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SENTENCING PROCEDURES UNDER THE ADVERSARIAL AND INQUISITORIAL MODELS OF JUSTICE: A COMPARATIVE ANALYSIS

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ABSTRACT. This article examines the key procedural distinction in sentencing between adversarial (common law) and inquisitorial (civil law) systems: bifurcation versus unification. Common law jurisdictions separate sentencing from the trial phase, while civil law systems integrate sentencing within the verdict determination. The article examines the implications of these approaches and assesses their strengths and weaknesses. Bifurcation allows for a focused mitigation hearing, ensures that all relevant information is considered prior to sentencing, and minimises potential bias from prior convictions or sentencing factors during trial. However, it also prolongs proceedings and can lead to inefficiencies. By contrast, unified sentencing integrates all relevant factors into a single hearing, streamlining the process but potentially exposing defendants to prejudicial considerations before a verdict is reached. While neither tradition is likely to fully abandon its approach, the authors suggest that if a new jurisdiction were to adopt a sentencing model, the adversarial system—with modifications to increase efficiency—would be preferable. They conclude by calling for further empirical research to assess the comparative impact of these systems on sentencing outcomes and perceptions of fairness.

I INTRODUCTION

Throughout his illustrious career, Professor Michael Tonry has repeatedly stressed the importance of cross-jurisdictional, comparative research. In his own scholarly publications, Tonry has drawn upon the research and policy developments experience of many countries. His numerous edited volumes on issues such as sentencing and prosecutorial discretion are equally comparative, containing the perspectives of scholars and practitioners from both common and

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civil law traditions.[1] Twenty five years ago, in a volume on comparative sentencing edited with Richard Frase, Tonry highlighted the goals and benefits of a comparative approach in the following words: "The strategic aim is to consider whether practices that appear to achieve important public purposes in some countries can or should be adopted by others and whether the spread of ineffective or failed practices can be prevented".[2] The landmark series *Crime and Justice*, which has now published over 50 volumes, is a remarkable example of the kind of comparative research that its editor has advocated since the first volume appeared.

In the spirit of such comparative research, this brief article discusses the single most important procedural difference at sentencing between Anglo-Saxon, common law countries and civil law jurisdictions: *bifurcation* vs *unification*. Should a court determine sentence at the same time that it reaches a verdict? Or should the criminal process be divided, with sentencing taking place after conviction in a separate 'penalty phase' of the criminal process? Common law (adversarial) jurisdictions take the bifurcated approach.

In contrast to the adversarial approach, in most systems originating in the civil law tradition the sentencing decision is part and parcel of the decision to convict or acquit.[3] We suggest that, by its very nature, an adversarial process requires a separate penalty phase. When evidence is adduced by adversarial parties rather than by an investigating magistrate, a separate hearing becomes necessary – for example to permit the defence to mobilise its arguments in mitigation unburdened by a simultaneous defence strategy aimed at refuting the prosecution's case. Moreover, the judicial role under the adversarial model is more restrained and passive. An inquisitorial judge, in contrast, having been a more active participant throughout the criminal process may be better equipped to sentence without the benefit of additional submissions from the parties.

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[1] There are many such comparative volumes to cite, including Michael Tonry (ed), *Sentencing Policies and Practices in Western Countries. Comparative and Cross-National Perspectives* (Oxford University Press 2016).

[2] Michael Tonry and Richard Frase (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press 2001).

[3] It is worth noting that a number of continental European systems are less than fully inquisitorial. In Italy, for example, following the 1988 reform of criminal procedure rules and a 1999 Constitutional reform the court system is now informed by adversarial principles and yet unification still operates there. See Alessandro Corda, "Sentencing and Penal Policies in Italy, 1985–2015: The Tale of a Troubled Country" (2016) 45 *Crime and Justice* 107, 115, 130.

The essay explores the relative advantages and deficiencies of the two procedural approaches. Since neither legal tradition is likely to abandon its current procedures, the purpose of this article is to highlight and assess the strengths and weaknesses of both approaches.

Part II summarises procedures in the two traditions. Part III evaluates the claims made to justify a separate sentencing hearing and discusses the ways in which civil law trials address procedural concerns. Part IV briefly notes some costs of operating a separate penalty phase. Part V provides a summary and conclusion.

II SENTENCING PROCEDURE IN CIVIL LAW AND COMMON LAW JURISDICTIONS

2.1 *Sentencing procedure in civil law jurisdictions*

In civil law jurisdictions the verdict and the sentence are normally decided within a unitary hearing. We examine German law as a representative example of a unified system in the civil law tradition.[4] In Germany, before a case enters the trial phase, the police (supervised by the prosecution) investigate[5] and prepare a dossier (*Ermittlungsbericht*) that forms the basis for any further action by the prosecution. This report contains information relevant to sentencing and aims to provide a comprehensive view of the (provable) facts of the case. The narrative includes aggravating as well as mitigating factors since the prosecution is required by law to ascertain not only "incriminating" but also all "exonerating" circumstances.[6] As a result of the investigation, the prosecution may decide to charge the accused with one or more specific offences based on the alleged events. The court is not bound by this charging decision.

As an alternative, the prosecution may, in less serious cases[7], decline to prosecute, even though there is sufficient evidence to support

[4] For a selection of essays comparing sentencing in Germany and common law jurisdictions, see Kai Ambos (ed), *Strafzumessung / Sentencing. Angloamerikanische und deutsche Einblicke / Anglo-American and German Insights* (Göttingen University Press 2020).

[5] S. 160(1) in conjunction with S. 163(1) of the German Code of Criminal Procedure (Strafprozessordnung – StPO).

[6] S. 160(2) StPO.

[7] Only felonies with a one-year statutory minimum are exempt.

a conviction.[8] A prerequisite for this decision is that the offender's culpability is considered to be low and there is no public interest in the prosecution. In addition, the prosecution may decide not to prosecute but instead impose conditions that have to be fulfilled by the accused (such as payment or services to a non-profit organisation).[9] This decision is subject to the evaluation of whether, in the specific case, the imposition of the conditions can eliminate the public interest in a criminal prosecution and that the degree of culpability does not present an obstacle.

In more serious (but not the most serious) cases, the prosecutor may apply for a 'penal order' – a written judgment issued by the court without a trial.[10] As the prosecutor drafts the order for the judge to sign, their evaluation of the case is key. If the judge disagrees (or the defendant objects), the case will be set for trial. Again, this option exists only for less serious cases. It allows only the imposition of lesser penalties such as a fine, the suspension of the driver's license and, as a maximum, a suspended prison sentence not exceeding one year. In order to decide which procedural avenue to pursue, already at this early stage, the prosecution evaluates the circumstances of the case based on all aggravating or mitigating factors that speak in favour of, or against the classification of the case as a less serious one.

If a case proceeds to trial, sentencing considerations remain relevant throughout the proceedings. For example, a specific court's jurisdiction may depend on the case-specific mitigating and aggravating circumstances. According to German procedural law, the court's jurisdiction is determined, among other things, by the expected sentence. Sentencing considerations are also relevant to the principal (trial) stage of the criminal proceeding. Evidence relevant to the sentencing decision is adduced at the trial stage.[11] In fact, under German law, all aspects of the case – whether pertinent to the question of verdict or sentence – need to be addressed within the trial (*Mündlichkeitsgrundsatz*, i.e., the principle of orality) and are decided by the trial court as part of the judgment. Consequently, all questions

[8] S. 153 StPO. The court only has to agree in certain cases. See Alexander Heinze and Shannon Fyfe, "Role of the Prosecutor" in Kai Ambos et al. (eds), *Core Concepts in Criminal Law and Criminal Justice* (Vol. I, Cambridge University Press 2020) 364 f.

[9] S. 153a StPO. The court has to agree to this decision.

[10] S. 407-412 StPO.

[11] Thomas Weigend, "No News is Good News: Criminal Sentencing in Germany since 2000" (2016) 45 *Crime and Justice* 87.

that are dealt with and prepared for in a separate hearing in a bifurcated system are addressed during the trial.

Professional judges know the case file and use it for preparation of the trial,[12] while lay judges are prevented from having any knowledge of it.[13] Under German law, the court has the duty to investigate all relevant facts (*Aufklärungspflicht*).[14] This duty extends to all facts relevant to the sentencing decision. Since the trial opens with the examination of the personal situation of the defendant,[15] this informs the determination of relevant sentencing factors (according to substantive law inter alia the offender's prior history is a relevant sentencing factor[16]).

Unlike Anglo-American systems, the defendant's prior crimes are considered early in the proceedings. According to the law, however, they only are to be discussed if and when necessary and the exact timing depends on the decision of the presiding judge.[17] This means that it is possible for them to be introduced at the beginning of trial when the defendant is heard. Prior convictions are consequently routinely examined before the court reaches a verdict. Discussing the defendant's criminal history before an adjudication regarding guilt raises questions about their potential prejudicial effect, an issue we shall discuss at greater length later in this article.

During the subsequent taking of evidence the consequences of the offence are also established (e.g., by hearing the victim as a witness, through written or oral statements of the treating physicians, etc.). The court, the public prosecution, and the defence will pose questions (e.g., about the motives or consequences of the crime). The German judge is more interventionist than their common law counterpart. Aggravating and mitigating circumstances relevant to verdict need to be established during trial, either through witness testimony or by

[12] This knowledge raises concerns about a possible prejudicial effect, Eberhard Schmidt, "Probleme der Struktur des Strafverfahrens unter rechtsstaatlichen Gesichtspunkten" (1959) *Deutsche Richterzeitung* 16, 20, particularly with regard to prior convictions.

[13] RGSt 69, 120 ff.

[14] S. 244(2) StPO, "The court shall, in order to establish the truth, ex officio extend the taking of evidence to all facts and means of proof which are relevant to the decision".

[15] S. 243(2) StPO.

[16] S. 46(2) of the German Criminal Code (Strafgesetzbuch—StGB).

[17] S. 243(5) 5 and 6 StPO.

adducing other evidence.[18] With regard to aggravating circumstances, the rule of *in dubio pro reo* (which states that any factual ambiguity is resolved to the benefit of the accused) is applicable,[19] so that only those aggravating factors established beyond reasonable doubt are to be applied. At the end of the trial the prosecution addresses both aggravating and mitigating circumstances, while the defence focuses on mitigation. The prosecutor sets out the reasons for the sentence in the summation (*Schlussantrag*) and recommends a specific sentence. This recommendation does not legally bind the court. Unlike in many common law systems[20] the court can (and does at times) impose a more severe sentence, although its sentence normally remains below the prosecution's proposed sentence range.[21]

The focus of the defence during trial is more unidimensional – to achieve the best outcome for the accused. As a result, the defence will address aggravating factors only to refute or mitigate their impact on sentence. It will highlight mitigating factors and advance any mitigating factor overlooked by the court or prosecution. In particular, less obvious mitigating factors[22] and those that only arise after the conclusion of the investigation[23] are often raised by the defence at trial. This dual duty on the defence complicates the primary defence task of focusing on exculpation. The defence lawyer needs to adopt a two-track defence strategy, i.e., maintaining the innocence of the defendant while simultaneously stressing mitigating factors in the event of the offender being convicted. This obliges the defence to adopt contradictory positions. This may not always weaken the case for an acquittal and can simply be viewed as a prudent defence strategy. However, a court's awareness of potentially mitigating factors may affect its perceptions and possibly its decisions. For

[18] German criminal procedure law provides for only four forms of evidence: Expert witness, inspection (*Augenschein*), documentary evidence (*Urkundenbeweis*), and witnesses.

[19] Gerhard Schäfer, Günther M. Sander and Gerhard van Gemmerer, *Praxis der Strafzumessung* (C.H. Beck 2024) 469.

[20] Imposing a sentence that is harsher than the prosecution's recommendation is extremely rare in common law jurisdictions. This judicial deference to a sentence within the range created by the defence and prosecution is consistent with the adversarial model of adjudication.

[21] Weigend, *supra* note 11, 87.

[22] E.g., S. 46b StGB.

[23] E.g., S. 46a StGB.

example, highlighting provocation by the victim as a mitigating factor may strengthen a court's perception of the offender's guilt, thereby increasing the chance of a conviction.

The last stage of the trial includes the court's verdict and, if the accused is convicted, the specific sentence. The identification of the relevant sentencing factors is an important part of the written judgment. The court is required by law to set out the circumstances determining the penalty.[24] Hörnle criticizes this procedure, arguing that in practice this offers only limited insight into the factors which determined the sentence imposed.[25] However, since the court has to identify relevant sentencing factors, at least these can be found in the judgment. In principle, this allows for a sentence-based appeal if the sentencing considerations laid down in the judgement reveal an error in law.[26]

This brief overview shows that in a civil law jurisdiction such as Germany, all parties to criminal proceedings must consider issues relating to sentencing from the very outset of the trial. These considerations remain relevant throughout the criminal procedure. Furthermore, sentencing factors are not only important for their core purpose – the determination of the sentence – but also with regard to other procedural decisions such as whether or not to indict.

Facts and circumstances which constitute elements of the offence may also have later relevance for sentencing. For this reason, operating within a single hearing, a court will need to avoid double-counting factors, either in mitigation or aggravation. German sentencing law thus provides a rule against double-counting. Sec. 50 German Criminal Code states that "A circumstance which, alone or together with other circumstances, justifies the assumption that the case is a less serious one and which simultaneously represents a special statutory mitigating circumstance as referred to in section 49 may only be considered once".[27] Although double-counting factors is also possible within the adversarial two-stage approach, the danger is

[24] S. 267(3) of the StPO.

[25] Tatjana Hörnle, "Comparative Assessment of Sentencing Laws, Practices, and Trends" in Darryl K. Brown, Jenia I. Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 904.

[26] See further Schäfer, *supra* note 19, 561 ff.

[27] See the official translation at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0288 (accessed 10 March 2025).

greater in the unitary scheme – hence the rule in German law.[28] The question is whether the existence of the rule is sufficient to prevent sentencing factors contaminating earlier judicial decisions. Empirical research is needed to answer this question.

Efficiency is the principal advantage of a unified approach. However, some principled reasons can also be advanced in its favour. The civil law trial is a search for an objective truth.[29] This inquisitorial idea lends itself to a unified approach because it requires the adjudicator to be aware of *all* relevant facts. Knowing from the beginning all (or most) relevant information during trial, the court is well-placed to determine an appropriate sentence. The need to give a written reason for a sentencing decision also prevents sentencing from being just an afterthought, even in a unified system. Furthermore, the offence and the offender, the question of facts and the legal consequence are inextricably linked. Under German law, factors of dual relevance exist. A separation is sometimes impossible or inconvenient and may lead to unnecessary delay, heightening the burdens of a trial on the accused (and the costs to the state). A unified approach might also alleviate the burden of the accused because, rather than anxiously waiting, they know immediately what they are facing in terms of punishment. However, the unified approach carries the risk that the personal situation of the defendant is insufficiently explored at trial because the main focus is the determination of guilt. Discussion of sentencing factors during trial also may raise problems regarding the presumption of innocence.[30] If the accused is deemed innocent until proven guilty, considering potential arguments in mitigation may undermine that presumption of innocence.[31]

2.2 *Common law sentencing procedures*

In contrast to the civil law approach, courts in common law jurisdictions create a separate hearing for sentencing. Common law

[28] For discussion see Michael Bohlander, *Principles of German Criminal Procedure* (Hart Publishing 2012) 190–1.

[29] Thomas Weigend, "Truth in Criminal Law and Procedure: The Erosion of a Fundamental Value" (2019) 28 *Juridica International* 28, 29.

[30] See Hans Dahs, "Fortschrittliches Strafrecht in rückständigem Strafverfahren. Zur Dringlichkeit einer Zweiteilung der Hauptverhandlung durch ein „Schuldinterlokut"" (1970) *Neue Juristische Wochenschrift* 1705, 1706.

[31] Heinz Schöch and Hans-Ludwig Schreiber, "Ist die Zweiteilung der Hauptverhandlung praktikabel? Erfahrungen mit der Erprobung eines informellen Tatinterlokuts" (1978) 11(3) *Zeitschrift für Rechtspolitik* 63, 67.

jurisdictions normally pause after a verdict is recorded, either following a trial or a hearing where the defendant waives his right to trial and enters a guilty plea. In what follows we describe the essential features and steps followed in a common law sentencing hearing. This 'generic' description (based on procedures in England and Wales) attempts to capture the essential features of sentencing under the adversarial model. Readers should be aware of significant variation, however, across countries.

In most common law jurisdictions, a single judge presides at the first tier of trial court, determining both verdict and sentence, albeit with an interval between the two phases. In England and Wales, there are two tiers of trial court: the magistrates' courts and the Crown Court. In the latter, a jury determines verdict while the presiding judge imposes sentence in the event of a conviction. Bifurcation operates more clearly in the Crown Court: there are separate decision-makers and normally an interval between verdict and sentencing. At the lower level, most cases are resolved by a panel of three lay magistrates.[32] After deciding on verdict in their retiring room, the magistrates return to open court to announce their verdict and give reasons. At that point, they will generally retire to deliberate, sometimes for a few minutes if the sentencing is to take place the same day. More commonly, the matter will be put over for days or weeks to permit various agencies and individuals to prepare reports on the offender (see below). During their deliberations on verdict the magistrates will determine whether the prosecution has proven its case to the criminal standard. Sentencing will not be discussed at this stage. However, nothing prevents the magistrates from thinking ahead to sentencing matters[33], and anecdotal evidence suggests that this sometimes occurs. For present purposes, we simply note that in the lower courts, bifurcation may be less rigorously implemented.

The different routes to conviction (guilty plea or contested trial) have important consequences for sentencing. A court sentencing an offender convicted following a trial will acquire much information about the nature of the offence, and to a lesser degree the character and circumstances of the offender. In contrast, if the offender pleads

[32] A small percentage of cases—those which are more serious or complex—are resolved by a professional judge, known as a District judge.

[33] Professional judges who sit in the trial court level of other common law countries such as New Zealand, Canada and Australia may also think ahead to the sentencing decision. In these jurisdictions a single judge decides both verdict and sentence.

guilty, the sentencing court will only have a relatively concise agreed statement of facts (the 'basis of plea' in England and Wales). In these cases, the court is deprived of the opportunity to hear the evidence. As Wasik notes, "It may seem odd, at first sight, that an accused can be found guilty of an offence when important factual issues remain unresolved".[34] But even at trial the focus is upon matters contested by the parties and only those issues relevant to verdict. In both routes to conviction there may be a need for a separate hearing where contested facts likely to affect sentence can be resolved. Lawyers for the parties will make representations about various disputed facts and the court will ultimately issue a ruling. In this hearing, the court will make a determination with respect to all contested facts.

Introducing an adjournment after conviction permits the preparation of reports for consideration at the separate sentencing hearing.[35] The same adjudicator (a single judge or panel of magistrates in England and Wales) is usually responsible for presiding at trial and determining sentence. This is sometimes impossible due to crowded timetables and is one of the disadvantages of bifurcation.

At the sentencing hearing, the prosecution makes its submission on sentence during the hearing and immediately afterwards, the defence provides its plea in mitigation. The defence speech in mitigation lies at the heart of the adversarial sentencing hearing. The defence focuses on a range of issues, and draws upon a variety of additional reports, testimony and other sources of information. Once the defence mitigation is concluded, the court may rise and retire from the courtroom to reflect on the submissions and put reasons for the sentence in writing. Longer delays will be employed in complex cases.

At first glance, the justifications for a separate penalty phase may appear purely practical: additional time is needed for the court to ensure it has all relevant information necessary for sentencing (discussed later in this essay). Yet there are arguments of principle, to the effect that a delay between conviction and sentencing allows for greater offender (and victim) participation and also promotes a more reasoned and informed sentence. Since the civil law jurisdictions have

[34] Martin Wasik, *A Practical Approach to Sentencing* (Oxford University Press 2014) 16.

[35] Lengthy court backlogs caused by the pandemic have resulted in a higher percentage of cases being sentenced on the same day as conviction. Probation services provide more limited 'on the day' pre-sentence reports on the offender. However, the distinction between trial and punishment remains still clear, even of the sentencing proceeds hours rather than days or weeks after the trial ends.

operated a unitary proceeding for centuries, why is it necessary to employ two distinct hearings separated in time? We can identify several claims to justify the use of a separate sentencing hearing separated from the trial by a delay.

III BIFURCATION OF THE TRIAL PROCESS: EXPLORING THE JUSTIFICATIONS

3.1 *Different issues being litigated: verdict and sentencing*

One justification for creating a separate penalty phase relates to the nature of the decision being made. Simply put, there are different issues being litigated at these two stages of the criminal process. At sentencing, the question is not whether the offender is guilty, but how much punishment is appropriate, and what form should it take? From the point of a unitary hearing, it is argued that the offence and the offender, the factual question of the (alleged) crime and the decision on the legal consequences are inextricably linked.[36] Facts that must be established for the guilty verdict cannot be separated from those facts that are decisive for the determination of legal consequences.[37] This applies both to elements of the offence and to general criteria of criminalisation. For example, it is not possible to determine whether someone is evading a legal obligation to pay maintenance in violation of the criminal law (s. 170 of the German Criminal Code [Strafgesetzbuch—StGB]) without a comprehensive clarification of the (financial) circumstances of the person concerned. A detailed examination of the accused and her development is also necessary to determine a mental impairment (*Zurechnungsfähigkeit*). Factors of dual relevance are not uncommon. Consequently, an overlap is unavoidable, especially in complex cases. It can therefore be argued that a comprehensive investigation as part of the criminal proceedings is not only possible, but also desirable for reasons of effectiveness and speed. However, it can also be argued that an adjudicator focused on verdict should not be distracted by wider considerations relating to sentencing.

The application of sentencing factors may affect verdict decisions in a similar way. After the seriousness of the offence, an offender's

[36] See Schöch and Schreiber, *supra* note 31, 63.

[37] Ernst Heinitz, "Zweiteilung der Hauptverhandlung" in Walter G. Becker and Ludwig Schnorr von Carolsfeld (eds), *Sein und Werden im Recht. Festgabe für Ulrich von Lübtow zum 70. Geburtstag* (Duncker & Humblot 1970) 835, 841.

prior convictions are the most important determinant of sentence severity in the common law jurisdictions.[38] Even in civil law countries such as Germany, previous convictions remain one of the most important aggravating factors at sentencing.[39] Prior convictions are principally relevant for the purposes of sentencing. Yet prior crimes, particularly when similar to the current charge, are likely to be highly prejudicial to the defendant.[40] Even if the sentencer is a professional judge, there is a danger that after hearing about a lengthy criminal record, the court will assume the defendant has a propensity to offend, and this assumption may affect verdict. Experienced judges may be able to compartmentalize and distinguish information relevant to verdict rather than sentencing, but making this distinction will be more challenging for laypersons. If prior convictions are introduced only later, at a separate sentencing, this potential bias at trial is eliminated. More than that, at sentencing the defendant has the opportunity to contextualise the prior crimes by offering a mitigating explanation for the prior offending, one which may not be apparent by the bare fact of conviction. The offender's submissions on his or her criminal past may reduce the additional punishment deemed appropriate to reflect the previous conviction(s).

Merging trial and sentencing carries other dangers. Returning to the trial context, there are clear dangers arising from jury decision-making when jurors are aware of the penalty likely to follow conviction. Juror awareness of the likely sentence may affect the verdict. Knowing that a conviction will trigger a very severe sentence may reduce the likelihood of conviction. In others, believing the offender may receive only a modest punishment may make a conviction more likely. It is possible that when the decisions on verdict and penalty are fused, consideration of the latter may affect the former.

A final distinction between trial and sentencing concerns the temporal frame of the proceeding. At trial, the focus is on the past - the offence and the offender's actions and intentions at the time the

[38] See Richard Frase and Julian V. Roberts, *Paying for the Past: Prior Record Enhancements in the US Sentencing Guidelines* (Oxford University Press 2019).

[39] Julian V. Roberts and Stefan Harrendorf, "Criminal History Enhancement at Sentencing" in Kai Ambos et al. (eds), *Core Issues in Criminal Law and Criminal Justice* (Vol. I, Cambridge University Press 2020).

[40] Its prejudicial character was also one of the main arguments advanced in favour of bifurcation, see Helmuth Fischinger, "Teilung des Strafverfahrens in zwei Abschnitte. Schuldspruch und Strafausspruch" (1969) 81 *Zeitschrift für die gesamte Strafrechtswissenschaft* 49, 54.

crime occurred. In contrast, a sentencing court will be equally concerned about *future* events: how likely is this offender to re-offend or reform? In fact, the sentencing court is looking Janus-like, in two directions simultaneously: back in time to determine the seriousness of the offence and the offender's culpability for that offence, and also to the future, to establish the offender's risk of future offending.

3.2 *Different evidentiary standards apply*

Another key justification for bifurcation is that different evidentiary rules operate at trial and at sentencing phases of the criminal process. Rigorous rules of evidence apply at trial, whereas these become significantly less stringent at sentencing. Even hearsay evidence may be admitted if it is credible and trustworthy.[41] Horovitz describes sentencing as constituting "a completely different procedural regime".[42] Aggravating factors generally need to be proved to a criminal standard; but for mitigation, a balance of probabilities, or an even lower "air of reality" test generally applies.[43] This is a further reason to consider these factors separately from the evidence adduced at trial; if a single hearing is employed, the adjudicator must juggle these different legal thresholds when evaluating evidence and argument. Professional judges should be able to draw the appropriate distinctions, but the danger remains. In this respect, a bifurcated proceeding simplifies judicial decision-making.

3.3 *Shift in focus from the offence to the offender*

A separate penalty hearing permits a more comprehensive examination of the offender's life circumstances and character. At trial, in common law jurisdictions the focus is largely on the offence, and whether the offender is criminally responsible. The issues in litigation mostly relate to the crime, and specifically whether the prosecution has proven the elements of the offence to the criminal standard. The defendant's circumstances will emerge only to the extent that they

[41] Naomi Lutes, "The Role of Defence Counsel at Sentencing" in David Cole and Julian V. Roberts (eds), *Sentencing in Canada. Essays in Law, Policy and Practice* (Irwin Law 2019) 143. This question of (a change of) evidentiary rules is less relevant in the German system as there exist few evidentiary rules during trial in the first place, e.g., hearsay evidence is routinely used in German trials.

[42] Anat Horovitz, "The Emergence of Sentencing Hearings" (2007) 9(3) *Punishment and Society* 271, 272.

[43] Allan Manson, *The Law of Sentencing* (Irwin Law 2001) 174–5.

shed light on the *actus reus* or *mens rea*: Did they commit the act? Did they intend to commit this specific act? Issues relating to the level of blameworthiness and sources of mitigation will play little role. As a result of the focus on verdict, the court may learn little about the individual's personal circumstances, although these are normally relevant to the sentencing decision.

The situation is different in civil law trials where the background of the defendant is routinely examined. This may be problematic because private and/or prejudicial information is routinely discussed in open court.[44] However, as a consequence, strategic considerations do not prevent an accused from testifying. This is one argument advanced in favour of unification: The separation into two phases may make the accused less willing to confess and to cooperate in clarifying the facts of the case. Personal contact with the accused is made more difficult because they are not freed from any inhibitions (to speak freely) at the beginning of the main hearing by a conversation about their personal circumstances.[45]

3.4 *Undermining the defendant's trial strategy*

Creating a separate penalty phase, with an interval between trial and punishment, may also contribute to greater equality between the parties. As noted earlier, the continental system of a unified hearing requires the defence lawyer to simultaneously affirm the client's innocence *and* offer evidence in mitigation.[46] Or, even worse, in order not to weaken its defence strategy predicated on the client's innocence, the defence may omit reference to mitigating factors. Even if an experienced defence lawyer can manage this problem, this still places the defence at an obvious conceptual and strategic disadvantage relative to the prosecutor. Jenia Turner noted this problem when she wrote that bifurcation avoids placing the defendant "in the awkward position of simultaneously arguing his innocence and contesting sentencing facts of which he is not supposed to have knowledge if he were innocent".[47] Aside from the issue of trial

[44] Fischinger, *supra* note 40, 52.

[45] Schöch and Schreiber, *supra* note 31, 63.

[46] A problem that has been identified repeatedly by proponents of a bifurcated system, e.g., Fischinger, *supra* note 40, a defence lawyer with an experience of 42 years.

[47] Jenia I. Turner, "Implementing Blakely" (2004) 17(2) *Federal Sentencing Reporter* 106, 108.

strategy, the defendant is caught in a trap. At sentencing the offender has a chance "to tell in his own words why the sentence should be lessened",[48] yet this exercise of allocution is unconvincing if the defendant is also denying responsibility for the offence. A separate hearing may create a more equal relationship between the parties. At sentencing the defence can focus entirely on mitigation, providing context for the offence and informing the court about the client in a way that does not compromise its defence strategy regarding the criminal charge.

Defendants can benefit from a delay between conviction and sentence. This period may enable them to reflect upon the nature and consequences of their wrongdoing. If several weeks separate the trial from the sentencing hearing, the offender has an opportunity to produce evidence that the offence was an aberration in a normally law-abiding life, or the product of external pressures. In a unified system the phase between indictment and trial is the principal means to permit this reflection.[49] In practice, there is time before the case is adjudicated which permits a victim-offender-mediation or other opportunities for mitigation such as treatment for a drug problem. It might even strengthen the accused's case in that it shows their efforts to reform are serious if they act before the start of the trial and therefore before they are even convicted.

Finally, within an adversarial model of justice, it is important to allow the parties the time and opportunity to respond to each other's submissions for sentencing. In a unified hearing, little preparation will be possible. A separate penalty hearing to determine sentence facilitates this adversarial scrutiny. The prosecutor may challenge certain arguments in mitigation; the defence may require the State to prove alleged aggravating factors to a criminal standard. The sentencing court will have a more informed view of the crime and the offender as a result of the adversarial exchange of views.

In complex or serious cases, defence lawyers may conduct investigations into the crime, as well as the individual's personal circumstances and social history. The defence may also seek expert witnesses (such as psychologists or psychiatrists) to address the defendant's mental state at the time of the offence. The submission may uncover or highlight grounds to consider the offender less culpable, or other

[48] Kimberly A. Thomas, "Beyond Mitigation: Towards a Theory of Allocution" (2007) 75(5) *Fordham Law Review* 2641, 2655.

[49] In German law, unlike the Anglo right to a speedy trial, the court is not bound to a specific time frame after the indictment takes place.

reasons for mitigation. Thus, an effective speech in mitigation can make the difference between a community penalty and a term of custody, or a short versus long term of imprisonment. An effective plea in mitigation may require considerable time to prepare, as well as to arrange for character and other witnesses to testify on the offender's behalf at sentencing.

3.5 *Offender agency and participation at sentencing*

A separate hearing may amplify the voice of the offender, who has an important role in the sentencing decision, either directly or through counsel. Courts allow the offender to "speak to sentence", to address the court directly prior to sentence being imposed. This represents an opportunity for the individual to contextualise the offence and to make any relevant submissions.

A temporal interval permits defendants greater opportunity to influence the sentencing outcome. For example, they may make voluntary reparation after conviction but prior to sentencing. They may also provide evidence of progress towards rehabilitation. An interval also permits a restorative justice meeting involving the offender and the victim to take place, if this is deemed desirable. Most common law jurisdictions, including England and Wales and Canada, allow courts discretion to delay sentencing for the specific purpose of allowing a restorative encounter/ resolution to take place or to recognise other important developments or changes in the offender's life circumstances that may legitimately affect the sentence ultimately imposed. This is known as "deferred sentencing", and the sentencing hearing may be deferred for six months or more.[50]

Finally, if the defendant declined to testify at trial, they now have the opportunity to speak to sentence. Denying the offender an opportunity to speak to sentence is generally held to be a reversible error in law. Whether they accept the court's invitation to speak or not, knowing they have the right may well enhance perceptions of procedural legitimacy.[51] Offender input may also be indirect, through his counsel or via the pre-sentence report.

Defendants have an opportunity to speak in civil law proceedings too. During trial they can also contextualise the offence and present any relevant information – either themselves or through counsel,

[50] Julian V. Roberts, "Deferred Sentencing: A Fresh Look at an Old Concept" (2022) 3 *Criminal Law Review* 204.

[51] See Tom R. Tyler, *Why People Obey the Law* (Princeton University Press 2006).

although it takes place before the defendant is convicted. In addition, in German law the right to the last word at trial belongs to the defendant.[52] This affords the defendant the opportunity to strengthen their case for mitigation, for example, if they apologized before being convicted. This opportunity to reflect on their actions before the court's final decision might be favourable to perceptions of legitimacy of the trial.

Under the adversarial model once the conviction is announced, the defendant, now an offender, can take comfort from the knowledge that he now has a fresh opportunity to be heard, this time in order to speak to sentence in order to mitigate the sentence imposed. While no direct empirical comparison has been made involving defendants in common law and civil law countries, perceptions of legitimacy may be enhanced by a system which allows more opportunities for litigants to express their views and advocate on their behalf.

3.6 *Time necessary to obtain information relevant to sentencing*

The additional time created by a separate hearing is an important justification. Both prosecution and defence can benefit from more time and greater opportunity to prepare their submissions on sentence. In the US, this may involve the defence retaining sentence planners or 'sentencing experts' to assist in preparing the defence sentence submission. Professional mitigation experts are particularly likely in high value white collar and capital cases across the United States. But in all jurisdictions, the defence solicitor will likely solicit statements of support from relatives, friends, employers, or medical experts. Expert witnesses may also be sought to document any diminished culpability claims relating to medical or psychiatric problems. Soliciting and compiling these reports takes time and is unnecessary and indeed highly inappropriate unless and until the defendant has been convicted.

IV COSTS OF A SEPARATE PENALTY PHASE

One of the main arguments advanced against bifurcation is that it extends the trial due to the addition of a separate penalty phase.[53]

[52] S. 258(2) StPO.

[53] See Heinitz, *supra* note 37, 837; Beatrice Biland-Zimmermann, *Das Schuldinterlokut in der Hauptverhandlung* (Juris Druck + Verlag 1975) 54 ff.

The right to a trial within reasonable time[54] is an important right and key requirement of justice. An increase in the duration of criminal proceedings may be problematic. An additional delay due to a separate penalty phase would therefore need to be counterbalanced by other reductions in the duration of trials. However, it should also be noted that in cases of acquittals a separation necessarily leads to a reduction in trial time because all the (later as superfluous revealed) sentencing considerations cease to be addressed.[55]

Finally, we note some practical difficulties which arise as a result of the decision to create a separate hearing for sentencing. First, the criminal process is necessarily protracted. Some offenders may prefer to learn their sentence as soon as possible in order to move on with their lives. If the defendant is detained in custody pre-trial, arrangements will need to be made to determine whether he should be released on bail, and if so, under what kinds of conditions. Resolving the issue of the offender's custody status may require yet another hearing to hear the bail application. At best it will be necessary to protract proceedings following conviction.

Second, the victim may be disappointed to learn that a further delay is necessary before sentence will be determined. Undue delay may protract victim suffering. Some victims may be launching a civil action against the offender, and this may be delayed until after the sentencing hearing has been held, and possibly the appeal period has elapsed. Third, court services will need to schedule an additional hearing, and the practitioners and judge (and possibly the victim as well) will need to accommodate this in their schedules. There is a preference in common law countries to require the same judge who presides over the trial to be the one who imposes sentence.[56] This is a legal requirement in some cases and is endorsed in sources of guidance in England and Wales.[57] The same individual or panel of magistrates is necessary to ensure a rounded knowledge of the case and the circumstances of the offender, and as noted earlier, this requirement may further complicate arrangements.[58] While not a normative consideration, the additional costs and time of the sentencing phase constitutes one of the main arguments against a change

[54] Article 6(1) ECHR.

[55] Dahs, *supra* note 30, 1706.

[56] R. v. Ryan [1976] Crim LR 508.

[57] Richard Taylor, Martin Wasik and Roger Leng, *Blackstone's Guide to the Criminal Justice Act 2003* (Oxford University Press 2004) 230.

[58] Roger Farrington, *Summary Justice* (Matador Books 2016) 61.

from unification to bifurcation.[59] As a consequence of the principle of legality and the absence of 'bargaining' over pleas, civil law systems likely have more trials than common law regimes, and this would further limit their ability to conduct a separate penalty hearing.

V SUMMARY AND CONCLUSION

Ultimately, the standard by which a sentencing system is to be measured is how well it serves the pursuit of justice and this includes the requirement of a proportionate sentence. We have discussed the different claims advanced in favour of bifurcation and considered them from a unified point of view. Most issues are adequately addressed in both systems.

While within a bifurcated system verdict and sentence are clearly separated, a unified system sees the offence and the offender, the factual question of the (alleged) crime and the decision on the legal consequences as inextricably linked. Consequently, aspects that are separated in a bifurcated system (and dealt with differently in the sentencing phase such as different evidentiary standards or offender participation), are integrated in a unified system. The different evidentiary standards are taken into account by the trial judge, the offender's personal situation is addressed at the beginning of the trial and at the end they have the right to a last word.

However, two features of a bifurcated system seem useful in reaching a just sentence. First, it is of paramount importance that the sentencing court has all necessary information prior to determining sentence. A separate sentencing phase, conducted after a period of time, is better able to accommodate this need. As we have shown, it also allows the parties time to reflect and for more information to be gathered on which to base the final sentence decision. Second, the offender who contests the charge (and their lawyer) is at a strategic disadvantage in a unified system. By needing to assert innocence while simultaneously enumerating mitigating factors, the defence is faced with a dilemma that clearly disadvantages them.

Anecdotal evidence suggests that experienced practitioners in the civil law jurisdictions manage to adapt their defence strategy to accommodate this potential problem. In contrast, a separation allows the defendant to focus on exculpation at trial and on mitigation at sentencing. In addition, the fact that prior convictions routinely are

[59] Heinitz, *supra* note 37, 837.

addressed during or even right at the outset of a trial risks being prejudicial to the adjudicator(s) and may undermine the confidence of the accused in the impartiality of the court. This said, there is no compelling evidence that sentencing outcomes (at least in Germany) are adversely affected by the use of a unified model. The civil law systems are no more punitive,[60] and there is no evidence of problems regarding the perceived legitimacy of sentencing decisions. In short, sentences do not appear to be (more) unjust under the unitary model. In all likelihood, lawyers are able to adjust their trial strategy in response to the problem.

Most scholarship focuses on the adversarial approach. As a result, we know less about the strengths and weaknesses of a unified hearing.[61] We cannot therefore conclude that this approach produces less principled or individualized outcomes. Establishing which of the two approaches is superior remains challenging. No empirical research has attempted to compare procedures or outcomes under the twin approaches. Ultimately, the question is whether one procedural model yields more principled and individualized sentencing outcomes. We see no obvious metric with which to compare the two approaches on these dimensions. The court's reasons for sentence may constitute one potential source of comparison. If one of the two approaches achieves a more profound or holistic view of the offence and the offender, this should be reflected in a more detailed and thoughtful justification of sentence. Defendants' perceptions of the process are also a research priority. Are defendants in one model more likely to believe that they have been fully heard and fairly treated? Objective measures of success could include the volume of information provided to the court about the offence, the offender and the suitability of available sentencing options.

As noted in our introduction, neither legal tradition is about to abandon their current approach to determining sentence. However, if a new jurisdiction were to emerge that needed advice choosing a sentencing procedure, we would recommend the adversarial model, albeit one which also considered the need for expeditious procedures

[60] Weigend, *supra* note 11, 90 ff.

[61] One potential, as yet unexplored effect of bifurcation relates to the profile and visibility of sentencing decisions. Conducting a separate hearing raises the profile of the sentence imposed and as a consequence, the level of public scrutiny. Particularly in serious cases, the sentencing attracts much greater media coverage and commentary than in civil jurisdictions. This heightened attention may enhance any deterrent or censuring effects of the sentence. On the other hand, it is perhaps not a coincidence that public criticism of sentencing and sentencers appears much stronger in common law countries.

in certain cases. For example, bifurcation could be waived for the least serious cases, with sentencing taking place shortly after verdict. In addition, it is important that the same adjudicator that participated in the trial also decides on sentencing. Finally, common law systems could consider one of the potential advantages of the civil law systems, namely, the ability to review and possibly adjust the sentence as it is being administered.

AUTHOR CONTRIBUTIONS

J.R. and A.P. contributed equally to the manuscript

DATA AVAILABILITY

No datasets were generated or analysed during the current study.

DECLARATIONS

COMPETING INTERESTS The authors declare no competing interests.

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