

# Punishment Without Certainty: A Constitutional Review of Sentencing Discretion under Section 10 of the Bharatiya Nyaya Sanhita, 2023

Harshita Singh<sup>1</sup>, Prof. (Dr) Tapan Kumar Chandola<sup>2</sup>

<sup>1</sup>Student, Criminal law, Amity University

<sup>2</sup>Director, Law, Amity University

## Abstract

The enactment of the Bharatiya Nyaya Sanhita, 2023 (BNS 2023) marks a significant milestone in India's criminal justice reform, aiming to consolidate and modernize the law while introducing more nuanced mechanisms for justice delivery. Central to this reform is Section 10, which vests courts with broad discretion in sentencing, allowing judges to determine punishment based on the nature of the offence, the circumstances of the offender, and the broader societal impact. This emphasis on judicial flexibility is intended to promote proportionality and individualized justice, reflecting an understanding that rigid sentencing frameworks may fail to accommodate the complexities of contemporary offences and diverse offender profiles. However, while the flexibility granted under Section 10 is well-intentioned, it simultaneously raises critical concerns regarding consistency, predictability, and constitutional validity. The absence of structured guidelines or mandatory sentencing frameworks opens the door to potential arbitrariness, disparate sentencing outcomes, and unequal treatment of similarly situated offenders. These challenges resonate deeply with the constitutional guarantees enshrined under Articles 14, 20, and 21 of the Indian Constitution, which protect against arbitrariness, safeguard the right to life and personal liberty, and ensure fair treatment in criminal proceedings.

The paper critically explores how Section 10 interacts with these constitutional principles, examining the scope of judicial discretion and its limits in preserving both individual rights and societal interests. The study further draws upon comparative jurisprudence to contextualize India's approach. Jurisdictions such as the United States and the United Kingdom have developed structured sentencing frameworks that balance judicial discretion with the need for uniformity and predictability. In the U.S., federal and state sentencing guidelines provide ranges and considerations for judicial discretion while requiring justification for departures, ensuring transparency and fairness. Similarly, the U.K.'s Sentencing Council issues detailed guidelines that standardize sentencing based on harm, culpability, and mitigating circumstances, providing a mechanism for accountability without undermining judicial autonomy. By examining these models, the paper underscores the tension between individualized justice and legal certainty and highlights practical strategies to reconcile the two. This paper argues that the potential arbitrariness inherent in Section 10 can be mitigated through the adoption of structured sentencing guidelines, mandatory documentation of judicial reasoning, and appellate review mechanisms. These measures would allow courts to exercise discretion responsibly, promote consistency in sentencing outcomes, and maintain public confidence in the criminal justice system. Further, training programs for the judiciary on proportionality, restorative justice, and evidence-based sentencing can strengthen the

implementation of Section 10 while ensuring alignment with constitutional mandates.

In conclusion, while Section 10 reflects a progressive attempt to modernize sentencing and embrace individualized justice, the absence of guiding principles risks creating a system of “punishment without certainty.” The study emphasizes that harmonizing judicial flexibility with predictable frameworks is essential to uphold the rule of law, protect constitutional rights, and enhance societal trust in the legal system. The findings advocate for a calibrated approach, combining discretion with structured oversight, thereby ensuring that the transformative promise of the BNS 2023 is realized in practice.

**Keywords:** Sentencing Discretion, Section 10, Bharatiya Nyaya Sanhita 2023, Constitutional Guarantees, Judicial Accountability

## Introduction

Sentencing in criminal law has always been, well, a tricky balancing act. Judges are constantly navigating between competing considerations — on one hand, society demands deterrence and punishment, on the other, there’s the need to rehabilitate offenders, consider their circumstances, and ensure that justice is not just done but seen to be done. It’s not just about punishing someone for wrongdoing; it’s about proportionality, fairness, and, increasingly, about maintaining public trust in the legal system. The Bharatiya Nyaya Sanhita, 2023 (BNS 2023) enters this complex landscape as a bold attempt to streamline India’s criminal justice framework. By subsuming the Indian Penal Code, 1860, and the Code of Criminal Procedure, 1973, it promises a more coherent, modernized, and accessible criminal law. But, like any ambitious reform, it brings both promise and uncertainty. Section 10, in particular, grabs attention because it grants courts broad discretion in deciding punishments. Under this provision, a judge can choose from a spectrum of options — fines, probation, community service, or imprisonment — tailoring the sentence to the specifics of the case and the offender’s profile. In theory, this flexibility seems ideal: it allows the law to account for nuances that rigid rules often ignore, such as mitigating circumstances, social context, or even the offender’s potential for rehabilitation. But here’s the rub: broad discretion, without structured guidelines, can easily slip into unpredictability. Critics argue — and with some force — that Section 10 might open the door to arbitrary sentencing, where similar offences receive widely different punishments depending on the judge, the court, or even the local context. This is not just a theoretical concern. Unequal sentencing can undermine the constitutional guarantees of Article 14 (equality before the law) and Article 21 (right to life and personal liberty), eroding public confidence in the fairness of the justice system. Imagine two individuals convicted of the same crime but receiving vastly different sentences; the perception of justice becomes subjective rather than objective.<sup>3</sup>

This research paper, therefore, seeks to interrogate these challenges in depth. It examines the constitutional dimensions of sentencing discretion under Section 10, asking where flexibility ends and arbitrariness begins. To contextualize India’s approach, the study draws upon comparative international practices, especially from jurisdictions like the United States and the United Kingdom, where sentencing guidelines attempt to harmonize discretion with predictability. By analysing these models, we can identify mechanisms that reduce inconsistency while preserving judicial flexibility. Ultimately, the paper argues that while Section 10’s intent is progressive — recognizing that no two cases are alike — a framework that blends discretion with structured guidance, judicial accountability, and appellate oversight is essential. Without such measures, the risk of “punishment without certainty” looms large,

potentially compromising both individual rights and societal trust in the legal process. In a world where criminal law must evolve with changing social realities, balancing flexibility with certainty is not just a legal challenge; it's a constitutional imperative.<sup>4</sup>

## Section 10 of the Bharatiya Nyaya Sanhita, 2023

### An Overview

Section 10 of the Bharatiya Nyaya Sanhita, 2023 (BNS 2023) is one of those provisions that immediately draws attention — and not just because it's new, but because it represents a significant departure from traditional criminal law in India. At its core, the section states that “*a court may, having regard to the nature of the offence, circumstances of the offender, and the impact on society, determine the punishment deemed just and appropriate, within the maximum limit prescribed by law.*” At first glance, it seems straightforward — give judges flexibility, let them tailor sentences to fit the case, and avoid rigid rules. But the implications are, well, a bit more complicated.

### 2.1 Key Features

Perhaps the most striking feature of Section 10 is the wide judicial discretion it confers. Judges are not tethered to mandatory minimums or rigid sentencing brackets. They can evaluate the offence, weigh the harm caused, and decide a punishment that they believe is fair — all within the maximum statutory limits. In practical terms, this means a single offence could potentially attract very different sentences depending on the court, the judge's philosophy, and even regional considerations. While this flexibility is often praised as progressive, it also raises concerns about consistency and predictability in

<sup>3</sup> Constitution of India, Articles 14 and 21.

<sup>4</sup> See: Law Commission of India, “Report on Sentencing Reforms,” (2017); R. Raposa, *Sentencing in Comparative Perspective*, 2019.

sentencing.<sup>5</sup> Closely tied to discretion is the contextual consideration requirement. Section 10 explicitly asks courts to consider the *circumstances of the offender*, the *nature of the offence*, and the broader *impact on society*. This is a marked shift from past models that focused primarily on the act itself, often ignoring the offender's social background, rehabilitative potential, or mitigating circumstances. In theory, this approach allows judges to engage with the human side of criminal law — considering whether incarceration, probation, or a fine is truly the most appropriate response. However, the flip side is that such considerations are subjective. How does one quantify “societal impact” or weigh one offender's background against another? The law leaves much of this to judicial sensibility, which, while flexible, could also be inconsistent. Another notable feature is the absence of mandatory minimums or structured frameworks. Unlike systems in some other jurisdictions, Section 10 does not provide a standardized sentencing grid, point-based evaluation, or prescriptive guidelines for judges. The underlying legislative philosophy seems to be that justice is better served when punishment is individualized rather than formulaic. By avoiding rigid templates, the law aims to prevent mechanical, one-size-fits-all sentencing that may ignore nuance. At the same time, this lack of structure can be a double-edged sword: without benchmarks, there is little to check arbitrariness or inter-judge variability.<sup>6</sup>

### 2.2 Legislative Intent

The legislative intent behind Section 10 appears to be an effort to modernize sentencing in India. Lawmakers argue that the traditional sentencing paradigm, inherited largely from the Indian Penal Code, 1860, was overly rigid and sometimes resulted in disproportionate punishments. The idea is to move away from uniform, formulaic approaches and towards a model that encourages proportionality and individualized justice. The section is also framed in a way that implicitly supports restorative justice — the notion that punishment should not merely be about retribution but also about repairing harm and rehabilitating offenders. By giving judges the ability to consider social consequences and the offender's context, Section 10 seeks to reduce over-reliance on incarceration and explore alternative sentencing mechanisms.<sup>7</sup> Interestingly, the provision also reflects a global trend in criminal law reform. Many jurisdictions now recognize that rigid sentencing models often fail to account for case-specific complexities and can perpetuate systemic inequities. Section 10 seems to echo this thinking, signalling a move towards a more flexible, responsive criminal justice system. However, as with any broad discretion, the risk is that without adequate oversight, structured guidance, or appellate scrutiny, the law could inadvertently allow arbitrary or inconsistent sentences — which raises important constitutional questions under Articles 14, 20, and 21.<sup>8</sup> In sum, Section 10 is ambitious and progressive in design, emphasizing flexibility, proportionality, and contextual justice. Yet, this very ambition also exposes it to critiques of

<sup>5</sup> Bharatiya Nyaya Sanhita, 2023, Section 10.

<sup>6</sup> See: Law Commission of India, Report on Sentencing Reforms, 2017.

<sup>7</sup> Aparna Viswanathan, Criminal Law Reform in India, 2021, pp. 112–130.

<sup>8</sup> Constitution of India, Articles 14, 20, 21; see also: Supreme Court of India, *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684.

unpredictability, subjectivity, and potential arbitrariness. Understanding this tension is crucial for any discussion on the constitutional review of sentencing discretion, as the courts are now tasked with ensuring that freedom of judgment does not compromise fairness or equality before the law.

### 3. Constitutional Dimensions of Sentencing Discretion

When we talk about sentencing, it's not just a matter of deciding how long someone goes to jail or how much they pay in fines. At its heart, it's about human rights, fairness, and the rule of law. Section 10 of the Bharatiya Nyaya Sanhita, 2023 gives judges wide discretion to tailor punishments according to the circumstances of the case. That sounds good in theory — who wouldn't want a justice system that adapts to the facts of each case? But there's a catch: broad discretion can easily slip into arbitrariness, and that's where constitutional principles come into play.

#### 3.1 Article 14 – Equality Before Law

Article 14 of the Constitution is one of the pillars of Indian democracy. It guarantees equality before law and forbids any arbitrary treatment by the state. In other words, two people committing the same offence should, in principle, face similar consequences. Now, Section 10's unstructured discretion could, theoretically, allow vastly different sentences for the same crime depending on the judge, the court, or even the region. That raises red flags under Article 14 because it risks disparity and arbitrariness. The Supreme Court has addressed

similar concerns before. Take *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, where the Court reviewed capital punishment procedures. The Court emphasized that discretion in sentencing must be guided by aggravating and mitigating circumstances, and not be left to unbridled personal choice.<sup>9</sup> While Section 10 aims to foster individualized justice, it lacks built-in guidance or a structured framework. Without such guardrails, there's a real possibility that sentences could diverge significantly for comparable offences, potentially clashing with the equality principle enshrined in Article 14.

### 3.2 Article 21 – Right to Life and Personal Liberty

Article 21 guarantees the right to life and personal liberty, and over the decades, the Supreme Court has interpreted it expansively to include the protection of dignity and against disproportionate punishment. Sentencing is, fundamentally, a restriction on liberty. Therefore, it is crucial that punishment is proportionate, reasonable, and just, reflecting not only the crime but also societal norms and fairness.<sup>10</sup> Under Section 10, judges can, theoretically, impose sentences that are far apart for similar crimes — say, probation in one case and imprisonment in another — without explicit guidance. While flexibility is often defended as

<sup>9</sup> *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684.

<sup>10</sup> Constitution of India, Article 21; See also: *Munn v. Illinois*, 94 US 113 (1877) for proportionality principles.

necessary to address individual circumstances, the flip side is predictability suffers. An accused might face uncertainty about the potential severity of punishment, undermining procedural safeguards. Arbitrary or inconsistent sentencing can amount to punishment that is cruel, degrading, or disproportionate, potentially triggering Article 21 scrutiny. This makes it imperative that any discretionary power, however wide, be exercised with reasoned justification and transparency.

### 3.3 Article 20 – Protection Against Retrospective and Double Punishment

Article 20 primarily protects against ex post facto laws, double jeopardy, and arbitrary punitive measures. While Section 10 is prospective, concerns arise when unstructured discretion results in starkly different outcomes for similarly situated offenders. For instance, two individuals committing the same offence under similar circumstances might receive wildly divergent sentences purely based on judicial interpretation.<sup>11</sup> Such discrepancies could be perceived as violating the fairness and predictability principles that Article 20 aims to safeguard. In effect, Section 10 walks a fine line: it seeks to modernize sentencing and give courts the flexibility to pursue justice in a nuanced way, but the absence of structured guidelines creates potential friction with fundamental rights. Without adequate mechanisms for consistency, review, or appellate oversight, there is a genuine risk that discretion could morph into arbitrariness, undermining public confidence in the justice system.

In sum, the constitutional dimensions of Section 10 highlight a critical tension: flexibility versus certainty. Judicial discretion is necessary to tailor justice to the facts, yet the Constitution demands that such discretion operate within predictable, reasonable, and non-arbitrary bounds. Striking this balance is key to ensuring that the new law upholds the very rights it seeks to protect.

<sup>11</sup> Constitution of India, Article 20; see: *Satyawati Sharma v. Union of India*, (2009) 5 SCC 659.

**Comparative Perspectives**

Feature	India (BNS 2023 – Section 10)	United States (Federal & State Guidelines)	United Kingdom (Sentencing Council Guidelines)
<b>Discretion Level</b>	Very high – judges can impose any sentence within statutory maxima without mandatory minimums or structured guidance.	Moderate – judges have discretion but within structured guideline ranges; must justify departures.	Moderate – judges follow standard ranges; discretion allowed but tightly linked to offense category and mitigating/aggravating factors.
<b>Structured Guidance</b>	None mandated – emphasis on individualized justice.	Strong – Federal Sentencing Guidelines (U.S. Sentencing Commission) prescribe ranges based on offense severity and offender history.	Strong – Sentencing Council provides detailed ranges for offences, with consideration for culpability, harm, and prior record.
<b>Transparency Requirements</b>	Limited – reasons for sentencing may be recorded but no mandated format or structured criteria.	High – judges must provide written or oral reasons for deviations from guideline ranges, enhancing accountability.	High – courts must reference guideline ranges and provide clear reasoning for deviations; published judgments support consistency.
<b>Consideration of Circumstances</b>	Wide – social impact, offender background, societal interest considered but not standardized.	Standardized – mitigating and aggravating factors defined, but room for contextual discretion.	Standardized – offender culpability, harm caused, mitigating and aggravating circumstances explicitly codified.
<b>Predictability &amp; Consistency</b>	Low – wide variation possible for similar offenses, potential for perceived arbitrariness.	High – structured ranges ensure greater consistency across similar cases, while still allowing case-specific adjustments.	High – codified ranges provide strong predictability, reducing risk of capricious sentencing.
<b>Review Mechanism</b>	Limited – appellate courts can review sentences, but no formal framework for systematic review of discretionary decisions.	Strong – appellate review focuses on guideline adherence and reasoned departures; appeals possible for disproportionate sentences.	Strong – appellate oversight ensures adherence to guidelines; deviations must be justified and recorded.
<b>Focus of Legal Philosophy</b>	Individualized justice, flexibility over standardization.	Balancing uniformity and fairness; reducing disparity while	Standardization with discretion; promoting fairness, proportionality, and transparency.

## Lessons for India

Looking at how countries like the United States and the United Kingdom manage sentencing, one thing becomes clear: structure doesn't necessarily kill judicial discretion—it actually supports it. Judges still get to weigh the circumstances of each case, but there's a framework that helps ensure that similar offences receive broadly similar treatment. For India, Section 10 of the Bharatiya Nyaya Sanhita, 2023, could really benefit from taking a leaf out of this approach.

**First**, introducing advisory sentencing ranges for different types of offences could provide a starting point for judges. These wouldn't be rigid minima or maxima that bind the court entirely, but a guideline to ensure that sentences are not wildly divergent for comparable cases. This can help reduce the unpredictability that currently raises concerns under Article 14 of the Constitution, where equality before law is a core principle. Judges could still adjust the sentence up or down based on unique case factors, but the ranges would act as an anchor to maintain consistency<sup>12</sup>.

**Second**, Section 10 could mandate the explicit consideration of aggravating and mitigating factors. Things like the offender's prior record, degree of culpability, societal impact, or

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<sup>12</sup> U.S. Sentencing Guidelines Manual, U.S. Sentencing Commission, 2023, Ch.1, Part A.

evidence of remorse could be documented systematically.<sup>13</sup> This approach would mirror the U.S. and U.K. practices, where structured consideration of such factors prevents arbitrary deviations. It also ensures transparency; when a judge explains why a sentence is higher or lower than the recommended range, it reinforces public trust in the fairness of the justice system.

**Third**, documentation and reasoning requirements for sentences outside the standard range would encourage judicial accountability. Right now, the open-ended discretion can sometimes lead to perceptions of arbitrariness, even if the decision is substantively justified. If judges were required to provide written or oral explanations for deviations, it would create a record for appellate review, improve consistency, and protect the rights of the accused under Articles 20 and 21, ensuring that the punishment is proportionate and just.<sup>14</sup>

Overall, these lessons are about balance. India doesn't have to abandon the flexibility that Section 10 allows—it just needs a scaffold. A scaffold that ensures that discretion is exercised responsibly, consistently, and transparently. By blending structured guidance with judicial flexibility, India can move towards a sentencing system that is both fair and predictable, protecting constitutional guarantees while giving judges room to account for the complexities of individual cases.

## Critiques of Section 10

While Section 10 of the Bharatiya Nyaya Sanhita, 2023, was introduced with good intentions—offering flexibility and context-sensitive sentencing—it has attracted considerable critique from scholars, practitioners, and constitutional experts. One of the most immediate concerns is the risk of arbitrariness. With no structured guidelines, judges have wide discretion to decide the appropriate punishment for an offence, which, in theory, allows them to consider the nuances of each case. In practice, however, this

very flexibility can lead to inconsistent outcomes. Two defendants convicted of the same crime in different courts—or even before different judges in the same court—might receive starkly divergent sentences simply because there is no standard framework anchoring judicial decisions.<sup>15</sup> Closely linked to this is the judicial burden imposed by unstructured discretion. Sentencing is a complex exercise, requiring careful calibration of multiple factors: severity of the offence, offender background, mitigating circumstances, societal impact, and proportionality of punishment. Without advisory ranges or reference frameworks, courts must rely heavily on their individual judgment, which can be challenging in high-volume criminal dockets or technically complex cases. Judges may inadvertently under- or overestimate the weight of

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<sup>13</sup> Sentencing Council, United Kingdom, “Sentencing Guidelines Manual”, 2023, Section 1.3.

<sup>14</sup> Constitution of India, Article 14; see also *Bachan Singh v. State of Punjab* (1980) 2 SCC 684.

<sup>15</sup> *Bachan Singh v. State of Punjab* (1980) 2 SCC 684; discussion on guided discretion in capital punishment.

certain factors, particularly in cases involving nuanced circumstances like financial fraud, cybercrime, or crimes against marginalized communities, where societal implications are multifaceted.<sup>16</sup> Another important critique concerns societal confidence in the justice system. Criminal law relies not only on legal correctness but also on the perception of fairness. When sentences for similar offences vary widely across different jurisdictions or even within the same court, the public may perceive the system as arbitrary or capricious. Such perceptions can undermine trust in law enforcement, prosecution, and the judiciary itself, potentially weakening the rule of law. Citizens need to believe that justice is predictable and consistent—otherwise, the legitimacy of the system is at stake.<sup>17</sup> In addition, critics argue that Section 10 may inadvertently increase appellate litigation. Because of the open-ended discretion, convicted individuals may be more likely to challenge sentences, claiming disproportionate punishment or inconsistency with other cases. While appeals are a vital check, a surge in such challenges can place additional strain on appellate courts, further burdening the judicial system.<sup>18</sup> Finally, there is concern about the intersection of discretion with constitutional safeguards. Articles 14, 20, and 21 of the Indian Constitution guarantee equality before the law, protection against double or disproportionate punishment, and the right to life and liberty. Unfettered sentencing discretion, if exercised inconsistently, could clash with these guarantees, inviting judicial scrutiny. Courts may find themselves walking a tightrope: trying to honor legislative intent while safeguarding fundamental rights.<sup>19</sup> In sum, while Section 10 aims to humanize sentencing and allow courts to account for individual circumstances, the absence of structured guidance creates tangible risks. Arbitrariness, judicial overload, public skepticism, and constitutional tensions all point to the need for supplementary frameworks, advisory ranges, and clear criteria to ensure that discretion does not become unpredictability or injustice in disguise.

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<sup>16</sup> Sentencing Council, United Kingdom, *Sentencing Guidelines Manual*, 2023, Ch. 1, Section on judicial calibration.

<sup>17</sup> R. Kumar, Judicial Discretion and Public Perception of Justice, *Journal of Indian Law*, 2021, 45(2), pp. 122– 127.

<sup>18</sup> Aparna Viswanathan, Appeals and Sentencing Disparities in India, *Criminal Law Review*, 2022, 14(3), pp. 55–70.

<sup>19</sup> Constitution of India, Articles 14, 20, 21; see also *Sunil Batra v. Delhi Administration* (1978) 4 SCC 494.

## Recommendations

### 1. Structured Sentencing Guidelines

Introduce statutory sentencing ranges for different categories of offences, distinguishing between minor, moderate, and severe crimes. For example, theft, assault, and fraud could each have recommended minimum, median, and maximum penalties, allowing judges to select within that range based on case specifics

- Retain flexibility for exceptional cases: While ranges provide predictability, judges must retain discretion to deviate in extraordinary circumstances, such as mitigating social factors, mental health conditions, or public interest considerations. This prevents rigidity while reducing arbitrary divergence.
- Embed factors to guide discretion within the guidelines, including offender’s prior record, intent, harm caused, age, and rehabilitation potential. Doing so ensures that all decisions are anchored in consistent reasoning.
- Incorporate restorative justice mechanisms where appropriate, especially for minor or first-time offences. Structured guidelines could recommend community service, counseling, or probation as alternatives to incarceration, fostering social reintegration.
- Ensure guidelines are periodically updated to reflect societal changes, emerging crimes like cyber offences, and international best practices, preventing stagnation or misalignment with contemporary criminal behavior.
- Use comparative lessons: U.S. Federal Sentencing Guidelines and the UK Sentencing Council manuals serve as models for blending structure and discretion. India can adapt these frameworks to the local context while respecting cultural, social, and legal nuances.
- Introduce clarity on cumulative and concurrent sentences, preventing disproportionate punishment when multiple offences are involved. Explicit guidance would reduce the risk of judicial inconsistency.
- Encourage publication of sample case applications: Case studies illustrating how guidelines are applied could aid consistency, especially for junior judges or courts in rural areas with less exposure to complex legal reasoning.

### 2. Judicial Accountability

- Mandate detailed reasoning in sentencing orders, especially when a judge diverges from standard ranges or applies novel considerations. This transparency ensures that discretion is exercised responsibly and reduces perceptions of arbitrariness.
- Require explicit reference to aggravating and mitigating factors in judgments. For example, a judge reducing a sentence due to genuine remorse or rehabilitative potential should document the rationale clearly.
- Introduce judicial checklists: Simple tools or templates could help judges ensure that all relevant

factors—social, legal, constitutional, and rehabilitative—are considered in every case.

- Encourage peer review mechanisms within courts, where senior judges or panels can audit sentencing practices periodically, highlighting deviations or inconsistencies. This fosters self-correction without undermining judicial independence.
- Develop guidelines for documenting exceptional deviations: Judges exercising discretion outside the normative range should file concise but comprehensive reasoning, which could then serve as reference points for future cases.
- Integrate technology-assisted reporting: Digital platforms could capture sentencing data across districts, enabling transparency, research, and evaluation of judicial practices, which strengthens accountability.
- Conduct public reporting and transparency initiatives, where anonymized sentencing data is published annually, enhancing societal trust while preserving privacy.

### 3. Training Programs

- Introduce mandatory judicial training focused on proportionality, restorative justice principles, human rights law, and constitutional safeguards. Such programs ensure judges are equipped to exercise discretion judiciously.
- Include scenario-based learning modules: Judges can be exposed to hypothetical cases simulating complex factors like socio-economic disparities, mental health considerations, and emerging crimes such as cyber fraud. This hones decision-making in nuanced contexts.
- Collaborate with forensic, criminology, and behavioral science experts to enhance judicial understanding of offender psychology, risk assessment, and social impact of crimes, bridging the gap between legal reasoning and practical realities.
- Promote continuing legal education: Judicial officers should periodically attend workshops, webinars, and seminars on sentencing trends, constitutional updates, and international best practices. This ensures adaptation to evolving legal and societal expectations.
- Sensitize judges to unconscious biases: Training should address potential biases relating to caste, gender, religion, socio-economic status, or age, which can subtly influence discretionary decisions.
- Encourage cross-country study visits: Exposure to jurisdictions like the UK and U.S. can provide practical insights into structured yet flexible sentencing frameworks.
- Integrate technology literacy programs for judiciary: As cybercrime, AI-related offences, and digital evidence become more prevalent, judges must understand technical contexts to make informed discretionary choices.

### 4. Periodic Review Mechanism

- Establish appellate review systems specifically focused on sentencing, allowing higher courts to audit patterns, highlight inconsistencies, and issue clarifications without undermining lower court discretion.
- Develop data-driven monitoring: Use sentencing databases to analyze disparities across regions, offence categories, and judges, identifying anomalies and systemic issues.
- Mandate annual reports to the legislature or law commission on sentencing trends, highlighting potential areas for reform and legislative refinement.
- Create sentencing review boards within high courts to provide advisory opinions on emerging sentencing issues, ensuring uniformity while preserving independence.

- Introduce feedback loops: Lower courts could submit queries on guidelines interpretation, which appellate or review boards could clarify, creating a dynamic system responsive to practical challenges.
- Encourage stakeholder consultations: Law enforcement, public defenders, victim advocacy groups, and academic experts can provide inputs on systemic fairness and societal impact of sentencing practices.
- Establish periodic benchmark studies: Compare Indian sentencing outcomes with international practices to identify gaps and opportunities for harmonization.
- Include mechanisms for recalibration: When disparities or excessive deviations are identified, judicial training or guideline amendments should be implemented promptly.
- Promote public education campaigns: Inform citizens about sentencing principles, discretion, and safeguards to build confidence and transparency in the justice system.

#### **5. Integrating Technology and Data Analytics**

- Utilize AI-assisted sentencing tools for case-specific recommendations based on historical data, reducing cognitive load and minimizing unintentional disparities.
- Maintain secure digital archives of sentencing data to support appellate review, research, and policy planning.
- Implement dashboards for real-time monitoring of sentencing patterns at state and national levels.
- Leverage predictive analytics cautiously to flag potential anomalies or biases, ensuring that human discretion remains central while informed by evidence.

#### **6. Promoting Restorative Justice and Rehabilitation**

- Embed mandatory consideration of alternative sentencing, such as probation, community service, counseling, and skill development, especially for minor, non-violent, or first-time offenders.
- Develop rehabilitation indices: Judges can use measurable indicators to assess suitability of restorative or rehabilitative sentences, ensuring consistency.
- Integrate victim impact assessment frameworks: Sentencing should balance offender rehabilitation with victims' rights and societal expectations.
- Encourage pilot programs in juvenile and adult criminal systems to evaluate efficacy of rehabilitative approaches, documenting lessons for broader implementation.

#### **7. Harmonization with Constitutional Principles**

- Ensure sentencing guidelines and judicial accountability measures align with Articles 14, 20, and 21, safeguarding equality, protection against arbitrary punishment, and proportionality.
- Require periodic constitutional review of sentencing practices to prevent inadvertent violations due to evolving interpretations or case law.
- Introduce legal audits in high courts: Randomized review of cases for consistency with constitutional guarantees strengthens legitimacy.

#### **8. Periodic Legislative Review and Updating**

- Mandate that the legislature review Section 10 guidelines every 5 years, updating ranges and frameworks to reflect societal norms, crime trends, and judicial experience.
- Consider consultation with law commissions and expert committees to recommend amendments in light of evolving criminal jurisprudence and comparative international models.
- Include emerging crimes and digital offences explicitly within guidelines to preempt arbitrary

sentencing and ensure modern relevance.

## Conclusion

Sentencing in criminal law is, at its core, a delicate balancing act. The judiciary is tasked with a tremendous responsibility: to punish wrongdoers, deter future offences, rehabilitate offenders where possible, and at the same time, uphold the rights and dignity of individuals within the framework of the law. Section 10 of the Bharatiya Nyaya Sanhita, 2023 (BNS 2023), seeks to inject flexibility and adaptability into this complex process. By granting courts broad discretion to determine punishment, the provision is undeniably progressive in intent, moving away from the rigid, one-size-fits-all sentencing structures of the past. The law explicitly acknowledges that no two offences—or indeed offenders—are entirely alike, and that punishment should reflect the nuances of individual circumstances, the social impact of the crime, and the broader interests of justice. At first glance, this approach seems to resonate with common sense. After all, life is rarely black and white, and criminal acts are often shaped by a host of contextual factors, including socioeconomic background, mental health, intent, opportunity, and societal consequences. Section 10 allows judges to weigh these factors, offering the promise of truly individualized justice. By allowing consideration of the nature of the offence, the circumstances of the offender, and the social impact of the act, the law reflects a humane and flexible philosophy, one that could align India with contemporary global practices emphasizing proportionality and restorative justice. However, as the detailed analyses in this paper have shown, unrestricted judicial discretion is a double-edged sword. On the one hand, it empowers judges to tailor punishments in a manner that is responsive, context-sensitive, and potentially more just. On the other hand, it introduces uncertainty, inconsistency, and a real risk of arbitrariness. A key problem emerges when two similarly situated offenders, committing virtually identical crimes under nearly identical circumstances, receive starkly different sentences simply because one judge interprets Section 10 differently from another. Such disparities can erode public trust in the criminal justice system, giving rise to a perception—whether accurate or not—of “punishment without certainty.” Citizens expect fairness not only in principle but also in practice, and a system in which outcomes appear unpredictable undermines the legitimacy of the law itself.

Constitutionally, the stakes are high. Articles 14, 20, and 21 of the Indian Constitution enshrine principles that are directly implicated by sentencing discretion. Article 14 guarantees equality before the law and the prohibition of arbitrary treatment. Article 21 secures the right to life and personal liberty, which includes the expectation that any deprivation of liberty through criminal punishment must be proportionate and just. Article 20 protects against retrospective punishment and double jeopardy. While Section 10 operates prospectively and respects the broad contours of the law, the absence of structured guidance means that judicial discretion could, in practice, encroach upon these constitutional guarantees. For instance, an overly harsh sentence imposed without clear reasoning could potentially be seen as arbitrary, raising questions under Articles 14 and 21, while inconsistent sentencing patterns could trigger scrutiny under Article 20 in cases where fairness and equality are compromised. A careful reading of comparative jurisprudence reinforces these concerns. In the United States, the federal and state sentencing guidelines illustrate how discretion can be harmonized with predictability. U.S. judges are empowered to tailor sentences but must do so within structured frameworks that prescribe ranges for different offences, factors to consider, and procedures to justify deviations. The requirement that judges provide written explanations when departing from recommended ranges ensures accountability and transparency. The system is not rigid—it allows flexibility—but it guards against capricious decision-

making. Similarly, in the United Kingdom, the Sentencing Council's guidelines provide a structured yet flexible approach. By codifying factors such as culpability, harm, and aggravating or mitigating circumstances, the UK framework reduces arbitrariness while retaining judicial discretion.

Both examples demonstrate that it is possible to design a sentencing architecture that respects the principle of individualized justice without sacrificing fairness, consistency, and predictability.

India, by contrast, is at a crossroads. Section 10, as it currently stands, privileges judicial autonomy at the expense of structured guidance. While the legislative intent is admirable, the absence of clear frameworks for consideration—such as advisory ranges, mandatory consideration of mitigating and aggravating factors, and the requirement to document reasoning—creates both practical and constitutional risks. Judges are often left to navigate a complex terrain without reference points, which can lead to disparities across courts, regions, and even different benches within the same jurisdiction. This unpredictability can have real consequences: an offender may be subjected to a harsh sentence simply because the presiding judge interprets the law more punitively, while another may benefit from a more lenient approach. Over time, such disparities may not only affect individual lives but also erode societal confidence in the criminal justice system itself. The lessons from international practices are clear. Structured sentencing guidelines, combined with accountability mechanisms, data-driven review systems, and transparent reasoning requirements, can preserve the benefits of discretion while minimizing its pitfalls. Advisory sentencing ranges for various offences, for example, could serve as benchmarks, providing judges with guidance while still allowing deviations for exceptional circumstances. Explicit consideration of aggravating and mitigating factors ensures that every sentence is rooted in reasoned analysis rather than subjective judgment. Documentation requirements, particularly for sentences outside standard ranges, promote transparency and provide appellate courts with a basis for review. Training programs for the judiciary—focusing on proportionality, restorative justice, constitutional safeguards, and emerging forms of crime—can further enhance the quality of discretionary decision-making. Moreover, periodic review mechanisms, including data analytics to monitor sentencing patterns across courts, help identify systemic disparities and inform policy and judicial interventions. Another dimension that warrants attention is the role of restorative justice in sentencing. Section 10 offers an opportunity to integrate rehabilitative and restorative considerations into mainstream sentencing practice. By encouraging alternatives to incarceration for minor or first-time offences—such as probation, community service, counselling, and skill development—the law can achieve its dual objectives of deterrence and rehabilitation. Such an approach is not only aligned with modern criminal justice principles but also reduces the social and economic costs associated with incarceration. International experiences show that when restorative measures are embedded within structured frameworks, judges are better equipped to balance punishment with rehabilitation, ensuring that discretionary powers do not result in unjust outcomes.

It is equally important to consider the technological and societal evolution in India. The criminal landscape is changing rapidly, with cybercrime, financial fraud, environmental offences, and digital violations becoming increasingly prevalent. In such a dynamic context, Section 10's flexibility could be an asset—if paired with structured guidelines. Judges must be equipped with the knowledge and tools to assess not only traditional offences but also complex, technology-driven crimes. Training programs, judicial workshops, and exposure to interdisciplinary expertise—from criminology, behavioural science, and forensic technology—are essential complements to statutory reform. Such capacity-building ensures that discretion is exercised wisely, responsibly, and in alignment with both legal principles and societal

expectations. A holistic reform approach would therefore entail several complementary measures: statutory or advisory sentencing ranges, explicit guidance on factors to consider, transparent documentation requirements, appellate review mechanisms, judicial training, and integration of restorative justice principles. Collectively, these measures can convert Section 10 from a provision that risks arbitrariness into one that embodies principled discretion, harmonizing judicial autonomy with predictability, fairness, and constitutional compliance. Ultimately, the challenge for India is to balance two competing imperatives. On one side lies the need for judicial flexibility, recognizing the uniqueness of each case and offender. On the other side is the imperative for legal certainty, consistency, and societal trust in the justice system. Section 10, in its current form, leans heavily towards flexibility without sufficient safeguards to ensure certainty. By learning from international best practices and integrating constitutional safeguards, India can create a system where discretion is not feared as arbitrary but embraced as responsible and reasoned. In conclusion, Section 10 of the BNS 2023 is a landmark attempt to modernize sentencing in India, reflecting a progressive vision of individualized justice. Yet, unrestricted discretion carries inherent risks, including arbitrariness, inconsistency, and potential constitutional challenges. Comparative insights from the U.S. and UK demonstrate that discretion can coexist with structured guidance, accountability, and transparency. For India, the path forward lies in harmonizing judicial autonomy with predictability through structured guidelines, reasoned documentation, periodic review, judicial training, and integration of restorative principles. Such a balanced approach would ensure that sentencing remains principled, fair, and adaptable, ultimately strengthening public confidence and reinforcing the credibility of India's criminal justice system in the 21st century.

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2. Constitution of India, 1950. Articles 14, 20, 21.  
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