Summary. Sentencing law and sentencing decision making

The initial context of this research – judicial cooperation with regard to consistency in sentencing
This dissertation is part of a research project in which the phenomenon of judicial cooperation in several areas of the law has been taken as a starting point. The concept of judicial cooperation describes informal structures and products thereof of judicial policymaking for the purpose of the settlement of legal cases. Results of judicial cooperation concern for example the calculation of alimony, procedural rules for the settlement of civil cases and rules for the calculation of compensation after the (non voluntary) annulment of employment contracts. The initial focus of this research has been the rise of forms of judicial cooperation with regard to the topic of sentencing. To promote consistency in sentencing, the judiciary has over the years taken steps to develop so called starting-points or orientation points for sentencing as well as a database for sentencing. Both ‘instruments’ lack a formal status from a legal point of view, but especially the starting or orientation points proved to be influential to the decision making process. The starting- or orientation points (hereafter: orientation points) for sentencing offer a short type-description of the fact combined with either a fixed indication of the sentence to impose, or an indication of the bandwidth within which the actual imposed sentence could be. The database for sentencing offers, in contrast to the orientation points, no specific descriptions of so-called standard cases, but aims primarily to support judges searching for similar cases by providing insight into sentencing decisions in individual cases made by other judges.

The legitimacy of sentencing – finding a perspective for analyses
The rise of the phenomenon judicial cooperation in sentencing has been analyzed in Dutch academic literature from several different perspectives. Primarily attention is given to the overall perspective of judicial lawmaking – the way in which the phenomenon leads or could lead to binding rules of substantive and procedural law. From another and somewhat broader perspective, the phenomenon has been linked with aspects of justification and accountability and the way account is given for decisions taken within the boundaries of judicial discretion. That (broader) context of justification carries a particular character against the background of criminal law and punishment – it ultimately deals with the application of government power on an individual by means of intentionally inflicted harm. This research aims at,
rather than exploring the possibilities and limits of judicial cooperation with regard to consistency in sentencing, providing insight in the meaning of the phenomenon in the light of the way in which account is given for the sentencing decision.

The justification of the sentencing decision can, it was stated, be divided into two main roads. Currently, most attention is paid in the Netherlands to the justification afterwards: the reasoning of the sentence. The practice of the sentence-reasoning lies under critique, partly because of the alleged mechanical and common placed character of it, expressed and symbolized by the mere reference to the seriousness of the fact, the circumstances among which it has been committed and the person of the offender. For that reason, both the legislator and the judiciary attempt to increase the meaningfulness and expressiveness of the sentence reasoning. That lead for example to the coming into force of a statutory rule, obliging the courts to respond to explicitly presented opinions on the sentence to impose, stated by both the participants in criminal proceedings: the public prosecutor and the defendant. Attempts to structure the reasoning of the sentence as laid down in the verdict are made within the judiciary itself, within the framework of PROMIS to be exact, an institutionally based project to improve the reasoning in criminal cases. Not only the orientation points for sentencing, but also attempts to structure the sentence reasoning raise questions however that refer to elements that involve the legitimacy of the sentencing decision in a more broader sense. With that, another perspective of justification comes up for discussion, namely the way in which prior to the sentencing decision the responsibility for the realization of it is constructed. The sentencing decision derives its legitimacy not only from the way reasons have been given for it. It necessarily involves the way in which the judge and the judiciary function within the frameworks of the rule of law in a democratic society. In that respect the constitutional and institutional context of the functioning of the judge and the judiciary, as well as the specific statutory (both substantive and procedural) context of the sentencing decision become of additional significance. The need for the analysis of this context confirms one of the core findings of Recommendation (92) 17, ‘Consistency in Sentencing’, namely that (directions for) solutions regarding the problem of consistency in sentencing can eventually be found and founded in the national legal systems itself.

Sentencing within a multifaceted and ambiguous context
The above mentioned broader perspective of justification lead to the conviction that the discussion solely based on the promotion of consistency in sentencing in the light of the phenomenon of judicial cooperation was a restriction that would ultimately leave the reader dissatisfied. One of those restrictions was related to the state of the art concerning the status and role of products of judicial cooperation, like sentencing orientation points. Discussing the embedding of results of judicial cooperation in sentencing in terms of lawmaking powers seems to have lead us, after a period of intensive scientific and practice originating attention, into a proverbial cul-de-sac. Lawmaking
through the concept of judicial cooperation within the frameworks of the rule of law in a democratic society has (subject to the roles and process regulations in Dutch civil law) as yet appeared to be possible nor desirable. The primacy of the legislature in lawmaking and the independence and the impartiality of the judge and the judiciary play an important role in this, whereas also the potentially increase in workload for the Supreme Court seems a factor of weight at denying outcomes of judicial cooperation the status of law in the formal sense of the word. Directives for sentencing requisitions issued by the Public Prosecution Service, originally developed to achieve a consistent prosecution and settlement practice of the Public Prosecution Service, are in effect of importance for the sentencing decision, but statutory merely a recommendation to the court. Within this framework a balance of actually divided powers exists, each actor left with a specific role and responsibility. A balance that as a handle for further analysis will be considered as invariable. It nevertheless provides plenty of room for further thinking.

In addition to the constitutional perspective it also became clear that within the organization of the judiciary, i.e. on an institutional level, a lack of clarity continues to exist concerning the meaning of the statutory institutional responsibility for the promotion of uniformity in the application of the law as well as the quality in the administration of justice. In that area important questions rise concerning the relation between the Council for the Judiciary, the Courts and the position of consultation and network agencies such as the national body of presidents of the criminal law chambers of the district and appellate courts, who have taken up the responsibility for developing and issuing the sentencing orientations. The institutional framework of the jurisdiction is lacking, where the promotion of uniformity in the application of the sentence as well as the quality in the administration of the sentencing decision, in a coherent procedural (how?) and substantive (to which?) perspective. The conclusion then must be that both the constitutional and the institutional framework surrounding the discussion on promoting consistency in sentencing finds itself in an impasse. The practice however strides along.

For several (and obvious) reasons it was necessary to involve the statutory sentencing rules into this analysis. These reasons derived from both the context of justification afterwards, by means of the reasoning of the sentence, and from the context within which the sentencing decision is realized. The restrictions to the lawmaking potential of the phenomenon judicial cooperation, as well as the lacking in a procedural and substantive perspective on the meaning of the responsibility of the judicial organization, indicate the necessity of an analysis of questions at the level of the substantive and procedural law surrounding the sentencing decision. In that respect, great importance should be attached to the assumption that the sentencing orientations presuppose both a method of decision making as a substantive sentencing law, to which those orientation points relate in one way one or another. Neither the statutory sentencing rules, nor jurisprudence appear to fulfill at least this last requirement satisfactorily. They are to a great extend and also to its merits
open with respect to the determinants that shape the sentencing decision. The statutory regulation of sentencing confirms and stresses the judge’s responsibility of balancing all interests involved in criminal proceedings and in sentencing. That is the fundamental meaning of the plurality and ambiguity in sentencing aims and the relevance of a connected assessment of offence-seriousness, the circumstances among which the offence has been committed and the person and individuality of the offender. Because of the absence of supervision by the Supreme Court on most parts of the sentencing decision, the (substantive) legal character of the sentencing decision has faded into the background. The procedural embedding of the sentencing decision cannot in its current state compensate shortages in the field of the substantive sentencing law. On the contrary: criminal sentencing procedure assumes a more elaborated framework for the sentencing decision than actually exists in Dutch criminal (procedural) law.

The question of judicial cooperation with regard to consistency in sentencing, but therefore also broader, the sentencing decision itself, are at the level of the constitutional and institutional scheme as well as at the level of the act of sentencing to a far-reaching degree problematic. A deepening in the criteria and the factors that (might or might not) shape the sentencing decision, is important merely for that reason alone. The described context must therefore be defined as multi-purpose and ambiguous. The existing relationships within the trias poenalis (the trias politica in sentencing) is furthermore characterized as a divided responsibility, which has led to a vacuum in the discussion concerning increasing the legitimacy of the sentencing decision. Developments in legal practice, in particular within the judiciary itself, oblige however to a new perspective on and for sentencing in these multi-purpose and ambiguous context. That perspective must be found in what ultimately (and for the time being) remains: the discretion of the judge.

**The discretion of the judge**

The discretion of the judge is a fundamental aspect of the way the sentencing decision is realized in current Dutch sentencing regulations. As such it is not called into question. Nevertheless it has become clear that the discretion of the judge is problematic when it comes to the justification of the sentencing decision. It leaves the judges a necessary space, but one that functions within a dynamic context and for that reason cannot be taken for granted. It needs and deserves ongoing attention and maintenance. Problematic is that here too a perspective is lacking in Dutch dogmatics and practice: the discretion of the judge falls between two stools. However, arguments can be extracted from the context as described above, that not only offer the possibility for the judge but also impose the duty to structure sentencing decision making. Not the perspective of lawmaking authority is then determinative, the problem of sentencing must be redefined in the light the act of sentencing by the judge, in the light of theories of adjudication. The constitutional and institutional context of the sentencing decision, as well as the statutory regulation of sentencing leads to the conclusion that there is a need of a supplement to the existing...
system of justification of the sentencing decision – a concept of justification that derives from methods of legal decision making.

Sentencing law and sentencing decision making
A first step in the direction of increasing the legitimacy of the sentencing decision is the further development of sentencing law - the way in which and the conditions among which the realization of the sentencing responsibility of the judge takes place. Its outline was described (and could be also found) within the framework of the statutory regulation of sentencing. In addition, a closer description and analysis of adjudication in sentencing is needed. Accepting the discretion of the judge presupposes a more or less coherent view on criminal law adjudication in which justice is done to the multi-purpose and ambiguous context within which the sentence is realized. That context assumes from a substantive law-perspective, openness in the legal concepts at hand and in the choice and applications of sentencing criteria as well as a (relative) freedom of choice with respect to the aims of sentencing. Out of this, broad band widths follow for minimum and maximum penalties. From the perspective of the sentencing procedure, that context assumes an open, contradictory and deliberative procedure, which should be the foundation for the sentencing decision.

By considering the sentencing decision as a problem of adjudication, the need of a closer interpretation of object and method of adjudication at sentencing arises. Sentencing decision making, the actual creation of the sentencing decision, marks primarily the discretion of the judge. Filling in this space means in essence structuring sentencing decision making: Within the existing frameworks of the rule of law in a democratic society and the system of the statutory regulation of sentencing, this aspect is considered to stipulate the legitimacy of the sentencing decision. The striving towards consistency in the act of sentencing leads to the need of a frame of reference, a concept of sentencing decision making in a context of a still developing Dutch sentencing law. The primary frames of reference can be found in the system of the statutory regulation of sentencing. The sentencing aims, the triptyque of the seriousness of the offence, the circumstances among which it has been committed and the person of the offender; they form the most basic starting points for shaping and constructing the sentencing decision. The development of another frame of reference, coming to expression in the orientation points for sentencing, needs in that respect closer attention. What role do they play in sentencing adjudication?

Sentencing law, sentencing decision making and typology
A concept of (sentencing) decision making appears at least to be able to play a role in the spectrum of facts, circumstances and interests which, taken together, shape the sentencing decision. In that decision making model of determining and appreciation of facts, balancing of interests and the fixing of the sentence, theories of adjudication seem indeed to provide space for such a concept. That concept does not find its origin in the manner of jus-
tification traditionally linked with (civil law) methods of subsumption and
the syllogistic model of argumentation. Where sentencing decision making is
concerned, it is suggested that methods apply that are primarily derived from
the ancient topics and applied heuristics. It is specifically linked with theoreti-
cal concepts of comparative reasoning and the concept of typology. The latter
model of reasoning has been built by means of the type, a (socio-scientific)
construction which stands for the use of the description, the classifying and
the analysis of phenomena in the broadest sense as they appear in reality.
The legal meaning of the type is a particularization of this general scientific
construction. Specifically it claims to contribute to the justification of legal
decision making in areas in which the decision making is under the influence
of a need for structuring, but where legislation is not an option for reasons of
individualization of the decision and/or the impossibility of describing all
manifestations by law.

The typological method is founded upon a fundamental openness
towards the described and applicable Types in the sentencing decision mak-
ing, but can only be applied within a context of substantive sentencing law.
When in supplement then (or with help from it) the sentencing law has been
made more expressly than has been the case until now, it might very well
contribute to consistency in sentencing, whereas the discretion of the judge
remains guaranteed. The method carries the possibility in itself of structuring
(in part) matters of sentencing law and sentencing decision making, whereas
continues to do justice to the multi-purpose and ambiguous context within
which the sentence itself is imposed. Typology assumes thereby the appropri-
deate discretion for the judge, founds and structures these at the same time, it
is argued.

In that structuring of sentencing decision making, the promotion of the
consistency in sentencing executes itself. It is therefore a structuring of the
act of decision making which can be seen as a separate and substantial aspect
of consistency in sentencing. In that decision making model of sentencing,
typology has a place, but only in the context of and at the use of that deci-
sion model of (in the core) assessment and determination. Typology not only
assumes sentencing law and sentencing discretion, it also contributes to its
development.

The description of some ground forms of offences, such as visible is in the
above mentioned orientation points for sentencing in the Netherlands, has to
a certain extend characteristics that are related to the typological method. The
typological concept of sentencing decision making shows that even beyond
the discussion concerning judicial cooperation and judicial lawmaking in the
context of a civil law system, possibilities exist for a judge and for a judiciary
who actively strive for increasing the legitimacy of the sentencing decision. To
that extend, the analysis here offers a starting point for institutional activities
aimed at increasing consistency in sentencing. Institutional responsibilities
(as laid down in the Judicial Organisation Act) with respect to the uniformity
Summary

...in the application of the law as well as the quality in the administration of justice may find their target in the concept of typological sentencing decision making.

Looking ahead, the importance of a layered interpretation of the discretion of the judge must be stressed. Within the context as described, the typology of sentencing decision making forms a link between the process of determination and weighting of the facts, circumstances and interests on the one hand and the fixing of the sentence in type, measure and modality on the other. The concept forms a tool in assessing what also has been described as ‘the jump’ from law and facts to the sentence. To that extend the typology has a meaning for the process of decision making in individual cases.

Besides the relevance for the realization of a judgment, typology has a meaning for the reasoning of the sentencing decision: it offers the opportunity to make transparent on the basis of what facts and on which grounds cases are similar or why they differ. The need to justify the sentencing decision, it is argued, therefore structures the process of fact finding.

Moreover typology has significance for the organization of the judiciary: it forms a starting point for carrying over and bringing up discussions on knowledge and insights of (effectiveness) of sanctions. The organization of the judiciary can, by means of supporting this concept of sentencing decision making contribute to the context of dialectics and deliberation in which criminal procedure in fact is lacking. The development and application of sentencing orientation points shows affinity with the typological model of sentencing decision making, and not only assumes a constant process of evaluation, but also a context of discussion and training, of research, dialectics and debate concerning fundamentals, objectives and effectiveness of sanctioning, as well as a deepening in sentence determinants. This way, and within the described context, an active judge and an active judiciary can contribute to the need for a further developed sentencing law in the Netherlands and, as a necessary feature of it, to sentencing decision making.