§ Law in context

Sentencing and Penal Policy

Andrew Ashworth

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PREFACE

Recent years have seen a resurgence of serious interest in the theory and practice of sentencing. In the second half of the nineteenth century there was lively public debate about the proper principles of sentencing, with magistrates and judges writing articles and pamphlets, debating not merely broad theories of punishment but also 'middle-range' issues such as the sentencing of persistent offenders. In the second half of the twentieth century, discussion has taken a rather different form. There has been renewed philosophical debate about the justifications for punishment and the aims of sentencing, but this has not (with a few exceptions) been extended to a discussion of the range of practical sentencing problems which arise daily in the courts. There has been a growing academic interest in the principles of sentencing as laid down by the Court of Appeal when dealing with appeals against sentence, but this has largely been unaccompanied by any case-by-case or principle-by-principle examination of the assumptions behind those decisions. There has been some empirical research into sentencing, but this cannot be said to have penetrated far into the complex processes which appear to be involved in this kind of decision-making. There has also been a substantial increase in the number of government statements about penal policy, probably resulting from the fact that the numbers sent to prison now considerably outstrip the accommodation provided, and the use of custodial sentences by the courts has been the focus of considerable public discussion. This last facet of contemporary concern has led the senior judiciary in the Court of Appeal to urge sentencers to reduce the level of sentences for certain types of offence, but they have continued staunchly to defend the discretion of the courts to select the sentence for each case from among a wide range of alternatives, with a minimum of statutory restriction.

The aim of this book is to place sentencing in the context of penal policy, to explore some of these neglected issues, and to examine the assumptions which underlie prevailing patterns of thought. For this,

it is necessary to begin with a general overview of the sentencing system (Chapter 1). This is followed by an examination of the conceptions of judicial independence which play such a predominant part in English thinking on the subject (Chapter 2), and a discussion of the relationships between sentencing and criminal law reform, sentencing and the decisions which precede it in the criminal process, and then sentencing and the decisions of penal policy which lead the legislature to provide the courts with new penal measures (Chapter 3). Many modern approaches to sentencing, whether in theory or in practice, invoke the idea of proportionality. For some, it is the central element in determining the amount of punishment; for others, proportionality is regarded as setting an upper limit to the severity of punishments. However, the implications of references to proportionality are rarely subjected to detailed consideration, and some other principles which might refine it or conflict with it tend to be neglected. Chapter 4 explores the notion of culpability, considering the ideas of seriousness of offence and culpability of offender which form integral parts of the concept of proportionality. The next chapters focus upon some of the practical problems of sentencing and some general principles which have been laid down by the courts – the problem of persistent offenders (Chapter 5), the approach to sentencing multiple offenders (Chapter 6), the principles of equality of impact and equality before the law (Chapter 7), and the various symbolic and self-reinforcing elements in sentencing practice (Chapter 8). Here, as throughout the book, the emphasis is less upon the legal minutiae of the decided cases or the general 'aims of punishment' than upon theories of the middle range – examining critically some of the maxims and general principles which are invoked by sentencers in particular kinds of case. Chapter 9 considers the courts' use of custodial sentences, exploring the justifications for imposing imprisonment and for choosing certain lengths of sentence. Chapter 10 discusses the criteria for imposing the various non-custodial measures. In Chapter 11 the various relationships between sentencing and other parts of the criminal process are drawn together, in the context of suggested procedural changes which might improve those relationships.

No attempt is made to survey all the relevant decisions of the courts or all the known studies; the aim is rather to draw upon selected materials in order to provide a structure for critical evaluation of the practice and principles of sentencing. Although no

book on this topic could be written without making assumptions of social philosophy, the emphasis here lies upon middle-range issues which have to be resolved whatever the general philosophical approach, and which often seem to be resolved independently of any 'master theory' of punishment. There are no separate chapters on such topics as victims and compensation, the sentencing of 'dangerous' offenders, the sentencing of young offenders or the disposal of mentally disordered offenders; nor is there an attempt to describe the ranges of sentences for particular offences, as in Dr Thomas's *Principles of Sentencing*. The aim is to examine, for the benefit of those studying sentencing, criminology or penology, what might be termed 'general principles of sentencing', in their context of penal policy.

I have incurred many debts of gratitude during the period of writing. Shortly after it was agreed that I should write this book, I had the good fortune to be invited by the late Sir Rupert Cross to join him in preparing the third edition of his book on the *English Sentencing System*. The few months of our collaboration in that work stimulated me greatly, and the fact that that book sets out the legal details of the various orders on conviction available to English courts makes it unnecessary to repeat them in this book. Shortly after finishing work on the third edition of Cross, I was invited to direct a research project into sentencing in the Crown Court, being carried out by a team of four researchers at the Centre for Criminological Research in the University of Oxford. In the event, that research came to an abrupt end after only one year, when the Lord Chief Justice, Lord Lane, refused his permission for the project to proceed beyond a 'pilot study'. That decision effectively prevents access to systematic knowledge about the approach to sentencing of those who pass sentence in the courts which deal with our most serious crimes. Despite the tragedy of that decision, I must record that the year which I spent working with the four researchers on that project was one of great pleasure and profit for me: my outlook on sentencing was enriched by our lengthy discussions.

I owe thanks to all members of the Centre for Criminological Research for their support and for their helpful comments on aspects of my work. Several other friends have kindly read chapters or parts of the book in draft, but I am reluctant to implicate them by listing their names here. I must, however, single out Martin Wasik of Manchester University for special thanks, since he read and

commented on most of the chapters in draft. I have certainly benefited greatly from his criticisms and suggestions, but he is not to be implicated in the way the book has been written. I ceased to collect new material after the end of September 1982, but I have been able to incorporate some more recent developments and I have treated the Criminal Justice Act 1982 as being in force – in fact, most of its provisions come into force on 24 May, 1983.

Andrew Ashworth
Oxford, March 1983

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