Aims and purposes of sentencing

Discuss, and comment, on the aims and purposes of sentencing. To what extent are they a reflection of sentencing currently practised by courts?

A sentence in law, according to the Oxford Dictionary of Law (2006) is:

“ Any order made by a court when dealing with an offender with respect to his offence… now governed by the Criminal Justice Act 2003”

Courts deal with sentences choosing from a mix of different aims for the sentence to have. There are six main types of aim when assessing the purpose of any sentence: Retribution, Deterrence, Desert Theory, Rehabilitation, Restorative Justice and Incapacitation

Firstly, retribution is where The Old Testament’s ‘ an eye for an eye and a tooth for a tooth’ form of justice is taken. It takes the view that offenders deserve to be punished and satisfies the victim’s ‘ need’ for revenge. This form of punishment is full of criticism, for example Mahatma Ghandi himself stated “ an eye for an eye will make us all go blind”. This highlights the disproportionate nature of retributivism. In the case of Sargeant retribution as a purpose of sentencing was de-applied in the criminal courts where the judge stated:

“ The Old Testament concept of an eye for an eye and a tooth for a tooth no longer plays any part in our criminal law”

This shows how judges and parliament have moved away from this form of justice to others. However, in cases not to do with criminal law, such as Tort law or other aspects of law that give damages, it could be construed that there is a retributive aspect of taking damages from someone who has

wronged you. Granted this is a sort of reparative justice (discussed lower) but the principle is well the same.

Deterrence is a similar form of justice to retributivism in that it attempts to maintain order through threats and fear. There are two forms of deterrence, general and individual. They are fairly self explanatory, general is where the courts sentence heavily to dissuade the general criminal public and individual is where the courts sentence heavily on the individual to supposedly make them not want to commit crime anymore. An example of deterrent sentencing can be seen in the case of Storey. It was an attempt to make an example of the offender so as to stop others committing the same crime, in this case, robbery, statistics show that it only worked in the short term. An issue is that deterrence is disproportionate, and does not take into account the cause of crime. It assumes that the offender thinks rationally of his choices, which is not always the case.

There has been much legislation and policy to curtail judicial discretion with regard to deterrence in sentencing. For example the CJA 1991 stated that deterrence was not to be used as a means of lengthening a sentence. However, traditionally the courts have steered toward a deterrent policy of sentencing, and in the face of opposed legislation they were not about to give that up easily. The CJA 1991 was so poorly written that Lord Taylor in the case of Cunningham managed to read section 2 (2) (a) of the 1991 Act as follows:

“ The purposes of a custodial sentence must primarily be to punish and to deter. Accordingly, the phrase ‘ commensurate with the seriousness of the

offence’ must mean commensurate with the punishment and deterrence which the seriousness of the offence requires”.

This enabled judges to effectively disregard the statute in such a manner that they could continue on ‘ business as usual’. There was also a government White Paper in 1990 that came close to directly saying that deterrence was no longer a valid consideration when sentencing. However, despite all of this deterrence has once again emerged as a key aim of sentencing courtesy of section 142 (1) (b) of the Criminal Justice Act (hereon CJA) 2003 where deterrence is one of the only purposes mentioned directly.

Desert Theory is a form of justice based around proportionality. The Swiss judiciary uses this as their main purpose for sentencing. It essentially means that the sentence must be proportionate to the culpability of the offender. The CJA 2003 includes culpability into judicial reasoning. A case of where Desert has been put into practice would be Lord Lane CJ’s justification of his lowering of the sentence for social security fraud. This is the case of Stewart where it was given that the crime was “ non-violent, non-sexual and non-frightening”. The Halliday Report shows a large preference to Desert Theory as it emphasises the need to link severity of punishment with culpability and seriousness of the offence, so as to give a proportionate sentence.

Problems with this form of principle are that there is an assumed blame factor on the offender’s side, which does not take into account social situations when taken literally. The actual limits of proportionality are also contentious; the key concept of proportionality itself is too open to divergent

opinion. However, it could be interpreted that desert is a main principle for our system as the CJA 2003 incorporates much of what desert stands for into it i. e. mitigation and culpability.

The concept of rehabilitation is also mentioned directly in CJA section 142. This principle recognises the need to lower future crime and reconviction. This form of justice views the sentence and the associated loss of liberty as the real punishment; it puts forward the concept that through cognitive training during this time of lost liberty crime can be reduced, such as with the “ Think First” program and the “ What Works” ethos developed by Maguire and Priestley. It is particularly useful in cases dealing with drugs and alcohol abuse. However, long term studies have indicated that in other circumstances it is unlikely to be of much use, as was found by the ‘ nothing works’ research project. A 1998 Home Office survey evaluated that:

“ there have been… very few well-designed and carefully evaluated studies in this country of the effectiveness of programmes designed to rehabilitate and reduce the risk of re-offending.”

This represents a warning that rehabilitation is a very niche area giving various so-called experts powers over who is let out and who is not, based upon loose assertions that the offenders are ‘ better’ or not. However, it does remain in the CJA 2003 section 142, but not as the sole rationale. The Mental Health Act 1983, despite the previous 1998 report, still gives the courts jurisdiction over the mentally ill, and as addiction can be construed as a mental illness then it is possible to infer that the government supports this form of sentencing in this context.

The principle of ‘ making amends’ for one’s crime is the idea of restorative justice.

“ criminal justice should… focus [on] restoring individual damage and repairing ruptured social bonds… a truly reparative system would seek the holistic restoration of the community”

Some of these developments in this form of justice are to make sure the criminal does not profit from his crime, i. e. compensation. Others are more reparatory in nature, meaning criminals are put to work for little or no wages in an effort to ‘ rebuild’ a part of the community they have victimised, for example a vandal fixes broken street lights for his criminal damage. The Powers of the Criminal Courts Act 2000 can be seen to greatly support the use and amendment of differing forms of community reparative sentences and further evidence is given to support reparation in the CJA 2003.

However, various problems rise up when this form of justice is used. Firstly, it is disproportionate in nature, where a minor offence is committed a seemingly longer sentence of reparation will be administered rather than a shorter jail term. The disproportionate side enters where if the offender does not conform then a much harsher sentence will be imposed upon them. This does not address the cause of crime and can never be used for violent offenders as to do so would be a gross injustice to the victim. Therefore as a rationale it can only ever be taken in certain circumstances.

Incapacitation is where the offender’s opportunity to commit crime is taken away, by removing key aspects of his liberty that facilitate the crime convicted. For example a dangerous driver is disqualified and electronically

tagged. As a result of humanitarian issues, such as imposing a harsh curfew which may interfere with someone's right to personal autonomy and personal life, this gives the result with this being a heavily prescribed form of rationale. It is mainly limited to repeat (career) criminals or those deemed to be ' dangerous' courtesy of the CJA 2003 sections 224-229 criteria. Incapacitation could also be construed within mental illness cases as well. The Mental Health Act 1983 gives judges the opportunity to use various methods of incapacitation on mentally ill offenders.

The primary power the court has is the Hospital Order in respect of section 37 of the 1983 Act. Despite the fact that this is a form of incapacitation in Birch Mustill LJ explained that the intention of this was different and meant to be humane. This principle of justice is held to be in the favour of the defendant, even though all liberty is removed by an order of the court. Liberty can be further removed in the interests of protecting the public using a Restriction Order as of section 41 of the 1983 Act. A Home Office report however supports this when used on the mentally ill where practicable and appropriate. This would show that incapacitation is a form of justice that most governments find irresistible to direct judges upon when issuing Acts and policies on sentencing.

The point that Ashworth makes is that the CJA 2003 incorporates all of these rationales in the consideration of sentencing. This is true. It would then also be true that there is a pick-and-mix element to judgement with regard to this Act. However, it is untrusting of the judiciary to state that this invites inconsistency. While the main thrust of this Act could be seen to be the Desert Theory, as there is much mention of different levels of blame, this

would show that this gives judges the discretion they will need to achieve justice for all. It would be the assertion of this paper that the CJA 2003 invites consistency of judgement but allows for the discretion of the inconsistency of crime in its own chaotic nature.

Table of Statutes:

Criminal Justice Act 2003

Criminal Justice Act 1991

Powers of the Criminal Courts (Sentencing) Act 2000

Mental Health Act 1983