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An introduction to English sentencing

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1.1 Courts and crimes

Although some common law crimes remain, most of the offences in English criminal law were created by statute and have a statutory maximum penalty. For the purposes of trial, offences were divided into three categories by the Criminal Law Act 1977– offences triable only on indictment, offences triable only summarily, and offences triable either way. The most serious offences (e.g. murder, rape) are triable only on indictment, at the Crown Court. A large mass of less serious offences is triable only summarily, in magistrates’ courts. The middle category of offences triable either way comprises most burglaries, thefts and frauds. The first question in these cases concerns the defendant’s intended plea: if the defendant indicates a plea of guilty, the magistrates must assume jurisdiction and proceed to sentence, unless they decide that their sentencing powers are insufficient. If the intended plea is not guilty, the defendant will be tried at a magistrates’ court unless either the magistrates direct or the defendant elects to have the case tried at the Crown Court.

The Crown Court sits with a judge and jury. There are three levels of Crown Court centre: first-tier centres, where both civil and criminal cases are tried and where High Court judges and circuit judges preside; second-tier centres, where High Court judges or circuit judges preside but only deal with criminal cases; and third-tier centres, where circuit judges or recorders deal with criminal cases, being mostly offences triable either way. The types of criminal offence are divided into four classes, according to their gravity, and some can

only be tried by a High Court judge, whereas others can be tried by circuit judges or recorders. In total, there are around 1,500 Crown Court sentencers. Circuit judges are full-time judges, although they may divide their time between civil and criminal work. Recorders and assistant recorders are part-time judges, whose main occupations are barristers, solicitors or (in a few instances) academics; most full-time judges start their judicial careers in this way. Appeals against sentence from the Crown Court go to the Court of Appeal and, if there is no point of law involved, the appeal requires the court's leave if it is to be heard. Applications for leave are dealt with by individual High Court judges.

Magistrates' courts deal with the least serious criminal offences. There are around 30,000 lay magistrates in England and Wales, divided into local benches, and a court normally consists of three magistrates. There are also full-time and part-time District Judges (Magistrates' Courts) (DJMC), formerly known as stipendiary magistrates, whose numbers have grown in recent years to over 200. A DJMC must be a barrister or solicitor of at least ten years' standing, and he or she sits alone – usually dealing with the longer or more complicated summary cases. The powers of magistrates' courts are limited to imposing a maximum of six months' imprisonment in respect of one offence (or a total of 12 months for two or more offences).¹ The maximum fine or compensation order that may be imposed by a magistrates' court is usually £5,000. Magistrates may, having heard the evidence in a case, commit it to the Crown Court for sentence, if they form the view that the offence was so serious that greater punishment should be inflicted than they have power to impose. As mentioned above, a defendant who indicates an intention to plead guilty to an either-way offence should be sentenced by the magistrates unless they decide that their powers are insufficient, in which case they should commit to the Crown Court for sentence. A person who has been sentenced in a magistrates' court may appeal against sentence to the Crown Court. The appeal takes the form of a complete rehearing of the case, before a circuit judge or recorder and two lay magistrates, and the Crown Court has the power to pass any sentence which the magistrates' court could have imposed, even if that sentence is more severe than the one they did in fact impose.²

Summary offences are little discussed in this book, although there are frequent references to sentencing in magistrates' courts (which also deal with many 'triable-either-way' offences). Most of the statistics quoted in part 1.3 of this chapter refer to 'indictable offences', which include those triable on indictment and those 'triable-either-way', whether tried in a magistrates' court or at the Crown Court.

¹ S. 154 of the Criminal Justice Act 2003 provided for the ordinary maximum to be raised to 12 months for one offence (15 months for two or more offences). But this increase was intended to accompany the introduction of a new measure called 'custody plus' and, for reasons explained in ch. 9, this has not been implemented.

² For fuller details on relevant aspects of criminal procedure, see Sprack (2008).

1.2 The available sentences

Recent years have seen several major statutes bringing change to the sentencing structure, and three of them are particularly important for present purposes. The first is the Criminal Justice Act 1991, which was the first major attempt for over 40 years to establish a coherent sentencing structure. After a series of further statutes in the 1990s, Parliament consolidated sentencing law in the Powers of Criminal Courts (Sentencing) (PCCS) Act 2000. This consolidation was a wonderful idea, since it promised the great convenience of bringing the various powers together in one place. Sadly, the statute had already been overtaken by new provisions by the time it came into force, and after three years large parts of it were replaced by the now principal statute, the Criminal Justice Act 2003. That Act, in turn, has been amended and added to by several subsequent statutes.

This part of the chapter gives a preliminary sketch of the courts’ sentencing powers, referring also to the different sentences available in relation to young offenders. Most of these sentencing powers are discussed in detail in later chapters, and in part 1.4 of this chapter we examine the reasons why only a small proportion of the crimes committed in any one year result in an offender’s being sentenced in court.

1.2.1 Sentences for adult offenders

A court’s duty in all cases involving injury, death, loss or damage is to consider making a *compensation order* in favour of the victim or, in a case of death, the victim’s family. This forms part of a policy of increasing recognition of the needs, wishes and rights of the victims of crime. A court has a duty to give reasons for not making an order in a case where it has the power to do so. The provisions governing compensation orders are to be found in ss. 130–134 of the PCCS Act 2000. One important restriction is that the court should take account of the means of the offender when deciding whether to make an order and, if so deciding, for what amount. The consequence is that some victims whose offenders are impecunious will receive nothing from this source, and that victims in cases where an order is made may receive compensation for only part of their loss.³ In 2007, over half of offenders convicted at magistrates’ courts of indictable offences of criminal damage were ordered to pay compensation; as for those convicted of offences of violence, 33 per cent in the magistrates’ courts and 15 per cent in the Crown Court were subjected to compensation orders.⁴ A compensation order will usually be made as well as another order, but it may be made as the sole order against an offender.

³ Victims of crimes of violence also have the possibility of applying to the Criminal Injuries Compensation Scheme: see below, ch. 10.4.

⁴ Ministry of Justice (2008a), Table 4.9.

The most lenient course which an English court can take after conviction is to order an *absolute discharge*. The power is governed by s. 12 and Schedule 1 of the PCCS Act 2000. A conviction followed by an absolute discharge does not count as such for most future purposes. Formally, the court must be satisfied that it is ‘inexpedient to inflict punishment’. In practice, the power is used in fewer than 1 per cent of cases, and is generally reserved for instances where there is very little moral guilt for the offence.

The power to grant a *conditional discharge* is also to be found in ss. 12–15 and Schedule 1 of the PCCS Act 2000, and once again the conviction does not count as such for most future purposes. The condition is that the offender must commit no offence within a period, of not more than three years, specified by the court. If the offender is convicted of an offence committed during that period, then he or she is liable to be sentenced for the original offence as well. Thus, the conditional discharge carries a threat of future punishment, as does also the power to ‘bind over’ an offender to keep the peace – in effect, a kind of suspended fine which some courts tend to use more frequently than others.⁵ As Tables 2 and 3 below demonstrate, conditional discharges continue to be used in substantial numbers of cases: of adult male offenders dealt with in 2007, some 54,000 conditional discharges were given in magistrates’ courts and 600 in the Crown Court; the figures for females were 16,000 and 500 respectively.

The *fine* remains the most used penal measure in English courts, largely because of its widespread use for summary offences. Its use for both summary and indictable offences has declined spectacularly, as Tables 2 and 3 demonstrate. In 2007 some 641,000 adult male offenders were fined in the magistrates’ courts and 1,800 in the Crown Court; for females, the figures were 204,600 and 200 respectively. Maximum fines are usually unlimited for indictable offences tried in the Crown Court, but in magistrates’ courts the maximum fines have been banded in five levels. The leading principle (in s. 164 of the Criminal Justice Act 2003) is that the fine should reflect the seriousness of the offence and the offender’s ability to pay; and a court should give priority to a compensation order over a fine where the offender has limited financial resources and appears unable to pay both. The use of imprisonment for non-payment of fines has declined in the last decade, as community-based alternatives have been introduced, but some offenders are still committed to prison for non-payment, even though the original offence was not thought to merit custody.

The *community sentence* was changed in major ways by the Criminal Justice Act 2003. In place of the plethora of different sentences hitherto available (e.g. community punishment, curfew orders, drug treatment and testing orders, and so forth), the Act introduced a new generic community sentence – the idea being that this would bring to courts both flexibility and (if they follow the guidelines) consistency. Section 148 of the 2003 Act states that a court must not

⁵ This power, deriving from the common law and the Justice of the Peace Act 1391, was reviewed by the Law Commission in 1994 and by the Home Office in 2003: see ch. 10.3 below.

pass a community sentence unless satisfied that the seriousness of the offence(s) is sufficient to warrant such a sentence. Having reached this decision, the court must then select the requirement(s) which (i) are most suitable for the offender and (ii) impose restrictions on the offender which are commensurate with the seriousness of the offence. The list of requirements largely corresponds to the separate orders available previously, and is as follows (for offenders aged 18 or over):

- (a) an unpaid work requirement
- (b) an activity requirement
- (c) a programme requirement
- (d) a prohibited activity requirement
- (e) a curfew requirement
- (f) an exclusion requirement
- (g) a residence requirement
- (h) a mental health treatment requirement
- (i) a drug rehabilitation requirement
- (j) an alcohol treatment requirement
- (k) a supervision requirement
- (l) an attendance centre requirement (only for those aged 16–25).

Further discussion of this order in Chapter 10 below will examine the prospects for greater consistency in the application of community sentences and for greater effectiveness in reducing reoffending.

Next in ascending order of severity is *imprisonment*. Before imposing a custodial sentence, the court must be satisfied, according to s. 152(2), that the offence was ‘so serious that neither a fine nor a community sentence can be justified’, a formula that requires the court to dismiss all lesser alternatives before resorting to custody. If it decides on custody, s. 153(2) states that the sentence should be for the shortest term ‘commensurate with the seriousness of the offence’. In determining the length of any custodial sentence, courts are bound to apply any relevant guidelines, and to take due account of aggravating and mitigating factors (see Chapter 5), and of previous convictions (see Chapter 6).

When the court has decided that a prison sentence is justified and has decided on its length, it may still have the choice between a suspended sentence order and immediate imprisonment. This applies where the court is minded to impose a sentence of less than one year. If it decides that there are grounds for suspending, it may suspend any sentence of between 28 and 51 weeks for a period of up to two years (s. 189 of the 2003 Act), during which time it may order the offender to comply with one or more requirements taken from the list available for community sentences (above). Non-compliance may result in return to court and the activation of the whole or part of the prison sentence.⁶

⁶ In the original scheme of the 2003 Act, all custodial sentences under 12 months were to take effect as ‘custody plus’, involving a short period of imprisonment followed by intensive supervision on licence. These provisions have not been implemented: see ch. 9 below, and n. 1 above.

Tables 2 and 3 show the sharp rise in its use in recent years, with corresponding reductions in the use of imprisonment, community sentences and fines.

Standing in contrast to the general injunction to courts to impose the shortest proportionate custodial term (in s. 153(2)) are some mandatory provisions, usually justified on public protection grounds. Section 287 of the 2003 Act introduced a minimum sentence of five years' imprisonment for various offences of possessing firearms, from which a judge may depart only in 'exceptional circumstances'. Already in place were the minimum sentence of seven years for the third offence of trafficking class A drugs (s. 110 of the PCCS Act 2000) and three years for the third domestic burglary (s. 111 of the PCCS Act 2000), from which a judge may depart if the minimum sentence would be 'unjust in all the circumstances'. The 2003 Act also provided three severer forms of custodial sentence for dangerous offenders deemed to present a significant risk of serious harm to members of the public – life imprisonment, imprisonment for public protection (IPP, which, like life imprisonment, is indeterminate), and extended sentences. As we shall see in Chapter 6.7 below, Parliament removed the mandatory element from IPP in 2008, so that the courts now have a discretion whether to impose such a sentence.

Both the use of custodial sentences and their average length have shown general increases over the decade. As Tables 2–7 show, the use of immediate custody for males peaked at 103,000 in 2002 and had fallen back to 87,000 by 2007; for females, the corresponding figures were 8,800 custodial sentences in 2002, falling back to 7,800 in 2007. The actual meaning of custodial sentences depends on the operation of the system of early release under the Criminal Justice Act 2003. In broad terms, all prisoners are released after serving half their sentence, but are then on licence and subject to recall at any time until the expiry of the full sentence. The licence involves supervision for sentences of 12 months or longer; there is no supervisory element for those released from shorter sentences.

There is a whole list of ancillary and/or preventive orders which may be made by the courts in appropriate cases. These range from orders for deportation, restitution orders, and disqualification from driving, to the more recent flush of preventive orders – notably, anti-social behaviour orders (ASBOs), exclusion from premises, exclusion from football grounds, and so on. In some circumstances the court is bound, or almost bound, to make an order – such as disqualification from working with children. In other cases, such as drug trafficking and serious crime, a court is bound to follow the statutory procedure towards making an order for the confiscation of the offender's assets under the Proceeds of Crime Act 2002. Ancillary orders are discussed in Chapter 11.

1.2.2 Sentences for young offenders

The courts' powers for sentencing offenders aged under 21 fall broadly into two groups – first, those relating to offenders aged 18, 19 or 20, who are termed

‘young adults’ and dealt with in adult courts; and secondly, those relating to offenders aged 10–17 inclusive, who are dealt with chiefly in the youth court.

The structure of sentencing for young adults is largely the same as that for adults, although young adults sent to custody have usually been placed in different establishments from adult prisoners. Otherwise, sentencing powers are fairly similar to those for adults, except that the *attendance centre order* is available only for those aged up to 25, as noted above. Attendance centres operate on Saturday afternoons and require offenders to participate in demanding (and usually physical) activities. The maximum order is 36 hours. Sentencing for young adults is discussed in Chapter 12.2 below: Tables 4 and 5 show sentencing trends for this age group.

For young defendants under 18 both the procedure and the sentencing powers differ considerably. Their cases are dealt with in youth courts, except when there is a charge of a particularly grave crime. Very young children charged with murder, manslaughter and some other serious offences are tried in the Crown Court. However, where the defendants are as young as 11 or 12, special efforts must be made to ensure that the defendants can follow and participate in the trial: a Practice Direction on the appropriate procedures for such cases was issued in 2000,⁷ but further changes were required by a subsequent decision of the European Court of Human Rights.⁸

However, cases of that kind are few. In practice, as we shall see in part 1.4 below, most offenders of this age are dealt with by a reprimand or final warning under the Crime and Disorder Act 1998, described more fully in Chapter 12. Section 37 of the 1998 Act declares that ‘the principal aim of the youth justice system [is] to prevent offending by children and young persons’, but this has now been augmented by various reforms of youth justice in the Criminal Justice and Immigration Act 2008. For those who are prosecuted in court for the first time and plead guilty, the court is under a statutory duty to make a referral order under s. 16 of the PCCS Act 2000. The consequence of the referral order, described more fully in Chapter 12, part 12.1.2, is the drawing up of a ‘youth offender contract’ requiring certain commitments. In other cases the youth court has the same range of powers as do the ordinary courts when dealing with young adults, with two noticeable exceptions. The first is that when a youth court is dealing with a child under 16, it must require the attendance of the child’s parents unless this would be unreasonable, and it must bind over the parents to exercise control over the child unless it give reasons for not doing so. The second difference concerns custodial sentences, which have been relatively rare for young offenders. Details of the law are given in Chapter 12.1 below, but essentially a ‘detention and training order’ may only be made in certain standard lengths, as consolidated in ss. 100–107 of the PCCS Act 2000 (i.e. 4, 6, 8, 10,

⁷ *Practice Direction: Young Defendants in the Crown Court* [2000] 2 All ER 284, applying the decision in *V and T v. United Kingdom* (2000) 30 EHRR 121.

⁸ *SC v. United Kingdom* [2004] Crim LR 130.

12, 18 or 24 months, and not intermediate lengths). The resulting sentencing patterns are shown in Tables 6 and 7. The 2008 Act introduces a new youth rehabilitation order, and the expressed intention is that this should be used instead of custody in many cases.

1.3 The general statistical background

Some 4.95 million ‘notifiable offences’ (excluding minor crimes) were recorded by the police in 2007, showing a decline from earlier years in the decade (notably 2002 and 2003, when the overall figure was approaching 6 million), and beginning to reflect the overall decline in the volume of crime as measured by the British Crime Survey – down to 10.1 million crimes against households and individuals in 2007, compared with 12.3 million in 2002. Table 1 shows how the volume of crime as measured by the British Crime Survey was considerably higher in 1991 than it is in the early years of the twenty-first century, whereas the number of crimes recorded by the police grew steadily until the last few years. These differences between recorded crimes and the crime rate estimated by the British Crime Survey are discussed in section 1.4 below.

Table 1 also shows that the detection rate – the proportion of recorded offences resulting in ‘sanction detections’ – declined substantially in the 1970s and 1980s, and for much of this decade has hovered around 23 per cent, approximately half the rate of 1961, until increasing lately to 28 per cent in 2007. This will be discussed further in part 1.4 below.

Table 1 shows that, of almost 1.4 million non-minor offences detected in 2007, some 473,000 resulted in either a finding of guilt for an indictable offence or a police caution for an indictable offence. The figure includes some 205,000 formal cautions, of which the majority were reprimands or warnings administered to offenders under 18. Some 362,000 persons were found guilty of indictable offences by the courts in 2007, and it may seem strange that so many fewer people were convicted in 2007 than in 1981, when the figure was 465,000 (see Table 1). One reason why this statistic appears strange is the wide disparity in the numbers of crimes recorded in the two years – 2.8 million in 1981, compared with 5 million in 2003. The explanation is to be found in a combination of factors – the decline in the detection rate from 38 per cent in 1981 to 28 per cent in 2007, the increase in the use of police cautions (up from 104,000 to 205,000), and perhaps the increased discontinuance rate of prosecutions.

How do the courts use their sentencing powers? The detailed statistics for the last decade are presented in six separate tables. Tables 2–7 show the trends for all male and all female offenders for the years 1997–2007, showing the recent rises in community sentences and in suspended sentences, the decline in the use of the fine, and the continuing high use of custody. Turning to young adult offenders, Tables 4 and 5 show how suspended sentence orders have tended to displace both custody and community orders in recent years, for both young men and young women. Tables 6 and 7 give the figures for offenders

Table 1 Summary of criminal justice statistics, 1951, 1961, 1971, 1981, 1991, 2001 and 2007

	1951	1961	1971	1981	1991	2001 ⁽⁷⁾	2007 ⁽⁷⁾
England and Wales	(000)						
Crime measured by British Crime Survey	(1)	(1)	(1)	11,046	15,125	13,037	10,143
Notifiable offences							
– offences recorded by the police ⁽²⁾	525	807	1,666 ⁽³⁾	2,794	5,075	5,525	4,951
– offences detected	247	361	775 ⁽³⁾	1,056	1,479	1,291	1,374
– detection rate (percentage)	47	45	45 ⁽³⁾	38	29	23	28
Number of offenders cautioned ⁽⁴⁾	(6)	70	109	154	279	230	363
of which Indictable offences ⁽⁵⁾	(6)	25	77	104	180	144	205
Defendants proceeded against at magistrates' courts	736	1,161	1,796	2,294	1,985	1,838	1,733
of which Indictable offences ⁽⁵⁾	122	159	374	523	510	501	–
Defendants found guilty at magistrates' courts	705	1,121	1,648	2,042	1,438	1,293	1,351
of which Indictable offences ⁽⁵⁾	115	151	282	402	269	270	252
Defendants sentenced at the Crown Court after summary convictions	3	4	14	14	7	16	5
Defendants tried at the Crown Court	20	34	48	79	100	77	83
Defendants found guilty at the Crown Court	18	31	40	63	81	56	65
Total offenders found guilty at both courts	723	1,152	1,688	2,105	1,519	1,350	1,416
of which Indictable offences ⁽⁵⁾	133	182	342	465	347	324	313
Total offenders found guilty or cautioned ⁽⁴⁾	723 ⁽⁶⁾	1,222	1,797	2,259	1,796	1,580	1,489
of which Indictable offences ⁽⁵⁾	133 ⁽⁶⁾	207	419	568	527	468	473

⁽¹⁾ The British Crime Survey did not commence until 1982, where interviews were based on the previous year's experience of crime.
⁽²⁾ Excluding other criminal damage of value £20 and under. Includes estimates for criminal damage over £20 for Merseyside and Metropolitan Police. Figures were affected by the new counting rules from 1998 onwards and by the NCRS from 2001–2 onwards.
⁽³⁾ Adjusted to take account of the Criminal Damage Act 1971.
⁽⁴⁾ Cautions, written warnings and all fixed penalties for summary motoring offences are not covered in this volume but are published in the Home Office Statistical Bulletin 'Motoring offences and breath tests'.
⁽⁵⁾ Indictable offences include those triable either way.
⁽⁶⁾ Cautions figures were not collected until 1954.
⁽⁷⁾ Both British Crime Survey data and notifiable offences data are for the financial years, i.e. 2001–2 and 2007–8.
Source: *Criminal Statistics 2003 and 2007*, Table 1.1.

aged 10–17 inclusive. Community sentences have increased sharply throughout, largely at the expense of conditional discharges and fines. The use of custody has increased significantly for girls.

What has been the effect of these sentencing patterns on the custodial population? Tables 8 and 9 give a breakdown of the males and females in prison on 30 June for each of the years from 2002 to 2007. The total prison population was thus around 80,000 at that time, and it has increased since then (some 83,810 prisoners were held on 1 August 2008). It is evident from Tables 8

Table 2 Male offenders aged 21 and over sentenced by disposals, 1997-2007

All Courts								
	Absolute discharge	Conditional discharge	Fine	Suspended sentence order	Community sentence	Immediate custody	Otherwise dealt with	Total offenders sentenced
MALES								
1997	12,694	54,022	721,349	2,747	76,877	66,417	13,510	947,616
1998	12,373	55,627	761,907	2,664	79,966	70,966	14,415	997,918
1999	10,808	54,559	716,102	2,403	78,831	73,527	15,284	951,514
2000	10,206	52,383	703,703	2,355	77,459	73,995	14,603	934,704
2001	9,777	53,169	642,609	2,115	79,646	74,183	15,520	877,019
2002	10,026	55,994	674,684	1,889	87,962	79,600	17,654	927,810
2003	9,322	60,266	731,687	2,093	92,670	78,619	20,405	994,992
2004	8,303	56,812	766,673	2,083	98,923	77,870	25,532	1,036,196
2005	7,115	53,796	716,021	7,526	98,178	74,092	24,166	980,894
2006	6,284	50,309	665,665	25,253	88,192	69,397	26,332	931,432
2007	5,670	54,010	643,216	30,538	88,472	68,563	23,425	913,894

Source: Sentencing Statistics (Ministry of Justice 2008a) Table 1.5.

Table 3 Female offenders aged 21 and over sentenced by disposals, 1997-2007

All Courts								
	Absolute discharge	Conditional discharge	Fine	Suspended sentence order	Community sentence	Immediate custody	Otherwise dealt with	Total offenders sentenced
FEMALES								
1997	2,610	15,842	151,441	744	13,188	4,556	1,830	190,211
1998	2,469	16,485	163,568	784	14,642	5,380	2,114	205,442
1999	2,455	15,871	147,790	758	15,245	6,123	2,449	190,700
2000	2,644	15,946	182,300	717	15,608	6,337	2,362	225,914
2001	2,501	16,226	163,376	640	16,124	6,546	2,698	208,111
2002	2,592	17,420	180,061	630	17,628	7,228	3,203	228,763
2003	2,219	18,544	180,329	624	17,418	7,413	3,675	230,222
2004	1,921	17,788	196,500	772	18,411	7,491	5,160	248,043
2005	1,719	16,636	200,782	1,499	18,207	6,898	4,386	250,127
2006	1,589	15,452	195,988	4,069	16,268	6,540	5,102	245,008
2007	1,436	16,610	204,612	5,042	16,631	6,522	4,378	255,231

Source: Sentencing Statistics (Ministry of Justice 2008a) Table 1.5.

and 9 that the remand population has not produced the increases: it is prisoners under sentence, and particularly (for males) sentences of four years and longer. The causes of the increase in the prison population, from some 40,000 in early 1993 to its present high level, are discussed in some detail in Chapter 9 below.