

# Judicial Discretion and Sentencing Disparities in India: Challenges, Constitutional Principles, and the Need for Reform

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**Abstract:** *Indian criminal statutes prescribe punishments by offence but offer judges almost no guidance on how to select a sentence within the prescribed range. The result is a system of wide and largely unstructured judicial discretion, in which comparable offenders may receive markedly different sentences. This article examines the sources and forms of sentencing disparity in India, tests the present arrangement against the constitutional principles of equality, fairness and proportionality, and evaluates the judicial and legislative responses so far. It argues that unguided discretion is difficult to reconcile with Articles 14 and 21 of the Constitution, that the Supreme Court's case-by-case efforts cannot substitute for a structural solution, and that the Bharatiya Nyaya Sanhita, 2023 has left the central problem untouched. Drawing on comparative models from England and Wales, the United States, Australia and South Africa, the article proposes a framework of guided discretion built around a statutory Sentencing Commission, structured guidelines with a duty to give reasons, a distinct sentencing hearing, and systematic data collection.*

**Keywords:** sentencing disparity; judicial discretion; Article 14; proportionality; sentencing guidelines; rule of law; Bharatiya Nyaya Sanhita

## I. INTRODUCTION

Equality before the law is usually discussed in connection with conviction: whether the same evidence produces the same verdict irrespective of the accused's identity. It applies with equal force to punishment. A legal system that convicts consistently but sentences arbitrarily fails the ideal of treating like cases alike, since the sentence is the point at which the State's judgment is translated into a concrete deprivation.

In India, the distance between the statutory maximum and the judge's actual choice is wide. Many offences carry a maximum term but no minimum, and some permit imprisonment, fine, or both. Within that space the judge decides, guided by experience, temperament and the facts of the case. The Supreme Court has acknowledged the difficulty on several occasions. In *State of Punjab v. Prem Sagar* (2008), it observed that India has no legislative or judicial sentencing policy and that the matter is left largely to individual judges, and in *Soman v. State of Kerala* (2013) it repeated the point, calling for a principled approach.

This article addresses three questions. What does sentencing disparity look like in India, and what causes it? What do the Constitution and the rule of law require of a sentencing system? And what reforms would reconcile the legitimate need for judicial discretion with the equally legitimate demand for consistency? Part 2 describes the anatomy of discretion. Part 3 examines disparity. Part 4 sets out the constitutional principles. Parts 5 and 6 review judicial and legislative responses. Part 7 draws on comparative experience, Part 8 proposes reform, and Part 9 considers objections.



## **II. THE ANATOMY OF SENTENCING DISCRETION IN INDIA**

### **2.1 Statutory design**

The Indian Penal Code, 1860 (IPC), and now the Bharatiya Nyaya Sanhita, 2023 (BNS), define offences and attach punishments. The typical formula sets a maximum term, sometimes with a fine, and leaves the rest to the court. A minority of offences carry minimum sentences, and a small number carry a mandatory penalty. Neither statute states the purposes of sentencing, ranks them, or lists factors that should influence the choice.

### **2.2 Procedural features**

The procedural law supplies only limited structure. Section 235(2) of the Code of Criminal Procedure, 1973 (CrPC), which the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) retains in an equivalent form, requires the court to hear the accused on sentence after conviction. The Supreme Court emphasised the importance of this requirement in *Santa Singh v. State of Punjab* (1976). In capital cases, section 354(3) of the CrPC requires "special reasons", and the Court has insisted on a separate and meaningful hearing. Provisions on probation and release on admonition provide an alternative to imprisonment for eligible offenders. But beyond these, nothing in the statute directs how a judge should weigh, for example, the seriousness of the harm against the age or background of the offender.

### **2.3 Appellate review**

Appellate courts can enhance or reduce sentences. Section 377 of the CrPC permits the State to appeal for enhancement, and courts of appeal routinely revise sentences. Yet appellate review of sentence is typically deferential, and in the absence of articulated standards, there is no consistent test by which an appellate court determines that a sentence is manifestly excessive or inadequate. This makes the system's corrective mechanism itself dependent on the same unguided discretion.

### **2.4 Discretion is necessary**

None of this is an argument against discretion as such. Offences of the same legal description vary enormously in their circumstances, and an inflexible system would produce injustice in the opposite direction. The question is how discretion is guided, explained and reviewed, not whether it exists.

## **III. SOURCES AND FORMS OF SENTENCING DISPARITY**

### **3.1 Types of disparity**

Sentencing scholars distinguish several forms. *Inter-judge disparity* arises when different judges sentence similar cases differently because of their individual philosophies, with some emphasising deterrence and others reformation. *Inter-court and regional disparity* arises from local practices and perceptions of crime. *Temporal disparity* appears when sentencing patterns change in response to public sentiment or high-profile events. *Extra-legal disparity* arises where factors that should be irrelevant, such as the offender's caste, religion, class, gender or the quality of representation, influence outcomes.

A simple hypothetical illustrates the first form. Two Sessions Courts try two accused for culpable homicide not amounting to murder, on materially similar facts. One imposes five years of rigorous imprisonment; the other imposes ten. Both sentences fall within the statutory range, and both may survive appeal because each can be defended by reference to some recognised factor. The difference lies in how each judge weighed the factors, and the system provides no means of showing that either was mistaken.

### **3.2 The state of the evidence**

A limiting factor in the study of disparity in India is the scarcity of systematic data. Sentencing outcomes are not collected in a standardised form, and the National Judicial Data Grid, which tracks pendency, does not report sentencing patterns. Much of what is known derives from reasoned judgments, from the Supreme Court's own observations, and from targeted empirical studies, particularly in the area of capital punishment.

The most detailed work is that of Project 39A at the National Law University, Delhi. Its *Death Penalty India Report* (2016), based on interviews with death row prisoners and their families, found that a large majority of those sentenced to death were economically vulnerable, and that about three-quarters belonged to backward classes or religious



minorities. It also documented inadequate legal representation, and cursory consideration of mitigating circumstances at the trial stage. Its annual statistics reports have shown that trial courts impose death sentences in considerable numbers, while a significant proportion are commuted or set aside on appeal, a pattern that is difficult to explain except as a reflection of inconsistent standards at the trial level.

### **3.3 The Supreme Court's own recognition**

The Court has been candid. In *Aloke Nath Dutta v. State of West Bengal* (2006) and in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009), it acknowledged that the application of the "rarest of rare" doctrine had been uneven, and that its own decisions could not easily be reconciled. In *Sangeet v. State of Haryana* (2013), it questioned the categories laid down in *Machhi Singh v. State of Punjab* (1983), observing that the approach had become overly focused on the crime. These are institutional admissions that outcomes in the most serious cases depend on factors other than a settled principle.

### **3.4 Disparity in both directions**

Disparity is not only a problem of excessive severity. The Supreme Court has also criticised undue leniency, warning in *State of Madhya Pradesh v. Bala* (2005) and in *Sumer Singh v. Surajbhan Singh* (2014) that misplaced sympathy and inadequate sentences undermine public confidence in the justice system. The aim of reform is therefore not to push sentences in one direction, but to make the reasons for them transparent and the results predictable.

## **IV. CONSTITUTIONAL PRINCIPLES**

### **4.1 Article 14: equality and non-arbitrariness**

Article 14 guarantees equality before the law and equal protection of the laws. Since *E.P. Royappa v. State of Tamil Nadu* (1974), the Supreme Court has treated arbitrariness as the antithesis of equality, and in *Shayara Bano v. Union of India* (2017) it recognised manifest arbitrariness as a ground on which legislation itself may be struck down. A sentencing system that permits materially different outcomes for like cases, without a principled explanation, raises the question whether discretion is being exercised in a manner consistent with this guarantee. The point is not that every disparity is unconstitutional, but that the State bears a responsibility to structure discretion so that arbitrariness is minimised.

### **4.2 Article 21: fair, just and reasonable procedure**

After *Maneka Gandhi v. Union of India* (1978), any procedure that deprives a person of life or personal liberty must be fair, just and reasonable. In *Mithu v. State of Punjab* (1983), the Court applied this to sentencing and struck down the mandatory death penalty in section 303 of the IPC, holding that a sentence imposed without regard to circumstances is arbitrary. The corollary of *Mithu* is that sentencing must be individualised, but individualisation without guidance can slide into the very arbitrariness that the decision condemned. The principle cuts in both directions: neither mandatory rules nor wholly unstructured discretion satisfy Article 21.

### **4.3 Proportionality**

Proportionality has become an established feature of Indian constitutional law. The Court applied it in *Om Kumar v. Union of India* (2001) in the administrative context and in *Modern Dental College v. State of Madhya Pradesh* (2016) and *K.S. Puttaswamy v. Union of India* (2017, 2018) in the context of fundamental rights, adopting a structured test that asks whether the measure serves a legitimate aim, is suitable, is necessary, and strikes a fair balance. Sentencing is a restriction on liberty by the State, and it is conceptually straightforward to extend the same discipline to punishment. In *Gopal Singh v. State of Uttarakhand* (2013) and *Ahmed Hussein Vali Mohammed Saiyed v. State of Gujarat* (2009), the Court emphasised that punishment must fit the crime. The difficulty is that without a framework for assessing gravity and culpability, the requirement of proportion remains an aspiration.

### **4.4 The rule of law: predictability and reasoned decisions**

The rule of law demands that legal consequences be reasonably predictable, so that individuals can understand how the law applies and so that the exercise of public power can be assessed. A sentencing regime in which outcomes cannot be anticipated, and in which reasons are frequently perfunctory, falls short of this standard. Reasoned decision-making is a



related requirement: a sentence without reasons denies the offender, the victim and the appellate court the means of evaluating it.

#### **4.5 Article 20(1) and legality**

Article 20(1) prohibits a penalty greater than that which might have been inflicted at the time of the offence. This reflects the broader value that the law should announce punishment in advance. Where the actual punishment depends heavily on unarticulated judicial preferences, the practical content of that guarantee is diluted.

### **V. JUDICIAL RESPONSES**

#### **5.1 Articulating principles**

The Supreme Court has laid down general principles in numerous decisions. It has identified aggravating and mitigating circumstances, as in *Ramnaresh v. State of Chhattisgarh* (2012), which collected factors that courts should consider, and it has stressed proportionality, the importance of reasons, and consideration of the offender's circumstances. In *Bachan Singh v. State of Punjab* (1980), it insisted that sentencing in capital cases be individualised and based on a balance of aggravating and mitigating factors.

#### **5.2 Process reforms in capital cases**

The most significant recent development is *Manoj v. State of Madhya Pradesh* (2022), in which a three-judge bench directed trial courts to collect information about the accused's psychological and social background, jail conduct and potential for reform before imposing a death sentence. The Court recognised that the mitigation inquiry could not be left to chance. A suo motu reference on guidelines in potential death penalty cases has been placed before a Constitution Bench, and its outcome is likely to be significant for the entire field. Readers should verify its current status.

#### **5.3 The limits of case-by-case guidance**

There are structural reasons why judicial pronouncements alone cannot solve the problem. First, the Court decides only the cases that reach it, and sentencing in most trials is never reviewed by the Supreme Court. Second, decisions on sentence are heavily fact-specific, so precedents offer limited guidance on the weight of competing factors. Third, benches of different composition may take different approaches, and the Court has itself had to correct earlier lines of authority. Fourth, in the absence of agreed benchmarks, general principles such as "the sentence must be proportionate" are applied differently depending on how a judge understands proportion. A system built wholly on judicial elaboration remains unpredictable at the trial level, where most sentencing occurs.

### **VI. LEGISLATIVE GAPS AND MANDATORY MINIMUMS**

#### **6.1 The BNS and BNSS**

The 2023 criminal law reforms introduced some noteworthy changes, including community service as a sentence for specified petty offences and new offences such as organised crime and mob lynching. But they did not enact a statement of sentencing purposes, a sentencing commission, or guidelines for judges. The structure of broad statutory ranges, with discretion exercised by judges and appellate courts, was carried over.

#### **6.2 Minimum sentences as a substitute for guidance**

In the absence of guidance, Parliament has increasingly used mandatory minimum sentences to constrain discretion, particularly in response to public concern about sexual offences, narcotics and terrorism. These provisions reduce disparity at the cost of proportionality. A floor applied to a broadly defined offence will inevitably catch cases of widely different culpability, and the Supreme Court's reasoning in *Mithu* and in *State of Punjab v. Dalbir Singh* (2012) shows the constitutional unease that such rules provoke. Moreover, mandatory minimums transfer discretion to charging decisions by police and prosecutors, which are less visible and less reviewable than judicial sentencing. Disparity does not disappear; it relocates.



## **VII. COMPARATIVE PERSPECTIVES**

### **7.1 England and Wales**

The Sentencing Council, established under the Coroners and Justice Act 2009, issues offence-specific guidelines. These direct the court to assess culpability and harm, identify a starting point and category range, and then adjust for aggravating and mitigating factors and for matters such as a guilty plea. Courts must follow the guidelines unless it would be contrary to the interests of justice. The model gives structure and transparency while preserving discretion, and its use of a stepwise method makes reasoning visible and reviewable on appeal.

### **7.2 The United States**

The federal Sentencing Guidelines, adopted in the 1980s, reduced inter-judge variation but at the cost of rigidity, and shifted power towards prosecutors through charge selection. In *United States v. Booker* (2005), the Supreme Court held that mandatory guidelines violated the Sixth Amendment and rendered them advisory. The American experience demonstrates both the capacity of guidelines to reduce disparity and the risks of excessive rigidity.

### **7.3 Australia: the "instinctive synthesis"**

Australian courts have traditionally used an approach known as "instinctive synthesis", under which the judge takes all relevant factors into account and arrives at a sentence without assigning numerical weights. The High Court endorsed this approach in *Markarian v. The Queen* (2005). It is the closest analogue to current Indian practice and illustrates both its strengths, flexibility and attention to the particular case, and its weakness, a difficulty in demonstrating consistency. Australian jurisdictions have supplemented it with legislation that states the purposes of sentencing and with sentencing advisory bodies that collect and publish data.

### **7.4 South Africa**

South Africa introduced prescribed minimum sentences for serious offences in 1997, but with a provision allowing departure where there are "substantial and compelling circumstances". In *S v. Malgas* (2001), the Supreme Court of Appeal interpreted this as preserving the court's duty to impose a proportionate sentence. The South African model illustrates how a legislated minimum can be combined with a safety valve that protects proportionality.

### **7.5 Lessons**

The comparative experience supports four conclusions. A statement of sentencing purposes helps courts to reason consistently. Guidelines issued by an expert body led by judges can reduce disparity without removing discretion. Departures should be permitted for recorded reasons. And reliable data is indispensable, both for designing guidelines and for evaluating whether they work.

## **VIII. TOWARDS GUIDED DISCRETION: PROPOSALS FOR REFORM**

**8.1 A statutory statement of sentencing purposes.** Parliament should specify the purposes of sentencing and their relationship, with proportionality to gravity and culpability as the governing principle and deterrence, incapacitation, reformation and reparation operating within it. This would supply the common vocabulary that courts currently lack.

**8.2 A Sentencing Commission.** A permanent statutory body, including judges from different levels of the judiciary, prosecutors, defence lawyers, academics, prison and probation officials and victim representatives, should draft offence-specific guidelines, review them regularly and report to Parliament. This was in substance what the Malimath Committee recommended in 2003 and what the Law Commission and other bodies have repeatedly urged.

**8.3 Structured guidelines with a duty to give reasons.** Guidelines should be presumptively binding, with departure permitted for recorded reasons. The judge should be required to identify the factors that determined the sentence, the weight accorded to them, and, where a departure occurs, the reasons for it. This would make decisions reviewable and facilitate consistent appellate standards.

**8.4 A distinct sentencing hearing and pre-sentence reports.** The hearing on sentence should be separated from the verdict by a reasonable interval, with a pre-sentence report prepared by a probation officer or similar official, addressing the offender's background, mental health, prospects of reform and the impact on the victim. The directions in *Manoj* for capital cases should be extended in graduated form to serious non-capital offences.



**8.5 Appellate review standards.** The law should specify the standard on which appellate courts will interfere with sentences, such as manifest excess or inadequacy, or departure from the guidelines without sufficient reasons, and should encourage the Supreme Court and High Courts to issue guideline judgments for particular categories of offence pending legislation.

**8.6 Rationalising mandatory minimums.** Minimum sentences should be reviewed for proportionality, and where they are retained, they should include a safety valve permitting departure for recorded reasons in exceptional circumstances, along the lines of the South African model.

**8.7 Data collection and transparency.** A national sentencing database should record the offence, the sentence, the factors relied on, and relevant characteristics of the offender and victim, with appropriate privacy safeguards. Publication of disaggregated data would allow disparities by region, court, caste, religion, gender and class to be identified and addressed. Without data, claims about disparity are anecdotal and reform is blind.

**8.8 Judicial education.** Judicial academies should provide training on sentencing principles, mitigation, implicit bias, and the interpretation of guidelines, and should share comparative sentencing information with trial judges.

**8.9 Capital punishment.** Pending any decision on abolition, binding guidelines should require a thorough mitigation inquiry at trial, qualified defence counsel, and an offender-centred application of the *Bachan Singh* test, and should exclude public outrage as a sentencing factor.

## **IX. ANTICIPATING OBJECTIONS**

**Judicial independence.** It may be said that guidelines intrude on the judiciary's independence. The English experience suggests the opposite when guidelines are drawn up by bodies in which judges play a leading role: they reinforce judicial authority by supplying a principled foundation for sentencing decisions. Guidelines that preserve a power to depart for reasons leave the judge's constitutional function intact.

**Rigidity.** The American experience shows that mechanical guidelines can produce unjust results. This argues for presumptive and not mandatory guidelines, with a safety valve, and for periodic review of the guidelines in the light of data.

**Capacity and cost.** India's courts are already stretched, and a more elaborate sentencing process requires resources. But inconsistent sentencing imposes its own costs in appeals, in incarceration beyond what is warranted, and in the loss of public confidence. Investment in structured sentencing, supported by probation and pre-sentence reporting capacity, is likely to be efficient in the long run.

**Limits of reform.** Guidelines cannot eliminate bias or error. They can, however, make bias visible, supply standards against which it can be challenged, and reduce the room for it to operate unnoticed. That is a worthwhile contribution even if the result is imperfect.

## **X. CONCLUSION**

Sentencing in India rests on a paradox. The consequences of a conviction are among the most serious that the State can impose, yet the process by which the sentence is selected is among the least structured parts of the criminal process. Courts have recognised the problem and have responded with principles, process requirements in capital cases, and candid admissions of inconsistency. Parliament has responded with mandatory minimums that reduce disparity at the cost of proportionality, and with the reforms of 2023, which left the structural question unaddressed.

The constitutional position is clear enough. Articles 14 and 21, the doctrine of proportionality and the rule of law require that punishment be reasoned, proportionate and predictable, and that discretion be exercised within a framework that makes arbitrariness unlikely. Neither mandatory rules nor unfettered discretion meets that standard. The comparative experience shows that guided discretion, through an expert Sentencing Commission, presumptive guidelines, reasoned decisions, a proper sentencing hearing and reliable data, can reconcile consistency and individual justice. The task for India is to build that framework. Until it does, the question whether a person will be sentenced to five years or ten will continue to depend, in part, on who happens to be sitting on the bench.



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