



University  
of Glasgow

Keane, E. P. H. (2022) Graeme Brown, *Sentencing Rape: A Comparative Analysis*. *Edinburgh Law Review*, 26(3), pp. 474-476.  
(doi: [10.3366/elr.2022.0800](https://doi.org/10.3366/elr.2022.0800))[Book Review]

There may be differences between this version and the published version.  
You are advised to consult the published version if you wish to cite from it.

<http://eprints.gla.ac.uk/282466/>

Deposited on 18 October 2022

Enlighten – Research publications by members of the University of Glasgow  
<http://eprints.gla.ac.uk>

## **Graeme Brown, SENTENCING RAPE A COMPARATIVE ANALYSIS**

Oxford: Hart ([www.hartpublishing.co.uk](http://www.hartpublishing.co.uk)), 2020. xxxv + 291 pp.  
ISBN: 9781509917570. £80.

The prosecution of sexual offences in Scotland is amidst a veritable storm of upheaval. The recommendations of Lady Dorrian's *Improving the Management of Sexual Offences Cases*, published in 2021, has led to intense debate about many of the foundational elements of Scottish criminal justice, including the jurisdiction of the High Court of Justiciary in light of a proposed specialist sexual offences court, the use of trial by jury and the operation of the Scottish "rape shield" provisions. Alongside the political and legal debate engendered by the report, the Appeal Court's own output also remains heavily focused on matters related to sexual offences. At a time of such potentially far-reaching reform in the area, considered comparative critical analysis is especially welcome, and Graeme Brown's monograph on sentencing rape makes an important contribution to the field in this respect.

The monograph's entry point to its subject is a description of the case of *Gubinas & Radavicius v HM Advocate*, [2017] HCJAC 59; 2018 JC 45. The case, as is noted in the text, is well known amongst the legal profession, given it clarified the appropriate approach to be taken to the interpretation of real evidence in Scottish courts. What Brown is interested in though, is how the case, in which multiple accused were convicted of the kidnap and serious sexual assault of an intoxicated young woman, an offence described in sentencing remarks by the presiding judge as a "grave crime" which warranted a "significant" custodial sentence, resulted ultimately in a custodial sentence of (just) four and half years of imprisonment. Brown's text explores various themes related to the case, including whether such a sentence is proportionate, in a typically thorough and illuminating fashion (he has for years written about Scottish sentencing practice with an admirable clarity and insight that, as a junior solicitor practising in the criminal courts, I often found invaluable).

In order to grapple with the themes raised by *Gubinas & Radavicius*, the monograph adopts a comparative perspective on the contemporary sentencing practice of rape in six adversarial jurisdictions (England and Wales, Scotland, Canada, the Republic of Ireland, South Africa and New Zealand). This work is undertaken in reference to, and building upon, a review of the large scholarship on the physical and physiological harm caused by rape, the philosophical literature on the wrongfulness of the offence and scholarship on judicial decision making in sentencing. Brown's central argument is that there is a need for reform of sentencing practice for rape in certain jurisdictions such as Scotland, where judicial discretion is not fettered by numerical, prescriptive and presumptively binding guidelines. This argument is premised on the fact that at present, sentencing practice in these jurisdictions is disproportionate (in the sense that it is too lenient) given that it fails to reflect the severity of the offence measured by reference to the harm caused to victims and modern societal attitudes. The monograph proposes a solution to this problem through a call for relevant appellate courts to issue guideline judgments. This will allow for the exercise of principled judicial discretion in rape sentencing, in a manner that in turn will permit a "behaviour-based approach" to the offence. This approach will see offending categorised by reference to the true character of the incident before the court, achieving consistency whilst also ensuring that neither victims nor offenders are unjustly treated.

Following an introductory chapter, where the book's comparative methodology is justified, and some minor matters relating to terminology are clarified, the text begins substantively in chapter 2 where the nature of the offence of rape is considered by way of reference to legal, medical and social science research. Chapter 3 explores the additional harm, and general response of sentencing courts, to the increasing trend of perpetrators of rape to record the commission of their offence or photograph their victims. In chapters 4 – 7, the

comparative analysis of the monograph is undertaken, with the approach of each of the aforementioned jurisdictions to sentencing the offence explored, with New Zealand and South Africa both being considered together in chapter 7. The text concludes in chapter 8 with the case being made for reform (along the lines as described above).

Brown's work throughout is as meticulous as it is informative. He possesses a command of detail, and an understanding of principle, that one suspects is borne of a career spent not only writing about matters academically but from dealing with consideration of such issues in practice (he is a qualified solicitor and spent several years working as a professional support lawyer at the Appeal Court in Edinburgh). His appreciation of the mechanics of the process of sentencing and the dynamics of judicial discretion, a topic he considered at length in the Scottish context in an earlier publication (G Brown, *Criminal Sentencing as Practical Wisdom* (2017)), is evident throughout. The work highlights again the Scottish judicial tendency of "instinctive synthesis" when it comes to sentencing, and the value of such an approach.

There is much to learn from in this text, even for those who would consider themselves reasonably well versed in the area. The contrast between New Zealand, where guideline judgments have progressively become more sophisticated, and South Africa where, a stringent regime of mandatory and minimum sentencing of the offence was introduced (notwithstanding a tradition of judicial discretion), provides a remarkable example of the complexities inherent in this area, the inescapable influence of legal culture, and indeed the potential for unintended consequences. New Zealand's leading guideline judgment (*R v AM* [2010] NZCA 114; [2010] 2 NZLR 750) is held out as the paradigm of good practice in the area by Brown, involving as it does, the categorisation of offending in bands relating to severity so as to guide sentencing, but retaining flexibility thus promoting judicial discretion. South Africa's system of mandatory and minimum sentences meanwhile is justifiably criticised for doing the opposite.

In my view, the central argument advanced by Brown in this work as far as the need for appellate guidance in the area, in the manner he proposes, in the non-guideline jurisdictions considered, is beyond question. The fact that the law remains in the state that it does in Scotland, raises some interesting questions. Chief amongst them is the institutional role of the Scottish Sentencing Council ("the SSC") in this area, and its output to date.

Brown notes in chapter 5 that the SSC, in 2018, announced its intention to prepare a sentencing guideline or guidelines on sexual offences. He also reviews their entire output as at 1 June 2019 in the text. This section is particularly illuminating. In writing this review, I considered what else had been produced by the SSC in this area since the monograph was published. Literature reviews on sentencing in sexual offences and rape were commissioned, completed and submitted for consideration (informative pieces of work, although as far as rape was concerned not featuring consideration of as many jurisdictions as Brown's monograph, nor engaging, understandably, in the sort of detailed theoretical analysis undertaken in his work). Since then, there has been nothing of substance to speak of, the guidelines are noted as being at the second stage of seven ("development of a draft guideline") on the SSC's website. The SSC is currently simultaneously engaged in considering several other areas of sentencing practice.

Brown is correct when he categorises the SSC's output as valuable in the sense that it promotes public understanding of sentencing, but reading this text, it made me wonder, what, if anything, the involvement of the SSC will achieve in this area that could not have been achieved via the formulation of a guideline judgment directly from the Appeal Court itself, along the lines of "the behaviour based" approach to sentencing suggested by Brown, in a suitable case? The Appeal Court often cites other jurisdictional approaches in sentencing appeals (e.g. the English sentencing guidelines can be used as a "cross check" in suitable cases as per *HM Advocate v A B* [2015] HCJAC 106; 2016 SCCR 47). It can refer to academic literature too if it so wishes. The one substantive guideline produced by the SSC and approved

by the High Court to date on sentencing young people, essentially amounted to little more than a restatement of current Scottish sentencing practice and law in the area. Will any response to a consultation on a draft guideline on sexual offences really prove to be worth the wait? Will it provide valuable insight or knowledge via consultation that the Appeal Court would lack otherwise? Will the guideline amount to something more than simply a general restatement of the current law? I am somewhat sceptical about all of this, and whilst the jurisdiction waits for the SSC to produce such a guideline, sentencing practice, as deftly illustrated by Brown, continues to operate in suboptimum fashion.

To conclude, this commendable text is well worth reading for anyone with a professional or academic interest in the area, indeed, if and when the time does finally come for a guideline judgment on sentencing rape in Scotland, it is to be sincerely hoped that those presiding on the bench, have it to hand.

*Eamon P H Keane*  
*University of Glasgow*