

Walker, Nigel, Aggravation, Mitigation and Mercy in English Criminal Justice, Blackstone Press UK, 1999. 298 pp.
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The modern literature of sentencing is almost entirely devoted to courts' powers and procedures. Some textbooks list sentencers' aims briefly and with the implication that they present no real problem. Few deal with their chances of achieving those aims, or with the conflicts between them. Hardly any deal sympathetically with the considerations that seem to persuade courts to pursue their aims with leniency or severity in individual cases. Yet the legislation of the nineties, with its emphasis on proportionality, aggravation and mitigation, has increased their importance. This book is an effort to fill all these gaps.

This is the ambitious task that the author sets for himself in the preface of this work. It is a particularly ambitious task for a book of 270 pages. My judgment is that he has largely achieved what he set out to do. He has firstly identified two main schools of thought in relation to sentencing: retributive sentencing and utilitarian sentencing (some would argue that this is an over-simplification) and dealt with the conflicts between them. He has also explored the question of which of those two aims is being pursued by the legislature or the judiciary in particular Acts or cases. He has also highlighted some of the deficiencies in retributive and utilitarian arguments. The book provides a good overview of sentencing issues and the difficulties facing sentencers.

There is no disputing Nigel Walker's authority in the area of sentencing. He founded the Oxford Centre for Criminological Research and was Director of the Cambridge Institute of Criminology. His books include *Crime and Insanity in England*, *Sentencing in a Rational Society*, *Public Attitudes to Sentencing*, *Why Punish? Sentencing Theory, Law and Practice* and *Dangerous People*. His biographical details indicate that he has been a member of nearly every national committee in the UK concerned with sentencing since 1960.

In Part 1, 'Justifying Penalties', Walker devotes brief chapters to what he sees as the rival views of the general justifying aim of punishment, Desert and Utility. In the chapter on Desert he raises an interesting argument relating to the idea of punishment. He argues that retribution as we know it in the form of delayed retaliation is unknown to animals other than humans; that animals are more likely to display reconciliatory behaviour (1999:6). Walker, however, provides only limited evidence for these propositions. This is a limitation that I found infected the book as a whole. It is only minimally referenced. This makes it difficult to follow up points he makes or to gauge the support for some of his propositions. Whilst with some texts you drown in the footnotes, with this one you need some ballast.

The validity or lack of validity of punishment as a goal is an issue that the proponents of restorative justice should perhaps explore more. Walker argues that there are cultures such as the Japanese who place the focus on the need for a confession of guilt rather than punishment. He refers to the provisions of the English Criminal Justice Act 1991 which adopt a retributive approach in requiring that the length of custodial and community sentences be commensurate with the seriousness of the harm caused, but points out that the Court of Appeal has not been willing to lay down general sentencing principles.

Walker asserts that Utility rather than Desert has been the fundamental aim of most penal legislation, for example, the Crime and Disorder Act 1998 makes the principal aim of youth justice 'to prevent offending.' However he explores how 'legislators have been guided by assumptions about the effectiveness of penalties rather than by organized experience – that is, by research' (1999:18). He considers the idea of sentencing as expressing outrage *perhaps the most desperate of utilitarian resorts* (1999:21) especially when public dissatisfaction with the leniency of sentencing is taken into account.

In considering the question 'Sentencing for what?', Walker ponders whether an offender is being sentenced for criminal behaviour or for his character. Why are prior convictions, or the fact that the defendant's behaviour was 'out of character' taken into account in sentencing? He further questions what we mean by 'character' especially given that when defence counsel makes reference to his or her client's previous good behaviour, he or she is often implying only that the client has no previous convictions. He also raises the question of whether a sentence should reflect the harm done in fact or the harm intended or likely to result from the actual behaviour.

In Part 2, 'Aggravation', Walker deals firstly with statutory and miscellaneous aggravation. He includes in miscellaneous aggravations, practice directions of the Court of Appeal and case law. He raises some unusual issues including what he calls the unstated principle of sacrilege and includes the following example.

In 1998 *Kelly*, a sculptor with a blameless record, received a short custodial sentence for stealing parts of human bodies, not from a church or graveyard but from the Royal College of Surgeons. If he had merely stolen books he would almost certainly have been dealt with non-custodially (1999:48).

I can see that sacrilege would have been involved if the body parts had been stolen from a church or graveyard. However, I wonder if it really is the issue in point here. If it is the human body which is to be treated as sacred by the courts rather than places, the issue of sacrilege would affect sentencing for all assaults. Walker also notes that one Practice Direction requires magistrates to commit for trial in cases where sadism against children is part of the allegations and finds it odd that this requirement does not extend to adults, for example, to wives (1999:50). On this point, I am in agreement with him.

Walker draws attention to the fact that the supposed prevalence of an offence is a circumstance of aggravation which is accepted without proof.

When the defendant in *Williams* (1995) was sentenced to four years for intimidating a witness it seems to have been accepted by all concerned that this was 'particularly prevalent' in Liverpool. It is not easy to think of another sort of aggravation which is accepted so unquestioningly (1999:51).

Given the ready availability of crime statistics, this is unacceptable. Walker believes that in these days of economic rationalism (my words not his), having lust as a motive is more likely to act as a circumstance of aggravation than greed is. I wonder if this is true, particularly now that, as a result of feminist lobbying, the focus in cases of sexual violence is likely to be placed on the violence rather than the sexual aspect. He also points out that having no discernible motive (as in mindless violence) also aggravates a sentence.

Walker then goes on to devote individual chapters to the controversial issues of precautionary detention and non-custodial precautions. He believes that it is possible to discuss the issue of precautionary sentencing without talking about dangerousness, pointing out that the term is not used in relevant legislation and rejecting the argument that situations rather than people are always the problem. Walker suggests that the factors which are

relevant in prolonging a precautionary sentence are (1) if the serious offender finds himself in similar situations more often than would be expected to happen by mere chance, or (2) that his *modus operandi* or other evidence indicates that he seeks or makes opportunities for offending (1999:75).

He provides interesting figures from the UK Parole Board which show that, as expected, sexual offenders are least likely to be released as soon as they are eligible, but perhaps less expectedly that property offenders are less likely to be released than violent offenders. In discussing the longer-than-commensurate sentences open in cases of serious sexual or violent offences, he also provides statistics that show that they average 5.1 years and 7.2 years respectively (compared with 3 years and 2.3 years for commensurate sentences) but that they are imposed in only 6% of sexual offence and 3% of violent offence cases.

In relation to non-custodial precautions, Walker lists the variety of legislation which provides for disqualifications other than in relation to driving, including the Football Spectators Act which he asserts is unworkable in practice. In dealing with registers of sex offenders, he refers to the 1998 case of *Thorpe and another* in which the Court of Appeal said that the police *should be allowed to act in a sensible and pragmatic way* in relation to the disclosure of such information (my emphasis, 1999:87). It is a pity that the *Sun* newspaper did not see fit to act in a sensible and pragmatic way in relation to this issue. Walker suggests that surveillance or supervision is limited and that generally disqualifications are

no more than prohibitions backed up by threats which impress only the law-abiding (1999:90).

In Part 3, 'Mitigation', Professor Walker again deals firstly with statutory and miscellaneous pleas and then moves on to the specific issues of Harm, Youth and Old Age, Mental Disorder, Revenge and Provocation, (the unfortunately titled) Women's Situations and Unfashionable Mitigations. He draws attention to the problem that

Unlike aggravations, mitigating considerations are often based on facts which have not been established in the trial or by a plea of guilty, and the facts may not be facts (1999: 118).

In relation to mental disorder, Walker claims that the insanity defence is now very rare (1999:158). Presumably this is because such matters are usually referred to a specialist tribunal. He also asserts that psychiatrists are less ready these days to argue diminished responsibility for clients who have personality disorders perhaps on the basis that

offenders of this sort know what the law requires and are capable of the necessary self-control when it is in their interests (1999:171).

In the chapter on 'Revenge and Provocation', Walker mentions the case of *Haley* (1983) where the defendant stabbed his wife's lover and the Court of Appeal claimed that

There is no need to deter the appellant. He will never do anything like this again.

This statement goes unchallenged by Walker. Yet it is hard to discern the basis on which such an assessment is made. Indeed my main criticism of this text is its lack of gender analysis. It is extraordinary that the fact that offending behaviour is largely engaged in by men continues to be ignored as a systemic issue. The only reference to it is a rather facetious comment by Walker in the preface (1999:xii) where he says

(Some authors nowadays use 'she' to include 'he' when writing of offenders, but I am never sure whether they are prompted by fear or humour.)

Again in the preface (1999:xii) Walker suggests that

lower courts often mitigate for reasons – or to an extent – which the Court of Appeal would reject. An example is leniency for women...

This ignores the literature suggesting that women are treated leniently by courts only if they fit gender stereotypes and indeed are punished severely for straying from them.

In the chapter titled 'Women's Situations', Walker gives a hint of this type of thinking without seeming to be aware of it:

If she had a partner - preferably a husband - that was more encouraging [to the sentencer] than living alone (1999:189).

It is also disconcerting to find him claiming Helena Kennedy as the source of his argument that *judges and juries can be very sympathetic to battered women* (1999:190). It is probably because this text purports to provide an overview of all the issues involved in sentencing that such issues are skimmed over. The result is, however, a distortion.

Part IV deals with the issue of mercy and the question of where sentencing is headed. Walker asks the question whether it is proper for a criminal court to go further than is justified by a plea in mitigation and act mercifully. He suggests a limited role for the concept of mercy. One example he gives is 'the quashing or reduction of a parent's prison sentence in the interests of her (or more rarely his) children' (1999:227). I have problems with this example. I fail to see how this is an issue separate to mitigation.

Earlier in the book (1999:117), Walker refers to a concept he denotes Using Up Mitigation and provides the case details of *Frankson* (1996) where a co-defendant had pleaded pregnancy and her responsibility for three young children but the Court held that she had 'well and truly used up the credit for those responsibilities in her history of criminal offences.' As Walker himself points out, Frankson's girlfriend presumably still had three children, not to mention the new pregnancy. Does an issue move from being one of mitigation to one of mercy when courts fail to give it sufficient weight? I would have thought a preferable alternative would be to argue that mitigation should operate in a more inclusive way.

In his final chapter, Walker considers the issue of public confidence in the criminal justice system. He argues that

if the aim is the modest one of minimizing avoidable loss of public confidence in sentencing, increasing severity is not the only way of achieving it. The news media could be given fuller explanations of sentences which seem *prima facie* lenient.

I agree with this proposition but suggest that educating the public about sentencing issues should be the responsibility of the education system as well as the media.

Finally, I wonder whether the difficulties and inconsistencies raised by Walker are reflective of the fact that the criminal justice system is unbalanced in its focus on sentencing the offender. That is, unbalanced in the sense of both focusing on the offender and focusing on sentencing, it is hard, after reading this book, to resist the argument of the restorative justice proponents that the system needs to be reconceptualised.

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