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JUDGES' ATTITUDES AND PERCEPTIONS TOWARD THE SENTENCING PROCESS

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Judges' Attitudes and Perceptions Toward the Sentencing Process

Introduction

What judges and magistrates think about sentencing, and how they approach the task, can be described as a missing link in sentencing research. The judge holds a central role in the sentencing process, because of our system of judicial discretion, and it is because of this largely unfettered discretion that it is important to know how judges[1] come to their decisions.

Research into judicial attitudes and perceptions of sentencing is rate, and there are difficulties with permissions and access which discourage potential investigators. Because of this, there are virtually no precedents for this type of research. A similar study of sentencing in the Crown Court in the UK was attempted in the early 1980's (with a team led by Professor Andrew Ashworth), but was refused permission to continue beyond the pilot study.[2]

My interview based research involved Queensland judges, not only because I had practised and worked in that jurisdiction since the early 1980s, but also because Queensland adopted the model of the Victorian *Sentencing Act* and had not been previously studied. I was also fortunate in having personal contacts with a number of the judges, which also facilitated access. Ultimately 60% of the judges on the District and Supreme Courts took part in the interviews, 21 District Court and 10 Supreme Court. A number of other judges were willing to participate, but ultimately unable to do so due to leave, caseload or country circuit commitments.

The research was ultimately published in a book by Federation Press, *How Judges Sentence*, 2005.[3] When I was asked to speak on this topic today, I decided to highlight some interesting features of the research, and in particular to include some of the discussion by the judges which did not appear in the book, mainly for reasons of space. This paper therefore provides some thought provoking issues regarding judges and their interactions with the sentencing process, largely in their own words.

Balancing

When asked about how they "saw" the process, almost half of the judges replied that they saw sentencing a balancing process. Judges tend to see the process as one of balancing different interests which can be hard to reconcile. They tend to emphasise the difficulty of the task, and sentencing is often seen as complex and troublesome.

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[1] This term is used in an inclusive sense, to also include magistrates.

[2] Andrew Ashworth et al, *Sentencing in the Crown Court: Report of an Exploratory Study*, Occasional Paper no 10, Centre for Criminological Research, University of Oxford, Oxford, 1984.

[3] As well as publication of the book, the findings of this study were presented to both the Supreme Court and District Court judges' seminars in Brisbane. The assistance in this research by Mr George Zdenkowski (formerly Associate Professor, UNSW), and Professor David Brown, UNSW, is gratefully acknowledged.

As two judges said:

> "The sentencing process is like scales, it is very finely balanced."
>
> "Sentencing is not solely science, art or intuition. It is a balancing act, between the interests of the community, the concerns of the victim, and the best interests of the offender."

Some judges used a puzzle analogy, for example:

> "Sentencing is like putting pieces into a jigsaw in each case."
>
> "Basically I think that sentencing is a game, but it's not necessarily a fun game."

When judges are talking about balancing, they are of course really talking about judicial discretion:

> "The balancing exercise that we talk about is sentencing discretion."

Art/instinctive synthesis

Sentencing as an "art" is a recurring theme in the caselaw, but perhaps contrary to expectations, only five of the judges referred to sentencing as an "art". Only one judge described sentencing as a "science", but their reasoning was compelling:

> "I look upon sentencing as a science because I try to approach it in a systematic way in relation to other decisions. I don't just go on my own reactions. I look at other cases, particularly the Court of Appeal. It is scientific in that I identify relevant facts and intertwining themes. It is more an attempt to be part of a systematic approach of sentencing consistency; this is very important."

The term "instinctive synthesis" came from the Victorian case of *Williscroft* [1975] VR 292, and has recently been endorsed by the High Court in *Markarian* (2005) 79 ALJR 1048. Although the term "instinctive synthesis" is not generally used in Queensland in sentencing decisions, this study showed that Queensland judges were comfortable with the concept. See, for example, the following comments:

> "I decide which of the [sentencing] purposes to apply fairly instinctively, but not arbitrarily."
>
> "In sentencing, there is room for an intuitive view. Sentencing is not solely science, art or intuition."
>
> "I always listen to what is being submitted to me, and I work to some degree on a feel for things. I like to think it is based on experience. I suspect I am not often wrong in my perception of something in this area. Most experienced judges will do that".
>
> "Sentencing really becomes a gut reaction, dependent on the individual case."

In a similar vein is the concept of crafting a sentence to fit the circumstances of the case:

> "Judicial discretion plays a pivotal role in the sentencing process. … The discretion to craft a sentence for an individual case is basic to the criminal justice system."
>
> "Judicial discretion is very important, because it is important to tailor sentencing to individual circumstances."

The judges were overwhelmingly defensive of judicial discretion, generally saying that it assisted them to individually design a sentence to fit the circumstances, and that this was a fairer process.

The question which therefore arises is whether preservation of a broad judicial discretion promotes consistency, and if "intuition", "experience" or "gut reaction" is being used, does this guarantee objectivity and fairness?

However some commentators are of the view that a broad judicial discretion may be linked with unjustified disparity; others point out that this is a problem which is not necessarily self evident to many judges.[4] Justice Kirby, in an article on judging,[5] says that

> "intuition may itself by the product of unrecognised psychological forces, cultural assumptions and social attitudes. Working under the pressure of constant decision-making, the average judge does not have a great deal of time to pause and clarify, in his or her own mind, the myriad of influences which are at work."

Sentencing purposes

Most Australian jurisdictions now have a list of sentencing purposes in their legislation, although these vary in length and content. The recent Australian Law Reform Commission Discussion Paper, *Sentencing of Federal Offenders*, ALRC DP 70 (2005) proposes a comprehensive list of purposes:

- Retribution/just deserts "to ensure that the offender is punished appropriately for the offence"
- Deterrence
- Rehabilitation
- Protection of the community
- Denunciation
- Restoration

Queensland and most other Australian jurisdictions list the first five of these.

A preliminary point is what the judges think about lists of sentencing purposes? The judges in the study did not see such lists as necessarily welcome, useful or innovative, for example the following comments:

> "states the obvious"
>
> "the sorts of things that people took into account anyway"
>
> "what we were doing as judges anyway"
>
> "Courts have sentences along these lines for years"
>
> "basically the things that one automatically considers as a sentencing judge"
>
> "states the obvious … fairly trite"

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4 See eg, Michael Tonry, *Sentencing Matters*, Oxford University Press, New York, 1996, 177.

5 Justice Michael Kirby, 'Judging: Reflections on the Moment of Decision' (1999) 18 *Australian Bar Review* 4, 19.

> "probably didn't need a statute to lay down the factors which a judge looks at"

However, despite these comments, being aware of, and understanding sentencing purposes is vital to the sentencing process, and there are good reasons why such a list should be provided for the information of all parties in the court, including the judge.

When the question is posed how should the sentencing purposes be used, again the balancing analogy tended to be used.

> "Sentencing is often a matter of balancing deterrence against rehabilitation"

In this paper I will discuss only retribution, rehabilitation and deterrence, as this is where the judges had the strongest views.

Retribution

None of the 31 judges interviewed spoke in favour of retribution, but a number felt that the community was demanding it, eg,

> "Retribution is an unnatural approach. It appears however to be better understood by the public than the other tenets. The difficulty is that however severe the retribution, it would not satisfy those who have been injured."

> "I am starting to think that what we (the judges) are really talking about in court is retribution."

The second comment demonstrates a thoughtful approach, as what this judge was saying is that judges may not use the word "retribution" or similar terms in sentencing remarks, but it may in fact be what they are doing.

Utilitarian sentencing purposes

The judges' views on sentencing were however overwhelmingly utilitarian in nature. For example,

> "I see the purpose of the sentence as to punish offenders and look to the future."

> "In sentencing, I like to give emphasis to what is going to happen in the future. Being retrospective is pointless as a sentence usually takes place so long after the offence … I like to see the process as designing for the future so they won't re-offend."

Rehabilitation

There was wide acceptance of rehabilitation as a sentencing purpose amongst the judges, particularly for young people and first offenders. See for example these two comments:

> "The most significant purpose for sentencing for youthful offenders is rehabilitation"

> "Society accepts rehabilitation for young offenders"

But rehabilitation was also seen as being in the interests of the community as a whole:

> "Rehabilitation will generally be a factor that is both in the interests of the community and in the interests of the offender … because in almost all cases, sooner or later prisoners will be released into the community."
>
> "If you can stop people re-offending, it is in society's long term interest."

Not unreasonably, rehabilitation was seen as suitable for a community-based sentencing options such as probation or community service, rather than imprisonment.

> "There is a futility in putting someone in prison, as I know it isn't necessarily going to stop or rehabilitate them."
>
> "Jail doesn't rehabilitate offenders. Judges don't want to put people in jail unless we have to."

But, several judges (including one who said that jail doesn't rehabilitate), also said that it *could,* in certain circumstances, have a rehabilitatory effect. What they are probably referring to here however is individual deterrence.

> "Prison does of itself have a rehabilitative effect, because people don't want to go back."
>
> "I know that it is said that prison does not do anything to rehabilitate. On the other hand I have quite often heard it said that after somebody has served a term in prison they never ever want to go back and therefore this (deterrence) may be regarded as a form of rehabilitation."

Deterrence

Many of the judges expressed cynicism about deterrence:

> "I am personally a little cynical about deterrence generally, but it doesn't mean that you shouldn't give a person a deterrent sentence merely because you don't know that it will have that effect."
>
> "Generally deterrence is a fiction which makes it easy to get heavy on crime. Some judges rely on it as a reason to give heavy sentences but really they should be looking at the seriousness of the offence."

Despite the judges generally expressing scepticism about deterrence, and in particular general deterrence, a number of offences where general deterrence was thought to have an effect were described – eg armed robbery and white collar crime were mentioned quite frequently. But even when the judges spoke about using deterrence, doubts were expressed:

> "General deterrence can however work on some people, for example, doctors who defraud Medicare, solicitors and police officers. It is clearly a significant factor in those cases, however these are a very small minority of criminal offences. It is not realistic and often used by judges in a less than honest intellectual manner."

Deterrence is of course closely linked with publicity – the public in general need to know about the sentence if it is to have a deterrent effect.

> "There is no point in a judge thundering on about deterrence when nobody will know about what they are saying."
>
> "I agree with general deterrence, but what's the point? If reporters only turn up to court occasionally then the sentence isn't going to be reported."

But contrast this comment:

> "It gets through one way or another, not necessarily through the media. It gets around enough to have some effect."

Public opinion

As one of the judges said,

> "Judges should take account of public opinion but the big question and the vexed question is what is public opinion? It is not what some people in the media, particularly with extreme ideas think that it is. The judge has a lot of difficulty in determining what is public opinion."

What are the judges' views on public opinion and whether it should be taken into account on sentencing? If so, how should it be ascertained? Do we ever really know what "public opinion" is? Which parts of public opinion should be taken into account? Many judges were of the view that only "informed" or "real" public opinion should be taken into account.

Public opinion is of course linked with what is sometimes called "law and order auctions"—the political process which occurs at every State or Territory election.

> "The root problem in sentencing is political. Neither side of politics is prepared to treat crime as a long term problem, because of the politicians' interest in short term political mileage and adopting a knee jerk reaction."

The big problem is, if public opinion it to be used somehow in sentencing, how is it to be determined? Should it be determined according to the judge's own views?

> "I am very wary about acting on my own view of what public opinion is."

Should it be determined from contacts in the community?

> "On social occasions people may ask about sentences in certain cases and I can see that there is some concern - you can't ignore those sorts of incidents."

But is this a problem due to the social circles which judges move in?

> "The only way to gauge public opinion is to be a member of the community, and I believe that judges can be too isolated and can live in protected environments. Many mix in too few circles."

Or is public opinion determined by the appellate courts?

"I try to read all decisions of the Court of Appeal and if the Court of Appeal says something which reflects their view of public disquiet, I would regard that is fair enough and take it into account."

A number of judges were of the view that public opinion can be determined via the media. For example,

> "I determine public opinion through the media but you must contrast a beat-up with genuine concern."

Does the media reflect or make public opinion? Which media outlets should be used as a source of public opinion? There were perhaps surprising views on this.

> "If you are going to rely on print or electronic media, I would place more emphasis on letters to the editor."

In contrast:

> "Does one assume this morning's editorial in the paper is public opinion? Am I obliged as a sentencing judge to take that into account? I don't think I am."

The problem with this of course is that letters to the editor may not be representative of the community in general. And what is reported in the media can be selective. Reliance on this information can lead to inaccuracies, but on the other hand where else is the judge to get the information, if not from the media or their own contacts?

Community values and expectations

A number of judges were of the view that sentencing should be an expression of community values. If this is the case, the sentence is much more likely to be accepted by the community in general.

> "Community values are an informed expectation. I think if the community had all the information I had when sentencing, this is what they would expect in the sentencing process. It is important to be responsive to community values, but not ill informed criticism."

Community expectations were also mentioned as important by some judges:

> "Public opinion plays no part in the sentencing process, but as a judge you are aware of community expectations. …I find it helpful to find out what people are thinking. It is the community expectation of a sentence rather than public opinion which is important."

Both community values and community expectations tended to be seen as positive influences on the sentencing process, whilst public opinion was differentiated from these, and tended to be seen as more of a negative influence.

There is a valid argument for sentencing to be an expression of community values, however extending this to community expectations has the potential for incorporating inappropriate matters, and should be treated with caution.

The media

The media and sentencing was a topic which elicited a lot of comments from the judges, many of them negative; for example these two judges:

> "Public opinion is dangerous particularly where the local newspaper is "redneck" and intolerant, which is the case here."

> "The media is an enormous influence in the sentencing process. The media is responsible for the huge incarceration rate in recent times."

One judge noted that it was important that justice be seen to be done, and another used the media to send a message:

> "It is good to have judges' sentences being scrutinised. If we are being watched, we will be more careful."
>
> "It ensures that you stay careful, and sometimes if you want to send a message, you can do so through the media, but it is hit and miss."

However some judges saw the media's role in sentencing as a positive one, and in some cases this was where the judge self-identified as having co-operated with the media previously, for example where the judge gave out transcripts of their sentencing decisions (not generally otherwise available in Queensland). This comment is particularly apt:

> "If I have a case that is high profile, I will ensure that the media have timely access to the transcripts of the sentence or judgments. Often the cases can't be simplified, but we can as judges go to trouble to express concepts in ways that can be understood and expressed in a newspaper article. It is also possible to refer the media to parts of judgments which are useful and may give a summary of the case. I don't go out of my way to court the media, but there is no point in making their job difficult. In keeping the media fully informed there are spin offs in increased public awareness and understanding of the system, and thereby assisting in making public opinion better informed."

It is this type of co-operation which builds better relationships and understanding. This in turn leads to more "informed public opinion", (if I can use that term), and in turn more reasonable and more realistic public expectations.

Conclusion

Judicial attitudes and perceptions toward sentencing are important, and discerning these assists in understanding the process, as well as giving a voice to the judges, whose views would not otherwise be heard. Perceptions by the judges of lack of confidence by the community in the sentencing system are no doubt correct, and are fuelled by constant media criticism of the courts. Although there is no simple solution, better communication between the courts and the public, one of the recurring themes of many of the speakers at the conference, is an important part of the answer.

References

Andrew Ashworth et al, *Sentencing in the Crown Court: Report of an Exploratory Study*, Occasional Paper no 10, Centre for Criminological Research, University of Oxford, Oxford, 1984.

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