

The Function of Sentencing Guidelines in English Criminal Justice System

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Abstract

At present, criminal discretion is rife throughout the criminal justice system in UK. Thus, it seems like that, pursuing consistency through sentencing guidelines is with little point. However, this essay holds the opinion that, despite the considerable amount of discretion in the criminal justice system, sentencing guidelines are not rendered futile. They are essential to maintaining consistency and upholding the rule of law.

Keywords

Sentencing guidelines; Discretion; Criminal justice system.

1. Introduction

In order to ensure judicial sentencing is within a clear range, sentencing guidelines are employed by many countries for judges to follow. At present, criminal discretion is rife throughout the criminal justice system such that sentencing guidelines may not fulfill their primary function in ensuring consistency in sentencing. This essay claims that sentencing guidelines are essential to ensuring consistency in the sentencing stage. But prior- and post-sentencing, there is little point pursuing consistency through sentencing guidelines because of the substantial level of discretion throughout the rest of the justice system. This essay is divided into four parts. The first will discuss the concepts of criminal discretion, sentencing guidelines and consistency. The relationship between criminal discretion and consistency will also be discussed in this part. The second will demonstrate that pursuing consistency in sentencing guidelines at the stages of prior-sentencing and post-sentencing is somewhat futile, because criminal discretion is widespread at both of these two stages – in this essay, the role of the police, prosecution, and parole board are discussed to demonstrate the vast range of discretionary powers available beyond sentencing. Nonetheless, the third part will illustrate how sentencing guidelines improve consistency in the stage of sentencing, which is in itself valuable despite discretion throughout the rest of the justice system, although the sentencing guidelines are not always consistent, and do not necessarily ensure consistency even in sentencing. Finally, this essay contrasts the previous discussions to highlight that sentencing guidelines are necessary to ensure consistency, and can help remedy failings in the rest of the justice system, even if they are only a small measure in ensuring consistency overall.

2. Concepts

This part will briefly discuss the main concepts deployed in this essay, including criminal discretion, sentencing guidelines and consistency. Illustrating the connotations of these concepts is helpful for the later discussion about the relationship between them.

2.1. Criminal discretion

According to The New Oxford Companion On Law, discretionary power means the power to make a discretionary decision which is just, equitable, correct, fair and reasonable in the

circumstances. The law often confers on judicial officers the power or duty to ensure that they can exercise their discretion in certain circumstances. Criminal discretion is rife throughout the criminal justice system because elements of the criminal justice system such as law enforcement officers, prosecuting attorneys, judges, correction officers and probation officers are all faced with discretionary decision-making throughout the criminal justice process. For example, law enforcement officers share the rights to choose from a variety of alternative actions in order to resolve certain situations caused by unclear laws, nuisance behavior, ambiguity in state statutes, moral standards, and outdated laws. Prosecutors may offer a variety of plea agreements including suspended sentences, probation, or substantial assistance. The discretion of judges is of course even wider, including issuing warrants, supervising pretrial activity, presiding over hearings and trial, deciding guilt or innocence in some cases, and passing sentences on those convicted.

2.2. Sentencing Guidelines

Sentencing guidelines are for the most significant offences sentenced in magistrates' courts and also for most sentencing decisions in the Crown Court (as well as guidelines on general principles and on youth sentencing). The essence of sentencing guidelines is to provide ranges of sentences for different levels of seriousness of each type of offence, and within each range, to indicate a common starting point. The aim is to structure judicial discretion - not to take it away, but to provide a framework within which the court can locate the particular offence with which it is dealing, and then reflect the facts of that case (notably, aggravating and mitigating factors) by placing it appropriately within or outside the relevant range.

Since the 1970s, the English Court of Appeal has developed several offence-specific sentencing guidelines in jurisprudence to assist judges in dealing with similar cases. Early examples were *Willis* (on buggery), *Turner* (on armed robbery) and *Taylor* (on unlawful sexual intercourse). The first guideline judgment issued by a Lord Chief Justice was that for a drug offence, in *Aramah*. Most sentencing decisions do not deal with points of law or generate precedents in the sense familiar from other branches of law. They simply provide guidance as to the appropriateness or otherwise of a particular sentence passed in the lower court. Such cases tend to be very fact-specific, and hence are of limited precedent value. To solve this problem, the Crime and Disorder Act 1998 created a Sentencing Advisory Panel to draft guidelines, consult widely on them, and then advise the Court of Appeal about the form that they should take. Then, the Sentencing Guidelines Council (SGC) was established under the 2003 Act to replace the Court of Appeal in the publication of sentencing guidelines, with the Sentencing Advisory Panel remaining responsible for the drafting and validation of the sentencing. Finally, the Coroners and Justice Act 2009 created a new single body, the Sentencing Council, to undertake all the relevant tasks.

Now, there are now dozens of sentencing guidance documents in the UK, broadly grouped into two categories. Firstly, there are guides on the basic principles of sentencing, such as *Overarching Principles: Seriousness*. Secondly, sentencing guidelines for specific types of offence or specific subject offence, such as the *Overarching Principles: Domestic Abuse* and the *Definitive Guideline for Sentencing Children and Young People*. Although these guidelines are not mandatory, every criminal court judge must be aware of and familiar with them and follow them in the specific sentencing process. If they impose a sentence that does not follow the guidelines, they must publicly explain in court why they have set a sentence that does not do so.

2.3. Consistency and the relationship between consistency and criminal discretion

According to Sentencing Council's Analytic Note: *The Resource Effects of Increased Consistency in Sentencing*, there is no universally accepted definition of consistency in sentencing. The

general concept is clear, however: similar offenders who commit similar offences in similar circumstances would be expected to receive similar sentencing outcomes.

Furthermore, consistency is the result of a balance between judicial discretion and sentencing guidelines. Since the power of discretion is given to judges, within any offence type, a wide range of sentencing outcomes would be expected due to variations in offenders' characteristics and the severity of offences. As the American scholar Lawrence Baxter notes, "while broad or unconfined discretion might lead to convenience ... [it also leads to] potential abuse of these powers..." Thus, sentencing guidelines were introduced to limit discretion, perhaps consistent with principles of the rule of law constraining unlimited judicial discretion. However, on the other hand, if a judge only has the right to rigidly apply provisions, the result will be a mechanical judgment, which is not only detrimental to the implementation of the outcome of discretion, but also fails to achieve legislative intent – again, potentially infringing on the rule of law. This is because the provisions of law are limited and cannot deal with all situations in actual cases. Thus, in the judicial system, discretion and sentencing opinions are both essential. It is the exercise of the judge's discretion within the sentencing range set by sentencing guidelines that results in similar, but not completely identical, treatment of similar cases that may ensure consistency.

3. Discretion in the Criminal Justice System Prior to Sentencing, and Post-Sentencing

The fact is that judicial discretion in sentencing may only play a role once a case comes to the sentencing stage. There are, however, a number of areas in which discretion plays a role in the criminal justice system, long before one reaches the sentencing stage. Indeed, as Ashworth notes, a majority of crimes are never reported; or lack sufficient evidence to identify a suspect. On top of this, a range of bodies, including the police and Crown Prosecution Service, have discretion as to whether an individual is to come before the court in the first place, all of which obviously go beyond the remit of sentencing guidelines. Furthermore, after sentencing, there are also many bodies, including the Parole Board and Probation Service, who can exercise discretion as to how the sentence imposed on an offender is to be enforced. This part will discuss discretion at the stages of prior-sentencing and post-sentencing separately, in order to prove the point that it makes little sense to pursue consistency in sentencing guidelines if the rest of the criminal justice system does not follow suit.

3.1. Discretion in the Criminal Justice System Before Sentencing

3.1.1. Police's Discretion

In the UK, the police are independent in investigating cases and are not directed by prosecutors. Under the Prosecution of Offences Act 1985, the Crown Prosecution Service has no investigative function. Their primary function is to prosecute and therefore the CPS has no power to direct the police in investigating cases. In minor cases, the police have a broad discretion to issue a penalty order or impose a formal caution at the police station or on the spot, thereby saving the person concerned from prosecution. Statistics show that in 2000, a total of 239,000 cautions were issued to offenders for all offences in England and Wales, except motor vehicle offences. This represents a third of all offenders, including those convicted of offences, which shows the extent of its discretionary powers.

Even in more severe cases, the police enjoy considerable discretion as to dealing with the offence – with limited resources, the police cannot pursue literally every crime or every suspect. In 2000, more than 1,700 convicted of the most severe crimes, such as rape, robbery and attempted murder, were punished with a caution. Also, when proceedings need to be pursued, it is often the police who initiate the proceedings. It is evident that the police have the power to

investigate cases independently and have the power to adopt different prosecutorial processes. It is thus clear that the discretion of the British police is broad, designed both substantively and procedurally. This is clearly beyond the scope of control of the sentencing guidelines, and means that even before the CPS gets involved in a case, the actions of individual police officers can greatly impact a suspect's chances of being convicted.

3.1.2. Crown Prosecution Service's Discretion

In the UK, before making the decision to prosecute, the prosecutor must consider two tests. First is the evidential test, whereby the prosecutor may not prosecute if there is insufficient evidence that the defendant may be acquitted. According to Provision 4.23 of the Director's Guidance on Charging, prosecutors will be proactive in identifying and (where possible) seeking to rectify evidential weaknesses, and in bringing to an early conclusion those cases that cannot be strengthened by further investigation. The second is a public interest review, where the prosecutor needs to consider whether the prosecution is in the public interest, for example, by considering the impact of the prosecution on public morality and public policy. According to statistics, prosecutors' discretionary decisions not to prosecute account for 12 per cent of all cases, of which 70 per cent are not prosecuted for insufficient evidence (again, potentially due to the role of the police) and the rest are not considered by prosecutors to be in the public interest. Furthermore, the discretion of the CPS is reflected in the selection of charge, out-of-court disposal, court venue and accepting the guilty pleas. This shows that the discretion of the prosecutor is widely exercised. And this is not all that can be taken into account in the sentencing guidelines. Thus, there is little point pursuing consistency through sentencing guidelines in this aspect.

However, it is worth pointing out that the UK has adopted a plea bargaining system and established the Turner Rules, which facilitate the exercise of prosecutorial discretion. In this area, sentencing guidelines can help with pursuing consistency. Taking the Fraud, Bribery and Money Laundering Offences Definitive Guideline as a case study, it can be concluded that sentencing guidelines can reach the correct balance between being too prescriptive and too vague, which is helpful in pursuing consistency.

Through an overly prescriptive system, the defendants can foresee different specific sentencing outcomes of whether to make a guilty plea. And the substantial discount of making a guilty plea can become a kind of pressure that leads the defendants to admit the charge. In contrast, if the framework is too ambiguous, defendants will lack enough faith in the expected sentence results and enter a guilty plea, rendering the system ineffective. Prior to the SGC guideline on sentencing for fraud offences, the only manner in which defendants in England and Wales were able to predict a sentence outcome was through a sentence indication from the judge rather than an educated guess from counsel, as the prescriptive extent of sentencing was defined largely by the maximum tariff set out in the relevant legislation combined with aspects of sentencing policy which should have been taken into account, such as those in *R v Mills* and *R v Kefford*. The SGC's guideline gives a fixed differential of three years between maximum and minimum sentences, within which the judge must hand down the appropriate sentence. It achieves the proper balance between the defendant and the judge. The defendant is given necessary information of likely sentencing outcomes, which is enough for the defendant to make the plea decision. The judge is offered sufficient discretion in order to prevent the defendant to play the numbers game. This allows the defendant to predict the outcome of their trial to a certain extent and limits the judge's discretion while ensuring that they still enjoy a certain degree of discretion. This allows similar cases to be dealt with similarly and promotes consistency in the aspect of plea bargaining.

3.2. Discretion in the Criminal Justice System after Sentencing

3.2.1. Parole Board's Discretion

The Parole Board is governed by the Parole Board Rules 2016 made by Parliament under the Criminal Justice Act 2003. It has the discretionary power of deciding whether prisoners who are serving certain types of sentences can be released. The board considers the offender's situation that led to offending behaviour, their lifestyle, ability to be re-integrated into the community and their relationships, such as with their Offender Manager.

The discretion of the Commission is decisive, and even the government cannot fight it. For example, to take a prominent case that has recently featured in the news, Colin Pitchfork, who raped and murdered two schoolgirls in the 1980s, will be imminently released from prison after the Parole Board rejected a Government challenge to keep him locked up. Not only the victim's family, but also the Ministry of Justice is "unhappy" with the decision. However, Ministers don't have the power to block Pitchfork's release, or to force the parole board to rethink the decision. This is due to laws passed by parliament to ensure judicial independence. Instead, ministers are given 21 days to make submissions to the board about why their decision should be overturned. Crime victims and members of the public can also make a request via the minister, but the threshold for overturning decisions is very high - the same as when seeking a judicial review in court. According to the rules, "being unhappy" with the decision is not grounds for reconsideration. It can be seen that the discretion of the Parole Board is codified in its independence. Therefore, even after a criminal has been sentenced according to the sentencing guidelines, there is not necessarily consistency in sentencing as the Parole Board's decision is not strongly impacted by the sentencing guidelines, considering the other factors the Parole Board must take into account when determining an individual's release.

3.2.2. Probation Service's Discretion

The court should make a probation order after considering the probation manager's assessment of the case and the recommendation of sentence. The probation manager should evaluate the following elements in order to give the court such an assessment: the offender's situation, the nature of the offence, the degree of social harm, the situation of the victim, the offender's family and community, the offender's post-offence attitude and behaviour, and the suitability for probation. Although the final decision of probation is made by the court, the probation officer's opinion plays a key role, which can have a direct impact on the sentence. The probation officer's power of making the recommendation to impose probation based on these various factors should also be considered a form of criminal discretion. Given that these factors relate to many aspects of the offender's real life and are not exhaustive of the sentencing guidelines, it is challenging to seek consistency through the sentencing guidelines in the aspect of making the decision of probation.

The enforcement of probation is then solely dependent on the probation officer involved. The probation officer examines various factors, including the offender's attitude to society, level of social awareness, self-management skills, and risk to society. Based on these factors, the probation officer will exercise his discretion to decide how the offender's probation continues. These considerations also cover many areas that the sentencing guidelines do not cover, thus, the sentencing guidelines cannot regulate the probation officer's discretion about the enforcement of the sentence.

4. How Sentencing Guidelines Improve Consistency in the Stage of Trial

There is little point pursuing consistency in sentencing guidelines because there is so much discretion in the criminal justice system, long before the sentencing guidelines even become relevant. However, during sentencing - i.e. once all the previous processes have been completed

- it makes more sense to pursue consistency. It would be unfair if different sentences were given for the same cases; but similarly, it would be unfair if the same sentence were given for the same crime, but with a vastly different factual matrix. This part will firstly describe the present situation of criminal discretion in the stage of trial. Then the problems concerning consistency created by continued judicial discretion will be explained. Finally, this part will end by illustrating how sentencing guidelines improve consistency in the stage of trial.

4.1. Present Situation of Criminal Discretion in the Stage of Trial

In the UK, judges have a relatively wide discretion in the stage of trial, especially in the aspect of sentencing. The only legislative restriction on this power is that, on appeal by the defendant, the Court of Appeal may not impose a sentence that is higher than the sentence originally imposed at trial. A judge is required to consider a number of factors when sentencing a case. When applying his discretion to sentencing decisions, it is intended that the judge uses legal factors such as the nature and seriousness of the offence and the defendant's criminal history. The judge is also obligated to take into account any aggravating and mitigating factors. For instance, in England and Wales, aggravating factors include the vulnerability of the victim, whether the victim was racially or religiously targeted, the offender's leading role in the offence, and any profit made from the offense. Mitigating factors include whether the offender was provoked, the offender's minor role in the offence, and their acceptance of responsibility or show of remorse. The greater the number of sentencing factors to be considered, the greater the need to rely on the judge's discretion. Thus, it can be inferred from this that English judges have a wide range of discretionary powers.

4.2. Problems Concerning Consistency Led by Judges' Broad Discretion

4.2.1. Inadequate Legal Expertise of Magistrates Makes It Possible for Them to Be Inconsistent Without the Support of Sentencing Guidelines

In the English judicial system, two kinds of courts can deal with the first instance of criminal cases - the Magistrates' Courts and the Crown Courts. In 2015, there were 1,177,915 convictions in the Magistrates' Courts and 87,212 convictions in the Crown Courts, the former being 13.5 times as many as in the latter. It can be seen that the Magistrates' Courts deal with the vast majority of criminal cases. There are two kinds of judicial officers in Magistrates' Courts. The first kind is the district judges. They have an academic background in law and try cases on a full-time basis. The other kind is the magistrates. They are non-law graduates and sit on a part-time basis with other jobs. As of April 2016, there were only 234 district judges and 17,552 magistrates in the English magistrates' courts, but because of a decline in crime and the widespread use of out-of-court disposal measures, the number of magistrates has fallen considerably (in 2012, the number of magistrates used to reach over 25,000). But the contrast between the number of magistrates and district judges nonetheless remains stark, implying that in criminal trials, "the English judicial system relies on magistrates in the Magistrates' Courts for sentencing". These large numbers of magistrates do not receive professional legal education, and only work in the Magistrates' Courts for 13 full or 26 half days a year. This means they have much less practical judicial experience than professional judges, and are more likely to make wrong decisions based on their own life experience rather than legal analyses, which can harm the consistency of the justice system.

4.2.2. Improper Exercise of Sentencing Discretion

There is indeed positive value and significance to the discretionary power of judges, but that does not mean that all sentences imposed by the use of judges' discretion are reasonable. In the absence of sentencing guidance, judges may not exercise discretion correctly for two reasons: firstly, without guidance, the judge's primary reference for characterizing and sentencing a case derives from previous case-law. However, as the facts vary significantly from case to case, it is

not necessarily possible for judges to find a previous case with a sufficient degree of similarity. This leaves the judge with no choice but to base their sentencing decision on their own views and experience. Secondly, the existence of the judge's discretion may lead to the abuse of this power by the judge, leading to judicial injustice. Yet a judge need not even abuse their discretionary power in order to create situations contrary to the predictability and consistency desirable in a judicial system consistent with the rule of law: different discretionary decisions can also result in similar cases not receiving similar penalties, harming the consistency of the judicial system.

Thus, the improper - or even inconsistent - exercise of judicial discretion can undermine the consistency of the judicial system. In addition, it can reduce the predictability and certainty of the law, and undermine the rule of law in consequence.

4.3. How Sentencing Guidelines Can Help with Consistency in the Stage of Trial

4.3.1. Sentencing Guidelines Can Help Non-experienced Judges or Magistrates in Making More Consistent Sentencing Decisions

The sentencing guidelines are laid down in a step-by-step format, dividing the entire process of conducting a trial into ten steps, almost like a detailed sequence of every detail of the trial process, telling the judge what to do first and what to do second. There is no doubt that this step-by-step approach is too detailed for a judge with professional legal education and a long career in criminal justice. It seems to conflict with Oliver Wendell Holmes' famous comment on common law tradition that "the life of the law has not been logic: it has been experience".

However, the current state of English criminal justice dictates that this sentencing guideline model is scientifically sound and practical. As noted above, the majority of criminal cases in England are dealt with by magistrates, who are not legally trained to deal with sentencing cases, and who may lack experience. Even without any practical experience of judicial sentencing before, magistrates are guided by the sentencing guidelines step-by-step in reaching a provisional sentence, considering any factors which indicate a reduction for assistance to the prosecution, and considering special custodial sentences for certain offenders of particular concern. It is under the protection of the sentencing guidelines that magistrates can deal with a wide range of specialist legal issues such that similar cases can be given similar decisions, thereby maintaining the consistency of the justice system. Thus, it can be concluded that, because of the technical support of detailed step-by-step sentencing guidelines in England, consistency can be achieved without being damaged by non-professional magistrates.

4.3.2. Sentencing Guidelines Can Prevent Improper Exercise of Discretion

Consistency in sentencing, or whether similar cases are treated alike, is one of the fundamental principles underpinning a fair legal system and the rule of law. The ultimate goal of the sentencing guidelines system is to eliminate sentencing disparities and achieve sentencing consistency. Sentencing is essentially a judicial decision-making activity in which judges analyse, judge, and finally determine the appropriate sentence to defendants, based on the relevant facts of the offence and offender, within the statutory limits set by the criminal law. Modern criminal law theory agrees that the uniqueness of individual cases means that judges are not machines that apply the law mechanically. They must exercise their discretion in deciding cases to individualize sentences. The sentencing guidelines should also aim to achieve consistency in sentencing, taking account of the exercise of discretion where necessary. However, the inherent disadvantages of discretion, which can lead to a lack of fairness, difficulties for judges, and judicial corruption, must not be overlooked and must be limited. Therefore, sentencing consistency can be achieved by limiting judicial discretion.

The key element of any sentencing guideline system is the degree of restraint it imposes on the courts. At present, to achieve an effective combination of consistency and discretion in

sentencing, the UK sentencing guidelines system adopts a method combining leniency with rigidity. On a macro level, sentencing guidelines bind judges to their guidelines for a wide range of sentences – above all, most recently, the Coroners and Justice Bill 2009 replaced the somewhat ambiguous phrase “must apply” with the more directive wording “must follow”. This change provoked strong opposition and fears from the Magistrates’ Association and the Bar Council, creating fears the guidelines would create “tramlines” and “straight jacket” judges and magistrates. The government did not let these objections deter efforts to make the sentencing guidelines more binding. The Act finally passed and kept the high requirement threshold of “must follow”.

However, taking into account the objections mentioned above, sentencing guidelines again leave considerable room for discretion on the part of the judges despite being binding on a macro level. For example, the Criminal Attempts Act concerning Attempted Murder rules that the category range can be varied from 8 years to 10 years according to different situations – for an offender, the difference between a sentence of 8 years and one of 10 years is profound, and entirely up to the discretion of the judge concerned if previous factors are met. At a micro level, the relevant aggravating or mitigating factors to be considered by the judge as set out in the sentencing guidelines for specific offences are a combination of “exhaustive and non-exhaustive”. In the “determining the offence category” step, the relevant factors listed in the sentencing guidelines are exhaustive; the judge cannot consider other factors beyond that to determine the seriousness of the offence and the type of offence to which it belongs. In the next step, the “starting point and category range”, the factors listed in the sentencing guidelines are not exhaustive, and judges may consider other factors beyond this range. For example, the Sexual Offences Act 2003 rules that the court should determine which categories of harm and culpability the offence falls into by reference only to the exhaustive table.

In this method, combining leniency with rigidity, the English sentencing guidelines system has worked out a more appropriate balance between sentencing consistency and sentencing discretion, with significant results. In 2013, of the 1,169,727 sentencing findings made by 652 judges in 77 criminal courts, 149 district judges and 21,626 magistrates in 364 magistrates’ courts in England and Wales, 97% were within the ranges specified in the applicable sentencing guidelines. The guidelines were taken into account by the courts in accordance with the intent of the sentencing guidelines and were applied consistently by different courts.

5. Conclusion

Beyond the sentencing stage, discretion is rife throughout the criminal justice system. Pre-trial, from the police to the CPS, a broad range of discretionary powers are available which mean that before sentencing is even an option, an offender may have had a number of completely different outcomes which have strong potential to be inconsistent. Further, even after sentencing, the Parole Board and Probation Service both have considerable discretion in the early release or parole of offenders, which may disrupt the consistency attempted to be achieved by the sentencing guidelines. Nonetheless, during sentencing, this essay has demonstrated that there is little doubt about the value of sentencing guidelines to ensure consistency in the criminal justice system. Even with the range of other elements of discretion throughout the system, consistency in sentencing guidelines is crucial to upholding the predictability and certainty of sentencing essential to maintaining the rule of law. It can help non-experienced judges and magistrates to make consistent decisions, and constrain the potentially unlimited discretion of individual judges, helping to reduce personal biases from getting in the way of sentencing. In summary, despite the considerable amount of discretion in the criminal justice system, sentencing guidelines are not rendered futile. They are essential to maintaining consistency and upholding the rule of law.

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