

SENTENCING METHODOLOGY – TOWARDS IMPROVED REASONING IN SENTENCING

Abstract

This paper addresses the legislative and juridical context within which sentencing in Ireland takes place and examines how judicial discretion in sentencing in Ireland is in fact guided, while also looking at other means by which it might be guided. Against this backdrop, and in the context of responding to Dr Graeme Browne's paper, it further looks at what the Irish appellate courts have been saying in recent judgments about methodology and reasoning in sentencing.

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Introduction

The programme at the National Conference of the Judiciary of Ireland in 2018¹ included a session on judicial discretion and reasoning in sentencing. Dr Graeme Brown² presented the main paper in this session entitled simply 'Discretion in Sentencing', in which he described four models of judicial reasoning in sentencing. In response to Dr Brown's paper,³ I presented an earlier version of this paper, in which I sought, *inter alia*, to highlight what the Court of Appeal, and its predecessor the Court of Criminal Appeal, has been saying about sentencing methodology.

The legislative and juridical context in which sentencing takes place.

The paradigm for the process of sentencing that enjoys the widest currency, certainly in this jurisdiction, is that it represents an appropriate balancing of the concurrent, but sometimes conflicting, penal objectives of retribution, deterrence (general and/or specific) and rehabilitation.⁴ Moreover, at the heart of this balancing exercise, is the constitutionally mandated requirement that every sentence should be proportionate, both to the gravity of the crime and to the circumstances of the perpetrator.⁵

¹ Held at Dublin Castle on 16 November 2018 under the auspices of the Committee for Judicial Studies.

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³ An expanded version of which appears in this issue of the Irish Judicial Studies Journal alongside my own, now entitled 'Four Models of Judicial Reasoning in Sentencing'.

⁴ *People (DPP) v DW* [2018] IECA 143; also *People (DPP) v GK* [2008] IECCA 110, *People (DPP) v Kelly* [2005] 2 IR 321 (CCA) and *People (AG) v O'Driscoll* (1972) 1 Frewen 351.

⁵ In *State (Healy) v Donoghue* [1976] IR 325 (SC) 353, Henchy J opined that cumulatively Article 38. 1, Article 40.3.1^o, Article 40.3.2^o and Article 40.4.1^o of the Constitution necessarily imply, 'at the very least, a guarantee that a citizen

The principal of proportionality in sentencing refers to proportionality in the distributive sense⁶ and has a different meaning to that referred to as the constitutional ‘doctrine of proportionality’ as expounded in *Heaney v Ireland*.⁷ The former Court of Criminal Appeal has said that ‘[t]he sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused’.⁸ Numerous re-iterations of this principle can be found in subsequent judgments of that court,⁹ in those of its successor, i.e., the present Court of Appeal,¹⁰ and in judgments of the Supreme Court.¹¹

It follows that sentencing in Ireland is highly individualistic and that a just and constitutional sentence is dependent on the appropriate application of judicial discretion to the circumstances of the individual case. Whether the process by means of which the discretionary sentence to be imposed is arrived at be intuitive and unspoken, or structured and articulated in some fashion, it must take account of the gravity of the offence, it must take account of relevant mitigating circumstances, and it must be in furtherance of one or more of the recognised objectives of sentencing and be structured with a view to best achieving that or those objectives.

Of course sentencing does not take place in a vacuum. Judges are not totally at large. It goes without saying that principles of sentencing law as expounded by the superior appellate courts will, to a degree, corral and guide the exercise of discretion. Discretion will also be corralled by any sentencing parameters,¹² or guiding rules, set by the Oireachtas, or in the case of a decreasing number of older statutory offences by a pre-1937 legislature, alternatively by the common law. Nevertheless, in the last analysis the sentencing judge imposes, in the exercise of her discretion, what she considers to be the appropriate tariff.

That determination involves the making of numerous value judgments concerning issues like the degree of moral culpability, both intrinsic to the way in which the offence was committed and inherent in the nature of the specific offending,¹³ and the extent to which there might be specific aggravation,¹⁴ or mitigation,¹⁵ of culpability. Discretion is also

shall not be deprived ... where guilt has been established or admitted, of receiving a sentence appropriate to his degree of guilt and his relevant personal circumstances’.

⁶ See: *Whelan & Lynch v Minister for Justice* [2012] 1 IR 1 (SC) [54]; see also *Osmanovic v DPP* [2006] 3 IR 504 (SC) [34] (Geoghegan J) endorsing the comments of Flood J in *People (DPP) v WC* [1994] 1 ILRM 321 (HC) 325 concerning proportionality in sentencing.

⁷ [1994] 3 IR 593 (SC).

⁸ *People (DPP) v McCormack* [2000] 4 IR 356 (CCA) 359.

⁹ Examples include *People (DPP) v O’Driscoll* (1972) 1 Frewen 351; *People (DPP) v Kelly* [2004] IECCA 14, [2005] 2 IR 321.

¹⁰ Examples include *People (DPP) v Flynn* [2015] IECA 290 ex temp [14]; *People (DPP) v Kelly* [2016] IECA 204 [33]-[34].

¹¹ See *People (DPP) v M* [1994] 3 IR 306 (SC) 315 (Egan J) 317 (Denham J); also *Gilligan v Ireland* [2014] 1 ILRM 154 [34]-[35]; also *Whelan & Lynch* (n 6) and *Osmanovic* (n 6).

¹² Usually by means of the specification of maximum penalties in the case of summary conviction and/or conviction on indictment. In a small number of cases, such as in the case of convictions under s 15A of the Misuse of Drugs Act 1977, as amended, and in the case of certain firearms offences, presumptive mandatory minimum sentences may also apply. Moreover, there are statutory guidelines according to which children must be sentenced contained in s 96 of the Children Act 2001. Yet another example is provided by s 11(4) of the Criminal Justice Act 1984, as inserted by s 10 of the Bail Act 1997, on foot of which the fact that an offence was committed while on bail must be treated as an aggravating factor.

¹³ Taking into account the form of commission and the actual harm done.

¹⁴ Factors such as premeditation and planning, breach of trust or fiduciary duty, the causing of especial suffering (to name but some). See more generally Law Reform Commission, *Consultation Paper on Sentencing* (LRC CP 6 – 1993) [5.31].

required to be exercised in relation to making allowance for mitigation in general.¹⁶ It is also within the judge's discretion to determine what sentencing objective or objectives ought to be prioritised in the circumstances of the individual case and how best to structure the proposed sentence to give effect to that/those sentencing objective(s), and if rehabilitation is to be one of them, whether the court might be justified in the circumstances of the case in granting some further discount or amelioration of sentence¹⁷ to incentivise rehabilitation.

Proceeding from the premise that notwithstanding the parameters set by sentencing ranges, and such limited other statutory guidance as exists, the process of sentencing still involves the exercise of considerable judicial discretion, one might ask what, if any, other guidance, be it hard or soft, is available to assist judges in Ireland in the exercise of their discretion. It may be helpful in that regard to first examine the possibilities, and then to consider the actual position in Ireland at the present time.

Guiding the exercise of judicial discretion – possibilities

Approaching the question from a comparative law perspective, the possibilities appear to be relatively few. A review of some of the major Irish and English works on sentencing,¹⁸ which have looked at different approaches in various other common law jurisdictions, suggests that they might include, in ascending order of complexity, *ad hoc* guidance in individual cases drawn from case comparators, guideline judgments provided by appellate courts, a system of assisted appellate review by an advisory non-rule making sentencing body, and guidelines from a rule-making sentencing body such as a Sentencing Commission or Council established on a statutory basis. Brief mention should perhaps also be made of numerical guidance systems which are favoured widely in the United States of America and also championed by some academic commentators such as Lovegrove.¹⁹

At the outset it should be stated that we do not have a Sentencing Commission or Council established on a statutory basis, akin to that in many other common law or predominantly common law jurisdictions;²⁰ although, it should be mentioned in passing

¹⁵ Factors such as duress, provocation, acting under the compulsion of an addiction (to name but some). See more generally Law Reform Commission, *Consultation Paper on Sentencing* (LRC CP 6 – 1993) [5.51].

¹⁶ Mitigating factors that do not bear directly on moral culpability, such as previous good character and post commission behaviour such as the entering of a guilty plea, co-operation, the expression of remorse, efforts at rehabilitation, and the making of restitution (to list but some). See more generally Law Reform Commission, *Consultation Paper on Sentencing* (LRC CP 6 – 1993) [5.78].

¹⁷ Such as part suspending a further portion of the sentence, after having already discounted appropriately for mitigation, as an incentive to rehabilitation, or more frequently continued rehabilitation – often colloquially referred to by lawyers urging the taking of such a step as 'going the extra mile'.

¹⁸ Thomas O'Malley, *Sentencing Law and Practice* (3rd eds, Round Hall 2016) [Ch 1] [1-09 to 1-22 on 'Structuring Sentencing Discretion'], also [1-23 on 'The Role of Guideline Judgments']; Thomas O'Malley, *Sentencing: Towards a Coherent System* (Round Hall 2011) [Ch 5 on 'Statutory and Judicially-Developed Principles' (included assisted appellate review) at pp111-131; also Ch 6 on 'Sentencing Commissions and Guidelines' at pp132 – 155]; Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press 2010) [Ch 2]; Andreas Von Hirsh, Andrew Ashworth and Julian V Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd edn, Hart Publishing 2009) [Ch 6: pp229-293, seven essays on 'Structuring Sentencing Discretion']; Sue Rex and Michael Tonry (eds), *Reform and Punishment: The future of sentencing* (Willan Publishing 2002) [Ch 5: p75].

¹⁹ See Austin Lovegrove, *Judicial Decision Making, Sentencing Policy, and Numerical Guidance* (Springer-Verlag 1989) and Austin Lovegrove, *The Framework of Judicial Sentencing: A Study in Legal Decision Making* (Cambridge University Press 1997).

²⁰ The United States has had a sentencing commission since shortly after the enactment of the federal Sentencing Reform Act, Pub. L. No. 98-473 (1984); England and Wales established a Sentencing Advisory Panel following the enactment of the Crime and Disorder Act 1998, but more recently, following the publication of the Halliday Report in 2001 (John Halliday, Cecilia French and Christina Goodwin, 'Making Punishments Work: A Review of the Sentencing

that there has been a recent legislative proposal in the form of a private members bill to establish an Irish Sentencing Council.²¹ Where such commissions or councils exist they have usually been established with a view to reducing disparity in sentences, and improving consistency in the exercise of judicial discretion, and they formulate guidance themselves, which is presumptive in nature with departure permitted only in limited circumstances.²² Clearly there is the potential for huge variety both in their composition and in their precise terms of reference. They have both proponents and critics, and there is a large body of academic commentary which discusses their objectives, and successes and failures in that regard.²³ A sentencing council established on a statutory basis to set presumptive determinate sentences would impinge significantly on judicial discretion. While it is likely that a constitutionally acceptable model is capable of being designed, if any such sentencing council were to be unduly pre-occupied with generating consistency at the expense of more individualised sentencing it could be constitutionally problematic.

Neither do we have a system of assisted appellate review in this country. The concept is somewhat vague,²⁴ envisaging the provision to appeal courts of more general information and broader policy analysis than can ordinarily be expected from submissions filed by the parties.²⁵ Hughes²⁶ distinguishes between sentencing bodies with rule-making powers (in the form of presumptive guidelines) and those without. Assisted appellate review bodies fall into the latter category. O'Malley has enthusiastically proposed a model for Ireland involving:

the creation of [a] sentencing advisory or information unit charged with the ongoing task of gathering information on existing sentencing practice, collating and disseminating appeal court sentencing jurisprudence, and drawing up working documents on the problems and issues associated with the sentencing of particular offences and categories of offender.²⁷

Framework for England & Wales' (HMSO 2001). A Scottish Sentencing Council was established as recently as October 2015. In Australia, there are Sentencing Advisory Councils in New South Wales and Victoria. In New Zealand a Sentencing Council Act was enacted in 2007, but following a change of government in 2008 which did not favour sentencing guidelines it was mothballed and the legislation was eventually repealed in 2017. In Canada, on the other hand there is no sentencing commission or council and no system of structured sentencing guidance.

²¹ On 1 February 2017, in response to a number of high profile cases in which sentences imposed were criticised in the media as being unduly lenient, Sinn Féin's then spokesman on Justice and Equality, Jonathan O'Brien T.D., published a private members Bill entitled The Sentencing Council Dáil Bill (2017) which proposed, inter alia, the establishment of a sentencing council with a statutory remit to prepare sentencing guidelines relating to the sentencing of criminal offenders. The Bill failed to attract support in the Oireachtas beyond that of Sinn Féin and a small number of independent deputies and senators. However, more recently, and in the context of negotiations with the alliance of independent deputies around the controversial Judicial Appointments Commission Dáil Bill (2017), the Minister for Justice, Charles Flanagan TD, indicated a willingness to consider making provision for sentencing guidelines in the Judicial Council Bill 2017 which is also pending before the Oireachtas. It is unclear at present whether that might involved the establishment of a sentencing council, or a system of assisted appellate review, or some other system structure.

²² Paul Hughes, 'The Functions of Rule-Making and Non Rule-Making Sentencing Councils and Commissions' (2016) 26(1) *Irish Criminal Law Journal* 13, 14.

²³ A useful overview of some of the available literature is to be found in O'Malley, *Sentencing: Towards a Coherent System* (n 18), in Chapter 6 entitled, 'Sentencing Commissions and Sentencing Guidelines'.

²⁴ The former Sentencing Advisory Panel of England and Wales is perhaps the archetype.

²⁵ O'Malley, *Sentencing: Towards a Coherent System* (n 18), in Chapter 6 entitled, 'Statutory and Judicially-Developed Principles' at 129.

²⁶ See note 22.

²⁷ O'Malley, *Sentencing: Towards a Coherent System* (n 18) 129-130.

He later adds:

Under the model being proposed here, all of the information unit's output would be publicly available, and therefore accessible to advocates or lay litigants wishing to incorporate relevant parts of into their submissions. Such a system would promote a more constructive use of discretion by encouraging courts to engage in the progressive elaboration of principle. A point would be reached at which fairly specific tariffs or benchmark sentences could be indicated, maybe not for all offences but at least for the more prevalent ones.²⁸

What we do have in Ireland, although only to a very limited extent, are guideline judgments by appellate courts. It is perhaps more correct to say that appellate criminal courts in Ireland have been taking their first tentative steps towards offering guidance to sentencing judges by way of guideline judgments.²⁹ A continuation by the Court of Appeal of the start made in that regard by the former Court of Criminal Appeal has only recently begun. The apparent inertia has predominantly been due to the Court of Appeal's workload since its establishment,³⁰ and the fact that it has been under-resourced from the beginning, particularly in the number of judges on the court.³¹ The preparation of a guideline sentencing judgment involves substantially more research and work than is required in the preparation of a sentencing judgment confined to the circumstances of an individual case. The workload in the Court of Appeal has until very recently precluded continuation with the experiment commenced by its predecessor in 2014. In 2015, the Court of Appeal was asked by the Director of Public Prosecutions to consider issuing a guideline judgment in respect of sentencing in cases of dangerous driving causing death, but declined to do so.³² However, 2018 has seen the Court of Appeal taking the first tentative steps in resuming the experiment by issuing guideline judgments on sentencing in burglary, aggravated burglary and robbery cases.³³ In addition the court has also endeavoured to provide some, perhaps less formal, guidance with respect to the sentencing of offenders in certain types of fraud cases,³⁴ in cases involving persons concerned in the operation of cannabis grow houses,³⁵ and in sentencing in the more esoteric field of contempt of court by publication.³⁶

²⁸ O'Malley, *Sentencing: Towards a Coherent System* (n 18) 131.

²⁹ See *People (DPP) v Ryan* [2014] IILRM 98 (CCA); *People (DPP) v Fitzgibbon* [2014] 2 IILRM 116 (CCA), both of which provided indicative sentence ranges for specific offences. Somewhat more limited guidance, but valuable nonetheless, was provided in relation to child pornography in *People (DPP) v Loving* [2006] 3 IR 355 (CCA). The guidance here was more limited because it did not indicate indicative ranges but rather indicated relevant factors to be taken into consideration in sentencing for child pornography.

³⁰ It inherited a large number of cases both from the Supreme Court (1355 cases of all types) and the former Court of Criminal Appeal (220 sentence appeals and 75 conviction appeals), so that it began work with a substantial acquired backlog.

³¹ See Dearbhail MacDonald, 'New Court of Appeal seeks more judges to reduce delays' *Irish Independent* (Dublin, 27 November 2015); Press Association, 'Urgent need for more Court of Appeal Judges – Chief Justice' *Irish Independent* (Dublin, 29 November 2017) <<https://www.independent.ie/breaking-news/irish-news/urgent-need-for-more-court-of-appeal-judges-chief-justice-36170743.html>> accessed 07 April 2019; 'Court of Appeal: The new bottleneck. At least three more judges needed to give Court a fighting chance of providing required service' *Irish Times* (Dublin, 2 November 2017). It should be noted that on the 4th of December 2018 the government announced its intention to make legislative provision in early 2019 for the appointment of an additional six judges to the Court of Appeal.

³² *People (DPP) v Casey [No 2]* [2015] IECA 278. The decision not to provide the requested guidance was announced separately from the judgment and is not referred to in the judgment. The decision not to provide guidance received public criticism - See Fiona Gartland, 'Time for sentencing guidelines for dangerous driving causing death' *Irish Times* (Dublin, 25 October 2016).

³³ *People (DPP) v Casey & Casey* [2018] IECA 121.

³⁴ *People (DPP) v Maguire (Siobhan)* [2018] IECA 310.

³⁵ *People (DPP) v Samuilis* [2018] IECA 316.

³⁶ *DPP v Independent News and Media Plc & Ors* [2018] IECA 301.

It might be considered surprising that it was only in 2014 that the Irish appellate courts took their first tentative steps towards providing general guidance in sentencing. Twenty-six years previously, in *People (DPP) v Tiernan*,³⁷ the Supreme Court was invited to provide such guidance in the case of rape offences, but declined to do so stating:³⁸ ‘I would doubt that it is appropriate for an appellate court to appear to be laying down any standardisation of tariff of penalty in cases’. This was justified in part by ‘the absence of any statistics or information before this Court in this appeal concerning any general pattern of sentences imposed for the crime of rape within this jurisdiction’.³⁹ It was also justified on the basis of the need to preserve wide judicial discretion in order to meet the requirement of proportionality in sentencing. Despite this, the judgment in fact provides many strands of useful guidance, though it falls short of indicating presumptive sentence ranges.

In the light of Finlay CJ’s complaint in *Tiernan* concerning the dearth of readily available statistical information relevant to sentencing, it is appropriate to mention here the now dormant Irish Sentencing Information System (with the unfortunate acronym ISIS), that was established in the hope of addressing that deficit. ISIS was initially established as a pilot project, under the auspices of the Courts Service Board, with the aim of designing and developing a computerised information system, on sentences and other penalties imposed for offences in criminal proceedings, which might inform judges when considering the sentence to be imposed in an individual case. It was envisaged that this sentencing information system would enable a judge, by entering relevant criteria, to access information on the range of sentences and other penalties that have been imposed for particular types of offence in previous cases.⁴⁰ Initial data collection commenced in 2007 and ran until 2010, and was confined to data collected from selected courts in selected court venues around Ireland. It began in 2007 with the Dublin Circuit Criminal Court, and was incrementally extended to include Cork and Limerick Circuit Criminal Courts, Dublin District Court and the Court of Criminal Appeal. The intention was that when the data collected was analysed ISIS would publish reports on sentencing trends in specific areas for the information of interested persons, including judges, sentencing scholars, lawyers and the wider public. Ultimately, ISIS did not in fact publish any reports of its own, but instead published on its website several reports⁴¹ authored by researchers in the Judicial Researchers Office.⁴² These are still accessible on the ISIS website, which remains live.⁴³

³⁷ [1988] IR 250 (SC).

³⁸ [1988] IR 250 (SC) 254 (Finlay CJ).

³⁹ *ibid.*

⁴⁰ See description on ISIS website homepage at <http://www.irishsentencing.ie/>; See also: Brian Conroy and Paul G Gunning, ‘The Irish Sentencing Information System ISIS A Practical Guide to a Practical Tool’ (Irishsentencing.ie 2007)

<<http://www.irishsentencing.ie/en/ISIS/ISIS%20Courts%20Newsletter.doc/Files/ISIS%20Courts%20Newsletter.doc>> accessed 07 April 2019.

⁴¹ Michelle Lynch, ‘An analysis of manslaughter sentences 2007 to 2012’ (Irishsentencing.ie 2013) <<http://www.irishsentencing.ie/en/ISIS/Analysis%20of%20Manslaughter%20Sentencing%202007-2012.doc/Files/Analysis%20of%20Manslaughter%20Sentencing%202007-2012.doc>> accessed 07 April 2019; Laura Butler, ‘An analysis of sentencing in robbery cases’ (Irishsentencing.ie 2013)

<<http://www.irishsentencing.ie/en/ISIS/Analysis%20of%20Sentencing%20in%20Robbery%20May%202013.doc/Files/Analysis%20of%20Sentencing%20in%20Robbery%20May%202013.doc>> accessed 07 April 2019; Kelly Mackey, ‘Analysis of Sentencing for Possession or Importation of Drugs for Sale or Supply’ (Irishsentencing.ie 2013) <<http://www.irishsentencing.ie/en/ISIS/Analysis%20of%20Sentencing%20for%20Drug%20Offences,%20Mar%202014.pdf/Files/Analysis%20of%20Sentencing%20for%20Drug%20Offences,%20Mar%202014.pdf>> accessed 07 April 2019.

⁴² A support service made available to the judiciary by the Courts Service of Ireland.

⁴³ See note 40.

The timing of the ISIS project was perhaps unfortunate. Though it was embarked upon with considerable fanfare and there were high hopes for it, it was also embarked upon in the throes of Ireland's worst ever economic downturn. The homepage of its website, last revised in 2014, warns tellingly:

Future

This website contains the work gathered by the Steering Committee and the researchers for this pilot project. It is proposed to assess this project.

The future development of the website and the ongoing maintenance and population of the database will have resource implications which will have to be considered in the context of the current financial climate.⁴⁴

The ISIS project was effectively mothballed in 2014 due to lack of financial resources, and has been dormant ever since. It is not known when, if ever, it will be re-activated.

It is further relevant to mention, particularly in the light of the mothballing of the ISIS project, that the Judicial Researchers Office has since January 2013 been publishing on the Judges' Intranet⁴⁵ periodic statistical analyses, based upon published and unpublished sentencing judgments, both at first instance and on appeal, for the benefit of the judiciary.⁴⁶ In the case of unpublished judgments, and ex-tempore sentencing judgments delivered at first instance, recourse has been had to court transcripts where available, and/or to the Courts Service Digital Audio Recording (DAR) facility⁴⁷ from which the sentencing judge's *ipsissima verba* were transcribed for analysis purposes.⁴⁸ In addition there has been some updating of those early sentencing analyses provided to ISIS, the originals of which appeared, and can still be accessed, on the ISIS website. While these updates are available to the judiciary and to judicial assistants and judicial researchers on the Judges' intranet, the Judge's intranet is unfortunately not an open access resource. It requires to be stated that, unlike material on the Judges' Intranet, any material which it is sought to access via the ISIS website has not been updated, and must therefore be treated with caution at this stage. The Judge's Intranet, which may be somewhat under-used,⁴⁹ represents an excellent resource for judges in terms of providing useful sentencing statistics. However, any such material, and any analyses prepared by the Judicial Researchers Office, is not to be regarded as sentencing guidance *per se*. What it does offer

⁴⁴ 'Homepage' (Irish Sentencing Information System) <www.irishsentencing.ie> accessed 13 March 2019.

⁴⁵ An on-line repository of research papers and materials of relevance to the judiciary, maintained on the Courts Service of Ireland computer network and accessible only by members of the judiciary, judicial researchers, judges' library staff and certain other authorised persons. It was launched in 2012.

⁴⁶ Such material comprises statistics and analysis relating, inter alia, to robbery, rape, sexual assault, manslaughter, dangerous and careless driving, drug supply offences, child pornography, aggravated burglary, and child defilement.

⁴⁷ Over the last decade the Courts Service has been incrementally introducing a Digital Audio Recording (DAR) facility into every courtroom in Ireland. The project has only recently been completed. Where it is in place every word spoken in court is recorded digitally 24/7 and the audio record is available for replaying in court or transcription where duly authorised. However, access to it is restricted. Only a judge can authorise its release. It is not a publicly accessible resource. The Courts Service publishes an information publication about the DAR system on its website. See: Courts Service, 'Digital Audio Recording: Information Guide to Digital Audio Recording in Court' (Courts Service) <[http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/EABA8BDF656AE9738025756D005A2B44/\\$FILE/Digital%20Audio%20Recording%20-%20February%202009.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/EABA8BDF656AE9738025756D005A2B44/$FILE/Digital%20Audio%20Recording%20-%20February%202009.pdf)> accessed 08 April 2019.

⁴⁸ Occasionally, where there was no transcript available, and no DAR recording to which recourse could be had, the researchers have also utilised print and broadcast media reports of cases of which they have become aware as source material.

⁴⁹ Notwithstanding anecdotal evidence that some judges of the Circuit and District Courts have recourse to it frequently.

though, to those sentencing judges who care to access it, is assistance comprising valuable information concerning potentially relevant case comparators.⁵⁰

Returning to the subject of guideline judgments, it is noteworthy that some twenty years after *Tierman*, and notwithstanding the Supreme Court's earlier stated reservations, Charlton J, when still in the High Court and sitting at first instance as a judge of the Central Criminal Court, attempted in *People (DPP) v D(W)*⁵¹ to do what the Supreme Court had declined to do, but in the case of sexual assaults and aggravated sexual assaults and related offences. Although the sentence imposed in *D(W)* was appealed to the Court of Criminal Appeal, the judgment on the appeal was delivered *ex tempore* and it neither endorsed nor criticised Charlton J's guidance. Despite this, Charlton J's guidance was regularly cited to the Court of Criminal Appeal, and continues to be cited to the present Court of Appeal in appeals concerning sexual assaults, aggravated sexual assaults and related offences.⁵² Unlike in the case of *Tierman*, Charlton J in *D(W)* did have the benefit of some statistics,⁵³ as well as comparators with which to work, and also the Law Reform Commission's Consultation Paper on Sentencing.⁵⁴

It should also be mentioned in passing that his sentencing judgment in *D(W)* was not the only occasion in which Charlton J, endeavoured to provide sentencing guidance while sitting as a judge at first instance in the Central Criminal Court. He also did so with respect to the sentencing of elderly persons convicted of child sexual abuse in *People (DPP) v PH*.⁵⁵

Turning then to *ad hoc* guidance in individual cases drawn from comparators, the author's experience suggests that this is by far the most common form of guidance availed of by the Irish appellate courts.⁵⁶ However, the utility of comparators as a form of guidance has very considerable limitations and these were recently discussed by the Court of Appeal in *People (DPP) v Maguire*.⁵⁷ It was observed in *Maguire* that it is trite, and a statement of the obvious, to observe that no two cases are the same and that every case depends on its own facts.⁵⁸ Moreover, account must be taken of the ability of judges to exercise legitimate judicial discretion in the imposition of sentences within accepted margins of appreciation. Accordingly, any temptation to superficially compare cases, and outcomes, in the hope of discerning a manifestly consistent approach must be resisted as involving a largely meaningless quest. Cases proffered as comparators do not represent binding precedents, at least in terms of assessments of gravity, or the extent of allowances to be afforded in mitigation, or as to outcomes. Their principal value lies in providing evidence of discernible trends in sentencing for different types of offences,

⁵⁰ See the discussion concerning the nature of permissible assistance in *People (DPP) v Z* [2014] 1 IR 613 (CCA), and *People (DPP) v Hussain* [2015] IECA 22. See also, Lisa Scott, 'Developments in Irish Sentencing' (2017) 1 *Irish Judicial Studies Journal* 1.

⁵¹ [2008] 1 IR 308 (CCA).

⁵² Charlton J's judgment in *D(W)* (n 51) was referred to with approval by Murray CJ, giving judgment for the Court of Criminal Appeal, in *People (DPP) v Keane* [2008] 3 IR 177 (CCA). The former Chief Justice described the judgment as a 'valuable reference point in ascertaining the wide variety of factors ... which can influence sentencing in rape cases'. Again, on this, see Lisa Scott, 'Developments in Irish Sentencing' (2017) 1 *Irish Judicial Studies Journal* 1.

⁵³ [2008] 1 IR 308 (CCA) [15].

⁵⁴ Law Reform Commission, *Consultation Paper on Sentencing* [LRC CP 6 – 1993].

⁵⁵ [2007] IEHC 335.

⁵⁶ The observation is autoethnographic and anecdotal based on in excess of 35 years of continuous practice by the author in the Irish criminal courts, both as a barrister and as a judge. However, to date there is no published research specifically on the topic of the frequency with which Irish judges are referred to, or in fact utilise, comparators. This is, in part, the subject matter of the author's ongoing PhD research.

⁵⁷ [2018] IECA 310.

⁵⁸ [2018] IECA 310 [97].

based upon an analysis of a representative sample of sentencing judgments in such cases. To be useful in that way, the sample size proffered must be meaningful, the cases included must be representative and not manifestly exceptional, and the analysis must be rigorous. Despite this, it is commonplace for just a single case, or a very small number of cases, with facts that are loosely analogous to facts of the case then being dealt with, to be proffered to a sentencing judge for direct comparison purposes; and as though they must be treated as binding or at least highly persuasive precedents as to how the case before him or her should be disposed of, when they are nothing of the sort. The value of comparators used in this way is virtually nil. Although it is possible to do so, it is unnecessary for the purposes of this paper to elaborate further on these limitations.

Sentencing methodology and reasoning in sentencing

Turning then to consider what our appellate courts have been saying about methodology and reasoning. First of all, it has been made clear that there is no one correct method. That having been said, the Irish Court of Appeal has indicated a distinct preference for staged reasoning over pure instinctive synthesis.⁵⁹ It has been commended to sentencing judges in Ireland⁶⁰ that, as a matter of best practice,⁶¹ the exercise should involve a two (or more) stage process, in which the sentencer should first of all determine upon a headline sentence with reference to the spectrum or range of penalties available and having regard to the gravity of the offence, and then secondly consider whether, and the extent to which, it is appropriate to discount from the headline sentence determined upon in the first stage to reflect mitigating circumstances (not already taken into account in the first stage) for which credit should be given, and/or to incentivise rehabilitation.

The need for a third stage might arise where consecutive sentences are being imposed and account requires to be taken of the so-called ‘totality principle’⁶² in the interests of ensuring overall proportionality; alternatively, where some adjustment requires to be made to the sentence determined upon at the end of the second stage to ensure equality of treatment⁶³ (in the sense of non-discrimination against offenders on irrelevant or impermissible grounds⁶⁴), or to ensure parity of treatment as between co-offenders whose situations are not significantly different;⁶⁵ alternatively where a wholly suspended sentence is being considered⁶⁶ and it is necessary to determine whether that would in fact be appropriate in the circumstances of the case.⁶⁷

In commending this basic two stage, and occasionally three stage, process as ‘best practice’, while not absolutely insisting upon it, the Court of Appeal has had as its objectives the promotion of greater consistency in sentencing, the promotion of better explained reasons for the determination of a sentence in a particular case, and the

⁵⁹ *People (DPP) v Molloy* [2018] IECA 37 [20].

⁶⁰ *People (DPP) v M* [1994] 3 IR 306 (SC) 315; *People (DPP) v Renald* (CCA, 23 November 2001); *People (DPP) v Kelly* [2005] 2 IR 321 (CCA) [34]-[35]; *People (DPP) v Farrell* [2010] IECCA 116; *People (DPP) v Fhynn* [2015] IECA 290 [14]; *People (DPP) v Kelly* [2016] IECA 204 [33]-[34].

⁶¹ It was so characterised by the Court of Appeal in *People (DPP) v Fhynn* [2015] IECA 290 [14]. It was also held in that case and subsequent cases (eg *People (DPP) v Kelly* [2016] IECA 204; *People (DPP) v O'Brien* [2016] IECA 164 [28]; *People (DPP) v JD* [2017] IECA 144 [27]) that failure to adhere to the recommended best practice would not necessarily amount to an error in principle.

⁶² Expressly acknowledged in *People (DPP) v TB* [1996] 3 IR 294 (CCA) 298-299.

⁶³ In light of the guarantee contained in Art 40.1 of the Constitution.

⁶⁴ O'Malley, *Sentencing Law and Practice* (n 18) 5-41.

⁶⁵ *People (DPP) v Cunningham* [2015] IECCA 2 [2.15].

⁶⁶ Strictly speaking a subsidiary issue to be decided upon within the ‘second stage’, rather than a distinct ‘third stage’.

⁶⁷ *People (DPP) v Byrne* [2017] IECA 97 [28].

encouragement of greater rigour in the analysis of the factors feeding into both sides of the sentencing equation, namely the assessment of gravity on the one hand, and the affording of due credit for mitigation on the other hand, all with a view to improving public confidence in the sentencing process.⁶⁸

The main reasons for the Court of Appeal's present reluctance to insist upon the adoption of such a procedure, as opposed to merely commending it as best practice, stem firstly from a concern that to impose too rigid and formulaic an approach could potentially unduly inhibit the exercise of legitimate judicial discretion; and secondly from a recognition that, as stated more than once by the former Court of Criminal Appeal, the failure to adhere to a particular sentencing method or formula will not necessarily result in an incorrect sentence. Neither will slavish adherence to a method or formula guarantee the imposition of a correct sentence.⁶⁹

Thus, in *People (DPP) v Fitzgibbon*,⁷⁰ the Court of Criminal Appeal had remarked with respect to the process of sentencing that:

It does also need to be emphasised that a sentencing judge should set out clearly the factors which have been taken into account in arriving at an appropriate sentence and specify the approach adopted in coming to a conclusion as to the appropriate sentence having regard to all of those factors.

...in reviewing sentences which are challenged, this Court does need the maximum possible clarity as to how the sentencing judge reached a conclusion as to the appropriate sentence to be imposed in all the circumstances of the case. There is no one way in which this needs necessarily to be done. There is no requirement for a sentencing judge to stick slavishly to any particular method or formula. It is, however, important that this Court, when asked to review a sentence, is not left to guess or infer, to any impermissible extent, what the reasoning of the sentencing judge was.⁷¹

Similarly, in *People (DPP) v Byrne*⁷² the same court said:

This Court does not consider that sentencing should be approached in an overly punctilious or pedantic way. The formulaic repetition of a checklist is not necessarily the sign of a proper sentence.⁷³

Giving judgment for the court, O'Donnell J explained that the function served by having standard steps and criteria which are expected in any sentence is, in the first place, to remind the sentencer of the factors which need to be addressed; secondly, to explain to interested parties and the public at large the reasoning process by reference to which the particular sentence is arrived at; and thirdly, thereby to facilitate review in an appropriate case. However, he emphasised: '...it remains possible to arrive at a correct sentence

⁶⁸ It was explicitly acknowledged by the Supreme Court in *People (DPP) v Duffy* [2003] 2 IR 192 at 200 that unexplained (and I would suggest inadequately explained) disparity in sentencing is potentially undermining of public confidence in the administration of justice. See also the comments of Edwards J in *People (DPP) v Flynn* [2015] IECA 37 at [20], concerning the need for proper reasoning and explanation and the potential difficulty in upholding sentences 'where the sentencing judge may have had perfectly good, but unspoken, reasons for imposing the sentence in question'.

⁶⁹ *People (DPP) v Molloy* [2018] IECA 37 [14]–[16].

⁷⁰ [2014] IECCA 12 (Clarke J giving judgment for the Court).

⁷¹ [2014] IECCA 12 [7.3].

⁷² *People (DPP) v Byrne* (CCA, 17 December 2013).

⁷³ *Byrne* (n 72) [5].

without specifically invoking familiar headings as it is indeed possible to name check standard criteria and yet arrive at an incorrect sentence'.⁷⁴

However, as the present Court of Appeal has pointed out in *People (DPP) v Flynn*:⁷⁵

14. ...best practice involves in the first instance identifying the appropriate headline sentence having regard to the available range, based on an assessment of the seriousness of the offence taking into account aggravating factors (where seriousness is measured with reference to the offender's moral culpability and the harm done), and then in the second instance taking account of mitigating factors so as to ultimately arrive at the proportionate sentence which is mandated by the Constitution as was emphasised in *The People (Director of Public Prosecutions) v McCormack*[2000] 4 I.R. 356.⁷⁶

Drawing on well-established jurisprudence in support of its contention that this was the consistently recommended approach, the court cited *The People (DPP) v M*,⁷⁷ *The People (DPP) v Renald*,⁷⁸ *The People (DPP) v Kelly*,⁷⁹ and *The People (DPP) v Farrell*.⁸⁰ It then went on to say:

18. Since its establishment this Court has repeatedly and consistently sought to emphasise that this approach is regarded by it as best practice and we have sought to commend to trial judges that they explain the rationale for their sentences in that structured way, not least because a sentence is much more likely to be upheld if the rationale behind it is properly explained. Equally if this Court when asked to review a sentence cannot readily discern the trial judge's rationale or how he or she ended up where they did having regard to accepted principles of sentencing such as proportionality, the affording of due mitigation, totality and the need to incentivise rehabilitation in an appropriate case, it may not be possible to uphold the sentence under review even though the trial judge may have had perfectly good, but unspoken reasons, for imposing the sentence in question.

19. However, the mere fact that best practice has not been followed in terms of adequately stating the rationale behind the sentence does not necessarily imply an error of principle. At the end of the day if the final sentence imposed was correct and there was no obvious error of principle the sentence may be upheld.⁸¹

In *People (DPP) v Molloy*,⁸² the Court of Appeal recently elaborated on why it has a preference for staged reasoning over pure instinctive synthesis. It said:

17. Sentencing should ... be about substance over form, rather than the reverse, although it is increasingly recognised based on parallel developments in the field of judicial review, (see for example ...), an accused is entitled to have the reasoning process, by means of which a sentencing court has arrived at the

⁷⁴ *Byrne* (n 72) [5].

⁷⁵ [2015] IECA 290.

⁷⁶ [2015] IECA 290 [14].

⁷⁷ [1994] 3 IR 306 (SC).

⁷⁸ *The People (DPP) v Renald* (CCA, 23rd November 2001).

⁷⁹ [2005] 2 IR 321 (CCA).

⁸⁰ [2010] IECCA 116.

⁸¹ [2015] IECA 290, [18]-[19].

⁸² [2018] IECA 37.

sentence which it has imposed upon him or her, rationally and adequately explained.⁸³

The judgment goes on to specifically allude to the long standing debate amongst sentencing law scholars concerning whether it is best for a sentencing judge to adopt a discretion-orientated ‘instinctive synthesis’ approach as opposed to a staged, two (or more) tier, approach. In the former, the judge identifies all the factors that are relevant to the sentence, evaluates their significance and then makes a value judgment as to what is the appropriate sentence given all the factors in the case. In this approach, the sentence is determined only at the end of the process. The principal alternative approach is the staged, two (or more) tier, approach to sentencing in which the judge first assesses gravity and fixes a headline sentence, and then proceeds in a second stage or subsequent stages to discount for mitigating and other considerations, so as to arrive at a final or ultimate sentence. The staged, two (or more) tier approach still involves the exercise of judicial intuition or instinctive synthesis in each of its stages, but involves a more structured methodology, and arguably provides for greater transparency in terms of how a sentence is constructed. The Court noted that the debate in this regard has received considerable judicial attention in other countries, particularly in Australia where the (Federal) High Court of Australia, which had previously refused to be drawn into the methodological debate, finally grasped that nettle in the landmark case of *Markarian v R*,⁸⁴ an appeal from the Supreme Court of New South Wales, and favoured the instinctive synthesis approach over the staged approach. They declined however to set down a universal rule enshrining instinctive synthesis as the only permissible sentencing methodology, but instead opted to emphasise the discretionary nature of sentencing.⁸⁵

Edwards J, giving judgment for the Court of Appeal, then remarked:

20. We have instead favoured the staged approach because it seems to us that it is likely to best focus judges at first instance on the overriding criterion of ensuring that sentences are proportionate both to the gravity of the offence and the circumstances of the offender, and in particular that the sentence ‘to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused’ – see *The People (DPP) v McCormack* [2000] 4 IR 356. In addition, it has the advantage of producing better reasoned sentencing judgments, that better explain to the interested parties why a particular sentence was imposed and which are also more readily amenable to review at appellate level. Finally, we are not persuaded by the arguments against staged sentencing, namely that they do not allow for sufficient individualisation of sentences, that this methodology tends to give rise to more punitive sentences, that sentencing discretion is in some way corralled or restricted if a staged approach is adopted, and that the process is in a way illusory because judicial intuition has to be applied in any event at each stage.⁸⁶

As mentioned, the staged reasoning approach for which the Court of Appeal expressed a preference renders sentencing judgments at first instance much more amenable to appellate review, and, I would add, in circumstances where the judge’s reasons are pellucid rather than unspoken, much more likely to be upheld in the course of such

⁸³ *ibid*, [17]. Internal references in para 17 omitted for greater clarity.

⁸⁴ *Markarian v R* [2005] HCA 25 (Austl.).

⁸⁵ *Markarian v R* [2005] HCA 25 (Austl.) See leading judgment of Gleeson CJ at [36 et seq].

⁸⁶ [2018] IECA 37 [20].

review. Discretion remains at the heart of our sentencing system and, in that regard, it is recognised that a sentencing judge has a significant margin of appreciation in terms of the sentence that he/she may impose in any particular case. Therefore, great deference will always be shown to a sentencing judge's reasoning. There must however be a discernable reasoning process that demonstrates appropriate analysis and rigour in the judge's approach to the imposition of sentence. If, however, the approach of the sentencing judge has simply been to outline the facts of the case, to perhaps list certain sentencing principles, and to then say, 'I take into account (this, that and the other) and accordingly I sentence the accused to imprisonment for five years', it virtually guarantees that the grounds of appeal will be:

- that the sentence imposed failed to respect the principle of proportionality in sentencing;
- that the sentencing judge over assessed the gravity of the offence; and/or
- that the sentencing judge failed to adequately take into account the mitigating factors in the case.

An appellate court faced with reviewing such a sentence is faced with the immediate difficulty that the sentencing judge's stated reasons provide no assistance in discerning whether the core constitutional value of proportionality between the gravity of the offence and the circumstances of the offender has been respected. Such a sentence gives no clue as to the sentencing judge's view on the gravity of the offence, nor does it give any clue as to the level of discount being afforded in mitigation. All one has is the ultimate sentence imposed. True, the factors synthesised in arriving at the ultimate result have been identified in terms of name checking them, but no indication has been given as how the proportionality requirement has been addressed.

A review of the sentencing judgments of the Court of Appeal since its establishment as published on the Courts Service website will confirm that it has encountered this problem repeatedly. The court has in some cases managed to uphold such sentences by engaging in a process of reverse engineering (and to have to resort to such an approach at all is suboptimal), but in other cases has found it simply impossible to do so.⁸⁷

The staged reasoning approach, in contrast, ensures that the two components of the proportionality requirement are individually addressed. Judicial discretion is not fettered, I suggest, in any meaningful sense. The stages that a judge is recommended to proceed through offer no more than a sign-posting towards the destination the judge is trying to get to. At every step along the route the judge still has the ability to exercise his/her considerable discretion, and within each stage will be free to apply instinctive synthesis of relevant factors and judicial intuition. The outcome however will be that gravity will have been assessed leading to a headline sentence, mitigation will also have been assessed for discounting against the headline sentence, and there will be an ultimate sentence that is transparent with respect to how the requirements of proportionality have been addressed, and as to the sentencing objectives being prioritised by the sentencing judge.

Speaking for myself, I agree with Dr Brown that Thomas O'Malley's model involving principled discretion probably best describes how we approach sentencing in Ireland. Some structure in sentencing is favoured, but as an aide to the correct exercise of

⁸⁷ For example, *People (DPP) v Flynn* [2015] IECA 290; *People (DPP) v Kelly* [2016] IECA 204; *People (DPP) v O'Brien* [2016] IECA 164; and *People (DPP) v JD* [2017] IECA 144 amongst others.

discretion rather than as a fetter on discretion. We are still feeling our way towards finding the correct balance.

The Future

As O'Malley (2011) points out, the legislature has tremendous scope for shaping judicial practice and policy in sentencing matters.⁸⁸ It has extensive constitutional competence to lay down general principles to be applied in sentencing. However, up until now the legislature has adopted a minimalist approach to seeking to guide judges with respect to their sentencing practice and policies, for the most part being content to trust the judges to formulate sentencing policy where they are free to do so, and to exercise their considerable discretion appropriately and responsibly. It is sensible, in that the legislature retains the freedom to shape judicial discretion at the macro level by the laying down of general principles in statute law, but it leaves judges the flexibility to determine general sentencing policy in areas where the legislature has not seen fit to do so, and the freedom to do justice in individual cases. However, this sensible policy leaves judges exposed to the populist charge that they are a law unto themselves and can do what they like in sentencing, which is simply not the case. There is an ever-present danger in today's world that the legislature could be prompted by populist pressure to impose, in an ill-considered way, more extensive and rigid guidance than they do at present.

While judges do have considerable discretion, this discretion is in fact significantly corralled by sentencing rules, principles and policies that must be applied. However, this needs to be better explained. Whenever there is an expression of public outrage at a sentence that is perceived to have been too lenient, or, less frequently, too severe, it is vital that the sentencing judge's reasoning, which must contain adequate explanation, is made available for consideration by reasonable persons, and that the rules, principles and policies that have been applied are clearly identified and cogently stated. Opacity in reasoning and lack of transparency increases the risk in today's culture of an ill-considered and rushed statutory intervention in response to populist pressure inspired by public outrage at the perceived inappropriateness of some sentence.

However, this is something that judges have it within their power to protect against. They can do this by a combination of (i) better reasoned judgments both at first instance and at appellate level, and (ii) through what O'Malley (2011) characterises as 'a vibrant system of appellate review' that provides meaningful guidance to judges at first instance through guideline judgments, which guidance is in the public domain, is open to scrutiny and is capable of being reviewed, and modified, with relative ease.⁸⁹ The main focus of this paper has been on reasoning, and the encouragement of better reasoning by the superior courts through the recommended semi-structured reasoning approach as opposed to pure instinctive synthesis. However, better, and more, guideline judgments will also lead to improved reasoning and greater transparency in the process.

It is unclear whether the Judicial Council Bill,⁹⁰ when finally enacted, will ultimately provide for a sentencing advisory body to assist the existing system of appellate review, or whether, as has been hinted at by the Minister for Justice and Equality, it may be amended to provide for more specific 'sentencing guidance'.⁹¹ Section 18 of the Bill as

⁸⁸ Thomas O'Malley, *Sentencing-Towards a Coherent System* (Thompson Reuters 2011) 106.

⁸⁹ *ibid* 115.

⁹⁰ Currently undergoing Third Stage legislative scrutiny, and before Seanad Éireann.

⁹¹ See note 21.

initiated envisages a Sentencing Information Committee ‘to collate, in such manner as it considers appropriate, information on sentences imposed by the courts’, and to disseminate that information ‘to judges and persons other than judges’. It remains to be seen as to what the final shape of the Bill will be. However, if it does contain provision for a properly resourced sentencing advisory body to assist the existing system of appellate review, that will be a welcome support for judges in the difficult task faced by them each day of endeavouring to exercise their discretion in sentencing matters justly and proportionately.