

UNITED KINGDOM (ENGLAND AND WALES)

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I. INTRODUCTION

I am describing the English and Welsh sentencing system : Scotland and Northern Ireland have different, though similar, systems. England has no penal code. There is a huge number of crimes, mostly statutory (created by Act of Parliament) but some such as murder are still governed by the common law. Many regulatory offences are created by delegated legislation (statutory instrument). Parliament has also enacted many statutes which contain sentencing provisions. These were codified in the Powers of the Criminal Court (Sentencing) Act 2000 (PCC(S)A), though changes have already been enacted in subsequent Acts e.g. the Criminal Justice and Court Services Act 2000, the Vehicles (Crime) Act 2001, the Criminal Justice and Police Act 2001 and the Anti-Terrorism, Crime and Security Act 2001. Maximum sentences for individual offences are to be found in the statute creating the offence, but the general sentencing framework is found in other Acts of Parliament, and, very importantly, in decisions of the Court of Appeal.

As well as the statutory provisions, general guidelines for the lower courts (particularly the Crown Court) are laid down in appeal decisions of the Court of Appeal (Criminal Division). These are nowadays well reported e.g. in *the Criminal Appeal Reports (Sentencing)* and in Dr David Thomas' four volume loose-leaf *Current Sentencing Practice*. Thus sentencing law is seen as a well-developed subject, but treated separately from criminal law. As well, the Sentencing Advisory Panel is a statutory body which since 1998 has issued guidance of the Court of Appeal. The Magistrates' Association lays down guidance for the magistrates' courts (where the vast majority of offenders are sentenced).

The political climate in England in recent years has led to a strong political message that criminals should be punished severely and that the

public should be protected from criminals. Yet at the same time, there is a growing belief that if the criminal justice system is to be effective in reducing crime, rehabilitative measures are vitally important. Government and policy makers are showing an increased interest in the “what works” literature, and in developing new community sentences. There has been a flood of important reports and Government White Papers on the subject¹: it seems likely that in the near future there will be significant changes, with a wide variety of new sentences being made available to the judge: customised community penalties; custody plus, custody minus, intermittent custody. With an emphasis on the resettlement of the (non-dangerous) offender in the community, the traditional distinctions between custodial and non-custodial sentences is being broken down.

Whether there is a political commitment to European harmonisation of sentencing is a quite different issue. Whilst many people would welcome greater co-operation in judicial and penal matters, harmonisation is at best considered to be a distant goal.

II. CRIMINAL DEFINITIONS

Terrorism

The political quagmire in Northern Ireland means that there has been terrorism legislation in the United Kingdom for many years. The Terrorism Act 2000² reforms and extends previous counter-terrorist legislation: the Prevention of Terrorism (Temporary Provisions) Act 1989; the Northern Ireland (Emergency Provisions) Act 1996; and ss 1 to 4 of the Criminal Justice (Terrorism and Conspiracy) Act 1998³.

Previous counter-terrorist legislation provided a range of measures designed to prevent terrorism and support the investigation of terrorist crime. These fall into three broad categories: a power for the Secretary of State to proscribe terrorist organisations, backed up by a series of offences connected with such organisations (membership, fundraising etc); other specific offences connected with terrorism (such as fund-raising for terrorist purposes, training in the use of firearms for terrorist purposes, etc); and a range of police powers (powers of investigation, arrest, stop and search, detention, etc). The previous counter-terrorist legislation was subject to annual renewal by Parliament. This is no longer the case: the

¹ See the HALLIDAY Report: *Making Punishments Work: A Report on the Review of the Sentencing Framework*, July 2001; the Home Office's *Making Punishments Work: a Response to Consultation*, February 2002; The White Paper, *Justice for All*, July 2002 (all available on www.homeoffice.gov.uk).

² For a description, see J. J. ROWE, (2000) *The Terrorism Act 2000, Criminal Law Review* 527. The Government has also published Explanatory Notes available on www.hmso.gov.uk/acts.htm.

³ See also *Legislation against terrorism* (Cm 4178, 1998) and Lord Lloyd of BERWICK'S *Inquiry into legislation against terrorism* (Cm 3420, 1996).

main provisions in the Act are permanent. There will, however, continue to be an annual report to Parliament on the working of the Act (see s 126).

The law has already been strengthened by the Anti-Terrorism, Crime and Security Act 2001⁴, which was rushed through Parliament at the end of 2001. This creates a host of new offences. It amends the Biological Weapons Act 1974 to make it an offence to transfer biological agents or toxins outside the UK or to assist another person to do so (s 43). Other new offences are causing nuclear explosions (s 47), bribery and corruption committed on foreign officers outside the UK (ss 108-10); using noxious substances to cause harm (s 13); hoaxes and threats involving noxious substances or things (s 114); failure to disclose information about acts of terrorism (5 years imprisonment if convicted on indictment) (s 117). The Act adds another paragraph to ss 54 of the Terrorism Act 2000 to cover training relating to radioactive material and weapons designed or adapted for the discharge of radioactive material (s 120).

In brief, I believe that English law complies with the framework document on terrorism. The most interesting questions will be how much the law is used in practice, and whether, in practice, the law can be applied without breaching the suspect's procedural rights under the European Convention on Human Rights. Particular concerns are raised by the powers to detain suspected terrorists indefinitely without charge; the extension of disclosure of information powers; the retention of communications data; the third pillar powers which enable the Government to implement terrorist-related EU Justice and Home Affairs decisions without any Parliamentary scrutiny. It is also important to remember that any terrorist who is caught is as likely to be charged with the "traditional" offences of murder, conspiracy to murder, firearms offences etc as with these specific offences.

Crimes against the environment

There are a wide-range of crimes against the environment, developed in a variety of statutes in a rather unprincipled way over many years. Here are a few examples :

(i) Offences under the Environmental Protection Act 1990

These include the offence of carrying out a prescribed process without, or in breach of, authorisation, contrary to s 23. There are regimes for integrated pollution control and air pollution control, regimes which cover the more complicated processes, which obviously have the potential to cause great pollution. This section criminalises unauthorised processes. Other offences are carrying out an unauthorised or harmful deposit of waste, contrary to s 33 (maximum sentence 2 years) and committing a statutory nuisance, contrary to s 79.

⁴ Notes on Clauses are available on www.parliament.the-stationery-office.co.uk.

(ii) *Offences under Water Resources Act 1991*

It is an offence contrary to s 24 to abstract water illegally. Water abstraction is governed by a licensing system which controls the amount abstracted in order to protect the environment and the public drinking water supply. It is an offence contrary to s 85 to pollute controlled waters. Section 85(1) provides that

“a person contravenes this section if he causes or knowingly permits any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters”.

The section creates two offences : causing pollution and knowingly permitting pollution. It has led to interesting litigation about the required “mens rea”. For example, in *Empress Car Company (Abertillery) Ltd v National Rivers Authority* [1999] 2 AC 22, the defendant company maintained a diesel tank in a yard. The tap to the tank was opened by a person unknown (who could have been an employee or a complete stranger) and the entire contents of the tank ran into a drum, overflowed into the yard and passed down a drain into a river. D’s defence to a charge under s 85 of the Water Resources Act 1991 was that “causing” required some positive act and that the escape could not be said to have been caused by the company. The House of Lords dismissed his appeal. It was open to the magistrates to hold that the defendants caused the oil to enter the controlled waters. It is wrong and distracting to ask “what caused the pollution?”. The only question is “did the defendant cause the pollution?”.

Other offences have been created for breaches of Regulations (delegated legislation) made under this Act e.g. The Control of Pollution (Oil Storage)(England) Regulations 2001 (SI 2001 No 2954)

(iii) *Offences under the Clean Air Act 1993 and the Pollution Prevention and Control Act 1999*

The Clean Air Act 1993 creates a number of offences. Thus, for example, s 2 :

“(1) Dark smoke shall not be emitted from any industrial or trade premises and if, on any day, dark smoke is so emitted the occupier of the premises and any person who causes or permits the emission shall be guilty of an offence”.

This is drafted similarly to the water protection offences described above. It raises similar questions of causation and strict liability. Thus in *O’Fee v Copeland Borough Council* (1996), a farmer, was prosecuted for emitting dark smoke from a fire more than 600 meters from the boundary of his farm. The question was whether it was necessary to prove that the smoke emitted over and beyond the farmer’s own land. He argued that ownership of land gives rights in the space above that land, and that a penal statute should not be construed as limiting those rights unless plain language is used. The Divisional Court (Pill LJ) dismissed the appeal. Section 2 applies to black smoke in the air within the boundaries of the relevant premises. Thus it was not necessary for the prosecution to prove that dark smoke emitted beyond the territorial boundary of the land.

Section 20 prohibits emission of smoke in smoke control areas. Section 21 allows regulations which create offences for breaches of these regulations e.g. Smoke Control Areas (Exempted Fireplaces) (England) Order 2001 (SI 2001 No 422).

Many regulatory offences have been created by regulations passed under the Pollution Prevention and Control Act 1999 : see the Pollution Prevention and Control (England and Wales) Regulations (SI 2000 No 1973, amended by SI 2001 No 503) ; Offshore Combustion Installations (Prevention and Control of Pollution) Regulations 2001 (SI 2001 No 1091) etc.

Does English law comply with the European Convention on the Protection of Environment through criminal law? The major question must be English law's use of strict liability. Although there is clearly a presumption of mens rea (see recent rulings of the House of Lords in relation to sexual offences against children : *B (a minor) v DPP* [2000] 1 All ER 833 ; *K* [2001] 3 All ER 897), it is not clear how far this will be accepted in the "regulatory" sphere. English makes no formal distinction between regulatory and other crimes, but the courts are happier to accept strict liability in crimes which they perceive to be "not truly criminal".

Cybercrime

The "ordinary" criminal law may well be used to prevent cybercrime (often defined as crimes committed either with or against computers). Thus, the law of theft, fraud and criminal damage offences may apply here. Those who download indecent materials involving children may be prosecuted under the Protection of Children Act 1978. As well, there are the offences created in the Computer Misuse Act 1990. The Act created three offences : unauthorised access to computer material ; unauthorised access with intent to commit or facilitate commission of further offences ; unauthorised modification of computer material.

The offences do not have to be committed in the UK as long as there is a "significant link" with the domestic jurisdiction. The Act was amended by the Criminal Justice and Public Order Act 1994 and by the Criminal Justice (Terrorism and Conspiracy) Act 1998 to make it easier to prosecute inchoate offences in relation to computer misuse abroad.

As well as the Council of Europe Convention on Cybercrime, the United Kingdom is involved in developing a Commonwealth Model Law and guidelines for states in relation to computer and computer-related crime⁵. The difficulties of fighting cybercrime are related however, less to the problem of substantive criminal law, but to resources. The new National High Tech Crime Unit (NHTCU) of the police is hoping to spearhead improvements to the detection and prosecution of cybercrime.

⁵ See the two expert working group reports published by the Commonwealth Secretariat's Legal and Constitutional Affairs Division's *Law in Cyber space* (2001, Commonwealth Secretariat).

III. THE RELATIONSHIP BETWEEN CRIME AND PUNISHMENT

Punishment flows from a criminal conviction, so it is essential to have a clear idea of the substantive criminal law on which the penal sanctions sit. Harmonisation of sanctions between jurisdictions whose criminal laws differ will be hugely problematic. Even within England, criminal law can be highly problematic. For example, English law has traditionally divided crimes into two main elements : the guilty act (*actus reus*) and the guilty mind (*mens rea*), to which should be added the absence of a defence. Both concepts create difficulties in the areas which we are studying : the conduct element of a crime may in fact be a voluntary act or an omission, or a state of affairs ; it may require particular circumstances or consequences. Thus many crimes require a certain consequence to have been caused by the criminal act, as we saw in the cases mentioned above on “causing pollution”. Again, various states of mind may lead to criminal liability. English law puts more emphasis on intention and recklessness than on negligence, which it can be argued is not a state of mind since it is merely a failure to comply with the standards of the reasonable man. We noted earlier the problems involved with strict liability in environmental offences.

English law distinguishes between principals and accomplices (governed by the Accessories and Abettors Act 1861). Aiding and abetting, counselling or procuring are not separate offences, but simply a means of convicting someone of the main offence. If A asks B to kill C, and B does so, both A and B will be convicted of murder, whether or not A was present at the scene. Both will receive a mandatory life sentence.

There are the three inchoate offences of incitement, conspiracy and attempt. The maximum sentence permissible for all inchoate crimes is the same as for the substantive offence. Sentencing of all the above may vary considerably, though without specific rules (see the relevant case law guidance). An accomplice may even be given immunity from prosecution in the public interest, where for example, she gives evidence against the principal. Sometimes the accomplice may receive a more significant penalty than that imposed on the principal. For example, someone who encourages others to steal. Wide discretion is given to the trial judge. An attempt in English law is punishable up to the maximum permitted for the equivalent completed offence (see s 4 of the Criminal Attempts Act 1981). In practice the trial judge has a wide discretion. For example, of the 54 offenders over 18 who were sentenced for attempted murder in the year 2000, 8 received life sentences and the rest received custodial sentences ranging between 5 and 16 years. The most frequently used sentence was 10 years.

It is important to note that there is no separate scheme of corporate liability in English law. Generally speaking, partnerships, unincorporated associations, the Crown and government agencies cannot be convicted of crimes. Most crimes are addressed at human beings and not at corporate bodies, and the *mens rea* concepts apply uncomfortably to companies. However, there are a number of ways the law has evolved in order to convict a company :

(i) the doctrine of vicarious liability has been used to convict companies of strict liability offences.

(ii) A statute may also impose liability on a company specifically or by necessary implication. For example, if a statute penalises the occupier of premises, a company which is the occupier will be as guilty as any human occupier.

(iii) The doctrine of identification means that the company itself is deemed to have *mens rea*. The law seeks to identify who is or are the “brains” or controlling mind of the company, and then their acts can be attributed to the company, not because they are the servants of the company but because the law deems them to be the company. These principles apply more easily in the case of small companies than in the case of large ones. Penalties for regulatory offences under such statutes as those mentioned in the section on crimes against the environment are regularly increased, and at the same time the courts seem to be taking a firmer line in favour of corporate liability. Thus in *British Steel plc* (1995) 1 WLR 135D the company was prosecuted under s 3 of the Health and Safety at Work Act 1974, which imposes a duty on employers to ensure, so far as is reasonably practicable, that others are not exposed to risk to their health and safety. The defendants argued that because they had taken steps at a senior level to ensure safety, they should not be liable. The Court of Appeal dismissed their appeal against conviction. Since all reasonable steps had not been taken at operating level, the defendants were guilty. The Court commented on the inadequacy of a fine of £ 100 imposed where a man had died. Again, in *Gateways Foodmarkets Ltd* (1997) 2 Cr App R 40, the duty manager in a store fell through a trap door in the lift control room and died. The Court of Appeal upheld the company’s conviction under s 2 of the Health and Safety at Work Act 1974 (which imposes a duty on employers in relation to their own employees), and a fine of £ 10,000.

The Law Commission in 1996⁶ recommended (following public concern that P & O European Ferries were not successfully prosecuted after the sinking of the ferry the *Herald Of Free Enterprise* in 1987, caused by a failure to close the bow doors, had led to the death of 192 passengers) an offences of corporate manslaughter :

“(1) A corporation is guilty of corporate killing if-

(a) a management failure by the corporation is the cause or one of the causes of a person’s death ; and

(b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances”.

This proposal has not yet been enacted. There has been some debate as to whether “corporations” should be widened to include any “undertaking”.

⁶ See *Legislating the Criminal Code : Involuntary Manslaughter, Law Com Report No 237*.

IV. CLASSIFICATION OF SENTENCES

In England the main penalties are imprisonment, community penalties and fines. However, most sentences of imprisonment end with a period of supervision in the community : the law on release is both complex and largely discretionary (see the tables). A sentence of imprisonment may exceptionally be suspended by the sentencing judge (or magistrates) when imposing the sentence. As well, there are many possible ancillary orders e.g. disqualifications, confiscation orders, forfeiture orders, deprivation orders. Parliament has usually specified the maximum penalty, but it is up to judges or magistrates to fix the precise level. The sentencing system for young offenders (aged 10-18) is very different and is not dealt with in this paper⁷.

Until the Crime (Sentences) Act 1997 there was just one mandatory sentence in England and Wales : the mandatory life sentence for murder (though very rarely does this mean that a prisoner spends the rest of their life in prison : see below). The 1997 Act introduced automatic life sentences for second (very) serious offences ; minimum sentences of seven years for a third class A drug trafficking offence ; and minimum three year sentences for third domestic burglaries (see now ss 109-111 PCC(S)A 2000). But even these minimum terms will be subject to the early release rules described below.

The maximum sentence in England is life imprisonment. A life sentence is mandatory where a person is convicted of murder, and automatic (unless there are "exceptional circumstances") for those sentenced for a second serious sexual or violent offence which could carry a life sentence (introduced in s 2 of the Crime (Sentences) Act 1997, now s 109 of the PCC(S)A 2000). Those under the age of 18 who have been convicted of murder are detained at Her Majesty's Pleasure, and although this is mandatory, they are treated as discretionary life sentence prisoners for release purposes. A life sentence is a possible (i.e. discretionary) sentence for a number of offences such as : attempted murder ; manslaughter ; rape ; robbery ; arson ; criminal damage with intent to endanger life ; aggravated burglary ; kidnapping ; incest ; sexual intercourse with a girl under the age of 13 ; infanticide ; possessing a Class A drug for supply ; unlawful abortion ; and forgery of births, deaths or marriage certificates.

The use of the discretionary life sentence in practice has always been reserved, broadly speaking, for cases where the offence was a grave one in itself, and where it appeared to the sentencing judge that the accused was a person of unstable character likely to commit such offences in the future, thus making him dangerous to the public in respect of his probable future behaviour unless there was a change in his condition.

⁷ See for an overview, T. NEWBURN, *Young People, Crime and Youth Justice in The Oxford Handbook of Criminology*, 3rd ed., 2002, or N. M. PADFIELD, *Juvenile Justice in Handbook of Criminal Procedure* (eds M. McCONVILLE and G. WILSON), Oxford, 2002.

Once the normal sentence appeal process has been exhausted, there is no way to convert this life sentence into a fixed term sentence. What happens is that the prisoner is given a “tariff”, the penal term, supposedly based on the requirements of retribution and deterrence. Discretionary lifers learn the length of this tariff period in open court, and it is appealable. Mandatory lifers learn later : the Home Secretary still has a role in fixing the tariff. Only about 30 prisoners have been told that their “tariff” is their natural life. Once the lifer has served the tariff period he or she is entitled to regular reviews by the Parole Board. English law in this area has been much effected by decisions of the European Court of Human Rights (see below).

The length of determinate prison sentences is governed by ss 79 and 80 of the PCC(S)A 2000, which replaced ss 1 and 2 of the Criminal Justice Act 1991. A prisoner may be sentenced under s 79(2)(a) or (b) :

“(2) Subject to subs (3) below, the court shall not pass a custodial sentence on the offender unless it is of the opinion-

(a) that the offence, or the combination of the offence and one or more offences associated with it, was so serious that only such a sentence can be justified for the offence ; or

(b) where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from him”.

The length of these sentences is governed by s 80(2) :

“(2) Subject to ss 110(2) and 111(2) below, the custodial sentence shall be-

(a) for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it ; or

(b) where the offence is a violent or sexual offence, for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender”.

Thus, in essence, an offender should either be sentenced to a term commensurate with the seriousness of the offence (or the combination of the offence with other associated offences) or, in the case of violent or sexual offences, for a longer period which the court thinks is necessary to protect the public from serious harm from the offender. The relationship between these basic rules has been complicated by the introduction of minimum seven year sentences for third class A drug trafficking offences and minimum three year sentences for third domestic burglaries by the Crime (Sentences) Act 1997 and of extended sentences by s 58 of the Crime and Disorder Act 1998 (now s 85 of the PCC(S)A 2000), which allows courts to extend sentences for the purposes of requiring offenders to undergo a longer period of post-release supervision.

General mitigating circumstances in England and Wales include an early guilty plea (see s 152 of the PCC(S)A 2000) which results in a discount in penalty between one-fifth and one-third. (It had been the practice for many years for courts to give a discount for a timely guilty

plea, but when this was enacted in 1994 there was controversy whether this should be formally recognised). Assisting the police may also mitigate sentence.

There are many other factors which will lead a judge, in his or her discretion, to reduce the sentence. For example, the Sentencing Advisory Panel's guidance on environmental crimes suggests the following facts may reduce the seriousness of the offence : the defendant played a relatively minor role or had relatively little personal responsibility ; the defendant genuinely and reasonably lacked awareness of the relevant regulations ; the offence was an isolated offence. As well there may be other personal mitigating factors ; for example, in environmental offences : prompt reporting and co-operation with the enforcement authorities ; the defendant's good environmental record ; the fact that the defendant took steps to remedy the problem as soon as possible. This list is by no means exhaustive.

Terrorism

The maximum penalties for the main terrorism offences contained in the Terrorism Act 2000 are 14 years imprisonment (see above). However, the ancillary penalties may be as important : for example, the Anti-Terrorism, Crime and Security Act 2001 contains provisions to prevent terrorists from gaining access to their money. They complement the provisions in the Proceeds of Crime Act 2002 which considerably strengthen the law on confiscation. The Act increases both investigative and freezing powers, replacing the previous provisions in the Terrorism Act for the seizure and forfeiture of terrorist cash at the borders.

Crimes against the environment

The standard penalties here are likely to be fines. For example, the penalty for an offence under s 85 of the Water Resources Act 1991 is set out in subs (6) :

“Subject to the following provisions of this Chapter, a person who contravenes this section or the conditions of any consent given under this Chapter for the purpose of this section shall be guilty of an offence and liable-

(a) on summary conviction, to imprisonment for a term not exceeding three months or to a fine not exceeding £ 20,000 or to both ;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both”.

The leading sentencing case on s 85 is *R v Milford Haven Port Authority* [2000] 2 Cr App R (S) 423 where the Court of Appeal dramatically reduced the fine imposed at first instance. In that case, the appellant port authority, responsible for the management and control of maritime traffic in and out of a port, pleaded guilty when a tanker supervised by a professional pilot employed by their wholly owned subsidiary had gone aground losing 70,000 tonnes of oil thus causing a pollution disaster. The offence was one of strict liability to which they had no defence. The Lord Chief Justice, Lord Bingham, accepted that the authority should be

able to rely in mitigation on “its relative lack of culpability” and on its status as a public trust port : “if a very substantial financial penalty will inhibit the proper performance by a statutory body of the public function that it has been set up to perform, that is not something to be disregarded”. The Chief Executive of the County Council had written to the Court saying, “The Council considers that Pembrokeshire has had to suffer twice from the impact of the Sea Empress. The economic damage and the associated negative publicity of the oil spill itself was a disaster, the fine and curtailment of investment plans by the Port Authority has worsened the situation at a time when the County needs additional support”. Balancing the seriousness of the offence and the need to ensure the highest levels of vigilance with the need not to cripple the authority’s business and blight the economy of the area, the Court reduced the fine of £ 4 million to £ 750,000.

An offender may be given time to pay the fine ; an individual may be allowed to pay by instalments over a 12 month period ; for a company, the fine may sometimes be paid in instalments over a longer period. Minor environmental offences are punishable by “fixed penalty notices”.

Cybercrime

The leading case is *R v Maxwell-King* [2001] 2 Cr App R (S) 28. The appellant pleaded guilty to three counts of inciting the commission of an offence contrary to the Computer Misuse Act 1990, s 3, of inciting a third party to supply a multi-mode board which caused an unauthorised modification of a computer. He and his wife were directors and sole shareholders in a company which manufactured devices which would allow the subscribers to cable television services to access all the channels provided by the cable company regardless of the number of channels or programmes for which the subscriber had paid. He pleaded guilty on the basis that only 20 devices had been supplied over a period of three months. The total turnover arising out of the offences was £ 600. He had originally been sentenced to four months’ imprisonment on each count, all concurrent. The Court of Appeal held, considering *Carey* [1999] 1 Cr. App. R. (S.) 322, that the offence was effectively a form of theft and plainly an offence of dishonesty. However a conviction on a plea of guilty for a first offence of this nature committed on a small scale did not necessarily cross the threshold of seriousness which required the imposition of a custodial sentence. This case did not cross the threshold, and a substantial fine or a community sentence was appropriate. The Court concluded, bearing in mind that the company had been ordered to pay £ 10,000 prosecution costs, that the appropriate sentence was a period of community service. The sentence of imprisonment was quashed and a community service order of 150 hours substituted.

The case has a number of interesting features. First, it was the first prosecution of its kind brought under the 1990 Act, in the words of Wright J, “in a field which makes up for in fascination what it loses in obscurity”. Secondly, the case highlights the problem of “policing” the internet. Thirdly, the case raises questions about what is and is not dishonest (a

term which is not defined in English law but left to the jury to apply). Maxwell-King was aware that his actions could be illegal, but had convinced himself that, as long as he was not using the device personally, he was not really doing anything wrong. This was unsurprisingly rejected by the court. Finally the case raises questions about the proper use of police powers, especially by individual investigatory agencies. The Court reports that when “investigating officers from the Federation Against Copyright Theft descended upon Mr Maxwell-King’s premises they virtually closed him down, because not knowing precisely what it was he was doing, they seized and analysed virtually all the technical equipment that he had on his premises, much of which had no application to this particular scheme at all”.

The internet is also much used by those who download pornography. It has recently been held that making photographs contrary to s 1 of the Protection of Children Act 1978 may fall below the custody threshold for imprisonment for a first time offender (see *Wild* [2001] Crim LR 665).

Conclusion

In practice, the judge or magistrate when sentencing has a relatively wide margin of appreciation, guided by detailed provisions laid down by Parliament as well as the appellate courts. But we should not exaggerate this freedom : in reality, a lot of time and effort is spent teaching judges on the need for consistency, and inappropriate sentences will lead to successful appeals. It is also important to recognise that the judge when sentencing should point out to the offender the implications of the sentence, in particular in relation to the early release scheme, described below (see *R v Secretary of State, ex p Francois* [1998] 2 WLR 530). The Lord Chief Justice’s *Practice Direction : Custodial Sentences* (of 22 January 1998) [1998] 1 WLR 278 had already required trial judges to “explain the practical effect of the sentence” in line with the models included in the *Practice Statement*.. The sentencers’ job is certainly complex.

V. THE ADMINISTRATION OF SENTENCES OF IMPRISONMENT

Not only is the sentencers’ job complex, but the rules on early release and supervision in the community are complex. The rules are detailed, but they also give broad discretionary powers to both the Prison Service (in relation to short sentences) and to the Parole Board (for sentences of four years or more). Supervision is provided by the Probation Service. It is an area which is resulting in much litigation. Prisoners who are detained longer than they should be are likely to be successful in their claims for compensation (see *R v Governor of Brockhill, ex p Evans (No 2)* [2000] 3 WLR 843 ; [2000] All ER 15).

The first difficulty arises from the calculation of release dates. Periods spent in custody on remand must be taken into account, though the position is not simple to calculate when a prisoner may have spent periods pre-trial remanded in custody and released on bail into the community on

various different charges. A second problem arises when calculating release dates for concurrent and consecutive sentences. In *R v Governor of Brockhill Prison, ex p Evans ; R v Governor of Onley YOI* [1997] 2 WLR 236 the Court of Appeal held that where an offender is sentenced to a combination of individual sentences, whether consecutive or concurrent, time spent in custody in connection with any of the offences, which is a “relevant period” for the purposes of s 67 of the Criminal Justice Act 1967, is deducted from the aggregate sentence, subject always to the rule that time could never be counted more than once.

Then there is the difficulty of prison governors’ powers to add days to a sentence as a punishment for offences against prison discipline. Although the UK Government has sought to argue that these “added days” should be seen as a loss of early release and not as an extension of a sentence, they have recently lost their argument in the European Court of Human Rights. In *Ezeh and Connors v UK* (July 30, 2002) the Court held that the prisoners, charged with serious offences against prison discipline, should have had a right to legal representation, and that the governor was not an “independent and impartial tribunal”. Having regard to the nature of the charges (threatening language to a parole officer and assault), and the potential and actual penalties (40 added days, and short periods of cellular confinement, exclusion from associated work and forfeiture of privileges), disciplinary proceedings constituted criminal proceedings for the purposes of Art 6, notwithstanding their classification as disciplinary proceedings. The Government is still considering how to replace or amend the system of prison discipline.

On top of these difficulties in calculating release dates, we then have to explore the early release schemes, governed by the Criminal Justice Act 1991, and amended many times since. All those sentenced to less than twelve months imprisonment are eligible for *Automatic Unconditional Release* at the half way point in their sentence. Prisoners are then at risk of being returned to serve the rest of their sentence if they are convicted of further imprisonable offences before their sentence has fully expired, but are not subject to compulsory supervision. Since May 2002, prisoners serving between 3 and 12 months may also be released even before the half way point under the Home Detention Curfew scheme described below.

Those sentenced to between twelve months and less than four years are released at the halfway point on *Automatic Conditional Release*. They are supervised on license, under the supervision of a probation officer, until the three-quarter point in their sentence. Since January 1999, such prisoners may be released up to two months earlier on a *Home Detention Curfew License*. This period has been extended to three months early, from October 2002. Thus a prisoner sentenced to two years, will be released automatically after one year, and may be released after nine months. Such prisoners are subject to electronic monitoring (“tagging”). The risk assessment for HDCL is operated by prison staff. They have to balance any risk to the public presented by the bringing forward of the release date against the potential benefits of incorporating a period of HDC within the sentence. The prisoner may appeal against the refusal

of HDC to the governor of the prison, but there is no appeal outside the prison system. In *R v SSHD, ex p Allen* (2000) 97 (14) LSG 43 it was held by the Court of Appeal that fairness did not require that a prisoner should be given the information on which the risk assessment was made, but did require that he be given an opportunity to put his case where, following an assessment that he should not be released early, he appeals to the governor. If at that stage he is given the gist of the material on which the assessment was made, the requirements would be satisfied. Over 44,000 prisoners have been released under this scheme before the half way point in the last three years.

The Parole Board is only involved with the release of those prisoners sentenced to more than four years, who become eligible for *Discretionary Conditional Release* at the half way point. If early release is not granted, these prisoners are released automatically at the two-thirds point in the sentence. They remain under supervision until the three-quarter point in their sentence. Many sex offenders remain on license until the end of their sentence on the recommendation of the trial judge. The Parole Board is a body made up of nearly 100 members, almost all serving part-time, and appointed by the Home Secretary for a period of three years. Members include judges, psychiatrists, probation officers, criminologists as well as non-expert lay people. Parole Board Interviewing Members visit prisons to interview prisoners about their parole applications, and their interview reports are added to a prisoner's dossier which is studied by a three member panel who meet in London to decide whether to recommend early release. The prisoner is not present at the hearing. Only about 48 % of prisoners are now paroled at some point in their sentence : the Parole Board is very cautious in the way it exercises its risk assessment exercise. In fact, it has been argued that the parole rate could be substantially increased without increasing the proportion of prisoners who would be reconvicted of a serious offence on parole ⁸.

Life sentence prisoners are subject to different release processes. Since the Government accepted the European Court of Human Rights' decision in *Thynne Wilson and Gunnell v UK* [1991] 13 EHRR 666 discretionary life sentence prisoners have been entitled to an oral hearing before a *Discretionary Lifer Panel* of the Parole Board. These panels are always chaired by a judge, and meet in the prisoner's prison. The decision of the Parole Board to direct the release of a prisoner is binding on the Home Secretary. However, research reveals that decisions are heavily influenced not only by questions of risk, but prison security classification etc ⁹. During the 1990s, as a result of further decisions of the European Court of Human Rights, this release system was extended to those convicted of murder as children and those subject to the new automatic life

⁸ See R. HOOD and S. SHUTE (2000), *The parole system at work : a study of risk-based decision making* (HORS No 202).

⁹ See N. M. PADFIELD and A. LIEBLING, *An Exploration of decision-making at Discretionary Lifer Panels* (HORS No 213) ; N. M. PADFIELD, *Beyond the Tariff : the Release of Life Sentence Prisoners*, Willan, 2002.

sentence. The Government is currently considering the most recent decision, in *Stafford v UK* (2002) 35 EHRR 32¹⁰, which concerned the power of the Home Secretary not to accept a recommendation of the Parole Board to release on license an offender subject to a mandatory life sentence, whose previous license had been revoked. The Court accepted that all life sentences are made up of two parts : the first, the punishment element of the sentence, is a sentencing exercise, not the administrative implementation of the sentence of the court. The second part, imposed for the protection of the public because of the offender's dangerousness, should be reviewed regularly by a body with a power to release and under a procedure with the necessary judicial safeguards, including, for example, the possibility of an oral hearing. The Court held unanimously that there had been a violation of both Article 5(1) and Article 5(4) of the Convention in the case before it. The Home Secretary should not have the power to detain post-tariff lifers, whether mandatory or discretionary, against the recommendation of the Parole Board.

Where the Prison Service, Home Office or Parole Board have discretionary release powers, there is no right of appeal to the courts. However, the offender may seek judicial review in the High Court of the legality of the decision. A recent important example is *R (Giles) v Parole Board and the Home Secretary* [2002] EWCA Civ 951. In this case a prisoner argued that since he had been given a longer than commensurate sentence (under s 79 (1) (b) of the PCC (S) A 2000) rather than the more usual commensurate sentence imposed under s 79 (1) (a), he should be entitled to an oral hearing before the Parole Board and the Home Secretary should be bound to accept the decision of the Board. This argument convinced the judge at first instance in the High Court, Elias J, who agreed that he could see no distinction in principle between a person who is, for example, subject to a sentence of two years as punishment and 10 years preventative sentence, and a discretionary life sentence prisoner. But the Court of Appeal has recently overruled this bold decision. In my view, the Court of Appeal has failed to acknowledge that the length of a prison sentence is rarely determined by the judge when sentencing : the final decision lies in the hands of those who fix the release date, in this case the Parole Board, who focus on questions of risk. But the decision must have been a relief to the Government who, if the earlier decision of Elias J had been upheld, would have had to invest heavily in the Parole Board to make it a truly independent "court or tribunal".

Occasionally a prisoner may be granted the discretionary prerogative of mercy or compassionate release from prison, by the executive authorities. However, any prisoner refused compassionate release is unlikely to succeed in an application for judicial review of the administrative decision. There are proposals under discussion¹¹ which would give the sentencing

¹⁰ See also *R.v. Anderson* [2002] VKHLF6, [2002] 3 WLR 1800, where the House of Lords declared s. 29 of the Crime (Sentences) Act. 1997 to be incompatible with the European Convention of Human Rights.

¹¹ See footnote 2 above.

court the duty to review the progress of an offender's sentence, but these discussions are in their early stages.

VI. THE IMPORTANCE OF COMMUNITY PENALTIES

The emphasis of this discussion has been on custodial penalties but it is important to notice the huge importance of community penalties in English law (see the tables). Probation orders (recently renamed community rehabilitation orders) last for between 6 months and 3 years and may include a variety of specific requirements, for example for treatment or residence. Community punishment orders (previously community service order) compel the offender to do unpaid work for between 40 and 240 hours in the community. A curfew order requires the offender to remain in a specified place, normally subject to electronic monitoring. An offender may also be subject to a drug treatment and testing order, or a drug abstinence order. The most common sanction remains the fine. There are also a host of ancillary orders : most notably compensation orders and confiscation orders.

VII. CONVICTIONS IN FOREIGN JURISDICTIONS

Computerised information on previous convictions is held on the Police National Computer and this is used to produce antecedent reports for English courts. I have failed to find examples of the court using foreign convictions when sentencing.

The question of proving convictions may of course arise other than in sentencing. Thus in a recent case, where a man wanted to argue that he was "of good character" and wanted the judge to give a "good character" direction to the jury, the prosecution was forced to prove his previous Dutch convictions : see *R v Mauricia* [2002] Crim LR 655. When the prosecution disclosed a number of convictions against M in Holland for theft, handling stolen goods and forgery in 1985, M disputed this, saying he had only motoring offences recorded against him, and wished to give evidence of his good character. A *voire dire* (a pre-trial hearing) was held. The Crown (prosecution) called a Dutch police liaison officer who produced certificates that a man of M's name and birthday had been convicted of the offences. Evidence that the fingerprints of the man convicted were the same as M's was called, the Dutch officer having explained the record-keeping involved. The trial judge then dismissed M's submission that this was an insufficient method of proving the convictions, and allowed the prosecution to cross-examine on the basis of them. M then admitted the convictions but claimed that he had not served any sentence because the convictions had been "forfeited". The Court of Appeal refused his appeal against his conviction. The Court accepted that the only way to prove a foreign conviction is under the Evidence Act 1851, s7. The documents produced by the Dutch police officer were "examined copies" in the terminology of the 1851 Act and all the prosecution had to prove

was the “examined copies” related to M, the defendant before the court. This the prosecution could do by any admissible evidence in the ordinary way : fingerprint evidence was clearly a sensible way, and it was not necessary to produce the officer who had taken the fingerprints in 1985 in the light of the evidence from the Dutch police officer relating to the Dutch police records. This case illustrates the problems of harmonisation : as long as our systems of criminal procedure and evidence vary, indeed as long as the domestic courts in this country need to be reassured about the integrity of a foreign jurisdiction, any harmonisation project is going to be fraught with difficulties.

VIII. OBSTACLES TO HARMONISATION

It is clear that the English criminal justice system has characteristics not shared with several of its European sisters : there is no obligation of the Crown Prosecution Service, or other prosecuting authority, to prosecute. Therefore, the parties can agree to a process other than prosecution : this would be most obvious in the case of environmental crimes, where non-criminal measures may be considered more effective. But it is also possible that the authorities might choose not to prosecute someone who helped the authorities in other ways. The rules of criminal procedure and evidence are very different, the definition of individual crimes vary, the length of a sentence of imprisonment imposed by a judge is likely to be shorter in practice than the length stated in court. The reality is impossible to ascertain at the beginning of the sentence.

The real fight against most crimes, especially those such as terrorism and cybercrime, will be carried out by the police and other intelligence officers. Harmonising sentencing law is not an obvious political priority. It is unrealistic to expect too much of a sentencing system. But if our political masters are determined they must confront two preliminary issues :

— Can the European countries agree a sentencing framework, based on core principles acceptable to all member states? What are the key principles, acceptable to all countries? Desert, or rehabilitation, for example? A fundamental review of philosophical first principles is required.

— If harmonisation is to be encouraged, a pre-requisite is the harmonisation of the general principles of criminal law (especially the *mens rea*, culpability, requirements) as well as the definition of individual offences, rules of criminal procedure and evidence. A next stage will be a harmonisation of early release and the ways that punishments are applied in practice¹². There is little point having clear guidelines on sentencing frameworks if there is no clarity on the interpretation and application of these guidelines in practice.

¹² Perhaps a review of the way the Convention on the Transfer of Sentenced Persons 1983 would also be useful starting point. It is clear from the way the Convention applies in England that those sentenced to similar periods at home and abroad may end up serving different lengths of sentence.

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