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Some characteristics of the

SENTENCING PROCESS

dr. Jan J.M. van Dijk

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Dr. Jan J.M. van Dijk
Research and Documentation Centre, Ministry of Justice, The Netherlands,
Schedeldoekshaven 100, The Hague, 2500 EH.
Phonenumber: 070-706573

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Introduction to the subject

Social scientists have conducted studies of a thousand kinds on the realities of crime and crime control, usually with the stated aim of assisting the sentencers in their decision-making. These social scientists however almost unvaryingly have scant knowledge about the psychological and social realities of the sentencing process itself. Their position is comparable to that of the ill-prepared technologists that were sent in the sixties to developing countries as advisers on agriculture or family planning. The impact of their well grounded advice on technical matters was nil because they were not able to adapt their advice to the social and cultural realities of their hosts. Their presence was a source of mutual frustrations. Sometimes they were even expelled. So, at the Research and Documentation Centre of the Ministry of Justice[1] the decision was made some years ago to start a series of studies on the sentencing process, with the intention of increasing the impact of our work on the decision-making of the judiciary.

Our first studies consisted of a thorough analysis of the available documentary data. Several thousands of criminal files were analysed by research assistants in order to find out which characteristics of the case and of the offender, as documented in the files, were most closely related to the various judicial decisions. At a later stage we decided, in accordance with an established anthropological tradition, to conduct some field studies. Several of our staff members undertook studies at local courts which involved direct observations of the sentencing process. One of them, Dr. Van Duyne[2], was permitted to participate for about a year as a psychological observer to the prosecutor's office in the daily activities of this office. During his stay at this office he asked the seven prosecutors to read and think aloud when studying actual criminal files with a running tape-recorder at their desk. In this way he was able to make recordings of the soliloquies of prosecutors reaching a prosecutorial decision on a criminal case in an almost natural setting. In order to study the sentencing process at the level of the judges three of our staff members[3] were allowed to attend the secret sentencing meetings of a district court, after having been sworn in as legal clerks. In this way we were able to make protocols of about 18 sentencing sessions of a district court.

In this lecture I would first like to discuss some of the key findings of our analyses of about 3.000 criminal files. After this I would like to relate these findings to some preliminary results of our observational studies. At the end of my talk I will venture to make a few generalizing remarks about some structural and functional characteristics of the process of sentencing.

By means of a series of analyses of criminal files we hoped to find out which of about one hundred characteristics of the case and of the offender were in any way related to crucial judicial decisions like the decision of the prosecutor whether or not to put a case to trial -in the Dutch system the prosecutor has great discretionary powers-, the decision whether or not to order pre-trial detention and of course the final sentence.

Results of an analysis of criminal files

The results of our analysis of the prosecutors decision whether or not to prosecute a case, were not very satisfactory.[4] We were not able to find any relationship between the information in the files concerning the case or the offender and the prosecutor's decision which was particularly strong. In as far as any statistical relationships were found however, the seriousness of the cases, in the sense of the value of the stolen property or the degree of injury, appeared the single most important factor. For instance, most of the cases of burglary with a stolen property value of less than 700 dollars had not been put to trial. Cases with more serious financial consequences had been prosecuted much more often. Almost all cases with financial consequences of more than 1.000 dollars had been put to trial, regardless of the other characteristics of the case or the characteristics of the offender. These results indicate that the prosecutors do use their discretionary power only if the financial consequences of a property crime have not surpassed a limit of 1.000 dollars. With cases bearing more serious consequences it is apparently no use arguing with the prosecutors about a dismissal of the case. At the same time our analyses have shown the upper limit of 1.000 dollars is not uniformly applied by all prosecutors. Some prosecutors tend to apply much lower upper limits of seriousness when executing their discretionary power. So, to be or not to be prosecuted appears to be a matter of chance when the offence is not too serious.

One of our more succesfull analyses was concerned with the decision of the investigative judge whether or not to order pretrial detention (or 'custody in remand' as it is called in England)[5]. In the terminology of statisticians, we were able to explain about 40 percent of the variance of these decisions by means of a multiple regression analysis. Like the decisions of the prosecutors the decisions of the investigative judges appeared to be predominantly influenced by the material seriousness of the case. The number of offences committed, their joint financial consequences and the degree of bodily harm appeared to be strongly related to the decision whether or not to order pre-trial detention. Offender characteristics like the number of former convictions or drug addiction seemed to be influential only with the less

serious crimes. These results are similar to the results of our analysis of the prosecuting decisions. Still, they are somewhat surprising since according to the Code of Penal Procedure the decision to order pre-trial detention has to be justified primarily with a grounded expectation of immediate recidivism. In practice however the degree of financial damage caused by the crimes committed seems to be an almost decisive criterion for these judicial decisions. Again, the critical values of this criterion appeared to be different for the various decision-makers. The investigative judges of some district courts tend to order pre-trial detention for much less serious crimes than their colleagues of other courts. These disparities in sentencing appear to be quite consistent over time.

Lastly we analyzed the actual sentencing decisions for various types of serious crimes. As was to be expected on the basis of the other findings, the severity of the final sentence too appeared to be associated most strongly with the material seriousness of the offence. When the degree of damage had surpassed a certain limit -e.g. when more than three different burglaries had been put to trial jointly- an unconditional prison sentence appeared to be the almost invariable outcome of the sentencing process. The length of the prison sentence too appeared to be dependent primarily on the material seriousness of the crime. The individualization of the sentence, that is application of the principle that the sentence should fit the characteristics of the offender, appears to be a guiding principle for the sentencer only with the less serious crimes.

The results of our analysis of criminal files can be summarized as follows. Most judicial decisions appear to be influenced foremost by the material seriousness of the crime. Offender characteristics seem to be an important point of consideration only with the less serious crimes. Although all sentencers tend to give much weight to the material seriousness of the crime, they do not reach identical decisions on identical cases because they use different 'critical values'. While some of them consider a financial damage of 1.000 dollars to be "the limit", others tend to apply lower or higher limits.

Results of the observational studies

As I explained before,we did not restrict ourselves to an analysis of criminal files. We also made a serious effort to conduct observational studies on the sentencing process. These studies could be characterized as anthropological field studies among the natives of the courtroom. First of all, one of us was allowed to attend the various activities and meetings of the prosecutors working in one of the smaller court districts. At his request all prosecutors had studied a series of ten actual criminal files which had been selected from their collective caseload. They were asked to reach a decision on these cases by reading and thinking -loud with a tape-recorder at their desk.

Some years ago a study using similar methods had been carried out at the University of Leyden on the ways in which civil lawyers reach a decision in a civil law suit. A global comparison of the protocols based on the tapes shows that the prosecutors arrive at their decisions on serious crimes in a more schematic and straightforward way than civil lawyers dealing with a civil case. The huge caseload of the prosecutors seems to severely restrict the amount of information that is taken into account and to preclude armchair philosophizing on the ultimate aims of a particular decision. Working as a prosecutor is almost like working on an intellectual assembly line: 'Time is always running out'. Besides, the prosecutor when studying a criminal file is repeatedly disturbed by police officers calling up or clerks bringing in documents for signature. The structural constraints on his functioning, brought about by his work environment, seem to be quite substantial[7].

As far as the strategy of decision-making is concerned, both civil lawyers and prosecutors appear to be result thinkers, that is they make up their minds very quickly and then start looking for justifications for their intuitive decision. In the case of the prosecutor this means checking whether two or three additional categories of information do fit the pattern he has in mind. It is only when the additional information sharply contradicts the preconceived pattern, that the prosecutor will fundamentally change his mind. When comparing the protocols we often found a similar piece of

information had been interpreted differently by prosecutors with different preconceived ideas. For instance, the fact that a burglar had not been reconvicted during the past six years was seen both as evidence of his retirement from an active criminal career and as evidence of his professional ability to prevent arrest. The first prosecutor decided to dismiss the case, while the other decided to demand a prison sentence of one and a half year.

Since prosecutors tend to be result thinkers, their first impression is of crucial importance for the outcome of their decision-making. This first impression seems to be based to a large extent on the judgement of the reporting police officer. The police officer is the first to attach a penal label to the incidence, by defining it as a burglary or a case of aggravated assault. This label usually is the first information category the prosecutor receives about a case, since it is written on top of the file. Whatever might be the other reasons for it, the preliminary judgement of the prosecutor seems to be based largely on the perceived seriousness of the case. When at a later stage the prosecutor's attention is drawn to a particular sad or problematic aspect of the offender's personality or social situation, our tape-recorder would register comments like: "in such serious cases I really can't give too much consideration to the characteristics of the offender".

The data concerning former arrests and convictions seemed to be the exception to this rule: these data often seemed to play an important role in the decision-making. Former arrests and convictions however are often not used as indications of the offender's rehabilitation potentials but as information about his culpability or blameworthiness. According to the prosecutors a person that has not taken warning from his former conviction deserves a more severe punishment because he is more to blame for his illegal behavior.

Probably one of the more interesting elements of the protocols is the very limited number of direct references to the ultimate aims of the proposed punishments. Soliloquies about the desirability of punishing the offender as a means of correction, deterrence or retribution appear to be the exception.

The majority of sentencing decisions are arrived at without any reasoning about the aims of the punishment to be inflicted. The well known textbook discussions about the various aims of punishment seem to be lacking conspicuously in the actual sentencing process.

Finally I would like to comment briefly upon some of the observations we have made of the sentencing meetings of one of the district courts. The sentencing process at the level of the court is different from the decision-making process of the prosecutors in many aspects. To begin with the sentencing process of the judges concerning more serious crimes is a group affair. Besides, several other parties -the prosecutor, advocate etc.- have already expressed their opinions on the case before the sentencing meeting takes place. The problem solving by the judges seems to have a less active nature. On the other hand there are some striking similarities. The judges too are involved in a flow production of decisions that have to be made in a very limited span of time. The president of the court often has to push decisions because time is running out.

Concerning the discussions on the severity of the punishment the following quotation seems to be exemplary. When discussing a particular case of burglary one of the judges would say: "I see a close resemblance to this Pietersen case we had to deal with last month. If I am not mistaken we gave him 6 months". The other judge would answer: "Yes, yes, that is correct, but then there was more recidivism involved. So, I would suggest 4 months". Says the president: "All right, I agree, let's make it four". As I said, this short fragment of a sentencing discussion seems to be representative for the majority of these discussions. With the average case the final sentencing decision is arrived at without direct references to the social aims of the punishment.

Sentencing in practice is not a process of relating the facts about the case and the offender to the aims of punishment. In most cases it consists of relating these facts to a scheme, that is based on former decisions.

Actually, the team of judges we have been allowed to observe during their sentencing meetings, would often check their sentencing decisions with the short notes on former decisions that one of them used to bring along. Sometimes they would even ask for the file of a previous case in order to make

a precise comparison with the present one before fixing the punishment. At one particular time the President remarked to his fellow judges at the end of a long meeting: "I do not worry about the quality of our sentences, but to be honest, I have some doubts about their consistency". In this remark, I think he expressed a very basic concern of the individual sentencer: consistency. Consistency in relating sentences to culpability could very well be the primary working goal of the majority of sentencers. The protocols on cases with two or three suspects are of particular interest in this regard. When discussing these cases the judges expressed on several occasions their concern about whether the suspects would be able to agree with the differences between their sentences (in relation to their differential culpability).

If I may now sum up the combined results of both our analysis of criminal files and our observational studies, I would like to put forward some general and interrelated conclusions. First of all the observational studies have brought to our attention the sentencer's working goal of consistency over time. This working goal of consistency is of course a general characteristic of most decision-making processes. In this case however it seems to be a consequence of the occupational role of the sentencer too. The sentencer is not responsible for the existence of the penal system. His task is to measure out pain and misery to individuals on behalf of society. In this he could be compared to the sergeant-major who is expected by his superiors to punish his soldiers for a variety of reasons. The soldiers know he is not the one who invented the army regulations. They however expect him to be consistent in his decisions concerning these rules. In our culture soldiers, as well as schoolpupils, delinquents and bystanders feel very strongly about fixing the punishment in proportion to the culpability of the offender. A person who is less to blame than someone else should never be punished more severely. This basic principle of justice should not be mistaken for the theory of retribution. Neither the sergeant-major nor the soldiers will usually have a strong interest in retribution. There is no uncertainty however about the role expectancy of the sergeant-major: he is expected to fix the penalty in proportion to the culpability of the offender. If he is considered to be inconsistent in this regard he

will lose at once his credebility and prestige with his group. So,in our view the concern about consistency of the sentencer is a central element in his social role. This role expectancy has no strong connection with the current philosophies on the aims of the penal system. Young judges are probably socialized into an occupational role which lays stress on consistency. This process of socialization takes place during their usual very extended period of training. Deviances from this norm are reacted upon by the suspects -many of them "acquaintances" of the judge- by advocates, prosecutors and of course the appellate courts. Remember also, the remark by the President of the Court: "I do not worry about the quality of our sentences, but I have doubts about their consistency". This remark was made some weeks after the arrival of a newly appointed judge in his chamber.

My second general conclusion has to do with the consequences of the huge caseload of the judiciary in our present times. If sentencing is an art, it definitely has developed into mass production art. Especially at the level of the prosecutor's office the sentencing process is structurally influenced by the necessity of flow production. The sentencer is pressed by his lack of time towards result thinking. In order to arrive at a quick decision he has to restrict his use of information to a minimum. A sentencer who is not capable of reaching a decision after studying only the global features of a case, is no good for his job. This means the sentencer does not have the opportunity to assess the culpability of the offender in a minute way. In order to reach his working goal of consistency he needs to use crude and objective indicators of culpability. Such indications are the number of offences, their joint financial consequences and the number of former convictions. On the basis of these objective indicators he is able to distinguish various categories of cases. For each category or pattern he knows his usual sentence or tariff[8]. This tariff is the starting point of his final sentencing decision. Special characteristics of the case or the offender that have been noticed by the sentencer might induce him to small deviations from this tariff. He will resist however the pressures from other parties, like defence counsellors or probation officers, to deviate too strongly from his usual tariff. It is only with the exceptional cases that are really unique or bizarre, that the sentencer has an open mind about the punishment to be inflicted. It is only with such exceptional cases that the sentencer finds himself reasoning at length about the various conflicting aims of punishment, as the textbooks on penal law expect him to do routinely.

With these insights in the mechanics of the sentencing process, it is small wonder our analysis of criminal files showed most judicial decisions to be related closely to objective indicators, like the joint financial consequences of a case. Particularly with the more serious cases the sentencer will resist substantial deviations from his usual tariff, consisting of a prison sentence. With regard to the less serious crimes he will feel free to individualize the sentence since the absolute difference between the punishments will be small anyway. With our present knowledge about the sentencing process it is small wonder too, our analyses have produced evidence of consistent disparities in the sentencing decisions of different prosecutors, investigative judges and district courts. The criteria for sentencing are very similar but each sentencer or team of sentencers tends to stick to his own regular tariffs.

Some practical recommendations

Before entering the discussion on these ideas I would like to refer briefly to some of the practical recommendations that could be based on them. These recommendations are directed at three different professional groups: first the criminologists, secondly the various advisers of the sentencers (like probation officers or psychiatrists) and lastly the sentencers themselves. First of all the results of our studies,if correct,should be taken into account in future research projects on sentencing policies. There seems to be little sense, for instance, in questioning sentencers about the social aims of individual sentencing decisions, as has been done repeatedly in elder studies[9]. Sentencers will have great trouble in answering such questions and probably make up answers that do not reflect their actual thoughts. Our findings seem to be relevant too for criminologists who want to track down possible class-biases in sentencing. According to our present views possible class-biases will be most influential with the sentencing on less serious crimes. My second hypothesis would be class-biases will be operative primarily through the reports to the sentencer of the probation officer or the psychiatrist. These advisers will pay attention to the social background of the offender much more thoroughly than the average sentencer himself. While

addressing myself to my fellow criminologist I would lastly like to advocate future research projects which include in depth interviewing of judges about their role taking while pondering about the just sentence[10]. My hypothesis would be many judges are highly sensitive to the perceived reactions to their sentences by the suspects, especially with regard to the degree of fit between culpability and punishment.

The advisers of the sentencers too could make good use of some of the above mentioned findings. If it can be shown that the chances of influencing the judicial decisions with pre-sentence reporting are much greater for particular categories of crimes -for instance the less serious crimes- the adviser should make a special effort with regard to these categories. After studying the past sentencing decisions the adviser will be able to identify quite precisely those cases which he could work on most fruitfully. This recommendation seems to be especially relevant for probation officers who are asked to advise the investigative judge on the decision to order pretrial detention.

The final recommendations are directed at the sentencers themselves. According to our views most sentencers make use -consciously, semi-consciously or unconsciously- of privately developed sentencing guidelines. Sentencing in practice means checking out whether a case globally fits to a preconceived pattern consisting of a limited amount of elements. If the pattern is applicable, which it usually does, a fixed tariff is measured out. This finding seems to argue strongly in favor of the introduction of formal sentencing guidelines[11]. In fact, the implementation of formal sentencing guidelines would simply mean the institutionalization of an existing practice. This institutionalization seems to have several advantages.

First of all the availability of carefully structured sentencing guidelines would probably increase the efficiency of the sentencing process. Preliminary decisions could be checked with a sentencing guideline. Checking one's decision with a guideline seems to be a much more efficient working method than looking through one's private notes or groping one's memory for past decisions on similar cases. The average time needed to reach a decision on an ordinary case would probably become somewhat less. The time saved that way could be spent on dwelling longer upon the exceptional cases and on discussing general policy issues (like the contents of sentencing guidelines). The sentencer would less become the victim of his caseload.

Secondly the development of sentencing guidelines requires the verbalization and quantification of the vague and highly abstract concepts that are being used for reaching a sentencing decision. Sentencing guidelines will create new possibilities for more effectively communicating about sentencing decisions. Last but definitely not least the implementation of formal guidelines will decrease the existing disparities in the sentencing decisions of various sentencers. Of course the sentencer will be free to deviate from the punishment suggested by the guidelines. Such deviations however will have to be justified with references to the objective characteristics of the case. As a result the average sentences will become harmonized eventually.
The individual sentencer will be requested to temporarily sacrifice the consistency of his own sentences for the sake of the consistency of the sentencing decisions of the judiciary. Since sentencers have been found to be very much concerned about consistency, we logically expect them to be sympathetic to the idea of sentencing guidelines.
According to the findings of our observational studies the recommendation to introduce sentencing guidelines seems to go nicely with the fundamental traditions of sentencing. Resistance among sentencers to the introduction of a sentencing guideline will probably originate from side traditions like the individualism of professional people. This type of resistance can probably be overcome, if sentencing guidelines are developed in close collaboration with the practicing judges themselves.

References

1. Research Bulletin of the Ministry of Justice, the Netherlands, nr.1, 2,3, The Hague, '77, '78, '79.
2. P.C. van Duyne, Beslissingsprocessen op een Arrondissementsparket van het Openbaar Ministerie, R.D.C., The Hague, 1980 (to be published)
3. P.C. van Duyne, J.R.A. Verwoerd, J.J. van der Kaaden, Beslissen in de Raadkamer, R.D.C., The Hague, 1980 (to be published)
4. F.W.H. van Straelen, C. van der Werff, Gelet op de Ernst van het Misdrijf, in: Tijdschrift voor Criminologie, febr. 1977, p. 3-11
5. A.C. Berghuis, L.C.M. Tigges, Voorlopige Hechtenis: Toepassing, schorsing en zaken met lange duur, R.D.C., The Hague, 1980 (to be published, English summary)
6. H.F.M. Crombag, J.L. Wijkerslooth, M.J. Cohen, Een theorie van rechterlijke beslissingen, Groningen 1977.
7. H.G. van de Bunt, Besluitvorming op het Parket. In: L. Gunther Moor, E. Leuw, Beslissingsmomenten in het strafrechtelijke systeem, Utrecht 1978.
8. Ch.J. Enschedé, Theorie, praktijk, onderzoek. In: Ch.J. Enschedé, H.C.M. Moor-Smeets, A.H.J. Swart, Strafvorming, Clinken, 1975.
9. J. Hogarth, Sentencing as a Human Process, Toronto, 1971.
10. B. Snel, Kijken in de rechtzaal, Amsterdam, 1976.
11. L. Wilkins, a.o., Sentencing Guidelines: Structuring Judicial Discretion, Washington D.C., 1978.

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