentencing and the effect of the guidelines on public confidence in the criminal justice system. Promoting public confidence is likely to be a priority for the new Council. A number of commentators regard this as a central function of a sentencing guidelines authority. It has been argued that sentencing councils and commissions need to do more than simply devise and distribute guidelines — they have to be promoted to stakeholders in the field of sentencing as well as to the general public.

The Coroners and Justice Act 2009 also states that the Council “may promote awareness of matters relating to the sentencing of offender...in particular the costs of different sentences, and their relative effectiveness in preventing re-offending”. The Sentencing Council is further required to publish a report about “non-sentencing factors” which are likely to have an impact on the resources needed for sentencing. These

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non-sentencing factors include (but are not limited to): recalls of prisoners released to the community; breaches of community orders; patterns of re-offending; decisions taken by the Parole Board of England and Wales, and considerations relating to the remand prison population. Finally, the Council is also charged with a duty to assess the impact of all government policy proposals (or proposals for legislation) which may affect the provision for prison places, probation and youth justice services. Taken together, the tasks represent a radical departure from the far more restricted duties of the previous organisations responsible for devising and disseminating sentencing guidelines.

(ii) Size and Composition of Sentencing Council

Despite its expanded range of duties, the new Council is a smaller body than its predecessors. The SAP-SGC had a combined membership of up to 25 members while the new Council is composed of 14 individuals. Judicial members constitute a majority on the new council. Some commentators have argued in favour of a Council with more non-judicial members. However, the predominance of judicial members will not mean that the judiciary will dominate the nature and direction of the guidelines; indeed, the new Chair has made it clear that non-judicial members “will play an equal role on the Council.”

B. Nature of the English Sentencing Guidelines

The guidelines are designed to provide courts with guidance regarding the nature and severity of sentence – but without unduly restricting a court’s ability to impose a fit sentence. The Coroners and Justice Act 2009 introduced changes to the requirements for courts with respect to sentencing guidelines. The critical element of any sentencing guideline scheme is the degree of constraint imposed upon courts. A rigid system prevents courts from sentencing outside a specific range, unless exceptional circumstances justify a departure. Yet if the guidelines adopt a very relaxed approach to sentencing outside their ranges, consistency of approach in sentencing is hard to achieve. In evaluating the recent changes to the compliance requirement, it may be helpful to consider a specific guideline. Figure 1 summarises the definitive guideline ranges for robbery in England and Wales. As with many offences for which definitive guidelines exist, this one is divided into three sub-categories based on crime seriousness.

Figure 1: Definitive Sentencing Guideline for Robbery in England and Wales

<table>
<thead>
<tr>
<th>Category of Robbery</th>
<th>Starting Point</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Threat or use of minimal force and removal of property</td>
<td>1 year custody</td>
<td>Up to 3 years custody</td>
</tr>
<tr>
<td>A weapon is produced and used to threaten, and/or force is used resulting in injury to the victim</td>
<td>4 years custody</td>
<td>2-7 years custody</td>
</tr>
<tr>
<td>Victim is caused serious physical injury by the use of significant force and/or use of weapon</td>
<td>8 years custody</td>
<td>7-12 years custody</td>
</tr>
</tbody>
</table>

(Source: Sentencing Council of England and Wales²²)

C. Previous Statutory Compliance Requirement: Duty of a Court at Sentencing

Until 2009, the compliance requirement in England and Wales was the following: courts were directed that in sentencing an offender, they “must have regard to any guidelines which are relevant to the offender’s case” as per section 172(1) of the Criminal Justice Act 2003. In addition, section 174(2) of the same Act stated that: “Where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate for the offence and the sentence is of a different kind, or is outside that range, state the court’s reasons for deciding on a sentence of a different kind or outside that range”. In short, a court simply had to consider (“have regard to”) the Council’s guidelines and to give reasons in the event that a “departure” sentence was imposed.

D. The new test for compliance (duty of a court at sentencing) in England and Wales

The provisions attracted considerable debate during the course of Parliamentary review of the Coroners and Justice Act 2009. The version of the Bill ultimately proclaimed into law adopts the following formulation:

Every court must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and

²² All the definitive English sentencing guidelines are available at www.sentencing.council.org.
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(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.

The new statutory language is more directive than that which it replaces. Thus, from merely a duty to have regard to any relevant guideline, courts must now “follow” any relevant definitive guideline. The more forceful language is, of course, qualified by the words creating the discretion to impose some other sentence in the event that the court is satisfied that imposing a disposal consistent with the guideline would be contrary to the interests of justice.

The innovation of the Coroners and Justice Act 2009 is to be found in subsequent sections which provide further clarification. Recall the three levels of seriousness found in the robbery guideline, with separate (but overlapping) sentence length ranges for each level (see Figure 1). S. 125(3)(b) of the Act makes it clear that the duty of the court is to impose a sentence within the overall offence range, not the more restrictive category range. In the event that the court imposes a sentence outside the overall range in the interests of justice, it must give reasons for its decision. The new provisions focus a court’s attention on the relevance of the guidelines, yet also allow judicial discretion to impose a fit sentence.

Where do these latest reforms leave us? Three conclusions may reasonably be drawn. First, the broader remit of the new Sentencing Council suggests that it will be more engaged in community outreach than its predecessors. It is likely that the Council will seek to promote public awareness and increase public knowledge of the sentencing process. Secondly, the new test for compliance in England and Wales is likely to create a heightened expectation that courts will impose a sentence consistent with any definitive guidelines issued by the Sentencing Council or its predecessors. Thirdly, the new Sentencing Council will be responsible for producing a far more comprehensive portrait of sentencing decisions in this jurisdiction, and this will benefit sentencers, criminal justice professionals, crime victims and indeed anyone with a stake in the sentencing process.

IV. LESSONS FROM THE ENGLISH EXPERIENCE

What lessons for common law countries such as India may be drawn from recent experiences in England and Wales? First, there is a consensus now among legal scholars around the common law world that consistency of approach at
sentencing cannot be achieved by appellate review alone; some form of guidelines scheme is desirable, even necessary. Beyond this, there is far less agreement. The US jurisdictions favour relatively rigid two dimensional sentencing grids which compel courts to impose sentence within a relatively narrow range, or justify why a departure sentence outside the range is appropriate. This model of structuring discretion at sentencing has proved unpopular in other countries. Canada rejected the grid based system in 1987, Western Australia in 2000, New Zealand in 2002, and England and Wales in 2008. In our view, the US-style systems are too restrictive, and therefore have no utility for India.

Secondly, whether formal guidelines are adopted along the lines of those used in the United States or England and Wales, there is considerable utility in creating some kind of sentencing commission. Although the English guidelines have not been subject to any formal evaluation and many questions remain unanswered, it is clear that sentencers benefit from a detailed and comprehensive system of guidance. This guidance relates to general issues, such as the appropriate discount for a guilty plea, the determination of offence seriousness and so forth, as well as the appropriate sentence for specific offences. Yet the guidelines preserve judicial discretion. Each offence-specific guideline contains considerable latitude with respect to the appropriate sentence. This means that courts can impose a relatively wide range of dispositions, and remain within the guidelines. On the other hand, if a court wishes to impose a sentence outside the guidelines range, this merely requires it to give reasons why it would be contrary to the interests of justice to follow the guidelines.

A number of Australian jurisdictions have created a sentencing advisory council, which, although without the mandate to issue guidelines, serves a very useful function in terms of promoting public awareness of sentencing and conducing and disseminating research in sentencing. We are not the first to call for creation of some form of sentencing commission in India. Creation of some form of council or commission would prove of great utility to sentencers in India, and indeed the wider justice community and general public.

Thirdly, guidelines are particularly beneficial and, we would argue, even necessary in a vast jurisdiction such as India, where local variation is likely to significantly threaten consistency. This is not to argue for uniformity of

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sentencing without any local or regional variation. The perceived gravity of offences will vary from one part of the country to another, and some allowance for this variability must be made. However, in a unitary jurisdiction such as India or England and Wales, it is important to set a national standard, and then allow limited departures from that standard.

*Fourthly,* sentencing guidelines are capable of bringing other benefits besides promoting consistency. Although the English guidelines were not designed to act as a control upon the prison population, in other jurisdictions such as several US states, overcrowding in prison is controlled by making adjustments to the sentencing guidelines. While the overall rate of prisoners per population in India is relatively low by western standards - 32 per 100,000 adult population according to the latest statistics\(^{25}\) - there is still a problem. Custodial facilities in India have for years housed more inmates than is desirable, at least in male correctional facilities. For example, the latest statistics show that for male institutions, the occupancy rate in 2008 was 132%\(^{26}\).

The burgeoning prison population of the country\(^ {27}\) largely consists of males charged with petty offences\(^ {28}\). Most of these offenders come from the impoverished strata of society and are unable to fulfil even bail conditions imposed by courts, much less be able to afford a lawyer to represent them during a lengthy criminal trial. There is general agreement around the common law world that prison should be reserved for the most serious cases, hence the custodial threshold in England and Wales\(^ {29}\). But a statutory custodial threshold is seldom sufficient to constrain sentencers\(^ {30}\). For this reason, sentencing guidelines, which specify the kinds of cases that normally should attract a custodial penalty, are useful.


\(^{26}\) National Crime Records Bureau, *Crime In India* (2009), Table 2.1.


\(^{29}\) According to § 152(2) of the Criminal Justice Act 2003, a court must not pass a custodial sentence unless the offence “was so serious that neither a fine alone nor a community sentence can be justified for the offence”. Similar statutory provisions exist in other common law jurisdictions.

\(^{30}\) The English experience is again illustrative. Despite the existence of a statutory threshold which must be met before a term of imprisonment is imposed, the size of the prison population has risen continuously over the period 1993-2009.
The experience with guidelines in other jurisdictions clearly demonstrates the benefits of providing guidance regarding the kinds of cases which should result in custody. For example, in many US jurisdictions including Minnesota, guidelines accomplished a transformation in the prison population: fewer offenders convicted of less serious property crimes were imprisoned, and custody became a more likely outcome for offenders convicted of crimes of violence.\(^{31}\)

Since the Supreme Court declared in 2004 that life imprisonment in India means a prisoner is sent to jail for the rest of his or her natural life,\(^{32}\) the nature of punishment has undergone a drastic change from when life imprisonment meant detention for only 14 years. In practical terms, those imprisoned for life can still be released after serving 14 years behind bars, but they are now at the mercy of the government and prison administration to give them adequate remission on the basis of their conduct in jail. Only last year the State Government of Maharashtra declared that the offenders sentenced to life imprisonment in connection with the 1993 terrorist attack on Mumbai will have to serve a minimum of 60 years in prison before their plea for release is even considered. Given that a number of offences in India carry a maximum penalty of life imprisonment, guidance for judges from a sentencing council would be welcome.

Another practical problem that exists in India is that few prosecutors, judges and defence advocates in local courts are aware of latest criminal law reforms. For example, the option of plea bargaining has remained largely unused and five years after its introduction, very few courts have had such applications filed before them. Similarly, the option of release on probation had not been heard of by several lawyers when a famous Bollywood actor found guilty of illegal arms possession made a similar plea before the judge.\(^{33}\) A sentencing council in India along the lines of the Council in England and Wales would also serve the purpose of generating greater awareness of sentencing among members of the legal profession. Without such a reform, even well-meaning criminal law amendments will remain ineffective, and the problems of sentencing will continue.

Finally, India should be concerned about the rising cost of legal assistance\(^{34}\) which means that only a selected few defendants — those with ample financial

\(^{31}\) Frase, supra, n. 1.
\(^{32}\) Life term means jail till death, INDIAN EXPRESS, Sept. 20, 2005.
\(^{34}\) Check rising cost of litigation, says PM, TIMES OF INDIA, May 8, 2010.
resources at their disposal — are able to take their case through every stage of appeal. It is a country with a vast geographical area and population, but only one bench of the Supreme Court in Delhi. There have been persistent demands that the Supreme Court establish benches in at least the four major cities so that appellants do not have to travel large distances for their cases to be filed. Until now, the Indian Supreme Court has rejected all such calls. A sentencing council would ensure that at trial court level, prisoners are treated with a degree of fairness, so that even if they are unable to move up in appeal, they have not been unduly prejudiced in terms of their sentence.

**Conclusion**

We have argued in this essay that India has little to fear and much to gain from introducing some form of sentencing guidelines. Such a step would need to be preceded by creating a statutory body such as a sentencing council or commission to devise, consult upon and disseminate guidelines. The experience in England and Wales offers clear evidence of the benefits of more structure sentencing. These benefits include greater transparency in terms of the sentencing process, more consistent sentencing and greater public confidence in sentencers.

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