Sentencing:

Principles on which sentencing decisions are based have to be considered in the light of the available penalties which a criminal court may impose on a defendant. Whatever principles there are will be reflected in the types of sentence available and the way in which the courts choose between alternative penalties.

The valuable penalties are first of all determined by the offence for which the defendant has been convicted: many minor offences for example will be punishable only by way of fine. In addition if the matter is disposed of in the **Magistrates' Court or Youth Court** (for juveniles) there are additional restrictions on the powers of sentence. **Generally no custodial term may exceed six months (12 months exceptionally where more than one offence is involved) nor may any fine exceed five thousand pounds.**

However, in these cases if the offence is 'triable either way' the magistrates may commit the offender to the Crown Court for sentence only where the Crown Court has powers to impose any sentence permitted by the offence (although **in the case of juveniles, except in very restricted cases, any custodial term must not exceed one year**).

The courts broadly have a choice between a discharge (conditional or absolute), fine, community sentence (there are six type of community sentence: probation order, community service order, combination order, curfew order, attendance center order and supervision order), imprisonment, suspended imprisonment and in the case of juveniles (**up to and including 17 year olds) and young offenders (up to and including 20 year olds) detention at a youth offender institution.**

The separation of young offenders from adult offenders in custody reflects a general underlying theme of treating juveniles in a different way from adult offenders.

Both the courts and policy makers have recognised the existence of the range of principles on which sentencing decisions may be made. The policy underlying sentencing was subject to a major view in the late 1980's culminating in the government White Paper '**Crime, Justice and Protecting the Public'**. The proposals in the White Paper were then turned into law by the **Criminal Justice Act (CJA) 1991**, which has, as a result of wide criticism, been amended by the **CJA – 1993.** The key effect of the **CJA – 1991** was to make sentencing of the basis of 'desert' or what the offender deserved for the offence the basis of all sentencing decisions.

Deterrence is an obvious aim of sentencing. The idea is simply that if a penalty is imposed for committing a crime this should deter both the particular offender and

others from committing that type of offence. This may involve the imposition of exemplary sentences: a sentence to make an example of a particular offender as occurred in **Freeman (1989),** where a persistent pick pocket was sentenced to five years' imprisonment for a theft on the London Underground.

It seems unlikely that such an approach would be permissible under the **CJA – 1991** because of the desert-based approach. It is also the case that exemplary sentencing with a view to punishing one offender particularly harshly to deter others in undesirable as it is unjust to the person who is being made an example. In addition, deterrence as a basis for sentencing is not well founded empirically. Although it is difficult to show the effect of sentences on individuals or society generally (as if there is a deterrent effect the person deterred commits no offence and is therefore untraceable) it seems that offenders are more motivated by the risk of being caught rather than the fear of punishment. In answer, the former Home Secretary Michael Howard made it clear that he believes on a common sense basis that harsh sentences do deter.

Another established aim and principle of sentencing is rehabilitation. This is applicable to all offenders but is of particular relevance to juvenile offenders. The courts may be anxious to attempt to quickly rehabilitate juveniles before they become hardened criminals. Rehabilitation may involve counseling typically by probation officers via probation orders (**for those over 16**) or by social workers (**via supervision orders for those up to 21 but particularly those under 16**) on the offender's attitudes, behavioural problems (for example, drug abuse) or help with education or training. For **those over 16**, rehabilitation might also be combined with more rigorous restrictions on liberty via community service order (**between 40 and 240 hours of voluntary work**) or a combination of community service and probation.

For those **under 16 (or indeed up to 21**), an attendance center order can require attendance at a center for up to **36 hours** of demanding activities. All of those community sentences are based on rehabilitation and are only likely to be ordered by the court where the probation service's pre-sentence report favours the rehabilitative approach. Rehabilitation is based on the needs of the offender rather than the seriousness of the offence although the **CJA 1991** makes it clear **(s5)** that community sentences should only be imposed where the offence is so serious as to justify such an approach and the restrictions placed on the offender in the order should reflect the seriousness of the offence. These principles reflect the underlying importance of the dessert approach even in rehabilitation sentencing.

'Dessert' as a principle underlying sentencing has always been very important. Now it has become, under the **CJA – 1991**, the central pillar of sentencing policy which can be disapplied in only a few cases. The idea of dessert-based

sentencing is that the penalty should reflect the seriousness of the offence and should represent a punishment for breaking the rules.

It is criticized by some theorists as being unfair as it will often assume individual culpability for an offence when in fact the offence may be due other causes such as poverty or unemployment. Dessert-based sentencing will involve an element of general deterrent, as the more serious offences will be punished more severely. Indeed, in **Cox (1992),** even under the restrictions of the **CJA – 1991**, it was held that the prevalence of a particular class of offence and public concern about them could be regarded as an aggravating feature of an offence which made it more serious, thus justifying a higher sentence on a desert-based approach.

The **CJA – 1991** restricts the use of custody (**both for juveniles and adults**) to three circumstances (**s1 of CJA – 1991)**: first, where the offence is so serious that only imprisonment can be justified; secondly, where the offence is a violent or sex offence and imprisonment is necessary to protect the public from serious harm and finally, where an offender has refused to consent to a community sentence.

Thus, imprisonment in the case of a non-violent or sex offence cannot be justified on the basis of public protection or exemplary deterrent, only on the basis of giving the offender what he deserves for that offence. This new approach was aggravated by provisions since repealed by the **CJA – 1993** which restricted the courts ability to take into account previous convictions in considering the seriousness of the offence. Previous convictions may now be regarded as features which make the offence more serious. The length of imprisonment should reflect the seriousness of the offence (**s2 of CJA – 1991)** and in the case of violent or sex offences such longer period as is necessary to protect the public.

Similarly both community sentence and fines (**s18 of the CJA 1991 as amended)** are based on a desert basis in setting the term of the community sentence or the amount of fine.

Incapacitation is a further principle of sentencing. The idea is simply that, whilst an offender is in custody, they cannot commit further offences. This principle seems to have recently found favour with the last Conservative government although, given the cost of keeping persons in prison, it may be regarded as an expensive way of keeping crime figures down. It remains to be seen what the new Labour government's approach will be.

Gross overcrowding in many prisons has always hampered this approach. The curfew orders community sentence introduced by the **CJA 1991** may be another way of achieving the same end. **Section 1 of CJA 1991** permits the use of incapacitation as a reason for sentencing to custody in cases of sex or violent

offences. It seems from empirical studies that prediction of those likely to re-offend is 'hit and miss' which does make the use of incapacitation both expensive, as several offenders may have been placed in custody to ensure that the one likely to re-offend is imprisoned, unreliable and unfair to those imprisoned when they were not likely to re-offend in any event.

One of the most recent developments in the law of sentencing concerns the introduction of minimum sentencing by the **Crime (Sentences) Act (C(S)A) – 1997.** This became law just before the end of the last Conservative government. It introduces minimum sentences for persistent offenders committing serious crime. In particular, persons convicted whilst adults of a second serious offence (which includes murder, manslaughter, rape or robbery and certain other offences) will be subject to life imprisonment unless the court sentencing the second offence finds that there are exceptional circumstances. Similarly repititative convictions for drug trafficking will result in a minimum sentence of seven years unless there are particular circumstances which justify a shorter sentence. Finally, conviction for three domestic burglaries will lead (subject again to judicial discretion) to a minimum sentence of three years imprisonment.

Two points of interest arise from the **C(S)A – 1997**. First, this Act represents an increased emphasis on deterrent and not merely dessert. Whether this trend will be maintained under the new Labour government remains to be seen. Secondly, when the last government formulated its proposals it was determined not to leave an overriding discretion to the judges to impose lighter sentences if they thought necessary. This proposal drew considerable criticism from the judiciary especially the Lord Chief Justice. In the event, to get the Bill through Parliament the discretion point had to be conceded allowing desert to override deterrent on occasion.

Restoration or reparation is a further principle on which sentencing may be based. The idea is that the victims should receive justice. The **Powers of Criminal Courts Act – 1973,** allows courts to make compensation orders in favour of the victims of crime, and requires the court to give reasons when it fails to do so and a person has suffered loss, injury or death, and to give priority to the compensation order when considering the amount of a fine. The principle does face difficulties in application to crimes when the state or community rather than an individual is a victim. In those cases compensation may not be required.

A further principle relating to custodial sentencing is that there should be restraint in the use of custody. This is sometimes expressed more broadly as the principle of minimum intervention. In **Bibi (1980)**, the court said that the sentence should be the minimum to be consistent with its purpose of protecting the public and punishing and deterring the criminal.

The principle of equal impact is based on the idea that the effect of the sentence on an offender should be the same regardless of the particular circumstances of

the offender. This became a key principle in relation to fines (where it is of most relevance) under the **CJA – 1991** through the infamous 'unit fines' system. This has now been abolished. The idea was that magistrates decided how serious the offence was by assigning to it a number of units. The offender's income was then multiplied against the number of units to produce the fine. Thus, a rich D would pay a much larger fine than a poor offender, reflecting the idea that the proportionate impact on each should be the same. The means of any D remain relevant to the setting of a fine under the new system but this principle has lost some credibility.

Proportionality is a principle, which is closely linked to dessert. Proportionality simply requires that, in deciding on the severity of the offence and therefore penalty, all aggravating and mitigating factors should be taken into account. These might include co-operation with the police or guilty plea on the one hand or pre-meditation or the use of violence or a weapon on the other. The guilty plea has taken on a new significance since the introduction of **s48 of the Criminal Justice and Public Order Act – 1994.** This requires a sentencing court to take into account, when a guilty plea is entered, the stage and circumstances in which the guilty plea was indicated by the accused.

This reflects the policy of rewarding offenders who save court time and spare the worry of the victim. The earlier guilt is indicated, the greater may be the sentence reduction. A guilty plea but without acceptance of the prosecution's version of facts might lose some, or all, credit if a '**Newton hearing'** is forced. [A **Newton hearing** is held when the facts on which a guilty plea were based are in dispute; for example, the extent of damage or injury might be disputed]

The principles used in setting appropriate sentences for individuals are wide ranging. Whilst desert appears to have been crucial under the **CJA – 1991**, along with a greater range of more flexible rehabilitative sentences particularly for juveniles, it seems likely that incapacitation and deterrence are likely to be given greater prominence in the government's forthcoming legislation on criminal justice.