BOOK REVIEW: GRAEME BROWN *CRIMINAL SENTENCING AS PRACTICAL WISDOM* (HART PUBLISHING, OXFORD, 2017).

WARREN BROOKBANKS*

This book is the outcome of a research project undertaken by the author to investigate the views of Scottish judges and to provide a comprehensive review of recent sentencing scholarship. The book is based on a PhD undertaken at the University of Edinburgh, in the course of which the author interviewed 17 sheriffs and eight judges of the High Court of Justiciary who offered their frank views on sentencing as practised in Scotland. The motivation for interviewing judges was to gain a direct insight into the operation of the law and to present a "human face" to the enterprise of judging and sentencing. As the author notes, while senior members of the Scottish judiciary were extremely supportive of the research, a number of judges who were approached for interviews declined. It was suggested that possible reasons for such reluctance was fear of unfairly adverse criticism, apprehension about the use of research findings by the government and beliefs about judicial independence. However, despite this reluctance amongst some of the judges, the writer was able to assert that the survey was the most extensive of Scottish sentencers undertaken in recent years.

The substantive discussion begins in chapter three with an examination of comparative judicial sentencing methodology in Canada and Australia. The traditional approach to sentencing in Canada, as expressed in cases such as *R v Willaert* (1953) 105 CCC 172 (ONCA), was that the "art" of sentencing was a wise blend of deterrence and reformation, with retribution "not entirely disregarded".Trial judges, having gained experience from the "front lines of criminal litigation" were perceived as the workhorses, while appellate review was generally non-interventionist and deferential. In particular, Canadian jurisprudence identified sentencing as a highly individualized exercise going beyond a "purely mathematical calculation". Sentencing is seen by Canadian judges as a very human process; a delicate art based on competence and expertise.

In Australia, the notion of a "delicate art" has evolved into the idea of an "instinctive synthesis" of the facts and circumstances of the offence and the offender so that sentencing is a "single, global process of reasoning". This approach, which is endorsed at the highest level of Australian sentencing jurisprudence, permits the sentencer to balance and weigh all the circumstances of a particular case and to make a judgment as to the appropriate sentence to be imposed. The focus is on the final result, rather than whether the road taken is laid out correctly. This approach has not been without controversy in Australia. Some senior Australian judges, notably Sir Michael Kirby, have been critical of the instinctive synthesis model arguing that it is inconsistent with "statutory transparency" – the trend to spell out in legislation specific considerations to be taken into account in sentencing. Kirby argues that the instinctive synthesis

* Professor of Criminal Law and Justice Studies, AUT Law School

approach discourages explanation of the "logical and rational process" leading to the sentence, to the extent that it can[1] reasonably be given (see discussion at 44)[2].

Within the Scottish courts, however, Brown notes that there is authority suggesting a general preference amongst appellate judges for the instinctive synthesis over the staged or two-tiered approach. Recent case law and legislation[3] governing the calculation of punishment elements in discretionary life sentences, whereby courts are required to fix a period of time appropriate to satisfy the requirements of retribution and deterrence, and to be served before parole can be considered, has, according to Brown, illustrated "the problems and perceived injustices" that can arise following the imposition of a formalised and staged sentencing process.[4] The problems relate to the difficulties in assessing sentences according to "precise arithmetical calculation" where, in a particular case, there may be a range of incommensurable and conflicting objectives in reaching the final sentence. However, such cases only comprise a small percentage of cases sentenced by Scottish courts and sentencing routinely follows practice in Canada and Australia, where an individualised process has, at its core, judicial discretion and experience.

One of the challenges to the instinctive synthesis model is the claim that it is incompatible with the rule of law. The basis of this claim is that doing *particularised* justice, as implicit in the instinctive synthesis model, is distinguished from justice as *lawfulness,* and incompatible with rule of law values. This is the subject of the discussion in chapter four, where Brown surveys academic critiques of the instinctive synthesis approach, noting that while some academics, including Andrew Ashworth, have criticised the idea as "inscrutable" and sanctioning a "free for all" approach to the purposes of punishment, others acknowledge the idiosyncratic nature and difficulty of the sentencing task. It involves self-conscious and reflective social actors making decisions and choices within certain boundaries, actively interpreting material and drawing on past experience to make decisions which are fact-specific in relation to offences and offenders which are "infinitely complicated".[5] The judge's task is thus to balance often incommensurable factors and arrive at a sentence that is just in all the circumstances.[6] Yet this does not allay the criticism of some rule of law advocates that such sentencing decisions are no more than expressions of value preference made by the individual sentencer and neither determined by, nor recognisable as, legal decisions. However, as Brown notes, this analysis may proceed from a flawed understanding of the rule of law which cannot be separated from human participation since, as in other areas of law, it is impossible to apply legal rules and principles without human reason, insight and judgment. The complexity of sentencing, on this view, demands a wide judicial discretion, albeit subject to the constraints of legal doctrine, institutional constraints, policy and strategic considerations, and the equities of individual cases.

---

[1] See *R v T* [2011] EWCA Crim 2345 at [18].
[2] *Markarian v The Queen* [2005] HCA 25 at [130].
[3] See Criminal Procedure (Scotland) Act 1995, s 196 and Prisoners and Criminal Proceedings (Scotland) Act 1993.
[4] Graeme Brown *Criminal Sentencing as Practical Wisdom* (Hard Publishing, Oxford, 2017) at 50.
[5] At 52.
[6] See *Elias v The Queen* [2013] HCA 31 at [27].

Nonetheless, the dispensation of individualised justice does not command universal support in the jurisdictions surveyed, and as the author notes, policy driven changes introducing statutory minimum sentencing schemes are a challenge to the requirements of proportionality, parsimony and individualised justice. They fail to take account of the circumstances of individual offences, and often result in grossly unjust outcomes. Yet, as Brown notes, statutory minimum sentencing schemes are anathema to Scottish sentencers, most of whom continue to practice equity through individually crafted sentences, in contrast to following universal rules. This also reinforces the approach that offenders are to be treated as individuals – whole people – rather than as "two dimensional crime-and-criminal-history amalgams".[7]

In the fifth chapter, Brown develops a theme that is central to this book, namely, examining the social character of sentencing through the Aristotelian concept of *phronesis,* or practical wisdom. This is linked to the idea of value pluralism. In the context of sentencing, this means weighing and balancing potentially competing and incommensurable societal values and values particular to individuals in imposing sentence. *Phronesis* allows judicial recourse to equity in sentencing by a *phronetic* synthesis of all the relevant facts and circumstances of the case. Value pluralism is set against monism which, as a "single embracing vision" or single right way of answering any moral or political question, allows for the possibility that scientific investigation of the human world will yield a harmonious set of laws that can be formulated by experts. Whereas for the pluralist human goods are viewed as multiple, conflicting and incommensurable, the monist perspective says that all human goods are realised within a single moral and political system, which is authorised, administered and enforced by the same experts. However, in contrast to moral monism, Brown argues that value pluralism is better able to make sense of the many distinct features and dimensions of offence, offender and victim. These are implicit in the sentencing task which involves a "wise blending" of penal aims and values which are, of their nature, "irreducibly multiple and incommensurable".

For this reason prescriptive lists of sentencing purposes such as those set out in s 142(1) of the Criminal Justice Act 2003 (UK)[8] are sometimes viewed as a "recipe for inconsistency" and incapable of resolving the inevitable conflict between purposes that a sentencing task may give rise to. Indeed, as Brown notes, studies of matters that influence courts at sentencing have identified as many as 292 such factors. This has led to the claim that it is a reasonable assumption that consciously or subconsciously, sentencers will have set their own priorities and developed their own interpretations in sentencing particular cases.[9] Value pluralism is expressed in the dictum from *R v Nasogatuak* where the Supreme Court of Canada said: "No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case."[10]

[7] Brown, above n 4, at 104.
[8] Compare Sentencing Act 2002, s 7.
[9] Brown, above n 4, at 115.
[10] *R v Nasogatuak* [2010] 1 SCR 206 at [43].

Scottish law, as the author notes, does not have a list of statutorily defined purposes, although Scottish judges are guided by the same principles of punishment as are employed in other common law jurisdictions. However, while Scottish sentencers are guided by the six contemporary rationales of sentencing including deterrence, rehabilitation, incapacitation, desert, reparation and social theories (emphasising the social context of offending) together with relevant aggravating and mitigating circumstances of a case (described as the "dark mass of factors" constituting human existence), contemporary sentencing practice in England and Wales, according to Brown, is monist in approach. This is evident, he suggests, in the use of formal, prescriptive and presumptively binding sentencing guidelines from the Sentencing Council.[11] The problem with monist approach to sentencing, as Brown observes, is that the conflicts between the sentencing purposes (for example, retribution, deterrence) cannot be reduced to a single common measure, with any one moral claim having priority over the others. Regarding the sentencing purposes as incommensurable, as a value pluralist view would suggest, means that each has an equal claim to the attention of the sentencer, even if particular circumstances may allow the ranking of plural values to reflect the particulars of the case in hand.

Choosing amongst the incommensurables requires the application of sets of skills (virtues). Making such hard choices involves developing certain character traits which comprise generosity, (open-mindedness), realism, attentiveness and flexibility. Together these virtues allow the sentencer to properly perceive and correctly describe the particular case before them so that he or she is able to capture "the fine detail of the concrete situation" by confronting it as a "complex whole".

Value pluralism also affirms the need for autonomy in decision-making and allows the judge to decide value-related questions concerning the type of disposal, but independent of the constraints of abstract rules. How this works is well expressed in the quote from Crowder:[12]

> "Pluralists …are obliged… to think for themselves in a strong sense...They should be able to stand back from received rules and customs, recognise the value rankings these embody, and critically assess their application in the circumstances. This may involve appeal to background values such as personal and collective conceptions of the good, but these too should be subject to revision. Pluralists ought, that is, to be capable of autonomy when they are faced with such fundamental conflicts."

The capacity to choose autonomously, or critically, implies, for Brown, choosing well which may also mean eschewing systems "of formal, prescriptive and presumptively binding sentencing guidelines" in favour of the pluralist virtue of attentiveness to the

[11] Brown, above n 4, at 117.
[12] George Crowder "Value Pluralism and Liberalism – Berlin and Beyond" in George Crowder and Henry Hardy (eds) *The One and the Many – Reading Isaiah Berlin* (Prometheus Books, New York, 2007) 225.

detail of the situation (the particular offence) and the persons involved in it (offender, dependents, victims).

At the heart of Brown's analysis is the idea of practical wisdom, which allows the practical reasoner to organise choices among incommensurable goods and to avoid making decisions which would otherwise be arbitrary, incoherent and, ultimately, self-defeating. Thus practical reason, or *phronesis,* is distinguishable from the other Aristotelian concepts of *episteme* (analytical, scientific knowledge) and *techne* (technical knowledge or know how). Practical reasoning is based on practical value-rationality, and represents a reflexive analysis and discussion of values and interests. In particular, and importantly for Brown's thesis, it is about value judgment, not producing things. It represents what is ethically practical as opposed to what can be articulated in terms of theoretical axioms. But as Brown notes, not just any phase of learning will be adequate to the task of the *phronemos* as judge. In assessing the types of competencies appropriate to a sentence, Brown draws on the model of the human learning process developed by Hubert and Stuart Drefus.[13] The Drefus-Drefus model postulates five levels of learning of all skills, from the Novice Actor through to the Expert Actor.[14] Brown argues that only the final stage, the Expert Actor, is an appropriate descriptor for a judge who, as a user of intuition, assumes a special role and deals with situations that are distinct from the circumstances faced by other members of the community. Their intuition is employed "over a larger field, against a wider horizon of possible courses of action and with far greater power".[15]

For Brown, *phronesis* as practical wisdom allows judicial recourse to equity in sentencing, ensuring a judge gives appropriate weight to the relevant considerations of the crime, the offender and the interests of society, a factor which speaks powerfully in favour of a wide sentencing discretion. Whether sentencing is properly described as an "art" or as a "balancing exercise", for Brown the notion of the "instinctive synthesis" remains the most accurate shorthand description of the sentencing task.

Chapter six examines how the sentencing discretion is structured. In the pursuit of consistency English sentencing is said to have undergone four "phases", namely, appellate guidance, the Sentencing Advisory Panel, the Sentencing Guidelines Council and Presumptively Binding Guidelines and the Sentencing Council. According to Brown, each respective phase represents a movement towards more structured sentencing, through the issuing of "definitive guidelines" aimed at structuring, rather than eliminating proper decision-making by sentencers. Commentators cautioned, however, that given the crucial nature of predictability and consistency in any sentencing regime, there was a perceived danger that an excessive focus on guidelines risked them becoming mandatory or heavily prescriptive. However, although measures like the establishment of the Sentencing Council of England and Wales in 2009 foreshadowed a mandatory obligation to follow relevant guidelines, unless doing so would be contrary to the interests of justice, appellate courts continued to push back

[13] See Hubert Drefus and Stuart Drefus, *Mind over Machine: The Power of Human Intuition and Expertise in the Era of the Computer* (New York, Free Press, 1986).
[14] The five levels are: (1) the novice; (2) the advanced beginner; (3) the competent performer; (4) the proficient performer; (5) the expert.
[15] Brown, above n 4, at 130.

against any notion of "slavish adherence" to guidelines, emphasising the overriding obligation to do justice in an individual case.

Although there would appear to be some evidence that academic commentators have applauded the scheme introduced in 2009, as being exemplary for other jurisdictions contemplating structuring judicial discretion in sentencing,[16] according to Brown, Scottish judges and sheriffs are less optimistic, given the uniqueness and great diversity of circumstances arising in relation to offenders coming before the courts for sentence. Other critics of the English guidelines argue that the system effectively creates an "algorithm" for sentencers to follow, making the judgment of experienced sentencers count for less and less.

By contrast Brown argues that the Scottish approach is more conducive to achieving justice in individual cases because the focus is on "the particular and situationally dependent rather than on the universal and on rules".[17] With the concrete and the practical being emphasised over the theoretical, Scottish sentencing practice is a paradigm example of *phronesis* – practical wisdom. More particularly, Brown argues that the introduction of prescriptive, presumptively binding sentencing guidelines in England and Wales has transformed normative discourse in sentencing, replacing it with a discourse that "privileges an abstract and de-personalised approach to justice", considered the only legitimate approach.[18]

While experience and intuition are important in the decision-making of Scottish judges and sheriffs, they are not mere guesswork, but emerge out of practice. This requires an ability to select and focus on aspects and features of a case which are most relevant to the aim of crafting an appropriate sentence. Judicial discretion is central to this task, requiring not a detached (epistemic) observer but an expert who draws on experience, judgment and intuition. While Brown prefers to describe this approach to sentencing as a *phronetic* synthesis, rather than a conceptualisation in terms of the Australian "instinctive synthesis" model, it is noted that the last ten years in Scotland have seen the Appeal Court drawing more heavily on its statutory power to issue guideline judgments, intended to structure rather than remove judicial discretion and individualised justice. The model provides sentencers a framework in which to locate an individual case, while not depriving sentencers of the discretion to deal differently with a case with "unusual features". It is a "discretion underpinned by principles, rather than hemmed in by rules".[19]

[16] See A Ashworth & JV Roberts, "Sentencing: Theory, Principle and Practice" in M Maguire, R Morgan and R Reiner (eds), *The Oxford Handbook of Criminology* (5th ed, Oxford University Press, Oxford, 2012) 892; A Ashworth & JV Roberts "The Origins and Nature of the Sentencing Guidelines in England and Wales" in A Ashworth and JV Roberts (eds), *Sentencing Guidelines – Exploring the English Model* (Oxford University Press, Oxford, 2013) 11; JV Roberts & HH Bebbington, "Sentencing Reform in Canada: Promoting a Return to Principles and Evidence-based Policy" (2013) 17 (3) *Canadian Criminal Law Review* 327 at 337–338.
[17] Brown, above n 4, at 192.
[18] At 192–193.
[19] At 193.

The penultimate chapter, chapter seven, is headed "A 'Seedy Little Bargain with Criminals'? Judicial Discretion and the Guilty Plea Discount". The title speaks for itself. The chapter examines the practice of plea discounting in Scotland in a way which highlights the importance of judicial discretion, equity and individualised justice. In opening this discussion the author notes the traditional antipathy of Scottish judges towards sentence discounting, referred to as an "objectionable practice". However, sentence discounting has been provided for in legislation in Scotland since 1995.[20] The limited guidance about the scale or magnitude of discounts available in legislation has been met by a body of case law providing guidelines on the practice of sentence discounting. Senior Scottish judges have generally affirmed the discretionary approach to sentence discounting, while cautioning against perceptions that granting discounts is virtually automatic. In the leading Appeal Court decision in *Murray v HM Advocate* (*Murray*) the Court reiterated the existing principles, namely, that an accused is not entitled to any particular discount in return for a guilty plea, the discount will be greater the earlier the plea is entered, and that in order to maintain public confidence in the justice system and the credibility of sentences, the court's discretion to allow a discount should be exercised sparingly and only for convincing reasons.[21] In particular, the Court firmly rejected the view, at large amongst criminal defence lawyers, that an early plea was effectively an entitlement to a discount of one third. *Murray* and other appellate decisions reaffirmed the Scottish approach to sentencing and the use of guidelines as intuitive, holistic and interpretive consistent with the notion of *phronesis.*

The balance of the chapter outlined the results of the study as it related to discretion in discounting, noting a general scepticism of judges towards a structured, formulaic or mathematical approach to discounting and the need for discretion in setting the level of discounts. Respondents in the study saw discounting as an administrative necessity, rather than being based on indications of offender remorse or sparing victims from the ordeal of giving evidence. Nevertheless, there was also concern that sentence discounts could operate as a perverse incentive for innocent people to plead guilty, especially where a guilty plea could have the effect of eliminating the risk of a custodial sentence. There was also concern that punishment varied substantially for administrative reasons of cost and efficiency and could be viewed by the public as simply a bargain unrelated to the accused or his conduct.

The final chapter is entitled "The *Phronimos* and the Metronomic Clockwork Man". In this chapter the author draws together the dialectic themes that have informed the substance of the book, namely, individualised justice and practical wisdom as opposed to the "one size fits all" and "box ticking" approach to sentencing implicit in Metronomic Clockwork Man model, and summarises the case in favour of the *phronetic* synthesis approach. This view of sentencing methodology incorporates both the discretionary based "instinctive synthesis" approach developed by Australian judges and the intuitive, holistic and interpretive form of decision-making that is involved in the Aristotelian idea of *phronesis,* or practical wisdom. The use of *phronesis* demonstrated by the judges surveyed in the study points towards a sentencing methodology that achieves individualisation by judicial recognition of the "profoundly

[20] See Criminal Procedure (Scotland) Act 1995, s 196(1).
[21] *Murray v HM Advocate* [2013] HCJAC 3.

contextualised nature of the process".[22] Brown rejects both the "staged" approach to sentencing outlined in chapter three and the use of prescriptive and presumptively binding numerical guidelines as issued by the Sentencing Council. While sentencing discretion structured using a sentencing algorithm may produce consistent and predictable outcomes, consistency is often achieved at the expense of individualised justice.

By contrast, in Scotland where judicial sentencing discretion means that sentencing outcomes are "wobbled through the prism of personality", justice is preferred to consistency and the ability to cater for the unique circumstances of each case, a task unachievable in a guideline system.

In addressing the question of reform of the system for guilty plea discounting, Brown notes that the Australian Law Reform Commission, and appellate courts in New Zealand and Ireland have rejected legislative prescription of the quantum of a discount and the idea of a "sliding scale" approach. The latter was considered by the New Zealand Supreme Court to be too heavily structured and involved an inappropriate departure from a sentencer's duty to evaluate the full circumstances of each individual case.[23]

Suggestions for reform in this domain centre around the question of whether defendants ought to be able to benefit from reduced sentences going beyond any guilty plea discount. This may occur: for example, a defendant may benefit from fact and charge bargaining and then obtain an additional inherent discount by pleading guilty and entering into an agreed narrative with the Crown. Such factors, it is suggested, have a potentially corrosive effect by limiting a sentencer's ability to do equity in a particular case by imposing a sentence crafted to the circumstances of the offence, the offender, the victim(s) and the community. This issue could be addressed by giving sentencers a discretion to decide whether to allow a discount, thereby restricting the amount of any discount that might be granted in cases where collateral benefits have already been achieved through negotiated pleas derived through charge and/or fact bargaining. Such an approach has already been established in Australian sentencing jurisprudence.[24] Recently the English Court of Appeal has, despite constraints imposed by presumptively binding, numerical guidelines, accepted that withholding of a reduction for a guilty plea in an appropriate case was not precluded by the presence of a sentencing guideline.[25]

At the present time New Zealand sentencing law is broadly consistent with the practical wisdom approach advocated by Brown. In particular the New Zealand Supreme Court has rejected the structured approach to the extent of the reduction in

[22] Brown, above n 4, at 229.
[23] See *Hessell v R* [2011] 1 NZLR 607 at [72].
[24] See eg *R v Shannon* (1979) 21 SASR 442.
[25] See *R v T*, above n 1, at [18].

sentence based principally on when the plea was entered. In *Hessell v R*,[26] the Supreme Court held that determining the sentencing discount for a guilty plea by reference to a sliding scale which was dependent on the timing of the plea usually failed to recognise other circumstances in which the plea was made. These might include such matters as the strength of the prosecution case or the necessity of resolving disputed facts. Significantly, for the purposes of the present discussion, was the Court's view that the value to be given to a guilty plea must be assessed with regard to all the circumstances of the case, rather than by reference to a prescriptive scale of discounts depending on when the plea was entered.[27]

This book is a tour de force in the exposition of sentencing policy and in consolidating the case for judicial discretion in sentencing. It is analytical in its approach yet is thoroughly accessible for any serious student of sentencing policy and practice. While the study at the heart of the book is focussed on judicial experiences of Scottish sentencing practice, the insights and frank expressions of opinion offered demonstrate the ethical, legal and social dilemmas that are the common lot of sentencers as practitioners of practical wisdom.

While the book does acknowledge the central role played by the principles of, for example, retribution, deterrence, rehabilitation and incapacitation in modern sentencing theory, these are not examined in systematic detail but are a point of departure for a much more intense examination of sentencing practice as a human process.

It is a book that deserves careful study for anyone interested to understand the difficult nature of the sentencing task, the ubiquitous character of judicial discretion and the complexity of the overlap between judicial practice and official policy. As such it will be of interest to students of criminal law and criminal justice, criminal lawyers, judges and policy makers.

[26] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.
[27] See Simon France (ed) *Adams on Criminal Law — Sentencing* (online looseleaf ed, Brookers) at [SA9.18] for a full discussion of the principles applying in the post-*Hessell* sentencing environment in New Zealand.