



A SENTENCING FRAMEWORK

The Criminal Justice Act 1991

Prison overcrowding has been a dominant feature of the English criminal justice system for the last 25 years. It is not merely that there have been insufficient prison places for each prisoner to have an individual cell, so that in 1991, with a prison population of over 45,000, some 13,000 were held either two or three to a cell. There has also been a growing acceptance that some offenders are sent to prison unnecessarily, and others for unnecessarily long. Even before the riots at Strangeways and other prisons in April 1990 brought the world's attention to our prison problems, strategies were being developed to change the system. Those strategies were announced by the Government in its 1990 White Paper, *Crime, Justice and Protecting the Public*, and are now incorporated in the Criminal Justice Act of 1991, most of which came into force on October 1, 1992.

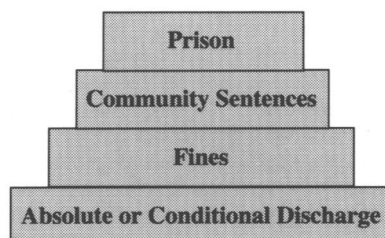
The Policy

The official aim is to move towards a twin-track policy of sentencing - dealing severely with people who commit serious offences involving violence, sex or drugs, and yet lowering the level of penal response to those who commit non-serious offences. Offenders sentenced to 4 years' imprisonment or longer will have the possibility of parole: if they are not paroled, they will be released conditionally after serving three-quarters of the sentence, with a liability to serve an unexpired portion if they re-offend before the end of the full term. Offenders serving less than 4 years' imprisonment will have the benefit of automatic conditional release after one-half: those serving one year and under 4 years will have compulsory supervision during the third quarter of their sentence, and will remain liable to serve any unexpired portion of their sentence until the very end of the term imposed.

However, a major element in the strategy is its 'lower track' - that a higher proportion of offenders should be 'punished in the community' instead of being sent to prison. In an attempt to persuade courts to use community sanctions, the Act introduces a new, tougher form of sentence called the 'combination order' (a mixture of probation and community service), and probation orders themselves are made more rigorous by the adoption of new 'National Standards' for their content and enforcement.

The Sentencing Framework

The Criminal Justice Act 1991 introduces a new sentencing framework, which can perhaps best be visualised as a kind of pyramid.



In all but the most serious group of cases, courts are expected to start at the base of the pyramid and work upwards. If the features of the case do not indicate that the offender should be given an absolute or conditional discharge, the penalty is likely to be a fine. Around 40 per cent of 'indictable offences', including many thefts, result in a fine, but the figure was closer to 60 per cent in the mid-1970s, and the policy is to persuade courts to fine more often. Magistrates' courts are required to adopt a form of day-fine system called 'unit fines', aimed at achieving a fairer adjustment between the amount to be paid and the financial resources of the offender. Section 18 of the Act makes it clear that the number of units should reflect the seriousness of the offence, whilst the amount payable per unit will depend largely on the means of the offender, with a minimum of £4 per unit and a maximum of £100 per unit.

Section 6(1) of the Act is designed to ensure that a court only moves up from a fine to a community sentence if it is satisfied that the offence is serious enough to warrant this. Once the court has over-

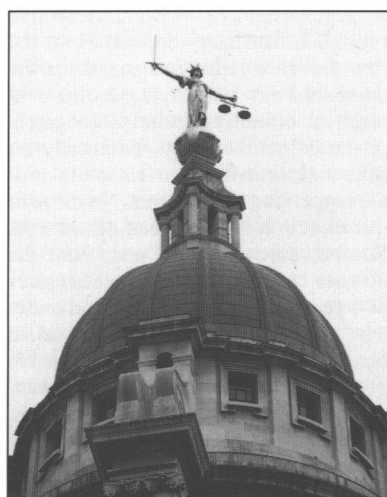
come this threshold, it has a choice between a probation order, a community service order or a combination order. In making this choice and in deciding the length of the order, it must not only choose the one which is most suitable to the needs of the offender but also ensure that the 'restrictions on liberty' involved are 'commensurate with the seriousness of the offence'.

The final step up the pyramid, from a community sentence to prison, should only be taken if the court is satisfied that the offence is 'so serious that only a custodial sentence can be justified' (section 1(2)). If the court is of that opinion, the length of the prison sentence must be 'commensurate with the seriousness of the offence' (section 2(2)). These provisions rule out disproportionately long sentences based on individual deterrence or general deterrence. However, there is a limited exception for incapacitative sentences: a court may impose a prison sentence for a sexual or violent offence if it believes that only such a sentence would be adequate to protect the public from serious harm from the offender, and such a sentence may be longer than would be proportionate to the seriousness of the offence committed. Section 31(3) of the Act offers a definition of the key phrase, 'serious harm'.

The Common Law of Sentencing

The 1991 Act does not introduce a complete new code of sentencing laws. What it does is to superimpose a framework on the existing common law of sentencing, developed by the Court of Appeal over the last 80 years. The White Paper of 1990 envisaged a partnership between the legislature and the courts, in which the Court of Appeal through its judgements would give guidance which put 'the flesh' on the 'bones' established by Parliament. During the 1980s the Court of Appeal handed down about a dozen 'guideline judgements', each of which includes some sentencing guidelines for a major offence such as drug trafficking, rape, causing death by reckless driving, child abuse, etc. The Government expressed the 'hope' that the Court would continue to fulfil this function in relation to the 1991 Act.

The practical impact of the Court of Appeal will probably be twofold. First, it will continue to develop a kind of 'tariff' for the more serious types of offence, using appellate judgements to decide what sentence levels are proportionate or disproportionate. Second, it may give an authoritative interpretation of the key



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concept of 'seriousness of offence', which determines virtually every step up the pyramid of sanctions. The practical frequency of problems at the 'in/out' borderline means that the Court must give guidance on how to evaluate thefts, burglaries and deceptions if the 1991 Act is to achieve even a modest success. In the past the Court has shown far more confidence in judgements on very serious crimes, and its jurisprudence on the more mundane crimes which are the daily fare of most judges and magistrates remains underdeveloped. To put it bluntly, there is hardly any guidance on sentencing levels for theft, deception, burglary and handling stolen goods.

Repeat and Multiple Offenders

One unusual and controversial feature of the 1991 Act is its approach to prior record and to multiple offences, both of which tend to occur in a majority of Crown Court cases. Section 29(1) states that an offence 'shall not be regarded as more serious ... by reason of any previous convictions of the offender'. Whilst section 28 allows courts to take account of a good previous record as a mitigating factor, section 29 means that the seriousness of the current offence establishes a kind of 'ceiling' beyond which the sentence may not go. The policy behind this is to restrain courts from imposing severe sentences on repeat small-time offenders - and, in fact, to remove many petty thieves and property offenders from prison. The same policy underlies the provision that, when a court is deciding whether an offence is so serious that only a custodial sentence can be justified, and the offender stands convicted of several offences, the court may take account of only two of them in deciding whether the case is serious enough. Even if the offender is being sentenced for 20 or 120 cheque frauds, the 'two offence rule' restricts the court to aggregating any two of the offences in order to gauge the seriousness of the case.

The policy behind this is to keep small-time criminals out of prison, but many sentencers find the provisions artificial and unacceptable. A few words in section 29(2) open up the possibility of some judicial circumvention, and it remains to be seen whether the essence of the new policy will survive.

Youth Courts

The Act takes young people aged 17 out of the adult courts and into the new

Youth Courts, which will deal with all offences charged against persons under 18. The courts' sentencing powers are expanded by the Act, but they are subject to the same statutory controls as described earlier. There is a wide range of 5 possible community orders when dealing with 16 and 17 year-olds: community service, probation, combination orders, attendance centre orders and supervision orders. Custodial sentences on offenders under 18 must be no longer than 12 months, unless the exceptional powers under section 53(2) of the Children and Young Persons Act are invoked. When dealing with offenders under 16, the Act places the emphasis on parental responsibility, requiring the parents to be present in court and requiring the court to bind the parents over to exercise control over the young offender unless there are good reasons not to do so. Fears have been expressed that this will often have a negative effect on families which already have a cluster of problems.

The Likely Impact of the 1991 Act

Will the effect of introducing the new Act in October 1992 be to reduce, or even to control, the prison population? The Government itself seemed unclear about this when the 1990 White Paper was issued, but its latest estimate is that the prison population will decline by 3,500, or around 10 per cent, by 1995. Many of us hope that they are right: a concerted effort has been put into the development of community sanctions which the courts will actually use, and in the 1980s there were successes in reducing the use of custody for juveniles and for young adults.

Unfortunately, however, at least five sources of difficulty appear. First, the Act abolishes remission and alters the provisions for early release: this will result in offenders spending longer in prison unless the courts voluntarily reduce their sentencing levels in the middle range, from 1 to 4 years. No move in this direction has yet been announced. Second, between 1985 and 1990 the number of prisoners serving sentences of 4 years or longer doubled, and under the 'twin-track' strategy this is set to continue. Third, if more offenders are given the more demanding community sanctions they may well breach them in larger numbers, and thus enter prison by that route. Fourth, much will depend on how the Court of Appeal, under the new

Lord Chief Justice (Lord Taylor), approaches its task: the Court should give an early and positive lead to other judges.

This leads us to the fifth question, which may or may not prove to be a difficulty. Many judges and magistrates seem sceptical about the new Act. Wholesale change in one's working practices is rarely welcome to anyone, and the obscure drafting of some parts of the new Act hardly encourages a sympathetic response. But the Act does leave a considerable degree of discretion to the courts. Will they use this to neutralise the spirit of the legislation? Or will they use it to advance the primary aim of proportionality in sentencing, and to move more towards community sentences instead of custody? The new Criminal Justice Act leaves far more power in the hands of the judiciary than sentencing reforms in most other parts of the world. Criminology research might lead to the prediction that they will alter their approach as little as possible, co-opting the new Act into their established working practices. Will they confound their critics and show that the judiciary can participate in the process of reform?

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The Act & the CPS

"A formal role in sentencing has traditionally been denied the Prosecution in England and Wales. Nevertheless, the CPS can influence the sentencing process in a number of ways, one of which is by the choice of offences. The new sentencing provisions which place emphasis on the seriousness of the offence as a basis for sentencing will place added responsibility on the Prosecution to choose the appropriate charge, thus ensuring that the Court has the power it needs to impose the most suitable sentence."

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