The Sentencing of Young People in England and Wales

With the advent of a Labour Government in May 1997, the reform of youth justice arrangements has proceeded at a frenetic pace. In part, the new arrangements chime with New Labour’s “tough on crime” mantra, but they also reflect tensions pertaining to the status of the young offender as a child or an adult which have recurred throughout the century. Ironically, in highlighting the urgency of tackling youth crime, current policies may encourage the re-emergence of an individualized and developmental approach to sentencing young persons.

I. The Special Position of Young People in Sentencing

In the wake of pioneering initiatives pursued in Illinois and elsewhere, the reforming Liberal Government in Britain through its Children Act 1908 created the juvenile court with jurisdiction over all cases, except murder, involving persons aged seven and up to their sixteenth birthday. This legislation firmly established the principle that young people appearing before the courts are a discrete category and that any resort to punishment needs to be qualified in terms of what action best protects the young person’s welfare. This principle, in turn, reflects a pervasive developmental perspective which has largely survived as a discernable expression of public policy despite the twists and turns driven by political expediency.

A leading academic authority has noted: “During this century, the English system has seen a constant process of adjustment and re-adjustment between law and discretion in sentencing, and between legislative and judicial guidance.” Considerable discretion resides with the courts, and the role of the Court of Appeal has, since the early 1980s, become quite significant with its development of guideline judgments. But these judgements and other decisions taken by the Court of Appeal only rarely address magistrates’ courts and non-custodial penalties. Furthermore, the guidelines recently produced by the Magistrates’ Association on “entry points” for sentencers do not apply to young offenders. Finally, the mandatory minimum sentences (“two strikes and you’re out”) introduced in the dying days of the Conservative Government in 1997 apply only to persons aged eighteen and over. However, the actual sentencing framework for young persons is broadly the same as for adults. The principal difference is that additional sentences are available for young persons and that, with the exception of murder and “grave offenses”, any custodial sentence is restricted to a maximum of two years.

What is special about young people before the courts, in this context, arises less from the available sentencing options than from the distinct approach which depends on the status of youth. Even in the unusual circumstances where young persons are dealt with by the adult magistrates’ court or the Crown Court, the approach due to them remains intact.

II. Welfare and Punishment

Over the course of the twentieth century, English public policy on young offenders has largely remained a cautious blend of welfare and punishment considerations. For example, the Children Act 1908 ended the imprisonment of children under the age of 14 but introduced a sentence of punitive detention. Remarkably, the original version of the bill sought to raise the age of criminal responsibility to 14, allowing the prosecution of 14- and 15-year-olds only in exceptional circumstances. However, as the bill proceeded, its character moved away from the Child Welfare Board established in Norway in 1896 and came to resemble the model developed in North America and parts of Australia.

A generation later, with the Children and Young Persons Act 1933, Parliament set its face against ending corporal punishment as a sentence of the courts for 14- to 16-year-old boys (this step had to wait until 1948) but it raised the age of criminal responsibility to eight and amended the jurisdiction of the juvenile court so as to embrace 16-year-olds. Of particular importance, the Act endorsed the view of the Malony Committee (1925–27) that “the welfare of the child or young person should be the primary object of the juvenile court.” Section 44, which remains in force, states: “Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person.” Thirty years later the age of the criminal responsibility was raised to 10, two years below the recommendation of the Ingleby Committee (1956–60).

With the return of the Labour Party to power in 1964, the stage appeared set for a quantum leap in the direction of child welfare. Bold and innovative action was taken in 1968 in Scotland to opt for “children’s hearings” (for 8- to 15-year-olds) instead of criminal courts. Meanwhile, the Children and Young Persons Act 1969 (which applied to England) held forth the promise of replacing criminal proceedings for under-14-year-olds, although subsequent governments did not bring this provision into force.

However, acting at the local level and without any
statutory basis, most police forces across the country made significantly greater use of formal cautions instead of prosecuting young people. A formal caution may be issued by a senior police officer if there is an admission of guilt and a parent or other responsible adult is present. Although a prosecution is avoided, courts are expected to take account of formal cautions in any subsequent sentencing decision, and the formal caution is also a matter of record for other purposes. Between 1979–1992 the percentage of persons aged 10–17 who were cautioned rose (as a percentage of all cautions and guilt findings) from 50% to 81%. In many parts of the country, as court case loads shrank, it was the police station which became the main site of dispositional decision-making.

This pattern of uneven policy development continued into the 1980s. The Criminal Justice Act 1982 extended the availability of short-term custodial sentences while also imposing restrictive criteria to be met before any imposition of a custodial sentence with respect to persons aged 14–20. Under these criteria, as refined in 1988, courts were able to impose custodial sentences only where the offender “has a history of failure to respond to non-custodial penalties and is unable or unwilling to respond to them; or (where) only a custodial sentence would be adequate to protect the public from serious harm; or (where) the offense of which he has been convicted or found guilty was so serious that a non-custodial sentence cannot be justified.” As stated in a white paper, these provisions “reflected the widespread view that, so far as possible, young offenders should not be sentenced to custody, since this is likely to confirm them in a criminal career.” The white paper noted with approval that the number of custodial sentences imposed on persons under 17 had been halved and that more recently, there had been a significant drop in custody with regards to young adults. The legislation showed “that it is possible for Parliament to give guidance on the use of custody without placing intolerable restrictions on the discretion of the courts. The legislation defines in general terms the circumstances which justify a custodial sentence. When a court gives a custodial sentence to a young offender, it has to explain, in open court, why it has done so.” Decisions issued by the Court of Appeal with respect to these provisions consolidated a more consistent sentencing approach.

In a sense, however, these statutory sentencing criteria became a victim of their success. Encouraged by the downward impact on sentencers’ resort to custodial sentences, the framers of the Criminal Justice Act 1991 sought to extend the approach to all age groups. Space does not permit a full review of this landmark legislation or a discussion of subsequent amendments in the period of punitive populism which dominated the political stage after 1992. Suffice to say, that under the Criminal Justice Act 1991 (as amended by the Criminal Justice Act 1993), with respect to offenders of all ages, a court “shall not pass a custodial sentence on an offender unless it is of the opinion (a) that the offense, or the combination of the offense and one or more offenses associated with it, was so serious that only such a sentence can be justified for the offense; or (b) where the offense is a violent or sexual offense, that only such a sentence would be appropriate to protect the public from serious harm from him.” The legislation also established criteria governing the use of community sentences, determined by reference to the seriousness of the offense. This overall approach reflected the then Government’s intention that resort to custody be reduced within a “just deserts” formulation of sentencing criteria.

But much of this effort was rapidly overtaken by darkening penal clouds and policy u-tums which were in part shaped by public and political concerns about apparent youthful lawlessness, exemplified by the reactions to the murder in February 1993 of a toddler by two ten-year-old boys. The resulting 57% increase in the prison population between 1993 and 1998 reflected a sharp growth in the custodial sentencing of both young people and adults. The vulnerability of young offenders to these punitive trends, which matched the political mood enveloping both main political parties, was probably made more acute by the disappearance of age-related restrictive sentencing criteria. This loss may have been further compounded by the attempt to place young people within the deserts theory underlying the 1991 Act.

III. A New Approach?
Following “New Labour’s” landslide election victory in May 1997 there was an extraordinary outpouring of consultation papers, reports and legislation reflecting the new government’s highly interventionist approach to young offenders, with its stress on responsibility, restoration, and reintegration. In particular, the Crime and Disorder Act 1998 introduced a range of criminal and civil orders regarding young persons and their parents. These powers include “reparation orders,” “action plan orders” and (civil) “parenting orders.” A “detention and training order” has replaced existing forms of custodial sentence for persons aged 12–17, with the legislation providing powers for this sentence to be applicable to offenders as young as age 10. This especially regressive feature of New Labour’s youth justice policy appears to have been driven by a determination to make New Labour’s image even tougher than that of the Conservatives. In terms of the overall scheme, however, the utmost importance is attached to the role of the new multi-agency “youth offending teams,” each of which will have a manager selected after a public competition. The rest of the team will consist of individuals from the probation service, social services and the police and, to
a lesser extent, from education and the health services. Once operational, the youth offending teams are expected to be of pivotal significance at every stage of the local process — from engaging with those young people who receive a “final warning” from the police (instead of prosecution) to preparing pre-sentence reports for the courts.

It seems likely that the new scheme of “reprimands” and “final warnings” which, under the Crime and Disorder Act 1998, replaced formal cautions for young people (but not adults), will result in a substantial increase in the number of prosecutions. This is because of the virtual elimination of police discretion to issue repeat cautions to young people deemed not to have responded to the reparation or other arrangements organized by the youth offending team as a consequence of the “final warning.” The statute, furthermore, curtails the discretion of the courts by removing, in most cases, the option of the conditional discharge where the young person has been subject to a “final warning” from the police. Given that discharges have been used in almost one third of all cases over recent years, this development represents a serious infringement of the powers of the courts in dealing with young people. Taken together, these aspects of the legislation place young people at a substantial disadvantage compared with their adult counterparts.

Even before the 1998 legislation was fully brought into force, the Labour Government embarked on yet further reform. Under the Youth Justice and Criminal Evidence Bill, the disposition of most first offenders before the youth court is to be radically reshaped. In cases where the offender enters a guilty plea, after conviction the youth court will (if the Bill is enacted) refer the young person to a “youth panel” comprised of a magistrate, a member of the youth offending team and perhaps a police officer. The panel and the young person will then enter into a “contract” placing clear requirements on the offender and on his or her parents. This contract, together with other specified activities including a reparation element, will last for a period determined by the court — at most twelve months. In due course, the Home Office will issue guidance on the operation of the new youth panels. This will, no doubt, advise panel members on their approach to selecting appropriate dispositions.

IV. Conclusion
As to overall sentencing reform, there is no immediate prospect of an American-style sentencing commission receiving wide political support. The Labour Government is in the process of appointing an “advisory sentencing panel” to advise the Court of Appeal in the framing of guideline judgments with respect to specified categories of offenses, but this innovation seems unlikely to have much impact on young people.

Much greater influence resides with local youth offending teams and the proposed youth panel. In contrast to the regressive policy direction of much of the 1990s, these recent steps may indicate the re-emergence of an emphasis on the individualized and developmental approach to sentencing young persons. In this respect (if not in others), the new Government’s public policy on young offenders is consistent with Article 40 of the United Nations Declaration on the Rights of the Child requiring that young people be dealt with in a manner consistent with their age and “the desirability of promoting the child’s reintegrations and the child assuming a constructive role in society.”

Notes
1 The term “young person” is used here to refer to persons who fall within the jurisdiction of the youth court because of their age. Under the Criminal Justice Act 1991, the juvenile court was replaced by the youth court with jurisdiction of persons aged 10-17; a new family proceedings court had already assumed responsibility for the civil caseload of the juvenile court under the Children Act 1989.
2 English legal terminology speaks of “children” (persons aged 10-13) and “young people” (persons aged 14-17); the term “young adults” refers to persons aged 18-21. Some sentencing options are specific to each of these categories. See Bryan Gibson et al., The Youth Court, One Year Onwards (Winchester: Waterside Press, 1994); updated in Roger Long et al., Blackstone’s Guide to the Crime and Disorder Act 1998 (London: Blackstone, 1998).
5 In England there is no equivalent of young persons being deemed to be “adults” for the purposes of trial and sentence.
7 For an excellent insider’s account of how Scotland achieved this feat in juvenile justice policy, see David J. Cowperthwaite, The Emergence of the Scottish Children’s Hearings System, Institute of Criminal Justice Occasional Paper, Southampton University (1988).
9 It should, however, be noted that the Criminal Justice Act 1991, which brought 17 year-olds within the ambit of the new youth court, also accommodated the Government’s concept of 16- and 17-year-olds as “near adults.” Persons of this age, according to their maturity, now qualify for specific community penalties otherwise only available for adults.
10 On the ramifications of the murder of James Bulger, Julia Fionda has remarked that during the 1990s “[a] series of legislative changes, major judicial decisions and reformulations of policy have in common an almost stubborn blindness towards the incapacity of children.” Julia Fionda, R v Secretary of State for the Home Department ex partee Venables and Thompson. The age of innocence?—the concept of childhood in the punishment of young offenders, 10(1) Child and Family Law Quarterly 77 (1998).
11 See generally Lucia Zedner, Sentencing Young Offenders, in