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Sentencing councils and commissions: an exception to Damaška's two ideal types

by Paul Hughes*

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1. Introduction

Damaška[1] developed a framework for tracing similarities and differences in civil and common law jurisdictions, assembling them into two 'ideal types' called the 'hierarchical' and the 'coordinate.' The hierarchical ideal is associated with civil law jurisdictions while the coordinate is connected to common law jurisdictions. Damaška contends that the structure of authority in any jurisdiction can be broadly categorised into either of these two ideal types but accepts that traits of one may be found in the other. However, these traits will only be loosely attached to each category with firm moorings in one of the ideal types. The characteristics associated with the hierarchical ideal include decision making according to technical standards with narrow choices and emotional disengagement. The decision maker is expected to make a particular decision when certain facts are present. The idea of individual justice is reduced. Professionals serve long terms of office and a feeling of routine may develop. A sense of insiders and outsiders appears. On the other hand, the coordinate notion is characterised by hostility to more formal models of decision making, and this results in a more individualised approach, thus maintaining a personal feel. Technical approaches to decision making are unwelcome. Power is vested in lay people with a spirit of inclusivity.

Damaška's ideal types are not without criticism based on the notion that reducing all jurisdictions to two basic model types is overly simplistic, and that the two model types cannot accommodate modern developments within legal systems. One such development is the concept of sentencing councils and commissions (referred to as 'sentencing bodies' in this article) and their associated sentencing guidelines. Generally, sentencing bodies are independent bodies set up pursuant to statute with a mix of judicial and non-judicial (lay) members. These bodies seek to promote greater consistency and transparency in sentencing and increase the public's awareness of sentencing. Some have heavy judicial input, while others have no judicial input at all. Members come from diverse backgrounds including academics, experts in law enforcement, experts in criminal law such as prosecutors and defence counsel, experts in juvenile justice, those with experience of victims of crime and experts in the prison system. Sentencing bodies have many different functions relating to sentencing matters and can include promulgating guidelines, monitoring sentencing, accessing costs, carrying out research, educating the public on sentencing and giving sentencing advice to the courts.

The use of sentencing guidelines requires that sentencing decisions are reached in a technical way with narrow choices. A particular outcome is expected if certain facts are present. With professional members serving fairly lengthy terms on these sentencing bodies one might associate sentencing bodies with Damaška's hierarchical ideal. However, sentencing bodies have not emerged in hierarchical (civil law) jurisdictions, and instead have developed in coordinate (common law) jurisdictions and are therefore a common law phenomenon. The purpose of this article is to discuss why sentencing bodies have emerged in some common law jurisdictions when according to Damaška such jurisdictions have hostility to technical-type decision making with a more individualised approach preferred. Could the notion of sentencing bodies be an exception to Damaška's ideal types? Frase[2] suggests that comparative sentencing analysis could be improved by explicit incorporation of Damaška's works.

Part two of this article will discuss the characteristics of the common law and civil law traditions. We will see that the civil law tradition is more mechanical than the common law tradition. Part three will explain in more detail the characteristics of Damaška's two ideal types and the criticism they have attracted. Part four will consider whether sentencing bodies fit into either of the two ideas and discuss whether they are an exception to Damaška's ideal types. Part five will make some concluding remarks.

2. The civil and common law traditions

Before discussing Damaška's ideal types it is first necessary to outline the characteristics of the civil law and common law landscapes. Sentencing bodies are a common law phenomenon and they do not appear in the civil law tradition.[3] It is important to understand why this is so: as Tonry[4] points out 'it is harder to explain why things do not happen than why they do.' Legal systems are, in essence, value systems,[5] and it is difficult to explain comparative differences without acknowledging that value commitments differ from society to society, with the only explanations sometimes arising from cultural, historical and social traditions.[6] Of course there are some similarities between the two legal traditions when it comes to the criminal law. Generally, the substantive criminal law does not differ greatly between the two, with the same kind of deviant behaviour considered criminal.[7] The two traditions operate with the same palette of rationales for punishment, including retribution, deterrence, incapacitation, and rehabilitation.[8] Lempert suggests when examining the functions of the two legal systems that they both appear different, but each must achieve similar ends relating to binding the society together. They both have evolved to do much the same thing.[9] However, apart from these similarities not much else is the same. When we look at the two traditions there are many differences which may help explain why sentencing bodies did not emerge in the civil law tradition.

Many characteristics of the civil law tradition suggest that it is more rigid than the common law, with some arguing that there is more emphasis on form rather than substance.[10] It has been described as 'a sort of slot machine … The necessary machinery had been provided in advance by the legislation … and one had but to put in the facts above and take out the decision below.'[11] Indeed the same comment could be made about sentencing bodies and their associated guidelines, where the facts of the case are inputted and the output comes in the form of the appropriate sentence. The civil law tradition is highly systematic, with legal scholars[12] and legal science[13] playing a more important role. Principles derived from scientific study of legal data are made to fit together in a very intricate way. As principles are discovered, they must be fully integrated into the system. If they are not, then either the system must be modified to accommodate them, or they must be modified to fit the system. Civil law jurisdictions are described as closed systems, in which any kind of question must, at least in theory, be resolved by an interpretation of an existing rule of law. On the other hand, the common law is described as an open system where one begins with a rule of law already enunciated and discovers the legal rule, perhaps a new legal rule, which must be applied in the instant case.[14] 'In a common law system, judicial decisions constitute part of the law … In a code system, codes and auxiliary statutes are the main body of law. In theory the courts merely "apply" and "interpret" the law.'[15] In the civil law tradition, no decision of a court is binding on any other court; it is even possible for an inferior court to overrule a decision of a higher court.[16] The civil law tradition believes in the superiority of legislation, not relying on previous judicial decisions.[17]

With civil law, there is a different ideology regarding legislation, where it is considered a complete set of law capable of answering all legal scenarios.[18] However, in a common law system, legal rules do not fall to be measured unless there is a dispute and all the facts of the case are known.[19] In civil law, legal rules have risen to a higher level of abstraction and are viewed as rules of conduct, not merely rules appropriate to a solution in a given case.[20] One could argue that sentencing imposed through rigid guidelines has also reached a high degree of abstraction.

Certainty is supreme in the civil law tradition, and legislation must be complete, coherent and clear[21] rather than take the form of broad laws that judges could apply as they see fit.[22] Civil law judges cannot make the law, and there is no room for judicial discretion unless authorised by statute, with flexibility sacrificed for certainty.[23] The common law tries to balance these two elements. In the civil law tradition, the application of the law is as automatic as possible.[24] The judge's role is routine and is like the operator of a machine designed and built by the legislature, though it may afford the judge a certain degree of discretion. His job is fundamentally rigid, mechanical, and uncreative.[25] Much of the civil law judge's work is done away from the courtroom, unlike their common law counterparts who often give detailed *ex tempore* judgments.[26] Decisions from the civil law courts tend to be relatively short and declaratory of the law. Again, this automatic rigid application of the law is reflected in sentencing bodies and their associated guidelines.

In a civil law tradition, the criminal procedure itself appears to have a more rigid character than the common law and operates in a piecemeal fashion[27] (or instalment style) with heavy reliance on the written record.[28] Review from higher authorities is normal and the decision, unlike in common law systems, is not considered final until all reviews have been exhausted.[29] The single event trial is unknown, with trials involving a series of successive hearings and consultations. After a given session, new points arise which are the subject of another session, and so on, until the issue seems thoroughly clear. A final session is then devoted to bringing all the strands together and reaching a decision.

3. Structuring authoring in civil and common law jurisdictions

The primary characteristic of any sentencing body is that it offers a degree of rigidity to sentencing considerations through various mechanisms, resulting in the structuring of judicial discretion. For such a body to be superimposed onto an existing legal system, one must take into account the structure of that existing system. In an attempt to bring order into the bewildering world of comparative procedure, Damaška established a framework to assist when tracing similarities and differences in component parts of differing legal systems by linking identifiable associations and reducing them to more manageable proportions. Damaška focused on procedural issues at a given point in time and gave little attention to sentencing;[30] consequently, it will be interesting to see where sentencing bodies fit in his framework.

3.1. Damaška's structuring of authority

Damaška proposed a two dimensional theory which was designed to replace the traditional adversary – versus – inquisitorial models when comparing legal systems. He suggested a framework which would facilitate the study of linkages between authority and the legal process. In order to do this Damaška dissected procedural styles into their individual components, grouped them together according to their similarities and differences, and assembled them into 'ideal types' of civil and common law procedure, and then built pure models of procedural styles.[31] The first dimension of Damaška's theory examines the structure of procedural authority as he contends that it leaves its marks on the legal process. To keep the problem within manageable proportions, he assembled into two models or 'ideals,' the characteristics of procedural officialdom constructed against the background of models of authority. Damaška accepts that the two styles will include some traits found in one or another version of these concepts, but while these traits are only loosely attached to each category, they will have firm moorings in this scheme.

He called these ideal types 'hierarchical' and 'coordinate.' The second dimension of Damaška's framework looks at the role of government in implementing their political goals. He contends that there are connections between these goals and the structure of authority which are relevant to the choice of many procedural arrangements. Again, he identified two ways of pursuing the state's goals, each of which had a tendency to be

associated with one of the ideal types identified. The first he called the 'policy implementing' (or 'activist') state and the second the 'conflict solving' (or 'reactive') state. In the following paragraphs we will take a closer look at the characteristics of each of these dimensions. However, for our purposes, the first dimension, whose characteristics are more physically observable, is the most important, and this is the primary focus. This is because I am concerned with the overall sentencing architecture in place rather than the implementation of a state's goals, which is associated with the second dimension of Damaška's ideal. Moreover, the second dimension of Damaška's framework is more trial focused and is thus not central to this article.

3.1.1. The hierarchical ideal

The first ideal type of structuring authority that Damaška identified was what he called the 'hierarchical' ideal, which is associated with the civil law tradition. This first structure is characterised by a professional corps of officials who make decisions according to technical standards not easily accessible to laymen. Professionals carve a sphere of practice which they regard as their own special province. Over time, they develop a sense of identity with similarly situated individuals, so the lines become rigid between insiders and outsiders. If outside participation is imposed upon such officials it is viewed as meddling. Long terms of office create the space for making tasks appear routine. As matters become routine, calls for individualized justice decrease. Choices become narrow, and emotional disengagement is possible. As a result, the decision maker can make decisions in his professional capacity that he would never make in his private capacity. The ideal is also characterised by using technical standards for decision making. Here, decision makers are expected to make a particular decision when specific facts are found. The mechanisms used in arriving at decisions are framed in language which forecloses many theoretically possible paths of interpretation.

3.1.2. The coordinate ideal

The second ideal type identified by Damaška was what he called the 'coordinate' ideal which is associated with the common law. This ideal is characterised by power vested in lay people who perform their functions for a limited time. Where the apparatus of authority is for a limited time, there is little opportunity for a spirit of exclusivity to develop. Routine has little chance to develop, but if terms of office are longer, some hardening of ways may set in. Decisions taken have more of a personal feel. Professionals make it their business to interact with the lay officials. These professionals assist the lay officials. Thus a symbolic relationship develops between lay officials and professionals. Another characteristic of the coordinate ideal is the undesirability of technical approaches to decision making. There is hostility towards more formal models of decision making and this results in a more individualised approach to decision making, thereby leaning towards official discretion. The ideal rejects any approach to decision making that would require officials to apply standards divorced from prevailing ethical, political or religious norms. Non-technical decisions are more open ended and have a tendency not to be forced into rigid notational systems. Decisions reached need not be totally unpredictable nor incapable of justification. Lay officials do not like being bound by technical criteria as such criteria may transpire to be at odds with their ideas about the appropriate solution of the case.

3.1.3. The second dimension of Damaška's framework

Having discussed each of the ideal types, this leads us to a discussion on the second dimension of Damaška's framework. Damaška argued that each ideal type produces fundamentally different types of state each with its own characteristics. The first is what he called the 'activist' state which is associated with the hierarchical structure of authority. This state seeks to manage social problems and achieve defined government goals. It seeks to achieve defined social and governmental purposes by discerning goals worthy of pursuit and formulating policies correctly geared towards their attainment. The 'activist' state seems to anticipate problems and implement a policy to deal with the problem in advance of the problem arising. The government considers itself as a joint manager of its own pursuits and that of the people. The second type of state Damaška called the 'reactive' state. This state is characterised by a more stand-offish approach by the government. The government does not interfere with people's lives and they are left to pursue their interests, with the courts merely providing a mechanism to settle disputes

after they arise. Damaška accepts that a state may pursue a mixture of activist and reactive goals. This may happen where a state previously committed to the ideal of limited government acquires an increasing appetite to intervene in the circumstances of social life. In summary, it is fair to say that Damaška's hierarchical ideal and associated activist state is characterised by rigidity and inflexibility while his coordinate ideal and reactive state is characterised by a more flexible and individual approach.

3.2. Criticism of Damaška's ideal types

Some commentators have criticised Damaška's framework. These criticisms are often general in nature and point to situations not caught by Damaška's model. Firstly, we will look at the general criticisms followed by the specific sentencing criticisms. Swart[32] contends that Damaška's framework is limited when dealing with international criminal justice. When looking at the first dimension of Damaška's framework, he argues that Damaška's structure of authority is predicated on the existence of a national state and a central authority and the international society cannot be compared with a national state, or only to a very limited degree and in a rather loose way. While there may well be an international society, there is no such thing as a world state or a world authority. Power is fragmented and dispersed and there is no vertical structure of authority. When looking at the second aspect of Damaška's framework, Swart points out that although international criminal law exists, there is no international legislator to determine its contents or to pursue its goals. He explains the closest thing to a world government is the Security Council of the United Nations. In a more general way, Swart points to a problem when using ideal types which is that they only tend to reveal what is different and do not explain which features legal systems in the real world might have in common or the reasons why. Interestingly, Swart, despite these criticisms, applies the first dimension of Damaška's framework (the structuring of authority) to ad hoc international tribunals and the International Criminal Court and finds that they represent hybrids of the hierarchical and coordinate ideal types of officialdom. This is because of the absence of lay participation in the trying of cases which tends to be hierarchical and the leaning towards non-technical decision making which tends to be coordinate. In applying Damaška's framework to tribunals and courts in this way, it opens up the possibility of applying it to other bodies, such as sentencing bodies.

Chiavario[33] has also criticised Damaška's framework, particularly when it is applied to Italy. Damaška, after describing the characteristics of the hierarchical ideal, indicated that the traditional judicial apparatus on the European continent was a typical example of it. Chiavario contends that this is not the case in Italy as their judicial organisation rejects hierarchy as in Italy magistrates, judges, prosecutors and other officials are quite distinct and do not form a hierarchy. In Italian juvenile courts, lay people with qualifications in sociology, psychology and the like, help professional judges. In the military courts judges are helped by members of the army. Lay judges are present in the court of assizes.[34] Chiavairo contends that the presence of such lay participation is inconsistent with Damaška's hierarchical ideal. Marafioti concludes that the Italian system 'has attempted to graft adversarial procedures on to a fundamentally inquisitorial legal system. The result is a system caught between two different traditions.'[35]

Markovits[36] like Chiavario points to jurisdictions which seem to contradict Damaška's framework. She looks at the Soviet Union as an example of a jurisdiction which Damaška indicated fell into the hierarchical and policy implementing ideal. She points out that there was a relatively high degree of public participation there; judges were elected and they tolerated a lack of professionalism. Thaman[37] also points to other coordinate type reforms since the collapse of the Soviet Union in 1991. These include adversarial procedures, plea bargaining and jury trials. This indicates that the former Soviet Union leans more towards the coordinate ideal. Markovits also contends that Damaška's framework is abstract and value free. Markovits accepts that Damaška's first dimension (relating to the structure of authority) focuses on visible structures of judicial organisation and is discernible from an external point of view. However, she contends that Damaška's second dimension relating to pursuing and attaining goals is vague and subject to interpretation. She sees them as not being tangible outward arrangements, which can be observed or described.

Finally, we will look at the criticisms of Damaška's framework which specifically relate to sentencing.[38] Frase contends that the growing complexity and hybridisation of modern criminal justice systems tends to undercut the simplicity needed for models to serve their

functions. Damaška characterised continental Europe as having a hierarchical framework. Frase points out that continental Europe gives lay judges or lay jurors as well as crime victims (ie non-professionals) more substantial sentencing roles. This suggests a leaning towards the coordinate ideal and this does not sit comfortably with Damaška's thinking. Frase suggests that Damaška's models were primarily designed to categorise, describe and explain procedural systems at a given point in time and give little emphasis to modelling of change or evolution in these systems. He gives the example of the development of highly technical sentencing guidelines which should be more likely in the hierarchical ideal, but which have developed in the United States, a jurisdiction which Damaška considers as falling into the coordinate ideal. Frase explains this development by a shift in the purposes of sentencing from rehabilitation to retribution and deterrence. Damaška's limited success in this context reflects the powerful effects that sentencing purposes and severity have on sentencing procedure. Inevitably sentencing policies pursue an 'activist' approach. That said, Frase concludes that comparative sentencing analysis could be improved by explicit incorporation of Damaška's structural and systemic-purpose models which is a challenging task.[39]

4. Fitting sentencing bodies into Damaška's ideal types

The particular ideal type that a legal system leans towards has fundamental implications for the shape of its legal reasoning. The hierarchical ideal is associated with civil law jurisdictions, while the coordinate ideal is associated with common law jurisdictions. The hierarchical ideal is orientated towards long-serving professionals, supervision, and control over lower ranking officials by higher ones. It is essential that the law gives a definite answer as far as possible, and a law cannot be considered a law unless it is formulated with sufficient precision to enable a citizen to foresee the consequences of his actions.[40] The hierarchical ideal applies technical standards used in a routine fashion for decision making[41] with emotional detachment and no individual justice. The language used in standards forecloses many theoretical possibilities. Decision makers are expected to make particular decisions when facts are found that are specified under normative standards. Therefore, hierarchical jurisdictions regard judicial discretion as dangerous and, as a result their system is rigid.[42] Consequently, by allowing some degree of rigidity or precision, a sentencing body, by structuring judicial discretion, is offering something that appears to be already inbuilt into the overall structure of authority in civil law jurisdictions. In essence the functions that are offered by a sentencing body are served elsewhere in hierarchical jurisdictions.

By way of example, in Sweden, a hierarchical jurisdiction, the legislation[43] contains what are described as 'discursive' guidelines.[44] The sentencing body's function of preparing guidelines is subsumed in the legislation. This legislation results from the work of the Committee for Imprisonment who drafted two wholly new chapters of Sweden's penal code.[45] This committee studied sentencing for a number of years and consulted with a wide group of stakeholders, including scholars, judges, prosecutors, lawyers, correctional administrators, union officials and other interested persons. Effectively, the committee carried out the work usually associated with a sentencing body. Germany and Finland have similar principles, but the Swedish model is considered to be the most sophisticated.[46] This legislative guidance articulates the goals the judiciary should pursue when determining sentences and the criteria and steps they should apply in pursuing those goals. The Swedish model has been described as falling somewhere between the English model, where the appellate courts lay down guidance, and that of the US state of Minnesota with a numerical sentencing grid.[47] It lays down principles without numbers. The Swedish legislation sets out[48] that the 'abstract penal value' of the crime is gauged reflecting the harmfulness and the culpability of the offender that is typical for such an offence. Next, the court makes a judgement on the 'concrete penal value' of the offender's particular criminal act, which is the seriousness of the crime in the particular circumstances. The legislation offers specific guidance on the circumstances in which the penal value is enhanced[49] and diminished.[50] Next aggravating[51] and mitigating[52] factors are considered as outlined in the legislation. Then the choice of sanction is considered, which depends on whether the penal value ascertained is high or low. There are three levels of sanction,[53] fewer than most other countries.[54] The most severe is imprisonment, the next is probation, and the least severe is fines. The legislation sets out particular guidance on the choice of sanction.[55] Crimes of high penal value generally result in imprisonment while those with low value generally attract fines. The Swedish legislation has led to a more reasoned decision making process with the judiciary engaging more

explicitly and openly in how they arrive at a particular sentence.[56] One can see how such guidance as that contained in the Swedish legislation would lead to a more definitive sentence which is more predictable. This is to be expected in a hierarchical jurisdiction.

Furthermore, over time the hierarchical ideal develops a sense of identity and lines become rigid between insiders and outsiders.[57] The lay participation of many sentencing bodies does not fit with the hierarchical ideal characterised by professionals. If outsider participation in making a decision is imposed (by a sentencing body) upon officials it is viewed, at best, as meddling that needs to be contained and minimised. In civil law traditions, the power to make decisions about sentences comes from the legislature in the form of scales with guided discretion. This is culturally accepted and has its roots in constitutional principles. Part of the culture is that the courts do not accept instructions from outside (in this case a sentencing body).[58] The reason for this can be traced historically to the strict separation of powers in the civil law tradition as compared to the common law tradition.[59] This rigid separation of powers affects the court system.[60] The strict separation of powers developed largely due to a spate of upheavals that took place in the West in the late eighteenth century which in turn, gave rise to an intellectual revolution. This movement, which affected most Western nations, included such dramatic events as the American and French revolutions, the Italian Risorgimento, the series of wars of independence that liberated the nations of Latin America, the unification of Germany and the liberation of Greece.[61] In civil law jurisdictions judges sometimes refused to apply new laws, or interpreted them contrary to their intent,[62] which was not a problem in common law jurisdictions where judges had played an important part in the centralisation of government. In order to prevent this, sharp lines were drawn between the separation of powers. It was the function of the legislature only to make the law, and the judge was prevented from doing so. The legislature was the elected branch of government and was the only entity entitled to respond to the popular will of the people. To this day the separation of powers is sharper in civil law jurisdictions. In the civil law tradition the legislature may delegate some of its powers to organs of the state,[63] but this appears not to include independent agencies free of state involvement. That being the case, a sentencing body does not fall neatly within the hierarchical ideal as, in effect, it is instructing the court what to do.

Officials in civil law jurisdictions have succeeded in keeping control of the punishment process without becoming subject to decisive pressure from a disgruntled public.[64] They have a routinized attitude insulated from politics. One could associate this with the first dimension of Damaška's theory relating to the structure of authority. Politicians are not calling for populist policies and they do not have the same success in engaging in scare tactics as they do in common law jurisdictions. Politics has less of an impact on criminal justice in civil law jurisdictions.[65] The idea of insulation from politics is one of the reasons sentencing bodies emerged in common law jurisdictions, something that appears to be inherent in civil law jurisdictions. Likewise the media in civil law jurisdictions take a sober and reasonable attitude to criminal policy. The media in many civil law jurisdictions is often shocked at the severity of punishments in America and treat it as a rogue state, hesitating to extradite offenders there.[66] In America symbolism and ideology often are more important in policy formulation than substance and principle.[67] In civil law jurisdictions fairness to the offender is seen as a paramount value to be pursued in sentencing. Consequently, as sentencing bodies introduce a feeling of insiders and outsiders, they do not sit comfortably in the hierarchical jurisdictions as this insider and outsider feeling is there already.

Also, in civil law jurisdictions crime policy has not been heavily politicized and sentence severity is restrained which means they have been under much less pressure to change.[68] Sentence lengths have been notably longer in common law jurisdictions, particularly America, in which sentences of ten, twenty and thirty years are common. Whitman suggests part of the reason for this 'is the presence of some distinctively fierce American Christian beliefs.'[69] In civil law jurisdictions sentences are more commonly measured in months or a few years with sentences of longer than two years uncommon. For example, Whitman indicates that the average sentence in France is eight months while in America it is five to ten times greater.[70] Moreover, in civil law jurisdictions there is a drive to make a range of offences 'not crime,' while in many common law jurisdictions, the concept of zero tolerance is gaining currency. When sentences are measured in months rather than years, disparity and inconsistency do not appear to be as big a problem, thus eliminating the need for sentencing bodies. With more severe sentences coupled with broad judicial discretion the likelihood of inconsistency increased, thus resulting in the emergence of sentencing bodies.

When we look at the coordinate ideal associated with common law jurisdictions we see there are weak hierarchical controls and wide ranging discretion. Technical or formal approaches to decision making appear undesirable and it rejects any decisions divorced from prevailing ethical, political or religious norm.[71] As sentencing bodies offer a degree of rigidity in the sentencing process one would not expect to see sentencing bodies within coordinate jurisdictions (as Frase points out).[72] However, the coordinate ideal accepts a wide diffusion of authority among legal professionals with short terms of office who interact with lay officials. The composition of sentencing bodies often includes both professional and lay members appointed for relatively short periods. This may very well be a factor giving sentencing bodies a footing within coordinate jurisdictions. Moreover, the public in civil law jurisdictions generally have more confidence in the judiciary and therefore there are fewer efforts to eliminate any judicial discretion afforded to them by statute. This can be contrasted with America (coordinate jurisdiction) where there is suspicion of state power.[73] Generally, judges everywhere try to resist efforts to restrict their discretion. In civil law jurisdictions judges are career non-partisan civil servants and have resisted change more easily, whereas, in America judges are appointed in a system in which partisan political considerations play a large part and therefore are more likely to be open. Consequently, sentencing bodies and guidelines emerge.

5. Conclusion

The picture that emerges in the common law world is complex as some jurisdictions have sentencing bodies while others do not. Furthermore, there is a vast array of different sentencing body models in operation. The situation in the civil law world is much clearer as sentencing bodies do not exist in these jurisdictions, primarily because of the structuring of authority in place and the sentencing practices that have developed. Effectively, the functions offered by sentencing bodies are allocated elsewhere in these jurisdictions.

It is difficult to state with any degree of certainty which ideal the notion of sentencing bodies aligns with. Sentencing bodies offer a degree of rigidity (through highly technical standards) to sentencing and accordingly one might be inclined to associate them with the hierarchical ideal given its technical rigid approach. As we have seen, however, they do not fall neatly into that ideal as the benefits and functions of what sentencing bodies offer, appear to be subsumed in the overall structure of that ideal. Sentencing bodies do not sit neatly within the hierarchical structures of civil law jurisdictions as such jurisdictions view outside influence as unwarranted interference. Moreover, many of the reasons for the emergence of sentencing bodies such as structuring judicial discretion, insulating sentencing from the political process and populism, are not pressing issues in civil law jurisdictions. This is primarily due to a more lenient approach to sentencing with shorter sentences usually measured in months, thus disparity does not appear to be as big a problem.

On the other hand, as the coordinate ideal accepts a wide spread of authority between professional and lay members, one could conceive of sentencing bodies leaning towards that ideal. It may be argued that they do not fit neatly in the coordinate structures of common law jurisdictions because sentencing bodies offer a degree of rigidity to the sentencing process and this rigidity is associated with hierarchical structures. However, they have gained a footing there which may be connected to the acceptance of the diffusion of authority. It can be concluded that the notion of sentencing bodies do not fall neatly into either ideal as the rigid characteristics of the sentencing body itself appear to be hierarchical while the variance of authority resonates with the coordinate ideal. Reinforcing the notion that sentencing bodies do not sit comfortably in coordinate jurisdictions is the fact that not all coordinate jurisdictions have resorted to them. Moreover, some jurisdictions that established sentencing bodies subsequently decided to abandon the idea.[74] However, Damaška's ideals come with the proviso that, 'to be sure, the two styles will include some traits found in one or another.'[75] Lempert[76] expects that the breakdown of the two ideal types will accelerate as increased international interchange takes place resulting in borrowing across the traditions where aspects of one tradition seem functionally superior. Moreover, Hancock and Jackson point out that 'particular systems do not fall neatly into ideal types that [Damaška] caricatured as they evolve to meet particular social and economic conditions that prevail within societies in which they are located.'[77] It is possible that sentencing bodies represent an exception to Damaška's framework and they have emerged in some common law jurisdictions to meet

particular social and economic needs.

Endnotes

* PhD. This article is based on part of a completed PhD thesis submitted to University College Dublin. The thesis was completed under the supervision of Professor John Jackson of Nottingham University, to whom the author is most grateful.

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49 Swedish Criminal Code, Chapter 29(2). These circumstances include, inter alia, the offender taking advantage of a victim's vulnerable state, abusing a position of trust and careful planning.

50 ibid, Chapter 29(3). These circumstances include, inter alia, mental abnormality, the manifest lack of development or strong human compassion led to the commission of the crime.

51 ibid, Chapter 29(4). This includes previous criminal history.

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