

# Law essay on Sentencing

Explain the ranges of sentences available to the judge or magistrate.

Sentencing is a process by which offenders are brought to justice in order to uphold the law. Sentencing, in criminal law is punishment that a court orders, imposed on a person convicted of criminal activity primarily with the objective to modify their behaviour and to get them to live inside the parameters of their society. Sentences typically consist of three categories, custodial, community sentences and fines. Magistrates and Judges are those who decide on an appropriate sentence for the offender. A magistrate can impose a sentence of up to 6 months imprisonment for one offence, and 12 for two offences, and up to £5,000 fines. A Judge in the Crown Court however, has no such limits; they can compel up to life imprisonment and there is no maximum figure for fines.

However, there are still restrictions. Each crime has for that type of offence set by parliament. For example, the crime of theft has a fixed maximum of seven years imprisonment. For some types of sentencing a judge can have complete discretion over, for instance, rape and manslaughter. The offender may be sent to prison for life, or given a shorter prison sentence. Murder is an exception, which carries a mandatory life sentence.

In the British legal system there are three stages of sentencing. Firstly Parliament will set out the maximum or minimum for each offence, (this is the job of the Home Secretary, who is responsible for Law and order). Then the trial judge determines the appropriate sentence for the individual offenders convicted of a particular crime. Next the court of appeal may review the sentence imposed by the trial judge. Politicians can legislate to determine the range of sentencing available to the courts but it is the magistrate in the Magistrates Court or the Judge in the Crown Court who will actually decide upon the sentence in a particular case. Of course, Politicians will look at the range of current sentences and decide whether they need altering, whether to add new ones or whether to remove them all together.

The courts will consider:

- The offence (s): the normal sentence for this offence, any factors that make the offence more or less serious;
- The offender, his or her past record and present circumstances- whether the defendant has a settled job and at home, for example;
- Guidance from the Court of Appeal.

When judges or magistrates have to pass a sentence they will not only look at the sentences available, but also they will have to decide what they are trying to achieve by the punishment they give. I am going to outline the range of sentencing available to a magistrate or judge when deciding what is the right form of punishment for the offender. There are six main different and sometimes

conflicting ranges of sentencing. These are, retribution, denunciation, incapacitation, deterrence, rehabilitation and reparation.

There are four main theories of punishment; retribution, deterrence, incapacitation and rehabilitation. The retributive theory looks back to the crime and punishes because of the crime. The remaining three all look forward to the consequences of punishment and thereby hope to achieve a reduction in crime. They are therefore often termed consequentialist or utilitarian theories. The boundaries between these theories are far from clear, containing sub-categories, many of which are perceived quite differently by different writers.

The term retribution can be used in several senses. It can indicate vengeance or ~~e~~xpiration, however, it is today more commonly associated with giving the offender his just deserts and using punishment as a censure or denunciation. The desire for vengeance theory is that the punishment satisfies the victim's desire for vengeance, and the state is ~~e~~xacting vengeance on their behalf to prevent private retaliation. Such a view finds little support today.

~~E~~xpiration requires the offender to work off his guilt; he must be purified through suffering. "The essence of the ~~e~~xpiratory view is that in suffering his punishment, the offender has purged his guilt, has 'paid for' his crime, and that his account with society is therefore clear." The focus is on the past crime with the attempt to wipe the slate clean. These ideas largely stem from religious influences on our culture. However, a deeper psychological ~~e~~xplanation has been argued to ~~e~~xist, underlying the offender's need for ~~e~~xpiration. Guilt is a state of tension which gives rise to a need for the removal of this tension. From the time we are children we are conditioned to ~~e~~xpect this relief through punishment.

The view that has gained support, whilst theories of punishment such as deterrence and rehabilitation have come under increasing attack, is that we punish criminals primarily because they deserve it. The Criminal Justice Act 1991 followed a White Paper, which proclaimed that the aim was "better justice through a more consistent approach to sentencing, so that convicted criminals get their 'just deserts.'" Just desert theorists have tended to follow the ideas of Kant, that people deserve to be punished if they have broken the law. Furthermore, all persons owe duties to others not to infringe their rights. Justice and fairness ensure that all persons must bear the consequence of obeying the law equally. Thus punishment is necessary to remove the benefits gained by the offender. The concept of just deserts has attracted criticism, as there is the suspicion that "the idea of desert cannot be distinguished from a principle of vengeance or the unappealing assertion that two wrongs somehow make a right." Although, there are two main advantages to desert based punishment. Firstly, it imposes limits on the states power in that ~~e~~xcessive ~~e~~xemplary or incapacitative sentences become unacceptable. Second, it reduces the unjustifiable sentencing disparity, as two offenders whom commit the same crime will receive similar punishments, irrespective of race, culture or background.

Deterrence is the second main theory of punishment and it aims to reduce crime by the threat or ~~e~~xample of punishment. Unlike retributive theories, deterrent theories are forward looking, concerning themselves with the consequence of punishment. Deterrence operates on several

levels. Firstly, by individual deterrence it is hoped that the experience of punishment will be so unpleasant that the offender will not re-offend. In this theory, the task of the sentence is to look to the future and select the punishment that will have the greatest impact on the individual. It is argued that every time a crime is committed the theory of deterrence is weakened. Moreover, reconviction highlights the failure of the previous sentence. Andrew Ashworth states that where a "former prisoner is not reconvicted within two years, one cannot tell whether the explanation for that is the rehabilitative effect of custody, or its deterrent effect upon him, or a decision taken independently by the offender, or simply good luck in avoiding detection."

Under the theory of general deterrence it is the threat of punishment that deters people from committing crimes. At the legislative level, Parliament establishes penalties to threaten those who might contemplate committing a crime. At the sentencing level, offenders are punished in order that others will be discouraged from committing crimes. Thus, punishment is held up as an example of what will happen to those who engage in similar activities. When a specific crime is on the increase or attracted much publicity, then exemplary sentences may be imposed to attempt to prevent that particular crime. In Whitton, concern over the rise of hooliganism at football matches led to an exemplary sentence of life imprisonment for riotous assembly outside a football ground. The theory of general deterrence rests upon the crucial assumption that people are deterred from committing crime by the threat of punishment. It is of some significance that from the evidence on deterrence, the White Paper preceding the Criminal Justice Act 1991 concluded that "it is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation."

Within the theory of deterrence it is possible for punishment to have a more profound subconscious effect on society. The idea of educative deterrence is that punishment of criminals builds up the habit of not breaking the law in society. For example, every time someone is punished for theft the public morality that theft is wrong is strengthened and the habit of not stealing is reinforced. The achievement of inhibitions and habits is of greater value than mere deterrence.

The third main theory of punishment is the theory of incapacitation. In the case of Sargent, Lawton L.J. acknowledged "that there are some offenders for whom neither deterrence nor rehabilitation works. They will go on committing crimes as long as they are able to do so. In those cases the only protection which the public has is that such persons should be locked up for a long period." The aim of protective sentencing is to render the offender incapable of committing more crimes. Thus, not only can it be seen as punishing the offender for past crimes, but it seeks to punish for crimes yet to be committed. In the Floud Report on Dangerous Offenders the problem of punishing people for what they are predicted to do is assessed by reference to the risk of grave harm to potential victims which must be balanced against the grave harm of unnecessary protective sentences. More recently, attempts have been made to locate incapacitative sentencing within a retributive framework. Thus, the principle of proportionality can set a ceiling beyond which punishment is impermissible. Few would doubt that there are a number of dangerous offenders for whom incapacitation may be a serious option. In fact there is much public support for cases where society needs protection. However, the lack of proportionality inherent in protective sentencing remains problematic. Therefore, the only way forward is to defend protective sentencing on desert grounds.

The final theory is to punish with the aim of reforming or rehabilitating the offender. This theory is one of the most ambitious developments in penal theory. Its aim is to secure conformity through inner positive motivation on the part of the individual. As more was learned about human behaviour it was hoped that therapeutic measures could be designed which would improve the offender's behaviour. However, with the rehabilitative ideal is the problem that proportionality suffers. Instead of looking to the past and the offence committed, the sentencer must concern himself with the future needs of the offender. Thus the chosen sentence should be the one with the best chance of bringing about the desired change. Therefore, treating like cases in a like manner has little or no part to play. Furthermore, the success of a rehabilitation programme is measured by studies of recidivism. Few of which lend much support to the idea that rehabilitation works. It is wrong to say that nothing works, what is more accurate is to state, as did Robert Martinson that "with few and isolated exceptions, the rehabilitative efforts have been reported so far have had no appreciable effect on recidivism." The Criminal Justice Act 1991 has to some extent acted upon the notion that power over a criminal's life should not be taken in excess of that which would be taken were his reform not considered as one of our purposes. Thus, the reformist ideal is not discarded but any measures designed to reform take place within the confines of the system based primarily on proportionality.

Therefore, in conclusion, the main purpose of punishment is that criminals receive their just deserts. This may, obviously, have the desirable effect of stimulating law-abiding conduct and discouraging crime (educative deterrence). Moreover, this may enable the sentencer to incapacitate the dangerous and hopefully even reform them. However, these latter aims are merely welcome by-products of the central retributive function of punishment.

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When reaching an appropriate sentence a Judge or Magistrate will take certain factors into account. These will be factors like, Statute, precedent, Criminal Justice Act 1991, Crime Sentences Act 1997 and the Crime Disorder Act. Things like the seriousness of the offence whether the public need to be protected, the facts of an offence and whether the person pleads guilty or not guilty.

The main principle of the Criminal Justice Act of 1991 is that the sentence given to the offender should reflect the seriousness of the offence committed. The term used in the Criminal Justice Act 1991 to decide proportionality is that the 'sentence should be commensurate with the seriousness of the offence'.

'Just desserts' reflects the aim of the Act that an offender is punished properly for his offence.

The seriousness factor is the determinant for establishing the custody and community sentence thresholds and for determining the length or quantum sentences.

The sentencing framework created by the CJA 1991 is primarily determined by the seriousness of the offence. Seriousness is a question of fact for the sentencing tribunal and is dependent on the aggravating and mitigating factors which surround the offence, but a Judge or Magistrate must take into account the circumstances of the offence. Of course, when looking at the defendant's background, i.e., previous convictions, and response to previous convictions, these factors will have an effect.

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### **Protection of the public**

In the 1980's the Court of Appeal based an approach to sentencing whereby property offenders are punished as much as possible within the community. However, there is a different approach to sex offenders and very violent offenders because there is a need to protect the public. Here, offenders are given long custodial sentences.

The salient criteria, i.e. the protection of the public is the basis for the sentencing framework created by the CJA 1991, which results in custodial sentences.

When deciding appropriate sentences there is a methodology that a Judge or Magistrate will refer to.

1. Consider the aggravating and mitigating factors of the offence and provisionally determined 'seriousness'.
2. Consider whether there are any relevant previous convictions, which have been committed by the offender, which would have effect on the determination of seriousness if taken into account.
3. Consider any mitigation put forward on behalf of the defendant, which are related to the question of sentence.
4. Determine the nature of the sentence to be imposed taking into account 1-3 above.
5. Determine the sentence to be imposed.
6. Consider whether the seriousness of the offence is commensurate with the sentence imposed.

### **Reasons**

Since the Human Rights Act all sentences imposed on a defendant must be supported with reasons. In many cases it has been established that the offender will have the effect of the sentence read to them in plain English. This means that not only the offender and advocate hear why a particular sentence has been given, but also the public via the media can.

### **Mitigating factors**

Section 28 CJA 1991 provides a statutory basis for mitigation to be taken into account in three ways:

- As regards matters considered relevant to sentence
- As regards taking into account other penalties included in the sentence

- As regards the total effect of the sentence to be imposed

Mitigation must be taken into account, such mitigation is of general effect and there is no limit to the extent to which mitigation is to be relied on. Also, there is not a right which means that an offender has to have his personal mitigation taken into account.

When a defendant tries to reduce his sentence by blaming others, the courts must hear the evidence to decide what credibility to ascribe to the mitigation. This can affect any discount for a guilty plea.

When imposing a sentence, the higher courts will take the following into account;

1. The age of the offender.
2. Family circumstances
3. The record; i.e. are they a first offender?
4. Remorse or contrition
5. Voluntary reparation- although an offender should not be allowed to 'buy off' his likely sentence
6. Physical or mental disabilities
7. Peer group pressure.

### **Previous convictions**

As long as the Courts deem the offenders previous convictions to be relevant, they will be taken into account along with the offender's response to them. These are factors which the Judge or Magistrate will consider when assessing the level of seriousness of an offence and what sentence to give him/her.

### **Totality principle**

Section 28(2)(b) of the CJA 1991 allows a Judge or Magistrate to mitigate a sentence by taking into account the whole of the offending behaviour for multiple offences and then to impose and then impose sentences which reflect this totality rather than unrealistic sentences. With these circumstances the right approach is to select one or two offences for the sentences to be imposed and to deal with the remaining offences by the use of discharges or 'no separate penalty'. What matters is that the total is correct.

### **Discount for Guilty Plea**

Section 28 of the CJA and Public Order Act 1994 puts into statutory form the basic principle that an offender who has remorse for his/her crime is entitled to be treated more leniently than

one who has not. Ancillary arguments such as the avoidance of vulnerable witnesses having to give evidence or the saving of Court time are important, but not the real issue.

The Judge or Magistrate will give a judgement as to whether the defendant should get discount. If the offender pleads guilty then that is a sign of remorse in itself as every defendant has the right to compel the prosecution to prove the case against him. Therefore, unless there is a strong argument with reason for why a defendant should not, he who pleads guilty is entitled to have a discount against the sentence which the Judge or Magistrate has given.

If a defendant has plead not guilty but is initially found guilty does not get an increased sentence but will receive the sentence justified by the seriousness of the offence and after personal factors have been taken into account. If an offender has not responded to previous conviction then it is deemed more serious.

### **Family considerations**

The hardship to be inflicted on an offender's family as a result of the offender's sentence may be a mitigating factor in exceptional cases.