Richard Fox[*]

SENTENCING AND SOCIETY: INTERNATIONAL PERSPECTIVES

Edited by Cyrus Tata and Neil Hutton,
Aldershot Ashgate Publishing Ltd, 2002
ISBN 0 7546 2183 9
Pages i-xxix; 600pp

Scholarly interest in sentencing has come a long way since the late Nigel Walker, in his pioneering book *Sentencing in a Rational Society,*[1] declared that '...if the criminal law as a whole is the Cinderella of jurisprudence, then the law of sentencing is Cinderella's illegitimate baby'.

His description was certainly true of Australia until the Australian Institute of Criminology in Canberra decided to plough this neglected field in the late 1970s and early 1980s. The first research output was Mary Daunton-Fear's *Sentencing in Western Australia*[2] in 1977. John Newton's *Sentencing in Queensland*[3] appeared in 1979 followed by Ivan Potas' *Sentencing Violent Offenders in New South Wales*[4] in 1980. In that same year, Daunton-Fear's follow-up work, *Sentencing in South Australia*[5] was also released. By the time the Criminology Research Council funded project on Victorian sentencing law[6] was completed in 1985, the authors had broadened the jurisdictional base to analyse federal sentencing law as well.

The latter was uncharted territory for most lawyers and largely ignored by government until the Australian Law Reform Commission was given a reference on the topic in 1980. Its final report, released in 1988, led to major changes in the *Crimes Act* 1914 (Cth). This marked the beginning of the Commonwealth's efforts to reduce its reliance on state sentencing legislation by significantly enlarging its own sentencing powers, even though for the actual execution of the measures it still had to draw on state correctional resources.

---

* Professor, Faculty of Law, Monash University

1 N Walker, *Sentencing in a Rational Society* (1969) 1.

2 M Daunton-Fear, *Sentencing in Western Australia* (1977).

3 J Newton, *Sentencing in Queensland* (1979).

4 I Potas, *Sentencing Violent Offenders in New South Wales* (1980).

5 M Daunton-Fear, *Sentencing in South Australia* (1980).

6 R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (1st ed) (1985).

The approach taken by these local authors and their counterparts overseas (such as Thomas in the United Kingdom, Hall in New Zealand and Ruby in Canada) to explain the legal practice of sentencing and to dissect the justifications for the sanctions which the courts imposed, was primarily a legal-philosophical one. The works revealed little interest in exploring sentencing in its social context, nor the political drivers of legislative change, nor the actual perceptions and attitudes of the different participants in the sentencing process. Nor did they examine the extent to which the legislative, judicial, or executive elements of the system alone or in combination served to maintain criminality or contributed to structural inequalities in the treatment of different groups.

These early texts and law reform efforts sought to improve the consistency of sentencing primarily through the design of more coherent legislative frameworks and the encouragement of better judicial and extra-judicial guidance. They were driven by a liberal philosophy which tried to deal humanely with offenders by minimising gratuitous cruelty in punishment and by using rehabilitative measures, often in a community-based context, for those who appeared to have the capacity to change.

But the 1980s liberalism was soon overtaken by a climate of populist punitiveness and political expediency. State politicians, when in election mode, tried to outdo each other with promises of easy fixes packaged in catch cries like 'truth in sentencing', 'getting tough with crime', 'mandatory sentencing' and promises of extended or indefinite sentences for ever widening categories of 'serious' offenders. This media-reinforced political pressure invoked 'public opinion' and 'the rights of victims' as the justifications for change and has since had a palpable influence on Australian courts and their sentencing behaviour.

But such shifts are not simply local phenomena. They have been occurring on a global scale in part because policy makers have been unashamedly looking at the practices and experiences of other countries. Not surprisingly, many ideas were imported from the United States despite their unsuitability to a different cultural climate. The harsh militaristic regime of 'boot camps' did not find fertile ground here, but the concept of electronically monitoring offenders to reduce the burden on probation officers was taken up in this country. So too was the 'three strikes and you're in' option in the jurisdictions with the largest aboriginal populations. 'Drug Courts' are the latest import. Their carrot and stick approach to certain classes of illicit drug users is being trialled in some Australian states.

More important than the borrowing of specific remedies are the elemental issues with which all jurisdictions still struggle. What should be the core business of the sentencing system, given the growing reliance on administrative penalties and civil remedies, particularly for corporate wrongdoing? How can the system be best tuned to reduce unjustified sentencing disparities? How much judicial or executive

discretion should be tolerated in the setting and execution of sentences? Can the sentencing methodology of the judges be understood or improved? What scope, if any, should there be for individualised rehabilitative approaches in systems that are premised on retribution? And what role should victims, or 'the public', or 'public opinion', play in fixing sentences?

It is therefore not surprising that when the first 'open invitation' major international conference on sentencing was held in Glasgow, Scotland, in June 1999, it attracted well over 100 delegates keen to explore penal policy from comparative and cross-national perspectives. But the organisers at the Centre for Sentencing Research at the University of Strathclyde, were also eager to highlight the need to shift from the legalism which had characterised earlier sentencing scholarship in favour of more detailed exploration of the sociology of sentencing. This edited collection of selected papers presented at that conference takes up this theme under the title *Sentencing and Society*. The collection, with appropriate introductory and concluding overviews by the editors, is divided into five parts.

Part I, 'The International Movement Towards Transparency and Truth in Sentencing', explores the sources and motivation of political demands for greater clarity, consistency and openness in sentencing decisions as these issues emerged in six countries. In an ironical twist, some demands for truth in sentencing were in response to the early-release policies adopted as an emergency means of dealing with the overcrowding of prisons. It was clear that the announced sentence was not identical to that which was actually served. Yet those prison populations were soaring because of punitive policy settings such as mandatory sentences which were largely unrelated to growth in the level of recorded crime, or increases in recorded convictions.

In Part II, 'The Truth About Public and Victim Punitiveness', the book takes up issues of public knowledge, attitudes and opinion in relation to sentencing decisions. It offers interesting empirical evidence which challenges the widespread assumption that the public's punitive demands are unmet by the courts. It turns out that the more members of the public are informed about the facts of the cases and the applicable sentencing principles, the closer their judgements are to the actual determinations of the courts. Part III, 'Measuring Punishment', contains eight papers which emphasise the lessons to be learned from comparative approaches, particularly in relation to the design and application of scales of sentence severity which are so central to concepts of penal proportionality.

Part IV, 'Reason-giving and Approaches to Explaining Sentencing', turns a sociological searchlight on whether sentencers actually adhere to the legislative and appellate court guidance which, according to the legal-philosophical model, is supposed to govern their decision making. Part V, 'Doing Justice: Power, Equality and Equity', tests the extent to which sentencing systems are contaminated by

disparity based on racial, gender, or other discriminatory factors which violate the concept of equality before the law. In this last part attention is also given to reducing the apparent discrimination in favour of corporate offenders by designing more effective sanctions for this special offender group.

The 28 papers offered within these divisions represent less than a third of the total number presented at the 1999 conference, but they include ones from Canada, the United States, Italy, Finland, Brussels and China, as well as a significant and perhaps disproportionate set from the United Kingdom. Strong Australian representation is offered in contributions by Arie Freiberg (Vic) on cross-jurisdictional comparisons of sentence severity, Neil Morgan (WA) on legislatively imposed sentencing matrixes or grids similar to those already developed in the United States, and from David Tait (ACT) on the ceremonial and symbolic aspects of sentencing. The latter elaborates the often overlooked proposition that the ritual and drama of trial and sentence has an emblematic value beyond its efficiency in reducing crime. From Tasmania, Julia Davis challenges Andrew von Hirsch's revival of the 'just desserts' justification for punishment and its proportionality underpinnings by applying measurement theory to his models and questioning whether they and the sentencing guidelines which have been erected upon them are entitled to claim mathematical legitimacy. From the same jurisdiction, Kate Warner, who is the author of the current leading text on sentencing in Tasmania, tackles the problem of dealing with special offender groups in the context of sexual offenders in the United Kingdom and Australia.

The book has the necessary author and subject indexes to assist readers extract topics of interest located in more than one paper. All-in-all, the compilation demonstrates the international coming of age of sentencing. It is a rich resource of talent and ideas for anyone seeking a comparative and interdisciplinary understanding of the nature and ramifications of one of the central and most complex features of the criminal trial process.