

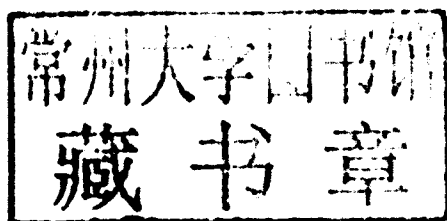
SENTENCING AND THE LEGITIMACY OF TRIAL JUSTICE

RALPH HENHAM



Sentencing and the Legitimacy of Trial Justice

Ralph Henham



First published 2012

by Routledge

2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada

by Routledge

711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

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British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data

Henham, Ralph J., 1949-

Sentencing and the legitimacy of trial justice / Ralph Henham.

p. cm.

1. Criminal justice, Administration of--Philosophy. 2. Punishment--Philosophy. 3. Sentences (Criminal procedure)--Philosophy. I. Title.

K5001.H46 2011

345'.0772--dc22

2011004645

ISBN13: 978-0-415-67141-5 hbk

ISBN13: 978-0-203-80673-9 ebook

Typeset in Times New Roman

by Integra Software Services Pvt. Ltd., Pondicherry



Printed and bound in Great Britain by
CPI Antony Rowe, Chippenham, Wiltshire

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Acknowledgements

Sentencing is pivotal to the credibility of the criminal process. It is through sentencing that the legitimacy of punishment is declared and justified. However, punishment is increasingly portrayed as something that should be more responsive to the pluralistic values and needs of individuals and communities in contemporary society. They may have very different perceptions of what justice should consist of and how it should be delivered. Despite this, the relationship between sentencing and legitimacy is something which has received scant attention in recent analyses of the role of the criminal trial. Such accounts generally fail to explain how the trial process might be implicated in delivering more inclusive forms of sentencing by tying the issue of legitimacy more firmly to the relevant contexts for delivering 'justice'. This book sees the ability of the trial to produce more socially responsive sentences as key to the effectiveness of criminal justice governance and directly connected to issues of social welfare and the cohesion of communities. The volume builds on the author's previous work on developing more inclusive forms of trial justice and its implications for the future of 'legitimate' governance in criminal justice at both the international and domestic level.

The research and writing of this book were greatly facilitated as a result of time spent as a Visiting Scholar at the Institute of Criminology and Pembroke College, Cambridge during the Easter Term of 2010. In particular, the author wishes to thank Professor Loraine Gelsthorpe of Cambridge University for her most helpful and constructive comments on the manuscript. My thanks also to Dr Caroline Fournet of the University of Exeter and Professor Grazia Mannozi of the University of Insubria, Como for their invaluable assistance with the French and Italian materials, and to Professor Roger Cotterrell of Queen Mary, University of London, and Dr Jonathan Doak of Nottingham Trent University for helping me to clarify my thinking in the early stages. Needless to say, the views expressed herein, and any errors that remain, are mine alone.

Finally, the constant support and encouragement of my wife, Anne Marie, is also acknowledged. Without it, this book would never have been written.

Ralph Henham
Nottingham, October 2010

List of abbreviations

CC	Criminal Code
CPP	Code of Criminal Procedure (codice di procedura penale)
ECHR	European Convention on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	United Nations International Criminal Tribunal for Rwanda
ICTY	United Nations International Criminal Tribunal for the Former Yugoslavia
RPE	Rules of Procedure and Evidence
SAP	Sentencing Advisory Panel
SC	Sentencing Council
SFRY	Socialist Federal Republic of Yugoslavia
SGC	Sentencing Guidelines Council
VAS	Victims' Advocate Scheme
VFS	Victim Focus Scheme
VIS	Victim Impact Statement
VPS	Victim Personal Statement

Italy

Italian Criminal Code 1930

Italian Code of Criminal Procedure 1988

Italian Constitution 1947

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ICC

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ICC Statute

ICTR

ICTR Rules of Procedure and Evidence

ICTR Statute

ICTY

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ICTY Statute

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Introduction

This book discusses the relationship between sentencing and the legitimacy of punishment. By 'legitimacy' the book refers to the public perception of punishment, rather than offering a moral critique of the sentencing process. Sentencing is crucial because it is the point in the trial where the aims of punishment are given concrete and public expression in specific cases. Therefore, the process of sentence decision-making provides a crucial link between the ideology¹ which informs punishment and the context against which the legitimacy of punishment is judged.

The book argues that there is an increasing gap between what is perceived as legitimate punishment and the sentencing decisions of the criminal courts. The book contends that this argument holds good for sentencing in both international and national contexts, and has significant implications for the future role of trial justice. The book suggests that the aims of punishment and their realisation through sentencing are becoming increasingly divorced from what individuals and communities perceive as 'justice' for certain types of behaviour and offender. This perceived 'failure' is invariably blamed on the judiciary and their wide discretionary powers in sentencing, in addition to the legal framework, structures and procedures that shape the sentencing process.

The book argues that there are important similarities, as well as differences, between international and domestic sentencing practices. The most important similarities are the ideological and normative constraints placed upon sentencing by the predominantly retributive sentencing philosophy and adversarial model of trial justice prevalent in common law based systems of criminal justice, such as the United States and England and Wales.

In developing its argument, the book draws on a wide range of international and national sentencing sources. The main international focus is the sentencing practices of the United Nations International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), and the International Criminal Court (ICC), although the analysis also draws on the experiences of

1 'Ideology' here refers to penal ideology, which is a matter of political reality.

2 Introduction

internationalised and hybrid courts and tribunals, such as those of Kosovo, Sierra Leone and East Timor.

The domestic focus is on the sentencing practices and criminal justice systems of Western Europe; more particularly, England and Wales, France and Italy. England and Wales provides an excellent example of a common-law jurisdiction which combines adversarial trial with a sentencing philosophy based on just deserts. The influence of the latter has gradually diminished over the last twenty years or so, this being accompanied by a slow erosion of judicial discretionary power in sentencing. On the other hand, other countries in Western Europe, such as Italy, have become more hybridised, with the dominant civil law, inquisitorial mode of trial being infiltrated by adversarial trial practices that have often not been fully integrated into pre-existing penal ideology and processes. This phenomenon has caused significant conceptual and practical difficulties in the area of sentencing.²

In addition, the book draws on a wide variety of empirical research evidence. For example, in the international context, such evidence ranges from victim surveys examining perceptions of punishment in Rwanda and the Former Yugoslavia to the evaluation of recent initiatives, such as the ICC's Outreach programme and its impact on the delivery of trial justice. In the domestic context, evidence from England and Wales draws on recent developments such as the victims' advocate scheme,³ as well as the Sentencing Advisory Panel's research report on the perception of sentences for driving-related deaths.⁴

The book suggests two reasons why the role of sentencing in shaping perceptions of punishment has major significance for the future of criminal justice and its credibility:

1. Contemporary societies increasingly contain individuals and groups with very different perceptions of what justice should consist of and how it should be delivered. Consequently, conflicting views as to the legitimacy of punishment delivered through the sentencing decisions of criminal trials are likely to increase for the foreseeable future.
2. The question of legitimacy is directly related to that of effective governance in criminal justice, because loss of faith, or lack of moral empathy by citizens with the ideologies, processes and outcomes of punishment suggests that the ability of criminal justice to function effectively (for example, by maintaining the 'rule of law') is gradually being undermined.

This book does not pretend to provide the solution to what is a very complex problem. Rather, by focusing on the theory, principles and practice of sentencing it seeks to illuminate one aspect of the debate and so offers a positive way forward.

2 Henham and Mannozi (2003).

3 The Victims' Advocate Scheme was replaced by the Victim Focus Scheme in 2007.

4 Hough *et al.* (2008).

One of the book's core objectives is to develop the analytical tools to help us comprehend more accurately what such a crisis in legitimacy might mean in practical terms for the future role of criminal justice. Consequently, the book argues that existing theories and methods for explaining sentencing fail to provide an effective framework for understanding its relationship to questions of legitimacy. Sentencing theory is generally weak in helping us to explain the normative effect of sentencing; namely, how people's expectations about punishment relate to what *actually* transpires when a sentencing decision is made, and the impact the sentence itself has on values and behaviour beyond the courtroom.

In conceptualising the notion of legitimacy, the book takes a broad and inclusive view of the role of the trial in delivering 'just' punishment. In other words, it does not simply focus on the issue of individual criminal responsibility, and the trial's traditional purpose of punishing individuals found guilty of alleged crimes. Instead, it supports the view that notions of criminal responsibility should be delineated by their social context, so linking them inextricably to social and community concerns.⁵ Such a perspective not only recognises that social conditions contribute to criminality, but also that the harmful consequences of crime and their effective punishment are directly connected to issues of social welfare and the cohesion of communities.⁶ This is based on the view that responsibility for both the causes and consequences of criminality should be shared between individuals and communities. Internationally, for example, the notion of individual responsibility appears inadequate when much of the violence is collective in nature and rooted in cultural history.⁷ Hence, the book argues strongly that a major focus for the trial should be to reflect the justice expectations of both individuals and communities in the practice of sentencing.

The book examines how far these justice expectations are currently reflected in the theory and practice of sentencing. An important aspect of this, and essential to extending the ability of the trial to produce more socially responsive sentences, is the extent to which values about punishment are shared in any particular social context. For example, in national systems, this sharing may reflect commonly held views about how courts should deal with particular types of crime, or criminal. These may vary in their intensity according to community or culture.⁸ In the international context, universally shared values

5 Shared responsibility, restoration and community reintegration are also key concerns of restorative justice.

6 See, further, Hudson (1993), Lacey (1988).

7 At the domestic level, there may be wide differences between offences such as burglary and fraud in terms of perceived gravity, notions of responsibility and appropriate sentencing levels that are the result of cultural history; see Slapper and Tombs (1999).

8 In England and Wales, for example, the jury or magistrates personify the concept of lay participation, although, of course, the deliberations of the former are restricted solely to matters of innocence or guilt.

might include the widespread condemnation of crimes such as genocide and crimes against humanity. However, there may be less agreement about how to achieve peace and reconciliation, and the extent to which trial justice might be expected to contribute to this. Therefore, such a perspective recognises the importance of reflecting the diversity of justice expectations in trial processes and outcomes.

The book aims to advance knowledge in a number of key areas:

- It proposes a more normative perspective for analysing the social reality of sentencing which focuses on the relationship between sentence decision-making and social context and aims to extend our capacity for understanding the impact of trial justice.
- Its detailed analysis of the structures and processes of sentencing seeks to enhance our understanding of the relationship between the ideology of punishment and sentencing practice in criminal trials and its implications for criminal justice policy.
- The book's methodological focus on deconstructing the social context of sentencing is aimed at increasing our understanding of how trial justice is perceived in different jurisdictions. It is hoped this will assist those policy-makers who wish to consider more effective ways of making sentencing more inclusive and socially responsive.
- The book should help provide clearer insights into the relationship between values and process on the international platform and those on the domestic platform, and the extent to which they cross-fertilise each other.

In summary, the book discusses how sentencing could be developed within a more socially inclusive framework for the delivery of trial justice.⁹ In the international context, such developments are directly relevant to the future role of the ICC, especially its capacity for delivering more coherent and inclusive trial outcomes that contribute to social reconstruction. Similarly, in the national context, these issues have a vital role to play in helping to reposition trial justice as a credible cornerstone of criminal justice governance where social diversity persists. In so doing, the book should assist policy-makers in appreciating the likely implications for criminal trials of 'mainstreaming' restorative forms of justice.

9 The expression 'trial justice' refers to the significance of the sentence in terms of its perception by 'relevant audiences'. It should not therefore be taken as referring to the perceived 'justice' of the overall trial. Consequently, when referring to sentencing in the context (or as part) of the trial, my object is to draw attention to the importance of conceptualising it as something which is part of a continuous process of structured social interaction (the criminal trial process), rather than, as has often been the case hitherto, explaining sentencing as if it were a self-contained entity, detached from both what has gone before and what is to come. This approach is consistent with my view that a holistic appreciation of the trial, and the place of sentencing within it, is necessary in order to facilitate the kind of comparative contextual analysis of sentence decision-making that is necessary when making cross-cultural and jurisdictional comparisons and inferences.

Structure of the book

The aim of the first chapter is to illustrate why the issue of legitimacy has become so important in criminal justice. Accordingly, it reflects on the increasingly isolated position of the judiciary in England and Wales in matters of punishment and sentencing, drawing out significant broader themes about the relationship between punishment and criminal justice governance which are developed during the course of the book. It argues that recent sustained criticism of judicial sentencing in England and Wales reflects a much deeper malaise afflicting the legitimacy of punishment which not only threatens the liberal consensus view of the judiciary as pivotal to the rule of law, but also undermines the rationality which underpins conventional paradigms of criminal justice more generally.

The chapter goes on to argue that there are important lessons to be learned from engaging with the debates about punishment and sentencing which are taking place on the international stage, suggesting that the crisis in domestic sentencing is really symptomatic of a more fundamental crisis in penal legitimacy that affects the whole of civil society; one that touches upon the role of punishment in the governance of so-called democratic states. It concludes that the time may have come to modify the predominant neo-liberal paradigm of punishment and sentencing prevalent in western criminal justice by making it more responsive to the needs of communities.

The second chapter focuses on issues of theory and method and looks at different theoretical approaches for conceptualising the relationship between legitimacy and sentencing from a cross-disciplinary perspective. One of the core objectives of the book is to draw together legal, criminological and sociological ideas to engage with current debates. For example, it challenges those approaches which emphasise the 'closed' nature of legal rules and the distorting tendencies of sociological theorising about law.¹⁰ It argues that theoretical engagement with criminal justice and punishment, in particular, must proceed from a basis which involves asking questions about the social functions of law, and that these questions can only be answered if social theory is capable of providing explanations of how the outcomes of penal justice are perceived in moral terms.

The discussion also evaluates current models of criminal justice and their relevance to the comparative analysis of trial justice at both the global and local levels. It focuses particularly on the extent to which such modelling is

10 An illustration of this approach is Wandell's recent application of autopoiesis theory to the analysis of sentencing. Following Luhmann, Wandell argues for the self-referential and reciprocal character of legal systems, emphasising the capacity of law to synthesise those communications which are essentially legal through its operational structures. However, it is argued that this theoretical approach fails to provide a convincing conceptualisation of sentence decision-making because it does so from a perspective which maintains a false conceptual duality between legal closure and contextual openness; Wandall (2008).

capable of engaging with the normative aspects of sentencing and suggests alternative approaches to understanding.

The chapter also identifies key methodological issues raised by the comparative analysis of trial justice.¹¹ This analysis describes different methodologies and their justifications; identifies weaknesses and suggests solutions. Again, the emphasis is on making connections between theory and method with the aim of improving our capacity to appreciate the relationship between the perception and the social reality of trial justice.

Chapter 3 explores some inherent problems in the comparative contextual analysis of punishment rationales and suggests why and how normative questions about punishment could be addressed more effectively by criminal justice theory. In this context it focuses on the purposes for attributing responsibility, both individual and collective, and their expression through punishment and sentencing. The chapter also discusses why the meanings and relevance attributed to penal aims and the principles of distributive justice need to be understood contextually. It explores theoretical and methodological difficulties of comprehending the meanings attached to different punishment rationales and studies the relationship between values, norms and the legitimacy of punishment in different social contexts.

Chapter 4 considers the relationship between judicial discretionary power and sentencing from both theoretical and contextual perspectives. More particularly, it evaluates different models of judicial sentencing with the object of assessing how universal factors in decision-making and particular contextual influences on sentencing practice are balanced. The analysis considers the nature of sentencing norms and whether existing models of sentence decision-making are capable of engaging with the relevant normative aspects of sentencing. These concerns are addressed from both a local and global perspective, focusing particularly on their implications for governance in criminal justice.

The chapter then explores the difficulties of conceptualising the notion of 'context' for the purposes of modelling. It explains the approach of comparative contextual modelling¹² and its use as a tool for understanding sentencing as a process of discretionary decision-making. The chapter further suggests how sentencing modelling could be improved to better reflect normative considerations such as legitimacy in different contexts. The discussion concludes by assessing the broader implications of this approach for criminal justice governance.

11 For example, it is suggested that, in order to make sense of sentencing comparatively, it is necessary to comprehend the meaning and significance of 'penalty' in different contexts, and how international and domestic systems cross-fertilise each other.

12 Contextual modelling is an approach which relies on an initial evaluation of a particular context to determine its theoretical orientation and methodological prescription. It is a conceptual vehicle for testing various (possibly competing) versions of what might constitute the process of sentence decision-making in any particular context. Therefore, it typically reflects a combination of methodologies designed to serve the interests of both inductive and deductive theory. For a detailed description of this approach, see Findlay and Henham (2007).