

# International Approach to Sentencing Policies in Drug Offences: An Appraisal

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## ABSTRACT

Looking in to the phenomenal increase of socio-economic offences especially Drug offences, in the recent past, illustrates the grim picture of sentencing in Criminal Justice System of nations like US, UK and India, thereby raising the fundamental question about the effectiveness of the sentencing in these offences. This riddle accentuates the need for deeper understanding and analysis of the fact as to whether there is need for overhauling the sentencing policy especially in Indian context. The present study tries to examine the global trend of sentencing provided under socio-economic offences in above mentioned jurisdictions and what are the remedies available to enhance or make it more efficient. An analysis is also made with respect to shoddy implementation of sentencing law, which have severe ramification on the administration of justice and public safety.

**Key Words :** Sentencing, Narcotic offence, Socio-economic offences, Criminal justice system

## INTRODUCTION

The sentencing guidelines in America, England, some European jurisdictions<sup>1</sup> becomes important to understand the nuances of Indian criminal administration of justice, as it happens to have the common base. International conventions & reports of Committees on reforms of sentencing in Socio economic offences at the global level especially related to drug offences have played a significant role to regulate, control and prevent its menacing effect. The drug crimes world-over has shown an increasing trend and has engulfed the human population with alarming ill-effects so it was necessary to provide an effective sentencing model to curb and control this menace by the nation states. The lead role in this direction as usual has been that of the global body *i.e.*, United nations which represents the collective will and concern

of the world community.

### United Nations response:

The United Nations General Assembly in 1998 organized a special session on the request of member States, on the issue of controlling and prevention of Narcotic Drugs and Psychotropic substance abuse and its illicit trafficking, in which member states agreed on a 'Political Declaration on Global Drug Control, just to ensure and express concerns and intentions of all member states regarding world drug problem. Then ten years later, member states met in Vienna to discuss the progress made so far and to materialize the agreement on a new political declaration and plan of action on international cooperation towards an 'Integrated and Balanced Strategy to Counter the World Drug Problem'<sup>2</sup>.

In 2012, the President of Colombia, Guatemala and

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1. Independent Drug Policies of these jurisdictions have been included in this chapter.
  2. Third objective under Sustainable Development Goals of United Nations.

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Mexico called on the UN to host an international conference on Drug Policy Reform<sup>3</sup>, and their Sentencing Strategy which called for adopting policy programme for elimination of drugs by member states<sup>4</sup>. But it did not yield any substantial result in terms of control and prevention of drug offences as expected by the UNGASS. In this regard the observations of IDPC members, Ochoa and Fernandez, are worth quoting:

... the outcome of UNGASS (2016) has left a bittersweet aftertaste. The representatives were obliged to stand in line that echoed the need for Global Drug Regime. The trail of UNGASS-vision document by member States highlighted the lack of explicit mention of harm reduction, decriminalization, the failure of call for the creation of an expert group to evaluate global drug control, and need to recognize and to experiment with the legal regulation of internationally controlled substance and most importantly the holistic view of sentencing strategy. All in all, the protracted discussions and negotiations on 'war on drug' debate, both within the plenary sessions and negotiations in the roundtable discussion laid bare fault lines of the "fragile consensus" in global drug control<sup>5</sup>.

Because of the failure of UNGASS, 2016, all members of United nations were set to meet again in year 2019, where a new Political Declaration and Plan

of Action was to be produced<sup>6</sup>.

Thereafter, United Nations General Assembly Special Session(UNGASS) on drugs was held on the theme: "Political Declaration and Action Plan" for achievement of a significant reduction in the elimination of the DEMAND and SUPPLY of drugs. It was observed by the committee on drug policy reforms that the survival of international drug control system vis a vis sentencing policy of individual States will depend on the capacity of the concerned countries in engaging a process of meaningful reforms<sup>7</sup>.

### **World Drug Report 2018:**

According to World Drug Report<sup>8</sup>, released by the United Nations Office on Drugs and Crime (UNODC) in 2018, it was reported that there has been substantial rise in non-medical use of prescription drugs and is becoming a major threat to public health and law enforcement worldwide with opioids causing the most harm and accounting for 76 per cent of deaths where drug use disorders were implicated. Global cocaine manufacture in 2016 reached the highest level ever reported, with an estimated 1,410 tons being produced. Most of the world's cocaine comes from Colombia while the Report also showed that Africa and Asia are emerging as cocaine trafficking and consumption hubs<sup>9</sup>. Therefore, the findings show that drug markets are expanding, with

3. Subsequently, a provision was included in an "Annual Omnibus Resolution on Drug Policy" (AORDP) sponsored by Mexico, and co-sponsored by 95 other countries – to bring forward this global drug policy summit meeting in 2016 year.
4. On the issue of enormous rise in socio-economic crime especially drug crimes, the present researcher would like to highlight that member States of United Nations Organisation should have answered these states on the issue of rising of black swarms of drugs and its trade around US, UK and other countries of world, including India. See <http://idpc.net/policy-advocacy/the-UN-General-Assembly-Special-Session-on-Drugs-UNGASS-2016>.
5. T.A. Ochoa. Juan Fernandez; IDPC, US. 3rd May, 2016.
6. It was projected that the process of reform will certainly go ahead at national and sub-national level. It is predicted that next three years will be resolving the tensions between the letter of the conventions and these ongoing initiatives on the ground and would be of vital importance.
7. Drug Policy Development Program, IDPC, 2016. The former US president Barrack Obama, on his legacy and Trumps' – win as President in 2016 of USA, laid the path forward where it was described that 'we should try to discourage substance abuse. And I am not who believes that legislation is a panacea. But I do believe that treating this as a public health issue the same way we do with cigarettes and alcohol, is the much smarter way to deal with it'
8. See United Nations Office on Drug Crime and control (UNODC)- Word Drug Report, New york/Vienna/Geneva/Nairobi, 26 June 2018, where it was said that there is rise in Opioid Crisis, Prescription Drug Abuse Expands, Cocaine and Opium hits a record high.
9. It was seen that from 2016-2017, global opium production jumped by 65 per cent to 10,500 tons, the highest estimate recorded by UNODC since it started monitoring global opium production at the start of the twenty-first century. A marked increase in opium poppy cultivation and gradually improving yields in Afghanistan resulted in opium production their last year reaching 9,000 tons.

cocaine and opium production hitting absolute record highs, presenting multiple challenges on multiple fronts. In order to highlight such challenges, it was reiterated by UNODC Executive Director, Yuri Fedotov, as follows:

...UNODC is committed to working with countries to seek balanced, integrated solutions to drug challenges and achieve progress towards the Sustainable Development Goals<sup>10</sup>.

He further said that:

...the World Drug Report represents a key pillar of our support, along with assistance to translate international obligations into action and capacity building on the ground to enable effective responses, and protect the health and welfare of humankind.

### **Sentencing in socio-economic offences: International overview:**

To understand the sentencing schemes that are provided for tackling the socio-economic offences like drug offences, it becomes necessary to make a brief study of sentencing patterns provided in the legislative framework of some developed jurisdictions, like United States, England and few other countries sharing the common legal foundation with India as a global drive against the drug menace.

#### **USA:**

Ever since Richard Nixon and Nancy Reagan proclaimed 'War on drugs' the US has been struggling to create a unified drug policy that would both keep their streets safe and children properly educated about the dangers of substance abuse. This proclamation raged on as many people in power, pushed for stricter laws (regarding drugs) with stringent sentencing policy. The key moments in United States drug policy was in 1971, when the then president Richard M. Nixon created the "Drug Enforcement Agency" (DEA) with the express purpose of fighting back against the copious amounts of drugs flowing from over the borders<sup>11</sup>. It was through

the tougher laws and powerful advertising campaign, the US war on drug was intended to get rid of illegal narcotics and put foreign drug cartels out of business within their borders<sup>12</sup>. Drug rates since that time were down in overall states. It may be noted that many scholars like sociologists and penologists have argued (based on their findings) that, it is, due to other societal factors and not government policy<sup>13</sup>.

Over the years, many judges in US have expressed the opinion that the American criminal justice system has largely failed in its drug enforcement role and as a consequence, the justice system itself has suffered with the loss of community support and internal morale. To address this issue, a set of five principles were adopted in American system, in order to guide the improvement of drug enforcement, as a preventive activity, to reduce drug abuse and related harms. These principles were developed through six specific proposals propounded by United States Criminal Justice System for enforcement of public welfare laws. These proposals include:

- firstly, make marijuana enforcement a minor matter for police through decriminalization of possession or outright legalization;
- second, induce drug users who are under criminal justice supervision to refrain from drug use by imposing appropriate monitoring and graduated sanctions programs;
- third, expand opioid substitution therapy for heroin- and other opioid-using offenders;
- fourth, reduce the average severity of sentences for drug offenses, particularly for minor functionaries who are easily replaced;
- fifth, base sentence length on culpability, danger, and replaceability, not quantity possessed or number of prior convictions; and
- sixth, reduce prescription drug abuse by policing that reinforces regulatory efforts.

According to eminent criminologists, these principles would provide an evidence-informed approach that should

10. <https://about.jstor.org/world.drug.report-2018>.

11. Nixon called it the "war on drugs" a phrase that was brought back into the National consciousness again during the Reagan Presidency in the 1980s.

12. Which in 1994 resulted into incarceration of 1,000,000 people in the United States. Studies have shown that during this time these individuals were non-violent drug abusers.

13. National Narcotic Intelligence Consumer's Committee (NNICC) (1950-2015). Narcotic's Intelligence Estimate 1984, Washington D.C. U.S. Govt. Printing Press Office.

both reduce America's drug abuse problem and increase the perceived legitimacy of the criminal justice system<sup>14</sup>.

### Role of Sentencing Commission in USA:

In the US system, the guidelines are the product of the United States Sentencing Commission (USSC) and are part of an overall federal sentencing reform package that took effect in the mid-1980s. These guidelines suggest that the sentencing scheme that was followed in convicting offenders of socio-economic crimes falls under one of two penal policies, viz., intermediate and determinate sentences. Intermediate sentencing practices were predominant for several decades, that led to the major reform efforts undertaken by many states and the federal government in the mid - to late 1970s and early 1980s<sup>15</sup>. Congress passed a sentencing reform measure in the form of Sentencing Reform Act, which abolished indeterminate sentencing at the federal level and created a determinate sentencing structure through the Federal Sentencing guidelines. The Sentencing Reform Act reformed the Federal Sentencing System by:

- a. Dropping rehabilitation as one of the goals of punishment;
- b. Creating the U.S. Sentencing Commission and empowering it with establishing sentencing guidelines;
- c. Making all federal sentences determinate; and
- d. Authorizing appellate review of sentencing.

The US Supreme Court decision in *United States v/s Booker*<sup>16</sup>, is a leading case on how the sentencing policy in USA has taken a new dimension. Because of this decision, a two-part opinion transformed federal criminal sentencing by restoring to judges much of the discretion that Congress took away when it put mandatory sentencing guidelines especially for socio- economic offences. This case presented two dimensional issues, viz.,

1. Whether imposing an enhanced sentence under

the U.S. sentencing guidelines based on a judicial determination isolated the Sixth Amendment, and it is does;

2. Whether the sentencing guidelines are unconstitutional.

The answer to these issues is that in first place, the Court held that the current mandatory sentencing guidelines violated defendants Sixth Amendment right to trial by jury by giving judges the power to make factual findings that increased sentences beyond the maximum that the jury's findings alone would support. In the second part, a different majority concluded that the constitutional deficiency could be remedied, if the guidelines were treated as discretionary or advisory rather than the mandatory one.

As a result of the discussion, the Court struck down a provision in law that made the federal sentencing guidelines mandatory, as well as, a provision that permitted appellate review of departure from the guidelines.

In essence, the US Supreme Court's ruling gave federal Judges the discretion in sentencing offenders by not requiring them to adhere to the guidelines, rather, than the guidelines can be used by judges on an advisory basis.

Later on, the Congress tasked the US Sentencing Commission to act as an expert body to inform on sentencing policy and make guidelines, amendments and statutory recommendations which would reflect the advancement in the curbing the socio-economic crimes. In this direction, the Commission held two extensive public hearing with the Department of Justice, Federal Public Defenders, State and Local Law Enforcement Agency, Sentencing Advocates, Conservative Thinkers and many others. All the stakeholders voted with one voice unanimously to reduce federal drug guideline in order to help control federal prison costs and populations, ensure fair and just sentences, and project public safety. And thus in April, 2014, the United States Sentencing Commission voted unanimously to reduce sentencing

14. Jonathan P. Caulkins and Peter Reuter; "Dealing More Effectively and Humanely with Illegal Drugs", Crime and Justice.2017. 46:1, 95-158.

15. The perceived failure of the intermediate system to "cure" the criminal, coupled with renewed concern about the rising crime rate throughout the nation in the mid – 1970s, resulted in wide experimentation with sentencing system by many states and the creations of sentencing guidelines at the federal level.

16. U.S. V/s Booker, 543 US 230 (2005). The U.S Supreme Court ruled that the Sixth Amendment, right to trial by Jury, requires that the current federal sentencing guidelines be advisory, rather than mandatory. In doing so the court struck down a provision in law that made federal sentencing guidelines mandatory.

guidelines for most federal drug offences<sup>17</sup>. Thereafter, it was recommended that the courts can now consider the motions for retroactive sentence reduction, but no prisoner be released based on this reduction prior to November 1, 2015<sup>18</sup>.

### **Sentencing Strategies for Drug Offences in United States:**

The penalties for drug possession or its sale in United States was not seen as very harsh, which was evidenced by the fact that large percentage of prison population in that country were comprised of individuals with a drug problem ranging their involvement from supply to demand phenomenon. Comparatively, it was not uncommon for drug offenders to get caught in certain countries in the Middle East and the far East, to find themselves receiving Life Sentences or even the Death Penalty. In United States, the punishment was not that severe but there were still some very serious consequences under law for those who would break the law<sup>19</sup>.

The present sentencing policy for drug offences in United States is that they have mandatory minimum sentence policy for drug possession that can't be plea bargained<sup>20</sup>. In drug offences, the criminals can face steep fines for possession of drugs and new policy requires that judges may require that the individual commit a large number of hours to community service as a type of penance for their crime<sup>21</sup>.

Those who are found guilty of selling drugs to a minor, face sentences of 10 years or more. In convicting

the offender, the burden of proof of intent to sell, relies heavily on the testimony of arresting officers. Another reflection of drug abuse in US is the smuggling of drugs and the researchers have suggested that smuggling of drugs being illegal in US as a federal crime and punishable with long mandatory sentences<sup>22</sup>. Consequently, prison statistics for drug smuggling reveals that U.S. prisons are filled with non-violent individuals, serving 20- year terms, because they trusted the wrong people or felt that bringing drugs was too easy to pass-up<sup>23</sup>.

### **Fair Sentencing Act, 2010:**

For sentencing reforms in US, the Fair Sentencing Act, 2010, was passed. This Act changed the statutory penalties for crack cocaine and eliminated mandatory minimum penalty for simple possession of crack cocaine. In 1995, 1997, 2002 and 2007, the United States Sentencing Commission (USSC) submitted four separate reports<sup>24</sup>, to Congress regarding cocaine sentencing as major socio-economic offence. The commission made four core findings regarding drug penalties as they existed before Fair Sentencing Act as-

- i. They overstated the relative harmfulness of crack cocaine compared to powder cocaine;
- ii. They swept too broadly and applied most to lower level offenders;
- iii. They overstated the seriousness of most crack cocaine offences and general drug offences and failed to provide adequate proportionality; and
- iv. Their severity mostly impacted minorities.

17. In July, 2014, the Commission voted again unanimously, to make sentencing reduction retroactive, but Congress didn't approve of it and this amendment lapsed in November 1, 2014.

18. United States Sentencing Drug Policy, "US Sentencing Policy Profile", (USSC) – 2014.

19. Many surveys suggest that when an individual is caught with possession of illegal drugs, they can face potential fines as well as jail time and sentencing strategy varies according to the place or state where offence occurred and also on the previous criminal record of the individual offender.

20. The average amount of jail time awarded in a drug possession case in U.S. is between 30-40 months.

21. The punishment scheme for selling drugs do carry much harsher penalties than those received that a person seen to have repeated been caught selling drugs can face three, six or nine years in prison.

22. It is observed that those who are caught have not been the ruthless kingpins of crime world, but they are average men and women who need money desperately and are willing to risk anything to stay afloat financially.

23. See United Nation Office on Drugs and Crime – "Illicit Trafficking and Border Management" Feb. 22, 2016. It was said that in drug smuggling cases once a drug offender is caught he has to spend decades of his life in prison as the result of one dumb mistake.

24. Which were based on legislative history, scientific and medical literature, extensive analysis of the commission's own data, public comment, and expert testimony

As a consequence, the commission reduced penalty of the cocaine possessor, and Congress repealed mandatory minimum penalty for simple possession of crack cocaine<sup>25</sup>. This relative stability in offense and offenders character, combined with decreased guidelines and statutory penalties, resulted in average increase in rate of incidence in socio-economic offences, since FSA.

### **Post-2015 Scenario on Drug policy in US:**

With respect to question of incidence of drug offences in U.S, it is observed that U.S. govt. is not doing much in terms of prosecuting drug addicts and other socio-economic offenders. One of the area where U.S. drug regime hasn't focused enough attention, is the rehabilitation of drug-addicts. Some enforcement agencies have been too preoccupied with putting drug users in prison as opposed to helping them in getting the help they need via drug rehabilitation. This issue needs to be addressed if they are to be seen as a forward - thinking progressive nation who rehabilitate addicts<sup>26</sup>.

### **A Reformist Model:**

There was mounting pressure on US government and policy makers, because of public outrage which led them to develop the pragmatic alternatives to straight incarceration for the creed of drug offenders. As a result, different intervention models emerged to address the

problem of substance abuse vis-a vis crackdown on drug elitist. This included diversion program and custody- based programme in prisons & drug courts<sup>27</sup>.

Diversion programme and Drug Court programme with judicial supervision resulted into a change from punitive to therapeutic orientation with justice system, which is regarded as great policy shift in sentencing strategy through reformist model approach<sup>28</sup>.

Hence, there were almost 3000 drug courts in US that emerged as therapeutic solution specializing in chronic substance abuse. Drug courts specifically have proved to be an effective in reducing recidivism among participants in drug court programs. While in diversion program, drug offenders are diverted to treatment program prior to sentencing in which charges were dismissed for offenders who complete treatment successfully, or after sentencing in which offenders are offered the option of treatment in lieu of incarceration<sup>29</sup>.

Jail and prison based substance-use intervention were also available, although they were not widely used<sup>30</sup>. The proliferation of drug courts diversion programme and intervention in custody has testified the changes in judicial thinking about the effectiveness of incarceration as a deterrent to criminal behavior, motivated by or committed under the influence of substances. The success of therapeutic instead of punitive approaches favored a shift in thinking within the criminal justice system of America

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25. Further FSA reduced the disparity between powder cocaine and crack cocaine sentences and reduced sentences from 124 months to 96 months in case of cocaine and 83 months to 79 months in case of powder cocaine respectively (FY 2003-2013). Thus it was seen that average cocaine sentences are decreasing and as a result are becoming more similar to powder cocaine sentences.
  26. Official Report of National Institute of Drug Abuse-2015.
  27. Belenko, S, Mathew, H, Hamilton, H, (2013). Treating Substance Use Disorders in Criminal Justice System. *Curr. Psychiatry Rep.* 11.
  28. Impressions are researchers.
  29. National Institute on Drug Abuse (1985). *Highlights from Drugs and American High School Students: 1975-1984*. Washington DC. US Govt. Printing Press. Under reformist model, the best known state-wide diversion program for substance abuse offenders was California's "Substance Abuse Crime Prevention Act, 2001", also known as Proposition 36, which was based on approved referendum to divert offenders to community treatment under supervision. Under (SCAPA), non- violent drug offenders were offered treatment as a part of their court program instead of straight incarceration Other well-known diversion models include 'Treatment Accountability for Safer Communities-(TASC)' and Drug Treatment Alternatives to Prison (DTAP) programs. TASC-model generally provide assessment, referral to treatment, case management and monitoring of offenders who are diverted to treatment. DTAP programs are based on diversion to community residential treatment programs that offer a Therapeutic Community Mode (TCM). Studies show that each type of diversion program is moderately successful with respect to recidivism.
  30. For example, Motivational Interviewing or Screening. Brief Intervention and Referral to Treatment (SBIRT) programme are more suited to short – term custody situation.

(because of new this model), but it must be acknowledged that there is widespread skepticism about the effectiveness of treatment for drug offender including convicted drug lords<sup>31</sup>.

### England:

The legislative response to the problem of drug offences in United Kingdom came to be known as the Misuse of Drug Act, 1971. This Act has been on the statute book since 46 years which provide the legal basis for controlling the use and availability of illicit drugs and punishment provisions by punish increasing numbers of drug users and dealers. But, people have expressed concerns over lack of the effectiveness of M.D. Act in drawing the right balance between dangers associated with each type of drug, deterrence by mandatory sentencing strategy and in providing a fair, balanced and proportionate response to drug use by different groups in British society<sup>32</sup>. This Act also sets out the circumstances in which it is lawful to import, produce, supply, possess with intent to supply, and possess controlled drugs. Under 2<sup>nd</sup> schedule of M.D. Act, 1971, drugs are classified either A, B, or C categories which in theory reflect the degree of harm they are considered to cause to an individual or society. Each category of offences has maximum different penalties, which are enumerated under section 3 to 6<sup>33</sup> of Act. Section 8 provides that it is prohibited for the occupier knowingly to permit premises to be used for,

production, or supply or preparation. Section 9 and 9A are offences related to opium use and smoking and its unlawful administration e.g.; needle exchange programs. Section 18 to 22 create other offences mainly dealing with incitement to commit an offence under the Misuse of Drugs Act. The sentencing strategy that is adopted under this Act are mainly set out in sections 25 and 26. Section 27 deals with forfeiture<sup>34</sup>.

In addition to this, producers and traffickers are also liable to confiscation of assets under the Trafficking Act, 1994<sup>35</sup>. In UK, most drug offences may be tried summarily by magistrates or on indictment with a jury at a Crown Court. If tried summarily, the maximum cannot exceed six months and /or £ 5000, fine or three months and/or fine for less serious offences. The M.D. Act does not distinction between trafficking and non-trafficking offences rather this distinction is in the drug trafficking Act, 1994<sup>36</sup>.

Worth to note that the UK anti-drugs coordinator's position was eliminated and has been given a job relating to tacking international drug trafficking. Scotland Yard has endorsed a plan that will relax enforcement with respect to cannabis possession. People are given warning rather being cautioned, arrested and possibly charged<sup>37</sup>.

In June, 2017 three men were sentenced to prison for smuggling and dropping cocaine, potentially worth £ 2.5 million (nearly 21 crores) from an aircraft in England. Investigators had seen the aircraft flying low over a

31. Taxman FS, Perdoni ML, Harrison LD (2007). Drug Treatment Services for Adult Offenders: The State of the State, *Journal of Substance Abuse Treatment*. 32: 239-254.

32. *Ibid* at p. 31.

33. These provisions are related to importation and exportation (the actual offences are contained in and prosecuted under the Customs and Excise Management Act, 1971), production supply, possession and possession with intent to supply.

34. For further elucidation, the penalties for offences under the Act are:

a) For Class A drugs: 7 years and/or unlimited, fine for possession, life and/or unlimited fine for production or trafficking with a mandatory seven-years sentence for a third conviction for trafficking. The mandatory sentence for third conviction of trafficking is found in the Criminal Sentences Act, 1997.

b) For class B drugs: The maximum penalties are 5 years and/or unlimited fine for possession and 14 years and/or unlimited fine for production or trafficking.

For class C drugs the maximum penalties are 2 years and/or unlimited fine for possession and fine years and/or unlimited fine for trafficking.

35. The Drug Trafficking Act, 1994 was adopted to enable the UK meet its obligation under United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1998 (The Vienna Convention). It creates offences in connection with laundering and handling of the proceeds of drug trafficking and introduces confiscation measures.

36. United Kingdom National Drug Policy – A legislative framework at <http://www.wikipedia.org/uk-drug-policy-2016>.

37. Lafreniere'. Gerald, National Drug Policy: UK, prepared for the Senate Special Committee on Illegal Drugs, 2001, Law and Government Division, Library of Parliament of UK.

secluded field before fuel containers, carrying 31 kgs. of Cocaine, were dropped. They later recovered more cocaine and MDMA from one of the men. A Dutch National was also caught on board flight while dumping 2 kilograms of Cocaine in flight toilet seat<sup>38</sup>. Such instances show up the extent and operation of drug offences. Despite long standing political presence of problem, relatively coherent polices and huge investments, the United Kingdom remains at the top of the European ladder for drug use and drug dependence.

The study made by Professor Peter Reuter, University of Maryland, USA and Alex Stevens, University of Kent, England are vital. Their study pertains to the prevalence and nature of drug problem in United Kingdom. They concluded that:

... the United Kingdom has the highest level of dependent drug use and among the highest levels of recreational drug use in Europe. The drug measure has worsened more drastically over the last quarter of 20<sup>th</sup> century viz; the number of dependent Heroin users has increased for 5000 in 1975 to a current estimated 2,81,000 in England and over 50,000 in Scotland.

They found that around a fifth of arrestees appear to be dependent on Heroin. Illicit drugs might also be linked to violent crimes through the direct effects of stimulants, such as crack cocaine, leading to aggression besides, the operation of the illegal markets which is punctuated by violence and fear. It has recently been estimated that the size of the UK market for illicit trafficking of drugs is over £ 8 Billion. The annual socio-economic cost of drug-related crime in England and Wales has been estimated at over £ 21 billion. Social deprivation and environmental effect of peer groups are main causes of drug dependence, drug-related deaths, infection. It is also a great challenge to UK government<sup>39</sup>.

### **Role of Sentencing Council:**

The sentencing council is an independent non-departmental body of Ministry of Justice, as one exists in America (United States of Sentencing Commission (USSC), Department of Justice, USA). It was established in 2009 by the Coroners & Justice Act and is responsible

for issuing guidelines for sentencing that just be followed by the courts unless it is contrary to the interests of justice to do so. Its role includes:

- i. Developing guidelines and monitoring the use of sentencing;
- ii. Assessment of impact of guidelines on practice of sentencing; and
- iii. Promoting and encouraging awareness amongst the public regarding the realities of sentencing vis-à-vis publication of information regarding the practice in Magistrates' and the Crown's court.

The Council is accountable directly to the parliament, in terms of achieving its statutory remit, to the Permanent Secretary at the Ministry of Justice, to account for effective oversight of the body and to annually report to the Lord Chancellor, who in-turn lay a report (detailing the Sentencing Councils activities), before Parliament.

The adoption process of guidelines includes that when drafting sentencing guidelines, the Council is required to take into account:

- a. the sentences imposed by Courts in England and Wales for offences;
- b. the need to promote consistency in sentencing;
- c. the impact of sentencing decisions on victims of offences;
- d. the need to promote public confidence in the criminal justice system; and
- e. the cost of different sentences and their relative effectiveness in preventing re-offending.

During the period of twelve weeks, the Council undertakes a policy and legal review and write an initial draft, which is send to Lord Chancellor, then, other persons he wishes to direct, the Justice Select Committee of the House of Commons and any other person Council considers appropriate. The Council then publishes the guidelines and also monitors constantly the application of the guidelines<sup>40</sup>.

The sentencing guidelines which are made public are subject to Coroners and Justice Act, 2009 that is to specify the list of range of sentences that is known as 'Sentencing Range' and list any factors or mitigating circumstances that could affect the Sentence known as "Category Range". The guidelines are published for most

38. <http://www.theguardian.co.uk>; published on 5th Jan. 2017.

39. The UK Drug Policy Commission, "Bridging The Evidence and Analysis Together to Inform UK Drug Policy – 2007.

40. How Guidelines Are Developed, Sentencing Council – 2014.



of the significant offences heard in the magistrates court and a wide range of offenses heard at Crown Court<sup>41</sup>. The guidelines provide step by step process in determining the sentence which means court should determine the offense category, that is, how much harm was caused and the offenders level of culpability. Such culpability is recognised by three categories which include:

Category 1: Greater harm and higher culpability;

Category 2: Greater harm and lower culpability or lesser harm and higher culpability; and

Category 3: Lesser harm and lower culpability.

Once the sentence is determined the court must also look into principle of totality, that is whether the offender is being sentenced for multiple offences or if the offender is already serving a sentence or more appropriately, in case of socio-economic offences e.g. drug offences. If the offender is serving a sentence, the total sentence must be just and proportionate to the offence(s) committed. The court must consider the mandatory sentencing strategy in drug offences and the court must state reasons for and explain effect of the sentence.

The penalty which a drug offender get will depend on:

- i. the class and quantity of drug;
- ii. where the offender and drugs were found;
- iii. the personal history of offender (previous crimes, including previous drug offences); and
- iv. other aggravating or mitigating factors.

Important to note here that since 1964, drug abuse was increasingly criminalized with the framework still in place as of 2016, largely determined by the Misuse of Drug Act, 1971.

The Sentencing Council of United Kingdom (SCUK) brought sentencing guideline together for the first time, in order to ensure consistent and proportionate sentencing for all drug related cases that come before Courts in England and Wales. These guidelines covered the most commonly sentenced offences viz; importation,

production, supply, permitting premises to be used for drug offences and possession. All drugs from class 'A to C' that were categorised under M.D. Act, 1971 are covered by the guidelines. Under New guideline there are increased sentence lengths for those guilty of large scale production of drugs and reduced sentence lengths for drug mules. Sentences for drug mules –who are usually valuable and exploited by organized crime will have a starting point of 6 years' imprisonment<sup>42</sup>.

It is seen that new guideline did not changed the sentencing for possession or drug supply offences, which are same as provided under M.D. Act, 1971. Where an offender profit from selling drugs, a prison sentence can be expected on street dealers/vendors who play significant role in selling / trafficking class A drugs, with a starting point of four and a half years. Sentence could go up to 16 years for a single incident depending on the quality of drugs involved. This new guideline also introduced a new aggravating factor to supplant offences which ensures that when offenders who are under the age of 18 years, they are to be treated more severely. Further, the Sentencing Council has conducted a public research into attitudes to sentencing for drug offences, which revealed that there is little support for custodial sentences for drug possession or for substantial custodial penalties for small scale supply to medium scale importation offences. On the other hand, it did indicate that there was support for lengthy custodial sentence for medium to large-scale and large-scale importation offences<sup>43</sup>.

**Lord Justice Hughes**<sup>44</sup> has observed:

... drug offending has to be taken seriously. Drug abuse underlies a huge volume of acquisitive and violent crimes and dealing can blight communities, Offending and offenders vary widely so we have developed this guideline to ensure that there is effective guidance for sentences and clear information for victims, witnesses and the public on

41. Visit <http://sentencing.council.judiciary.gov.uk/guidelines/downloadhtml>.

42. A drug mule should not be confused with other types of offenders of socio-economic crime sentenced for importation offences, it is said that if the court decides that he or she has a more significant role in importing drugs, than a longer prison sentences would be passed.

43. Sentencing Council United Kingdom: New Guideline for Sentencing Drug Offender – 2012 Report: Published on 24th on, 2012, by UK Sentencing Council. The present researcher during empirical study gathered similar suggestion from criminal justice professionals who agree that such a strategy can be adopted by classifying a range of drug offenders in Indian context.

44. Deputy Chairman of Sentencing Council of UK.

how drug offenders are sentenced.

This guideline reinforces current sentencing practice in UK with respect to drug offenders. Drug dealers can expect substantial jail sentences.

**Chief Constable Tim Hollis**<sup>45</sup> remarked:

The Association of Chief Police Officers welcomes the sentencing guidelines issued by Sentencing Council. Police take the issue of tackling drug offences seriously and the sentencing of offenders provides part of the overall approach to combating such crime and reducing harm to local communities. The Council has clearly given a good deal of consideration to the new guidelines and has produced a document which provides the police and our criminal justice partners with consistent guidance, yet still provides the courts with flexibility to deal with each case on its own merits when appropriate.

Before passing of the above guideline by Sentencing Council, the British Drug Policy had gone under a wide radical policy shifts. For example, in 2010, on the issue of sentencing for drug offences in England and Wales, a consortium known as 2<sup>nd</sup> International Drug Policy Consortium (IDPC) was organized and this consortium lead to undergo a wide review of public consultation with respect to drug issue and its trafficking in UK<sup>46</sup>.

Another instance is that of Drug Law Reform Project (DLRF), which was a joint project on drug law reform from Transnational Institute (TNI) and the International Drug Policy Consortium (IDPC). This project aimed to promote more humane, balanced and effective drug laws and seeks to stimulate the debate around legislative reforms by highlighting good practices and lessons learned in areas such as decriminalization,

proportionality of sentences, specific harm reduction measures and alternatives to incarceration and scheduling criteria for different substances. It also aimed to encourage a constructive dialogue amongst policy makers, multi-lateral agencies and civil societies, in order to shape policies that are grounded in the principles of human rights, public health and harm reduction<sup>47</sup>.

Thus, from the above discussion and deliberations, it is evident that the English justice system considers that sentences imposed on offenders should reflect the crime committed and be proportionate to the seriousness of his offences. Because of which it has a Sentencing Council that is responsible for producing, issuing and reviewing guidance to the courts, perhaps on what factors should be considered when sentencing offenders and the range of sentence that should be awarded. The guidance should be followed unless, it is, not in the interests of justice to do so. The aim of sentencing guidelines issued by Sentencing Council is to ensure consistency in sentencing strategies across country<sup>48</sup>.

#### **India:**

Despite the transformation of approach and changes in principles of sentencing across the world, India has not a well-developed sentencing, because, it has not been possible to put to rest the conflicting views on sentencing policy in our country. Here, sentencing process is mainly guided by judge made laws. The Supreme Court of India in *Bachan Singh's* judgment<sup>49</sup>, revealed the principles governing the sentencing policy required in our criminal jurisprudence, which have been more or less consistent right up to the pronouncement. The Court stated:

... punishment is certainly an onerous function in

45. As head of the Association of Chief Police Officers (ACPO) of UK.

46. In this consortium, fundamental principles were brought forward for a constructive public discussion for the first time and an advice was adopted which radically change the sentencing strategies in socio economic offences by the courts. The purpose of this consortium was to examine and evaluate the mechanism for law reform, without the need for legislative reform, and to consider the specific discussions around sentencing for drug offenses which has led to conclusion and recommendations. Through the Sentencing Advisory Panel (SAP) it was learned that the deterrence as the basis of drug sentencing is, in fact without evidence a baseless and ineffective. In UK, the current level of sentencing for drug couriers are disproportionate to their culpability and to the harm associated with their offence. SAP's advice attempted to give a delicate balance between the consistency, transparency, and separation of powers necessary for the rule of law, the prediction which allowed better resource allocation and the overriding commitment to do justice in the individual case.

47. International Drug Policy Consortium: An Abstract by Genevieve Harris, Sentencing for Drug Offences in England and Wales – 2010.

48. Coroners and Justice Act, 2009 C. 25, pt. 4 <http://www.legislation.gov.uk/ukpga/2009/25>.

49. *Bachan Singh and Ors. V. State of Punjab and Ors* AIR 1971 SC 2164.

the dispensation of criminal justice. For sentencing the court is expected to keep in mind the facts and circumstance of a case, the principles of law governing award of sentence, the legislative intent of special or general statute raised in the case and the impact of awarding punishment.

In 2017, the Centre of Excellence for Death Penalty, National Law University, Delhi, published a report on the death row convicts in India. The key concern of the report (prepared by almost over 60 retired judges of Supreme Court and High Courts, many academicians, criminologists and penologists) focused on the revisiting and revitalizing the current sentencing policy, particularly in socio- economic crimes.

As per International Drug Policy Consortium-2015, it was highlighted that the country's reaction to drug trafficking demanded stringent enforcement, because India has a long history of cannabis and opium use<sup>50</sup>. Presently, India is significantly using large chunk of land estate for illegal drug cultivation. It is also considered a good transit route as well as potential consumer market.

Like other members of United Nations, India is signatory to conventions like UN Single Convention on Narcotic Drugs, 1961; UN Convention On Psychotropic Substances, 1971; and UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. As per Article 253 of Indian Constitution, Parliament can exercise its legislative powers to make any law for implementing any treaty, agreement or convention or decision made at international level, and thus India passed NDPS Act, 1985, replacing Opium Acts and Dangerous Drugs Act.

The NDPS Act, 1985 was amended in 1989, 2001 and 2014. It prohibited cultivation, production possession, sale, purchase, trade, import, export, use and consumption of narcotic drugs and psychotropic substances except for medical and scientific use in accordance with law<sup>51</sup>. The Act covers three broad classes of substances, which are as under:

1. Narcotic drugs that or those covered under 1961 Convention;
2. Psychotropic Substance or those covered under 1971 Convention as well as psychoactive substance such as ketamine which though yet has not been covered/listed under Convention; and
3. Controlled substances, that are used to manufactured narcotic drugs or psychotropic substances, for example, precursor chemicals such as acetic- anhydrate, ephedrine and pseudo-ephedrine.

This Act lays down the procedure for search, seizure and arrests of persons in public and private places<sup>52</sup>. At the same time, norms for investigation in evidence are permissive and have been interpreted in a manner that prejudiced the accused<sup>53</sup>.

In order to check the menace of drug trafficking in 1988, the NDPS Act was supplemented by the another Act namely, Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act to provide for preventive detention of people suspected or accused of involvement in drug trafficking.

Influenced by international commitments and deliberations at South Asian Association for Regional Cooperation (SAARC) on growing menace of drug trafficking and increase of political dissent and terrorist activities like narco- terrorism, it led to the introduction of some of the amendments to NDPS Act in 1989 which is first Amendment that led to the introduction of tougher punishments such as mandatory minimum sentences of 10 years imprisonment, bleak chances of bail, bar on suspension and commutation of sentences, forfeiture of property, trial by special courts and mandatory death sentence for certain repeat offenders. This resulted into controversy with respect to person(s) caught with possession of small quantity of drugs because they are facing long sentences, thus reflects flawed sentence

50. <http://reformdrugpolicy.com/up-content/update/2011/10/>. Drug Policy in India - Compounding harm. Pdf: By Charles. M., Begley. Taylor, D.C. Neidpath A. (Oct, 2015)

51. Section 80 of NDPS Act, 1985.

52. Sections 41-43 and 50 of Act.

53. Rajkumar Karwal v/s Union of India (1990) 2 SCC 409 and Kanhaiyalal v/s Union of India (2008) 4 SCC 408, in both the cases, the Supreme Court in a departure from settled position on the law on evidence, made confessions of drug law enforcement officers admissible as evidence.

policy under the Act<sup>54</sup>. It resulted into sharp criticism with respect to harsh and disproportionate sentencing policy and as a consequence another amendment was made in the year 1998 namely, NDPS (Amendment) Act, 1998,<sup>55</sup> was adopted in 2001. It contained provisions to grade the punishments on the basis of quantity of drugs i.e., ‘small’,<sup>56</sup> ‘commercial’,<sup>57</sup> or ‘intermediate’.

In order to make better sentencing policy, a third time amendment was introduced in 2014, which inter alia provided the following guidelines:

- a. It created new category of ‘Essential Narcotic Drugs’,<sup>58</sup> which the Central government can specify and regulate uniformly throughout the country;<sup>59</sup>
- b. For countering abuse of illicit drugs and to promote the medical and scientific use of Narcotic Drugs and Psychotropic Substances principle of “Balance” between ‘Supply and Demand’ of Narcotic drugs were given in order to widened the concept & objective of law;
- c. It introduces recognized and approved treatment standards and evidence based medical interventions;<sup>60</sup>
- d. The provisions for utilizing discretionary power by making death penalty a discretionary, in case of subsequent offences, certain quantity of drugs

under section 31A were included and in such cases the Court can impose imprisonment up to 30 years, under section 31;

- e. 6 months to 1-year imprisonment for small quantity offences;
- f. Raising the role of officers authorized to conduct search and arrest licensees who are alleged for violation NDPS law;<sup>61</sup> and
- g. Elaborate provisions for forfeiture of property of persons charged of drug trafficking<sup>62</sup>.

Thus, these amendments resulted into adoption of a pragmatic sentencing policy under NDPS Act. It is seen that the scale of sentencing and fine now varies significantly depending on the substance and quantity found, while determining the amount of punishment<sup>63</sup>. The purity controversy of ‘total weight’, has also been addressed by Supreme Court in number of cases about the question of drugs mixed with ‘neutral substances’. It is settled question that only that narcotic drug is relevant for determining when it constitutes a small or commercial quantity<sup>64</sup>. Regarding this controversy of commercial quantity, the government of India directed that in calculating the quantity, the total weight of the seized contraband should be considered and not the pure drug quantity<sup>65</sup>.

Critics suggest that such type of change is

54. See *Raju v/s State of Kerala* AIR 1999 SC 2139. In this case appellant had served 10yrs of rigorous imprisonment and was imposed a fine of 1 Lakh, for possession of 100mg of heroin worth 25. Absence of withdrawal was seen as evidence that the appellant was not drug dependent and therefore, the heroin was not meant for personal use. The S.C finally held that such a small quantity could not have been meant for sale or distribution and reduced the sentence to that for possession for personal consumption.

55. Introduced by parliament and examined by Parliamentary Standing Committee on Finance.

56. Sec. Section 2 (xxiii), NDPS Act.

57. Sec Section 2 (vii), NDPS Act.

58. Sec Section 2 (viii), NDPS Act.

59. Sec, Section 9(1) (va) and 9(2) (ha), NDPS Act.

60. Sec. 71(1), NDPS Act.

61. Section 42(1) NDPS Act.

62. Section 68B, 68D, 68H and 68 O, NDPS Act.

63. Much litigation surfaces around the question of term like “what is mixture” or “what was preparation made of” or what is with” or what is ‘with or without neutral material, that are included in it. In such issues, the forensic experts suffer from inconsistent interpretation and conflicting decisions not just between different classes of drugs but even for the same drug because the NDPS Act doesn’t provide guidance for ascertaining quantity, and when it comes to numerical percentage (e.g. opium and opium derivatives).

64. *E. Michael Ray v/s Intelligence Officer, Narcotic Control Bureau* (2008) SCC 161.

65. Notification No. 18 of 2009.

significantly damaging for the people who use drugs. The quantity based sentencing policy also covers other important factors like the motive and role of offender which is irrelevant. It is, worth to note that simple possession attracts the same amount of punishment as distribution (trafficking) for profit gains. Same is true for other types of Socio economic which have enshrined same scheme of sentencing and the judges are allowed to enhance sentence by using discretion as per the merits and demerits of case. But the question with respect to sentencing-disparity still remains debatable.

### Findings:

The contemporary sentencing scenario quite conspicuously reveal the efforts of the legislature, to interfere with the sentencing discretion of the courts, particularly, by introducing minimum mandatory sentences. The sentencing judges are left with no discretion, except to award the mandatory sentence that induces them to indulge in a mechanical sentencing process. The findings with respect to sentencing policies may be summed up as under:

- a. The tendency of awarding minimum-maximum punishments, are extendable to socio-economic offences as in the case of traditional offences. The principal reason for the shift in the policy appears to be that courts seldom award sentences which would have a deterrent effect, particularly in certain types of socio-economic offences that are necessarily to be dealt with sternly in the interest of the society.
- b. In case of heinous crimes, the problem remains as the particular statute that prescribes a minimum, instead of a maximum sentence, compels the court to impose the minimum sentence<sup>66</sup>.
- c. Handing down lenient sentences to guilty individuals, has been a problem faced by the courts and the criminal justice system for a very long time. While the tide is slowly turning against the concept of deterrent punishment, there is as yet no consensus as to whether soft sentencing is a boon or bane. In America, there is an extremely powerful and influential lobby that believes in harsher sentencing policy, since they feel that criminals are getting away too lightly.
- d. A minimum requirement in a rational system is that there should be some degree of correspondence between the crime committed and crime for which the defendant is convicted. It is, true that inadequate sentences can do harm to the system.
- e. There is a constant interplay between the rights of the victims and that of the accused. When it comes to soft sentencing, the focus is undoubtedly on the victim and the victim's family which gives rise to restorative justice.
- f. There is thrust on investment in high-quality, community-based substance abuse and mental health treatment for the drug abusers, because of impossibility of traditional law enforcement and correction systems.
- g. The updated sentencing guidelines in US like Early Case Assessment and Referral system for policymakers and judges make administration of justice better, cost-effective for defendants, victims and communities, taken together.
- h. The improved capacity to conduct research on sentencing and correctional trends has ensured the effective and efficient use of correctional resources.

### Conclusion:

Different societies have approved different types of sanctions for different types of offences. With passing time, countries have adopted new penological jurisprudence and hence new thought of penology was developed, and the punishments in many legal systems have been streamlined and rationalized<sup>67</sup>. Presently, penal philosophy has reached to a level where there is more emphasis on reform of the criminal than on deterring him<sup>68</sup>. The legal pundits all over the world have been

66. For example, under Section 32 B of NDPS Act allows the Court to consider inter alia the use or threat of violence or arms by the offender impact on or use of minors in committing the offences, association with organised or International Criminal group to impose a punishment higher than the minimum term of imprisonment or amount of fine.

67. Roberts. Julian. R. and Hough. Mike.; 'Changing Attitudes to Punishments' Chapter 12. William Publications. (2013).

68. This fact is not universally true, because in respect of some forms of crimes, say for example socio – economic crimes, the approach of penal philosophy towards economic offenders needs to be stringent one, which must be adopted and implemented.

working to establish coherent set of principles for judicial sentencing, but fundamental question is as to what theory suits appropriate in a given case, while sentencing<sup>69</sup>. There seems to be a cocktail of all the theories, being utilised by sentencer while awarding punishment to offenders, but in some cases like white collar criminality, justice delivery should adopt advance deterrent approach<sup>70</sup>. Thus situation should be that Judge has to pass a legitimate expression in his denunciation of offenders' act by passing exemplary sentence<sup>71</sup>.

Leon Radzinowicz,<sup>72</sup> has rightly said:

The perplexities, conflicts and disagreements of judges on the point of executives of sentence cannot be so easily solved, but, they testify to an apparently ineradicable sense.

Lord Devlin,<sup>73</sup> on the nature of sentencing and sentencer has said:

...it is quite easy for the experienced judge to decide in a minute or two the length of sentence that matches the crime, but to decide what sort of reformatory treatment an individual criminal should have and how long it is likely to take is a different matter.

Speaking broadly, the ultimate desideratum of most sentences, followed by world community as described

above, is to make an offender a law abiding citizen. If judges impose effective sentences with the proper attitude and manner, they may decrease the rising number of criminals and quasi-criminal activities of nation<sup>74</sup>. Therefore, it means that sentencing is the scheme of law through which the offenders are punished<sup>75</sup>. Not surprisingly, it is also the most controversial, politically sensitive and also the least principled and coherent body of law. To recount the main purpose of legislature for providing scheme of sentences in a penal statute, following two broad principles reflect various aspects of punishment and are described here under:

*Firstly*, the system of punishment cannot be based exclusively on the basis of nature of the crimes committed, but must be conditioned by the personality of the offenders. The same kind of crime may be committed by entirely different types of criminals. Therefore, punishments must be suited to different categories of criminals.

*Secondly*, punishment must not only be a reaction against the crime itself, but must also aim at preventing the offender from committing further crimes. It is, therefore, obvious that if in certain crimes, the traditional punishment does not fulfil this function, it must be replaced by some other means<sup>76</sup>.

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69. Gupta. P.K. Sen, Evolution of Ancient Law in India p. 46 (1955).

70. Boas. Gideon, Chifflet. Pascale. International Criminal Justice Elgar Publications (2017). The author highlights that because the value system for such socio-economic crimes has changed much, a judge has to acquaint himself with the changing public opinion and he may prefer to award a heavy sentence than one prescribed ordinarily.

71. It is for the reason that the crucial juncture for a judicious sentencing is whether the protection of society and the prevention of crime which are the primary objective of sentencing.

72. Radzinowicz. Leon, The Growth of Crime, p. (1972).

73. News of the World, 5th Sept. 1965.

74. See Hiralal v. State of Bihar (1977) 4 SCC 44.

75. The sanctions available against criminal offenders target the most cherished and coveted individual interests, such as the right to liberty., because the sentencing process is the area of law where the state acts in its most coercive and intrusive manner.

76. Supra Note 172, pp. 244-245.