

SENTENCING BY NUMBERS

Sentencing policy and the prison population

The prison population in England and Wales increased by around 5000 during 1993. Moral panic generated by the mass media - focussed on certain notorious offences and well-publicised sentences - led to the more restrictive use of bail and a greater use of imprisonment and of detention in young offender institutions. But where, if at all, did sentencing law come into this? Does the law function as a restraint on courts, or is there sufficient discretion to allow courts to impose more or less custody as they wish?

The Criminal Justice Act 1991

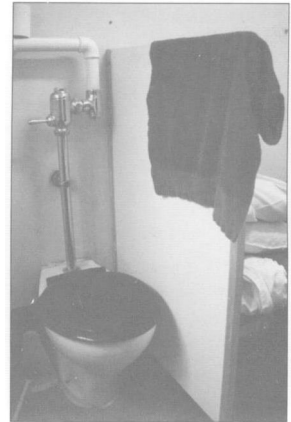
The 1991 Act was brought into force in October 1992. Its provisions restrained courts from imposing a custodial sentence unless the offence was so serious that only custody could be justified, and in taking that decision courts could not consider more than two offences (where

In the early months of 1993, however, the use of custody began to rise. This seems to have been a spontaneous response to what was perceived as genuine public anxiety about crime and sentencing. Some might argue that certain judges and magistrates were "looking for" a reason for circumventing what they regarded as ill-advised restrictions contained in the 1991 Act. Certainly there have been other occasions on which the judiciary has declined to be moved by expressions of "public opinion". Yet nothing was announced formally, and a reading of the reported Court of Appeal decisions gives no hint of a change of approach. Indeed, there were some cases decided well into 1993 in which the Court quashed custodial sentences for burglary (e.g. Bennett (1993) Criminal Law Review 802), and in general the Court has continued to determine on a case-by-case basis whether offences are or are not so serious that only custody can be justified.

What effect has the 1991 Act had upon the "tariff" of prison sentences? All that the Act says on this issue is that the length of sentence must be "commensurate with the seriousness of the offence": section 2(2) (a). In the past the tendency of the Court of Appeal has been to justify sentence levels for certain offences by reference to the need for deterrence (e.g. robbery, drug trafficking, and many others). The 1990 White Paper demonstrated official scepticism about deterrence and made it clear that proportionality was to be the primary criterion, but this failed to prevent the Lord Chief Justice from declaring in the case of Cunningham (1993) Crim. L.R. 149 that "the phrase 'commensurate with the seriousness of the offence' must mean 'commensurate with the punishment and deterrence which the seriousness of the offence requires.'" By this stroke of statutory misinterpretation, the need to reconsider the structure of the tariff was avoided.

The Criminal Justice Act 1993

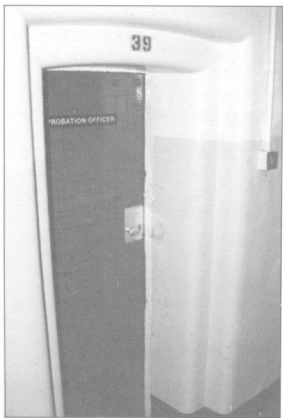
Within a mere eight months of the implementation of the 1991 Act the Government announced a U-turn on three key elements of the Act's sentencing framework. This was quickly rushed through Parliament by way of amendments to an existing Bill, and the



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provisions appear in the "miscellaneous" part of the Criminal Justice Act 1993. The system of unit fines was abolished. No matter that the system had operated satisfactorily in several courts before the Act. No matter that Treasury pressure had allegedly led the Government to increase the maximum fines, well above those used in the experimental courts. No matter that changes to the "allowances" against income could remove some of the difficulties. No matter that several other European countries use unit fines without major problems. Kenneth Clarke, as Home Secretary, saw the opportunity for an extravagant gesture which promised considerable political kudos and, in an atmosphere charged by the widely-reported saga of the "crisp packet" case, he abolished the whole system of unit fines. Out went the baby with the bathwater, and the law was returned to its previous position. A system which the Government criticised in its 1990 White Paper, as leading to unfairness and to unnecessary committals to prison in default, is restored. Fortunately some magistrates' courts are continuing to use aspects of the unit fine system - the new provision includes such wide discretion that this is lawful - but, with well over a half of all convicted offenders being unemployed, the prospect of more prison for the poor seems real.

The 1993 Act also reverses the rule in the 1991 Act relating to multiple of-



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the offender stood convicted of several) and could not regard previous convictions as an aggravating factor. The Act also introduced the concept of a community sentence, and required magistrates' courts to use unit fines. Statistics suggest that the impact of the Act in its first few months was to reduce the proportionate use of custody and to increase the proportionate use of community sentences and of fines.¹

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fences. Under the 1991 Act, where a court was sentencing an offender for several offences, it was only permitted to combine two of them in order to decide whether the case was so serious that only a custodial sentence could be justified. This had the advantage of preventing courts from aggregating several minor offences in order to justify prison, but had the disadvantage of restricting courts when dealing with "professional" fraudsters who committed 100 or more small offences before being caught. The rule in the 1991 Act is now abolished. Courts can more easily justify custody for the professional fraudster; they can also justify it more easily for the ordinary minor recidivist.

The practical power of a couple of newspaper editors far outstrips the influence of a hundred criminologists

This point is compounded by the replacement of the original s.29 of the 1991 Act with a new provision on previous record. The new s.29 (1) states that "in considering the seriousness of any offence, the court may take into account any previous convictions of the offender or any failure of his to respond to previous sentences." Exactly how the provision on previous convictions changes the law is unclear: there were some suggestions that previous convictions could now be treated as aggravating factors, but the Lord Chief Justice stated (in his speech to NACRO, November 11th, 1993) that offenders should not be sentenced on their record. The final phrase of the new s.29(1), referring to "failure to respond to previous sentences", surely opens up the possibility that people will be sent to prison because they have not "responded" to community sentences rather than because of the intrinsic seriousness of their current offence. How else could "failure to respond" be relevant to sentencing?

The 1993 Act also introduces a requirement that courts treat the fact that an offence was committed whilst on bail as an aggravating factor - not merely a principle that they should generally do so, but a rule that they must, even if the new offence is minor and unconnected with the remand charge.

The new Magistrates' Association Guidelines

To coincide with the enactment of the Criminal Justice Act 1993 the Magistrates' Association issued a new version of their Sentencing Guidelines in September 1993. Naturally they replace references to unit fines with references to monetary values, but rather more significant is a change in the structure of the guidelines. For each of the 35 offences there is an "entry point": for some offences this is a community sentence, and for a few offences it is custody. The guidelines urge the court to take account of factors relevant to the seriousness of the offence, and of personal mitigating factors, but there is the danger that courts may be reluctant to move away from the entry point so as to reflect these factors properly. In his NACRO speech Lord Taylor expressed the hope that this is "an unworthy piece of scepticism", but that remains to be seen. Some local benches were unhappy with the previous set of guidelines because the starting points were thought too low. Will the new guidelines act as a conduit for severity?

Conclusions

The result of all these changes seems likely to be a consolidation of the recent trend towards greater use of custodial sentences. Some of the changes made by

the 1991 Act have been misinterpreted, others were jettisoned before they were properly tested. The practical power of a couple of newspaper editors far outstrips the influence of a hundred criminologists. The opportunism of Kenneth Clarke as Home Secretary has been replaced by the tub-thumping of Michael Howard, and there remains a determination that mere evidence should not be allowed to stand in the way of populist policies. Will this be one occasion to be grateful that English sentencers generally react adversely to being told what to do? Or have these Home Secretaries been mining a rich but recently neglected seam of support among sentencers for greater severity (or, to be more precise, greater severity except for those who suffered from heavy financial penalties under the "unit fine" system)? Predicting the forces that will shape sentencing practice in 1994 is no easy task, but the prognosis is for more custody and the role of the law seems peripheral.

1. Home Office, "Monitoring the Criminal Justice Act 1991 - Data from a Special Collection Exercise", Statistical Bulletin 25/93

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THE PRISON POPULATION IN 1992

Main Points

- The average population in custody (including those in police cells) in 1992 was 45,800, 100 lower than in 1991.
- The average population in police cells was 1,100, the same as in 1991 but considerably more than in 1990 (700) and 1989 (100).
- The seasonally adjusted population at the end of 1992 was 42,300, nearly 5,000 lower than a year earlier and the lowest monthly figure since September 1984.
- The remand population (after seasonal adjustment) remained around 10,600-10,700 between October 1991 and April 1992, and then fell steadily to reach 9,200 in December.
- The sentenced population (after seasonal adjustment) rose from 36,300 at the end of December 1991 to 36,700 at the end of April 1992, after which it fell steadily to reach 32,800 in December 1992.
- The dramatic reduction in the sentenced and remand populations in the second half of 1992 partly reflected the advancement of releases on parole when some restrictions on paroling were lifted in June 1992, and the introduction, on 1 October 1992, of the Criminal Justice Act 1991.

Source: Home Office Statistical Bulletin, March 1993