SACRO

SENTENCING: BEYOND PUNISHMENT AND DETERRENCE[1]

Introduction

I would like at the outset to thank SACRO for affording me this opportunity to express what will be some personal views on the broad topic of Sentencing: Beyond Punishment and Deterrence. The topic has too many different aspects for them all to be covered in this short address. There are some extremely important areas which I am not going to touch upon specifically; notably the effect of sentencing on children, the treatment of women offenders, mental health disposals and the place of the victim in the current sentencing process. I hope that this will not prove to be a disappointment to those of you with particular expertise in these areas. Rather this talk is intended to provide some insight into judicial thinking about how sentencing operates in practice at present and how it might operate differently in the future. That phraseology perhaps gives some indication that there may be, as ever, room for improvement. That improvement may be in relation not only to the proper approach to sentencing both in general and in individual cases but also, in an age of mass media, the expression of sentencing in the public forum.

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[1] I would like to acknowledge the work of Elizabeth Strachan, librarian at the Judges' Library, in successfully locating the materials required for this talk.

I start with a word of caution derived from a recent book review[2]. It is this, and I quote:

> "Sometimes it feels as though criminologists and lawyers occupy different worlds. Lawyers shut their eyes to what can be learned from criminologists. The lawyers' 'comfort zone' is to be found in the law, rules and may be the interpretation of policy documents… Criminal lawyers (and judges) need to understand what is known about the causes of crime and what works to reduce it. Criminologists should take some of the blame: often writing in a language, with a vocabulary which alienates the outsider."

There is a significant divergence in the use of language between the lawyer, perhaps in particular the judge, and the criminologist and those in other disciplines, including social and other support workers, connected with the criminal justice system. Yet it is imperative that there be mutual understanding of each other's thinking.

By way of an introduction, which may put this subject into some historical context, I am going to refer to a case which stems from events in this building some 70 years ago[3]. On 26 January 1944, two students at Edinburgh University asked two of their brethren to assist in the clandestine removal of typewriters from the secretarial department of the University office. All four were aged 17 or 18 and all had "good characters, and came from good homes and from excellent schools". That is perhaps an understatement. The two

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[2] Nicola Padfield: *Legitimacy and Compliance in Criminal Justice* 2013 Crim LR 361.
[3] *W & Others* v *Muir* 1944 JC 128.

protagonists, whose names were interestingly anonymised in the law reports, lowered two typewriters gently from roof level down into the street.

On 3 February, all four pled guilty to the theft at the Sheriff Court. Each was promptly sentenced to 3 weeks imprisonment without, as it was then put, the option of a fine. The Lord Justice General (Normand), who presided over the sentence appeal court, remarked upon their parentage, homes and schools as involving double-edged considerations. Ultimately the two main players were shown little mercy and their appeals were refused. But the other two were made the subject of probation orders. I mention this case not simply because of its physical proximity, but to see the direction of the route to justice in sentencing over which the courts have travelled since that time.

What I would like to do this evening is to pick up the threads left dangling from that wartime case and to examine the extent to which sentencing has progressed since these offenders were dealt with and the manner in which it might progress further in the coming years.

The Traditional Approach to Sentencing

The court requires to sentence the offender. It is important to observe that the word used is "sentence" and not "punish". Just what a particular judge is doing when carrying out his duty in this regard ought to depend, to a material degree it might be thought, on what he or she considers the exercise

is intended to achieve. It is not an essential element of a law degree, nor a requirement to qualify as a solicitor or an advocate, that a course in criminology, social work or penology be undertaken. Equally, since neither the solicitor nor the advocate is called upon to undertake the task of sentencing, it does not form part of the necessary knowledge or experience required for appointment as a sheriff or judge. He or she may have a background of attending sentencing diets in solemn and summary cases, but that is not a compulsory element in the appointment process.

Hopefully, all High Court and Sheriff Court sentencers[4] are familiar, at least from their knowledge of philosophy, with traditional theories describing how justice is achieved in the sentencing process and from which we ultimately derive the principles of punishment[5]. Starting from this point of abstract thinking, and echoing Hart in his Prolegomenon to the Principles of Punishment[6], most will be aware, on the one hand, of the retributivist school, following on the work of Kant and Hegel, which seeks to impose upon the offender his "just deserts"; that is to say, that the punishment should fit the crime. Those two words actually appeared in the Conservative government white paper[7] which preceded the Criminal Justice Act 1991 for England and

[4] I do not refer to the Justices of the Peace simply for ease of expression. That is not a reflection on the importance of their work.
[5] eg Easton & Piper: *Sentencing and Punishment: The Quest for Justice* (3rd ed) para 1.4.2.
[6] Hart: Punishment and responsibility – Essays in the Philosophy of Law (2nd ed) chapter 1.
[7] Crime, Justice and Protecting the Public (1990) para 1.6.

Wales and they were repeated by the then Lord Chancellor[8] in his foreword to the Ministry of Justice's Breaking the Cycle policy as one of two fundamentals, along with public safety, which a state should offer its citizens. Many of a more liberal persuasion, on the other hand, will seek to follow the utilitarian school, from the teachings of Bentham and Mill, which has at its heart the idea of social protection, achieved by means of preventing the particular offender from committing further crimes and of deterring others. This, of course, holds that punishment in an individual case should benefit society as a whole and may have as part of its purpose the rehabilitation of the offender as well as his incarceration. The two schools proffer different ideas, but they are not entirely inconsistent[9].

In the modern era, retribution and deterrence, which are key elements from each school, remain central pillars in the theory of judicial thinking on sentencing. Both elements expressly feature in the 2003 legislation[10] which introduced the "punishment part" as a requirement of a life sentence. The third element in the process is expressly described as being the protection of the public. On this basis, it would seem, the Parliament has determined that, at least in a custodial sentence, there are three principal components: retribution, deterrence and protection of the public.

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[8] Kenneth Clarke.

[9] On the tensions see Matravers: Political Neutrality and Punishment (2013) 7 Crim Law and Philos 217.

[10] Convention Rights (Compliance) (Scotland) Act 2001, s 1 amending Prisoners and Criminal Proceedings (Scotland) Act 1993, s 2.

The extent to which the Scottish Courts have actually expressed retribution, deterrence or protection of the public, as the critical elements in the sentencing process in a given case, is limited. The difficulty which judges faced in fixing punishment parts using this methodology was that none had hitherto thought in terms of compartmentalising parts of a custodial term into discrete periods.

Digressing slightly, it is not unreasonable to say that the judiciary had considerable difficulty in understanding what was required when selecting punishment parts for mandatory life sentences and what are now Orders for Lifelong Restriction[11], to which I will return. The 2012 Act[12] is designed to cure the problems of interpretation but, without a clear understanding of the background and intent of the amendments to the 1995 Act, the courts may not be out of the statutory woods just yet[13].

The Comfort Zone

Assuming then a judicial grasp of the abstract theory, and returning to the quotation about the use of language, how is that understanding put to use by lawyers? How does it fit into the comfort zone of the judge or sheriff?

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[11] see the debacle in *Petch* v *HM Advocate* 2011 JC 110, overruling *Ansari* v *HM Advocate* 2003 JC 105.

[12] Criminal Cases (Punishment and Review) (Scotland) Act 2012.

[13] see the criticism in Renton & Brown's *Criminal Procedure* para 23-07.1 fn 5.

It is interesting to note that the main current legal textbook on sentencing[14], which is used on a day to day basis, expressly declines to deal with general principles of this magnitude at all. This is not an omission; it is a deliberate editorial choice[15]. That is understandable for a legal work and the same approach is taken in the leading volumes on criminal procedure[16]. The lawyers' comfort zone is in the law; the rules. In the ordinary case, the judge, and particularly the sheriff, will not be so much interested in the objectives of sentencing in an abstract or even a real sense but simply in: first, what the maximum or minimum competent sentence is; and, secondly, what the *norm* for the particular offence for someone with the accused's background happens to be. The function of the first instance court is generally a practical one of applying the law at its raw end; not to invent or contemplate theoretical ideals.

This is ultimately why the sentencing textbook, which in its loose-leaf form runs to at least 1000 pages and increasing, is regarded as so helpful, in a practical sense, to judges and sheriffs. Within it can be found many relatively recent precedents, shortly stated. It is an encyclopaedia of examples of what has gone before[17]. Since the cases are all at the appellate level, their study

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[14] Morrison: *Sentencing*.
[15] para A1.0002.
[16] Renton & Brown (*supra*) para 22-18.
[17] A more rational computerised Sentencing Information System did not prove successful: see Hutton: From Institution to Database: Translating Justice (2013) 17 Theoretical Criminology 109.

ought to promote consistency in the penalties selected. However, in using examples in this way to ground sentencing decisions, the assumption must be that the elements of retribution, deterrence and public protection have already been taken into account in the earlier determinations; there is no need to reconsider them in the particular case. They are integral to the precedents. That then is the principal understanding of the sentencing court, which will be reluctant to depart from the recognised levels of penalty except in wholly exceptional circumstances. There is little purpose in the first instance court developing a jurisprudence of its own, if it is not consistent with the decisions at appellate level.

The sentencing textbook does not seek to go behind the decisions in order to define what sentences are designed to achieve. Its predecessor[18] did examine the objectives of and principles in sentencing up to a point. It expressed what may seem, at least on a cursory glance and but for what has just been touched upon, an obvious view, that the sentencing judge:

> "must (although he may not think of it in every case) decide what his sentencing objectives are, both in general and in relation to the particular case".

This, however, begs the question of the degree to which the individual judges, and again particularly sheriffs, do, or indeed should, think about sentencing objectives in a general sense, as distinct from applying what are recognised to

[18] Nicholson: *Sentencing* (2nd ed) 177.

be acceptable levels of penalty which the appellate courts have already determined to be generally appropriate for a particular level of offending.

The book identified a problem in the search for objectives in reported judgments because of what was perceived by the author, no doubt correctly, to be the custom of the criminal appellate courts to say no more in a particular case than was necessary for its disposal. The High Court, sitting in its appellate capacity, tended:

> "to decide cases on their own facts and circumstances rather than on the basis of any declared principles"[19].

This was noticeably in contrast with the approach being adopted by many other appeal courts in the Commonwealth including England, Australia, New Zealand and Canada.

The author, who was an experienced sheriff, was able to express certain general views under sub-headings, which he asserted as encapsulating the objectives of sentencing within the Scottish system, notably: punishment, protection of the public, deterrence, denunciation, rehabilitation, restitutions, economy and reduction of crime. No quotation from any decided case was cited, however, which expressed the view that any of these objectives actually formed part of the court's reasoning in justifying a particular disposal.

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[19] para 9-02, and fn 2.

The traditional approach, of saying no more than is necessary to deal with the particular facts and circumstances, and perhaps also discouraging the use of precedent in sentencing, is regarded by some as laudable; as preserving flexibility or indeed even the independence of the judiciary in applying wide discretionary powers in the sentencing process, especially in relation to common law crimes[20]. However, as I have said in relation to other topics[21], although a legal system ought to be careful to guard what is good in its traditions, built as they are upon the wisdom of generations, if the essentials are out of kilter with the fundamentals applied in all other similar civilised legal systems, it will often be time to look again at the domestic regime with a heavier degree of scrutiny.

Scotland does not have a statement of the general principles of sentencing enshrined in law. England, for example, does[22]. They are expressed in the form of general matters which the court must have regard to, notably: (a) the punishment of the offenders; (b) the reduction of crime (including its reduction by deterrence); (c) the reform and rehabilitation of offenders; (d) the protection of the public; and (e) the making of reparation by offenders to persons affected by their offences[23]. Are the English provisions glimpses of the blindingly obvious, which do not require expression in statutory or other

[20] see eg recently *HM Advocate* v *Cooperwhite* 2013 SLT 975, Lord Eassie at para [28].
[21] Carloway Review, para 7.2.55 on corroboration.
[22] Criminal Justice Act 2003, s 142(1).
[23] There are different criteria for children, ie those under 18, Crime and Disorder Act 1998, s 37.

form? Should we be looking to England in the first place or to smaller jurisdictions similar to our own[24]? This is something requiring further analysis. Nevertheless, if the stated principles are not mere rhetoric, and if the courts are to have regard to, for example, the need to reduce crime through deterrence or to the reform and rehabilitation of offenders, the courts have to know, amongst other critical matters, what demonstrably operates as a deterrent, what has been shown to rehabilitate effectively and what values should be put on each element in a given case.

Public Opinion

It is perhaps only since the 1970s that there has been a real focus on sentencing theory and practice[25]. Before then, sentencing might have been described as an approximate balance of brutality and paternalism, not necessarily in that order. At the High Court level, almost all sentences were measured in periods of years above the then statutory maximum for the sheriff court of 2 years imprisonment. That remains, with some notable exceptions, the situation today, with an adjustment of the number of years, given the normal level of seriousness of crimes prosecuted in the High Court. It accords with public expectations of the use of significant retributive justice for high level offending.

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[24] see O'Donnell: *Making Progress with Penal Reform* [2013] 23 Irish Crim LJ 66 at 67.
[25] see von Hirsch *et al*: *Principal Sentencing* (3rd ed) preface.

If there is to be general respect for the law, and in particular the criminal justice system, the public must regard sentencing as "legitimate"; that is to say it must, in general, be in tune with common shared societal values[26]. There requires to be an independent assessment by the judge of the sentence in the particular case; but that assessment is not to be carried out in a vacuum into which only that judge's or sheriff's personal values or morality are poured. The judicial function remains to carry out the requirement of society to determine what is appropriate and proportionate. That task ought to be carried out not as a consequence of instinctive reaction but by applying recognised practices and principles of the law as set out in statute and precedent. It is also undertaken keeping in mind what will or will not be regarded as acceptable not just in the appellate court but also in the public forum.

Public opinion, in so far as it can be accurately ascertained, is important. This is not a reference to the headlines in the popular press, but to properly researched material[27] on the public's understanding of the courts' performance in sentencing offenders. If sentencing decisions do not generally accord with public perceptions of just punishment, respect for, and the value of, the sentencing process and the courts will deteriorate. This danger must be noticed and guarded against if confidence in the system is to be preserved.

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[26] Henham: *Sentencing and the Legitimacy of Trial Justice* pp 10 *et seq*.
[27] eg 2010/11 Scottish Crime and Justice Survey, para 8.1.

Judges and sheriffs have to be aware of the potential for unjust sentences, as the public might perceive them, not simply to affect the offender for good or ill but also to undermine public attitudes to the legal system.

It is in the sentencing arena that the discretionary powers of the judge or sheriff come under attack, notably from the popular press, but sometimes from the more responsible elements of the media too. There is no difficulty in public criticism of sentencing decisions as a generality; provided matters are not allowed to spiral out of control. There has to be a recognition on all sides, including politicians and members of the fourth estate, of the potential effects of repeated vitriolic attacks. In one particularly disturbing case[28] when the judge's family home had been targeted and one particular paper ran a reader's poll to promote the judge's removal from office, the court was keen to stress that:

> "The denigration of a judge betrays gross indifference to the critical importance in a democratic society of the independence of the judiciary, and tends to harm the administration of justice. If a judge's reputation or tenure of office were to depend on whether his decisions met with popular approval, nothing could be more calculated to undermine public confidence in the judiciary, and put at hazard the integrity and independent judgment which the public expect of judges."[29]

[28] *HM Advocate* v *JT* 2004 SCCR 619.
[29] Lady Cosgrove delivering the Opinion of the Court at para [46].

That is one side of the equation. There is little doubt that press attacks[30], if sustained, will have an effect on sentencing and perhaps also on Parole Board decision making[31]. If popular and political culture were to be focused on the "just deserts" policy, which some say is increasingly the case in European society where almost all imprisonment levels are on the increase[32], jail sentences would become more frequent and longer and, in essence, injustice will prevail.

A particular problem can be seen in, and I return to, the selection of punishment parts, especially in murder cases. The court is, of course, imposing a life sentence, and is determining the minimum period to be served before parole can be considered. This was, it will be recalled, in response to human rights concerns about indeterminate sentences. As sometimes occurs, there are unintended consequences of good deeds, none of which, it has been said, go entirely unpunished[33]. The court began this new era by selecting relatively modest periods[34], since the judges well understood that the periods were *minima* and, after all, there had previously been no periods at all and the Parole Board could, and on occasions did, release life prisoners when they

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[30] my own particular nadir followed sentencing in *HM Advocate* v *IWKM* 2003 SCCR 499.
[31] See Thomson : Another Attempt to Change the Law Governing Life Sentences 2013 SCOLAG 140 on the release of the notorious Thomas McCulloch.
[32] Tham: Law and Order from below or from above (2013) 10 European Journal of Criminology 387 at 388.
[33] Sometimes attributed to Oscar Wilde, but possibly more accurately to Clare Boothe Luce in "The Women".
[34] Eg 12 years for stabbings in *Nicol* v *HM Advocate* 2000 SLT 811 and, *McIntyre* v *HM Advocate* 2002 SCCR 1026.

had served relatively short periods. There was a perception that offenders might be released after 10 years or so. This was true in 1986, although it had increased to 13 only ten years later[35] and is now probably established at 15 or more[36]. When the punishment part was introduced, the press regularly reported the minimum as if that was *the* sentence, albeit that this was plainly not the case since that period did not take into account what the public were probably particularly interested in; their own protection.

A culture of retribution is not what society ought to be aiming at as a generality, even if the retributive element can take the front stage *par excellence* for extremely serious crimes, such the murder of multiple victims[37]. The exemplary sentence has its place. However, as has been said elsewhere[38], a prevailing retributive dynamic across the board restrains the proper use of discretion. What ought to be being considered is a move away from this type of approach, designed to stigmatise the offender and to subjugate and isolate him from society to a model in which the sentences are far more tailored to the individual offender and are more inclusive in taking account of the needs of the community (including those of the victim), in which the offender has operated and to which he may return. However, every sound idea brings with it different problems. Embarking, without significant research and

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[35] Crime and Justice Research Findings No. 29: 1999.
[36] following *HM Advocate* v *Boyle* 2010 JC 66.
[37] eg 35 years in *Smith* v *HM Advocate* 2011 SCCR 134.
[38] Henham (*supra*) p 18.

consideration, on such a model may promote the legitimate criticism of the current system that sentencing can be unduly inconsistent. It may also remain impossible to persuade the public that anything short of imprisonment is not punishment[39].

Rehabilitation

Of particular interest in this area is the question of where and how the rehabilitation ideal sits within the judicial mind-set in the modern era. The notion that a convicted person may be rehabilitated is not new; if by that is meant the correctional model of diagnosis of problem in the offender's psyche and its treatment. If the offender has a drug or alcohol problem, issues of anger management or deviant, criminal sexual proclivities, these might be tempered, if not eradicated, by suitably targeted programmes and individual or group therapy. If a relational model is adopted and the offender is seen, as will often (if not always) be the case, as requiring to be re-integrated into his (or at least a) community, efforts can be made to provide him with employment, accommodation and general lifestyle planning advice. Contact can be facilitated between the offender, his family, the wider community and, sometimes, his victim(s). However, it is necessary then to return to the question of whether the judges and sheriffs should have either, both, or neither model in mind when dealing with a particular offender.

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[39] See Ashworth: "Unavoidable" Prison Sentences 2013 Crim LR 621.

The aim of rehabilitation, in the sentencing rather than social welfare context, is essentially utilitarian in content. It is not so much intended to benefit the offender directly, but society as a whole; because it will reduce offending at least where the rehabilitative programme devised is well targeted, properly funded and carefully implemented. Despite scepticism in some quarters, it is generally accepted that rehabilitation programmes do work, albeit not all the time or with every individual.

The first, and perhaps most significant, effect of rehabilitative thinking for the High Court judge is within the context of the Order for Lifelong Restriction[40]. These have now been competent for 7 years, but the circumstances in which they may be regarded, not so much as competent but as proportionate, may still require some analysis. They are competent, indeed theoretically mandatory[41], if the offender has a "propensity to commit" sexual or violent offences and it is demonstrated that there is "a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large."[42]

It was envisaged that this type of order would be imposed only in rare cases[43], but they have been used in relation to what, in themselves, might have been

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[40] Criminal Justice (Scotland) Act 2003, s 1, introducing s 210B into the 1995 Act as from June 2006.
[41] *Johnstone* v *HM Advocate* 2011 SCCR 470.
[42] 1995 Act, ss 210B(1)(b) and 210E-F.
[43] Maclean Committee Report: Serious Violent and Sexual Offenders.

regarded as relatively minor offences[44]. The problem which the judges have faced stems from the similarity between the test for an OLR and that for an extended sentence; the latter involving a discretion to impose such a sentence, which divides into custodial and supervisory periods, if the custodial element is not long enough "for the purposes of protecting the public from serious harm"[45].

In imposing a custodial sentence, whether an OLR, extended sentence or otherwise, the court does not (indeed cannot) specify the rehabilitation measures which should be put in place. The direction of any corrective measures is left to the prison authorities or local programmes and the offender's willingness to reform. Any relational measures are left to such post-custodial regimes as may be put in place by the local authority social work departments. That is in contrast to the use of the Supervised Release Order, for non-sexual offence sentences of under 4 years where, once again, the court considers that a period of supervision after release is required to "protect the public from serious harm"[46]. There the court may specify certain requirements:

> "for the purpose of securing the good conduct of the person or preventing, or lessening the possibility of, his committing a further offence".

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[44] eg *Johnstone* (*supra*).
[45] 1995 Act, s 210A.
[46] 1995 Act, s.209.

It is possible to see the extended sentence as essentially retributive and the SRO as primarily deterrent, although aspects of each may be present in both.

Community Payback

However, returning to where this talk began, with the students and the typewriters, one critical improvement which has been made over the last few decades is the reduction in the imposition of short-term custodial sentences. It is, of course, widely known that the vast majority of crime, especially violent crime, is committed by young males aged between 16 and 25. It was, and may ever be, thus for physiological and other associated reasons. Most offenders will mature and, through that process rather than any particular action of the criminal justice system, eventually desist from further anti-social conduct[47].

One message which both Parliament and the High Court have tried, and broadly now succeeded, in putting across to sentencers is that offenders, especially young and first offenders, should not be imprisoned or detained unless "no other method of dealing with him is appropriate"[48]. There is now the prohibition, in similar terms, on sentences of less than 3 months[49]. This is all very laudable and is designed to end the "revolving prison door" form of

[47] See Farrow and Hughes: Taking Account of Maturity in Sentencing Young Adults 2013 Crim Law & Justice Weekly (177 JPN) 388.
[48] 1995 Act, ss 204(2) and 207(3).
[49] 1995 Act, s 204(3A).

justice[50]. It has been said for years that short sentences do not work and are probably counter-productive[51]. The offender with repeated (and they do tend to be repeated) short term sentences comes to regard them as events which just required to be managed; like going to work or school. If society manages to end short sentences, this ought to result in the Community Payback Order[52] becoming the most important disposal for summary, and perhaps also some solemn, cases which would, in recent past times, have resulted in the offender having a visit to prison of no more than a month or so, which served only to disrupt his home, family and work.

The drive by the courts away from the retributive element in the sentencing process is best illustrated by the case[53] of the 16 year old robber of a 14 year old paper boy by presenting a knife at him. No physical injury was inflicted. He did have a minor record, was from a broken home, and had developed into an alcoholic. Having sentenced him to 3 years detention with a SRO attached, the sheriff reported:

> "I have to have regard however to the interests of decent people in society who are entitled to expect that, if someone robs another person at knife point, then that person will be imprisoned for a substantial period both as a punishment and as a deterrent to others. To do

[50] See the historical origins for England in Johnston & Godfrey: "Counterblast" (2013) 52 Howard Journal 433.
[51] Armstrong & Weaver: Persistent Punishment : User Views of Short Prison Sentences (2013) 52 Howard Journal 285.
[52] 1995 Act, s 227A.
[53] *Kane* v *HM Advocate* 2003 SCCR 749.

> otherwise would be to send out a weak and unconscionable message to society."

This is of course the kind of outspoken and exaggerated remark which is likely to alienate the appeal court, which does attempt to approach the sentencing of offenders in a calm, reasoned and impartial manner. The then Lord Justice Clerk (Gill) accepted that retribution and deterrence were important factors in the sentencing process but retorted with the now classic lines:

> "… but there is more to sentencing than sending messages to society, particularly in the case of a young offender. The court has to consider the personal circumstances of such an offender; his home background; the extent to which he may not be solely responsible for his behavioural problems; and the opportunities that a non-custodial sentence may give for rehabilitation before he becomes trapped in a cycle of crime".

This case could not be clearer in its message and it has been followed repeatedly in the High Court in relation to first, young and minor offenders.

It is, of course, important to re-emphasise the need for the judge or sheriff to remain independent of government when sentencing an individual offender. However, as has already been touched upon, that does not mean that it is permissible for the judge or sheriff to ignore or be unaware of what is going on around him or her in societal terms. It is extremely important for judges and sheriffs to be aware of what is actually happening in our communities. He or she may, and for obvious reasons often does, live in a relatively protected environment, where the incidence of crime is low. However, it

must not be forgotten that it is generally in the less wealthy and more deprived areas that honest citizens have to put up with repeated "violence and threats, muggings and burglaries, graffiti and needles on their doorstep"[54].

The courts do have an important part to play in at least not undermining the drives which the government and others have promulgated with a view to making our communities safer by reducing the incidence of crime. Neither the courts, nor the government, nor the legislature, is likely to succeed in that goal unless there is a degree of dovetailing of the ideas and methods employed by each other. That means that each organ of the state has to be aware of what the other is doing, why it is doing it and what success (outcomes) has been achieved.

The principle of the independence of the judiciary does not carry with it obligation to befriend the offender at the expense of the community. The judge or sheriff should have an interest in the exercise he is carrying out when sentencing an offender; and to that extent he should take cognisance of any predictable consequences of his sentence on that person. He or she must not become the offender's mentor or parent. He or she must keep his distance and act dispassionately according to accepted norms[55]. Nevertheless, there is

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[54] Tham (*supra*) at 390.

[55] For a slightly alternative approach, see Doak & Taylor: Hearing the voices of victims and offenders (2013) 64 NILQ 25.

an opportunity, with the flexibility of the CPO, to have much more joined up thinking in the sentencing process. The Criminal Justice Social Work Report should include details of the possible requirements which might be imposed. The reasons for any suggestions ought to be apparent from the body of the report, even if not expressed in quite those terms. Rather than, as has occasionally occurred in the past, seeking to criticise any suggestions in the public forum, the focus for the judge or sheriff ought to be to find the most effective solution, once the principle of the appropriateness of the CPO has been established, having regard to all those factors which have been touched upon as forming the basis for sentencing decisions.

The court has had clear pointers from the legislature on what it can do with a CPO. The requirements can be, as in part, retributive (eg an unpaid work condition), deterrent (residence and supervision), rehabilitative (drug and alcohol treatment) or restorative (compensation). A tailored approach may introduce aspects of all of these elements into a single order, especially if combined with a fine[56] or the restriction of liberty[57].

The sentencing process is correctly moving rapidly away from short, sharp, shock of periods of incarceration in favour of community based disposals. No doubt that, in theory, is a good thing. There are 3 concerns. The first is that the court, usually the sheriff, has had sufficient time to carry out a proper

[56] 1995 Act, s 227D.
[57] 1995 Act, s 245D.

tailoring exercise required in a CPO. For that, he or she will require to rely to a significant extent on the CJSWR for guidance. The second is that there are sufficient resources in the system to ensure that the requirements are properly monitored. The third is that there are in place effective measures to deal with those defaulting from the terms of the order.

It is at this point in particular that I admit to a lack of practical knowledge. How can the courts deal satisfactorily with the offender who is unwilling or simply incapable of complying with a CPO, especially where the CPO has followed a failure to pay a fine? How is the recalcitrant recidivist to be dealt with without putting him in prison? This is something which I would welcome your views on. It is said that the prison population will rise to around 8,300 this year, but to as much as 9,500 by the year 2020[58]. This is despite the measures[59] which have been taken already to prevent this trend. There is much work to be done to tackle this problem. One thing is for sure, a system, based upon populist retribution, will not achieve it.

Sentencing Council

It would be churlish to end without making any mention of the Sentencing Council which was promoted in the 2010 Act[60] following upon the

[58] Scottish Government: High Level Summary of Statistics Trend: Prison Population.
[59] see for Ireland, similar statistics and proposed reforms; O'Donnell: Making Progress with Penal Reform (2013) 23 Irish Crim LJ 66.
[60] Criminal Justice and Licensing (Scotland) Act 2010, s 1.

recommendations in the final report of the Sentencing Commission in 2006. It has not yet been established, given the current constraints on Government spending, but its objectives when it is set up will be: (a) to promote consistency in sentencing practice; (b) assist the development of policy in relation to sentencing; and (c) promote greater awareness and understanding of sentencing policy and practice. It will prepare, for approval of the court, sentencing guidelines which may relate in particular to (i) the principles and purposes of sentencing; (ii) sentencing levels; (iii) the particular types of sentence that are appropriate for particular types of offence or offender; and (iv) the circumstances in which guidelines may be departed from. The Council will be obliged to consult before submitting guidelines. However, once approved, courts must have regard to them.

The Council is to be chaired by the Lord Justice Clerk and will have 4 judicial office holders, three lawyers, a policeman, victim expert and one other lay person. As is not unusual when reform to the law are being promoted, the idea of promulgating guidelines, even if they require court approval, has its critics; mostly those who, for reasons which escape me, prefer a more haphazard and inconsistent approach with no defined principles. I have little doubt that, once the Council is established, it will take Scotland into a new era of sentencing: one which will attempt to create a more principled approach and will define, upon the basis of concrete research, what we are trying to

achieve and how it can be achieved. It will not eradicate crime but it will advance Scotland into a more civilised era where retribution, other than in relation to the most serious of crimes, will have a smaller plate at the sentencing table.

5 November 2013 Lord Carloway