

# **STUDII JURIDICE**

## **Sentencing Hearings In English Crown Courts: Moralization in Criminal Trials**

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### **Abstract:**

*This study investigates the expressive side of the sentencing hearing in three trials dealing respectively with a charge of battery, of indecent assault and of manslaughter. The communication phases of the sentence have been associated with underlying functions of the judge's speech and with moments of moralization. The specificity of the case appears in the distancing from the defendant and in the moralizing style of the judges. We discuss the implication of this procedure for the administration of justice and for the defendant.*



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**Rezumat:**

*Acest studiu investighează partea expresivă a pronunțării hotărârii de condamnare în trei procese care se referă fiecare la infracțiunile de loviri și alte violențe, de hărțuire și respectiv de omor. Fazele de comunicare ale sentinței au fost asociate cu funcțiile de subliniere ale discursului judecătorului și cu momente de moralizare. Specificitatea cazului apare în distanțarea din partea inculpatului și în stilul moralizator al judecătorilor. Discutăm despre implicațiile acestei proceduri pentru administrarea justiției și pentru inculpat.*

**Keywords:** *judicial speech, court hearing, criminal sentence, moralization, crown court, sentencing hearings, sentencing process, judicial demeanor*

**1. Introduction - A Note on Research and Theory**

The sentencing speech occurs during the last hearing of a trial and consists of a series of ritualistic moves through functions aimed at positioning the judge towards the others (defendant mainly, but also lawyer, prosecutor, family, community). This communication bears the specificity of the criminal case and channels the sentencing hearing like a drift towards the pivotal move, the expression of the sentence. The term function is used here in the sense of a purpose intended by the judge and conveyed by means of his spoken words. These words are also referred to as the expressive side of sentencing, which is concerned with what judges (should) say and what they do not say when punishing the offender (Davis, 1991).

A degradation ceremony is a communicative act transforming a person's public identity into an identity belonging to a lower status. In his famous article published by the American Journal of Sociology, Harold Garfinkel (1956) presents eight necessary conditions of a successful degradation ceremony. He also points out that every society offers the conditions of an identity's degradation and therefore focuses merely on which features lead to a successful degradation. In this context, courts have been described as places where degradation ceremonies are performed and used to

abase the defendant (Garfinkel, 1956, p. 424): "The court and its officers have something like a fair monopoly over such ceremonies, and there they have become an occupational routine." Recent studies have shown the relevance of his approach by shedding light on the functions of a trial (Brion, 2003) and brought a distinction between a degradation incident, which doesn't comply with a structured proceeding, and a proper degradation ceremony (Schoepflin, 2009).

The perpetrator's shame and guilt are essential components to a successful degradation ceremony. The moralizing of the judge plays a central role in bringing into light these feelings. Furthermore trials are one of the most charged rituals, where feelings threaten to burst in a division of moral expression: defendants manifest feelings, judges do not. Other scholars point out that the courtroom environment doesn't encourage expression from any party due to the communicative formalities (Szmania & Mangis, 2005).

This study explores the expressive aspect of the sentencing speech and the exchanges on guilt in the last hearing of a criminal trial. The sentencing hearing represents a main site of expression due to the crucial communication of the judgment. We will investigate whether judges moralize defendants in a selection of three criminal cases and if they do so, how would they do it and how could the defendants reply? The questions will shed light on the communication of the judges and on the treatment of defendants in the

last hearing of a trial in English Crown Courts.

## **2. Direct and Indirect Moralization**

Moralization denotes more than the normative interpretation of actions, it also constitutes a demand to explain one's own "wrong" or "problematic" behaviour. In this sense, a moral triangulation takes place: the judge is a moralizing actor who asks for a moral explanation from the moralized defendant towards the court and the morally affected victim(s), her/his family and the community who may experience symbolic amends for the immoral deed through meaningful signs of remorse (Scheffer, 2010). As a response, the moralized person may (or may not) account for this behaviour and identify with the norms and values implied by the request. Commenting morally on some of her/his own acts denotes a reflection on the past in terms of admission, justification or apology.

Moralizing denotes the initiation of a moral response on the part of the addressee, here the offender who should comment morally on his acts. Self-moralizing denotes a reflection on the biographical past in terms of admission, justification, or apology. This distinction reminds of what Luckmann (2002) called communicative styles of moralizing. Moralizing "may be either direct, in the form of straightforward praise or complaint, injunction, accusation, indignation, etc., or it may be indirect in the form of litotes, questions, if/then formulations, certain kinds of teasing, etc." (Luckmann, 2002, p. 20). However, this definition identifies the types only by their linguistic forms and does not include the audience of moral communication. In the following, moralizing is used more narrowly and denotes communicative acts that ask somebody for a moral explanation. Moralizing, in other words, demands for a moral standpoint by the

addressee, meaning by the one who has been moralized. This demand includes the expectation that the moralized person is going to articulate her/his moral standpoint vis-à-vis the moralizing party (e.g., the judge or the prosecutor) and the morally affected party (e.g. the victim, her/his family, the community).

On the one hand the judge's message could be criticised for its tendency to expose and to degrade the offender. The conventions leave no opportunity for excuse, self-defence, or relativism. On the other hand, the judge's "reintegrative shaming" would be praised, because the offender gets the opportunity to distance himself from and condemn the offence (Braithwaite, 1989). The moralization opens the way back into the community. For a restorative justice approach, however, the dialogue in direct moralizing is considered as highly restricted and limited due to an overload of technicalities. The cold procedural atmosphere might leave no room for immediate authentic expressions of pain, remorse, and forgiveness. There might not be sufficient room given to meet the requirements of full confrontation of moral responsibility and moral concernment (Szmania & Mangis, 2005). There is, for instance, no designated speech and recipient position for the victim. Moreover, the offender's moral account could be overshadowed by legal incentives and ritualistic conventions. The wrongdoer is offered a constricted opportunity to morally account for his deed in open court and by doing so, to fit the court's mission: the offender realizes that he acted wrongly and addresses the moral feelings of the community.

Such moralizing processes remind of Durkheim's classical distinction between mechanical and organic solidarity and, here, to a rather mechanical treatment and response to delinquency. Common values and beliefs of a community serve

the social integration of its members and emphasize punishment in cases of deviance, while interactions and recognition of interdependent needs would be in the foreground of a response based on organic solidarity. The offender faces the victim's suffering and injury. In return the community, including the victim, finds the offender in a state of distress and shame. There is a "mechanical" element of public revenge - and an emotionally felt urge for such revenge - attached to this "ordeal of expressing remorse and apologizing" that "even if done initially for the wrong reasons, may in time promote genuine repentance" (Bibas & Bierschbach, 2004, p. 143).

### **3. Official Transcripts of Sentencing Hearings**

This study is part of a five-year international comparative research project, including fieldwork in Germany, England, and the United States of America (Scheffer, Hannken-Illjesm, Holden & Kozin, 2007). In this paper, we focus on official court transcripts of criminal trials held in English Crown Courts in 2003 and 2004. The case study addresses the presentation of the sentence by judges and maps out where and how the offenders are asked to respond morally, meaning here to articulate authentic feelings and emotions that could be ascribed to their personal conscience and character.

English Crown Courts deal with serious criminal offences or appeals against conviction and/or sentence emanating from magistrates' courts. The sentencing hearing procedure does not allow defendants to say "last words". Therefore this moment is not granted to the moralized person in order to account morally for any wrongdoing. Likewise, the victim, the family and the community can neither express moral feelings nor receive expressions of remorse. In this sense, a

procedure may favour or prevent face-to-face confrontations of the moralized one and the ones morally involved. On closer inspection, however, the Crown Court procedure does not lack instances of moralization, but shows another pattern, indirect moralization.

Three cases have been selected for their inter-variability in regard to the type of crime, the judge and the defendant. The material consists of sentencing hearings in a case of indecent assault, of manslaughter and of battery with three defendants. All defendants were male and pled guilty (57% of the cases received for trial in Crown Courts reach this agreement), which led logically to their condemnation. Therefore it is not the verdict but the sentence that will be announced in the last hearing.

Advantages and limits of the case method have been widely discussed in qualitative research (Rangin, 1992; Stake, 2000; Yin, 2009). The case method, despite its obvious limitations in representational terms, allows the researcher to place data in the practical context of its occurrence and here, to investigate the communications of the judge and the treatment of the defendant when the sentence is rendered.

The official transcripts of the sentencing hearings are analysed with a discourse and sequential analysis (Shuy, 1986; Maiwald, 2005), which will take into account the specific situational context of the language beyond the level of a sentence and the sequence of the speaker's turn-taking. The specific language in which the defendant is addressed, as well as his answers, could be indicators of moral distance, of authority, showing the hierarchical distance between the moralizing and the moralized. After interpreting the meaning of the judge's communication throughout the sentencing hearing (semantic level), we will connect these results to an

investigation of the purpose connected to the communication phases extracted in the previous step (functional level).

The transcripts of the hearings have a similar length of two pages. They are divided into phases of communication, understood as meaningful units of communication conveying a homogeneous message about the defendant or the sentence. Therefore a phase can comprise a few words or several sentences, as long as they support the same message (no words were left out of the analysis). First we compare the phases of each criminal case in order to discover if they are common or unique. Does the sequence of communication differ from case to case and if so, to what feature(s) of the cases could this difference be attributed? In a second step, we study the elements of communication appearing in each phase of the three cases. Do we observe similar phases with different modalities like in experimental studies where variables

have several modalities? This question leads to our last step, which will highlight the function at work behind a communication phase (what needs to be done in a phase?). We hypothesize that these functions are modulated by the different elements of communication according to the specificity of the case.

#### 4. Communication Phases and Speech Functions

Seven phases of communication with four underlying functions have been derived from our material. In each criminal case, they cover the whole original transcript by appearing in each sentencing hearing and fulfilling identical functions, while presenting different elements due to the specificity of the case. No phase is found in only one case, which speaks in favour of a common structure of the sentencing hearings. The following presentation takes place in their order of appearance in our cases with selected excerpts to illustrate the phases:

**Table 1.** Phases of communication and their related speech function.

<i>Phase</i>	<i>Function</i>
1. Distance towards the defendant	1. Individualization of the case
2. Difficulty of the case	1. Individualization of the case
3. Framing the decision-making	2. Limitation of the sentence
4. Exclusion of an alternative sentence	2. Limitation of the sentence
5. Mitigating and aggravating elements	3. Weighing up the elements
6. Choice of the sentence	4. Announcement of the decision
7. Transition of authority	4. Announcement of the decision

1. The first phase of communication also represents the first words of the hearing and indicates to which extent the judge directly addresses the defendant. In other words, it manifests the distance towards him by modulating the use of the second or third person, his name and polite expressions:

- *“Well, John Twist you have pleaded guilty to an offence of indecent assault”* shows that the judge starts using the first and the last name of the defendant as well

as the second person pronoun, which shows limited distance. Throughout the hearing, the judge speaks directly to the accused and uses the active voice for the verbs;

- *“It is not necessary for the defendant to stand”* presents a maximal distance towards the defendant in the case of manslaughter, which is underlined by the use of the third person singular as subject of the verbs;

- *“Can you stand up, please?”* in the case of battery demonstrated an intermediary distance in comparison to the two previous examples. The defendants are addressed with the second person pronoun and they are politely asked to stand up, while in the first case no such request has been done, and in the second the defendant is indirectly asked to remain seated.

2. The second phase of communication demonstrates the difficulty of the case, how unique and troubling it is, requiring reflection and presenting a difficult sentencing exercise due to particularities that don't allow guidance by other cases.

- *“So this case presents a difficult sentencing problem. I have been referred to such guidance as there is from the Court of Appeal in other cases, but, as has been frequently observed, cases of manslaughter are infinitely variable. Each case necessarily depends upon its own facts, which here I have attempted to identify and outline”* for the manslaughter;

- *“I have thought very long and hard about this case, it is a troubling case and it has many unusual features, and I have to decide today whether or not I, in effect, affect the rest of your lives by punishing you for what you did on that night”* for the battery, with an explicit reminder of the judge's power.

The first and second phase express an individualizing function of the case, which outlines the distance – which remains identical until the end of the hearing - of the judge towards the defendant and the specificity of the case, identified as a unique problem to solve.

3. The third phase of communication frames the decision-making of the judge and restricts the sentence he passes, while providing his feeling about the plea entered by the defendants:

**A recent study has shown that the perception of the judge is by far the most important factor in the perceived fairness of the court.**

- *“(...) his inevitable plea to the offence of manslaughter – well, “inevitable”, once he had admitted to the police – as he did – that he pushed her thereby fracturing her ribs”*, where the plea is not perceived as a good element because the defendant was forced to enter a guilty plea after admitting certain facts.

4. The fourth phase comes one step closer to the choice of a sentence by excluding an alternative type of sentence. The judge doesn't deliver his judgment as fast as possible; in our cases he creates tension as a substitute for leniency.

- *“I have to say that had the original complaints been substantiated which, of course, were more serious, I would have had no alternative but to pass an immediate prison sentence on you which I'm not proposing now to pass”* shows a moment of indirect moralizing for the indecent assault in the way the judge mentions a harsher sentence than the one he will render in the sixth phase;

- *“(...) this offence is so serious that only a custodial sentence can be justified and you know very well that to prison you should go. (...) I don't need to send you into custody today. But I tell you, you come within a whisker of it”* excludes a custodial sentence for the battery and directly moralizes the defendants about the severity of their offence. There is no moment during which the moralized could

answer, because the moralizing figure replies for them.

Phases 3 and 4 have the function to limit the possible sentence by introducing the plea and by excluding alternative sentences. The ritual of the sentencing hearing follows its unfolding process, before closing on the expression of the sentence. In the fourth phase, the decision appears as being made on that day (present tense). This element contributes to the creation of tension about his choice.

5. The fifth phase presents the mitigating and the aggravating elements of the defendants. In the indecent assault and the battery cases, the judges only refer to the positive features of the defendants (good references, no previous convictions, plea of guilty). In the manslaughter case, the judge presents mainly the aggravating factors even if they do not apply to the case: *“Ever since he was a young child, he has presented behavioural problems (...) I should mention his previous convictions very many years ago, for quite different offences. They are, to this sentencing exercise, entirely irrelevant. (...) He is and always will be entirely inadequate.”* But the extraordinary feature of this case lies in *“His apparent absence of remorse, to which a number of those who have written reports refer, is not, in my judgement, another factor for which he is to be condemned. It is a consequence of the limited capacity he has to feel guilt, which is part and parcel of his condition.”*

The moralized shows no remorse and the moralizing expresses that he should not be condemned for it. The defendant's “behavioural problems”, for which he has been addressed with maximal distance during the course of the trial, are considered to be the source of this unsuccessful moralization.

The fifth phase corresponds to a weighing up function, in which judges

balance the good and the bad about defendants.

6. The sixth phase announces the judge's decision along with the help needed to choose the appropriate sentence.

- *“His personal circumstances are described in very considerable detail in the many reports that I have read. (...) Prison, no doubt, will bear hard upon him. The sentence of imprisonment, in my judgement, is inevitable.”* In the manslaughter case the judge presents his choice as unavoidable - no other type of sentence could be passed - which underlines the ritualized rationality of the legal decision-making process. The sentence could last between three and fifteen years of imprisonment and the judge decides on 3,5 years, which is much less than if the defendant had been sentenced to a hospital placement or a community disposal.

7. The last phase ends the transcript of the hearing and offers a transition of authority from the judge to the execution of the sentence. It attends towards the future of the defendant.

- *“I am quite satisfied having heard all that I have heard about you that it's very unlikely that you're likely to reoffend*

*(...) And, of course, as I say you must report when you're required to by the probation officer and attend any courses and any interviews which they have in mind in dealing with this order. (...) Well, you see the probation officer before you go. That is the sentence of 12 months community rehabilitation order. Thank you”* indicates that the judge considered the protection of the society and the risk of reoffending. He addresses directly the defendant until the very end of the hearing and introduces the probation officer for the execution of the sentence;

- *“He is, I agree, not a risk to anyone else. (...) Those responsible for his*

*supervision after his discharge will have to make effective arrangements. To that end I direct that the relevant reports in this case, including the pre-sentence report, are submitted to the prison department and I will make the necessary arrangements*” shows that a balance had to be found between the condemnation of the society (not its protection as it seems to be a unique offence) and the severity of the offence. The present and the future of the verbs appear with the usual third person address. The judge speaks even about the end of the prison sentence and ends the hearing with *“Thank you, very much”*.

The two last phases deal with the core function of the sentencing hearing – the announcement of the sentence - and with the future of the defendant.

Although the phases appear in each case (indecent assault, manslaughter and battery), the variation of the elements found in a phase enables the judges to give a colour and address the specificity of the case. The communicative turn from one phase to the other is asymmetrical because it is always the judge who initiates a new turn. Whereas the defendant plays a role within each phase by the simple fact that he is (in)directly addressed, there is no place for defendants to initiate a communicative move or even to answer rhetorical questions (van Dijk, 1989). In conclusion, the judge goes through a similar series of functions of the speech by using different elements present in identical phases of communication.

## **5. Discussion**

The distance from the defendant is expressed by the use of the second or third person pronoun and by the request to stand or remain seated. The maximal distance is reached in the manslaughter case where the judge never addresses the defendant directly. He is referred to

in the third person and never in the second, as in regular sentencing hearings. The distancing is intentional. This might be explained by the “behavioural problems” and the “very low intelligence” of the defendant, but also by his apparent absence of remorse throughout the proceedings. The introduction of the judge denies the defendant a moral capacity, he is considered as unable to receive the court’s moral judgement. This denial cuts off the relation between the judge and the defendant as a fellow citizen. He appears as a person to whom it is useless and/or unwanted to address as a member of the community. In other words, the moralizing figure denies the moralized other a moral standing (Duff, 2003). When mentioning his previous condemnations and his permanent inadequate behaviour, the judge creates a personal continuity. It contributes to the defendant’s degradation, meaning it marks his “former identity as accidental; the new identity is the ‘basic reality’ . What he is now is what, ‘after all,’ he was all along” (Garfinkel, 1956, p. 422).

The power of language is used to perform a moral public punishment as part of the sentence. The judge expresses his authority and thinks aloud about what the defendant did. Indirect moralization takes place by presenting a sentence before choosing another one. The uncertainty and tension created about the choice of the sentence before solving it performs an additional punishment. If this intermediary sentence can be found in a larger sample of hearings, the possibility to remove it from the sentencing speech could be discussed with the judges, who would then present the elements serving to adjust the sentence directly followed by the selected punishment.

Objectivism as facts of the case is related to the judge’s subjectivism. A dialogue between the judge and the case



occurs, where he shows, with his comments and evaluations, how he is affected. He therefore becomes a commentator of the case, inscribing its narration in a dialogical structure ending in the proclamation of the sentence. The function of his speech is going through an idealized thought process. In other words, judges express their feelings and arguments while defendants remain silent and become “bystanders in their own trial” (Szmania & Mangis, 2005, p. 347). This could decrease the defendant’s perceived fairness of the sentence, of the court and of the criminal justice system, which in turn influences future law-abiding behaviour. Procedural fairness derives from the courts procedures, while distributive fairness is connected to the case outcome. In forming an opinion about the court, procedural fairness prevails over distributive fairness (Tyler & Huo, 2002).

A recent study has shown that the perception of the judge is by far the most important factor in the perceived fairness of the court, even if the treatment of the defendant by other court actors (court officers, attorneys, prosecutors) also plays a role (Frazer, 2006, p. 19). The communicative style of the judge in each phase of the sentencing hearing is important in this regard, but further investigation is needed to propose concrete solutions. The identification of the phases with their underlying function offers a first step in this direction, by shedding light on the message transferred to the defendant and by showing the pitfalls of such a difficult exercise.

The procedural design of indirect moralization implies a certain rationale that would not apply to direct moralization. Ideally, direct moralization would affect the defendant instantly and enduringly, but would prevent social conflicts or at least their spreading out by keeping the parties at a distance. Ideally, it would

resemble a shock therapy by which the personality would be shaken and transformed. As an effect, moral norms would remain like an imprint on the person’s self. Students of moral communication doubt this efficacy for conventional court hearings, their rituals and routines of self-exposure, their legal incentives for showing remorse and their silencing of victims. Indirect moralization, in contrast, adheres to a different rationale. Ideally, it would move the defendant from one stage of reflection to the next. It would entangle her/him in a web of moralizing encounters. It would collect moral reactions of various forms. It would integrate reactions into a moral learning progression. The offender would not pass just one turning point, one moment of conversion, but rather a sequence of moralizing events that would feed, ultimately, into a single educational process. Ideally, this process would move the defendant to permanently reshape her/his self-perception. Indirect moralization, this is the idea, would stimulate further “self-examination” and “self-judgements” (Hepworth & Turner, 1979, p. 232).

Bringing it closer to the French definition of the word sentence, which means either a decision by a court or a moral precept, our case study suggests that sentencing hearings in English Crown Courts could represent an opportunity for indirect moralization. While direct moralization creates powerful moments of confrontation and exposure, indirect moralization involves a series of short moralizing encounters. This expansion facilitates a soft but enduring force of moral education. It facilitates as well, and this seems to parallel a motive in Luckmann’s (2002) communicative exploration of indirect moralization, the protection against confrontational reception. With the defendant’s self-explanations being placed on the procedural

backstage, indirect moralization can hardly fail as a performance. Even problematic characters such as the unregretful defendant in the manslaughter case are integrated in an overly fitting presentation of the matter and its judgement.

In order to gain better understanding of the judges' communication and the treatment of the defendant in sentencing hearings, official transcripts in lower English courts and in German courts (Amtsgerichte and Landgerichte) could also be explored. Two legal systems and the participation of lay judges in criminal trials will allow a comparison of the potential occurrence of moralization performed by judges, which could in turn contribute to the improvement of the defendant's experience of a trial: "In many ways, though, what is striking is that sentence received does not, by itself, carry the day. Defendants are not just saying that they find their sentences palatable or unpalatable" (Casper, 1978). In this regard, the procedure followed by a judge plays the most important role and is transferred in the sentencing hearing by means of what is said or kept silent.

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