Strathclyde Centre for LAW, CRIME & JUSTICE

University of Strathclyde Glasgow

Sentencing & Penal Decision-Making

European Working Group

Admitting Guilt:
Pleading, Presenting, Performing
European Seminar
Thursday 22 – Friday 23 June 2023
ABSTRACTS

Centre for Law, Crime & Justice, Law School

University of Strathclyde, Scotland

(Glasgow City Centre Campus)

With the Support of

University of Glasgow Law School, Scotland

UofG School of Law

Just wanting to 'get it over with' and 'forget about it': Lived experiences and perceptions of legitimacy in the criminal courts among defendants in England.

Amy Kirby, Birkbeck, University of London, England.

The study of legitimacy has become increasingly popular in the disciplines of criminology and socio-legal studies in recent decades. Though conceptualisations are contested, the core argument is that for institutions to maintain a valid claim to authority they need to be perceived as legitimate in the eyes of those they serve (Beetham, 2013; Tyler, 2006). This includes those who come into contact with the criminal justice system as defendants. Considering legitimacy in these terms is known as 'empirical' or 'subjective' legitimacy because it concerns the mental state of individuals, as opposed to 'normative' or 'objective' legitimacy which is about the extent to which institutions achieve ethical standards in practice (Hough, 2021). It is argued that subjective legitimacy inspires voluntary cooperation with authorities, that is normatively grounded, as opposed to that which is motivated by instrumental concerns such as incentives or fear of sanction (Tyler, 2006). The aim of this paper is to consider the extent to which the criminal courts are considered as legitimate in the eyes of defendants. This will include the tensions and nuances that exist between normative cooperation and instrumental compliance and difficulties that arise when trying to understand defendant perceptions of legitimacy.

To achieve this aim, this paper draws upon two existing studies conducted in England which have examined perceptions of legitimacy among lay parties, including defendants, through the use of qualitative methods (Jacobson et al. 2015; Kirby, 2019). The paper argues that understanding how defendants engage with the court process acts as a lens through which to understand legitimacy. High levels of engagement are indicative of strong perceptions of legitimacy while weak levels of engagement are indicative of strain within the legitimacy dialogue (Kirby, 2023). Examples of weak levels of engagement, or disengagement, include cooperation that is grounded in fatalism or 'dull compulsion' (Carrabine, 2004), compliance that is motivated primarily by incentive or fear of sanction, and active resistance to, or withdrawal from, aspects of the court process.

The paper concludes by considering ways in which research could further understand defendant perceptions of the court process, including decision-making around pleas and at a cross-jurisdictional level, by highlighting research which is currently being undertaken on defendants lived experiences of the law. This project, led by the Institute for Crime and

Justice Policy Research (ICPR) and Revolving Doors, and funded by the Nuffield Foundation, aims to examine how perceptions of legal rights and the judicial process are shaped by individuals' formal and informal encounters with the law over time.

The Guilty Plea and Self-Respect

Gabrielle Watson, Edinburgh University, Scotland.

The guilty plea can both affirm and erode the self-respect of the accused. On one view, the entering of a guilty plea can be a gesture of contrition, a form of atonement, and a public acceptance of criminal responsibility. On another view, the guilty plea is an incentivisation tool employed by the state, designed to appeal not only to the factually guilty, but also to the factually innocent, who routinely waive their right to trial and plead 'guilty' in exchange for a sentence reduction. The guilty plea, then, has the capacity to generate quite conflicting sentiments. There are mixed motivations for its use, and it can pose a material risk to the welfare of the accused.

The presentation proceeds as follows. It begins by introducing the legal framework of the guilty plea in Scotland. It then proposes the concept of self-respect – a person's regard for his intrinsic worth – as a new analytic category for sentencing scholarship and an institutional commitment that Scottish courts should be required by justice to support and maintain. At present, there is good reason to be sceptical that those who plead guilty emerge from the criminal process with their self-respect intact.

Apologies in Czech Criminal Law – Inseparability from Admitting Guilt?

Sylva Řezníková, Czech University of Life Sciences, Czech Republic

This paper deals with the role of apologies in criminal court proceedings in the Czech Republic. The theoretical and methodological frameworks of law and linguistics are integrated. I analyse case-law of criminal courts in the Czech Republic, and I compare the meaning of apologies in the Czech cultural and linguistic context with the role of apologies in Scottish and Irish jurisdictions, especially regarding admission of guilt thereof.

According to the Czech Criminal Code, admission of guilt is one of several possible mitigating circumstances. These allow the court to impose a punishment on the milder side of the permitted range (§ 41, Act No 40/2009). Czech statute law does not mention apology in this respect. However, case law clearly demonstrates that pronouncing an apology towards the victims of a crime is one of the most frequent and probably the most "efficient" ways of admitting guilt, to be considered for this specific mitigating circumstance (*cf*. cases with ref numbers 7 Tdo 949/2020-II, 1 To 50/2019, 28 T 9/2015-1191).

This paper focuses on detailed analysis of the three abovementioned Czech court cases and on the assessment of apologies by judges in the criminal proceedings thereof. The accused person in these proceedings filed an appeal with a Higher Court against the first-instance decision of the Regional Court, and later an appellate review with the Supreme Court. The appellant's claims were based on the reasoning that pronouncing an apology to the victim constitutes an important circumstance, based on which a crime is to be qualified as a less serious "regular crime", not as a "felony". The Higher Court and the Supreme Court dismissed the appeal and the appellate review respectively and stated that admitting guilt represents a mitigating circumstance but does not account for a reason to re-qualify the crime. The "admission of guilt and apology to the victim" are treated as interwoven in a single phrase. The courts disregard the fact that the Criminal Code only specifies admitting guilt as a mitigating circumstance, while apology should be legally irrelevant, according to the literal wording of the statute.

Linguistically, pronouncing an apology is done through performative verbs. Speech act theory has provided a sound body of literature on performatives since its origins in the 1960s (Austin 1962/1975, Searle

1969). Legal scholarship has also paid considerable attention to speech act theory and how it can promote better legal analysis, especially with respect to performatives such as promises, confessions and consent (Ainsworth 2015, Shuy 1998).

This paper further deals with the meaning of apology in different linguistic, cultural, and jurisdictional contexts. I draw a comparison to recent research on apologies in Scotland (Kentish & Thomson 2017) and Ireland (Bryson & MacCarthaigh 2022), questioning the admission of guilt as an inherent part in apologies, while in Scotland this is contradictory to the intended purpose of the Apologies (Scotland) Act 2016.

It is concluded that Czech jurisdiction treats apologies as synonymous for guilt admissions. Secondly, I conclude that while Czech jurisdiction presents a civil law system, the usual practice regarding apologies presents an instance of judge made law where the judges consistently depart from the explicit wording of statute law.

References and bibliography

Act No 40/2009 Coll., as amended, Criminal Code of the Czech Republic.

Ainsworth, J. 2015. "How We Play Games with Words in the Law", in Lawrence Solan, Janet Ainsworth, and Roger Shuy, eds., *Speaking of Language and the Law*, Oxford: Oxford University Press.

Apologies (Scotland) Act 2016, 2016 asp 5.

Austin, J.L., Urmson, J.O. & Sbisà, M. 1975, *How to do things with words*, 2nd ed. / by J.O. Urmson and Marina Sbisà. edn, Oxford: Clarendon Press.

Bryson, A. & MacCarthaigh, M. 2022, "Accounting for the past: the role of public apologies in Ireland", *Irish political studies*, vol. 37, no. 4, pp. 571-595.

Higher Court in Olomouc, case ref no 1 To 50/2019, issued on 12 December 2019.

Kentish, A. & Thomson, K. 2017, "Sorry; Not Sorry! Apology v. admission; where do we draw the line? How far it is safe to go under the Apologies Act 2016 in relation to complaints and claims", *Journal of the Law Society of Scotland*, vol. 62, no. 11, pp. 44.

Regional Court in Ostrava, case ref no 28 T 9/2015-1191, issued on 14 May 2019.

Searle, J.R. 1969, *Speech acts: an essay in the philosophy of language*, London: Cambridge University Press.

Shuy, R.W. 1998, *The language of confession, interrogation and deception*, Thousand Oaks: Sage Publications.

Supreme Court of the Czech Republic, case ref no 7 Tdo 949/2020-II, issued on 23 December 2020.

How Do Juveniles Plead ? Exploratory Research into Plea Bargaining in Spain

Alicia Montero, Universidad de La Frontera, Spain

Nowadays plea bargaining is a common and accepted legal practice in the Spanish juvenile courts. As far as we know, there is no work in Spain that analyse the juvenile defendant's decision to plead or not in a trial. Specifically, we have analysed whether there are legal or extra-legal variables that may influence this decision and also explored the different positions of judicial actors and juvenile offenders on how they deal with this process. This research includes a mixed methodology: we reviewed 532 judicial records of children prosecuted in Castilla-La Mancha (Spain) and interviewed 30 professionals (lawyers, prosecutors and judges) and 12 juveniles serving a half-open custody measure. Our preliminary results find that 66% of juveniles are convicted through a plea bargain, although there are differences in plea bargaining rates due to the established dynamics of each juvenile court. Judges, prosecutors and lawyers may prefer to dispose of cases through a plea bargain because doing so helps to manage caseloads and reduce the number of cases that require the full trial.

On the one hand, it seems that some legal and extra-legal variables influence the decision to accept a plea agreement. We found evidence suggesting that juveniles who have a deviant peer group, commit a domestic violence offense or a property damage and have a public defender are the most likely to plead guilty at trial. Likewise, it is observed that through a plea bargain the adolescent agrees to plead guilty to the charges in return of a lenient sentence. In this sense, our findings show that those defendants who agree a plea deal consisting of a measure of socio-educational tasks, community service or probation obtain greater reductions in the length of the measures imposed in the sentence. However, there are no significant differences in the length of custodial measures.

On the other hand, juvenile offenders often feel tremendous pressure to accept a plea agreement and do not understand the consequences of the decision. Lawyers defend plea bargaining; and juveniles, advised by lawyers, tend to accept the plea agreement thinking that it is their best option before the hearing, unaware of the future implications of having taken this decision.

Encouraging Admissions of Guilt: Who Really Benefits from 'Discounts', 'Mitigations' & 'Concessions'?

Cyrus Tata University of Strathclyde, Scotland

Much of the research and policy thinking about methods of encouraging (earlier) admissions of guilt[1] is centred on a simple binary debate. On the one hand, there is the due process concern (prevalent among 'liberal' academics, lawyers, NGOs etc) about the dangers of a person being more or less pressured into admitting guilt. On the other hand, methods of encouraging admissions of guilt tend to be justified (especially by policy officials and practitioners) on pragmatic grounds as a necessary 'efficiency' in an imperfect world.

I will seek to show that this simple binary debate obscures more than it reveals.

Who is served by these methods of encouraging admissions of guilt? I will examine the various claims made. I will suggest that methods of encouraging admissions of guilt have less to do with efficiency than is often supposed, and more to do with the search by policy officials and especially practitioners to see that the violence which they have to impose can be regarded as legitimate punishment. However, by encouraging admissions, practitioners find themselves in a tragic dilemma of their own making: they can never be sure that they can believe that a person's admission of guilt is free and sincere.

[1] By means of encouraging (earlier) admissions of guilt I am seeking to refer to a wide range of practices through the criminal justice process including: pre-trial, trial, pre-sentence or serving the sentence. It includes so-called 'rewards', concessions and sentence 'discounts', as well as mitigations for appearing to show retractive feelings (e.g. remorse, contrition, regret etc).

Lying, crying, and admitting guilt the Danish way: the role of 'culture' in court

Louise Victoria Johansen, Copenhagen University, Denmark.

This paper presents findings from four different ethnographic projects conducted in Danish criminal courts, focusing on how legal professionals expect defendants and victims to communicate and react 'appropriately' during trials. Judges, prosecutors, defense lawyers and victim counsels alike have tacit understandings of how one should explain oneself and express emotions in a proper, 'Danish' way. When dealing with 'non-Danish' ways, however, they use different strategies based on their different professional roles. Perceived non-Danish ways include explaining vaguely and at great length; denying even the most obvious pieces of evidence; being very aggressive or conversely exaggeratedly sorry, and so on. Prosecutors and defense lawyers will try to 'translate' victims' and defendants' excuses and emotions to the judges, while victim counsels see their role as trying to 'manage' victims' feelings and avoiding heavy emotional outbursts. I relate these strategies, and judges' perceptions of the involved parties, to questions of conviction as well as sentencing. A recent study shows that ethnic minority victims of sexual violence experience that the defendant is acquitted more often than when the victim is ethnic Danish. Ethnic minority defendants, on the other hand, may receive harsher sentences if they are perceived as lying and denying in unacceptable ways. While Danish courtrooms are generally presented as neutral spaces, and judges have explained to me that they are colour blind, culture plays an important, but unarticulated role in this setting.

Negotiated settlement and procedural traditions: towards a concept of dialogue?

Stewart Field, Cardiff University, Wales

For critics from both inquisitorial and adversarial procedural traditions in Europe, negotiated settlement is often conceived of as a kind of guilty secret of the criminal process. It is seen as cutting across the truth-finding mission of the inquisitorial tradition and the essential contest at the heart of the adversarial. It supports the complacencies of co-operative professional cultures and the exclusion of defendants. We have a proudly developed legal concept of fair trials but no equivalent for fair agreements. Yet in a relatively recent article, Rinat Kitai-Sangero uses examples from French literature about criminal trial to argue that we should welcome but reconceive negotiated settlement as dialogue ('Plea-bargaining as dialogue', 49 Akron L Rev 63 (2016). I will consider this startling argument by drawing on my own research on French criminal courts and a recent collection edited with Cyrus Tata on the operation of remorse and responsibility in criminal process (S Field and Cyrus Tata, eds 2023: '*Criminal Justice and the Ideal Defendant in the making of Remorse and Responsibility'* (Oxford: Hart). Could such a dialogic approach show us a way to make negotiated settlements respectable or even legitimate across the European procedural traditions in criminal process?

Is Plea Bargaining Detrimental to Rehabilitation?

Jay Gormley, University of Glasgow, Scotland.

Research on plea bargaining and work on rehabilitation and reintegration (R&R) has seldom interacted. Given that plea bargaining dominates the legal process as a pervasive means of attempting to expedite case disposal, and that R&R are key notional aims of criminal processes, the mutual lack of consideration is an omission. This paper aims to consider both topics together to yield valuable new insights. Notably, R&R benefits from cooperation to work *with* (not simply *on*) offenders. Therefore, if the criminal system seeks to effectively achieve R&R as a consequentialist aim, it must be seen by offenders to act fairly and justly to facilitate deep and meaningful cooperation rather than mere strategic engagement or even resistance. Unfortunately, perceived justice and fairness can be damaged by a criminal system's focus on efficiency through plea bargaining. Drawing inspiration from Scottish research in the sheriff courts, which included interviews with persons accused of an offence, this paper argues that plea bargaining can erode the perceived legitimacy of the justice process and prime offenders to view themselves as resisting the R&R demands of (as they may see it) an unscrupulous system. The implication is that the operation of plea bargaining must be reconsidered to account for how offenders perceive it. Failure to account for these offender perceptions entails the risk that the criminal process will be less effective in securing R&R.

Pleading for Recognition

Fergus McNeill, University of Glasgow, Scotland

Drawing on earlier work about how processes and practices of supervision and rehabilitation relate to questions of recognition and misrecognition, and on the crucial role of dialogue in these processes and practices, this paper speculates about how and why 'accepting' guilt might be so difficult for some accused persons. It suggests that accepting guilt — even for technical and instrumental reasons — might represent a key moment of submission to the systemic distortion of the human stories at stake in responding to crime. Surrendering one's own story to the system's story-making logics may represent a key moment of misrecognition and even of symbolic violence, and thus a critical juncture in the generation of the pain of punishment.

Recording in Progress": Guilty Pleas at the Chilean Summary Court.

Javier Velásquez, Universidad de la Frontera, Chile

During the covid pandemic, the Chilean Judiciary - like many other judiciaries around the world - faced the challenge of deciding how to deal with the sanitary restrictions. It was agreed then that the trials would be halted, but the pre-trial business would continue through online means. These changes involved an attempt to "translate" court business into a "virtual space". In the context of a research study about the use of remand, I was allowed to conduct a virtual ethnography of three different Chilean summary criminal courts over six months (Aug 2022- Jan 2023). During this observation period, it was clear that the virtual hearing was not a translation of the in-person business but rather a whole new "thing". The virtual space is, at least from a sociological perspective, a different setting where our social interactions occur. Thus, being in a different social environment completely changed the "courtroom dynamics". In this paper, I will explore how this affected the guilty pleas using observation and interviews with defendants, prosecutors and judges.

Admitting Guilt as a Legal and a Human-Biased Factor in the Italian Sentencing System: How AI May Help Prevent Unfair Discrepancies

Fabio Coppola, University of Salerno, Italy

Admitting guilt in the Italian sentencing system is considered a mitigating factor by judges (see Italian Supreme Court, judgment n. 32422, 18 November 2020). On the contrary, a defendant's claim of innocence cannot be considered an aggravating factor. Whether the latter in practice is a true statement is hard to say. Practitioners could claim it depends on the judge's attitude towards the crime and the defendant. On the other hand, sentencing practice does not give any clue, as judges usually provide a 'window-dressing' justification for their sentences. For example they refer to the "fairness", "adequacy", and "reasonableness" of the sentence imposed. Therefore, sentencing remains opaque in Italy, and largely at the discretion of the judge. To bring a principled and rational approach to sentencing, capable of reducing the impact of biased decisions and discrepancies, this paper describes the "Ex-Aequo" algorithm which is capable of emphasising the sentencing factors provided by the law (e.g. the confession as mitigating factor) and reducing the impact of the human factors at sentencing. "Ex-Aequo" is intended to supplement not supplant the judges due to its machine learning capability and data collection (similar to the HAL algorithm analysed for the English system by Schwarze and Roberts, 2022).

The proposed algorithm makes judges both user and teacher of the machine. In the first phase of launching "Ex-Aequo" we would extrapolate the data from sentencing practice in a specific district and input them into the machine. Thereafter, the judges of that district could compare their new cases with the ones already decided in the whole district. In doing so, the judges could implement the machine's information anytime they want to depart from the suggested penalty range. In this case, they would only be required to input into "Ex-Aequo" the legal factor they considered as grounds for departure. In the third phase, we would extend the use of "Ex-Aequo" in all judicial districts of Italy. The expected outcome is that, as more Italian judges use "Ex-Aequo", there will be an increase in consistency, transparency, proportionality, and fairness in the sentencing practice, without the loss of judicial control over sentencing.