P.H.P.H.M.C. van Kempen, M.J.M. Krabbe,
J.L. Guzmán Dalbora & F. Molina Jerez (eds.)

Legality and Other Requirements for Sentencing

An international and comparative perspective on non-arbitrary punishment and sentencing discretion

Légalité et autres exigences en matière de condamnation

Une perspective internationale et comparative sur les peines non arbitraires et le pouvoir discrétionnaire en matière de condamnation

150 years IPPF history

150 ans d'histoire FIPP

International Penal and Penitentiary Foundation
Fondation internationale pénale et pénitentiaire
49

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All over the world, governments impose punishments on their citizens for transgressions of the criminal law. Consensus exists that this sanctioning should be in accordance with the principle of legality and the rule of law. However, governments struggle with providing foreseeability and non-arbitrariness in their sentencing systems. This continuous struggle raises the question of how – and to what extent – foreseeability and non-arbitrariness must be guaranteed. Not only in relation to the type of sentence imposed (quality), but also to its length (quantity) and the circumstances under which the sentence is executed. Worldwide, a variety of sentencing principles (*e.g.*, proportionality, equality, culpability) are employed, not only to promote foreseeable, non-arbitrary sentencing, but also to do justice in the individual case. Although similarities exist, countries differ greatly in the principles they apply and the meaning they ascribe to them.

This volume provides insight in the worldwide ideas and practices on legality and other requirements for sentencing. Which requirements should be leading? How do these requirements interrelate? And how should they be defined and implemented? The present volume hopes to both provide answers to these questions and to support the reader in developing new thoughts and angles on these topics.

Partout dans le monde, les gouvernements imposent des sanctions à leurs citoyens pour des transgressions du droit pénal. Il existe un consensus sur le fait que cette sanction doit être conforme au principe de légalité et à l'État de droit. Cependant, les gouvernements s'efforcent d'assurer la prévisibilité et l'absence d'arbitraire dans leurs systèmes de condamnation. Cette lutte permanente soulève la question de savoir comment – et dans quelle mesure – la prévisibilité et le caractère non arbitraire doivent être garantis. Non seulement en ce qui concerne le type de peine imposée (qualité), mais aussi en ce qui concerne sa durée (quantité) et les circonstances dans lesquelles la peine est exécutée. Dans le monde entier, divers principes de détermination de la peine (par exemple, la proportionnalité, l'égalité, la culpabilité) sont utilisés, non seulement pour promouvoir une détermination prévisible et non arbitraire de la peine, mais aussi pour rendre justice au cas par cas. Bien qu'il existe des similitudes, les pays diffèrent grandement dans les principes qu'ils appliquent et dans la signification qu'ils leur donnent.

Ce volume donne un aperçu des idées et des pratiques mondiales sur la légalité et les autres exigences en matière de condamnation. Quelles sont les exigences à privilégier ? Comment ces exigences sont-elles liées entre elles ? Et comment doivent-elles être définies et mises en œuvre ? Le présent volume espère à la fois apporter des réponses à ces questions et aider le lecteur à développer de nouvelles réflexions et de nouveaux points de vue sur ces sujets.

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Table of Contents

Acknowledgments

With great pleasure, I hereby present the 49th publication of the International Penal and Penitentiary Foundation, published on the occasion of the 150st anniversary of the IPPF and its predecessors (1872-2022). More about the IPPF and its fascinating history can be found at the back of this volume, where you will also find the full version of the speech delivered to the IPPF members in Geneva in the fall of 2022, during celebration of these 150 years.

Not only is this volume published at a milestone for the IPPF, it also marks a change in my own involvement with this international organization. On 1 January 2023, I retired from the board, having held the position of Secretary General for thirteen years. I therefore would like to express my cordial gratitude for the inspiring cooperation to all former and current board members. The cooperation with former (now Honorary) President Hon. Phillip Rapoza and former Treasurer Dr. Manon Jendly was an effective and wonderful experience at an important time in the development of the IPPF. Of course, little could have been accomplished without the constructive support of other board members – I expressly mention Prof. Dr. Peter Tak, who preceded me as Secretary General, former Vice President Dr. Warren Young and the current members of the board, President Stephen Shute,Vice President Prof. Dr. José Luis Díez Ripollés, Secretary General Dr. Mary Rogan, Vice President Arch. Alejo García Basalo, and Treasurer Dr. Véronique Jaquier Erard – and the former and present members, associate members and fellows of the IPPF. I am honoured and pleased to remain within the IPPF as voting member for the Netherlands.

As to the editing of this book, I am delighted to have been joined by Dr. Maartje Krabbe (again), Prof. Dr. José Luis Guzmán Dalbora, and Mr. Francisco Molina Jerez. We express our gratitude towards all contributors to this volume. Their meticulous and transparent descriptions and analyses of sentencing systems are deeply appreciated. The chapters in this volume were produced after the four-day colloquium on 'Legality, non-arbitrariness and administrative and judicial discretion in sentencing and enforcement of sentences', which was held in Santiago and Valparaíso in Chili in March 2019. In this respect, I am also indebted to Prof. Dr. Jaime Naquira Riveros, Prof. Dr. José Luis Guzmán Dalbora, Mr. Francisco Molina Jerez, and their colleagues, for their support in organizing the colloquium. Many thanks also to Mr. Alan Gül for his work as an editing assistant. Finally,

Mrs. Fiorina Argante deserves great appreciation for, again, her dedicated administrative assistance in this project. She, moreover, has been a great support during the whole thirteen years mentioned above, not only to me, but also to the board, and to the members of the IPPF.

Piet Hein van Kempen
Secretary General (until 1 January 2023) International Penal and Penitentiary Foundation
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Remerciements

C'est avec grand plaisir que je vous présente la 49e publication de la Fondation internationale pénale et pénitentiaire (FIPP), publiée à l'occasion du 150e anniversaire de la FIPP et de ses prédécesseurs (1872-2022). Vous trouverez plus d'informations sur la FIPP et son histoire fascinante à la fin de ce volume, où vous trouverez également la version intégrale du discours prononcé devant les membres de la FIPP à Genève à l'automne 2022, à l'occasion de la célébration de ces 150 ans.

Non seulement ce volume est publié à un moment clé pour la FIPP, mais il marque également un changement dans mon propre engagement au sein de cette organisation internationale. Le 1er janvier 2023, je me retirerai du conseil d'administration, après avoir occupé le poste de secrétaire général pendant treize ans. J'aimerais donc exprimer ma gratitude cordiale à tous les anciens et actuels membres du conseil d'administration pour leur coopération inspirante. La coopération avec l'ancien président (aujourd'hui honoraire), Hon. Phillip Rapoza et l'ancienne trésorière, la Dr Manon Jendly, a été une expérience efficace et merveilleuse à un moment important du développement de la FIPP. Bien entendu, peu de choses auraient pu être accomplies sans le soutien constructif des autres membres du conseil – je mentionne expressément le professeur Peter Tak, qui m'a précédé au poste de secrétaire général, l'ancien vice-président Warren Young et les membres actuels du conseil, le président Stephen Shute, le vice-président José Luis Díez Ripollés, la secrétaire générale Mary Rogan, le vice-président Arch. Alejo García Basalo, et la trésorière, la Dr Véronique Jaquier Erard – ainsi que les membres anciens et actuels, les membres associés et les boursiers de la FIPP. Je suis honoré et heureux de rester au sein de la FIPP en tant que membre votant pour les Pays-Bas.

En ce qui concerne l'édition de ce livre, je suis ravi d'avoir été rejoint par le Dr Maartje Krabbe (à nouveau), le Prof Dr José Luis Guzmán Dalbora et M. Francisco Molina Jerez. Nous exprimons notre gratitude à tous ceux qui ont contribué à ce volume. Leurs descriptions et analyses méticuleuses et transparentes des systèmes de condamnation sont profondément appréciées. Les chapitres de ce volume ont été produits après le colloque de quatre jours sur « La légalité, l'absence d'arbitraire et le pouvoir discrétionnaire administratif et judiciaire en matière de condamnation et d'exécution des peines », qui s'est tenu à Santiago et à Valparaíso, au Chili, en mars 2019. À cet égard, je suis également redevable au Prof. Dr. Jaime Naquira Riveros, Prof. Dr. José Luis Guzmán Dalbora, M. Francisco Molina Jerez et à leurs collègues, pour leur soutien dans l'organisation du colloque. Nous remercions également M. Alan Gül pour son travail d'assistant d'édition. Enfin, Mme Fiorina Argante mérite une grande reconnaissance pour son assistance administrative dévouée dans le cadre de ce projet. En outre, elle a été d'un grand soutien tout au long des

treize années susmentionnées, non seulement pour moi, mais aussi pour le conseil d'administration et les membres de la FIPP.

Piet Hein van Kempen
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Part I
Introduction

1ière Partie
Introduction

Legality of sentencing and the need for a catalogue of principles

Piet Hein van Kempen, Maartje Krabbe, José Luis Guzmán Dalbora and Francisco Molina Jerez[*]

1 Introduction to this volume

All over the world, governments impose punishments on their citizens for transgressions of the criminal law. Consensus exists that this sanctioning should be in accordance with the principle of legality and the rule of law. However, governments around the world struggle with providing foreseeability and non-arbitrariness in their sentencing systems. This continuous struggle raises the question how – and to what extent – foreseeability and non-arbitrariness must be guaranteed. Not only in relation to the type of sentence imposed (quality), but also to its length (quantity) and the circumstances under which the sentence is executed. Worldwide, a variety of sentencing principles (*e.g.*, proportionality, equality, culpability) are employed, not only to promote foreseeable, non-arbitrary sentencing, but also to do justice in the individual case. Although similarities exist, countries differ greatly in the principles they apply and the meaning they ascribe to them.

This volume provides insight in the worldwide ideas and practices on legality and other requirements for sentencing. Which requirements should be leading? How do these requirements interrelate? And how should they be defined and implemented? An array of topics and questions is discussed regarding these requirements. Some examples: How should judicial discretion and the principle of legality be balanced? Should the execution of sentences be a matter for the judiciary or the administration? What is the relationship between the principle of legality and the prohibition against discrimination? Can *human* judges practice consistent sentencing? Should temporary release be a discretionary power or a right? And: How can we increase public confidence in sentencing? The present volume

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hopes to both provide answers to these questions and to support the reader in developing new thoughts and angles on these topics.

Regarding the structure of this book: this volume contains four thematic chapters by authorities on specific topics, sixteen national chapters describing sentencing principles and practices in various countries and the present introductory chapter. This introductory chapter (which constitutes Part I of this volume) first provides an introduction to this volume (present section). Next, definitions relevant to the title of this volume are provided (section 1.1). An outline of this volume is presented in section 1.2. This section offers a brief summary of the four thematic chapters in Part II (section 1.2.1), explains the structure of the national chapters in Part III (section 1.2.2) and provides an introduction to the subsequent sections of the present chapter (section 1.2.3). These subsequent sections (2-7) aim to provide an introduction on the leading principles in sentencing worldwide, based upon an analysis of the thematic chapters and national chapters contained in this volume.

1.1 Definitions

Several definitions are relevant to clarify the title of this volume. In what follows, the concepts of *sentencing*, *sentencing discretion* and *non-arbitrariness* are provided with some context. For the purpose of this volume, the concept of *sentencing* must be understood broadly, referring to the imposition of sanctions (particularly: punishments) by judicial authorities (courts, judges) or by non-judicial authorities (the police, the prosecution) for criminal or administrative offences, as well as the execution of these sanctions. Generally, the quality (e.g., prison, non-custodial etcetera) and quantity (length) of a sanction is decided on in the 'imposition stage'. However, execution authorities may also influence quantity and quality. This is, for example, the case when these authorities take decisions concerning early release (quantity). Or when they determine the prison where the sentence must be served and the severity of the regime (quality). Execution authorities generally also have the power to apply disciplinary or other kinds of sanctions, for example in case of misconduct by a detainee or when the offender does not meet obligations during the execution of a community service sentence (quality). *Sentencing discretion* refers to the scope of the freedom vested in an adjudicator when imposing a sentence in a specific case with specific circumstances. *Non-arbitrariness* refers to sentencing that is based on objectified reasons or a system, rather than on random or subjective choices.

1.2 Outline of this volume

1.2.1 Thematic chapters

A thematic approach to the legality, non-arbitrariness and discretion in sentencing and the enforcement of sentences is presented in part II of this volume, in which four professionals from various parts of the world present an expert opinion on difficulties, limits, opportunities and solutions related to this topic.

An ambitious human rights perspective as regards the sentencing process and the enforcement of sentences is provided by **Paul Mevis**. He explains that whereas there are various human rights documents and mechanisms that cover most aspects of the enforcement of sentences, there is no comprehensive hard-law human rights instrument that concerns sentencing. Pointing at several present-day developments, including a hardening sanction climate, this must be regarded as a pressing shortcoming in international human rights protection, according to Mevis. He then proposes the development of an international protocol concerning human rights and sentencing as an independent safeguard against disproportionate sentencing. In addition to a right against disproportionate sentencing, the author argues that the protocol could include various other guarantees. With a view thereto, several other topics are explored, such as the protection against discrimination in sentencing, a rule that time spent in custody before trial or before appeal should count towards the sentence, an obligation to apply undue delay in the criminal process as a ground for reduction of the punishment in the suspect's favour, as well as several procedural requirements for the sentencing process as such. In the chapter, Mevis pays special attention to two highly problematic sanctions from a human rights perspective: the life sentence and the (long) fixed-term prison sentence.

Yvette Tinsley more closely examines the relationship between judicial independence, discretion and fairness in sentencing. After some general remarks about judicial independence and the role of the principle of legality or rule of law, she discusses five aspects regarding the tension between independence and fairness: the role of the executive and legislature, the use of sentencing guidelines, the challenges of administrative technology, potential limits of impartiality and impacts of judicial activism, and the increase in pressure from public opinion. Tinsley raises many essential questions and offers a great variety of key insights. She concludes that while impartiality is difficult to achieve, we should try to set up conditions to reduce bias and undue influence to the fullest extent. In her view, it is therefore important for those managing the courts to put in place education for judges and the community; and for judges to share their experiences with each other, in order to ensure that sentencing decisions are made as impartially as possible and without undue focus on controversies of the day.

The joint contribution of **Rita Haverkamp & Johannes Kaspar** focuses on judicial discretion within a framework. It distinguishes between two ideal types of sentencing. In

the first, judges strictly adhere to the words of the law and do not have judicial discretion concerning either the choice of sentence or its length (determinate sentencing), while in the second type judges have unfettered judicial discretion (indeterminate sentencing). The first approach may contribute to uniform sentencing, whereas the second can find a basis in the principle of individualization. Haverkamp & Kaspar first consider the historical background of theories on sentencing and judicial discretion, differences in sentencing systems in national jurisdictions around the world, and purposes of punishment. They then go on to discuss disparity in sentencing, and the practical consequences of tough-on-crime policies. After having stressed the value of the Council of Europe Recommendation No. R (92) 17 on Consistency in Sentencing, the authors conclude that some judicial discretion seems necessary in order to take individual offenders' circumstances into account, while at the same time acknowledging that if sentencing regulations exist and rightly do leave some judicial discretion, there will probably always be the need for further guidance, for example by case law or sentencing traditions. In order to secure transparency in this regard, Haverkamp & Kaspar hold that the introduction of a database with related court decisions would be an improvement.

Uju Agomoh's chapter on administrative discretion in the execution (or enforcement) of sentences starts with pointing out that the criminal process is marked by an extensive *de facto* if not *de jure* police, prosecutorial and judicial discretion as regards the enforcement of laws, the prosecution of offences and the sentencing of offenders. Agomoh explains that sentencing is founded upon two premises that are in perennial conflict but are fundamentals of a fair sentencing system: individualized justice and consistency. She goes on to discuss judicial control of administrative discretion, administrative discretion and its impact on the prison centres' designated capacities, and opportunities for rehabilitation and fairness in the exercise of administrative discretion in the execution of sentences, which brings her to look closer at indeterminate versus determinate prison sentences. In this chapter, Agomoh pays special attention to discretionary application of laws and policies, and its effects on the poor and the disadvantaged.

1.2.2 National chapters

The national chapters in this volume are based on a questionnaire to which professionals from 16 countries responded during 2019-2022. The reporting states are Argentina, Chile, Finland, Germany, Greece, Ireland, Italy, Japan, Lithuania, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, and Switzerland. Each of the national chapters discusses the principle of legality and/or the rule of law with respect to criminal punishments, human rights requirements as regards the sentencing process and the enforcement of sentences, judicial discretion in sentencing in general (the position of an independent judiciary and its responsibility for fairness), judicial discretion within frameworks such as guidelines and mandatory sentencing systems, sentencing by non-judicial entities (*e.g.*,

criminal punishment by police or prosecution, or disciplinary sanctions by prison authorities), and administrative discretion in the execution of sentences. The chapters contain a similar structure, although in some cases several of these topics are combined within a paragraph, while other chapters offer extra paragraphs on relevant topics.

1.2.3 Present chapter

The following sections of this chapter aim to provide an introduction on the leading principles in sentencing worldwide, based upon an analysis of the thematic chapters and national chapters contained in this volume. First, the principle of legality and the rule of law are discussed in relation to sentencing (section 2). Next, obstacles to foreseeable and non-arbitrary sentencing are dealt with (section 3). Section 4 sets forth the concept of 'consistent individualization', merging demands of legality with the concept of doing justice in the individual case. A catalogue of sentencing principles is presented in section 5. For each principle, different meanings around the world are discussed. Section 6 provides a comparative perspective on various mechanisms to limit judicial discretion. This chapter ends with a brief conclusion, balancing the interests of foreseeability and non-arbitrariness *versus* sentencing discretion, while at the same time stressing the importance of a more common understanding among adjudicators of the scope and application of sentencing principles (section 7). The following introduction is based on the information provided in the national and thematic chapters in this volume. Throughout this chapter, we refer to these contributions in the text. In case the reference concerns a national chapter, the name of the country is put between parentheses behind the authors' names, while in case of a thematic chapter the authors' names are followed by the word 'thematic' between parentheses.

2 The principle of legality, the rule of law and sentencing

The principle of *nullum crimen, nulla poena sine praevia lege poenali* – which was coined by Paul Johann Anselm Ritter von Feuerbach (1755-1833)[1] and which is a cornerstone of the criminal justice system as well as an international human right – signifies that there can be no crime and no punishment without a previous penal law. Broadly speaking, the rationale behind the principle of legality is that a person can foresee what conduct can trigger criminal liability and what penalty can be imposed for that conduct. The principle thus aims to secure the individual's legal certainty. To that end, the principle of legality requires that offences and applicable penalties are clearly defined by law.

1 P.J.A. von Feuerbach, *Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts,* Giesen 1801.

The legality principle is not exactly the same as the rule of law, but it is unquestionably an essential element of it. Ortenzi & García Basalo (Argentina) even qualify the principle of legality as the most distinctive feature of the rule of law. Tinsley (thematic) acknowledges that there is widespread agreement that the rule of law should guard against anarchy and official arbitrariness and allow people to plan their affairs with reasonable confidence that they can foresee or expect the legal consequences of various actions. She warns that beyond this the precise meaning and effect continues to be the subject of considerable debate.

In spite of the fundamental position of the principle of legality and the rule of law, criminal justice systems around the world struggle with providing real foreseeability for individuals and for society as regards the form (quality) and severity (quantity) of the punishment that can be expected for a certain offence. This raises the question how and to what extent the principle of legality and the rule of law aim to guarantee foreseeability and non-arbitrariness of sentences, non-judicial punishment, and the execution of sentences.

2.1 The principle of legality as a codified norm

It follows from the principle of legality in the general United Nations (ICCPR), African (AfChHPR), American (ACHR), and European (ECHR and EU Charter) human rights treaties that one can only be punished on account of any act or omission which constituted a criminal offence at the time when it was committed, and, moreover, that no heavier penalty shall be imposed than the one that was applicable at the time when the criminal offence was committed.[2] As part of the legality principle, the provisions in the ICCPR, the American Convention, and the EU Charter also stipulate that if, subsequent to the commission of the offence, a provision is made by law for the imposition of the lighter penalty, the offender shall benefit therefrom (*lex mitior* rule).

According to the codifications of the legality principle in the ICCPR, AfChHPR, ACHR, ECHR, and EU Charter, the principle implies that the imposition of a concrete punishment for an offence must have a clear basis in the law that may not be applied retroactive. In that sense, the punishment must be foreseeable. As long as a penalty stays within the boundaries of the law with respect to its form (i.e. the quality: imprisonment, fine, community service, etcetera) and severity (i.e.: the quantity: duration, circumstances,

2 See Article 15(1) of the 1966 UN International Covenant on Civil and Political Rights (ICCPR), Article 7(2) of the 1981 African Charter on Human and Peoples' Rights (Banjul Charter or AfChHPR), Article 9 of the 1969 American Convention on Human Rights (Pact of San Jose, Costa Rica, or ACHR), and Article 7(1) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). See also Article 49(1) of the 2000 (2012) EU Charter of Fundamental Rights (EU Charter).

etcetera), the principle does not require further foreseeability as to the form and severity of the concrete punishment that will be actually imposed by the court in a specific case.

The legality principle applies to the provisions defining the offences and the corresponding penalties. According to, for example, the European Court of Human Rights (ECtHR), in principle, they do not apply to procedural laws. However, where a provision classified as procedural in domestic law influences the severity of the penalty to be imposed, the ECtHR classifies that provision as "substantive criminal law" to which the rule that "no heavier penalty shall be imposed than the one that was applicable at the time the criminal offence was committed" is applicable.[3] The Court has, furthermore, drawn a distinction between measures constituting a "penalty" and measures relating to the "enforcement" of that penalty. For example, remission of sentence or a change in the procedure for conditional release is not an integral part of the punishment within the meaning of the principle of legality. Nevertheless, if measures taken by the legislature, the administrative authorities or the courts after the final sentence has been imposed or while the sentence is being served result in the redefinition or modification of the scope of the penalty imposed by the trial court, those measures fall within the scope of the prohibition of the retroactive application of penalties, according to the ECtHR.[4] On this issue, see also Della Casa & Ruaro (Italy) and Ramírez Ortiz & Rodríguez Sáez (Spain).

The principle of legality as it is codified in human rights treaties only demands limited clarity and thus foreseeability as regards the concrete punishment that one can actually expect for a specific offence in a concrete criminal case. The same generally applies to codifications of the principle in constitutions and penal codes, as many of the national chapters in this volume make clear. See, for example, also Trechsel (Switzerland).

2.2 The principle of legality as an inspirational norm

The principle of legality has not only value through its codification in the form of rules. Beyond its functioning as a limited set of rules, which has only specific relevance for sentencing, it also still works as a principle, *i.e.*: as a legal instrument with an open structure that indicates a moral direction and puts argumentative weight on the considerations to be made by the legislature, judiciary and administration. The same applies to the rule of law, which is a much broader concept than the legality principle, and is normally not codified as such although aspects of it usually are. It is mainly in their capacity of principles that scholars and courts ascribe further functions to the principle of legality and the rule of law.

3 See the website of the Court, with references to case law, *Guide on Article 7 of the European Convention on Human Rights* (updated on 30 April 2022), para. 16.

4 See *Guide on Article 7 of the European Convention on Human Rights* (with case law references) (updated on 30 April 2022), para. 18-20.

First, it can be argued that the more a specific form and severity of the sentence that one can expect to receive for a certain offence under certain circumstances is foreseeable, the better the rationale of the principle of legality and the rule of law is served. Agomoh (thematic) remarks that parity in sentencing underpins the rule of law, a doctrine which requires both the absence of arbitrary power and the need for fixed and predictable laws. Relative thereto, she points out that the existence and imposition of inconsistent sentences makes it impossible for citizens to foresee the consequences of their actions. The notion that under the rule of law, an offender should be able to know what sentence he or she might expect compared with other offenders convicted of similar crimes under similar circumstances, is also stressed by Haverkamp & Kaspar (thematic).

Second, in line with the previous point, according to several authors the principle of legality and the rule of law do not only require that the law clearly stipulates which acts and omissions constitute a criminal offence, but also the maximum penalties that can be imposed for committing that offence. For example, Haverkamp & Kaspar (thematic) hold that it is a basic requirement for the rule of law that the legislator (as opposed to the judiciary) at least roughly decides upon the question of what constitute "similar" crimes or "similar" circumstances (see also their chapter on Germany). In their view, this should include regulations on the purposes of punishment and relevant sentencing criteria.

Tinsley & Young (New Zealand) explain that heavy reliance on case law, developed by the judiciary to set sentencing levels in the context of sentencing in individual cases or to innovate and develop alternative resolutions, is problematic from the point of view of legality.

This practice (heavy reliance on case law) potentially results in inconsistencies, unfairness, and a lack of transparency, while it may also suffer from a democratic deficit. However, this does not lead Tinsley & Young to conclude that more of the responsibility should be referred back to the legislature. That would, in their view, result in even less conformity with the principle of legality. Rather, they look for a solution in the establishment of statutory bodies to develop sentencing policy (like the Sentencing Council in England & Wales). Such a solution can create a partnership model between the judiciary and members of the community in developing sentencing principles with which legality interests are served. However, this approach can also raise the question whether this would undermine judicial independence. See also Tinsley (thematic).

In relation to the execution of custodial sentences, Molina Jerez, Náquira Riveros & Guzmán Dalbora (Chile) criticize the fact that relevant aspects of prisoners' lives, such as access to healthcare, prison privileges, and the disciplinary regime are stipulated by prison regulations. They imply that the principle of legality demands that the penalties and the execution thereof are provided for by statues, not by regulations. Also, several other authors imply the relevance of the principle of legality or the legality aspect of the rule of law for the execution phase. On legality and discretional power of the authorities that are

responsible for the execution of sentences, see particularly Argentina, Japan, the Netherlands, and Norway. Particularly in the case of indeterminate sentences, the discretional power of the administration can reach far, and this can raise questions from the perspective of the principle of legality's requirement of foreseeability. See Mevis (thematic), Agomoh (thematic) and Della Casa & Ruaro (Italy). Della Casa & Ruaro discuss the execution of life imprisonment, imposed in the context of organized crime (mafia, terrorism).

Third, sometimes the legality aspect of the rule of law is closely linked to other principles that are relevant for sentencing. For example, Sakalauskas (Lithuania) explains that, on the basis of the rule of law, the Lithuanian Constitutional Court requires that when liability for the violation of a clearly defined law is established, heed must be paid to the requirement of reasonableness and the principles of proportionality and necessity. According to Tinsley & Young (New Zealand) and Tinsley (thematic), the principle of legality also carries with it the expectation that in an individual case the process by which liability and the sanction are determined, will be legally prescribed, and applied consistently and fairly by an independent judicial decision-maker. Tinsley also points out that some authorities claim that the rule of law is also a principle of criminal law, and together with requirements of culpability and proportionality, governs the just distribution of criminal punishments. She emphasizes, however, that these ideas of the operation of legality in relation to criminal law and punishment are contested.

3 Limited foreseeability of actual sentencing and execution of sentences

The thematic and national chapters in this volume make clear that the principle of legality and the legality aspect of the rule of law have a rather limited capacity to achieve foreseeability as to the form and severity of the actual punishment and the execution thereof in a specific case. Even if authorities in excess of the requirements that follow from the principle of legality strive to provide foreseeability, this may be difficult or undesirable to realize. A variety of difficulties to achieve a precise degree of foreseeability comes to the fore in the chapters in this volume.

3.1 The law is never perfectly clear

The principle of legality can only be formally respected but usually not substantively, because the law cannot offer absolute certainty and often even hardly a sufficient degree of real certainty. This applies to sentencing and, as Della Casa & Ruaro (Italy) explain, certainly also to the law that regulates the execution of sentences. Words and texts are

hardly ever completely clear. Moreover, the more they regulate in detail, the more their clearness may become a fiction if the detailing complicates the system too much. Another difficulty is that offences are usually defined in such general terms that covers a wide range of specific behaviour, often varying from conduct that is rather inconsequential to conduct that is very grave. Furthermore, as Tinsley & Young (New Zealand) put forward, sentencing goals, sentencing principles, and sentencing rules on aggravating and mitigating factors cannot provide significant guidance when they are defined in rather general terms and when prioritization of the various norms is lacking. And as for the available punishments when an offence is committed, the greater variety of punishments the courts have at their disposal in order to render a fair sentence that truly fits the case, the greater their discretional powers to decide the sentence and the risk for inconsistency will be.

3.2 Consistency and individualization

The question arises to what extent it is actually desirable that the law strives to realize the highest degree of foreseeability possible. One of the most fundamental problems is, as Agomoh (thematic) observes, that sentencing is founded upon at least two premises that are in perennial conflict with each other but fundamental to a fair sentencing system: consistency and individualized justice. Confer Ortenzi & García Basalo (Argentina): discretion is limited by two general principles of law: legality and reasonableness. The tension between consistency and individualized justice is extensively discussed by Haverkamp & Kasper (thematic). Where evenness of sentences and the execution of sentences fosters uniformity and foreseeability, individualization of the sentence and its execution usually does not. But, as Tinsley & Young (New Zealand) for example also make clear, there are good reasons why the guidance for judges in individual cases is not prescriptive and is purposefully designed to prevent a formulaic approach to sentencing: even though this may not fulfil the principle of legality, it leaves room to achieve fair outcomes by being responsive to the needs of individual offenders. However, consistency and individualization can be brought together: "The desired outcome is consistency in the application of sentencing principles, not consistency of outcome as expressed in terms of numerical equivalence" (see, with further references, Haverkamp & Kaspar (thematic)). In this way, consistency and individualization can mutually enforce fairness in sentencing. It is thus imperative for fair sentencing to specify in what sense consistency and individualization are required.

3.3 Differences or lacking in understanding

In connection with the previous point, it is difficult to reach foreseeability of punishments and the execution thereof in concrete cases as long as sentencing principles and execution principles are not applied consistently by the courts and the administration. As will further become clear below, sentencing rules and particularly sentencing principles can usually be understood in many ways. Adjudicators are often not aware that others may have a somewhat different understanding of the principle they apply or give a different weight to it. Many times, it is even difficult to describe how one exactly understands and weighs a principle. Moreover, adjudicators frequently lack the information to properly apply a principle. Trechsel (Switzerland) illustrates this as follows. He states that it is not difficult to understand why there is little foreseeability as far as the quantity of the sentence is concerned. He remarks that we know very little about the effects of criminal sentences, let alone about the importance of the severity of prison sentences for their consequences. Since these effects are relevant in deciding on the proportionality of sentences, the test of proportionality is doomed to fail from the outset. He concludes that sentencing is a process which is, to a considerable extent, irrational. This does, however, not mean that we can expect it to be fully "subjective". As Rodrigues, Fidalgo & Manata (Portugal) state: the judge's conviction should never be understood as pure discretion, as a purely personal or emotional conviction.

3.4 Society, politicians, and the media

Several of the chapters observe that society, politicians, and/or the media frequently put pressure on the sentencing process and the execution of sentences. Such pressure can be an obstacle to achieve consistency with other cases and, moreover, individualized fairness. Mevis (thematic) therefore argues the need to lay down human rights guarantees to protect the sentencing system and process against particularly undue political and media pressure: procedures will need to be created and courts will need to be found that are prepared and have the courage to maintain human rights confirmative sentencing in spite of the spirit of the times. The theme of societal, political, and media pressure is also discussed in Tinsley (thematic) and Haverkamp & Kaspar (thematic) as well as in several country chapters; see particularly Lappi-Seppälä & Rautio (Finland), Lambropoulou & Tsolka (Greece), Della Casa & Ruaro (Italy), Sakalauskas (Lithuania), Mevis & Vegter (the Netherlands), Tinsley & Young (New Zealand), Strandbakken (Norway).

4 The legality principle as an aspiration for consistent individualization

The principle of legality and the legality aspects of the rule of law as these are applied on the basis of human rights treaties, constitutions, and penal codes, usually only rather marginally bind sentencing by courts and non-judicial entities (*e.g.*, criminal punishment by police or prosecution, or disciplinary sanctions by prison authorities) and the execution of sentences. It is, however, also clear that better foreseeability of the specific form and severity of the sentence that one can expect to receive for a certain offence under certain circumstances is likely to improve conformity with the rationale behind the principle of legality and the rule of law. This does not mean that all consistency and foreseeability is necessarily satisfactory. From the viewpoint of the liberal democratic state where the law is upheld in general and that of human rights more specifically, legality must not result in injustice and should preferably support fairness.

Sentencing principles can be used for simultaneously increasing consistency and individualization in order to achieve real foreseeability and substantive fairness. These are not necessarily opposite interests, they can be interdependent of each other. If perpetrators of a certain offence – such as theft – always receive the same punishment, this would certainly be consistent and thereby foreseeable, but it would also be unfair considering that there may be significant differences between, for example, the nature and severity of the actual offences, the conditions under which these were committed and the circumstances of the perpetrators. Consistency should thus not rule out individualization. At the same time, inconsistent individualization will not only harm foreseeability but also fairness, because it will come down to arbitrary adjudication. Individualization should thus not bar consistency. If, however, there is consistency between cases that are in principle equal in all the relevant aspects, this not only contributes to foreseeability but also to fairness. To put it differently: if there is consistency in individualization, this may support both foreseeability and fairness.

This means that the principle of legality implies a need for consistent individualization that supports both foreseeability and fairness. This may be hard to achieve without the consistent application of sentencing principles, a clear statutory sentencing framework, and transparent sentencing guidelines. The use of sentencing principles could thus contribute to reflecting the rationale behind the principle of legality and the legality aspect of the rule of law. However, as will be discussed below, sentencing principles are far from clear cut. As a result, consistent application of sentencing principles to reach consistent individualization can be very difficult to accomplish.

5 A catalogue of principles for sentencing and execution of sentences

In this volume, a great variety of sentencing principles and sentence execution principles will pass in review. All national criminal justice systems strive to provide at least a sufficient degree of foreseeability and fairness through the use of these principles. Nevertheless, as is manifest from the country chapters, countries differ in the principles they apply, to what end (punishment goals) they apply them, the meaning they ascribe to a certain principle, and the weight and hierarchy that is afforded to it. See also Haverkamp & Kaspar (thematic) for an overview of fundamental differences between countries in sentencing approaches, particularly as regards the continuum between offender-oriented and offence-oriented perspectives in relation to sentencing goals. The country chapters show that there are also significant differences as to the discretion that courts have in the application of sentencing principles. Moreover, in some countries the authority to impose criminal punishments is not exclusively restricted to the judiciary only, but is – usually within limits and with overview by courts – also granted to non-judicial authorities such as the police and prosecution (see the Netherlands and Norway; see about administrative sanctions in the criminal domain, Finland, Germany, Ireland, New Zealand, and Poland). In that case, the principles may also apply to these non-judicial authorities. We will now present the most significant principles and some of their noteworthy features.

5.1 Principle of proportionality

Proportionality of punishment has received human rights status through its codification in the EU Charter of Fundamental Rights. Article 49(3) holds: "The severity of penalties must not be disproportionate to the criminal offence." On this provision, see also Mevis (thematic) and Ramírez Ortiz & Rodríguez Sáez (Spain). A similar guarantee can, however, not be found in other binding international human rights treaties, although it is acknowledged in soft law instruments.[5] The need for proportional sentencing is widely acknowledged, as one chapter after the other in this volume illustrates. According to Lappi-Seppälä & Rautio (Finland), the principle of proportionality has its roots in the concept of the rule of law. Mevis (thematic) argues that proportionality should be seen as

5 See, *e.g.*, p. 28 (under: F) of the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa (adopted by the African Commission on Human and Peoples' Rights during its 56th Ordinary Session in Banjul, Gambia 21 April to 7 May 2015), and Principle 4 of the Appendix to the Council of Europe Recommendation No. R (92) 17 on Consistency in Sentencing (adopted by the Committee of Ministers on 19 October 1992 at the 482nd meeting of the Ministers' Deputies).

the core human rights guarantee with regard to sentencing and why it should be further codified in a binding international human rights instrument.

This does not mean that the principle of proportionality can by itself easily lead to consistent and foreseeable sentencing, as real-life cases that are mentioned in the chapters of Germany, Greece and Ireland illustrate. One problem is that countries and often also judges within a jurisdiction have different views as to between exactly which variables proportionality must exist. Must the form and severity of the sentence as far as the proportionality test is concerned only be related to the severity of the crime as such (Japan), or are, for example, also the circumstances under which the crime was committed and the person of the perpetrator relevant for the test? Or should the punishment, inflict upon the criminal an amount of suffering which is proportional to her or his degree of guilt, in accordance the just deserts (retribution) theory (see Trechsel on Switzerland)? Another difficulty is that the variables used are often difficult to compare, because of their different nature. How can one equate a burglary with imprisonment? Because mathematical precision is unattainable here, cultural beliefs, political views and personal subjectivity will significantly influence the assessment.

For these and other reasons, reasonable people can easily disagree on what constitutes a proportional sentence in a given case (or a proportional disciplinary sanction for misconduct of a detainee). It is, therefore, essential to relate proportionality to other sentencing principles. Such other principles can be necessary to prevent proportionality-oriented sentencing from bringing about a development towards a harsher punishment climate, as is described by Haverkamp & Kaspar (thematic). Furthermore, Seto (Japan) explains that especially in the sentencing process, precedent is a means of ensuring proportionality. He, moreover, describes how Japan has a special system in so-called saiban-in cases (cases in which lay judges are involved) that makes sure that unduly harsh and lenient sentences are avoided.

5.2 Principle of guilt or culpability

In many countries, the principle of guilt is of fundamental importance to sentencing. That certainly does not mean that the principle has the same function in the sentencing process in all these countries. As a minimum requirement, the guilt principle holds that there can be no punishment without culpability. The existence of guilt of the perpetrator of the offence is a threshold for applying a penalty against him or her. In relation with this, the guilt principle also supposes that "punishment is personal and can be imposed only on the offender", as Article 7(2) of the AfChHPR states. That punishments must be personal also means, at least in Finland, according to Lappi-Seppälä & Rautio, that while it may be impossible to avoid that penalties have also collateral effects on the offender's family,

relatives or friends etcetera, punishments should be designed in a manner that minimizes these side-effects.

Whereas in some jurisdictions guilt is legally no more than a threshold for punishment, in some it also works as a measure: punishment is only allowed to the extent that there is culpability. In, for example, Germany, Greece, and Portugal it is a principle that no one should be punished in a way that exceeds the level of individual guilt (culpability, blameworthiness). This also means that, according to Lambropoulou & Tsolka (Greece), that the goal of general deterrence against crime cannot justify a punishment that goes beyond the culpability of the offender. An argument supporting this view is that humans have an absolute value and cannot be used as a means for other purposes. The principle is connected to the right to dignity and the rule of law (see Germany and Portugal). The guilt-limit also applies in relation to the punishment goal of specific deterrence; see Rodrigues, Fidalgo & Manata (Portugal), and also Rogan, Geiran & Ní Raifeartaigh (Ireland).

According to Haverkamp & Kaspar (Germany), critics argue that this "upper limit" of punishment by the amount of "guilt" of the perpetrator of the offence is not a very strong protection against excessive punishment, as there are no clear standards for how guilt is to be measured and how it is to be transferred into concrete numbers (*e.g.*, days in prison). Therefore, they conclude that there is a great deal of discretion for the individual judge to decide on these matters. Similarly, Trechsel (Switzerland) states that there are no fool-proof methods to measure the amount of guilt, and that it is even less obvious what amount of guilt calls for what severity of sentence. He rightly points out that we are actually faced with incommensurable scales.

5.3 Principle of equality

Usually, the legal principle of equality is understood to mean that equal cases should be treated likewise, while unequal cases should be treated differently to the extent that they are dissimilar. The principle requires consistency in punishment and in sentence execution between similar cases. It promotes sentence parity for like offences. As mentioned above, Agomoh asserts that consistency and individualization are the fundamentals of a fair sentencing system. She stresses that ensuring that there are adequate mechanisms in place to achieve sentencing consistency is of fundamental importance to any system of law. This is particularly so if the courts have a wide discretion in sentencing. The more discretion a judge is allowed to exercise, the greater the risk of similarly situated offenders being treated differently. Or, as Haverkamp & Kaspar (thematic), put it: judicial discretion always raises the question of sentencing disparity. They also point out that the more discretion judges have, the more difficult it becomes for research to identify sentencing disparity.

Agomoh (thematic) warns that treating equal cases differently and inequal cases similarly can lead to injustice and erode public confidence in the legal system. Arbitrary sentencing and especially discrimination are fatal for that. See also Rogan, Geiran & Ní Raifeartaigh (Ireland), who illustrate that inconsistency can also be the result of (gender) discrimination of the victim of the offence. Actually, as Della Casa & Ruaro (Italy) show, it is also possible that sentencing inconsistency exists between categories of offences when the legislator applies different maximum punishments for offences that are rather similar in seriousness. This can, for example result, in class discrimination. On that topic, see also Agomoh, who elaborates on the problem that that there is a strong nexus between poverty and imprisonment. See Della Casa & Ruaro (Italy) also on the discriminatory use of a general and absolute presumption of higher social dangerousness. We assert that even though consistency is a requirement for equality, consistency as such does guarantee equality. For example, if a bias or a discriminatory approach is applied perfectly consistent, this still does not meet the principle of equality.

Tinsley (thematic) explains that courts have acknowledged the importance of the rule of law, the principle of legality and lawfulness in promoting parity in sentencing. See also Strandbakken (Norway), who explains how the principle of equality is linked with the principle of legality in Norway: clear provisions about what constitutes a criminal act and the limits on punishment will help the courts to decide identical cases in the same way. For such reasons, Finnish justice places a strong emphasis on equal treatment. Lappi-Seppälä & Rautio (Finland) explain that respect for consistency and uniformity in sentencing means that the court must take into account the general sentencing practice and use the kind of punishment that has been used in similar cases, unless there are special reasons to deviate from these starting points. See on the importance of taking similar cases into consideration, particularly also the chapters on Japan, New Zealand, and Switzerland. Interestingly, because of the emphasis on guilt-oriented individual sentencing decisions (see above the principle of guilt) in Germany, equality does not play an important role there with regard to sentencing. The German Federal Court of Justice (BGH) had even stressed that it would be a legal mistake to use sentencing decisions in other cases as a decisive argument for sentencing in the actual case.

There are several major difficulties with properly applying the principle of equality when sentencing and executing sentences. One problem is that it is hard to decide in general what factors should be taken into consideration when assessing similarity and dissimilarity between cases and trying to accomplish consistency, and what the weight of these factors should be. Even if a tight statutory sentencing system and/or tight sentencing guidelines is/are in place, this will only be possible to some extent since there will always be a need for interpretation of the sentencing rules and principles and for weighing the relevant factors by the judge. A further problem is that the more a system secures consistency through limiting the sentencing discretion of the courts, the harder it will get

to also realize substantive fairness and individualization (see also below). Finally, there will usually be a lack of knowledge, not only of all the relevant circumstances and facts that surround a case, but also with respect to the precise reasons that underlay the sentences in other cases.

5.4 Principle of fairness or reasonableness

In many countries, fairness or reasonableness are acknowledged requirements in relation to sentencing and the execution of sentences, but there are major differences as regards the function and content of these principles. These principles can be understood and applied in many different ways, without it ever being clear what exactly their contents are.

In Japan, for example, fairness of punishment is a basic principle of the criminal justice system that seems to be connected to consistency and the principle of equality. Seto (Japan) explains that respecting the precedent of past sentences is important to maintaining the fairness of judgments, according to the courts. This does, however, not necessarily mean that the practice of sentencing offenders based on past similar cases has binding effect. The sentencing range might change along with the social circumstances and public consciousness. Interestingly, as Ortenzi & García Basalo explain, in Argentina reasonableness is applied together with legality to limit judicial discretion. When the limits of these principles are crossed, arbitrariness comes into play. Arbitrariness is considered to exist when an act is against reason, law or justice. Also Haverkamp & Kaspar (thematic) point out that the principle of individualized justice is supposed to guarantee a fair and appropriate sentence for each convicted person, but that if it is more or less up to judges alone to decide what is relevant to their decision, the rule of law is put at risk and "individualistic justice" turns into mere "subjective justice" from the point of view of the judges in each single case. See, furthermore, Tinsley (thematic), who points out that one way to promote fairness – as well as consistency and certainty – is to increase the guidance given to sentencing judges.

A somewhat different function of the principle of fairness can be found in the chapter by Della Casa & Ruaro on Italy, where the principle of reasonableness is acknowledged by the Supreme Court and seems to be connected to the principle of proportionality. This also seems to be the case in Lithuania; see the chapter by Sakalauskas. See also the chapter on Chile. Molina Jerez, Náquira Riveros & Guzmán Dalbora explain for Chile that disciplinary sanctions in prison must be fair, that is, timely and proportional to the offence committed and must take into consideration both its severity and its duration and the characteristics of the inmate.

Several countries link the principle of the totality of sentences to the fairness of sentences. For example, Lambropoulou & Tsolka (Greece) explain that in cases where an

offender is to serve more than one sentence, the overall sentence must be just and appropriate in light of the overall offending behaviour. They emphasize that this principle is also a derivative of the proportionality and legality principles. See also Rogan, Geiran & Ní Raifeartaigh (Ireland) and Sakalauskas (Lithuania).

In Finland, fairness is rather related to notions such as compassion, tolerance, solidarity, forgiveness, and humanity. Lappi-Seppälä & Rautio (Finland) state that there is an element of "reasonableness" in traditional Nordic legal thinking and that the system allows for the possibility to make downward deviations from normal rules due to arguments of fairness and mercy. See also Lambropoulou & Tsolka (Greece), who explain that leniency has always played a decisive role in the Greek judicial system, both in the law itself and in law enforcement, despite some contemporary drifts towards severity in the last two decades. According to ancient Greek thought, leniency is intrinsically linked to the idea of justice. Democritus, for example, considers *epieikeia* ("reasonableness") as an element of good administration and thus the strongest pillar of the State.

When notions such as legality, foreseeability, consistency, proportionality, and humanity are violated through the sentence or the execution thereof, this often also will be considered as unfair or unreasonable. Fairness can be used here with very different meanings: for example, both consistency and individualization can be incremental to achieve fairness, even though they can be opposite to each other. Therefore, real fairness requires not just consistency or individualization as such, but rather consistent individualization.

The above seems primarily about fairness and reasonableness towards the perpetrator of the offence. Fairness can, however, to some extent also be considered towards the victim and as regards society in general. Notions like legality, foreseeability, consistency, proportionality, and humanity can also be of relevance in that respect. De facto impunity or a very light sentence for a serious offence can be really unfair to, for example, victims who have suffered greatly because of the crime. This also means that retribution – or *just deserts*; see Haverkamp & Kaspar (thematic) – to some extent can be a notion of fairness. Clearly, this complicates the function and contents of the principle of fairness or reasonableness for sentencing and the execution of sentences even more. In our view, fairness should at least be regarded as a principle that requires a judge to consider and weigh the many different interests of the offender, victims, and society involved in sentencing.

5.5 Principle of individualization

When courts are afforded sentencing discretion, this is usually done with a view to enabling judges to apply a sentence that fits the individual concrete case considering the

circumstances of that particular case. For example, in the Netherlands, as Mevis & Vegter point out, the legislator leaves the courts with much discretion, with the intention to enable the courts to apply the proper, individualized punishment appropriate in the concrete case. Even though that principle of individualization has not been codified as such, the principle follows from the Dutch system of law. Something similar applies to Spain, where the need for judicial decisions to be based on the analysis of the particular circumstances of the case and the personal circumstances of the convicted person is acknowledged as a legal doctrine. According to Ramírez Ortiz & Rodríguez Sáez, it can be said that the two basic concepts in Spain are individualization and the rejection of automatism as a bureaucratic process of decision-making. As they infer, without a discretionary margin to determine the substance of the criminal response to an offence, individualization would become impossible.

It seems that all countries to at least some extent recognize the value of and need for individualization. However, this does not make clear what individualization exactly encompasses and how it must be applied. Which factors in and around a case are relevant to individualization and how should these factors be weighed? Here we see similar issues as with the concepts of justice, fairness and reasonableness, to which the principle of individualization is instrumental. It seems to us that it purports to guarantee a fair and appropriate sentence in the case, instead of just in respect of the offender, the victim or society. This means that in a particular case both the specific circumstances and facts that point to a more lenient punishment as well as the factors which rather direct towards a more severe penalty are relevant when applying the principle of individualization.

See also Haverkamp & Kaspar (thematic) on the risk of "individualistic justice" turning into "subjective justice" (set out above under 'Principle of fairness or reasonableness'). Consequently, they assert that some binding legal safeguards seem necessary, which would also contribute to avoiding illegitimate sentencing disparities. Indeed, in our view, the principle of individualization should go hand-in-hand with the principle of equality. The principle of individualization can only prevent arbitrariness if there is consistency in the way principles are applied to individual cases, in the factors that are taken into consideration, and in the way these factors are weighed. This requires that the judges within a jurisdiction who are involved in sentencing need to have a common understanding of which principles must be applied, what these principles mean, and what factors are relevant and to which extent. Ultimately, of course, this not only has to apply to judges in the sentencing process, but also to authorities who impose punishments themselves (*e.g.*, police, prosecution, prison officials) or determine how sentences are executed.

5.6 *Principle of necessity and principle against unnecessary harm*

Of course, when a sentence interferes with a constitutional or fundamental human right, which it typically does, the interference must be necessary in order to be justified. However, some countries expressly acknowledge the principle of necessity as a sentencing principle that holds that the sentence may not be more severe than is necessary in order to meet the purposes of sentencing. This, for example, applies to Greece, as Lambropoulou & Tsolka explain. They associate the principle with leniency and parsimony. It seems, to us, that the principle of necessity in this respect is aligned with utilitarian concepts rather than retributive concepts of criminal justice.

In Finland, according to Lappi-Seppälä & Rautio, the principle is particularly relevant with respect to the demand that punishments must not cause unnecessary suffering. They expound that while punishment is always something that is experienced as unpleasant, it still is forbidden to cause any additional suffering than the one included in a sanction measured according to valid sentencing principles. See also Mevis & Vegter on the Netherlands and Rodrigues, Fidalgo & Manata on Portugal; in these countries the Constitutions hold provisions that make clear that persons who have been lawfully deprived of their liberty retain their fundamental rights, save for the limitations that are inherent to the purpose of their convictions and to the specific requirements imposed by the execution of the sentence. See also the chapters on Spain and Switzerland.[6]

The principle of necessity is thus of relevance to both the sentencing process and the execution of sentences. The latter not only involves the way in which sentences are executed, but may also concern disciplinary sanctions against detainees. See also Molina Jerez, Náquira Riveros & Guzmán Dalbora (Chile), who with regard to disciplinary sanctions clarify that the prison authorities must comply with necessity and opportunity criteria.

5.7 *Principle of the effect of the punishment and principle of rehabilitation*

In order for the courts to be able to impose a sentence that meets certain sentencing goals, it must be clear what the expected effect of the punishment will be. Similarly, proper application of principles such as fairness, proportionality and necessity requires at least some insight in the effects of possible punishments in a concrete case. There is something

6 The principle that prisoners retain their rights also follows from international human rights law. For an overview of international instruments containing this principle see: Maartje Krabbe, 'A legal perspective on the worldwide situation of defendants and detainees with mental illness', in: P.H.P.H.M.C. van Kempen & M.J.M. Krabbe (eds.), *Mental health and criminal justice: international and domestic perspectives on defendants and detainees with mental illness*, Den Haag: Eleven 2021, p. 3-44, p. 23, footnote 139.

else that is of further relevance to sentencing, namely the fact that punishment of offenders often has adverse consequences, not only for the sentenced individuals, but also for their family, their employer, society, and sometimes even the victim.[7] For all these reasons, courts must anticipate what the effect of a certain punishment will be.

As one can understand from Trechsel (Switzerland), the need to look at possible effects on the life of the convict is inspired by such interests as resocialization and rehabilitation. For example, rehabilitation and reintegration remains the central aim of the enforcement of sentences in Finland, according to the chapter by Lappi-Seppälä & Rautio. This certainly also weighs heavily on the sentencing process itself, for example when it comes to the choice between imprisonment, community service or a fine. See also the chapter of Della Casa & Ruaro on Italy, who note that the Constitutional Court of Italy has stated that an evaluation of adequacy of the punishment in terms of re-education is always necessary, and that this evaluation should not be confined only to the execution phase, but should also take place in the initial quantification of the punishment.

Interestingly, Article 27(3) of the Constitution of Italy even stipulates that penalties are aimed at "re-education" of the convicted person. This aim is also linked to the principle of proportionality. According to Della Casa & Ruaro, an excessive penalty is perceived as unjust by convicted persons, with the consequence that the re-education process is compromised from the outset, i.e. from the moment the legislative provision is made. See also their explanation of Articles 133 and 176 of the Penal Code of Italy. Reintegration is also an express aim of the sentence in countries like Portugal, as is broadly explained by Rodrigues, Fidalgo & Manata.

5.8 Reasoning for sentences

Proper reasoning for sentences can contribute to the idea behind the principle of legality in various ways. With well-reasoned sentencing, the courts display how they have applied the sentencing framework set by the legislator. This does not only confirm that the courts work within that framework, to some extent it also prevents arbitrariness and personal subjectivity, which are both also relevant to the rule of law. Furthermore, reasoning that is based on such principles as equality and proportionality helps to provide real foreseeability for individuals and for society with respect to the form and severity of the punishment that can be expected for a certain offence under certain conditions.

The need for proper reasoning behind sentencing decisions is discussed in many of the chapters; see particularly Finland, Greece, Ireland, Italy, the Netherlands, and Spain. One

7 See, e.g., P.H.P.H.M.C. van Kempen & W. Young (eds.), *Prevention of reoffending. The value of rehabilitation and the management of high risk offenders / Prévention de la récidive. Valeur de la réhabilitation et gestion des délinquants à haut risque,* Cambridge/Antwerp/Portland: Intersentia 2014 (IPPF series Nr. 45).

of the problems that are discussed is that courts often use standard formulas that offer little insight in the actual reasons for the punishment in the individual case. As Della Casa & Ruaro (Italy) contend, with such an application of legal sentencing criteria the law does not curb judicial discretion sufficiently. See also Ramírez Ortiz & Rodríguez Sáez, who explain how the Supreme Court in Spain strives to strengthen the reasoning for sentences by the lower courts.

5.9 Further principles, requirements, and limits

The principles described above limit the discretion for judges in the sentencing process, for non-judicial entities that render punishments (*e.g.*, criminal punishment by police or prosecution, or disciplinary sanctions by prison authorities), and for the authorities during the execution of sentences. Of course, these principles function in frameworks that contain many more requirements and standards on sentencing and sentence execution. Many of the country chapters present details of these frameworks, including on such topics as the goals of sentencing, the role of the severity of the crime for the sentence, and the (aggravating and mitigating) sentencing factors that the courts need to consider.

Many chapters also pay attention to procedural requirements of the sentencing process, such as judicial independence, the right to defence, the reasoning for judgments, and the purpose and value of review of sentencing by higher courts. Procedural requirements are also discussed relative to the execution phase, more particularly complaints mechanisms.

Furthermore, the relevance of the prohibition of inhuman treatment for sentencing and the execution of sentences is discussed (see, particularly, Germany, Italy, Lithuania, Norway, the Netherlands, and also Mevis (thematic) in respect of life imprisonment and the long fixed-term prison sentence).

6 Databases, guidelines, mandatory sentences, and other limits to judicial discretion

Even apart from such problems as bias and noise in the process of sentencing and the phase of the execution of sentences, the principles discussed above will not guarantee real foreseeability and non-arbitrariness (legality) as long as judges and other authorities lack a clear common understanding of which principles must be applied, what these principles mean, and which factors are relevant to applying them and with what weight. The question arises whether it is possible and desirable to control this problem by using guidelines, mandatory sentencing systems or other legal restrictions.

As mentioned before, this question is discussed in more depth by Haverkamp & Kaspar (thematic). One of the difficulties is that stricter guidance for courts can reduce their

sentencing discretion, which they need to render a sentence that serves individualized justice and fairness. This applies even though this may at the same time lead to a system that better meets the purposes of the legality principle. This is enough reason for Haverkamp & Kaspar (Germany) to oppose guidelines that are too detailed. In their view, these pose a danger of overly schematic sentencing, without considering the special features of individual cases.

However, the extent to which the discretion of the judiciary is actually interfered with may depend on who is responsible for the limits and/or guidance: the legislator or the judiciary itself. If it is the latter, the overall discretional power can stay with the courts, while foreseeability and consistency may also be served. This is moreover also relevant to maintain the independence of the judiciary, since, as Wąsek-Wiaderek & Zbiciak (Poland) point out, the independence of judges is related to the independence of courts. On the complex relationship of guidelines, discretion, and judicial independence, see Tinsley (thematic).

It is clear from the country chapters that all countries discussed therein struggle to offer both consistency and individualization in sentencing. Formal guidance concerning sentencing remains relatively limited and judicial discretion therefore wide, in, for example, Germany, Ireland, the Netherlands, and Switzerland.

With a view to consistent and simultaneously individualized sentencing, Finland has an interesting system in place, which offers a heuristic decision-making model called "the notion of normal punishments" (see the chapter by Lappi-Seppälä & Rautio). This system is based on substantial reasoning for punishments and effective dissemination via electronic databases, handbooks, and systematic commentaries. In this system, the limitations of judicial discretion in individual cases follow from the case law of the courts themselves, not from the legislator. See also Seto on Japan, where a sentencing database is in place that includes many past judgments and sentences, and includes elements which might be recognized as keys to the determination of sentences in each case. Haverkamp & Kaspar (thematic) assert that when sentencing regulations exist and (rightly) do leave some judicial discretion, there will probably always be the need for further guidance, e.g., by case law or sentencing traditions. They plead for the introduction of databases, which, in their opinion, can lead to quite uniform sentencing throughout a jurisdiction even when there are no specific regulations on sentencing purposes or criteria. See also Mevis (thematic).

A still relatively weak non-judicial limit to judicial discretion can be found in the chapter by Strandbakken, who explains that in Norway a "normal punishment level" for different offences was introduced by the minister but which is not formally binding. Lithuania applies "the rule of the average penalty", which, according to Sakalauskas, causes long prison sentences, despite a relative wide discretion of judges in sentencing. See for a different system, the Portuguese "theory of preventative scale", about which Rodrigues,

Fidalgo & Manata (Portugal) assert: despite the effort made by the Portuguese legislator and doctrine to legalize the process of determining the concrete measure of the sentence, the truth is that this process is an eminently practical one.

Much more constricting are all kinds of constructions in the law. For example, for a small number of very grave offences, countries such as Germany, Ireland, and New Zealand have (semi-)mandatory sentences. As follows from the chapter by Wąsek-Wiaderek & Zbiciak, (semi-)mandatory sentencing is applied a little more broadly in the criminal legislation of Poland. New Zealand, furthermore, has "two strikes" and "three strikes" legislation for some offences.

Della Casa & Ruaro (Italy) point out that the use by the legislator of instruments aimed at reducing the discretionary power of the judge, in a way that is unfavourable to the accused or convicted person, is increasingly frequent. Looking at the developments that Wąsek-Wiaderek & Zbiciak describe, a similar conclusion seems applicable to Poland. There is a wide variety of possibilities to curtail judicial discretional power. One example is the requirement in statutory law of a minimum punishment for an offence (see also Norway). Mandatory sentencing is discussed more generally by Agomoh (thematic) and also by Mevis (thematic), who proposes the adoption of an international protocol on sentencing that could declare itself against the use of special sentence minima per offence in the national systems of sanctions or at least declare that these are preferably abandoned.

However, limitations of judicial power to the detriment of the accused are not only signalled and argued against, authors also indicate that judicial discretion should be restricted to serve the principle of legality and reinforce the position of the accused. According to Haverkamp & Kaspar (Germany), reform of German sentencing laws should be directed at eliminating unnecessary margins of judicial discretion and sentencing frames should be narrowed, preferably by lowering the upper limit of sentences. Furthermore, judicial discretion can be restricted through tighter regulation of aggravating or mitigating circumstances (see also Spain).

7 Concluding remarks

In spite of the globally recognized fundamental position of the principle of legality and the rule of law, governments around the world struggle with providing foreseeability and non-arbitrariness in their sentencing systems. This continuous struggle raises the question how – and to what extent – foreseeability and non-arbitrariness must be guaranteed. Not only in relation to the type of sentence imposed, but also to its length and the circumstances under which the sentence is executed. Paramount in achieving foreseeability and non-arbitrariness is the scope of sentencing discretion, which must enable adjudicators to strike a balance between consistency in sentencing and doing justice in the individual

case. This balance is crucial, for both excessive consistency and boundless discretion may lead to injustice. Key in balancing these interests is the practice of 'consistent individualization': being consistent in cases that are identical in all the relevant aspects. In order to practice consistent individualization, adjudicators need to have access to clear sentencing principles, laws and policies.

As to sentencing principles, a variety of these principles underlie the world's sentencing systems. For example, the principles of proportionality, culpability, equality, fairness, individualization, necessity, effectiveness and 'reasoned sentences'. Although countries differ in the principles they apply and the meaning and status they ascribe to them, all national criminal justice systems strive to provide at least a sufficient degree of foreseeability and non-arbitrariness through the use of these principles. An important condition for 'consistent individualization' on the level of principles is that the adjudicators within a jurisdiction have a common understanding of which sentencing principles must be applied, what these principles mean, and which factors are relevant to applying them. When shaping these principles (and also sentencing laws and policies), different aspects may influence the outcome. Applicable human rights standards, for example, as well as ideas on the distribution of power between the organs of the state, and the justification(s) for punishment that the government in place values.

Whatever the national context may be, it is vital to contemplate on the basic principles of our sentencing systems, and the way these principles should shape laws and policies. Not merely to govern in accordance with the principle of legality and to do justice in the individual case, but also as a safeguard to future social and political developments, which may include sentencing decisions (partly) being determined by artificial intelligence.

Légalité des peines et nécessité d'un catalogue de principes

Piet Hein van Kempen, Maartje Krabbe, José Luis Guzmán Dalbora et Francisco Molina Jerez[*]

1 Introduction à ce volume

Partout dans le monde, les gouvernements imposent des sanctions à leurs citoyens pour des transgressions du droit pénal. Il existe un consensus sur le fait que cette sanction doit être conforme au principe de légalité et à l'État de droit. Cependant, les gouvernements du monde entier s'efforcent d'assurer la prévisibilité et l'absence d'arbitraire dans leurs systèmes de condamnation. Cette lutte permanente soulève la question de savoir comment – et dans quelle mesure – la prévisibilité et le caractère non arbitraire doivent être garantis. Non seulement en ce qui concerne le type de peine imposée (qualité), mais aussi en ce qui concerne sa durée (quantité) et les circonstances dans lesquelles la peine est exécutée. Dans le monde entier, divers principes de détermination de la peine (par *exemple, la* proportionnalité, l'égalité, la culpabilité) sont utilisés, non seulement pour promouvoir une détermination prévisible et non arbitraire de la peine, mais aussi pour rendre justice au cas par cas. Bien qu'il existe des similitudes, les pays diffèrent grandement quant aux principes qu'ils appliquent et à la signification qu'ils leur donnent.

Ce volume donne un aperçu des idées et des pratiques mondiales sur la légalité et les autres exigences en matière de condamnation. Quelles sont les exigences à privilégier? Comment ces exigences sont-elles liées entre elles? Et comment doivent-elles être définies et mises en œuvre? Un large éventail de sujets et de questions sont abordés à propos de ces exigences. Quelques exemples: Comment équilibrer le pouvoir discrétionnaire du juge et le principe de légalité? L'exécution des peines doit-elle relever du pouvoir judiciaire ou de l'administration? Quelle est la relation entre le principe de légalité et l'interdiction de la discrimination? Les juges *humains* peuvent-ils appliquer des peines cohérentes? La

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libération provisoire doit-elle être un pouvoir discrétionnaire ou un droit? Et: Comment accroître la confiance du public dans la détermination de la peine? Le présent volume espère à la fois apporter des réponses à ces questions et aider le lecteur à développer de nouvelles réflexions et de nouveaux points de vue sur ces sujets.

En ce qui concerne la structure de ce livre: ce volume contient quatre chapitres thématiques rédigés par des autorités sur des sujets spécifiques, seize chapitres nationaux décrivant les principes et les pratiques en matière de condamnation dans différents pays et le présent chapitre introductif. Ce chapitre introductif (qui constitue la première partie de ce volume) présente tout d'abord une introduction à ce volume (présente section). Ensuite, des définitions relatives au titre de ce volume sont fournies (section 1.1). Un aperçu de ce volume est présenté à la section 1.2. Cette section offre un bref résumé des quatre chapitres thématiques de la partie II (section 1.2.1), elle explique la structure des chapitres nationaux de la partie III (section 1.2.2) et fournit une introduction aux sections suivantes du présent chapitre (section 1.2.3). Ces sections suivantes (2-7) visent à fournir une introduction sur les principes directeurs en matière de détermination de la peine dans le monde, sur la base d'une analyse des chapitres thématiques et des chapitres nationaux contenus dans ce volume.

1.1 Définitions

Plusieurs définitions sont pertinentes pour clarifier le titre de ce volume. Dans ce qui suit, les concepts de *détermination de la peine*, de *pouvoir discrétionnaire en matière de détermination de la peine* et de *non-arbitraire* sont replacés dans leur contexte. Dans le cadre de cet ouvrage, le concept de *condamnation* doit être compris au sens large, c'est-à-dire l'imposition de sanctions (en particulier de peines) par les autorités judiciaires (tribunaux, juges) ou non judiciaires (police, ministère public) pour des infractions pénales ou administratives, ainsi que l'exécution de ces sanctions. En général, la qualité (par exemple, prison, peine non privative de liberté, etc.) et la quantité (durée) d'une sanction sont décidées au cours de la « phase d'imposition ». Cependant, les autorités d'exécution peuvent également influencer la quantité et la qualité. C'est par exemple le cas lorsque ces autorités prennent des décisions concernant la libération anticipée (quantité). Ou lorsqu'elles déterminent la prison dans laquelle la peine doit être purgée et la sévérité du régime (qualité). Les autorités chargées de l'exécution des peines ont généralement aussi le pouvoir d'appliquer des sanctions disciplinaires ou autres, par exemple en cas de mauvaise conduite d'un détenu ou lorsque le délinquant ne respecte pas ses obligations pendant l'exécution d'une peine de travail d'intérêt général (qualité). Le *pouvoir discrétionnaire en matière de condamnation désigne* l'étendue de la liberté dont dispose un juge lorsqu'il prononce une peine dans un cas spécifique et dans des circonstances

spécifiques. L'*absence d'arbitraire* désigne une condamnation fondée sur des motifs objectivés ou sur un système, plutôt que sur des choix aléatoires ou subjectifs.

1.2 Aperçu du présent volume

1.2.1 Chapitres thématiques

Une approche thématique de la légalité, de l'absence d'arbitraire et du pouvoir discrétionnaire en matière de condamnation et d'exécution des peines est présentée dans la partie II de ce volume, dans laquelle quatre professionnels de différentes parties du monde présentent une opinion d'expert sur les difficultés, les limites, les opportunités et les solutions liées à ce sujet.

Paul Mevis présente une perspective ambitieuse des droits de l'homme en ce qui concerne le processus de détermination de la peine et l'exécution des peines. Il explique que s'il existe divers documents et mécanismes relatifs aux droits de l'homme qui couvrent la plupart des aspects de l'exécution des peines, il n'existe pas d'instrument complet de droit contraignant en matière de droits de l'homme qui concerne la détermination de la peine. Au vu de plusieurs développements actuels, y compris un climat de sanctions plus sévère, selon Mevis, ceci doit être considéré comme une lacune urgente dans la protection internationale des droits de l'homme. Il propose ensuite l'élaboration d'un protocole international concernant les droits de l'homme et la condamnation comme garantie indépendante contre les condamnations disproportionnées. Outre un droit contre les condamnations disproportionnées, l'auteur soutient que le protocole pourrait inclure diverses garanties supplémentaires. Dans cette optique, plusieurs autres sujets sont explorés, tels que la protection contre la discrimination dans la détermination de la peine, une règle selon laquelle le temps passé en détention avant le procès ou avant l'appel doit être pris en compte dans la détermination de la peine, l'obligation d'appliquer un retard injustifié dans la procédure pénale comme motif de réduction de la peine en faveur du suspect, ainsi que plusieurs exigences procédurales pour la procédure de détermination de la peine en tant que telle. Dans ce chapitre, Mevis accorde une attention particulière à deux sanctions très problématiques du point de vue des droits de l'homme: la peine d'emprisonnement à perpétuité et la peine d'emprisonnement à durée déterminée (longue).

Yvette Tinsley examine de plus près la relation entre l'indépendance judiciaire, le pouvoir discrétionnaire et l'équité dans la détermination de la peine. Après quelques remarques générales sur l'indépendance judiciaire et le rôle du principe de légalité ou de l'État de droit, elle aborde cinq aspects de la tension entre l'indépendance et l'équité: le rôle de l'exécutif et du législatif, l'utilisation de lignes directrices en matière de condamnation, les défis de la technologie administrative, les limites potentielles de l'impartialité et les impacts de l'activisme judiciaire, ainsi que la pression accrue exercée par l'opinion

publique. Tinsley soulève de nombreuses questions essentielles et offre une grande variété de points de vue. Elle conclut que si l'impartialité est difficile à atteindre, nous devrions essayer de mettre en place des conditions permettant de réduire au maximum les préjugés et les influences indues. Selon elle, il est donc important que les responsables des tribunaux mettent en place des formations pour les juges et la communauté et que les juges partagent leurs expériences entre eux, afin de s'assurer que les décisions de condamnation soient prises de la manière la plus impartiale possible et sans se focaliser indûment sur les controverses du moment.

La contribution conjointe de **Rita Haverkamp et Johannes Kaspar** se concentre sur le pouvoir discrétionnaire des juges dans un cadre. Elle distingue deux types idéaux de condamnations. Dans le premier cas, les juges s'en tiennent strictement aux termes de la loi et ne disposent d'aucun pouvoir discrétionnaire en ce qui concerne le choix de la peine ou sa durée (détermination de la peine), tandis que dans le second cas, les juges disposent d'un pouvoir discrétionnaire illimité (détermination de la peine indéterminée). La première approche peut contribuer à l'uniformisation des peines, tandis que la seconde peut trouver un fondement dans le principe d'individualisation. Haverkamp & Kaspar examinent dans un premier temps le contexte historique des théories sur la détermination de la peine et le pouvoir judiciaire discrétionnaire, les différences entre les systèmes de détermination de la peine dans les juridictions nationales du monde entier et les objectifs de la sanction. Ils examinent ensuite la disparité des peines et les conséquences pratiques des politiques de répression de la criminalité. Après avoir souligné la valeur de la Recommandation du Conseil de l'Europe n° R (92) 17 sur la cohérence des peines, les auteurs concluent qu'une certaine discrétion judiciaire semble nécessaire pour prendre en compte les circonstances individuelles des délinquants, tout en reconnaissant que si les réglementations en matière de peines existent et laissent à juste titre une certaine discrétion judiciaire, une orientation supplémentaire sera probablement toujours nécessaire, par exemple par la jurisprudence ou les traditions en matière de peines. Afin de garantir la transparence à cet égard, Haverkamp & Kaspar estiment que l'introduction d'une base de données contenant les décisions judiciaires correspondantes constituerait une amélioration.

Le chapitre d'**Uju Agomoh** sur le pouvoir discrétionnaire de l'administration dans l'exécution (ou l'application) des peines commence par souligner que le processus pénal est marqué par un vaste pouvoir discrétionnaire de *facto*, voire de *jure*, de la police, du ministère public et de la justice en ce qui concerne l'application des lois, la poursuite des infractions et la détermination de la peine des délinquants. Agomoh explique que la détermination de la peine est fondée sur deux principes qui sont en conflit permanent, mais qui sont les fondements d'un système de détermination de la peine équitable: la justice individualisée et la cohérence. Elle aborde ensuite le contrôle judiciaire du pouvoir discrétionnaire de l'administration, le pouvoir discrétionnaire de l'administration et son

impact sur les capacités désignées des centres pénitentiaires, ainsi que les possibilités de réhabilitation et d'équité lors de l'exercice du pouvoir discrétionnaire de l'administration dans l'exécution des peines, ce qui l'amène à examiner de plus près les peines d'emprisonnement à durée indéterminée par rapport aux peines d'emprisonnement à durée déterminée. Dans ce chapitre, Agomoh accorde une attention particulière à l'application discrétionnaire des lois et des politiques et à ses effets sur les pauvres et les défavorisés.

1.2.2 Les sections nationales

Les chapitres nationaux de ce volume sont basés sur un questionnaire auquel des professionnels de 16 pays ont répondu au cours de la période 2019-2022. Les États déclarants sont l'Allemagne, l'Argentine, le Chili, l'Espagne, la Finlande, la Grèce, l'Irlande, l'Italie, le Japon, la Lituanie, la Norvège, la Nouvelle-Zélande, les Pays-Bas, la Pologne, le Portugal et la Suisse. Chacun des chapitres nationaux traite du principe de légalité et/ou de l'État de droit en ce qui concerne les sanctions pénales, des exigences en matière de droits de l'homme en ce qui concerne le processus de condamnation et l'exécution des peines, du pouvoir judiciaire discrétionnaire en matière de condamnation en général (la position d'un pouvoir judiciaire indépendant et sa responsabilité en matière d'équité), du pouvoir judiciaire discrétionnaire dans des cadres tels que les lignes directrices et les systèmes de condamnation obligatoire, de la condamnation par des entités non judiciaires (par *exemple*, la sanction pénale par la police ou le ministère public, ou les sanctions disciplinaires par les autorités pénitentiaires), et du pouvoir administratif discrétionnaire en matière d'exécution des peines. Les chapitres présentent une structure similaire, bien que dans certains cas, plusieurs de ces sujets soient combinés dans un paragraphe, tandis que d'autres chapitres proposent des paragraphes supplémentaires sur des sujets pertinents.

1.2.3 Présent chapitre

Les sections suivantes de ce chapitre visent à fournir une introduction sur les principes directeurs en matière de détermination de la peine dans le monde, sur la base d'une analyse des chapitres thématiques et des chapitres nationaux contenus dans ce volume. Dans un premier temps, le principe de légalité et l'État de droit sont examinés en relation avec la détermination de la peine (section 2). Ensuite, les obstacles à une condamnation prévisible et non arbitraire sont abordés (section 3). La section 4 présente le concept d'« individualisation cohérente », qui fusionne les exigences de légalité avec le concept de justice dans le cas individuel. Un catalogue des principes de détermination de la peine est présenté dans la section 5. Pour chaque principe, les différentes significations dans le monde sont discutées. La section 6 offre une perspective comparative des différents mécanismes visant à limiter le pouvoir discrétionnaire des juges. Ce chapitre se termine par une brève conclusion, qui met en balance les intérêts de la prévisibilité et de l'absence

d'arbitraire *avec le* pouvoir discrétionnaire en matière de condamnation, tout en soulignant l'importance d'une compréhension plus commune, parmi les juges, de la portée et de l'application des principes en matière de condamnation (section 7). L'introduction qui suit est basée sur les informations fournies dans les chapitres nationaux et thématiques de ce volume. Tout au long de ce chapitre, nous faisons référence à ces contributions dans le texte. Dans le cas d'un chapitre national, le nom du pays est placé entre parenthèses derrière les noms des auteurs, tandis que dans le cas d'un chapitre thématique, les noms des auteurs sont suivis du mot « thématique » entre parenthèses.

2 Le principe de légalité, l'État de droit et la condamnation

Le principe *nullum crimen, nulla poena sine praevia lege poenali* – inventé par Paul Johann Anselm Ritter von Feuerbach (1755-1833)[1] et qui est une pierre angulaire du système de justice pénale ainsi qu'un droit de l'homme international – signifie qu'il ne peut y avoir de crime ni de peine sans loi pénale préalable. D'une manière générale, le principe de légalité repose sur le fait qu'une personne peut prévoir quel comportement peut engager sa responsabilité pénale et quelle sanction peut être imposée pour ce comportement. Le principe vise donc à garantir la sécurité juridique de l'individu. À cette fin, le principe de légalité exige que les infractions et les sanctions applicables soient clairement définies par la loi.

Le principe de légalité n'est pas exactement la même chose que l'État de droit, mais il en est incontestablement un élément essentiel. Ortenzi & García Basalo (Argentine) qualifient même le principe de légalité de caractéristique la plus distinctive de l'État de droit. Tinsley (thématique) reconnaît qu'il existe un large consensus sur le fait que l'État de droit doit protéger contre l'anarchie et l'arbitraire officiel et permettre aux gens de planifier leurs affaires avec une confiance raisonnable dans le fait qu'ils peuvent prévoir ou s'attendre aux conséquences juridiques de diverses actions. Elle met en garde qu'au-delà de cela, la signification et l'effet précis continuent de faire l'objet d'un débat considérable.

Malgré la position fondamentale du principe de légalité et de l'État de droit, les systèmes de justice pénale du monde entier peinent à assurer une réelle prévisibilité pour les individus et la société en ce qui concerne la forme (qualité) et la sévérité (quantité) de la sanction à laquelle on peut s'attendre pour un délit donné. Cela soulève la question de savoir comment et dans quelle mesure le principe de légalité et l'État de droit visent à garantir la prévisibilité et le caractère non arbitraire des peines, des sanctions non judiciaires et de l'exécution des peines.

1 P.J.A. von Feuerbach, *Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts,* Giesen 1801.

2.1 Le principe de légalité en tant que norme codifiée

Il découle du principe de légalité énoncé dans les traités généraux des Nations unies (PIDCP), africains (AfChHPR), américains (ACHR) et européens (CEDH et Charte de l'UE) relatifs aux droits de l'homme qu'une personne ne peut être punie qu'en raison d'une action ou d'une omission qui constituait une infraction pénale au moment où elle a été commise et, en outre, qu'aucune peine plus lourde que celle qui était applicable au moment où l'infraction pénale a été commise ne peut être imposée.[2] Dans le cadre du principe de légalité, les dispositions du Pacte international relatif aux droits civils et politiques, de la Convention américaine et de la Charte de l'Union européenne stipulent également que si, après la commission de l'infraction, la loi prévoit l'imposition d'une peine plus légère, l'auteur de l'infraction doit en bénéficier (règle de *la lex mitior*).

Selon les codifications du principe de légalité dans le Pacte international relatif aux droits civils et politiques, le Pacte international relatif aux droits économiques, sociaux et culturels, la Convention américaine relative aux droits de l'homme, la Convention européenne des droits de l'homme et la Charte de l'Union européenne, le principe implique que l'imposition d'une sanction concrète pour une infraction doit avoir une base juridique claire qui ne peut pas être appliquée rétroactivement. En ce sens, la sanction doit être prévisible. Tant qu'une sanction reste dans les limites de la loi en ce qui concerne sa forme (c'est-à-dire sa qualité: emprisonnement, amende, travail d'intérêt général, etc.) et sa sévérité (c'est-à-dire sa quantité: durée, circonstances, etc.), le principe n'exige pas de prévisibilité supplémentaire quant à la forme et à la sévérité de la sanction concrète qui sera effectivement imposée par le tribunal dans un cas spécifique.

Le principe de légalité s'applique aux dispositions définissant les infractions et les sanctions correspondantes. Selon, par exemple, la Cour européenne des droits de l'homme (CEDH), il ne s'applique pas, en principe, aux lois de procédure. Toutefois, lorsqu'une disposition qualifiée de procédurale en droit interne influence la sévérité de la peine à infliger, la Cour européenne des droits de l'homme qualifie cette disposition de « loi pénale matérielle » à laquelle s'applique la règle selon laquelle « il ne peut être infligé de peine plus forte que celle qui était applicable au moment où l'infraction pénale a été commise ».[3] La Cour a en outre établi une distinction entre les mesures constituant une « peine » et les mesures relatives à l'« exécution » de cette peine. Par exemple, une remise de peine ou une

2 Voir l'article 15(1) du Pacte international relatif aux droits civils et politiques (PIDCP) de 1966, l'article 7(2) de la Charte africaine des droits de l'homme et des peuples de 1981 (Charte de Banjul ou AfChHPR), l'article 9 de la Convention américaine relative aux droits de l'homme de 1969 (Pacte de San José, Costa Rica, ou CADH), et l'article 7(1) de la Convention européenne des droits de l'homme et des libertés fondamentales de 1950 (CEDH). Voir également l'article 49, paragraphe 1, de la Charte des droits fondamentaux de l'UE de 2000 (2012) (Charte de l'UE).

3 Voir le site Internet de la Cour, avec des références à la jurisprudence, *Guide sur l'article 7 de la Convention européenne des droits de l'homme* (mis à jour le 30 avril 2022), paragraphe. 16.

modification de la procédure de libération conditionnelle ne fait pas partie intégrante de la peine au sens du principe de légalité. Néanmoins, si des mesures prises par le législateur, les autorités administratives ou les juridictions après le prononcé de la condamnation définitive ou pendant l'exécution de la peine ont pour effet de redéfinir ou de modifier la portée de la sanction imposée par la juridiction de jugement, ces mesures entrent dans le champ d'application de l'interdiction de l'application rétroactive des peines, selon la Cour européenne des droits de l'homme.[4] Sur cette question, voir également Della Casa & Ruaro (Italie) et Ramírez Ortiz & Rodríguez Sáez (Espagne).

Le principe de légalité tel qu'il est codifié dans les traités relatifs aux droits de l'homme n'exige qu'une clarté et donc une prévisibilité limitée en ce qui concerne la sanction concrète à laquelle on peut s'attendre pour un délit spécifique dans une affaire pénale concrète. Il en va généralement de même pour les codifications du principe dans les constitutions et les codes pénaux, comme le montrent clairement de nombreux chapitres nationaux de ce volume. Voir, par exemple, également Trechsel (Suisse).

2.2 Le principe de légalité comme norme d'inspiration

Le principe de légalité ne vaut pas seulement par sa codification sous forme de règles. Au-delà de son fonctionnement en tant qu'ensemble limité de règles, qui n'a qu'une pertinence spécifique pour la détermination de la peine, il fonctionne également en tant que principe, *c'est-à-dire* en tant qu'instrument juridique doté d'une structure ouverte qui indique une direction morale et donne un poids argumentatif aux considérations à faire par le législateur, le pouvoir judiciaire et l'administration. Il en va de même pour l'État de droit, qui est un concept beaucoup plus large que le principe de légalité et qui n'est normalement pas codifié en tant que tel, bien que certains de ses aspects le soient habituellement. C'est principalement en leur qualité de principes que les universitaires et les tribunaux attribuent d'autres fonctions au principe de légalité et à l'État de droit.

Premièrement, l'on peut affirmer que plus la forme et la sévérité spécifiques de la peine que l'on peut s'attendre à recevoir pour un certain délit dans certaines circonstances sont prévisibles, mieux la logique du principe de légalité et de l'État de droit est servie. Agomoh (thématique) remarque que la parité dans la détermination de la peine sous-tend l'État de droit, une doctrine qui exige à la fois l'absence de pouvoir arbitraire et la nécessité de lois fixes et prévisibles. À cet égard, elle souligne que l'existence et l'imposition de peines incohérentes empêchent les citoyens de prévoir les conséquences de leurs actes. Haverkamp & Kaspar (thématique) insistent également sur le fait que, dans un État de droit, un

4 Voir le *Guide sur l'article 7 de la Convention européenne des droits de l'homme* (avec références jurisprudentielles) (mis à jour le 30 avril 2022), para. 18-20.

délinquant devrait être en mesure de savoir à quelle peine il peut s'attendre par rapport à d'autres délinquants condamnés pour des crimes similaires dans des circonstances similaires.

Deuxièmement, dans le droit fil du point précédent, selon plusieurs auteurs, le principe de légalité et l'État de droit exigent non seulement que la loi stipule clairement quels actes et omissions constituent une infraction pénale, mais aussi les sanctions maximales qui peuvent être imposées pour avoir commis cette infraction. Par exemple, Haverkamp & Kaspar (thématique) soutiennent qu'il est essentiel pour l'État de droit que le législateur (par opposition au pouvoir judiciaire) décide au moins grossièrement de ce qui constitue des crimes « similaires » ou des circonstances « similaires » (voir également leur chapitre sur l'Allemagne). Selon eux, cela devrait inclure des réglementations sur les objectifs de la punition et les critères pertinents de détermination de la peine.

Tinsley & Young (Nouvelle-Zélande) expliquent qu'une forte dépendance à l'égard de la jurisprudence, développée par le pouvoir judiciaire pour fixer les niveaux de condamnation dans le contexte de la condamnation dans des cas individuels ou pour innover et développer des solutions alternatives, est problématique du point de vue de la légalité.

Cette pratique (recours massif à la jurisprudence) est potentiellement source d'incohérences, d'injustices et d'un manque de transparence, et elle peut également souffrir d'un déficit démocratique. Cependant, cela ne conduit pas Tinsley & Young à conclure qu'une plus grande part de la responsabilité devrait être renvoyée au législateur. Cela entraînerait, selon eux, une conformité encore plus faible au principe de légalité. Ils cherchent plutôt une solution dans la création d'organismes statutaires chargés d'élaborer la politique de détermination de la peine (comme le Sentencing Council en Angleterre et au Pays de Galles). Une telle solution peut créer un modèle de partenariat entre le pouvoir judiciaire et les membres de la communauté pour développer des principes de détermination de la peine qui servent les intérêts de la légalité. Toutefois, cette approche peut également soulever la question de savoir si elle porterait atteinte à l'indépendance judiciaire. Voir également Tinsley (thématique).

En ce qui concerne l'exécution des peines privatives de liberté, Molina Jerez, Náquira Riveros & Guzmán Dalbora (Chili) critiquent le fait que les aspects importants de la vie des détenus, tels que l'accès aux soins de santé, les privilèges de la prison et le régime disciplinaire, sont stipulés par des règlements pénitentiaires. Ils suggèrent que le principe de légalité exige que les peines et leur exécution soient prévues par des lois et non par des règlements. Par ailleurs, plusieurs autres auteurs soulignent la pertinence du principe de légalité ou de l'aspect légalité de la règle de droit pour la phase d'exécution. Sur la légalité et le pouvoir discrétionnaire des autorités chargées de l'exécution des peines, voir notamment l'Argentine, le Japon, les Pays-Bas et la Norvège. En particulier dans le cas des peines indéterminées, le pouvoir discrétionnaire de l'administration peut aller très loin, ce

qui peut soulever des questions du point de vue de l'exigence de prévisibilité du principe de légalité. Voir Mevis (thématique), Agomoh (thématique) et Della Casa & Ruaro (Italie). Della Casa & Ruaro abordent l'exécution de l'emprisonnement à vie, imposé dans le contexte du crime organisé (mafia, terrorisme).

Troisièmement, l'aspect légalité de l'État de droit est parfois étroitement lié à d'autres principes pertinents pour la détermination de la peine. Par exemple, Sakalauskas (Lituanie) explique que, sur la base de l'État de droit, la Cour constitutionnelle lituanienne exige que, lorsque la responsabilité pour la violation d'une loi clairement définie est établie, il soit tenu compte de l'exigence de raisonnabilité et des principes de proportionnalité et de nécessité. Selon Tinsley & Young (Nouvelle-Zélande) et Tinsley (thématique), le principe de légalité implique également que, dans un cas particulier, le processus par lequel la responsabilité et la sanction sont déterminées soit légalement prescrit et appliqué de manière cohérente et équitable par un décideur judiciaire indépendant. Tinsley souligne également que certaines autorités affirment que l'État de droit est également un principe de droit pénal et qu'avec les exigences de culpabilité et de proportionnalité, il régit la juste répartition des sanctions pénales. Elle souligne toutefois que ces idées sur le fonctionnement de la légalité en relation avec le droit pénal et la punition sont contestées.

3 Prévisibilité limitée de la condamnation et de l'exécution effectives des peines

Les chapitres thématiques et nationaux de ce volume montrent clairement que le principe de légalité et l'aspect légalité de l'État de droit ont une capacité assez limitée à assurer la prévisibilité de la forme et de la sévérité de la peine réelle et de son exécution dans un cas spécifique. Même si les autorités qui dépassent les exigences découlant du principe de légalité s'efforcent d'assurer la prévisibilité, il peut être difficile ou non souhaitable d'y parvenir. Les chapitres de ce volume mettent en évidence diverses difficultés à atteindre un degré précis de prévisibilité.

3.1 La loi n'est jamais parfaitement claire

Le principe de légalité ne peut être respecté que formellement, mais généralement pas matériellement, parce que la loi ne peut pas offrir une certitude absolue et souvent même à peine un degré suffisant de certitude réelle. Cela s'applique à la détermination de la peine et, comme l'expliquent Della Casa & Ruaro (Italie), certainement aussi à la loi qui régit l'exécution des peines. Les mots et les textes ne sont jamais totalement clairs. En outre, plus ils réglementent en détail, plus leur clarté peut devenir une fiction si le détail complique trop le système. Une autre difficulté réside dans le fait que les infractions sont généralement

définies en des termes si généraux qu'elles couvrent un large éventail de comportements spécifiques, allant souvent d'une conduite plutôt sans conséquence à une conduite très grave. En outre, comme le soulignent Tinsley & Young (Nouvelle-Zélande), les objectifs, les principes et les règles de détermination de la peine concernant les circonstances aggravantes et atténuantes ne peuvent fournir d'orientation significative lorsqu'ils sont définis en termes plutôt généraux et que la hiérarchisation des différentes normes fait défaut. En ce qui concerne les peines disponibles lorsqu'une infraction est commise, plus les tribunaux disposent d'une grande variété de peines afin de rendre une sentence équitable qui corresponde réellement à l'affaire, plus leur pouvoir discrétionnaire de décider de la sentence et le risque d'incohérence seront importants.

3.2 Cohérence et individualisation

La question se pose de savoir dans quelle mesure il est réellement souhaitable que la loi s'efforce d'atteindre le plus haut degré de prévisibilité possible. L'un des problèmes les plus fondamentaux est, comme l'observe Agomoh (thématique), que la détermination de la peine est fondée sur au moins deux principes qui sont en conflit permanent l'un avec l'autre, mais qui sont fondamentaux pour un système de détermination de la peine équitable: la cohérence et la justice individualisée. Voir Ortenzi & García Basalo (Argentine): le pouvoir discrétionnaire est limité par deux principes généraux du droit: la légalité et le caractère raisonnable. La tension entre la cohérence et la justice individualisée est largement abordée par Haverkamp & Kasper (thématique). Alors que l'uniformité des peines et de leur exécution favorise l'uniformité et la prévisibilité, l'individualisation de la peine et de son exécution ne le fait généralement pas. Mais, comme Tinsley & Young (Nouvelle-Zélande) par exemple le montrent clairement, il y a de bonnes raisons pour que l'orientation des juges dans les cas individuels ne soit pas prescriptive et soit délibérément conçue pour empêcher une approche formelle de la détermination de la peine: même si cela peut ne pas satisfaire au principe de légalité, cela permet d'obtenir des résultats équitables en répondant aux besoins des délinquants individuels. Toutefois, la cohérence et l'individualisation peuvent être combinées: « Le résultat souhaité est la cohérence dans l'application des principes de détermination de la peine, et non la cohérence des résultats exprimés en termes d'équivalence numérique » (voir, avec d'autres références, Haverkamp & Kaspar (thématique)). De cette manière, la cohérence et l'individualisation peuvent mutuellement renforcer l'équité dans la détermination de la peine. Il est donc impératif de préciser dans quel sens la cohérence et l'individualisation sont requises pour que la peine soit équitable.

3.3 Différences ou manque de compréhension

En relation avec le point précédent, il est difficile de parvenir à la prévisibilité des peines et de leur exécution dans des cas concrets tant que les principes de détermination et d'exécution des peines ne sont pas appliqués de manière cohérente par les tribunaux et l'administration. Comme nous le verrons par la suite, les règles de détermination de la peine, et en particulier les principes de détermination de la peine, peuvent généralement être compris de différentes manières. Souvent, les juges ne savent pas que d'autres peuvent avoir une compréhension quelque peu différente du principe qu'ils appliquent ou lui donner un poids différent. Souvent, il est même difficile de décrire de quelle façon on comprend et évalue exactement un principe. De plus, les adjudicateurs manquent souvent d'informations pour appliquer correctement un principe. Trechsel (Suisse) illustre cette situation de la manière suivante. Il déclare qu'il n'est pas difficile de comprendre pourquoi il y a peu de prévisibilité en ce qui concerne la quantité de la peine. Il remarque que nous savons très peu de choses sur les effets des condamnations pénales, et encore moins sur l'importance de la sévérité des peines d'emprisonnement pour leurs conséquences. Puisque ces effets sont pertinents pour décider de la proportionnalité des peines, le test de proportionnalité est voué à l'échec dès le départ. Il conclut que la détermination de la peine est un processus qui est, dans une large mesure, irrationnel. Cela ne signifie toutefois pas que nous pouvons nous attendre à ce qu'il soit entièrement « subjectif ». Comme l'affirment Rodrigues, Fidalgo & Manata (Portugal): la conviction du juge ne doit jamais être comprise comme une pure discrétion, comme une conviction purement personnelle ou émotionnelle.

3.4 Société, hommes politiques et médias

Plusieurs chapitres observent que la société, les politiciens et/ou les médias exercent fréquemment des pressions sur le processus de condamnation et l'exécution des peines. Cette pression peut constituer un obstacle à la cohérence avec d'autres affaires et, en outre, à l'équité individuelle. Mevis (thématique) souligne donc la nécessité d'établir des garanties en matière de droits de l'homme pour protéger le système et le processus de détermination de la peine contre les pressions politiques et médiatiques particulièrement indues: il faudra créer des procédures et trouver des tribunaux qui soient préparés et aient le courage de maintenir la détermination de la peine confirmant les droits de l'homme en dépit de l'esprit du temps. Le thème de la pression sociétale, politique et médiatique est également abordé dans Tinsley (thématique) et Haverkamp & Kaspar (thématique), ainsi que dans plusieurs chapitres nationaux; voir en particulier Lappi-Seppälä & Rautio (Finlande), Lambropoulou & Tsolka (Grèce), Della Casa & Ruaro (Italie), Sakalauskas (Lituanie), Mevis & Vegter (Pays-Bas), Tinsley & Young (Nouvelle-Zélande), Strandbakken (Norvège).

4 Le principe de légalité comme aspiration à une individualisation cohérente

Le principe de légalité et les aspects de l'État de droit liés à la légalité, tels qu'ils sont appliqués sur la base des traités relatifs aux droits de l'homme, des constitutions et des codes pénaux, ne lient généralement que de manière assez marginale la détermination des peines par les tribunaux et les entités non judiciaires (par *exemple*, les sanctions pénales par la police ou le ministère public, ou les sanctions disciplinaires par les autorités pénitentiaires) et l'exécution des peines. Toutefois, il est également clair qu'une meilleure prévisibilité de la forme spécifique et de la sévérité de la peine que l'on peut s'attendre à recevoir pour une certaine infraction dans certaines circonstances est susceptible d'améliorer la conformité avec la logique qui sous-tend le principe de légalité et l'État de droit. Cela ne signifie pas que toute cohérence et prévisibilité soit nécessairement satisfaisante. Du point de vue de l'État démocratique libéral où la loi est respectée en général et du point de vue des droits de l'homme en particulier, la légalité ne doit pas entraîner d'injustice et elle doit de préférence favoriser l'équité.

Les principes de détermination de la peine peuvent être utilisés pour renforcer simultanément la cohérence et l'individualisation, afin de parvenir à une prévisibilité réelle et à une équité substantielle. Il ne s'agit pas nécessairement d'intérêts opposés, ils peuvent être interdépendants. Si les auteurs d'un certain délit – comme le vol – reçoivent toujours la même peine, ce serait certainement cohérent et donc prévisible, mais ce serait également injuste étant donné qu'il peut y avoir des différences significatives entre, par exemple, la nature et la gravité des délits réels, les conditions dans lesquelles ils ont été commis et la situation de leurs auteurs. La cohérence ne doit donc pas exclure l'individualisation. Dans le même temps, une individualisation incohérente nuirait non seulement à la prévisibilité, mais aussi à l'équité, car elle reviendrait à une décision arbitraire. L'individualisation ne doit donc pas empêcher la cohérence. Toutefois, s'il y a cohérence entre des cas qui sont en principe égaux dans tous les aspects pertinents, cela contribue non seulement à la prévisibilité, mais aussi à l'équité. En d'autres termes, la cohérence de l'individualisation peut favoriser à la fois la prévisibilité et l'équité.

Cela signifie que le principe de légalité implique la nécessité d'une individualisation cohérente qui soutienne à la fois la prévisibilité et l'équité. Cela peut être difficile à réaliser sans l'application cohérente de principes de détermination de la peine, un cadre légal clair de détermination de la peine et des lignes directrices transparentes en matière de détermination de la peine. L'utilisation de principes de détermination de la peine pourrait ainsi contribuer à refléter la logique qui sous-tend le principe de légalité et l'aspect légalité de l'État de droit. Toutefois, comme nous le verrons plus loin, les principes de détermination de la peine sont loin d'être clairs. Par conséquent, l'application cohérente des principes de

détermination de la peine pour parvenir à une individualisation cohérente peut être très difficile à réaliser.

5 Un catalogue de principes pour le prononcé et l'exécution des peines

Dans ce volume, une grande variété de principes de condamnation et d'exécution des peines sera passée en revue. Tous les systèmes nationaux de justice pénale s'efforcent d'assurer au moins un degré suffisant de prévisibilité et d'équité en appliquant ces principes. Néanmoins, comme le montrent les chapitres consacrés aux pays, ceux-ci diffèrent quant aux principes qu'ils appliquent, à la finalité (objectifs de la peine) qu'ils poursuivent, à la signification qu'ils attribuent à un principe donné, ainsi qu'au poids et à la hiérarchie qui lui sont accordés. Voir également Haverkamp & Kaspar (thématique) pour une vue d'ensemble des différences fondamentales entre les pays en matière d'approches de la condamnation, en particulier en ce qui concerne le continuum entre les perspectives axées sur le délinquant et les perspectives axées sur l'infraction en relation avec les objectifs de la condamnation. Les chapitres nationaux montrent qu'il existe également des différences significatives en ce qui concerne le pouvoir discrétionnaire dont disposent les tribunaux dans l'application des principes de détermination de la peine. En outre, dans certains pays, le pouvoir d'infliger des sanctions pénales n'est pas exclusivement réservé au pouvoir judiciaire, mais il est – généralement dans certaines limites et sous le contrôle des tribunaux – également accordé à des autorités non judiciaires telles que la police et le ministère public (voir les Pays-Bas et la Norvège; voir à propos des sanctions administratives dans le domaine pénal, la Finlande, l'Allemagne, l'Irlande, la Nouvelle-Zélande et la Pologne). Dans ce cas, les principes peuvent également s'appliquer à ces autorités non judiciaires. Nous allons maintenant présenter les principes les plus significatifs et certaines de leurs caractéristiques remarquables.

5.1 Principe de proportionnalité

La proportionnalité des peines a été reconnue comme un droit de l'homme par sa codification dans la Charte des droits fondamentaux de l'Union européenne. L'article 49, paragraphe 3, stipule que « La sévérité des peines ne doit pas être disproportionnée par rapport à l'infraction pénale ». Sur cette disposition, voir également Mevis (thématique) et Ramírez Ortiz & Rodríguez Sáez (Espagne). Une garantie similaire ne figure toutefois pas dans d'autres traités internationaux contraignants relatifs aux droits de l'homme, bien

qu'elle soit reconnue dans des instruments non contraignants.[5] La nécessité de prononcer des peines proportionnelles est largement reconnue, comme l'illustrent, l'un après l'autre, les chapitres de ce volume. Selon Lappi-Seppälä & Rautio (Finlande), le principe de proportionnalité trouve son origine dans le concept de l'État de droit. Mevis (thématique) soutient que la proportionnalité devrait être considérée comme la garantie fondamentale des droits de l'homme en matière de détermination de la peine et qu'elle devrait être codifiée dans un instrument international contraignant relatif aux droits de l'homme.

Cela ne signifie pas que le principe de proportionnalité puisse en soi conduire facilement à des condamnations cohérentes et prévisibles, comme l'illustrent les cas réels mentionnés dans les chapitres consacrés à l'Allemagne, à la Grèce et à l'Irlande. L'un des problèmes est que les pays, et souvent aussi les juges au sein d'une juridiction, ont des points de vue différents quant à savoir exactement entre quelles variables la proportionnalité doit exister. La forme et la sévérité de la peine doivent-elles, en ce qui concerne le test de proportionnalité, être uniquement liées à la sévérité du crime en tant que tel (Japon), ou les circonstances dans lesquelles le crime a été commis et la personne de l'auteur, par exemple, sont-elles également pertinentes pour le test? Ou bien la punition doit-elle infliger au criminel une souffrance proportionnelle à son degré de culpabilité, conformément à la théorie de la rétribution (voir Trechsel sur la Suisse)? Une autre difficulté réside dans le fait que les variables utilisées sont souvent difficilement comparables, en raison de leur nature différente. Comment assimiler un cambriolage à une peine d'emprisonnement? La précision mathématique étant ici inaccessible, les croyances culturelles, les opinions politiques et la subjectivité personnelle influenceront considérablement l'évaluation.

Pour ces raisons et d'autres encore, des personnes raisonnables peuvent facilement être en désaccord sur ce qui constitue une peine proportionnelle dans un cas donné (ou une sanction disciplinaire proportionnelle en cas de mauvaise conduite d'un détenu). Il est donc essentiel de relier la proportionnalité à d'autres principes de détermination de la peine. Ces autres principes peuvent être nécessaires pour éviter que les peines proportionnelles n'entraînent une évolution vers un climat de punition plus sévère, comme le décrivent Haverkamp & Kaspar (thématique). En outre, Seto (Japon) explique qu'en particulier dans le processus de détermination de la peine, le précédent est un moyen de garantir la proportionnalité. Il décrit en outre comment le Japon dispose d'un système spécial dans les affaires dites saiban-in (affaires dans lesquelles des juges non professionnels sont impliqués) qui permet d'éviter les peines indûment sévères et indulgentes.

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5 Voir, *par exemple*, p. 28 (sous: F) des Principes et directives sur les droits de l'homme et des peuples dans la lutte contre le terrorisme en Afrique (adoptés par la Commission africaine des droits de l'homme et des peuples lors de sa 56e session ordinaire à Banjul, Gambie, du 21 avril au 7 mai 2015), et le Principe 4 de l'Annexe à la Recommandation du Conseil de l'Europe n° R (92) 17 sur la cohérence des peines (adoptée par le Comité des Ministres le 19 octobre 1992 lors de la 482e réunion des Délégués des Ministres).

5.2 Principe de culpabilité

Dans de nombreux pays, le principe de culpabilité est d'une importance fondamentale pour la détermination de la peine. Cela ne signifie certainement pas que ce principe a la même fonction dans le processus de détermination de la peine dans tous ces pays. En tant qu'exigence minimale, le principe de culpabilité stipule qu'il ne peut y avoir de peine sans culpabilité. L'existence de la culpabilité de l'auteur de l'infraction est un seuil pour l'application d'une peine à son encontre. Dans ce contexte, le principe de culpabilité suppose également que « la peine est personnelle et ne peut être infligée qu'à l'auteur de l'infraction », comme le stipule l'article 7(2) de la CADHP. Le fait que les sanctions doivent être personnelles signifie également, du moins en Finlande, selon Lappi-Seppälä & Rautio, que même s'il est impossible d'éviter que les sanctions aient des effets collatéraux sur la famille, les proches ou les amis de l'auteur de l'infraction, etc., les sanctions doivent être conçues de manière à minimiser ces effets collatéraux.

Alors que dans certaines juridictions, la culpabilité n'est légalement qu'un seuil pour la punition, dans d'autres, elle fonctionne également comme une mesure: la sanction n'est autorisée que dans la mesure où il y a culpabilité. En Allemagne, en Grèce et au Portugal, par exemple, le principe est que personne ne doit être puni d'une manière qui excède le niveau de culpabilité individuelle (culpabilité, caractère blâmable). Cela signifie également, selon Lambropoulou & Tsolka (Grèce), que l'objectif de dissuasion générale contre la criminalité ne peut justifier une peine qui dépasse la culpabilité du délinquant. Un argument à l'appui de ce point de vue est que les êtres humains ont une valeur absolue et ne peuvent être utilisés comme moyen à d'autres fins. Ce principe est lié au droit à la dignité et à l'État de droit (voir Allemagne et Portugal). La limite de culpabilité s'applique également à l'objectif de dissuasion spécifique; voir Rodrigues, Fidalgo & Manata (Portugal), ainsi que Rogan, Geiran & Ní Raifeartaigh (Irlande).

Selon Haverkamp & Kaspar (Allemagne), les critiques soutiennent que cette « limite supérieure » de la sanction en fonction du degré de « culpabilité » de l'auteur de l'infraction n'est pas une protection très forte contre les sanctions excessives, car il n'existe pas de normes claires sur la manière de mesurer la culpabilité et de la traduire en chiffres concrets (par *exemple*, en jours d'emprisonnement). Ils concluent donc que le juge dispose d'une grande marge de manœuvre pour décider de ces questions. De même, Trechsel (Suisse) affirme qu'il n'existe pas de méthode infaillible pour mesurer le degré de culpabilité, et qu'il est encore moins évident de savoir quel degré de culpabilité appelle quelle sévérité de peine. Il souligne à juste titre que nous sommes en fait confrontés à des échelles incommensurables.

5.3 Principe d'égalité

Habituellement, le principe juridique d'égalité signifie que les cas égaux doivent être traités de la même manière, tandis que les cas inégaux doivent être traités différemment dans la mesure où ils sont dissemblables. Le principe exige une cohérence dans la sanction et l'exécution de la peine entre des cas similaires. Il favorise la parité des peines pour des infractions similaires. Comme mentionné ci-dessus, Agomoh affirme que la cohérence et l'individualisation sont les fondements d'un système de détermination de la peine équitable. Elle souligne que la mise en place de mécanismes adéquats pour assurer la cohérence des peines est d'une importance fondamentale pour tout système de droit. C'est particulièrement le cas lorsque les tribunaux disposent d'un large pouvoir d'appréciation en matière de détermination de la peine. Plus le juge est autorisé à exercer son pouvoir discrétionnaire, plus le risque que des délinquants se trouvant dans une situation similaire soient traités différemment est grand. Ou encore, comme le disent Haverkamp & Kaspar (thématique): le pouvoir discrétionnaire des juges soulève toujours la question de la disparité des peines. Ils soulignent également que plus les juges ont de pouvoir discrétionnaire, plus il est difficile pour la recherche d'identifier la disparité des peines.

Agomoh (thématique) met en garde contre le fait que traiter différemment des cas égaux et similairement des cas inégaux peut conduire à l'injustice et éroder la confiance du public dans le système juridique. Les condamnations arbitraires et surtout la discrimination sont fatales à cet égard. Voir également Rogan, Geiran & Ní Raifeartaigh (Irlande), qui illustrent le fait que l'incohérence peut également résulter de la discrimination (sexuelle) de la victime de l'infraction. En fait, comme le montrent Della Casa & Ruaro (Italie), il est également possible que l'incohérence en matière de condamnation existe entre les catégories d'infractions lorsque le législateur applique des peines maximales différentes pour des infractions qui sont relativement similaires en termes de gravité. Cela peut, par exemple, entraîner une discrimination de classe. Sur ce sujet, voir également Agomoh, qui développe le problème du lien étroit qui existe entre la pauvreté et l'emprisonnement. Voir également Della Casa & Ruaro (Italie) sur l'utilisation discriminatoire d'une présomption générale et absolue de dangerosité sociale plus élevée. Nous affirmons que même si la cohérence est une condition de l'égalité, la cohérence en tant que telle ne garantit pas l'égalité. Par exemple, si un parti pris ou une approche discriminatoire est appliqué de manière parfaitement cohérente, cela ne satisfait toujours pas au principe d'égalité.

Tinsley (thématique) explique que les tribunaux ont reconnu l'importance de l'État de droit, du principe de légalité et de la légalité dans la promotion de la parité en matière de condamnation. Voir également Strandbakken (Norvège), qui explique comment le principe d'égalité est lié au principe de légalité en Norvège: des dispositions claires sur ce qui constitue un acte criminel et les limites de la peine aideront les tribunaux à statuer de la même manière sur des affaires identiques. Pour ces raisons, la justice finlandaise met

fortement l'accent sur l'égalité de traitement. Lappi-Seppälä & Rautio (Finlande) expliquent que le respect de la cohérence et de l'uniformité dans la détermination de la peine signifie que le tribunal doit tenir compte de la pratique générale en matière de détermination de la peine et utiliser le type de peine qui a été utilisé dans des cas similaires, à moins qu'il n'y ait des raisons particulières de s'écarter de ces points de départ. Sur l'importance de prendre en considération des cas similaires, veuillez consulter notamment les chapitres sur le Japon, la Nouvelle-Zélande et la Suisse. Il est intéressant de noter qu'en raison de l'accent mis sur les décisions de condamnation individuelles axées sur la culpabilité (voir ci-dessus le principe de culpabilité) en Allemagne, l'égalité ne joue pas un rôle important en matière de condamnation. La Cour fédérale de justice allemande (BGH) a même souligné que ce serait une erreur juridique d'utiliser des décisions de condamnation dans d'autres affaires comme argument décisif pour la détermination de la peine dans l'affaire en question.

L'application correcte du principe d'égalité lors de la détermination et de l'exécution des peines implique plusieurs difficultés majeures. L'un des problèmes est qu'il est difficile de décider, de manière générale, des facteurs à prendre en considération pour évaluer la similitude et la dissemblance entre les affaires et essayer d'assurer la cohérence, ainsi que du poids que ces facteurs devraient avoir. Même si un système de peines légales et/ou des lignes directrices strictes en matière de peines sont adoptés, cela ne sera possible que dans une certaine mesure, car il sera toujours nécessaire que le juge interprète les règles et les principes en matière de peines et qu'il pèse les facteurs pertinents. Un autre problème est que plus un système assure la cohérence en limitant le pouvoir discrétionnaire des tribunaux en matière de condamnation, plus il sera difficile de réaliser également l'équité matérielle et l'individualisation (voir également ci-dessous). Enfin, il y aura généralement un manque de connaissance, non seulement de toutes les circonstances et de tous les faits pertinents qui entourent une affaire, mais aussi des raisons précises qui sous-tendent les peines infligées dans d'autres affaires.

5.4 Principe d'équité ou de vraisemblance

Dans de nombreux pays, l'équité ou le caractère raisonnable sont des exigences reconnues en matière de condamnation et d'exécution des peines, mais il existe de grandes disparités quant à la fonction et au contenu de ces principes. Ces principes peuvent être compris et appliqués de différentes manières, sans que leur contenu exact ne soit jamais clair.

Au Japon, par exemple, l'équité des peines est un principe de base du système de justice pénale qui semble lié à la cohérence et au principe d'égalité. Seto (Japon) explique que le respect du précédent des condamnations antérieures est important pour maintenir l'équité des jugements, selon les tribunaux. Toutefois, cela ne signifie pas nécessairement que la

pratique consistant à condamner les délinquants sur la base d'affaires antérieures similaires a un effet contraignant. L'échelle des peines peut évoluer en fonction des circonstances sociales et de la conscience publique. Il est intéressant de noter, comme l'expliquent Ortenzi & García Basalo, qu'en Argentine, le principe du raisonnable est appliqué conjointement avec celui de la légalité pour limiter le pouvoir discrétionnaire des juges. Lorsque les limites de ces principes sont franchies, l'arbitraire entre en jeu. On considère qu'il y a arbitraire lorsqu'un acte est contraire à la raison, à la loi ou à la justice. Haverkamp & Kaspar (thématique) soulignent également que le principe de justice individualisée est présumé garantir une peine juste et appropriée pour chaque personne condamnée, mais que s'il appartient plus ou moins aux seuls juges de décider de ce qui est pertinent pour leur décision, l'État de droit est mis en danger et la « justice individualisée » se transforme en une simple « justice subjective » du point de vue des juges dans chaque cas particulier. Voir également Tinsley (thématique), qui souligne qu'un moyen de promouvoir l'équité – ainsi que la cohérence et la certitude – consiste à accroître l'orientation donnée aux juges chargés de la détermination de la peine.

Une fonction quelque peu différente du principe d'équité peut être trouvée dans le chapitre de Della Casa & Ruaro sur l'Italie, où le principe de raisonnabilité est reconnu par la Cour suprême et semble être lié au principe de proportionnalité. Cela semble également être le cas en Lituanie; voir le chapitre de Sakalauskas. Voir également le chapitre sur le Chili. Pour le Chili, Molina Jerez, Náquira Riveros & Guzmán Dalbora expliquent que les sanctions disciplinaires en prison doivent être équitables, c'est-à-dire opportunes et proportionnelles à l'infraction commise et qu'elles doivent prendre en considération à la fois sa gravité, sa durée et les caractéristiques du détenu.

Plusieurs pays lient le principe de la totalité des peines à l'équité des peines. Par exemple, Lambropoulou & Tsolka (Grèce) expliquent que dans les cas où un délinquant doit purger plus d'une peine, la peine globale doit être juste et appropriée à la lumière du comportement délinquant global. Ils soulignent que ce principe est également un dérivé des principes de proportionnalité et de légalité. Voir également Rogan, Geiran & Ní Raifeartaigh (Irlande) et Sakalauskas (Lituanie).

En Finlande, l'équité est plutôt liée à des notions telles que la compassion, la tolérance, la solidarité, le pardon et l'humanité. Lappi-Seppälä & Rautio (Finlande) déclarent qu'il existe un élément de « raisonnabilité » dans la pensée juridique nordique traditionnelle et que le système prévoit la possibilité de s'écarter à la baisse des règles normales pour des raisons d'équité et de clémence. Voir également Lambropoulou & Tsolka (Grèce), qui expliquent que la clémence a toujours joué un rôle décisif dans le système judiciaire grec, tant au niveau de la loi elle-même que de son application, malgré certaines dérives contemporaines vers la sévérité au cours des deux dernières décennies. Selon la pensée grecque antique, la clémence est intrinsèquement liée à l'idée de justice. Démocrite, par

exemple, considère l'*epieikeia* (« raisonnabilité ») comme un élément de bonne administration et donc comme le pilier le plus solide de l'État.

La violation de notions telles que la légalité, la prévisibilité, la cohérence, la proportionnalité et l'humanité par la peine ou son exécution sera souvent considérée comme injuste ou déraisonnable. L'équité peut être utilisée en l'occurrence dans des sens très différents: par exemple, la cohérence et l'individualisation peuvent être progressives pour atteindre l'équité, même si elles peuvent être opposées l'une à l'autre. Par conséquent, l'équité réelle ne requiert pas seulement la cohérence ou l'individualisation en tant que telles, mais plutôt une individualisation cohérente.

Ce qui précède semble essentiellement concerner l'équité et le caractère raisonnable à l'égard de l'auteur de l'infraction. L'équité peut toutefois, dans une certaine mesure, être également envisagée à l'égard de la victime et de la société en général. Des notions telles que la légalité, la prévisibilité, la cohérence, la proportionnalité et l'humanité peuvent également être pertinentes à cet égard. L'impunité de fait ou une peine très légère pour un délit grave peut être particulièrement injuste, par exemple, pour les victimes qui ont beaucoup souffert du délit. Cela signifie également que la rétribution – ou le *juste mérite*; voir Haverkamp & Kaspar (thématique) – peut, dans une certaine mesure, constituer une notion d'équité. Il est évident que cela complique encore la fonction et le contenu du principe d'équité ou de raisonnabilité dans la détermination et l'exécution des peines. Selon nous, l'équité devrait à tout le moins être considérée comme un principe qui requiert du juge qu'il prenne en considération et pondère les nombreux intérêts différents du délinquant, des victimes et de la société impliqués dans la détermination de la peine.

5.5 Principe d'individualisation

Lorsque les tribunaux disposent d'un pouvoir discrétionnaire en matière de détermination de la peine, c'est généralement dans le but de permettre aux juges d'appliquer une peine adaptée au cas concret individuel, compte tenu des circonstances de ce cas particulier. Aux Pays-Bas par exemple, comme le soulignent Mevis & Vegter, le législateur laisse aux tribunaux une grande marge de manœuvre, pour que les tribunaux puissent appliquer la peine appropriée et individualisée adéquate dans le cas concret. Même si ce principe d'individualisation n'a pas été codifié en tant que tel, il découle du système juridique néerlandais. Il en va de même en Espagne, où la nécessité de fonder les décisions judiciaires sur l'analyse des circonstances particulières de l'affaire et de la situation personnelle du condamné est reconnue au titre de doctrine juridique. Selon Ramírez Ortiz & Rodríguez Sáez, l'on peut dire que les deux concepts de base en Espagne sont l'individualisation et le rejet de l'automatisme en tant que processus bureaucratique de prise de décision. Par

conséquent, sans marge discrétionnaire pour déterminer la substance de la réponse pénale à un délit, l'individualisation devient impossible.

Il semble que tous les pays reconnaissent, au moins dans une certaine mesure, la valeur et la nécessité de l'individualisation, sans indiquer toutefois clairement ce que l'individualisation englobe exactement et comment elle doit être appliquée. Quels facteurs dans et autour d'une affaire sont pertinents pour l'individualisation et comment ces facteurs doivent-ils être pondérés? Nous constatons ici des problèmes similaires à ceux rencontrés avec les concepts de justice, d'équité et de caractère raisonnable, pour lesquels le principe d'individualisation est déterminant. Il nous semble qu'il vise à garantir une peine juste et appropriée dans l'affaire, et pas seulement à l'égard du délinquant, de la victime ou de la société. Cela signifie que, dans un cas particulier, tant les circonstances et les faits spécifiques impliquant une peine plus clémente que les facteurs qui vont plutôt dans le sens d'une peine plus sévère sont pertinents lors de l'application du principe d'individualisation.

Voir également Haverkamp & Kaspar (thématique) sur le risque de voir la « justice individualiste » se transformer en « justice subjective » (voir ci-dessus « Principe d'équité ou de raisonnabilité »). Par conséquent, ils affirment que certaines garanties juridiques contraignantes semblent nécessaires, ce qui contribuerait également à éviter les disparités illégitimes en matière de condamnation. En effet, selon nous, le principe d'individualisation devrait aller de pair avec le principe d'égalité. Le principe d'individualisation ne peut empêcher l'arbitraire que s'il existe une cohérence dans la manière dont les principes sont appliqués aux cas individuels, dans les facteurs qui sont pris en considération et dans la manière dont ces facteurs sont pondérés. Cela implique que les juges d'une juridiction qui participent à la détermination de la peine doivent avoir une compréhension commune des principes qui doivent être appliqués, de ce que ces principes signifient, ainsi que des facteurs qui sont pertinents et dans quelle mesure. En fin de compte, bien sûr, cela ne doit pas seulement s'appliquer aux juges lors du processus de détermination de la peine, mais aussi aux autorités qui imposent des sanctions elles-mêmes (par *exemple*, la police, le ministère public, les fonctionnaires de l'administration pénitentiaire) ou qui déterminent la manière dont les peines sont exécutées.

5.6 Principe de nécessité et principe contre les dommages inutiles

Bien entendu, lorsqu'une peine interfère avec un droit constitutionnel ou un droit de l'homme fondamental, ce qui est généralement le cas, pour être justifiée, l'interférence doit être nécessaire. Toutefois, certains pays reconnaissent expressément le principe de nécessité en tant que principe de détermination de la peine, selon lequel la peine ne peut être plus sévère qu'il n'est nécessaire pour atteindre les objectifs de la détermination de la

peine. C'est par exemple le cas en Grèce, comme l'expliquent Lambropoulou & Tsolka. Ils associent ce principe à l'indulgence et à la parcimonie. Il nous semble, à cet égard, que le principe de nécessité est aligné sur les concepts utilitaires plutôt que sur les concepts rétributifs de la justice pénale.

En Finlande, selon Lappi-Seppälä & Rautio, le principe est particulièrement pertinent au regard de l'exigence selon laquelle les sanctions ne doivent pas causer de souffrances inutiles. Ils expliquent que si une peine est toujours ressentie comme désagréable, il est néanmoins interdit de causer une souffrance supplémentaire par rapport à celle incluse dans une sanction mesurée selon des principes valables de détermination de la peine. Voir également Mevis & Vegter sur les Pays-Bas et Rodrigues, Fidalgo & Manata sur le Portugal. Les constitutions de ces pays contiennent des dispositions précisant que les personnes légalement privées de liberté conservent leurs droits fondamentaux, à l'exception des limitations inhérentes à l'objet de leur condamnation et aux exigences spécifiques imposées par l'exécution de la peine. Voir aussi les chapitres sur l'Espagne et la Suisse.[6]

Le principe de nécessité s'applique donc à la fois au processus de condamnation et à l'exécution des peines. Cette dernière n'implique pas seulement la manière dont les peines sont exécutées, elle peut également concerner les sanctions disciplinaires à l'encontre des détenus. Voir également Molina Jerez, Náquira Riveros & Guzmán Dalbora (Chili), qui précisent, en ce qui concerne les sanctions disciplinaires, que les autorités pénitentiaires doivent respecter les critères de nécessité et d'opportunité.

5.7 Principe de l'effet de la peine et principe de la réhabilitation

Pour que les tribunaux soient en mesure d'imposer une peine qui réponde à certains objectifs, il faut que l'effet attendu de la sanction soit clair. De même, l'application correcte de principes tels que l'équité, la proportionnalité et la nécessité requièrent au minimum une certaine connaissance des effets des sanctions possibles dans un cas concret. Un autre élément est encore plus pertinent pour la détermination de la peine, à savoir le fait que la punition des délinquants a souvent des conséquences négatives, non seulement pour les personnes condamnées, mais aussi pour leur famille, leur employeur, la société, et parfois

6 Le principe selon lequel les prisonniers conservent leurs droits découle également de la législation internationale en matière de droits de l'homme. Pour un aperçu des instruments internationaux contenant ce principe, voir: Maartje Krabbe, "A legal perspective on the worldwide situation of defendants and detainees with mental illness", in: P.H.P.H.M.C. van Kempen & M.J.M. Krabbe (eds.), *Santé mentale et justice pénale: Perspectives internationales et nationales sur les prévenus et les détenus atteints de maladie mentale*, La Haye: Eleven 2021, p. 3-44, p. 23, note de bas de page 139.

même la victime.[7] Pour toutes ces raisons, les tribunaux doivent anticiper les effets d'une peine déterminée.

Comme on peut le comprendre à la lecture de Trechsel (Suisse), la nécessité d'examiner les effets possibles sur la vie du condamné est inspirée par des intérêts tels que la resocialisation et la réinsertion. Par exemple, la réhabilitation et la réinsertion demeurent l'objectif central de l'exécution des peines en Finlande, selon le chapitre de Lappi-Seppälä & Rautio. Cela pèse certainement aussi sur le processus de condamnation lui-même, par exemple lorsqu'il s'agit de choisir entre l'emprisonnement, le travail d'intérêt général ou une amende. Voir également le chapitre de Della Casa & Ruaro sur l'Italie, qui note que la Cour constitutionnelle italienne a déclaré qu'une évaluation de l'adéquation de la peine en termes de rééducation est toujours nécessaire et que cette évaluation ne devrait pas être limitée à la seule phase d'exécution, mais devrait également intervenir lors de la quantification initiale de la peine.

Il est intéressant de noter que l'article 27(3) de la Constitution italienne stipule même que les sanctions visent à « rééduquer » la personne condamnée. Cet objectif est également lié au principe de proportionnalité. Selon Della Casa & Ruaro, une peine excessive est perçue comme injuste par les condamnés, ce qui a pour conséquence de compromettre le processus de rééducation dès le départ, c'est-à-dire dès le moment où la disposition législative est adoptée. Voir également leur explication des articles 133 et 176 du Code pénal italien. La réinsertion est également un objectif explicite de la peine dans des pays tels que le Portugal, comme l'expliquent amplement Rodrigues, Fidalgo & Manata.

5.8 Raisonnement pour les peines

Une bonne motivation des peines peut contribuer de différentes manières à l'idée qui sous-tend le principe de légalité. En motivant correctement les peines, les tribunaux montrent comment ils ont appliqué le cadre de détermination des peines fixé par le législateur. Cela ne confirme pas seulement que les tribunaux travaillent dans ce cadre, mais empêche également, dans une certaine mesure, l'arbitraire et la subjectivité personnelle, qui sont tous deux également pertinents pour l'État de droit. En outre, un raisonnement fondé sur des principes tels que l'égalité et la proportionnalité contribue à offrir une réelle prévisibilité aux individus et à la société en ce qui concerne la forme et la sévérité de la peine à laquelle on peut s'attendre pour une certaine infraction et dans certaines conditions.

7 Voir, par exemple, P.H.P.H.M.C. van Kempen & W. Young (eds.), *Prévention de la récidive. Valeur de la réhabilitation et gestion des délinquants à haut risque*, Cambridge/Anvers/Portland: Intersentia 2014 (IPPF series Nr. 45).

La nécessité d'un raisonnement correct à la base des décisions de condamnation est abordée dans de nombreux chapitres; voir notamment la Finlande, la Grèce, l'Irlande, l'Italie, les Pays-Bas et l'Espagne. L'un des problèmes abordés est que les tribunaux ont souvent recours à des formules standard qui ne donnent que peu d'indications sur les motivations effectives de la peine dans chaque cas. Comme le soutiennent Della Casa & Ruaro (Italie), avec une telle application des critères légaux de détermination de la peine, la loi ne limite pas suffisamment le pouvoir discrétionnaire des juges. Voir également Ramírez Ortiz & Rodríguez Sáez, qui expliquent comment la Cour suprême espagnole s'efforce de renforcer la motivation des peines par les juridictions inférieures.

5.9 Autres principes, exigences et limites

Les principes décrits ci-avant limitent le pouvoir discrétionnaire des juges dans le processus de détermination de la peine, des entités non judiciaires qui prononcent des sanctions (*par exemple*, des sanctions pénales par la police ou le ministère public, ou des sanctions disciplinaires par les autorités pénitentiaires) et des autorités lors de l'exécution des peines. Il est évident que ces principes s'inscrivent dans des cadres contenant des exigences et des normes bien plus nombreuses en matière de condamnation et d'exécution des peines. De nombreux chapitres nationaux présentent des détails sur ces cadres, notamment sur des sujets tels que les objectifs de la détermination de la peine, le rôle de la gravité de l'infraction dans la détermination de la peine et les facteurs de détermination de la peine (aggravants et atténuants) que les tribunaux doivent prendre en considération.

De nombreux chapitres s'intéressent également aux exigences procédurales du processus de détermination de la peine, telles que l'indépendance judiciaire, le droit à la défense, la motivation des jugements, ainsi que l'objectif et la valeur du contrôle de la détermination de la peine par les juridictions supérieures. Les exigences procédurales sont également abordées en ce qui concerne la phase d'exécution, plus particulièrement les mécanismes de plainte.

La pertinence de l'interdiction des traitements inhumains pour le prononcé et l'exécution des peines est par ailleurs examinée (voir, en particulier, l'Allemagne, l'Italie, la Lituanie, la Norvège, les Pays-Bas, ainsi que Mevis (thématique) en ce qui concerne l'emprisonnement à vie et les peines d'emprisonnement longues à durée déterminée).

6 Bases de données, lignes directrices, peines obligatoires et autres limites au pouvoir discrétionnaire des juges

Même en dehors de problèmes tels que la partialité et le bruit dans le processus de détermination de la peine et la phase d'exécution des peines, les principes examinés

précédemment ne garantiront pas une réelle prévisibilité et l'absence d'arbitraire (légalité) tant que les juges et les autres autorités n'auront pas une compréhension à la fois commune et claire des principes qui doivent être appliqués, de la signification de ces principes, des facteurs pertinents pour leur application et de leur poids. La question se pose de savoir s'il est possible et souhaitable de contrôler ce problème en utilisant des lignes directrices, des systèmes de peines obligatoires ou d'autres restrictions légales.

Comme indiqué précédemment, cette question est examinée de manière plus approfondie par Haverkamp & Kaspar (thématique). L'une des difficultés réside dans le fait qu'une orientation plus stricte imposée aux tribunaux peut réduire leur pouvoir discrétionnaire en matière de détermination de la peine alors même qu'ils ont besoin de ce pouvoir discrétionnaire pour rendre une sentence qui serve la justice individualisée et l'équité. Cela s'applique même si c'est de nature à mener simultanément à un système qui répond mieux aux objectifs du principe de légalité. C'est une raison suffisante pour que Haverkamp & Kaspar (Allemagne) s'opposent à des lignes directrices trop détaillées. Selon eux, elles présentent le danger d'une condamnation trop schématique, qui ne tient pas compte des particularités des cas individuels.

Toutefois, la mesure dans laquelle le pouvoir discrétionnaire du pouvoir judiciaire est effectivement entravé peut dépendre de la personne responsable des limites et/ou des orientations: le législateur ou le pouvoir judiciaire lui-même. Dans ce dernier cas, le pouvoir discrétionnaire global peut rester entre les mains des tribunaux, tandis que la prévisibilité et la cohérence peuvent également être servies. Ceci est d'ailleurs également pertinent pour maintenir l'indépendance du pouvoir judiciaire, puisque, comme le soulignent Wąsek-Wiaderek & Zbiciak (Pologne), l'indépendance des juges est liée à l'indépendance des tribunaux. Pour en savoir plus sur la relation complexe entre les lignes directrices, le pouvoir discrétionnaire et l'indépendance judiciaire, voir Tinsley (thématique).

Il ressort clairement des chapitres consacrés aux pays que tous les pays qui y sont évoqués s'efforcent d'assurer simultanément la cohérence et l'individualisation des peines. En Allemagne, en Irlande, aux Pays-Bas et en Suisse, par exemple, l'orientation formelle en matière de condamnation reste relativement limitée et le pouvoir discrétionnaire des juges est par conséquent important.

En vue d'une individualisation cohérente et simultanée des peines, la Finlande dispose d'un système intéressant qui propose un modèle heuristique de prise de décision appelé « la notion de peines normales » (voir le chapitre de Lappi-Seppälä & Rautio). Ce système repose sur une argumentation solide des peines et une diffusion efficace par le biais de bases de données électroniques, de manuels et de commentaires systématiques. Dans ce système, les limites du pouvoir discrétionnaire des juges dans les cas individuels découlent de la jurisprudence des tribunaux eux-mêmes et non du législateur. Voir également Seto sur le Japon, où une base de données sur les peines est en place et comprend de nombreux

jugements et peines antérieurs, ainsi que des éléments qui pourraient être reconnus comme des clés pour la détermination des peines dans chaque cas. Haverkamp & Kaspar (thématique) affirment que lorsque des réglementations en matière de peines existent et laissent (à juste titre) une certaine marge d'appréciation aux juges, il sera probablement toujours nécessaire d'obtenir des orientations supplémentaires, par exemple par le biais de la jurisprudence ou des traditions en matière de peines. Ils plaident en faveur de l'introduction de bases de données, qui, selon eux, peuvent conduire à une condamnation assez uniforme dans une juridiction, même en l'absence de réglementations spécifiques sur les objectifs ou les critères de condamnation. Voir aussi Mevis (thématique).

Une limite non judiciaire encore relativement faible au pouvoir discrétionnaire des juges peut être trouvée dans le chapitre de Strandbakken, qui explique qu'en Norvège, un « niveau de punition normal » a été introduit par le ministre pour différents délits, sans qu'il soit formellement contraignant. La Lituanie applique « la règle de la peine moyenne », qui, selon Sakalauskas, entraîne de longues peines d'emprisonnement, en dépit du pouvoir discrétionnaire relativement important des juges en matière de détermination de la peine. Pour en savoir plus sur un système différent, voir la « théorie de l'échelle préventive » portugaise, à propos de laquelle Rodrigues, Fidalgo & Manata (Portugal) affirment: malgré l'effort consenti par le législateur et la doctrine portugais pour légaliser le processus de détermination de la mesure concrète de la peine, ce processus est en réalité éminemment pratique.

Il existe de nombreuses constructions juridiques beaucoup plus contraignantes. Par exemple, pour un petit nombre d'infractions très graves, des pays comme l'Allemagne, l'Irlande et la Nouvelle-Zélande appliquent des peines (semi-)obligatoires. Comme le montre le chapitre de Wąsek-Wiaderek & Zbiciak, les peines (semi-)obligatoires sont appliquées de manière un peu plus large dans la législation pénale polonaise. En outre, la Nouvelle-Zélande dispose d'une législation « deux fautes » et « trois fautes » pour certaines infractions.

Della Casa & Ruaro (Italie) soulignent que l'utilisation par le législateur d'instruments visant à réduire le pouvoir discrétionnaire du juge, dans un sens défavorable à l'accusé ou à la personne condamnée, est de plus en plus fréquente. En examinant les développements décrits par Wąsek-Wiaderek & Zbiciak, une conclusion similaire semble s'appliquer à la Pologne. Il existe une grande variété de possibilités pour limiter le pouvoir discrétionnaire des juges. Un exemple est l'exigence dans le droit écrit d'une peine minimale pour un délit (voir également la Norvège). Les peines obligatoires sont abordées de manière plus générale par Agomoh (thématique), ainsi que par Mevis (thématique), qui propose l'adoption d'un protocole international sur les peines, qui pourrait se prononcer contre l'utilisation de peines minimales spéciales par infraction dans les systèmes nationaux de sanctions ou, du moins, déclarer qu'il est préférable d'y renoncer.

Cependant, les limitations du pouvoir judiciaire au détriment de l'accusé ne sont pas seulement signalées et combattues, les auteurs indiquent également que le pouvoir discrétionnaire du juge devrait être limité pour servir le principe de légalité et renforcer la position de l'accusé. Selon Haverkamp & Kaspar (Allemagne), la réforme des lois allemandes sur les peines devrait viser à éliminer les marges inutiles de discrétion judiciaire et les cadres des peines devraient être réduits, de préférence par l'abaissement de la limite supérieure des peines. En outre, le pouvoir discrétionnaire des juges peut être limité par une réglementation plus stricte des circonstances aggravantes ou atténuantes (voir également l'Espagne).

7 Remarques finales

Malgré la position fondamentale mondialement reconnue du principe de légalité et de l'État de droit, les gouvernements du monde entier s'efforcent de garantir la prévisibilité et l'absence d'arbitraire dans leurs systèmes de condamnation. Cette lutte permanente soulève la question de savoir comment – et dans quelle mesure – la prévisibilité et le caractère non arbitraire doivent être garantis. Non seulement en ce qui concerne le type de peine imposée, mais aussi en ce qui concerne sa durée et les circonstances dans lesquelles elle est exécutée. La prévisibilité et l'absence d'arbitraire dépendent essentiellement de l'étendue du pouvoir discrétionnaire en matière de condamnation, qui doit permettre aux juges de trouver un équilibre entre la cohérence de la condamnation et le respect de la justice au cas par cas. Cet équilibre est crucial, car une cohérence excessive et un pouvoir discrétionnaire illimité peuvent tous deux conduire à l'injustice. La pratique de « l'individualisation cohérente » est essentielle pour équilibrer ces intérêts: il s'agit d'être cohérent dans des cas qui sont identiques dans tous leurs aspects pertinents. Afin de pratiquer une individualisation cohérente, les juges doivent avoir accès à des principes, des lois et des politiques clairs en matière de détermination de la peine.

En ce qui concerne les principes de détermination de la peine, divers principes sous-tendent les systèmes de détermination de la peine dans le monde. Par exemple, les principes de proportionnalité, de culpabilité, d'égalité, d'équité, d'individualisation, de nécessité, d'efficacité et de « peines raisonnées ». Bien que les pays diffèrent quant aux principes qu'ils appliquent ainsi qu'à la signification et au statut qu'ils leur attribuent, tous les systèmes nationaux de justice pénale s'efforcent d'assurer au moins un degré suffisant de prévisibilité et d'absence d'arbitraire par l'application de ces principes. Une condition importante d'une « individualisation cohérente » au niveau des principes est que les juges d'une juridiction aient une compréhension commune des principes de détermination de la peine qui doivent être appliqués, de la signification de ces principes et des facteurs pertinents pour leur application. Lors de l'élaboration de ces principes (ainsi que des lois

et politiques en matière de condamnation), différents aspects peuvent influencer le résultat. Les normes applicables en matière de droits de l'homme, par exemple, ainsi que les idées sur la répartition du pouvoir entre les organes de l'État et la ou les justification(s) de la peine que le gouvernement en place valorise.

Quel que soit le contexte national, il est essentiel de réfléchir aux principes fondamentaux de nos systèmes de condamnation et à la manière dont ces principes devraient façonner les lois et les politiques. Non seulement pour gouverner conformément au principe de légalité et pour rendre la justice au cas par cas, mais aussi pour se prémunir contre les évolutions sociales et politiques futures, qui pourraient inclure des décisions de condamnation (en partie) déterminées par l'intelligence artificielle.

Part II
Themes

2ième Partie
Thèmes

The right to be protected against disproportionate sentencing

Human rights requirements as regards the sentencing process and the enforcement of sentences – the need for a step forward to 'hard law' about sentencing systems

P.A.M. Mevis[*]

1 Introduction: human rights in sentencing and in enforcement respectively: a difference in the degree of representation in international regulations

Two subjects have been joined under the title of this paper: human rights requirements in the sentencing process and human rights in the enforcement of sentences. From the perspective of criminal law enforcement, there is an essential relationship between the two. For imposing sanctions and executing sanctions are in line with each other. From a human rights perspective, however, there is a relevant difference. As to human rights aspects concerning the enforcement of (custodial) sentences, there have long been various documents and mechanisms in which human rights requirements are provided for as general principles for the set-up of the entire enforcement.[1]

At a United Nations (UN) level, this pertains to the Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules, 1957) and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988). This protection is even reflected in the hard-law stipulation of Article 10, paragraph 1, of the International Covenant on Civil and Political Rights (ICCPR) to treat all persons deprived of their liberty 'with humanity'. At the European level, especially the European Prison Rules and the Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) are important, in addition to

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1 A still adequate overview of all documents can be found in Dirk van Zyl Smit & Sonja Snacken, *Principles of European Prison Law and Policy: Penology and human rights*, New York: Oxford University Press, 2009, p. 408-413.

some Recommendations of the Committee of Ministers of the Council of Europe.[2] Especially the United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules; 1990), for which the IPPF made its own draft in 1988, are relevant to freedom-restricting sanctions.[3]

Although primarily 'soft law' in themselves, these documents provide quite a sound legal basis and a tool for further discussion on and improvement of the significance of and compliance with human rights in enforcing – in particular – custodial sanctions for adults.[4]

For the lasting attention to, and dynamic in, this legal development on the basis of this soft law, it is particularly important that an international top-down mechanism of supervision on the detention conditions is provided for at both a UN level and a European level (Council of Europe): the mechanisms of the Optional Protocol to the UN Convention against Torture[5] and the European Convention against Torture.[6] The supervision is done especially by means of visits to places and institutions of detention in the individual member states and by dialogue with and reporting by the respective member states. The fact that after each visit these mechanisms, at a supranational level, encourage a critical dialogue between the international supervisory body and the respective member state on furthering the human rights situation in detention guarantees that the said documents, although soft law in themselves, do not deteriorate into somewhat forgotten, meaningless texts and rules that – however well-intentioned that may be, are not operationalised any further and are of no use to the average detainee in an everyday detention situation. With oversight mechanisms, this effect is prevented to a certain degree.[7]

With respect to human rights concerning the *sentencing process*, the situation is quite different, apart from the prohibition against imposing the death penalty. Actually, there is neither a living body of soft law, nor an active debate on the development towards the

2 And of course the jurisprudence of het ECtHR. There is an ECtHR's Guide on the case-law of the European Convention on Human Rights Prisoners' Rights, updated in August 2022.

3 H.J.J. Tulkens (ed), *Standard minimum rules for the enforcement of non-custodial sanctions and measures involving restriction of liberty* (IPPF Colloquium 1988), Deventer: Kluwer Law and Taxation Publishers, 1989.

4 This paper only concerns the law on sentencing and sanctions for adults. Sanction systems for juveniles have their own pedagogic content and dynamic and are therefore left out of consideration here. With respect to juveniles, see the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (Havana Rules; 1990). In the Council of Europe, the European Rules for juvenile offenders subject to sanctions or measures (Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states) are relevant at a European level. In the European Union, Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings applies.

5 Adopted by the UN General Assembly by Resolution A/RES/57/199.

6 Strasbourg, 26 November 1987.

7 More on prison oversight in the 'Prisons: The Rule of Law, Accountability and Rights (PRILA)' project, funded by the European Research Council under the direction of Mary Rogan, Trinity College, Dublin.

realisation, improvement, or operationalisation of ideas inspired by human rights with respect to sentencing. Only some isolated beginnings to such effect are discernible, even though these beginnings are significant and of (potential) significance for the future for various reasons, as will be discussed later. Can anyone remember that a recommendation was adopted in the Council of Europe in 1992 on the consistency in sentencing, which, it should be added, was focused in the first place on avoiding 'unwarranted disparity' in sentencing between the member states of the Council of Europe?[8]

Is this state of affairs (part of) a problem? Does the theme of human rights requirements need to be put on the agenda of the IPPF (again) in 2020? And is it advisable to provide for further beginnings to promote the standardisation of supranational law-making, even if only into harder soft law, especially with respect to human rights as regards the sentencing process? Can we take a step forward in this respect? Is this desirable and – not unimportant – is this possible? Are there sufficient tools and first steps? There is something to be said in favour of this nowadays, perhaps even much. For this purpose, it is important to first provide some relevant developments in outline.

2 Some relevant developments

2.1 In the European Union (a basis for) involvement in sanctions law and the system of sanctions in the member states is emerging

The two supranational organisations in Europe, the European Union (EU) and the Council of Europe, have their own, rather mutually dissimilar, objectives. Their composition differs too. All EU member states are also member states of the Council of Europe, but this latter organisation comprises considerably more member states that are not a member state of the EU.

The first relevant development is related to a change in the European perspective and concerns the fairly recent specific involvement of the EU in, and the influence on, the sanctions in criminal law in the legislation and the administration of justice in the member states. Traditionally, the prison system – especially the set-up of the enforcement of (custodial) sentences in Europe – was part of the realm of the Council of Europe. Until recently, there was no legal basis in the EU for any involvement in setting up the system of sanctions or in the quality of setting up the enforcement of custodial and other criminal law sanctions in the EU member states. This changed when the Treaty on the Functioning

8 Recommendation Nr R (92) 17 of the Committee of the Ministers to the Member States concerning consistency in sentencing: https://rm.coe.int/16804d6ac8.

of the EU (TFEU; 26 October 2012) took effect.[9] On the basis of Articles 82 and 83 of this treaty, the EU got involved in the subject of sentencing,[10] both with respect to setting up certain parts of the criminal law system of sanctions in the legislation of the member states (especially the Penal Code) concerning the sentencing process and with respect to setting up the enforcement of criminal law sanctions. This authority and involvement of the EU are subject to the all-encompassing EU objective to create an 'area of freedom, security and justice' in the EU. Within this framework, (regulation of) adequate cooperation in the area of criminal justice between the EU member states is considered of major importance. This cooperation is then made possible in the EU on the basis of the principle of mutual recognition and mutual trust.[11]

Later on, we will see how this EU involvement has influenced the law on sanctioning of the member states, which is significant to the theme of 'human rights requirements as regards the sentencing process and the enforcement of sentences'. The EU – with its supervision on the compliance and conversion of EU law by the member states under the control of the European Court of Justice – has added a manner of enforcing fundamental rights to the two 'classical' options of the Council of Europe, i.e. the complaint procedure with the European Court of Human Rights (ECtHR) on the basis of the European Convention on Human Rights (ECHR) and the monitoring system of the CPT on the basis of the European Convention against Torture. Although in the EU these developments are motivated by realising the objectives of the EU as such, the form and content of this fairly new form of involvement in the theme of this paper is of great importance when reflecting on human rights and sentencing, also outside the EU and outside Europe.[12]

9 Official Journal of the European Union, C 326/47.

10 Although it is not altogether clear what the exact scope of these articles is and thus to what extent the EU can be involved on the basis of these articles. At any rate, the articles do not provide a basis for rules on *harmonisation* of the right concerning imposing or enforcing sanctions in the member states.

11 For instance, the European Parliament adopted a resolution in October 2017 to urge the EU member states to combat overcrowding in prisons and improve material detention conditions: see the Resolution of the European Parliament of 5 October 2017 on penitentiary systems and conditions of detention in prisons (2015/2062(INI).

12 As to the background of this EU involvement, it should be noted that there are currently two contradictory ideas in this respect in the EU about the role and influence of the EU concerning criminal law, now and in the future. In one approach, the emphasis is on strengthening *cooperation*, focused on free cross-border traffic of persons. This strengthening is enhanced by mutual recognition of judicial decisions, harmonisation of (national) material criminal law and of (national) formal criminal law (procedural rights) in the key of better cooperation. In the other idea, the emphasis is rather on a, or one, EU citizenship and the EU citizen's fundamental rights, and in that sense more on harmonisation of standards (material criminal law) and rights (procedural rights) in a *single area of justice*. There is a difference of approach here: only (development of further) cooperation between member states on the basis of national (criminal) law versus development towards a single EU area of justice. This difference may also become apparent in further development of EU involvement in sanctions law.

2.2 *A changed criminal law climate: diminishing importance of sanction limitations; is the sky the limit?*

The second, important reason for paying attention to the theme of 'human rights requirements as regards the sentencing process and the enforcement of sentences' is the change in sentencing climate in politics, legislation and administration of justice that seems to emerge all across the world. After the experiences with the horrors of the Second World War, a humane sentence and detention policy was the counter reaction among politicians, legislators, law practitioners and other reformers for a long time. A shorter and more humane detention and sensible alternatives to detention were looked for rather than imposing the maximum of custodial sentences as an expression of (populist) criminal politics. The experience of leading politicians, who had been imprisoned during the war themselves, contributed to this significantly. Their experience made them resilient until well into the second half of last century. As former IPPF president George Kellens put it in 2008: "Penal policy, based on humanity, continues to be defined by experts and research results, rather than political opportunism and the law of immediacy."[13]

Within this 'benevolent' political climate international instruments for the protection of human rights in – especially – the enforcement of sentences could more or less 'allow' themselves to be limited to further encourage and legitimise such a humane and mild detention climate in the penitentiary regulations and practice of enforcement of (custodial) sanctions in various national jurisdictions. Hard law against an non or less human rights orientated policy was not necessary. This is partly why many of the international documents have not evolved from the status of soft law.

For the legislation concerning the system of sanctions i.e. the rules concerning the sanctions, that may be imposed for crimes in national legislation (the Penal Code in particular) and the sentencing by criminal courts, supranational involvement is less obvious. This is especially so because such influence means a violation of the national sovereignty concerning the set-up of the system of sanctions in legislation and in the administration of justice in the member states.[14] At any rate, such influence will be regarded and felt much sooner as a violation of national sovereignty. Member states are hesitant to consent to an influence like this. Especially today, given the political consequences of such violations in a climate in member states in which the set-up and application of a 'firm' national system of sanctions and the application in specific cases is,

13 George Kellens, 'Foreword', in: Peter J.P. Tak & Manon Jendly (eds), *Prison Policy and Prisoners' Rights*, Nijmegen: Wolf Legal Publishers, 2008, p. 2.

14 The only exception is the prohibition against making the death penalty part of the national system of sanctions. See, for the UN, the Second Optional Protocol to the ICCPR. In the Council of Europe, especially Protocol 6 and Protocol 13 to the ECHR include a farther-reaching step than the step in Article 4 of the ECHR, which still leaves the death penalty open.

currently more explicitly than ever, an object of media and popular political attention. This explains why topic of (the possibility of) the set-up of a system of sanctions in the legislation of national states and their application in specific cases has been left out of consideration to a large extent in the (aforementioned and other) existing international documents until today. Unlike the situation with respect to the enforcement of custodial and other criminal sanctions, there is scarcely any soft law concerning (human rights in) the sentencing process. To the extent that it exists, it hardly has any operational significance; no monitoring mechanism or reporting mechanism has been provided for.

The basic principle for setting up the system of criminal law and criminal sanctions, the *ultimo ratio* principle is shared and accepted, if not explicitly embraced, all over the world, not only among legal theoreticians and legal practitioners but also by politicians, legislators and policy-makers (initially, until the end of last century).[15] It provides the basis for a certain – albeit *implicit* – safeguard against immoderateness and improper use of (the system of) criminal sanctions by the legislator and politics in setting up the system and by the court in sentencing in a concrete case. In combination with the said element of violation of the sovereignty, the implicit character of the *ultimo ratio*-principle explains why at a supranational level there is scarcely any soft law on human-rights-related aspects of the set-up of the system of sanctions in Europe. Such aspects could, for instance, entail steps to establish upper limits to sentence maximums for the legislator when setting up the system of sanctions or steps for explaining a (minimum) standard norm and safeguard against disproportionate sentencing.

The political times have changed, however. What does a politician nowadays know about life in prison? Worse still, human rights requirements as regards the sentencing process and the enforcement of sentences are under pressure of popular driven politicians who aim at increasingly longer prison sentences (and security measures) in their own legal systems and at more severe and harsher sentencing by the courts when trying specific criminal cases. Those who consider similar trends in many countries and judicial systems[16] will notice the following. There are national judicial systems in which, with respect to sentencing decisions, limitations, instructions and mechanisms can be found that seek to protect proportionate sentencing or at any rate to prevent disproportionate sentencing.[17]

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15 P.H.P.H.M.C. van Kempen, 'Criminal Justice and the ultima ratio principle: need for limitation, exploration and consideration', in: P.H.P.H.M.C. van Kempen & M. Jendly (eds), *Overuse in the Criminal Justice System (IPPF/FIPP 47)*, Cambridge – Antwerp – Chicago: Intersentia, 2019, p. 3-12.

16 See the various country reports in P.H.P.H.M.C. van Kempen, 'Criminal Justice and the ultima ratio principle: need for limitation, exploration and consideration', in: P.H.P.H.M.C. van Kempen & M. Jendly (eds), *Overuse in the Criminal Justice System (IPPF/FIPP 47)*, Cambridge – Antwerp – Chicago: Intersentia, 2019, completed by the overview 'Overuse of Imprisonment: Statistical Analyses of Incarceration Rates Across the World', by T. Lappi-Seppälä in the same publication, p. 165-212.

17 For the Netherlands this is not the case. Despite the ample freedom left in the Dutch system of sanctions by the legislator to the court, there are hardly any general safeguards for proportionate sentencing as a

Examples of these mechanisms include the rationales for sentencing codified in the Penal Code, and therefore drafted by the legislator itself, like those explicitly and authoritatively formulated in Article 46 of the German Criminal Code (*Strafgesetzbuch*, StGB). As such, these rationales are 'held up' (if not imposed) to the court by the legislator; compliance can be verified by the higher court. Other examples are the use of 'sentencing orientations' that indicate sentence ranges for variations of a crime, or 'starting points for sentencing', indicating a basic sentence for different variations of a crime.[18] In some judicial systems, strict rules and regulations apply with respect to the written justification of the sanction imposed and its testing by higher courts.

Additionally, the standard of proportionate sentencing, or the standard of preventing disproportionate sentencing, can be codified explicitly or derived for instance from the constitution. Yet, there seems to be an upward trend of sentence increase in many judicial systems. Apparently, such regulations, although they can possibly be used for monitoring a certain consistency in sentencing, are only of relative significance. Each regulation individually and even all regulations together will offer (too) little legal protection if the political climate changes towards a popular-political upward tendency in sentencing, not only in sentencing by the court but especially also via legislation to amend the system of sanctions.

This trend of change in the national legislation of many states towards more severe sentencing illustrates that the previous consensus concerning the assumption that some moderation and a notion of preventing disproportionate sentencing is, although implicitly, the basic approach of the set-up and application of a national system of sanctions, no longer applies in times of 'maximising legislation' (that is hardly empirically supported) and the sentence-increasing application of this legislation by the criminal courts. If the sky becomes the limit, only an implicit basic rationale, even hardly explained in soft law, of moderation of sanctioning will not protect against explicit immoderateness. Yet, this is not the only relevant development.

2.3 Sentencing influence of the EU: 'minimal sentence maxima'

Back to the significance of the influence of the EU on the development of the system of sanctions in the member states. In the past few years, the EU has focused on sentencing

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standard, even though in sentencing criminal courts take the proportionality of the sentence in relation to the seriousness of the offence, the suspect's guilt and the suspect's personal circumstances as a point of strong orientation. For a description, see the contribution by P.A.M. Mevis and P.C. Vegter, 'Legality, non-arbitrariness and judicial and administrative discretion in sentencing and enforcement of sentences in the Netherlands' included elsewhere in this volume.

18 Recommendation R (92) 17 concerning consistency in sentencing, op. cit., under B.3.c and B.3.b respectively.

and detention more and more intensively, although not in the first place from a human rights perspective but aimed at creating the area of freedom, security and justice in the EU.

In this context, the EU has focused on the specifics of its authority to draw up a policy and regulations on many phenomena that pose a threat to this area of freedom, security and justice, such as human trafficking, terrorism, corruption, discrimination, etc. In its initiatives to be able to address such phenomena, the EU more often opts for (the set-up of) criminal law and the criminal system of sanctions in the member states. After all – as the EU not unjustifiably assumes – the effectiveness of measures against these phenomena not seldom depends on the adequate set-up of the enforcement of criminal law in this matter in each of the member states. This effectiveness can at the same time only be the sum of criminal law enforcement in *all* members states together, since the EU does not have a Penal Code of its own. This explains the dependence on national (criminal and sanctions) law.

From this point of view, the EU approach mentioned above fits in well. It is intended to strengthen the effectiveness of criminal law cooperation between member states by partly basing it and monitoring it (or being able to do so) on the principle of mutual trust. If this is all there is, however, the dependence on the weakest link in the chain of EU member states will remain when it comes to criminal law as an effective contribution to combating the undesirable phenomena mentioned above, to realise the area of freedom, security and justice as the ultimate EU objective without any specific instruments. Therefore, it is essential that the EU does have instruments to influence and control the content of criminal law and the law on criminal sanctions of the EU member states.

As to this kind of involvement of the EU in the set-up of the system of sanctions in the national laws of the member states, framework decisions and guidelines appeared in many policy areas. These instruments force member states to include so-called 'minimal sentence maxima' in the system of sanctions of the national Penal Code of each member state, with the intention of adequately protecting the interests of the EU in the respective policy area. The obligation is phrased as follows: "Each member state shall take the measures necessary to ensure that the offences defined in Articles XY etc., are punishable by criminal penalties of (for instance) 'a maximum of at least 5 years', or 'at least between 5 and 10 years.'" Article 5 of the Framework Decision 2002/475 on Combatting Terrorism (even) requires that the member states shall ensure that terrorist offences "are punishable by custodial sentences heavier than those imposable under national law for such offences in the absence of the special intent of terrorism".[19] Such instructions from the EU are

19 One can have doubts whether a (one) special (specific) intent should be allowed to have the effect of a supra-national obligation to increase the maximum of custodial sentences under national law. Albite the threat of terrorism, 'even' the intent of discrimination on race has never 'reached' this level of translation into an obligation for member-states under international of European law.

addressed as such to the legislator of the member states. It should be noted that they do not force the respective member state to include minimum sanctions or mandatory sanctions in their national legislation.[20]

Such a mechanism is not unproblematic.[21] It may have a sentence-increasing effect, maybe not explicitly intended, as the 'necessity' for a severe penalty on crimes against corruption, human trafficking, terrorism, etc. almost always goes without saying. Additionally, this EU involvement may lead to a certain (legal) inequality at a national level between the areas of crime and material criminal law in respect of which this involvement does or does not exist. However, this EU mechanism is a next step to binding involvement of a supranational institution in the set-up of the system of sanctions in member state legislation. This is precisely an idea that was developed to only a very limited extent in the documents of the Council of Europe or of the United Nations concerning human rights as legal protection with respect to sentences, as we have seen above.

2.4 The importance of Jeschek's 'objection' by complicit courts

In a dissenting opinion to the judgment of the ECtHR (Grand Chamber) in the case *Ilnseher v. Germany* of 4 December 2018, judge Pinto de Albuquerque, joined by judge Dedov, quoted Hans Heinrich Jeschek on the renaissance of the *Feindstrafrecht*:

> He confessed that what he feared most in Europe was the misuse of criminal law by unthinking political majorities without objection by complicit courts.[22]

Especially the second part of this quote includes an important connection to answering the question of why the theme of human rights requirements as regards the sentencing process and the enforcement of sentences demands attention again today. Looking for, putting forward, mentioning, designing, and emphasising fundamental and normative legal principles, arguments, connections, and material and procedural tools for such 'objection', so for normative guarantees against immoderateness of the legislator in particular, seems more than necessary in our time to counterbalance the changing spirit of the times in (criminal) politics.

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20 André Klip, *European Criminal Law*, 4th edition, Cambridge – Antwerp – Portland: Intersentia, 2021, p. 423.

21 Yet, some degree of consistency in the systems of sanctions can be achieved, or unwarranted disparities can be avoided, with an EU mechanism like this. This is exactly what the Council of Europe wants to achieve or promote with the said 1992 Recommendation.

22 ECtHR (Grand Chamber), Judgment of 4 December 2018, *Ilnseher v. Germany*, Appl. 10211/12 and 27505/14, ECLI:CE:ECHR:2018:1204JUD001021112, dissenting opinion of judge Pinto de Albuquerque joined by judge Dedov, par. 129.

To render ideas of human rights concerning the sentencing process applicable and keep them up, 'if necessary' *against* politics and the legislator, procedures will need to be created and courts will need to be found that are prepared and have the courage to do this in spite of the spirit of the times. This is not obvious, given the fact that in some European countries the cardinal aspect under the rule of law of the court and the respect for its decisions, including respecting and guarding the essential and fundamental independence of the judiciary, can no longer be taken for granted. Add to this the fact that this independence and freedom of the courts to decide in each individual case is essential, especially in the sentencing decision, to ensure that sanction decisions are individualised and moderate. Undoubtedly, there are many examples of judicial decisions in which this courage has actually been mustered. It seems to be appropriate that these courts are given a sufficient legal basis and tools for such decisions, also more explicitly than is currently the case, and especially also in supranational standardisation that is still missing.

3 Interim conclusion: the need for a 'protocol' as a step forward

The interim conclusion that can be drawn from the foregoing actually consists of two parts. There seems to be a necessity that what has been laid down as an encouragement – especially in many soft-law documents in the mild sentence climate after the Second World War – should in more cases be codified in hard(er) laws of human rights requirements as regards the sentencing process and the enforcement of sentences. With respect to enforcement, there have been initiatives that were intended to bring about such toughening of soft law towards hard law. In their aforementioned, well-documented book *Principles of European Prison Law and Policy*, Dirk van Zyl Smit and Sonja Snacken[23] mention the initiatives in the Council of Europe to add a separate protocol on the protection of the rights of detainees to the ECHR. This includes the initiative to adopt a binding treaty containing a free-standing Prison Charter. These initiatives, as well as others, have not (yet) led to a binding document with 'hard' law, however. In the EU, a Green Paper on Detention was published, and a Framework decision or directive concerning Human Rights in Detention has been considered.[24] The latter failed to materialise in the EU, although the EU has started to make demands on the quality of detention within the context of promoting cooperation in criminal matters and criminal law enforcement.

However, these (failed) attempts only pertain to the possibly further toughening of soft law concerning human rights aspects in the *enforcement* of sanctions. As to the sentencing

23 Dirk van Zyl Smit & Sonja Snacken, *Principles of European Prison Law and Policy: Penology and human rights*, New York: Oxford University Press, 2009, p. 376-381.

24 http://europa.eu/rapid/press-release_IP-11-702_en.htm?locale=en.

process and the set-up of the system of sanctions in national law, there is not even much soft law. In the political (sanction) climate of today, however, it seems to be preferable (to be able) to make demands on and set preconditions and limits at a supranational level to legislation concerning the system of sanctions in the criminal law of the member states and using it in imposing sentences by the national criminal courts.

The conclusion so far is that still and more than ever there is a need to develop a concept for 'hard law' minimum standards, not only for enforcing sentences, where 'humanity' is the major focus, but also, and possibly more urgently, so that the arrears in regulation are made up with respect to human rights ideas for setting up the system of sanctions in national legislation and using it in the administration of justice. In this respect, not humanity as a basic standard comes first, but rather the notions of proportionality and moderation of imposing sanctions (proportionality and subsidiarity, effectiveness or purpose limitation of sanctions, or safeguards against disproportionality, also in view of the 'sociality' of the system of sanctions in the law and its application and use in practice, which latter point concurs with the demands on enforcement). In this context, it currently seems to be essential more than ever to make the connection between human rights aspects in the execution of sentences and aspects of human rights protection in the sentencing process itself in thinking about any protocol.

An (integral) protocol can have (added) value if it can be used to make a connection in one document at a supranational level under the common denominator of 'human right requirements' between the set-up of the system of sanctions in legislation, imposing sanctions by the court and the set-up of enforcement. Bringing these topics together in a single protocol is the expressive of the fact that this connection exists and that it is important under the denominator of human rights protection. Moreover, both aspects are thus subject to supranational involvement. Within that framework, the further discussion on bringing about a protocol and its possible content may be relevant as well. In other words, there is a need for (discussion about) more international 'hard law' documents, such as an optional protocol to the ECHR or to the International Covenant on Civil and Political Rights on relevant human rights requirements concerning sentencing as a step forward. What if we use this thought to develop a protocol like this? What should or could be in it?

4 Elements of a 'protocol'

The second part of this paper explores – very tentatively, limited and especially meant as food for discussion – what the content of the aforementioned protocol could or should be, which could or should include (at least) both human rights aspects of sentencing and of execution of sentences. This kind of 'protocol' could thus be the successor in 'hard law' of

the recommendation already mentioned of the Council of Europe of 1992 concerning consistency in sentencing. Although it is almost 30 years old, this document partly still provides a good basis to build upon for the set-up of the said 'protocol'. It deserves an update, however, both where its content is concerned and within the meaning of 'from soft law to hard law'. Meanwhile, a step forward like this has become possible, and it is a good thing that any protocol does not appear out of the blue just like that.

Below, some general aspects concerning (human rights and) sentencing are explored first. Next, special attention is paid to the two most problematic sanctions from a human rights perspective: the life sentence and the (long) fixed-term prison sentence. Then a partly additional exploration is provided of some human rights aspects and enforcement to be expressed in a possible protocol. It should be emphasised that the exploration below is not and cannot be a complete analysis. The abundant literature that has appeared on each part separately is enough to make this clear. The information below is but a brief exploration, which, as is said above, is primarily intended as food for discussion.

4.1 Codification of a prohibition against disproportionate sentencing

A first, very important aspect of the standardisation of sentencing in a possible protocol to be drawn up is the desirability or necessity of the codification of a standard that protects against disproportionate sentencing. Not only by the legislator in setting up the system of sanctions but also by the court in trying specific criminal cases. This aspect calls for some closer attention, also because a brief outline of some recent developments is important. Here it is appropriate to focus once again on the law and the legal development in the Council of Europe and the EU.

The right to protection against disproportionate sentencing, either as an order demanding proportionate sentencing or, at any rate, as a prohibition against disproportionate sentencing, does not exist or hardly exists under the ECHR, or for that matter, the International Covenant on Civil and Political Rights. In the ECHR or the case law of the ECtHR, standardisation of the sanction decision via a standard for proportionate sentencing or at any rate a safeguard against disproportionate sentencing is not obvious, as this is not an explicit right that is guaranteed in the ECHR. This does not alter the fact that in the case law concerning the application of certain rights from the ECHR, the proportionality of the sanction can be within the scope of the ECtHR. With regard to sentencing, the ECtHR is generally reluctant to intervene, partly given the distance observed by the Court with respect to the set-up of the criminal system of sanctions in the criminal law of the member states. The Court does assume that the order of applying the most favourable regulation for the suspect by legislative amendment (Article 7, paragraph 2, of the ECHR) is related to the apparently changed insight into the proportionality of the

sentence by the legislator.[25] This provides a basis for developing the mildness order or *lex mitior* principle in the law of the Council of Europe. However, it only concerns the operation and scope of Article 7 of the ECHR in the event of amendment of legislation. A fixed sentence imposed by an administrative body that cannot be adjusted by the court in the criminal charge is not in the first place considered by the ECtHR as disproportionate sentencing. This rather raises questions of whether the (material) demands are met that define a 'court' as stipulated in Article 6 of the ECHR ("full jurisdiction to quash the decision in all respects"[26]). Apart from this, the ECtHR assumes there can only be disproportionate sentencing under exceptional circumstances. As the Grand Chamber considers in the *Vinter* case:

> The Chamber found that a grossly disproportionate sentence would violate Article 3 of the Convention. (…). The Grand Chamber agrees with and endorses the Chamber's finding. It also agrees with the Chamber that it will only be on rare and unique occasions that this test will be met.[27]

Within the scope of the ECHR, the reluctance of the ECtHR is understandable, as and to the extent that the Court deduces the protection against grossly disproportionate sentencing from Article 3 of the ECHR, the protection against inhumane treatment, exclusively. In fact, and from a legal perspective, inhumane treatment is not often the case.

Beyond this, the ECtHR until recently only tested with respect to protection of the right to freedom of speech (Article 10 of the ECHR) – particularly where journalists, publishers and politicians are concerned – whether (threatening) possibly disproportional penal sanctions could amount to a form of censorship by the government.[28] More recently, the ECtHR also started to apply the notion of proportionate sentencing with other rights from the ECHR mechanism. This pertains to the assessment of complaints of double

25 ECtHR (Grand Chamber), Judgment of 17 September 2009, *Scoppola v. Italy no. 2*, Appl. 10249/03, par. 108.

26 Standard case law of the ECtHR. Cf. for instance ECtHR, Judgment of 21 July 2011, *Sigma Radio Television Ltd v. Cyprus*, Appl. 32181/04 and 35122/05, par. 147-157 and ECtHR, Judgment of 7 June 2012, *Segame SA v. France*, Appl. 4837/06, par. 55.

27 ECtHR (Grand Chamber), Judgment of 9 July 2013, *Vinter and others v. UK*, Appl. 66069/09, 130/10 and 3896/10, par. 102.

28 ECtHR, Judgment of 6 December 2018, *Slomka v. Poland*, Appl. 68924/12 and ECtHR (Grand Chamber), Judgment of 29 March 2016, *Bédat v. Switzerland*, Appl. 56925/08, par. 79: "The Court reiterates that the nature and severity of the penalties imposed are further factors to be taken into account when assessing the proportionality of an interference (…). Furthermore, the Court must be satisfied that the penalty does not amount to a form of censorship intended to discourage the press from expressing criticism. In the context of a debate on a topic of public interest, such a sanction is likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, it is liable to hamper the press in performing its task as purveyor of information and public watchdog. In that connection, the fact of a person's conviction may in some cases be more important than the minor nature of the penalty imposed".

sentencing or even double conviction (duplication of proceedings) in consecutive criminal and disciplinary proceedings, or sanctioning proceedings under criminal law and under administrative law concerning the same offence, as is possible in many member states. This may be a violation of Article 4 of the 7th Protocol to the Convention. As evidenced by the decision of the Grand Chamber of 15 November 2016,[29] the ECtHR accepts this double sanctioning in consecutive proceedings, probably because of its frequent occurrence in the judicial systems of the member states. However, this kind of succession is only acceptable under an overall safeguard of proportionate sentencing:

> (A)s explained above (…), Article 4 of Protocol No. 7 does not exclude the conduct of dual proceedings, even to their term, provided that certain conditions are fulfilled. (…) This implies not only (…), but also that the possible consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected.
> As regards the conditions to be satisfied in order for dual criminal and administrative proceedings to be regarded as sufficiently connected in substance and in time and thus compatible with the bis criterion in Article 4 of Protocol No. 7, the relevant considerations deriving from the Court's case-law (…) may be summarised as follows.
> (…)
> and, above all, whether the sanction imposed in the proceedings which become final first is taken into account in those which become final last, so as to prevent that the individual concerned is in the end made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of any penalties imposed is proportionate.[30]

From the viewpoint of protection of human rights, a stricter application of the *ne bis in idem* principle could be proposed, in which these double proceedings would not be possible that easily.[31] Within the scope of this paper, it is important that via this angle, the

29 ECtHR (Grand Chamber), Judgment of 15 November 2016, *A & B v. Norway*, Appl. 24130/11 and 29758/11, ECLI:CE:ECHR:2016:1115JUD002413011.

30 ECtHR (Grand Chamber), Judgment of 15 November 2016, *A & B v. Norway*, Appl. 24130/11 and 29758/11. ECLI:CE:ECHR:2016:1115JUD002413011, par. 130-132. This line of reasoning is continued in ECtHR, Judgment of 18 May 2017, *Jóhanesson and others v. Iceland*, Appl. 22007/11, ECLI:CE:ECHR:2017:0518: JUD002200711 and ECtHR, Judgment of 6 June 2019, *Nodet v. France*, Appl. 47342/14, ECLI:CE:ECHR: 2019:0606JUD004734214.

31 "They overlook the fact that the content of a non-derogable Convention right, such as ne bis in idem, must not be substantially different depending on which area of law is concerned", as judge Pinto de Albuquerque

ECtHR has a tool for assessing the proportionality of the imposed sanction under certain circumstances.

This relatively incidental approach, which is restricted to Article 4 of the 7th Protocol of the ECHR, has been followed by the EU Court of Justice in the matter of preventing double prosecution or sentencing for the same offence or behaviour. In its decision of 20 March 2018, the EU-court in Luxemburg considers the following:

> (i)n the light of all of the above considerations, the answer to the question referred is that Article 50 of the Charter must be interpreted as not precluding national legislation in accordance with which criminal proceedings may be brought against a person for failing to pay VAT due within the time limits stipulated by law, although that person has already been made subject, in relation to the same acts, to a final administrative penalty of a criminal nature for the purposes of Article 50 of the Charter, on condition that that legislation (…) provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.[32]

It is not surprising that the claim to proportionate sentencing, or at any rate a safeguard against disproportionate sentencing, has a firmer basis in the EU than in the law of the Council of Europe. In this respect, after all, the Charter of Fundamental Rights of the EU is of prominent significance.

In the first place, unlike what is stipulated in the ECHR, the aforementioned mildness order (*lex mitior* principle) is explicitly provided for in Article 49, paragraph 1, of this EU Charter in the event of legislative amendment concerning sanctions law of the member states.[33] Nevertheless, the principle has been recognised within the law of the Council of Europe by the ECtHR in its case law. Thus, the mildness order has the status of a fundamental right under European law, in any case with respect to legislative amendments concerning criminal sanctions. As such, without any objection, the mildness order can be included in the protocol on human rights and sentences to be drawn up.

The third paragraph of Article 49 of the EU Charter is more significant in this matter. As evidenced by this paragraph, the EU law goes one step further in laying down claims

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puts it in his comprehensive dissenting opinion to the above-mentioned Grand Chamber decision of 15 November 2016, par. 76.

32 EU Court of Justice (Grand Chamber), 20 March 2018, C-524/15, ECLI:EU:C:2018:197 (*Luca Menci*), par. 63.

33 Its establishment in the case law of the European Court of Justice in Luxembourg begins with ECJ 3 May 2005, C-387/02 et al., ECLI:EU:C:2005-270 (preliminary ruling ECJ in the criminal case against Berlusconi et al.).

concerning sentencing than has appeared possible within the framework of the law of the Council of Europe so far. The third paragraph of Article 49 of the EU Charter reads as follows:

> Principles of legality and proportionality of criminal offences and penalties
> (…)
> 3. The severity of penalties must not be disproportionate to the criminal offence.

It should be noted that this regulation from the EU Charter is 'only' related to the application of EU-related law. The regulation concerns the EU itself in the event of creating criminal law legislation. The regulation also has to be complied with by the member states both when EU law is implemented under criminal law and when the member state provides for protection against a violation of EU laws under criminal law. So far, the regulation of Article 49, paragraph 3, of the EU Charter has mainly been of operational significance in the event of sanctions concerning competition law.[34] Still, some more general aspects on the scope of the regulation are relevant for the theme of this paper. In the first place, the proportionality requirement of Article 49, paragraph 3, of the EU Charter is addressed to the legislator as well as to the court in the member states:

> When criminalizing and adopting the maximum or minimum penalties provided for a crime, the legislator of the Member-States must take the requirement into consideration. […] When handing down a sentence, the national court must […] impose a penalty that is proportional to the offence actually committed.[35]

Secondly, the article provides a possibility of assessing at a supranational level whether the sentence for certain crimes in national legislation or the sentence actually imposed is possibly disproportional in the opinion of the European Court of Justice. This applies in particular to the sanction provisions in national legislation for enforcement of EU framework decisions and directives. The regulation has extra significance, as in the EU mechanism, every criminal court – when applying national legislation where it is the compulsory enforcement of EU involvement in a framework decision or directive – can ask the European Court of Justice in Luxembourg preliminary questions about whether a

34 For a recent analysis: Marc Veenbrink, *The impact of criminal law concepts on the enforcement of national and European competition law: a silent take over?*, Deventer: Wolters Kluwer/Kluwer Law International, 2019, par. 2.6.2.2. and par. 5.7.

35 André Klip, *European Criminal Law*, 4th edition, Cambridge – Antwerp – Portland: Intersentia, 2021, p. 431.

certain sentence provided for in national legislation may be disproportionate within the meaning of Article 49, paragraph 3, of the EU Charter. The highest national criminal court is even held to ask the ECJ such preliminary question, where appropriate. As a result, this criminal court can 'challenge' the national law to a certain extent in respect of this, also, if necessary 'versus' the legislator of its own state.

With the regulation of Article 49, paragraph 3, of the Charter of the EU, this international organisation (too) makes demands on the national legislator as to setting up the system of sanctions in national law and its application by the national court. This time not as a regulation on the minimum severity of the sentence, but to monitor a certain upper limit. In such a supranational mechanism, the mutual comparison of the systems of sanctions of the EU countries becomes or can be a tool for assessing the disproportionality of sentencing. If an EU directive stipulates, for instance, that the national law should provide for a prison sentence of at least between five and ten years, and the large majority of member states would provide for a maximum of six years, a maximum sentence of ten years provided for in the law of one other member state might be considered disproportionate. In the third place, it is important that the proportionality of sentencing is made an independent standard by Article 49, paragraph 3, of the EU Charter. The application no longer depends on the answer to the question whether the sanction legally provided for, or the sanction imposed in a specific case, is disproportionate to a such a serious extent that it can be considered *inhumane* sentencing within the meaning of (violation of) Article 3 of the ECHR. This means that with this assessment of (dis) proportionality of specific sentencing factors concerning the suspect's person and personality (and the assessment if it has been adequately investigated) can be brought up for discussion sooner and more easily. The scope of the more general regulation of Article 49, paragraph 3, of the EU Charter is not restricted to the above mentioned, limited possibilities to test the proportionality under the ECHR.

All in all, given these legal developments, it certainly does not appear to be a step too far to argue that in a protocol concerning human rights and sentencing to be developed, an independent safeguard against disproportionate sentencing should be laid down. Codifying such standard has added value over the minimum standard of disproportionate sentencing as part of the protection against inhumane treatment. Given the world-wide criminal-political development towards more severe sanctions, such independent counterbalance as a supranational standard is also suitable for codifying a claim to protection against disproportionate punishment by the legislator and the court in national law on sanctioning, also supplementary to existing safeguards under national law. Once a clear right that offers protection against disproportionate sentencing in legislation in general and the application in a specific case has been laid down in a protocol to be drawn up, this right can gradually develop further in legislation and case law at a supranational

level and in the various national judicial systems. Codifying such a general claim as a basis will in this respect be a good start of such further legal development.

4.2 *Indication of the object of sentencing as a reference point for sentencing and its upper limit?*

Merely laying down a right to protection against disproportionate sentencing is not enough. If I am correct, this right even appears in some US Sentencing Guidelines, for instance in those for sentencing at a federal level, whereas this right neither functions as an adequate upper limit nor guarantees individualisation of the sentence. Laying down a claim to protection against disproportionate sentencing should go hand in hand with an answer to the question of what is decisive for the duration of the sentence, especially the duration of the fixed-term prison sentence. When is a long fixed-term prison sentence disproportionate? Disproportionate in comparison to what?[36] This is subject to extensive penological-theoretical debate, as we all know, which, given its nature, will hardly (be possible to) lead to any specific standards or words to be included in a protocol. However, there is something to say about it. Therefore, a brief exploration is provided of some aspects that are relevant for thinking about a possible protocol concerning sanctioning (sentencing and execution).

The question about (a formulation of) the object of the sentence as an upper limit to sentencing has been dealt with profoundly in the preliminary advice submitted by Johannes Kaspar to the German lawyers' conference (*Deutschen Juristentag*) in 2018.[37] In the advice, a concept is developed of the idea of 'positive general prevention'.[38]

Kaspar's reference point for the basis of sentencing is the degree of disruption of legal concord by the specific violation of a certain legal interest by the criminal offence, as this disruption (still) exists during the trial. This basis is connected with the retribution of the offence depending on the degree of the suspect's guilt; the *gerechten Schuldausgleich* of the injustice culpably caused. This is a first closer interpretation of the upper limit to proportionate sentencing. However, Kaspar goes a step further in his proposal for further

36 Article 49, paragraph 3, of the EU Charter, is primarily about a claim to protection against sentencing that is proportional to the seriousness of the criminal offence. The question is whether this is enough. A sentence for an offence against property can also be disproportional in relation to the suspect's property; a (long) custodial sentence can be disproportional in comparison with the mental capacity and resilience of the suspect's person.

37 Johannes Kaspar, *Sentencing Guidelines versus freies tatrichterliches Ermessen – Brauchen wir ein neues Strafzumessungsrecht?, Gutachten C zum 72. Deutschen Juristentag,* Munich: C.H. Beck, 2018. Discussed by Clara Herz, 'Striving for Consistency: Why German Sentencing Needs Reform', 21 *German Law Journal* (2020), p. 1625-1645.

38 Johannes Kaspar, *Sentencing Guidelines versus freies tatrichterliches Ermessen – Brauchen wir ein neues Strafzumessungsrecht?, Gutachten C zum 72. Deutschen Juristentag,* Munich: C.H. Beck, 2018, p. C 25.

operationalisation of this thought. It is his idea of a positively (actively) formulated general prevention. To this effect, he connects the demand for proportionate sentencing with the sentence in society. What matters here is the question of which sentence is appropriate and necessary, within the upper limit of the guilt and the seriousness of the offence, to apply as a sentence for crime that is accepted among the population of (the respective) society and adopted as a (sufficient) sentence to keep them from committing punishable offences.[39]

According to Kaspar, this standard should be given substance and take shape in adequate empirical research into what is experienced among the population as relevant factors for sentencing. It should be established which sentence is sufficient to counter judging in one's own case, to continue confidence in justice to restore legal concord disrupted by the offence, and (thus) to establish which sentence acts as a deterrent on citizens to commit punishable offences themselves. (This orientation, therefore, is not only or primarily derived from the (current) indignation over a committed offence or its actual consequences for the victim.) The sentence to be imposed does not need to be more severe in terms of severity and duration than that it sufficiently meets what is thus considered a positive general preventive effect of sentencing in society. To this effect, (it should be possible that) the results of adequate empirical research among the population need to be apparent in legislation and justice concerning sentencing.

A lot can be said in favour of Kaspar's point of departure of a sentence theory and approach to hold on to operationalisation of the notion of proportionate sentencing in criminal legislation and criminal justice via adequate empirical research on sanctioning among the population.[40] Simultaneously, it is a theoretical notion of which it remains to be seen whether it is suitable for being used as a point of departure in a possible sanctioning protocol to be drawn up. A first attempt to answer this question can be twofold.

Firstly, it is clear that a notion like this can only exist if national governments are aware of the necessity of adequate empirical research into all aspects of sentencing, including the (actual) needs and opinions among citizens in the respective society in general.[41] An adequate sentencing database is a first condition for this. Next, the findings of this research should play a role as legitimating operationalisation of what the law on sanctions and

39 Johannes Kaspar, *Sentencing Guidelines versus freies tatrichterliches Ermessen – Brauchen wir ein neues Strafzumessungsrecht?, Gutachten C zum 72. Deutschen Juristentag,* Munich: C.H. Beck, 2018, preliminary advice, p. C 25-28 and p. C 104.

40 Although it should be taken into account that a basis that is too closely related to sentencing would open the gates wide to provide for preventive measures as well, such as preventive detention, for which such a sentencing concept, as a result, can no longer be used as a basis.

41 For the scope and content of such research, see Johannes Kaspar, *Sentencing Guidelines versus freies tatrichterliches Ermessen – Brauchen wir ein neues Strafzumessungsrecht?, Gutachten C zum 72. Deutschen Juristentag,* Munich: C.H. Beck, 2018, p. C 112-114, and more extensively: Johannes Kaspar & Tonio Walter (eds), *Strafen "im Namen des Volkes"? Zur rechtlichen und kriminalpolitischen Relevanz empirisch feststellbarer Strafbedürfnisse der Bevölkerung,* Baden-Baden: Nomos, 2019.

sanctioning should actually look like in legislation and justice. The legislator and the court should have this research at their disposal and should have access to it, and they should operationalise its findings in their work on sentencing. The findings and carry-over of this operationalisation in the system of sanctions and in sentencing among the population will then be a basis for (further) research. This means that at any rate, the necessity of conducting this adequate empirical research into the various aspects of sentencing can be laid down and stipulated in a protocol possibly to be drawn up.

Additionally, where laying down the point of departure of 'positive general prevention' is concerned, it is not unimportant that Kaspar in his preliminary advice phrased a concrete proposal to codify his point of departure in the German Criminal Code (*Strafgesetzbuch*, StGB). He proposes that his idea of the 'positive general prevention' should be laid down in the criminal code in a provision in which the foundations for judicial sentencing are explicitly phrased, in conformity with the current Article 46 of the German Criminal Code. As to his sentencing theory, he proposes that the following should be included as a first paragraph:

> The punishment serves to restore legal peace through a proportionate effect on the general public and the perpetrator. Their assessment must be based on the extent to which the legal peace was disturbed that was caused by the offense and that still existed at the time of the sentencing.[42]

This laudable 'operationalisation' of his theoretical thoughts into a concrete legal text renders it possible to include the content of this concrete proposal in the discussion as a point of departure of possibilities and desirabilities when the content of any supranational protocol to be drawn up is established.

4.3 Codification of three principles as reference points of departure concerning sentencing in the protocol

Apart from some additional aspects to be discussed later, which can be formulated as demands on the set-up of the system of sanctions in the national law of the member states, there are some further reference points that, in addition to the right to indemnification against disproportionate sentencing, can be included in the protocol itself. Three of these are obvious, when looked at in the light of the latest legal opinions.

42 Johannes Kaspar, *Sentencing Guidelines versus freies tatrichterliches Ermessen – Brauchen wir ein neues Strafzumessungsrecht?, Gutachten C zum 72. Deutschen Juristentag,* Munich: C.H. Beck, 2018, p. C 104. Only the first paragraph of his proposal for a legal provision is quoted here, but the other paragraphs are also relevant. However, the proposal is too long to be quoted here in full.

The first one is that it is of great value that the protection against discrimination in sentencing is expressed in a protocol like this. "No discrimination in sentencing (is allowed) by reason of race, colour, gender, nationality, religion, social status, political belief or (sexual orientation or disability) of the offender or the victim. Factors such as unemployment or cultural or social conditions of the offender should not influence the sentence so as to discriminate against the offender", to paraphrase the respective part of Recommendation R (92) 17[43] into more contemporary opinions and give it the form of a claim and right to be included in a protocol rather than only a recommendation to a member state.

The second reference point is the codification of the hard rule that time spent in custody before trial or before appeal "should count towards the sentence".[44] If a custodial sanction is imposed, the duration of the custodial sentence is reduced by the time spent in custody. Instead of the point of departure, which is too much without obligations and without substance, of Recommendation R (92) 17 in respect of this,[45] it can be laid down in the Protocol that for settling the time spent in custody, no distinction is made any longer according to whether the preliminary trial detention has been undergone in the national jurisdiction of the trial-state itself or abroad in another State or jurisdiction.

Finally, it should be noted that partly due to the trend of increasing the punitive aspect of the law of sanctions, there is the inclination that undue delays in criminal justice are (even[46]) no longer a sentence-reducing factor in favour of the suspect, even if their cause is not at all at the suspect's risk or if they are caused by the complexity of the case. Partly with respect to legal equality, here is rather referred to compensation provisions outside the criminal proceedings, which will then be open to other participants in the trial as well. In the EU, in which the right to be tried within a reasonable term in legal actions in the EU has been laid down in Article 47 of the EU Charter, the ECJ follows the legal interpretation that – at least where the penalties imposed for the EU Commission are applied – exceeding the reasonable term can no longer lead to sentence reduction as a compensation, partly in view of the effectiveness of sentencing as a means to protect the interests of the EU.[47] This is despite the fact that the right to a hearing within a reasonable term as a right of the suspect of a human rights nature has developed into hard law. The respective element in

43 Recommendation R (92)17 concerning consistency in sentencing, op. cit., A.7.

44 Recommendation R (92)17 concerning consistency in sentencing, op. cit., G.

45 Recommendation R (92)17 concerning consistency in sentencing, op. cit., "There should be a coherent policy with regard to time spent in custody abroad."

46 Termination of the proceedings as sanctioning for undue delay goes too far to lay it down as a point of departure in a protocol; in the European Union, this would not be acceptable either if it damages the unity and effectiveness of the Union law, as evidenced by statements such as ECJ EU 05-06-2018, C-612/15, par. 75 and 76.

47 ECJ EU (Grand Chamber) 26 November 2013, C-58/12 P, ECLI:EU:C:2013:770 (*Groupe Cascogne/Commission*), par. 72-79.

Article 6 of the ECHR is one of the parts of this convention that demands most attention from the ECtHR but that first and foremost also requires an adequate provision of prevention and possible legal rehabilitation at a national level via Article 13 of the ECHR.

Also with a view to further implementation of this right of the suspect to a hearing within a reasonable term, it seems to be the right approach to lay down in a protocol to be drawn up on sentencing that undue delay in criminal justice is a factor that should apply as a ground for reduction of the punishment in the suspect's favour, including the obligation of indicating in the motivation of the judgment to which reduction the violation of the right to a hearing within a reasonable time has actually led. It seems to be appropriate to give priority as a special provision to reduction of the punishment as a compensation for the suspect if his or her right to a hearing within a reasonable time has been violated, instead of only financial compensation outside the criminal proceedings. Although the ECtHR considers such compensation acceptable as well,[48] provided that it is stipulated in a modality that yields an effective remedy and that has to meet certain requirements, there is a preference in case law for reduction of the punishment in cases in which this is possible. This preference is further accentuated by the Council of Europe Advisory Commission for Democracy through Law (Venice Commission).[49] Furthermore, it is phrased in the respective Recommendation of the Council of Europe from 2010.[50]

4.4 Demands on the set-up of the system of sanctions in national law

Something more can be said about possible parts of a protocol concerning sanctioning (sentencing and execution) with respect to points of departure for setting up and designing the system of sanctions in the legislation in national judicial systems. This also contributes to the general claim to be codified to protection against disproportionate sentencing.

Within that framework, first a regulation could be provided prescribing that in the national legislation it should be stipulated explicitly that a short custodial sentence can only be imposed if this sentence is inevitable and not before the court has adequately investigated all options for imposing an alternative sentence. Article 47 of the German Criminal Code is an example of such regulation in national law. The protocol should

48 ECtHR (Grand Chamber), Judgment of 29 March 2006, *Scordino v. Italy*, ECLI:CE:ECHR:2006: 0329JUD003681397, par. 187: "However, States can also choose to introduce only a compensatory remedy, as Italy has done, without that remedy being regarded as ineffective."

49 https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)036rev-e, under 228 238.

50 https://vm.ee/sites/default/files/content-editors/Rec_2010_3%20_2_eng.pdf, under 10.

encourage the member states to provide for alternative sanctions in the system of sanctions as much as possible.[51]

A possible protocol could also declare itself against the general, vague sentence maximum-increasing circumstances, such as 'the special seriousness of the offence'.[52] A preference could be expressed to restrict sentence maximum-increasing circumstances in national legislation to specific circumstances that have been accepted more generally, such as a (racially) discriminatory motive, for instance. Developing too extensive a catalogue at a supranational level caries the risk of unbridled extension of such grounds and should therefore only take place with restraint. At the same time, mentioning a (racially) discriminatory motive as a possible sentence maximum-increasing circumstance in particular can contribute to countering discrimination, especially on the basis of race, also according to the EU nowadays a threat to be taken seriously to all citizens coexisting in our society. To such extent, it can be argued with respect to protection against discrimination, at any rate on the basis of race, that it is appropriate that the protocol demands from member states that racial and other discriminatory motives can lead to more severe sentencing of the suspect and that this latter aspect is made visible in some way in the system of sanctions.[53]

Next, a possible protocol could declare itself against the use of special sentence minima per offence in the national systems of sanctions or at least declare that these are preferably abandoned. It cannot be ruled out, however, that in times of frequent criminality undermining society, such as violent crime, or fraud and corruption, politics and the legislator feel a need of using special sentence minima to propagate they want to put a stop to these forms of crime.

Nevertheless, such a system inevitably damages the leeway the court has to tailor the sentence to the suspect's person and personal circumstances as much as possible. From this perspective, it is important to lay down that in a specific case and given the suspect's person, the court can deviate from a special legal sentence minimum (whether or not explicitly motivated). From every system of sanctions developed in national law, it can be expected that it provides for the explicit possibility that the court can impose a lighter sentence (in terms of type or degree), where appropriate, than the sanction provided for under the special minimum in law; no absolute mandatory sanctions in this respect.

Within this framework, it can further be argued that in the protocol to be drawn up, the sentence-reducing circumstances are mentioned that are included in the national law

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51 In conformity with Recommendation Rec(2000)22 of the Council of Europe Committee of Ministers on improving the implementation of the European Rules on community sanctions and measures, and its prior documents mentioned in that Recommendation.

52 Like the category of 'besonders schwäre Fälle' in German law, which is strongly criticised in Germany.

53 See the recent comparative law study in this respect by J.M. ten Voorde, S.V. Hellemons & P.M. Schuyt, summarised in English on: 3064AsummaryPDFdocument (wodc.nl).

so that the court can take them into account as appropriate. Examples include diminished imputability of the offence to the suspect, the suspect's awareness of punishability and the suspect's remorse, for instance and particularly as evidenced by the suspect's acts to reduce the consequences of the offence for the victim, and, as already mentioned, processing in a sentence-reducing sense a violation of the suspect's right to a hearing within a reasonable term.

Additionally, it could be laid down that (other) forms of further 'mathematisation' of sentencing in the law or in the guidelines should be avoided. Such mathematisation may easily have an upward effect on the severity and duration of the sentence to be imposed. More than non-binding sentencing guidelines to identify and avoid disproportionate differences in sentencing in a certain judicial system (consistency in sentencing or – at least – avoiding unwarranted disparity), is neither necessary nor desirable.

As a basic standard of all of this, it can be stipulated in the protocol that the national judicial system provides for the possibility that the court in sentencing in a specific criminal case always has the freedom to refrain from a punishing sanction altogether on the basis of special circumstances, especially pertaining to the suspect's personal circumstances, even though the suspect is guilty of a proven criminal offence.

A procedural requirement can be attached to the aspects above. Each of the aspects mentioned underline the necessity to provide for the leeway for the court in a system of sanctions to tailor the sentence as a basis for humane sentencing as appropriate. When drafting the sentence to be imposed, the personal circumstances of the suspect to be sentenced, also to the extent that these have changed after the offence was committed, are rather of central importance.

Personalisation and individualisation of the sanction as a human right concerning sentencing should be laid down in any case in the protocol to be drawn up. This basic concept of the human rights character of the sentencing process is indissolubly connected with the suspect's right within this framework to put forward at the trial all circumstances relevant for imposing the sanction, especially those concerning the suspect's person, and to have these adequately investigated, discussed in court and discounted in the decision on the sanction imposed on this suspect.

As to the facts and circumstances used against the suspect in the sentencing, there should be the right to challenge these circumstances, to a similar degree as the suspect's right to challenge the evidence used against him or her, without the requirement that the same standard of proof has to apply, partly because entirely different judicial systems are and could be involved.

Finally, it would be appropriate to include in a possible protocol the point of departure that the national law should provide for the stipulation that a sentence imposed has to be motivated adequately so as to enable the higher court to assess its proportionality in particular. Here, too, the text of Recommendation R (92) 17 concerning consistency in

sentencing can serve as a point of departure for codification of this point of departure into hard law.[54] Paragraph F of the Recommendation includes the regulation that the principle of the prohibition of *reformatio in peius* 'should be taken into account' where only the defendant appeals. One might hesitate if such a relatively detailed regulation should be included in the protocol. True, a possible rule should be limited to the event in which only the suspect appeals. Abuse of the right to appeal (Recommendation F under 2) should better be addressed in other ways, for instance by testing the motivation of the appeal. Besides, other substantive and more meaningful demands can be made on appeal proceedings before a more severe sentence can be imposed if only the suspect appeals, for instance the demand of unanimous vote in the trial chamber.

Also with respect to the possibility and desirability of a possible provision concerning the prohibition of *reformatio in peius*, the diversity in judicial systems can be an impediment to including a provision in a possible protocol on this point as well. On the other hand, a phrasing like 'should be taken into account' as is used in the Recommendation allows the member states ample leeway to give substance and form to such a starting point in a protocol in their own way. If member states can agree on such a provision at a supranational level, such a regulation would not be out of place in a possible protocol.

4.5 Two specific cases: life sentence and long fixed-term prison sentence

The foregoing pertains to the set-up of the sentencing system in general. Where the exploration of the content of a possible protocol is concerned, two special cases should be discussed in further detail: life imprisonment and the long fixed-term prison sentence.

4.5.1 Life imprisonment: no 'case against', but effective review and stricter terms for application

Since the case against the death penalty under European and international law is clear, the 'next' object of concern in a range of severity is life imprisonment and the long fixed-term prison sentence. Precisely these two modalities have been coming up in legislation and case law under the influence of popular driven policy. It is against the background of this fact that more law should be developed and brought in contention. Especially with respect to these two sanctions in general, the aforementioned claim to proportionate sentencing,

54 Recommendation R (92)17 concerning consistency in sentencing, op. cit., E.: 'Giving reasons for sentences'; E.1. and E.2.: "Courts should, in general, state concrete reasons for imposing sentences. In particular, specific reasons should be given when a custodial sentence is imposed. Where sentencing orientations or starting points exist, it is recommended that courts give reasons when the sentence is outside the indicated range of sentence. What counts as a 'reason' is a motivation which relates the particular sentence to the normal range of sentences for the type of crime and to the declared rationales for sentencing."

or at least the safeguard against disproportionate sentencing, can be significant in the first place.

As to life imprisonment, the following applies. Although a strong case can be made for abolishing life imprisonment,[55] this ultimate sentence as such is not in conflict with international or European law. There is by far no 'case against life imprisonment' similar to the 'case against the death penalty'. The ECtHR, too, indicates that imposing as well as – *in ultimo* – (after review) enforcing life imprisonment until the end of the life of the convicted person is in itself not in conflict with the ECHR, and not with Article 3 of the ECHR concerning the protection against inhumane treatment either. European or international law will not change this in the short term; a prohibition against life imprisonment is not feasible, apart from the question whether it is desirable in the first place.

A more effective and promising approach is realising restrictions to influence enforcement via the demand of sentence reducibility and to use this approach to push back the *application* of life imprisonment by the criminal court in sentencing. Some relevant, hopeful European developments can be mentioned in this context. Although the ECtHR has considered life imprisonment in itself as well as by its nature to be not in violation of the ECHR, there may be a conflict with Article 3 of the Convention due to the way in which the execution has been set up. This is especially relevant because in some countries, including mine (the Netherlands), the approach has shifted towards 'life sentence = sentence for life'. The hopelessness this entails as from the first day of detention is deemed in violation of Article 3 of the ECHR ('right to hope', as the UN Committee against Torture calls it). There should always be the prospect of a possible or initially conditional release. To this end, there should be a review mechanism in every member state, as emphasised by the ECtHR (Grand Chamber) in, *inter alia*, its extensively documented judgment of 9 July 2013 (*Vinter and others v. UK*):

> For the foregoing reasons, the Court considers that, in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider

55 ECtHR (Grand Chamber), Judgment of 24 January 2017, *Khamtokhu and Aksenchik v. Russia*, Appl. 60367/08 and 961/11, dissenting opinion of judge Pinto de Albuquerque, par. 25-38; Dirk van Zyl Smit & Catherine Appleton, *Life Imprisonment: A Global Human Rights Analyses*, Cambridge Massachusetts: Harvard University Press, 2019, Chapters 1 and 11. For Germany: B.-D Meier, *Strafrechtliche Sanktionen*, Heidelberg: Springer, 2015, p. 472 476; K. Höffler and J. Kaspar, 'Plädoyer für die Abschaffung der lebenslangen Freiheitsstrafe', *Goltdammer's Archiv für Strafrecht* 162 (2015), p. 453-462 and the official report 'Abschlussbericht der Expertengruppe zur Reform der Tötungsdelikte (§§ 211-213, 57a StGB) dem Bundesminister der Justiz und für Verbraucherschutz Heiko Maas im Juni 2015 vorgelegt': https://www.bmjv.de/SharedDocs/Downloads/DE/News/Artikel/Abschlussbericht_Experten_Toetungsdelikte.pdf;jsessionid=44269593754945BE39F83DDAA176CA36.1_cid324?__blob=publicationFile&v=2.

> whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.[56]

The ECtHR takes a careful though clear approach in which the 'hopelessness' of a life sentence is broken out of by demanding that the law of the member states has to provide for a review procedure so that there is yet hope and prospect as from the first day of detention. 'If it were not for hope, the heart would break,' as the saying goes. This also has consequences for how enforcement is organised. After all, as from day one, the manner of enforcement may not exclude (the possibility of) resocialisation.[57]

The hopelessness of detention as from day one based on the lack of an adequate review mechanism is a separate argument to conclude with this manner of enforcement that Article 3 of the ECHR is violated, somewhat apart from the lack of a prospect of resocialisation as an argument for setting up a 'bare' detention regimen in which (possible) activities focused on resocialisation during enforcement are denied or refused. The demands on the set-up of enforcement of life imprisonment are made in the context of this review mechanism: "Detention in prison must be organised in such a way as to enable life-sentenced prisoners to progress towards their rehabilitation", as the CPT puts it.[58]

However, the European Court is also reticent to a certain extent in making further demands on this review procedure. The demand is exclusively based on Article 3 of the ECHR. Since, according to the ECtHR, the lawfulness of life imprisonment is based on the judicial decision to impose it, the review demand is not based on Article 5, paragraph 4, of the ECHR.[59] In addition, the Court notices a trend in Europe towards consensus that such a review would be appropriate after 25 years' detention, but the Court does not

56 ECtHR (Grand Chamber), Judgment of 9 July 2013, *Vinter and others v. UK*, Appl. 66069/09, 130/10 and 3896/10, par. 119. Other decisions are relevant as well. An overview can be found in ECtHR, Judgment of 23 May 2017, *Matiošaitis a.o. v. Lithuania*, Appl. 22662/13 and seven others.

57 Cf. the Council of Europe Recommendation Rec (2003)23 of the Committee of Ministers to Member States on the management by prison administrators of life sentences and other long-term prisoners. Next, the CPT converted the starting points of this document into a number of objectives and principles for the treatment of prisoners serving a life sentence (the individualisation principle, the normalisation principle, the responsibility principle, the security and safety principles, the non-segregation principle, the progression principle): Situation of life-sentenced prisoners, CPT/Inf(2016)10-part, Extract from the 25th General Report of the CPT, published in 2016, https://rm.coe.int/16806cc447, par. 74.

58 CPT, op. cit. (footnote 57) par. 73. In the document, the way in which these starting points should be put into practice in the detention regimen is discussed in more detail.

59 ECtHR, Judgment of 21 June 2011, *Kafkaris v. Cyprus*, ECLI:CE:ECHR:2011:0621DEC000964409, par. 61.

determine this term itself: "it is not for the Court to determine when that review should take place."[60]

The Court leaves it to the member states to choose within certain limits between designing the review mechanism of such judicial procedure or of a parole procedure. The latter can be sufficient.[61] The approach by the ECtHR in this respect is a result of the more general approach that the ECtHR does not give an opinion on a specific criminal justice system as such.[62] It is remarkable that the UN Committee against Torture goes one step further and does demand a judicial procedure.[63] Perhaps it might be expected that the ECtHR will also move towards the demand of a judicial procedure, also because it is clear that a possible parole procedure has to meet stringent demands to be accepted as an effective review procedure by the ECtHR. Judge Pinto de Albuquerque made the following adequate summary in his concurring opinion to the Grand Chamber decision of 26 April 2016:

> Although the Grand Chamber mentioned the freedom of Contracting Parties to decide on the concrete features of their own parole mechanisms, it also established clear limits to this freedom (…) the parole mechanism must comply with the following five binding "relevant principles":
> (a) the principle of legality ("rules having a sufficient degree of clarity and certainty", "conditions laid down in domestic legislation");
> (b) the principle of the assessment of penological grounds for continued incarceration, on the basis of "objective, pre-established criteria", which include resocialisation (special prevention), deterrence (general prevention) and retribution;

60 ECtHR (Grand Chamber), Judgment of 9 July 2013, *Vinter and others v. UK*, Appl. 66069/09, 130/10 and 3896/10, par. 120.

61 ECtHR (Grand Chamber), Judgment of 9 July 2013, *Vinter and others v. UK*, Appl. 66069/09, 130/10 and 3896/10, par 120: "It is not its task to prescribe the form (executive or judicial) which that review should take."

62 ECtHR (Grand Chamber), Judgment of 9 July 2013, *Vinter and others v. UK*, Appl. 66069/09, 130/10 and 3896/10, par. 104 with reference to ECtHR, Judgment of 12 February 2008, *Kafkaris v. Cyprus*, Appl. 21906/04, par. 99.

63 UN Committee against Torture 18 December 2018, CAT/NLD/C/07 (Concluding observations on the seventh periodic report of the Netherlands), par. 35: "The State party should ensure that prisoners serving life sentences have the prospect of release or a reduction in their sentence, with respect to the right to hope, after a reasonable period of time and that an independent judicial mechanism be established in all of its constituent countries to periodically review the situation of such prisoners. Furthermore, those prisoners should be informed of the possibility of a review or reduction in their sentences at the earliest possible time."

> (c) the principle of assessment within a pre-established time frame and, in the case of life prisoners, "not later than twenty-five years after the imposition of the sentence and thereafter a periodic review";
> (d) the principle of fair procedural guarantees, which include at least the obligation to give reasons for decisions not to release or to recall a prisoner;
> (e) the principle of judicial review.[64]

On the basis of the ECtHR case law, some hard(er) frameworks have been established for organising the enforcement of life imprisonment and for its assessment, even if it is only to make clear what is no longer possible. Judicial systems which should apply in law or in fact as 'life without the possibility of parole' (LWOP) after the apt qualification by Van Zyl Smit and Appleton,[65] are no longer acceptable in Europe. This can be included as a rule in a possible protocol.

This does not mean that according to such protocol only a judicial procedure would be acceptable or that a judicial model is always preferable to a parole model (or other non-judicial model) that meets these demands. Especially in a time of popular driven policy, it is significant that the decision to grant parole (also or even) to a person sentenced to life imprisonment yet remains part of the authority, duty and responsibility of the penitentiary administration and the (penitentiary) government. It is advisable not to give politicians an easy opportunity to (be able to) hide behind the judicial model while passing criticism on the court about its parole decisions. It is better to ensure they are (and remain) jointly responsible for the decision to release 'lifers'.

In the next step, if the manner of enforcing a certain sentence does not meet the standard of Article 3 of the ECHR, the respective citizen has to be protected against such violation. For life imprisonment this means that, if no adequate review mechanism is in place, the violation of Article 3 of the ECHR arising from this comes about at the moment at which this sentence is imposed.[66] This connection can lead to restrictions on the *application* and therefore on *imposing* this sentence; after all, member states have to protect citizens against evident threatening convention violations.[67] Partly because of this, the

64 ECtHR (Grand Chamber), Judgment of 26 April 2016, *Murray v. The Netherlands*, ECLI:CE:ECHR:2016:0426JUD001051110, concurring opinion by judge Pinto de Albuquerque, par. 13.

65 Dirk van Zyl Smit & Catherine Appleton, *Life Imprisonment: A Global Human Rights Analyses*, Cambridge Massachusetts: Harvard University Press, 2019, p. 35.

66 ECtHR (Grand Chamber), Judgment of 9 July 2013, *Vinter and others v. UK*, Appl. 66069/09, 130/10 and 3896/10, par. 122: "Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration."

67 In *Murray v. the Netherlands*, the ECtHR judged that the set-up of life imprisonment in the Netherlands is in violation of Article 3 of the ECHR due to the lack of a review mechanism that met the demands. Next, the highest criminal court ruled in 2016 that, as long as the *enforcement* of life imprisonment is in violation of Article 3 of the ECHR, the Dutch criminal court is not allowed to *impose* a life sentence.

connection is of major significance, because the public prosecutor cannot demand life imprisonment if the criminal court cannot impose this sentence any longer.

In the Netherlands, this led to a wide coalition in favour of the opinion that the enforcement of life imprisonment should be provided with some review procedure. In the meantime, this has been realised.[68] In the new regulation, (only) after twenty-five years' detention,[69] an advisory board advises the minister whether the convict can qualify for activities aimed at reintegration; the decision rests with the minister. In due course, these activities may lead to release. Thus, from a European and an international perspective, the new regulation – which is only based on the minister's published policy decision and which is therefore not (even) laid down in Parliamentary Law[70] – is nothing more than the absolute minimum that is also criticised by international bodies.[71] Nevertheless, the prohibition of imposing life imprisonment without proper review has considerably contributed to a change in enforcement policy by creating a review procedure in the parole model. According to the highest Dutch criminal court, this new model is compatible (for the time being) with the demands of the ECHR.

As a result of the foregoing, at least the following could be laid down in the considerations on a protocol to be developed concerning human rights requirements as regards the sentencing process and the enforcement of sentences:

– For life imprisonment, the law of a country has to provide for an effective review procedure. This necessary review procedure has to be applied after 25 years' detention at the latest. If this point of departure of a hard approach has been realised in a large number of member states, reduction of the said 25-year term can be aimed at.
– It is harder to decide whether it is appropriate that the review procedure always has to be a judicial procedure rather than merely an executive procedure, such as a parole procedure. This also depends on the effectiveness of the procedure under national law. As to this aspect, the protocol to be drawn up does not need to speak out in more detail by demanding (at least) a judicial procedure.
– It should also be laid down that, now that without an effective review procedure the enforcement yields the prohibition against inhumane treatment or the deprivation of the 'right of hope', life imprisonment should not be *imposed* by the criminal court in

68 Parliamentary Documents II, 2015/16, 29 279, nr 325.

69 The ultimate term stated by the ECtHR.

70 In this respect there is a difference between the various countries of the Kingdom of the Netherlands that is worth mentioning. Three constituent countries that are part of the Kingdom of the Netherlands – Sint Maarten, Curaçao and Aruba – have their own Criminal Code of which the content is largely identical. It provides for the regulation that the person sentenced to life imprisonment is released on parole after this person has been incarcerated for at least 20 (in Sint Maarten 25) years if in the opinion of the court (the Joint Court of Justice), any further unconditional enforcement no longer serves a reasonable purpose.

71 Cf. for instance, the above-mentioned 'Concluding observations from the UN Committee against Torture'.

cases in which the national law allows imposing life imprisonment but no effective review procedure is available.[72]

Partly apart from this review demand, it seems to be appropriate from the perspective of protecting human rights as regards the sentencing process to phrase independent safeguards for *imposing* life imprisonment addressed to the national legislator in a protocol yet to be drawn up. In a discussion paper of the Global Coalition on Life Imprisonment, a preparation for the International Civil Society Strategy Forum on Life Imprisonment, held in London on 11-12 December 2018, two key-elements are mentioned:

– Ensuring that life sentences are reserved for only the most serious crimes under national criminal law;
– The abolishment of mandatory life sentences.[73]

Whereas the first aspect is certainly of value as a point of departure and its codification cannot do any harm, it is traditionally already the approach of the set-up of the system of sanctions in the criminal law of many states. There is little argumentation in European and international law concerning human rights to bring up for discussion whether a member state has threatened with life imprisonment against certain crimes in its own Penal Code justifiably.

The second point offers more ground for codification as a regulation and demand on the national judicial systems in a possible protocol. One of the possibilities would be to phrase the demand in such a manner, that with respect to all crimes threatened with life imprisonment, the national legislator should make it possible for the court to impose a fixed-term prison sentence (or other alternative); no mandatory life sentences anymore. Hopefully, the German Constitutional Court, in other fields unquestionably a frontrunner in the protection of fundamental rights within the framework of sanctioning, adopts this recommendation, which was submitted by Johannes Kaspar to the German lawyers' conference in 2018.[74]

If the sanctioning court opts for sentencing to life imprisonment, it may help if it indicates as an opinion how long the detention term should at least be. Some flexibility of

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72 As will be illustrated later, this latter approach will have consequences for the international cooperation in criminal matters with countries in the judicial system of which the (enforcement of) life imprisonment does not meet the minimum requirements.

73 Here is an important difference with Recommendation Rec(2003)23 of the Committee of Ministers of the Council of Europe to the member states on the management by prison administrations of life sentence and other long-term prisoners. This recommendation only concerns demands on the set-up of the *enforcement* of life imprisonment and of long fixed-term prison sentences.

74 Johannes Kaspar, *Sentencing Guidelines versus freies tatrichterliches Ermessen – Brauchen wir ein neues Strafzumessungsrecht?, Gutachten C zum 72. Deutschen Juristentag,* Munich: C.H. Beck, 2018, p. 56-58 and p. 119, thesis 4.

the term could help avoid a fixed minimum term of detention. It is more important that the sentencing court in such an opinion mentions something about its penological grounds. The latter is relevant for the compulsory review during enforcement. After all, there has to be "the principle of the assessment of penological grounds for continued incarceration, on the basis of 'objective, pre-established criteria,' which include resocialisation (special prevention), deterrence (general prevention) and retribution" (see the Murray criteria as described above). Especially where the penological grounds for continued incarceration are concerned, it is important that the sentencing court indicates something about this in its opinion on the minimum duration of the detention imposed. To such extent it could be expressed in a possible protocol that the national law of the member states should provide for such advisory authority.

In this way, imposing life imprisonment as the severest alternative is made an *exception* in national criminal law. Additionally, due to such demands, the character of life imprisonment may essentially be a fixed-term prison sentence of an initially indefinite duration rather than – exceptions excluded – imprisonment for the rest of the convicted individual's life. The latter cannot be ruled out, but when it comes to demands to be laid down in a possible protocol to be drawn up, it should be made an exception.

The said protocol may include the requirement that the legislator and the court be held to consider the option of life imprisonment, given the alternative, as an exception of which the application in a specific criminal case requires explicit motivation in the court judgment. The motivation requirements should include that the criminal court does not impose this ultimate sentence without having been informed by a behavioural expert on the consequences for the respective suspect, in particular as to the suspect's mental strength and resilience. In the event (and in spite) of conviction to life imprisonment, the preservation of the capability to live (translated from the beautiful term derived from an opinion of the German Constitutional Court (*Bundesverfassungsgericht*): *Erhaltung der Lebenstüchtigkeit*) is most important. If an individual with a life sentence loses this capability in a concrete case, this is not only disproportional sentencing but also inhumane sentencing; taking somebody's capability to live (*Lebenstüchtigkeit*) is not all that remote from the death penalty.

4.5.2 The long fixed-term prison sentence: a maximum to the 'race to the top' as a point of departure

Whereas life imprisonment due to its ultimate nature is also a reason in politics and among the legislator of national jurisdictions for some restriction and reticence in threatening with it and imposing it, the situation regarding the maximum term of the fixed-term prison sentence is different. As to this maximum term of the fixed-term prison sentence, there are some developments that are anything but encouraging. In the first place, there are the legislative amendments in various countries in which the maximum of the fixed-

term prison sentence has increased and courts actually impose sentences with this increased maximum term.

In Spain, for instance, life imprisonment has been re-established in the criminal sanctions system in 2015, for the first time since its abrogation in 1928. The maximum penalty in accordance with the regulation of the accumulation of crimes was increased from 30 years to the limit of a 40-year penalty in 2003. In Belgian criminal law, there is the possibility of imposing a 40-year prison sentence as well, and in Surinam even a 50-year prison sentence can be imposed. In many countries, a term of 30 years seems to find acceptance as a maximum to the fixed-term prison sentence as an alternative to life imprisonment, and this long(er) sentence duration of 30 years then has consequences for other crimes. The Netherlands is an example of this. In the Dutch Penal Code, the maximum term of a fixed-term prison sentence as from the introduction of the Penal Code in 1886 was 20 years until 2006, especially in cases in which a fixed-term prison sentence acted as an alternative to life imprisonment. Per 1 February 2006, this maximum was increased to a 30-year prison sentence. This maximum also functioned as a new maximum in cases in which life imprisonment did not apply. The government has investigated the intention of increasing this maximum further to a 40-year prison sentence. For reasons related to the judicial system, this intention was not put into practice. Instead, a proposal has been made to increase the maximum prison sentence for manslaughter from 15 years to 25 years. Furthermore, conditional release is restricted to a maximum of the last two years of the custodial sentence. What is more, the detainee must have deserved this conditional release. In that case, actual detention on the basis of a fixed-term prison sentence can (still) have a 28-year term; the difference with life imprisonment will not really be substantial anymore.

Anyone looking at the ease with which the maximum of a fixed-term prison sentence is increased in various countries by politics and the legislator in our time could think that there are no rational arguments that make a certain maximum obvious and that might stop or at least slow down a race to the top. This suggests that also in a protocol possibly to be developed, no upper limit could be determined or laid down in this protocol that – even if only as a point of departure – can be used as a maximum for the legislator when determining an upper limit to the duration of the fixed-term prison sentence as part of the set-up of the system of sanctions in national law.

It is not likely that there will ever be a hard regulation under European or international law in which an absolute upper limit is set to the fixed-term prison sentence or is prescribed to the national law of member states. And in case this would happen, the maximum would probably be very high. This does not mean that from a human rights perspective, no grounds can be mentioned that could lead to a certain basic principle concerning the maximum duration of the fixed-term prison sentence, which could be phrased in a protocol to be drawn up. It can be argued that this is possible.

In the period of codifications of the national criminal law at the end of the nineteenth century, so important to Europe and so interesting for scientists and law practitioners, arguments for determining the maximum of the fixed-term prison sentence were also looked for. In Germany, this search resulted in the well-known, wide study among prison governors and prison physicians into which prison sentence duration they considered bearable for detainees and after which prison sentence duration the chances of successful resocialisation and return to society, without the risk of reoffending, would have been reduced to zero in their opinion.[75]

With fairly much consensus, this study yielded a maximum duration of fifteen years as a guideline. The idea was that if resocialisation did not succeed within these fifteen years, it would not succeed either if the detention were longer. In any case, a longer term of detention was considered fatal to resocialisation. With a high degree of consensus of opinion, these findings were adopted by the legislator in Germany and next in other countries as well. This explains why in quite a few countries the maximum for fixed-term imprisonment was set to fifteen years in the respective penal codes in the legal system of sanctions. The same occurred in the Dutch Criminal Code of 1886, in which, like in Germany and other judicial systems, the maximum of fifteen years is more or less still discernible in parts of the system of sanctions today. In Germany, with some exceptions this maximum still applies as the absolute upper limit to a fixed-term prison sentence.

This legal maximum duration of a fixed-term prison sentence also depends, of course, on the manner in which this prison sentence is enforced and the term after which conditional release can be granted. Since the end of the nineteenth century, much has changed in the manner of enforcing custodial sanctions. Nevertheless, nothing has changed to the extent that recent studies also suggest that (too) long imprisonment can cause serious damage to the detainee's person.[76] This is caused by well-known factors of isolation and institutionalisation due to detention: loss of meaningful contacts, relationships, interaction, et cetera, which also cause serious damage to the convict's capability of returning to society without reoffending. Recent neuropsychological research suggests that detention leads to deterioration of essential brain functions in detainees. The sober detention environment may be the cause of this deterioration. This implies inevitable loss of autonomy and freedom, also inside the penitentiary, with little physical, mental and

75 Collected discourses of the Reichstag of the North German Confederation from 1870, including the Study of administrations of German prisons and physicians connected to these included in nr 5, *Anlage* 4 (https://books.google.nl/books?id=Mx5LAAAAcAAJ&printsec=frontcover&hl=nl&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false).

76 In a long-term study in the Netherlands, a group of some 2,000 detainees is being monitored during and after detention for the consequences of detention (http://www.prisonproject.nl/overhetprisonproject.html), in which sleeping problems, depression, anxiety disorders, et cetera are reported.

social activity to compensate for this. This kind of regimen affects various brain functions that are crucial for successful resocialisation.[77]

It could be argued that the possible damage to the detainee provides a tool and a basis for some standardisation of the sentencing process with long fixed-term prison sentences. With respect to very long fixed-term prison sentences, these effects and their consequences for the detainee could be part of deciding to impose this kind of sentence by the criminal court responsibly.

Against the backdrop of the foregoing, a concrete maximum to the long fixed-term prison sentence could be mentioned in the first place, albeit with the character of a point of orientation, in a protocol concerning human rights aspects of sentencing to be developed. Any upper limit to the maximum custodial sentence is relatively arbitrary. At any rate, an exact upper limit cannot be based or calculated on the basis of criteria for determining the harmfulness to and burden on the detainee. Yet, there are actually no arguments for not setting this term as a point of orientation (not a rule) for national systems of sanctions[78] to a fifteen- to twenty-year prison sentence.[79] A *longer* fixed-term prison sentence provided for in the legislation of a certain country, and in some cases imposed, would then not be explicitly prohibited as such, but it would have the ring of a disproportionate sentence to it. Imposing it should then only be possible in special cases. For instance, when the court refrains from life imprisonment in a specific case, or in special cases of sentence increase provided for in the law on the basis of concrete, not merely vaguely phrased, aggravating circumstances. In concrete proceedings that meet all criteria of a fair trial, it should be established (proved) with sufficient certainty that these cases of sentence (maximum) increase provided for by law actually occur in a specific criminal case.

Furthermore, it should be stipulated that within the framework of human rights in relation to the sentencing process – similar to imposing life imprisonment – the court

77 J. Meijers, *Do not restrain the prisoner's brain*, Amsterdam: Vrije Universiteit Amsterdam, 2018 (dissertation).

78 It might be different in case of international crimes charged before national or international courts. Based on Article 77 of its Statute, the ICC may go up to 30 years' imprisonment. Whether in this respect the sentencing of Radovan Karadžić to 40 years' imprisonment by the ICTY Trial Chamber is convincing, might be open to discussion. Both parties appealed. The Appeals Chamber set aside the sentence of 40 years of imprisonment. In a well-argued decision, it imposed on Mr Karadžić a sentence of life imprisonment. All relevant documents in this case on https://www.irmct.org/en/cases/mict-13-55.

79 It cannot be ruled out that such a maximum to a fixed-term prison sentence will have consequences in considerations on the term spent in detention on average by convicts sentenced to life imprisonment. For instance, in Section 57a of the German Penal Code it is stipulated that review of a life sentence will only be possible after at least 15 years have been spent in detention, whereas in practice the average term is around 20 years. This term also depends on the fact that otherwise the 'distance' to the maximum fixed-term prison sentence of 15 to 20 years would be too big. In this context, it should be noted that the maximum minimum term of detention of 25 years only barely accepted by the ECtHR could be reduced in the future, for instance if a possible protocol serves as a handle for the idea that a term of detention of more than 15 to 20 years should be considered exceptional.

imposing the sentence has been informed about the detainee's mental strength concerning the long prison sentence the court considers imposing in a specific case. Is the defendant up to a sentence this long? Does imposing a prison sentence in excess of fifteen years not have a disproportionally burdening effect on this defendant?

Imposing a longer prison sentence than a sentence based on the point of departure of fifteen to twenty years should have to be motivated with special reasons in the judgment. Such a provision could read as follows:

> In principle, the duration of the fixed-term prison sentence does not exceed fifteen/twenty years. Imposing a longer prison sentence is only possible on the basis of grounds specifically referred to in the judgment in cases provided for in the law. If the court imposes a prison sentence of more than fifteen years, it seeks information as to whether a sentence of this duration does not have a disproportionally burdening effect on the defendant's person.

In this way, some restraints can be imposed on the duration of an extremely long fixed-term prison sentence, without a very hard upper limit, and thus sentencing the defendant disproportionally can (also) be prevented.

4.6 Interim conclusion

In summary, a protocol to be drawn up could and should at least include the claim to protection against disproportionate sentencing, if not to a more drastic stipulation of an order demanding proportionate sentencing. This could be further specified in various themes indicated above. In this way, the supranational law could be extended to the system of (the law on) sanctions and the sentencing process of the member states, also to the extent that this is set out in national legislation or developed in national administration of justice.

By laying down such normative 'starting points' (principles) of the set-up and application of systems of sanctions in a protocol, they can gather further content and be part of a (to be codified) claim to the protection against disproportionate sentencing, especially when custodial sanctions are being imposed, and therefore also of the commandment demanding humane treatment in general within sanction systems under criminal law, to a higher extent than is currently possible and stipulated.

5 Human rights and enforcement

It is important that a protocol to be drawn up also focuses on human rights requirements concerning the enforcement of sentences, especially also in one and the same protocol together with points of departure concerning human rights and sentencing. Sentencing and enforcement of sanctions are inextricably interconnected. They are in line with each other. Bringing both aspects together in a single protocol enhances the importance of standardisation. Such a protocol will become more valuable if it combines human rights aspects of sentencing and execution of sanctions in one document.

As to the content, it is important that, as already said, the existing protection of human rights in the sentencing process is clearly different from that in the enforcement. For the sentencing process, as argued above, these human rights should be further developed into a protocol in the first place. For the enforcement phase, a considerable amount of documentation concerning the order demanding a humane approach of detention enforcement is already available, not only for humaneness of detention in general[80] and the applicable basic principles on conditions of imprisonment but also for regulating special subjects of parole and of the prison regimen, such as accommodation, work and recreation, labour, contact with the outside world, somatic and mental health care, etc. Within this approach, further and specific regulations for the set-up of enforcement should be demanded for certain groups of convicts and detainees.[81]

Within the scope of this paper, especially the separate requirements for enforcement of life imprisonment are important, since the set-up of the regimen determines whether the necessary review has a chance of success where its specifics are concerned. In other words, that the suspect sentenced to life imprisonment is given sufficient possibilities to work towards this possible release. For the set-up of the detention regimen of this category, the ECtHR formulated a framework in the *Khoroshenko* case in particular.[82]

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80 'Starting' with the problem of overcrowding, in detail elaborated in ECtHR (Grand Chamber), Judgment of 20 October 2016, *Muršić v. Croatia*, Appl. 7334/13.

81 Here, a reference to the Council of Europe, Committee of Ministers Recommendation Rec(2003)23 (October 2003) on the management by prison administrations of life sentences and other long-term prisoners, and the relevant prior recommendations mentioned therein, suffices. As is the case with Recommendation Nr R (92) 17 of the Committee of the Ministers to the Member States concerning consistency in sentencing, it is also true here that a possible protocol can already have a good basis in such resolutions. In a protocol, the content of such recommendations can be given substance and more legal significance (hard law). For the latter, such a process of gradual development and acceptance of relevant standards is significant. A possible protocol does not appear out of the blue but can be a next, responsible step forward in a continuous process of legal development. A 'hard' but generally phrased basis for demands in the protocol on enforcement concerning labour, health care, contacts with the outside world, et cetera can contribute to specifying this by referring to existing and many detailed soft-law regulations of all these various detention aspects.

82 ECtHR (Grand Chamber), Judgment of 30 June 2015, *Khoroshenko v. Russia*, Appl. 41418/04. See also Dirk van Zyl Smit & Catherine Appleton, *Life Imprisonment: A Global Human Rights Analyses*, Cambridge

Considering the judgment of the Grand Chamber of the ECtHR in *Rooman v. Belgium*,[83] it is once again clear that especially the adequate contact with prisoners with mental health problems is a point of concern. It will be appropriate to lay down (again) in any case that the responsibility for the detainees' health care must rest with health care authorities, separately from the penal authorities. From the national law it may be expected that an effective system is provided for on the basis of which sufficient adequate (mental) health care will be available in prison or that detainees can be moved to (secure psychiatric) hospitals outside the prison system. In many cases, sufficiently secure hospitals will have to be developed to make the latter possible. Equality of health care inside and outside detention has to be the point of departure. The protocol could include a prohibition against force-feeding in the event of a hunger strike.

All this soft law and case law constitute a sufficiently developed basis for laying down the great outline and points of departure of it as basic rules in a possible protocol. Such a protocol could then be a supplement to especially the European and UN soft-law rules and the work of the CPT (European Convention against Torture) and the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

As is the case with human rights and sentencing, it should be possible that these great outlines of human rights protection in the execution of (custodial) sanctions could be codified in a possible protocol as a demand on legislation and penitentiary practice in the member states. In a short *tour d'horizon* a small number of such human rights foundations of detention law can be mentioned.

In the first place, the prohibition against inhumane treatment should not be the foundation as a basic principle for humane enforcement of custodial sanctions (cf. Article 3 of the ECHR). It would rather be appropriate to codify the positively phrased *order* demanding *humane* treatment as included in Article 10, paragraph 3, of the ICCPR. Especially now that Article 10, paragraph 3, of the ICCPR is already hard law as provision in this convention, nothing less than a civil right for detainees should suffice for the content of a possible protocol where this aspect is concerned.

A second general foundation that could be laid down is that the mere conviction to a custodial sentence in itself cannot lead to automatically losing the possibility of being able to exercise fundamental rights. In this respect, the ECtHR has upheld the principle that detainees should not lose their voting right merely because they have been convicted to a

Massachusetts: Harvard University Press, 2019, chapter 8.

83 ECtHR (Grand Chamber), Judgment of 31 January 2019, *Rooman v. Belgium*, Appl. 18052/11.

custodial sentence.[84] This also applies after Brexit: the United Kingdom has left the EU, not the Council of Europe.

Thirdly, in this context it is especially important that as early as in the *Golder* case from 1975, the ECtHR explicitly judged that the so-called 'general restrictions' (implied limitations; restrictions automatically arising from detention) do not fit in the system of the restriction of fundamental rights in this convention.[85] Every restriction of fundamental rights should fit in with the restriction system of the respective convention provision, although, for instance with Article 8 of the ECHR concerning the right to privacy, in the test of restricting this right pursuant to Article 8, paragraph 2, of the ECHR, for instance for checking communication between detainees and the outside world, the reasonable requirements of imprisonment can be taken into account in the interpretation and application of the restriction criteria and restriction grounds mentioned in the ECHR.[86]

Fourthly, merely making demands on the system of restrictions to exercising fundamental rights in the detention situation is not enough, however. It could be codified that the government has a duty of care towards every detainee that the enforcement should take place humanely. In that sense, it should be laid down that where detainees are concerned, the government has the positive convention commitment to make an active effort for humane enforcement of the detention and causing exercising basic rights to be realised to the highest extent possible in the detention situation. Also for such a *positive* convention commitment, there is now the necessary basis in international law, as

84 'Ever since' ECtHR (Grand Chamber), Judgment of 6 October 2005, *Hirst v. United Kingdom*, Appl. 74025/01. An overview of the Court's jurisprudence can be found on https://www.ehcr.coe.int/documents/fs_prisoners_vote_eng.pdf. For the situation in African countries: https://acjr.org.za/resource-centre/fact-sheet-17-prisoners-vote.pdf.

85 ECtHR, Judgment of 21 February 1975, *Golder v. UK*, Appl. 4451/70, par. 44: "In the submission of the Government, the right to respect for correspondence is subject, apart from interference covered by paragraph 2 of Article 8 (art. 8-2), to implied limitations resulting, inter alia, from the terms of Article 5 para. 1 (a) (art. 5-1-a): a sentence of imprisonment passed after conviction by a competent court inevitably entails consequences affecting the operation of other Articles of the Convention, including Article 8 (art. 8). (…) As the Commission have emphasised, that submission is not in keeping with the manner in which the Court dealt with the issue raised under Article 8 (art. 8) in the "Vagrancy" cases (De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 45-46, para. 93). In addition and more particularly, that submission conflicts with the explicit text of Article 8 (art. 8). The restrictive phrasing used at paragraph 2 (art. 8-2) ("There shall be no interference … except such as …") leaves no room for the concept of implied limitations. In this regard, the legal status of the right to respect for correspondence, which is defined by Article 8 (art. 8) with some precision, provides a clear contrast to that of the right to a court (paragraph 38 above)".

86 ECtHR, Judgment of 21 February 1975, *Golder v. UK*, Appl. 4451/70, par. 45: "The Court accepts, moreover, that the "necessity" for interference with the exercise of the right of a convicted prisoner to respect for his correspondence must be appreciated having regard to the ordinary and reasonable requirements of imprisonment. The "prevention of disorder or crime", for example, may justify wider measures of interference in the case of such a prisoner than in that of a person at liberty. To this extent, but to this extent only, lawful deprivation of liberty within the meaning of Article 5 does not fail to impinge on the application of Article 8".

previously explained in the IPPF context.[87] It is time to codify this basis in the protocol to be drawn up as a point of departure of humane detention and as an order to the member states.

Fifthly, it is important that monitoring the detention situation should not only be left to the prison authorities. For an effective protection of human rights in prison, an effective and independent system of monitoring at a domestic level is necessary. Merely relying on a supranational monitoring system like that from the European Convention against Torture is insufficient. At a national level, it can be demanded that monitoring by inspectorates that as an institute or on the basis of the staff regulations of its officials are not entirely independent of the government would not suffice. Confidential communication between the detainee and these institutions should be possible without being checked. The protocol to be designed should prescribe such an effective system of monitoring at the domestic level. For OPCAT member states, the National Preventive Mechanism can be referred to, set up for the execution of that convention, provided that the NPM has been set up sufficiently independently and functions adequately.[88]

Finally, proper social reintegration and parole should be mentioned. In the foregoing, the desirability and necessity of developing a protocol within the framework of humane sentencing has been explained as well as the enforcement of sentences. This necessity especially pertains to arming more and harder law to counterbalance the spirit of the times in politics and society. Especially in that context, it is essential that the convict's right to proper reintegration and resocialisation is safeguarded in a protocol possibly to be developed. After all, this right implies the recognition of the fact that in detention, the detainee can and remains a citizen of society as well and therefore has a claim towards free society to be able and to be allowed to return to society when they have done their time and are prepared for this during detention. It is not surprising that such a claim to resocialisation can be found in many documents on human rights demands on the set-up of enforcement of custodial sanctions. Even though the ECtHR has not phrased any hard law on resocialisation until now, the claim to it is inherent in case law, as became apparent in the discussion on life imprisonment.[89] A possible protocol would not be complete without a relevant section on the claim to proper social reintegration.

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87 Piet Hein van Kempen, 'Positive obligations to ensure the human rights of prisoners. Safety, healthcare, conjugal visits and the possibility of founding a family under the ICCPR, the ECHR, the ACHR and the AfChHPR', in: Peter J.P. Tak & Manon Jendly (eds), *Prison Policy and Prisoners' Rights*, Nijmegen: Wolf Legal Publishers, 2008, p. 21-44.

88 More on monitoring systems in the above (footnote 7) mentioned research program.

89 ECtHR, Judgment of 8 July 2014, *Harakchiev and Tumulov v. Bulgaria*, Appl. 15018/11, par. 264: "While the Convention does not guarantee, as such, a right to rehabilitation, and while Article 3 cannot be construed as imposing on the authorities an absolute duty to provide prisoners with rehabilitation or reintegration programmes and activities (…) it does require the authorities to give life prisoners a chance, however

In line with this it is fairly evident that in a possible protocol, attention is paid to the claim to conditional release and parole in the context of enforcement of custodial sanctions. Here, too, there is the possibility of laying down in the protocol what has been laid down so far only in a Recommendation in the Council of Europe, whereas its content has developed since then to a level that codification as hard law in a protocol is appropriate and possible. In this case, it concerns Recommendation Rec(2003)22 of the Council of Europe Committee of Ministers, adopted on 24 September 2003 on conditional release (parole).[90] At least the following general principles could be derived from it for the content of a possible protocol: "In order to reduce the harmful effects of imprisonment and to promote the resettlement of prisoners under conditions that seek to guarantee safety of the outside community, the law should make conditional release available to all sentenced prisoners."[91]

It is not necessary to choose in the protocol between a discretionary release system or a mandatory release system as long as prisoners know (from the start of detention) either when they become eligible for release by virtue of having served a minimum period of time (defined in absolute terms and/or by reference to a proportion of the sentence) and the criteria that will be applied to determine whether they will be granted release, or when they become entitled to release as of right by virtue of having served a fixed period of time defined in absolute terms and/or by reference to a proportion of the sentence.[92] As long as any (minimum) period will be fixed in accordance with the law.[93] It should not be so long that the purpose of conditional release cannot be achieved.[94] The criteria that prisoners have to fulfil in order to be conditionally released should be clear and explicit. They should also be realistic in the sense that they should take into account the prisoners' personalities and social and economic circumstances as well as the availability of resettlement programmes.[95] Important is the recognition that this claim to resocialisation is not just a claim from the detainee towards the government as a condition for legitimate deprivation of liberty. As the German Constitutional Court put it very nicely in 1973, this demand of humanity also implies a positive commitment for society to give the detainee the opportunity to return to society: "Not only the detainee needs to be prepared for return to free human society; this in turn must be ready to take them in again."[96] It would be

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remote, to someday regain their freedom. For that chance to be genuine and tangible, the authorities must also give life prisoners a real opportunity to rehabilitate themselves".

90 The recommendation is based on a comparative law study: P.V. Tournier, 'Systems of Conditional Release (Parole) in the Member States of the Council of Europe', Champ Pénal/Penal Field Vol. I 2004.

91 Recommendation Rec(2003)22, par. 4a.

92 Recommendation Rec(2003)22, par. 6.

93 Recommendation Rec(2003)22, par. 16.

94 Recommendation Rec(2003)22, par. 6.

95 Recommendation Rec(2003)22, par. 18.

96 German Constitutional Court (*Bundesverfassungsgericht*) 5 June 1973 1 BvR 536/72.

marvellous if this positive fundamental right commitment were laid down in our time in a protocol to be drawn up on human rights in the sentencing process and in the enforcement of sanctions, or at least be apparent in it as a basis, if only in an explanatory paper.

6 Enforcement: compliance as a condition for international cooperation in criminal cases

In this paper, the added value of a protocol is searched for. Within this framework, enforcement of such a protocol is also relevant. The added value as hard law and therefore as a basis for a possible individual right of complaint and for oversight and inspection mechanisms has already been mentioned. For a special aspect of enforcing the protocol to be developed, we need to go back to the points of departure of EU law, for here the recent involvement of the EU in the quality of detention is relevant too. This influence is due to the relationship between the identified violations of human rights in the sentencing process and in the enforcement of sanctions on the one hand and the standardisation of criminal law cooperation between the countries of the EU at a supranational level on the other hand. It is this cooperation that the EU has promoted and made easier in the past few years by replacing the classic instruments of cooperation, such as extradition, by the theoretically unhindered and compulsory cooperation between the member states on the basis of the principle of mutual trust. In the context of this extensive and compulsory international cooperation in criminal cases, the following is important. After, in the mechanism of the Council of Europe, the ECtHR – partly on the basis of the fact finding of the CPT – in its pilot judgment of 10 June 2015 had judged the quality of the entire Hungarian prison system below the level of Article 3 of the ECHR,[97] the question arose within the framework of compulsory EU cooperation in criminal cases whether the obligation of extraditing persons to Hungary still existed unimpaired after this judgment. For influencing the quality of detention circumstances, it is very important that in the *Aranyosi/Caldărăru* case, the European Court of Justice judged that the execution of a European Arrest Warrant (EAW) has to be postponed or possibly terminated if there is a real risk of inhumane or degrading treatment due to the suspect's detention circumstances in the member state where the order was issued.[98] With these decisions, the EU Court provided back-up to the Council of Europe Strasbourg Court in its condemning of Hungary following the detainee's claim, whereas the Council of Europe Court, with the

97 ECtHR, Judgment of 10 June 2015, *Varga and 450 others v. Hungary*, Appl. 14097/12. Also relevant is ECtHR 25 April 2017, *Rezmives and others v. Romania*, Appl. 61467/12.

98 Court of Justice of the EU, 5 April 2016, C-404/15 and C-659/15 PPU (*Pál Aranyosi and Robert Căldăraru*).

said decision, had provided back-up to the CPT findings on the detention situation in Hungary.

With this judgment of the EU Court of Justice in Luxembourg, obstacles arise for EU member state Hungary in its cooperation with other member states. This gives rise to something that looks like a state complaint. EU member state Hungary will feel committed to improve the detention climate not only towards detainees in Hungary but also towards the other member states. Otherwise, the criminal law cooperation with these other countries will be at issue and so will the effective criminal law enforcement in Hungary itself. No government of an EU member state would like to see this happen.[99]

The case law of both European Courts mentioned here yields an outstanding and hopeful example of enforcing human rights concerning sentencing and the enforcement of sentences. It speaks for itself that this effective connection with the criminal law cooperation between member states should be codified in the protocol to be drawn up, not only in the event that a suspect with citizenship rights in a certain member state is threatened to be subjected to inhumane treatment in the enforcement of the sentence, but also in the event that he or she is threatened to be subjected to a disproportionate sentence. The protection against disproportionate sentences should result in a provision in the protocol that threatening disproportionate sentencing is also a ground for refusing criminal law cooperation. Such a provision would in a way complete a circle.

7 Conclusion

There seems to be much to recommend the conclusion that at this juncture, it is desirable and necessary to resume and continue the earlier initiatives to develop a hard-law document on human rights requirements as regards the sentencing process and the enforcement of sentences. For instance, in the form of the idea already suggested: a protocol to the ECHR.

99 The Court of Amsterdam submitted, with its judgment of 31 July 2020, ECLI:NL:RBAMS:2020:3776, the preliminary question to the EU Court of Justice whether the EU law opposes the fact that the executing judicial authority enforces a European Arrest Warrant that has been issued by a court, "whereas the national law of the issuing member state has been amended after the EAW was issued to the extent that the law no longer meets the requirements of effective judicial protection/actual legal protection because this legislation does not safeguard the independence of this court anymore". Following this approach would have led to the ECJ condemning the entire Polish judiciary, including those who do want to observe sufficient independence and who should be able to continue to ask preliminary questions in this context. As evidenced by ECJ 17 December 2020, C 693/18, ECLI:EU:C:2020:1040, this consequence was going too far, in the view of the ECJ. This illustrates the value and significance of case law on the detention climate in Hungary all the more. As to life imprisonment, it can be argued that cooperation in criminal matters can be refused if requested by a state in which jurisdiction review is not possible, if life imprisonment might be at stake.

It is important that such a protocol does not only include demands on the enforcement of sentences but also on the set-up of the system of sanctions in the national law in legislation and in sentencing practises. Especially bringing rights and basic principles together in a single protocol can be of added value. Fortunately, this protocol can build on the soft law already developed. A protocol does not appear out of the blue. It is not an entirely new idea, not a complete new 'step' but rather the next 'step forward'.

The basis of the protocol is formed by the codification of the claim to protection against disproportionate sentencing in national legislation and in sentencing practise. A supranational document making demands on the system of sanctions of the member states is an important element of the protocol as a 'step forward'.

The aspect of resocialization of the convicted individual affected is very important to both imposing sentences and the set-up of enforcement. At any rate, it could be codified that this is a claim for the convicted individual. The next step in codification could be that this claim implies the positive commitment of the government to focus the set-up of detention on the return to society. It is at least as important to lay down that society has to be prepared to receive the sentenced person in its midst again after the sentence has been completed.

Additionally, it should be laid down that such standards are the practical result of the right to *humane* treatment in sentencing and to *humane* detention respectively. Such standards should not merely be any longer what the prohibition against *inhumane* treatment and sentencing looks like or demands.

Finally, it can be codified that when establishing that a member state acts in violation of the protocol, this can be a basis for refusing criminal law cooperation with the respective member state, also as an exception to any commitment to mandatory criminal law cooperation under conventional law or otherwise.

For the further content of such a protocol, some options have been explored in more detail, albeit very tentatively. In that context, it is important that even the discussion about the possibility and desirability of such a protocol within political bodies and institutions can be significant. From that perspective, conducting quantitative and qualitative, empirical and comparative law studies into the set-up and practice of systems of sanctions again and again is important to the further legal development and law making worldwide. After all, this kind of research has also contributed to bringing currently applicable soft law and its content about. This research is of great importance for developing a protocol as a step forward in the future. It speaks for itself that the IPPF is the ideal platform for bringing together and discussing the results of such research.

Judicial discretion in sentencing in general: the judiciary's independent position and its responsibility for fairness

Yvette Tinsley[*]

1 Introduction

In this chapter, I examine aspects of the relationship between judicial independence, discretion and fairness in sentencing. The issue of judicial independence and fair sentencing is theoretically and practically complex, and I have space to raise just a few of the pertinent issues. After some general remarks about judicial independence and the role of the principle of legality/rule of law, I discuss five aspects of international debate to illustrate the varied elements of tension between independence and fairness. First, the role of the executive and legislature is briefly examined. Secondly, the use of sentencing guidelines, their potential impacts on judicial discretion and independence, and ultimate effects on fairness in sentencing is discussed. Thirdly, the challenges of administrative technology and its potential for encroachment on judicial independence are outlined. Fourthly, debates about whether judges should remain silent in the face of policy discussions on the criminal justice system illustrate the potential limits of impartiality and impacts of judicial activism. Finally, the increase in pressure from public opinion and its effect on judicial independence in sentencing is considered.

2 Judicial independence, judicial discretion and the rule of law

While a "concrete or consistent definition of the term is elusive",[1] 'judicial independence' at the individual level refers essentially to decisional autonomy: the freedom of judges to render impartial rulings based solely on the law and the facts in each case, as affirmed in Article 10 of the Universal Declaration of Human Rights. But in a broader sense, judicial independence is intimately bound with the principle of legality ("the rule of law" in

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1 Lydia Brashear Tiede, 'Judicial Independence: Often Cited, Rarely Understood', 15 *Journal of Contemporary Legal Issues* (2006), p. 130.

common law jurisdictions) and the separation of powers.[2] In particular, 'judicial independence' signifies independence from the Executive branch. The rule of law, in relation to judicial independence, is an ideal that connotes the separateness of the law from the interests and influence of those who make and operate it. In some countries, judicial independence is constitutionally enshrined, but its importance is just as clear in jurisdictions that have unwritten constitutions.

It is claimed that there is widespread agreement the rule of law should guard against anarchy and official arbitrariness, and "allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions".[3] As Lord Diplock stated in *Black Clawson International Ltd v Papierwerke AG*[4]

> "The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says. In construing it the court must give effect to what the words of the statute would be reasonably understood to mean by those who conduct it regulates."

Beyond these rather broad areas of common agreement, "the rule of law" is a contestable term which has been manipulated to suit all political positions and may mean different things to different people. It's precise meaning and effect therefore continues to be the subject of considerable debate.[5]

Some claim a special or distinctive meaning of the rule of law as a principle of criminal law, "where it is said to combine with requirements of 'culpability' and 'proportionality' to govern the just distribution of criminal punishments".[6] As with the rule of law generally, these ideas of the operation of legality in relation to criminal law and punishment are contested:[7]

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2 Matthew Palmer, 'The Rule of Law, Judicial Independence and Judicial Discretion', Speech at the National University of Singapore (2016) (at: https://www.courtsofnz.govt.nz/assets/speechpapers/hj2jh.pdf).

3 Richard Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse', 97 *Columbia Law Review* 1 (1997), p. 7-8.

4 Black Clawson International Ltd v Papierwerke AG [1975] UKHL 2, [1975] AC 591, at 23.

5 Radley Henrico, 'Revisiting the rule of law and principle of legality: judicial nuisance or licence?' *Journal of South African Law* (2014), p. 742; Coleman and Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* Oxford: Oxford University Press, 2002, 206, 268 and following pages.

6 Peter Westen, 'Two Rules of Legality in Criminal Law', 26 *Law and Philosophy* 3 (2007), p. 231.

7 Ibid. See also Jerome Hall, 'Nulla Poena Sine Lege', 47 *Yale Law Journal* (1937), p. 165.

> "While commentators are entirely in agreement about the hallowed value of legality in criminal law, they differ regarding its scope. Although everyone appears, at the very least, to equate legality with the maxims *nulla poena sine lege* and *nullum crimen sine lege*, they disagree as to what the maxims mean."

For example, some commentators argue that the maxims of legality suggest that there are requirements regarding both when a state must define criminal offences *and* which institutions must do so. Others would say legality also consists of requirements about how offences are defined, to avoid vagueness. And so on.

In sentencing, the issue becomes less clear still, certainly in common law jurisdictions. While statutory provisions about sentencing and punishment have a profound impact on fundamental rights and freedoms, it has been noted that the concept of legality is largely absent from sentencing jurisprudence. This is despite the fact that "the manner in which the principle of legality can apply to shape the interpretation and application of sentencing statutes is infinite".[8] Despite this reported lack of engagement with the common law principle of legality by sentencing judges, some basic principles can be discerned. The rule of law requires that criminal punishments should be imposed only in response to the breach of a rule that was clearly defined in law at the time of the offence. The sanctions available for judges to utilise in response to the breach of a rule should also be clearly defined. This leads to the expectation that in individual cases, the sentencing process should be legally prescribed and applied by an independent judicial officer in a consistent and fair manner. Consistent with the agreed aim of the rule of law set out above, this would allow offenders to plan their lives in knowledge of the available and likely sanctions for behaviour in breach of a legal rule.

Notwithstanding the importance of all these various areas of debate regarding legality and the criminal law, for the remainder of this chapter, our discussion will focus on the expectation that independent judicial officers conduct the sentencing process in a consistent and fair manner, thereby promoting fair outcomes. It is at the time of sentencing that courts have the power to take the liberty of offenders, and therefore judicial independence is of paramount importance at the sentencing stage. Just as there has been relatively little exploration of the rule of law as it relates to sentencing and punishment, "little research has documented or explored the everyday meanings and implications of judicial independence as both a formal rule and a key organizing principle of judicial work in criminal justice practice".[9] I suggest that independence in sentencing decisions

8 Mirko Bagaric & Theo Alexander, 'Addressing the Curious Blackspot That Is the Separation between the Principle of Legality and Sentencing', 41 *Monash University Law Review* 3 (2015), p. 517.

9 Fiona Jamieson, 'Judicial independence: The master narrative in sentencing practice', 21 *Criminology & Criminal Justice* 2 (2021), p. 134.

means that judges are free *from* interference with their decision-making, in order to ensure they are free *to* deliver fair sentences.

But this too is complex. How can we maintain independence of the sentencing judge from the Executive and the Legislature, and how can we ensure that the judge makes fair decisions that are not self-interested or unduly swayed by public opinion or mood? Is it in fact necessary in maintaining a fair sentence to take into account to some degree public opinion, mood, and societal changes? And what does all of that mean for consistency and certainty, principles which are central to lifting a sentencing decision from a mere exercise of discretion to an application of law (or, at least, the application of legal principle)?

Given the extensive scholarly commentary about the principle of legality/rule of law, and the lack of agreement as to its precise meaning, any discussion of its impact on judicial independence and its relationship to fairness in sentencing is necessarily complex. To aid simplicity, therefore, I adopt for this chapter requirements of legal application that result from a broad, general conception of the rule of law by the Honourable Justice Matthew Palmer, Judge in the High Court of New Zealand. These requirements not only illustrate the underlying importance of the rule of law, but also allow for an exploration of judicial independence and discretion as it relates to advertised rules, sanctions and the sentencing process. Palmer suggests that to comply with the rule of law, the law must be applied:[10]

- Independent of the interests of those who made the law;
- Independent of the interests of those who apply the law;
- Independent of the interests of those to whom it is applied; and
- Independent of the time at which it is applied

In relation to the final requirement, it is surely the case that the law cannot be completely independent of the time at which it is applied, because a strict interpretation of this condition would prevent the law from being able to adapt to societal change and scientific advances. Punishment is one area of the criminal law where responsiveness to improvements in social and natural sciences is crucial. Such improvements can aid our understanding of culpability, especially in relation to an offender's personal mitigating factors.

3 Independent of the interests of those who made the law?

Taking the first condition in Palmer's requirements for applying legal provisions in compliance with the rule of law, judicial independence requires that judges are independent

10 Matthew Palmer, above note 2.

of the interests of those who made the law. This requires us to think about the role of the other branches of government, the role of guidance (whether from government or the higher courts), and the impact of administrative technology.

a The role of the Executive and Legislature

Legislatures obviously have input into sentencing: how much varies between civil and common law systems and between jurisdictions within those systems. As a minimum, most legislatures prescribe maximum penalties. Some provide for minimum penalties. And, increasingly, legislatures have provided for principles that judicial officers should apply in sentencing. It is generally agreed that decisions in individual cases are for judges to make, and governments should not attempt to influence them. However, there is a lack of consensus about how detailed legislative guidance for judges should be, and how far government policy should influence the judicial task. At a minimum, in most countries governments fund the administration of sentences. They also usually provide for the type and range of sentence options open to judges to use in individual cases.

The appropriate role of the Executive in sentencing decisions is a matter of some debate. Both the operation and underpinning philosophy of a State's sentencing regime is a matter of interest to the Executive, which has responsibility for the international reputation of their country. That reputation may be impacted by issues such as harsh sentencing or the overrepresentation of minority groups in prisons. In addition, sentencing is relevant to other social justice policies, for which the Executive has responsibility. All of this means that the Executive, and government in general, has a legitimate interest in both sentencing principle and practice.

However, how far the legitimacy of the interest goes is contestable. For example, should sentencing courts be informed about the annual costs of sentencing practices, so that they have information about the impact of their decisions in individual cases in a wider context? Cost should be a consideration for government when setting policy about sentence type and range. But to go further and provide the information to judges risks influencing some judges to sentence according to cost, even where the cheaper option is not in the best interests of the individual offender. This is one example of how an increased interest in sentencing could fetter discretion and encroach on judicial independence, even where that is not the Executive branch's intention.

This risk is magnified when we consider the way judges are appointed or elected. Although appointment varies across systems and ranges from appointments by judicial bodies through to popular election, in many countries politicians play some role in judicial appointments. Even where there is no attempt to directly influence day-to-day decisions of the courts, government involvement in judicial appointments has the potential to impact on judicial independence in two ways: first, in the types of judges who are appointed

and second, in the way judges make decisions once they are on the Bench. Judges are human and – even subconsciously – may suffer from indirect influence with regard to issues such as promotion, even where they are appointed for life or cannot be removed until a mandatory retirement age. One way to safeguard judicial independence is to have judicial boards responsible for appointments and eliminate or reduce Executive input. Although this comes with its own problems – such as problem in increasing the diversity of the judiciary – it does remove the real or perceived influence of the Executive.

b The impact of guidelines and other forms of guidance on judicial independence

One way to assist in the structure of sentencing decisions and promote fairness, consistency and certainty, is to increase the guidance given to sentencing judges. I will keep what I say about guidelines brief, because they are the topic of another chapter in this book. My focus will be on the need for guidelines to be scrutinised not only for the resulting sentences and their impact on offenders, but also for their effect on the process of judging.

It is now largely accepted – even in systems using a discretionary sentencing model – that some level of guidance should be provided to judges to prevent inconsistency. While there are a multitude of approaches to guidelines internationally, all countries have some type of legislative guidance, even if only by way of rather loose guides such as maximum penalties. It is beyond the scope of this chapter to closely analyse the relationship of guidelines, discretion, and judicial independence. The relationship is a complex one, particularly if we accept that independence "is not fixed or stagnant, but is fluid and changeable".[11] It continues to prompt significant debate. On the one hand, some commentators argue that a narrowing of judicial discretion does not impede independence,[12] because judges are still able to make decisions without fear or favour, and can still act impartially and free from influence, thereby upholding the rule of law.[13] Others remain of the view that the only way to achieve fairness in sentencing is to retain high levels of judicial discretion that allow for an individualised response tailored to each offender and their circumstances.[14]

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11 Tiede, above note 1, p. 134.

12 D. Spears, 'Structuring discretion: sentencing in a jurisic age', 22 *University of New South Wales Law Journal* 1 (1999), p. 295.

13 Andrew Ashworth, 'Sentencing Reform Structures', in: Michael Tonry (ed), *Crime and Justice: A Review of Research*, 16, Chicago: University of Chicago Press, 1992, p. 181-241. Ashworth undertakes an analysis of the Basic Principles on the Independence of the Judiciary, which were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985: see https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx for a text of the Principles.

14 For a discussion of the focus on the philosophy of individualisation in some countries, see Marc Robert, 'Inequalities in Sentencing', in: *Disparities in Sentencing: Causes and Solutions*, Strasbourg: Council

Some sentencing judges and politicians in (mainly) common law jurisdictions see sentencing discretion as a pillar of judicial independence, and guidelines as a fetter on that independence by reducing the scope of judicial discretion in individual sentencing cases. This is illustrated by the fact that between 1987 and 1989, after the United States Sentencing Guidelines were enacted, two hundred judges declared them to be unconstitutional.[15] Curiously, the judiciary proceeded to apply the Guidelines in a much more prescriptive way than was intended by the original drafters of the Guidelines, even after the Supreme Court declared guidelines to be advisory and mandatory guidelines to be unconstitutional.[16] To borrow John Merryman and Perez-Pardomo's term, to a degree the judges became "expert clerks" who were the "operators of a machine designed and built by legislators".[17] It could be argued that this voluntary ceding of independence had detrimental effects on fairness, particularly in a lack of responsiveness to the individual circumstances of offenders.

One measure of fairness in sentencing is the achievement of sentence parity for like offences. Sentencing guidelines can encourage parity by assisting judges to treat like cases alike. In turn, by achieving parity, sentencing guidelines may support the rule of law. The courts have acknowledged the importance of the rule of law in promoting parity in sentencing. For example, in the Australian case of *Green v The Queen*, the Court stated that:[18]

> "Equal justice' embodies the norm expressed in the term 'equality before the law'. It is an aspect of the rule of law. It was characterised by Kelsen as 'the principle of legality, of lawfulness, which is immanent in every legal order'. It has been called 'the starting point of all other liberties'. It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires, so far as the law permits, that *like cases be treated alike*" [my emphasis]."

While guidelines may assist with achieving 'fairness' through parity, their impact must be examined further. If parity is addressed only in a strict proportionality sense, by limiting the assessment to the harm caused and the features of the offence, sentencing neutrality

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of Europe, 1989.

15 Nancy Gertner, 'From Omnipotence to Impotence: American Judges and Sentencing', 4 *Ohio State Journal of Criminal Law* 523 (2002).

16 *US v Booker*, 543 U.S. 220 (2005).

17 John Merryman and Rogelio Perez-Perdomo, *The Civil law tradition: Introduction to the legal system of Western Europe and Latin America*, 4th ed., Stanford: Stanford University Press, 2019, p. 36.

18 *Green v The Queen* (2011) 244 CLR 462, at 472-3 (citations have not been included).

will be achieved. But it is questionable whether true fairness or equity in treatment will also result. Just as inconsistency can result in unfairness, so can absolute uniformity.[19] In particular, issues of social adversity which deserve mitigation need to be addressed for sentencing to be 'fair' (or, at least, that is one step towards fairness of process and outcome). The efforts to achieve 'equal justice' often focus on a type of equality that is blind to the inequities that offenders bring into the courtroom with them. The same sentence for like *offences* of course does not necessarily equal equality between *offenders*. In other words, a nominal equality does not promote substantive fairness.

While there remains tension between flexibility and legality, most 'individual case' proponents now accept that as well as individual factors, there are recurrent features across offence types that are amenable to more general guidance.[20] It is the nature, rather than the fact, of sentencing guidelines that is often more controversial, both in terms of the source of the guidelines (statute, higher courts or sentencing commission) and their authority (advisory or mandatory). In many countries, then, the tension between individual case and legality approaches has evolved into a debate about which approach is emphasised, rather than which should dominate completely.

Despite concerns about the type of equality that strict guidelines can achieve, we should not discount the importance of sentencing guidance or its positive impacts on consistency and the respect for legality. If the need to address social adversity in sentencing is borne in mind, guidelines can support the process of judging and judicial independence. At their best, they can provide guidance that minimizes discriminatory practices and instead promotes fairness and substantively equal justice. Judicial input into guidelines, for example through guideline decisions or as members of sentencing councils, can create a partnership model between the judiciary and members of the community in developing sentencing principles.

c Challenges from administrative technology

In some countries, the courts have undergone what Raine has coined New Public Management, which is characterized by a sharper focus on efficiency.[21] This shift to New Public Management in courts comprises three main aspects:[22]

> "First, a shift of control for the running of the courts from the judiciary to a new cadre of managers; second, a rationalization and modernization of the

19 Andrew Ashworth, above note 13.

20 For an early discussion, see Roger Hood, *Sentencing in Magistrates' Courts*, London: Heinemann, 1962.

21 John W. Raine, 'Courts, Sentencing and Justice in a Changing Political and Managerial Context', 25 *Public Money and Management* 5 (2005), p. 290.

22 Raine, above note 21, p. 294.

> court infrastructure; and third, streamlining in the caseload by diversion to other, more efficient, means of deciding matters and dispensing punishment."

While efficiency measures may be required to alleviate the burdens of an overworked criminal justice process, it is safe to say that in some countries the judiciary has been perceived as a roadblock to initiatives that would make the courts work more efficiently. One way of maintaining judicial independence through the separation of powers is to allow the courts to have autonomy over courts administration. This, for example, would allow courts to decide on the allocation of funds within their budget without interference or close monitoring by the Executive.

Social scientist John Raine has called the increasing involvement of governments in day-to-day court administration a "steady encroachment" on judicial independence.[23] Others may see it as a way to free up judges to do what judges do best. Whatever view you take, there must be some ability for judges to manage the aspects of courts that they are experts in – fact-finding and decision-making. How that is supported financially and administratively may determine whether there is actually encroachment on judicial independence.[24]

4 Independent of the interests of those who apply the law

Back in the 1950s, the BBC wrote to the Lord Chancellor (then Lord Kilmuir) about an idea for a series of lectures involving sitting judges, to which the Lord Chancellor responded (in what were to become known as the Kilmuir rules) that "so long as a judge keeps silent, his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the performance of his judicial duties, must necessarily bring him within the focus of criticism".[25]

The Kilmuir rules and utterances like them have been criticised for stifling debate, by encouraging judges to maintain silence about the issues of the day.[26] I share the disquiet of those who bemoan a 'form over substance' approach, whereby judges remain silent but are nonetheless influenced in their work. We should not try to deny that judges are human, have views, and hold power. I also have sympathy with the view that silence and perceived aloofness can smack of elitism and leave judges open to be defined by others, because by

23 Raine, above note 21, p. 290.

24 For a discussion of different models of court governance, see R. Dale Lefever, 'The Integration of Judicial Independence and Judicial Administration: The Role of Collegiality in Court Governance', 24 *The Court Manager* 2 (2010), p. 5.

25 Hugo Young & Anne Sloman, 'The judges', 2 *Contemporary Record* 3 (1988), p. 37.

26 David Brown, 'Judicial Independence: An Examination', 58 *The Australian Quarterly* 4 (1986), p. 348-356.

remaining invisible they are not defining themselves.[27] Nonetheless, I ultimately err to the rather more generous view that Lord Kilmuir was simply alive to the need for judges to make decisions independent of their own personal views or political standpoints, and to be able to be believed to be doing so by others. In relation to punishment, Lacey has observed that the nature and extent of judicial insularity is an important variable in how governments and criminal justice agencies respond to calls for increased penal severity.[28] By keeping "above the battle",[29] judges may be more able to retain independence from pressures to increase the harshness of punishments imposed.

It is often said that judges must be impartial and must be seen to be so – it is claimed to be one of the great virtues of an independent judiciary. Perfect impartiality is not possible. From what we know about how the brain works, judges are not immune from subconscious short cuts and heuristic decision-making, some of which cannot be "educated out" or willed away.[30] This is a concern for fair sentencing in that ingrained biases may affect decisions. Subconscious pressures related to the views of government, the public, or other bodies may sway judges without them even realizing that is the case.

In any event, although judges themselves have been documented by researchers as believing that judges should, and do, stand above and apart from the political class, the reality is that all empirical studies of judges show them to be active policy-makers. Griffith, in his classic work "The Politics of the Judiciary" claimed that judges are political actors, in the sense that as "part of the machinery of authority within the State…[they] cannot avoid the making of political decisions".[31] In one British study judges said in their own words that they felt obliged to resist a succession of "bad" governments that had legislated "bad law".[32] This doesn't mean that judges are not interpreting the law sincerely, but it does mean that when called upon, senior judges at least are participants in the political process.

One way in which judges can be seen to be political actors is in the increasing prevalence of "judicial activism". It has been noted that "independence allows judges to engage in policy-making of their own, thereby shifting policy in unpredictable directions".[33] Although judicial activism is usually a concern that judges will substitute their own policy

27 Frances Kahn Zemans, 'The Accountable Judge: Guardian of Judicial Independence' 72 *Southern California Law Review* (1999), p. 625.

28 Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies,* Cambridge: Cambridge University Press, 2008.

29 Jamieson, above note 9, p. 139.

30 Jeremy Finn, Elisabeth McDonald and Yvette Tinsley, 'Identifying and qualifying the decision-maker: The case for specialisation', in: Elisabeth McDonald and Yvette Tinsley (eds), *From 'Real Rape' to real justice: Prosecuting rape in New Zealand*, Wellington: VUP, 2011, p. 221-278.

31 J. A. G. Griffith, *The Politics of the Judiciary*, London: HarperCollins, 1997, p. 293.

32 N. G. Fielding, 'Judges and Their Work', 20 *Social & Legal Studies* (2011), p. 99.

33 F. Andrew Hannssen, 'Is There a Politically Optimal Level of Judicial Independence?', 94 *The American Economic Review* 3 (2004), p. 712.

preferences for those of the legislature,[34] there is a more recent form of activism that sees well-motivated judges acting to formulate policy outside of individual cases, in order to fill perceived policy vacuums or offer alternatives to policies that are not working well. I will use one example of the phenomenon to illustrate that ideas introduced (at least in part) to promote fairness in sentencing can in reality undermine fairness, transparency, and consistency when they are not subject to legislative or policy regulation. Judges in many countries, particularly those following the Anglo-American tradition, have been the power behind the introduction of "problem-solving" or "solution-focused" courts. These are usually targeted for offenders with health or socio-economic needs that are thought to precipitate their offending – alcohol and drug courts, mental health courts, and homeless courts all fall into this category. Judges surely acted politically when they lobbied to introduce these courts.

While forming an alternative way of decision-making because of defects in the traditional system, could be characterised as the ultimate act of judicial independence: these courts effectively promote unfairness by selecting a small number of offenders for special treatment. The offenders chosen are often under the authority of the court for longer than if they were ordinarily sentenced, as these courts usually defer sentence while treatment is undertaken or other services are identified. There is no parity between like offenders, and a lack of regulation of the powers of the court while the offender awaits sentence. This form of judicial activism has been allowed to flourish because of flawed notions of judicial independence within the judiciary and governments alike, as well as a belief (which I would argue is often mistaken) that offenders will benefit.

Because it is virtually impossible – and undesirable – to take the human element out of the endeavor of judging, mechanisms are needed to promote actual and perceived fairness of sentencing decisions. If we must have problem-solving courts then the exercise of discretion by the judge, who is ultimately responsible for sentencing, should be guided more firmly. Such firm guidance would assist in preventing harm and unfairness in the way offenders are treated in the period that the sentence is deferred. In a similar vein, in the general run of cases it is important to give detailed reasons for the sentence arrived at. Reasons should be related to the aims the judge is trying to achieve, referring to similar cases and to guidance from statute, the higher courts and (if applicable) the relevant sentencing council or commission. While such decisions won't prevent the use of subconscious biases, they do at least give insight into the justifications for the decision and limit arbitrariness and bias.

34 Frances Kahn Zemans, above note 27.

5 Independent of the interests of those to whom the law is applied and independent of the time at which it is applied

The judiciary should decide cases "without fear or favor, affection or ill will".[35] As well as being alive to their own subconscious biases and beliefs, it is widely accepted that judges must not seek popularity or be swayed unduly by public opinion, political or social controversies, or lobby group campaigns. In other words, they must remain independent of those to whom the law is applied, and independent of the time we live in, in order to apply the law and exercise discretion in a fair, balanced and impartial manner. This may ensure that a judge's fidelity is to "enforcement of the rule of law regardless of perceived popular will."[36] There is a delicate balance to be struck, because public confidence in the courts is part of the courts' responsibility,[37] and nowhere is public confidence more delicate than in relation to the criminal law.

This balance is arguably even more difficult to strike for those judges who are elected by the public. As Muniz argues:[38]

> "In a governmental system in which public confidence in the impartiality of the judiciary is essential, judges must be dedicated to intellectual honesty and must demonstrate the ability to rise above the political moment to enforce the rule of law. Nothing can be more damaging to a society based on the rule of law than if judges fear that they will be removed from office or that their livelihood will be impacted solely for making a decision that is right legally and factually but unpopular politically."

Research by Lim indicates wide variability in sentencing outcomes according to the political ideology of voters in the relevant district, which raises concerns about judicial independence in sentencing.[39] Most commentators favor appointment over election.[40] However, as discussed briefly above, there are valid criticisms that appointment of judges

35 These words appear in the Codes of a number of jurisdictions. In New Zealand, it appears in the Oaths and Declarations Act 1957, s 18. For another example (Scotland), see Fiona Jamieson, above note 9, p. 133.

36 Paul J. De Muniz, 'Politicizing State Judicial Elections: A Threat to Judicial Independence', 38 *Willamette Law Rev*iew 3 (2002), p. 387.

37 As Justice Felix Frankfurter reportedly said "[t]he Court's authority, consisting of neither the purse nor the sword, rests ultimately on substantial public confidence in its moral sanction.": cited in Stephen Parker, *Courts and the Public*, Victoria: Australian Institute of Judicial Administration Inc, 1996, p. 16.

38 De Muniz, above note 36, p. 389. See also Bruce Fein & Burt Neuborne, 'Why Should We Care About Independent and Accountable Judges?', 84 *JUDICATURE* (2000), p. 63 and Ruth Bader Ginsburg, 'Judicial Independence: The Situation of the U.S. Federal Judiciary', 85 *Nebraska Law Review* (2011).

39 Claire S.H. Lim, 'Preferences and Incentives of Appointed and Elected Public Officials: Evidence from State Trial Court Judges', 103 *American Economic Review* 4 (2013), p. 1360.

40 Tiede, above note 1.

can fetter independence, particularly where the appointments are made by politicians rather than bodies such as judicial councils. Care should also be taken before relying on research that looks only to decisions and outcomes in assessing whether judges have been unduly affected by constituencies, pressure groups or political opinion. Some decisions may be constrained by law, and it is necessary to examine the whole decision-making process.[41]

In times where social and traditional media unpick every aspect of public debate, it is unlikely that judges do not form personal views on issues of public opinion that affect sentencing. And we would probably not want a judiciary full of people who showed little interest or passion in the issues of the day. But adverse commentary on sentencing and campaigns by the media about individual sentences surely creates pressure on the sentencing judge. Crime, especially violent crime, is emotive and personal, and it forms a large part of public focus about the courts and the justice system. It is well established that the public are not well informed about sentencing, and that as they learn more about individual cases or the system more generally, they tend to prefer a less punitive approach to sentencing.[42] Therefore:[43]

> "The more information people are given about what sentencing judges are doing, and why they are doing it, the less likely they are to believe that there is a gulf between their expectations of the criminal justice system and the reality. The more accurate and reliable the information that the public get about what judges do, about the detail of the cases they confront, and about their reasons for decisions, the less likely they are to think that judges do not understand or share their concerns".

The pressure on judges, and the promotion of fair sentencing that is independent of those to whom the law is applied, is therefore relieved by public education measures and public involvement in the system in roles such as jurors and lay judges.

6 Conclusion

There are challenges in retaining judicial independence in sentencing, especially in times of government rhetoric about crime and populist politics. Likewise, promoting fair sentencing when under pressure from governments, the public and personal views, requires the courts to be alive to the reality of modern-day judging, the psychology of

41 De Muniz, above n 36, p. 388.
42 The Honourable AM Gleeson AC, 'Out of Touch or Out of Reach?', 7 *The Judicial Review* (2005), p. 241.
43 Gleeson, above note 42, p. 247.

decision-making and the role of social media. The philosopher, Professor Amartya Sen, has eloquently stated:[44]

> "So what is fairness? This fundamental idea can be given shape in various ways, but central to it must be a demand to avoid bias in our evaluations, taking note of the interests and concerns of others as well, and in particular the need to avoid being influenced by our respective vested interests, or by our personal priorities or eccentricities or prejudices. It can broadly be seen as a demand for impartiality."

While impartiality is difficult to achieve, we should try to set up conditions to reduce bias and undue influence to the fullest extent. It is therefore important for those managing the courts to put in place education for judges and the community; and for judges to share their experiences with each other, in order to ensure that sentencing decisions are made as impartially as possible and without undue focus on controversies of the day.

44 A. Sen, *The Idea of Justice*, (2009), Cambridge, Mass, USA, Harvard University Press, at 54.

Judicial discretion within a framework: between determinate and indeterminate sentencing

Rita Haverkamp and Johannes Kaspar[*]

1 Introduction

It was *Montesquieu*[1] who said that "the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour". This view reflects one ideal type of sentencing whereby judges are reduced to mere passive beings, and there is no judicial discretion left concerning either the choice of sentence, or its length.[2] According to this system, all offenders who have committed the same offence are convicted to serve the same sentence[3] – which of course leads to the rather difficult question of which features of the offences or the offender should be considered relevant, and whether they actually do constitute as the 'same' (or at least similar) offences.

The other ideal type of sentencing is unfettered judicial discretion, which is based on the principle of individualisation, and is characterised by indeterminate sentencing.[4] From this point of view, uniform sentencing casts aside not only individual circumstances, but also the circumstances of the offence, and therefore ignores the diversity of cases and individuals.[5] Whereas individualised sentencing might lead to arbitrary discretion by

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1 "[…] les juges de la nation ne sont […] que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur", Montesquieu, *De L'Esprit des Lois*, 1777, p. 327 (at: https://fr.wikisource.org/wiki/Page:Montesquieu_Esprit_des_Lois_1777_Garnier_1.djvu/501) (last visited: 16 May 2023).

2 Alessandro Corda, 'Sentencing and Penal Policies in Italy 1985-2015: The Tale of a Troubled Country', in: Michael Tonry (ed), *Sentencing Policies and Practices in Western Countries: Comparative and Cross-National Perspectives*, Chicago/London: The University of Chicago Press, 2016, p. 135.

3 Julian C. Jr. Esposito, 'Sentencing Disparity: Causes and Cures', 60 *Journal of Criminal Law and Criminology* 2 (1969), p. 182.

4 Esposito (fn. 3), p. 182.

5 Jaqueline Hodgson & Laurène Soubise, 'Understanding the Sentencing Process in France', in: Tonry (ed) (fn. 2), p. 241.

imposing different sentences for the same offence without justification, uniform sentencing implies rigidity and harshness when applied without reference to aggravating or mitigating factors.[6]

This paper will consider the historical background, sentencing frameworks, and purposes of punishment, going on to discuss disparity in sentencing, and the practical consequences of tough-on-crime policies. Next, the Council of Europe Recommendation on Consistency in Sentencing will be discussed. Finally, the conclusion will remark on the extent of judicial discretion.

2 Historical background

Sentencing scholarship and research seem to originate in England.[7] As early as the 19th century, an English magistrate published the first sentencing text.[8] *Edward Cox* emphasised that the judge should always mitigate the statutory maxima, and explain such mitigation.[9] He argued for wide discretion "[…], leaving to the judgement of the Court the largest latitude for *mitigation* of the legal penalty, according to the special circumstances of each case".[10] Not only this early empirical research on sentencing dates back to this period. In the journal 'Nature', the famous statistician *Francis Galton* examined the judicial distribution of prison sentences.[11] *Galton* discovered that on the one hand, judges often imposed certain custodial sentence lengths, whilst on the other hand, they often made little or no use of others. In contrast to *Cox*, *Galton* turned against wide discretion as it leads to "[t]he extreme irregularity of the frequency of the different terms of imprisonment […] which interferes with the orderly distribution of punishment in conformity with penal deserts".[12] The reason for these differences is rooted, according to *Galton*, in the tendency of human beings to have "decimal or duodecimal habits"[13] and to unconsciously choose particular numbers.[14] It is clear that from the beginning two opposing views emerged, which have continued to shape the controversy on discretion in sentencing.

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6 Esposito (fn. 3), p. 182.

7 Julian V. Roberts & Andrew Ashworth, 'The Evolution of Sentencing Policy and Practice in England and Wales 2003-2015', in: Tonry (ed) (fn. 2), p. 308.

8 Edward W. Cox, *The Principles of Punishment, as Applied in the Administration of Criminal Law by Judges and Magistrates*, London: Law Times Office, 1877.

9 Cox (fn. 8), p. 20.

10 Cox (fn. 8), p. 18.

11 Francis Galton, 'Terms of Imprisonment', 52 *Nature* 1338 (1895), p. 174-176.

12 Galton (fn. 11), p. 175.

13 Galton (fn. 11), p. 176.

14 This phenomenon has been confirmed in various studies in different countries, for Germany see e.g. the classic study of Klaus Rolinski, *Die Prägnanztendenz im Strafurteil*, Hamburg: Kriminalistik Verlag, 1969. For a recent example concerning England, Wales and New South Wales (Australia) see Mandeep K. Dhami

Less than a century later, Anglo-American and continental academics and politicians began to debate on how sentencing discretion should be guided, as a result of widespread intuitive sentencing which employed free and unfettered discretion.[15] In the 1970s, the debate was fuelled by a proportionality-oriented sentencing theory called 'just desserts'.[16] Just desserts justifies the punishment of offenders on a moral basis, meaning that the persons concerned deserve sanctions due to the harm caused by them. When applying this system, the structured sentencing process is guided by the seriousness of the offence, and the offender's past record of offending. Consequently, it was argued that this sentencing procedure should replace judicial discretion in order to avoid disparity and discrimination.[17] In addition, under this system, parole release should be abolished to ensure the equal and certain duration of punishment.[18] However, those who supported the 'just desserts' theory were disappointed with its outcome in sentencing practice, and this was particularly the case in the United States (U.S.). Their intention had been to restrict the state's authority to punish, by limiting the use of severe sanctions. However, in many federal states of the U.S., the introduction of determinate and mandatory sentencing laws and sentencing guidelines led to harsher punishment,[19] though a slight tendency for moderation can be observed in the U.S.[20] It should be emphasised that the 'just desserts' theory cannot be blamed for this development. The theory arose during a fundamental change to an ongoing law and order policy in the U.S.[21] Since then, incapacitation has been important, and this political trend has supported an increase in levels of punishment. Furthermore, proportionality-defying sentencing laws on the federal level have abandoned the principle of proportionality between the offence and the sentence.[22]

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et al., 'Criminal Sentencing by Preferred Numbers', 17 *Journal of Empirical Legal Studies* 1 (2020), p. 139-163.

15 Tapio Lappi-Seppälä, 'Nordic Sentencing', in: Tonry (ed) (fn. 2), p. 49.

16 Andrew von Hirsch, *Doing Justice: The Choice of Punishments*, New York: Hill and Wang, 1976, reprinted Boston: Northeastern University Press, 1986.

17 Pamala L. Griset, 'Criminal Sentencing in Florida: Determinate Sentencing's Hollow Shell', 45 *Crime & Delinquency* 3 (1999), p. 316.

18 Griset (fn. 17), p. 316.

19 Andrew von Hirsch, 'The Politics of Just Deserts', 32 *Canadian Journal of Criminology* 3 (1990), p. 400. In the 1970ies there were further influences such as the request to give the purpose of deterrence more weight, Shawn D. Bushway, Emily G. Owens & Anne Morrison Piehl, 'Sentencing Guidelines and Judicial Discretion: Quasi-Experimental Evidence from Human Calculation Errors', 9 *Journal of Empirical Legal Studies* 2 (2012), p. 292.

20 Arie Freiberg, 'The Road Well Traveled in Australia: Ignoring the Past, Condemning the Future', in: Tonry (ed) (fn. 2), p. 420.

21 Von Hirsch (fn. 19), p. 402; Calvin J. Larson & Bruce L. Berg, 'Inmates Perceptions of Determinate and Indeterminate Sentences', 7 *Behavioral Sciences & the Law* 1 (1989), p. 128.

22 Michael Tonry, 'Equality and Human Dignity: The Missing Ingredients in American Sentencing', in: Tonry (ed) (fn. 2), p. 463-465.

3 Sentencing systems

National sentencing systems differ remarkably from each other. However, "[i]t is not simply that punishments are more severe, or different, in some places than in others. They are, but the differences are more fundamental than that. They involve basic human rights; procedural fairness; and commitment to the ideas that only the morally guilty should be convicted, that those convicted should be treated consistently and evenhandedly, and that no one should be punished more severely than he or she deserves".[23]

When comparing English speaking countries with countries in continental Europe, the latter display a tendency towards more lenient punishments, particularly in Scandinavian and German-speaking countries. According to *James Whitman*, the fundamental divide between the U.S. and continental Europe is based on different historical developments which have shaped their societies.[24] While in European countries, mild punishment was formerly reserved for aristocrats, and was extended to all citizens in the course of democratisation, the U.S. had already begun with low-status punishment for all, then going on to adhere to a harsh and degrading regime of punishment even to the present day.[25] At first sight, these considerations appear convincing; however a closer look leads us to question why this divergence in sentencing has only taken place over the last 40 years.[26] Furthermore, there are clear differences in penal policy between the U.S. and other English speaking countries, despite a shared English background and decisions about equality.[27] As such, the reasons behind the divergence of sentencing systems are complex, and not easy to explain.

As well as the U.S., other countries around the globe have undergone major sentencing reforms since the 1970s (e.g., Australia, England, Wales, and Sweden). Before these reforms, sentencing systems were based on both wide judicial discretion, and wide disparity in sentences due to an individualised approach.[28] Ideas of proportionality and consistency were subsequently accepted, and sentencing reforms curtailed judicial

23 Michael Tonry, 'Differences in National Sentencing Systems and the Differences They Make', in: Tonry (ed) (fn. 2), p. 2.

24 James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe*, New York: Oxford University Press, 2003, p. 254-255; according to James Q. Whitman, 'Two Western Cultures of Privacy', *113 The Yale Law Journal 6* (2004), p. 1165 even the terrible experiences with Nazism in Europe cannot explain the divergence in punishment.

25 Whitman, (fn. 24), p. 108-174.

26 Roger Berkowitz, 'Book Review Harsh Justice', 1 *Law, Culture and the Humanities* 1 (2005), p. 134; Lloyd Bonfield, 'Book Review Harsh Justice', 23 *Law and History Review* 5 (2005), p. 716.

27 Tonry (fn. 23), p. 11; Tonry (fn. 23), p. 11 also rejects *Whitman*'s differentiation between a presumption of innocence in the U.S. and a presumption of mercy in Europe that also explains the differences in punishment, see James Q. Whitman, 'Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice', 94 *Texas Law Review* 5 (2016), p. 933.

28 Bushway et al. (fn. 19), p. 292.

discretion. At the same time as indeterminate sentencing was being questioned, the rehabilitation model also came under scrutiny ("nothing works").[29] In recent decades, findings from further empirical studies have modified this pessimistic conclusion to a more optimistic assertion ("something works").[30] Although treatment research has recently reported the successful rehabilitation of offenders, these findings have no influence on judicial decision-making in sentencing. Unsurprisingly, rehabilitation does not appear to matter in determinate sentencing systems which emphasise other purposes of punishment.

National sentencing frameworks across Western countries are varied in how they deal with judicial discretion. There is an enormous diversity in rules, standards, and guidelines, which range from general and permissive, to detailed and mandatory rules.[31] The following table illustrates the different sentencing frameworks, and the extent of judicial discretion in industrialised countries.[32]

Table 1 Sentencing frameworks in industrialised countries

judicial discretion	sentencing	normative ideas	country
very broad	offender-proportionality-oriented	individual circumstances, "instinctive synthesis"	Australia
very broad	offender-oriented	individualisation, resocialisation	France
very broad	culpability-oriented	circumstances of offence, prevention	Japan
very broad	offender-proportionality-oriented	seriousness of the offence; circumstances of the offender; public interest	South Africa
broad	culpability-oriented	individual blame and prevention	Germany

29 Robert Martinson, 'What works? Questions and answers about prison reform', 35 *The Public Interest* (1974), p. 22-54; in contrast to this report, Martinson's withdrawal of his "nothing works" position remained unheard, see Robert Martinson, 'New findings, new views: A note of caution regarding sentencing reform', 7 *Hofstra Law Review* 2 (1979), p. 243-258.

30 Maria Sapouna, Catherine Bisset, Anne-Marie Conlong & Ben Mathews for The Scottish Government, *What Works to Reduce Reoffending: A Summary of the Evidence*, 2015 (at: https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2015/05/works-reduce-reoffending-summary-evidence/documents/works-reduce-reoffending-summary-evidence/works-reduce-reoffending-summary-evidence/govscot%3Adocument/00476574.pdf) (last visited: 16 May 2023).

31 Tonry (fn. 23), p. 5.

32 For another differentiation see Krzysztof Krajewski, 'Sentencing in Poland: Failed Attempts to Reduce Punitiveness', in: Tonry (ed) (fn. 2), p. 188-189.

judicial discretion	sentencing	normative ideas	country
broad	offender-oriented	offence seriousness, resocialisation	Italy
broad	culpability-oriented	circumstances of offence, prevention, sentencing guidelines	South Korea
less broad	offence-proportionality-oriented	proportionality to offence seriousness, consistency	Sweden
less narrow	offence-proportionality-oriented	proportionality and consistency through sentencing guidelines	England and Wales
narrow	retributive-oriented	just deserts and incapacitation, harsh, grid-based sentencing guidelines	U.S. federal and several States

The fundamental sentencing approaches alone vary considerably. As shown in Figure 1, while some countries base their sentencing on the offender (France, Italy), other approaches are based on offender-proportionality (Australia), culpability (Germany, Japan, and South Korea), offence-proportionality (England, Wales, and Sweden), and retribution (U.S.). Although these countries' underlying ideas do not seem too different, as they have similar purposes of punishment, each national sentencing framework places a remarkably different emphasis on those ideas. The contrast between offender-oriented and offence-oriented respective retributive sentencing is plainly visible. Whereas under the first system, sentencing is guided by individual circumstances and reintegration of offenders (Australia, France, and Italy), under the latter system, the seriousness of the offence and the sentencing guidelines are both essential in order to achieve proportionality (England, Wales, and Sweden) and/or consistency (England, Wales, South Korea, Sweden, and U.S.) of punishment. Countries such as Germany operate between those two models, considering a broad variety of offence- and offender-related aspects as being relevant to sentencing.

To make things even more complex, consistency might be understood in a different sense, as is the case in Australia: "The desired outcome is consistency in the application of sentencing principles, not consistency of outcome as expressed in terms of numerical equivalence".[33] The Australian major sentencing principle is the concept of proportionality for the upper and lower limits of permissible retribution.[34] Judicial discretion pays attention to this principle, and is characterised by an "intuitive synthesis" – that is, "an

33 Freiberg (fn. 20), p. 428 with reference to the High Court of Australia, Decision of 8 December 2010, *Hili and Jones v. The Queen*, S142/2010 and S143/2010, par. 48-49.

34 Freiberg (fn. 20), p. 423.

exercise in which all considerations relevant to the instant case are simultaneously unified, balanced, and weighed by the sentencing judge".[35]

Nevertheless, judicial discretion is restricted by mandatory and presumptive sentences, which usually increase sentence severity, and which the Australian legislator has recently enacted more frequently.[36] A tendency towards harsher punishment could also be observed in France, where the government (under former president *Nicolas Sarkozy*) aggravated statutory minimum sentences for several crimes, thus reducing French sentencing judges' judicial discretion, which had traditionally been very broad.[37] An amendment in August 2014 reinstated the previous status of judicial discretion in strict consideration of the principle of individualisation.[38] Except for where there are limiting principles and regulations, the wider the range of minimum and maximum penalties, the greater the judicial discretion.

This pattern is consistent with sentencing in Japan.[39] The range of penalties is generally very broad, with the upper end of the scale – reserved for severe cases – including the death penalty and long-term imprisonment of up to 30 years. Judicial discretion is quite broad, and allows the potential for the judge to further mitigate the lower end of the sentencing frame if it seems too harsh in the concrete case. Furthermore, there are no statutory regulations concerning the exercise of judicial discretion at all. With this in mind, it is quite remarkable that at the same time, the level of sentencing in Japan is very uniform, as judges tend to strictly follow sentencing traditions which are part of their (centralised) education, and also those which are demonstrated by their older and more experienced colleagues. This equality in sentencing has existed even before the introduction of a sentencing database in 2009, which was supposed to provide lay judges with information on 'usual' punishment in comparable cases – therefore ensuring similar punishment across the country. Nonetheless, the need for reform by way of introducing a concise sentencing rule has previously been expressed by some scholars.[40]

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35 Freiberg (fn. 20), p. 427.

36 Freiberg (fn. 20), p. 425 usually so-called 'head sentences' that consist of a maximum term of imprisonment imposed by the court and a non-parole period.

37 Hodgson & Soubise (fn. 5), p. 222.

38 See Art. 132-1 Code pénal: Toute peine prononcée par la juridiction doit être individualisée. Dans les limites fixées par la loi, la juridiction détermine la nature, le quantum et le régime des peines prononcées en fonction des circonstances de l'infraction et de la personnalité de son auteur ainsi que de sa situation matérielle, familiale et sociale, conformément aux finalités et fonctions de la peine énoncées à https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070719&idArticle=LEGIARTI000029363615&dateTexte=&categorieLien=cid; More detailed: Hodgson & Soubise (fn. 5), p. 242.

39 For a short introduction see Julius Weitzdörfer, Yuji Shiroshita & Nicola Padfield, 'Sentencing and Punishment in Japan and England', in: Jianhong Liu & Setsuo Miyazawa (eds), *Crime and Justice in Contemporary Japan*, Cham: Springer, 2016, p. 189-214.

40 Prof. Dr. Akihiro Onagi; grateful thanks for his information about the Japanese sentencing system.

A smaller margin of judicial discretion – but still broad – characterises countries such as Germany and Italy. In Germany,[41] there is a broad range of penalties which lay between the legally permissible lower and upper limits. In recent decades, minimum and maximum sentences were subject to amendments which tightened the statuary punishment range. Still, German judges determine sentences, and have broad judicial discretion based on one vague provision in the Criminal Code, with general principles of sentencing, and a fairly heterogeneous catalogue of relevant criteria. As sentencing is based on the guilt of the offender, the challenge for German judges is to bring abstract principles and the numerical value in line with one another.[42] The Federal Constitutional Court highlights the impact of both the principle of culpability and proportionality of the punishment to the seriousness of the crime, and the offender's guilt.[43] The overall moderate level of punishment in Germany[44] is also due to the Federal Court of Justice, which requests that punishments for average cases should be taken from the lower section of the statuary range.[45]

Imposing sentences which are close to the statuary minimum sentence is also common in Italy, but for another reason.[46] The Italian Criminal Code is "[characterised] by a distinctive harshness that reflects the ideology of the authoritarian regime that promulgated them".[47] Since the return to democracy, the then-introduced provision of "generic mitigating circumstances" has enabled a lessening of punishment due to circumstances not listed in the Criminal Code.[48] Pursuant to Article 132 of the Italian Criminal Code, the judge exercises judicial discretion "within the limits provided by the law [… and] he shall be required to specify the grounds which justify the use of such discretionary power. In increasing or reducing punishment the limits prescribed for each type of punishment shall not be exceeded, except in cases expressly defined by the law".[49] Article 133 of the Italian Criminal Code contains sentencing factors, and firstly emphasises proportionality by

41 For a short introduction see Helmut Satzger, Johannes Kaspar, Benedikt Linder, Laura Neumann et al., 'Länderbericht Deutschland', in: Helmut Satzger (ed), *Harmonisierung strafrechtlicher Sanktionen in der Europäischen Union*, Baden-Baden: Nomos, 2020, p. 109 et seqq, especially the English summary on p. 110-112. See also Franz Streng, 'Sentencing in Germany: Basic Questions and New Developments', 8 *German Law Journal* 2 (2007), p. 153-171.

42 Section 46 German Criminal Code and paragraph 1 "The guilt of the offender is the basis for sentencing. The effects that the sentence can be expected to have on the offender's future life in society should be taken into account" (translated by Tatjana Hörnle), more detailed Tatjana Hörnle, 'Moderate and Non-Arbitrary Sentencing without Guidelines: The German Experience', 76 *Law & Contemporary Problems* 1 (2013), p. 193.

43 For references see Hörnle (fn. 42), p. 195.

44 See Jörg-Martin Jehle, *Criminal Justice in Germany: facts and figures*, Berlin: Federal Ministry of Justice and Consumer Protection, 2019.

45 For references, also to the Court's 'margin' or 'leeway' theory, see Hörnle (fn. 42), p. 194-195.

46 For an introduction of the Italian sentencing system see Luigi Foffani & Francesco Viganò, 'Country Report Italy', in: Satzger (ed) (fn. 41), p. 295-332.

47 Corda (fn. 2), p. 136.

48 Corda (fn. 2), p. 136: in 2005 the provision was aggravated with regard to first-time offenders.

49 Translated by Corda (fn. 2), p. 135.

taking into account the seriousness of the offence, the nature of the conduct, and the guilt of the offender, and secondly, the prospect of recidivism.[50] The constitutional goal of punishment is the rehabilitation of the offender, though the Italian Constitutional Court recognises that punishment may serve different purposes, such as deterrence and incapacitation, provided that a prospect of rehabilitation is offered to each convicted person, including those who have been sentenced to life imprisonment.[51]

In contrast to Germany and Italy, the Swedish Criminal Code has in place more elaborate provisions on sentencing in two chapters, due to a major reform in 1988.[52] The commitment to 'humane neo-classicism' changed sentencing considerably as proportionality, predictability, and equality became the leading principles.[53] Pursuant to Chapter 29, Section 1, of the Swedish Criminal Code, "[…] penalties are determined within the framework of the applicable scale of penalties according to the penalty value of the offence and the combined offences [, taking into consideration the interest of uniform application of the law]".[54] The judge assesses the penalty value by taking into account the damage, the violation or danger of the offence, as well as the offender's perceptions, intentions, or motives (Chap. 29 Sec. 1 Swedish Criminal Code). When assessing the penalty value, the statuary catalogue of aggravating circumstances is exhaustive, however this is not the case for the statuary catalogue of mitigating circumstances.[55] Consequently, mitigating circumstances allow for more judicial discretion, and the judge may even impose a sentence below the prescribed minimum (Chap. 29 Sec. 3 Swedish Criminal Code).[56] To guarantee the aforementioned principles of proportionality and predictability, Sweden adopted two to three degrees of offence seriousness, each with a specific minimum and maximum sentence as a 'ladder model'.[57] The range of minimum and maximum penalties is broad, and also provides margin for judicial discretion.[58] Prior convictions should especially be taken into account when determining a penalty (Chap. 29 Sec. 4 Swedish Criminal Code).

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50 Art. 133 Italian Criminal Code, more details Corda (fn. 2), p. 135-136.

51 Corda (fn. 2), p. 137-138; grateful thanks to Prof. Dr. Francesco Viganò, also Judge of the Italian Constitutional Court, for his comments.

52 Nils Jareborg, 'The Swedish sentencing law', 2 *European Journal on Criminal Policy and Research* 1 (1994), p. 70.

53 Tapio Lappi-Seppälä & Kimmo Nuotio, 'Crime and Punishment', in: Pia Letto-Vanamo, Ditlev Tamm & Bent Ole Gram Mortensen (eds), *Nordic Law in European Context*, Switzerland: Springer Nature, 2019, p. 187.

54 Ministry of Justice, *Non-official translation of the Swedish Criminal Code*, 2020 (1962:700) (at: https://www.government.se/490f81/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf) (last visited 16 May 2023).

55 Ville Hinkkanen & Tapio Lappi-Seppälä, 'Sentencing Theory, Policy, and Research in the Nordic Countries', 40 *Crime and Justice* 1 (2011), p. 356.

56 But in case of aggravating circumstances not above the prescribed maximum.

57 Hinkkanen & Lappi-Seppälä (fn. 55), p. 356; Lappi-Seppälä (fn. 15), p. 51.

58 Lappi-Seppälä (fn. 15), p. 51.

In England and Wales, consistency, uniformity, and transparency were major objectives of the fundamental sentencing reform in 2009, which strengthened the binding nature of Sentencing Guidelines, and created the Sentencing Council as a statuary body.[59] The guidelines provide a sentencing methodology which consists of nine steps. The English judge begins with a three-tiered categorisation of the offence, with regards to the level of seriousness: offences of the first category characterise great harm and high culpability, offences of the second category either cause great harm or have high culpability, and offences of the third category characterise low harm and low culpability.[60] Then, the related guideline points to a sentence range, and a corresponding sentence starting point, from which the judge can build a sentence which will be altered by the next steps in the guideline.[61] During the whole procedure, considerable judicial discretion could be exercised at three points. Firstly, in the beginning stage, the judge does not have to adhere to the category range if significant aggravating or mitigating circumstances cumulate.[62] Secondly, when it comes to the final sentence, the much broader total offence range could be chosen, instead of the category range. Lastly, it is possible to refrain completely from the guideline if it would be contrary to the interests of the justice to adhere to the guidelines. The initial effects of the sentencing reform were examined using a multivariate multi-level analysis of assault data from the 2011 Crown Court Sentencing Survey.[63] The researchers conclude that "[consistencies] in sentencing and judicial discretion are not mutually exclusive goals. In fact, it seems that England and Wales may be doing a reasonable job of reconciling them".[64]

A comparison between sentencing in the U.S. and England and Wales is only useful if it is limited to the federal level, and to states with guidelines which allocate offences to levels of seriousness within a sentencing grid.[65] The crucial difference between the two systems lies in their starting points: a bottom-up approach is followed in England and Wales, whereas U.S. systems with a sentencing grid adopt a top-down approach. As such, the English guidelines have a uniform, but offence-specific structure, under which each offence is assigned to a corresponding sentencing guideline, while the federal U.S.

59 Coroners and Justice Act 2009, more in Roberts & Ashworth (fn. 7), p. 334-335.

60 Julian V. Roberts, 'Sentencing guidelines in England and Wales: Recent developments and emerging issues', 76 *Law and Contemporary Problems* 1 (2013), p. 6.

61 Roberts (fn. 60), p. 6.

62 Roberts & Ashworth (fn. 7), p. 337.

63 Jose Pina-Sànchez, Ian Branton-Smith & Li Guangquan, 'Mind the step: A more insightful and robust analysis of the sentencing process in England and Wales under the new sentencing guidelines', *Criminology & Criminal Justice* (2018), p. 3. Article available in: OnlineFirst (at: https://journals.sagepub.com/doi/pdf/10.1177/1748895818811891) (last visited 16 May 2023).

64 Pina-Sànchez et al. (fn. 63), p. 13-14.

65 See the overview by the Robina Institute of Criminal Law and Criminal Justice of the University of Minnesota (at: https://robinainstitute.umn.edu/sentencing-guidelines-resource-center, last visited 16 May 2023).

guidelines consist of a sentencing table for all offences. The federal guidelines are considered to be both more complex and more punitive than most state guidelines.[66] Examples of this include an often increased offence severity ranking for federal crimes, 'relevant conduct' as an aggravating factor (which has been much criticised), and prior convictions holding a higher weight.[67] The binding force of sentencing guidelines ranges from mandatory in certain cases, to merely advisory, acting as "as a continuum, not a simple mandatory-advisory dichotomy".[68] Since a fundamental decision by the U.S. Supreme Court in 2005, the federal guidelines have been advisory, and judges have used their judicial discretion.[69] However, judicial discretion in the federal guidelines is narrow compared with the aforementioned national sentencing systems. Pursuant to the federal guidelines manual, "[if], however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure".[70] The biggest problems with federal sentencing are identified in "congressional micromanagement of sentencing policy in the form of specific statutory directives and mandatory minimum penalties"[71], as well as in the substantial influence of elected prosecutors who pursue a political agenda, and exercise prosecutorial discretion concerning plea bargaining.[72]

The English guidelines partly served as a model for South Korean sentencing guidelines.[73] Nevertheless, sentencing in South Korea refers to the guilt of the offender and similarities exist to the Japanese system.[74] Until 2007, when the Sentencing Commission was established, the courts' judgements had been repeatedly subject to harsh criticism for irregularities on the grounds of too broad discretion. Today, there is still critique and little trust in the judiciary as a favouring of the rich and powerful is feared and partly seen as a remnant of the former authoritarian regime. The Sentencing Commission issued

66 Richard S. Frase, 'Sentencing Guidelines in American Courts: A Forty-Year Retrospective', 32 *Federal Sentencing Reporter* 2 (2019), p. 113.

67 The higher weight results from the different criteria: while the severity of the imposed sentence without considering a fully suspended sentence is relevant for the federal guidelines, the legal classification or offence severity ranking of the conviction is essential in state guidelines, see Frase (fn. 66), p. 113.

68 Richard S. Frase, 'Fourty years of American sentencing guidelines: What have we learned?', 48 *Crime & Justice* (2019), p. 99.

69 Supreme Court of the United States, Decision of 12 January 2015, United States v. Booker, 543 U.S. 220 (at: https://supreme.justia.com/cases/federal/us/543/220/) (last visited 16 May 2023); Paul J. Hofer, 'Federal sentencing after Booker', 48 *Crime & Justice* (2019), p. 139.

70 United States Sentencing Commission, *Guidelines Manual 2018*, p. 2.

71 Hofer (fn. 69), p. 141.

72 Frase (fn. 66), p. 113-114; Tonry (fn. 23), p. 3-5.

73 Hyungkwan Park, 'The Basic Features of the First Korean Sentencing Guidelines', 22 *Federal Sentencing Reporter* 4 (2010), p. 265; Julian V. Roberts, 'The evolution of sentencing guidelines in Minnesota and England and Wales', 48 *Crime & Justice* (2019), p. 188.

74 Grateful thanks to Harkmo Park, researcher at the Korean Institute of Criminology in Seoul, for his information about the Korean sentencing system.

sentencing guidelines, though they are understood "as an advisory recommendation" rather than mandatory without any legally binding authority. Nevertheless, the sentencing judge is to respect the guideline in the sentencing determination. For sentencing decisions that depart from the guideline's sentencing range, the judge is required to set forth their reasons in judicial opinions (Court Organization Act Article 81-7, paragraphs 1 to 2).[75] An urgent need for reform of the sentencing system is put forward, but no change is in sight.

In South Africa, sentencing is determined by three guiding principles, which are known as the "triad of Zinn":[76] the gravity of the offence, the circumstances of the offender, and public interest. Firstly, to ensure that punishment is appropriate, and truly 'fits the crime', the severity of the criminal act has to be taken into account, for example the degree of violence, or the extent of the damages that the victim suffered. Secondly, in the course of what the law expressly calls "individualisation", the circumstances of the offender must be considered, with prior convictions treated as an aggravating factor. The third element relates to "public interest", which should comprise the various purposes of punishment, including deterrence, rehabilitation, and protecting society from future crimes. As is the case with other countries, there are multiple proportionality considerations as a basis for sentencing, combined with various (and in part, conflicting) purposes of punishment. As a result, there is a considerable amount of judicial discretion. This is also evident from the fact that minimum sentences for certain severe crimes such as murder or rape (which were introduced in 1998) are discretionary, and can be neglected by judges in cases of "substantial and compelling circumstances", which have to be clearly spelled out and documented.

These observations are only a glimpse of sentencing systems all over the world. Although we have attempted to categorise sentencing systems, it is obvious that there are no clear-cut types of system, as there are various overlaps and mixtures. This is especially the case when accounting for both the written law and the law in action. The key differences between systems concern the weight of purposes of punishment, the existence and level of normativity of sentencing rules or guidelines, and the associated extent of judicial discretion; even in strict regimes, judges have some judicial discretion left. Nevertheless, commonalities can be also found among the introduced sentencing frameworks. Statuary minimum and maximum penal ranges are widespread, as are aggravating and mitigating circumstances. Prior convictions are always a factor which exacerbates sentences. In

75 Introduction to the sentencing guidelines (at: https://sc.scourt.go.kr/sc/engsc/guideline/manual/introduction/introduction_03.jsp) (last visited 29 May 2023).

76 Stephan Terblanche, 'Sentencing in South Africa', in: Michael Tonry & Kathleen Hatlestad (eds), *Sentencing Reform in Overcrowded Times*, New York/Oxford: Oxford University Press, 1997, p. 172. For the following see the official government website (at: https://www.lawforall.co.za/arrest-crimes/jail-time-south-africa/) (last visited 16 May 2023).

almost all systems, parole is an option. Most introduced sentencing systems have either undergone major sentencing reforms, or the need for a sentencing reform has at least been articulated (Germany, Japan, and South Korea). During recent decades, the national reform of jurisdictions limited judicial discretion, in order to achieve more consistency in sentencing by introducing different forms of sentencing guidelines. This variation is described as a continuous scale, referring to the extent of judicial discretion:[77] on one side of the scale, outcome-oriented sentencing grids act as rigid guidelines (U.S. federal level, and several states), while on the other side, sentencing follows a 'guidance by words' approach (Sweden), and between the two, there are approach-oriented sentencing guidelines (England, Wales, and South Korea).[78]

4 Purposes of punishment

In these frameworks, judicial discretion can reach from narrow to wide, though the objectives of punishment differ, and hold a different weight. Rehabilitation of the offender can be the primary sentencing goal within offender-oriented sentencing. A wider concept of offender-oriented sentencing also incorporates specific deterrence, as well as the protection of society, and other objectives of punishment depending on the individual case. Despite individual prevention, culpability-oriented or offence-oriented sentencing systems focus more on retribution, general deterrence, and/or positive general prevention. Positive general prevention should encourage law-abiding behaviour, strengthen trust in the law, and restore the law, as well as ensure legal certainty.[79]

As mentioned above, the aims of these penal systems might overlap, and it is also possible that they may directly contradict each other, leading to different end points.[80] As such, the question of what the appropriate sentence in a particular case is, especially when the sentencing objectives conflict with each other, is a challenging one. It directly relates to the questions raised at the beginning of this paper: What features of the offence or the offender are relevant for sentencing at all? What makes crimes 'the same', or at least similar and comparable, so that disparities in sentencing would seem illegitimate? The answer to these questions largely depends on the respective dominating punishment goal, or a

77 Kevin R. Reitz, 'Comparing sentencing guidelines: Do US systems have anything worthwhile to offer England and Wales?', in: Andrew Ashworth & Julian V. Roberts (eds), *Sentencing Guidelines: Perspectives on the Definitive Guidelines*, Oxford: Oxford University Press, 2013, p. 197-198; Jose Pina-Sánchez & Robin Linacre, 'Refining the measurement of consistency in sentencing: A methodological review', 44 *International Journal of Law, Crime and Justice* 1 (2016), p. 69.

78 Pina-Sánchez & Linacre (fn. 77), p. 69.

79 Johannes Kaspar, *Verhältnismäßigkeit und Grundrechtsschutz im Präventionsstrafrecht,* Baden-Baden: Nomos, 2014, p. 648-654.

80 Freiberg (fn. 20), p. 428.

blending of sentencing goals.[81] Take, for example, two cases of theft which were committed under very similar circumstances, and which related to two identical objects with the exact same value. We might argue that these are the 'same' offences, and so the punishment should also be the same. However, should we at this point be looking to consider further information about each case? On the assumption that both offenders have no criminal history, we can exclude this dominant (but also fairly controversial) sentencing factor as a reason for differentiating between the two cases. We will now assume that Offender A only committed the crime due to very exceptional circumstances which will never happen again, whereas Offender B shows a high risk of recidivism. The question which now arises is whether this difference in circumstances justifies different levels of punishment. Those who support the 'just desserts' theory would clearly answer 'no' here. However, in an offender-oriented system which aims at individual deterrence and the protection of society, it would be the logical outcome to impose a fine on Offender A (if it is decided to punish him at all) on the one hand, and to throw Offender B in jail on the other.

It is obvious that a focus on certain overriding punishment goals or a clear 'hierarchy' of different goals has the potential to restrict discretion to a varying extent, whereas the blending of sentencing goals allows for unfettered discretion by an 'instinctive' or 'intuitive' synthesis.[82] Whether the former system is the better one remains open to debate; it seems preferable at least in terms of consistency and predictability of punishment. A further assessment depends of course on whether certain preferred punishment goals are legitimate and apt to avoid excessive punishment (in other words, to guarantee proportionality in the sense of German constitutional law). If we look at the other side of the spectrum, sentencing by instinctive synthesis is sometimes understood as an art (and on the other hand, mandatory minimum sentences and guidelines as science based on an algorithm).[83] The term 'art' for instinctive synthesis seems to be somewhat euphemistic, however, because it might serve to conceal the fact that such sentencing is an unregulated area, leading to arbitrary sentences.[84] Ashworth makes a valid point when he refers to a "free for all" approach to punishment aims where "no weight at all is given to rule-of-law values".[85]

Indeed, in an instinctive system without clear objectives and criteria for sentencing, much if not all depends on the individual preferences of the sentencing judge. They have the Herculean task of simultaneously unifying, balancing, and weighing all considerations

81 Graeme Brown, *Criminal Sentencing as Practical Wisdom*, Oxford/Portland (Oregon): Hart, 2017, p. 49; Freiberg (fn. 20), p. 427.
82 Brown (fn. 81), p. 427.
83 Brown (fn. 81), p. 136-138; Freiberg (fn. 20), p. 428.
84 Brown (fn. 81), p. 51.
85 Andrew Ashworth, *Sentencing and Criminal Justice*, Cambridge: Cambridge University Press, 2015, p. 81.

relevant in the case in question.[86] Not only experience is important, but also data derived from comparable sentences, as well as the use of guidelines and principles laid down in statute and case law.[87] The principle of individualised justice is supposed to guarantee a fair and appropriate sentence for each convicted person.[88] But if it is more or less up to judges (the 'artists') alone to decide what is relevant to their decision and what is not, the rule of law is put at risk and 'individualistic justice' turns into mere 'subjective justice' from the point of view of the judges in each single case.

In order to avoid this rather unsatisfying result, some binding legal safeguards seem necessary, which would also contribute to avoiding the illegitimate sentencing disparities which will be addressed in the next section. We could even go a step further: it is only these legally binding criteria that allow us to discern 'illegitimate' sentencing disparities or 'unfair' sentencing at all, therefore also enabling courts of appeal to intervene in problematic cases. If there is vast judicial discretion within an 'instinctive system', the judge's mere belief that a certain factor is relevant to the case would be enough to justify harsher or milder punishment compared to other cases which appear similar. In such a system of total dependence on the judge's opinion, illegitimate sentencing disparities (and, consequently, illegitimate sentencing) would, by definition, not exist at all.

5 Disparity in sentencing

As we have seen, the idea of 'individualised' or (even more so) 'subjective' justice can cause disparities in sentencing and vice versa, while uniform justice may cause illegitimate harshness in sentencing. Both disparity and austerity raise equality and equity concerns. However, a highly individualised sentencing process is less predictable and less transparent than a sentencing framework based on systematic and publicly accessible guidelines.[89] Not only do such guidelines promote a more consistent and principled sentencing, but also a greater understanding of sentencing. They promise more conformity and accountability, either of approach or of outcome.[90]

Under the rule of law, an offender should know what sentence he or she might expect compared to other offenders convicted of similar crimes under similar circumstances.[91] Besides, as stated above, a basic requirement for the rule of law is that the legislator (as

86 Freiberg (fn. 20), p. 427.
87 Brown (fn. 81), p. 53.
88 Brown (fn. 81), p. 54.
89 Roberts & Ashworth (fn. 7), p. 145.
90 Brown (fn. 81), p. 142.
91 William Rhodes, Ryan Kling, Jeremy Luallen & Christina Dyous, *Federal Sentencing Disparity: 2005-2012*, in: Bureau of Justice Statistics Working Paper Series, 2016, p. 16 (at: https://permanent.access.gpo.gov/gpo71983/fsd0512.pdf) (last visited 16 May 2023).

opposed to the judge) at least roughly decides upon the question of what constitute 'similar' crimes or 'similar' circumstances at all, which should include regulations on the purposes of punishment and relevant sentencing criteria.

Whereas rigid rules such as mandatory sentences and sentencing grids relate to the outcome and leave little judicial discretion, rules guiding the sentencing process emphasise the approach, and give judges more discretion. *Brown* states that "[t]he concept of consistency of approach aims to strike an equilibrium between the supposed dangers of too much and too little judicial discretion in sentencing".[92]

Consequently, judicial discretion always raises the question of sentencing disparity. The term itself can be defined as "an inequality in criminal sentencing which is the result of unfair or unexplained causes, rather than a legitimate use of discretion in the application of the law".[93] With regard to research on sentencing, the question arises how to measure sentencing disparity.[94] The extent of the problem depends on the extent of judicial discretion: the more judges have, the more difficult it becomes for research to identify sentencing disparity.[95] Nonetheless, sentencing research is established in criminology, though "the effectiveness of different approaches to structuring discretion remains an open question", due to poor data and disagreement on the theoretical concept of consistency.[96] Despite this, existing research examines sentencing disparities from four angles, namely: differences between courts and judges, legal factors, and the offenders' extra-legal characteristics.[97] Research focuses more on measuring the level or extent of inter-court disparities than inter-judge disparities, because it is not easy to obtain information on the judge's decision-making.[98] Legal factors such as prior convictions, sentencing for multiple offences, and aggravating and mitigating circumstances are also the subject of different studies, and this is even truer of offenders' extra-legal characteristics, especially race, gender and age.[99]

Naturally, national differences in the relevance and extent of such research can be observed.[100] Findings from studies in various countries, which differ in the extent of judicial discretion, show considerable inter-district variation in sentence severity and

92 Brown (fn. 81), p. 142.
93 USLegal (at: https://definitions.uslegal.com/s/sentence-disparity/) (last visited 16 May 2023).
94 For the emphasis on consistency of sentencing and its theoretical framework see Pina-Sánchez & Linacre (fn. 77), p. 71-74.
95 Rhodes et al. (fn. 91), p. 18.
96 Pina-Sánchez & Linacre (fn. 77), p. 70.
97 Jakub Drápal, 'Sentencing disparities in the Czech Republic: Empirical evidence from post-communist Europe', 17 *European Journal of Criminology* 2 (2020), p. 152.
98 Drápal (fn. 97), p. 152 provides a short overview about findings on differences between judges.
99 Drápal (fn. 97), p. 152.
100 Drápal (fn. 97), p. 153-154; Jeffery Ulmer, Michael T. Light & John Kramer, 'The "Liberation" of Federal Judges' Discretion in the Wake of the Booker/Fanfan Decision: Is There Increased Disparity and Divergence between Courts?', 28 *Justice Quarterly* 6 (2011), p. 801.

other factors, regardless of the sentencing system.[101] This variation is generally attributed to regional policies or local traditions of court communities, or individual preferences and features of judges[102], including situational aspects of the individual case. A study in Israel suggests that hungry judges tend to decide probation cases in a more timely and at the same time stricter manner than they do after lunch break.[103]

The judicial sentencing process is also crucial with respect to discrimination because of age, race, or gender.[104] These offenders' extra-legal characteristics may influence judicial decision-making in part; the resulting disparities in punishment seem to be connected not only with stereotyping by judges, but also with risk factors rooted in the offender's disadvantaged personal circumstances.[105] Results from the U.S. indicate that presumptive guidelines might reduce racial and ethnic disparities compared to voluntary guidelines, or sentencing without guidelines.[106] Furthermore, wide judicial discretion allows judges to highlight different purposes of punishment: whereas judges who prefer public safety or retribution tend to impose harsher sentences, judges who favour rehabilitation tend to impose more lenient sentences.[107] In England and Wales, there is prima facie evidence that the introduction of sentencing guidelines regarding approach may improve consistency and proportionality.[108] They even seem to enhance public confidence in the criminal justice system, and reduce criticism about sentences as being too lenient.[109] Furthermore, the results of a study on individualization of sentencing indicate that judges do still make use of their judicial discretion, but prefer – as *Francis Galton* discovered (s. 2.) – certain numbers in sentence lengths for assault offences.[110] Consequently, sufficient

101 For empirical proof concerning Germany with wide judicial discretion see Johannes Kaspar, *Sentencing Guidelines versus freies tatrichterliches Ermessen – Brauchen wir ein neues Strafzumessungsrecht?*, München: C.H.Beck, 2018, p. C 19-C 21 and for proof concerning the U.S. concerning narrow judicial discretion Ulmer et al. (fn. 100), p. 802.

102 Ulmer et al. (fn. 98), p. 802; Thomas Weigend, 'No News Is Good News: Criminal Sentencing in Germany since 2000', in: Tonry (ed) (fn. 2), p. 90.

103 Shai Danziger et al., 'Extraneous factors in judicial decisions', 108 *PNAS* 17 (2011), p. 6889-6992.

104 Sigrid van Wingernden, Johan van Wilsem & Brian D. Johnson, 'Offender's Personal Circumstances and Punishment: Toward a More Refined Model for the Explanation of Sentencing Disparities', 33 *Justice Quarterly* 1 (2016), p. 101; Jose Pina-Sánchez, 'Defining and Measuring Consistency in Sentencing', in: Julian V. Roberts (ed), *Exploring Sentencing Practice in England and Wales*, London: Palgrave Macmillan, 2015, p. 76.

105 Van Wingernden et al. (fn. 104), p. 127-128.

106 Xia Wang, Daniel P. Mears, Cassia Spohn & Lisa Dario, 'Assessing the differential effects of race and ethnicity on sentence outcomes under different sentencing systems', 59 *Crime & Delinquency* 1 (2013), p. 106-107.

107 Proofs by Hörnle (fn. 42), p. 196 and Kaspar (fn. 101), p. C 18-C 19.

108 Roberts & Ashworth (fn. 7), p. 344-345; Pina-Sánchez et al. (fn. 63), p. 13-14.

109 Roberts & Ashworth (fn. 7), p. 344-345.

110 Julian V. Roberts, Jose Pina-Sánchez & Ian D. Marder, 'Individualisation at sentencing: The effects of guidelines and "preferred" numbers', 18 *Criminal Law Review* 2 (2018), p. 123.

individualisation at sentencing seems to be guaranteed within approach-oriented sentencing guidelines.[111]

6 Practical consequences of crime policies

Taking a short look at criminal policy issues, it has to be noted that the introduction of mandatory minimum sentences, sentencing guidelines, and no or less parole release, promoted an increasingly punitive approach in the U.S., and in England and Wales.[112] These sentencing reforms express politicians' desire to restrict and control judicial discretion in sentencing.[113] The pervasive 'Law and Order' approach coincided with the introduction of sentencing guidelines. In addition, judges who depend on political parties may promote harsher sentencing.[114] In contrast to a 'Judges as Civil Servants' model, a 'Judge by Public Election' model is influenced by public opinion, in particular when it comes to re-election. When a 'Law and Order' policy is in place, it is obvious that the public favours higher levels of punishment than in a more moderate climate.[115] A 'Law and Order' period can also lead to neglect of proportionality in punishment.[116] One prominent example is three-strikes laws.[117]

Besides, we should also take into account the historical, socio-economic, and cultural frameworks behind sentencing systems.[118] When we compare the effects of wide and narrow judicial discretion, we can conclude by citing *Hörnle*: "… legal systems can work fairly well and achieve moderate, non-disparate sentencing patterns, even if the legislature does not strive to curtail judges' discretion through sentencing guidelines". We can conclude that unfettered discretion does not necessarily lead to arbitrary sentencing, with Japan being the best example: as mentioned above, we can see quite uniform sentencing throughout the country (related mostly to the circumstances of the offence), even though there are no specific regulations on sentencing purposes or criteria. One could say that such a phenomenon puts the importance of clear legal ramifications, and the potential benefit of sentencing guidelines that was mentioned before into perspective. But we would still argue that such a legal framework is a better safeguard against future social and political developments that might lead to arbitrary and illegitimate sentencing. Punishing

111 Roberts et al. (fn. 110), p. 123.
112 Brown (fn. 81), p. 180; Hörnle (fn. 42), p. 197.
113 Brown (fn. 81), p. 227.
114 Hörnle (fn. 42), p. 207.
115 Hörnle (fn. 42), p. 207.
116 Tonry (fn. 22), p. 462.
117 Tonry (fn. 22), p. 473.
118 Hörnle (fn. 42), p. 203-204.

other people is the exercise of power, and history shows that power has to be controlled in order to avoid its abuse.

7 Guidance by national constitutional, supranational and international law

This need for control and limitation at the same time also follows (with a varying degree of binding legal force) from national constitutional law,[119] or principles and recommendations on the supra- and international level. Article 49 Section 3 of the European Charter of Basic Rights rules out, for example, punishment that is disproportionate to the offence.

Another important example is the Council of Europe´s Recommendation (No. R (92) 17) on Consistency in Sentencing that was adopted by the Committee of Ministers in 1992. Due to its neutral approach and its clarity, coherence, and transparency, the recommendation is still relevant today.[120] It rejects a punitive approach and emphasises that consistency in sentencing should not lead to more severe sentences (thereby reinforcing the aforementioned emphasis on control and limitation). In addition, judicial discretion should have its place: the court's decision should always be based on the individual circumstances of the case and the personal situation of the offender. The recommendation addresses the following themes: rationales for sentencing, penalty structure, aggravating and mitigating factors, previous convictions, the need to give reasons for sentencing, prohibition of reformatio in peius, time spent in custody, role of the prosecutor, sentencing studies and information, statistics and research, and European co-operation. Concerning the rationales for sentencing, we recommend declaring them in accordance with the national traditions, to give indications on how to deal with different rationales in conflict and state a primary rationale. Disproportionality between the seriousness of the offence and the sentence should be avoided, and no discrimination should occur. Finally, sentencing rationales should be consistent with modern and humane crime policies.

119 For Germany see Kaspar (fn. 79); for Italy see Foffani & Viganò (fn. 46), p. 320. The 8th amendment of the US constitution only prohibits "cruel and unusual punishment".

120 Heike Jung, 'Die Empfehlung des Europarates zur Strafzumessung', in: Hans-Heiner Kühne (ed), *Festschrift für Koichi Miyazawa*, Baden-Baden: Nomos, 1995, p. 447.

8 Conclusion

The Council of Europe's Recommendation is still a good point of departure for further developments in sentencing frameworks. Taking into account different sentencing traditions in Western countries, further development should focus on guarantees for moderate sentencing: that means parsimony in punishment, choosing the least restrictive alternative, and offering parole release.

Some judicial discretion seems necessary in order to take individual offenders' circumstances into account. Consequently, narrow judicial discretion is rightly criticised when it comes to determining outcome by means of mandatory sentences and guidelines. Contrary to Montesquieu's opinion, the judge is more than a mouth and should have judicial discretion. Concerning the extent of judicial discretion, there is no one size fits all approach in our opinion. Formal guidelines on approach seem to be a possible improvement, as they give some orientation while leaving enough judicial discretion to the courts. The idea of an 'instinctive synthesis', with excessive judicial discretion and without sufficient legal ramifications and boundaries is problematic in our eyes.

If sentencing regulations exist and (rightly) do leave some judicial discretion, there will probably always be the need for further guidance, e.g., by case law or sentencing traditions. In order to secure transparency in this regard, the introduction of a database with related court decisions (that has been introduced in Japan and is being debated in Germany) would be an improvement. Generally, the use of legal tech (including forms of artificial intelligence) within sentencing with all its potential benefits and downsides has to be debated.[121] Another important point is that judicial training on how to exercise judicial discretion and how to tackle conflicts between different punishment purposes is essential in both universities and courts.

Further research is needed not only into the existence of sentencing disparity, but also into its causes. It would be crucial to know more about the question of why and when disparity appears in different contexts, and what the specific underlying social and psychological mechanisms are.[122]

121 See e.g. Johannes Kaspar, Katrin Höffler & Stefan Harrendorf, 'Datenbanken, Online-Votings und künstliche Intelligenz – Perspektiven evidenzbasierter Strafzumessung im Zeitalter von „Legal Tech", 32 *Neue Kriminalpolitik* 1 (2020), p. 35-56.

122 Van Wingernden et al. (fn. 104), p. 128.

Administrative discretion in the execution of sentences

Uju Agomoh[*]

1 Introduction

The criminal process is marked by an extensive *de facto* if not *de jure* police and prosecutorial discretion to determine what laws to enforce against what individuals and in what circumstances before accusation and trial of the offender. After guilt has finally been ascertained, the system is marked by *de jure* discretion of the sentencing judge, correctional institutions and other applicable agencies to determine the treatment the offender will receive. Sentencing decisions are based on some identified sentencing principles. These principles are developed through statute law and common law.[1] Some of them are: that the sentence must be no more severe than is necessary to meet the purposes of sentencing; that the overall punishment must be proportionate to the gravity of the offending behavior; that similar sentences should be imposed for similar offences committed by offenders in similar circumstances; and that where one is to serve more than one sentence, the overall sentence must be just and appropriate in light of the overall offending behaviour.

Over time changes that have occurred in sentencing policies and practices can be ascribed to emphasis on different goals. The four major goals usually attributed to sentencing processes are retribution, rehabilitation, deterrence, and incapacitation. Retribution emphasizes that people who break the law deserve to be punished. The other three goals lay emphasis on protection of the general public though their specific approaches to it differ. For instance, deterrence emphasizes the severity of punishment: offenders are deterred from committing crimes because according to a rational calculation the cost of punishment is so high, that neither the punished offender nor others commit crimes in the future. Incapacitation aims at depriving people of the capacity to commit crimes because they are physically detained in prison. Rehabilitation attempts to modify offenders' behavior and thinking so they do not continue to commit crimes. In practice,

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1 Sentencing Advisory Council on Sentencing Principles, Purpose, Factors (at: https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-principles-purposes-factors) (accessed 27/3/2023).

sentencing usually address these goals. Emphasis on which goal is of the highest priority has changed in the past years.

Changes in the practice and philosophy of sentencing and corrections, especially on effective utilization of non-custodial alternatives, will likely have a major impact on incarceration rates. It is important to note that the size of the prison population throughout the world is growing, placing very serious financial and other burdens on governments as well as affecting the social cohesion of societies.

This chapter will examine from a universal perspective the possibilities for the administration to decide within the rule of law on the way a sentence is executed, address the threats that the exercise of such discretion can offer to the principle against arbitrary sentencing and the opportunities it can provide towards rehabilitation, fairness and in addressing the problem of overcrowding of prisons/custodial centers.

2 Fundamentals of a fair sentencing system

Sentencing is founded upon two fundamental premises of a fair sentencing system that are in perennial conflict: individualized justice and consistency.

2.1 Individualized justice

This holds that courts should impose sentences that are *just* and *appropriate* according to all of the circumstances of each particular case. Crucial here is the perspective through which the sentence is determined. To whom is the sentence 'just'? To the victim? The offender? Or to society? Can we achieve a balance that can apply equally or to some degree to all of these? The ability of the sentencers to achieve this balance is often very difficult if not an impossible task to achieve. Thus, one may argue that the term 'justice' or 'being just' may only be a myth when applied to all – the victim, offender and society. Perhaps a better way to perceive or assess the sentencers judgment report will be to see it as a piece of art which serves as a canvass upon which the sentencers paint out the rationale for the sentence and the factors that were considered to reach the decision. In other words, how well was the balancing act achieved between the offender, victim and society and if not achieved, who was given a more priority or preferred consideration over the other and what had been the reason for this.

The other term – *appropriate* – calls for some examination of the circumstances of the case, the socio-demographic characteristics of the offender and in some instances the victim. Also here lies a challenge in practice. Achieving justice to all concerned is difficult, even more considered viz-a-viz the *appropriateness* of the sentence: taking into account all conditions and the social, psychological, and economic background of the offender, victim

and society. The question is thus how can we achieve justice for all concerned and yet ensure that each is appropriately treated?

The concept of 'appropriateness' and an attempt to address this dilemma may have influenced the drafting of the following preliminary observations to the United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules):

> In view of the great variety of legal, social, economic and geographical conditions in the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavor to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.
> On the other hand, the rules cover a field in which thought is constantly developing. They are not intended to preclude experiment and practices, provided these are in harmony with the principles and seek to further the purposes which derive from the text of the rules as a whole. It will always be justifiable for the central prison administration to authourize departures from the rules in this spirit.[2]

2.2 Consistency

This holds that similarly situated offenders should receive similar sentencing outcomes. The result is an ambivalent jurisprudence that challenges sentencers as they attempt to meet the conflicting demands of each premise.[3] One of the fundamental principles of criminal law is consistency: like offenders must be treated alike.[4] If similar offenders are not treated alike then the community begins to view the courts as unfair, which in turn jeopardizes the ongoing legitimacy of the justice system. Ensuring that there are adequate mechanisms in place to achieve sentencing consistency is of fundamental importance to any system of law.

Sentencing is a notoriously difficult component of the criminal law. It requires a judge to balance complex, abstract and often competing considerations with a view to achieving the elusive and equally abstract notion of 'justice'. To this end, judges have traditionally

2 United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules), Preliminary Observation 2.

3 Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualist Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?', 76 *Law and Contemporary Problems* (2013), p. 265.

4 Sean J Mallett, 'Judicial Discretion in Sentencing: A Justice System that is No Longer Just?', 46 *Victoria University of Wellington Law Review* 2 (2015), p. 533.

enjoyed considerable discretion to tailor an appropriate sentence, subject to the maximum penalties prescribed by Parliament. However, this flexibility comes at the cost of another important principle of the criminal law: consistency. The more discretion a judge is allowed to exercise, the greater the risk of similarly situated offenders being treated differently. How to resolve this tension and find a suitable equilibrium is a problem faced by jurisdictions the world over.

Consistency in sentencing is of fundamental importance to the criminal justice system. What is needed is parity: like offenders must be treated alike, a maxim that has its origins in the works of Aristotle.[5] If offenders are not treated alike, the resulting disparity can result in injustice to an accused person and may raise doubts about the evenhandedness of the administration of justice. Conversely, dissimilar cases should not be treated in a like fashion. Both of these situations would lead to injustice and erode public confidence in the legal system. The importance of maintaining this confidence cannot be overstated. Victims and witnesses will only cooperate with police and prosecutors if they trust the system and the professionals – including judges – with whom they have contact. That trust will quickly diminish if the public perceives the system to be inconsistent in its outcomes and thus unfair. The legitimacy of the criminal justice system hinges on public support, and this needs to be earned.

In Nigeria, there is a public relations phrase often used by the police – 'The Police is Your Friend'. During some of my human rights trainings for police officers across the country (which to date have implemented in 15[6] out of the 36 States and the Federal Capital Territory, FCT and trained over 5,000 police officers), I have often asked them to recant and demonstrate through role plays how one treats his/her friend who is in trouble. I then ask them if that is how they treat victims and witnesses in the course of their work. To this they often say they do not treat them as such. In conclusion we usually agree that our friends are not usually introduced to us. If the police are really our friend this will be known by those who are their friends and that friendship grows and is nurtured by trust and support, and trust is earned.

Mandatory sentences ensure consistency in sentencing by legislatively removing discretion entirely. However, because the facts of any given case are unique, this approach inevitably comes at the expense of individualized justice. Furthermore, the practical effect of mandatory sentences would be simply to shift discretion from the judges into the hands of police and prosecutors, as an offender's sentence would effectively be determined by the

5 See CJ Rowe and Sarah Broadie (eds), *Aristotle: Nicomachean Ethics*, Oxford: Oxford University Press, 2002.

6 These are Lagos, Oyo, Osun, Rivers, Bayelsa, Cross Rivers, AkwaIbom, Imo, Anambra, Abia, Benue, Yobe, Kaduna, Sokoto, Kano States and the FCT.

choice of charge laid. This raises issues around transparency and accountability, leading to the conclusion that the widespread implementation of mandatory sentences would cause more problems than it could potentially solve. The three strikes policy in the United States perhaps presents a very good example which can help us understand this principle and the potential effects of it.

Parity in sentencing underpins the rule of law, a doctrine which requires both the absence of arbitrary power and the need for fixed and predictable laws. The existence and imposition of inconsistent sentences makes it impossible for the citizenry to foresee the consequences of their actions. A look at the Rwanda experiment with *Gacaca* teaches one or two lessons. In Rwanda following the genocide a lot of persons were detained for serious offences such as murder/participating in the genocide to the extent that the prison population rose astronomically to about 154,000 and more. The country was unable to feed or keep that huge number of prisoners in its facilities. They had to rely on humanitarian assistance from organizations such as ICRC for providing food and sanitary needs in prison and this was not sustainable. They had to modify their law allowing for the introduction of *Gacaca*. This is a traditional legal process which allows panels to consider some cases of those who participated in the genocide who confessed to be sentenced to a non-custodial sentence (such as to *tigi* which is community service). This approach, led to faster dispensation of justice and reduction of the prison population to about 59,000 at some stage.

A lesson from the experience of Rwanda is that the law must serve the interest of the society. It can be modified as new circumstances emerge. Rigid application of the law may cause more harm than good. Thus, reviewing the content and application of the law to ensure its continued relevance in serving the interest of the society and curing the mischief as was originally intended by the drafters. Even in this, a standard, yardstick and benchmark need to be set to maintain some consistency. So, for the *Gacaca*, the decision was that those who were ring leaders and who spearheaded the killings during the genocide were sent to prison and not to *tigi*.

3 Judicial control of administrative discretion

Discretion is the latitude granted officials to act under a formal set of rules and in a public capacity. The rules themselves are usually the result of discretion by other actors in the criminal justice system, such as the legislature. However, even the most detailed rules allow for discretion, and it is possible that this discretion will allow actors subject to the rules to countermand or contradict the rules. The best example of this type of contradiction comes in the case of mandatory sentences, where legislative intent is frequently averted through the use of prosecutorial discretion. Even if executed 'within' the rules, however,

discretion can lead directly to disparity, where 'like' cases are treated differently. In the case of sentencing, disparity involves the application of different punishments to cases that appear to be identical on the merits, or alternatively, the application of same punishment to cases that appear different[7].

Regarding discretionary functions of prosecutors, it has been provided that: "In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution."[8] And for the judiciary: "The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."[9]

The broad principles, on which the exercise of discretionary powers can be controlled, have now been judicially settled. These principles can be examined under two main heads:

– Where the exercise of the discretion is in excess of the authority, i.e. *ultra vires*;
– Where there is abuse of the discretion or improper exercise of the discretion.

These two categories, however, are not mutually exclusive. In one sense the exercise of the discretion may be *ultra vires*, in the other sense the same might have been exercised on irrelevant considerations.

As regards the *ultra vires* exercise of administrative discretion, the following incidents are pre-eminent:

(1) Where an authority to whom discretion is committed does not exercise that discretion himself;

(2) Where the authority concerned acts under the dictation of another body and disables itself from exercising discretion in each individual case;

(3) Where the authority concerned in exercise of the discretion, does something which it has been forbidden to do, or does an act which it has not been authorized to do;

(4) Were the condition precedent to the exercise of its discretion is non-existent, in which case the authority lacks the jurisdiction to act at all.

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7 Law Teacher, 'Judicial Control And Exercise Of Discretion', November 2013 (at: https://www.lawteacher.net/free-law-essays/constitutional-law/judicial-control-and-exercise-of-discretion-constitutional-law-essay.php?vref=1) (accessed 27/3/2023).

8 Guidelines on the Role of Prosecutors, Article 17 (Adopted at the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders), held at Havana, Cuba, from 27 August to 7 September 1990.

9 Article 6 of the United Nations Basic Principles on the Independence of the Judiciary (Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985).

Under the second category, i.e., abuse of discretionary power, the following instances may be considered:
(a) Where the discretionary power has been exercised arbitrarily or capriciously;
(b) Where the discretionary power is exercised for an improper purpose, i.e., for a purpose other than the purpose of carrying into effect in the best way the provisions of the Act;
(c) Where the discretionary power is exercised inconsistent with the spirit and purpose of the statute;
(d) Where the authority exercising the discretion acts on extraneous considerations, that is to say, takes into account any matters which should not have been taken into account;
(e) Where the authority concerned refuses or neglects to take into account relevant matter or material consideration.
(f) Where the authority imposes a condition patently unrelated to or inconsistent with the purpose or policy of the statute;
(g) Where in the exercise of the discretionary power, it acts mala fide;
(h) Where the authority concerned acts unreasonably.

Where the discretionary power has been arbitrarily exercised, the Court will generally interfere and set aside the order passed by the administrative authority. Where the order smacks of arbitrariness and seems to be motivated by extraneous considerations it shall be quashed by the Court.

4 Administrative discretion and class analysis

This aims to scrutinize the issue of discretionary application of laws and policies and its effects on the poor and the disadvantaged. Across the African continent, criminal justice systems are inundated with cases involving people charged with outdated, colonial era petty offences that pose little threat to public safety. Laws against loitering, being a 'rogue or a vagabond', or having no 'ostensible means of assistance', amongst others are used to target the poor, minorities, and marginalized groups. Others discriminate against people with disabilities, giving broad powers to police to detain anyone perceived of being of 'unsound mind' or found 'wandering at large'. While some of these laws actively penalize people based on society's biases, others serve to fill gaps in places where there is a lack of social services. In these situations, the criminal justice system steps in, incarcerating people for non-criminal behavior or for behavior associated with poverty, substance use or disability.

4.1 Petty offences

In late 2017, the African Commission on Human and Peoples' Rights (ACHPR) formally adopted the 'Guidelines on Decriminalization of Petty Offences in Africa' thereby creating a clear roadmap for Member States of the African Union to repeal these outdated laws. These Guidelines was launched on the 25th of October 2018 at the 63rd Ordinary Session of the ACHPR held in Banjul, The Gambia. The ACHPR principles on the Decriminalisation of Petty Offences in Africa, call upon State Parties to: decriminalise certain petty offences; consider alternatives to arrest and detention; address the root causes of poverty and other marginalization; and implement the ACHPR principles.

Petty Offences are 'minor offences for which the punishment is prescribed by law to carry a warning, community service, a low value fine or short term of imprisonment, often for failure to pay the fine. Examples include but not limited to, certain nuisance-related offences, offences created through certain by-laws aimed at controlling public nuisances, and certain laws criminalising informal commercial activities, such as hawking and vending'.[10] There is increasing evidence that mainly poor and marginalized people, such as the homeless, street children, sex workers, street vendors, ethnic minorities, refugees and persons with psychosocial and intellectual disabilities are the most hurt by these laws. The overall impression is that petty offences laws are used to target people regarded as 'undesirable' and 'unwanted', not because they pose a threat (or more threat) to public safety, but rather because they are powerless and 'do not belong'.

4.2 Poverty

Findings from a recent Nigerian Prison Survey[11] which focused on assessing the socio-economic characteristics of prisoners and their families, and the impact of imprisonment on the prisoner, prisoners' family and the prison service, provide some information on strategies for effectively addressing problems relating to the administration of the criminal justice system in Nigeria especially as it relates to overuse of imprisonment. The findings of the research conducted in three States (Kano, Lagos and Enugu) indicate that there is a strong nexus between poverty and imprisonment. Most of the prisoners were poor, with low education and employment status and they earned little, prior to their incarceration. The survey findings indicate that prisoners were more likely to have little or no education and poor employment level. Most of them were from poor backgrounds as reflected in the

10 Pettyoffences.org (accessed 27/3/2023).

11 Conducted in 2017 by the Nigeria Prison Service and PRAWA with the funding support of the Foreign and Commonwealth Office of the British Government. This relates to Vol. 3 of the Prison Survey titled 'Socio-economic characteristics of Prisoners and Impact of Imprisonment in Nigeria'.

level of education and type/status of employment of their parents. The table below shows some of the findings of the Prison Survey:

Table 1

Highest level of education	PRISONS		
	Enugu Maximum	**Kano Central**	**Ikoyi**
No formal education	140(10.61%)	213(18.13%)	171(10.47%)
Primary school	345(26.14%)	234(19.91%)	350(21.42%)
Junior Secondary	235(17.80%)	154(13.11%	209(12.79%)
Senior Secondary	465(35.23%)	317(26.98%)	624(38.19%)
Tertiary education	111(8.41%)	85(7.23%)	244(14.94%)
Others	24(1.82%)	172(14.64%)	36(2.20%)
Total	1320(100%)	1175(100%)	1634(100%)

Source: Prisoners' Self Report Questionnaires (SRQ) March 2017.

Also, the research shows that the monthly income of the respondents indicates that a large majority of the sampled inmates had a low income. Of the prisoners interviewed in the census, about 76% had a monthly income of 50,000 naira[12] or less. Inmates who earned a monthly income of over N500,000 constituted only 1.67% of the total respondents. In fact, 16.7% earned 10,000 naira or less per month which is 333 naira per day or less (0.9 cents per day using the September 2017 exchange rate and 0.6 cents using January 2017 exchange rate). This explains the reason that the majority of the inmates were unable to employ lawyers as indicated in their responses. Thus, the majority of the inmates can be described as poor.

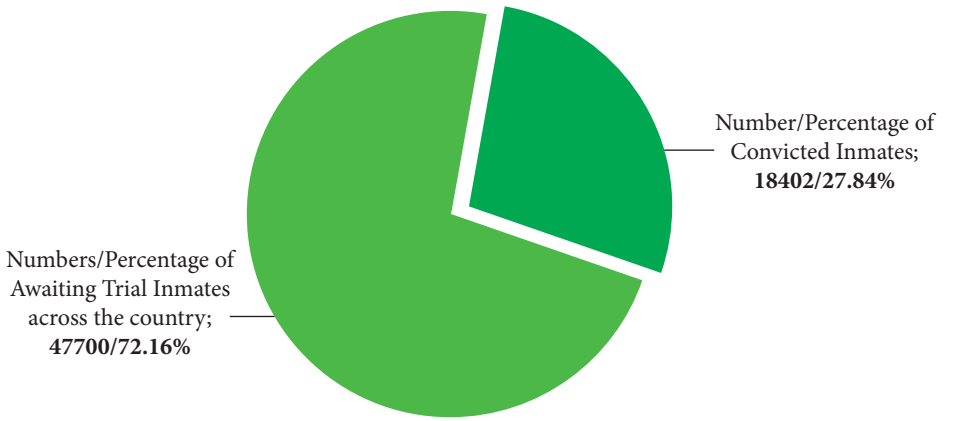
4.3 Discussion

Perhaps a look at the court records and prison statistics of other jurisdictions may indicate a similar trend. Therefore, in providing and applying administrative discretions in sentencing, an attempt should be made to eliminate or at least reduce the number of cases that indicate discrimination against a given class of people. This exercise will further contribute to the reduction of prison overcrowding which has become a persistent problem in the criminal justice administration. Statistics (as at end May 2019) from the Nigerian Prison Services (as it then was called) website indicate that the total number of those under the roofs of all the prisons in Nigeria is 73,248 out of whom only 23,373 (32%) have

12 1 USD was exchanged for 560 Naira as at January 2017 and 360 as at September 2017.

been tried and convicted and 49,875 (68%) are awaiting trial.[13] With regards to 2020, data[14] provided by the Nigeria Correctional Service as at May 11th, 2020, indicated that the total lockup for the country was 66,102 inmates. From this total lockup, 72.16% of this number represented Awaiting Trial Inmates (ATI) while 18,402, representing 27.84%, is the number of convicted persons. Looking at the geopolitical zones, it was observed that there were more convictions in the Northern region of Nigeria compared to the Southern region, with the South-East depicting less conviction and over 80% of ATI. This could also mean that inmates spend more time in correction centers across the Southern regions with South-East at peak. The North-East and North-Central zones show more conviction with less ATIs. With R^2=0.722 (72.2%) shows that the proportion of the variance in the dependent variable almost accurate (72.16%).

Figure 1 Awaiting Trial Inmates and convicted inmates across Nigeria



13 See https://www.vanguardngr.com/2019/06/congestion-in-nigerian-prisons/.

14 Data obtained from the *Data and Strategy Series on Corrections* developed by PRAWA and NCoS, April 2020.

Figure 2 ATI and convicts across the federation

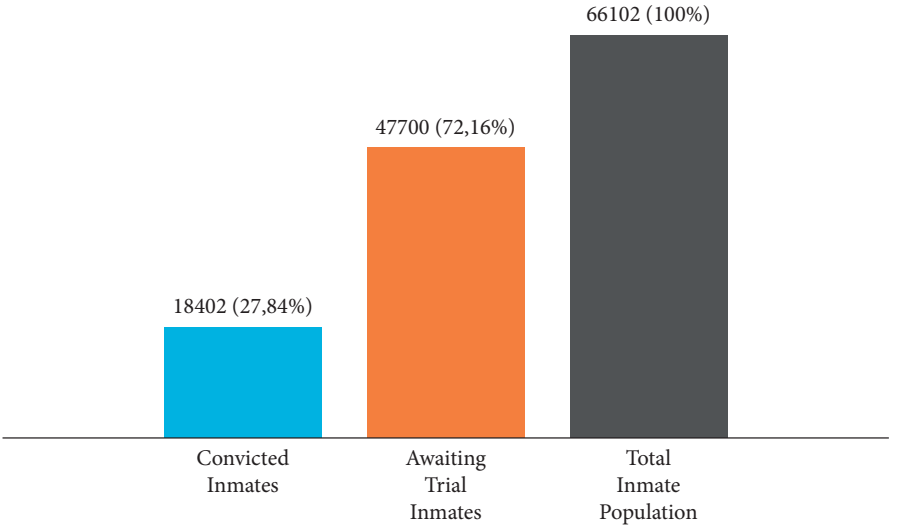


Figure 3 Number of male and female inmates in Nigeria as at May 11th, 2020

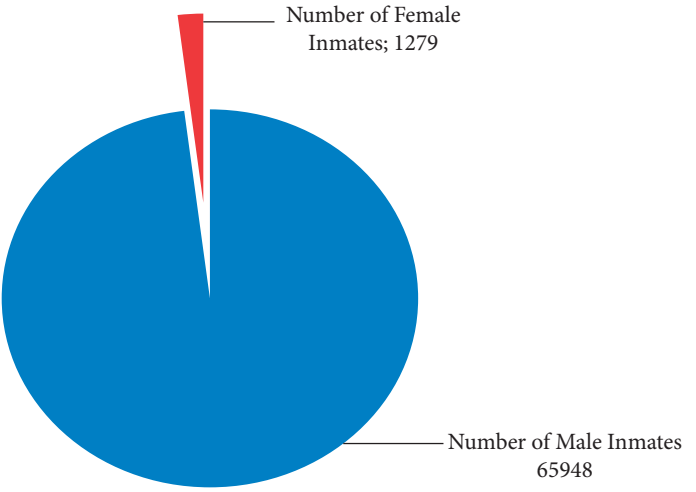


Figure 4 Awaiting Trial Inmates

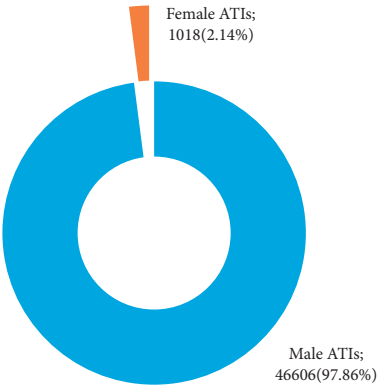


Figure 5 Linear progression between the ATI and convicted

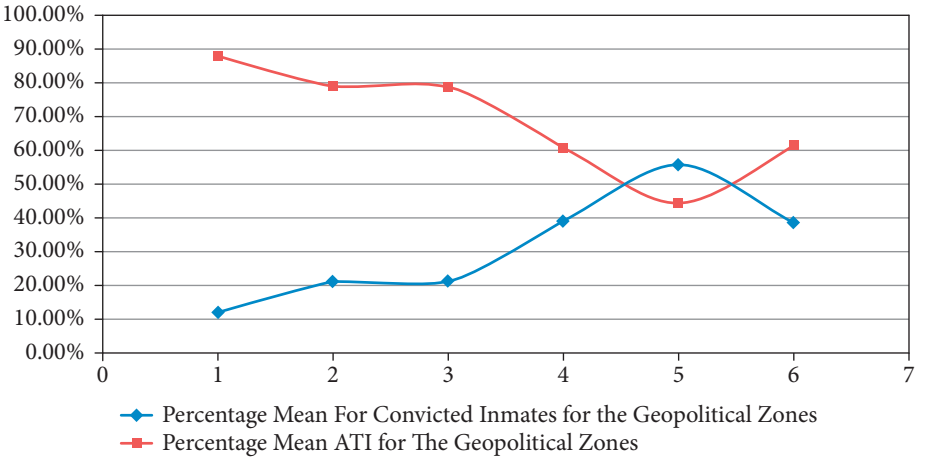
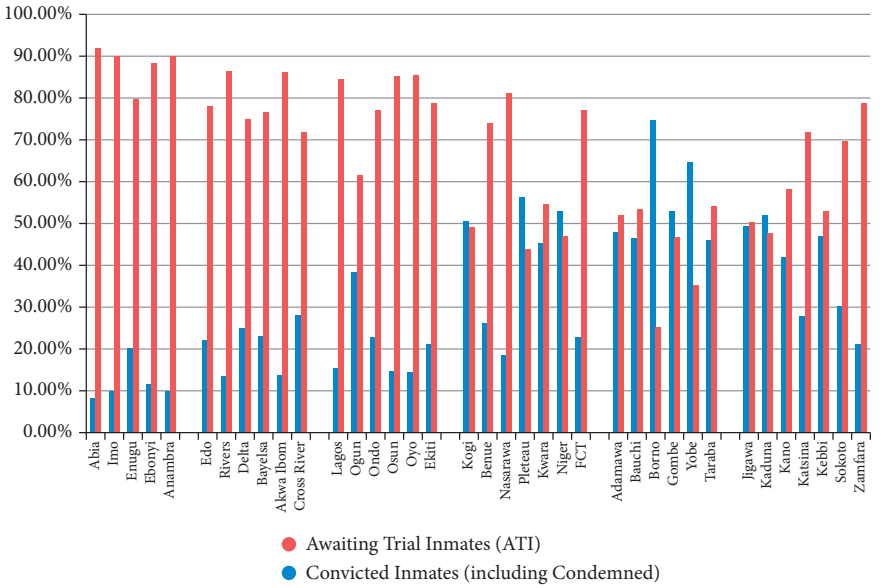


Figure 6 Percentage of convicts compared to Awaiting Trials Inmates in all the correctional centers in Nigeria



5 Administrative discretion and impact on the prisons/ correctional centers designated capacities

Every prison/correctional center has a designated capacity of persons to hold. This applies irrespective of whether the facility is using economic or developmental resources of the country. It is important to regularly assess if the inmate population of every prison/ detention center is within the designated capacity. See below recent statistics from Nigeria as at 1st March 2021[15] assessing this:

15 I.G Igbokwe and U.R Agomoh, Data and Strategy Series Vol. 2, No. 1, PRAWA: Lagos (2021).

Figure 7 National Outlook: custodial capacities vs total lockup in all states of Nigeria

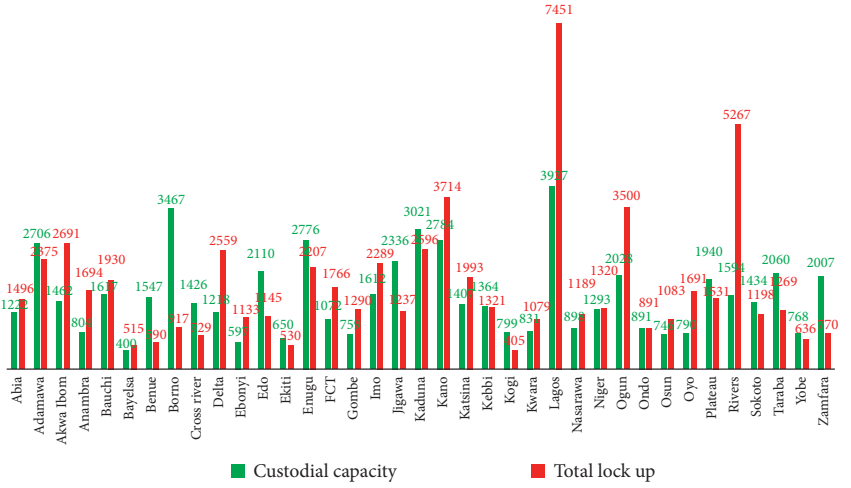


Figure 8 National Outlook: disparity between custodial centre capacities and their lockups

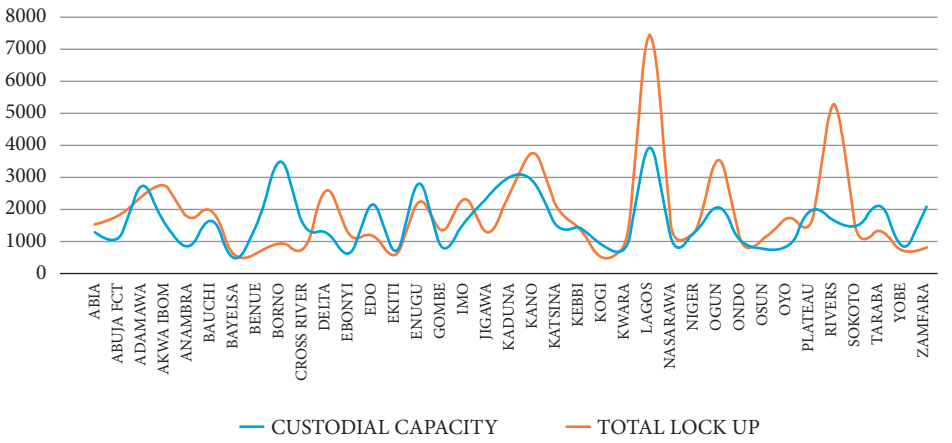


Figure 9 National outlook: national demographics of custodial centres capacity and total number of lockup as at March 1st, 2021

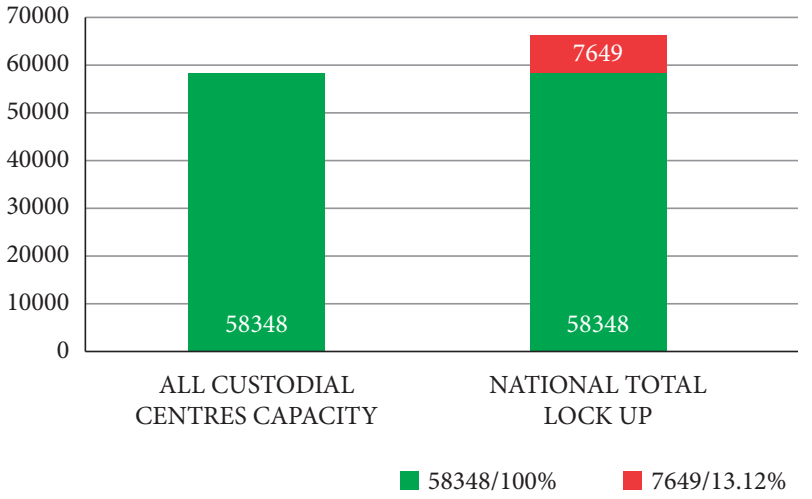
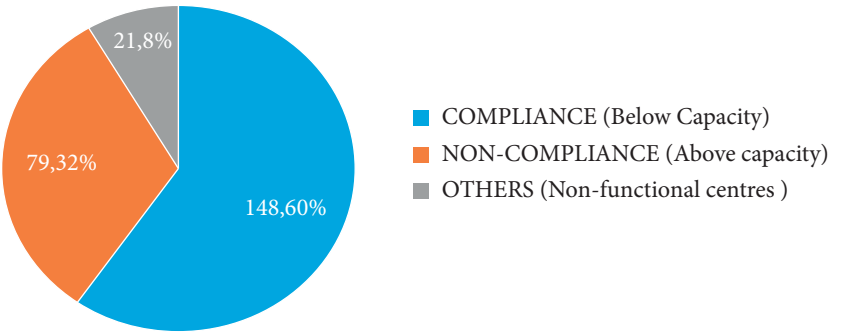


Figure 10 National outlook: Nigeria's correctional custodial centres compliance and non compliance to section 12 (4) (12) of the NCS Act 2019



When the total number of inmates (the total inmate population) exceeds the designated capacity of a facility, there are negative impacts on the infrastructure and services provided for in the facility as well as other negative consequences. To effectively address this, there is a need to establish a sustainable and institutionalized process of controlling the inflow into prisons/correctional centers, the duration in custody and the rate of exits of inmates in custody. In an attempt to address this, some jurisdictions have incorporated the application of administrative discretion to control these processes in their legislation and practices. One of such legislations is the Nigerian Correctional Service Act 2019. Section 2(1)(d) states that one of the objectives of the Act is to 'establish institutional, systemic and sustainable mechanisms to address the high number of persons awaiting trial.' Further, section 12(4) states that:

> Where the Custodial Centre has exceeded its capacity, the State Controller shall within a period not exceeding one week, notify the –
> a. Chief Judge of the State
> b. The Attorney-General of the State
> c. Prerogative of Mercy Committee
> d. State Criminal Justice Committee; and
> e. Any other relevant body

Section 12(5) states that:

> With regard to the Federal Capital Territory, the Controller shall notify the Attorney-General of the Federation[16] and Chief Judge of the Federal Capital Territory.

Section 12(6) states that:

> The Controller-General of the Correctional Service shall notify the Attorney-General of the Federation and the Chief Justice of Nigeria about the Correctional Centers in the Country.

16 This is because for the Federal Capital Territory there is no State Attorney – General thus the responsibilities lie with the Attorney-General of the Federation (AGF) who reside in Abuja in the Federal Capital Territory which is the capital of the country.

It is important to note that certain interventions are expected by the officers and institutions notified under sections 12(4), 12(5) and 12(6) to address this the over-population in the designated facilities within a given timeline, failure of which will attract certain consequences. These are stated as follows:

> Upon receipt of the notification referred to in subsection (4), the notified body shall, within a period not exceeding three months, take necessary steps to rectify overcrowding.[17]
>
> Without prejudice to subsection (4), the State Controller of Correctional Service in conjunction with the superintendent shall have the power to reject more intakes of inmates where it is apparent that the Correctional Centre in question is filled to capacity.[18]
>
> A State Controller of Correctional Service shall be sanctioned if he fails to notify the relevant bodies when the Custodial Centre exceeds full capacity within the stipulated time frame as stated in subsection (4).[19]
>
> A Superintendent who fails or refuses to observe the procedure as stated in subsection (4) by continuing to accept inmates after the expiration of the notification timeline shall be sanctioned.[20]

Section 12(10) indicated that the criteria to be considered for the release of inmates or diversion of inmates to non-custodial centres may include:

a. Inmates sentenced to three years and above with less than six months to the completion of their sentence
b. Inmates charged, convicted or sentenced for minor offences
c. Inmates with civil cases; and
d. Any other criteria as may be determined by the Chief Judge or the Prerogative of Mercy Committee.

It is necessary that these provisions are complied with for their intended impact to be felt. Examining the impact of application of judicial discretion in relation to the review of cases in prison custody and effecting releases, the opportunities these portrayed were made evident. For example, in the light of the Covid-19 pandemic, coordinated efforts have been made by various key stakeholders and actors in the criminal justice administration

17 Section 12(7) of the Nigerian Correctional Service Act 2019.
18 Ibid. Section 12(8).
19 Ibid. Section 12(11).
20 Ibid. Section 12(12).

across the states and the federal capital territory to implement decongestion directives and an advisory (in relation to federal and state offences respectively).

The maiden edition of the Data and Strategy Series on Corrections contains information on the number of inmates released across the various states of the federation and the Federal Capital Territory as at April 30, 2020, and the analysis of this information according to other demographics. The analysis provides information on the impact of the exercise on the prison population and the potential of this helping towards decongestion of the correctional centers and promoting opportunity for social distancing. It also provides information on the number of persons released in relation to the various states and Geopolitical zones. The data shows that as at April 30th, 2020 only twenty-six (26) states and Federal Capital Territory effected the release directive/advisory. Abia, Imo, Enugu, Gombe, Zamfara, Bayelsa, Niger, Adamawa, Taraba and Jigawa states are yet to effect the directive/advisory. All the states in South-West region have complied with the directive/advisory. Percentage of those released in relation to the total inmate population of the country is 4.03%, while that of Lagos is 2.38%.

Figure 11 National outlook of released and incarcerated persons as at April 30th, 2020

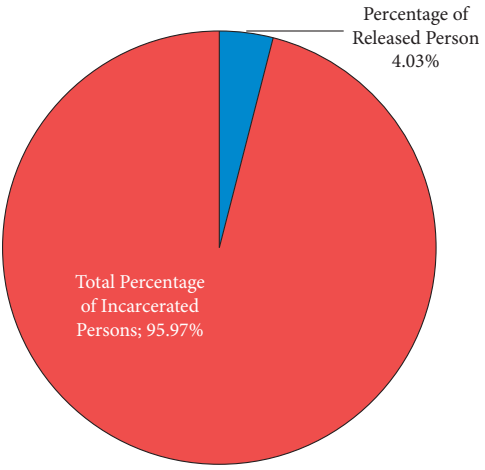


Figure 12 Number of released persons

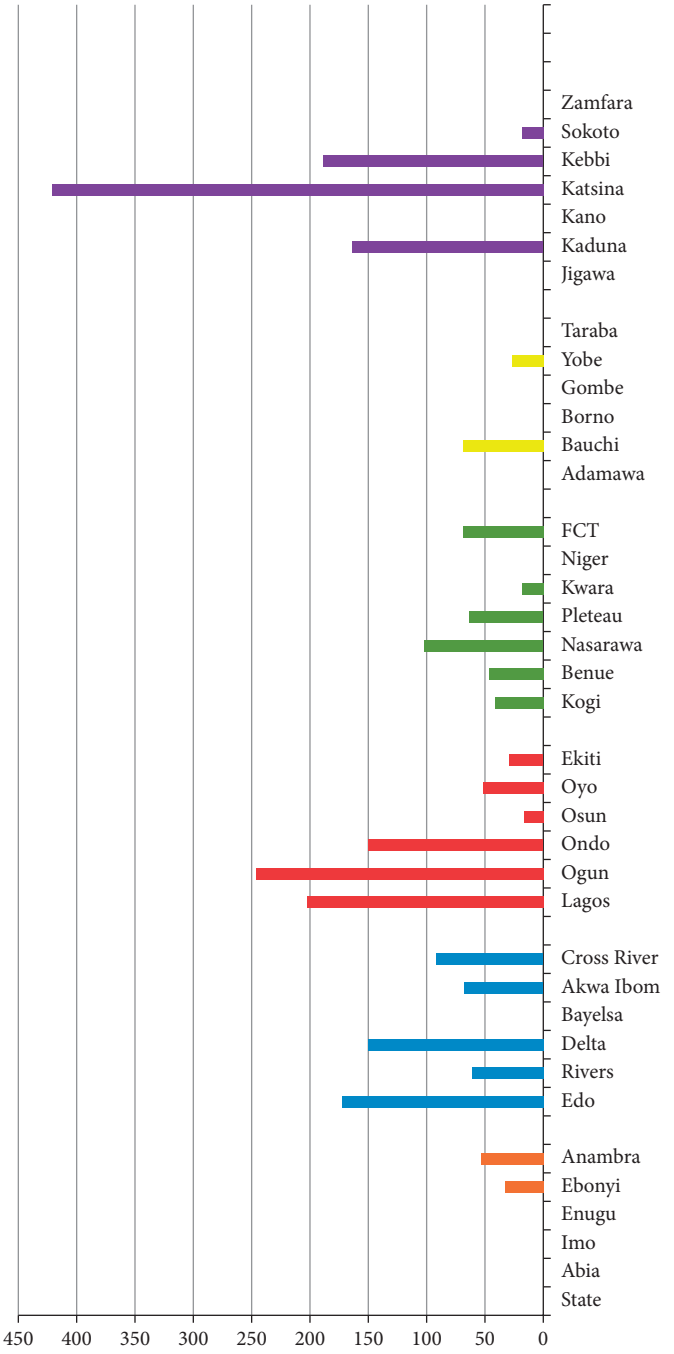


Figure 13 Number of released persons

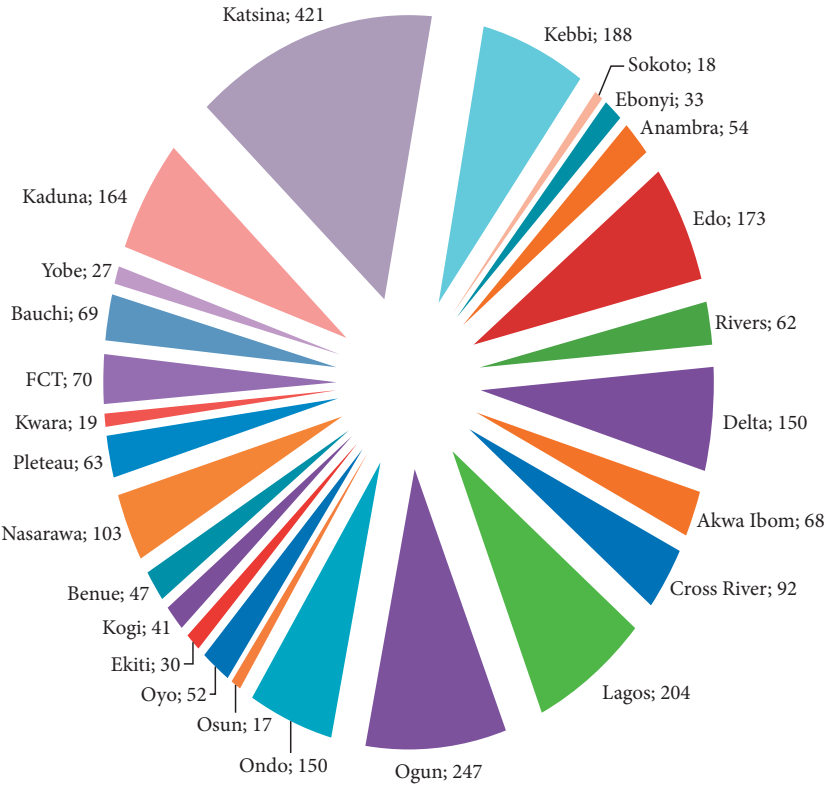
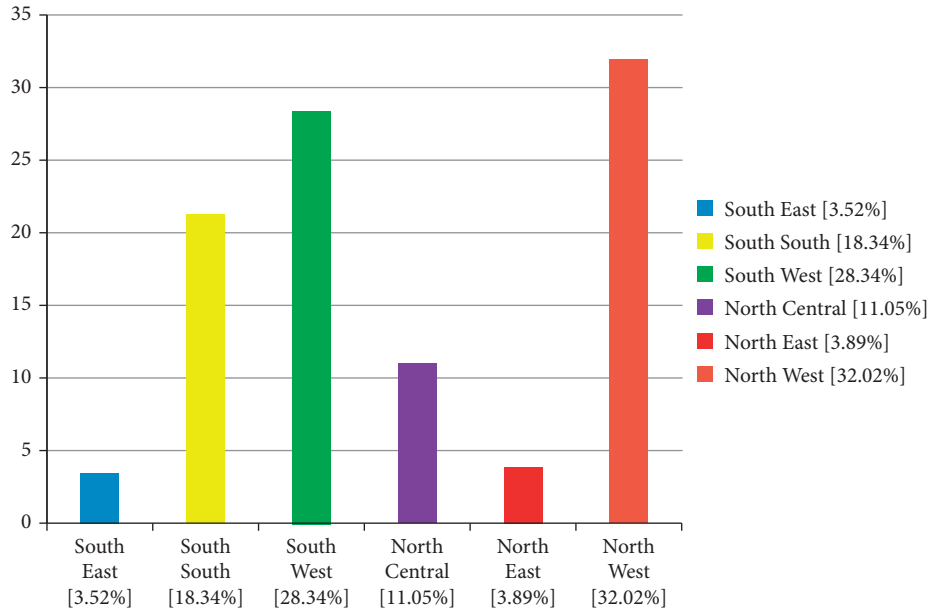


Figure 14



6 Administrative discretion, threats and opportunities reducing prison congestion, and improving rehabilitation and fairness

In examining the opportunities for rehabilitation and fairness in the exercise of administrative discretion in the execution of sentences, this will bring us to look at indeterminate versus determinate prison sentences. A determinate sentence is a prison sentence that has a defined length and cannot be changed by a parole board or other agency. For example, a sentence of six months imprisonment is determinate, because the prisoner will spend six months in prison custody (minus time off for good behavior, work-release, or other alternatives to in-custody time, when applicable). An indeterminate sentence is one that consists of a range of years, for example: "20 years to life." With an indeterminate sentence, there is always a minimum term (which, again, may be lessened by credits), but the release date, if any, is uncertain. It will be determined by a parole board when it periodically reviews the case. The State parole board holds hearings that determine when, during the range of the sentence, the convicted person will be eligible for parole.

Indeterminate sentences may be handed down for felony convictions, where punishment includes incarceration in prison. They are not generally used when the crime is less serious. The principle behind indeterminate sentences is the hope that prison will rehabilitate some offenders, and that different people respond very differently to punishment. Prison officials generally like indeterminate sentencing because the prospect of earlier release gives prisoners an incentive to behave while incarcerated. With indeterminate sentencing, the goal is that offenders who show the most progress will be paroled closer to the minimum term than those who do not. The decision takes into account the individual offender's crime (including mitigating or aggravating circumstances), criminal history, conduct while in prison, and efforts toward rehabilitation. The victims of the offender's crime may also submit statements. There is, at least in theory, a careful and specific evaluation before the offender is released back to the community.

The problem with indeterminate sentencing, according to its critics, is that it puts too much power into the hands of the parole board, leading to arbitrary and discriminatory results. They charge that too often, minorities and prisoners without connections receive overly harsh decisions from parole boards, while less deserving offenders are released early. Determinate sentencing began to spread widely during the 1970s and 1980s and is now the rule in many places. It is often seen as a "tough on crime" system because of its mandatory minimum sentences. Its proponents claim that it also leads to greater fairness, because when the legislature sets a determinate sentence and judges have little discretion, people who commit very similar crimes receive very similar sentences. Indeterminate sentencing, however, is making a comeback in a time of prison overcrowding and lower crime rates. More room for judicial or parole board discretion is being let back into the sentencing systems of many states, especially for drug crimes, where rehabilitation is seen as a reasonable and attainable outcome for many convicted offenders.

7 Conclusion

This paper shows that the application of administrative discretion in sentencing and in the execution of sentences does present challenges. The act of finding a right balance between justice, appropriateness and consistency and between the interest of the victims, offender and the society is difficult but key. Understanding the spirit behind every law and the evil that the law intends to cure as intended by its drafters will go a long way in giving us some guidance on how to navigate this delicate process.

The authority and power of the judiciary is at the heart of the underlining principles of independence of the judiciary. The role of the legislature and that of the executive in the determination and control of the discretionary powers of the judiciary in sentencing need to be critically assessed, monitored and controlled. Application of administrative discretion

to sentencing can be argued as presenting an executive process to effect such control over the judiciary. Therefore, it requires proper oversight and regular review. The outcome of such review can propel legislative reforms as may be found needful. A healthy checks-and-balancing process between the executive, legislature, and judiciary is also recommended. In all, there is the need to keep focus of the overall interest of the society. In this spirit, the law should serve the interest of the people and not the other way – having the people serve the interest of the law or sacrificed on the altar of the law / legality.

Considering the need to ensure the right balance regarding the interest of the society, victims and offenders, and that sentences are just and appropriate, clear and effective oversights are recommended with regards to the provision and application of administrative discretion in the execution of sentences. In addition, it is recommended that to facilitate fair criminal justice systems, the legislators, judiciary, prison administrators/officers, and other relevant stakeholders should ensure that the poor, vulnerable and marginalized are not doubly discriminated against by the nature and application of the law regarding the use of discretionary powers in sentencing and in the execution of sentences in their respective jurisdictions.

Part III
National Reports

3ième Partie
Rapports nationaux

Legality, non-arbitrariness and judicial and administrative discretion in sentencing and enforcement of sentences in the Argentine Republic*

*Roberto Patricio Ortenzi and Alejo García Basalo***

1 Introduction

In the Argentine Republic, given the federal, republican and representative system of government adopted under Section 1 of the Argentine Federal Constitution, the enactment of the civil, commercial, criminal, mining, and labour and social security codes, as well as of general laws applicable throughout the country, lies within the powers of the Federal Congress only (Section 75(12)).[1] This means that these bodies of regulations apply to the whole territory of the country. On the other hand, the enactment of procedural rules lies within the powers of the provinces (and of the City of Buenos Aires), which, in exercising such power, are entitled to pass their own codes of procedure and other local laws. Based on time, extension, and specificity reasons, this work will only focus on the federal jurisdiction; however, it should be noted that there are no significant differences in the regulation of criminal procedural matters within the federal jurisdiction and the jurisdictions of the rest of the provinces and the City of Buenos Aires.

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1 See the previous report: Julio E. Aparicio & Roberto P. Ortenzi, 'Pre-trial detention in the Argentine Republic', in: P.H.P.H.M.C. van Kempen (ed), *Pre-trial Detention. Human Rights, Criminal Procedural Law and Penitentiary Law, Comparative Law/Détention avant jugement. Droits de l'homme, droit de la procédure penale et droit pénitentiaire, droit compare*, Cambridge: Intersentia, 2012, p. 225-239; Julio E. Aparicio, Roberto P. Ortenzi & Alejo García Basalo, 'Women in Prison in Argentina', in: P.H.P.H.M.C. van Kempen & Maartje Krabbe (eds), *Women in Prison. The Bangkok Rules and Beyond/Femmes en prison. Les Règles de Bangkok et au-delà*, Cambridge: Intersentia, 2017, p. 177-204; Roberto P. Ortenzi & Alejo García Basalo, 'Overuse in the Criminal Justice System in Argentina', in: P.H.P.H.M.C. van Kempen & M. Jendly (eds), *Overuse in the Criminal Justice System/Le recours excessif au système de justice pénale*, Cambridge: Intersentia, 2019, p. 253-273.

In this regard, Section 5 of the Argentine Federal Constitution sets forth:

> Each province shall enact its own constitution under the republican, representative system, in accordance with the principles, declarations, and guarantees of the Federal Constitution, ensuring its administration of justice, municipal regime, and elementary education. Under these conditions, the Federal Government shall guarantee each province the full enjoyment and use of its institutions.

Within this legal framework, the provinces and the City of Buenos Aires are to adjust their constitutions and other regulations to the provisions of the Federal Constitution and international instruments with constitutional rank (Sections 5 and 31). Concerning the latter, Section 75(22) provides:

> Treaties and concordats rank higher than laws. The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and the Optional Protocol thereto; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Women; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; as they may be in effect from time to time, have constitutional rank, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognised herein…In order to enjoy constitutional status, all other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House after their approval by Congress.

In analyzing the topic proposed, we will look at the correspondence between Argentina's legislation and these international instruments.

In this chapter, the Argentine Supreme Court of Justice – the highest court in the country – will be referred to as CSJN (for its Spanish acronym); the Argentine Federal Constitution will be referred to as FC; the Inter-American Court of Human Rights will be referred to as IACtHR; the Federal Civil and Commercial Code will be referred to as

FCCC[2]; the Argentine Criminal Code will be referred to as CC[3]; the new Federal Code of Criminal Procedure will be referred to as FCCP[4]; Law 24660 on the Enforcement of Custodial Sentences will be referred to as 'Law 24660'[5]; the Argentine Official Gazette will be referred to as BO (for its Spanish acronym); and the Inter-American Commission on Human Rights will be referred to as IACHR. The international instruments incorporated into the FC and referred to in this chapter are the following: the American Convention on Human Rights (ACHR)[6]; the American Declaration of the Rights and Duties of Man (ADRDM)[7]; the Universal Declaration of Human Rights of 1948 (UDHR)[8]; the International Covenant on Economic, Social and Cultural Rights (ICESCR)[9]; and the International Covenant on Civil and Political Rights (ICCPR)[10].

2 The principle of legality in constitutional and human rights law

Following Argentine constitutional-law scholar Gregorio Badeni[11], we can assert that legality, reasonability and equality are fundamental conditions to which the validity of any limit on constitutional freedoms shall be subject. For the purposes of this work, we will understand the *principle of legality*, which is 'the most distinctive feature of the rule of law', as the exclusive ruling of legal provisions, rather than the will of rulers or – we shall add – of any pressure group. The principle of legality does not refer to formally enacted statutes, but to any kind of legal regulation, including statutes, decrees, resolutions and ordinances, and it safeguards legal certainty for individuals. For in order to impose punishments on these individuals, there must be a pre-existing law to that effect. According to criminal-law scholar Edgardo Donna[12], the principle of legality operates as a safeguard for individuals relative to the State, and any law providing for it must be enacted by Congress.

The principle of legality, as well as the rights and safeguards resulting therefrom, are fully guaranteed for individuals under the FC. In this regard, Section 18 of the FC establishes that:

2 Law 26994, as amended by Law 27077.
3 Law 11179, as amended.
4 Laws 27063, 27272, 27482 and consolidated text by Decree 118/19.
5 Law 24660 on the Enforcement of Custodial Sentences, as amended.
6 Organization of American States, American Convention on Human Rights, 'Pact of San Jose, Costa Rica', 1969.
7 Organization of American States, American Declaration of the Rights and Duties of Man, 1948.
8 United Nations, Universal Declaration of Human Rights, 1948.
9 United Nations, International Covenant on Economic, Social and Cultural Rights, 1966.
10 United Nations, International Covenant on Civil and Political Rights, 1966.
11 Gregorio Badeni, *Tratado de Derecho Constitucional*, Vol. I, Buenos Aires: La Ley, 2004.
12 Edgardo A. Donna, *Derecho Penal. Parte General*, Vol. I, Santa Fe: Rubinzal-Culzoni, 2008.

> No inhabitant of the Nation may be punished without previous trial based on a law enacted before the act that gives rise to the process, nor tried by special committees, nor removed from the judges appointed by law before the act for which he/she is tried. Nobody may be compelled to testify against himself/herself, nor be arrested except by virtue of a written warrant issued by a competent authority. The domicile may not be violated, as well as the written correspondence and private papers, and a law shall determine in which cases and for what reasons their search and occupation shall be allowed. Capital punishment for political causes, any kind of tortures and whipping, are forever abolished.

In addition to the limitations relative to physical punishment, there are also constitutional limitations to monetary penalties, which in light of the provisions of Section 17 of the FC shall not be confiscatory.

According to Badeni[13], this principle is also enshrined in Section 19 of the FC, which clearly establishes the limit to the State's powers over the inhabitants of the Nation by setting forth that:

> The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges. No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit.

In addition, some legal scholars state that the principle of legality is supplemented by the principle that *anything which is not forbidden is allowed*, enshrined in Section 19 of the FC. In our view, the first part of this section refers to the principle that anything which is not forbidden is allowed, while the last paragraph refers to the principle of legality. This constitutional principle is correlated to Sections 18 and 19 of the UDHR, which protect freedom of thought, conscience and religion, and freedom of opinion and expression, respectively.

Also, in connection with the principle of legality, under Section 14 of the FC, the exercise of constitutional rights shall be regulated by law. In turn, Section 28 sets forth that:

> The principles, guarantees and rights recognised in the preceding sections shall not be modified by the laws that regulate their enforcement.

13 Gregorio Badeni, *op. cit*.

And Section 29 establishes that:

> Congress may not vest on the Federal Executive – nor may the provincial legislatures vest on the provincial governors – extraordinary powers or total public authority; it may not grant acts of submission or supremacy whereby the life, honour, or wealth of the Argentine people will be at the mercy of governments or any person whatsoever. Any acts of this nature shall be utterly void, and shall render those who formulate them, consent to them or sign them, liable to be convicted as infamous traitors to the Nation.

As already said, under Section 1 of the FC, the Argentine Republic has a federal, republican and representative system of government. The structure and the contents of the FC provide for a system of separation of powers dividing the government into branches, which is consistent with a republican system of government. Thus, Congress holds legislative powers, the Judiciary holds judicial powers and the Executive holds administrative powers. Nevertheless, the Executive may exceptionally issue rules of a legislative nature, in the form of two different types of regulations admitted under the FC. Under Section 76 of the FC, Congress cannot delegate legislative powers to the Executive

> save for issues concerning administration and public emergency, with a specified term for their exercise and according to the delegating conditions established by Congress.

This permitted exceptional delegation materialises in the so-called 'delegated decrees'. Furthermore, Section 99(3) of the FC allows the issue of the so-called 'necessity and urgency decrees':

> When due to exceptional circumstances the ordinary procedures foreseen by this Constitution for the enactment of laws are impossible to be followed, and when rules are not about criminal issues, taxation, electoral matters or the system of political parties, [the Executive] may issue decrees on grounds of necessity and urgency, which shall be decided by a general agreement of ministers who shall execute them together with the Chief of the Ministerial Cabinet.

It should be pointed out that both these types of decrees require later examination in accordance with the procedure provided for in the FC and Law 26122.

In its first part, the FC outlines some types of crimes, in an effort to protect legitimacy. Under Section 15, the slaves that were still in existence at the time the Constitution entered

into force, were declared to be free. Those executing contracts for the purchase and sale of persons, as well as the notaries and officers authorizing such contracts, were assigned criminal liability. Equality before the law and the freedom of slaves were proclaimed in Section 16 of the FC, and the same was later done in the UDHR (Articles 1-4, 7 and 10, and similar articles) and the ACHR (Articles 6, 7(1), 24 and similar articles). Section 32 of the FC forbids the Federal Congress from enacting laws restricting the freedom of the press or establishing federal jurisdiction over it. Along the same lines, freedom of opinion and expression are safeguarded under Article 19 of the UDHR and freedom of speech is protected under Article IV of the ADRDM.

Section 22 of the FC establishes the crime of sedition. Section 29 forbids the Federal Congress and provincial legislatures from vesting on the Federal Executive, the provincial governors, respectively, the total public authority or granting submissions or supremacies whereby the life, honour or wealth of the Argentine people be left at the mercy of a certain government or person, and these acts are declared to be utterly void. Section 119 of the FC deals with the crime of treason against the Nation and Section 127 establishes that no province shall have the power to declare or make war against another province and that conflicts between provinces shall be settled by the CSJN.

As regards interpretation of the law in general, the *pro homine* (or *pro personae*) principle has constitutional rank in the Argentine legal system because it is recognised in international instruments on human rights which were made a part of the FC through Section 75(22). Consequently, using this principle is mandatory for courts when interpreting the law. Based on this rule, the regulation that is most favourable to the individual, his/her freedom and rights shall be applied, regardless of its origin.[14] This principle is also enshrined in the ACHR (Articles 5(1)(2)) and the ICESCR (Articles 5(1)(2)).The CSJN has decided several cases in connection with this topic and held that the interpretation of the law conferring more rights to the individual relative to the power of the State is to prevail. This has been set forth in cases *Cardozo*[15] and *Acosta*[16], among many others. In turn, the IACtHR has rendered several decisions stating that the rule that is most favourable to the individual is to prevail.

Below is explained how the principle of legality and its derivations have been made a part of the Argentine CC, which is applicable nationwide. The CC is divided into two books, the first of which is entitled 'General Provisions' and the second of which is entitled 'Crimes', and they in turn are divided into titles, which are made up of chapters. It also has a section with supplementary provisions.

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14 Germán Bidart Campos, *Tratado Elemental de Derecho Constitucional Argentino*, Vol. 1 A, Buenos Aires: Ediar, 2000.

15 CSJN, Judgment of 20 June 2006, *Cardozo, Gustavo Fabián on Petition for Cassation*, Fallos 329:2265.

16 CSJN, Judgment of 23 April 2008, Acosta, Alejandro Esteban on Offence under Section 14, paragraph 1 of Law 23737, Fallos 331:858.

The principle of legality as regards criminal matters is recognised in the CC in connection with the limits to the *ius puniendi*, which is the State's power to punish criminal offenders. A prerequisite for punishment is that the crime be statutorily defined before its commission, that is, the action must perfectly fit an already existing definition of a crime in order for the relevant punishment to be applicable. If this was not the case, the Latin maxim *nullum crimen, nulla poena sine praevia lege* (there shall be no crime or punishment without a pre-existing criminal law) applies. Needless to say, the description of the crime shall be in writing and shall establish strict limits, since analogy is not admitted in criminal law. The requirement of a previously-existing law was included in the ACHR (Article 9 – Freedom from Ex Post Facto Law) and in the UDHR (Article 11(2)).

In Book II of the CC, actions that are considered criminal offences are specifically defined. This serves as a guarantee for individuals, since in order for an action to be considered a criminal offence and, thus, to be punishable, it must necessarily have all the elements turning it into a criminal offence. Under the so-called "theory of crime", of German origin, the criminal act must be a typical, anti-juridical and guilty action according to the rules of both the general and the special parts of the CC. A *criminal type* is the statutory definition of an action that contradicts a rule, while describing an action as *typical* entails that the action actually fits the criminal type.

As explained by Carlos Creus[17], both the criminal type as a definition and the resulting description of an action as 'typical' function as limits to the scope of the *ius puniendi*, since actions which are not typical cannot be punished. This way, the criminal type serves as a safeguard for individuals. And these limiting and safeguarding functions are constitutionally regulated by the principle of legality, which is recognised in Section 18 of the FC and supplemented by the principle that anything which is not forbidden is allowed, enshrined in Section 19 of the FC, both of which make Argentine criminal law a system based on legality.

It has been established by the IACtHR that, in establishing criminal types, strict and unequivocal terms must be used to define in a clear way the punishable actions, thus fully recognizing the principle of legality. The CSJN has repeatedly held that "one of the most relevant safeguards is the one recognised under Section 18 of the FC when establishing that 'no inhabitant of the Nation may be punished without previous trial based on a law enacted before the act that gives rise to the process"[18].

As a consequence of the principle of legality, laws are applicable to the future, as set forth in Section 7 of the FCCC – our chief body of regulations –, which reads:

17 Carlos Creus, *Derecho penal. Parte general*, 5th Ed., Buenos Aires: Astrea, 2011.

18 Mariano Cúneo Libarona, Procedimiento Penal. Garantías Constitucionales en el Estado de Derecho, Buenos Aires: La Ley, 2011.

> From the time of their effectiveness, laws shall apply to the consequences of existing legal relationships and situations. Laws shall have no retroactive effect, whether they relate to public order or not, except as otherwise established. A retroactivity established by law shall not affect the rights protected by constitutional safeguards.

Regarding the exceptions to the principle of non-retroactivity and as a derivation of the principle of legality in the criminal field, Section 2 of the CC prescribes that the law that is most favourable to the criminal offender must be applied:

> If the law effective at the time of the commission of the crime is different from the law effective at the time of sentencing or in the meantime, the law most favourable to the criminal offender shall always be applied. If while the criminal offender is serving the sentence, a more favourable law is passed, the punishment shall be limited to that established by the latter law. In all of the cases covered by this section, the new law shall apply automatically.

As regards the scope of the notion of 'law' as mentioned in Section 2 of the CC, legal scholars have almost unanimously said that it does not exclusively refer to the most favourable law in the criminal field but to the most favourable law in general, since it also includes the cases when criminal law must be combined with laws of other fields. In this regard, it is usual for criminal legal provisions to be subject to provisions which are not of criminal nature and instead belong to other fields of the law (civil, commercial, administrative), but which are an integral part of the criminal type. Therefore, changes in these fields must also be considered for the purposes of retroactivity of the most favourable law.[19]

Concerning the exception to the principle of non-retroactivity, Section 3 of the CC establishes that:

> In computing the time spent in pre-trial detention, the law that is most favourable to the offender shall be separately applied.

At the international level, the retroactivity of the most favourable law has been recognised in Article 9 of the ACHR, last part of Article 11(2) of the UDHR and Article 15 of the ICCPR. In *Pelesur S.A.*[20], the CSJN restated its traditional opinion that "the effects of the

19 Sebastián Soler, *Derecho Penal Argentino*, Vol. 2, Buenos Aires: Tea, 1992.

20 CSJN, Judgment of December 10 1997, *Pelesur v. Office of the Undersecretary of the Merchant Navy*, P. 1619. XXXII. REX.

most favourable criminal law apply automatically, that is, even in the absence of a request by the party (Fallos 277:347 and Fallos 281:207)".

The CC does not provide for capital punishment and in Sections 144 *bis* and *ter* criminalizes cruelty, ill-treatment or harassment by public officials on individuals deprived of liberty. In turn, Law 24660 establishes specific rules about the treatment to be dispensed to criminal offenders deprived of liberty. All these regulations are a corollary of the provisions of Section 18 of the FC. The international instruments added to the FC also outlaw these actions. For example, the ADRDM (Article I and similar articles – right to life and personal security), the UDHR (Articles 3, 5 and similar articles), the ACHR (Articles 4, 5 and similar articles – right to life and right to personal integrity), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

3 Judicial discretion and procedural rights

Now we will analyse judicial discretion in criminal law. The requirement of a pre-existing law, the rigid structure of the criminal type and the resulting ban from using analogy operate as important limits to criminal judges' discretion. Thus, in the event that there were no regulations applicable to a specific case or if there were an excessive number of applicable regulations and as a consequence various interpretations thereof, the principle *nullum crimen, nulla poena sine praevia lege* or the solution that is most favourable to the offender shall be applied, depending on the case. Concerning the interpretation of court precedent, reasonableness is to prevail, in light of clarity, legal judgment and the expression of grounds, in order to prevent the decision from being arbitrary. Some legal scholars see the guidelines established in Section 41 of the CC for determining the applicable punishment as an admission of the use of judicial discretion; however, according to Horacio Días, this shall not be equated with mere personal judging.[21]

As regards the law of procedure, the FCCP – to be progressively implemented by the various jurisdictions – has fully recognised the principle of legality, established in Sections 18 and 19 (second part) of the FC, and the principle that anything which is not forbidden is allowed, established in Section 19 (first part) of the FC. All other constitutional rights and safeguards, as well as human rights principles established in international instruments with constitutional rank have also been fully recognised in the FCCP.

For the sake of brevity, in this work we are going to discuss the FCCP (as consolidated by Decree 118/2019), which is the one that will ultimately apply at the federal level. The

21 Horacio Días, Código Penal de la Nación Argentina Comentado. Parte General, Santa Fe: Rubinzal-Culzoni, 2018.

provisions of Book I, Title I protect the procedural principles and safeguards inherent in every person in a country based on the rule of law. As regards the requirement of *previous trial*, Section 1 establishes that:

> No person shall be sentenced without previous trial based on a law existing before occurrence of the facts giving rise to the trial, and such a trial shall be held in observance of the rights and safeguards established in the Federal Constitution, human rights international instruments and rules of this Code.

Section 2 sets forth that an adversarial system approach is adopted and consequently recognises the following principles and rules: the principle of equal treatment of the parties, the rule that the trial and procedures shall be mainly oral, the rule that the proceedings shall be public, the principle of *audi alteram partem*, the rule that all questions in the proceedings must be settled in one decision, the rule that the judge must be involved in all stages of the proceedings, and the rule that procedures must be simple, agile and speedy. It also establishes that hearings shall be public, except as otherwise provided for in the FCCP.

The *presumption of innocence* has been fully adopted in Section 3, which determines that evidence obtained in a legitimate way shall be required to rebut it. Section 4 establishes a guarantee against self-incrimination and that exercising this right may not be taken as an admission of facts or indication of guilt, and that any such admission or confession shall be made freely and shall be expressly consented by the accused. The *rule against double jeopardy* (a person cannot be tried twice for the same crime) was established in Section 5 and the *inviolability of the right to a defence* was recognised in Section 6. The *principle of the court with jurisdiction predetermined by law* was provided for in Section 7, and the requirements of *impartiality and independence* of judges and juries, in Section 8. Section 9, in turn, provides for the *separation of powers between judges and prosecutors*, and determines that judicial powers and authority shall not be delegated to subordinate officers or employees. As regards the *assessment of evidence*, Section 10 determines that it shall be based on reasoned judgment, that is, it shall be based on the rules of logic, scientific knowledge and the maxims of experience, and Section 11 establishes the principle of *in dubio pro reo*. The *rights of the victim* are recognised in Section 12 and the protection of the victim's *intimacy and privacy*, as well as the resulting rights, are established in Section 13. The requirement to make a *restrictive interpretation* of the legal provisions limiting personal freedoms or rights, as well as the *prohibition from using extensive interpretation and analogy* are enshrined in Section 14. The provisions of the FC about the prison system and the living conditions and treatment of prisoners are reflected in Section 15; Section 16 establishes the limits to restrictions to fundamental rights; and Section 17, the boundaries for the application of measures restricting liberty. According to

Section 18, judicial decisions shall be rendered within a reasonable term. Under Section 19, a judgment of acquittal or a sentence shall be final, and judges shall neither refrain from making nor delay a decision on the grounds of regulatory obscurity and ambiguity. Section 20 requires judicial decisions to be substantiated, that is, well-founded, and establishes specific requirements for such substantiation and for individual opinions in the case of multi-judge courts. Section 21 provides for the *right to appeal* a sentence before a different judge or court with broad powers to review. Section 22 determines that in the *resolution of conflicts*, judges and prosecutors shall seek to settle the issue "by giving preeminence to the solutions which are most favourable to the restoration of harmony between the parties and social peace". Section 23 deals with *citizen involvement* in the administration of criminal justice, in accordance with the provisions of Sections 24, 75(12) and 118 of the FC, and with the special law to be passed to that effect. Section 24 establishes that "when the criminal offence involves members of an indigenous people, their customs shall be taken into account".

These safeguards are in line with the provisions of the international instruments with constitutional rank. For example, the principle of the court with jurisdiction predetermined by law is included in the ACHR (Article 8(1)); the rights to be given a trial and to be accused based on a pre-existing law are recognised under the UDHR (Article 11(2)) and the ACHR (Article 9); the presumption of innocence, and the resulting principle of *in dubio pro reo*, in the ADRDM (Article XXVI), the UDHR (Article 11(1)) and the ACHR (Article 8(2)), among others.

The guarantees of inviolability of the right to a defence and due process of law are also protected by the FCCP in the sections which regulate the different stages of the proceedings, and also by the law governing release from prison, as a direct consequence of the provisions of Section 18 of the FC. This is in line with the provisions of the UDHR against arbitrariness (Articles 8, 9 and 11(1)); the provisions of the ACHR against arbitrariness (Article 7(3)) and its recognition of the accused's right to receive adequate information (Article 7(4)), to a hearing within reasonable time (Article 8) and to have prompt recourse to a court (Article 25); and the provisions of the ADRDM on due process of law (Article XXVI).

Concerning the principle of the most favourable law, courts have traditionally understood that it does not apply in the field of criminal procedure because procedural rules are governed by other principles mandating their immediate applicability – except if there was an express provision in the law to that effect or if immediate applicability would affect the validity of procedural acts which were completed and became final during the effectiveness of the repealed regulation. The CSJN has repeatedly decided that laws modifying jurisdiction, even if they failed to include a specific provision to the effect, shall

apply immediately to pending cases (Fallos 242:308[22] and Fallos 274:64[23], among others). On the other hand, Zaffaroni, Alagia and Slokar[24] are of the opinion that in the criminal field no distinction shall be made between substantive and procedural laws, because Section 18 of the FC does not make such a distinction. Esteban Righi and Alberto Fernández also advocate the retroactive application of criminal procedural law.[25]

As already pointed out, these procedural provisions are in keeping with the provisions concerning the most favourable law established at the international level in Article 9 of the ACHR, Article 11(2) last part of the UDHR and Article 15 of the ICCPR, all of which rank at the constitutional level (Section 75(22) of the FC).

Concerning *arbitrary judgments*, that is, decisions which are unconstitutional because they violate rights and safeguards protected under the FC, the remedy available is the federal question appeal before the CSJN, which was developed by this court for such purpose.[26] Other types of decisions related to criminal punishment, such as arrest warrants or pre-trial detention orders, shall not be arbitrary either. These provisions against arbitrariness are in keeping with the safeguards on the matter included in the international instruments which were made a part of the FC, as is the case of the UDHR (Article 9) and the ACHR (Article 7(3)), among others.

4 Judicial discretion in sentencing: position of the independent judge and responsibility for fairness

As already explained, the Executive is the branch with administrative powers according to the FC. These powers translate into the so-called "acting powers". In order to analyse administrative powers, it is necessary to first grasp two basic notions – regulated activity and discretional activity.

The notion of regulated activity relates to what is imposed by the legal regulatory system, with no room for choice by the body applying the rule. That is, given a certain fact, the rule provides only one applicable solution. In turn, discretion is characterised by the possibility available to the body making the decision of choosing between two or more possible solutions which are equally valid from the legal point of view. Also, administrative acts for which greater discretion is allowed are required to be more thoroughly grounded.

22 CSJN, Judgment of 21 November 1958, *Yankunite, Elena v. Mareli, Miguel*, Fallos 242:308.

23 CSJN, Judgment of 18 June 1969, Junta Nacional de Granos v. S.A.I.C. and Marítima Contimar, Fallos 274:64.

24 Eugenio Raúl Zaffaroni, Alejandro Alagia & Alejandro Slokar, *Derecho Penal. Parte General*, 2nd Ed., Buenos Aires: Ediar, 2002.

25 Esteban Righi & Alberto A. Fernández, *Derecho penal: la ley, el delito, el proceso y la pena*, Buenos Aires: Hammurabi, 1996.

26 Gregorio Badeni, *op. cit*.

Practice shows that discretional acts by State bodies always involve some degree of regulated activity.

Discretion is limited by two general principles of law: legality and reasonableness. When these limits are crossed, arbitrariness comes into play. Arbitrariness is considered to exist when an act is against reason, law or justice.[27] The FC bans arbitrariness in Section 19, which establishes the principle of legality, and Section 28, which refers to the principle of reasonableness. María Angélica Gelli explains that the latter principle is not expressly mentioned in the constitutional text, but legal scholars and the courts have established it through the application of the section mentioned.

In Gelli's words:

> If reasonable is the opposite of arbitrary, that is, the opposite of lacking grounds – or of resulting from the mere will of the performer of the act, even if it was a collective will –, a law, a regulation or a judgment are reasonable when they are supported by the facts and circumstances giving rise to them and based on the legal regulations in force.[28]

Furthermore, the FC provides appropriate safeguards against arbitrariness. Section 43 of the FC establishes the constitutional remedies of *amparo*[29], *habeas corpus* and *habeas data*. The remedy of *amparo* consists in a 'swift and summary proceeding' and is admissible:

> Provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognised by th[e] Constitution, treaties or laws, with open arbitrariness or illegality.

Habeas data, in turn, is the remedy available for the protection of personal data by request of the suppression, amendment, confidentiality or updating thereof in the case of false data or discrimination. Finally, Section 43 of the FC deals with *habeas corpus*. According to Gelli, this remedy "was mainly aimed at protecting individuals' personal liberty and freedom of movement in the event of an unlawful detention or arrest"[30].

Now we will analyse the *guarantee of impartiality* of judges, juries and other members of the Judiciary (Sections 8 and 9 of the FCCP), which is indispensable for a decision to be fair and evenhanded. The CSJN has stated that the guarantee of impartiality is implicitly

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27 Juan C. Cassagne, *Derecho Administrativo y Derecho Público General*, Buenos Aires: BdeF, 2020, p. 285.

28 María A. Gelli, *Constitución de la Nación Argentina*, 5th Ed., Buenos Aires: La Ley, 2018, p. 558.

29 Juan C. Cassagne & Tomás R. Fernández, *Sobre la ley, el poder discrecional y el derecho*, Buenos Aires: Abeledo Perrot, 2014, p. 119.

30 María A. Gelli, *op. cit.*, p. 846.

recognised in Section 33 of the FC, as a result of the republican form of government, the adversarial system, and the guarantee of due process of law and the right to a defence established in Section 18 of the FC and recognised in the international instruments with constitutional rank (Fallos 125:10, Fallos 240:160[31], Fallos 240:160[32], precedent settled in *Quiroga, Edgardo Oscar*[33], and Fallos 328:1491, *Llerena*[34], point 7 of the grounds section). In *Muñoz*[35], a case in which two of the judges of the lower court had been previously involved in the review of an appeal against an order of pre-trial detention, the CSJN held that those judges "failed to meet the requirements of objective impartiality when issuing a decision on the final judgment because they had already given an opinion on the key aspects of the matter".

On this topic, the CSJN has followed the opinions of the IACHR; for example, the preliminary investigation shall not be performed by the same judge who renders the decision (Report 5/96, *Raquel Martín de Mejías v. Peru*[36], followed by the CSJN in *Llerena*). In turn, in cases *Castillo* (1999)[37] and *Cantoral Benavides* (2000)[38], the IACtHR held that

> the guarantees to which every person brought to trial is entitled must be not only essential but also judicial. Implicit in this conception is the active involvement of an independent and impartial judicial body. (Castillo)

Rule 4.2 of the Mallorca Rules[39] establishes that:

> Courts shall be impartial. National laws shall establish the reasons for abstention and recusal. In particular, an individual who has already been involved in a case in any way, even in a different position or in a different stage of the case, shall not be a member of the court.[40]

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31 CSJN, Judgment of 21 December 1906, *Nuñez, Manuel v. Rocca de Ominelli, Manuela*, Fallos 125:10.

32 CSJN, Judgment of 18 March 1958, Andino, Ricardo and Laserna, Pablo on Petition for Review of a Denied Appeal, Fallos 240:160.

33 CSJN, Judgment of 23 December 2004, *Quiroga, Edgardo Oscar, Case No. 4302*, Q. 162, XXXVIII. RHE.

34 CSJN, Judgment of 17 May 2005, Llerena, Horacio Luis on Illegal Use of Weapons and Battery, Fallos 328:1491.

35 CSJN, Judgment of 30 November 2010, *Muñoz, Alberto, Case No. 724/4*, M.939, XLII.

36 Report of the IACHR, *Raquel Martín de Mejía v. Perú*, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 168 (1996), March 1 1996.

37 IACtHR, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*.

38 IACtHR, Judgment of 18 August 2000, *Cantoral Benavides v. Peru*.

39 Project of United Nations Standard Minimum Rules for the Administration of Criminal Justice.

40 Mariano Cúneo Libarona, *op. cit*. Ángeles Ledesma, 'Las garantías constitucionales del proceso penal. Nuevos estándares del proceso a la luz de las garantías', in: Daniel Sabsay (dir) & Pablo Manili (coord), *Constitución de la Nación Argentina*, Vol. 1, Buenos Aires: Hammurabi, 2010.

When it comes to international instruments with constitutional rank in our country, this guarantee is recognised in the ICCPR (Article 14(1)), in the ADRDM (Article XXVI(2)), in the IACtHR (Article 8(1)), in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 13) and in the UDHR (Article 10). The guarantee of impartiality is implicitly embodied in Section 33 of the FC and Section 8 of the FCCP regarding fair and evenhanded judgments, which are essential in a country based on the rule of law.

A country based on the rule of law is also to protect the fundamental guarantee of having access to an independent judge, which is recognised in the FC. Following Montesquieu, it establishes that the separation of powers into three branches shall apply to the entire Argentine territory. This guarantee is embodied in Section 8 of the FCCP. The CSJN has confirmed in several judgments the importance of judicial independence for a state (Fallos 322:1616[41], among others). This guarantee is also established in the international instruments with constitutional rank, such as the UDHR (Article 10), the ACHR (Article 8(1)), the ICCPR (Article 14(1)) and the ADRDM (Article XXVI).

5 Sentencing by non-judicial entities

According to Section 5 of the CC, the punishments available for the commission of criminal offences are imprisonment, confinement, fine and disqualification. On the basis of the division of the State into branches, Section 109 of the FC bans the Executive from using judicial powers. Therefore, according to Sections 18 and 116 of the FC, only the Judiciary has jurisdictional powers to apply the punishments provided for in the CC. It should be noted that fines and disqualification may be administrative sanctions, but they are not applied based on Section 5 of the CC but rather on administrative rules developed as part of the Executive's powers to punish.[42] These should not be confused with criminal punishments. Rather than being governed by the CC, they are imposed based on violations of administrative rules of local nature. Therefore, the Executive is not entitled to impose custodial sentences, which may be imposed exclusively by the Judiciary in cases when a criminal offence included in the CC has been committed. Nevertheless, current regulations provide for measures such as custody, arrest or detention, which are not punishments in nature but merely preventive. The Executive may apply such measures, but they shall be always subject to the monitoring and later involvement of the court with competent jurisdiction.

41 CSJN, Judgment of 19 August 1999, *Carlos Santiago v. Federal Government*, Fallos 322:1616.

42 The admission of and limitation to the Executive's jurisdictional powers by the CSJN may be seen in CSJN, Judgment of 19 September 1960, *Fernández Arias v. Poggio*, Fallos 247:646.

The following are examples:

1. The measure of custody provided for in Section 23 of the FC in the event of state of siege may be ordered by the Executive in the presence of emergency or domestic commotion. The president does not have powers to sentence or impose punishments on his/her own: "In such a case, his/her power shall be limited, with respect to persons, to their arrest or transfer from one place of the Nation to another, should they not prefer to leave the Argentine territory".
2. Under Section 122 of Decree-Law 22415 (Customs Code), the customs service may – with no need of previous authorization – arrest individuals and seize goods in order to identify and search them, if appropriate under the circumstances. Furthermore, if the individual was arrested based on an alleged customs offence, the court with competent jurisdiction shall be inmediately notified and the individual shall be taken before such authority within forty-eight (48) hours.
3. Section 216 of the Senate Regulations, approved by resolution D.R. 1388/02, establishes that "whenever the members of the Senate were in any way and in any place hindered or prevented from performing their parliamentary activity, the Senate, with the vote of two thirds of those present, may order that the individual responsible for that be taken into custody for a maximum of seventy-two (72) hours, and in such a case the Senate shall inform the court with competent jurisdiction about the events. The accused shall first be given the chance to defend him/herself by a reliably-served notice".

Even though throughout history the powers mentioned under point (1) above have resulted in arbitrariness, no state of siege has been ordered since the beginning of the century.

6 Administrative discretion in the enforcement of sentences

One of the main causes for the use of discretion in prison facilities lies in the lack of regulation of Law 24660.[43] Below we will analyse some of the main topics related with this.

43 Law 24660 was passed in 1996 and was amended several times (Laws 25948, 26742 and 26695), with the most recent amendment being that of 2017 by Law 27375, which strongly limited some of the penological aspects of the law. The ill-advised amendment introduced by Law 27375 practically put an end to a period of progressiveness in the penitentiary system which had begun in 1933 with the Argentine Republic being characterised during the entire 20th century by the application of advanced ideas in penitentiary matters and took it back to ancient times. Despite preserving the progressiveness of the penitentiary system (Section 12), it limited it for a large number of crimes, thus turning such progressiveness into merely declarative.

6.1 Consequences of the lack of internal policies for prison facilities

Law 24660 establishes that every facility shall have its own internal policies based on the law, on its specific purpose and on the needs of individualised treatment (Section 177). Issuing regulations for laws – internal policies in this case – is within the province of the Executive (Section 99(2) of the FC). To date, no internal policies have been issued by the Executive and the administration is governed by a general policy[44] or by temporary procedures established by penitentiary authorities, which may result in arbitrariness. The function of internal policies is to determine the use that will be given to penitentiary facilities, provide coherent organization for life inside the facilities, assign the positions of responsible officers, establish the administrative organization and provide specifics about treatment. These guidelines shall be drafted clearly and synthetically for the staff, the inmates and the community. Since Law 24660 was passed, almost no penitentiary facility has implemented formal internal policies, with the resulting risk of them being arbitrarily modified and of lacking the publicity required for this type of instruments. The lack of internal policies may give rise not only to administrative discretion but also to arbitrariness.

6.2 Consequences of the lack of regulations on the capacity of prison facilities

Under Law 24660, the number of inmates per facility shall be predetermined and shall not be exceeded (Section 59). Law 24660 also establishes that the capacity of facilities must be based on ventilation, lighting, heating conditions and size, which entails using objective and measurable parameters as a basis for its determination. Overcrowding in facilities in the Argentine Republic by 2018[45] was really high, to the point that 70,226 individuals (74% of the prison population) were living in facilities with more inmates than their rated capacity. The situation is even worse in the province of Buenos Aires – the largest jurisdiction –, where all facilities are overcrowded and some of them have twice as many inmates as the amount the facility can accommodate. This situation led to a decision by the CSJN[46] in 2005 about accommodation conditions in the province of Buenos Aires, and several bills for setting maximum amounts of inmates in penitentiary facilities ensued,

44 This is so in the case of individuals prosecuted based on the General Regulations for the Accused (Decree 303/1996) and in the case of individuals sentenced based on the Regulations of Basic Forms of Enforcement of Sentences (Decree 396/1999). Some aspects of these regulations were amended by Law 27375, but they have not been updated yet.

45 Ministry of Justice and Human Rights, *Annual Report for the Argentine Republic*, SNEEP 2018.

46 CSJN, Judgment of 3 May 2005, *Verbitsky, H. et al. on Habeas Corpus*, Fallos 328:1146.

none of which was passed.[47] Since Section 59 has not been regulated, administrative authorities discretionally set the capacity of prison and correctional facilities, but nonetheless there are no clear and consistent rules for the determination thereof. This approach has been disapproved of in several judgments in which the courts have set the maximum number of inmates that facilities may accommodate.[48]

6.3 Lack of regional prison facilities

The Argentine Republic is a large country – its territory is 2.8 million square kilometres – with unequal distribution of population (one third of the population lives in the City of Buenos Aires and its surroundings). There are federal jails and prisons in thirty different places, but not all provinces have one. Since almost two thirds of the prison population is from the area of Buenos Aires, where the capacity of facilities is not enough, inmates are frequently transferred far away (to places which are between 1,000 and 1,500 kilometres away). Originally, Law 24660 provided for the creation of regional prison facilities to make the criminal enforcement system more uniform (Section 211). However, no facilities of this kind have been built. Furthermore, the amendment introduced by Law 27375 failed to consider the updates made to the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), such as Rule 59, which recommends that prisoners be allocated to prisons close to their homes or their places of social rehabilitation. This has given rise to administrative arbitrariness and has recently led to a decision of the IACtHR[49] concerning the accommodation of prisoners in facilities located between 800 and 2,000 kilometres away from their families, judicial authorities in charge of the sentence enforcement and counsel. The IACtHR pointed to the lack of regulation by the Executive concerning transfers and the existence of scattered internal rules developed by penitentiary administrations which are unknown to judges, counsel and inmates. In the understanding that the Argentine State lacked regulations on the transfers based on

47 Among others, "Minimum Standards of Habitability and Accommodation Capacity in Penitentiary Facilities", introduced in the Argentine Senate by Marcela Campagnoli on 19 July 2019, File No. 3626-D-2019; "Preliminary Draft of Bill for Operating Certification of Prison Facilities and Control of Overpopulation", introduced in the Argentine Senate by Julio Raffo on 18 October 2017, File No. 5563-D-2017; and "Operating Certification of Prison Facilities and Control of Overpopulation", introduced in the Argentine Senate by Norma Morandini, File No. 1794-D-2016. Also, the Federal Prisons Ombudsman introduced a similar initiative in 2017.

48 Among others, Federal Court of Appeals of General Roca, Judgment of 11 January 2019, *Individuals Incarcerated in Federal Facility V of Senillosa on Habeas Corpus*; Execution of Sentences Court No. 2, Province of Buenos Aires, Judgment of 19 April 2018, *Case on Section 25 of the CPP on the Capacity of Facility 44*; Federal Cassation Court No. 2, Judgment of 28 June 2019, *Federal Penitentiary Attorney General's Office on Cassation Appeal*; and Federal Criminal and Correctional Court of Morón No. 2, Judgment of 7 November 2019, *Penitentiary Attorney General's Office et al. on Habeas Corpus*.

49 IACtHR, Judgment of 25 November 2019, *Rolando López et al. v. Argentina*.

Section 72 of Law 24660, the IACtHR ordered the regulation thereof with the aim of safeguarding, to the extent possible, the maximum possible contact with family members, counsel and the outside world.

6.4 Lack of prison inspectorate board

Section 209 orders the Executive to appoint qualified, trained and experienced inspectors, who are independent from the penitentiary administration, for them to monitor every six months whether the treatment of prisoners and the organization of facilities are in keeping with legal provisions. This board has not been created. The lack of reports describing the achievements, failures and improvements to be introduced in the operation of prison facilities has resulted in the persistence of the deficiencies mentioned herein.

7 Conclusion

The Argentine FC establishes the separation of the branches of government, so that each of them has the necessary and indispensable independence in the exercise of their respective powers, as is characteristic of a republican State. As it has been explained throughout this work, the Argentine legal system, as is structured, recognises the principles of legality, liberty, the principle that anything which is not forbidden is allowed, prosecutorial discretion and the *pro homine* principle, following the guidelines established in the FC and international instruments, many of which have constitutional rank. Nonetheless, regrettably, during some administrations both the division of powers into branches and the independence of judges have been distorted in practice. Finally, despite the step forward entailed by the passing of Law 24660 back then, some of the amendments thereto, the lack of precise regulations for all prison facilities and the delay in providing appropriate facilities to administrations have cast shadow on and reduced the Law's effectiveness.

The principle of legality and the rule of law on criminal penalties in Chile

Francisco Molina Jerez, Jaime Náquira Riveros and José Luis Guzmán Dalbora[*]

1 Introduction

Before analysing the principle of legality in the Chilean criminal justice system, it is necessary to review its historical context and evolution. During the first decades after the national Independence in 1810, the authorities adopted the laws issued by the Spanish Crown and enforced in Chile while the country was a colony of the Spanish Empire.[1] Since the 1840s, the creation of commissions aimed at developing their own legal codes on criminal matters, as first pillars of the Chilean criminal justice system, was encouraged. The first one was the Criminal Code, of 1874,[2] still in force. The first Code of Criminal Procedure came to the light in 1906[3] and, finally, the first Prison Regulations in 1911.[4]

Throughout the long time the Criminal Code has been in force, it has been modified several times, but it had preserved its original structure, which makes it one of the oldest in the world. Since 2005, Chilean academics under different governments have participated in the effort to write a new Criminal Code. Until 2019 four preliminary drafts of overall reform have been prepared (2005, 2013, 2015 and 2018). As argued by the authors of the last preliminary draft,[5] the main axes of all the proposals are to: reform the list of penalties; modify the process in which the penalties are determined; improve the legislative technique regarding organised crime and Criminal Law on Economic matters; and

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1 In this regard: Alfredo Etcheberry, *Derecho Penal. Parte General*, Vol. I, Santiago de Chile: Editorial Jurídica de Chile, 1997, p. 45.

2 Original text available at: https://www.leychile.cl/Navegar?idNorma=1984&tipoVersion=0.

3 Original text available at: https://www.leychile.cl/Navegar?idNorma=22960&tipoVersion=0.

4 Original text available at: https://www.leychile.cl/Navegar?idNorma=1045498.

5 Available at: http://www.minjusticia.gob.cl.

culturally adapt the criminal justice system, duly protecting the interests linked to new forms of criminality.[6]

The Code of Criminal Procedure, inquisitorial in nature, remained in force for slightly over one hundred years. An old doctrinal critique expressed against its anachronism, inefficiency and disrespect for human rights, was instrumental in breaking it down. The criminal process was slow and bureaucratic; the parties involved did not appear before the judge, but before an administrative official (called court clerk); the procedure lacked transparency; the procedural rules and those regarding precautionary measures determined that between 50% and 60% of the imprisoned persons in Chilean prisons were detainees or remand prisoners, but not yet convicted;[7] the judge used to carry out multiple tasks, he had to investigate, accuse and decide, which seriously compromised their of impartiality at the time of judging;[8] there was not an autonomous entity in charge of exercising public criminal proceedings; and no institutional protection was granted to victims and witnesses.

In the first decade of the 21st century, the overall reform of the criminal procedure was initiated. Act 19.696, of 29 September 2000, based on the Code of Criminal Procedure, reference for Latin America, adopted – among other measures – an accusatory trial system, taking into account the experience of Anglo-Saxon countries, as well as the Chilean reality, as the new Code of Criminal Procedure was gradually implemented in the Chilean territory, starting in less populated or less complex regions, until finally reaching the Metropolitan Region, that is, Santiago de Chile.

The new Code provided access to Justice, ensuring the possibility that the parties to the action were aware of the entire process in their cases, unlike in the old system, with secret stages for the accused and the victim. The duration of the proceedings was also reduced. New institutions were created: the Public Prosecution Service and the Public Defence Service. The Judiciary stopped investigating the crimes, and exclusively devoted to exercise jurisdictional functions, both controlling the legality of the investigation stage, and the subsequent trial wherein the guilt or innocence of the accused is determined, and finally, the control of the legality of the enforcement of the sentences.

Certainly, the main consequence regarding the topic at hand is that the possibility of controlling all legal and administrative acts that have an impact on the accused or sentenced persons has increased. The orality, immediacy and publicity of the new criminal justice system allow that the backgrounds of the legal decisions are known in a timely and appropriate manner, but also allow to control and amend them.

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6 See full text of the presentation of the authors' preliminary project grounds in their letter to the Ministro de Justicia y de los Derechos Humanos, at: https://www.gob.cl, p. 2.

7 Information available at: https://www.gendarmeria.gob.cl/estadisticas_compendios.html.

8 In this regard: María Inés Horvitz Lennon & Julián López Masle, *Derecho procesal penal chileno*, Vol. I, Santiago de Chile: Editorial Jurídica de Chile, 2004, p. 19.

As to the regulation of the enforcement of the custodial sentences, the situation is still that of the 19th century. The Criminal Code (article 80) provides that an administrative regulation shall regulate the stage of the enforcement of the sentence. This is how the Prison Regulations of 1911 originated and also those who took its place, the last of which dates back from 1998. Although it may be understandable the legislator's decision of 1874, of invoking a regulation of lower hierarchy than the law to regulate the enforcement of the custodial sentences, at that time, of course, it is not tolerable today according to the standards of the international treaties regarding human rights and those enforceable in the criminal justice system of a Rule of Law. This is why, several attempts have been made in order to create a law of enforcement of sentences, but unfortunately none of them has had the necessary continuity to see the results.

2 The principle of legality and the rule of law on criminal matters

The legislation has adopted every aspect related to the principle of legality on the basis of the continental European conception. At a constitutional level, a list of fundamental rights is established and, among them, those related to the criminal justice system (Constitution of 1980, art. 19, numbers 3 and 7). By virtue of the *principle of nullum crimen sine lege* and the *principle of nulla poena sine lege*, the writers of the Constitution provided that "no crime shall be punished with other penalty than that provided for by the law enacted before the commission of the offence, unless a new law favours the party affected" (article 19, number 3, subparagraph 8) and that "no law shall provide penalties without the conduct being sanctioned is expressly described in it" (article 19, number 3, last subparagraph). This constitutional regulation is supported by the Criminal Code, granting legal certainty with regard to the conducts constituting a crime and correlative punishments. Furthermore, most of the codified crimes respects the mandate of determination.[9]

The *principle of jurisdiction* is reflected in two passages of the Constitution. On one side, the prohibition of being judged by special courts is provided and, on the other hand, the hearing of a criminal case by courts following the commission of the crime is prohibited (article 19, number 3, subparagraph 5). Also, the Courts of Justice shall ensure that the investigation, accusation and trial are carried out respecting the due process (article 19, number 3, subparagraph 6). Similarly, the Code of Criminal Procedure and its principles

9 Unfortunately, the same is not true for crimes contained in some special laws. Deliberately imprecise, always in detriment to the defendant, are among others, the laws on the security of the State, public order, terrorism, and drug and weapon control.

protect the principle of jurisdiction. For example, extensive interpretations leading to the restriction or deprivation of the rights of the accused are prohibited by this Code.

However, there are serious problems in the stage of enforcement of the custodial sentences. The principle of legality demands that the penalties are provided for by the law, not by regulations. Such relevant aspects for the prisoner's life as access to healthcare, prison privileges, and disciplinary regime are stipulated by prison regulations, and not in a proper, complete and protecting manner.

Another issue arising from the enforcement stage is that, in the absence of an unitary law there are several legal norms involved, that is, the Criminal Code, the Code of Criminal Procedure, Prison Regulations (*Reglamentos de Establecimientos Penitenciarios*), the law and regulations on conditional release, the law and regulations on sentence reduction for good behaviour, the regulations on prison labour, the law and regulations on the remission of penalties, several decrees regarding rehabilitation (deletion of criminal records) and others that address the visits, the use of force, searches, solitary confinement, etc. The fact that there are various legal sources results in the lack of knowledge of the prison regulation and causes contradictions, with regulations that are not consistent with the law.

For example, Decree Law 321 on conditional release (1925) has been modified several times – five times during the last decade[10] – but its regulations have been unaltered since 1991.[11] That is, the content of the Law regulating prison parole is not consistent with the content of the regulation. This situation worsened with the last legal reform, in January 2019, as this modification entailed a significant change in the legal nature of conditional release, the requirements to be met to be eligible for parole, and the procedure regarding the enforcement of the sentence under parole. Due to the extent of the reform, a temporary article ordered the Ministry of Justice to issue a new regulation regarding conditional release. The deadline for the authority to comply with the order was May 2019. However, the new Regulation was only issued in September 2020, fourteen months after having been ordered by law.

Finally, in the past years the legislator has been more prone to making laws modifying the rules of Prison Law in order to have a regime aiming at the actual enforcement of prison sentences, against giving access to alternative sentences or to prison privileges. The trend evidences in reforms to the regime of determination of the sentences of certain crimes, always in detriment to the accused. Some reforms were retroactively applied. For example, in 2016, there was an increase in the length of time for prisoners to apply for conditional release (Act 20.931) in crimes that according to the political power cause more public alarm, robberies, mainly. Commissions on parole started rejecting the

10 Act 20.507, of 8 April 2011; Act 20.587, of 8 June 2012; Act 20.770, of 16 September 2014; Act 20.931, of 5 July 2016, and Act 21.224, of 18 January 2019.

11 Available at https://www.leychile.cl/Navegar?idNorma=19001. Revised on 10 July 2020.

applications of the prisoners who had committed such crimes, but applying the new minimum term of the sentence, higher than the valid one at the time of the sentence, and, of course, of the crime. In their defence, *habeas corpus* action was filed against the commissions. Although there were a couple of rulings that rejected the retroactive application of the legal modification, the main trend of most of the Courts of Appeal and almost completely of the Supreme Court was to reject the appeals for protection of constitutional rights. The argument is that the prison rules have the legal nature of a procedural law; therefore, they come into effect from the moment they are issued (*in actum*). Thus, we forget that the Code of Criminal Procedure (art. 11) prohibits the application of new procedural rules to processes already initiated when the former law contains more favourable provisions for the accused. Above all, we forget that the principle of criminal legality aims at preventing the abuse of *ius puniendi* in all its phases or stages, including, indeed, the enforcement of the sentences. At the judges' discretion, the fact that the modified rules are criminal laws and that, therefore, their standards are applicable, is excluded.

This unwelcomed case law materialised in the aforementioned Act 21.124, the last Act to modify the conditional release. It increases one more time the length of time to apply to the conditional release (now for other crimes), tightens the requirements for application, and article 9 of the Act provides that, on this matter, "it shall be understood that the requirements to obtain the benefit of conditional release are those at the moment of the application". In other words, the legislator expressly allows the retroactive application of the criminal rule, even though it is detrimental to the person, even though this is an expressly unconstitutional rule.

In this legal scenario, the commissions on parole continue rejecting the applications of persons who did not comply with the minimum time served and the new requirements, decisions ratified by the Courts of Appeal and the Supreme Court. In the absence of an unclear control of constitutionality in charge of any court of justice in Chile, four requirements were submitted before the Constitutional Court demanding the inapplicability of article 9 for being unconstitutional.[12] Three of them were rejected[13] and one was accepted.[14] In relation to the latter, the Court considers there is a violation against the legality principle, and its main arguments are the following:

12 Five other requirements were submitted, but they were declared inadmissible since there was no other judicial formality pending in the processing of the cases, which had ended with the sentences of the accused.

13 Court File No. 6.717-2019, Court File No. 8.108-2020 and Court File No. 8.536-2020, all available at https://www.tribunalconstitucional.cl/buscador.

14 Court File No. 6985-2019, ruling of 23 January 2020.

10. That, in regards to this constitutional principle, it has been logically asserted that the legality of the enforcement of the sentence stems from the principle of legality of the sentence, as the conditions to enforce it are set at the very moment of the sentence, principle expressed in the maxim "nullum crimen, nulla poena, nulla executio sine lege." Consequently, this Court has mentioned that the principle of legality requires that a previous law not only stipulates the term and the type of sentence, but also the circumstances to enforce it, that is, the conditions of enforcement.[15]

11. That it attempts to claim that, by regulating a benefit for the subject serving a custodial sentence, the legal provision in question is of an administrative nature, thus classifying it as inherent to a prison administrative law and not inherent to the criminal law in an execution dimension. This may be observed in the arguments presented by the State Defence Council, on page 67 and following of the constitutional file. In fact, the basis for determining as such has been establishing a limitation to the scope of the criminal law, with its principles and requirements only until the moment of the sentence or imposition of the penalties, so the execution and enforcement of these corresponds to a different legal dimension, of a merely administrative nature, as previously mentioned.

12. That considering the aforementioned execution of the sentences as a strictly administrative function, in which part of the national legal doctrine incurs and in the subsequent jurisprudential errors, poses a contradiction and deep rejection of the function of both the sentence and the prison regime, from the moment the accused are denied fundamental rights and guarantees enshrined in principles, particularly those regarding the legality of the sentences and the release regime to which they may be eligible to. Furthermore, the rejection in the national prison procedures of the resocialising or social reintegration aims of the sentence, as consequence of the material conditions of the enforcement of a custodial sentence, accounts for the doctrinal and jurisprudential arguments in favour of a merely administrative perspective.

15 STC 2.983 c. 23 and in the same sense, STC 6.985 c. 15.

3 Standards in the light of human rights with regards to the process of sentence and the enforcement of sentences

According to the Chilean doctrine,[16] the implementation of the new criminal justice system promoted by Act No. 19.696 entailed the enshrinement and the strengthening of the due process and the different principles stemming from it, that is:

a. Autonomy and impartiality of the Court.
b. Right to previous trial.
c. Principle of contradiction or adversarial principle.
d. Principle of immediacy.
e. Right to defence.
f. Right to procedural equality.
g. Principle of publicity.
h. Free assessment of evidence.
i. Principle of grounds of the decisions.
j. Principle of urgency.
k. Principle of proportionality.
l. Principle of efficiency and effectiveness.
m. Right to present petitions.

4 Judicial discretion in the sentence in general: position of the autonomous judge and responsibility for equality

The system is not infallible, but there are counterbalance mechanisms that allow parties to challenge the judicial decisions issued during the process and the final judgement. In case of a guilty verdict, the duty of establishing the legal reasoning has to be met on the basis of the freedom to produce evidence, but in accordance with the rules of logic, the maxims of experience, and scientific consolidated knowledge. This standard not only protects the persons before a court, but also the court facing pressures from third parties, as not just any grounded arguments are sufficient to understand the validity of a sentence.

Although the President of the Republic takes part in the appointment of the judges of the Supreme Court, the Courts of Appeal, and the judges of first instance, this action is carried out together with the Senate in the case of the Supreme Court. In other cases, a person is chosen from a triad prepared by the Judiciary itself. The external independence of the Judiciary is thus affected by the direct intervention of the Government in the

16 Rodrigo Cerda San Martín, *Manual del sistema de justicia penal*, Santiago de Chile: Editorial Librotecnia, 2018, p. 101 and following.

appointment of the judges. However, internal independence is also a complex issue, since Chile does not have a supreme council of the judiciary. Disciplinary control of the judges is carried out by their jurisdictional superiors, who, with this action, become hierarchical superiors. The Chilean legal system is, then, quite old, even pre-Napoleonic.

Also, even though it is an attribution of the President of the Republic to ensure the ministerial conduct of the judges or members of the Judiciary, if considered necessary to apply measures, a request should be made to the Supreme Court so that they declare the misbehaviour of the judge. In relation to the Congress, impeachments (constitutional accusations) against a judge of the Superior Courts may only be regarding a serious dereliction of duties, but not for criteria discrepancies when deciding on an issue (art. 52, number 2, letter c, and art. 53 of the Political Constitution of the Republic), thus reducing the interference the political authorities might incur in regarding jurisprudential trends. In fact, however, at least some accusations presented against the senior magistrates of the country lacked or did not have a clear legal basis and show instead the position of the Parliament towards subjecting the judges to the political game. There are two cases precisely regarding the conditional release which took place in recent times, one against judges of the Supreme Court which granted it to persons convicted of crimes against humanity during the military dictatorship, and another one announced against a judge of appeal who granted it to convicted felons.

5 Judicial discretion within a framework

Judges are obliged by law to solve controversial issues. In criminal matters this means that they must pronounce judgements, verdicts of guilt or acquittal, or dismiss the case for good or temporarily. There is no discretion in this regard, not even with private action crimes.

The process of sentencing has two stages. First, the law provides the judge with a closed list of factors he has to consider for the modulation of the general penalty provided for the crime: *iter criminis*, participation, mitigating and aggravating circumstances, meeting of offences, among the most important. The law provides for this procedure, determining increases or reductions in the time served. However, there are margins of discretion bound by the same law, for example, in the meeting of mitigating and aggravating circumstances. Unfortunately, weighing the meeting of circumstances is not usually performed in a reasoned manner, but by a simple mathematical computation. This arbitrariness is a forensic use at a national level.

The second stage is determining the exact punishment within the legally preformed margin. The Criminal Code still does not have a precise declaration of the factors a judge must ponder. As the codes of the nineteenth century, it only indicates that the judge shall

pronounce the verdict bearing in mind the number and extent of the mitigating and aggravating circumstances, and the greater or lesser extent caused by the criminal action (article 69). This general and ambiguous provision accounts for the fact that judges do not usually duly ground their decisions, which turn out to be unpredictable and, sometimes frankly unequal in relation to similar cases. Here lies the greatest failing of legality of the Criminal Code. In the special legislation regarding adolescents and legal entities this failing has been partially corrected by indicating the precise factors for determining the penalty. Similar problems than those of discretionary decisions affect the imposition of punishments alternative to prison, given the freedom granted by the law to the judges at the moment of assessing the adequacy of the alternative penalty for the subject under judgement.

6 Sentences pronounced by non-judicial entities.

The current regulation permits the Chilean Gendarmerie[17] to impose disciplinary punishments by way of an administrative resolution. The Criminal Code (art. 80) refers to Prison Regulations for the regulation of the actions that are considered breaches of discipline, the disciplinary sanctions to be imposed, and the rules of procedure, which is the attribution that the prison authority exercises according to criteria of necessity and opportunity.

Prison Regulations include a vast list of disciplinary breaches (serious, less serious, minor). When taking a closer look, one may note that ten of these breaches are, also, crimes punished by criminal law (acts against life and physical integrity, acts against state property, illegal drug trafficking, carrying or manufacturing of firearms or bladed weapons). It even is a serious misconduct "committing any other act considered as a crime or misdemeanour" (art. 78, letter m). Consequently, in the presence of the commission of the actions described in the previous paragraph, the State is enabled to punish either administratively or judicially. This two-way punitive procedure results in non-judicial entities imposing legal consequences for committing an action that is also considered a criminal offense.

This power of imposing sanctions enables the Chilean Gendarmerie to restore the order and the security inside prisons, as well as to carry out the necessary actions to avoid that both officials as well as persons deprived of liberty are victims of aggressions that may affect their integrity or life. In fact, the purpose of the disciplinary sanctions is to end the threat or the aggression caused, to reduce the possibilities of the incident from happening again and reassuring the Gendarmerie's authority. Also, empowering the prison authority

17 Name given in Chile to the old age organism which in other countries is called 'Prison Services'.

with imposing sanctions entails that transferring this duty to a judge of the Judiciary is avoided, which, according to the current Chilean legislation, would mean an increase of the workload, affecting the speed with which this kind of contingencies should be solved.

The problem is that there are no regulations that expressly determine what should happen when a person is punished by the Chilean Gendarmerie for having committed an offense and, subsequently, the Public Prosecutor's Office fails to prove the criminal offence, therefore, they decide not to continue with the investigation, or the Justice Court dismisses the case or the individual is acquitted. In case there is or may be a criminal offence, the Regulation establishes that the Chilean Gendarmerie must forward the criminal record to the Public Prosecutor's Office, which is allowed to impose a disciplinary punishment notwithstanding what happens in the criminal proceedings. This is not a minor matter, since the court proceedings have a much higher standard regarding the investigation and prosecution than proceedings at an administrative level. Furthermore, despite the claim of some criminal lawyers and some government initiatives in the past, nothing is seen in the immediate and medium-term future that indicates that Chile may have an actual judge of criminal execution, as most of the South American countries do.

The fact that the conditional release is not entrusted to the Judiciary, but to a special commission is also serious. Although composed by criminal judges, the commission does not proceed as an authentic jurisdictional entity. Therefore, its decisions do not admit regular procedural remedies, but only the *habeas corpus*.

7 Administrative discretion in the enforcement of penalties

The margins of the regulatory scenario described when talking about the principle of legality and prison law are diffuse. So, the concept of discretion is mistaken by arbitrariness. During approximately one hundred years, the events that occurred inside the Chilean prisons were almost of exclusive interest of the Prison Service, which was not subject to constant legal control, was not studied by the scholars, and was of no interest for the rest of the bodies of the Public Administration and even less for the civil society or the population in general. With the reform of criminal procedure not only the investigation and the judgement of criminal offences became more visible, but also the effects of the enforcement of the preventive detention and custodial sentences.

One of the practices that were evidenced – and not uncommon – was the lack of grounded reasons for the decisions of the prison authorities. It is worth noting that government entities as the National Institute for Human Rights and the Public Defence Service have been disclosing several situations in which the constant factor was the lack of grounded reasons for administrative actions from prison. Either at the moment of

granting/ rejecting benefits or of imposing disciplinary sanctions, among other issues of great importance for the prisoner and the society in general.

There has been some progress during the past ten years. In 2009, the Law on the Transparency of Public Functions and Access to Information on Public Administration was enacted. This law allows access to information on the procedures of the Chilean Gendarmerie and to their grounds. If we add the aforementioned to the access to Justice given by the reform of criminal procedure, the possibilities to question such administrative actions have increased to the extent that the Chilean Gendarmerie had to issue internal regulations to raise the standards for the grounding of decisions.

For example, in July 2012, the National Directorate of Gendarmerie by way of circular 184/12 gave instructions as to the grounds to be presented in the minutes of the technical commission (internal entity that decides on granting prison benefits, among other issues), reminding that the minutes proceedings are official documents and express record must be left on them of the analysis of each of the applications by the prisoners, pointing out the opinion and grounds for the opinion of each of the members of the technical commission regarding the matter. However, the institution took a step further and, in that same document mentioned above, stated that the lack of grounds for the decisions of the technical commission infringes the right to a rational and fair proceeding.

The courts of justice have contributed to reverse the arbitrariness inside prisons. Disciplinary sanctions are one of the matters left to the discretion of the Chilean Gendarmerie. The disciplinary regime is affected by the same problems that generally affect the Chilean Prison Law, particularly the lack of certainty due to poor legislation and the need to resort to several laws to solve the issue. For example, with regard to disciplinary sanctions, article 82 of Prison Regulations states that:

> All sanctions shall be enforced by the Head of the Prison where the inmate is, who shall proceed by strictly having the report at sight, along with the statement of the offender, witnesses and parties affected, if any, and were able to render statement, as well as, where appropriate, the recommendation of the Technical Commission if pertinent. *All of this shall be briefly recorded on the Resolution enforcing the sanction*, so that the punishment is fair, that is, timely and proportional to the offence committed considering both its severity and its duration, and having the characteristics of the inmate in mind.

Some prison governors and judges used to understand 'succinct record' as 'concise grounds'. However, by enforcing the Law on the Basis of the Administrative Procedures, the courts of justice have ruled out this interpretation. They argued that the disciplinary sanction, as any administrative act, must be based on a minimum of grounds that allows any person to understand the action that is being punished and why and how is being

punished. Even the courts have increasingly raised the standard of the disciplinary sanctions as regards evidence and compliance with the form.

Prisoner transfer is another example of this situation. Although the Regulation has a rule that orders the Chilean Gendarmerie to prefer as prison unit the one located in the place of residence of the family group (art. 53), the institution and the courts of justice usually contravene this rule, arguing that they prefer the Constitutional Organic Law of the Chilean Gendarmerie, as this regulatory body stipulates that Gendarmerie is enabled to determine the facilities where the convicted persons shall serve their term and arrange transfers. They, thus, have some sort of freedom to decide on these matters, either for family reasons or internal security. The aforementioned shows how the idea of the discretion faculty is so poorly interpreted where rule-bound discretion is mistaken by absolute discretion. That is, without being subject to regulations, precisely on the matter where there is a regulation, the foregoing article 53.

8 Conclusion

In summary and as a conclusion, the Chilean criminal justice system, seen as a whole, but particularly regarding the enforcement of the sentences, is still weak in terms of legality and, also as to what is expected from a Rule of Law, where the State exists and functions not on its own, but by virtue of the Law. Regarding Criminal Law, said legality may only be contained in those laws.

The Criminal Procedure Reform has slightly contributed to moderate the glaring defects of a prison organization, rather concerned about its internal organization, as administrative entity, than of the prisoners' rights and the State's duties in the actual enforcement of the *ius puniendi*. The Criminal Procedure Reform did not involve the substitution or reform of the Criminal Code, very much in need of provisions with regard to the enforcement of sentences, or by a prison law on the procedure and the multiple accidents that may arise during the enforcement of the custodial sentences.

From a regulatory standpoint, the Chilean case is exceptional today in South America. All the nearby countries have legal regulations and adequate execution judiciaries, particularly Brazil. In no way, the mere existence of laws on the matter is a safeguard against illegal and abusive practices during the enforcement period. But it is the fundamental starting point to bring order to these matters, to place the country closer to a civilised one with regard to Prison Law, dignify the task of Prison Service, raise awareness among the judges that their duty does not end when they pronounce a sentence and, in general, build a legal and human interest in society for the fate of the prisoners.

Human-rights movement and constitutional principles in Finnish criminal justice

Tapio Lappi-Seppälä and Ilkka Rautio[*]

1 Introduction: A peak in the past

1.1 Against coercive care, abuse of power and the overuse of imprisonment (1960-70s)

Finnish criminal policy has experienced two major transformations since the 1960s. The first one was a part of a larger social and cultural movement, also reflecting a structural change from a poor post-war agrarian country to a prosperous Nordic welfare state. This reform period was much about demands of humanization of Finland's outdated and overly severe criminal code, abolishment of social discrimination, better guarantees for legal security in judicial proceedings and abolishment of coercive care. The core target of criticism was the overuse of imprisonment, resulting in serious overcrowding and breaches of the proportionality principle in the implementation of indeterminate sanctions.

This entailed also a decline of treatment ideology. However, it did not entail a general shift towards harsher penal regimes and prison warehousing. The core message was to scale down the use of imprisonment and to abolish indeterminate sanctions. The prison reforms that followed in the turn of the 1960/70s improved the rights of the inmates, abolished humiliating disciplinary punishments, introduced prison leaves and expanded the system of open facilities. The resulting criminal political ideology – 'humane neo-classicism' – stressed both the legal safeguards against coercive care and less repressive measures in general. In sentencing, the principles of proportionality and predictability became the central values. In sentence enforcement the principles of normality and the minimization of harms replaced the old progressive principle. The discretionary power of administrative authorities was curbed. In prison construction strategic decisions were made towards the replacement of old, larger, closed prisons with smaller open-type

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facilities. A major change with strong symbolic significance was the abolition of indeterminate sanctions, including preventive detention in 1971. For Finland this was the beginning of a long-term reduction of imprisonment rates from the level of 150/100 000 inhabitants in the mid-1960s, to around 60 in the early 1990s.[1]

1.2 "Constitutionalization" and the emergency of fundamental and human rights (1990-2000s)

The principles laid down in the 1970s outlined the penal reforms for the following 15-20 years. Next reform phase started in the 1990s. This period was much influenced by Finland the joining of the Council of Europe, the ratification of the European Convention on Human Rights (ECHR in 1989), as well as the constitutional reforms carried out in 1995 and 2000. The ratification of the ECHR at the time of the constitutional reform opened the window of opportunity for the incorporation of human rights as part of fundamental rights in the constitution. Together with the practice and doctrine of fundamental rights developed by the Constitutional Law Committee of the Parliament this resulted into a harmonization of the Finnish fundamental rights and the international human rights system. Human rights, as defined in international treaties, have been converted into fundamental rights, as defined in the Finnish Constitution.[2]

Joining the ECHR had direct impact also on other parts of legislation. Before joining the Council of Europe and the ECHR, all fields of Finnish legislation were screened in order to ensure their compatibility with the convention. This applies also to the preparations of a new Prison Law. Reform work started in 1999 and the new code entered into force in 2006. The amended constitution posed stricter demands than before on legal regulation in all decisions that dealt with deprivation of liberty. It also obliged the legislator to define the rights and obligations of prisoners in greater detail than before (see below section 2, 3 and 4). Additional pressures towards a total revision of the Prison Law emerged from the fact that the old enforcement act had become scattered and outdated from a penological point of view.

The preparatory works for the code also used the support provided by the recommendations from the CPT. For example, in issues related to the introduction of a structured enforcement plan, the need for a comprehensive strategy regarding the

1 Penal transformations and the use of imprisonment in Finland and other Nordic countries is discussed in more detail in Tapio Lappi-Seppälä, 'Penal Policy in Scandinavia', in: Michael Tonry (ed), *Crime and Justice: A Review of Research*, Vol. 36, Chicago: The University of Chicago Press, 2007.

2 See closer, Sakari Melander, 'The Rule of Law and Criminal Law: The Constitutionalization of Criminal Law in Finland', in: Lin Li & Zengyi Xie (eds), *Rule of Law in China and Finland: Comparative Studies of Their Development History and Model*, Beijing: Social Sciences Academic Press (China), 2013, p. 421-433.

separation of prisoners for safety and security, and prisoners' right to appeal (Gov Prop 263/2004, chapter 2.2.1). Defects detected in the position and treatment of remand prisoners were taken up to support the proposal for a separate act on the treatment of remand prisoners, which was presented to Parliament together with the general Prison Law. Later on in 2015, the subsequent critical observations by the CPT on prisoners' appeal rights led to a second revision of the appeal rules (see Gov Prop 45/2014).

All in all, the 2006 reform of the Prison Law can be characterized first and foremost as a Rule of Law reform. As stated in the Government Bill, the act "aims to bring the prison law in accordance with the requirements of the new constitution, to define the obligations of prison authorities in more detail, to increase legal safeguards and transparency in prison administration, to reorganize the imprisonment process to a more structured and planned process and increase investments in rehabilitative program- and treatment work and thereby also to reduce recidivism"[3].

2 The principle of legality and/or the rule of law as regards criminal punishments

Finnish constitution section 8, on the principle of legality in criminal cases, states:

> No one shall be found guilty of a criminal offence or be sentenced to a punishment on the basis of a deed, which has not been determined punishable by an Act at the time of its commission. The penalty imposed for an offence shall not be more severe than that provided by an Act at the time of commission of the offence.

This principle has been restated also in the criminal code section 3:1, with slightly different phrasing and emphasis: (1) A person may be found guilty of an offence only on the basis of an act that has been specifically criminalized in law at the time of its commission. (2) Punishment and other sanctions under criminal law shall be based on law. The principle of legality, as understood in the Finnish legal doctrine, consists of several sub-principles.

The requirement of written law, enacted by the parliament. Both the Constitution and the Penal Code require that the perpetrator of a crime may be held guilty only on the basis of an act which, at the time of the offence, is punishable by an act of parliament. Penalization based on regulations or lower-level provisions are incompatible with Article 8 of the Constitution. Both the offense and the punishment need to be defined in such an act. This

3 Gov Prop 262/2004.

applies to "all penalties imposed in criminal proceedings". Legal certainty reasons also require that decisions containing a guilty plea be tied to the law.

Requirement of precision. The principle of legality also includes a requirement that the contents of the Criminal Code be precise. It is impossible to give unambiguous guidance on the closer content of the punctuality requirement. As stated in the Constitutional Commentary, the content of the requirement must in practice be resolved "in a manner that takes account of the nature of the regulation and its target group"[4].

Analogy ban. This ban prohibits the analogue application of the provisions of the Penal Code to the detriment of the accused. The requirement is underlined in Chapter 3, Section 1 of the Penal Code, by requiring that the perpetrator of a crime may be held guilty only on the basis of an act *expressly punishable* by law at the time of the offence. The preliminary work states: "With the term expressly imposed, reference is made to the prohibition of analogy"[5]. In practice, the scope and importance of the analogy ban remain open to interpretation in individual cases. Any application of the law requires interpretation (provision of meaning content).

Retroactivity ban This ban prohibits the use of retroactive criminal law (towards stricter direction). It requires that the offence was punishable at the time the act was committed. When applied to the Court, the principle prohibits the retroactive application of the Penal Code to punish an act that was not yet punishable at the time of the offence. If the legislature had passed such a law, the law itself would be unconstitutional, which would give the courts both the right and obligation to refrain from applying the law (Article 106 of the Constitution).

3 Human rights requirements as regards the sentencing process and the enforcement of sentences

3.1 Sentencing

3.1.1 Human rights-based requirements to criminal sanctions

The Finnish constitution section 7.2, following the ECHR Art. 3, sets the following human rights related limits to criminal sanctions: "No one shall be sentenced to death, tortured or otherwise treated in a manner violating human dignity". In 1976 Finnish criminal law

4 Pellonpää, 1999, p. 292.
5 Gov. Prop. 44/2002 vp.s.34/I.

committee listed a set of requirements which criminal sanctions should meet in all circumstance.[6] (1) The prohibition of inhuman treatment. This excludes the use of death penalty, torture, long term complete isolation, inhuman medical interventions or any measure that "weakens significantly the offenders ability for a mentally and physically full life". (2) The requirements of proportionality and equality. The use of criminal sanctions is restricted by the guilt-principle, and limits for the severity of the sanction are provided by the proportionality principle. Application of criminal law must respect the requirement of equality. There must be a possibility to make downward deviations from normal rules due to arguments related fairness and mercy. (3) Punishments must be directed against the offender only. While it may be impossible to avoid the fact that punishment may have collateral effects also on the offender's family, relatives or friends etcetera, their contents should be designed in a manner that minimizes these side-effects. (4) Punishments must not cause unnecessary suffering. While punishment is always something that is experienced as unpleasant it still is forbidden to cause any additional suffering than the one included in a sanction measured according to valid sentencing principles.

These principles have guided the sanction policy during the total reform of Finnish Penal Code. On these grounds both indeterminate penalties as well as 'shaming punishments' have been abolished. Also the use of imprisonment has been radically reduced through a long set of law reforms since the early 1970s and the system of community sanctions has been extended as a substitute to imprisonment.[7]

3.1.2 Human rights-based requirements to the sentencing process

The constitution provides also basic rules for the sentencing process "a penalty involving deprivation of liberty may be imposed only by a court of law. The lawfulness of other cases of deprivation of liberty may be submitted for review by a court of law" (Section 7.3). Section 21 of the constitution further states that:

> Everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice. Provisions concerning the publicity of proceedings, the right to be heard, the right to receive a reasoned decision and the right of appeal, as well as the other guarantees of a fair trial and good governance shall be laid down by an Act.

6 Criminal Law Committee. Committee reports 1976:72, p. 67-68.

7 For the role of community sanctions in the Nordics, see Tapio Lappi-Seppälä, 'Community Sanctions as Substitutes to Imprisonment in the Nordic Countries', 82 *Law and Contemporary Problems* 1 (2019), p. 17-50.

The aim of section 21 is to stress the importance of fundamental and human rights in the sentencing process. Also the supreme court has repeatedly referred to the requirements of the ECHR, thus influencing also on the lower courts practice on these issues.[8] One could say that during the 2000s the whole 'doctrine of the sources of law' has altered by including the international treaties and the decisions of the European Court of Human Rights (ECtHR) in the list of valid sources of law.

Substantially the most important principles and norms include the *ne bis in idem*-prohibition and its impact on the use of administrative and criminal sanctions in tax offenses. The ECHR provisions on the Fair Trial and the principles derived from the convention have also played an important role. The most visible in the case-law have been the principle of the prohibition of self-incrimination and other provisions on evidence, ultimately based on the presumption of innocence. The key obligations regarding fair trial, accused's rights and rule on evidence are now more clearly expressed in the reformed act of criminal proceedings. The enhanced role of human rights is also visible in the development of the provisions related to the defense of the accused. The provision of legal aid is relatively extensive and stricter requirements are also imposed on the professional skills of assistants.

Stronger than before, requirements have been imposed on the court's rulings and reasoning in sentencing. In particular, the arguments and reasons for the sentencing decisions (type and severity) are provided in much more detail than before. Furthermore, in practice it is required that the court's decision includes an explicit chapter devoted to sentencing grounds, if sentencing deviates from typical sentencing in similar cases or if there have been different opinions about the sentencing.

Finnish justice places strong emphasis on equal treatment. Section 6 of the Constitution states that "everyone is equal before the law". General provisions on sentencing in Gov Prop 44/2002 vp.s.34/I the Penal Code require that the courts pay attention to the "uniformity of the sentencing practice" (see below). This principle has a strong position in the Finnish legal culture and the courts do pay special attention in their work in order to avoid breaches of this principle.

Acceptable deviations from normal rules include more lenient treatment of children and adolescents, as defined in specific sections in the Penal Code.[9] Moreover, the Convention on the Rights of the Child is referred to more frequently in the explanatory statement, although it seems that the importance of the convention is less acknowledged than, for example, the ECHR.

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8 For example, the supreme court decisions 2016:19 on self-incrimination, 2018:3 on the presumption of innocence, and 2020:20 on the role of the ECtHR decisions and the Istanbul-convention in sentencing.

9 For more information on youth justice, see Tapio Lappi-Seppälä, 'Nordic Youth Justice: Juvenile Sanctions in Four Nordic Countries', in: Michael Tonry & Tapio Lappi-Seppälä (eds), *Crime and Justice: A Review of Research*, Vol. 40, Chicago: The University of Chicago Press, 2011, p. 199-264.

The position of the victim of the crime has traditionally been strong in Finnish legislation. This is evidenced, for example, in a quite extensive state compensation system for victims of crime. Victims losses are always clarified and confirmed in the preliminary investigation. There is no need for a separate civil process as the claims of compensation are, as a rule, dealt with together with the criminal charge in the criminal process (a so-called adhesion process). The victim always has the right to present claims for compensation to the court. He/she can also get assistance from the prosecutor in doing so.

Appeal-rules form an important part of the sentencing process. All parties including the victim have independent rights of appeal, but these rights have been restricted in minor offenses. In Finland, unrestricted appeal is available only in cases leading to a prison sentence of over 8 months. For lesser offenses the defendant may petition to appeal for reasons related to uniform application of the law or for other specific reasons. The appeal may pertain to all or part of the grounds of the decision or the sentence. Appellate courts review the lower court ruling on factual and legal grounds (including guilt and punishment). Appeal to the Supreme court requires that the court grants a leave to appeal.

3.2 Enforcement

3.2.1 Human rights and prison law

Human rights influences are visible both in Finnish constitution and in penitentiary legislation. Central articles of ECHR find their counterparts in the Finnish constitution, and several of them are further elaborated in the Prison Act.[10] Section 7.3 of the Constitution was included to protect the fundamental rights of prisoners: "The rights of individuals deprived of their liberty shall be guaranteed by an Act of Parliament".[11] The new constitution posed rigid demands on the legal regulation of decisions that dealt with the deprivation of liberty. It also obliged the legislator to define the rights and obligations of prisoners more accurately than before.

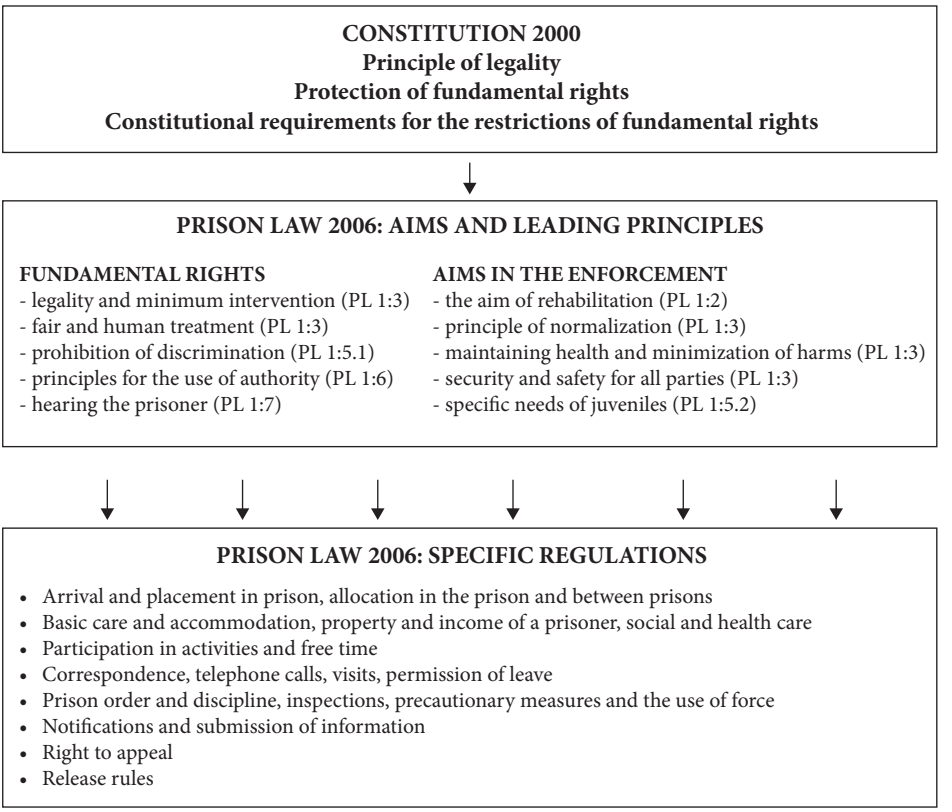
The opening chapter of the Prison Law includes declarations of leading principles of enforcement. These leading principles are given more concrete contents in separate provisions in the Prison Law (incl. provisions on rights and obligations related to issues such as arrival and placement in prison, basic care and accommodation, participation in activities, contacts with the outside world, prison order and discipline and inspections, etcetera).[12] The relation between constitutional requirements, leading principles in

10 For the historical development of enforcement principles in the Nordics, see Tapio Lappi-Seppälä, 'Principles of Nordic Prison Reform 1800-2000', in: *Festskrift för Dan Frände, Tidskrift Utgiven av Juridiska Förening I Finland* (2017).

11 More on this below in Section VI.

12 For more information on the Prison Act and enforcement, see Tapio Lappi-Seppälä, 'Imprisonment and Penal Policy in Finland', in: Peter Wahlgren (ed), *Scandinavian Studies in Law*, Vol 54, Stockholm:

enforcement and the more concrete areas of legal regulation in Finland is illustrated in figure below. The most important human rights principles are discussed separately below.



3.2.2 Enforcement principles and fundamental rights

Human dignity and fair and human treatment. The principle of inviolability of human dignity is confirmed in section 1 subsection 2 of the Finnish Constitution: "The Constitution should guarantee the inviolability of human dignity." It sets human dignity as the basic value behind the other fundamental rights provisions.[13] Subsection 7.2 (echoing

Stockholm University of Law Faculty, 2012, p. 333-380.

13 Gov Prop 309/1993.

the ECHR's Article 3) states that "no one shall be sentenced to death, tortured or otherwise treated in a manner violating human dignity". Section 22 of the constitution, in turn, states that "public authorities shall guarantee the observance of basic rights and liberties and human rights." These requirements have also been incorporated into the Nordic prison laws since the mid-1940s. They are also repeated in the present codes: "Prisoners shall be treated fairly and with respect for their human dignity" (FPL 1:5.1).[14]

The Finnish code imposes also concomitant obligations to the prison authorities: "The authorities in charge of the enforcement of imprisonment shall ensure that, during the imprisonment, no person will unjustifiably violate the personal integrity of the prisoner" (FPL 1:3.2). It also stresses impartial treatment and the prohibition of discrimination: "Prisoners may not, without a justifiable reason, be placed in an unequal position due to race, national or ethnic origin, color, language, sex, age, family status, sexual orientation, state of health, disability, religion, social opinion, political or professional activity or other reason relating to the person" (FPL 1:5.1).[15]

The law also spells out the general principles to be followed in the use of authority. "An official of the Prison Service shall: (1) act appropriately and impartially as well as in a spirit of compromise; (2) primarily through advice, requests and orders maintain prison order and security; (3) attend to his official duties without unnecessarily interfering with the rights of any person and without causing greater detriment than is necessary and justifiable in order to perform the task" (FPL 1:6).

Imprisonment as a loss of liberty only. "Offenders are sent to prison as punishment, not for punishment." The message behind this famous phrase (by Alexander Paterson) has been formulated in the Finnish law as follows: "The content of imprisonment shall be loss or restriction of liberty" (FPL 1:3.1). European Prison Rule (2006) 102.2 states: "Imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime shall not aggravate the suffering inherent in imprisonment". It is no longer required nor allowed to impose extra hardship on prisoners due to reasons related to the 'aims of punishment' (whether retribution or deterrence). Loss of liberty, as such, is enough.

Minimum intervention. The requirement of minimum intervention is linked with the claim discussed above. Thus, the cited Finnish provision continues, "The enforcement of imprisonment may not restrict the rights or circumstances of a prisoner in any other manner than that provided in the law or necessary due to the punishment itself" (FPL

14 This requirement is listed as the 1st rule both in the EPL 2006 and the UN Mandela rules 2015.

15 The provision had a direct model in the European Prison rules. See rule 1:2 (1987 edition) and rule 13 (2006 edition). See also Mandela rules 2015 rule 2.

1:3.1). Restrictions need to be based on a clear authorization by the law. In order they need to be "necessary due to the punishment itself".

The principle of normality. The normality principle occupied was the central leading principle of enforcement in Finland in the 1970s. As formulated in the present Law: "The conditions in a prison shall be arranged, to the extent possible, so that they correspond to the living conditions prevailing in society." (FPL 1:3) The other Nordic countries lack explicit formulations of the principle, but it forms a clear starting point for the regulation of prison life and conditions in general. In simple terms, the principle calls for the abolition of certain practices followed in prison-life only (for example, the use of prison clothes). In broader terms, the principle affects the ways in which work, education, and training is arranged in prisons.

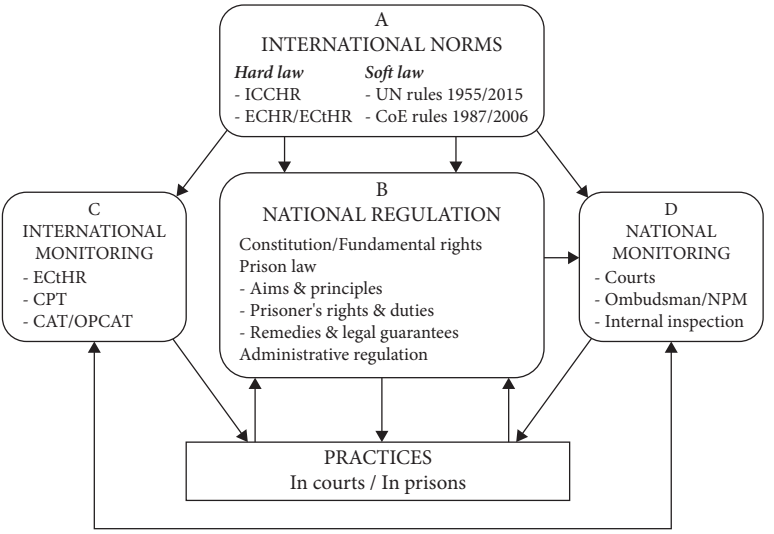
Rehabilitation (and prevention of re-offending). Rehabilitation and reintegration remain the central aim in enforcement. The Finnish Prison Law states: "The goal of the enforcement of imprisonment is to increase the ability of a prisoner to lead a crime-free life by promoting the prisoner's potential to cope and his adjustment to society as well as to prevent the committing of offences during the term of sentence" (FPL 1:2). The section covers both more narrowly focused efforts for social rehabilitation and reducing recidivism, as well as broader attempts to provide social support and networks promoting social adjustment and social survival.

Minimizing harms and maintaining health. The aim of minimizing harms can be seen as another re-formulation of minimum intervention (and the normality principle), but with a clearer and more concrete aim. The Finnish code links the avoidance of harmful effects of prison life and maintaining health and social functionality in the same paragraph: "The possibilities of a prisoner to maintain his health and functional ability shall be supported. Efforts shall be made to prevent any harmful effects caused by the loss of liberty" (FPL 1:3).

3.2.3 Securing the rule of law and human rights in enforcement

The realization of fundamental rights of prisoners in the Nordic countries are defined and protected by two interacting systems of norms, on the international and national level. The implementation of these norms is monitored by organisations at international and national levels, as displayed in the figure below.[16]

16 For the following, see Tapio Lappi-Seppälä & Lauri Koskenniemi, 'National and International Instruments in Securing the Rule of Law and Human Rights in the Nordic Prisons', 70 *Crime, Law and Social Change* 1 (2017), p. 135-159.



In Finland (and in other Nordic countries), human rights standards, as defined in international treaties (e.g. the ECHR) form a valid part of national law once incorporated into the national legal system by a separate legislative act.[17] As such, they are binding on both the legislature and the judiciary.[18] (Guidelines and recommendations (including the CoE Prison Rules 1987-2006) function as 'soft law' instruments. However, such soft law gains qualities usually reserved for hard law, when used as a general standard and as the basis for recommendations of the Committee for the Prevention of Torture (CPT) or in the judgements of the ECtHR.

The international monitoring instruments for human rights in the Nordic countries include the ECtHR and CPT, as responsible institutions supervising the application and implementation of the ECHR. The Optional Protocol to the 1984 United Nations Convention Against Torture (OPCAT) established an international inspection system, consisting both of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) at the in international level, and National Prevention Mechanisms (NPM) for the prevention of torture and ill-treatment at the domestic level.

17 Finland and other Nordic countries follow a dualistic model, under which the incorporation of international treaties takes place in a form of a separate legislative act.

18 Pellonpää, et al., 2012, and Viljanen, 2007. This description is greatly simplified and is only general by nature. In the Nordics rich and detailed literature exists about the relationship between European and national law, which we do not have space to comment on here.

These monitoring instruments examine and monitor prison practice, usually in the form of prison conditions or administrative procedures in prisons and evaluate them in the light of international norms and rules. National monitoring instruments base their evaluations on both national and international norms. Their recommendations, based on observations of practices, may target either the practices themselves or the national norms behind them (depending on whether the fault is in the application of norms, or the norms themselves).

Appeal rights and the Ombudsman. The main instruments to secure prisoners' rights are the internal rectification or appeal, court appeal and national monitoring, conducted by the Ombudsman. Rectification following the prison administration's internal mechanisms represents the first level. After this process has been exhausted, the case can be further taken to court.

During the 2000s internal mechanisms have undergone revisions in all Nordic countries with the general tendency to replace internal appeals by court proceedings. Finland revised the internal appeals mechanisms so as to be in line with the recommendations of the CPT and Article 6 of the ECHR in 2006. Later on, the subsequent critical observations by the CPT on the prisoners' right of appeal lead to a second revision of the appeals rules in 2015.[19]

Internal rectification and court appeal serve an important function in routine cases as the first level remedy. But this is clearly not sufficient. For this, and other related purposes, the Nordic countries have developed the system of the Ombudsman. First in Sweden in 1809, then in Finland 1919, Denmark 1955 and Norway 1962. After the establishment and ratification of the OPCAT, Ombudsmen have also functioned as the National Preventive Mechanisms in each Nordic country. The role of the NPM has extended the powers of the Ombudsman and brought new features to its activities. The two main techniques used for supervision include visitation and the investigation of complaints.

The legal provisions and the mandate of the Finnish Ombudsman were revised in connection with the 1995 and 2000 constitutional reform, with a clear fundamental and human rights orientation. Section 109 of the Constitution requires the Ombudsman to exercise oversight to "ensure that courts of law, the other authorities and civil servants, public employees and other persons, when the latter are performing a public task, obey the law and fulfil their obligations. In the performance of his or her duties, the Ombudsman monitors the implementation of basic rights and liberties and human rights"[20].

The Ombudsman does not investigate matters pending for review in other competent authorities. Furthermore, all other suitable legal remedies must be exhausted in order to

19 See Gov Prop 45/2014.

20 See also Parliamentary Ombudsman Act 197/2002.

obtain a decision. From 2014 onwards the Ombudsman has acted as the National Preventive Mechanism required by the OPCAT. The measures available for the Finnish Ombudsman are the following: prosecuting for breach of official duty, a reprimand, the expression of an opinion and a recommendation. In addition, a matter may be rectified while it is under investigation.

The Ombudsman has repeatedly expressed his criticism on the conditions of remand prisoners, especially on the lack of activities for remand prisoners. Another, recurrent theme in his reports has been the use of cells without toilet, which is against the international standards. While there has been progress on the latter issue, not much has happened regarding the first one.[21]

4 Judicial discretion in sentencing

4.1 Sentencing guidance and sources of sentencing law

Efforts to guide sentencing discretion intensified during the 1970s after 'the fall of the rehabilitative ideal', which had favoured more individualized sentencing. In Finland (and elsewhere in the Nordics) this move towards more structured sentencing discretion did not result in models favoured in the English-speaking countries in the forms of numerical sentencing guidelines and a mandatory minimum sentence. The Civil law tradition is unwilling to accept binding instructions for courts other than those imposed by the legislator. Nordic solutions followed civil law traditions, including the primacy of written law and the traditional division of powers between legislature and court.

Legislative guidance takes place in the form of penalty scales (latitudes), graded descriptions of offences and statutory sentencing criteria. Complementary legal material is to be found in the preliminary works (*travaux préparatoires*), court decisions (from higher and lower instances) and the legal doctrine. The enactment of specific sentencing provisions in Nordic criminal codes, was, in a way, a 'civil-law-type of response' to

21 See for details Tapio Lappi-Seppälä & Lauri Koskenniemi, 'National and International Instruments in Securing the Rule of Law and Human Rights in the Nordic Prisons', 70 *Crime, Law and Social Change* 1 (2017), p. 135-159. In 2015 the Ombudsman received 447 complaints relating to criminal sanctions and decided on 469 complaints. The Ombudsman took action in 28% of the cases (133), but mostly resorted to giving suggestions and pointing out problematic practices. However, two official notifications were also given due to practices contrasting the law. See *The Annual Report of the Ombudsman: 2015*, Juvenes Print Oy, Tampere, 2016, p. 183-193. An English summary (176 pages) of the 2015 report can be found in http://www.oikeusasiamies.fi/dman/Document.phx?documentId=dg29116163758950&cmd=download.

sentencing councils and guidelines, to be found in Anglophone countries. This took place in Finland in 1976. Sweden followed in 1988, Denmark in 2004 and Norway in 2005.[22]

While sentencing councils and commissions or advisory boards are unfamiliar to the Finnish sentencing system, there are other sources of sentencing law. Supreme court decisions play an increasingly important role. From a theoretical point of view, Finnish supreme court decisions are not legally binding in the sense they are in common law countries, even though they are often called 'precedents'. The rulings have guiding force, but the force is based on the persuasiveness of the reasons given. This role has increased in recent years in Finland and the supreme court itself has defined its decisions as valid norms to be followed in lower instances.

Legislative background works also are seen as a source of law. The Nordic legal tradition characterizes them as 'allowed' or 'weakly binding'. The form and status of these documents varies between countries, but all Nordic courts pay respect to statements in legislative documents.

Existing practice, as shown and described in statistical and legal analyses, has a peculiar role. It has for long been known to be perhaps the most influential 'source' of sentencing decisions ('ask older colleagues'), although it has no clear normative status. However, uniformity and consistency in sentencing practice have long been central values and leading principles. Courts cannot simply dismiss existing practice in similar or comparable cases. In Finland this has been formulated into a heuristic decision-making model called 'the notion of normal punishments'. The relative influence of court practice has been strengthened by effective dissemination via electronic databases, handbooks, and systematic commentaries.

Various kinds of 'soft law' instruments have been developed. In some cases, the judiciary has developed informal guidelines for certain types of offenses, most prominently to drug offenses and drunk driving. Prosecutors' practices may be guided by detailed instructions, especially for common offenses. The normative status of these lower-level sources of sentencing guidance is unclear. Written law is the only authoritative source. In most cases these supplementary sources, including statistical analyses, are tools that provide concrete starting points. But even as such, they have substantial practical relevance.

22 Sentencing norms and the system of sanctions in Finland and the other Nordic countries, see Tapio Lappi-Seppälä, 'Nordic Sentencing', in: Michael Tonry (ed), *Crime and Justice: A Review of Research*, Vol. 45, Chicago: The University of Chicago Press, 2016, p. 17-82.

4.2 Sentencing principles and norms

4.2.1 Structuring the sentencing decision

Punishment latitudes. Finnish Penal Code (FPC) provides individual statutory offence definitions with corresponding punishment latitudes with a minimum and a maximum for each offence. In addition, most offences are graded into two or three subcategories according to their internal seriousness (typically petty offence, basic form of the offence, aggravated offence) each with their own minimum and maximum penalty. Some examples of latitudes are shown in Table 1.

Table 1 Punishment latitudes for common offences

Punishment latitude	Offence
fine	petty assault/theft/embezzlement/fraud/tax fraud/criminal damage
fine-6 months imprisonment	causing a traffic hazard, driving under influence, unlawful use of narcotics
fine-1 year imprisonment	criminal damage
fine-1,5 years imprisonment	theft, embezzlement
fine-2 years	assault, fraud, tax fraud, narcotics offence, negligent homicide, causing a serious traffic hazard, driving while seriously intoxicated
4 months-4 years	aggravated theft/embezzlement/fraud/tax fraud/criminal damage
4 months-6 years	robbery, grossly negligent homicide
1-6 years	rape
1-10 years	aggravated assault/narcotics offence
2-10 years	aggravated rape/robbery
4-10 years	manslaughter under extenuating circumstances ('killing')
8-12 years	manslaughter
life	murder

Source: Finnish Penal Code

The resulting penalty ranges resemble statutory determinate sentencing and some systems of presumptive and voluntary sentencing guidelines in the United States. The ranges, however, are broad. Upper limits are binding and with minor exceptions may not be exceeded. The upper end of offense specific maximums is controlled also by general maximum penalties. For Finland the general maximum for a single offense is 12 years and in case of multiple offenses 15 years. Minimums, however, differ from those known in common law countries as mandatory minimums. They are fairly low (a few months for many aggravated offenses) and seldom compel courts to impose more severe penalties

than they otherwise would. Moreover, the minimums are only presumptive, and may be deviated on.

Sentencing decisions: type and amount. The latitudes, however, provide only outer limits for the court's discretion. Further guidance is given by statutory sentencing principles and norms. The sentencing criteria to be taken into account cover both factors related to the offence and the personal and social circumstances of the offender, as well as a broader set of arguments related to equity and reasonableness. Sentencing norms guide both the decisions about the type of punishment (the choice between different alternatives) as well as the severity of the punishment (the question of the amount).

For minor offences available sentencing options include a fine and the waiving of sanctions. A fine, numerous community sanctions and imprisonment are possible in the case of middle-range offences. Only for the most serious offences, starting usually from aggravated sexual offences and homicide, the only option for the court is unconditional imprisonment (perhaps to be replaced or combined with a treatment order). The decision on the amount (quantum) of punishment, typically includes the number and monetary value of day-fines and the duration of community sanctions or imprisonment.

4.2.2 Sentencing principles

The prevailing sentencing ideology – 'humane neo-classicism' – stresses the principles of proportionality, predictability and equality in sentencing. However, being named '*humane* neo-classicism', it pays attention also to other aims and values.[23]

Proportionality. As the FPC 6:4 states: "The sentence shall be determined so that it is in just proportion to the harmfulness and dangerousness of the offence, the motives for the act and the other culpability of the offender manifested in the offence." At the same time this ideology urges to use the least severe measures of the available alternatives whenever possible.

The principle of proportionality has its roots in the concept of the rule of law (*Rechtstaat*), legal safeguards, and the guarantees to citizens against misuse, arbitrariness, and excessive use of force. It is more important to prevent overly harsh and unjustified penalties than to prevent overly lenient ones. The main function of the proportionality principle is, thus, to impose upper limits that the punishment may never exceed. This asymmetry can be demonstrated in several ways. Courts have a general right to go below prescribed minimums whenever exceptional reasons justify it. The grading of offenses

23 The contents of the proportionality principle and related sentencing principles is discussed in more detail in Tapio Lappi-Seppälä, 'Humane Neoclassicism: Proportionality and Other Values in Nordic Sentencing', in: Michael Tonry (ed), *On One-Eyed and Toothless Miscreants: Making the Punishment Fit the Crime?*, New York: Oxford University Press, 2019.

reflects this same idea. Lists of aggravating criteria are exhaustive. Lists of mitigating criteria are always open-ended. The phrasing of mitigating criteria usually leaves greater scope for judicial discretion than does the phrasing of aggravated criteria.

Equality and consistency. The Finnish sentencing rules oblige the courts also to pay attention to the uniformity and consistency in sentencing, thus pointing out the importance of the principle of equality and the need to avoid unwarranted disparities in sentencing. In Finland this requirement occupied a central position as a symbol of the new sentencing ideology and the 'notion of normal punishments'. The respect of consistency and uniformity in sentencing means that the court must take into account the general sentencing practice and use the kind of punishment that have been used in similar cases, unless there are special reasons to deviate from these starting points. This phrase provided the courts a (heuristic) starting point for their decision-making.

Humanity. Further principles and criteria include also pragmatic considerations and values such as humaneness, equity, and mercy. Proportionality and consistency provide stability and legal security in the form of predictability. But general rules that aim to cover as many cases as possible in order to create stability in social relations also need *ad hoc* adjustments to take account of extraordinary and unexpected circumstances not taken into account in the formulation of rules. This incompleteness of abstract rules was well reflected in the sixteenth-century Nordic Rules for the judges, which stressed that "there must be mercy in justice as well"[24], and concluded that "It is better to have a good and wise judge than good law, because he can always settle the matter fairly". There is an element of 'reasonableness' in traditional Nordic legal thinking. Other values besides the requirements of 'strict' proportionality need to be included. The application and administration of law need to reflect values such as compassion, tolerance, solidarity, forgiveness, and humanity. To this end, sentencing provisions provide the courts general authority to impose sentences below minimum penalties in exceptional cases. Laws also indicate sets of factors that fall outside the scope of strict proportionality. They are unrelated to the severity of the offense or the culpability of the offenders, but nevertheless deserve to be taken into account. These considerations are noted in the sentencing codes, which provide long lists of exceptional

24 "What is not just and fair cannot be law either; for it is on account of the fairness which dwells in the law that the law is accepted. All law is to be wielded with wisdom because the greatest right is the greatest wrong; and there must be mercy in justice as well." "The Rules for the Judges" (Propositions collected by a 16th century Swedish theologian Olaus Petri. Olaus Petri 1552). These propositions from the sixteenth century have never been officially enacted and are not strictly speaking part of the positive law, but have been included as a preamble to the official law books in Sweden and Finland since 1635. They are firmly embedded as central values in Nordic legal culture.

circumstances related to post-act behaviour, personal conditions, and accumulation of sanctions that justify downward deviations from the 'normal punishments'.

Rehabilitation. As regards especially new community sanctions, arguments related social re-integration have become ever more prominent. The reform movement of the 1970s banned care by coercion because it overlooked the offenders' fundamental rights and was unable to deliver what it promised. But this did not mean that the aims and values of rehabilitation and reintegration were to be ignored in the administration of criminal justice. The differentiation of sanctions structures (in which different sanctions serve different aims in different ways) has continued through the emergence of new community alternatives. The usefulness of rehabilitative practices is seen today in much more positive light than in the 1970s. The use of new community alternatives is often linked to a combination of proportionality-oriented criteria and presumed individual preventive effects. This partial 'revival of the rehabilitative ideal' does not take us back to the time when people were institutionalized on the basis of false or unrealistic hopes of treatment effectiveness. Now the issue concerns making choices between alternative community sanctions, or about use of these alternatives instead of custodial sanctions on rehabilitative grounds. The question for the courts is not which of these alternatives is the most efficient, but rather would it be justified to replace a prison sentence (the normal penalty for an offense of this gravity) with a community alternative that would, according to our general knowledge, be less detrimental for the offender's future life in his or her specific circumstances.

All these principles have been given a more specific content through detailed instruction on aggravating and mitigating sentencing criteria. In addition, there are specific instructions for the use of all separate sentencing alternatives (such as the withdrawal of sentence, conditional imprisonment, juvenile penalty, community service and electronic monitoring).

4.3 Maintaining the independence of courts in relation to legislative powers, administration and public opinion in practical cases

The independence of the courts in relation to legislative powers relies on the prohibition of retroactive criminal law and the procedure for appointing judges. The prohibition of retroactive criminal law is included in both the Constitution and international treaties binding Finland, such as the ECHR. In Finland, no efforts have been made to influence the application of the previous law by means of legislation to be adopted. Legislative projects aimed at reducing sanctions or decriminalization have also been based on a

public debate about changes on penal values of specific offenses. There have been no cases which could be attributed to an attempt to amend a conviction in a particular criminal case. It is also obvious that the internationally exceptional examination-procedure of the constitutionality of legislative proposals in the Finnish Parliament is likely to prevent such efforts. The Constitutional Affairs Committee (on its activities see section 6), deals with cases on an expert-led basis and, at the latest, the attempt to influence pending court cases there would be noticed. In relation to the administration, the situation is similar. The risk of influencing the handling of a case pending before a court is deliberately avoided both in ministries and elsewhere in the administration.

On the other hand, there have been incidental statements by individual politicians on decisions given by the courts, even if the case is still pending before the court of appeal. Any such comment by a heavy weight politician would be met by a strong reaction in the public word. It seems that Finland has not yet formed a strong culture in all respects to avoid interference in pending issues in political debate. In the early 2000s, the Minister of Justice expressed his opinion on the excessively mildness of the judgment in an individual criminal case, even though the case was still before the court of appeal. The procedure received widespread publicity, criticizing the minister's actions. The Minister defended himself by invoking his right to assess the criminal acceptability of penalties. However, the independence of the courts is firmly rooted in Finnish legal culture and the mindset of the judges and there is no fear that the reckless statements made by politicians will have any impact on their function.

Public debate has been intense a few times in recent years about the outcome of a particular case pending in court. In general, however, the media is trying more to analyze the subject instead of taking a specific position on the issue. Occasionally the media has taken a specific stand on the issue, but cases are rare, and not necessarily dealing with criminal convictions.

4.4 Guarantees of independence in sentencing

The independence of the Court of Justice is governed by the Constitution. Other legislation lays down the conditions under which independence is safeguarded. Moreover, international agreements, such as the ECHR, have an equivalent legal status. The posts of judges are openly applied for and appointment, with the exception of supreme court judges, is based on a proposal from the Judge Selection Board. The composition of the Board shall consist of a majority of judges, supplemented by a representative of the Bar Association, the Public Prosecutor's Office and universities. Judges shall be appointed by the President of the Republic on a proposal from the Minister of Justice. In practice, the appointments of judges from general courts and administrative courts follow the board's

proposal. In practice, supreme court judges are appointed following the proposal prepared by the courts themselves. The role of the President of the Republic in appointing judges is justified by the fact that the President has a little internal political role, but is a person outside party politics. The ministry of justice's role in appointing judges has been seen mainly as the practical task of appointment. There has been no political influence on appointments.

An independent judicial agency (National Courts Administration) is responsible for the administration of the judiciary. It is under the authority of the Ministry of Justice, but its activities are governed by a board with a majority of judges. The budget of the judiciary is part of the state's budget. The preparation of the budget sets performance targets for the authorities, which also affect the funding of the courts. Budgetary negotiations are mainly conducted by the National Courts Administration. This reduces the ability of the Ministry of Justice to influence the functioning of individual courts, but in theory such an opportunity exists. In practice, no attempt has been found to influence the decision-fixing of the courts down this path.

The independence of judges is also safeguarded by the fact that judges are appointed permanently (but following the normal retirement rules). Their right of stay in office is also guaranteed by specific rules. A judge can only be dismissed by a court decision on the basis of a law.

As a whole, it can be estimated that there are no grounds for questioning the independence of courts in sentencing in Finland. Legislation provides the rules and principles for sentencing and the practice of punishment is well known to the judges. Judges have a strong desire to follow established practice and the culture of judges does not favor 'personal deviations'. In fact, there may even be a risk that the practice is too inclined to follow the existing traditions. There are hardly any views on pending issues from other governmental bodies. On the other hand, the culture of judges is strongly committed to independence. There are some views in the media on the measurement of convictions in concrete, pending, cases, but in general they are viewed in the right way. At present, Finland can probably estimate that the judge's independence is at least at a good European level.

5 Sentencing by non-judicial entities

Finland has traditionally had a very criminal justice-centered system of sanctions. Administrative sanctions have traditionally been used only in connection of minor traffic offences and minor tax offences. Also in this case, the use of these sanctions has been regulated in detail by the law. However, the scope of administrative sanctions has been

expanded more recently, especially in the sphere of economic life and to breaches of data protection.

5.1 Authorities entitled to impose administrative sanctions

The police have the most extensive powers to impose management sanctions. Typical situations are minor traffic offences. Administrative penalties related to transport also include a parking fee and a public transport inspection fee for passengers travelling without tickets on public transport. Economically most substantial administrative sanctions concern tax increases related to tax offences. They are percentage increases in the legal tax imposed by the tax authority, based on the seriousness of the infringement. Finance-supervision, which monitors the stock-markets, may impose a penalty fees for certain infringements of the stock-market regulations. The authorities supervising the data protection have the right to impose administrative penalties for the breaches of data protection legislation. An appeal may be lodged against such a penalty at the Administrative Court. In addition, international agreements may, for example, impose an oil emission levy, which is an administrative penalty imposed on the ship's owner as a result of the oil spill, and a penalty fee imposed on the trader for infringements of certain competition laws or European Union regulations.

5.2 Provisions governing the imposition of sanctions compared to the imposition of criminal penalties

The constitutionality of the laws adopted in the Finnish system will be examined in pre-legislative stages in a special parliamentary committee, the Constitutional Affairs Committee. The committee is an organ of Parliament and is made up of Members of Parliament. In addition to the constitutionality of the draft law, the Constitutional Affairs Committee checks whether drafts are compatible with international treaties binding Finland, such as the ECHR.

The Constitutional Affairs Committee has equated the administrative penalties reported with criminal sanctions. Consequently, the principles applicable to criminal proceedings can also be relevant to the rules on administrative penalties are. The provisions of Article 6(2) of the ECHR, including the presumption of innocence and right not to self-incriminate, also apply to significant administrative penalties. These principles are also included in the guarantees of a fair trial provided for in Section 21 of the Constitution of Finland. Therefore, administrative charges and their imposition are, in principle, subject to the same legal conditions as criminal sanctions. The penalties must be proportionate to the degree of the perpetrator's culpability and the seriousness of the offense. Also the

grounds for exemption from liability must be taken into account when determining the charges. Their imposition is also subject to the principle of legality and the prohibition of *ne bis in idem*. As a result, the imposition of administrative penalties follows essentially the same principles and criteria that apply to criminal punishment. However, in some areas the procedures differ. This applies for instance to penalties used for breaches of stock-market rules. These rules, set by the European Union law, put emphasis on non-guilt-based factors, such as the turnover of a company sentenced to a penalty.

When the imposition of criminal penalties is regulated fairly strongly by guiding provisions and the practice is largely well established, the imposition of administrative sanctions is in some cases more freely considered and no strong guiding practice has yet been established. Such features relate, for example, to administrative penalties for offences against the stock-markets. On the other hand, the penalty may also be determined directly on the basis of a formula defined in the law (oil emission levy). In the case of automatic traffic control, the penalty may be directed at the owner of the vehicle, even if it cannot be demonstrated that it was he who was driving the vehicle in the event of an infringement. The amounts in case of minor infringements are often fixed by law, whereas the amount of criminal fines is dependent in Finland also of the offenders level of income (so called day-fine system).

5.3 Advantages and disadvantages of administrative penalties

The expansion of administrative sanctions has been grounded in Finland mainly with reference to practical arguments. They save both time and money. The transition to administrative sanctions can also be defended by the fact that criminal sanctions and their imposition before a court are perceived as stigmatizing, which is to be avoided, particularly in the case of minor offences. It is obvious that the reduction in stigma is significant for ordinary people, but it is particularly important in business, which has also been reflected in the debate on sanctions against companies in Finland.

The use of administrative sanctions can be defended also with reference to the need of safeguarding expertise in areas where a good knowledge of the legislation and practice of a specific sector is required in order to assess the seriousness of the breaches properly. For example, the supervision of the stock-markets or banking, as well as the supervision of data protection, is highly dependent on the supervising authority's specific expertise and experience of acceptable practice of the sector.

Risk-factors include the possibility that the procedures used in minor cases have become too simple and routine-like. Although the authority has a duty of inquiry and a duty to provide evidence, the investigation can be very scheduled and superficial. This creates a risk of wrong decisions and the access to legal aid to investigate minor

infringements is understandably limited. Still, the imposition of administrative penalties involves usually the possibility and the obligation to bring the correctness of the decision first into the rectification procedure, which can be done by means of a very simple application. In particular, minor tax errors are very often corrected in favor of those who have made the claims for rectification.

Administrative penalties may also be brought before administrative court. Since the number of administrative courts is lower (six in mainland Finland and one in the province of Åland) than in the general courts (20 courts, some of which have more seats), it is somewhat more cumbersome to take the matter before the Administrative Court (due to distances). In particular, oral evidence is less presented in administrative courts than in district courts.

The relationship between administrative sanctions and criminal sanctions can be very problematic. According to the ECHR, no one should be punished twice for the same crime (*ne bis in idem*). The application of this principle in situations where both administrative and criminal sanctions are available can be extremely difficult. Problems have arisen in several countries, including Finland, in coordinating criminal proceedings on the basis of administrative tax increases and tax offences. Also *ne bis in idem*-problems have also arisen, for example, with regard to administrative driving license penalties and criminal penalties for traffic offences. The rulings of the ECtHR have not been easily to follow in national case law.

As stated above, the use of administrative sanctions has expanded considerably over the last few decades. Main reasons relate to economic arguments and resources. This has raised the debate whether administrative sanctions have become a cheap shortcut for the state at the expense of legal protection. A reasoned answer to this question would require a follow-up study. However, compared to many other jurisdictions, the Finnish legal system can still be deemed to represent a 'criminal-justice-oriented' response, much because of its long legalistic traditions.

6 Administrative discretion in the execution of sentences

6.1 Human rights orientation in enforcement

The rules of enforcement have been drafted with the intention to guarantee impartial and fair treatment of inmates and clients serving community alternatives. Prison Law section 1:5 on treatment of prisoners states that "prisoners shall be treated with justice and with respect for their human dignity. Prisoners may not, without a justifiable reason, be placed in an unequal position due to race, national or ethnic origin, colour, language, sex,

age, family status, sexual orientation, state of health, disability, religion, social opinion, political or professional activity or other reason relating to the person".

Prison Law section 1:6 enacts on the general principles relating to the use of authority:

> An official of the Prison Service shall act appropriately and impartially as well as in a spirit of compromise. […] An official of the Prison Service shall attend to his official duties without unnecessarily interfering with the rights of any person and without causing greater detriment than is necessary and justifiable in order to perform the task.

A similar provision applies to enforcement of community sanctions. Enforcement, meetings and supervision should be conducted in a manner that does not cause any unnecessary disturbance for family members or for the offender's social environment.

6.2 Curbing the scope of discretion

As regards to the scope of discretion, constitutional reform brought several changes. For the first, the new prison officially ended the (already at that time weakened) "assumption of institutional powers".[25] Meaning, that the fundamental rights of a particular group of people could be directly curtailed merely on the grounds that they have a special status subject to power or that they are under the power of an institution. This was refuted through the Finnish Constitution (Section 7.3): "The rights of individuals deprived of their liberty shall be guaranteed by an Act of Parliament." Since the rights of persons who have been deprived of their liberty must be safeguarded by an Act of Parliament, all restrictions for these rights must be based on a parliamentary act, not regulations of lower-level statutes, nor correctional orders issued by the administration. Thus, prisoners were no longer 'the slaves of the state'. They have their rights protected by the law like any other citizen. Consequently, any decision that entails deprivation of liberty or infringement of the rights of prisoners must have its foundation in the law. As a result, the prison law-codex has become quite detailed.

Stricter constitutional requirements as to the scope of administrative discretion have also influenced other parts of sanction system. During the enactment process of new community sanctions, the Constitutional Affairs Committee made several demands that the contents of community alternatives must be defined more clearly in the law. This applies to the number of weekly hours, or the maximum number of meetings etc. Still, it

25 Or "inherent limitations", see Dirk van Zyl Smit, & Sonja Snacken, *Principles of European Prison law and Policy. Penology and Human Rights*, Oxford: Oxford University Press, 2009.

remains under the discretion of enforcement agencies to plan and design the contents of probation and program work.

This, still, leaves the enforcement agencies considerable powers for prison authorities in deciding the contents of enforcement. First decision of principal importance is to decide in which prison the sentence will be served. In a country that uses extensively open prisons – as in Finland – this is a crucial issue for prisoners.[26] Open prisons are in practice 'prisons without walls': the prisoner is obliged to stay in the prison area, but there are no guards or fences. Also, compensation paid for the work is substantially better. Placement in an open prison is decided by a specific assessment centre, following the criteria defined in the laws and administrative instruction.

Other areas where the prison authorities have considerable powers to influence on enforcement conditions include decisions about receiving visitors, granting of leaves, participation in activities and conditional release. However, the criteria to be followed in all these decisions are confirmed either in the law or in administrative regulations. In addition, the prisoners have extensive right to appeal against decisions they do not agree with.

Having this said, it is clear that these rules are bound to leave room for discretion in individual cases. And they do not rule out the possibility of misuse of powers. Inspections by the CPT, however, rarely reveal individual breaches due to misuse of discretionary powers. Rather, the criticism relates to structural problems, such as the use of police cells for remand purposes or poor sanitation facilities ('slopping out', which by now has become history).[27]

6.3 Discretion in deciding on conditional release

The decision-making process for conditional release may serve as an example of Finnish regulation.[28] The time of the release is defined in detail in the law and varies according to the age of the offender at the time of the offence as well as previous prison terms. The law separates four groups: (1) Persons at least 21 years of age at the time of the offence and who have not served a sentence of imprisonment within three years preceding the offence

26 Open prisons hold about one third of the current prison population and about 40 % of prisoners serving a sentence. See for details in enforcement: Tapio Lappi-Seppälä, 'Prisoner resettlement in Finland', in: Frieder Dünkel, Ineke Pruin, Anette Storgaard, & Jonas Weber (eds), *Prisoner resettlement in Europe*, New York: Routledge, 2018, p. 104-127.

27 See Tapio Lappi-Seppälä & Lauri Koskenniemi, 'National and International Instruments in Securing the Rule of Law and Human Rights in the Nordic Prisons', 70 *Crime, Law and Social Change* 1 (2017), p. 135-159.

28 For details, see Tapio Lappi-Seppälä, 'Parole and Early Release in Finland', in: Nicola Padfield, Dirk van Zyl Smit & Frieder Dünkel (eds), *Release from Prisons. European Policy and Practice*, London: Routledge, 2010, p. 135-168.

are released as a rule after having served half of the sentence. (2) A person who has served a sentence of imprisonment within five years preceding the offence will be released after serving two thirds of the current sentence. (3) If the offence has been committed when the offender was under the age of 21 years, a first offender (who has not served a prison term during the last three years prior to the new offence) will be released after serving one third of the sentence. (4) Juveniles of that age, who have served a prison term during the above-mentioned period, will be released after half of the sentence. The minimum period to be served is in all cases 14 days. This is also the general minimum length of any prison sentence in Finland.

The postponement of parole is a rarely used exception. Release on parole may be postponed with the consent of the prisoner if new sentences of imprisonment are to be enforced or the prisoner wants postponement of release on parole for another justified reason. Release on parole may be postponed without the consent of the prisoner if on the basis of the conduct or threats made by the prisoner there is an evident danger that on release, he or she would commit an aggravated offence against life, health or liberty and postponement of the release is necessary in order to prevent the offence. Non-consensual postponement of parole must be reconsidered at intervals of at most six months. The decision to postpone parole non-consensually can be subjected to appeal. In practice postponement deals with a handful of cases.

The decision-making power is regulated by § 22:2 of the Prison Act. In regular parole matters these powers are in the first instance in the hands of the prison director. He or she shall decide on a conditional release in accordance with the provisions of chapter 2 c, section 5 of the Criminal Code. This applies also to the postponement of conditional release where the postponement is either consensual or based on the fact that there are new sentences waiting to be enforced. The postponement of a conditional release without the consent of the prisoner due to imminent risk of reoffending is decided by the Criminal Sanctions Agency. The prison director decides also whether the prisoner will be placed under supervision in regular cases, as well as on the consequences of a violation of probationary liberty under supervision. However, the revocation of conditional release is always a matter that the court has to decide (see below). A prisoner has the right to appeal to the Administrative Court against a decision postponing conditional release, either by the decision of the prison director or by the Criminal Sanctions Agency.

7 Conclusion

For historical reasons, the Finnish legal system carries a strong legalistic legacy. During the early years of 20th century, Finland was experiencing a strong coercion and pressures by Russia (at that time Finland was still an autonomous part of Russia before the

independence in 1917). This threat of 'Russification' was counteracted by strong adherence to the existing laws and by a passive resistance of any arbitrary interventions (from the Russian officials) that contradicted the Finnish law in force. Much thanks to this legalistic tradition, classical values of Rule of law, proportionality, predictability, impartiality, equality and legal security, have had a firm footing in the application of criminal law.

These principles also experienced a renaissance in all Nordic countries during the 1960/70s as the emerging social-liberal critics of criminal law raised barriers against treatment without consent, and criticized the use of indeterminate sanctions and overuse of incarceration in general. The paradigm-shift in criminal policy that took place in Finland during those years was, in fact, based on human rights values, but without the use of this term. The overriding motive for the reforms that reduced the use on imprisonment by two thirds was the reduction of unnecessary suffering caused by excessive use of incarceration. Attempts to counteract the detrimental effects of imprisonment (prisonization) were reflected in the formulation of enforcement aims and principles in the 1970s, including the principle of normality and minimization of harms.

Still explicit human rights-based argumentation entered the Finnish (and Nordic) legal discourse and practice not before the 1990s. For Finland, this was much initiated by joining the Council of Europe, the ratification of ECHR, the establishment of the ECtHR, the production of the European Prison Rules by the Council of Europe, as well as the visits by European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in the Finnish prisons. However, the fact that also a new constitution, a new prison law and a new criminal code were drafted during those same years intensified the impact of international human rights principles and thinking in Finland. Their influence penetrates through all layers of national regulation, from the constitutional fundamental rights to grass-root penal practices. Central articles of the ECHR find their counterparts in the Finnish constitutions, and several of them are further elaborated in the Prison Act. The Prison Act echoes the requirements of the Rule of Law, fundamental rights and social rehabilitation, in the spirit of international prison rules, as discussed above.[29] The overall development in prison law over the last 20 year can be characterized by the intensification of human rights thinking and towards more explicitly defined prisoners' rights in the form of parliament law.

Similar changes, albeit less explicit, can be detected at the sentencing level. Finland was the first Nordic country to carry a Rule of Law inspired sentencing reform in the 1970s. Concerns over disparities in sentencing and breaches of the requirement of equal treatment before the law led to the introduction of legislative norms to guide the discretion of the

29 And in turn, the European prison rules from 1987 and 2006 also reflect in many respects the principles and aims that were formulated in the Nordic prison law and theory from the mid-1940s onwards, especially in the 1970s.

courts. Values of justice, fairness and humanity were reflected in the formulation of leading principles of sentencing. What actually followed was a change in judicial culture through the adoption of reasoned decisions in sentencing. This practice grew out originally from the decisions of the Supreme Court and is now fixed practice also in district courts.

The resulting model of penal policy shares several favourable features: internationally low prison population rates, humane prison conditions and a general commitment to rehabilitating and reintegrating offenders into society. Children below 15 are not punished and the number of children aged 15-17 in penal institutions is can be counted on fingers; prisoners maintain all their constitutional rights defined in detail in the law and monitored nationally and internationally; a substantial number of prisoners are serving their sentences in open facilities; the use of indeterminate confinement is either prohibited or limited to a minimum, and criminalization follows the principle of *ultima ratio* and the Rule of Law.

Having said all this, Finnish criminal justice is far from complete, nor free from criticism. Reports from the CPT have repeatedly pointed out problems related especially to remand conditions. After long-standing criticism from the CPT, the Finnish authorities have slowly managed to reduce the use of police station cells for remand purposes. However, the prison conditions and lack of activities of remand prisoners and other segregated inmates (on security grounds, including the 'fearful' ones) have still raised concerns among the CPT during its last visit in 2020.[30] Critical observations on juvenile institutions and mental hospitals indicate that there is a permanent need for a human rights-based inspection and monitoring in all forms of institutional care, not only in the area of criminal justice.

30 Preliminary observations made by the delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which visited Finland from 7 to 18 September 2020 (at: https://rm.coe.int/1680a00dac).

Legality, non-arbitrariness, and judicial and administrative discretion in sentencing and enforcement of sentences in the German system

Rita Haverkamp and Johannes Kaspar[*]

1 Introduction

2014 was an eventful year for German football fans, with Germany winning the World Cup. Some months before this, on 13th March, Uli Hoeness, former national football player and (at the time) president of FC Bayern Munich, had been sentenced to three years and six months of imprisonment by the Higher Regional Court of Munich.[1] Hoeness was found guilty of tax evasion with an overall damage of 28.5 million Euros. For several years, he had not declared capital income for money in Swiss bank accounts. The verdict was discussed controversially all over Germany:[2] was it too mild? Did Hoeness enjoy advantages because of his high social position and reputation? Or was it unnecessarily cruel to lock an honourable elderly man up after all he had done for German football in general, and particularly for FC Bayern Munich?

Even though this case falls within tax law (being a special legal area), it illustrates quite well the general problems in German sentencing law. First of all, the range of punishment for tax evasion in a severe case (sec. 370 para. 3 German Tax Act) is broad and can be anything from six months to ten years of imprisonment – which is no exception in German law. Secondly, it was not easy to predict the outcome of the trial, as it was not clear at all what factors the court would take into account, and how the court would weight them. Considering the huge amount of money involved, three and a half years in prison might

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1 LG München II, Judgment of 13 March 2014, Reference W 5 KLs 68 Js 3284/13.

2 See, for example, Thomas Grosse-Wilde, 'Brauchen wir ein neues Strafzumessungsrecht? – Gedanken anlässlich der Diskussion in der Strafrechtsabteilung des 72. Deutschen Juristentages in Leipzig 2018', 14 *Zeitschrift für Internationale Strafrechtsdogmatik* 2 (2019), p. 130.

look like a comparably mild sentence. On the other hand, Hoeness himself had filed a report of false or incomplete tax declaration (*Selbstanzeige*, sec. 371 German Tax Act) to the tax authorities before being caught.[3] If this report had been complete and valid, Hoeness could not have been punished at all, as he had also fully compensated for the damage in the meantime. This was considered to be a mitigating factor alongside his lifelong achievements – the last point especially remained quite controversial.[4] What we can conclude from this case is the starting point for our discussion: German law leaves remarkable discretion to the sentencing judge. In spite of "German law´s strong attachment to the idea of codification"[5] (as opposed to countries with a case law approach), in the area of sentencing, strict boundaries and precise instructions by the legislator are a rare phenomenon. The range of possible sentences is, as shown above, regularly very broad, and the central regulation on sentencing in sec. 46 Criminal Code is not much of a help in this regard.[6] It states that the amount of "guilt" of the concrete offence is the "basis" for sentencing (sec. 46 para. 1 s. 1 Criminal Code); the effect that punishment will have on the future life of the offender is to be considered (sec. 46 para 1 s. 2 Criminal Code), as well as general preventive needs that are mentioned in other regulations, such as sec. 47 para. 1 Criminal Code. What is euphemistically called a "unifying theory"[7] is in fact a hotchpotch of different and in part conflicting purposes of punishment with no clear hierarchical order.

Considering all of this, it is no surprise that empirical studies have shown remarkable discrepancies within the sentencing of comparable cases across Germany. Empirical studies[8] indicate that sentencing decisions depend on the individual judges' personal attitudes and preferences, but even more so on regional unregulated sentencing traditions which are passed on from one generation of (older and more experienced) judges to the next in an informal, and therefore also non-transparent way. It is obvious that this is not a satisfying status quo if one considers fundamental principles of Constitutional Law such

3 For theoretical and empirical aspects of sec. 371 AO see Johannes Kaspar, 'Kriminologische und strafrechtliche Aspekte der strafbefreienden Selbstanzeige gem. § 371 AO', in: Fahl et al. (eds), *Festschrift für Beulke*, Heidelberg: Müller, 2015, p. 1167.

4 Tobias Stadler, *Die Lebensleistung des Täters als Strafzumessungserwägung*, Tübingen: Mohr Siebeck, 2019.

5 Benjamin Vogel, 'The core legal concepts and principles defining criminal law in Germany', in: Matt Dyson & Benjamin Vogel (eds), *The Limits of Criminal Law*, Cambridge: Intersentia, 2018, p. 39-69; Ulrich Sieber, 'Administrative Sanction Law in Germany', in: Dyson & Vogel (eds) (fn. 5), p. 311.

6 See also Johannes Kaspar, 'Sentencing Guidelines vs. Free Judicial Discretion. Is German Sentencing Law in Need of Reform?', in: Kai Ambos (ed), *Strafzumessung / Sentencing. Angloamerikanische und deutsche Einblicke / Anglo-American and German Insights*, 2020 (in press).

7 For an instructive overview of penal theories see Claus Roxin & Luis Greco, *Strafrecht Allgemeiner Teil*, Munich: C.H. Beck, 2020, p. 128-160; Tatjana Hörnle, *Straftheorien*, Tübingen: Mohr Siebeck, 2017.

8 See Johannes Kaspar, *Gutachten C für den 72. Deutschen Juristentag*, Munich: C.H. Beck, 2018, p. C 18 et seq.

as equality (Art. 3 Basic Law), as well as the principles of proportionality and legality (Art. 103 para. 2 Basic Law).

2 The principle of legality and/or the rule of law as regards criminal punishments

The rule of law regulated in Art. 20 para. 1 Basic Law (*Rechtsstaatsprinzip*),[9] and the principle of legality as its specification (Art. 103 para. 2 Basic Law; see also sec. 1 and sec. 2 Criminal Code, and Art. 7 ECHR) are both applicable to criminal law. Art. 103 para. 2 Basic Law states that "an act may be punished only if it was defined by a law as a criminal offence before the act was committed". Whilst the wording seems to indicate that the principle only refers to whether one is to be punished at all, it is widely agreed upon (and confirmed by the German Federal Constitutional Court, *Bundesverfassungsgericht* – BVerfG) that it also relates to sanctioning.[10] An important purpose of this principle is that every citizen should be able to know beforehand if certain behaviours might be punished, but also, what kind and what amount of punishment he or she will have to face.[11] And it is for the legislator, not the judiciary, to decide on these matters, at least in the sense of creating a normative framework with guiding rules and principles. Arbitrary judgments which are affected by criminal law judges' personal preferences or political influences should thus be avoided, and vice versa the influence of the democratically legitimised legislator should be strengthened.

What seems to be a good idea in theory does not actually have a strong impact on German sentencing law and sentencing practice, however.[12] When creating new or changing existing criminal law regulations, the legislator can make use of a considerable margin of discretion. Broad sentencing frames are accepted, as well as unspecified aggravated cases of certain offences, where the judge can choose from a higher sentencing frame if he or she considers the offence to be especially serious. A notorious example is sec. 212 para. 2 Criminal Code, which contains lifelong imprisonment for "aggravated" cases of homicide, without clear indications by the legislator which cases might be considered aggravated.[13] Generally, the Federal Constitutional Court (BVerfG) is not very

9 Franz Streng, 'Sentencing in Germany: Basic Questions and New Developments', 8 *German Law Journal* 2 (2007), p. 153.

10 BVerfGE 86, 288, 313; 105, 135, 153.

11 Claus Roxin, 'Der Grundsatz der Gesetzesbestimmtheit im deutschen Strafrecht', in: Eric Hilgendorf (ed), *Das Gesetzlichkeitsprinzip im Strafrecht*, Tübingen: Mohr Siebeck, 2013, p. 113 et seq.

12 Lothar Kuhlen, 'Das Gesetzlichkeitsprinzip in der deutschen Praxis', in: Hilgendorf (ed) (fn. 11), p. 45 et seq.

13 According to BVerfG, Decision of 24 April 1978, Reference 1 BvR 425/77 (see 1979 *Juristische Rundschau* 1 (1979), p. 28), however, the principle of legal certainty is not violated by sec. 212 para. 2 Criminal Code,

strict with regard to the principle of legality, nor when it comes to the prerequisites of criminal liability; even vague terms and general clauses are not excluded in this area.[14] According to new rulings of the BVerfG, some kind of a framework by the legislator is sufficient, and it is the task of the courts to fill this gap with specifications in concrete cases, therefore making the law more precise and adding to legal certainty (duty of specification – *Präzisierungsgebot*).[15]

In the past, the BVerfG have only considered very few regulations concerning criminal sanctions to be unconstitutional. The most prominent example is the confiscatory expropriation order (*Vermögensstrafe*), which was introduced in 1992 in sec. 43a Criminal Code (former version). In 2002, the Court's main argument against this kind of punishment was that there was no general upper limit, so the amount of punishment was dependent on the (unpredictable) total amount of assets owned by the offender.[16] Apart from that, sentencing regulations leaving huge margins of discretion to the judge are generally accepted by the BVerfG. One could argue that the aforementioned duty of specification also applies here: by coming up with sentences in concrete cases on a daily basis, courts actually do deliver specifications of broad sentencing frames, which might help to foresee a possible punishment in certain (standard) cases. But for several reasons, that would not be very convincing: firstly, as the example of Uli Hoeness shows, the idea of specification does not help to deal with exceptional cases with individual features that courts have not yet faced. Secondly, we have to confront the fact that the specification of sentencing in this sense will differ from court to court and region to region, and is (for all we know) not based on different legal considerations (let alone different laws), but mostly on the fact that locally or regionally, a certain sentencing tradition has developed. This is why the aforementioned sentencing disparities are not only a problem with regard to equality, but also to legal certainty. Lastly, the idea of engaging the courts in order to ensure legal certainty seems a bit odd: as the expression "legal" certainty clearly indicates, it is primarily a duty of the legislator. If it is the courts' task to "heal" unclear and vague regulations by interpretation, the legislator might be tempted to neglect their duty.[17] And for citizens, it is obviously much harder to inform themselves of the current legal situation by studying different legal commentaries and verdicts, instead of just taking a look at the law itself. Therefore, it should be clear that the legislator has to guarantee at least a minimum level of

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because the legislator had at least laid down, in sec. 211 Criminal Code, which circumstances lead to the assumption of murder instead of homicide. This is doubtful, as the catalogue of sec. 211 contains a heterogenous mixture of objective and subjective criteria with no clear common denominator, which makes it hard to identify comparable aggravating circumstances.

14 Roxin (fn. 11), p. 133.

15 BVerfGE 126, 170; cf. also Kuhlen (fn. 12), p. 54 et seq.

16 BVerfGE 105, 135; cf. also Roxin (fn. 11), p. 138 et seq.

17 See also Vogel (fn. 5), p. 45.

legal certainty. Some existing regulations are at any rate problematic in this sense;[18] the legislator could improve legal certainty by narrowing sentencing frames, getting rid of unspecified aggravating rules such as sec. 212 para. 2 Criminal Code,[19] or by establishing more precise sentencing rules based on a clear theoretical concept regarding the purposes of punishment and their hierarchical order.[20]

3 Human rights requirements as regards the sentencing process, and the enforcement of sentences (with the exception of the human right principle of legality)

Firstly, there are human and basic rights regulations which prohibit certain kinds of punishment in the first place. Art. 102 Basic Law contains an absolute ban of the death penalty; in addition, most scholars argue that the death penalty is a violation of human dignity (Art. 1 para. 1 Basic Law), and so even an amendment of constitutional law would not be admissible here (see Art. 79 para. 3 Basic Law).[21] Furthermore, the protection of human dignity prohibits torture as well as cruel and inhumane punishment (see also Art. 3 European Convention on Human Rights, ECHR). Prison sentences (including lifelong imprisonment) are not considered to be a violation of these principles. The BVerfG has ruled that in spite of its possible harmful effects on inmates' social lives and mental wellbeing, lifelong imprisonment is not a violation of human dignity or other basic rights as long as the offender gets a fair chance to regain his or her freedom (at least on probation) after a certain period of time (which is a minimum of 15 years under German law, see sec. 57a Criminal Code).[22] Here, but also in several other rulings, the BVerfG has made it clear that no matter what kind of crime the offender has committed, they are principally protected by basic rights[23] and are entitled to rehabilitation and reintegration.[24]

Apart from the aforementioned absolute boundaries, there are further principles of German constitutional law which influence sentencing. The principle of culpability or principle of guilt (*Schuldprinzip*)[25] is not explicitly regulated in the German constitution, but derived from human dignity and personal rights of the offender. It states that no one

18 Very critical in this regard: Bernd Schuenemann, *Nulla poena sine lege*?, Berlin/Boston: De Gruyter, 1978.
19 The latter reform proposal was accepted by the majority of votes on the 72. Convention of German legal scholars and practitioners (Deutscher Juristentag) in 2018.
20 Cf. Kaspar (fn. 8), p. C 104 et seq.
21 Cf. Johannes Kaspar, *Grundrechtsschutz und Verhältnismäßigkeit im Präventionsstrafrecht*, Berlin/Boston: De Gruyter, 2014, p. 630.
22 BVerfGE 45, 187.
23 See BVerfGE 33, 1.
24 See e.g. BVerfGE 35, 202; BVerfGE 98, 169.
25 Franz Streng, 'Sentencing in Germany: Basic Questions and New Developments', 8 *German Law Journal* 2 (2007), p. 153; Kaspar (fn. 21), p. 267-330; Vogel (fn. 5), p. 43 et seq.

shall be punished if he or she has acted without culpability (which relates to minors under the age of 14, and offenders with certain mental disorders, see sec. 19 and sec. 20 Criminal Code). It also states that no one should be punished in a way that exceeds the level of individual guilt (or "blameworthiness"[26]). This relates to sec. 46 para. 1 s. 1 Criminal Code, with the expression of guilt being the basis for sentencing (see infra). Critics argue that this 'upper limit' of punishment by the amount of 'guilt' or 'blameworthiness' of his or her offence is not a very strong protection against excessive punishment, as there are no clear standards for how guilt is to be measured and (especially) how it is to be transferred into concrete numbers (e.g. days in prison) – so again, there is a great deal of discretion for the individual judge to decide on these matters.

The idea of guilt-oriented individual sentencing decisions is the reason why equality, which is also guaranteed in the German Constitution (Art. 3 Basic Law), does not play an important role with regard to sentencing decisions. Legally, the judge is not bound by other sentencing decisions in comparable cases. Each case is individual, one could argue, so it is no violation of equality if the judge comes up with a different sentencing decision in similar cases. In fact, the Federal Court of Justice (BGH) stressed that it would even be a legal mistake to use sentencing decisions in other cases as a decisive argument for sentencing in the actual case.[27] This traditional view has slightly changed in recent years. The BGH still rejects "comparative sentencing"[28] in the narrow sense, but the Court has conceded that there are situations where the judge should indeed take into account other sentencing decisions, e.g. in cases of co-perpetrators with similar contributions to an offence.[29] While still accepting most sentencing decisions to a very wide extent, the Court has increasingly started to annul judgments because the sentencing decisions had differed too much from the "usual punishment" in comparable cases[30] – so in this sense, equality has started to come into play, and to influence sentencing at least 'through the backdoor' of judicial control.

Finally, the principle of proportionality (*Grundsatz der Verhältnismäßigkeit*) has to be mentioned. This principle is not explicitly regulated in the German Constitution, but is based on the rule of law and the nature of constitutional liberty rights being a protective shield against intrusions by the state.[31] The principle demands that state measures which interfere with citizens' right to liberty (with punishment being a very clear example) always have to be apt, necessary, and proportionate with regard to a legitimate purpose.

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26 See e.g. Vogel (fn. 5), p. 53.

27 BGHSt 56, 262; see also BGHSt 25, 207.

28 See Matthias Maurer, *Komparative Strafzumessung*, Berlin: Duncker & Humblot, 2005.

29 BGH at Klaus Detter, 'Strafzumessungsrecht', 2017 *Neue Zeitschrift für Strafrecht* 11 (2017), p. 631.

30 See e.g. BGH, 'Rückfall in Drogenabhängigkeit als schulderhöhender Umstand', 1992 *Strafverteidiger* 11 (1992), p. 570.

31 See Kaspar (fn. 21), p. 102 et seq.

Most courts and scholars argue that proportionality in this sense does not have to be checked in cases of punishment, as long as the aforementioned (and supposedly stricter) guilt principle is obeyed.[32] However, this is questionable, as the latter does not contain all the criteria of the former, including the duty of the state to always choose the mildest measure, which seems apt to fulfil the purpose of the measure in question.[33] To acknowledge proportionality issues within sentencing (alongside or perhaps even instead of the difficult question of measuring individual 'guilt') would therefore support the idea of criminal punishment being an *ultima ratio*[34] that has to be applied not only appropriately (in relation to the offence), but also cautiously.

4 Judicial discretion in sentencing in general: the position of the independent judge, and responsibility for fairness

In Germany, the judiciary is completely independent from the public and the administration, at least in the legal sense. The independency of each judge is guaranteed by the Constitution (Art. 97 para. 1 Basic Law), which reads as follows: "Judges shall be independent and subject only to the law". Judges are not subject to orders by the executive branch, and they are not elected by public vote. However, in at least some German Federal states, such as Bavaria, judges are appointed and promoted by the Justice Department. This might endanger total judicial independence, as judges are somewhat dependent on the goodwill of the Justice Department (being a part of the executive branch). That is why critics (including the German Association of Judges) have demanded to move the right to appoint and promote judges to independent judicial commissions.[35]

Judges are bound by the law, but as hinted above, legislation in the area of sentencing is not very strict, and leaves wide margins of discretion. Of course, the starting and end points of sentencing ranges are boundaries for the judge; fixed minimum sentences become especially relevant, whereas the maximum punishment is applied very rarely anyway. With the exception of lifelong imprisonment for very grave offences such as murder (sec. 211 Criminal Code) or genocide (sec. 6 International Criminal Law Code), there are no absolute or fixed sentences. Even in such cases, there can be exceptions. These

32 See e.g. Vogel (fn. 5), p. 44 and 46.

33 Cf. Kaspar (fn. 21), p. 155 et seq. and p. 283 et seq.

34 Wolfgang Wohlers, 'Criminal Law as a regulatory tool', in: Dyson & Vogel (eds) (fn. 5), p. 235-261 has a point when he states that the idea of *ultima ratio* has become a theoretical 'fairytale' that is neglected in criminal law practice and policy. One of the reasons for this might be that the respective content of the principle of proportionality is not always considered properly, and is outshined by a predominantly retributive penal theory which focuses on stressing individual guilt.

35 See e.g. Deutscher Richterbund (at: https://www.drb.de/positionen/themen-des-richterbundes/selbstverwaltung-der-justiz) (last visited: 11 September 2020).

are not based on written law, but on verdicts by the BVerfG, which pointed out in a leading case in 1977 that even in the case of murder, there must be a possibility of refraining from lifelong imprisonment in special cases with strong mitigating circumstances. Otherwise, the aforementioned principle of proportionality[36] would be violated. For this reason, the BGH ruled that in these exceptional cases, lifelong imprisonment could be replaced by a prison sentence of between 5 and 15 years (so-called *Rechtsfolgenlösung*).[37]

The fact that judges enjoy considerable discretion without strict judicial control by the higher courts is also reflected in the leading sentencing theory,[38] which combines retributive and preventive purposes: the judge is supposed to find the appropriate punishment by focusing on the upper and lower limit of the spectrum of possible guilt-oriented sentences. Within this frame, he or she is supposed to take into account preventive purposes as well. In doing this, he or she is granted a considerable margin of discretion that also appears in the theory´s name, as it is called the 'margin' or 'leeway' theory (*Spielraumtheorie*).[39]

In spite of the general tendency to not interfere too much with sentencing decisions, some of the BGH's general verdicts are the source of additional guidance for sentencing judges. The Court produced a distinction between the 'average case' (*Regelfall*) of a certain type of offence as it frequently appears before the courts, and a case of 'medium severity' (*Durchschnittsfall*). In terms of the statistical median, the average case is below the medium severity.[40] This means that, regularly, judges are supposed to pick a sentence from the lower half of the sentencing frame (which, according to various empirical studies, is actually the case).[41]

In recent verdicts, the BGH produced more concrete sentencing instructions within Tax Law. The Court ruled that, generally, in cases with a damage of 100,000 Euros or more, a mere fine would no longer be sufficient. If the damage is 1,000,000 Euros or more, the Court ruled that a prison sentence should be executed and shall no longer be suspended on probation.[42] It is understandable that the BGH tries to give some guidance for sentencing judges, and to reduce sentencing disparities and inequalities in this way. However, if such abstract and general sentencing rules (especially if they aim at severely

36 See supra 3.

37 BGHSt 30, 105; see also Thomas Weigend, 'Sentencing in West Germany', 42 *Maryland Law Review* 1 (1983), p. 50.

38 For the role of sentencing theories in this regard see Kaspar (fn. 6).

39 Tatjana Hörnle, 'Moderate and Non-Arbitrary Sentencing without Guidelines: The German Experience', 76 *Law & Contemp. Probs.* 189 (2013), p. 194.

40 Decisions by the Federal Court of Justice (*Bundesgerichtshof*) in criminal cases: BGH, Judgment of 21 April 1987, *Richterliche Aufklärungspflicht: Bestellung eines weiteren Sachverständigen; Strafrahmen bei geringem Schweregrad der Tat und Strafrahmenverschiebung*, Reference 1 StR 77/87, par. 13; BGH, Decision of 13 September 1976, Reference 3 StR 313/76, par. 7.

41 Kaspar (fn. 8), p. C 16 et seq.

42 BGHSt 53, 86; BGHSt 57, 130 et seq.

punishing the defendant by limiting milder sentences) can really be established by the judiciary, the question remains whether such important decisions should rather be made by the legislator.

5 Judicial discretion within a framework

Whilst the General Part of the Criminal Code lays down general principles for sentencing, the Special Part comprises offence descriptions with a sentence range for each offence. Nearly all offences have upper and lower limits and, as mentioned before, most of them leave wide judicial discretion for sentencing options. Sec. 12 Criminal Code distinguishes between 'less serious criminal offences' (*Vergehen*) and 'serious criminal offences' (*Verbrechen*):[43] the minimum punishment for serious criminal offences begins with one year of imprisonment (para. 1), while for all other less serious criminal offences, punishments are to be a lesser minimum term of imprisonment, or a fine (para. 2).

German law only has two sentences for adults: fines and imprisonment. The statuary maximum range for a fixed term of imprisonment is from one month up to 15 years (sec. 38 para. 2 Criminal Code), and is limited by the provisions of the Special Part of the Criminal Code, "which can increase the minimum length, decrease the maximum length, or both at the same time".[44] Concerning monetary punishment, the day fine system ranges between five daily units up to 360 daily units, and a daily rate between one Euro and 30,000 Euros (sec. 40 para. 1, 2 Criminal Code).

5.1 Sentencing rules in the General Part of the Criminal Code

As briefly mentioned above, in addition to the offender's guilt as the foundation for sentencing, the expected effects of the sentence on the offender's future life are to be taken into account (sec. 46 para. 1 sent. 2 Criminal Code). If the two considerations are in conflict with each other (e.g., where there is severe guilt, but long imprisonment will lessen the chance of rehabilitation), the provision is rather vague on how to come to a specific sentencing outcome.[45] Sec. 46 para. 2 Criminal Code refers in more detail to specific circumstances, which speak in favour of and against the offender, and which the

43 Stefan Harrendorf, 'Sentencing Thresholds in German Criminal Law and Practice: Legal and Empirical Aspects', 28 *Criminal Law Forum* 3 (2017), p. 504-505 chose "misdemeanor" and "felony", but emphasized the translation as misleading due to the wide sentencing ranges; this also applies to the above mentioned wording.

44 Harrendorf (fn. 43), p. 503.

45 Tatjana Hörnle (fn. 39), p. 193; Thomas Weigend, 'No News Is Good News: Criminal Sentencing in Germany since 2000', 45 *Crime & Justice* 83 (2016), p. 88.

court must take into account. These are: the offender's motives and objectives, the attitude reflected in the offence, and the degree of force during its commission, the degree to which the offender breached their duties, the modus operandi and the consequences caused by the offence to the extent that the offender is to blame for them, the offender's prior history, personal and financial circumstances, and the offender's conduct in the period following the offence (in particular, efforts to make restitution for the harm caused and efforts at reconciliation with the victim).[46] Sec. 46 Criminal Code is unique in including rudimentary principles for determining the type of sentence, as well as its level.[47] Consequently, the sentencing norm is at least in part faced with massive reproaches.[48] The BVerfG, however, approved the sentencing norm as constitutional with regard to the principle of legal certainty (*Bestimmtheitsgrundsatz*).[49]

Types of facultative mitigating grounds (*fakultative vertypte Milderungsgründe*) include victim-offender reconciliation and restitution (*Täter-Opfer-Ausgleich, Schadenswiedergutmachung*) (sec. 46a Criminal Code), and the Grand Leniency Notice called Contributing to Discovery or Prevention of Serious Crimes (*Hilfe zur Aufklärung oder Verhinderung von schweren Straftaten*) (sec. 46b Criminal Code). Since its introduction in 2009, this provision has given rise to massive criticism. The only point that the opponents agree on is that the provision generally participates in a problematic development towards strengthening cooperative criminal proceedings.[50] A constitutional review is not yet in sight.[51] Initial empirical findings point to a cautious application of the Grand Leniency Notice.[52]

With regard to short prison sentences, sec. 47 Criminal Code emphasises their exceptional character. Fines are given before sentences of imprisonment of less than six months, which are regarded as a last resort.[53] Though their imposition should be avoided as far as possible, the number of short prison sentences continues to be high.[54] A court

46 Translation provided by Prof. Dr Michael Bohlander. Translation completely revised and regularly updated by Ute Reusch; version information: The translation includes the amendment(s) to the Act by Article 2 of the Act of 19 June 2019, Federal Law Gazette I, p. 844 (at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0244) (last visited: 11 September 2020).

47 Klaus Miebach & Stefan Maier, 'StGB § 46 Grundsätze der Strafzumessung', in: Wolfgang Joecks & Klaus Miebach (eds), *Münchener Kommentar zum StGB*, Munich: C.H.Beck, 2016, par. 1.

48 With further references Jörg Kinzig, 'StGB § 46 Grundsätze der Strafzumessung', in: *Schönke/Schröder Strafgesetzbuch*, Munich: C.H. Beck, 2019, par. 1; Kaspar (fn. 8), p. C 58 et seq.

49 BVerfG, Judgment of 20 March 2002, Reference 2 BvR 794/95.

50 Kinzig (fn. 48), par. 2.

51 Kinzig (fn. 48), par. 2.

52 Johannes Kaspar & Stephan Christoph, 'Kronzeugenregelung und Strafverteidigung', 2016 *Strafverteidiger* 5 (2016), p. 318-322. See also Stephan Christoph, *Der Kronzeuge im Strafgesetzbuch*, Baden-Baden: Nomos, 2019.

53 Stefan Maier, 'StGB § 47 Kurze Freiheitstrafe nur in Ausnahmefällen', in: Joecks & Miebach (eds) (fn. 47), par. 1.

54 Nearly 30% of all prison sentences in 2015, see Kinzig (fn. 53), par. 1.

imposes short-term imprisonment if there are special circumstances either in the offence or in the offender's character, which strictly require its imposition to influence the offender or to defend the legal order (sec. 47 para. 2 Criminal Code).

Pursuant to sec. 49 Criminal Code, the sentence framework may shift in case of statutorily defined mitigating circumstances (*besondere gesetzliche Milderungsgründe*) (e.g., diminished responsibility, participation in the form of aiding, and attempt). In this respect, sec. 49 does not regulate under which conditions the sentence framework is to be or may be mitigated, but merely provides legal consequences.[55] The provision has decisive importance for determining the sentence framework, with its corresponding upper and lower limits, as well as for determining the concrete amount of punishment.[56] Sec. 49 comprises three case groups with regard to the sentence framework: an obligatory reduction (para. 1), a facultative reduction (para. 1), and a facultative reduction up to the legal minimum or the imposition of a fine instead of imprisonment (para. 2). The provision should avoid very broad sentence frameworks in order to ensure a fairer punishment, and to contribute to the calculability and predictability of sentencing.[57] There are doubts about this objective, particularly regarding the facultative mitigation up to the legal minimum (para. 2).[58]

In the case of multiple offences, the penalty is also reduced pursuant to sec. 52 to 55 Criminal Code: "they demand a cumulative sentence (separate and consecutively enforceable sentences may not be imposed) and result in mandatory sentencing discounts".[59]

5.2 Sentencing rules in the Special Part of the Criminal Code

The Special Part of the Criminal Code restricts the scope of judicial discretion by adding specified aggravating and mitigating grounds to the basic offence. These grounds are characterised by circumstances that would otherwise be relevant in sentencing.[60] The legal classification of serious and minor cases is accomplished in different ways. Qualifications and privileges are variations of the basic offence, and their application is mandatory if the conditions are met in such a way that qualifications have an aggravating effect, and

55 Gabriele Kett-Straub, 'StGB § 49 Besondere gesetzliche Milderungsgründe', in: Urs Kindhäuser, Ulfrid Neumann & Hans-Ullrich Paeffgen (eds), *Strafgesetzbuch*, Munich: C.H. Beck, 2017, par. 2.

56 Stefan Maier, 'StGB § 49 Besondere gesetzliche Milderungsgründe', in: Joecks & Miebach (eds) (fn. 47), par. 1.

57 Gabriele Kett-Straub (fn. 55), par. 3.

58 Gabriele Kett-Straub (fn. 55), par. 3.

59 Hans-Jörg Albrecht, 'Sentencing in Germany: Explaining Long-Term Stability in the Structure of Criminal Sanctions and Sentencing', 76 *Law and Contemporary Problems* 1 (2013), p. 214.

60 Jörg Kinzig, 'StGB Vorbemerkungen zu §§ 38 ff.', in: Albin Eser (ed), *Schönke/Schröder Strafgesetzbuch*, Munich: C.H. Beck, 2019, par. 45.

privileges a mitigating effect.[61] One example of a privilege would be an offender who committed homicide upon request, with a minimum sentence of six months and a maximum of five years' imprisonment (sec. 216 Criminal Code). Examples of a qualification would be armed theft, gang theft, and domestic burglary,[62] with a minimum of six months and a maximum of ten years' imprisonment (sec. 244 para. 1 Criminal Code).[63]

Furthermore, the Criminal Code distinguishes between serious and minor cases by means of presumptive examples (*Regelbeispiele*). Presumptive examples are sentencing rules which are similar to the constituent elements of a crime due to their indicative function, and are the most important cases for the use of an enhanced sentencing range, without prescribing a final determination.[64] If the conditions of the presumptive example, such as stealing on a commercial basis (aggravated theft in sec. 243 para. 1 no. 3 Criminal Code), are fulfilled, the sentence is generally to be taken from the modified sentence range. An additional examination is not required as to whether its use appears appropriate in relation to average cases.[65] If these conditions are missing, the court is obliged to justify the imposition of a more severe sentence taken from the aggravated sentence range.[66] If, however, a court considers that the indicative effect of a presumptive example has been disproved, the grounds of the judgment have to include the particular features on which the deviation from the modified sentence range is based.[67]

Finally, the Criminal Code knows unspecified minor and particularly serious cases (*unbenannte minder und besonders schwere Fälle*) which have already been mentioned and criticised above. They simply change the sentence range, without specifying the conditions under which the modified punishment is to be applied. In the absence of any mentioned attributes, it is entirely up to the court to decide on the circumstances that constitute a minor or particularly serious case.[68] If an especially serious case is in question, the external and internal circumstances of the offence must be weighed up against each other, taking into account all further relevant factors.[69] An especially serious case is to be assumed if the overall picture of the offence deviates from the average cases to such an extent that the use of the aggravated sentence range appears necessary; this requires an overall assessment of the objective and subjective circumstances, as well as the circumstances affecting the

61 Dennis Bock, *Strafrecht Allgemeiner Teil*, Berlin: Springer, 2018, p. 23.
62 Burglary in a private living space is a serious offence, with a minimum of one year and a maximum of ten years of imprisonment (sec. 244 para. 4 Criminal Code).
63 The basic offence of 'theft' is punishable by a fine or a prison sentence for up to five years.
64 Jörg Kinzig, 'StGB Vorbemerkungen zu §§ 38 ff.', in: *Schönke/Schröder Strafgesetzbuch* (fn. 48), par. 47.
65 Kinzig (fn. 64), par. 47.
66 Kinzig (fn. 64), par. 47.
67 Kinzig (fn. 64), par. 47.
68 Kinzig (fn. 64), par. 53.
69 BGHSt 2, 181.

offender's personality, which are inherent in the offence itself or are otherwise connected with it.[70] Even if sufficient circumstances exist, an especially serious case may be disregarded due to mitigating factors, such as if the offender's restitution compensates for or substantially reduces an exceptionally high damage.[71] In the case of an unspecified less serious case, the approach is the same, but an overall consideration is added, in which all circumstances that can be regarded as relevant to assess the offence and the offender must be taken into account.[72]

6 Sentencing by non-judicial entities

"The administration must not punish."[73] This guiding principle prevails almost unanimously both in literature and jurisdiction with reference to Art. 92 German Basic Law (*Grundgesetz*).[74] Pursuant to this Article, the judicial power shall be vested in the judges.[75] The BVerfG confirmed the monopoly of jurisdiction in 1967. In their verdict, the judges recognised a violation of Art. 92 Basic Law, and declared the practice of tax authorities imposing administrative penalties to be unconstitutional.[76] The Basic Law highlights the autonomy and uniformity of judicial power in order to safeguard the foundation of the rule of law by 'entrusting' it solely to judges for independent fiduciary exercise on behalf of the people.[77] The legally binding effect of court decisions distinguishes jurisdiction from administration.[78] Administrative decisions may gain enforceability, but the administrative authorities are allowed to change them in line with legal limits to protect legitimate expectations.[79] While the administration is authorised to pursue own

70 BGHSt 5, 130; BGHSt 28, 319.

71 BGH NStZ 1984, 413.

72 BGHSt 4, 8; BGHSt 26, 97.

73 Wolfgang Mitsch, 'Einleitung', in: Wolfgang Mitsch (ed), *Karlsruher Kommentar zum OWiG*, Munich: C.H. Beck, 2018, par. 98.

74 Dominik Brodowski, 'Die Verwaltung darf nicht strafen – warum eigentlich nicht? Zugleich eine Vorstudie zu einer rechts-evolutionären, weichen Konstitutionalisierung strafrechtsdogmatischer Grundannahmen', 128 *Zeitschrift für die gesamte Strafrechtswissenschaft* 2 (2016), p. 370.

75 Translated by: Professor Christian Tomuschat, Professor David P. Currie, Professor Donald P. Kommers and Raymond Kerr, in cooperation with the Language Service of the German Bundestag, Version information: The translation includes the amendment(s) to the Act by Article 1 of the Act of 28 March 2019, Federal Law Gazette I, p. 404 (at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0516) (last visited: 15 March 2023).

76 BVerfGE 22, 49, Judgment of 6 June 1967, Reference 2 BvR 375/60, 2 BvR 53/60, 2 BvR 18/65.

77 Gerd Morgenthaler, 'GG Art. 92 [Gerichtsorganisation]', in: Volker Epping & Christian Hillgruber (eds), *BeckOK Grundgesetz*, Munich: beck-online, 2019, par. 1.

78 Claus Dieter Classen, 'GG Art. 92', in: Hermann von Mangoldt, Friedrich Klein & Christian Starck (eds), *Grundgesetz*, Munich: C.H. Beck, 2018, par. 15.

79 Sec. 48-49 Administrative Procedures Act (Verwaltungsverfahrensgesetz); Classen (fn. 78), par. 15.

(material) aims, and to take (procedural) initiatives, both are denied to jurisdiction to ensure impartiality and neutrality.[80]

Though criminal law is the domain of the judge, and only the courts are allowed to impose penalties, administrative authorities have jurisdiction to sanction infringements below the threshold of the criminal law (administrative offences) pursuant to the Administrative Offences Act[81] (*Ordnungswidrigkeitengesetz*). For the first time, the legislator introduced administrative offences in the Economic Criminal Act from 1949, which served as a role model for the Administrative Offences Act in 1952.[82] The intention of the legislator, and indeed the outcome, was to decriminalise criminal law, and to relieve the criminal courts.[83] Over the years, the Administrative Offences Act underwent a step-by-step upgrading, gained more independence, and especially more popularity.[84] Administrative offences are also attractive because the federal government, federal states (*Bundesländer*), and municipalities have the competence to enact administrative offences in other laws and regulations. Consequently, administrative offences consist of a wide range of prohibitions and requirements of conduct in completely different spheres of life. On a local level, municipal regulations address a range of issues, for example when the cemetery can be entered, or where swimming is permitted.[85] In view of this, no reliable order of magnitude for administrative offences can be given, despite there being thousands of offences of this kind.[86]

However, the distinction between criminal and administrative offences is known as question of the century.[87] The Administrative Offences Act includes a formal definition that meets the practical needs of administrative authorities. Pursuant to sec. 1 of the Act, an administrative offence is an unlawful and censurable act, constituting the factual elements in a statute that enables the act to be sanctioned by imposing an administrative

80 Classen (fn. 78), par. 15; Volker Haas, *Strafbegriff, Staatsverständnis und Prozessstruktur: zur Ausübung hoheitlicher Gewalt durch Staatsanwaltschaft und erkennendes Gericht im deutschen Strafverfahren*, Tübingen: Mohr Siebeck, 2008, p. 350.

81 Another translation is "Act on Regulated Offences" provided by Neil Mussett, Version information: The translation includes the amendment(s) to the Act by Article 5 para. 15 of the Act of 21 June 2019, Federal Law Gazette I, p. 846 (at: https://www.gesetze-im-internet.de/englisch_owig/index.html) (last visited: 15 March 2023), Wolfgang Wohlers, 'Criminal Law as a regulatory tool', in: Dyson & Vogel (eds) (fn. 5), p. 235, 253 et seq. uses the similar term 'regulatory offences'; see also Sieber (fn. 5), p. 302.

82 Wolfgang Mitsch, *Recht der Ordnungswidrigkeiten*, Berlin, Heidelberg: Springer, 2013, p. 1.

83 Günter Heine, 'Unterscheidung zwischen Straftaten und Ordnungswidrigkeiten', 12 *Jurisprudencija* 4 (1999), p. 19; Klaus Rogall, 'Vorbemerkungen', in: Wolfgang Mitsch (ed) (fn. 73), par. 1.

84 Heine (fn. 83), p. 19.

85 For more information Roland Hefendehl, 'Ordnungswidrigkeiten: Legitimation und Grenzen. Ein vergleichender Blick auf Deutschland und Chile', 10 *Zeitschrift für Internationale Strafrechtsdogmatik* 9 (2016), p. 638.

86 Hefendehl (fn. 85), p. 638-639.

87 Hefendehl (fn. 85), p. 640.

fine.[88] In contrast, a material definition is still highly debatable.[89] The prevailing opinion in literature and judiciary is to use the mixed qualitative quantitative approach which the BVerfG decisively shaped.[90] According to this approach, the distinction depends on their classification to the core and the fringe areas. The core area is reserved for criminal law, and the fringe area for administrative offences law. While criminal offences are characterised by a particular social-ethical wrongfulness, administrative offences comprise mere disobedience, and lacks the seriousness that is reflected in criminal punishment by the state.[91] This qualitative distinction is not helpful when it comes to the wide intermediate area of criminal and administrative offences with gradual differences.[92] Therefore, the legislator has a margin of discretion for the classification of a criminal or administrative offence.[93]

In contrast to criminal proceedings, the opportunity principle is applicable to administrative offences (sec. 47 para. 1 Act on Administrative Offences). Consequently, the administrative authority in charge may refrain from the imposition of an administrative fine, particularly when there is no public interest in sanctioning.[94] The simplified procedure for administrative offences allows for the high amount of misdemeanours to be dealt with in a prompt and flexible way.[95] However, a diligent balance between an efficient administration, and the rights of the person concerned needs to be safeguarded.[96] This especially applies for the tangle of administrative offences on a municipal level, which are directed against conduct prohibited only in certain areas (e.g., alcohol ban), or for economic reasons (e.g., aggressive begging, speed trap).[97] Another problematic area is economic crime, where the sanctioning of corporations by imposing huge administrative fines of 1 billion Euros and more has risen recently.[98] *Sieber* speaks of "mega-Ordnungswidrigkeiten", and asks if the classification of mere administrative offences

88 Translation mainly provided by Neil Mussett, Version information: The translation includes the amendment(s) to the Act by Article 5 para. 15 of the Act of 21 June 2019, Federal Law Gazette I, p. 846 (at: https://www.gesetze-im-internet.de/englisch_owig/index.html) (last visited: 15 March 2023).

89 For an overview Rogall (fn. 83), par. 1.

90 BVerfG, Decision of 4 February 1959, *Wirtschaftsstrafgesetz*, Reference 1 BvR 197/53, par. 19; BVerfG, Judgment of 6 June 1967, Reference 2 BvR 375/60, par. 105; BVerfG, Decision of 16 July 1969, *Ordnungswidrigkeiten*, Reference 2 BvL 2/69, par. 40-42; BVerfG, Decision of 21 June 1977, *Verbot* der *gemeinschaftlichen Verteidigung im Ordnungswidrigkeitsverfahren*, Reference 2 BvR 70/75, par. 35-36.

91 BVerfG, Decision of 16 July 1969, *Ordnungswidrigkeitenrecht, Kammergerichtsbarkeit*, Reference 2 BvL 2/69, par. 31; BVerfG, Decision of 4 February 1959 (fn. 90), par. 5, 19; BVerfG, Decision of 21 June 1977 (fn. 90), par. 35-36.

92 BVerfG, Decision of 21 June 1977 (fn. 90), par. 35.

93 BVerfG, Decision of 16 July 1969 (fn. 91), par. 43.

94 Bundesministerium der Justiz und für Verbraucherschutz, *Das Ordnungswidrigkeitenrecht*, Berlin: Bundesministerium der Justiz und für Verbraucherschutz, 2015, p. 1-2.

95 Rogall (fn. 83), par. 1.

96 Rogall (fn. 83), par. 1.

97 Hefendehl (fn. 85), p. 643-644.

98 Sieber (fn. 5), p. 308 et seq.

"might not amount to simply using a false label in order to avoid having to comply with the safeguards of criminal law".[99]

7 Administrative discretion in the enforcement and execution of sentences

Only a final and legally binding criminal judgment is one which is enforceable (sec. 449 Code of Criminal Procedure *Strafprozessordnung*). Whilst the public prosecutor's office (sec. 451 Code of Criminal Procedure) is responsible for enforcing sentences concerning all procedural law measures to impose a final judgment (whether, when, to what extent), correctional facilities are in charge of executing sentences, which relates to the application and the content (how) of the sentence.[100] The enforcement of imprisonment comprises the procedure from the final judgment until the summons to commence confinement, as well as the general supervision of its realisation.[101]

Since the reform of federalism in 2006, the legislative power for the execution of imprisonment has been completely up to federal states, in accordance with Art. 70 Basic Law. Consequently, federal states enacted their own prison laws which largely replace the federal Prison Act (*Strafvollzugsgesetz*) from 1976.[102] Until the path-breaking decision by the BVerfG in 1972, the execution of imprisonment was based on the 'doctrine of the special relationship of subordination' (*Lehre vom besonderen Gewaltverhältnis*). This doctrine legitimated restrictions on the constitutional rights of the prisoner, without a statutory basis because of his or her subordinated relationship to the state, and the related duty to accept measures essential to achieve the purposes of punishment.[103] In its decision, the Court declared this doctrine as unconstitutional.[104] In its reasoning, the Court stated the protection of human liberty and dignity as the primary objective of the Basic Law.

99 Sieber (fn. 5), p. 311.

100 Claus Roxin & Bernd Schünemann, *Strafverfahrensrecht*, Munich: C.H. Beck, 2017, par. 1; Nina Nestler, '§ 499 Vollstreckbarkeit', in: Christoph Knauer, Hans Kudlich & Harmut Schneider (eds), *Münchener Kommentar zur Strafprozessordnung*, Munich: C.H. Beck, 2019, par. 9-10.

101 But not the execution in prison, Ekkehard Appl, 'Erster Abschnitt. Strafvollstreckung Vorbemerkungen', in: Rolf Hannich (ed), *Karlsruher Kommentar zur Strafprozessordnung*, Munich: C.H. Beck, 2019, par. 3.

102 Act on the Execution of Prison Sentences and Measures of Rehabilitation and Prevention involving Deprivation of Liberty; translation provided by the Language Service of the Federal Ministry of Justice and Consumer Protection, version information: The translation includes the amendment(s) to the Act by Article 1 of the Act of 19 June 2019, Federal Law Gazette I, p. 840 (at: https://www.gesetze-im-internet.de/englisch_stvollzg/englisch_stvollzg.html#p0028) (last visited: 11 September 2020).

103 BVerfG, Judgment of 14 March 1972, *Einschränkungen der Grundrechte des Strafgefangenen*, Reference 2 BvR 41/71, par. 26 f.; Jürgen Graf, 'Einleitung zum Vollzugsrecht', in: Jürgen Graf (ed), *BeckOK Strafvollzug Bund*, Munich: C.H. Beck, 2020, par. 5; Heinz Müller-Dietz 'Die Entwürfe zu einem Strafvollzugsgesetz und die Strafvollzugsreform', 29 *JuristenZeitung* 11/12 (1974), p. 353.

104 BVerfG (fn. 103), par. 25-26.

According to this, "basic rights shall bind the legislature, the executive and the judiciary as directly applicable law" and, thus, impede an arbitrary restriction of prisoners' constitutional rights.[105] The introduction of the federal Prison Law provided the constitutional fundament to restrict the basic rights of the prisoner,[106] and formed a standard in this respect for the prison laws by the states, though they differ considerably when it comes to the prison regime in conjunction with restrictions of the prisoner's rights within the constitutional frame.[107]

The rule of law guides the execution of imprisonment, and grants discretion to the prison authority in several areas.[108] This discretionary power, given for the order of different measures regulating individual matters, is presented using the example of the Prison Code (*Drittes Buch Justizvollzugsgesetzbuch*) in Baden-Wuerttemberg. If the prisoner claims an infringement of his or her rights by certain measures, he or she can apply for a court ruling (sec. 93 State's Prison Code, in conjunction with sec. 109 Federal Prison Act). The Criminal Chamber for the Execution of Sentences decides upon the application (sec. 93 State's Prison Code, in conjunction with sec. 110, 116 federal Prison Act). In the case of a negative decision, the person concerned can bring an appeal to a Criminal Division of the Higher Regional Court, founded only on the allegation that the decision is based on a violation of the law (sec. 93 State's Prison Code, in conjunction with sec. 116, 117 Federal Prison Act).

The decision to place an offender in accommodation in an open institution is one with restricted discretion ("should") (sec. 7 para. 1 Prison Code). The provision expresses the intention of the legislator to prioritise an open facility over a closed facility, though it is not the standard accommodation in prison due to the required eligibility of the person concerned.[109] In the assessment of the undetermined legal term "eligibility", the prison governor has a margin of judgment (*Beurteilungsspielraum*).[110] But even if the person concerned is eligible, and no reasons for escape or risk of abuse exist, a transfer to an open institution is not necessarily to be granted, due to restricted discretion.[111] Nevertheless, the prisoner has a claim to faultless use of discretion.[112] Re-transfer to a closed facility because of a lack of eligibility is regulated in a provision which leaves no discretion to the prison

105 BVerfG (fn. 103), par. 28.
106 Graf (fn. 103), par. 5.
107 See the criticism of the consequences of the federalism reform Bernd Maelicke, 'Sinn Und Unsinn Der Föderalismusreform', 27 *Neue Kriminalpolitik* 226 (2015), p. 228; Graf (fn. 103), par. 17.
108 Due to the extent this contribution is limited to a choice of provisions that allow for the exercise of administrative discretion.
109 Alexander Böhm, 'JVollzGB III § 7 Offener und geschlossener Vollzug', in: Joachim Müller (ed), *BeckOK Strafvollzugsrecht Baden-Württemberg*, Munich: beck-online, 2019, par. 4 and 27.
110 Böhm (fn. 109), par. 8 and 15.
111 Böhm (fn. 109), par. 8 and 27.
112 Böhm (fn. 109), par. 27.

governor (sec. 7 para. 2 sent. 2 Prison Code). The provision affects basic rights of the prisoner, and poses the question of whether the exclusion of discretion is constitutional.[113] This infringement may affect the principle of proportionality. Therefore, the provision requires an interpretation in conformity with the Basic Law, i.e., the circumstances relevant to discretion must be taken into account in interpreting the criterion of eligibility.[114]

The prison authority can, with the prisoner's consent, order relaxations or opening measures[115] of conditions of imprisonment, if he or she is eligible for the respective measures, and it is not to be feared that he or she might evade serving imprisonment or abuse the measure to commit criminal offences (sec. 9 Prison Code). The opening measures are outside work (*Außenbeschäftigung*) under the supervision of a prison officer, and work release (*Freigang*) without such supervision, short leave under escort (*Ausführung*) or without escort (*Ausgang*), as well as leave from custody (*Freistellung aus/von der Haft, Hafturlaub, Langzeitausgang*) (sec. 9 para. 2 Prison Code). Once again, the prisoner only has a right to a faultless use of discretion if he or she fulfils all requirements for an opening measure. Concerning the revocation of opening measures, the prison governor has discretion if he or she would be justified in refusing such a measure as a result of the circumstances that have subsequently arisen, if the prisoner fails to comply with instructions, or if the prisoner abuses the measure; in the case of serious breaches, the opening measure must be cancelled (sec. 11 para. 2 Prison Code). A withdrawal is also possible, if the prerequisites for being granted an opening measure which takes effect in the future have not been fulfilled (sec. 11 para. 3 Prison Code). In doing so, the prison governor must observe both the principle of proportionality and the protection of legitimate expectations.[116] Also, the necessary weighing of interests in light of the principle of legality of administrative action may come into play when examining the factual requirements of the provision, as well as when exercising discretion.[117]

In contrast to the aforementioned regulations with discretion, inmates have the right to communicate with persons outside the prison within the scope of the Prison Code (sec. 19 para. 1). They are allowed to receive visitors for at least one hour per month (sec. 19 para. 2 Prison Code). Additional visits should be permitted if they promote the treatment and integration of the inmate or serve individual, legal, or business matters which cannot otherwise be dealt with (sec. 19 para. 3 Prison Code). The discretion of the prison authority

113 Böhm (fn. 109), par. 34.
114 Böhm (fn. 109), par. 35.
115 Opening measures in Baden-Württemberg.
116 Böhm (fn. 109), par. 4.
117 Böhm (fn. 109), par. 4.

is limited.[118] The prison governor can prohibit visits if security or order in prison would be threatened, or if it is to be feared that visitors who are not relatives might have a detrimental influence on the inmate, or might hamper his or her integration (sec. 20 Prison Code). A ban on visits is only applied as a last resort, in compliance with the principle of proportionality.[119] If and only if milder interventions are not sufficient (e.g. acoustic monitoring, visit behind a glass barrier), a visit may be prohibited for a person from outside in individual cases.[120] A general ban on visits may also be imposed if the visitor represents a danger to every prisoner, pursuant to the prison provisions.[121] Not only can the prisoner take legal action against a visit ban, but also the external person.[122]

The maintenance of security and order in prison is of utmost importance. This crucial and sensible task within a treatment context requires on the one hand to awaken and encourage the prisoner's sense of responsibility for an orderly community life in the institution, and on the other hand the application of the principle of proportionality when it comes to duties and restrictions imposed on the prisoner (sec. 61 Prison Code). In the event of conflict with treatment, it is a priority to examine whether treatment measures might seem to be successful within a reasonable period. Otherwise, repressive measures can be taken, to which a broader view ascribes an *ultima ratio* function; a narrower opinion rejects this assumption for lack of support in the law.[123] General security measures may be ordered partially independent to the presence of imminent danger.[124] If one considers unexpected or anytime routine searches of cells (sec. 64 para. 1 Prison Code) without a concrete reason as an everyday measure in prison, the discretion of the prison authority is restricted by the obligation to respect the constitutional rights of the inmates, the prohibition on excessiveness and arbitrary action, and the general principles of the prison regime, due to the infringements on personal rights.[125] In light of the principle of proportionality, the order to strip search is subject to stricter conditions, though a general order is allowed upon admission to the prison, subsequent to contact with visitors, and after each absence from prison (sec. 64 para. 2, 3 Prison Code). However, strip searches can be disproportionate. If the risk of smuggling seems particularly far-reaching, then an exception to the general order may be required.[126]

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118 Frank Arloth, 'StVollzG § 24 Recht auf Besuch', in: Frank Arloth (ed), *Strafvollzugsgesetze: Bund, Baden-Württemberg, Bayern, Hamburg, Hessen, Niedersachsen*, Munich: C.H. Beck, 2011, par. 5.

119 Böhm (fn. 109), par. 12.

120 Klaus Laubenthal, *Strafvollzug*, Berlin: Springer, 2019, par. 509.

121 Laubenthal (fn. 120), par. 509.

122 Laubenthal (fn. 120), par. 509.

123 Matthias Maurer, 'JVollzGB III § 61 Grundsatz', in: Müller (ed) (fn. 109), par. 3.

124 Laubenthal (fn. 120), par. 701.

125 Maurer (fn. 123), par. 3.

126 BVerfG, Decision of 10 July 2013, Reference 2 BvR 2815/11, *Entkleidung und körperliche Durchsuchung von Strafgefangenen*.

In contrast to general precautions, special precautions (*Besondere Sicherungsmaßnahmen*) may only be ordered if the inmate's behaviour or mental condition indicates an increased risk of escape, violence against persons or objects, suicide, or self-injury (sec. 67 Prison Code). Regarding the prognosis of escape and/or violence, the prison governor has a margin of judgment (*Beurteilungsspielraum*) with limited judicial reviewability.[127] The special precautions include deprivation or withholding of articles, observation at night time, segregation from other prisoners, deprivation or restriction of outdoor exercise, detention in a specially-secured cell containing no dangerous objects, and use of physical constraints (sec. 67 para. 2 Prison Code). The principle of proportionality is expressly highlighted (sec. 67 para. 5 Prison Code) due to the serious interference with the prisoner's basic rights, which become increasingly severe the longer the measure lasts.[128] By their very nature, special precautions may be used only to deal with temporary and acute situations of danger.[129] The regulation therefore stipulates to check special precautions at appropriate intervals to determine whether, and to what extent, they have to be maintained (sec. 67 para. 5 Prison Code). The continuous segregation of a prisoner is especially regulated as solitary confinement, which is – in contrast to segregation from other persons – restricted to factors relating particularly to the person concerned (sec. 68 para. 1 Prison Code). Additionally, the indispensability of continuous segregation must be present, and thus, solitary confinement is the last resort ordered by the prison governor.[130] After an inmate in solitary confinement died of malnutrition in Baden-Wuerttemberg in summer 2014, the subsequent investigation revealed that not only was the necessary approval of the supervisory authority missing in this case, but also in another case within this institution.[131] The working group which was then set up was entrusted the task of drafting an appropriate administrative regulation, which came into force in August 2015.[132] This administrative regulation stipulates a period of 24 hours as "uninterrupted" solitary confinement, and thus agrees with the prevailing view.[133]

Special precautions may overlap in their effect with disciplinary actions, though conditions and goals differ profoundly.[134] While special precautions constitute preventive measures, only addressing security needs and not punitive aims, disciplinary actions refer to violations in the past, are repressive, and resemble punishment.[135] However, the

127 Laubenthal (fn. 120), par. 715.
128 BVerfG, Decision of 13 April 1999, Reference BvR 827-98, *Rechtsschutz gegen Einzelhaft und besondere Sicherungsmaßnahmen*.
129 Laubenthal (fn. 120), par. 715.
130 Louisa Maria Bartel, 'StVollzG § 89 Einzelhaft', in: Graf (ed) (fn. 103), par. 6.
131 Matthias Maurer, 'JVollzGB III § 68 Einzelhaft', in: Müller (ed) (fn. 109), par. 1.
132 Maurer (fn. 131), par. 1.
133 Frank Arloth, 'StVollzG § 89 Einzelhaft', in: Arloth (ed) (fn. 118), par. 1.
134 Matthias Maurer, 'JVollzGB III § 67 Besondere Sicherungsmaßnahmen', in: Müller (ed) (fn. 109), par. 3.
135 Maurer (fn. 134), par. 3.

(preventive) purpose of disciplinary actions lies in securing the conditions for the rehabilitative aim of the execution (sec. 1 Prison Code). Disciplinary actions (e.g., a reprimand, a restriction, withdrawal of radio or television, or detention) may only be imposed on the basis of legal regulations due to the strict legal reservation (Art. 103 para. 2 GG); misconduct has to be determined in a foreseeable manner for the norm addressees.[136] The order of a disciplinary action requires a culpable breach of a duty pursuant to the Prison Code (sec. 81 para. 1 Prison Code). The prison governor orders the disciplinary action within a due process (sec. 84, 85 Prison Code). Despite strong criticism, disciplinary actions are still seen as suitable and necessary means to maintain discipline in prison, and to preserve the conditions of the prison regime needed for resocialisation.[137] Due to the primacy of treatment, disciplinary actions are understood as a subsidiary instrument of a treatment-oriented prison regime.[138] Therefore, the imposition of disciplinary actions is left to the due discretion of the prison governor, who may refrain from them if a mere warning is sufficient (sec. 81 para. 2 Prison Code), or when treatment or security measures achieve the tasks of the prison regime.[139]

8 Conclusion

German sentencing law leaves remarkable margins of discretion to the courts. The law itself does not contain much information for predicting the sentence in a particular case, which is a problem in terms of legal certainty. Neither does the law clearly state that punishment is strictly limited by the constitutional principle of proportionality, with its duty always to choose the less intrusive of several apt measures (including a milder sentence compared to a more severe sentence). To be fair, one has to acknowledge that sentencing in Germany is comparably moderate, with fines being by far the most frequent form of punishment (around 80%), and executed prison sentences being an exception (around 5%). We can conclude that for the time being, judges try to avoid excessive punishment, and to find an appropriate and proportional way of sanctioning, but hitherto without a clear normative obligation and therefore without a sufficient legal safeguard for the future.[140] Judges also try to avoid arbitrary sentencing and tend to follow local and regional sentencing traditions (with regard to the "usual" punishment in comparable cases). However, these traditions or informal "sentencing guidelines", as we might call

136 Laubenthal (fn. 120), par. 635.
137 Andreas Grube, 'JVollzGB III § 81 Voraussetzungen', in: Müller (ed) (fn. 109), par. 2.
138 Rolf-Peter Callies & Heinz Müller-Dietz, '§ 102 Dreizehnter Titel. Disziplinarmaßnahmen', in: Rolf-Peter Callies & Heinz Müller-Dietz (eds), *Strafvollzugsgesetz*, Munich: C.H. Beck, 2008, par. 1.
139 Grube (fn. 137), par. 3.
140 Kaspar (fn. 6).

them, are not explicitly written down, let alone democratically legitimised, so the whole sentencing process and its outcome remains untransparent in this regard. And due to their local and regional character, it is no surprise that various empirical studies have shown considerable sentencing disparities across Germany.

Therefore, a reform of sentencing law with regard to unnecessary margins of judicial discretion would be recommendable. Sentencing frames should be narrowed, preferably by lowering the upper limit of sentences. Section 46 Criminal Code should be revised with regard to the objectives and relevant criteria of sentencing, including the principle of proportionality.[141] Unspecified aggravated cases with higher sentencing frames should be abolished. These measures would contribute to more equality in sentencing, and also help to avoid excessive and arbitrary outliers. However, they would still not give enough orientation with regard to a concrete amount of punishment in a particular case. In our opinion, it is the legislator´s (and not the judiciary´s) task to create more 'anchor points' for individual sentencing, e.g. by describing thresholds of a certain amount of damage leading to a higher or lower sentencing frame. Therefore, recent verdicts by the BGH trying to establish abstract sentencing rules for tax offences are pursuing a legitimate goal, but with the wrong means.

Introducing sentencing guidelines modelled after the Federal Sentencing Guidelines in the U.S. for example is not recommendable in our view,[142] and was declined by an overwhelming majority during the 72nd German Convention of Legal Practitioners and Scholars in 2018. One of the main arguments was that these guidelines pose a danger of overly schematic sentencing, without considering the special features of individual cases. Nevertheless, a sentencing database (e.g. such as the one used in Japan since 2009) might be a valuable source of information for judges.[143] It would help to give some guidance and make sentencing decisions, but also make their judicial control more transparent, as the usual punishment in comparable cases would then be visible, and also subject to public and scholarly debate. Such a sentencing database could also be a starting point for making use of forms of artificial intelligence within the sentencing process.[144]

The influence of the prosecutor on sentencing has not yet been discussed, and is generally underrated in Germany; the prosecutor dominates the (quite frequent) penal order proceeding (*Strafbefehlsverfahren*), because the judge has no authority to alter the penal order, and either accepts it or orders a trial.[145] The prosecutor appears to be a quasi-

141 Kaspar (fn. 8), p. 104 et seq.; Kaspar (fn. 6).

142 Kaspar (fn. 8), p. C 86 et seq.; Kaspar (fn. 6).

143 Kaspar (fn. 8), p. C 115. This proposal was accepted by the majority on the 72th German Convention of Legal Practitioners and Scholars.

144 Stefan Harrendorf & Katrin Höffler & Johannes Kaspar, 'Datenbanken, Online-Votings und künstliche Intelligenz – Perspektiven evidenzbasierter Strafzumessung im Zeitalter von „Legal Tech"', 32 *Neue Kriminalpolitik* 1 (2020), p. 35.

145 Weigend (fn. 37), p. 53-54.

judicial figure that causes a conflict between prosecutorial sentencing, and the presumption of innocence that might be violated because the defendant's guilt is not investigated, and thus plays no role.[146] A solution could be to safeguard the voluntariness of the defendant's decision: "[t]his could be accomplished by giving the defendant the right to judicial review of any sentence determined by the prosecutor, while precluding the judge from increasing the sentence".[147]

The prosecutor is responsible for enforcing sentences concerning all procedural measures, to impose a final judgment (whether, when, to what extent) (sec. 451 Code of Criminal Procedure). The prosecutor has considerable discretion in different enforcement issues that might alter the final verdict. One prominent example is default imprisonment ordered by the senior judicial officer at the prosecutor's office (sec. 43 Criminal Code, sec. 459e Code of Criminal Procedure). Though nearly all federal states[148] introduced community service in order to disburden prisons,[149] the imprisonment of fine defaulters is not an exception,[150] and contradicts the intention of a fine as a punishment for less serious offences. The reasons are on the one hand, legal differences between the states, and on the other hand, differences concerning the margin of discretion by prosecutors or senior judicial officers.[151] In practice, the need to submit an application already represents an obstacle for fine defaulters.[152] Therefore, a reform of default imprisonment seems overdue in order to considerably raise the bar for imprisonment.[153] The Swedish regulation could serve as a model, as default imprisonment is hardly ever used in practice, and is only considered as *ultima ratio* after all options for deferring payment and paying in instalments have been exhausted.[154]

The increasing role of administrative offences is ambivalent. On the one hand, they are an efficient and less intrusive way of dealing with minor forms of wrongdoing. On the other hand, one has to face the fact that this kind of procedure does not comprise all of the

146 Weigend (fn. 37), p. 84.
147 Weigend (fn. 37), p. 84.
148 Apart from Bavaria.
149 Hans-Jörg Albrecht & Wolfram Schädler, 'Die Gemeinnützige Arbeit auf dem Weg zur eigenständigen Sanktion? Entwicklung, Stand, Perspektiven', 21 *Zeitschrift für Rechtspolitik* 8 (1988), p. 278-279; Ekkehard Appl, 'Erster Abschnitt. Strafvollstreckung § 459e Vollstreckung der Ersatzfreiheitsstrafe', in: Hannich (ed) (fn. 101), par. 9.
150 A share of around 8% of all prisoners, see Nicole Bögelein, 'Money Rules: Exploring Offenders' Perceptions of the Fine as Punishment', 58 *British Journal of Criminology* 4 (2018), p. 808.
151 Albrecht & Schädler (fn. 149), p. 279.
152 Nicole Bögelein, *Deutungsmuster von Strafe. Eine strafsoziologische Untersuchung am Beispiel der Geldstrafe*, Wiesbaden: Springer VS, 2016, p. 79.
153 See the failed legislative initiative by the parliamentary group "Die Linke" to abolish default imprisonment Deutscher Bundestag, *Drucksache 19/1689. Entwurf eines Gesetzes zur Änderung des Strafgesetzbuchs und weiterer Gesetze – Aufhebung der Ersatzfreiheitsstrafe*, Berlin: Deutscher Bundestag, 2018.
154 Rita Haverkamp, *Elektronisch überwachter Hausarrestvollzug. Ein Zukunftsmodell für den Anstaltsvollzug?*, Freiburg i. Br.: Max-Planck-Institut für deutsches und internationales Strafrecht, 2002, p. 52-53.

legal safeguards that we usually recognise in criminal law. Furthermore, due to the principle of opportunity, prosecution is completely dependent on the use of discretion by the executive authority in charge – which always contains the danger of arbitrariness. This is especially problematic in the area of grave monetary sanctions for corporations, in the area of economic crime. A new statute regulating these kinds of "mega-Ordnungswidrigkeiten" might add to legal certainty.

Concerning the execution of prison sentences, disciplinary actions in particular are under criticism. A comparison of federal states reveals completely different sanctioning styles not only between states, but also between correctional facilities.[155] The legal scope for disciplinary actions is filled out by local sanctioning patterns and cultures,[156] which show that the general clause-like regulation allows far too much leeway.[157] As a result, there is a need for more precise and much tighter legal requirements in the provisions of federal states.[158] Furthermore, prison governors' extremely wide discretion should be considerably limited, because the status quo might reduce rather than improve the prisoners' chances of rehabilitation.[159] As a consequence, formal disciplinary actions should be severely restricted.[160]

155 Joachim Walter, 'Vor § 86 LandesR', in: Johannes Feest & Wolfgang Lesting & Michael Lindemann (eds), *Strafvollzugsgesetze. Kommentar*, Köln: Carl Heymanns Verlag, 2017, p. 673-674.

156 Michael Walter, 'Über Sanktionen im Jugendstrafvollzug', in: Klaus Boers et al. (eds), *Kriminologie – Kriminalpolitik – Strafrecht. Festschrift für Hans-Jürgen Kerner zum 70. Geburtstag*, Tübingen: Mohr Siebeck, 2013, p. 837.

157 Walter (fn. 155), p. 678.

158 Walter (fn. 155), p. 678.

159 Walter (fn. 155), p. 678.

160 Walter (fn. 155), p. 678.

Judicial discretion in sentencing and enforcement of sentences in Greece*

*Effi Lambropoulou and Olga Tsolka***

1 Introduction[1]

On June 6, 2007, the Three-Member Court of Appeals in Athens, Greece, sentenced two former rectors of a Greek state university to 25 years imprisonment for embezzling approximately €5 million, fraud against the State, and forgery, as well as another 14 years imprisonment for misappropriation of €1.2 million, fraud, and forgery. The deputy rector was sentenced to 16 years in prison for embezzling €1.3 million, fraud and forgery, while a professor was also sentenced to 14 years imprisonment for misappropriation of €2.7 million, fraud, and forgery. The university's chief accountant and some members of the university's administration staff were sentenced to between 10 and 16 years in prison on similar charges.

Although no money was found in the bank accounts and family property of the convicted academics and the convictions could have been reduced to charges for mismanagement of state funds and serious negligence, prosecutors, the courts, and even the appeals court did not reduce the sentences or lessen the charges. Even though the old Greek Law of the 1950s applied to the case ("Law on abuse of state resources", Law

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* References with asterisk* are in the Greek language and their titles are translated into English. All internet sources were re-accessed in March 2023.

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1 While writing this essay, new Penal and Criminal Procedure Codes were issued and put into force to be partly amended after a while (Law 4367/2019). In the time this essay was completed, the new Codes were under new amendment. The essay is up to date; however, we describe the practice of courts which applied the previous Codes for many years and whose impact is known.

1608/1950) foresees imprisonment of 5-20 years (felony) for fraud against the state, legal theory and case law holds that this sentence is too high and borders on unconstitutionality.[2]

In practice, rarely has such a long sentence been given for these types of offenses, amending, in practice, the old law and eliminating its impact. In the University's case, however, it seems that with the severe sentencing, in particular of the professors, the courts were only taking into account the State's economic loss, and not the personality of the offenders, as explicitly required by the Criminal Law (Art. 79 Greek Penal Code/ GPC).[3]

The judges, most likely, intended to make examples of these convicts and discourage future potential offenders, which explains why the decision has received positive feedback from a number of specialists, politicians, and public opinion. It is perceived as helping the fight against corruption, especially in the deterrence of high-ranking members of society committing similar crimes and being punished mostly with monetary sanctions or with convertible prison sentences or even with just a slap on the wrist.

Various opinions have been expressed so far from all perspectives, and there has been a lot of criticism and many heated debates.[4] No one denies that the offenders deserved the punishment. How much punishment, though? This court decision is a good example of the principles and rules concerning sentencing, in general, and the principle of proportionality for critical cases, in particular.

2 Principles and rules concerning sentencing

2.1 The General Principles[5]

Greek criminal law has, for decades, been categorising criminal offenses as petty offenses, misdemeanours or felonies.[6] The new Penal Code put into force in July 2019 distinguishes only between misdemeanours and felonies (Art. 18). A felony is a crime punishable by a

2 The Law 1608/1950 has been abolished in March 2019. Theodoros P. Mantas, 'Law 1608/1950 on Abusers of State Resources' (at: https://mantas-law.gr/articles/nomos1608-1950-peri-kataxraston-dimosiou).* Lambros Margaritis, *Law 1608/1950 and Abusers of State Resources*, Thessaloniki: Sakkoulas S.A., 2000.*

3 The PC of 2019 refers to the *character* of the offender, see Art. 79[3].

4 See *Proto Thema*, 'The Panteion scandal – thriller with three dead', by Vasilis Tsakiroglou, 4 July 2012 (at: https://web.archive.org/web/20120707221432/http://www.prototothema.gr/greece/article/?aid=208480).

5 For a detailed overview see Ilias Anagnostopoulos & Konstantinos D. Magliveras, *Criminal Law in Greece*, The Hague: Kluwer Law International, 2000, §53 paras. 269-293; Emmanouil Billis (ed.), *The Greek Penal Code*, Freiburg i.Br.: Max-Planck-Institut für ausländisches & internationales Strafrecht, 2017, p. 1-12.

6 A felony is a crime punishable by a prison sentence over five years to life (GPC, Art. 52). A misdemeanour is any offense punishable by a term of imprisonment from 10 days up to five years, a monetary sanction, or confinement in a juvenile correctional institution (GPC, Arts. 18, 53, 54). A petty offense is punished with detention of one to 30 days or with a fine (which has replaced detention).

prison sentence of 5-15 years or by a life sentence (GPC, Art. 52). A misdemeanour is any offense punishable by a term of imprisonment of 10 days up to five years, a monetary sanction, community service, or confinement in a juvenile correctional institution (GPC, Arts. 18, 53, 54, 55, 57).[7]

The cornerstone of the national Criminal Law is the principle of legality (*nullum crimen nulla poena sine lege*, Constitution, Art. 7[1]; GPC, Art. 1). Criminal Law sets out specific limits of punishment which can be imposed on the offender, since completely vague punishments are prohibited. However, this does not mean that the foreseen penal sanction must be strictly defined, because the system of 'relatively specific' punishments operates and adheres to the following rules: a) Depending on the criminal act committed, certain sanctions are foreseen: e.g. life imprisonment, a custodial sentence or monetary sanction; b) The minimum and/or maximum limits of the punishment are clearly stated: e.g. "imprisonment of at least 3 months"; "imprisonment of maximum 3 years"; c) More than one punishment may be alternatively threatened: e.g. imprisonment up to 2 years or a monetary sanction; d) A custodial sentence and a monetary sanction can be simultaneously foreseen: e.g. in cases of corruption, trading in influence and profiteering (GPC, Arts. 235[1], 236[2], 237[1], 237A[1]), the court may inflict both a custodial sentence and a fine.

Although, generally speaking, the sentencing judge has wide discretion in imposing criminal sanctions, the Penal Code contains specific guidelines which must always be taken into consideration. Should the sentencing judge fail to do so, his/her judgment could be appealed. Sentencing is based on two general criteria: the severity of the crime and the guilt of the offender (GPC, Arts. 79-87).[8] Both criteria are explicitly mentioned in Criminal Law (Art. 79[1] GPC). Specific provisions for the cumulation of offenses (GPC, Arts. 94-98) are also in force, while provisions for recidivists and repeat offenders (GPC, Arts. 88-93) have been abolished by the new Code.

The *severity of the crime* shall be determined in accordance with the damage or the danger that was caused (GPC, Art. 79[2]), the nature and the object of the offense, as well as all circumstances relating to its preparation or commitment (time, place, means, way) (GPC, Art. 79[2]). Regarding the *offender's guilt*, the court examines: the degree of *dolus* (intention) or negligence and the causes and motives for committing the offense; the offender's personality and the degree of maturity; the offender's existing and past private and social circumstances; the offender's behaviour during and after the offense was

7 The new Criminal Law has introduced several significant changes, many of which have been strongly criticised. It abolished the conversion of imprisonment to fine, thus all prison sentences irrespective of their duration have to be served and an increase in prison population is expected. Community service has been introduced as a main sentence despite the inadequate infrastructure for wide use. The limits of prison sentences have been significantly reduced, while several felonies have become misdemeanours.

8 Until recently the law referred to the *personality* of the offender.

committed; the remorse s/he shows, and his/her willingness to compensate for his/her wrongdoing (GPC, Art. 79[3]).[9] The Penal Code contains separate provisions for the imposition of monetary sanctions.[10] Thus, the court must further take into consideration the financial situation of the convicted person, as well as those of his/her immediate family, which s/he supports (GPC, Art. 80[1]).

The second basic principle of sentencing in Greek Criminal Law is that of *proportionality*. Proportionality means that the severity of the offense and the level of the sentence imposed must be proportional so as to ensure that there is a reasonable relationship between them. This implies that the sentence imposed should not exceed the limit corresponding to the socio-ethical disapproval of the act in question, but it also means that the appropriate type of sentence has to promote a formally legitimate purpose (suitability), and that in relation to its effect it is the least severe (necessity).[11]

According to the prevailing opinion, the highest level of depreciation should correspond to the specific circumstances of the act under consideration and not to general deterrence, where a specific offense, for example, happens repeatedly and must therefore be prevented from being committed again. The reason is that such perceptions are not justified by the principle of guilt according to Greek law, where the person has an absolute value and cannot be used as a means for other purposes, as might have happened with the University corruption scandal.

2.2 Special sentencing guidelines

2.2.1 Grounds for increasing punishment

As already mentioned, the new Penal Code has abolished all provisions referring in detail to sentences for recidivists and repeat offenders. Grounds for increasing punishment are now the commitment of crimes by profession, the extreme severity of crime, the exploitation of victim's trust, the inability of the victim to protect him/herself, and the offender's leading role in a crime committed by several persons (GPC, Art. 79[5]).

9 The new Penal Code (2019) has generally maintained the numbering of the previous one.

10 Monetary sanctions are calculated by daily units: each unit cannot be less than one euro and cannot exceed €100 (GPC, Art. 57 [3]). The previous Penal Code foresaw that a monetary sanction can be between €150-15,000 and a fine between €29-590, unless otherwise regulated by specific provisions (GPC, Art. 57).

11 Nikolaos Androulakis, '…to respect the principle of proportionality', 57 *Poinika Chronika* (2007), p. 865-873.

2.2.2 Grounds for mitigating punishment

(A) Extenuating circumstances

The Criminal Law stipulates a series of reasons, which are of general application and can decrease the imposed sentence: e.g. exceeding the limits of defence (GPC, Art. 23); exceeding the limits of an emergency situation (GPC, Art. 25[3]); hindering the consequences of the committed offense (GPC, Art. 44[3]); participating in an offense as a (simple) accomplice (GPC, Art. 47[1]);[12] offenders who, at the time of the offense, had not completed their 25th year of age (GPC, Art. 133).[13] For these cases the court shall impose far shorter and lenient sentences according to the details included in Article 83 of the GPC. For example, if the penal statute envisages *cumulatively* a custodial sentence and a monetary sanction, the judge can impose only the monetary sanction since it is regarded as the less severe sanction.

The previous Code was more *detailed* regarding the sentencing choices of judges, and the time span of the prison sentences for each alternative was shorter, e.g. instead of imprisonment of at least 10 years, it foresaw *imprisonment of up to 12 years or of at least 2 years* is imposed; instead of imprisonment up to 10 years, it foresaw *imprisonment of up to 6 years or of at least 1 year* is imposed (Art. 83 a, c).

(B) Mitigating circumstances

In its general Part, the new Penal Code (GPC, Art. 84), similarly with the old one, does not provide an exhaustive list of mitigating circumstances, but rather offers five directives, which apply to all crimes and all defendants, unless otherwise regulated by law:

a)The defendant had led until the time of the offense a life obeying the law; the formulation of the previous Penal Code was much more exact and helpful for the judge, since it referred to "an honest and honourable private, family, professional and social life". The new Code also introduced a controversial provision that the mitigating circumstances of conventional life "are not affected by a previous conviction of the defendant for a minor offense" (GPC, Art. 84[2a]).[14]

b) The defendant was driven to the offense not from "contemptible motives" or s/he was driven from great need or under the orders of a third person to whom s/he was obedient

12 Anagnostopoulos & Magliveras (fn. 5), paras. 110, 115, 151, 161.

13 According to previous PC "offenders who at the time of the offense had completed their eighteenth year of age but had not reached their twenty-first" (GPC, Art. 133).

14 See *Areios Pagos*, Judgment no. 1466/2019 (at: http://www.areiospagos.gr/nomologia/apofaseis_DISPLAY.asp?cd=OZCFXI8JHIJ3L3C568DWR8EAJCYZL2&apof=1466_2019&info=%D0%CF%C9%CD%C9%CA%C5%D3%20-%20%20%C5);* Elisavet Symeonidou-Kastanidou, 'The 'Lawful' Life According to Article 84 PC', 22 *Poiniki Dikaiosyni* 8-9 (2019), p. 889 -894.*

(see also Art. 21 GPC), or while s/he was under the influence of a very serious threat (see also GPC, Art. 22);
c) The defendant was impelled to the offense by the victim's improper behaviour or s/he committed it out of anger or distress caused by a prior illegal act committed against him/her;
d) The defendant showed remorse and attempted to repair the damage caused or limit its consequences;
e) The defendant showed good behaviour for a relatively long period of time after the offense.

The above mitigating circumstances are of *general application*. Furthermore, the Special Part of the Penal Code contains provisions referring to *specific circumstances* which may *annul the sentence* to be imposed. For example, if someone has lied as a defendant or witness to a public authority and recalled his/her testimony with a new testimony (GPC, Art. 227); in common dangerous crimes, where the perpetrator is relieved from any punishment, if s/he initiates the aversion of the danger or expeditiously informs the authorities (GPC, Art. 289 [1]). Such crimes are for instance: starting a fire (GPC, Art. 264); damaging safety devices in mines or factories (Art. 275), acting contrary to generally accepted construction rules (GPC, Art. 286). In addition, there are some provisions in the Special Part where the court can impose a *lower sanction*, regardless of whether the *general* mitigating circumstances of Art. 84 are present or not, e.g. light or negligible battery and bodily injuries (Art. 308[1 section b]); not particularly serious insult of honour (Art. 361[2]).

Wherever there is more than one reason for mitigating punishment (Art. 83 and/or Art. 84 GPC), or extenuating circumstances which could result in nullification of the imposed sanction (GPC, Art. 85), the Law provides that the court reduces further the lowest limit of the reduced sentence (5 years to 3 years; 2 years to 1; 1 year to 6 months and the reduced prison sentence to community service). The explicit reference of the amended article (GPC, Art. 85 [section a]) of the previous Code that the reduction of the sentence shall take place only once (in accordance with Art. 83 GPC), which means that the court sentencing the offender will take into account the extenuating circumstances as well as the mitigating circumstances, is omitted.

Finally, Art. 84 GPC stipulates that the sentence is decreased in those cases where mitigating circumstances are present, without defining who decides about the existence of those occasions, as the previous Code did, which *expressis verbis* mentioned that "the sentence is decreased in those occasions where *the court regards* (emphasis added) that mitigating circumstances are present".

(C) Cumulation (concurrence) of offenses

The Penal Code distinguishes between "real" and "ideal" cumulation of offenses (GPC, Art. 94). "Real" cumulation is the commission of two or more offenses which were perpetrated through two or more criminal acts. "Ideal" cumulation refers to a situation whereby the offender, by perpetrating a single criminal act, commits two or more offenses. In cumulation of offenses, the Greek Criminal Law follows the principle of an aggregate (or compound) punishment, according to which the defendant is sentenced for each offense separately and, subsequently, the court imposes an aggregate sentence, which comprises of the heaviest inflicted sanction increased accordingly. The Penal Code distinguishes between *concurrence of custodial sentences* (Art. 94) and *concurrence of monetary sanctions* (Art. 96). The distinction between "real" and "ideal" cumulation of offenses applies to both, while the sentences limits are respectively defined.

3 Other human rights requirements in the sentencing process and the enforcement of sentences

3.1 The pillars

Leniency has always played a decisive role in the Greek judicial system, both in the law itself and in law enforcement, despite some contemporary drifts towards severity in the last two decades. According to ancient Greek thought, leniency is intrinsically linked to the idea of justice. Democritus, for example, considers *epieikeia* ("reasonableness"[15]) as an element of good administration and thus the strongest pillar of the State.

Leniency is associated with *parsimony*, according to which the sentence must be no more severe than is necessary in order to meet the purposes of sentencing. Parsimony is under certain conditions the permitted temporary or permanent deviation from the 'precision', and necessary for the greater benefit of some people or the whole society.

In addition, similar sentences should be imposed for similar offenses committed by offenders in similar circumstances (parity) and in cases where an offender is to serve more than one sentence, the overall sentence must be just and appropriate in light of the overall offending behaviour (principle of totality; see above *2.2.2 B,C;* GPC, Arts. 85, 94, also Art. 105B [1,6]). Both guidelines are derivatives of the proportionality and legality principle.[16]

15 The principle in ethics that a law can be broken to achieve a greater good (Philosophy and Theology).

16 Sentencing Advisory Council, Sentencing Law in Victoria, *Sentencing Principles* (at: https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-principles-purposes-factors).

3.2 Fairness in criminal trial procedures

The Greek Criminal Procedure Code (GPPC) along with the Greek Constitution (Art. 21), the European Convention on Human Rights ("right to a fair trial", Art. 6) and its Protocols, the EU Charter of Fundamental Rights [EUCFR] ("right to an effective remedy and to a fair trial", Art. 47), and the International Covenant on Civil and Political Rights ("everyone shall be entitled to a fair and public hearing…", Art. 14) provide a well-developed framework that upholds the defendant's rights at the pre-trial and trial stage.

The suspect/defendant has the right to be informed of the charges against him-/herself and of his/her rights in a language s/he understands before being called to answer the charges, the right to interpretation,[17] the right to appoint defence counsel from the very beginning of the police or judicial investigation (up to two and at trial stage up to three attorneys – whereby in case of serious crimes legal assistance is mandatory (GPPC, Art. 340), the right to receive copies of the case file and ask for adequate time for preparation of his/her defence, the right to submit a written defence statement, the right to be present at most acts of the investigation (apart from the examination of witnesses), the right to legal aid,[18] the right to request the examination of witnesses, and the taking of evidence in defense of the charge.[19]

In case of violation of the provisions safeguarding the rights of the suspect/accused (GPPC, Art. 510[1A]), the proceedings are rendered completely void. The ECtHR is the court of last resort responsible for controlling the fairness of the criminal proceedings. The ECtHR's judgments are binding on the Greek State and result in a "repetition of proceedings" (GPPC, Art. 525 [1 nr.6]).[20]

The defendant who is duly summoned is obliged to appear personally before the Court, otherwise s/he is tried *in absentia*. The defendant has the right to remain silent and the right to communicate with his/her counsel during the hearing. It is forbidden, however, to consult with him/her before answering a question (GPPC, Art. 364). The defendant and his/her counsel always have the right to make a final statement. Only the President of the

17 See Ilias Anagnostopoulos, *Rights of Suspects and Accused Persons in the European Union – The EU Directives 2010/64 and 2012/13*, Athens: P.N. Sakkoulas, 2017, p. 70-77, 140-143.*

18 See Dominikos Arvanitis, 'The Rights of Access to A Lawyer and to Legal Aid in Criminal Proceedings', in: Proceedings of the 8th Conference of the Hellenic Criminal Bar Association *The EU Criminal Procedure – Trends and Challenges*, Athens: Nomiki Vivliothiki, 2020 [under publication] (at: The Art of Crime 6/2019, https://theartofcrime.gr).*

19 For a complete list of a defendant's rights, see Arts. 89-108 GPPC. See also the overview of Ilias Anagnostopoulos & Jerina Zapanti, 'Procedure before Criminal Courts', in: *Greek Law Digest*, Judicial System, June 2016, p. 66 [62-69] (at: http://greeklawdigest.gr/topics/judicial-system/item/299-procedure-before-criminal-courts).

20 For relevant case-law see Nikolaos Androulakis, Theoharis Dalakouras, Ioannis Giannidis & Ilias Anagnostopoulos, *Code of Criminal Procedure: Case-law per article*, Dimitrios Voulgaris (ed), Athens: P.N. Sakkoulas, 2015, Art. 525 par. 24.*

court, the rest of the court judges, and the Public Prosecutor are entitled to put questions to the defendant. The defendant, along with the public prosecutor, has the right to appeal against the convicting judgements of all courts (GPPC, Art. 489). The Public Prosecutor also has the right to appeal convicting decisions under specific terms and time limitations, either in favour or against the defendant (GPPC, Art. 491).[21]

The *presumption of innocence* (ECHR, Art. 6[2]) has traditionally been a fundamental principle of proceedings in Greece. The new Code of Criminal Procedure (July 2019), introduced an explicit reference to the presumption of innocence (GPPC, Art. 71), incorporating the EU Directive 2016/343.[22] In the Greek system, the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution and the defendant is not required to disclose his/her evidence before trial. On the contrary, the Public Prosecutor must acknowledge the list of witnesses to be examined in trial and all documentary evidence (GPPC, Art. 326 [1]). Any doubt as to the question of guilt is to the advantage of the defendant (*in dubio pro reo;* GPPC, Art. 178[3]). The standard of proof for delivering a verdict is proof beyond reasonable doubt and the decision is not necessary to be unanimous.[23] It is in consonance with the principle of presumption of innocence and the rule of lenity.

Regarding the *means of proof*, every piece of evidence acquired legally is, in principle, admissible in Court (e.g. indices, inspection of persons, places and objects, experts' reports, confessions, statements of witnesses and documents; GPPC, Arts. 177[2], 178 [1,2]).[24] The various means of proof and all legal evidence are generally subject to the court's *free evaluation* (GPPC, Art. 178[2]). Investigating authorities and courts have a duty to search for the factual truth (GPPC, Arts. 177 [1], 351 [1,2], 357).[25]

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21 Anagnostopoulos & Zapanti (fn. 19), p. 67.

22 Directive (EU) 2016/343 of the European parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. See Olga Tsolka, 'The Presumption of Innocence and the Participation of the Accused in the Criminal Proceedings', in: Proceedings of the 8th Conference of the Hellenic Criminal Bar Association, *The EU Criminal Procedure – Trends and Challenges*, Athens, Nomiki Vivliothiki, 2020 [under publication].

23 Anagnostopoulos & Zapanti (fn. 19), p. 65.

24 In November 2019 the amendment of Article 177[2] introduced an exception (Law 4637/2019, Art. 14). According to this exception, the evidence is not required to have been legally obtained for "1) felonies falling within the jurisdiction of the Public Prosecutor for a Financial Crime or of the Public Prosecutor for Corruption, provided that the evidence relates to information or data to which the aforementioned prosecutors have the right of access (GPPC, Arts. 34 [1], 36 [3]). 2) The use of the evidence during the referral and trial will be admitted if it is reasoned that: a) the damage caused by its acquisition is significantly lower by the nature, the importance and the extent of the damage or danger caused by the investigated crime, b) proving the truth would otherwise be impossible, and c) the act by which the evidence was obtained does not offend a human value."

25 Nikolaos Androulakis, *Searching for and Finding the Truth in Criminal Court Proceedings*, Athens: P.N. Sakkoulas, 2017.

In the Greek legal order, vital to the judges' decision-making process is Article 177 GPPC ("principle of moral proof") according to which:

> Judges do not follow legal rules of evidence, but they must decide as a result of their estimation, following the voice of their conscience and guided by the impartial judgment that emerges from the trial procedure regarding the truth of the facts, the credibility of the witnesses and the value of the other evidence, always giving specific and detailed justification regarding the means and reasoning by which they formed their judicial judgment.

According to the above provisions, the judge can establish the facts of each case without being bound by legal rules of evidence. Under Greek law, the value of the evidence cannot be determined in advance and no rules of assessment can be established.[26] Instead, the so called 'principle of free evaluation of evidence' applies in order to ensure that the substantive/factual truth is found.

However, this broad discretion of the judges is not unlimited since they must, throughout the exercise of their duties, ensure that the criminal proceedings are fair from the first moment that a person is suspected of committing a crime, until the court decision about guilt (or not) and sentencing. In addition, their judgment must be stated in writing with a specific and detailed justification (Constitution, Art. 93[3]; GPPC, Art. 139).[27] Otherwise, the principle of a fair trial and the fundamental procedural rights of the defendant are infringed and the judgment shall be annulled (GPPC, Art. 510). Detailed reasoning is also required for the imposed sentence (GPC 2019, Art. 79[7]).

The *reasoning of the judgements* has attracted widespread criticism in the last few decades, because they mostly repeat verbatim the criteria for the assessment of the sentence laid down in the law (Art. 79 [2,3]), with no specific explanation for each case (cf. GPC 1950,[28] Art. 79 [4]). Thus, the real reasons justifying the imposed sentence remain obscure.[29] The short sentencing deliberation of the court has attracted similar critique. In general, courts deliberate very briefly on the sentence. In particular, lower courts often

26 See Athens' Chamber of Criminal Appeals, Judgment no. 3922/1995, 46 *Poinika Chronika* 1996, p. 940-944.*

27 See for example *Areios Pagos*, Judgment no. 1/2005, 55 *Poinika Chronika* 2005, p. 781-783;* Areios Pagos, Judgment no. 3/2012, 63 *Poinika Chronika* 2013, p. 22-23.*

28 The previous Penal Code was enacted in 1950 (Law 1492/1950) and has been amended and reformed numerous times since then. The same applies to the previous Penal Procedure Code.

29 See Nikolaos Androulakis, 'Sentencing Law', in: Greek Association of Penal Law (ed), *Sentencing Law*, Athens: Sakkoulas, 1987, p. 7-23.*

decide on sentence while on the bench, without leaving the courtroom for consultation. The practice has been regarded as downgrading this part of procedure.[30]

The new Penal Code introduced that during sentencing, the court should *not* additionally take into account circumstances already assessed by the legislator in determining the sentence (Art. 79[6]). This arrangement is regarded as important since it excludes taking elements into consideration twice, either in favor or against the convicted and, eventually, is a balance for the deleted explicit reference of the old Penal Code (GPC, Art. 85 [section a]) that the reduction of the sentence shall take place only once. Detailed information on sentencing practices in Greece according to crime can mainly be found in the *Justice Statistics* publication.

4 Judicial independence and discretion in sentencing

4.1 Judge's independence

According to the Greek Constitution all judges enjoy functional and personal independence (Article 87[1]).[31] Regarding *functional (or institutional) independence* in performing their duties, judges are subject solely to the Constitution and the laws. In no case whatsoever are they obliged to comply with provisions enacted in violation of the Constitution. The courts are bound not to apply a statute whose content is contrary to the Constitution (Arts. 87[2], 93[4]). 'Independence' requires that neither the institution of the judiciary nor individual judges shall be subordinate to the other public powers. Moreover, no parliamentary control is allowed in a pending case and a law cannot invalidate or repeal a court decision. Regarding *personal independence*, judges are bound by the assessments of the law and not by their personal perceptions. They must try to remain free from unfounded interference or restrictions when they decide on a particular case. Personal independence is associated with *impartiality*; it refers to the state of mind of a judge or a court towards a case and its participants.[32] Consequently, judges should have unconstrained

30 See Athanasios Kontaxis, *Code of Criminal Procedure*, Vol. 2, Athens/Komotini: A.N. Sakkoulas, 2006, p. 2335; * see also Anagnostopoulos & Magliveras (fn. 5), par. 365.

31 See also *Report on the Independence of the Judicial System, Part I: The Independence of Judges*, Venice Commission / European Commission for Democracy through Law, 82nd Plenary Session, Venice, 12-13 March 2010, CDL-AD (2010)004, Study No. 494 / 2008, Strasbourg, 16 March 2010, p. 12-17 (at: https://rm.coe.int/1680700a63).

32 The Human Rights Committee (View of 23 October 1992, *Arvo O. Karttunen v. Finland*, Comm. 387/1989, par. 7.2) has stated that in the context of article 14.1 of the International Covenant on Civil and Political Rights (ICCPR), "impartiality of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties", International Commission of Jurists, *International Principles on the Independence and Accountability of*

freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts,[33] and while following the prevailing rules of law (see also section 3.2, GPPC, Art. 177: "principle of moral proof").

Art. 332 GPPC provides that judges have to treat all persons participating in the trial "in a composed, objective, decent and unemotional manner". The violation of this duty is considered to be a serious disciplinary offense. Apart from the Constitution, the Code of Criminal Procedure contains several provisions which ensure the impartiality of the judge. For example, the investigating judge cannot be a member of the Judicial Council which decides on issues that arose during the investigation before the case was brought to trial (GPPC, Art. 305[2]); no judge, who sat with the court of the first instance, can be member of the court of appeal (GPPC, Art. 14[3]); all members of a court or a judicial council, whose decision has been overturned by the Court of Cassation cannot sit with the court which retries the case (GPPC, Art. 519).[34]

Moreover, judges can be excluded from exercising their duties when they are causing or have caused suspicion of bias, namely, when there are facts which may justifiably put their impartiality in doubt (GPPC, Art. 15).[35] In such cases, the public prosecutor, the accused and the civil party have the right to propose the exception of the judge (GPPC, Art. 16 [1]). It is worth noting that in the lists of jury judges, those who provide, inter alia, guarantees of impartiality and independence of their opinion are always preferred (GPPC, Art. 383 [2]). This means that the obligation of independence is not only the responsibility of ordinary judges, but of the jury as well.

Ensuring personal independence is mainly related to regulations about appointing and maintaining the position of judge. Fair and impartial decision making is a complex concept that especially emerges when a judge's ideals strongly conflict with the political and executive power. The Greek Constitution and legislation safeguards a judge's personal independence through:

a) *Appointment*: The Constitution in Article 88[1] states that the appointment of judges is based on the qualifications prescribed by law and shall be made by Presidential Decree. Relevant to this Article of the Constitution is Article 34[1] of the Code for the Organisation of Courts and Status of Judicial Officers (KOD),[36] which defines that the appointment shall be finalized after the evaluation of the judge's qualifications *and* the assessment of the qualification procedure, as foreseen by the KOD. To become a judge, one must graduate

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Judges, Lawyers and Prosecutors, Practitioners Guide No. 1, Geneva, 2009, p. 21 (at: https://www.refworld.org/pdfid/4a7837af2.pdf).

33 In relation to judge's integrity see Efstathios Vergonis, 'Judicial Independence and Judges', *To Vima*, 27 October 2018 (at: https://www.tovima.gr/printed_post/dikastiki-aneksartisia-kai-dikastes/).

34 For more, see Arts. 14-26 GPPC. Anagnostopoulos & Magliveras (fn. 5), par. 359.

35 For example, when there is particular friendship or intimacy, as well as the hatred of the judge for any of the parties; see for instance *Areios Pagos*, Judgment no. 1560/1993, *Elliniki Dikaiosyni* 1994, p. 369.*

36 Law 1756/1988.

from law school, complete an internship and be licensed to practice law. Then one must then pass the examinations for admission to the National School of Judges (ESDI) and finish two-years of studies.
b) *Permanence*: Article 88[1] of the Constitution guarantees the permanence of the judiciary, giving judges the security of practicing their profession. The termination of their duties can take place only after a court decision convicts them either of a crime or for a severe disciplinary offense, as well as because of illness, disability, or inadequate service, which shall be certified as required by the Constitution (Art. 88 [4]).
c) *Incompatibility – exclusion*: The participation of judges in the Government is prohibited, but it is also forbidden to entrust them with any administrative duties (KOD, Art. 41 [3, 4]). Furthermore, the judge has to abstain from any kind of actions in favor of political parties (KOD, Art. 40[6]). There are also specific impediments to localization. For example, judges are not allowed to serve in the city where they or their spouses were born, or have lived the last ten years before their posting (KOD, Art. 42). In general, judges cannot work in any other profession at the same time. Personal independence requires complete dedication to the service s/he performs.
d) *Service changes*: Promotions and service changes are regulated by Article 90 of the Constitution and take place with a Presidential Decree as happens with appointment. They are decided by judicial boards while the Council of Ministers (Cabinet) appoints the Presiding Judges of the three Supreme Courts.[37]

In exercising their duties, judges may commit wrongdoings, i.e. acts or omissions harming the plaintiffs or in general the participants in a trial (defendants, victims, complainants). As a means of restoring the damage, the Constitution allows those harmed to file a lawsuit without the need for authorization (Art. 99 [3]). A special court is then set up to settle the dispute (Constitution, Art. 99 [1, 2]). Members of the court are randomly selected each year, in accordance with the law (Law 693/1977, Art. 2). Under no circumstances may this special court annul a court decision. The Constitution intends to provide legal protection for the plaintiffs against possible arbitrariness of the judiciary, gross negligence or denial of justice and not to annul the decision. The claim should involve an immediate relation between the illegal act and the damage. For offenses committed by judges that are unrelated to their duties, the law applies just as it would for any natural person. Article 91 of the Constitution foresees the procedure for *disciplinary violations* of the judges. Thus,

37 The Supreme Court for civil and criminal cases is the Court of Cassation (*Areios Pagos*); for administrative cases the Supreme Court is the Council of State; the Court of Auditors (or: Chamber of Accounts) is also a supreme administrative court, which has jurisdiction only on the audit of the expenditures of the State, local government agencies and other legal entities. Its decisions are irrevocable and out of the control of the Council of State. See *Ordinary Courts-Greece* (at: https://e-justice.europa.eu/content_ordinary_courts-18-el-maximizeMS-en.do?member=1).

according to par. 1, the Minister of Justice can bring a disciplinary lawsuit against judges having the degree of judge or of deputy prosecutor of the Court of Cassation and higher. The Court of Cassation (*Areios Pagos*) is the Supreme Court for civil and criminal cases in Greece.

4.2 Inter-judicial independence

Each court retains its independence not only over every other institution, function and power but also within the Justice organisation. Exceptions are foreseen by the law in specific cases. Important issues of inter-judicial independence are regulated by Art. 100 [1 d-f) of the Constitution and are associated with the *parity* guideline. Inter-judicial independence would create legal uncertainty, confusion, and eventually arbitrariness as every court could adopt a decision different from the one of another court in a similar case. Thus, according to the Constitution, in such cases of conflict, the universal and final powerful decision maker is the Supreme Special Court.[38]

In any case, as a rule, the lower courts comply with the judgment of the supreme court of their branch. However, the decision of the respective supreme court is formally binding for the lower courts, only if they must deal with the same case again. As a result, there have been cases where courts refused to apply a law provision deemed as unconstitutional.[39] It is to clarify that only the specific citizen who is a party to the proceedings in question is relieved of his/her obligation to comply with an unconstitutional law. For the rest, the law remains binding, since the court decision has no effect on them. Many argue that the hierarchical structure of the Justice organisation hinders inter-judicial independence, as the lower court must comply with the higher court. Nevertheless, the higher courts cannot enforce their decision *ex officio*.[40]

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38 The Supreme *Special Court*'s tasks are: to resolve disputes between the Supreme Courts or between the courts and the administration; to take an irrevocable decision, when contradictory decisions of the Supreme Courts concerning the true meaning or the constitutionality of a legal provision are issued; to judge the pleas against the validity of the result of the national elections or a referendum; to decide on incompatibilities of MPs; and disputes over the classification of rules of international law (Constitution, Art. 100 [1]); *Judiciary of Greece* (at: https://en.wikipedia.org/wiki/Judiciary_of_Greece).

39 Court of Appeal of Larissa 1617/2005; (three-member) Misdemeanours' Court of Katerini 196/2014; (three-member) Misdemeanours Court of Athens 6677/2017, in: Legal Information Databank ISOKRATIS, Athens Bar Association (at: dsanet.gr). According to the Greek judicial system, every court is competent to judge/decide on the (non)conformity of a legal provision with the Constitution. Therefore, if the judge considers that the content of a law or a provision does not comply with the Constitution, s/he will not apply the law exclusively to the case s/he examines.

40 Andreas G. Dimitropoulos, *Organization and Operation of the State*, Vol. B, Athens/Thessaloniki: Sakkoulas, 2009, p. 751;* Aspassia Kalafati, 'Reflections on the Independence of Judges and the Interjudicial Independence', 2014, *Association of Administrative Judges* (at: https://www.edd.gr).*

4.3 Critical issues and open questions about judicial independence

Greek jurists express their scepticism and have repeatedly voiced criticism on certain issues concerning the *institutional independence* of justice which, as it is said, could be the "gateway" for influencing or partially violating its independence.[41] The criticism focuses on the *inspection of justice* carried out exclusively by the highest ranks of Judiciary, i.e. the Vice-President of the Court of Cassation (*Areios Pagos*), a member of the Court of Cassation (*Areopagite*) and a Deputy Public Prosecutor of the Court of Cassation[42] (KOD, Art. 80 [1], Board of Inspectors). The point is that these high-ranking judges control and they are not controlled. The Board of Inspectors supervises those carrying out the inspections of judges at the various courts. Judges of the Court of Cassation and Deputy Public Prosecutors of the Court of Cassation inspect the Courts of Appeal, the Courts of First Instance and their respective Prosecutorial Service. Presidents and Prosecutors of the Courts of Appeal inspect Misdemeanours Courts, Magistrate's Courts, and their respective Secretariats. Presidents and prosecutors of appeal courts may be inspected by the Chairman of the Inspection Board, on the orders of the President or the Public Prosecutor of the Court of Cassation, respectively (KOD, Art. 80 [11]). The inspectors annually examine the judges' whole body of work and, in particular, the legal and factual parts of each case (KOD, Art. 84 [7]), suggest the filing of a disciplinary suit wherever necessary against the judge and if they consider that the judge being assessed is to be promoted. A copy of the inspection is submitted to the Minister of Justice, as well as to the President and the Prosecutor of the Court of Cassation.

As for the judge's *personal independence*, the critical points are the *promotions and transfers*, which are also carried out by the highest ranks of justice (KOD, Article 78 [1-2]). In particular, the promotions are made by the Supreme Judicial Council of Civil and Criminal Justice, which consists of the President and the Public Prosecutor of the Court of Cassation and nine or, where appropriate, thirteen members. These members are appointed randomly by the Vice Presidents, the judges and the deputy public prosecutors of the Court of Cassation who have served for a minimum of two years in the respective position. Two members of the Council are, in any case, deputy prosecutors of the Court of Cassation. In the Council, two non-voting presidents or two prosecutors of the appellate courts also participate, whose roles are only informative.

The *election to the top positions* of the Judiciary is criticized as well (KOD, Art. 49 [3a]). Promotions to the positions of President and Public Prosecutor of the Court of Cassation shall be effectuated by a presidential decree following a proposal by the Cabinet ("Ministerial Council"). The Cabinet taking into consideration the opinion of the

41 Ioannis Giannidis, *Justice as an Institution and as an Organization*, Athens: P.N. Sakkoulas, 2016, p. 78-80.*

42 In total 22 DPPs.

Conference of the Parliament's Presidents[43] and a recommendation by the Minister of Justice shall choose among those who are legally qualified. The opinion of the Conference of the Parliament's Presidents is requested by the Minister without binding him/her in his/her recommendation to the Cabinet.

In relation to this, the establishment of an independent advisory board is proposed. The board should be composed in its majority by senior judges of all branches (administrative, civil/penal), but should also include university professors, lawyers, etc., who shall submit a well-researched and fully justified list of candidates to the Government following an open and transparent procedure. The Government will make the final decision on the proposals that have been submitted. It is also suggested that in the case of a constitutional amendment, the regulation should be incorporated into the Constitution in order for this form of selection to become an obligation rather than a mere choice of each Government. In that case, it would be reasonable for the President of the Republic to make the final decision, and not the Government.

Finally, concerning the *intervention of the executive and legislative branches* in the exercise of judicial authority, it is emphasized that legislative intervention by introducing provisions adjusted to the cases pending before the court – and what is more to the Court of Appeal – constitutes a violation of the independence of Justice. The same applies when members of the government refuse to enforce the court decisions or, more specifically, when they explicitly declare that they will not enforce them (this mostly happens in cases of insurance and pension laws, re-employment of people working under contract who have been illegally fired, for the control of fuel purchases/fuel smuggling etc.), as well as when representatives of the government or MPs criticize a court decision which they dislike it. The frequency of this practice in the last decade entails developing a Code with precise rules about the relationship of the executive and legislative branches with the judiciary in these areas.

Yet, greater *pressure on the judiciary is exerted by the media and certain interest groups* than by the legislature or the government. Despite the legal restrictions,[44] media in Greece – and private broadcasters in particular – present sensationalist stories about defendants and other participants in criminal proceedings, violating the law.[45] Moreover, the media indirectly place pressure on the court judges and jury, in trials of serious crimes or highly publicized cases to decide according to the demands of powerful lobbyists or other minority groups. A more concerning situation is that judges and prosecutors have sometimes been targets of attacks from terrorists or organized criminal groups (e.g. bombs

43 A representative of all parliamentary groups/parties.

44 Presidential Decree 77/2003.

45 Ilias Anagnostopoulos, 'Defence Counsel and the Media', 47 *Poinika Chronika* (1997), p. 337-348.*

placed in cars, or at home entrances, envelopes sent with explosives), resulting in three people being murdered over the last 20 years.

5 Administrative discretion in the execution of sentences

Until July 2019, and for many decades prior, the Ministry of Justice has been responsible for the administration of prisons. This has changed and the administration of prisons is now the responsibility of the Ministry of Citizen Protection (Presidential Decree 81/2019, Art. 2 [5, 5.1]). This transfer of authority has had no effect on the public prosecutor(s) and the court(s) that are competent for the enforcement and supervision of sentences, which remain under the authority of the Ministry of Justice. The enforcement of prison sentences, the protection of prisoners' rights and the supervision of prison operation rests with the public prosecutor of the court in the area of which each prison is located.[46] Everything is regulated by the Correctional Code (or Prison Law, hereinafter: GCC) and the relevant Decrees. The public prosecutor is also responsible for the complaints and the appeals against disciplinary sanctions imposed on prisoners, as well as duties assigned to him/her by the Prison Law and other laws (GPPC, Art. 567).

Greek correctional institutions have a Prison Board, a Disciplinary Board and a Furlough Granting Board. The Prison board plans and organises prisoners' activities, their work, education, admittance to prison, transfer to another prison or department, diet and dietary requirements, issues referring to visits and other methods of prisoner communication (GCC, Art. 10[5]) and, finally, carries out the measures for keeping prison in order (GCC, Art. 71[2]). The board (GCC, Art. 10[1]) consists of the prison director, the senior social worker of the prison and the senior special scientist (psychologist, teacher, sociologist, jurist, agriculturist), and the chief warden of the correctional officers, the latter without voting rights. The Disciplinary board is concerned with the disciplinary proceedings in cases of disorder and riots (GCC, Art. 70[1]). It consists of the public prosecutor, the prison director and the senior social worker of the prison. The Furlough Granting board, composed by the same officials as the Disciplinary board, has the authority to grant the regular, vocational and educational furloughs (GCC, Art. 55[2]; 58[1]), and to make recommendations. The prisoners can always appeal against the decisions of the three boards (furloughs, disciplinary sanctions, restrictions of vocational or educational training etc.), as well as for a violation of their rights to the court responsible for the

46 GCC, Art. 85; 'Internal Regulation of General Detention Establishments Type A and B', Art. 7 (MD 58819/7.4.03, Government's Gazette B-463).*

sentence enforcement (Law 2225/1994; GCC, Art. 53[7]).[47] In summary, this court resolves issues arising from Prison Law enforcement.[48]

Greek law does not provide non-judicial entities with the authority to impose custodial or non-custodial sentences. The courts have the unique authority for judging and sentencing. This complies with Art. 5 [2, 3] of the Hellenic Constitution, Art. 5 of ECHR, and Art. 6 EUCFR referring to the guarantees for the deprivation of liberty.

6 Conclusions

The Greek legal system offers a satisfactory set of principles for fair and impartial sentencing by the courts, along with an array of sentencing outlines. The independence of judges is safeguarded and ensured.

The most criticized issues are the involvement of executive in the posting of judges to the top positions of the Judiciary, as well as the inspection and promotions of judges by the highest ranks of justice, who cannot be controlled. To overcome the involvement of the governments, the establishment of an independent advisory board is proposed.

The second group of criticism refers to short sentencing deliberation and inadequate reasoning in court decisions. In the judicial practice in Greece, over the last few decades, the sentencing process lasts for only a few minutes, and the whole process is considered to be carried out as a matter of routine. Moreover, the sentencing decisions are not justified in detail but in summary, even though the Penal Code (GPC 1950, Art. 79[4]; 2019, 79[7] GPC) provides that the judgment had to "clearly state the reasons justifying the sentence that the court has imposed" and that in case the court fails to comply with this requirement, the judgement shall be reviewed (GPPC, Art. 510 [1d]).

Under these circumstances, many practitioners and academics stressed that it is difficult to identify the thinking of the judges. Furthermore, they argue that court decisions show inconsistency and depend on the judge's perceptions of the purposes and effectiveness of the sentence; namely, whether priority must be given to social interest and deterrence or to the personality and particular family, financial, or other problems of the offender that may have led him/her to commit the crime.[49] Therefore, according to this view, some judges might give more severe or more lenient sentences than others. As a result, it is

47 Any prisoner has the right to legal protection under Art. 20[1] of the Constitution; see Maria Galanou, *Treatment and Rights of Detainees*, Athens/Thessaloniki: Sakkoulas, 2011, p. 463-465.*

48 In relation to this, see for example *Areios Pagos*, Judgment no. 1656/2017 (at: http://www.areiospagos.gr/nomologia/apofaseis_DISPLAY.asp?cd=NKW10XSXYFJ586ZYL3DH3G3EGBSHSO&apof=1656_2017&info=%D0%CF%C9%CD%C9%CA%C5%D3%20-%20%20%C6).*

49 See Nestor Courakis, 'Sentencing in the Greek Judicial system: Thoughts on Avoiding Inequalities in Criminal Law', in: *Honorary Volume for Dimitris Travlos-Tzanetatos*, 2017 [under publication] (at: http://crime-in-crisis.com/wp-content/uploads/pdfbio/epimetrisi%20poinis.pdf), p. 18.* As to the nature and

considered that the basic principles of rule of law are violated, such as the principle of equality and legal certainty. For these reasons, the need for a special sentencing law is proposed, which should be equally important to the General and Special Part of the Criminal Law. It is claimed that a special sentencing law would assign the necessary importance to the length of the sentence and would determine the right sentence for each case with greater precision and care.

Nonetheless, this prospect implies the risk of further delaying judicial decisions and overloading the judges even more. It would be much more reasonable to instruct and motivate or even train the judges to quickly provide a more detailed reasoning of their imposed sentencing decisions, rather than adding one more body of law, or additional rules and regulations. This is also justified by the results of research on the sentencing of similar cases. It has been found that for regular cases, the 'usual sentences' are handed down with small disparities among them. For instance, an offender can receive 7-10 months imprisonment for slander although, by law, can be sentenced for up to 5 years; 7-12 months for theft (car or motorcycle theft, or other things from a home or business), while the law foresees imprisonment of at least 3 months or 2 years if the stolen property is of high value; 15-24 months for manslaughter (if the victim is not responsible) in case of a traffic accident, while the law foresees imprisonment of at least 3 months (up to five years).[50] The empirical research is still rudimentary and irregular; it is carried out mostly by law students, who refer to individual cases and not to bigger samples. Consequently, organised empirical studies are needed for reliable conclusions on sentencing practices.

The third concern of the judiciary is media interference. In these cases, the courts can be the only responsible institution to protect themselves and maintain their functional independence from media interests. Furthermore, due to the increasing interference of media, politics and pressure groups in pre-trial and trial proceedings – that make it difficult to conduct a fair trial – it is necessary to develop a media law. The media law would protect defendants' rights in high profile trials, manage pre-trial publicity and its treatment in the Greek courts, and protect fundamental rights in a new audio-visual sector.[51]

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purposes of sentencing, see Nikolaos Androulakis, *Criminal Law: General Part*, Athens: P.N. Sakkoulas, 2000, p. 37-50. *

50 See Nestor Kourakis, Efstratios Papathanasopoulos, Foteini Kokkori & Evangelos Chainas, 'Sentencing and the Framework of Ordinary Sentences Imposed by Greek Case Law', *Criminology* 1-2 (2015), p. 8-16.*

51 Eric M. Barendt (ed), *Media Freedom and Contempt of Court*, Farnham: Ashgate, 2009, Part III, pp. 247-371; Paul Lambert, *Courting Publicity: Twitter and Television Cameras in Court*, Haywards Heath, West Sussex/London: Bloomsbury Professional, 2011; Ursula Smartt, *Media and Entertainment Law*, 3rd edn., New York/Oxon: Routledge, 2017, ch. 8, p. 321-375.

Legality, non-arbitrariness and judicial and administrative discretion in sentencing and enforcement of sentences: the case of Ireland

Mary Rogan, Vivian Geiran and Úna ní Raifeartaigh[*]

1 Introduction

Ireland is a common law country with a written Constitution (Bunreacht na hÉireann), which contains guarantees of judicial independence and the right to a fair trial. Ireland is Member State of the European Union and the Council of Europe and is subject to the European Convention on Human Rights. Sentencing options in Ireland include imprisonment (up to life), suspended and part-suspended sentences (whereby a term of imprisonment is not imposed for a certain period, subject to the person's compliance with certain conditions), non-custodial orders (which include, for example, community service orders, supervision orders and probation orders), fines, compensation, curfews and restriction on movement orders, and disqualification orders (such as from driving). 'Binding over', whereby a person receives an order requiring them to keep the peace is a longstanding feature of Irish sentencing practice, as is the 'poor box', whereby individuals may make a payment to a charity chosen by a judge or to a general fund to avoid a different kind of penalty, or a conviction. Particular orders apply to those convicted of sexual offences; these may include post-release supervision orders. Post-release orders have been introduced more broadly in Irish law,[1] but do not appear to be widely used. Ireland's rate of imprisonment is currently around 80 per 100,000 population.

Judicial discretion is a notable feature of Irish sentencing practice. As Brandon and O'Connell argue: "the Republic of Ireland has one of the most unstructured sentencing systems in the common-law world, wherein sentencing policy has largely been developed

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1 *Criminal Justice Act* (2007) Part III.

by judges on an *ad hoc* basis",[2] a point also made by Maguire.[3] The legislature has not introduced any sentencing guidelines or grid structures to date. In general, formal guidance concerning sentencing remains relatively limited in Ireland, though a series of recent judgments from the Court of Criminal Appeal, latterly the Court of Appeal, has developed principles which should apply in sentencing certain offences. While the legislature has historically tended to confine itself to laying down maximum sentences in law, there have been a number of instances whereby mandatory or presumptive minimum sentences have been brought into Irish law.

In this chapter, we will examine the constitutional, statutory and common law principles which provide for the principles of legality and other human rights protections in Irish sentencing practice. We will then explore the position of the independent judge in the Irish system and the role of sentencing guidelines. We will pay attention to the introduction of more mandatory or presumptive minimum sentences in Irish law and the consequences of this move away from the highly discretionary system of sentencing which has become characteristic of the Irish criminal justice system. We will then briefly explore sentencing by non-judicial entities, before going on to assess the role of administrative discretion in the early release and alteration of sentences, particularly those of imprisonment.

2 The principle of legality and the rule of law in Irish sentencing practice

The principle of legality has a central place in Irish sentencing practice. One Supreme Court judge, Denham J, as she then was, put the matter thus: "no matter how heinous the crime, or how disturbing the facts, every man, woman and child suspected, charged or convicted of an offence is entitled to the rule of law, and has constitutional rights".[4] The Court of Appeal has also recognised that: "the principle of legality is at the heart of the criminal justice system".[5] The principle of legality has been interpreted as being of constitutional status by the Supreme Court of Ireland. Article 15.5 of Bunreacht na hÉireann (the Constitution of Ireland) explicitly states that the Oireachtas (parliament) "shall not declare acts to be infringements of the law which were not so at the date of their commission". The High Court has further held that the Constitution should be interpreted

2 Avril Brandon & Michael O'Connell, 'Sentencing Disparities between Irish and Non-Irish Nationals in the Irish Criminal Justice System', 58 *The British Journal of Criminology* 5 (2018), p. 1127-1146, at p. 1128.

3 Niamh Maguire, 'Sentencing', in: Deirdre Healy, Claire Hamilton, Yvonne Daly and Michelle Butler (eds) *The Routledge Handbook of Irish Criminology*, London: Routledge, 2016, p. 298-318.

4 *G v. DPP* [1994] 1 IR 374 at 381.

5 *People (DPP) v. Geraghty* [2014] IECA 2, par. 14.

to mean that it is not permissible to impose heavier penalties retroactively. Article 38.1 of the Constitution contains the right to trial in due course of law, and, in *Enright v. Ireland*,[6] was interpreted by the High Court to mean that a penalty should not be imposed on a person convicted of an offence which is heavier than that which was applicable at the time the offence was committed. Though this was not the basis for the decision, as O'Malley notes, the court's view is "nonetheless compelling and has remained unchallenged".[7]

The need for clarity in the law governing offences is also a constitutional principle in Ireland. This principle was made clear in *King v. Attorney General*[8] which concerned the offence of vagrancy. This typically Victorian law was held to be repugnant to the Constitution on the ground of vagueness. The Supreme Court also noted the need for accessibility in the criminal law in *DPP v. Cagney*, in which it was stated: "it is a fundamental value that a citizen should know or at least be able to find out, with some considerable measure of certainty, what precisely is prohibited and what is lawful" (per Hardiman J).[9]

3 Human rights requirements in the sentencing process and the enforcement of sentences

No preventive detention

One of the most notable features of the Irish approach to sentencing is the constitutional prohibition on the use of preventive detention as an objective in sentencing. This fundamental principle derives from the presumption of innocence, itself a constitutional principle. This principle was discussed by the Supreme Court in the case of *People (Attorney General) v. O'Callaghan* which concerned the principles which should govern decisions on pre-trial detention. Walsh J held:

> in this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty only upon the belief that he will commit further offences if left at liberty, save in the most extraordinary circumstances.[10]

While the law on bail has been amended, following a constitutional referendum, to permit the imposition of pre-trial detention in circumstances where there is a risk of reoffending,

6 *Enright v. Ireland* [2003] 2 IR 321; [2004] 1 ILRM 103.
7 Thomas O'Malley, *Sentencing Law and Practice*, Dublin: Round Hall Press, 2016 (3rd ed.), p. 49.
8 [1981] IR 233.
9 *DPP v. Cagney* [2007] IESC 46, [2008] 2 IR 111 at 121-122, [2008] 1 ILRM 293.
10 *People (Attorney General) v. O'Callaghan* [1966] IR 501, at 516.

this principle remains intact at the sentencing stage. The courts distinguish between the purpose and the side-effects of a sentence. A court is entitled to impose a long sentence for a punitive purpose, which has the side-effect of prevention, but is not entitled to impose the sentence for a purely preventive purpose.[11]

Totality

Another important feature of Irish sentencing law is the principle of totality in sentencing. This means that, where a judge is imposing consecutive prison sentences for different offences, or is sentencing a person who is already serving a sentence for a different offence, s/he must examine what the total effect of the sentence is and ensure that it is a fair reflection of the gravity of the person's conduct as a whole.[12] Consecutive sentences, are, however permissible under law, and, in some cases are actually mandated, for example in the case of offending while on bail.

Equality

A third feature is the guarantee of equality in Article 40.1 of the Constitution of Ireland. This states that "all citizens shall, as human persons, be held equal before the law", and also permits the State to have due regard to differences of capacity, physical and moral, and of social function. O'Malley argues that this must also apply to courts when engaged in sentencing.[13] Courts may and do take into account such factors in fashioning a reduced sentence, or in imposing an alternative to imprisonment.[14] However, it is also clear that the courts face great challenges in balancing the requirement to impose a sentence proportionate to a person's level of wrongdoing and ensure that s/he will not be subjected to a degree of suffering which goes beyond that inherent in any sentence of imprisonment. For example, in a case involving historic child abuse by a man who, at the time of sentencing, had several major health problems, the sentencing judge described the matter as "one of the most difficult cases to resolve".[15]

Another manner in which the equality guarantee plays out is that a person's financial means is to be taken into account by a court imposing a fine, and the amount chosen should be proportionate to those means. This was stated explicitly in the Criminal Justice Administration Act 1914 and restated in section 5 of the Fines (Payment and Recovery) Act 2014.[16]

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11 *DPP v. Daniels* [2014] IESC 64; [2015] 1 ILRM 99.

12 *DPP v. Farrell* [2010] IECCA 68; *DPP v. McC* [2003] 3 IR 609.

13 Thomas O'Malley, *Sentencing Law and Practice*, Dublin: Round Hall Press, 2016 (3rd ed), par. 5.41, p. 123.

14 *DPP v. Kennedy*, Court of Criminal Appeal, 14th April 2018.

15 Cited in *DPP v. O'Brien* [2015] IECCA 1, at par. 10.

16 This states, *inter alia*, that "the purpose of this section is to ensure, in so far as is practicable, that, where a court imposes a fine on a person, the effect of the fine on that person or his or her dependents is

Another example of where the equality guarantee plays out concerns differences in treatment which arise from the characteristics of the crime itself. There have been instances where different sentences have been provided for in legislation depending on the gender of the victim of the crime. For example, in the case of sexual assault, the law used to provide that, where the offence was committed against a male, the maximum sentence was 10 years' imprisonment, whereas if it was against a female, the maximum was two years' imprisonment. The High Court found that this was unconstitutional.[17]

Proportionality

The Constitution of Ireland has also influenced sentencing practice. For example, the Supreme Court of Ireland has held that the Constitution requires judges to apply the principle of proportionality in sentencing. The sentence must therefore be proportionate to both the gravity of the offence and the person's personal circumstances. In fact the Court of Appeal is now encouraging judges to split their sentences into two parts – the headline sentence and the sentence after mitigating factors have been taken into account.[18] Ireland does not currently operate a 'tariff' system in sentencing.

Dignity

When it comes to the application of human rights standards during the execution of the sentence itself, general principles of constitutional law also apply. It is in the context of prison sentences that we see these principles discussed most often. Surprisingly, this analysis has not been developed in the area of non-custodial sanctions. The many human rights implications in these areas are therefore often overlooked by scholars and practitioners. While the Irish courts have emphasised that imprisonment necessarily involves the deprivation of rights, it is also well established that those rights which are not necessarily diminished by the fact of imprisonment must continue to be upheld.[19] The courts have stated that human rights are not completely obliterated by the fact of imprisonment, with the High Court holding, for example, that "among the residual constitutional rights of a prisoner which are not abrogated or suspended is the right to be treated humanely and with human dignity".[20] One of the most eloquent statements concerning the rights of prisoners in the modern era comes from Hogan J in the decision of *Connolly v. Governor of Wheatfield Prison*.[21] There, Hogan J drew on the Preamble to the

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not significantly abated or made more severe by reasons of his or her financial circumstances", section 5(1).

17 *M(S) v. Ireland (No. 2)* [2007] IEHC 280; [2007] 4 IR 369.

18 *DPP v. Stronge* [2011] IECCA 79; *DPP v. WC* [1994] 1 ILRM 321, at par. 17; *DPP v. Flynn* [2015] IECA 290; [2015] 12 JIC 0405; 2015 WJSC-CA 8145, at par. 13.

19 *Holland v. Governor of Portlaoise Prison* [2004] 2 IR 573.

20 *Devoy v. Governor of Portlaoise Prison and Others* [2009] IEHC 288, at par. 360.

21 *Connolly v. Governor of Wheatfield Prison* [2013] IEHC 334.

Constitution which seeks to ensure that the "dignity and freedom of the individual may be assured" in order to ground his finding that "the obligation to treat all with dignity appropriate to the human condition is not dispensed with simply because those who claim that the essence of their human dignity has been compromised are prisoners".[22]

Empirical research on sentencing

Some, though few, empirical studies exist which examine whether there are disparities in sentencing between particular groups. In a pioneering study, Brandon and O'Connell examined whether there are disparities in sentencing outcomes for Irish people as compared to non-Irish people.[23] The authors found that non-Irish nationals received statistically significantly longer sentences for four offences, specifically failing to comply with the conditions of bail, using a vehicle without a certificate of roadworthiness required by law, failure to comply with the direction of a garda (police officer) and possession of drugs for sale/supply when the value of the drugs is €13,000 or less. When controlled for gender, the study found substantially longer sentences for non-Irish males for the offence of possession of drugs with the intention of selling or supplying them when the value of the drugs is €13,000 or less. This was, on average, a difference of 10.78 months. Interestingly, however, when controlled for a previous custodial sentence, the differences reduced. It was also notable, however, that Irish nationals received higher sentences than non-Irish nationals for certain offence categories, notably assault, though again the differences reduced when prior custodial record was taken into account. These findings require much more sustained analysis as well as consideration as to how they can be taken account of in individual sentencing cases.

Though again limited in number, some studies have also explored whether there are geographical disparities in sentencing across the country. In a study comparing community service orders to short term prison sentences, O'Hara and Rogan found that the average number of community service orders per month which are ordered in lieu of a sentence of imprisonment varied by District Court location. For example, in one District Court area one month of imprisonment equated, on average, to 70.5 hours of community service, while in another, the equivalence was 23 hours.[24] There were also variations across different

22 *Connolly v. Governor of Wheatfield Prison* [2013] IEHC 334, at par. 28.

23 Avril Brandon & Michael O'Connell, 'Sentencing Disparities between Irish and Non-Irish Nationals in the Irish Criminal Justice System', 58 *The British Journal of Criminology* 5 (2018), p. 1127-1146.

24 Kate O'Hara and Mary Rogan, 'Examining the Use of Community Service Orders as Alternatives to Short Prison Sentences in Ireland', 12 *Irish Probation Journal* (2015), p. 22-45 (at: https://arrow.dit.ie/cgi/viewcontent.cgi?article=1069&context=aaschsslarts). See further an analysis of recidivism in the case of non-custodial sanctions by geographical region: CSO website, Probation Reoffending Statistics 2013, 2014 and 2015 (at: Home – CSO – Central Statistics Office).

sentence categories. In general, it was clear that offenders in some District Court areas were more likely to receive a community service order rather than a sentence of imprisonment, and vice versa.

Research on sentencing in Ireland is only beginning to emerge, and has been hampered by a lack of unified data sharing systems and easy access for researchers.[25] There are many gaps. However, there are encouraging signs from some state authorities of more openness to research and a desire to use evidence in the service of policy.[26] These developments will allow us to examine the practical application of the constitutional principle of equality in sentencing practice in more detail and more robustly.

4 Judicial discretion in sentencing in general: the position of the independent judge and responsibility for fairness

The extent of judicial discretion is one of the most notable features of the Irish approach to sentencing, when viewed in comparative perspective. As O'Malley argues: "Ireland's sentencing system remains largely discretionary, reflecting a commitment to individualised justice for criminal offenders".[27] While nearly all offences are subject to a maximum sentence provided for in legislation, only one truly mandatory sentence has been provided for in statute, namely the life sentence which must be imposed in the case of murder. However, over the last twenty years or so, we have seen a turn towards the creation of more mandatory minimum sentences by the legislature, generally for drugs and firearms offences. This will be discussed further below. During this period, the legislature has also created more presumptive minimum sentences, requiring the sentencing judge to impose a particular minimum sentence. The judiciary has also started to give more guidance concerning the appropriate range of sentences for particular offences by way of guideline judgments in the recent past. Nonetheless, individualised sentencing remains the dominant paradigm.

There is, at present, no legislation setting out the fundamental principles which should govern the purposes of sentencing in Ireland. New legislation which would have this effect had been planned, but has not yet come before the Oireachtas (Parliament).[28] The Penal

25 Mary Rogan, 'Improving Criminal Justice Data and Policy', 43 *The Economic and Social Review* 2 (2012), p. 303-323 (at: https://www.esr.ie/vol43_2/05%20Rogan%20PP%20_ESRI%20Vol%2043-2.pdf).

26 Department of Justice and Equality, 'Data & Research Strategy 2018-2020: Supporting delivery of "A safe, fair and inclusive Ireland"' (2018) (at: http://www.justice.ie/en/JELR/Department_of_Justice_and_Equality_Data_and_Research%20_Strategy_2018-2021.pdf/Files/Department_of_Justice_and_Equality_Data_and_Research%20_Strategy_2018-2021.pdf).

27 Thomas O'Malley, *Sentencing Law and Practice*, Dublin: Round Hall Press, 2016 (3rd ed.), p. 1, par. 1-10.

28 Department of Justice and Equality, Penal Policy Review Group, (at: http://www.justice.ie/en/JELR/Pages/Penal_Policy_Review). The Judicial Council Act 2019 may also lead to change in this regard.

Policy Review Group, which was set up by the Minister for Justice and Equality in 2012 to engage in a strategic review of penal policy in Ireland, has furthermore proposed that the principle that imprisonment be a sanction of last resort should be laid out explicitly in legislation.[29] This has not yet happened, though such a provision is in place for those under 18.[30] Deterrence, punishment and rehabilitation are all permissible goals of sentencing under Irish law.

While there are signs that a more structured approach to sentencing may be taking hold in Ireland, in the main, sentencing judges in Ireland continue to have the discretion to choose a particular sentence, subject to the maximum provided for in legislation. That sentence is also subject to the limits governing the maximum sentences which can be imposed by particular courts, with the District Court, for example, being able to impose a maximum prison sentence of one year for a single offence and two years for multiple sentences.[31]

As well as statutory influences on sentencing, a judge's approach to a particular sentence is also guided by a set of general principles, developed by the superior courts. These principles govern for example, aggravating and mitigating factors, and the use of concurrent or consecutive sentences in cases where more than one offence is at issue.

Victim impact statements are now well established features of Irish sentencing practice, but a court may not ask a victim or her/his family to, for example, choose, or express a view on a possible sentence.[32] A Victim Impact Statement is confined to describing the effects of the crime on the victim or her/his family.

With an approach to sentencing which prioritises judicial discretion, the position of the judge is therefore extremely important to the operation of the system in practice, as well as its fairness. Judicial independence is guaranteed by Article 35.2 of the Constitution.[33] The Constitution explicitly prohibits a judge from being a member of either House of the Oireachtas (parliament) and from holding any other office or position of emolument. As will be discussed further below, some administrative bodies do have the power to impose certain penalties, but the Constitution of Ireland requires that the choice of sentence for a

29 Department of Justice and Equality, Penal Policy Review Group, (at: http://www.justice.ie/en/JELR/Pages/Penal_Policy_Review).

30 *Children Act* (2001) section 96(2).

31 See further: Houses of the Oireachtas, 'Sentencing Policy and Practice', *Oireachtas Library & Research Service* 3 (2008), p. 4 (at: https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2008/2008-10-31_spotlight-sentencing-policy-and-practice_en.pdf).

32 *Criminal Justice Act* (1993) section 5(3).

33 It states: "all judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law".

criminal offence must be left to the judiciary.[34] Other branches of government cannot take this role.

Role of the prosecutor

It is a fundamental principle of Irish constitutional law that the choice of sentence in an individual case is reserved to the judiciary.[35] The public prosecutor (the Director of Public Prosecutions) may bring the court's attention to examples of previous sentences in similar cases, but cannot suggest or determine the final sentence. It is also not permissible for the court to seek the view of a victim or a victim's family in determining sentence.[36]

A sentencing hearing may follow a plea of guilty or a finding of guilty after a trial. It is the role of the prosecution to ensure that the court has all the available evidence relevant to sentencing, including evidence favourable to the accused. The prosecution must also ensure that the court is aware of the range of sentencing options available to it, to refer the court to any relevant authority or legislation that may assist in the determination of sentence, and assist the court to avoid errors in fact or law.[37] The defence is entitled to make a plea in mitigation and must also bring the court's attention to any relevant legislation or principles that may assist their client. This basic principle that a convicted person and his/her legal representative has the right to be heard concerning sentencing was recognised in *State (Stanbridge) v. Mahon*.[38]

For her or his part, the judge must decide in a way that is not only unbiased, but which does not give the reasonable and fair-minded objective observer, a reasonable apprehension of bias.[39] There is also a general duty to give reasons, though the precise content of that duty has not delineated exactly. As O'Malley notes, the duty is likely to be adequately discharged if the reasons are clear to the sentenced person and other interested parties.[40] The Penal Policy Review Group, described above, advocated that judges be required to give written reasons in all instances where they impose a custodial sentence. This

34 *Deaton v. Attorney General and Revenue Commissioners* [1963] IR 170.
35 *Deaton v. Attorney General and Revenue Commissioners* [1963] IR 170.
36 *DPP v. Carey*, ex tempore, Court of Criminal Appeal, 8 April 2005.
37 Director of Public Prosecutions, Guidelines for Prosecutors, November 2010.
38 [1979] IR 214.
39 *O'Callaghan v. Mahon* [2007] IESC 17; [2008] 2 IR 514.
40 Thomas O'Malley, *Sentencing Law and Practice*, Dublin: Round Hall Press, 2016 (3rd ed.), par. 31-19, at p. 785.

recommendation has not been implemented.[41] A judge must pronounce sentence in public.[42]

As a general safeguard, all sentences imposed in Ireland are subject both to appeal and to judicial review. Since 1993, the prosecution may also appeal sentences on the grounds of undue leniency in certain cases. There is also funded legal aid in Ireland, for those without the means to pay for their defence themselves, when the person is at risk of a custodial sentence.

5 Judicial discretion within a framework: guidelines, mandatory and presumptive sentencing

As described above, sentencing in Ireland is perhaps unusually discretionary, with the legislature largely providing guidance only on the maximum sentence which can be imposed for a particular offence. While the offence of murder attracts a mandatory penalty of life imprisonment, generally speaking, there are few truly mandatory sentences in Irish law.

There has, however, been a move towards more presumptive minimum sentencing, and in some cases, mandatory minimum sentencing for particular offences in Ireland since the late 1990s. The most well-known of these provisions is section 15A of the Misuse of Drugs Act 1977, inserted by the Criminal Justice Act 1999. Section 15A created an offence of having controlled drugs in one's possession for the purpose of selling or supplying them, when those drugs have a market value of €13,000 or more. Section 33 of the Criminal Justice Act 2007 now provides that, where such a convicted person is aged 18 years or more, and where the offence is the first offence under section 15A,[43] the court must, when imposing sentence, specify a term of not less than ten years as the minimum term of imprisonment to be served. There are, however, additional clauses in the legislation which dilute the mandatory minimum impact of the legislation. Under section 3D of the Criminal Justice Act 2007, the minimum ten year term shall not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or to the person convicted of the offence which would make a sentence of not less than ten years' imprisonment unjust in all the circumstances. The circumstances which the court may take into account in this assessment include whether the person has pleaded guilty to

41 Implementation of Penal Policy Review Group Recommendations, *Seventh Report of the Implementation Oversight Group to the Minister for Minister and Equality* (2019) Recommendation 33 (at: http://www.justice.ie/en/JELR/IOG_Seventh_Report_of_the_Implementation_Oversight_Group_to_the_Minister_for_Justice_and_Equality.pdf/Files/IOG_Seventh_Report_of_the_Implementation_Oversight_Group_to_the_Minister_for_Justice_and_Equality.pdf).

42 *State (Kiernan) v. de Burca* [1963] IR 348.

43 Or section 15B which relates to the importation of drugs.

the offence, the circumstances in which such a plea was entered and the stage at which it was entered, and whether the person materially assisted in the investigation of the offence. The court may also have regard to whether or not the person has a previous conviction for drug trafficking, and whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence.

In circumstances where a person aged 18 years or more is convicted of a second or subsequent offence under section 15A,[44] or is convicted of an offence under another one of the relevant sections under the Act, then the judge has no discretion concerning the minimum sentence, and must impose a sentence of not less than 10 years as the minimum term of imprisonment. No exceptional or mitigating circumstances can be taken into account. O'Malley describes this situation as "remarkably severe".[45] Where a person is addicted to drugs, and if the judge is of the view that the addiction was a substantial factor behind the commission of the offence, the court may list the sentence for review after at least half the sentence has been served. It is then open to the court, at the review, to suspend the remainder of the sentence. It is very unclear how often this provision is in fact used, if at all.[46]

The sentencing provisions for section 15A have been criticised for their severity,[47] but also for the infrequency of their application, although there is no formal[48] empirical research to substantiate these claims. However, there is good reason to believe that the minimum of ten years is not being extensively applied, based on practical experience. Much more analysis of the effect of these sentencing provisions is necessary. Since the time when this sentence was introduced, the prison population in Ireland has risen quite considerably. Unfortunately, in the absence of robust empirical assessment of the application of the sentence, and indeed sentencing generally, it is not possible to say definitively whether or not the section 15A sentencing provisions have played a role in this increasing prison population, but it is reasonable to suggest that they have.

Presumptive and mandatory sentences have also been introduced for certain firearms offences. The Criminal Justice Acts of 2006 and 2007 introduced a series of presumptive and mandatory minimum sentences for various offences involving possession of a firearm,

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44 Or section 15B.

45 Thomas O'Malley, *Sentencing Law and Practice*, Dublin: Round Hall Press, 2016 (3rd ed.), p. 467.

46 *Ellis v. Minister for Justice and Equality & Ors* [2019] IESC 30; *DPP v. Witkowski & Sowa* [2020] IECA 10; *DPP v. Maginn* [2019] IECA 20; *DPP v. Sarsfield* [2019] IECA 260; *O'Shea v. Ireland and Ors* [2017] IEHC 9; *Doyle v. Minister for Justice and Others* [2015] IEHC 728.

47 Irish Penal Reform Trust, *Position Paper 3: Mandatory Sentencing* (2013).

48 A Department of Justice report found that between 1999 and 2001, only 3 cases (5%) resulted in a custodial sentence of ten years or more – Patrick McEvoy, *Research for the Department of Justice on the criteria applied by the Courts in sentencing under s. 15A of the Misuse of Drugs Act 1977 (as amended)*, (2001) (at: http://www.justice.ie/en/JELR/Research.pdf/Files/Research.pdf); In 2016, the Irish Times reported similar infrequency from figures obtained by TD Clare Daly (at: https://www.irishtimes.com/news/crime-and-law/only-3-of-convicted-drug-dealers-given-mandatory-10-years-1.2884108).

carrying a firearm with intent to commit an indictable (serious) offence, and shortening the barrel of a shotgun or a rifle. Where a person over the age of 18 years is first convicted of such an offence, a judge must order a minimum term of imprisonment unless exceptional and specific circumstances relating to the offence or the offender would render the imposition of that minimum sentence unjust. The number of years depends on the nature of the offence, ranging between five and ten years.

The constitutionality of mandatory and presumptive sentences has been challenged in the case of the mandatory life sentence for murder in *Lynch and Whelan v. Minister for Justice* (hereafter *Lynch and Whelan*)[49] and the presumptive minimum sentence for certain firearms offences in the case of *Ellis v. The Minister for Justice and Equality* (hereafter *Ellis*).[50] In *Lynch and Whelan* a challenge to the constitutionality of the mandatory sentence of life imprisonment for murder was rejected by the Supreme Court, which held that the Oireachtas (Parliament) is entitled in the exercise of its legislative powers to choose to impose a fixed or mandatory penalty for a particular offence. In *Ellis*, the Supreme Court held that the sentencing regime for firearms breached the separation of powers and was unconstitutional.

Mandatory and presumptive minimum sentences have come in for considerable criticism from a variety of sources. Notably, the Law Reform Commission recommended that the existing mandatory and presumptive sentences for drugs and firearms should be repealed. The Commission observed that it had not been established that these sentences had reduced criminal behaviour, and, further, that they "do not appear to further the sentencing aims of deterrence, retribution and rehabilitation, it is unlikely that they further the overarching goal of crime-reduction".[51] The Commission also noted that these sentencing provisions had counter-productive results, and did not always promote the principles of consistency and proportionality in sentencing. Concerning the provisions on drug offences specifically, the Commission expressed concern that the sentences had primarily affected individuals at the lower level of drug activities, rather than those bearing most culpability.

As well as recommending the repeal of presumptive and minimum sentencing provisions for drugs and firearms offences, the Commission further recommended that the use of presumptive minimum sentences should not be extended to other offences in Irish law. This recommendation was also made by the Penal Policy Review Group in 2014. Despite the fact that these recommendations were accepted by government, a proposal for

49 *Lynch and Whelan v. Minister for Justice* [2012] IR 1.

50 *Ellis v. The Minister for Justice and Equality* [2016] IEHC 234; [2019] IESC 30.

51 Law Reform Commission, *Report on Mandatory Sentences* (2013), p. 183, par. 4.233 (at: https://www.lawreform.ie/_fileupload/Reports/r108.pdf).

a new presumptive minimum sentence has in fact been recently introduced in the form of the Criminal Law (Sexual Offences) Amendment Act 2019.[52]

Sentencing guidelines

As described above, Ireland's approach to sentencing retains a great deal of judicial discretion. Sentencing guidelines do not exist in legislation. The Law Reform Commission examined this issue in the 1990s, and did not recommend the adoption of sentencing guidelines in legislation.[53] However, in the very recent past, there are signs of an increasing effort by the judiciary to introduce sentencing guidance by way of guideline judgments. The Penal Policy Review Group recommended that a more structured approach should be taken to sentencing in Ireland, but that this should not come in the form of statutory guidelines but rather should be developed via the judiciary. In 2014, the Court of Criminal Appeal, in the view of O'Malley, introduced sentencing guidelines "suddenly and quietly",[54] in three judgments delivered on the same day.[55] The Court indicated sentencing ranges which would be appropriate for the offences of causing serious harm and the possession of firearms in suspicious circumstances. The Court further noted that, for the purposes of sentencing, offences could be located in the upper, middle or lower ranges in terms of their seriousness, suggesting this structure could be more widely used. The Court noted that it was constrained in its ability to examine pre-existing practice for certain offences because of the lack of reliable information on that practice. This lack of data on sentencing is an often-repeated complaint amongst those interested in the subject.[56]

These cases appeared to represent an important move towards more guidance concerning sentencing, however the pace of change has been somewhat gradual. It seems that more judgments are providing indications of the suitable range of sentences for particular offences.[57] It is not possible, however, to examine, as the Penal Policy Review Group advocated, whether or not more consistency in sentencing has in fact been the result of these developments. The Penal Policy Review Group also called for a review of developments in sentencing practice three years after the publication of the report, but this recommendation has also not been fulfilled.

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52 Government of Ireland, *Criminal Law (Sexual Offences) Amendment Act* (2019) section 58(1).

53 Law Reform Commission, *Consultation Paper on Sentencing* (1993) (at: https://www.lawreform.ie/_fileupload/consultation%20papers/cpSentencing.htm).

54 Thomas O'Malley, 'The Path to Consistency: A Survey of Recent Sentencing Judgements of the Court of Appeal', 2 *Criminal Law and Practice Review* (2018).

55 *DPP v. Ryan* [2014] IECCA 12; [2014] 2 ILRM 98; *DPP v. Fitzgibbon* [2014] IECCA 12; [2014] 2 ILRM 116; *DPP v. Z* [2014] IECCA 13; [2014] 2 ILRM 132.

56 Mary Rogan, *Prison Policy in Ireland: Politics, Penal Welfarism, and Political Imprisonment*, Oxon: Routledge, 2011; Ian O'Donnell, 'Imprisonment and Penal Policy in Ireland', 47 *Howard Journal of Criminal Justice* 2 (2005), p. 253-266.

57 Thomas O'Malley, 'The Path to Consistency: A Survey of Recent Sentencing Judgements of the Court of Appeal', 2 *Criminal Law and Practice Review* (2018).

Recent legislation may prove to be of major consequence for the operation of judicial decision-making and the courts system in general. The Judicial Council Act 2019 will establish, *inter alia*, a Sentencing Information Committee which will have the function of collating information on sentences imposed by the courts and disseminate that information to judges and others.[58] This Committee will also have the power to conduct research on sentencing. This has the potential to make a major contribution to academic and public understandings of sentencing practice, but will require the input of experts in statistical analysis and adequate resources.

6 Sentencing by non-judicial entities

The seminal case of *Deaton v. Attorney General*[59] held that sentencing is a matter reserved for the judiciary, Ireland does not have widespread use of administrative penalties. Fixed penalties are in place for certain road traffic offences.

7 Administrative discretion in the execution of sentences

There are two main mechanisms for release from prison sentences in Ireland: remission and temporary release. Most of the analysis concerning administrative discretion relates to sentences of imprisonment. All sentences of imprisonment save for the life sentence are subject to one quarter remission under law (i.e. the person is released at the three quarter point of the sentence). The Prison Rules 2007[60] govern many aspects of prison life in Ireland, including provisions on release. Rule 59 allows for two types of remission: standard remission, set at 25% of the sentence, and enhanced remission, which is up to 33% of the sentence. Prisoners sentenced to life imprisonment can seek release under a different regime, *via* the Parole Board; remission does not apply to such sentences.[61] Remission is the complete ending of a sentence at a reduced point.[62] Rule 59(1) states:

> a prisoner who has been sentenced to (a) a term of imprisonment or (b) terms of imprisonment to be served consecutively, shall be eligible, by good conduct,

58 Government of Ireland, *Judicial Council Act* (2019) section 23.

59 *Deaton v. Attorney General and Revenue Commissioners* [1963] IR 170.

60 S.I. No. 252 of 2007.

61 For a consideration of the factors which influence the Parole Board's decision-making concerning life sentenced prisoners, see Diarmuid Griffin, 'The Release and Recall of Life Sentence Prisoners: Policy, Practice and Politics,' 53 *The Irish Jurist* 1 (2015), p. 1-35.

62 For an assessment of the law on release from prison including the principles governing remission, see Mary Rogan, *Prison Law*, Bloomsbury, 2014 and Thomas O'Malley, *Sentencing Law and Practice*, Dublin: Round Hall (3rd edition), 2016.

> to earn a remission of sentence not exceeding one quarter of such term or terms.

It is not possible for a court to impose a sentence purporting to exclude remission.[63]

Enhanced remission was a concept introduced by the Prison Rules 2007,[64] through rule 59(2). This rule allows for up to one third remission for prisoners, i.e. prisoners may be released at a point after two thirds of the sentence have been served. Prisoners may therefore be eligible for early release amounting to a period equivalent of between one quarter and one third of a sentence. Enhanced remission may only be granted where certain conditions are met. These conditions require the Minister for Justice and Equality to be satisfied that the person is less likely to reoffend and is better able to reintegrate upon release. This decision is to be made by examining certain factors including the prisoner's engagement in authorised structured activity.

In 2014, several cases came before the High Court of Ireland arguing that individuals were *entitled* to enhanced remission on the basis that they had engaged in structured and authorised in-prison activities. In the first of these cases, *Ryan v. Governor of Midlands Prison*,[65] the High Court agreed and ordered the release of the applicant. A series of cases followed, culminating in a Court of Appeal decision *McKevitt v. Minister for Justice and Equality*,[66] which held that engagement in structured activity cannot automatically lead to release, and the Minister may consider a variety of factors in arriving at the decision whether or not to release the person. A statutory amendment also introduced legislation in the form of the Prison Rules (Amendment) (No. 2) of 2014.[67] This new rule clarifies that release cannot be automatic and the application for enhanced remission shall not be made earlier than six months prior to the date on which the prisoner would be released, should s/he be given the full amount of remission available under rule 59(2), i.e. one third of the sentence.[68] In order to grant enhanced remission, the Minister must be satisfied that the prisoner is less likely to reoffend and better able to reintegrate into the community.[69] Where the application is refused, the Minister must provide reasons for the refusal to the prisoner.[70] The Rule also lays down the factors to which the Minister must have regard when making decisions on enhanced remission. These include such factors as:

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63 *O'Brien v. Governor of Limerick Prison* [1997] 2 ILRM 349.
64 S.I. No. 252 of 2007.
65 *In the matter of an enquiry under Article 40.4.2°of the Constitution of Ireland, 1937, Ryan v. Governor of Midlands Prison* [2014] IEHC 338.
66 [2015] IECA 122.
67 S.I. No. 385 of 2014.
68 Rule 59(2)(c).
69 Rule 59(2)(d)(i).
70 Rule 59(2)(d)(ii).

> (i) the manner and extent to which the prisoner has engaged constructively in authorised structured activity;
> (ii) the nature and gravity of the offence to which the sentence of imprisonment being served by the prisoner relates;
> (iii) the potential threat to the safety and security of members of the public (including the victim of the offence to which the sentence of imprisonment being served by the prisoner relates) should the prisoner be released from prison;
> (iv) any offence of which the prisoner was convicted before being convicted of the offence to which the sentence of imprisonment being served by him or her relates.

The challenges concerning enhanced remission in the courts have certainly dissipated since these clarifications have been put into law.

Temporary release is the primary way in which administrative discretion applies to prison sentences. Temporary release was first put into statute in Ireland by the Criminal Justice Act 1960. Temporary release was originally designed to provide a legal basis for the consequences which flow when a person released for a short period, for example for compassionate or medical reasons, fails to return to prison. Humanitarian concerns and a desire to support reintegration were also motivating factors.[71] From the 1970s to the mid 2010s, however, temporary release was used on a very widespread basis simply as a measure to reduce overcrowding, a practice known as 'shedding'. This widespread use of this unstructured form of release, also known as the 'revolving door', was heavily criticised and the practice has been much reduced in recent years. Temporary release is now also used as the foundation for the 'Community Return Scheme', a mechanism of release for which prisoners serving up to eight years are eligible. Such prisoners may be released at the halfway point of their sentence, and serve the balance of it in the community, engaging in work under the supervision of the Probation Service. Temporary release is also the mechanism by which life-sentence prisoners are released into the community. This form of temporary release is reviewable and subject to possible revocation.

Under law,[72] the Minister for Justice and Equality takes decisions on temporary release, but in practice this function is delegated to the Irish Prison Service. It has been made clear in the case of *Whelan and Lynch v. Minister for Justice and Equality*[73] that the granting of temporary release is an executive function and does not constitute the exercise of a

71 Mary Rogan, *Prison Policy in Ireland: Politics, Penal Welfarism, and Political Imprisonment*, Oxon: Routledge, 2011, chapter 5.

72 *Criminal Justice (Temporary Release of Prisoners) Act* (2003).

73 *Whelan and Lynch v. Minister for Justice and Equality* [2012] 1 IR 1.

sentencing power. It is a purely discretionary power and viewed in law as a privilege for a prisoner, rather than a right.

Not all prisoners are eligible for temporary release. Those who are convicted of 'capital murder' i.e. those convicted under section 3 of the Criminal Justice Act 1990 which applies to the murder of a police officer, prison officer and certain other officials, are not eligible for temporary release unless there are grave reasons of a humanitarian nature at issue.[74] Restrictions also apply to those serving sentences for certain firearms offences and drugs offences, specifically those serving a sentence for an offence under section 15A of the Misuse of Drugs Act 1977, discussed above.

The principles of natural and constitutional justice apply to decisions to revoke temporary release. There must be some inquiry before temporary release is revoked and the person should be given reasons for the decision to revoke.[75] Curiously the application of the principles of natural and constitutional justice is less clear when it comes to the initial decision on an application for temporary release. The decision-making power must not be exercised in a way which is capricious, arbitrary or unjust, and it appears that some basic reasons must be provided to the applicant.[76]

Ireland's Parole Board is currently a non-statutory body with the ability to make recommendations to the Minister for Justice and Equality as to whether a prisoner should be released from their sentence. Its practice has been to review the sentences of prisoners serving eight years or more, and to hold the first review after seven years in the case of prisoners serving fourteen years or more, and at the halfway point in the case of those serving sentences of between eight and fourteen years. Recommendations are not legally binding. The involvement of the Minister in the decision-making has been found to comply with the Constitution by the Supreme Court in the case of *Lynch and Whelan v. Minister for Justice, Equality and Law Reform*,[77] an approach which was upheld by the European Court of Human Rights.[78]

The Parole Act 2019 was passed in order to put the Parole Board on a statutory footing and to give it the power to order release. This will remove the Minister for Justice and Equality from the process and is therefore intended to remove the appearance of political considerations influencing decision-making.[79] Under the Act, which is not yet commenced,

74 The case of *Callan v. Minister for Justice* held that where a person was originally sentenced to death for capital murder and where that sentence was subsequently commuted to 40 years imprisonment, temporary release must be possible during that sentence.

75 *Dowling v. Minister for Justice* [2003] 2 IR 353.

76 *Kinahan v. Minister for Justice and Law Reform* [2001] 4 IR 454.

77 *Lynch and Whelan v. Minister for Justice, Equality and Law Reform* [2010] IESC 34; [2012] 1 IR 1.

78 *Whelan v. Ireland*, no. 70495/10, ECHR 2013 and *Lynch v. Ireland*, no. 74565/10, ECHR 2013.

79 Irish Penal Reform Trust, *Parole Reform and the Parole Bill 2016*, 2019 (at: https://www.iprt.ie/site/assets/files/6499/iprt_submission_on_parole_june_2019_final1.pdf).

a prisoner will become eligible for parole after twelve years in the case of a life sentence and eight years in other circumstances. The criteria for release are that the person being considered for parole will not present an undue risk to society before the expiration of the sentence originally imposed, and that the release of the person will facilitate their reintegration into society as a law-abiding person.

Sentences may also be commuted and convicted persons may be pardoned. Commutation of sentences is provided for in Article 13.6 of the Constitution. It states: "The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may also be conferred by law on other authorities". Under s 23 of the Criminal Justice Act 1951 the Minister for Justice may exercise this power on behalf of the President, though certain offences are excluded from consideration. Administrative discretion in the area of non-custodial sentences is much less well understood when compared to provisions for release from a prison sentence and is an area of potential legal innovation in the future.

8 Conclusion

Sentencing in Ireland is notable for the wide discretion which still resides with the judiciary. Sentencing guidance remain comparatively few and far between and those that do exist have come from court decisions rather than coming from the legislature. While few truly mandatory or presumptive minimum sentences exist in Ireland, the concerns which have been expressed, most notably, about the operation of the presumptive minimum sentencing provisions for certain drugs offences, have acted, at least until recently, to limit the introduction of more sentences of this kind.

The sentencing process in Ireland contains robust procedural protections and a strong role for the defence. The availability of legal aid is a strong feature of the Irish system. However, there is worrying evidence of inequality of outcome in sentencing in Ireland, and a clear need for more research into sentencing practice. The dearth of data on sentencing in Ireland is a long-standing problem in Ireland. It is also a very serious one, preventing policymaking from being conducted on the basis of evidence, and limiting the ability to counteract public and political misconceptions about sentencing practices. Improving this state of affairs is long overdue. Initiatives, such as greater data integration across the criminal justice system and an increased focus on research, indicate that there is some hope that this situation may be about to improve. These initiatives require the political and practical support necessary to ensure that Irish sentencing and criminal justice policy is based firmly on the best available understanding of sentencing practice.

Judicial and administrative discretion in sentencing and enforcement of sentences in Italy

Franco Della Casa and Massimo Ruaro[*]

1 Introduction

In order to better address the subject of judicial and administrative discretion in sentencing and enforcement of sentences in relation to the Italian penal system, two basic concepts should be clarified from the outset. First of all, if we consider sentencing as an autonomous phase of the criminal trial, aimed at determining the sentence to be imposed on a defendant already found guilty. We can affirm – with clarifications that will follow – that it is a type of procedure still unknown in Italian criminal justice system.[1] In fact, as Article 533 of the Code of Criminal Procedure makes clear,[2] the penalty is determined by the same judge (and within the same proceedings) who has ascertained the responsibility of the defendant.

Secondly, the possibility for the judge to apply, when sentencing, sanctions other than imprisonment or fines, based on personality of the subject, and with a view to his or her

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1 On this topic, a fundamental and still current approach is to be attributed to Giovanni Conso, 'Prime considerazioni sulla possibilità di dividere il processo penale in due fasi', 11 *Rivista italiana di diritto e procedura penale* 4 (1968), p. 707. More recently, see: Francesco Caprioli, 'Processo penale e commisurazione della pena', in: Massimo Pavarini (ed), *Silète poenologi in munere alieno! Teoria della pena e scienza penalistica*, Bologna: Monduzzi, 2006, p. 135-153.

2 "The Judge pronounces a sentence if the defendant is guilty of the offence being challenged beyond any reasonable doubt. *Together with the judgement* the Judge applies the penalty and any security measures."

social reintegration (the "ultimate and resolving aim"[3] of the sanction set out in Article 27 paragraph 3 of the Italian Constitution), is usually rather limited. Imposition of or non-custodial sanctions, such as the libertà controllata, is permitted if the custodial sentence that the judge deems to be imposed is less than one year (Law 24 November 981, no. 689, Article 53). Public utility works are applicable for offences related to small drug dealing or driving under influence of alcohol. It is also possible to suspend the sentence on probation when it is less than two years, imposing on the sentenced person obligations to compensate victims or to carry out unpaid public service work (Article 163 of the Penal Code). However, the application of non-custodial sanctions is limited to less serious offences and to those falling within the jurisdiction of the Justice of the Peace, so that above a certain threshold – corresponding in principle to two years – the judge can only determine 'arithmetically' the amount of imprisonment penalty, and not the way in which it can be enforced.

If we try to search within the Italian penal system for something similar to the sentencing phase, we must refer to Article 656 of Code of Criminal Procedure, amended by Law 27 May 1998, no. 165. According to this provision, if a sentence of imprisonment not exceeding four years has been imposed and the sentence does not concern an offence included in a long list of crimes considered serious by the legislator, the Public Prosecutor, once the judgement has become final, is obliged to suspend its execution for a period of 30 days. This suspension is used by the convicted person to request the transformation of the prison sentence into a community penalty without entering prison, obtaining one of the measures (semi-freedom, home detention, probation in the social service or the health service responsible for detoxification) contained in the Prison Law (Law 26 July 1975, no 354). It is worth pointing out an important difference with respect to the sentencing system: the decision to convert a custodial penalty into an alternative measure is in fact entrusted to a different judge from the one who pronounced the sentence: the Tribunale di Sorveglianza, whose main feature is that it is composed of two career judges and two expert judges, specialized in the study of sentenced person's character aspects (psychologists, psychiatrists, criminologists, etc.).[4]

On the basis of these premises, the issue of judicial discretion in sentencing lends itself to being addressed from two different points of view: the first one relating to the

3 Constitutional Court, Judgement of 4 July 1974, no. 204, par. 2 (at: http://www.giurcost.org/decisioni/1974/0204s-74.html).

4 The *Tribunale di Sorveglianza* (Article 70 of Prison Law) and The *Magistrato di Sorveglianza* (Article 60 of Prison Law) are two judicial authorities – the first collegial, the second monocratic – primarily concerned, respectively, with the application of community measures and the protection of prisoners' rights. As it appears from what is written in the text, the composition of the judging panel is "mixed" and, not by chance, similar to that of the Juvenile Court. Given that it is composed of *four members*, in the event of a tie, the vote of the President shall prevail (Article 70 paragraph 8 of Prison Law).

determination of the quantity of the penalty in criminal proceedings, and the second one relating to the determination of the quality of the penalty in the post-trial phase assigned to the Tribunale di Sorveglianza.

2 The principle of legality and the rule of law as regards criminal punishments

In the Italian system, the principle of legality in determination of the penalty is enshrined in Article 25 paragraph 2 of the Constitution: it only refers to the principle nullum crimen sine lege, but, according to the Constitutional Court and doctrine, it also establishes, implicitly, principle nulla poena sine lege.[5] The concept is reiterated in Article 132 of the Penal Code, which states that "within the limits set by law, the judge shall apply the penalty on a discretionary basis", which is understood as that the judge shall "indicate the reasons justifying the use of this discretionary power". The principle of strict legality implies, among other things, that the legislator predetermines, for each offence, a minimum and a maximum penalty (the so-called "edictal frame"[6]). It also concerns the criminal judge, who may not apply a penalty that differs in quality or quantity from the one established for that offence. If the legislator does not respect this principle, it is up to the Constitutional Court to intervene and declare that the law does not comply with the Constitution. If it is the judge who, at the time the sentence is determined, violates the principle of legality, an appeal for error in iudicando to the Court of Cassation is allowed (Article 606, paragraph 1, letter b, Code of Criminal Procedure), which could ex officio invalidate the sentence, even if the appeal is inadmissible for other reasons.[7]

The Constitution prohibits the legislator from introducing indefinite sentences, but it should be added that this problem has never arisen in our legal system. A different issue from the indefinite penalty is that of unreasonable penalties, i.e. those penalties which, compared to those provided for very similar crimes, appear disproportionate to the offence caused. The Constitutional Court, in declaring certain rules illegal – concerning,

5 Franco Bricola, 'Commento all'articolo 25 comma 2 della Costituzione', in: Giuseppe Branca & Alessandro Pizzorusso (eds), *Commentario alla Costituzione*, Bologna/Roma: Zanichelli, 1991, p. 232.

6 Domenico Pultanò, 'The limits applicable to punishment, between political discretion and constitutional constraints' (at: https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/pulitano_2_17.pdf, p. 54); Francesco Viganò, 'A remarkable judgment by the italian Constitutional Court on proportionality of penalties' (at: https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/vigano_2_17.pdf, p. 65); Alessandro Pizzorusso, 'Le norme sulla misura delle pene e il controllo della ragionevolezza', 4 *Giurisprudenza italiana* 2 (1971), p. 192-193.

7 Court of Cassation, Section IV, Judgement of 2 April 2019, no. 17221, available for consultation in *Court of Cassation data processing center (CED)*, no. 275714.

for example, drug trafficking[8] or crimes linked to fraudulent bankruptcy[9] – stated that the determination of penalties for each offence falls within the discretion of the legislator, because appreciation of society's "need for punishment", i.e. the appropriateness of recourse to an "optimal level" of criminal protection for a given legal asset, is, by its very nature, typically political.

However, this rule has one exception: a punitive response with exceptional harshness – especially when the minimum is very high[10] – may violate the principle of equality provided for in Article 3 of the Constitution, because it ends up being unable to adapt to the variety of concrete situations that can be traced back to the legal model. Moreover, an unreasonably severe penalty also violates Article 27 paragraph 3 of the Constitution, which states that penalties are aimed at "re-education" of the convicted person:[11] in fact, a disproportionate penalty for excess is perceived by convicted persons as unjust, with the consequence that re-education process is compromized from the outset, i.e. from the moment the legislative provision is made.[12]

Turning to sentencing proceedings before the Tribunale di Sorveglianza, the criteria according to which this judge must decide whether to transform an imprisonment sentence into a community penalty are, as mentioned above, laid down in Prison Law. However, the principle of legality can only be said to be formally respected, because, as doctrine has long observed, law indications do not possess a sufficient degree of certainty.[13]

For example, in order to grant probationary social service, Article 47 paragraph 2 of the Prison Law requires the judge to ascertain whether the measure contributes to

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8 Constitutional Court, Judgement of 8 March 2019, no. 40 (at: http://www.giurcost.org/decisioni/2019/0040s-19.html); for an analysis of this judgment, see: Roberto Bartoli, 'Judgment No. 40/2019 of the Italian Constitutional Court: Pros and Cons of the Intrinsic Control of the Extent of Punishments', 62 *Rivista italiana di diritto e procedura penale* 2 (2019), p. 967-987.

9 Constitutional Court, Judgement of 5 December 2018, no. 222 (at: http://www.giurcost.org/decisioni/2018/0222s-18.html); for a comment on this Judgement, see: Paolo Pisa, 'Pene accessorie di durata fissa e ruolo "riformatore" della Corte Costituzionale', 25 *Diritto penale e processo* 2 (2019), p. 216-219.

10 See, for instance: Constitutional Court, Judgement 23 march 2012, no. 68 (at: http://www.giurcost.org/decisioni/2012/0068s-12.html) in which the Court ruled that it is contrary to the Constitution not to allow the Judge to apply a mitigating circumstance linked to the particularly low gravity of the facts in relation to the crime of kidnapping for ransom (Article 630 of the Penal Code), the minimum penalty for which is 25 years imprisonment.

11 In the past there have been many discussions about the meaning of this expression, and today it is unanimously understood as a synonym for "reintegration of the condemned into society". See: Andrea Pugiotto, 'Il volto costituzionale della pena (e i suoi sfregi)' (at: https://archiviodpc.dirittopenaleuomo.org/upload/1402260085PUGIOTTO%202014c.pdf, p. 2-4). See also: Emilio Dolcini, 'Punishment and Constitution', 62 *Rivista italiana di diritto e procedura penale* 1 (2019), p. 6-35.

12 E. Dolcini, 'Statutory penalties, the principle of proportion, rehabilitative purpose of punishment: the Constitutional Court restates the penalty for the alteration of status', 59 *Rivista italiana di diritto e procedura penale* 4 (2016), p. 1956-1974.

13 On the topic, please allow us to refer to Franco Della Casa, 'Misure alternative alla detenzione', *Enciclopedia del diritto*, *Annali*, III, Milan: Giuffrè Francis Lefevbre, 2010, p. 834.

re-education of the offender and is suitable to prevent him or her from committing other offences. This is a prognostic assessment characterized by wide margins of discretion, the contents of which have, over time, been defined by case law of the Court of Cassation.[14]

In the same way, once a measure has been granted, the judge must indicate the obligations that the convicted person must respect in freedom, choosing them from a list predefined by law. Even these commands are not formulated with sufficient determination: in fact, alongside specific provisions (obligation to "stay in a specific municipality" or to "punctually fulfil family assistance obligations"), there are indications of a generic scope (such as, for example, the one that prohibits "carrying out activities or having personal relationships that may lead to the committing of other crimes").[15]

Finally, with regard to a particular aspect of the principle of legality which consists of principle of non-retroactivity, there has recently been an important development in jurisprudence: until not so long ago, rules of the penitentiary system which make it more difficult for a convicted person to obtain community measures – for example by establishing a longer period of time in prison, or by requiring forms of cooperation between the person and investigative authorities – were considered to be procedural rules, with the consequence that a pejorative legislative change could be applied to the convicted person immediately, without taking into account the date on which the offence was committed. This principle is generally summarized with Latin formula tempus regit actum.

However, in a recent and important ruling, the Constitutional Court[16] has stated that wherever a new rule involves a "substantial" transformation of nature of the penalty – in

14 *Ex plurimis*, Court of Cassation, Section I, Judgement of 7 July 2020, no. 26228, (at: http://www.dirittoegiustizia.it/allegati/15/0000089132/Corte_di_Cassazione_sez_I_Penale_sentenza_n_26228_20_depositata_il_18_settembre.html), according to which there are numerous factors to be evaluated in order to make the prognostic judgement mentioned above: the absence of new charges, the repudiation of deviant behaviour of the past, adherence to the deepest reasons of socially shared values, affective closeness to the family context, current life conduct and a well-founded re-socialising perspective. See also: Court of Cassation, Section I, Judgement of 5 February 2019, no. 8044, (at: http://www.dirittoegiustizia.it/allegati/15/0000083897/Corte_di_Cassazione_sez_I_Penale_sentenza_n_8044_19_depositata_il_22_febbraio.html?coc=15).

15 Case law of the Court of Cassation admits a certain elasticity in determination of obligations and prohibitions, since it is a measure tailored to the personality of the convicted person, but prohibits imposition of prescriptions that cannot be inferred in any way from the law, such as the demolition of an illegally built building (Court of Cassation, Section I, Judgement of 22 March 2019, no. 29860, available for consultation in *Court of Cassation data processing center (CED)*, no. 276601), full compensation for damages to the victim (Court of Cassation, Section I, Judgement of 21 September 2016, no. 5981, available for consultation in *Court of Cassation data processing center (CED)*, no. 269033), or indiscriminate prohibition of the use of media or social networks (Court of Cassation, Section I, Judgement of 20 November 2018, no. 54339, available for consultation in *Court of Cassation data processing center (CED)*, no. 274756).

16 Constitutional Court, Judgement of 26 February 2020, no. 32 (at: http://www.giurcost.org/decisioni/2020/0032s-20.html). This Judgement transposes for the first time a significant precedent of the

the case examined by the court, the granting of an alternative measure for those guilty of bribery and corruption had been made subject to the application of much stricter requirements than in the past – the result is a higher probability that prison sentence will not be mitigated, turning into a non-custodial penalty.

In other words, a pejorative change in the prison legislation, within which community measures are regulated, means that condemned persons find themselves atoning for a penalty that is qualitatively different from what could reasonably have been expected at the time of the offence. Thanks to this sentence, even the rules that make it more difficult to obtain community measures in post-trial phase cannot be applied to those who committed the offence before the entry into force of a more rigorous law.[17]

3 Human rights requirements as regards sentencing process and enforcement of sentences

As we have already pointed out with regard to the principle of legality of penalties, the Italian system is, at least abstractly, respectful of human rights, recognized by the Constitution and International Conventions – first and foremost the European Convention on Human Rights – which Italy has signed. For example, regarding the right to life, Article 27 paragraph 4 of the Constitution, amended by Constitutional Law 2 October 2007, no. 1, prohibits application of the death penalty even during wartime, it being understood that since 1944 the death penalty has been deleted from the Penal Code and replaced with life imprisonment.[18]

With regard to the commonly – although improperly – defined "perpetual" punishment, the issue of the so-called ergastolo ostativo (preclusive life imprisonment) is certainly worth mentioning.[19] In accordance with the constitutional principle that finalises the sentence for the reintegration of convicted persons into social context, it is also permitted – indeed, it must be permitted – for those who have been inflicted the most serious penalty to return to freedom after having been in prison for many years. This possibility emerges

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Court of Strasbourg: EHtCR, Grand Chamber, Judgment of 21 October 2013, *Del Rio Prada v. Spain*, Appl. 42750/09.

17 For doctinal comments on this Judgement, see: Vittorio Manes & Francesco Mazzacuva, 'Irretroattività e libertà personale: l'art. 25, secondo comma, Cost., rompe gli argini dell'esecuzione penale', (at: https://www.sistemapenale.it/pdf_contenuti/1586880373_manesmazzacuva-2020a-irretroattivita-misure-alternative-esecuzione-corte-costituzionale-32-2020.pdf); Alberto Gargani, 'L'estensione selettiva del principio di irretroattività alle modifiche *in pejus* in materia di esecuzione della pena: profili problematici di una decisione storica', 65 *La giurisprudenza costituzionale* 1 (2020), p. 263.

18 For a retrospective analysis on the death penalty and life imprisonment in the Italian legal system, see: Cristina Danusso, 'The gallows and life imprisonment from liberal Italy to fascism', (at: https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/DPC_Riv_Trim_4_17_Danusso.pdf, p. 51-67).

19 Carmelo Musumeci & Andrea Pugiotto, *Gli ergastolani senza scampo*, Napoli: ESI, 2016.

from Article 176 of the Penal Code, which allows prisoners sentenced to life to be released on parole after 26 years, provided that they have completely repudiated deviant behaviour of the past. However, when life imprisonment is applied in relation to a crime attributable to organized crime of the mafia or terrorist type, the possibility of leaving prison definitively, is usually subject to the condition that the person becomes a justice collaborator (Article 4-bis paragraph 1 of Prison Law): a very demanding choice, which convicted persons, even if they have broken ties with the criminal world, often avoid for various reasons, including primarily the desire not to expose themselves or their family members to retaliation.

After the European Court of Human Rights ruled that life imprisonment is a violation of the prohibition of inhuman or degrading treatment, because it denies condemned persons the "right to hope" to one day regain their freedom,[20] the Constitutional Court has made it possible to grant short release permits even to those convicts belonging to organized crime who refuse to cooperate with justice.[21] Two clarifications are necessary in respect of this judgment: 1) the judge who requested the court's intervention made exclusive reference to the exit permit, thus delimiting the perimeter of the constitutionality issue; 2) the court chose to extend the effects of its ruling to persons sentenced under a temporary penalty, in order to avoid a difference in treatment, which would have been paradoxical.

As was to be expected, the court has recently been asked to pronounce on the constitutional legitimacy of the ergastolo ostativo, inasmuch as it prevents convicts not cooperating with the investigative authorities from gaining access to conditional release, regardless of whether there is evidence of a reasonable cause for non-cooperation.

Ordinance no. 97 of 2021,[22] issued at the end of the judgment, has an articulated structure: in fact, on the one hand, the court adheres to the thesis of unconstitutionality

20 We refer, in particular, to ECtHR, Grand Chamber, Judgment of 9 July 2013, *Vinter and Others v. United Kingdom*, Appl. 66069/09, 130/10 and 3896/10. This ruling, which overturned the decision issued by the Strasbourg Court in the first instance, represents the end point of a slow evolution of its jurisprudence, in the past characterized instead by a timid approach. See: Francesco Viganò, 'Ergastolo senza speranza di liberazione condizionale e articolo 3 CEDU: (poche) luci e (molte) ombre in due recenti sentenze della Corte di Strasburgo' (at: https://www.rivistaaic.it/images/rivista/pdf/Vigan%C3%B2.pdf).

21 Constitutional Court, Judgement of 4 December 2019, no. 253 (at: http://www.giurcost.org/decisioni/2019/0253s-19.html). The doctrine has dwelt a lot on this important judgment. Among the many commentators, see: Mario Chiavario, 'La sentenza sui permessi-premio: una pronuncia che non merita inquadramenti unilaterali' (at: https://www.osservatorioaic.it/images/rivista/pdf/2020_1_17_Chiavario.pdf); Marco Pelissero, 'Permessi premio e reati ostativi. Condizioni, limiti e potenzialità di sviluppo della sent. 253/2019 della Corte Costituzionale' (at: http://www.lalegislazionepenale.eu/wp-content/uploads/2020/03/M.-Pellissero-Approfondimenti.pdf); Andrea Pugiotto, 'Due decisioni radicali della Corte Costituzionale in tema di ostatività penitenziaria: le sentenze nn. 253 e 263 del 2019' (at: https://www.rivistaaic.it/images/rivista/pdf/1_2020_Pugiotto.pdf).

22 Constitutional Court, Judgement of 11 May 2021, no. 97 (at: https://www.giurcost.org/decisioni/2021/0097o-21.html).

recognizing the violation of the principles of reasonableness, re-educative purpose of punishment and prohibition of inhuman treatment, arguing that the choice of non-cooperation can be determined by reasons which have nothing to do with maintaining ties with criminal associations.

On the other hand, however, the court suspends the declaration of constitutional illegitimacy considering that, given the complexity of the matter, any manipulative pronouncement would fail to ensure the correct balance between the principle of re-education and the protection of the community, which is strongly endangered by the perpetration of serious crimes: more precisely, those which materialize the longa manus of organized crime.

Especially for this reason, the Constitutional judge resorts to a rare type of ruling (even though it has already been tried in the past, in relation to euthanasia and physician-assisted suicide[23]), which we could define as "delayed-blast unconstitutionality": in particular, the court gives the Parliament one year to regulate ex novo the relations between life imprisonment for mafia crimes and conditional release (or rather, between life imprisonment and the various community measures). If the Parliament does not act within the allotted time, it will be again the turn of the court to make its move, which will declare without further delay the illegitimacy of the legislation now submitted to its examination.

Still on the subject of convicts belonging to the mafia, in 2020 the health emergency linked to the COVID-19 posed the problem of respect for their right to health: Italian legislation allows for the suspension of execution of a prison sentence, or its continuation at home, when the health condition of the convicted person is so serious that it is incompatible with prison detention (Articles 146 and 147 of the Penal Code; Article 47-ter, paragraph 1-ter of the Prison Law). Since this possibility is independent from the type of offence or the amount of the sentence, during the most critical phases of the pandemic, the Tribunali di sorveglianza have – correctly – ordered the release of some mafia bosses, who were afflicted by very serious diseases and considered at risk of life in case of coronavirus infection: also because Prison Administration has declared itself not always able to safeguard their health if they remained in prison.[24]

In spite of this, following a tendentious media campaign that has magnified the risks deriving from this temporary release,[25] the legislator has introduced stricter and

23 Constitutional Court, Judgement of 22 November 2019, no. 242 (at: https://www.giurcost.org/decisioni/2019/0242s-19.html).

24 On the topic, see: Riccardo De Vito, 'Camere senza vista: il carcere e l'emergenza sanitaria' (at: https://www.questionegiustizia.it/rivista/articolo/camere-senza-vista-il-carcere-e-l-emergenza-sanitaria-42082).

25 See, for instance: Attilio Bolzoni, 'COVID: Il carcere provvisorio dei boss', *La Repubblica*, 2 September 2020, p. 25 (at: https://rep.repubblica.it/pwa/commento/2020/09/02/news/covid_i_boss_e_il_carcere_provvisorio-266101234/).

immediately applicable rules, which subjects those convicted of mafia association, released for health reasons, to very close health checks and increases the influence of the anti-mafia investigative authorities on decisions of the Tribunale di sorveglianza (Law decree 30 April 2020, no. 29, converted into Law 25 June 2020, no. 70).[26] As a result of this measure, many people convicted of mafia association have returned to prison, although paradoxically this was not enough to appease the controversy.[27]

Other human rights also play an important role in the determination of sentences: for example, while respecting the right to self-determination, it is not possible to apply sentences consisting of an obligation to work without consent of the offender (Article 54 paragraph 1 of Legislative Decree 28 august 2000, no. 274), just as it is only on the offender's initiative that a community measure containing an obligation to undergo a rehabilitation programme to defeat drug or alcohol addiction can be applied (Article 94 paragraph 1 Decree of the President of the Republic 9 October 1990, no. 309). The right to non-discrimination is also worth mentioning: a law of 2008 introduced a specific aggravating circumstance linked to the defendant's clandestine status into the Penal Code. Moreover, those convicted with the application of this aggravating circumstance, regardless of the offence committed, could access community measures only after a period of imprisonment (Decree Law 23 may 2008, no. 92, converted into Law 24 July 2008, no. 125). However, just two years later, the Constitutional Court has appropriately removed these rules from the system:[28] the status of irregular immigrant cannot become a 'stigma' capable of establishing a general and absolute presumption of higher social dangerousness.

Human rights of a procedural nature, which can be traced back to fair trial,[29] deserve a separate discussion. As already noted, the penalty is initially determined at the same time as the defendant's liability is established. So, from a theoretical point of view, the same guarantees given to defendants when their guilt must be established also apply when,

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26 See: Laura Cesaris, 'Il decreto legge n. 29 del 2020: un inutile e farraginoso meccanismo di controllo' (at: https://www.giurisprudenzapenale.com/wp-content/uploads/2020/05/Cesaris_gp_2020_5.pdf). The Constitutional Court, at its hearing on 5 November 2020, ruled that this new procedure is not contrary to the principles of independence of the judiciary and due process.

27 See, for instance: Salvo Palazzolo, 'La beffa dei boss scarcerati per il virus: la metà è ancora a casa', in *La Repubblica*, 3 September 2020, p. 2 (available at: https://rep.repubblica.it/pwa/generale/2020/09/02/news/la_beffa_dei_boss_scarcerati_per_il_virus_la_meta_e_ancora_a_casa-266102820/).

28 Constitutional Court, Judgement of 8 July 2010, no. 249 (at: http://www.giurcost.org/decisioni/2010/0249s-10.html). For an analysis of this Judgement, see: Francesco Viganò, 'Nuove prospettive per il controllo di costituzionalità in materia penale?' 55 *La giurisprudenza costituzionale* 4 (2010), p. 3017. On the same assumption, a few years earlier, the Court had already stated that it is not possible to preclude the granting of a community sanction only because the person requesting it is in a condition of illegal immigrant or is without a residence permit. See: Constitutional Court, Judgement of 16 March 2007, no. 78 (at: http://www.giurcost.org/decisioni/2007/0078s-07.html).

29 About the configuration of due process in the Italian system, see, *ex plurimis*: Roberto E. Kostoris (ed), *Il giusto processo tra contraddittorio e diritto al silenzio*, Turin: Giappichelli, 2002; Paolo Ferrua, *Il "giusto processo"*, Bologna: Zanichelli, 2012.

for example, the judge must decide on an aggravating circumstance, which affects the commensuration of the penalty. In practice, however, the trial focuses on liability, while issues about the quantification of the sentence are postponed by the parties to the trial before the Appeal Court, where guarantees are less extensive.[30] For example, when the parties do not contest the defendant's liability, but simply ask to change the penalty (Articles 599 and 599-bis of the Code of Criminal Procedure), the appeal trial takes place without the presence of the public. Recently, it was established that Prosecutor and Defence counsel can also agree on the quantification of the penalty to be submitted to the judge for ratification. Even the right to personal presence of the defendant detained in prison at the appeal hearing, where only the issues relating to the penalty are concerned, has only been recognized thanks to the intervention of the Court of Cassation.[31]

In the sentencing phase before the Tribunale di sorveglianza, some of the rights that can be traced back to the area of fair trial have been recognized only with recent reform (Legislative Decree 2 October 2018, no. 123). For example, until not so long ago, those detained in a prison far from the location of the court were not entitled to attend the hearing, which was always held behind closed doors, with the presence of the Defence lawyer and the Public Prosecutor. Today things have changed: the hearing can take place in public at the request of the convicted person, who has always the right to participate, regardless of where he or she is being held. Only for those considered more dangerous, physical presence can be replaced by examination by videoconference.[32] However, the system of evidence has not changed: parties do not have an effective right to bring evidence, but it is the court who, on its own initiative, requests documents necessary for the decision from prison operators, police, social services, and possibly experts in psychiatry and criminology.[33]

The topic would not be complete without a mention of prohibition of inhuman and degrading treatment guaranteed by Article 3 ECHR, which Italy has repeatedly violated due to overcrowding in prisons. The heavy condemnation by the European Court of Human Rights in the Pilot judgement Torreggiani,[34] which was followed by a series of laws, emblematically called 'prison-emptying,'[35] had the merit of introducing a political

30 Antonino Pulvirenti, '*Dal giusto processo alla giusta pena*', Turin: Utet, 2008, p. 41.

31 Court of Cassation, Joint Chambers, Judgement of 24 June 2010, no. 35399, available for consultation at *Court of Cassation data processing center (CED)*, no. 274837.

32 On the topic, please allow us to refer to Massimo Ruaro, 'Riforma dell'ordinamento penitenziario' (at: https://archiviodpc.dirittopenaleuomo.org/d/6322-riforma-dell-ordinamento-penitenziario-le-principali-novita-dei-decreti-attuativi-in-materia-di-sem).

33 Fabio Cassibba, 'Parità delle parti ed effettività del contraddittorio nel procedimento di sorveglianza' (at: https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/DPC_Trim_3-4_2012-19-31.pdf).

34 ECtHR, Judgment of 8 January 2013, *Torreggiani and others v. Italy*, Appl. 3517/09, 46882/09, 55400/09 et al.

35 It is sufficient to note that since the beginning of 2013 – the eve of the Torreggiani judgment – to the end of 2014 the number of prisoners has decreased from 65,000 to 53,000.

and cultural reflection on the need to strengthen the system of community sanctions in order to unburden the prison system, along the lines of the solutions contained in the Prison Law for minors, recently regulated entirely by a legislative source (Legislative Decree 2 October 2018, no. 121). Between 2015 and 2017, two Ministerial Commissions drew up an articulated reform project, but it was almost completely shelved following the establishment in 2018 of a new populist government:[36] among other effects, there was a worrying rise in the number of prisoners, which could soon again lead to a violation of Article 3 ECHR.[37]

4 Judicial discretion in sentencing in general: independence of judges and responsibility for fairness

The problem of judicial discretion in sentencing concerns both the judge at the trial stage, who must determine the concrete extent of the penalty within the limits set by law, and the Tribunale di sorveglianza, which must decide whether the penalty can be served in a non-prison form, and, if so, which of the various community measures can be applied and which obligations and prohibitions must be imposed on the convicted person.

As regards the quantification of the penalty imposed during the trial, it should first be pointed out that in the Italian penal system there are neither fixed penalties, nor detailed guidelines that the judge must follow to determine penalties. However, the Penal Code lays down general criteria to which judges must adhere, so that, at least in the abstract, the defendant and the Public Prosecutor are guaranteed control over the manner in which the judge has made use of its discretionary power. If such parameters did not exist, and the judge were to be free to choose the penalty, or on the basis of judicial practice, morality, fairness, common feeling, or even emotional and irrational impulses, constitutional principles of equality, personal responsibility, the re-educational purpose of the penalty and due process would be simultaneously violated.[38]

The relevant provisions in this regard are Articles 132 and 133 of the Penal Code. Paragraph 1 of Article 132, as already noted, expressly provides for the judge's discretion in application of the penalty, it being understood that, within the grounds for the sentence,

36 For a synthesis of this complex story, see: Elisabetta Frontoni, 'L'iter di attuazione della legge delega: un percorso tormentato', in: Pasquale Bronzo, Fabrizio Siracusano, Daniele Vicoli (eds), *La riforma penitenziaria: novità e omissioni del nuovo "garantismo carcerario"*, Turin: Giappichelli, 2019, p. 3.

37 According to statistical data provided by the Ministry of Justice, at the end of October 2020 there were 54,868 inmates in Italian prisons.

38 Ferrando Mantovani, *Diritto penale. Parte generale*, 10th ed., Milan: Wolters Kluwer, 2017, p. 768; Davide Bianchi, 'Judicial discretion and criminal law: a reviewed relation in the theory of criminal justice and in the sanctioning system', 62 *Rivista italiana di diritto e procedura penale* 3 (2019), p. 1431.

judges are required to indicate the reasons that led them to a certain quantification.[39] It should be underlined that, based on provisions of the Criminal Procedure Code, the judge cannot escape an assessment of adequacy of the penalty even if its measure was the result of an agreement between Public Prosecutor and defendant's lawyer (Article 444, paragraph 2 of the Code of Criminal Procedure).

For the purposes of our discussion, Article 133 of the Penal Code is more important: as mentioned above, it sets out seven criteria aimed at allowing both an assessment of the 'seriousness of the offence' and a measurement of the 'criminal capacity'.[40] Both in the Penal Code and in the Code of Criminal Procedure there are many rules referring to this article: in particular, whenever the judge is asked to link a criminal consequence to a discretionary decision (e.g. on the granting of probation during the trial, or for application of a security measure).

With regard to the list of criteria provided for in Article 133 of the Penal Code, however, doctrine is very critical, because it maintains that they are formulated in rather general terms and therefore unsuitable for curbing judicial discretion.[41] In particular, it should be noted that, in the absence of a clear legislative indication as to the purpose of the penalty, the criteria used – for example, having acted in a state of occasional anger – could be assessed in the opposite direction depending on whether a purely retributive or rehabilitative conception of the penalty is preferred. In any case, according to the majority of the doctrine, none of the criteria expressed in Article 133 lends itself to being used in a general prevention or deterrence perspective.[42] In our constitutional system, the accused cannot be considered as a means of pursuing criminal policy or social defence. In other words, from a procedural point of view, accused persons must defend themselves against the charge of having committed a crime against a victim, not against the social alarm caused by that type of crime or against hypothetical future victims.

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39 Ennio Amodio, 'Motivazione della sentenza penale', in *Enciclopedia del diritto*, vol. XXVII, Milan: Giuffrè, 1977, p. 181.

40 "In exercising the discretionary power indicated in the previous article, the Judge must take into account the seriousness of the offence, deduced from: 1) the nature, species, means, object, time, place and any other modality of the action; 2) the seriousness of the damage or danger caused to the injured party by the offence; 3) the intensity of the wilful intent or the degree of the negligence.
The Judge must also take into account the offender's criminal capacity, deduced from: 1) the reasons for the crime and the character of the offender; 2) the offender's criminal and judicial background and, in general, the conduct and life of the offender, prior to the crime; 3) the conduct contemporary with or subsequent to the offence; 4) the individual, family and social living conditions of the offender."

41 *Ex plurimis*, Emilio Dolcini, *La commisurazione della pena: la pena detentiva*, Padova: Cedam, 1968, p. 4; Franco Bricola, *La discrezionalità nel diritto penale. Vol. I: Nozione ed aspetti costituzionali*, Milan: Giuffrè, 1965, p. 3.

42 Giovanni Fiandaca & Enzo Musco, *Diritto penale. Parte generale*, 4th ed., Bologna: Zanichelli, 2009, p. 763-769.

This explains why the Constitutional Court has stated that an evaluation of adequacy of the punishment in terms of re-education is always necessary, and that this evaluation should not be confined only to the execution phase, but should also find room in the initial quantification of the punishment.[43]

With more specific reference to the criterion of 'criminal capacity', it must be remembered that the judge is, in most cases, lacking adequate tools to carry out an in-depth assessment of the psychological profile of the defendant and his or her dangerousness. In fact, in criminal trials, only psychiatric expert opinions are admitted, which are used to verify whether or not the defendant was, at the time of the crime, suffering from a mental illness that conditioned his or her actions. Instead, expert opinions concerning his or her mental qualities not depending on pathological causes are forbidden (Article 220 paragraph 2 of the Code of Criminal Procedure), as they can only be carried out when the judgment has become final, for matters related to execution of sentence. The purpose of such prohibition is obviously to avoid that the judge, when in doubt about the responsibility of the defendant, is negatively conditioned by his or her character connotations. A fortiori, even the use of computer algorithms capable of predicting the probability of recidivism of the defendant is expressly prohibited by law (Article 8 of Legislative Decree 18 May 2018, no. 51). In any case, the introduction of such means of proof, if not accompanied by guarantees of transparency and controllability on the part of the defence, would certainly run counter the principles of due process.[44]

Generally speaking, for the purpose of quantifying the penalty, it is not necessary for the judge to take into consideration all the favourable or unfavourable elements deduced by the parties or detectable from the procedural documents, but it is sufficient to refer to those considered decisive or in any case relevant, all the others being disregarded or overcome by this implicit assessment, so that jurisprudential practice is often characterized by the use of stereotyped formulas ("taking into account the criteria indicated in Article 133, the judge deems it adequate to inflict the sentence of … years of prison"). According to case law of the Court of Cassation, the degree of specificity of motivation required is directly proportional to the amount of the penalty to be imposed. When the court intends to impose a penalty in excess of half the range indicated by law for that

43 Constitutional Court, Judgement of 2 July 1990, no. 313 (at: http://www.giurcost.org/decisioni/1990/0313s-90.html). For doctrinal comments on this ruling, see: Giovanni Fiandaca, 'Pena «patteggiata» e principio rieducativo: un arduo compromesso tra logica di parte e controllo giudiziale' 114 *Il Foro Italiano* 1, 1990, p. 2385; Giovanni Tranchina, 'Patteggiamento e principî costituzionali: una convivenza piuttosto difficile', *ibidem*, p. 2394.

44 Serena Quattrocolo, 'New doubts and old solutions? Traditional legal concepts vs. the conundrum of predictive Justice', 59 *Cassazione penale* 4 (2019), p. 1748; Benedetta Galgani, 'Considerazioni sui "precedenti" dell'imputato e del giudice al cospetto dell'I.A. nel processo penale' (at: https://www.sistemapenale.it/pdf_contenuti/1586294115_galgani-2020a-precedenti-intelligenza-artificiale-processo-penale.pdf).

offence, they cannot do without writing an analytical and detailed motivation.[45] To impose the maximum penalty, the motivation must be completely unassailable from a logical and legal point of view.[46]

Except in cases where judges are subject to disciplinary proceedings or even the commission of an offence – for example, corruption (Article 319-ter of the Penal Code) – they cannot be called to account because a sentence does not correspond to canons of fairness. The only remedy is an appeal. In fact, the Court of Appeal – if the parties have requested control over the amount of penalty imposed at first instance – can change the sentence in substantial terms by correcting the lack of fairness of the measure submitted for its assessment.

Other State powers, and more specifically the executive power, do not interfere in any way with the decision-making functions of the criminal judge. On the contrary, sometimes an excessive indulgence of judges, consisting in the automatic application of certain rules favourable to the defendant, which should instead be evaluated discretionarily (for example, the so-called 'generic mitigating circumstances' provided for by Article 62-bis of the Penal Code), is interpreted as an attempt to replace the legislator, a sort of 'judicial policy of punishment'. Even recently, this situation has led to the approval of laws containing 'mandatory rules' that are unfavourable to the defendant, in order to place a limit on judicial discretion. Inevitably, as will be seen in paragraph 5, most of these rules failed the constitutionality test.

Also with regard to the post-trial sentencing phase, no particular situations can be identified in which the granting or not of a community measure by the Tribunale di sorveglianza is conditioned by undue interference from the executive power. Having made this fundamental premise, it is possible to mention a situation that has some affinity with the issue being addressed. We are alluding to the fact that in some cases Prison Law provides that, in its investigation, the Tribunale di sorveglianza must acquire written information from the prison management or from special committees made up of members of the police force, whose work is obviously under the control of the executive power. But this clarification should not lead to misunderstandings, because the court retains its discretion and is not obliged to align itself with the information of these committees.[47] Moreover, precisely in order to safeguard the independence of the judge whose decision could be blocked, if these bodies remain inert and do not send their report,

45 *Ex plurimis*, Court of Cassation, Section V, Judgement of 27 June 2019, no. 37100, available for consultation in *Court of Cassation data processing center (CED)*, no. 276932; Court of Cassation, Section III, Judgement of 10 January 2013, no. 10095, available for consultation in *Court of Cassation data processing center (CED)*, no. 255135.

46 *Ex plurimis*, Court of Cassation, Section III, Judgement of 18 June 2013, no. 27959, available for consultation in *Court of Cassation data processing center (CED)*, no. 258356.

47 Constitutional Court, Judgement of 12 June 1992, no. 271 (at: http://www.giurcost.org/decisioni/1992/0271o-92.html)

which is normally mandatory, the legislator has established that, once 30 days have passed since the request, the court is in any case free to decide by acquiring the necessary elements for decision from other sources (Article 4-bis paragraph 2 and 2-bis of Prison Law).

5 Judicial discretion within a framework: guidelines, mandatory sentencing rules, foreclosured access to community sanctions

As we have anticipated, the use by the legislator of instruments aimed at reducing the discretionary power of the judge, in a way that is unfavourable to the accused or convicted person, is increasingly frequent. This can be achieved in a number of ways: the more traditional one consists of changing legal framework of the offence, especially minimum threshold, or establishing that offences are punished with a penalty of "at least" a certain amount of imprisonment, with the implicit effect of suggesting the judge to apply a penalty above that threshold.

Given that this type of rules can, of course, only concern specific offences, stricter rules have recently been introduced which apply to any offence, or to broad categories of offences, either because they affect the regulation of aggravating or mitigating circumstances, or because they affect the discipline of the trial. In particular, these are mandatory rules, which block discretionary power. Or they are 'almost mandatory', imposing a very strict duty of motivation on the judge who wants to depart from their application.

We can provide a few examples: when any crime (damage, extortion, money laundering, etc.) is committed by "mafia method" or to "facilitate a mafia association", even by those who are not part of the association, the penalty must be compulsorily increased from one third to one half (Article 416-bis.1 of the Penal Code). Only after the increase, the judge must take into account the other circumstances and make the balance between aggravating and mitigating circumstances. As far as the 'almost mandatory' rule is concerned, it is sufficient to recall that the absence of previous convictions for other offences against the defendant cannot, by itself, be used as a basis for granting generic mitigating circumstances. A specific and in-depth statement of reasons is required on this point (Article 62-bis, paragraph 3 of the Penal Code).

Finally, with reference to the preclusions of a procedural nature, it should be remembered that, on the one hand, certain forms of plea bargaining, both at first instance and on appeal, are prohibited for many serious crimes, including sex crimes (Article 444 paragraph 1-bis of Code of Criminal Procedure). On the other hand, that, according to a recent law (Law 12 April 2019, no. 33), the summary trial cannot be requested by a person accused of an offence punishable by life imprisonment (previously this sentence, if

pronounced at the end of the summary trial, was reduced to thirty years of imprisonment)[48]. It should be noted that many of these mandatory rules have been introduced, both in the Penal Code and in the Prison Law, with reference to the aggravating circumstance of recidivism (Law 5 December 2005, no. 251). Purpose: to automatically increase penalties and to block granting of community measures, regardless of the actual seriousness of the offence and reasons for its commission, with the effect of resetting to zero the convicted person's chances of social reintegration.

However, it should be specified that most of these rules have been progressively deleted from the system: almost all of those relating to the executive phase – identified as one of the main causes of prison overcrowding – were repealed by the legislator after the ruling of the European Court of Human Rights Torreggiani v. Italy,[49] while a large number of those contained in the Penal Code were deemed unconstitutional, as they were in conflict with several articles of the Basic Law.[50] In the Constitutional Court's opinion, in fact, the obligatory increase in the penalty for repeat offenders contravenes the principle of reasonableness, because it equates different personal situations with equal and obligatory treatment. Recidivism can also be based on remote facts without significant seriousness and the decision can intervene even years after the fact was committed, without taking into account the subject's subsequent behaviour, indicative of his or her re-socialization.

As far as the post-trial phase is concerned, the killing in 1992 of magistrates Falcone and Borsellino by the mafia, against whom they had been engaged for a long time in their judicial activity, led, also in the field of Prison Law, to the approval of very strict laws to allow a more incisive fight against organized crime (Decree Law 8 June 1992, no. 306, converted into Law 7 August 1992, no. 356). Before that moment, the Tribunale di sorveglianza – even though it was a matter of examining the request for a prison benefit made by those convicted of a 'mafia crime' – could proceed and decide as in all other cases. On the one hand, in the preliminary investigation, the court used to turn to the same bodies it usually consulted. On the other hand, there were no preclusions capable of blocking the decision on the merits and forcing the judge to declare the request inadmissible without checking whether it was well-founded. In short, it was a question of using the

48 For a critical analysis of this reform, Claudio Marinelli, 'Summary judgement and life imprisonment: Law no. 33/2019 between exegetical aporias and systemic relapses', 53 *Rivista italiana di diritto e procedura penale* 1 (2020), p. 37.

49 One of the last remaining mandatory rules prevents, for example, a recidivist convicted of armed robbery from asking for short exit permits until he or she has served no less than the 2/3 of his or her sentence (Article 30-*quater* of Prison Law).

50 See, for instance: Constitutional Court, Judgement of 24 April 2020, no. 73 (at: http://www.giurcost.org/decisioni/2020/0073s-20.html); Constitutional Court, Judgement of 17 July 2017, no. 205 (at: http://www.giurcost.org/decisioni/2017/0205s-17.html); Constitutional Court, Judgement of 8 July 2015, no. 185 (at: http://www.giurcost.org/decisioni/2015/0185s-15.html). This ruling is commented by Marco Pelissero, 'L'incostituzionalità della recidiva obbligatoria: una riflessione sui vincoli legislativi della discrezionalità giudiziaria', 60 *La giurisprudenza costituzionale* 4 (2015), p. 1512.

same decisional criteria that the court applied when, for example, day work release or probation were requested by those who had been convicted for bribery. Obviously, in the hypothesis of a request from the perpetrator of a mafia crime, the investigation used to be more accurate, previous convictions used to be evaluated with particular attention and the convicted person's prison conduct, as well as links with the criminal organization in which he or she was active before entry into prison, used to assume great importance.

The situation has changed since 1992, however, because for those convicted of offences attributable to organized crime, special legislation has been introduced that differs from that normally applicable. This introduction can only be interpreted as a sign of clear – but not supported by statistical data – mistrust in the work of the Tribunali di sorveglianza: since then they have been obliged to take information on the dangerousness of the convicted person from a committee that groups together the highest offices of the various police forces and, what is more, cannot grant these convicts a measure that will get them out of prison, even temporarily, when they are aware of information that could be useful to the police forces to dismantle an organized crime cell, but refuse to cooperate.[51] If the requirement of cooperation with the judiciary is not met, the Tribunale di sorveglianza is therefore faced with a substantially insurmountable wall. Two important clarifications should be made about this mechanism: 1) while when it was created, it worked, as mentioned above, only for those convicted of offences attributable to organized crime, it was later extended incongruously to those convicted of much less serious offences and, above all, unrelated to the reasons that had led to its introduction.[52] This distortion is due to the legislator's inability to resist pressure from a certain part of public opinion and from a media sector perpetually oriented towards excessive use of prison sentences, which has led some commentators to speak of an insatiable "hunger for prison"; 2) in contrast to what has just been pointed out, the Constitutional Court has progressively exercised a more penetrating control on the reasonableness of the requirement of collaboration with the judiciary or, better, on the possibility for the judge to disregard this requirement when there is evidence of another kind that proves that the convicted person has been detached from organized crime.

This position emerges clearly from the Constitutional sentence of 4 December 2019, no. 253 which, in the wake of a previous ruling by the Strasbourg judge (Viola v. Italy, 13 June 2019),[53] formulated an important principle, limited for the time being – as

51 Alessandro Bernasconi, *La collaborazione processuale*, Milan: Giuffrè, 1995; Carlo Fiorio, 'Sempre nuove questioni di diritto penitenziario: la "collaborazione" come presupposto per i benefici', 38 *La giurisprudenza costituzionale* 3 (1993), p. 2505.

52 Lina Caraceni, 'Commento all'articolo 4-*bis* della legge penitenziaria', in: Franco Della Casa & Glauco Giostra (eds), *Ordinamento penitenziario commentato*, 6th ed., Padova: Cedam – Wolters Kluwer, 2019, p. 44.

53 ECtHR, Judgment of 13 June 2019, *Marcello Viola v. Italy* (no.2), App. 77633/16.

mentioned above in § 3 – to exit permits: the Magistrato di sorveglianza may also grant this benefit to a convicted person who does not wish to cooperate with justice, provided that he or she is able to provide evidence that, on the one hand, proves that there are no links with organized crime and, on the other hand, rules out the possibility of re-establishing such links. These two conditions were considered, not incorrectly, by commentators to be very difficult to meet and thus to reduce the innovative scope of the judgment. It is difficult not to agree with this assessment, while it is quite easy to understand the reasons behind this 'double-faced' judgment.[54] It is conceivable that among the judges, who decided the question of legitimacy, there was no uniformity of views, and that, therefore, the two limiting conditions included in the judgement served to give concrete prominence to the dissenting opinion of the minority of the panel. However, it is to be considered that the main reason was to appease a part of public opinion and of the prosecutor's offices specialized in mafia investigations, which had often pointed out that it would be catastrophic to give up the "mother of all preclusions", that of collaboration with justice. It is no coincidence that after the constitutional ruling, which actual scope has been amplified, a part of public opinion urged the rapid approval of a law that would intervene to limit the feared discretionary power of the "simple" – so it was written – Magistrati di sorveglianza.[55]

6 Sentencing by non-judicial entities

Currently, as far as the criminal process is concerned, this problem does not arise. But it has not always been the case. Until the end of the sixties there were two administrative bodies – the Tax Bailiff (Intendenza di Finanza) and the Harbour Commander (Comandante di porto) which could impose criminal sanctions in the field of financial fines and maritime offences respectively. However, this attribution has disappeared following two judgments of the Constitutional Court: judgment no. 60 of 1969 (in relation

54 *Ex plurimis*: Marcello Bortolato, 'Il futuro rientro nella società non può essere negato a chi non collabora, ma la strada è ancora lunga', 26 *Diritto penale e processo* 5 (2020), p.633; Carlo Fiorio, 'Ergastolo ostativo e diritto alla speranza? Sì, però …,' 10 *Processo penale e giustizia* 3 (2020), p. 649.

55 About these fears and the concomitant proposal of a petition on the well-known platform charge.org to solicit the approval of a decree-law aimed at counterbalancing the Constitutional Court ruling, see: Peter Gomez & Marco Travaglio, 'Ergastolo, no permessi premio ai boss stragisti che non collaborano', *Il fatto quotidiano*, 31 October 2019 (available at: https://www.ilfattoquotidiano.it/2019/10/31/ergastolo-no-permessi-premio-ai-boss-stragisti-che-non-collaborano).

to the Tax Bailiff)[56] and judgment no. 121 of 1970 (in relation to the Harbour Commander)[57] declared the constitutional illegitimacy of the provisions attributing criminal jurisdiction to these bodies. These provisions were considered contrary to the Constitution, which states that judges are subject only to the law and, therefore, independent from any other power. Contrary to this, the judges we are talking about were part of an administrative apparatus, so that it could not a priori be excluded that there was interference by the higher organs of that apparatus. The Constitutional Court also noted that the Tax Bailiff and the Harbour Commander did not enjoy the guarantee of immovability, which is an essential component of the principle of independence of the judge from other powers. Since these two Constitutional Court rulings, criminal jurisdiction has always been exercised by the judges provided for by the judicial system law (Royal Decree 30 January 1941, no. 12), which respects all the guarantees provided by the Constitution to guarantee the independence and impartiality of the judge.

Even in the post-trial phase, all measures relating to personal freedom are decided only by judicial authorities. More precisely, whenever a measure affecting the sentenced person's personal freedom is at stake, there is exclusive jurisdiction of the Tribunale di sorveglianza or the Magistrato di sorveglianza, depending on the importance of the measure. Most of the time, they issue their decisions at the end of proceedings in which the sentenced person is guaranteed the right of defence, the grounds of the judgement and the right to challenge the decision before a higher court.[58] It should be added, however, that in many cases the superior judge is the Supreme Court of Cassation, which can only review any defects in the legitimacy of the contested measure – e.g. logical inconsistency in the reasoning – without being able to enter into the merits of the decision that has been taken.

After providing this picture of the current situation, it is appropriate to look back to the past to appreciate the changes that have taken place in this area. Until the mid-seventies the phase of execution of the sentence was considered an administrative phase: since its function was only to ensure the implementation of the prison sentence, once the trial was

56 The law 7 January 1929, no. 4 (Article 21) had attributed to the tax bailiff, that is to a public administration body, the competence to Judge the criminal offences for which the financial laws imposed a monetary penalty (fine). For a comment to the Constitutional Judgement 3 April 1969, no. 60 (at: http://www.giurcost.org/decisioni/1969/0060s-69.html), see: Paolo Ferrua, 'Illegittimità dell'intendente di finanza giudice penale', 14 *La giurisprudenza costituzionale* 2 (1969), p. 974.

57 Article 1238 paragraph 1 of the Navigation Code gave the port master, i.e. a public administration body, the competence to inflict the penal fines provided for by the Navigation Code in matters of maritime navigation. For a comment to the Constitutional Judgement 24 June 1970, n.121 (at: http://www.giurcost.org/decisioni/1970/0121s-70.html), see: Paolo Ferrua, 'Indipendenza del giudice e unicità della giustizia penale:, 15 *La giurisprudenza costituzionale* 3 (1970), p. 1513.

58 On this topic, please allow us to refer to: Massimo Ruaro, *La magistratura di sorveglianza*, Milan: Giuffrè Francis Lefebvre, 2009, p. 145 ss.

over, there was no longer any reason for the judge to intervene.[59] This approach was confirmed by the legislation on conditional release which, before 1975 – the same year in which community measures were introduced into Italian law thanks to the approval of the Prison Law – was the only measure that allowed the convicted person to leave prison after having served only part of the sentence. Until a historic ruling of the Constitutional Court,[60] the granting of conditional release was reserved to the Minister of Justice, who enjoyed a wide and uncontrolled discretion. In this case, the court, in declaring the legislation providing for such jurisdiction to be contrary to the Constitution, found a violation of Articles 24 paragraph 2 and 13 paragraph 2. The first of the two provisions establishes the inviolability of the right of defence, which had no place in the proceedings that end with the Minister's decision. The second provides that any decision concerning the personal freedom of an individual must be taken by a judge. The legislator has complied with the court's judgment and, despite a rather uneven path,[61] has finally provided that the Tribunale di sorveglianza has jurisdiction over conditional release.

7 Administrative discretion in the execution of sentences

As noted above, decisions affecting the sentenced person's personal freedom – for example, the granting of a community measure or even a brief leave to leave prison – must be taken by the Tribunale di sorveglianza or the Magistrato di sorveglianza, in accordance with Article 13 paragraph 2 of the Constitution. The second of the two judges mentioned, also exercises control over the way in which the prison authorities actually execute the prison sentence. To be more precise, it should be added that the jurisdiction of the Magistrato di sorveglianza can only be activated when there has been a violation of a prisoner's right (Article 69 paragraph 6 letter a of the Prison Law). However, it is essential that those who believe they have suffered such a violation lodge a complaint (Article 35-bis of the Prison Law).

59 Franco Bricola, 'L'intervento del giudice nell'esecuzione delle pene: profili giurisdizionali e profili amministrativi', 12 *L'indice penale* 2 (1969), p. 279.

60 Constitutional Court, Judgement of 4 July 1974, no. 204 (at: http://www.giurcost.org/decisioni/1974/0204s-74.html). For an authoritative comment on this ruling, see: Giuliano Vassalli, 'La liberazione condizionale dall'amministrazione alla giurisdizione', 14 *La giurisprudenza costituzionale* 5 (1974), p. 3523.

61 Initially, jurisdiction had been inappropriately attributed to the Court of Appeal (l. 12 February 1975, no. 6), a Judge who, in addition to being completely detached from the prison environment, does not include any expert component in matters concerning the personality of the convicted person. For a reconstruction of the gradual transition of criminal execution from administration to jurisdiction, please allow us to refer to: Franco della Casa, 'Il ruolo della Corte Costituzionale nel progressivo "traghettamento" dell'esecuzione penitenziaria dall'amministrazione alla giurisdizione', in: Giovanni Conso (ed), *Il diritto processuale penale nella giurisprudenza costituzionale*, Napoli: ESI, 2006, p. 972.

Assuming that both conditions are met, the judge, in deciding the complaint, checks whether the prison administration has correctly exercised its discretionary power. To give an example, you can think of the power rightly reserved to prison operators to choose the cell in which the individual prisoner should be placed. However, if the choice turns out to be inadequate, because the environmental conditions in this room are not compatible with the pathologies of a specific prisoner, whose right to health is being violated, the Magistrato di sorveglianza, in accepting the complaint, "orders to remedy (Article 35-bis paragraph 3 of the Prison Law), i.e. orders the prisoner to be moved to another cell and the prison management is obliged to comply".[62]

However, it should be pointed out that in a large number of situations the prison administration enjoys a wide discretionary power over which no control by the Magistrato di sorveglianza is possible. In these cases, at most, the higher level administrative bodies may intervene if they consider that the lower level prison administration has made inadequate use of their discretionary power.

One area in which the administration operates with virtually no possibility of intervention by the Magistrato di sorveglianza is, for example, that of allocations and transfers. Given the morphology of Italy, the transfer of a prisoner from one prison to another has important consequences. It is not difficult to understand the big difference between serving a sentence in a place close to family's residence and being detained in an institution 400 km away from home. In the latter case, not only the detention itself becomes more afflictive, but, given the uprooting of the prisoner from its territory, the results of the treatment are also more difficult to achieve.

A no less important issue is the discretion enjoyed by the administration in determining whether prisoners can remain in a medium-security prison (i.e. in an 'ordinary' prison) or whether they should be assigned to a prison (or section of a prison) where a high-security regime is in force, which entails a prison life less rich in offers of treatment, and more attentive to the needs of order and security.[63] It should be noted that the sentence handed down at the end of the trial does not establish anything in this regard and even that the length of the prison sentence imposed has little relevance for the possible submission of the convicted person to the high security regime. The placement of a prisoner in the high-security circuit (A.S.) is decided on the basis of criteria laid down in numerous guidelines issued by the top management of the Prison Administration.[64] Above all, the role of

62 For an in-depth analysis of this procedure, see: Karma Natali, *Il reclamo giurisdizionale al magistrato di sorveglianza*, Turin: Giappichelli, 2019.

63 Angela Della Bella, *Il carcere "duro" tra esigenze di prevenzione e tutela dei diritti fondamentali*, Milan: Giuffrè Francis Lefevbre, 2016, p. 174; Fabio Fiorentin, 'Sicurezza e diritti fondamentali nella realtà del carcere: una coesistenza (im)possibile?', 25 *Diritto penale e processo* 11 (2019), p. 1599.

64 On this topic, please allow us to refer to: Franco Della Casa, 'Commento all'articolo 59 della legge penitenziaria', in: Franco Della Casa & Glauco Giostra (eds), *Ordinamento penitenziario commentato*, 6th ed., Padova: Cedam – Wolters Kluwer, 2019, p. 882.

prisoners within organized crime is taken into account, ensuring that, once in prison, they cannot exercise their leadership through the 'recruitment' of a prisoner belonging to the common criminality, with whom, in fact, they cannot have any contact. Both the prisoner's submission to the differentiated regime and his or her 'declassification', i.e. transfer to a prison under ordinary regime, depends on a discretionary choice of the Prison Administration, which only recently has been considered subject to a limited legitimacy control by the Magistrato di sorveglianza.[65]

Compared to the high-security sections, the detention regime is even stricter for prisoners who are subject to the serious limitations provided for by Article 41-bis of the Prison Law:[66] For them, in essence, re-educational treatment does not exist. The justification of this regime is to prevent detainees – especially those belonging to the high levels of organized crime – from continuing to communicate with the criminal associations in which they are included. In order to achieve this result, the practice of solitary confinement is used. Although confinement is not complete, it implies a strong limitation of contacts with other detainees and relations with their families (e.g., according to paragraph 2-quater of Article41-bis of the Prison Law, detainees can meet their family members only one hour a month).

However, it should be added that, unlike the high-security circuit, against the decision of the Minister of Justice to establish or extend the 'hard prison' regime, the detainee can lodge a complaint to the Tribunale di sorveglianza of Rome – the only court that, without considering the place of detention, is competent for all complaints denouncing the unjustified submission to this regime[67] – which can invalidate the decree of the Minister of Justice if it considers that there is no proof of the alleged ability of the convicted person to maintain links with a criminal or terrorist group.

8 Conclusions

As pointed out in the introduction, a fundamental feature of the Italian criminal trial is the absence of a real sentencing phase: in fact, after the final sentence issued at the end of the trial – a sentence that not only ascertains responsibility but also quantifies the penalty –

65 Court of Cassation, Section I, Judgement of 30 September 2019, no. 43858, available for consultation in *Court of Cassation data processing center (CED)*, no. 277147.

66 Angela Della Bella, *Il carcere "duro" tra esigenze di prevenzione e tutela dei diritti fondamentali*, Milan: Giuffrè Francis Lefevbre, 2016, p. 4.

67 The choice to include all complaints regarding the regime provided for by Article 41-*bis* of the Penitentiary Law in the competence of the Supervisory Court of Rome, and therefore to derogate from the ordinary rules of territorial jurisdiction established by Article 677 of the Code of Criminal Procedure, has been strongly criticized by the doctrine: in this sense, Francesco Caprioli & Daniele Vicoli, *Procedura penale dell'esecuzione*, 2nd ed., Turin: Giappichelli, 2011, p. 254.

the activities aimed at executing the verdict immediately begin. However, just as in the sentencing stage, the presence of a judicial body does not disappear in the post-sentencing phase. In fact, the Tribunale di sorveglianza is activated, which, in addition to monitoring compliance with the law of many activities entrusted to the prison authorities, is responsible for granting community sanctions.

On the basis of this premise, we observed that, compared to many of the issues discussed above, the guarantees provided for the post-sentencing phase are less extensive than those to be observed in the trial. On the other hand, it should not be forgotten that many of these guarantees have long been rooted in the guilt determination phase, while the post-sentencing phase has always been considered an administrative matter, which has been progressively 'jurisdictionalized' only since the 1975 Prison Law. In fact, thanks also to some important interventions of the Constitutional Court, the activity of the Tribunali di sorveglianza – for example, as regards the impartiality of the judge, its independence from the executive power, the non-retroactivity of the changes that tighten the rules on community measures – has evolved, being today more advanced than the regulation of the post-sentencing phase in other European systems.

As regards more specifically the profile of discretion, more detailed considerations are needed. Adopting an overall vision that encompasses both trial and post-sentencing, it is correct to say that the moments in which the judge must use discretionary power are not few. In fact, at first, the penalty is determined, in an almost mathematical sense, at the end of the first instance and frequently retouched in melius by the Court of Appeal. Subsequently, at the beginning of the executive phase, the same penalty can be transformed into a community penalty and, in some cases, it can be modified again by granting a wider community measure.

Each judge exercises discretionary power within a legislative framework, using parameters also indicated by law. This statement is indisputable: in fact, in theory, the trial judge can consider both the objective seriousness of the fact and the criminal capacity of the subject, while the Tribunale di sorveglianza is obliged to make, according to Prison Law, an evaluation exclusively linked to the personality of the convicted person.

However, judicial practice has shown that these directives given by the legislator are largely disregarded. On the one hand – as already mentioned – during the trial phase the judge's efforts are concentrated on the reconstruction of the 'fact' which is the subject of the indictment, while, in the absence of suitable instruments for a reliable evaluation of the defendant's personality, an analytical motivation of the subject's capacity to commit crime is used only when the intention is to inflict a higher penalty than the average (see section 4 above). On the other hand, the Tribunale di sorveglianza is inevitably conditioned by the seriousness of the facts underlying the conviction: this is demonstrated by the fact that, very often judges – although they can apply a community penalty, because this would be abstractly possible depending on the amount of the sentence imposed – prefer to leave

convicted persons in prison until they have benefited with positive results from less extensive measures (usually the so-called treatment permit). It should be stressed that very often these decisions improperly mention the principle of "progressive treatment".

Only one final observation remains. It concerns the future, i.e. the question concerning the reorganization of the relationship between the trial phase and the post-sentencing phase following a possible legislative reform. In this regard, it is necessary to start from the observation that, for a sector of doctrine, the prison sentence imposed by the judge at the end of the trial is somehow "symbolic".[68] The fact that it can be transformed, even within a short period of time (see section 1 above), into a community sanction – a sanction that is therefore executed outside prison – constitutes an anomaly.[69] In order to avoid this dysfunction, it has been proposed to enrich the range of non-custodial sanctions reserved to the trial judge – sanctions which could be applied generally and not, as now, in the few cases specifically indicated by law – and to attribute to the Tribunale di sorveglianza only the decisions on the benefits to be granted at a certain distance from the sentence, taking into account the evolution of the convicted person's personality over the medium-long term (semi-freedom or conditional release). Although this issue has been debated for some time, the legislator has never put it on its agenda and it is very difficult to hypothesize if and when this will happen. In short, in this regard, a quotation from Homeric poems is particularly fitting: "the future is in the womb of Jupiter".

68 Luigi Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, Bari: Laterza, 1991, p. 406.

69 See, *ex plurimis*: Francesco Palazzo, 'Esecuzione progressiva e "benefici" penitenziari. Che cosa conservare', in: Giovanni Conso, Vittorio Grevi, Emilio Dolcini et al. (eds), *Sistema sanzionatorio: effettività e certezza della pena*, Milan: Giuffrè Francis Lefevbre, 2002, p. 149 ss.; Adonella Presutti, 'Legge 27 maggio 1998, n. 165 e alternative al carcere: la pena rinnegata', in: Adonella Presutti (ed.), *Esecuzione penale e alternative penitenziarie*, Padova: Cedam, 1999, p. 27 ss.

Judicial and administrative discretion in sentencing and enforcement of sentences in Japan

Takeshi Seto[*]

1 Introduction

In the Japanese criminal justice system, practitioners such as judges, prosecutors and correctional officers have various occasions on which they exercise their discretionary powers. Some of these powers must be exercised in accordance with decision-making frameworks established by law, but not all discretionary powers are regulated. If the law does not provide concrete directions on the use of a discretionary power, how are practitioners to exercise that power? One way is to follow the accumulation of past practice, or precedent. Especially in the sentencing process, precedent is a means of ensuring proportionality. Human rights should also be considered in exercising discretionary power. In order to avoid arbitrary execution of power, due process should be fully respected. This contribution mainly describes the role of judicial discretion in rendering concrete sentences during trial. Additionally, administrative discretion is also touched upon.

1.1 Basic character of the Japanese Penal Code

The Japanese Penal Code was enacted in 1908. One of its characteristics is that it does not categorize crimes by degree (such as first degree murder, second degree murder, and so on). Instead, various types of crimes are included within the same category of crime. For example, killing a person with intent is categorized as intentional homicide. Regardless of whether the offender commits a planned homicide or homicide with a deadly weapon, the only applicable crime is intentional homicide. Therefore, each offence has a wide range of statutory penalties that can be imposed, reflecting the various types of crime. For example,

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before the minimum penalty was increased in 2004, intentional homicide was punishable with the death penalty, life imprisonment, or imprisonment for three years or more. There are no standards which encourage the court to render a specific penalty, such as sentencing guidelines. Accordingly, courts have a wide discretionary power in sentencing.

1.2 Introduction of the saiban-in system

In May 2009, Japan introduced a new procedure to its criminal justice system called the *saiban-in* system. The *saiban-in* system is applied to trials of first instance for the most serious crimes, such as intentional homicide and rape resulting in death or bodily injury. Under this system, Japanese citizens are selected to serve as *saiban-in*, or lay judges, who participate in court proceedings in roles similar to judges. This means that the lay judges have the authority to find facts, determine whether the defendant is guilty and, if guilty, decide appropriate sentences. Usually the bench in *saiban-in* trials consists of three professional judges and six lay judges selected from the voter registration lists prepared by local governments. Before the introduction of the *saiban-in* system, criminal trials, including judgments, were difficult for ordinary people to understand because all proceedings only involved professionals using technical jargon. Criminal trials were said not to reflect the opinions and perspectives of the general public. In order to overcome those problems, Japan established the *saiban-in* system in which members of the general public can participate in criminal trials. As a result, professional judges and lay judges serving on *saiban-in* panels exchange their views about whether a defendant is guilty or not guilty and what kind of sentence is appropriate to the specific case. The introduction of the new system has placed a new issue in the spotlight: how should professional judges discuss the appropriateness of sentences with *saiban-in*, who do not have abundant knowledge or experience in sentencing?

1.3 Changes to the Penal Code

While the *saiban-in* system increased the general public's interest in the appropriateness of penalties for each crime, a majority feels that the statutory penalties for some crimes in the Penal Code are too lenient. For example, when the Penal Code was enacted, rape and other sexual crimes were not clearly recognized as infringements of women's human rights. Therefore, the penalties for rape were relatively lenient compared to property-related crimes such as robbery. In response, statutory penalties for sexual crimes were strengthened. For example, although the minimum penalty for rape was two years' imprisonment before 2004, the minimum penalty for the same crime (now known as "forced sexual intercourse") is now five years' imprisonment. Although it is one of the

characteristics of the Japanese Penal Code to stipulate a simplified catalog of crimes with a wide range of statutory penalties, a new type of sexual crime – namely forced sexual intercourse by a custodian – was also introduced in order to reflect current circumstances involving sex-related crimes. Along with this trend, the minimum penalty for intentional homicide was also increased from three to five years' imprisonment.

1.4 Sentencing tendency after the introduction of the saiban-in system

In May 2019, the Supreme Court published a report on the tenth anniversary of the introduction of the *saiban-in* system. The report shows that sentences in cases involving intentional homicide and rape resulting in death or bodily injury have become tougher and, on the other hand, that the percentage of suspended execution of imprisonment for arson of an inhabited structure is also increasing. It also said that the range of sentences has become wider since the introduction of the *saiban-in* system. Accordingly, the views and senses of the *saiban-in* appear to be reflected in the sentencing process during the deliberations among professional judges and the *saiban-in*.

2 The principle of legality and/or the rule of law as regards criminal punishment

Evaluation of the gravity of criminal penalties differs from country to country and there is no universal standard. There is also no standard on how to apply statutory penalties to actual cases, although Rule 8.1 of the United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules)[1] holds: "The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted wherever appropriate."

In the sentencing process in Japan, as I said before, the Penal Code of Japan does not classify offences. Thus, the range of statutory penalties for each offence is wide, as is the court's discretion in sentencing. However, the Penal Code provides a framework that guides professional and lay judges as they exercise their sentencing discretion. These statutory provisions stipulate aggravating and mitigating factors that must be considered during sentencing. As an aggravating factor, article 57 stipulates that the maximum term of the second conviction shall be twice the maximum term of imprisonment. As to mitigating factors, the Penal Code stipulates factors such as attempt, surrender and so on. Requirements to apply these provisions are objective and clear. Therefore, if the criminal

1 Adopted by United Nations General Assembly resolution 45/110 of 14 December 1990.

act is proven through the trial, the range of statutory penalties is set accordingly. On the other hand, article 66 of the Penal Code stipulates reduction of punishment in light of extenuating circumstances. Since requirement to apply this article are "extenuating circumstances", the decision to apply this article is in fact subject to the discretion of the court. Under these circumstances, the court begins by evaluating the criminal act and outlining the range of possible sentences for that crime. This process involves narrowing the range of possible sentences based on the statutory penalty. After that, the court considers all aggravating and mitigating factors which are not directly related to the criminal act but are still relevant to the crime and the offender. Then, evaluating the aggravating and mitigating factors mentioned above, the court finally decides on the specific sentence, usually within the range of possible sentences described above. Although it is true that the court has the discretionary power to decide on a specific sentence during this process, it is also said that this power should be exercised in an objectively reasonable manner, avoiding the exercise of arbitrary discretion. This sentencing practice reflects Japan's approach to deciding a proper sentence in an objectively reasonable manner.

2.1 Proportionality

As I said before, the court begins by evaluating each criminal act based on the gravity of the accusation against the offender and the offender's responsibility for the criminal act. This concept is known as proportionality, or the principle of responsibility based on a criminal act. The elements of a criminal act can be divided into two parts: the first is the objective aspect of the criminal act, and the second is the subjective aspect. The objective aspect means elements derived from the act itself. The subjective aspect includes elements which are unrelated to the criminal act itself but are recognized as indispensable to the commission of the crime. These subjective elements exclusively belong to each offender. Concrete examples of those elements will be referred to later.

The objective aspect of a criminal act is abstractly reflected in the statutory penalty in the law. However, it is also true that each case has its own character, differentiating cases from each other, although the category of the crime is the same. Therefore, at first, the court considers objective elements of each case such as planning, maliciousness and prior criminal history, brutality, dangerousness, artfulness and imitativeness of the crime, the severity of the damage, social impact, the victim's conduct before victimization etc. The court also considers subjective elements such as the intention, motivation, purpose of the crime. All these elements characterize the impact and seriousness of the case. And under the concept of proportionality, the court narrows down the range of possible penalties from the statutory penalty of the case.

2.2 Sentencing database

During this process, the court duly considers the accumulation of past sentences among which the court can find similar cases. Major judgments have been made public through law journals and the website of the Supreme Court. In the past, all trials used to be conducted by legal professionals, such as judges, prosecutors and defense attorneys, and they knew, with reference to past similar judgments, what length of sentence is appropriate based on their abundant experience. Therefore, there were few cases in which the exercise of discretion in sentencing became an issue.

After the introduction of the *saiban-in* system, the Supreme Court established a database of past judgments, which includes crimes tried not only under the *saiban-in* system but also before the introduction of the *saiban-in* system, in order to help *saiban-in* imagine the range of possible sentences for the case. The database includes many past judgments and sentences, and includes elements which might be recognized as keys to the determination of sentences in each case. Therefore, after the court identifies elements which characterize the case, it inputs those elements into in the database, so that a distribution chart of sentences of past similar cases is created. The distribution chart assists the court in identifying the range of sentences imposed in similar cases. This practice also meets the requirements of equality and fairness in sentencing. Of course, the distribution chart does not necessarily reflect all elements of the specific case. Therefore, after carefully deliberating all objective and subjective elements of the case, the court may modify the range of possible sentences to that specific case based on the distribution chart. After these proceedings, the court identifies a certain range of sentences for the case. This range is recognized as the result of deliberation from the perspective of proportionality, and it is the basis for moving on to the next step.

2.3 Mitigating factors for the defendant

After the court determines the range of possible sentences, it considers all other aggravating and mitigating factors and decides the final sentence. Although the elements to be considered in this process are not stipulated by law, article 248 of the Code of Criminal Procedure, which provides the conditions for the exercise of prosecutorial discretion, serves as a reference. The article stipulates elements such as the character, age and environment of the offender, and the circumstances and situation after the offence. Other elements may include the degree of repentance, family circumstances, criminal history, forgiveness by the victim, the payment of compensation to the victim, etc. The possibility of reoffending may also be considered. The statutory mitigating factor of surrender can be included in this category. These elements are not directly connected to the criminal act. Therefore, these elements are not evaluated from the perspective of proportionality, but

they are all important in deciding the sentence. After evaluating all these elements, the court finally decides on the sentence, usually within the range derived from the first step, based on proportionality.

2.4 Sentencing procedure at trial and during judicial review of sentencing

Above, I explained how courts decide final sentencing. But before the court makes its decision, there is a trial proceeding for sentencing. As I mentioned before, not only judges or the court but also prosecutors and defense attorneys evaluate appropriate sentencing in their respective capacities. Although the factors relevant to sentencing will be viewed differently based on their respective roles, the sentencing methodology may not differ much among legal professionals. Prosecutors and defense attorneys always research past cases which are similar to the ongoing case, and they can also use the database prepared by the Supreme Court. Through these practices, each party finds a range of possible sentences. Then, considering other specific elements of the ongoing case, they decide which penalty is appropriate.

The public prosecutor recommends a specific sentence for the offender during the closing argument, while the defense attorney usually opposes the prosecutor's recommendation and suggests a more lenient penalty to the court, if the defendant does not deny guilt. Carefully listening to the arguments made by both prosecutor and defense attorney, the court makes the final decision.

If the sentence rendered by the court of first instance is appealed for exceeding the scope of the court's sentencing authority, the appellate court can review the appropriateness of the court's discretion. If the appellate court acknowledges that the sentence of the first instance court exceeds its discretion, the appellate court can overturn the sentence and render its own sentence or send the case back to the first instance court. Through these practices, the discretionary power for sentencing by a court has been properly exercised.

In addition, when imposing serious penalties, *i.e.* the death penalty, the second petit bench of the Supreme Court of Japan issued a famous judgment on July 8, 1983,[2] in which it established concrete criteria for the application of the death penalty. These criteria have become de facto binding precedent. Therefore, all criminal justice practitioners, including judges, follow these criteria. Therefore, if the lower court renders a death sentence exceeding these criteria or does not render a death sentence although the case is within these criteria, such judgment may be overturned by a higher court.

2 Keishu, Vol. 37, No. 6, p. 609.

2.5 *Influence of the saiban-in system*

After the introduction of the *saiban-in* system, the First Petit Bench of the Supreme Court rendered a judgment[3] providing guidance to appellate courts on how to review the fact-finding of first instance *saiban-in* courts, stating:

> […] if the appellate court concludes that the fact-finding of the court of first instance is wrong, it is necessary for the appellate court to explain concretely how the fact-finding judgment of the court of first instance is unreasonable from the point of logical and empirical rules etc. This should apply given that, with the introduction of the saiban-in system, the principle of direct oral testimony has been fully enforced.

The Supreme Court's judgment did not refer to sentencing itself, but appellate courts have respected the sentences imposed by courts of first instance according to a report published by the Supreme Court in 2012.[4] In the report, the percentage of sentences overturned by appellate courts by reason of inappropriateness differs between sentencing by professional courts and *saiban-in* courts. While the percentage of overturned sentences rendered by professional courts, which consist of one or three professional judges, is 5.3 percent, the percentage of overturned *saiban-in* court sentences is only 0.6 percent.

However, the discretionary power of the *saiban-in* courts is limited. I would like to take up some important judgments which refer to the discretion of the court to decide a sentence. The first judgment was rendered by the First Petit Bench of the Supreme Court on 24 July 2014.[5] The case involved an assault resulting in the death of a 20-month-old girl. The parents had repeatedly abused their daughter, and she died from damage to her brain. Although child abuse cases are becoming a serious social problem in Japan and society is expecting that the penalty for such cases should be harsher than ever, the public prosecutor made a recommendation of 10 years imprisonment for the parents based on the principle of proportionality. After trial, the court of first instance sentenced each parent to 15 years' imprisonment, reasoning that the sentencing database did not necessarily reflect all relevant elements of this specific case. The appellate court affirmed the sentences imposed by the court of first instance. The Supreme Court, however, explained the sentencing practice, saying that sentencing should be based on proportionality, and respecting the precedent of past sentences is important to maintaining the fairness of judgments. The Supreme Court also stated that concrete and persuasive reasons should be given if the

3 Keishu, Vol. 66, No. 4, p. 482, 2012 February 13.
4 HARADA Kunio, 'Sentencing by the Saiban-in court and the appeal court', 14 *Japanese Journal of Law and Psychology* (2014) p. 43.
5 Keishu, Vol. 68, No. 6, p. 925.

court would like to render a sentence beyond the range of past practice. Then it overturned the sentences of the court of first instance and sentenced the father to 10 years' imprisonment and the mother to 8 years' imprisonment, explaining that there was no concrete and persuasive reason to sentence parents to imprisonment beyond the recommendation by the prosecutor. One of the justices of the Supreme Court added that the practice of sentencing offenders based on past similar cases had no binding effect and the range might change along with the social circumstances and public consciousness, but fairness of punishment is still the basic principle of the criminal justice system.

In a case following the above-mentioned Supreme Court judgment, the Tokyo High Court, on 30 June 2016,[6] changed a court of first instance sentence of 3 years' imprisonment with suspension of execution, to six-and-a-half-years' imprisonment, saying that the court of first instance judgment did not provide concrete and persuasive reasons to order a sentence which differed from the past precedent.

In the first case, the Supreme Court changed the sentence to a more lenient one, and in the second case, the appellant court changed the sentence to a harsher one. Although the sentences were changed in the opposite direction, the concept behind these changes achieved proportionality and fairness based on past precedent. Accordingly, Japanese courts have broad discretionary power for sentencing, but the decision of the court may be overturned by a higher court if the court renders a sentence beyond its discretionary power.

3 Human rights and sentencing

3.1 Sentencing process

In Japan, if the prosecutor successfully proves the case, the court imposes a penalty. In some countries, the judgment of guilty or acquittal is rendered first. Then, if guilty, the trial proceeds to the sentencing stage. However, in Japan, like other continental law countries, trials always end with one single judgment, namely acquittal or, if guilty, sentencing. Therefore, there is no post-conviction or pre-sentencing procedure. Accordingly, the prosecutor must submit evidence which proves both the guilt of the defendant and establishes relevant facts for an appropriate penalty. In other words, during the investigation process, investigators and public prosecutors (public prosecutors also have investigative power in Japan) have to gather evidence which is useful to determine the appropriate sentence. Gathering evidence for proper sentencing is recognized as a necessary part of a criminal investigation. The Code of Criminal Procedure applies to this

6 Hanrei Jihou, Vol. 2345, p. 113.

process, meaning that compulsory measures to take evidence are permitted only as stipulated by law.

Concerning the trial stage, as stated in section 2, the court first establishes the range of possible sentences based on all relevant elements of the crime, including the elements of intent and the criminal act, reflecting the principle of proportionality. Then, evaluating the aggravating and mitigating factors which are closely related to the offender's situation, the court finally sets the sentence within the range of penalties. All factors used to fix the range of a possible sentence are connected to the criminal act, which must be proven beyond a reasonable doubt. Therefore, the applicable rules of evidence for such factors are the same as those applied to the fact-finding process, such as the hearsay rule. Furthermore, the level of proof for such elements is also the same as the fact-finding process, namely beyond a reasonable doubt. However, since the aggravating and mitigating factors, which are considered in deciding the final sentence, are not necessarily related to the criminal act, strict rules of evidence and the high standard of proof do not apply.[7] Although treatment of aggravating and mitigating factors is different from those used to determine guilt or innocence, the offender has the right to consult with his or her defense attorney on these issues and can ask the defense attorney to assert these factors and to submit evidence of mitigating factors with respect to his or her criminal responsibility or reducing the sentence.

3.2 Enforcement of sentences

Public prosecutors are responsible for the enforcement of sentences in accordance with the Code of Criminal Procedure.[8] Under certain circumstances, offenders with specific disorders or physical conditions may have their sentences suspended. This section will explain suspension of enforcement of sentences of the death penalty and imprisonment.

The death penalty has to be executed by the order of the Minister of Justice under article 475 of the CCP. Inmates on death row await execution, which will be suspended if the offender is pregnant or is suffering from a mental illness or disorder. During the period of suspension, these inmates will receive the necessary medical treatment. Execution of a prison sentence should be suspended, if the offender is under suffering from a mental illness or disorder. In such a case, the offender must be brought to a hospital or another appropriate facility. Execution of a prison sentence can also be suspended in any of the following situations: i) Execution of the sentence is likely to damage the offender's health or threaten his or her life, ii) the offender is 70 years of age or older, iii) the offender is 150

7 Fumio YASUHIRO, Kazuo KAWAKAMI et al. (eds), *Dai-Commentary on the Code of Criminal Procedure*, 2nd ed., vol. 7, Seirinshoin 2012, p. 342-343.

8 Art. 471 *et seq*. of the Code of Criminal Procedure.

days' pregnant or more, iv) it is less than 60 days since the offender gave birth, v) it is feared that irrevocable harm will be caused due to execution of the sentence, vi) the offender's grandparents or parents are 70 years of age or older, seriously ill or disabled, and there are no other relatives who can take care of them, vii) the offender's child or grandchild is an infant and there are no other relatives who can take care of him/her, viii) there are other significant reasons.

In certain situations, such as short-term imprisonment for a first-time offender, the court can order the suspension of the execution of the sentence. The judgment of this suspension can be revoked if one of the requirements of revocation is met. The requirements of revocation are clearly listed in the Penal Code.[9] For example, if an offender was granted a suspended sentence but reoffends within the period of suspension and is sentenced to imprisonment without suspension, the original suspended sentence has to be revoked. A prior suspended sentence can also be revoked in other cases, such as when a new penalty for a subsequent crime is a fine, or when the probationer, whose sentence of imprisonment is suspended, violates a condition of probation and the circumstances related to such violation are serious.

Public prosecutors petition the court to revoke suspended sentences. At the court hearing, if revocation is mandatory, the court determines whether the requirements for revocation have been met. If revocation is discretionary, the court determines not only whether the requirements for revocation have been met, but also the appropriateness or necessity of revocation. During the court proceedings, the court must hear from the offender or his/her representative. If the revocation requires a failure of the offender to observe any of the conditions of probation, the court must permit a hearing if requested by the offender. In the latter case, the party can appoint a defense attorney. An immediate appeal can be filed against the ruling of the court, if the offender is not satisfied with the decision.

Parole is authorized by Article 28 of the Penal Code for incarcerated offenders who have demonstrated signs of "substantial reformation." Parole is decided through administrative proceedings that are discussed in more detail later. If parole is revoked, the parolee has to be brought back to prison. The requirements of revocation of parole are also described in the Penal Code. The proceeding is conducted by the Regional Parole Board. Although the safeguards of this proceeding are not as robust as in judicial proceedings, the ruling of the revocation of parole can be appealed to at the National Offenders Rehabilitation Commission (NORC). The NORC consists of a chairperson and four members, all appointed by the Minister of Justice with the consent of both Houses of the Diet.[10] The term of office is three years, and the chairperson and other members may only be dismissed

9 Art. 26 *et seq*. of the Penal Code.

10 Art. 6, para.1 of the Offenders Rehabilitation Act.

when they are incapable of executing their duties due to a mental or physical disorder, when they have committed a violation of obligations in the course of duty, or when they have committed an act unbecoming the chairperson or a member of the Commission. In this way, neutrality and independence are highly guaranteed. Decisions of the Commission are made by majority. Hence arbitrary decisions on the revocation of parole can be prevented. In addition to that, if a party is dissatisfied with the decision of the NORC, he or she can file a lawsuit seeking cancellation of the NORC decision.

4 Judicial discretion in sentencing in general: position of the independent judge and responsibility for fairness

The independence of judges is secured under the Constitution of Japan,[11] which stipulates: "All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws." Judges are appointed by the Cabinet from a list of persons nominated by the Supreme Court. Judges can only be subject to disciplinary action by the Supreme Court, and they may not be removed except by public impeachment by the members of the National Diet, unless judicially declared mentally or physically incompetent to perform official duty. All judges shall receive, at regularly stated intervals, adequate compensation which shall not be decreased during their terms of office. Therefore, judges can exercise their duties independently from any other power or influence, including the legislative and executive branches of the government. However, the appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again by the people at the first general election of members of the House of Representatives after a period of ten years, and in the same manner thereafter.

After the introduction of the *saiban-in* system, the trial-court bench consists of judges and *saiban-in*, or lay judges, in serious criminal cases. In such cases, judges and *saiban-in* deliberate the guilt or innocence of the defendant and, if guilty, what kind of sentence is appropriate. However, there is no change to the independent status of judges or to their responsibilities. In addition, article 9 of the Act on Criminal Trials with the Participation of Saiban-in stipulates "saiban-in must carry out their duties in compliance with laws and regulations, impartially and in good faith. Saiban-in must not engage in any act that could offend their integrity". The Act also stipulates the offence of making requests of *saiban-in*

11 Chapter 6 of the Constitution of Japan.

and the offence of intimidation of *saiban-in*.[12] Hence, the fairness, impartiality and independence of *saiban-in* is also secured by the law.

5 Sentencing by non-judicial entities

In Japan, all criminal sentences must be rendered by courts. Non-judicial entities may not be involved in this process. This raises a question as to whether *saiban-in* trials violate this requirement. In short, they do not because at least one professional judge must be in the majority when determining guilt or imposing a sentence.

The trial-court bench in *saiban-in* cases usually consists of three professional judges and six *saiban-in*. Both professional judges and *saiban-in* have equal power to decide the verdict and the sentence. However, in order to reflect both professional and the general public's considerations in their judgment, the judgment cannot be decided by a simple majority of the bench. In other words, a guilty verdict must be decided by a qualified majority of the bench. To obtain a qualified majority, at least one professional judge must be included in the majority. For example, if 5 or 6 *saiban-in* (an absolute majority) conclude that the accused is guilty but all three professional judges disagree, the verdict will be not guilty because a qualified majority was not obtained. Criminal sentences must be decided in the same way. Sentences are decided by ranking the professional and lay judges according to the severity of the sentences they wish to impose. For the sake of illustration, you can imagine the nine professional and lay judges standing in a line. The person on the left wishes to impose the harshest sentence, while the person on the right would impose the lightest sentence. As we move from left to right, the harshest proposed sentences are eliminated one by one until the fifth person from the left is reached. At this point, a majority of the judges agree that the offender should be punished according to the fifth judge's proposal (of course, the other four judges in the majority would impose harsher penalties). But if those five persons in the majority do not include at least one professional judge, another person must be added to the majority until one professional judge is included. This system intends to eliminate the harshest proposed sentences that lack general agreement among the professional and lay judges.

These practices are stipulated in the Act, reflecting a balance between the perspectives of professional judges and *saiban-in* judges. In other words, although the opinions of *saiban-in* judges are respected and necessary to obtain a conviction, guilty verdicts and sentences must be decided with the support of at least one professional judge.

12 Arts. 107 and 108 of the Act on Criminal Trials with the Participation of Saiban-in.

6 Administrative discretion in the execution of sentences

As to administrative discretion in the execution of sentences in Japan, this generally occurs in one of four situations, namely (i) determining whether or not to execute sentences, (ii) revocation of the suspension of execution of sentence, (iii) granting or denying parole, and (iv) disciplinary measures in prison.

(i) Discretion to execute sentences

Once a sentence becomes final, it must be executed. The Code of Criminal Procedure stipulates that the prosecutor orders the execution of sentences unless otherwise stipulated in the Code. As stated in section 3, mental illness or disorder is the requirement for mandatory suspension of the execution of imprisonment, and there are some other requirements for discretionary suspension. If the requirement for discretionary suspension is met, the public prosecutor decides whether or not to suspend the execution of sentence. Although the inmate or the warden of the prison can ask the public prosecutor to suspend the sentence, they cannot appeal against the decision rendered by the public prosecutor.

(ii) Revocation of suspension of the execution of sentence

In Japan, the court can sentence the defendant to imprisonment with suspension of the execution of sentence. In accordance with the Penal Code, the court is authorized to exercise its judicial discretion to suspend the execution of all or part of the sentence of the offender. Two of the purposes of this judicial sentencing option are (a) to enable the offender to rehabilitate in the community and (b) to incentivize the offender to do so successfully. Of course, the suspension of the execution of sentence can be revoked if certain conditions are met. The requirements and proceedings are stated in section 3.

(iii) Granting or denying parole

A major field of administrative discretion in the execution of sentences is the grant or denial of parole. Article 28 of the Penal Code of Japan stipulates that "[w]hen a person sentenced to imprisonment with or without work evinces sign[s] of substantial reformation, the person may be paroled by a disposition of a government agency after that person has served one-third of the definite term sentenced or 10 years in a case of life imprisonment." In addition, the regulation provides more concrete requirements, stating that parole is permitted (i) if a person has the attitude of repentance and a willingness to reform him- or herself, (ii) there is no likelihood of reoffending and (iii) supervision by a probation officer is appropriate for rehabilitation.

The warden of a prison may apply to the Regional Parole Board for the parole of an inmate. The Regional Parole Board is the organization that decides whether or not to grant parole. Wardens should apply for parole if they find that the requirements of parole are

fulfilled. According to the rules, the warden has to review the possibility of parole at the time the inmate becomes parole eligible and every 6 months thereafter.

The Regional Parole Boards are located in 8 major cities around Japan. Each board consists of three or more members appointed by the Justice Minister. All parole decisions, including revocation of parole, are rendered by the majority of the board. As to procedure for granting parole, a member of the board must interview the possible parolee. If the victim of the crime so requests, a board member must also hear from the victim.

The requirements of revocation of parole are also stipulated in the Penal Code. The Code says that parole can be revoked if the parolee is subsequently sentenced to a fine or more severe punishment or if the parolee does not abide by the conditions of parole. The Regional Parole Boards also decide whether the revocation of parole is appropriate.

If the application for parole is denied, the inmate cannot appeal the decision. The inmate has to wait for the next application by the warden. However, the decision to revoke parole can be reviewed by the National Offenders Rehabilitation Commission. The role of the NORC and its proceedings are addressed in section 3.

Figure 1 Number of start and completion of probation (Probation Office) (2017 to 2019)

Data are based on the Statistics on Rehabilitation.

Year	Carrying over from the previous year (as of the end of previous year)	Start and transfer			Completion and transfer		
		Total	Start	Transfer	Total	Completion of probation	Transfer
2017	33.392	34.188	32.538	1.650	36.810	35.166	1.644
2018	30.770	32.554	30.845	1.709	34.304	32.591	1.713
2019	29.020	30.820	29.183	1.637	32.011	30.369	1.642

	Persons under probation as of the end of year	In special conditions			
		Temporary suspension	Provisional release	Missing	Detention by law
2017	30.770	1	167	322	540
2018	29.020	2	136	273	570
2019	27.829	3	101	264	579

Source: Ministry of Justice, from the Japan Statistical Yearbook 2022

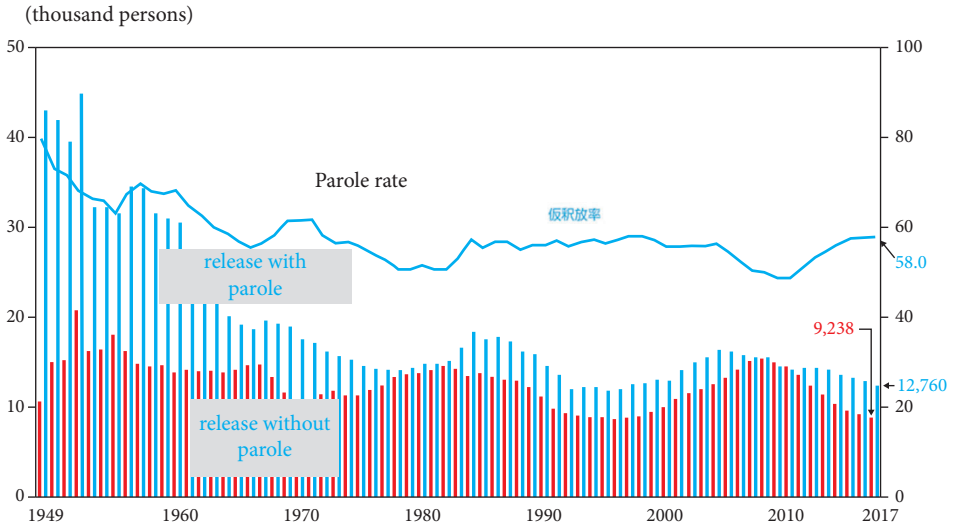
Figure 2 Review of parole applications commenced, granted and denied

Persons

Year	Parole (adult)			Parole (juvenile)		
	Commenced	Granted	Denied	Commenced	Granted	Denied
2016	14,351	13,397	496	2,708	2,702	5
2017	14,289	13,006	596	2,419	2,422	1
2018	13,498	12,273	587	2,190	2,177	2

Note 1. Annual Report of Statistics on Rehabilitation
2. Persons denied parole do not include persons for whom the chief of facility withdrew the application

Figure 3 Number of released inmates and parole rates (1949-2017)



(iv) Disciplinary action (disciplinary punishment) in prison

In prison, inmates must follow various rules which are provided to maintain the order and security of the prison. If an inmate violates these rules or fails to follow instructions given

by the staff of the prison, the prison warden can take disciplinary action (punishment) against the inmate. This is also a discretionary power while executing sentences.

As to the proceedings of the disciplinary action, the prison warden gives the inmate an opportunity to explain his or her conduct and designates an official to assist the inmate in the proceedings. If the warden takes disciplinary action, the warden must explain to the inmate the factual basis for, and the content of, the action to be taken.

In addition to the authority to take disciplinary action, the warden has broad discretionary power to permit the purchase of goods, access to published materials and so on by inmates. All decisions taken by the warden can be appealed to the superintendent of the Regional Correctional Headquarters. There are 8 headquarters throughout Japan. The superintendents review all appealed decisions under their jurisdiction. If the inmate is not satisfied with the decision made by the superintendent, a further appeal can be made to the Justice Minister.

If the inmate received an unsatisfactory result from the Justice Minister, he or she can also file suit in court to seek revocation of the decision. In addition, inmates may often face uncomfortable treatment by the warden or the staff of the prison. In those cases, inmates can file a claim directly with the Minister of Justice, an inspector of prisons and the warden of a prison without any intervention. Hence, many processes have been designed to avoid the arbitrary exercise of discretionary power by prison staff.

7 Conclusion

As explained above, the Japanese criminal justice system has a variety of ways in which judicial and administrative discretion can be exercised. However, the safeguards to avoid arbitrary exercises of discretionary power, such as the involvement of offenders in their proceedings and the systems of judicial and administrative appeals, are well incorporated into the criminal justice system. Therefore, the Japanese criminal justice system, in general, functions effectively, paying attention to the constitutional and human rights of each criminal defendant and offender. This is why the Japanese people place their trust in the criminal justice system.

The rule of law, judicial and administrative discretion in sentencing and enforcement of sentences in Lithuania

Gintautas Sakalauskas[*]

1 Introduction

On March 11, 1990, Lithuania proclaimed its independence after Soviet occupation, which lasted for almost 50 years. The new Constitution of the Republic of Lithuania was adopted by referendum on October 25, 1992. The Constitution met the expectations of the Lithuanian people that were linked to the law and justice, the harmony of social relations, and the social order based on well-being.[1] The reform of the judiciary took place everywhere and sought to ensure political and legal conditions for the functioning of the independence of the courts.[2] The Lithuanian legal and judicial system follows the Continental European model as opposed to the common-law system.[3] The Constitution provides that "justice shall be administered only by courts" (Article 109).

Lithuania has a dual judicial system, with ordinary and administrative courts having different jurisdiction in the administration of justice (Article 111). Courts of general jurisdiction deal with civil and criminal cases, while administrative courts deal with cases involving public administration, taxation and administrative offences (*e.g.* exceeding the speed limit, but also some minor misdemeanors with similarities to crimes, such as small (up to 150 Euros) theft, swindling, misappropriation or squandering of property, small violations of the public order, small smuggling (up to 250 Euros) etc.).[4] This kind of 'material decriminalization' limits the application of the Criminal Code in small cases, but

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1 Juozas Žilys, 'The Drafting and Adoption of the Constitution of the Republic of Lithuania', in: D. Žalimas (ed.), *Lithuanian Constitutionalism. The Past and the Present*, Vilnius: Constitutional Court of the Republic of Lithuania, 2017, p. 213.

2 Juozas Žilys, 'The Essence and Main Features of the Constitution of the Republic of Lithuania of 1992', in: D. Žalimas (ed.), *Lithuanian Constitutionalism. The Past and the Present*, Vilnius: Constitutional Court of the Republic of Lithuania, 2017, p. 215.

3 Vaidotas A. Vaičaitis, 'The Republic of Lithuania', in: L. Besselink, P. Bovend'Eert, H. Broeksteeg, R. de Lange & W. Voermans (eds.), *Constitutional Law of the EU Member States*, Deventer: Kluwer, 2014, p. 1069.

4 Articles 108, 208, 481 of The Code of Administrative Offences of the Republic of Lithuania, came into force on 1 January 2017.

also provides less procedural guarantees in comparison to a criminal procedure. Against a person who commits a minor misdemeanour only the following sanctions may be imposed: a warning, a fine and community service.[5]

The principle of the rule of law is mostly of importance for criminal investigation and sentencing. Approximately 25,000 persons are suspected of (charged with) criminal offences every year in Lithuania, almost 20,000 are sentenced. Noticeable, that makes up just about 900 and 750 persons respectively per 100,000 of the population, which is twice as little as the average of EU countries.[6] Nevertheless, Lithuania has the highest prisoner rate per 100,000 of the population in the EU.[7]

2 The principle of legality and the rule of law as regards criminal punishments

In Lithuanian, the idea of the rule of law is usually expressed by the term 'law-governed state' (*teisinė valstybė*).[8] The Lithuanian official constitutional doctrine states that the essence of the constitutional principle of a law-governed state is the rule of law. The constitutional imperative of the rule of law means that the freedom of the state's power is limited by law, to which all the subjects in legal relations, including the law-making subjects, must obey. It should be stressed that the discretion of all the law-making subjects is limited by the supreme law – the Constitution. All the legal acts and all the decisions of the state, municipal institutions and officials must be in compliance with the Constitution.[9] The Constitutional Court has held that the constitutional principle of a state under the rule of law must be followed both in law-making and in the enforcement of the law. The compliance of each institute of law with the Constitution must be evaluated according to how this institute operates in compliance with the constitutional principles of a state under the rule of law.

In terms of specific standards of the rule of law (the law-governed state) that are of relevance to sentencing, the Constitutional Court has named the following ones: the violations of law, for which liability is established in legal acts, must be clearly defined;

5 Article 23 of The Code of Administrative Offences of the Republic of Lithuania.

6 Eurostat. Suspects and offenders by sex – number and rate for the relevant sex group [CRIM_JUST_SEX], 2018.

7 See Gintautas Sakalauskas, 'Criminal policy and imprisonment. The case of Lithuania: open prisons, prison leave and release on parole', in: P.H.P.H.M.C. van Kempen & M. Jendly (eds), *Overuse in the Criminal Justice System*, Cambridge/Antwerp/Chicago: Intersentia, 2019, p. 229-249.

8 Egidijus Kūris, 'Standards of the Rule of Law', in: E. Kūris (ed), *Crisis, The Rule of Law and Human Rights in Lithuania*, Vilnius university, 2015, p. 23-55.

9 Constitutional Court ruling of 13 December 2004. See also Egidijus Kūris, 'Standards of the Rule of Law', in: E. Kūris (ed), *Crisis, The Rule of Law and Human Rights in Lithuania*, Vilnius university, 2015, p. 31-32.

when legal restrictions and liability for violations of the law are established, heed must be paid to the requirement of reasonableness and the principle of proportionality, according to which the application of legal measures must be necessary in a democratic society and suitable for achieving legitimate and universally important objectives (there must be a balance between the objectives and measures); legal measures may not restrict the rights of the person more than necessary in order to achieve the aforementioned objectives, and, if these legal measures are related to sanctions for a violation of the law, they must be proportionate to the committed violation of law.[10]

Separate from the above are the requirements for the application of the law: all law-applying institutions must follow the requirement of the equality of rights of person; it is not permitted to punish twice for the same violation of law (*non bis in idem*); liability (sanctions, punishment) for violations of the law must be predefined in a law (*nullum poena sine lege*); an act is not considered to be a criminal if it is not provided for in a law (*nullum crimen sine lege*); jurisdictional and other law-applying institutions must be impartial and independent and seek to establish the objective truth and render their decisions only on the grounds of law; similar cases must be decided in a similar manner (this is directly related with the constitutional principle of the equality of rights of a person), as a result of which the discretion of jurisdictional authorities in solving disputes and applying the law is limited; it is also limited by the continuity of jurisprudence.[11]

The Constitution of the Republic of Lithuania does not give a definition of justice, but from other constitutional provisions we can infer both substantial and procedural justice, *i.e.* that judgments must be administered impartially;[12] judges must be independent of other public authorities, political parties and private bodies (Articles 109, 113, 114); court proceedings must be open to the public (Article 117); the decisions of the courts must be reasonable, grounded in law and in conformity with the Constitution and the values expressed in the Constitution (Articles 7 and 110). The Constitution gives the judiciary wide discretion to decide what constitutes justice in a particular legal dispute.[13]

The first national Criminal Code of the Republic of Lithuania (CC) came into force on 1 May 2003, along with the Code of Criminal Procedure and the Code of Execution of

10 Idem, p. 38-39.
11 Idem, p. 39-40.
12 Idem. Vaidotas A. Vaičaitis, *Introduction to Lithuanian Constitutional Law*, Vilniaus universiteto leidykla, Kluwer Legal Publishers, 2007, p. 91.
13 Idem, p. 92.

Penalties.[14] The principle of legality is established in Article 2 of the Criminal Code.[15] The Article holds that "a person shall be held liable under this Code only when the act committed by him is forbidden by a criminal law in force at the time of commission of the criminal act" (Paragraph 1), "only a person whose act as committed corresponds to a definition of the body of a crime or misdemeanour provided for by a criminal law shall be liable under the criminal law" (Paragraph 4), "penalties, penal or reformative sanctions and compulsory medical treatment shall be imposed only in accordance with the law" (Paragraph 5), and "no one may be punished for the same criminal act twice" (Paragraph 6).

This is the system of rules, but the main question is, how is the reality and how is it to be measured? There are a lot of examples in the past and nowadays, when even obviously totalitarian regimes present itself as systems under the "rule of law". With reference to one of the most renowned researchers of the Western legal traditions, Harold J. Berman, it must be noted that also the Western legal tradition is familiar with a tension between ideals and realities, between dynamic qualities and stability, between transcendence and immanence.[16]

One of possible 'litmus papers' to check reality is the public opinion. Helpful in that respect are the surveys of Eurobarometer, requested by the European Commission. According to the results of the last Special Eurobarometer survey,[17] which in particular focusses on the question related to the trust in institutions, the level of public trust in the judicial system in Lithuania is lower than the average in the EU. According to the latest Eurobarometer data, a mere 46 percent of the Lithuanians surveyed expressed trust in the judicial system in 2019, compared with an EU average of 52 percent. Nevertheless, public trust in the judicial system in Lithuania has been increasing in the last decade: in 2009 it

14 The soviet Criminal Code of the Lithuanian Soviet Socialist Republic was adopted and entered into force in 1961. It was drafted strictly according to the Basic Principles of Criminal Legislation of the USSR and the Union republics, passed by the Supreme Soviet of the USSR on 25 December 1958. All 15 Soviet Socialist Republics had similar Criminal Codes with few peculiarities. The Code consisted of a General Part (5 Chapters with 61 articles) and a Special Part (11 Chapters with 221 articles). On 11 March 1990, following the restoration of the independent state of Lithuania, the validity of the Criminal Code of 1961 was reinforced. However, during the period of independence the Criminal Code underwent several fundamental reforms (in 1992, 1994 and 1997-1998), as a consequence of which 90% of all the articles have been amended. At least the following major aspects of the reforms should be emphasised: the restructuring of the penal system; amendments to the chapters on crimes against the State, crimes against property and crimes against military service; the introduction of a chapter on war crimes; and the abolition of the death penalty. See more: Ferdinand J. M. Feldbrugge, 'Soviet Criminal Law – The Last Six Years', *54 Journal of Criminal Law, Criminology & Police Science* 3 (1963), p. 249-266; Gintaras Švedas, *Criminal Justice Systems in Europe and North America: Lithuania*. Helsinki: HEUNI, 2000.

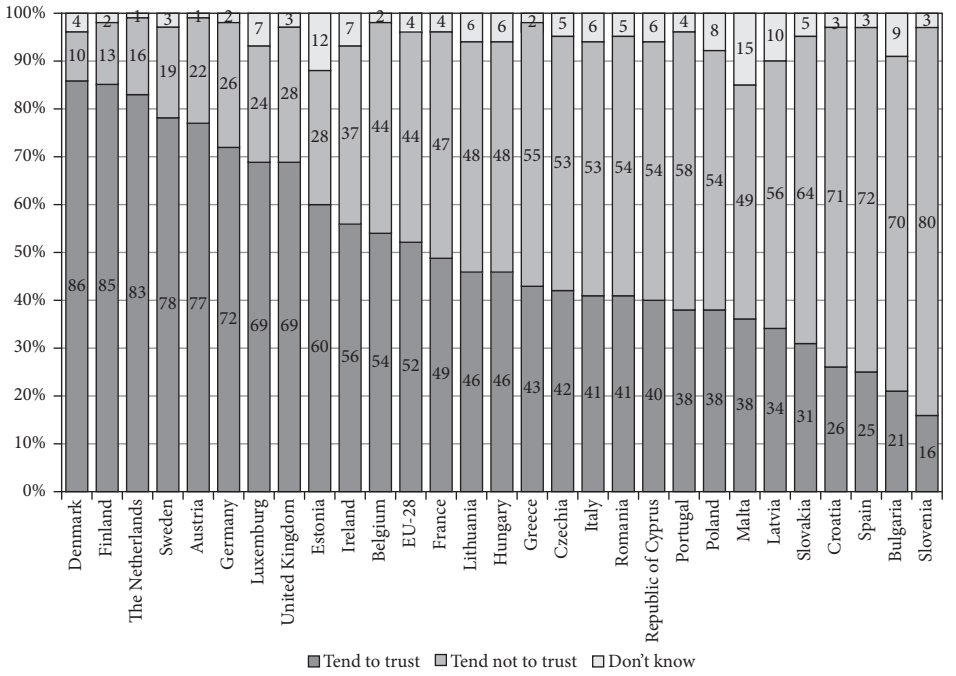
15 See version in English: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/28b18041843311e89188e16a6495e98c?jfwid=73odxyjwi.

16 Harold J. Berman, *Law and revolution: The formation of the Western legal tradition*. Cambridge, Mass. and London: Harvard University Press, 1983, p. 10.

17 European Union, *Special Eurobarometer 461. Designing Europe's future*. Report EN, 2017, p. 11.

was just 15 percent.[18] Figure 1 shows the major differences in trust in national justice systems between EU members, despite motherless common backgrounds of the rule of law, in particular under the umbrella of the European Convention on Human Rights and EU law. Researchers note that the youngest respondents and those with the highest education levels are the most likely to trust justice and the national legal system, as are managers, those with the least financial difficulties and those who consider they belong to the upper middle class.[19]

Figure 1 Trust in Justice / the (nationality) legal system. Special Eurobarometer 461 (April 2017)



The latest Eurobarometer survey in this field is focused on the opinion about the rule of law in the EU Member States. The introduction of the report notes that "in recent years, respect for the rule of law has been put to the test on several occasions and concerns have been raised about measures introduced in some EU Member States. In response to these concerns, in April 2019 the European Commission started a process of reflection on how

18 Aleksandras Dobryninas & Gintautas Sakalauskas, 'Country survey: Criminology, crime and criminal justice in Lithuania', 8 *European Journal of Criminology* 5 (2011), p. 432.

19 Idem, p. 13.

to strengthen the rule of law in the European Union."[20] This also shows that it is recognized that the reality can be very different from declarations in the bastion of the rule of law in the EU. The survey first addresses the importance of and the need for improvement in respect of 17 principles regarding the rule of law grouped into three thematic areas: legality, legal certainty, equality before the law and the separation of powers, prohibition of arbitrariness and penalties for corruption, effective judicial protection by independent courts. The survey also covers the importance of media and civil society as key players in safeguarding the rule of law. The survey further asks respondents to assess the importance of respect for the rule of law in other Member States and in the EU as a whole. Lastly, the survey asked respondents to assess how well-informed they are about the fundamental values of the EU.[21]

All EU Member States taken together, these 17 rule of law principles have a need for improvement score of 8.51 out of 10. The need for improvement score ranges from 5.87 in Denmark to 9.80 in Cyprus, while in Lithuania the score is 9.21 (8th place, high need for improvement).[22]

The last indicator for the reality of implementing of the rule of law is the general mistrust in courts in Lithuania. Figure 2 shows the dynamic of trust/mistrust in courts in Lithuania from 1998 to 2020. Just in the last for years we can see really positive developments: more people tend to trust in the courts (24-31%) than do not trust the courts (21-29%), despite a big corruption scandal at the beginning of 2019.[23] But the developments from 1998 to 2015 also show how difficult it was the to increase the public trust in the Lithuanian courts. Still, the trust in the courts and the perceived independence of courts and judges among the general public remains much lower than in Western European countries.[24]

In summary, the Lithuanian justice system includes the usual normative rule of law standards, but the public's lack of trust in this system could be an indication for its deficiency.

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20 European Union, *Special Eurobarometer 489. Rule of law*. Report EN, 2019, p. 1.

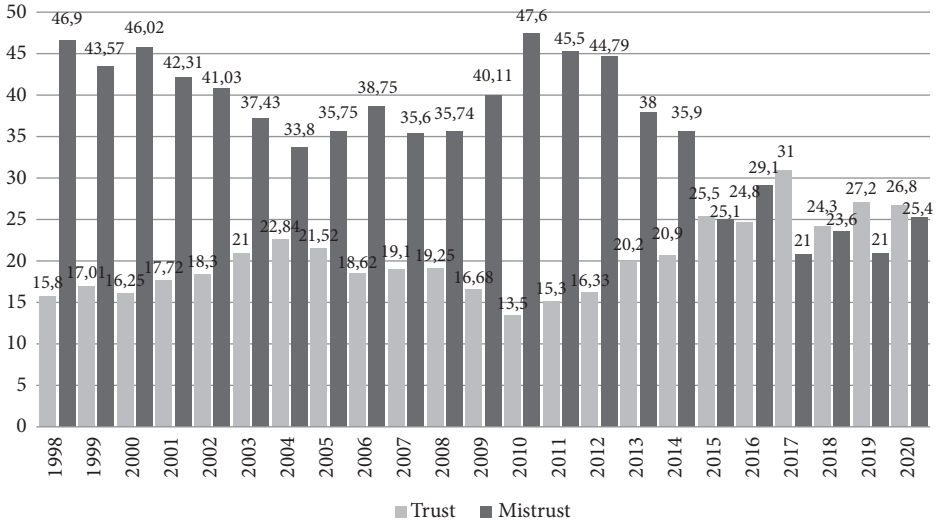
21 Idem.

22 Idem, p. 8.

23 Linas Jegelevičius, 'Lithuanian law enforcers bust high-profile judges and attorneys', *Baltic news network*, 2019 (at: www.bnn-news.com/lithuanian-law-enforcers-bust-high-profile-judges-and-attorneys-197412); BNS, 'Lithuania's Supreme Court apologizes for "lost trust in justice"', *The Baltic Times*, 2019 (at: www.baltictimes.com/lithuania_s_supreme_court_apologizes_for__lost_trust_in_justice_/).

24 European Union, *The 2019 EU Justice Scoreboard*, Luxemburg: Publication Office of the European Union, 2019, p. 44.

Figure 2 Trust / mistrust in courts in Lithuania 1998-2020 ("Vilmorus" surveys)[25]



3 Human rights requirements as regards the sentencing process and the enforcement of sentences

The right to a fair trial entails the entirety of a combination of constitutional guaranties.[26] This entirety consists of the right to a case investigation that takes place in public and is prompt (within a reasonable period of time), equal in rights, transparent and is conducted by an impartial and independent tribunal established by law (the right to a fair hearing).[27]

According to the Code of Criminal Procedure (CCP) the first stage of criminal procedure is the criminal investigation, the so-called 'pre-trial investigation' (Part IV). The pre-trial investigation is usually conducted by investigating police officers, and in some instances by officers of other investigating institutions. They are jointly referred to as pre-trial investigation officers in the Criminal Procedure Code (Article 164). A person who has been caught committing a criminal offence or shortly afterwards, may be arrested. Arrest (referred to as 'temporary detention') may last up to 48 hours and the arrested person has to be questioned as a suspect no later than within 24 hours (Article 140). If it is necessary to order pre-trial detention of the arrested suspect, such person has to be brought to court within 48 hours and the judge should make a decision concerning

25 www.vilmorus.lt.

26 Raimundas Jurka, 'The Right to a Fair Trial', in: Čepas A. (ed), *Human Rights in Lithuania*, Vilnius: Naujos sistemos, 2005, p. 39.

27 Idem.

detention. Each individual case is assigned to a prosecutor, who oversees the criminal investigation. Certain actions of the pre-trial investigation are performed by the pre-trial investigation judge. The investigation is considered concluded when the prosecutor draws up the act of indictment and submits it to the court (Articles 218 and 220). From that moment, the case is overseen by the court, which decides on it (Part V). The first instance court's decision can always be appealed (Part VI). A second appeal, appeal in cassation, to the Supreme Court of Lithuania is also possible, but only on substantial points of law (Part VIII).

Lithuanian criminal procedure has mostly the characteristics of an inquisitorial system, although there are some features of an adversarial system.[28] Pre-trial investigation is essentially an inquisitorial procedure, while before the court the case is heard in an adversarial manner, *i.e.* both prosecution and defence have equal rights to submit evidence, make requests, and present their arguments.[29]

In connection to the sentencing process, the most important parts of the right to a fair hearing is the right to know one's charges and the right to fair punishment. According to many researchers, the greatest problem related to the breach of a person's right to know the charges brought against him in Lithuania is the failure to ensure a defence counsel during detention. Article 10 of the Code of Criminal Procedure stipulates that a suspect, an accused and a convicted person shall be entitled to defence. This right shall be guaranteed to them immediately from the moment of their arrest or the first questioning. In accordance with the measures and means provided by law, the authorities (the court, the prosecutor and the officer of pre-trial investigation) must ensure that the suspect, the accused or the convicted person has the opportunity, to defend him- or herself against the suspicion and the charge, and that all the necessary steps are taken to ensure the protection of his or her personal and property rights. The most common problem encountered when detaining suspects of crimes is that their defence counsel is not present, even though the presence of a defence counsel is indispensable during the case investigation, or that the role of the legal aid lawyer is limited to a physical presence in the interrogation room or that the lawyer is passive.[30] Cases in which the lawyer is absent, participates in the interrogation only formally or participates only in a part of the interrogation, violate the suspect's right to an effective defence, as the suspect receives no legal advice and his or her situation may even be aggravated.

Coercion in the pre-trial investigation against suspects is more often employed in the Lithuanian justice system than it is in most of the European countries. The available

28 Erika Leonaitė & Karolis Liutkevičius, *Inside Police Custody 2. An empirical study of suspects' rights at the investigative stage of the criminal process in nine EU countries. Country Report for Lithuania*, Human Rights Monitoring Institute, 2018, p. 20.

29 Idem.

30 Idem, p. 103.

statistical data suggests that pre-trial detention is overused in Lithuania. Prosecutors' applications for pre-trial detention enjoy a success rate of 95%, and pre-trial detention is vastly more used than less strict alternatives.[31] Reports from former detainees and defence lawyers indicate that pre-trial detention is being used as a measure to coerce suspects into giving evidence. Although significant research has been carried out in this area, there are still uncertainties about the reasons for overuse of pre-trial detention, especially where the motives of judicial decisions are concerned.[32]

Undoubtedly, during the enforcement of sentences there is an even greater risk of human rights violations, in particular during the enforcement of custodial sentences. Article 1(2) of the Code of Execution of Penalties of the Republic of Lithuania (CEP) establishes that the purpose of laws for execution of sentences is "to set such procedures for the execution of a sentence that a convict, who has served a sentence, would achieve his/her lifetime goals by using legal methods and measures", but the reality is far away of this purpose.

Overuse of imprisonment,[33] old soviet infrastructure of prison buildings, poor living and working conditions, low wages and unprovided staff, irresponsible management, a lack of political attention and a fundamental lack of empathy with the interests and experiences of prisoners make it more difficult to ensure human rights and to implement the necessary reforms in the Lithuanian prison system.[34]

Even though fundamental problems in Lithuanian prisons have been evident throughout the last decade, and their systematic nature was pointed out by the European Court of Human Rights back in 8 December 2015 in the case of *Mironov's and Others v. Lithuania*,[35] they did not become public until the peripeteia in the summer of 2018, when the media began to publish on sub-cultural life in Lithuanian prisons. In 2018, a lot of information about violence and other human rights violations in Lithuanian prisons was disseminated both by the media and the prisoners themselves, who posted their

31 Human Rights Monitoring Institute, *The practice of pre-trial detention in Lithuania*, Research report, 2015, p. 12.

32 Idem.

33 See Gintautas Sakalauskas, 'Criminal policy and imprisonment. The case of Lithuania: open prisons, prison leave and release on parole', in: P.H.P.H.M.C. van Kempen & M. Jendly (eds), *Overuse in the Criminal Justice System*, Cambridge/Antwerp/Chicago: Intersentia, 2019, p. 229-249.

34 See more Gintautas Sakalauskas, 'Prisoner resettlement in Lithuania – Between Soviet tradition and challenges of modern society, in: F. Dünkel, I. Pruin, A. Storgaard & J. Weber (eds), *Prisoner Resettlement in Europe*, Oxon/New York: Routledge, 2019, p. 219-239; Gintautas Sakalauskas, 'Wie überwindet man den Totalitarismus im Strafvollzug?', in: K. Drenkhahn, B. Geng, J. Grzywa-Holten, S. Harrendorf, C. Morgenstern & I. Pruin (eds), *Kriminologie und Kriminalpolitik im Dienste der Menschenwürde. Festschrift für Frieder Dünkel zum 70. Geburtstag*, Mönchengladbach: Forum Verlag Godesberg, 2020, p. 909-926.

35 ECtHR, Judgment of 8 December 2015, *Mironovas and Others v. Lithuania*, Appl. 40828/12, 29292/12, 69598/12, 40163/13, 66281/13, 70048/13 and 70065/13.

experiences on social networks. The problems of violence in Lithuanian prisons were acknowledged in the reports of the Parliamentary Ombudsman and in the judgments issued by courts.[36]

Due to the torturing, inhuman and degrading conditions, the national courts of Lithuania compensated 174,000 euro to the prisoners in 2014, 1.3 million euro in 2016, 1.6 million in 2017-2018 and 0.3 million euro in the first half of 2019. In 2018-2019, several hundreds of thousands euro have been compensated for the poor imprisonment conditions only on the basis of appeals brought to the ECtHR and peace agreements reached with the Government of the Republic of Lithuania.[37] According to data published in the media, Lithuania has already compensated 3.5 million euro for inappropriate imprisonment conditions from 2016 until April 2020.

The number of claims, filed by the prisoners, increases every year. The practice of the Supreme Administrative Court of Lithuania confirms that conditions at the correctional facilities still often do not meet the requirements set out in legislation. Therefore, it is used as a basis for compensation of damage suffered by the prisoners. Damage due to unlawful conduct of public authorities forms the main part of practice of the Supreme Administrative Court of Lithuania. Meanwhile, most of the examined cases in this category are related to inappropriate conditions of detention and imprisonment.[38]

Over the past 10 years, an average of 8 prisoners have committed suicide in Lithuanian prisons each year. This number is 3 times higher than the suicide rate per 100,000 of the general population (25 suicides per 100,000 population, which would be equal to about 80 suicides among a corresponding number of prisoners).[39]

The number of criminal offences registered in Lithuanian prisons has been steadily increasing over the past 4 years. The high latency of criminal offences does not necessarily indicate a negative trend, however the relative number of registered crimes in Lithuanian prisons is almost 2.5 times higher than the number of crimes registered outside of prison establishments. The majority of registered criminal offences are related to drugs and other psychotropic substances (56 percent in 2018). However, a relatively high level of violence has also been recorded.[40]

A report issued on 25 June 2019 by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) after its visit on 20-27 April 2018 revealed that the Lithuanian prison system has the same problems as

36 More about actual problems in Lithuanian prisons see Gintautas Sakalauskas, 'Conditions of imprisonment and premisses for social integration of prisoners. Summary', in: G. Sakalauskas, L. Jarutienė, V. Kalpokas & R. Vaičiūnienė (eds), *Kalinimo sąlygos ir kalinių socialinės prielaidos*, Vilnius: Lietuvos teisės institutas, 2020, p. 434-456.

37 Idem, p. 438.

38 Idem.

39 Human Rights Monitoring Institute, *Human rights in Lithuania 2018-2019*, Overview, 2020, p. 103.

40 Idem.

those identified by the CPT in its previous reports (2011, 2014, and 2018). According to the CPT's assessments, no substantial changes have been made, particularly regarding the living space of prisoners, violence from other prisoners and officials, and health care. This shows that problems in Lithuanian prisons are systemic and cannot be resolved without a fundamental overhaul of the entire prison infrastructure and the staff training and professional development system, thus fundamentally changing the management culture and the quality of relations between staff and prisoners.

4 Judicial discretion in sentencing in general: position of the independent judge and responsibility for fairness

In Lithuania, criminal cases in regional and district courts of first instance are heard by a single judge. A panel of justices consisting of three judges hears cases in regional courts when cases are related to crimes for which accused persons in the course of committing a criminal offence were the president, members of Parliament or the government, judges of the Constitutional Court, judges, or prosecutors (Article 225 CCP). A panel of justices also may be formed in regional and district courts for hearing cases. In the Court of Appel all cases are heard by a panel of justices consisting of three judges (Article 320 CCP). In the Lithuanian Supreme Court criminal cases are heard by a panel of three judges. Upon the decision by the chief justice department of this court, such case may handed over to be heard under the cassation procedure by an extended panel of seven judges or by a plenary meeting of the Criminal Cases Department at the Supreme Court, when a judge responsible for the hearing of the case establishes that in the course of the investigation it may be necessary to formulate a new judicial interpretation of the legal norm applied or it may be necessary to deviate from the jurisprudence of the Supreme Court that has already be formed (Article 366 CCP).

Jury trials are non-existent in Lithuania. During the Soviet occupation, the system of sworn lay judges in session together with professional lawyers was tried, but discarded. Recently the introduction of a jury system has been raised more often, but the probability that it will be introduced is slight.[41]

5 Judicial discretion within a framework

The Criminal Code of the Republic of Lithuania recognizes two different categories of criminal acts: crimes and misdemeanours (Article 10). The main different between the

41 Algimantas Čepas & Gintautas Sakalauskas, 'Lithuania', in: R. G. Newman, M. F. Aebi & V. Jaquier (eds), *Crime and punishment around the world. Europe*, Vol. 4, Santa Barbara: ABC-CLIO, 2010, p. 202.

two is that crimes are punishable by a custodial sentence, whereas misdemeanours by a non-custodial sentence only (with the exception of arrest). In the last years, there were approximately 60,000 criminal offences registered in Lithuania (almost 2,000 per 100,000 of the population), 6-7% of which were misdemeanours.

Intentional crimes are classified into four categories, according to the maximal term of custodial sentence foreseen in the CC: minor gravity crimes (up to 3 years of custodial sentence), middle gravity crimes (a custodial sentence from 3 years up to 6 years), grave crimes (a custodial sentence from 6 years up to 10 years), and very grave crimes (more than 10 years) (Article 10). This classification is of importance when it comes to sentencing, because a suspension of execution is mostly only possible for misdemeanours, negligent crimes, intentional minor or middle gravity crimes (Figure 3).

In general, the Criminal Code foresees the three following sentencing possibilities for a person who commits a criminal act:[42] penalties (Article 42), penal measures for adults (Article 67) and reformative measures for juveniles (Article 82). Persons who are recognised by the court as being legally incapacitated or of diminished capacity as well as persons who, after committing a criminal act or having been imposed a penalty, have begun to suffer from a mental disorder rendering them incapable of understanding the nature of their actions or controlling them, may be subjected by the court to certain compulsory medical treatment measures (Article 98).

An adult person may be imposed one or several penal measures when he or she is released from criminal liability or released/suspended from a penalty or released on bail from a correctional institution (Figure 3). The law recognizes 8 grounds on which release from criminal liability is possible: when a person or criminal act loses its dangerousness (Article 36), the minor relevance of a crime (Article 37), upon reconciliation between the offender and the victim (Article 38), on the basis of mitigating circumstances (Article 39), when a person actively assisted in detecting the criminal acts committed by members of an organised group or a criminal association (Article 39(1), whistleblowers (Article 39(2), bail (Article 40), and when a juvenile commits a criminal act under certain conditions (Article 93).

According to Article 41 CC, a penalty shall be a measure of compulsion applied by the State, which is imposed by a court's judgement upon a person who has committed a crime or misdemeanour. The purpose of a penalty shall be: 1) to prevent persons from committing criminal acts; 2) to punish a person who has committed a criminal act; 3) to deprive the convicted person of the possibility to commit new criminal acts or to restrict such a possibility; 4) to exert, influence on the persons who have served their sentence to ensure

42 The Lithuanian CC also provides for criminal liability for legal entities. The following penalties may be imposed upon a legal entity for the commission of a criminal act: a fine, restriction of operation of the legal entity, liquidation of the legal entity (Article 43 CC).

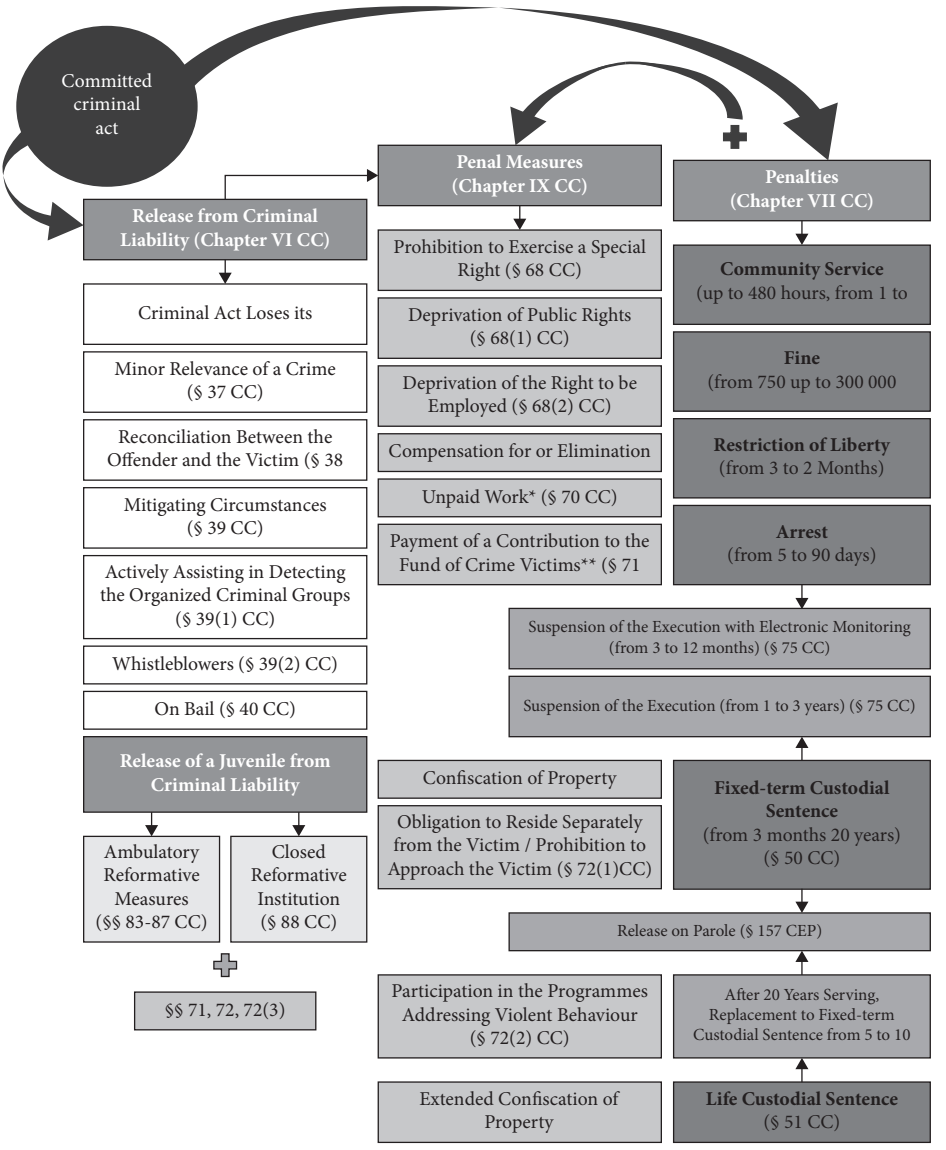
that they comply with laws and do not relapse into crime; 5) to ensure implementation of the principle of justice.

The following penalties may be imposed on a person who commits a criminal act: 1) community service; 2) a fine; 3) restriction of liberty; 4) arrest; 5) fixed-term custodial sentence; 6) life custodial sentence (the last two just for crimes) (Article 42).[43] Only one penalty may be imposed on a person for the commission of one crime or misdemeanour. Where several criminal acts have been committed, a court shall impose a penalty for each criminal act separately and subsequently impose a final combined sentence. When imposing a final combined sentence, the court may impose either a consolidated sentence or a fully or partially cumulative sentence (Article 63). If more than two penalties of a different type are imposed for several committed crimes, a court shall, when imposing a final combined sentence, select two penalties from those imposed: one of them being the most severe penalty, and the other one selected at the discretion of the court (Article 42). As can be gathered from figure 3 below, a person who committed a criminal act may, together with a penalty, be imposed one or more of the 8 of 10 penal measures.

According to Article 54 of the CC, a court shall impose a penalty according to the sanction of an article of the Special Part of the CC providing for liability for a committed criminal act and in compliance with provisions of the General Part of the Criminal Code. When imposing a penalty, a court shall take into consideration: 1) the degree of dangerousness of a committed criminal act; 2) the form and type of guilt; 3) the motives and objectives of the committed criminal act; 4) the stage of the criminal act; 5) the personality of the offender; 6) the form and type of participation of the person as an accomplice in the commission of the criminal act; 7) mitigating and aggravating

43 See also: Gintautas Sakalauskas, 'Lithuania', in: K. Drenkhahn, M. Dudeck & F. Dünkel (eds), *Long-Term. Imprisonment and Human Rights*, Oxon/New York: Routledge, 2014, p. 199.

Figure 3 Possibilities for Criminal Sentencing According to the Lithuanian CC



*Can't be imposed together with a penalty (§ 67

circumstances; 8) the damage caused by the criminal act.[44] Where imposition of the penalty provided for in an article is evidently in contravention to the principle of justice, a court may, taking into consideration the purpose of the penalty, impose a commuted penalty substantiated with reasoned decision.

The court shall generally impose a non-custodial sentence upon a person prosecuted for the first time for a negligent or minor or middle grave premeditated crime. In the event of imposition of a custodial sentence, the court must justify its decision (Article 55). In some cases, the court can impose a more lenient penalty than provided for by a law (Article 63). Upon hearing a criminal case under the accelerated procedure or upon conducting a summary examination of evidence, also when criminal proceedings are terminated by a penal order, the convict shall be imposed a penalty which, by the same judgment, shall be reduced by one-third. This rule applies solely in cases in which a person pleads guilty (Article 64(1)).

According to Article 61, when imposing a penalty, a court shall take into consideration whether only mitigating circumstances or only aggravating circumstances, or both mitigating and aggravating circumstances have been established and shall assess the relevance of each circumstance. Having assessed mitigating and/or aggravating circumstances, the scope, nature and interrelation thereof, and also other circumstances, a court shall make a reasoned choice of a more lenient or more severe type of penalty as well as the measure of the penalty with reference to the average penalty. The average penalty provided for by a law shall be determined as the aggregate of the minimum and maximum measure of a penalty provided for in the sanction of an article, which is subsequently divided by half. If the sanction of the article prescribes no minimum penalty for the committed criminal act, the average penalty shall be determined on the basis of the minimum penalty fixed for that type of penalties.[45] This rule of average penalty causes long sentences, despite a relative wide discretion of judges in sentencing.

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44 In imposing a penalty upon a juvenile, a court shall, in addition to the circumstances listed in Article 54(2) of the CC, take into consideration the following: 1) the living and upbringing conditions of the juvenile; 2) the state of health and social maturity of the juvenile; 3) previously imposed sanctions and effectiveness thereof; 4) the juvenile's conduct following the commission of a criminal act. The court may impose a fixed-term custodial sentence upon a juvenile where there is a ground for believing that another type of penalty is not sufficient to alter the juvenile's criminal dispositions, or where the juvenile has committed a serious or grave crime. In the event of imposition of the custodial sentence upon the juvenile, the minimum penalty shall be equal to one half of the minimum penalty provided for by the sanction of an article of the CC according to which the juvenile is prosecuted.

45 See more Gintautas Sakalauskas, 'Prisoner resettlement in Lithuania – Between Soviet tradition and challenges of modern society', in: F. Dünkel, I. Pruin, A. Storgaard & J. Weber (eds), *Prisoner Resettlement in Europe*, Oxon/New York: Routledge, 2019, p. 219-239.

6 No sentencing by non-judicial entities – even reconciliation without mediation

Lithuanian criminal procedure does not allow for sentencing by non-judicial entities.[46] The Constitution declares that "justice shall be administered only by courts". In the Soviet criminal system non-judicial entities such as "soviet public organizations", "labour collectives" and "commissions for juvenile affairs" did have sentencing functions. Their activities were based on the ideological influence by the state. Bad experience with them and an aspiration to sentencing under the rule of law led to the rapid withdrawal of such powers, although they would be needed in some areas these days, *e.g.* in mediation.

According to Article 38 of the CC (Figure 3), offenders can be released from criminal liability if they achieve reconciliation with the victim and meet other legally defined requirements.[47] The offender and the victim may reconcile during the pre-trial investigation, during preliminary hearing and during trial (no later when the court leaves for the chambers to consider the judgement).

While at a first glance one could assume that reconciliation in Lithuania bears some of the hallmarks of mediation, upon closer investigation it becomes clear that the two approaches and practices differ greatly. Besides the fact that the procedure involved in reconciliation in Lithuania is very formal, there are three major weaknesses compared to mediation: 1) an independent and well-trained third party (mediator) is not involved in the process; 2) release from liability is on the condition that the offender refrains from reoffending (if he or she reoffends with intent within one year, the decision not to prosecute is voided, and a decision should be adopted on the liability of the person for all the criminal acts committed); 3) there are some conditions precluding a process of reconciliation, which are more relevant to considerations on the risk of re-offending, not to the idea of mediation.

In Lithuania there are no research data what is really going on between the victim and the offender during the release from liability upon reconciliation. It is probable, that the offender and the victim "reconcile" following various motives: a reward for damages, threats, unwillingness to engage into long lasting criminal proceedings, a desire to avoid severe penalty etc. However, true reconciliation in such proceedings may happen rarely.

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46 There are a lot of institutions, which have sentencing discretions according to The Code of Administrative Offences of the Republic of Lithuania.

47 Skirmantas Bikelis & Gintautas Sakalauskas, 'Lithuania', in: F. Dünkel, J. Grzywa-Holten & P. Horsfield (eds), *Restorative Justice and Mediation in Penal Matters*, Mönchengladbach: Forum Verlag Godesberg, 2015, p. 477-500.

7 Administrative discretion in the execution of sentences

The Code of Execution of Penalties of the Republic of Lithuania (CEP) does not only have bearing on the execution of custodial sentences, but also on the execution of all other penalties (Figure 3). The execution of penal measures is just briefly regulated in the Code of Criminal Procedure. The most ambulatory penal measures and penalties are executed by the Probation service,[48] while the execution of all custodial sentences falls under the responsibility of correctional facilities, both under the supervision of the Ministry of Justice. Of course, the most sensible topic is the administrative discretion during the execution of custodial sentences.

7.1 Sentencing for disciplinary infractions in correctional facilities

The concept of theoretical and practical effects on prisoners in Lithuania can be summed up in two words: ideological chaos. In this chaos, the unidirectional intentions of 'correction' *i.e.* 'moral improvement' of prisoners, sound the loudest.[49] On the one hand, Article 1(2) CEP establishes the general purpose of resocialization of all convicts, but later in the same code the concept of unidirectional correctional "improving" the prisoner is used much more often, and one of the measures (together with disciplining offenders through the prison regime, i.e. strong discipline) is the social rehabilitation. The content of the latter includes not only privileges granted (e.g. increasing the number of visits, relaxations of penitentiary regime) or just inducements, but disciplinary measures as well.

According to Article 142 of the CEP, prisoners may be subject to the following disciplinary measures for breach of the penitentiary regime: 1) reprimand; 2) reduction of the maximum amount of money for which prisoners may purchase personal belongings per month by the amount of one basic social benefit (39 euros) to three months; 3) a ban on the acquisition of personal belongings (except for the acquisition of hygiene items and stationery); 4) a contribution to the fund of social support for prisoners in the amount of one basic social benefit. Prisoners who "systematically violate the penitentiary regime" or commit "a particularly malicious violation of the penitentiary regime", may be punished by transfer to cell-type premises for up to 30 days (juvenile prisoners for up to 5 days). These disciplinary measures shall be imposed by a decision of the director of the

48 See more Eva Deveikytė, 'Lithuania', in: A.M. van Kalmthout & I. Durnescu (eds), *Probation in Europe*, Nijmegen: Wolf Legal Publishers, 2008, p. 551-580.

49 See more Gintautas Sakalauskas, 'Prisoner resettlement in Lithuania – Between Soviet tradition and challenges of modern society, in: F. Dünkel, I. Pruin, A. Storgaard & J. Weber (eds), *Prisoner Resettlement in Europe*, Oxon/New York: Routledge, 2019, p. 219-222.

correctional facility. The prisoner has the right to appeal against the disciplinary measure imposed on him, but filling a complaint does not suspend the execution of the sentence.

The statistical data show that disciplinary sanctions were applied relatively often: approximately one-third of convicts were subject to regular disciplinary sanctions. Until the middle of 2020, a proposal of a disciplinary board of correctional facility was necessary for the transfer of prisoners to disciplinary rooms. According to the new regulation it is just a recommendation. From 2010 to 2018, the number of cases, related to disciplinary sanctions and discussed by the disciplinary boards of the correctional facilities, increased by more than 30% (from 6,439 to 8,446), although the number of convicts, serving their custodial sentence, decreased by almost 19% per year (from 11,084 to 9,002). Meanwhile, in 2017, when the number of discussed disciplinary sanctions was the highest (9,479), the number of convicts, serving their sentence that year, was the lowest during the entire period from 2004 to 2018 (8,612).[50]

After the visit held from 5 to 15 September 2016, the CPT expressed its concern in its statement regarding some of the following aspects of disciplinary measures applied at the correctional facilities of Lithuania: no right is granted to a prisoner to be heard before the application of a disciplinary measure; an opportunity to address the issue to its defendant is completely theoretical and the prisoner is not allowed to invite any witnesses. The committee recommended to correct these shortages. After the visit held from 20 to 27 April 2019, the CPT repeatedly pointed out that in order to isolate particular prisoners, they are being held under inappropriate conditions, which are equal to disciplinary punishment; moreover, conditions to engage in physical activities should be provided to the prisoners, who are being held in different premises, designated for discipline; their contact with the external world should not be limited and they should be allowed to communicate with their family members, unless their violations are related to such contact.

During recent empirical research,[51] prisoners were asked several questions about the application of disciplinary sanctions. The majority of respondents indicated that they have been subject to such sanctions. The most frequent sanction applied to respondents was placement in a disciplinary cell (33.3%). The majority of other applicable sanctions (which were mentioned 113 times) consisted of the prohibition to shop. 1.7% of the prisoners indicated that they have been subject to the application of a straitjacket, 6.6% said that a straitjacket was used to restrain other prisoners. Meanwhile, 12.6% of them indicated that they were handcuffed and 14.9% of the respondents said that handcuffs were used for

50 See more Gintautas Sakalauskas, 'Conditions of imprisonment and premisses for social integration of prisoners. Summary', in: G. Sakalauskas, L. Jarutienė, V. Kalpokas & R. Vaičiūnienė (eds), *Kalinimo sąlygos ir kalinių socialinės prielaidos*, Vilnius: Lietuvos teisės institutas, 2020, p. 451.

51 Idem.

other prisoners. The respondents have been asked, whether disciplinary sanctions solved the disciplinary issues. 86.5% of them said that they did not. The respondents were also asked whether they had experienced collective punishments at the correctional institutions and 46% of them said that they had.

7.2 Reform of release on parole

The new wording of Article 157 of the CEP, which came into force on 1 July 2020, once again substantially changed the conditions of parole (the said conditions were amended in 2003, 2011 and 2015).[52] Under this amendment to the CEP, prisoners that have been imposed an imprisonment sentence of up to 4 years for intentional offences may be released on parole after serving one third of their sentence in prison. The (final) decision on this matter will be made by the Conditional Release Commission and will not require any approval from the court. On the one hand, such an extended competence of the commission raises doubts on compliance with the provision of Article 109 of the Constitution of the Republic of Lithuania, according to which justice is administered only by courts, but on the other hand, and more importantly, the new system continues to apply the differentiation of conditions for parole based on the duration of the sentence, which is not in line with the purpose of the execution of sentences – re-socialisation. The length of a sentence depends primarily on the severity of the offence, which the legislator already takes into account when establishing appropriate lengths of imprisonment sentences in the sanction included in the article of the Criminal Code. However, the needs and opportunities for re-socialisation depend on the individual person and not on the length of the sentence imposed.

8 Conclusion

In summary, the example of Lithuania shows that even after long-term totalitarian oppression, it is possible to create a government based on the rule of law. Trust in the state and the courts is essential if the rule of law is not to remain a mere declaration. On the other hand, the consistent implementation of the rule of law promotes this trust. It is important that doubt about the compliance with the rule of law in the process of imposing and enforcing of penalties is reduced to a minimum. As the practice of other countries

52 About the system of release on parole in Lithuania in general and main problems see more Gintautas Sakalauskas, 'Criminal policy and imprisonment. The case of Lithuania: open prisons, prison leave and release on parole', in: P.H.P.H.M.C. van Kempen & M. Jendly (eds), *Overuse in the Criminal Justice System*, Cambridge/Antwerp/Chicago: Intersentia, 2019, p. 241-247.

shows, this leads to long-term confidence in the system of punishment and execution of sentences.

Legality, non-arbitrariness and judicial and administrative discretion in sentencing and enforcement of sentences in the Netherlands

P.A.M. Mevis and P.C. Vegter[*]

1 Introduction

The underlying principles of the Dutch system of sanctions are based on the Criminal Code of 1886.[1] The legislature decided at that time to adopt a 'sober' system of sanctions, also compared to the codifications in other countries. The core of this system is that the legislature only determines the sanction for a crime or a offence up to a certain level. Since 1886, the legislature has given the criminal courts, within a broad legal framework, an extremely large amount of discretion in sentencing. Although this statutory sentencing discretion is not totally unlimited, the restrictions that have been imposed do not have a great deal of significance. A second important main characteristic of the Dutch system is the likewise deliberate separation between sentencing and the enforcement of sentences. in principle, the sentencing court does not have any influence or control over the way in which the sanction is enforced. The practical enforcement of the sanction is the responsibility of the penitentiary administration, which nowadays is first and foremost the Ministry of Justice and Security. These principles, which are still applicable today, provide the framework for the content of the themes discussed below.

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1 For an overview in English: P.H.P.H.M.C. van Kempen et al. (eds), *The Criminal Justice System of the Netherlands*, Antwerp/Cambridge: Intersentia, 2019. See also: https://en.wikipedia.org/wiki/Criminal_justice_system_of_the_Netherlands. In Dutch: F.W. Bleichrodt & P.C. Vegter, *Sanctierecht*, Deventer: Wolters Kluwer, 2017; Marc S. Groenhuijsen, Tijs Kooijmans & Yves Van Den Berge, *Preadviezen voor de Nederlands-Vlaamse Vereniging voor Strafrecht 2013: Bestraffing in Nederland en België*, Nijmegen: Wolf Legal Publishers, 2013.

2 The principle of legality and/or the rule of law as regards criminal punishments versus (wide) judicial discretion

2.1 Punishment/Criminal Code

2.1.1 Legality and codification

The Dutch criminal law and the law of criminal procedure is public law that derives its principal structure from the starting points of the French Revolution, with an emphasis on legality and codification: legal protection by regulation in legislation with a general scope and structure arrived at in a democratic way. In line with these public law starting points, ever since 1886 the principle of legality for substantive criminal law[2] has been formulated in the opening article of the Criminal Code: "No act or omission which did not constitute a criminal offence under the law at the time of its commission shall be punishable by law" (Article 1(1) Criminal Code).

The scope of the substantive law legality principle, as a legislative tool and task, also covers the structure of the legal system of sanctions. The sentencing process, however, is regulated by the rules of the Code of Criminal Procedure. For the implementation of the substantive law legality principle, on the one hand, the law provides a statutory framework for the system of sanctions and the sentencing process. On the other hand, however, anyone who believes that in the Criminal Code the legislature defines to a large extent the sanction imposable for a certain criminal offence, or determines the way a sanction is imposed by the criminal court in a concrete case, or at least to some degree makes that sanction transparent and predictable (*lex certa* principle), is sorely mistaken. In the Dutch Criminal Code, within a broad legal framework, the legislature gives the courts a large amount of discretion in sentencing, especially compared to other legal systems. To that extent, the further implementation of the legality principle within the defined legal parameters is not very significant.

By providing this amount of discretion to the courts, the intention of the legislature is to enable the court to apply the proper, individualised punishment appropriate in the concrete case, although this individualisation principle is not codified as a starting point for sentencing. Traditionally, the legislature assumed, implicitly, that the system of sanctions would be applied with a certain amount of restraint (criminal law as *ultimum remedium*). The legality principle does not set limitations on a reinforcement of (the legal system of) sanctions by the legislator. The same applies for the limitation of the discretion

2 The substantive law legality principle should be distinguished from the legality principle for procedural criminal law, which is guaranteed in Article 1 of the Code of Criminal Procedure: "Criminal proceedings shall be solely conducted in the manner provided by law."

in sentencing of the courts by the legislature, like those that have become visible in some, more recent legislative amendments.

In the following sections we will first outline the judicial discretion within the system of sanctions as an example and illustration of, on the one hand, the practical implementation of the legality principle in Dutch criminal law and, on the other hand, as an illustration of the judicial discretion that the legislature has given to the criminal courts, and which has been such a unique aspect of the Dutch system of sanctions since 1886, albeit that this discretionary freedom is presently not as unimpeachable as it once was.

2.1.2 Types of sanctions: penalties and measures

The characteristics of the framework provided by the Criminal Code are as follows. The penalties and the criminal law measures are regulated in the general part of the Criminal Code. The primary penalties are: prison sentence; detention; community service; fine. The prison sentence and detention are custodial sanctions. The distinction does not mean much nowadays because the manner of enforcement is the same in both cases. Furthermore, the law provides for additional punishments: curtailment of certain rights; confiscation; publication of the court judgment. In practical terms, there is hardly any difference between primary penalties and an additional penalties, because it is now possible to impose an additional punishment on its own in cases where this is allowed under the law.

Besides the confiscation of dangerous objects, the confiscation of the proceeds of crime, and the order to pay compensation, the Criminal Code also includes the criminal law measures of hospital detention (of the convicted person), the committal of the convicted person to an institution for repeat offenders, and the so-called coercive and deprivation of liberty measures.

The character of a penalty is different than that of a measure.[3] A penalty is primarily a response to an offence that was committed in the past, it is primarily intended as retribution, and it is thus the deliberate infliction of suffering. A measure is aimed more at future behaviour, and thus in a certain sense it is an instrument for special prevention. A measure is aimed at ending an undesirable situation. For example, by giving medical and psychiatric treatment to a person being detained under a hospital order, by the confiscation of any proceeds of crime or by the compensation of any damages caused by a criminal offence. Without a doubt, the hospital detention order with compulsory psychiatric treatment is the most drastic (custodial) measure, because in cases involving violent crimes there is no limitation on the length of such (through successive extensions of the term by the courts). Special requirements apply for imposition. Generally speaking, a psychological disorder had to have existed at the time when the offence was committed, there has to be a risk of repetition, and reports have to be submitted about that disorder

3 Henny Sackers, 'The system of sanctions', in: Van Kempen et al. (eds) (fn. 3), p. 147 and p. 154.

and that risk by two behavioural experts, one of which is a psychiatrist. A unique aspect of this measure is that the focus of the enforcement is on the treatment of the psychological disorder, but nonetheless any stagnation in that treatment can lead to the detention continuing for many years without any treatment. At the end of the day, the main priority is to keep society safe.

2.1.3 Choice of sanctions and size of punishment

With respect to the penalties, the legislature sets the specific maximum sentence for each crime. Despite several attempts by the legislature to change the law in this area and to limit the extent of judicial discretion in sentencing, the Dutch system of sanctions has virtually no specific minimum sentences. There is a general minimum sentence; the minimum prison sentence is always one day. This means, for example, that in the case of manslaughter (Article 287 Criminal Code) the maximum prison sentence is fifteen years and the minimum prison sentence is one day. In the case of theft (Article 210 Criminal Code), the maximum prison sentence is four years and the minimum prison sentence is also one day. The more egregious the crime, therefore, the greater the legal discretion in sentencing given to the courts under the Dutch Criminal Code.

The Code does not include any specific guidelines about the minimum sentence that has to be imposed for a particular crime. In particular, despite a Recommendation to this effect of the Council of Europe,[4] it does not include any codification of the sentencing criteria to be applied by the courts. In the Netherlands, neither the legislature nor the criminal courts have expressed a need for such. However, the Code does include a summary of circumstances that can lead to the applicability of a higher statutory maximum of the (mostly custodial) sentence that can be implied. These include general aggravating circumstances, such as multiple concurrent crimes and repeat offending, as well as specific circumstances for each crime, especially aggravating consequences.

The rules of the system of sanctions in the Dutch Criminal Code moreover give the courts a great deal of freedom in the determination of the punishment in a concrete case, allowing them to choose between different types of sanctions or to combine different types of sanctions. If the punishment for a particular crime is a life prison sentence, then the legislature always provides for a temporary prison sanction (originally a maximum of twenty years, but since 2006 a maximum of thirty years) as an alternative. The court is left the freedom to choose. If the punishment for a particular crime is a custodial sentence, then the courts can still impose a fine or community service instead. And in most cases, they can also combine all sanctions with each other.

4 Recommendation No. R (92) 17 of the Committee of Ministers (Council of Europe) calls for the legislature of the member states to formulate rationales to this effect.

Community service that consists of work (in the public interest) is just one example of the considerably expanded arsenal of possibilities for the imposition of a '*restriction* of freedom'-sanction or sanction modality that has been introduced under recent legislation. These sanctions have behavioural conditions attached to them and are often combined with (electronic) monitoring with the aim of coercing the offender not to re-offend. Community service is, moreover, one example of a punishment where the imposition of such sometimes leads to unrest in (a part of) society. Apparently, the nature of the punishment is not considered to be severe enough for more serious (violent) crimes. For this reason, the possibilities for the imposition of community service were restricted in 2012. This has created a unique situation under Dutch law, whereby for a number of cases the law/legislature explicitly stipulates when this punishment *cannot* be imposed (by the criminal courts). The limitation of the discretion in sentencing of the courts by the legislature has led to a certain amount of conflict between the courts and the legislature about the application of such.

2.1.4 Suspended modalities

The array of sanctioning options has been enlarged even further by the fact that the courts can also impose a fine, community service, custodial sentence (up to 4 years), and additional sanctions on a totally or partially suspended basis. The imposition of a suspended sentence is under a statutory provision in all cases linked to a number of general conditions. The most important general condition is that the convicted person does not re-offend during the probationary period. The courts can also attach specific conditions to a suspended sentence, which relate to the behaviour of the convicted person. In accordance with the principle of legality, the Criminal Code includes a detailed description of the specific conditions.

2.1.5 Judicial pardon

The courts are as such not under the obligation to actually impose a sanction at all, not even if all the conditions for the imposition of that sanction have been satisfied. It can suffice with a ruling that the accused is guilty, but that no sanction will be imposed (Article 9a Criminal Code). However, for the application of this so-called 'judicial pardon', under the law the courts have to deem this appropriate in connection with the minor seriousness of the offence, the personality of the offender, or the circumstances under which the offence was committed, and they have to explain the grounds for this ruling in the judgment. In practice, therefor, a judicial pardon is only applied very rarely.

2.2 Principle of legality as regards enforcement of sentences

The circumstances described above have resulted in the following situation. The power of punishment in the broadest sense is vested in the legislature, the courts (as a rule), and the executive bodies. Essentially, the division between them is as follows.

2.2.1 Legislature and legality

For a long time, the starting point of Dutch law was that criminal law sanctions could only be imposed by the independent criminal courts. That still applies in full for the imposition of custodial sentences, which is also guaranteed under the Dutch Constitution (Article 113 Constitution). The Code of Criminal Procedure, however, also makes it possible for other bodies to impose sanctions in relation to criminal offences. Of particular significance from a practical perspective is the often used power of the public prosecutor to impose an administrative sanction (or 'penalty order'), which was introduced in 2008. This is explained in more detail in section VI. For the time being, we will only look at the imposition of sanctions by the courts.

The legislature decides what the sanctions are and what punishments and/or measures can be imposed for certain crimes or offences, either in combination with each other or otherwise. The legislature determines the (negligibly low) minimum and (more importantly) the specific maximum sentence for each crime, while at the same time the law also allows the possibility of suspension (or deferral) of the enforcement (suspended sentence). In other words, the law sets out a general framework for the type of sanction, the duration of the sanction, and the modality of the sanction. The principle of legality is not applied in such a way that it entails (absolute) limitations for the legislature in the way that it can structure (or restructure) the system of sanctions.

2.2.2 The courts and legality (1): extensive sentencing possibilities: balancing of interests

Under the system of sanctions regulated in the Criminal Code, the legislature has left it almost entirely up to the courts to decide when, how, and why the courts should apply this range of sanctions, and to decide which sentence(s) should be imposed (combined or otherwise) in a concrete case. The Criminal Code does not contain a summary or detailed description of sentencing guidelines or general starting points/criteria for the imposition of sanctions or sentencing criteria that have to be adhered to by the courts.

Furthermore, the Dutch system of sanctions does not include a general provision that establishes a right to proportionate punishment and/or which provides a safeguard against disproportionate punishment relative to the seriousness of the offence or the culpability of

the perpetrator.[5] There are only rules in relation to the imposition of a fine (the amount of which is determined based on a statutory categorisation), whereby the courts have to guard against not disproportionately punishing the offender. The Code contains these rules because otherwise, in the event of an accumulation of multiple offences, there would be no limitation on the size of the fine. The accumulation of *custodial* sentences is limited to one third on top of the highest maximum sentence. Under a legislative amendment that may come into force in the near future, this will be increased to half of the highest maximum sentence.

Although the proportionality criteria for the imposition of, for example, a custodial sentence, are not laid down under the law, it appears to us that in practice the Dutch courts do try to apply proportionate sentencing. However, that does not mean it would be sufficient grounds for an appeal to the Supreme Court as the highest criminal court and court of cassation and/or that the Supreme Court would uphold an appeal on such grounds. See further section 3.

2.2.3 The courts and legality (2): judicial rulings during the enforcement

There is not a general 'enforcement court' under the Dutch criminal justice system. The involvement of the courts in the continued or subsequent enforcement of a sanction and the manner of enforcement is (only) provided for in relation to separate decisions. And although this does form a considerable level of protection for the position of the convicted person, the system as a whole is not very transparent due to the lack of a clear legal methodology. However, in the case of a decision on the enforcement on conditionally imposed sanctions, or a decision to prolong or to continue enforcement of a sanction imposed by the sentencing court, then the starting point is that the ordinary (professional and independent) courts are involved as the adjudicating authority. This means, for example, that the ordinary criminal court can issue an order at the request of the public prosecutor for a sanction that was originally suspended to be enforced anyway, or for a conditional release to be postponed or cancelled, for a committal to an institution for repeat offenders to be ended earlier, for a coercive measure to actually be enforced, or for a hospital detention order to be (repeatedly) extended.

Appeals against these judicial decisions are sometimes heard by the ordinary criminal appellate court, but in other cases by a special division of one of the Courts of Appeal, which consists of three judges and two experts in behavioural sciences (the Execution of Sentences Division of the Court of Appeal Arnhem-Leeuwarden). In the case of many

5 Diminished responsibility, for example, due to a mental disorder, will not prevent the imposition of a long prison sentence if this is necessary to protect society. To that extent, Dutch law is not based on the principle of 'the punishment should not outweigh the crime': Supreme Court of the Netherlands, 12 November 1985, *Nederlandse Jurisprudentie* 1986/327.

other types of decisions of the administrative authorities charged in particular with the enforcement of custodial sanctions, there are other legal remedies available. For example, an objection or an appeal can be lodged with such judicial bodies as the complaints committee of a correctional facility or the Council for the Administration of Criminal Justice and Youth Protection. See below section 3.

2.2.4 Enforcement and legality

The principle of legality under criminal law and general public law also applies here. That means the law sets (the) limits here as well. Roughly speaking, there is (1) a duty of execution, that (2) the sanction has to actually be executed as soon as it is enforceable, and that (3) the sanction must be enforced in the form in which it was imposed. Nevertheless: certain exceptions to these rules are allowed under the law.

Re 1. The *first basic principle* is that a sanction imposed by the court actually has to be enforced. A number of exceptions to this duty of execution are allowed under the law, such as the granting of a pardon or cancellation of the obligation to pay back the proceeds of crime. These exceptions are only applied very seldomly. In the case of the custodial sentence, the possibility of conditional release (i.e., *voorwaardelijke invrijheidstelling*, abbreviated as: *VI*) is (presently) allowed after roughly two-thirds of the sentence has been served,[6] with, since July 2021, with a maximum of 2 years. When certain conditions have been met *VI* can be denied or postponed. Before 2021, *VI* was more or less automatically granted. This development should primarily be seen as a response to the public demand for more repression. We have not encountered any substantive arguments for this change.[7]

Re 2. The *second basic principle* is prompt enforcement. After the imposition of a sanction, the enforcement of such depends, amongst other things, on the question of whether or not the sanction is already eligible for enforcement. Until recently, if an appeal or appeal in cassation was still open or pending against the imposition of a sanction, then that circumstance would prevent the enforcement of that sanction. But that is no longer always the case. In recent years the legislature has given the criminal courts more possibilities to decide that (elements of) certain sanctions, and in particular restriction of liberty sanctions, are immediately enforceable. As justification for an exception to the mentioned starting point, the legislature has cited the danger of recidivism, especially in the case of violent crimes. This means the courts have been given the power to decide that the

6 Geert Pesselse, 'Conditional Release, Pardon and Aftercare of Prisoners', in: Van Kempen et al. (eds) (fn. 3), p. 167-168.

7 Jolande uit Beijerse et al., *De praktijk van de voorwaardelijke invrijheidstelling in relatie tot speciale preventie en re-integratie*, The Hague: Boom juridisch, 2018.

behavioural conditions attached to a suspended sentence are enforceable with immediate effect. The appellate court can overrule this decision. For the time being, these specific provisions should still be seen as exceptions to the rule that as long as a legal remedy is or can be availed of, then the enforcement of the sanction imposed by the previous instance is not possible.

Re 3. The *third basic principle* is that the practical implementation of the sanction within the statutory framework is vested in the executing, administrative authorities, and thus not in the courts or the public prosecutor. The administration has therefor to respect the sentence, applied by the court. But depending on the nature of the sanction, there is more or less room and necessity for variations in the method of enforcement. Generally speaking, the possibility of variation will exist if the enforcement of the sanction spans a certain amount of time. In other words, this might be clearly necessary in connection with a custodial sanction of several years, or at least this need is much less in the case of sanctions that essentially consist of the confiscation of property, whereby the decision and the enforcement more or less coincide (chronologically).

In particular, if there is a big variation in the enforcement modalities of a sanction, then this creates a need for further rules on the enforcement and the possibility of challenging decisions for the application of those rules in legal proceedings. The law confers on the penitentiary authorities, in some cases subject to certain conditions, the power to determine the further (even deviating) implementation of the punishment imposed by the court. For example, it can allow a fine that has been imposed to subsequently be paid in instalments. A prison sentence imposed as a form of deprivation of liberty can be implemented partially in the form of a so-called penitential programme, and thus as a restriction of liberty.

The following conclusion can be drawn in relation to these basic principles. Within the Dutch system of sanctions, a deliberate choice has been made for a system whereby, as a rule, the prosecuting public prosecutor and the sentencing court do not have any control over the enforcement. They do not decide if, when, and exactly how the enforcement will take place. The public prosecutor can make recommendations about the time and manner of enforcement, and the courts can give directions about this in the judgment. However, these possibilities are only made use of on a limited scale. The Minister of Justice and Security, as the executing authority, is not bound by these recommendations or directions, but in the event of a deviation from such, it is assumed that a statement of reasons will be given, although this is not prescribed in so many words.

2.3 Prohibition on retroactive force

As a part of the legality principle, under Article 1(2) Criminal Code, there is a prohibition on retroactive force.[8] See also Article 7 ECHR. In terms of the sentencing process, this means that the courts are not allowed to impose a more severe punishment or criminal law measure than was prescribed at the time when the punishable offence was committed. On the other hand, if the prescribed punishment is subsequently reduced by the legislature, then the offender will be entitled to benefit from the new lower maximum punishment that has ensued from the (apparent) change in the prevailing opinion about the punishability of the offence. In terms of enforcement, the prohibition on retroactive force as part of the legal system of sanctions does not have any or only limited significance, because any changes to the law will not affect the sentencing of the offence. Legislative amendments that include a limitation of the possibilities for conditional release, for example, also apply for prisoners for whom a custodial sentence was imposed by the courts before the relevant legislative amendment entered into force.

3 Human rights requirements as regards the sentencing process and the enforcement of sentences (with exception of the human right principle of legality)

3.1 Sentencing process

3.1.1 Imposition of the sanction

A court judgment is pronounced on the basis of the indictment (the charges drawn up by the public prosecutor) and the investigation of the case by the court at the trial. Apart from a few exceptions,[9] the starting point is that sanctioning is only possible if the offence has been proven and is qualified as a crime, and thus the accused is punishable. These questions and the question of which punishment should be imposed have to be answered in one and the same judgment. The Netherlands does not have a two-phase process with separate proceedings for the imposition of the sanction (the sentencing process). For a judicial decision for the imposition of a sanction, Article 6 ECHR is applicable. Naturally, the court has to determine that all the legal conditions for the imposition of a sanction have

8 Article 1(2) CC holds: "Where the statutory provisions in force at the time when the criminal offence was committed are later amended, the provisions most favorable to the suspect or the defendant shall apply."

9 It is always possible that perpetrators who are not criminally responsible due to a mental disorder, and who therefore cannot be held culpable for the crime, could have a hospital detention order imposed on them to protect society against the risk of re-offending; the criminal court can also order them to be committed to a (civil) mental healthcare institution.

been satisfied. According to case law, the grounds given for that determination in the judgment do not have to meet particularly high standards. No further conditions are prescribed under the law for a custodial sentence, fine, or community service. It is therefore often sufficient for only a reference to the statutory provision the sanction is based on to be included in the judgment.

Insofar as possible and necessary, the investigation of the court at the trial will take into account the factors that determine the nature of the punishment: the seriousness and the nature of the offence, the circumstances under which the offence was committed, and the personality and personal circumstances of the accused. In the case of (very) serious criminal offences, at the initiative of the public prosecutor, and sometimes also of the defence, an investigation will be carried out into the personality and personal circumstances of the accused before the trial takes place. This investigation will be carried out by employees of the probation service and laid down in a report so that the results of the investigation can be discussed at trial and can be used as argument for the sentencing decision of the court. If there are indications that the accused has mental problems, then this type of investigation will be carried out by experts in behavioural sciences, such as a psychiatrist and a psychologist. The most in-depth type of investigation is carried out during a stay in a psychiatric observation clinic and followed by a multidisciplinary report. The accused is not obligated to cooperate with an investigation into his personality or personal circumstances. However, he will have to comply with a committal to an observation clinic. If this type of investigation has not been carried out prior to the trial, the court can also decide to order this later on (even on appeal) if it deems it appropriate in connection with the contents of the sentencing decision or the fairness of the sentencing process.

3.1.2 Reasoning of the sanction

Statutory obligation to provide grounds

Due to the large amount of freedom given to the courts by the legislature in relation to the determination of the sentences(s) within the broad legal framework, there is a statutory obligation to state the reasons for the sanction imposed in the judgment in each specific judgment. The Code of Criminal Procedure includes a general obligation to state the reasons for the sanction imposed in Article 359 Code of Criminal Procedure. A specific, more detailed reasoning is, moreover, required under the law for the imposition of a sanction that entails a deprivation of liberty. The judgment will then have to include an explanation about why a custodial sanction has now been imposed, and the circumstances that were taken into account for the determination of the length of the custodial sanctions have to be described wherever possible. The reasons for the granting of a judicial pardon also have to be explained in the judgment.

Application in practice (1): cursory

In practice, the reasoning of sanctions in the judgment is rather cursory. If the sanction that has been imposed does not entail incarceration, the reasoning of the sanction usually consists of no more than a widely-applied standard formula: in light of seriousness and the nature of the offence, the circumstances under which the offence was committed, the personality of the accused, and his personal circumstances. This says relatively little, because it does not explain why the offence was serious, or what personal circumstances were taken into account. However, it is more or less standard practice to mention whether the accused has been convicted of criminal offences before. In practice, any re-offending will play a prominent role in the determination of the sanction, and therefore it is explicitly mentioned. Furthermore, the bar is not set very high for the extra obligation to state the specific grounds for a sanction that entails a deprivation of liberty. The court only has to state that the only appropriate punishment was a prison sentence in order to satisfy the specific reasoning obligation, because the judgment therefore shows that the court was at least aware of the fact that it had imposed a punishment that entailed a deprivation of liberty. In the reasoning of the sanction, the court does not have to show that it considered all or the most important factors for the sanctioning, or how it assessed the relative weight of these factors, either separately or in their mutual interrelationship. Unlike in the case of the more detailed formulation of sanctioning guidelines and the binding of the courts to such, which is generally considered to be undesirable, there is a more broadly supported opinion among legal scholars that calls for the sanctioning process to be regulated in more detail via the tightening up of the requirements set for the reasoning of the sanction in a judgment.

Application in practice (2): extra

The observation that the application of the rules on the obligation to provide grounds is not subject to stringent requirements does not prevent the criminal court from giving a more detailed explanation of the punishment imposed on the accused in a particular case if it wants to. It is becoming increasingly common for Dutch criminal courts to do that in rather serious criminal cases, especially those that receive a lot of media attention. The punishment that has been imposed and/or the alternatives that were not chosen are then often reasoned more extensively than the minimum prescribed by the Code of Criminal Procedure, in order to explain the sentence to the victims and to the general public. The grounds for the sentence in such cases will, for example, often explain why the court, in light of the legal possibilities, decided to impose a life sentence, or conversely why it decided to impose a (long) fixed-term prison sentence instead of a life sentence. This even though the rules on the reasoning of a punishment in the Code of Criminal Procedure do not compel the court to provide such a detailed explanation.

In addition to this more or less non-mandatory extra reasoning, the law also gives the public prosecutor and the defence the possibility of compelling the court to provide a more detailed reasoning of the sentence. To that end, they have to take forward so-called 'explicitly reasoned positions' in their pleadings. If the court decides to disregard such positions, it will then have to explain the reasons why. However, the Supreme Court has set certain requirements concerning explicitly reasoned positions. The positions have to be clearly formulated, supported by arguments, and accompanied by an unequivocal conclusion. A lawyer pleading in the fact-finding instance will generally be able to satisfy these requirements, especially if he expressly states that he has taken such a position as defined under the law. The strict requirements have been criticised in legal science and practice. Furthermore, a court can discuss any position of the parties to the proceedings in more detail in its judgment that it deems appropriate for the proper understanding of its decision.

Frequently occurring factors for (the reasoning of) a lower punishment

If the reasonable term for the holding of a trial has been exceeded, then this can lead to a lower punishment. This includes, for example, the handling time of two years per instance, or the late submission of procedural documents by the court in the first instance for the handling of the case on appeal. This type of sentence reduction frequently occurs in practice in the Netherlands, in many cases based on a sliding scale, due to backlogs in the handling of criminal cases. However, the court is then required to explicitly state how the reduction was determined. The reductions are, however, limited in terms of size.

To a lesser extent, irregularities and procedural defects in the preliminary investigation of a criminal offence can also lead to a reduction of the punishment. This will depend on the importance of the regulation that has been contravened, the seriousness of the defect, and the prejudice that has been caused as a result. This can include, for example, a failure to obtain the necessary permission from the judge to conduct a more invasive ('systematic') search of a smartphone. This is not a power, namely, that every investigating officer has.

Control of the reasoning

It is important to point out that the appellate courts in the Netherlands do not review the judgment of the court in the first instance, but conduct a new trial of the case, and therefore determine a (new) sentence of their own. That is why the appellate court is not obligated to explain any difference between its sentencing and the sentencing of the court in the first instance. Not even if that involves a (sometimes considerable) reinforcement of the sanction.

An inherent feature of cassation proceedings, which are under Dutch law possible after an appeal, is that the court of cassation cannot deliberate on the determination of the punishment and the associated determination and evaluation of circumstances of a factual

nature that the court of fact apparently deemed important for such, such as the circumstances under which the offence was committed, the personal circumstances of the accused, etc. As the court of cassation, the Supreme Court does not control whether or not the lower courts gave (sufficient) consideration to all the aspects relevant for the determination of the sentence in the grounds for the sentence. On the other hand, an assessment will be made during the cassation proceedings, if necessary by the court of cassation at its own initiative, about whether or not the law permits the punishment that was imposed by the court of fact, and whether or not the court had established that any relevant specific statutory conditions for the imposition of a criminal law sanction had been satisfied. Furthermore, an assessment will be made in cassation proceedings about whether or not the above-mentioned 'explicitly substantiated position' has been adequately refuted. Apart from that, the court of cassation will/can only overturn the decision of the court of fact about the punishment under very exceptional circumstances. This might happen, for example, if the punishment imposed is not comprehensible based on the overall grounds that were given for such. Such a punishment would then not be automatically impermissible, but just insufficiently reasoned.

3.2 Enforcement of sanctions

3.2.1 Introduction

Since 1 January 2020, the responsibility for the enforcement of criminal law sanctions has been completely vested in the Minister of Justice and Security and the Minister for Legal Protection. Under the law, they are the central decision-making authority/authorities. In practice, virtually all of the decisions in relation to individual convicted persons are taken on behalf of the Minister by an administrative agency, the Administration and Information Centre for the Enforcement Chain (AICE) of the Central Fine Collection Agency (CJIB). It would be too much to include a more detailed description of the organisation of the enforcement process in this contribution. The aim of the centralisation of decisions about enforcement is to promote a consistent and prompt enforcement of sanctions.

3.2.2 Further rules: general

The general framework for the enforcement of sanctions is regulated at a national level in the Code of Criminal Procedure (Book 6), although this framework is rather broad. The general rules can also relate to the organisation of the enforcement. In connection with the standardisation of the enforcement process, case law has increasingly accorded more weight to (national and international) human rights. That applies in particular to the enforcement of custodial sanctions.

Article 15, paragraph 4 of the Dutch Constitution states: "A person who has been lawfully deprived of his liberty can be restricted in the exercising of fundamental rights insofar as these rights are incompatible with that deprivation of liberty." This formulation means that although fundamental rights are also accorded to prisoners, they can be restricted in the exercising of these fundamental rights. There therefore has to be a legitimate reason for a restriction of the exercising of such rights. Roughly speaking, there has to be legal basis for the restriction of the exercising of the fundamental right, and that restriction has to be necessary because the unrestricted exercising of that fundamental right would be incompatible with the deprivation of liberty. These grounds for restriction point in a certain direction, but in practice there is a lot of room for interpretation.

Nonetheless, the recognition of the basic principle of Article 15, paragraph 4, of the Constitution has major implications. It emphasises that a person held in custody has certain rights and obligations conferred on them (as applies for every convicted person). This means that in principle, he is entitled to invoke all the applicable rules of law just like any other citizen. The status of convicted person or prisoner does not alter this circumstance. There is no system of general restrictions under Dutch law. The invoking of fundamental rights and human rights can only be denied if there are valid, specific grounds to justify a restriction of such. This means, for example, that prisoners in the Netherlands can exercise voting rights, are entitled to such food as is prescribed by their religion, can form an association and can conclude a purchase agreement, all unless and in so far the exercising of such rights is incompatible with the deprivation of liberty. That means, for example, that the exercising of the right to vote in elections by prisoners is facilitated as a rule by the awarding of proxies to other people. The prisoners are not given the opportunity to leave the prison in order to cast their vote in an ordinary polling station in the outside world.

In particular, the importance of European fundamental rights has increased in the detention process. For example, a prisoner can invoke the right to privacy (Article 8 ECHR). Exceptions can be made insofar as they fall within the limitation clauses of the European human rights. Consequently, the requirement of justifiable grounds for a restriction on the right is necessary in this situation as well. The detention is just one of the relevant circumstances that has to be taken into account. Under national law, for example, visits and telephone calls between prisoner and the outside world can be monitored. However, under European case law concerning the restriction clauses, this monitoring has to be apparent and foreseeable for the prisoner. Disclosure of monitored phone calls that have been transcribed on paper for investigation purposes to the public prosecutor without any legitimate grounds, for example, is not permitted, unless and in so far this disclosure is allowed under the law.

3.2.3 Further rules: specific

Specific laws have been introduced in the field of (the organisation of the) enforcement, for (in particular) prisons and detention centres (Custodial Institutions (Framework) Act; *PBW*), institutions for the serving of hospital detention orders (Hospital Orders (Framework) Act; *BVT*) and young offenders institutions (Young Offenders Institutions (Framework) Act; *BJJ*), as well as separate implementing decrees in each case. The enforcement of custodial sanctions in the Netherlands is therefore quite *sub* justice, and this is related to the starting point that the prisoner has citizenship rights. Since the early 1950s, the legislation in question – we will confine ourselves here to the *PBW* – has contained guidelines for the enforcement of custodial sanctions, with a particular focus on the preparation of a return to society. However, this is not unconditional. The law also prescribes, namely (when it was first introduced: 1), the maintenance of the character of a prison sentence and a custodial measure, and (since 1 July 2015: 2) taking into account the safety of the public and the interests of the victims and surviving relatives. The preparation of a return to society is thus no longer the only or central benchmark for the enforcement of custodial sanctions. Furthermore, the Framework Acts include in particular rules about placement and transfer, the level of association, compulsory orders and punishments, freedoms and restrictions, the use of violence, the searching of (and sometimes in) the body and clothing, contact with the outside world, compulsory medication, legal protection, etc.

3.2.4 Legal protection

The citizenship rights of prisoners mean that in principle – just like every other citizen – prisoners have a right of access to judicial and other authorities. This includes, for example, access to the civil courts in connection with civil disputes, but also access to the national ombudsman in connection with complaints about the conduct of the national government, and access to medical disciplinary tribunals in connection with complaints about medical conditions.

The accent of the legal protection of prisoners in the Netherlands, however, lies with special judicial authorities: the complaints committee of the supervisory board in each institution, and (centrally) with the Council for the Administration of Criminal Justice and Youth Protection (RSJ) in The Hague. In the early 1950s, these authorities were established for the supervision of and the giving of advice about the prison system, the hospital detention system, and the probation service. Over time, the main emphasis has shifted somewhat, and a judicial branch was added, which has been further expanded. We will describe the main characteristics based on a number of tasks that have been assigned to these jurisdictional authorities in the prison system. A very significant aspect is that these authorities can impose binding decisions on the prison authorities in their capacity as a court. This requires an independent relationship between these authorities and the

special judicial authorities, which for the most part has actually been realised in practice. The special judicial authorities are made up of lay-people with specific expertise and interest in the enforcement of sanctions, and who perform their judicial task as an ancillary activity. The chairman is nearly always a member of the ordinary judiciary who is charged with the administration of justice.

The prisoner can submit a complaint to the complaints committee of the institution where he is being held about a decision concerning him that has been taken by or on behalf of the prison director. It is estimated that around 20,000 complaints are instituted each year. An appeal can be made against a decision about a complaint, and around 3,000 appeals are dealt with each year. It therefore involves a substantial number of cases, which has put pressure on the handling capacity. There has been a sharp drop in the prison population in recent years, but there has hardly been any decline in the number of complaint and appeal cases. This has been attributed to the excessive workload of the staff, which means they have very little time for personal contact with the prisoners.

Although the law is based on the starting point that complaints should be dealt with in a (closed) hearing within the institution by a complaints committee with three members, the situation is different in practice. In most cases, the complaint is dealt with by a single complaints judge. In some of these cases, the complainant is not even heard in person. This is not only due to the excessive workloads of the complaints committees, but also because sometimes a prisoner has already been transferred by the time the complaint is dealt with, or because the case is so straightforward that an oral hearing by a committee with three members would be excessive.

Apart from that, the proceedings are rather basic and informal. A written complaint does have to be submitted within a certain period (seven days) though, and while the law does require the grounds for the complaint to be described in the complaint notice, a failure to satisfy this requirement does not have any consequences. Although, of course, it does have to be clear what the complaint is about. Complaints are made about a wide variety of subjects, and in particular about the imposition of disciplinary sanctions, such as the sanction of solitary confinement in an isolation cell for up to fourteen days. Objections are also frequently made against the extension of compulsory medication orders. The complaint has to be directed against a decision, and thus not against a rule or a recommendation in general. The complaints committee can gather information from third parties, but the hearing of witnesses or experts is not mandatory and only happens on very rare occasions.

A ruling that a complaint is well-founded can be accompanied by one of the following decisions: a new decision of the complaints committee that replaces the decision of the director (rarely), an instruction to the director to make a new decision taking into account the decision of the complaints committee (occasionally) or – if the consequences of the decision can no longer be reversed – the awarding of a form of recompense, either in kind

(e.g., extra visiting rights; rare) or in cash (in principle this is not seen as compensation; regularly). The law does not obligate the complaints committee to attach one of these decisions to the upholding of a complaint.

As mentioned earlier, an appeal against a decision of a complaints committee can be lodged with the RSJ. There are, moreover, numerous decisions that can be heard by the RSJ as the first and only instance, and thus not on appeal. In such cases, the law sometimes allows an objection to be made in advance to the adjudicating authority, or to make a request for mediation. Decisions can be taken by the RSJ as the first and only instance that deals with complaints about such subjects as: placement and transfer, (conditional) release and suspension of sentence, compulsory medication, and medical disorders. In the latter case, a doctor will be part of the appeals committee of the RSJ.

The possibility for complaints and appeals procedures are nearly always completed with the option for an urgent relief order. In case of a complaint, the prisoner can apply to the chairman of the appeals committee of the RSJ for the suspension of the decision against him.

These extensive complaint and appeal possibilities have often been criticised over the years. A frequent criticism is that all too often the cases are about trivialities (was the food fresh and/or hot enough? etc), but in our opinion, the situation is somewhat different in practice. Nonetheless, we do think that more use could be made of informal dispute settlement procedures and/or mediation and/or that the law could include provisions for such. At this point in time, it seems as though this route might be taken more often.

3.2.5 Practice

The correctional facilities have a very diverse population. There is no doubt that a considerable proportion of inmates have a mental disorder, a learning disability, a (history of) addiction, or any other kind of socially or economically problematic background. Just like in the rest of the world, the prison population is not a reflection of the general population. A relatively large number of people only stay in Dutch correctional facilities for a short period (less than three months). The shorter the period of incarceration, the more problematic the realisation of a well-prepared return to society.

There appears to be very little consensus about the best way to organise the preparation of a return to society in practice. In our opinion, the policy of mitigating the inevitable harmful consequences of incarceration is still crucial. In the Netherlands, the policy of the government nowadays is mainly focused on an individual-based approach, whereby the emphasis is placed on the individual responsibility of the prisoner. In connection with this approach, a system of promotion and demotion has been in place since 2014. Promotion means an inmate will be placed in a so-called 'plus programme', where he can earn privileges depending on how good his behaviour is. In addition, there are also five preconditions for release that have to be satisfied as far as possible: a place to live; income;

care; debt management assistance; and possession of a valid identity document. The principle of regionalisation also applies. This means the prisoner (at least in the final stage of a long sentence) has to be placed in a facility in the region where he will live after his release.

4 Judicial discretion in sentencing in general: position of the independent judge and responsibility for fairness

Until recently, the authority of the courts over matters concerning the imposition of sanctions was more or less automatically accepted by society. There is no question of a crisis of authority, and in general there is still an overall reluctance to criticise judicial rulings. However, the mood is changing. Not only are individual decisions of the courts being criticised, but there is more criticism coming from the side of (populist and other) politicians and, following in their footsteps or otherwise, the media about the decisions of judges in a general sense. Criticism of sentencing practices is to be expected up to a certain extent, because the courts have a considerable amount of judicial discretion when it comes to sentencing. In particular due to the absence of more specific sentencing guidelines and the limited requirements that apply for the reasoning of judgments, the Dutch system is vulnerable to criticism that it does not have any systematic, consistent sentencing standards. Furthermore, it does not set any limitations concerning restrictions of the judicial discretion in sentencing by the legislature.

The latter development in particular has consequences for both the legislature and the courts. The legislature has limited the possibilities for the imposition of a community service order and increased the maximum custodial sentence from twenty years to thirty years. It has not yet got to the stage of mandatory minimum sentences. There is no overwhelming consensus amongst Dutch politicians or in legal literature that the judicial discretion in sentencing needs to be restricted through the introduction of a system of specific minimum sentences. Nonetheless, restrictive changes to the conditions for conditional release mentioned earlier have recently come into force.

The courts should not and must not be insensitive to the prevailing attitudes within society. For example, the length of sentences has increased over the last 10 to 15 years. In all probability, the call for longer sentences within society played a role in this, and in and of itself that is not necessarily a bad thing. Nevertheless: whereas there were only a handful of convicts serving a life sentence in the Netherlands even towards the end of the last century, there are currently 53 convicts serving a life sentence. Following a judgment of

the European Court of Human Rights,[10] a review procedure has now been introduced, although it only has a very limited scope. Another factor that has played a role is the emancipation of the victim. In the Netherlands, the victim is not a party to the proceedings, but does have certain rights during the investigation at the trial. For example, not only can the victim make a statement about the impact the crime on her or him, the victim can also state an opinion about the sentence(s). The pressure to impose higher sentences would therefore seem to be inevitable.

The restrictions on the judicial discretion in sentencing that have been introduced in recent years have also created a certain amount of tension between the legislature and the courts in the Netherlands. The courts are using the reasoning of a sanction as a way of counteracting the pressure to impose higher sentences. The courts are trying to create a better understanding of the reasons for a sentence by using normal language and clear formulations instead of legal jargon. In addition, a counterbalance also seems to have been found in the tightening up of the sentence reasoning requirements by the highest court (the Supreme Court) in respect of – roughly speaking – (proof of) aggravating accusations against the defendant, such as 'malice aforethought' and 'deliberate recklessness'.

The change in the prevailing attitude towards custodial sentences also has implications for the enforcement of such sentences. There is virtually no support to be found in political circles any more for restraint to be shown in the enforcement of such sentences. The enforcement itself now has to have a more or less retributive character, with a more austere regime. In our opinion this will quickly lead to insufficient attention being paid to those aspects that are beneficial for a successful return to society. This includes, for example, short-term release possibilities and training and education facilities.

5 Judicial discretion within a framework: guidelines, mandatory sentencing etc.

As mentioned earlier, the statutory framework (still) gives the courts a considerable amount of discretion concerning the determination of the sanction in a particular case. For a long time, there was no recognisable standardisation of the judicial choice of sanction(s), sanction severity, or sanction modality, and there have only been minor changes in recent times. In the past, there was criticism of the (risk of) differing sanctions in (more or less) identical cases. If the punishment for drunk driving in Leeuwarden is structurally lower than in Maastricht, then at the very least an explanation has to be given for this. That was often not the case in the past. Under the influence of this criticism,

10 ECtHR (Grand Chamber), Judgment of 9 July 2013, *Vinter and others v. UK*, Appl. 66069/09, 130/10 and 3896/10, and ECtHR, Judgment of 26 April 2016, *Murray v. Netherlands*, Appl. 10511/10.

during the course of the latter half of the last century reference points were developed for the courts, as were prosecutorial charging guidelines for the public prosecutor.

Reference points have only been introduced within the judiciary for the sentencing of commonly occurring offences. And although these guidelines are public, they are not binding. Essentially, they consist of a very brief description of the nature of a criminal offence, together with an indication of the punishment that is deemed to be customary for such. The more commonplace the nature of a criminal case is, the greater the significance of the reference points. In the case of serious crimes, though, the courts only have comparative case law as a guideline. The court will then use the sentence that was imposed in similar concrete cases as a guideline. Nationally and in the separate courts, records are sometimes kept, digital or otherwise, of the sentences that have been imposed. However, the introduction of a national digital registration system has proved more problematic. The courts are not required to explain any difference between its sentence and the reference points.

In practice, the punishment requested by the public prosecutor has a big influence on the determination of the punishment. In the vast majority of cases, the sentence imposed will not differ significantly from this. In the formulation of the sentencing demand, the public prosecutor is bound by the starting points of its own, public guidelines for prosecutorial charging.[11] The courts are not automatically bound by these guidelines, but in many cases they will tend to use them as a starting point for sentencing, partly in order to avoid any unexplainable inconsistencies. In particular the fact that the sentencing demand of the public prosecutor, which is based on these guidelines, is followed in many cases by the courts, or is used as a starting point for sentencing, somewhat compensates for the statutory discretionary in sentencing traditionally given to the courts in the Netherlands under the Criminal Code. Nonetheless, there is no question of simply the 'agreed' punishment being imposed: the binding effect of the guidelines on the courts is too small, and its own responsibility to impose the 'just' punishment in terms of length, combination, and modality too important.

6 Sentencing by non-judicial entities

Under criminal law, the courts no longer have exclusive sentencing authority. Of particular significance from a practical perspective is the power of the public prosecutor to impose an administrative sanction (or 'penalty order') that was introduced in 2008 for criminal

11 Sigrid van Wingerden and Jakub Drápal, 'Dutch prosecutorial sentencing guidelines: an inspiration for other countries?', *Leiden Law Blog*, 14 November 2018 (at: https://leidenlawblog.nl); Geert Pesselse, 'Sentencing', in: Van Kempen et al. (eds) (fn. 3), p. 144.

offences subject to a prison sentence of no longer than six years.[12] This type of penalty order can be used to impose a community service order of up to 180 hours, a fine, a confiscation order, a payment obligation to a victim, or a suspension of a driving licence. Furthermore, restrictive behavioural conditions can also be imposed. Under certain circumstances, law enforcement officers and entities or persons charged with a public task can also issue a penalty order on the grounds of the Code of Criminal Procedure, which in many cases is exclusively used for the imposition of a fine. If an administrative penalty is imposed, the accused can still submit the case to the criminal court, after which the same procedure will be followed as for the imposition of a punishment by the courts. There are also numerous possibilities outside of criminal law for the imposition of an (administrative) fine by (numerous) administrative bodies. This can and often results in a criminal charge in the sense of Article 6 ECHR, although the legal basis for this is not regulated by (national) criminal law but by administrative law.

The emergence of the administrative penalty outside of criminal law can have adverse consequences and is not without discussion. Up until now, there have been no adequate rules concerning the choice of sanctioning under criminal law or administrative law. There are big differences in the legal protection accorded to citizens under the two systems. As a rule, the criminal law route provides the most legal safeguards for citizens, both in connection with the imposition of the sanction and in connection with the enforcement of such. Furthermore, there is the ominous risk of double sanctioning, because under national law at least, only in exceptional cases will the prohibition on *ne bis in idem* apply with respect to criminal prosecution after an administrative sanction has already been imposed.[13]

7 Administrative discretion in the execution of sentences

In relation to the main points of this theme, we suffice with a reference to the above, in particular concerning Enforcement and Legality in section 2.2.4. A considerable difference is noticeable between the large amount of discretionary freedom in sentencing given to the courts by the legislature, and the somewhat limited discretionary freedom given under the law to the administration charged with the enforcement of the sanctions imposed by the courts. This difference is hard to explain merely from the perspective of the legal

12 Sven Brinkhoff, Joeri Bemelmans & Maarten Kuipers, 'Criminal Procedure Law', in: Van Kempen et al. (eds) (fn. 3), p. 118-119.

13 The developing line of reasoning by the two European courts might lead to a more restricted approach in the Netherlands on this point: ECtHR (Grand Chamber), Judgment of 15 November 2016, *A and B v. Norway*, Appl. 24130/11 and 29758/11; ECtHR, Judgment of 18 May 2017, *Jóhanesson and others v. Iceland*, Appl. 22007/11; and ECtHR, Judgment of 6 June 2019, *Nodet v. France*, Appl. 47342/14. For the EU: Court of Justice (Grand Chamber), Judgment of 20 March 2018, *Luca Menci*, C-524/15.

position of a defendant on the one hand and a convicted person on the other. Although we are of the opinion that it is not appropriate for administrative authorities to be given a similar amount of discretionary freedom in relation to the sanction decision as the courts have in relation to the sanction system in the Criminal Code, it nonetheless seems to us that the starting point for the enforcing parties could and should be somewhat less restrictive, on the condition that legal protection is still safeguarded in the event of greater administrative discretion.

8 Conclusion

Under the Dutch system of sanctions, the legislature has traditionally given the courts a great deal of discretionary freedom in sentencing of concrete cases. The system does not contain any limitations for the legislature, and this has led to a tightening up of the legal system of sanctions. There are no specific mandatory minimum sentences, nor are there any statutory criteria to ensure equitable sentencing. In combination with the minimal standardisation of the not binding reference points and guidelines for sentencing, this has led to the system of sentencing being criticised for not being systematic enough. This has been amplified by the fact that the requirements set for the reasoning of sentences under the Code of Criminal Procedure are only formally adhered to in practice, and are thus only of limited normative value. There is considerable room for administrative discretion in the enforcement of sentences. This will make individualisation in the enforcement of sentences possible. Unlike with sentencing, a consistent policy of uniform enforcement is less important. In general, the existing discretion is accompanied by adequate legal protection, albeit through a collection of incidental, mutually different, judicial rulings that do not form a cohesive whole. In this open Dutch system of sanctions, there are no explicit legal safeguards against, or limitations on, the reinforcement of the system of sanctions by the legislature, by the courts, or in the enforcement. The influence of the changes in the prevailing opinion of society and the political attention given to such has resulted in a stricter sanction climate in all three areas.

The application of the principle of legality to criminal punishments in New Zealand

Yvette Tinsley and Warren Young[*]

1 Introduction

New Zealand's system of sentencing and punishment, as with other aspects of the criminal justice system, is firmly rooted in the principle of legality (or 'the rule of law' as it is called in common law jurisdictions). That stipulates that criminal punishments should be imposed only in response to the breach of a rule. It also requires that the rules themselves, and the nature of the available sanctions for their breach, should be clearly defined in law at the time of the offence.[1] The principle of legality also carries with it the expectation that in an individual case the process by which liability for the sanction is determined, and the sanction is selected, should be legally prescribed, and applied consistently and fairly by an independent judicial decision-maker.

Fundamental human rights are set out in the New Zealand Bill of Rights Act 1990. Although this is entrenched, and therefore may be overridden by other specific statutory provisions, attempts should be made to eliminate any inconsistency or ameliorate the impact of a necessary inconsistency between new legislation and the freedoms provided for in the Bill of Rights Act.[2] Legislation should be interpreted in a manner consistent with the Bill of Rights Act.[3]

As in other common law jurisdictions, the law in New Zealand governing sentencing and punishment can be found in a mixture of statute and case law (precedent established by the courts in the context of adjudication in individual cases). Offences and penalties are prescribed by statute. The courts through case law interpret statute, define some of the detailed ingredients of offences and develop much of the sentencing framework.

However, there have been a number of inroads into this basic structure over the last four decades. While these may be viewed as undermining the principle of legality, and in

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1 Peter Westen, 'Two Rules of Legality in Criminal Law', 26 *Law and Philosophy* 3 (2007), p. 229-305.

2 Legislation Design and Advisory Committee, *Legislation Guidelines* (2018) (at: www.ldac.org.nz).

3 Section 6 New Zealand Bill of Rights Act 1990.

particular giving rise to the potential for inconsistency and injustice through the relatively unfettered exercise of prosecutorial or judicial discretion, they have encouraged the development of a greater array of preventive measures, and of community-based rehabilitative initiatives. In the view of their proponents, this has had had a more positive impact on the lives of offenders and victims, and achieved a greater reduction in rates of reoffending, than the types of formal statutory sanctions traditionally available to courts.

In this article we will describe the overall sentencing framework, and the sentencing process in individual cases, and consider the extent to which they accord with the principle of legality; outline the statutory provisions and other mechanisms governing the administration and enforcement of punishments and assess their effectiveness in ensuring adherence to fundamental human rights; and discuss the advantages and risks of a number of legislative provisions and other preventive and rehabilitative practices that have developed in recent years.

2 The sentencing framework

2.1 Legislative control and guidance

The framework for criminal punishments in New Zealand is prescribed through a variety of legislative provisions:

a. All offences must be prescribed by statute. Section 9 of the Crimes Act 1961 essentially provides that no person can be convicted of or punished for any offence not prescribed under an Act of Parliament, or under secondary legislation (regulations and bylaws) promulgated under the authority of an Act of Parliament. The principal Acts creating criminal offences can be found in the Crimes Act 1961, the Summary Offences Act 1981, the Misuse of Drugs Act 1975, the Psychoactive Substances Act 2013 and the Arms Act 1983, although there are a myriad of regulatory offences scattered across a large number of other Acts, regulations and bylaws.
b. The statutory instrument that prescribes a particular offence also stipulates the maximum penalty that may be imposed for that offence – usually a specified term of imprisonment (for example, 10 years' imprisonment for burglary), a fine of a prescribed quantum (for example, $10,000), or both. Section 8(c) of the Sentencing Act 2002 requires the Judge to impose the maximum penalty if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate. Courts have interpreted that to mean that the maximum penalty should be reserved for the worst class of case of its type, and it is therefore rarely imposed.

c. In the absence of a mandatory penalty the Sentencing Act 2002 establishes a range of other sanctions that may be imposed on an offender. If the maximum penalty is a fine, the court may also impose a sentence of reparation or otherwise discharge the offender or suspend the imposition of sentence. If the maximum penalty is imprisonment, the court may impose a fine or reparation, and may also substitute a range of other semi-custodial or non-custodial sanctions (home detention, community detention, community work, intensive supervision, or supervision).[4] The court also has a range of powers to order the forfeiture of property used to facilitate a crime in particular circumstances.[5] Section 10A of the Act provides a hierarchy of sentences, which is subject to the overarching statutory principle in section 8(g) that the court must impose the least restrictive outcome that is appropriate in the circumstances.
d. Mandatory penalties are very rare. The main current one can be found in New Zealand's form of "two strikes" and "three strikes" legislation, which has existed since 2010,[6] although the current government has committed itself to repealing it.[7] Under section 86D(2) of the Sentencing Act 2002, where the offender has previously received a final warning and is convicted of another offence specified by the provision, he or she *must* be sentenced to the maximum term of imprisonment.
e. There are a very small number of semi-mandatory penalties attached to particular offence provisions, although always potentially in conjunction with other discretionary penalties. These provide that the court *must* impose a particular penalty unless there are special reasons for not doing so relating to the offence (*not* the offender): for example, sections 35 and 81 of the Land Transport Act relating to an order disqualifying the offender from driving for a minimum period for specified driving offences; and sections 255-256 of the Fisheries Act 1996 relating to the forfeiture of property (including vessels) used to commit specified offences under that Act. The term "special reasons relating to the offence" is interpreted narrowly by the courts.
f. More commonly, a number of "presumptive" sentences are prescribed by statute. These are presumptive because they are always accompanied by a caveat that enables the Judge to depart from them on the basis of factors relating to the offence *or* the offender. For example:
   – Section 102 of the Sentencing Act 2002 requires that a person convicted of murder be sentenced to life imprisonment (an indeterminate sentence with a minimum term, after which release is determined by a Parole Board), unless the circumstances of the offence or the offender would make that manifestly unjust.

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4 See the permitted combinations of sentences in section 19 of the Sentencing Act 2002.
5 Section 142N of the Sentencing Act 2002.
6 Sections 86A-86I of the Sentencing Act 2002.
7 At: https://www.stuff.co.nz/national/crime/300140023/labour-set-to-repeal-three-strikes-law-which-sees-repeat-offenders-get-max-sentence.

- Section 128B(2) of the Crimes Act 1961 requires that a person convicted of sexual violation be sentenced to imprisonment, unless, having regard to the particular circumstances of the offence and the offender, the court thinks that the person should not be sentenced to imprisonment.
- Section 12 of the Sentencing Act 2002 requires that, where there has been loss of or damage to property caused by the offence, the court must impose a sentence of reparation, unless it is satisfied that the sentence would result in undue hardship for the offender or the dependents of the offender, or that any other special circumstances would make it inappropriate.
- Under the "two strikes" and "three strikes" legislation mentioned above, offenders who are convicted of a serious violent offence, committed when they were aged over 18, must receive a first warning as to the consequences of further offending. If they are convicted of a further serious violent offence, they must receive a final warning, and serve the full term of a determinate prison sentence without the possibility of parole. If they are then convicted of a third such offence, they must be sentenced to the maximum penalty for that offence unless the court determines that this would be manifestly unjust, and serve the full term without the possibility of parole. In the case of a conviction for murder after a first or final warning, the offender must be sentenced to life imprisonment without the possibility of parole unless the court determines that this would be manifestly unjust.

g. The Sentencing Act 2002 prescribes the main purposes and principles of sentencing, and the aggravating and mitigating factors that should be taken into account. These are primarily set out in sections 7, 8 and 9 of the Act, and are in large part designed to ensure that the sentence is proportionate to the seriousness of the offence and the culpability of the offender.

Taken together, these types of provisions might suggest that criminal punishments are subject to a fairly high level of legislative control. However, the reality is rather different. It is certainly true that legislation controls the types of punishment that are available to the courts and (as we discuss in more detail below) provides some guidance about how they are to be administered and enforced. Beyond that, the average member of the public would in fact get very little guidance from the statute book as to the nature and quantum of the punishment likely to be imposed in the vast majority of individual cases. There are a number of reasons for that.

First, offences are typically drafted in broad terms and cover a very wide range of behaviour; degrees of seriousness are rarely set out in the substantive offence.[8] Since the

8 Theft and receiving are exceptions, at least in respect of property value. Sections 223 and 247 of the Crimes Act 1961 provides that, if the value of the property stolen exceeds $1,000, the maximum penalty is seven

maximum penalty is reserved for the hypothetical worst class of case, it is generally a poor guide to the expected sentence in day-to-day sentencing practice for the ordinary run of cases, and the vast majority of sentences have little apparent relationship with it. Moreover, there is no systematic mechanism for revising maximum penalties. Where offences have been on the statute book for a long time and have not been revised, the maximum penalty may be outdated and not in accordance with contemporary mores, so that judges are apt to ignore it in determining the seriousness of one offence relative to another.

Secondly, mandatory, semi-mandatory and presumptive sentences tend to be introduced for political rather than sound policy reasons and invariably end up giving rise to potential injustice in individual cases. This is particularly apparent in the case of mandatory sentences. Section 86D(3) of the Sentencing Act, that as already noted requires the imposition of the maximum penalty for an offender on a final warning, has led to a sentence of seven years' imprisonment for an indecent assault on a female prison officer by impulsively grabbing her and squeezing her bottom,[9] and a sentence of 10 years' imprisonment on an offender who put his arm around a 10 year old girl in a store and touched her bottom.[10]

Presumptive penalties ameliorate the obvious injustice of mandatory sentences by leaving a considerable degree of flexibility for Judges to determine the appropriate sentencing outcome, since they can be departed from on such broad grounds as "undue hardship", "manifest injustice" and "circumstances relating to the offence or the offender". As a result, departure is commonplace. For example, the presumption of a life sentence without the possibility of parole under section 86E of the Sentencing Act has been applied in only one case;[11] in every other case the court has found that such a sentence would be "manifestly unjust". That is unsurprising, and demonstrates the limits of legitimate legislative control in this area. Because of the range of culpability and personal offender circumstances arising even in the case of murder, uniform sentencing levels will inevitably be seen as doing injustice.

The result, of course, is that the number of mandatory, semi-mandatory and presumptive sentences actually imposed in legislation represent a very small proportion of all sentences. Such measures therefore provide legislative control at the margins only where there has been some political imperative to do so. If greater use were to be made of them, they would inevitably result in even more injustice than they currently do by treating dissimilar cases as if they were the same.

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years' imprisonment not exceeding; if the value exceeds $500 but does not exceed $1,000, it is one year's imprisonment; and if the value does not exceed $500, it is three months imprisonment.

9 *R v Campbell* [2016] NZHC 2817.

10 *R v Rutherford* [2019] NZHC 1628.

11 *R v Tarrant* [2020] NZHC 2192.

Thirdly, there are significant limitations to the effectiveness of the general statutory statements of purposes and principles in providing significant guidance. There is no prioritisation of the various purposes of sentencing set out in section 7: sentencing judges can pick and choose the purpose that they believe is appropriate to the particular case as they want.

Moreover, the principles, and the aggravating and mitigating factors, are often expressed in general and sometimes contradictory terms. For example, section 8(e) of the Sentencing Act 2002 requires a sentencing court to "take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar circumstances", while section 8(i) requires the court to "take into account the offender's personal, family, whānau,[12] community and cultural background in imposing a sentence or other means of dealing with an offender with a partly or wholly rehabilitative purpose". Thus, although the principles provide some guidance as to how a sentence for one offence should relate to another, they provide no guidance as to the actual quantum apart from the maximum penalty, which as noted above generally bears very little relationship to day-to-day sentencing practice.

The statutory framework on its own is therefore inadequate to ensure adherence to the principle of legality in this area. The quantum of punishment has been largely left to the courts, and judges have a very wide measure of discretion as to the severity of the sentence for any particular offence. Thus responsibility for ensuring adherence to the principle of legality falls heavily on the courts through the establishment of principles and sentencing levels enshrined in case law. We turn to consider how that works in practice.

2.2 Sentencing case law

The main mechanism for determining sentencing levels and imposing enforceable constraints on disproportionate outcomes is review by appellate courts. Both prosecution and defence have a broad right of appeal; appellate courts are able to allow the appeal not only if there has been an error in the sentence imposed, but if they conclude that a different sentence should have been given. In reaching those appellate decisions, the courts have developed an elaborate body of case law that dictates the appropriate sentencing levels in classes of case. This works in two ways.

First – subject to the maximum penalty, the statutory purposes and principles, and any other statutory requirements or constraints – sentences in individual cases are generally

12 "Whānau" is the Maori term for family or extended family. Māori are the indigenous peoples of New Zealand.

determined by reference to the appropriate sentencing level or "tariff" in the light of the sentences imposed in other similar cases. Sentencing decisions are readily available through on-line publications (the principal one being "Sentencing Tracker"[13]), through which similar cases can be readily extracted by prosecutors and defence counsel for presentation to the court in their decisions. This leads to the development of a type of implicit sentencing policy through the application in each case of a synthesis of earlier decisions.

This has its limitations. The lower the offence level, the less rigorous the comparison with earlier cases; indeed, in lower level police prosecutions in the District Court, it is generally only defence counsel who make any submissions at all. Moreover, in such cases the implicit sentencing policy that develops establishes at best a local tariff that may be quite different from that applying in a different geographical area.

Secondly, guidance is provided by way of decisions of appellate courts that analyse sentencing levels for a particular type of offence across a range of cases when deciding an individual appeal. The most systematic example of such decisions is a guideline judgment produced by the Court of Appeal. These provide guidance about sentencing levels for a particular offence or class of offence, generally expressed as a sentencing range set out in bands. For example, in a recent leading guideline judgment[14] in relation to Class A drug dealing offences of serious violence with intent, the Court prescribed five overlapping bands of prison sentence length depending on the presence of specified aggravating factors, primarily the quantity of drug involved and the role played by the offender: community-based sentence to 4 years for offending at the lowest end of the spectrum; 2 to 9 years for the second lowest; 6 to 12 years for the middle band; and 8 to 16 years for the second to highest band; and 10 years to life for the top band. Such bands are deliberately overlapping in order to allow for sentencing judges to take an evaluative, rather than a formulaic, approach.[15]

However, leaving aside the breadth of these guideline ranges, appellate decisions are limited in their ability to ensure consistency and proportionality in sentencing. Appeals against sentences for offences are often heard by the High Court at a local level, giving rise to the potential for considerable inconsistency between one area and another. Guideline decisions by the Court of Appeal are dependent upon the cases that the parties take on appeal, and are largely confined to the more serious cases resulting in significant terms of imprisonment. It is difficult to find guideline judgments for offences of lesser seriousness. Appellate judgments are also reliant upon submissions from prosecution and defence

13 A subscription database through Westlaw NZ. A more limited selection is available to the public via the courts' own website (at: https://www.courtsofnz.govt.nz/judgments/).

14 *Zhang v R* [2019] NZCA 507.

15 *Nuku v R* [2012] NZCA 584, at [40].

counsel and generally do not have the full range of information that one would expect in order to enable the court to reach an informed decision.

As a consequence, case law is partial in its coverage, and sometimes based on information that is less comprehensive than is desirable. There can be shifts in sentencing levels over time without any change in either legislative policy or any explicit shift in case law, and substantial inconsistency in practice between one court and another (and to a lesser extent between one Judge and another) in the extent to which imprisonment is used for lower level offences.[16]

2.3 The sentencing process

The process to be followed by the courts in determining and imposing the appropriate sentences is prescribed in some detail, again through a mix of legislation and case law.

Legislative prescriptions are mostly contained in sections 24 to 31 of the Sentencing Act 2002:

- Section 24 sets out the process that must be followed when an offender pleads guilty, but denies some aspect of the summary of facts presented by the prosecution. This includes the possibility of a "disputed facts hearing" (a form of mini-trial) in which the prosecution must prove beyond reasonable doubt any disputed aggravating factor, and negate beyond reasonable doubt any disputed mitigating factor related to the offence, that is raised by the defence.
- Section 24A requires that, where restorative justice processes are available in the area, the court must adjourn the proceedings after a guilty plea has been entered, but before sentence, to allow enquiries to be made about whether restorative justice is appropriate in the particular case.[17]
- Section 25 enables the court, after the entry of a guilty plea, to adjourn the proceedings to enable any other inquiries to be made about the most suitable method of dealing with the case.
- Section 26 provides for the most common form of inquiry – a "pre-sentence report" by a probation officer, and section 26A makes such a report mandatory where a sentence of home detention or community detention is being considered.[18]

16 See, for example, Wayne Goodall and Russil Durrant, 'Regional variation in sentencing; the incarceration of aggravated drink drivers in the New Zealand District Courts', 46 *Australian and New Zealand Journal of Criminology* 3 (2013), p. 422-447.

17 Restorative justice typically involves a meeting between the offender and the victim, facilitated by a restorative justice practitioner, to discuss how the offender can make amends for his or her offending.

18 Home detention involves electronically monitored detention, and community detention involves an electronically monitored curfew, in a person's residence for up to 12 months.

- Section 27 also enables the court to receive information, orally or in writing, about the personal, family, community, and cultural background of the offender. While section 27 was not often utilized in the past, its use has increased in recent years, generally by way of a written "cultural report" that is parallel to the pre-sentence report. While section 27 reports need to be requested by the defence rather than mandated by the court, judges may "invite" defence counsel to request such a report. Recent appeals have illustrated the need for judges to actively consider whether a report would be useful, necessary and/or appropriate, and to invite applications under section 27 accordingly. If on appeal it is considered that a report would have made a difference, then the case may be remitted back for sentencing, or the appeal court may take a later report into account.[19] Because of the recognized impact of colonization on Māori over-representation in prisons,[20] section 27 reports have mainly been used in the sentencing of Māori offenders, particularly for serious offending for which cultural background may result in a meaningful discount for mitigation. However, section 27 is not restricted to any particular cultural group.
- Sections 28 and 29 stipulate who is to have access to such reports.
- Section 30 prohibits the imposition of a sentence of imprisonment unless the offender has had the opportunity to be legally represented when he or she was at risk of conviction. Assistance with legal representation may be provided through government-funded legal aid.
- Section 31 requires the court to give reasons in open court for any sentence or order imposed.

There are also provisions enabling a court to obtain information about financial means before imposing a fine or sentence of reparation. Case law is more detailed about the decision-making process. In particular, courts have stipulated that Judges should go through a notional three-step process in determining the final sentence:[21]

- The first step is to determine the sentencing "starting point" by assessing the seriousness of the offence and the culpability of the offender.
- The second step is to consider whether overall the offence is aggravated or mitigated by circumstances particular to the offender (including previous criminal convictions, a guilty plea or assistance to the authorities) to the extent that it requires a variation from the starting point.

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19 See, for example, *Carroll v R* [2019] NZCA 172, *Nicholas v R* [2019] NZHC 3426 and *Moses v R* [2020] NZCA 296, (2020) 29 CRNZ 381.

20 Waitangi Tribunal *Tū Mai Te Rangi! The Report on the Crown and Disproportionate Reoffending Rates* (2017) Wai 2540.

21 *Moses v R* [2020] NZCA 296, (2020) 29 CRNZ 381.

– The final step is to determine whether there are any special circumstances in the individual case (such as the promptings of mercy or rehabilitative prospects that will be enhanced by an alternative sentence) that justify a departure from the tariff sentence produced by the first two steps.

A failure to follow this methodology will lead an appellate court to consider the matter afresh. Ultimately, however, case law makes clear that an appeal is to be determined by whether the end sentence is appropriate rather than by whether it was reached by the right process.

Between them, the statutory provisions and case law impose a significant degree of rigour on the sentencing process. However, some of the rules that are currently developed by the judiciary are arguably a matter of policy that should be determined outside the context of individual cases. For example, while the fact that offenders should receive credit for a guilty plea is prescribed by legislation,[22] the extent of the credit (which depends upon the time at which it is entered) has been left to the courts to be determined and has varied over time.[23]

It should also be noted that, while the legislative provisions address the range of information that must be or may be provided to the court, how that information is then used is largely a matter for the judiciary to determine. So too is it left to the judiciary to regulate internal court procedures. In general terms that is necessary to allow for flexibility in doing justice and responding to crime. Indeed, many developments, both good and bad, in the way courts operate have occurred through judicial innovation. However, it runs the risk of encouraging or permitting developments, often in the guise or with the intent of "doing good", that are not governed by any legal framework, lack sufficient procedural safeguards and undermine the rule of law. Innovations under the general rubric of "therapeutic jurisprudence", which we discuss in more detail below, are a good example.

2.4 Conclusion on the sentencing framework

The discussion above suggests that, while the core components of the sentencing framework conform with the principle of legality, there are several areas in which it fails to do so. In particular, the heavy reliance on case law, developed by the judiciary to set sentencing levels in the context of sentencing in individual cases, is problematic. So too is the ability of the judiciary to innovate and develop alternative resolutions free from the

22 Section 9(2)(b) of the Sentencing Act 2002.

23 The current law is set out in a Supreme Court guideline judgment in *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

constraints of procedural justice. Both have the potential to result in inconsistency, unfairness and a lack of transparency in the way in which the quantum of punishment is determined. But there are two other, perhaps more significant, concerns that we have discussed in more detail elsewhere.[24]

First, the reliance on judge-made law in this area creates what Andrew Ashworth has called a "democratic deficit":[25] unelected Judges, who are necessarily removed from the political arena and only indirectly responsive to community concerns, largely determine the severity of punishment for categories of offending, and thus effectively dictate fundamental matters of sentencing policy. That is at odds with the proper separation of powers in a modern democracy.

Secondly, it largely removes any ability for the cost effectiveness of different sentencing options to be analysed. Judges, including those sitting in appellate courts, are largely reliant upon submissions from counsel and generally do not have access to the range of information that would enable them to undertake such an analysis. As a result, there is no ability for the government to assess the relative merits of public expenditure on the administration of sentences by comparison with other areas.

The answer is not to transfer more of the responsibility back to the legislature. That would result in even less conformity with the principle of legality. For example, if the legislature were to attempt to define sentencing ranges for like cases, that would require the development of much more detailed and graduated offence categories which would shift consideration of many offence and offender variables from the sentencing to the trial stage of the process, with attendant delays, inefficiencies and injustice. It would also necessarily give great weight to the gravity of the offence at the expense of offender culpability and mitigating factors.

In any event, at least in New Zealand the legislature is ill-suited to developing the type of detailed, evidence-based sentencing policy that would be consistent with the principle of legality. For the best part of the last 40 years, legislation has been substantially driven by the politics of law and order. At the risk of over-simplifying the complexities of politics in this area, politicians of whatever political persuasion have tended to follow rather than lead public opinion, or perhaps more accurately to adopt strategies that pacify strongly held minority opinion epitomised by populist law-and-order groups, for whom evidence as to cost-benefit is an unnecessary and irritating distraction. The problem is that the short-term political gains from responding to the demands of such groups outweigh the need for coherent, rational and evidence-based decision-making. That is why, whenever

24 Yvette Tinsley and Warren Young, 'Overuse in New Zealand', in P.H.P.H.M.C van Kempen and M. Jendly (eds), *Overuse in the Criminal Justice System*, Cambridge: Intersentia, 2019, p. 449-480.

25 Andrew Ashworth, *Sentencing and Criminal Justice*, Cambridge: Cambridge University Press, 2005.

the New Zealand legislature has attempted to define the quantum of punishment in more mandatory and specific terms, it has produced injustice in individual cases.

It is for this reason that some common law jurisdictions have established statutory bodies to develop sentencing policy (usually in the form of sentencing guidelines). These have taken a variety of forms. In England and Wales, this has led the establishment of a Sentencing Council to write detailed non-binding guidelines for the judiciary on sentencing levels for all offences.[26] In 2006, the New Zealand Law Commission recommended the establishment of such a body (also termed a Sentencing Council) in New Zealand, comprising a mix of judicial and non-judicial members.[27] In brief, the remit of this Council would have been the development of guidelines for the vast majority of specific offences or offence types, prescribing presumptive sentences for "categories" or "bands" of seriousness. These guidelines would have been the subject of an analysis of cost-effectiveness and the impact of the prison population, and would have been dependent on the approval of Parliament.

The government of the day, concerned about the rapidly rising prison population, decided to implement that recommendation, and Parliament subsequently enacted the Sentencing Council Act 2007 that came into effect in 2008. However, before there was an opportunity for the Sentencing Council to be established, there was a change of government in late 2008. The new government decided not to implement the Sentencing Council and the legislation was eventually repealed in 2017. Ironically, the government's lack of support stemmed from two apparently contradictory concerns: that a Sentencing Council would undermine judicial independence; and that the development of detailed sentencing policy by such a body would usurp the role of Parliament (notwithstanding the fact that Parliament had been given a critical role in approving the guidelines).

In the meantime, appellate courts have been taking a more active role in developing case law through an increasing number of guideline judgments, but most of the same gaps in policy remain. In short, the sentencing framework in its present form puts adherence to the principle of legality at risk.

3 Administration and enforcement of sentences

There is a fairly elaborate set of mechanisms governing the administration and enforcement of sentences. The administration of sentences of imprisonment and all community-based sentences (home detention, community detention, community work, intensive

26 Details of the Sentencing Council's work can be found at: https://www.sentencingcouncil.org.uk/sentencing-and-the-council/.

27 New Zealand Law Commission, *Sentencing Guidelines and Parole Reform* (2006), R94, NZLC, Wellington.

supervision, and supervision) falls to the Department of Corrections. The administration of monetary penalties (fines and reparation) falls to the Ministry of Justice.

The processes for enforcing monetary penalties are set out in the Summary Proceedings Act 1957. They provide extensive procedural safeguards, and largely ensure that offenders are not unfairly penalised for non-compliance because of lack of financial means. This includes orders for payment by instalments, and provisions for unpaid fines to be converted to community work. Case law has also established the general principle that any order for payments by instalments that lasts for longer than five years is likely to be regarded as oppressive.[28]

The Department of Corrections is governed by the Corrections Act 2004. This legislation prescribes in considerable detail how prisons are to operate. For example, it sets out the purposes and principles of the "corrections system"; the minimum entitlements of prisoners; the powers and duties of prison staff; search powers; processes for dealing with disciplinary offences within prisons; requirements for medical and other care; and required processes for managing risk.

Section 29 of the Corrections Act also establishes "inspectors of corrections", who are supposed to have the "independent" function of carrying out inspections of places where offenders are subject to sentences (including dwellinghouses), investigating complaints from offenders, investigating serious incidents and monitoring other situations of concern. In practice, they focus almost exclusively on prisons.[29] They are employed by the Department, and it may be questioned whether they are capable of providing truly independent oversight when they are working with, and colleagues with, the very same people whose actions they are scrutinising.

That independence is actually provided elsewhere. New Zealand is signatory to the United Nations Optional Protocol to the Convention Against Torture, that requires all member countries to establish processes for the independent oversight of custodial facilities. That is given effect through the Crimes of Torture Act 1993, under which the Office of the Ombudsman is constituted as a National Preventive Mechanism to oversee prisons. The Office regularly undertakes unannounced visits and inspections, including interviews with detainees, and publishes detailed reports and recommendations to which Corrections is expected to respond.[30]

Notwithstanding these safeguards, the Ombudsman is frequently scathing in the findings arising from the visits of his Office. Legal proceedings against Corrections are also not uncommon, and there is occasionally scathing judicial criticism of their

28 See, for example, *Scanlon v R* [2013] NZCA 502.

29 See https://inspectorate.corrections.govt.nz.

30 These reports are available to the public at: https://www.ombudsman.parliament.nz/resources?f%5B0%5D=category%3A1993.

performance. That might suggest that, while the mandatory legislative requirements and the Ombudsman's oversight function are designed to produce a system that complies with the rule of law, it lacks sufficient teeth to enable it to do so as effectively as it should.

There are far fewer safeguards around the administration of community-based sentences. Under section 25 of the Corrections Act, "probation officers" employed by the Department are given the function, and the Sentencing Act specifies the nature of the requirements under each sentence[31] and the potential consequences for breach of them. Beyond that, the Department is left with considerable discretion as to the operating protocols to which probation officers are expected to adhere, and as noted above does not actively monitor performance through its own Inspectorate.

In the mid-2000s, the judiciary were expressing some concern about what they perceived as inadequacies and inconsistencies in the enforcement of some community-based sentences. As a result, the Sentencing Act as amended in 2007 now allows the court to attach a special condition of judicial monitoring to a sentence of home detention or intensive supervision, which requires a written progress report to the Judge at least every three months. However, this provision has been little used, and has tended to focus more on the response of the offender rather than the performance of the Department.

Finally, the role of the Parole Board should be mentioned. This is a quasi-judicial body established under the Parole Act 2002, which has the function of determining when those prisoners eligible for parole should be released, and under what conditions. The criterion for release, spelt out in section 28 of the Act, is that the Board is satisfied that the offender does not present an undue risk to the safety of the community. The Act specifies the nature of permitted release conditions, their variation and discharge, and procedures for review and recall. Otherwise the Board is largely left to regulate its own procedure. Over time, it developed a number of detailed and publicly available policies, but many of these were repealed some years ago, and the Board's processes tend to be non-transparent and not readily challenged. Equally, while it has increasingly adopted the practice of releasing its reasoned decisions publicly, it does not hear cases in public and still operates largely out of the public eye. Thus it is difficult to assess, for example, whether just and fair decisions are being made in accordance with the rule of law.

4 Other penal and preventive measures to address crime

We have so far discussed the formal system of sanctions and the manner in which they are imposed and administered. We have concluded that, while there are obvious deficiencies

31 For example, the reporting requirements and any special conditions under a sentence of supervision, and the type of work permissible under a sentence of community work.

in some areas, for the most part it adheres to the principle of legality. However, that is not the end of the story. There are a number of other recent developments, both legislative and non-legislative, that are rather more problematic. They can be divided into coercive legislative measures, with many of the characteristics of a sanction, that have been introduced to mitigate the risk of offending rather than respond to offending; and informal measures to provide more flexibility and put more emphasis on rehabilitation and restoration in the response to crime, both within the formal system and as an alternative to it.

4.1 Measures to address the risk of crime

There are a number of areas where policy innovations have led to quasi-criminal measures that act as preventive mechanisms sitting outside the criminal law. They are introduced to address the risk that individuals may commit a crime, do not require that any criminal offence is actually committed, and are officially deemed to be civil orders. Such orders are becoming more numerous in common law jurisdictions. They have many of the hallmarks of a criminal sanction: they involve decisions by law enforcement officers; they restrict the movement or the activities of those subject to them; in the most extreme cases they entail detention; and breach of them may result in criminal penalties. Two examples of such quasi-criminal or hybrid orders introduced in recent years in New Zealand are Police Safety Orders and Public Protection Orders.

4.1.1 Police Safety Orders

Police Safety Orders were introduced in 2010, and extended in scope in 2019.[32] They seek to address the risk of family violence, harassment and intimidation at an early stage, in order to prevent escalation to more serious criminal offending. They may be issued against a person who is in a family relationship with another person where there is insufficient evidence of an offence but the officers attending have reasonable grounds to believe that the issue of an order is necessary to keep the other person safe from family violence. An order may last for up to 10 days.[33] The person bound by the order must leave the premises named in the order for its duration, even if they normally live there. The police may detain the person for up to two hours to issue and serve the order and there is no right of appeal. Although a 2014 evaluation commissioned by New Zealand Police was largely positive

32 Family Violence Act 2018, ss 26-58, which came into force 1 July 2019.

33 The maximum period was initially five days, but it was extended to 10 days in the Family Violence Act 2018.

about the operation of Police Safety Orders,[34] they may be seen to infringe the basic tenets of the principle of legality.

On the one hand, they can be justified as a preventive measure to address the very real problem of family violence, which too frequently goes undetected, and even when it results in a call to law enforcement, is not addressed through effective intervention. Police Safety Orders provide the opportunity for some "breathing space" between the parties. It also leads to a subsequent assessment to identify any risk that the person is likely, after the expiry of the order, to continue inflicting family violence; and any steps that the assessor considers the person should take to help stop the violence. To the extent that these assessments and any subsequent actions are properly resourced, they provide a form of early intervention to protect the victim that has arguably been lacking in the system.

On the other hand, the orders appear to lack some basic due process protections. They do not depend upon the commission of an offence; they can be imposed by police without oversight or judicial mandate, on the basis of very general concerns about safety; and there is no right of appeal, making them effectively unreviewable in practice. The requirement for the person who is the subject of the order to leave the residence gives rise to the potential for significant adverse financial and emotional consequences for both children and adults involved. They therefore carry the significant risk of permitting the unchecked use of State power by law enforcement agencies.

4.1.2 Public Protection Orders

Public Protection Orders were introduced under the Public Safety (Public Protection Orders) Act 2014. Under that legislation, which is intended to be used only for a very small group of serious recidivist offenders, the court, on application by the Department of Corrections, may make a Public Protection Order requiring the detention at a secure facility within prison precincts. The orders are civil rather than criminal. They may only be put in place for individuals who have served a finite prison sentence for a serious violent or sexual offence, but still pose a "very high risk of imminent and serious sexual or violent offending".

The court may not make an order unless satisfied that the person cannot be safely managed in the community by other less intrusive means (such as Extended Supervision Orders, that may last for up to 10 years after the expiry of a prison sentence). It must also be satisfied the person exhibits a severe disturbance in behavioural functioning established by evidence to a high level of each of the following characteristics:

a. an intense drive or urge to commit a particular form of offending;

34 New Zealand Police, *Police Safety Orders* (at: http://www.police.govt.nz/advice/family-violence/police-safety-orders).

b. limited self-regulatory capacity, evidenced by general impulsiveness, high emotional reactivity, and inability to cope with, or manage, stress and difficulties;
c. absence of understanding or concern for the impact of the respondent's offending on actual or potential victims;
d. poor interpersonal relationships or social isolation or both.

The orders are subject to regular review at least annually by a statutorily constituted Review Panel. Those subject to the order are generally detained in a separate facility within the confines of prison grounds, although they may be transferred on the order of a court to the prison itself if they pose such an unacceptably high risk to themselves or others, that they cannot be safely managed in the residence, and all less restrictive options for controlling their behaviour have been considered and any appropriate options have been tried. The manager of the separate facility must give them as much autonomy and quality of life as is compatible with their health and safety, their well-being and the orderly functioning of the residence, and they must be given the opportunity to provide input into the making of rules and the running for the residence.

A number of features of public protection orders are broadly consistent with the principle of legality. They are available only when a very high threshold is met; they are subject to extensive and detailed legislative protections; and those protections have been interpreted and applied restrictively by the courts in the context of the New Zealand Bill of Rights Act 1990, in particular human rights obligations protective of liberty and suspicious of retrospective penalties.[35]

On the other hand, although the legislation and the courts themselves have emphasised that the orders are not penal but preventive, they look like retrospectively increased punishment being imposed for offending at the end of the original sentence, thus amounting to double punishment.[36] Partly for this reason and partly because there is such a high statutory threshold for their imposition, the courts appear reluctant to resort to them; only a tiny number of orders have been made since the Act came into force.[37] Moreover, it is not entirely clear, if such a serious risk is presented, why the court cannot identify that at the time of the original sentence and impose a sentence of preventive detention (which is an indeterminate sentence, with release determined by reference to whether the offender presents an undue risk to the safety of the community). It is to be

35 *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83.
36 In *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126, [2020] 2 NZLR 110, (2019) 12 HRNZ 95, the Court found that some aspects of the regime were punitive, but there was insufficient inconsistency with the New Zealand Bill of Rights Act 1990 to justify a declaration of inconsistency.
37 See, for example, *Chief Executive of the Department for Corrections v Douglas* [2016] NZHC 3184; *Chief Executive of the Department of Corrections v Chisnall* [2021] NZHC 32.

doubted whether further information comes to light during the prison sentence that changes the nature of that assessment. The legislation represents a worrying incursion on the principle that persons (or at least those capable of exercising rational choice) should be deprived of their liberty on the basis of what they have done rather than what they might do.

4.2 Measures to provide more flexibility and put more emphasis on rehabilitation and restoration in the response to crime

Increasingly both prosecution agencies (primarily police) and courts themselves have been experimenting with, and sometimes entrenching, alternative ways of dealing with offenders, on the premise that traditional formal systems of conviction and sentence perform poorly in reducing reoffending. These generally operate without explicit statutory authority or any formal due process rules. While they are contingent on an admission of guilt by the offender and may require his or her consent, many of the usual legal protections to ensure consistency and fairness are absent. The primary examples are pre-charge warnings; Police pre-trial diversion; Te Pae Oranga iwi community panels; and a variety of court initiatives under the umbrella of "solutions-focused justice" or "therapeutic jurisprudence".

4.2.1 Pre-charge warnings

Pre-charge warnings are alternative resolutions that operate post-arrest and pre-charge. They act to divert defendants from prosecution in cases where there is evidential sufficiency to prosecute. They can be used only for offences with a maximum penalty of less than 6 months' imprisonment where there is an admission of guilt. If a warning is issued, it is not recorded as a criminal conviction, but the fact of the warning is held on record.

Pre-charge warnings have developed solely by way of the exercise of discretion by the police, who in New Zealand is the agency responsible for deciding whether to lay criminal charges. There is no legislative mandate for this practice, which is subject only to internal police policy. This might not be a matter of too much concern, because a pre-charge warning has no consequences by way of a sanction for the defendant, and a prosecution in such cases would likely be costly and disproportionate to the offending and achieve little or nothing. However, a review of pre-charge warnings by the Independent Police Conduct Authority found that there was considerable inconsistency in decision-making within and between police districts.[38] Pre-charge warnings were also more likely to be given to non-Māori offenders than to Māori offenders: since Māori are more likely to be repeat offenders,

38 Independent Police Conduct Authority, *Review of Pre-charge Warnings*, September 2016.

the eligibility criteria operate to exclude them more often. This suggests at least the need for greater procedural safeguards.

4.2.2 Te Pae Oranga iwi community panels

Te Pae Oranga iwi community panels, like pre-charge warnings, are a form of pre-charge alternative to prosecution. They operate for offences where a pre-charge warning is not seen to be a sufficient or suitable response, but where there is not the public interest to proceed with prosecution. The same New Zealand Police Alternative Resolutions criteria apply to these panels as to pre-charge warnings. Offenders must admit guilt and be over 17 years of age, and there must be evidential sufficiency for prosecution. Te Pae Oranga panels currently operate in 16 locations.[39]

Panels consist of three community members such as church leaders, sports coaches and school teachers. Participants can bring support persons (but not a lawyer) and victims may attend. Panels conduct a hearing, from which they impose conditions for the offender. Outcomes focus on restitution, accountability and education, including conditions such as apologies, community service, financial reparation, donations, essays and referrals to treatment or support services. The outcomes must generally be completed within a six-week period. If the conditions imposed by a community justice panel are complied with no criminal conviction is recorded, but the fact that the offender went through a community justice panel process is kept on file. Although the panels were designed to be responsive to the needs of Māori participants, recent statistics on non-compliance and non-completion by Māori participants suggest that they may be failing in this regard.[40] This is despite findings that the panels reduce harm (but not necessarily recidivism).[41]

4.2.3 Police pre-trial diversion

Once a person is charged, the police may offer a defendant 'diversion', so that they can avoid a conviction. Diversion is not a true alternative to prosecution, as the initial steps to prosecute are taken. It is reserved for more minor offences and favours first time offenders, although since 2013 police policy allows it to be used for recidivist offenders. If diverted, the defendant attends a first appearance in court, where the case is adjourned. The requirements imposed must be proportionate to the offence, achievable within the

39 See https://www.police.govt.nz/about-us/m%C4%81ori-and-police/te-pae-oranga-iwi-community-panels. For more information about Te Pae Oranga, see also NZ Police *Annual Report 2019/2020*, 2020, Wellington, at 42 (at: https://www.police.govt.nz/sites/default/files/publications/annual-report-2019-2020.pdf).

40 See https://www.rnz.co.nz/news/te-manu-korihi/430833/te-pae-oranga-should-have-te-ao-maori-approach-put-tangata-whenua-first-advocates-say.

41 Darren Walton, Samara Martin & Judy Li, 'Iwi community justice panels reduce harm from re-offending', 15 *Kōtuitui: New Zealand Journal of Social Sciences Online* 1 (2020), p. 75-92.

adjournment period, and 'appropriate' in that they must be directed towards reparation, rehabilitation or both.[42] They may include letters of apology, reparation, meeting with the victim, counselling or community work. If the diversion requirements are carried out, police offer no evidence in court, and the prosecution is withdrawn or dismissed.

Unlike pre-charge warnings, diversion has real consequences for offenders, with an array of conditions (including community work and monetary payments such as donations to charity) that are similar to penal sanctions. While the defendant has to admit guilt and consent to both diversion and the conditions imposed, that consent is sought as an alternative to prosecution and is arguably therefore a constrained choice. Moreover, there is no independent scrutiny of the sufficiency of the evidence leading to the charge, because there is little effective opportunity for the defendant to obtain legal advice. Moreover, as with pre-charge warnings it is a discretionary process operated by police, and is sometimes inconsistent in its application.

4.2.4 Therapeutic jurisprudence

Over the last 15 years, judges of the District Court have progressively been introducing that they have described as "solution-focused justice" through specialist courts under the broad umbrella of "therapeutic jurisprudence". These courts focus on offenders where issues such as addiction, homelessness, cultural disconnection and poor mental health, among others, are driving or contributing to their offending. They include Alcohol and Other Drug Treatment Courts (closely modelled on equivalent courts in the United States[43]) and "Special Circumstances" and "New Beginnings" courts for the homeless. There has also been piloted special listing and processes for family violence, sexual violence and for young adults. These have recently been brought together under the umbrella of a judge-led programme called Te Ao Marama,[44] launched by the Chief District Court Judge in November 2020.[45] It will initially operate in two courts, with a view to rolling it out across the country. At its core, the intent is to reform the courtroom so that there is greater focus on the underlying causes of crime; use of plain language in court; incorporation of Maori protocol in court processes; referral pathways for tailored rehabilitation or treatment; and wider community involvement and presence in the court, including the presence of available agency and community services. In essence, this

42 New Zealand Police, *Adult Diversion Scheme Policy*, December 2019 (at https://www.police.govt.nz).

43 See Toni Carr, *Governing addiction: The Alcohol and Other Drug Treatment Court in New Zealand*, unpublished PhD thesis, Victoria University of Wellington, 2020 (at: https://researcharchive.vuw.ac.nz/xmlui/handle/10063/8835) for a history of the Alcohol and Other Drug Treatment Court in New Zealand.

44 In the Māori language, the phrase "Te Ao Mārama" literally means "the world of light" or "the enlightened world".

45 See https://www.districtcourts.govt.nz/media-information/media-releases/11-november-2020-transformativete-ao-marama-model-announced-for-district-court/.

sounds like a move to develop the courtroom into what is sometimes called a "one-stop shop".[46]

On the face of it, these developments have much to commend them. Nobody can object to initiatives that make the process more user friendly, more timely, and culturally appropriate to the individuals being dealt with. Nor is a focus on rehabilitation, reintegration and community involvement problematic in itself. However, to the extent that these initiatives are developed by judges in an informal and *ad hoc* way, they can too easily undermine the principle of legality and risk injustice.

Alcohol and Other Drug Treatment Courts (AODTC) illustrate this. The AODTC operates between conviction and sentence. Judges utilise section 25 of the Sentencing Act to allow for treatment to occur before sentencing takes place. Rather than simply completing a recommended rehabilitative programme, the offender has regular court appearances, presided over by the same judge, who works with lawyers, counsellors, occupational therapists, police and social workers in a multi-disciplinary team. International reviews suggest that such courts risk undermining the principle of legality and offenders' procedural rights by prolonging time within the criminal justice system, effectively "punishing" for failing treatment, and often failing to offer appropriate treatment.[47] Special rapporteurs to the UN have advised caution before states expand the use of drug courts, especially where there is insufficient treatment provision to fulfil the demand of court-mandated treatments.[48] Internationally, the courts also do not have clear success in reducing harm or recidivism.[49]

While there has been some positive feedback and evaluation of the AODTC in New Zealand in relation to improved relationships, health and connection to cultural values,[50] research has also reported on some of the same problems identified with these types of courts internationally. Issues with the New Zealand AODTC that have been identified include punitive sanctions for non-compliance; "cherry-picking" of suitable participants; and poor provision of treatment options, particularly for Māori. There is also some concern that participants stay within the criminal system for longer than if they were

46 For an evaluation of a similar "one stop shop" community court model, see C.G. Lee, F. Cheesman, D. Rottman, R. Swaner, S. Lambson, M. Rempel & R. Curtis, *A Community Court Grows in Brooklyn: A Comprehensive Evaluation of the Red Hook Community Justice Center*, Williamsburg VA: National Center for State Courts, 2013.

47 Joanne Csete & Denise Tomasini-Joshi, *Drug Courts: Equivocal evidence on a popular intervention*, New York: Open Society Foundations, 2015.

48 UN Human Rights Special Procedures, *Information Note: Drug courts pose dangers of punitive approaches encroaching on medical and health care matters, UN Experts say* (2019) (at: https://www.unodc.org/documents/commissions/CND/2019/Contributions/UN_Entities/InfoNote20March2019.pdf).

49 Csete and Tomasini-Joshi (fn. 48).

50 Ministry of Justice, Alcohol and Other Drug Treatment Court Outcomes Evaluation 2018-19: Summary Evaluation Report (2019), Wellington, Ministry of Justice (at: https://www.justice.govt.nz).

ordinarily sentenced.[51] While some short-term impact on recidivism has been noted, this benefit is lost when assessments of reoffending are made after more than two years.[52] As the AODTC is a court-led rather than a legislative initiative, there is a lack of regulation of what requirements courts may impose prior to sentencing. This means that treatment requirements could be imposed that restrict the freedoms of participants in ways that are experienced as sanctions.

5 Conclusion

Notwithstanding its lack of a written constitution, New Zealand's system is wedded to the importance of the principle of legality/rule of law. In many ways, the principle of legality is upheld in New Zealand: all offences are provided for in statute, with corresponding maximum penalties attached. This means there is a level of clear communication to citizens as to what behaviours are deemed to be criminal offences, and what the extent of punishment might be. However, the guidance for judges in individual cases is not prescriptive and is purposefully designed to prevent a formulaic approach to sentencing. While this could be seen to undermine the principle of legality in its tendency to result in some inconsistency, it also leaves judicial officers with the ability to achieve fair outcomes by being responsive to the needs of individual offenders. Initiatives by police and the courts to reduce prosecutions and address social disparities have much to commend them, but without statutory authority there is a risk that these could undermine the principle of legality. These initiatives therefore need to be closely evaluated for their impact on individuals and vulnerable groups, to ensure that injustices do not occur.

51 Carr (fn. 44). See also Caitlin Sargison, A Sobering Inquiry: How New Zealand's Alcohol and Other Drug Treatment Court has Removed Fundamental Legal Protections From Drug and Alcohol Dependent Participants, unpublished Honours dissertation, University of Otago, 2018 (at: https://www.otago.ac.nz/law/research/journals/otago716075.pdf).

52 Ministry of Justice (fn. 51).

Legality, non-arbitrariness and judicial and administrative discretion in sentencing and the enforcement of sentences in Norway

Asbjørn Strandbakken[*]

1 Introduction

The central provisions and principles for sentencing in Norway are laid down in the Penal Code of 20 May 2005 no 28, while the enforcement of sentences is regulated by the Execution of Sentences Act of 18 May 2001 no 21. In this article, I will provide an overview of the Norwegian regulation of this area.

The Penal Code from 2005 replaced the General Civil Penal Code from 1902. The first modern Penal Code in Norway was adopted in 1842, however. The 1842 code was the result of a requirement in the Constitution from 1814 Article 94, which stated that the parliament should adopt a new penal code. Both the Constitution and Penal Code were adopted under the influence of the ideas and spirit of the Enlightenment. The French Code Penal from 1810, the criminal code from Bavaria of 1813 and the criminal code of Hannover of 1840 provided important inspiration for the Norwegian Penal code. The general discussion among criminal law scholars in Europe also had an impact on the Penal Code from 1902.[1]

The general approach to sentencing in Norway and in the whole of Scandinavia is characterised by a relatively low sentencing level compared with other countries. Sentencing policy is based on different principles. The most important aspect is the level of blame.[2] The sentencing should be proportional to the act the defendant has committed. The interest that has been affected by the act will be a central issue, for instance whether the act caused physical harm to an individual rather than just economic harm. However, deterrence also occupies a central position in Norwegian case law.[3] We find references to

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1 Gröning, Linda, Husabø, Erling Johannes and Jacobsen, Jørn: Frihet, forbrytelse og straff. En systematisk fremstilling av norsk strafferett. 2nd edition. Fagbokforlaget 2019, pp. 3-4 and Mæland, Henry John: Fra Kriminalloven til straffeloven. Tidsskrift for Strafferett 2002, pp. 345-359.

2 See further *Gröning/Husabø/Jacobsen 2019* pp. 694-704.

3 See further *Gröning/Husabø/Jacobsen 2019* pp. 704-707.

both general deterrence and individual deterrence in concrete cases from the Supreme Court; see, for example, Rt. 2000 p. 400 as regards general deterrence and Rt. 2002 p. 742 as regards individual deterrence.

2 The principle of legality with respect to criminal sanctions

Article 96 first paragraph of the Constitution of the Kingdom of Norway reads as follows: "No one may be sentenced except according to law, or be punished except after a court judgment". This means that only an act that has been criminalised by a law adopted by the parliament pursuant to Article 49 of the Constitution can be punishable. This procedure ensures that criminalisation has democratic legitimacy among the general public.

Even though Article 96 has largely been regarded as a guarantee that the public will know in advance which acts are criminalised,[4] the article also required the parliament to decide what kind of punishment would be imposed for a given criminal act, and the maximum punishment that could be imposed. This also underpins the guarantee laid down in Article 98 that all people are equal under the law. Clear provisions about what constitutes a criminal act and the limits on punishment will help the courts to decide identical cases in the same way.[5]

It is not regarded as a violation of Article 96 that the power to issue more detailed regulations and provisions concerning a criminal act is delegated to different ministries under the government, as long as the general provisions that lay down the punishment are enacted in law. Such a legislative technique ensures flexibility for the government when it comes to technical details. Citizens are able to read that such and such an act is criminalized and that the ministries are empowered to issue more detailed rules, and citizens are encouraged to familiarise themselves with the administrative provisions.[6] For example, it is enough for the public to know that dealing in narcotics is criminalised under the Penal Code Section 231, even though what is deemed to be a narcotic is laid down in administrative regulations authorised by Section 22 of the Drug Act of 4 December 1992 no 132.[7]

When it comes to the principal of legality and criminal sanctions, each section in the Penal Code must include what kind of penalty can be imposed – a fine, imprisonment etc. – and within which limits such a penalty may be imposed. According to the Norwegian

4 See Strandbakken, Asbjørn: Grunnloven § 96. Jussens Venner 2004, p. 191 and *Gröning/Husabø/Jacobsen 2019* p. 63.

5 See further *Gröning/Husabø/Jacobsen 2019* p. 62.

6 See further *Gröning/Husabø/Jacobsen 2019* p. 64 and *Strandbakken JV 2004* pp. 192-194.

7 See further Jacobsen, Jørn, Husabø, Erling Johannes, Gröning, Linda and Strandbakken, Asbjørn: Forbrytelser i utvalg. Straffelovens regler om voldsforbrytelser, seksualforbrytelser, formuesforbrytelser og narkotikaforbrytelser. 1st edition. Fagbokforlaget 2020, p. 274.

tradition, however, there are no specific limits on the use of fines.[8] As regards imprisonment, each section has to state the maximum penalty. For instance, the maximum penalty for theft is set out as follows in the Penal Code Section 321 second paragraph: "The penalty for theft is a fine or imprisonment for a term not exceeding two years". While the criminal act of theft can be penalised by both fines and imprisonment, both a minimum and a maximum sentence are set out for the act of homicide, cf. the Penal Code Section 275: "A penalty of imprisonment for a term of between eight and 21 years shall be applied to any person who kills another person". More general rules about the different sentences, such as imprisonment, community sentences, youth sentences, fines etc., are laid down in the general part of the Penal Code, see Chapter 5 and the following chapters.[9]

The principal of legality is also important in connection with the interpretation of criminal statutes.[10] The requirement for recognition as 'law' in several decisions by the European Court of Human Rights in Strasbourg is that the law has to be: "formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".[11] This requirement also applies to the interpretation of Norwegian criminal law. The courts are not allowed to interpret a criminal statute too widely, and it is not permitted to use criminal statutes by analogy.[12] However, when it comes to interpretation of statutes on sanctions, this requirement is less strict. To arrive at an appropriate sanction, the courts should have some discretion when determining which sanction should be imposed in a concrete case. Some limits have to exist, however. If a statute only states that the court should impose an appropriate punishment, this will be a violation of the principle of legality.[13] As already mentioned, the different sections of the Penal Code set out the maximum penalty, and there are general guidelines for determining the sanctions in the Penal Code Chapter 14.[14]

The Norwegian Constitution Article 97 embodies the principle of retroactivity: "No law must be given retroactive effect". This principle is closely connected to the principle of legality.[15] Even though Article 97 expresses a general principle, this principle is of special

8 See Andenæs, Johs.: Alminnelig strafferett. 6th edition by Georg Fredrik Rieber-Mohn and Knut Erik Sæther. Universitetsforlaget 2016, p. 438.

9 See further *Gröning/Husabø/Jacobsen 2019* p. 65.

10 See further *Gröning/Husabø/Jacobsen 2019* p. 66-68 and *Strandbakken JV 2004* pp. 202-208.

11 See, for instance, ECtHR, Judgment of 26 April 1979, *Sunday Times v. The United Kingdom*, Appl. 6538/74, para 49; ECtHR, Judgment of 25 March 1983, *Silver and others v. The United Kingdom*, Appl. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, paras. 87-88, and ECtHR, Judgment of 2 August 1984, *Malone v. The United Kingdom*, Appl. 8691/79, para 66.

12 See further *Gröning/Husabø/Jacobsen 2019* pp. 68-72 and *Strandbakken JV 2004* pp. 202-206.

13 See further *Gröning/Husabø/Jacobsen 2019* p. 68.

14 See Chapter V below.

15 See Andenæs, Johs.: Statsforfatningen i Norge. 11th edition by Arne Fliflet. Universitetsforlaget 2017, pp. 573-574.

importance in the area of criminal law. The core area of application is retroactive use of criminal statutes. The principle will also apply to stricter rules for punishment. As mentioned the maximum penalty for theft is a fine or imprisonment not exceeding two years. It would be a violation of Article 97 to adopt and apply a stricter penalty after the theft is committed.[16]

Whether the courts can increase the general level of punishment within the limits of the maximum penalty has been discussed in practice and in the literature.[17] In the case of sexual assault, cf. the Penal Code Section 291, the maximum penalty is a term of imprisonment not exceeding 10 years. If the normal punishment is four years, can the courts increase the level to six years without violating the principle of retroactivity? The legislator has from time to time expressed an opinion on the level of sentencing for different kinds of criminal acts, without any connection to a concrete amendment to the Penal Code. The Supreme Court has taken the view that an increase in the sentencing level should take place step by step, cf. Rt. 2009 p. 1412.[18] This might be a wise approach, although I do not believe that a different view would violate the principle of retroactivity.

In principle, the rule on retroactivity also applies to the execution of sentences. However, the principle is not applied as strictly in this area as it is in connection with retroactive use of criminal statutes and stricter sentencing. As long as the new regulation does not aggravate the execution of a sentence to such a degree that the punishment is changed to a stricter punishment, a new regulation will apply to an already imposed sentence.[19] A general change to the rules for release on probation that will limit a convicted person's prospects of release will not be a violation of Article 97.[20]

3 Human rights requirements in relation to the sentencing process and the enforcement of sentences

The sentencing process is part of ordinary criminal procedure. After a conviction, the court has to determine a sentence. Several human rights requirements apply to criminal procedure in Norway.[21] These requirements were originally set out in a general clause in

16 See further *Gröning/Husabø/Jacobsen 2019* p. 72.

17 See further *Gröning/Husabø/Jacobsen 2019* p. 73-74. See also Elholm, Thomas and Strandbakken, Asbjørn: Hvem skal nu bestemme – dommerne eller politikere? Liber Amicarum Et Amicorum Karin Cornils. Jurist og Økonomforbundets Forlag. København 2010, pp. 77-99 for a comparative discussion of the question from a Scandinavian perspective.

18 See further Matningsdal, Magnus: Høyesterett som straffedomstol – straffutmåling. Lov, Sannhet, Rett. Norges Høyesterett 200 år. Universitetsforlaget 2015, pp. 566-580.

19 See further *Andenæs 2017* p. 584 and *Gröning/Husabø/Jacobsen 2019* p. 74.

20 See further *Gröning/Husabø/Jacobsen 2019* p. 75.

21 See Øyen, Ørnulf: Strafferprosess. 2nd edition. Fagbokforlaget 2019, pp. 44-50.

the Criminal Procedure Act of 22 May 1981 Section 4, which stated that the provisions of the act shall apply subject to such limitation as is recognised in international law or are derived from any agreement with a foreign State.[22] The Act relating to the strengthening of the status of Human Rights in Norwegian Law – the Human Rights Act – was adopted on 21 May 1999. Several international conventions were incorporated into Norwegian law, for instance the European Convention of 4 November 1950 on the Protection of Human Rights, the UN International Convention on Human Rights dated 16 December 1966, and the Convention on the Rights of the Child of 20 November 1989, see the Human Rights Act Section 2. The conventions listed in Section 2 shall take precedence over any other legislative provisions that conflict with them; see the Human Rights Act Section 3. In practice, the European Convention plays the most important role, since there is an operating Court that decides whether a violation of the Convention has taken place.[23]

In 2014, the Norwegian Constitution was amended. The primary motivation for this amendment was to strengthen human rights in Norway.[24] The new articles incorporated into the Constitution were inspired by the parallel articles in the European Convention on Human Rights. New articles were introduced concerning the right to life, prohibition of torture and other inhuman or degrading treatment, prohibition on slavery and forced labour, cf. Article 93, the right to a fair trial, cf. Article 95, the presumption of innocence, cf. Article 96 second paragraph, equality under the law, cf. Article 98, the right of privacy and family life, cf. Article 102, and the rights of children, cf. Article 104.

These human rights have an impact on both the sentencing process and the enforcement of sentences. Firstly, the general right to a fair trial will apply to the proceedings concerning the question of guilt and the question of sentencing. In Norway, these two questions are normally handled together and at the same hearing. This means that the defendant has a right to have reasonable time for preparation of his defence, a right to an oral hearing, to defend himself or by legal counsel, to examine witnesses or have them examined etc.[25]

When it comes to the sentencing itself, there are some limitations on what penalties can be imposed.[26] Firstly, there is a general prohibition on the use of the death penalty, see the Norwegian Constitution Article 93 first paragraph, cf. ECHR Article 2. Secondly, a prohibition against torture and inhuman degrading treatment or punishment limits both

22 See further Keiserud, Erik, Sæther, Knut Erik, Holmboe, Morten, Jahre, Hans-Petter, Matningsdal, Magnus and Golten Smørdal, Jarle: Straffeprosessloven. Lovkommentar. 5th edition. Volume I. Universitetsforlaget 2020, pp. 50-58.

23 See further Aall, Jørgen: Menneskerettsloven. Lov og Rett 1999, pp. 387-401.

24 On the impact on criminal law and criminal procedure, see Bårdsen, Arnfinn: Grunnloven, straffeprosessen og strafferetten – noen linjer i Høyesteretts praksis etter grunnlovsreformen 2014. Jussens Venner 2017, pp. 1-44 and Rui, Jon Petter: Retten til rettferdig rettergang anno 2017. Jussens Venner 2017, pp. 123-184.

25 See further *Aall 2018* – Aall, Jørgen: Rettsstat og menneskerettigheter. 5th edition. Fagbokforlaget 2018. pp. 423-522.

26 *Gröning/Husabø/Jacobsen 2019* p. 607.

what kind of penalties can be imposed and how penalties are enforced.[27] One of the penalties that can be imposed in Norway is a community sentence, cf. the Penal Code Section 29 letter c), cf. Chapter 8. To avoid violation of the prohibition on forced labour, one of the conditions for imposing such a sanction is that the offender consents, cf. the Penal Code Section 48 first paragraph letter c).[28]

Lifetime imprisonment is not an option in Norway. The maximum penalty is 30 years' imprisonment. It is assumed that life imprisonment with no prospects of release on probation will be a violation of the Constitution Article 93, cf. ECHR Article 3 on inhuman or degrading punishment.[29]

4 Judicial discretion in sentencing in general: the position of the independent judge and responsibility for fairness

As already mentioned, the different sections of the Penal Code set out a maximum penalty. It is a general characteristic of the Penal Code that the different sections allow for a fairly wide range of penalties. In the case of homicide, the penalty can range from 8 to 21 years' imprisonment. In principle, this gives the judge great room for discretion. However, the Penal Code Chapter 14 sets out some general guidelines for determining sanctions with respect to both aggravating and mitigating circumstances. It is fair to say that, since the introduction of the Penal Code of 1902, the legislator has given quite wide discretion to judges when it comes to sentencing. The Penal Code from 2005 has the same point of departure. However, when the 2005 code was adopted, the parliament used an untraditional legislative technique in the Norwegian context. In the documents presented to the parliament, the minister introduced what was referred to as the 'normal punishment level' for different offences. This was intended to be a point of departure for sentencing without being formally binding on the courts. So, the courts still have room for discretion when it comes to sentencing.[30]

To understand judicial discretion in the sentencing context, we have to be aware of the central position of the Supreme Court in Norway. Until 1995, the Supreme Court was the court of appeal for all appeals against sentencing decisions by both courts of the first instance and the traditional courts of appeal. A defendant had until 1995 no right to appeal the question of guilt. The question of guilt was decided by the city or district court in cases concerning offences punishable by up to six years' imprisonment, while offences

27 *Gröning/Husabø/Jacobsen* 2019 p. 607.
28 *Gröning/Husabø/Jacobsen* 2019 p. 629.
29 ECtHR, Judgment of 9 July 2013, *Vinter and others v. The United Kingdom*, Appl. 66069/09, 130/10 et. 3896/10, and further *Gröning/Husabø/Jacobsen 2019* p. 85-86 and 667.
30 See *Matningsdal FS-Høyesterett* pp. 570-580 and *Gröning/Husabø/Jacobsen 2019* p. 685-686.

that could lead to more than six years' imprisonment were heard by the court of appeal as the first instance court. The Supreme Court therefore heard a huge number of appeals against sentencing, both from city and district courts and the courts of appeal. Compared with the system in many other countries, the Norwegian Supreme court was therefore in a quite unique position to establish guidelines for sentencing that would be binding on the lower courts.[31]

Following a reform adopted in 1995, all cases now start in the district courts, and the courts of appeal have been 'genuine' appeal courts as regards the question of guilt, sentencing, the application of the law, and procedural errors.[32] Decisions by the courts of appeal can be appealed to the Supreme Court. The reform relieved the Supreme Court, which no longer had to hear many cases that did not raise important questions or questions of principle. This means that the Supreme court can hear fewer, but more important cases concerning the application of the law, procedural errors and sentencing. In sum, the Supreme Court has maintained its central position in establishing guidelines for sentencing in Norway.[33]

Based on the principle of separation of power laid down in the Constitution, the courts operate independently of the executive branch of government and the parliament; see the title of the Constitution Part D, compared with Parts B and C.[34] In a given case, the executive and the parliament have no possibility to intervene in the courts' handling of a case. However, the parliament can adopt amendments to legislation and introduce a minimum sentence, issue general guidelines on mitigating and aggravating circumstances, introduce new forms of sanctions etc.[35] Such amendments will not have any impact on pending cases, but will be binding on future cases, cf. the Constitution Article 97.

All appeals to the Supreme Court have to pass a screening panel, the Appeals Selection Committee, which is composed of three Supreme Court justices. The Appeals Selection Committee will only consent to proceed with an appeal if the appeal concerns issues that have significance beyond the current case or if there are other special reasons to have the case tried by the Supreme Court, see the Criminal Procedure Act Section 323.[36] If a new offence has been criminalised, new sanctions introduced or new types of crime have arisen – for instance, an increase in organised crime, new knowledge about the impact of a given crime – the Appeals Selection Committee will be quite liberal and allow an appeal to proceed to the Supreme Court.[37]

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31 See Andenæs, Johs.: Høyesterett som ankeinstans for straffutmålingen. Rett og Rettssal. Et festskrift til Rolv Ryssdal. Aschehoug 1984, pp. 261-262.

32 On the reform in 1995, see Matningsdal, Magnus: *To-instansreformen*. Universitetsforlaget 1996.

33 See *Matningsdal FS-Høyesterett* pp. 549-564.

34 *Andenæs 2017* pp. 91-96, cf. 168-169.

35 See the next chapter.

36 See further *Matningsdal FS-Høyesterett* pp. 551-563.

37 *Gröning/Husabø/Jacobsen 2019* p. 687.

By hearing a concrete case, the Supreme Court can decide the level of sentencing and ensure that cases in the different courts of appeal are treated equally. Firstly, the Supreme Court will issue guidelines to the lower courts about the general sentencing level for a given offence. If the case concerns sexual assault, see, for example, Rt. 2014 p. 637, the court will normally start by looking at the case in light of earlier precedents. The case will be compared with earlier cases when determining the sentence.[38] If there are no earlier precedents, the court will try to compare the case with similar offences with a view to ensuring that similar offences are treated equally. When new Supreme Court decisions are added to earlier ones, it is possible to see a pattern and identify guidelines with respect to in which cases there are mitigating circumstances compared with the general level, and in which cases where there are aggravating circumstances. If the Supreme Court believes that it is necessary to increase the general sentencing level, this is normally done in small steps over time.[39]

The use of different sanctions also leaves the judge some discretion. For instance, when imposing a sentence of imprisonment, the court may decide that the execution of the sentence shall be suspended – a suspended sentence of imprisonment, cf. the Penal Code Section 34. Through case law from the Supreme Court, guidelines are established for the use of suspended sentences for different types of crimes.[40] In the same way, community sentences can be imposed instead of a sentence of imprisonment, cf. the Penal Code Section 48. Even though special conditions have to be met for imposing such a sanction – for instance, the severest penalty that would otherwise have been imposed is imprisonment for a term of one year – there is still a room for discretion on the judge's part. The Supreme Court has also played a leading role in developing the scope of application of community sentences.[41]

5 Judicial discretion within a framework: guidelines, mandatory sentencing etc.

As shown in Chapter 4 above, Norwegian law leaves quite a lot up to judges' discretion when it comes to sentencing. However, this discretion applies within a framework. In this chapter, I will describe part of this framework.

In addition to the penal framework set out in each section of the Penal Code, there are some general rules. Firstly, the judge can only chose penalties that are set out in the Penal

38 *Gröning/Husabø/Jacobsen 2019* p. 987.

39 *Gröning/Husabø/Jacobsen 2019* p. 688.

40 See Matningsdal, Magnus: Straffeloven. Alminnelige bestemmelser. Kommentarutgave. Universitetsforlaget 2015, pp. 296-316 with reference to case law from the Supreme Court.

41 See *Matningsdal 2015* p. 412-432 with reference to case law from the Supreme Court.

Code Section 29, i.e. imprisonment, preventive detention, community service, youth sentences, fines and loss of rights. When it comes to imprisonment, Section 31 determines that the minimum penalty is 14 days. A sentence of imprisonment shall be for a fixed period of time. Sentences of up to 120 days shall be for a fixed number of days, and imprisonment for a term exceeding four months shall be specified by the number of months and years.[42] These general rules must be seen in conjunction with the specific penal framework set out in the individual provision for an offence. When, for instance, Section 271 concerning physical assault prescribes a penalty of a fine or imprisonment for a term not exceeding one year, this means that the penalty framework is from 14 days to one year. The normal maximum term of imprisonment is 21 years. Due to international obligations, the maximum penalty for genocide, crimes against humanity, war crimes and aggravated acts of terrorism was increased to 30 years in 2013.[43]

For some types of crimes, the Penal Code prescribes a minimum penalty. As already mentioned, the minimum penalty for homicide is eight years, cf. Section 275. Other examples are sexual assault involving intercourse etc., for which the minimum penalty is three years, cf. Section 292, aggravated obstruction of justice committed as part of an organised criminal group, which carries a minimum sentence of one year, cf. Section 158 second paragraph, and aggravated narcotic drugs offences involving a substantial quantity, which carry a minimum penalty of three years, cf. Section 232 second paragraph.[44] The courts are of course bound by such statutes, but we do have examples where part of the sentence has been suspended.[45]

The use of minimum sentences has been criticised because such provisions put too strong limits on the courts' discretion in connection with sentencing in concrete cases. It has been argued that, rather than imposing a compulsory minimum penalty, the courts might be tempted to wrongly acquit a defendant. This risk was especially present when the question of guilt was decided by a jury, which gave no reasons for its verdict.[46] Even though the use of juries was abolished by the amendment of 16 June 2017 no 58, in force from 1 January 2018, there is still a risk of such outcomes.

Besides the general rules concerning the penal framework described above, some general rules on determining sanctions are set out in the Penal Code Chapter 14. These rules set out guidelines for sentencing, cf. the wording of both Sections 77 and 78, starting

42 *Matningsdal 2015* pp. 275-277.
43 Amendment of 21 June 2013 no 85.
44 *Jacobsen/Husabø/Gröning/Strandbakken 2020* p. 292.
45 See *Matningsdal 2015* pp. 317-318 with reference to case law from the Supreme Court.
46 See *Andenæs 2016* pp. 457-458 and Garde, Peter and Strandbakken, Asbjørn: Juryen: Avskaffe, reformere eller begrense bruken av den? Lov og Rett 2001, pp. 23-24.

with 'factors to be given particular consideration'. The chapter begins with a number of aggravating circumstances, cf. Section 77. The list of aggravating factors reads as follows:[47]

a. was committed by means or methods which are particularly dangerous or carry a considerable potential for harm,
b. placed human life or health at risk or caused loss of welfare,
c. was intended to have a substantially more serious outcome or this could easily have been the consequence,
d. was committed in a particularly reckless manner,
e. formed part of a planned or organised enterprise,
f. was committed by multiple persons acting together,
g. was perpetrated by the offender exploiting or misguiding young persons, persons in a very difficult life situation, who are mentally disabled or in a dependent relationship with the offender,
h. affected persons who are defenceless or particularly vulnerable to criminal offences,
i. was motivated by a person's religion or life stance, skin colour, national or ethnic origin, homosexual orientation, disability or other circumstances relating to groups with a particular need for protection,
j. was committed in the course of public service or was perpetrated by violating a special trust,
k. was committed by a person who has previously been the subject of a criminal sanction for similar acts or other acts of relevance to the case,
l. was committed in the presence of a child under 15 years of age.

The mitigating factors listed in Section 78 are as follows:[48]

a. there exists a situation or condition as specified in section 80 b), c), d), e), i) or j),
b. the offender has prevented, reversed or limited the harm or loss of welfare caused by the offence, or sought to do so,
c. the offence was to a significant degree occasioned by the circumstances of the aggrieved party,
d. the offender had, at the time of the act, reduced capacity to realistically assess his or her relationship to the outside world due to mental illness, mental disability, impairment of consciousness not caused by self-induced intoxication, or a state of severe mental agitation,
e. the offence was committed a long time ago, or the proceedings have taken longer than is reasonable based on the nature of the offence, through no fault of the offender,

47 Se further *Matningsdal 2015* pp. 675-701.
48 See further *Matningsdal 2015* pp. 701-745.

f. the offender has made an unreserved confession, or contributed significantly to solving other offences,
g. the offender himself/herself has been severely affected by the offence, or the criminal sanction will impose a heavy burden due to advanced age, illness or other circumstances,
h. the prospects for rehabilitation are good,
i. the offender was under 18 years of age at the time of the act.

In addition, Chapter 14 includes Section 79 on the imposition of penalties exceeding the maximum penalty when multiple offences, reoffending and organised crime are involved.[49] Even though it is possible to increase the maximum penalty set out in a specific section for the reasons given in Section 79, the maximum penalty can never exceed the general maximum, which is normally 21 years, see above in this chapter.[50]

On the other hand, Section 80 enables the courts to impose a lower penalty than the minimum penalty or a less severe type of penalty if certain condition are met. The wording of Section 80 is as follows:[51]

a.
    1. without knowing he/she was under suspicion has to a significant degree prevented or reversed the harm caused by the offence, or
    2. has made an unreserved confession,
b. is being sentenced for attempt,
c.
    1. has acted on the basis of a dependent relationship to another participant, or
    2. has only participated to a minor degree,
d. has exceeded the limits of
    1. an act of necessity (see Section 17),
    2. self-defence (see Section 18), or
    3. self-enforcement (see Section 19),
e. has acted out of justifiable anger, under compulsion or under obvious danger,
f. at the time of the act, had a serious mental illness with a significantly reduced capacity to realistically assess his/her relationship to the surrounding world, but is not psychotic,
g. at the time of the act, is mentally disabled to a lesser degree,

49 See further *Matningsdal 2015* pp. 745-763.
50 *Matningsdal 2015* p. 746.
51 See further *Matningsdal 2015* pp. 763-773.

h. at the time of the act, had a somewhat less severe impairment of consciousness than would provide exemption from punishment pursuant to section 20, d). However, if the impairment of consciousness is a consequence of self-induced intoxication, this only applies when particularly mitigating circumstances so warrant,
i. is under 18 years of age at the time of the act, or
j. has acted under negligent ignorance of the law when violating a penal provision which requires intent or gross negligence.

The fact that a defendant has made an unreserved confession, cf. Section 78 letter f) and Section 80 letter a) no 2, is a factor that has significance for sentencing. An unreserved confession enables a simplified procedure in accordance with the Criminal Procedure Act Section 248, but could also lead to major reduction in the sentence.[52] What importance the confession will have for the sentence has to be decided on a case by case basis. However, the sentence may be reduced by up to one-third,[53] although it is a condition that the confession is made at an early stage of the investigation before substantial incriminating evidence is discovered. The purpose of this regulation is that the law should benefit defendants who contribute to simplifying the process.[54] This regulation cannot be regarded as a 'plea bargaining' system, a system that is not recognised in Norwegian criminal procedure, see Chapter 6 below.

There is no tradition of formal sentencing guidelines or sentencing tables in Norway. However, there is one example that might resemble the formal guidelines or tables known from other countries. In 1936, Norway introduced a fixed blood alcohol limit of 0.5 thousandths when driving a car. A higher level than that was regarded as drunk driving. For decades, the legislator used criminal law to ensure that citizens respected drunk driving regulations, and almost all violations were met with a term of imprisonment of 21 days, which was the minimum sentence in the Penal Code at that time. In 1988, the Road Traffic Act of 18 June 1965 no 4, was reformed as regards sentencing for driving under the influence of alcohol. Instead of imposing sentencing without any reference to the level of the blood alcohol content, the new provision differentiated the punishment. It was regarded as a challenge to introduce such a huge reform and ensure that all offenders were treated equally by the different courts in the country. Even though the Supreme Court would over time develop guidelines through its case law, the legislator found it necessary

52 In 2018, 44% of all judgments in criminal cases were decided pursuant to a simplified procedure prescribed in the Criminal Procedure Act Section 248.
53 See *Matningsdal 2015* pp. 721-724 with reference to the preparatory works and case law from the Supreme Court.
54 *Matningsdal 2015* pp. 721-722.

to introduce guidelines in the legislation.[55] The result was that Section 31 second and third paragraphs of the Road Traffic Act were amended to read:

Any person who violates Section 22, first paragraph, shall generally be liable to

a. a fine and a conditional sentence of a term of imprisonment if his blood alcohol content is less than 1.0 thousandths or the alcohol content in his breath is less than 0.5 milligrams per litre of air,
b. a fine and a conditional or unconditional sentence of a term of imprisonment if his blood alcohol content is between 1.0 and 1.5 thousandths or the alcohol content in his breath is between 0.5 and 0.75 milligrams per litre of air,
c. a fine and an unconditional sentence of a term of imprisonment if his blood alcohol content is higher than 1.5 thousandths or the alcohol content in his breath is higher than 0.75 milligrams per litre of air.

When determining the penalty pursuant to the second paragraph, particular regard shall be paid to the degree of intoxication and the nature of the risks caused by the driving. Repeated violation of Section 22, first paragraph, shall be punished by a fine and an unconditional sentence of a term of imprisonment.

Details relating to the application of these guidelines have been adopted by the Supreme Court.[56] However, this is the only example of guidelines or tables adopted by the legislator in Norwegian criminal law.

In other areas, the Supreme Court has adopted guidelines through case law. Driving above the speed limit is one example, where the sentencing will depend on which speed zone the offence takes place in and by how much the speed limit is exceeded.[57] When it comes to drugs, the sentencing will reflect the type and quantity of drugs. Heroin is regarded as more serious than amphetamine. Marijuana is regarded as less serious than amphetamine etc.[58] The benefit of guidelines adopted by the courts in the form of case law is that such guidelines are less rigid when it comes to changing them. We have seen examples where the court has increased the 'normal sentence' for different sexual offences

55 NOU 1987: 11 p. 77.

56 Matningsdal, Magnus: Nyere reaksjonspraksis m.v. ved promillekjøring og etterfølgende alkoholnytelse. Lov og Rett 1993, pp. 151-180 and Engstrøm, Bjørn Edvard (ed.): Vegtrafikkloven. Lovkommentar. 6th edition. Universitetsforlaget 2019, pp. 429-459.

57 Strandbakken, Asbjørn: Senkingen av minstestraffen – betydning for straffutmålingen ved fartsoverskridelse. Lov og Rett 1991, pp. 221-236 and *Engstrøm 2019* pp. 120-128.

58 For a detailed review of the sentencing for different drugs, see Matningsdal, Magnus: Straffeloven. De straffbare handlinger. Kommentarutgave. Universitetsforlaget 2017, pp. 373-394.

based on new knowledge about the damaging impact such acts have on the victim, cf. Rt. Rt. 1999 p. 363. There are also examples of the sentencing level being reduced for some drug offences as a result of a risk assessment of new drugs introduced to the market, and of an assessment based on the proportionality between how dangerous a drug is compared with other drugs, cf. Rt. 2009 p. 1394 and Rt. 1996 p. 1726.[59]

6 Sentencing by non-judicial entities

As regards sentencing by non-judicial entities in Norway, the most important entity is the prosecuting authorities, which have the competence to issues fines. However, police officers and other public authorities, e.g. customs officials, also have the competence to impose fixed fines.[60] These fines are standardised and can be imposed for less serious violations of the Road Traffic Act Section 31 b, the Customs Act of 21 December 2017 no 119 Section 16-9, and the Act concerning Small Boats of 26 June 1998 no 47 Section 42. The amounts of the fines are set out in administrative provisions, and are differentiated in relation to the severity of the infringement.[61]

Pursuant to the Criminal Procedure Act Section 255 first paragraph, the prosecuting authorities may issue a writ offering the option of a fine, loss of rights or confiscation instead of an indictment.[62] In the second paragraph, the use of the loss of rights sanction is limited to a period of three years, and cannot include loss of employment, the right to hold certain positions and/or loss of the right to engage in business. Loss of rights that go beyond the limits in Section 255 second paragraph have to be decided by a court.[63]

The use of writs including a fine is only available in less serious cases.[64] Possession and use of small amounts of drugs for personal use, minor theft etc. are typical offences where fines can be used. Fines can only be used where imposing a fine is included in the penal framework for the offence, see for instance the Penal Code Section 321 on theft and Section 231 on drugs, which both includes fines as a sanction. On the other hand, serious physical assaults or sexual assaults clearly cannot be penalised by a fine, see Section 272 and Section 291.

The defendant decides whether he accepts the fine or not, cf. the Criminal Procedure Act Section 257. If he accepts it, there is still a limited possibility to appeal on certain

59 See further *Matningsdal 2017* p. 374.
60 In 2018, 270,337 penal sanctions were reported, of which 206,036 were fixed fines.
61 For the Traffic Act, see administrative provisions of 29 June 1990 no 492, cf. *Engstrøm 2019* pp. 469-480.
62 On the requirement for the content of a writ, cf. the Criminal Procedure Act Section 256.
63 *Øyen 2019* p. 245.
64 *Øyen 2019* p. 245.

conditions, cf. the Criminal Procedure Act Section 259.[65] If the fine is not accepted, the prosecuting authority has to decide whether the case should be brought before a court, which can uphold the fine after a hearing. In that case, the writ replaces an indictment, cf. the Criminal Procedure Act Section 268.

A waiver of prosecution pursuant to the Criminal Procedure Act Sections 69 and 70 is regarded as a criminal sanction, cf. the Penal Code Section 30 letter f). Waiver of prosecution pursuant to Section 69 may be regarded as a formal warning. To issue a waiver, the prosecuting authority has to conclude that the defendant is guilty, but that, based on an overall assessment, there are weighty reasons for not prosecuting the offence. Such a waiver can include conditions that are used in connection with a suspended prison sentence, for instance a probationary period.[66] Waiver of prosecution in accordance with Section 69 is often used in cases concerning minor offences by young offenders. Serious crimes will not normally be decided by waiver of prosecution with reference to Section 69.[67]

The other option for waiving a prosecution, Section 70, is motivated by economic considerations. If a defendant is charged with three homicides, a conviction for driving through a red traffic light will have no impact on the sentence. The prosecuting authority can then decide not to prosecute such minor offences with reference to Section 70.[68]

If the defendant disputes that he has committed an offence, he has the right to bring a decision to waive prosecution before a court, cf. the Criminal Procedure Act Section 71.

Transferring the case to the National Mediation Service for mediation is also regarded as a criminal sanction, cf. the Penal Code Section 30 letter g). This provision also includes transferring the case to the National Mediation Service for supervision and youth supervision purposes. Such a decision is made by the prosecuting authority, cf. the Criminal Procedure Act Section 71a.[69]

There is no 'plea bargaining' system in Norway. The formal obstacle to such a system is the Criminal Procedure Code Section 38 second paragraph, which states that 'the court is not bound by the indictments or contentions that are submitted. The same applies with regard to a penalty or other applicable sanctions.' Any offer of a specific penalty in return for a confession will also be a violation of the Criminal Procedure Code Section 92 second paragraph, which forbids making any promises during the interrogation of a defendant.[70] It cannot be ruled out that negotiations might take place between the defendant and the

65 Keiserud, Erik, Sæther, Knut Erik, Holmboe, Morten, Jahre, Hans-Petter, Matningsdal, Magnus and Golten Smørdal, Jarle: Straffeprosessloven. Lovkommentar. 5th edition. Volume II. Universitetsforlaget 2020, pp. 1089-1094.

66 See further *Keiserud/Sæther/Holmboe/Jahre/Matningsdal/Golten Smørdal 2020 I* pp. 335-336.

67 See further *Andenæs 2016* p. 521 and *Keiserud/Sæther/Holmboe/Jahre/Matningsdal/Golten Smørdal 2020 I* pp. 332-333.

68 *Øyen 2019* pp. 245-246.

69 *Øyen 2019* p. 246 and *Keiserud/Sæther/Holmboe/Jahre/Matningsdal/Golten Smørdal 2020 I* pp. 341-345.

70 See further Kjelby, Gert Johan. Påtalerett. 2nd edition. Cappelen Damm Akademisk, pp. 349-353.

prosecutor, especially in cases involving enterprises.[71] The only aspect of 'plea bargaining' is the above-mentioned possibility laid down in the Penal Code Section 78 letter f) of having a sentence reduced. It has been proposed that the system should be introduced in Norwegian Law.[72] However, this proposal has not gain much support among scholars and politicians so far.

In addition to the prosecuting authority, some public authorities have been empowered to impose civil sanctions that are not regarded as criminal sanctions. There appears to be an increasing number of situations where the legislator chooses to introduce civil sanctions instead of criminal sanctions. These civil fines can amount to huge sums since the normal target for such fines will be an enterprise. Civil fines of this kind are set out, for example, in the Competition Act of 5 March 2004 no 12 Chapter 7.

7 Administrative discretion in the execution of sentences

This chapter deals with two main questions: discretion as regards deciding the content of the punishment, and discretion as regards execution of a sentence by the Norwegian Correctional Service. When a defendant is sentenced to community service, cf. the Penal Code Chapter 8, the court will decide the number of hours, an alternative sentence of imprisonment and the execution period, cf. the Penal Code Section 49. The Court should also decide the conditions that the defendant shall comply with during the execution period, cf. the Penal Code 50. The more detailed content of the punishment is decided by the Norwegian Correctional Service, however.[73]

The use of youth sentences, cf. the Penal Code Chapter 8a, also leaves much to the discretion of the executing authorities. Youth sentences are based on the principle of restorative justice.[74] The execution of the sentence is left to the National Mediation Service. The Court decides a framework for the execution period, which is between six months and two years, cf. the Penal Code Section 52b. An alternative sentence of imprisonment is also decided by the court. If the conditions for a youth sentence are breached, the court has to decide the consequences, cf. the Penal Code Section 52c. Again, the detailed content of the sentence is decided out of court. The question of whether such a regulation fulfils the requirement that follow from the rule of law has been raised by scholars.[75]

In favour of the provision, it might be argued that the wide discretion offered enables the correctional service to impose conditions that are appropriate for the individual

71 See *Kjelby 2019* p. 354-355.
72 NOU 2016: 24 pp. 363-381.
73 *Gröning/Husabø/Jacobsen 2019* p. 627.
74 *Gröning/Husabø/Jacobsen 2019* p. 633.
75 *Gröning/Husabø/Jacobsen 2019* p. 637.

defendant, and that imposing community service and youth sentences is dependent on the consent of the defendant. When the alternative is imprisonment, it is reasonable to ask whether such consent is voluntary or not.

As regards serving the sentence in a formal institution under the Norwegian Correctional Service, the conditions for execution of the sentence will play a major role for the convicted individual. In general, the Norwegian Correctional Service is given wide discretion when it comes to the execution of sentences, and there are limited opportunities to bring a decision concerning execution before a court.[76] It is important to bear in mind that the execution of a sentence should not be an additional punishment.[77]

The point of departure is that a judgment shall be executed as soon as it legally enforceable, cf. the Criminal Procedure Act Section 452. However, pursuant to Section 459 second paragraph, execution may be deferred when weighty reasons so indicate. Such reasons could be that the defendant is undergoing treatment for illness, that he has sole custody of minor children etc. Even though the main rule is that deferred execution is not granted, Section 459 allows for the Correctional Service exercising discretion.[78]

When a sentence is to be served in a prison, the Correctional Service has to decide which institution the convicted individual will be committed to, cf. the Execution of Sentences Act Chapter 3. There are different levels of security in different prisons, cf. the Execution of Sentences Act Section 10. This decision also allows for discretion, even though the guidelines in the law and administrative guidelines are fairly clear.[79] Moreover, decisions to transfer a convicted person for the execution of a sentence outside prison are subject to special conditions, cf. the Execution of Sentences Act Section 16, and include an element of discretion.[80]

During execution of the sentence, the Correctional Service will make decisions which have an impact on how the defendant will experience his sentence, for example transfer to a less restrictive prison, cf. the Execution of Sentences Act Section 15, leave of absence from prison, cf. the Execution of Sentences Act Section 33, or escorted leave, cf. the Execution of Sentences Act Section 34.[81] If the inmate commits an act in violation of internal regulations, such conduct can be met with sanctions under the Execution of Sentences Act Sections 39 and 40.[82] All such decisions will include elements of discretion.

At the end of the execution period, the question of release on probation arises. Pursuant to the Execution of Sentences Act Section 42, an inmate can be released on probation after

76 *Gröning/Husabø/Jacobsen 2019* p. 715 cf. p. 721.
77 *Gröning/Husabø/Jacobsen 2019* p. 717.
78 See further *Keiserud/Sæther/Holmboe/Jahre/Matningsdal/Golten Smørdal 2020 II* pp. 1601-1602 and *Gröning/Husabø/Jacobsen 2019* p. 725.
79 *Gröning/Husabø/Jacobsen 2019* pp. 725-727.
80 *Gröning/Husabø/Jacobsen 2019* pp. 727-729.
81 *Gröning/Husabø/Jacobsen 2019* pp. 729-730.
82 *Gröning/Husabø/Jacobsen 2019* pp. 733-734 and 737-739.

having served two-thirds of his sentence. Conditions in the law and guidelines have to be taken into account when making a decision on release on probation. However, they still leave some discretion to the Correctional Service.[83]

8 Conclusion

There has been a long tradition of granting quite wide discretion to judges when it comes to sentencing in Norway. The penal framework is often wide, there are few minimum sentences, and there are no binding tables for fixing a sentence. This is still the situation today. All the Scandinavian countries have practised a humane policy with respect to sentencing.[84] Compared with many other countries, these countries have a relatively low sentencing level. The absence of life imprisonment and a normal maximum sentence of 21 years is clear evidence of this.

As shown, quite a lot of decisions concerning the enforcement of sentences also include an element of discretion. It is difficult to run an enforcement regime without leaving some discretion to the Correctional Service. There is therefore also a need for rules for administrative appeals against decisions made by the Correctional Service.

However, in a world where politicians seems to be losing national control of crucial areas such as the economy, the environment, global warming and the Covid-19 pandemic, there is also a clear tendency in Norway to politicise the field of criminal law. The demand for heavier sentences and to be 'tough on crime' has also reached our part of the world. This was very clear when the Penal Code of 2005 was adopted. It is new to give examples in the preparatory works of concrete cases from the Supreme Court, and to thereafter state that, under the new code, such cases should be met with heavier penalties. However, it is the politicians who decide the sentencing level in society. Criminal law scholars should contribute by sharing their knowledge about whether increasing the level of punishment will have a deterrent effect. In my opinion, such an effect is modest. The most important thing is that offenders are caught and held criminally responsible. After all, crime in a society will always mirror living conditions in the same society. With a sound welfare state, I believe that the Scandinavian region will still be characterised by a penal policy based on a humane approach and a relatively low sentencing level.

83 *Gröning/Husabø/Jacobsen 2019* pp. 731-732.

84 *Gröning/Husabø/Jacobsen 2019* p. 732.

Legality, non-arbitrariness and judicial and administrative discretion in sentencing and enforcement of sentences in Poland

Małgorzata Wąsek-Wiaderek and Adrian Zbiciak[*]

1 Introduction

The Polish legal system belongs to the civil law family. The sentencing process and the enforcement of sentences is governed by written law (statutes) and case-law, including the jurisprudence of the highest court in Poland, the Supreme Court (the Criminal Chamber). However, the Supreme Court, whose competence is limited to the interpretation of the law, does not have competence to create guidelines on sentencing since these are all provided in the statutes. Nevertheless, in general terms, there is space for their flexible interpretation and application. Moreover, the Supreme Court has limited power to intervene in the sentencing process since in cassation appeals, the parties to the criminal proceedings cannot invoke "disproportionality of the penalty or penal measure" as a ground for cassation. They may only indicate serious breach of procedural or substantive laws which led to obvious disproportion of the sentence. Only the General Public Prosecutor is entitled to lodge an extraordinary cassation appeal based on the objection as to the proportionality of sanction and, moreover, such objection may be directly raised only in cases concerning felonies. Thus, the sentencing process is left to the first and second instance courts.

Having regard to the nature of the Polish legal system, further analyses concerning the sentencing process and the enforcement of sentences will focus on the presentation of legal provisions with limited recourse to the case-law.

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2 The principle of legality and/or the rule of law as regards criminal punishments

The principle of legality is provided in Article 42 para. 1 of the Constitution of the Republic of Poland.[1] It guarantees that "only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law." According to the Constitutional Tribunal's interpretation, Article 42 para. 1 of the Constitution comprises two basic principles of justice, commonly recognized by civilized nations: *nullum crimen sine lege* and *nulla poena sine lege anteriori*. They both lead to the prohibition of retroactive application of the law (*lex retro non agit*), which also stems from the rule of law principle guaranteed by Article 2 of the Constitution. However, this prohibition has a limited scope of application since it concerns only the law unfavorable for the accused. Laws that mitigate or abolish criminal responsibility shall apply retroactively.[2]

Obviously, the prohibition of retroactive application of more severe laws applies to all penalties and penal measures provided for in the Polish legal system. However, this rule (as well as the principle *lex mitior retro agit*) does not apply to provisions regulating statutes of limitation, since periods of time barring, although included into the Criminal Code (Articles 101-105 of the Criminal Code[3]), are considered not to belong to the substantive criminal law and are conceived rather as measures of criminal policy. Hence, the law extending time-limits for prosecution, as less favorable to a defendant, may be applied retroactively with only one exception: the new law on statute of limitations cannot restore opportunity of prosecution which expired prior to entry into force of such law. So, once the time-limit for prosecution/punishment expired, the new law extending such time-limit cannot be applied to defendants.[4]

Furthermore, also regulations concerning conditional release of a convict are considered to be excluded from the discussed prohibition of retroactive application of more severe laws. It is argued that this institution concerns only the process of execution

1 The Act of 2 April 1997, Journal of Laws of 1997, no. 78, item 483, with amendments; thereafter referred to as 'the Constitution'.

2 Judgment of the Constitutional Tribunal of 15 October 2008, P 32/06, OTK – A 2008, No. 8, item 138.

3 The Act of 6 June 1997, consolidated text published in: Journal of Laws of 2022, item 1138; thereafter referred to as 'the CC'.

4 Judgment of the Constitutional Tribunal of 25 May 2004, SK 44/03, OTK – A 2004, No. 5, Item 46; judgment of the Constitutional Court in case P 32/06 referred to in a footnote 2.

of a penalty. For this reason, any modifications of prerequisites of conditional release to the detriment of the convict do not fall into the scope of *lex severior retro non agit* rule.[5]

Principles expressed in Article 42 para. 1 of the Constitution have been concretized in Article 4 § 1 of the CC by giving precedence to the new law. However, the former law should be applied if it is more lenient to the perpetrator. Furthermore, Article 4 of the CC embraces also consequences of other changes of the law in favor of a defendant after commission of a criminal act. Article 4 § 2 of the CC concerns application of the new law lowering the level of seriousness of a penalty and states that "if, according to the new law, the act to which the sentence pertained is subject to a penalty whose upper limit is lower than the penalty imposed, this penalty shall be lowered to the upper limit of the statutory penalty provided for such an act in the new law." Pursuant to Article 4 § 3 of the CC, if the new law provides that a criminal offence is no longer subject to a penalty of imprisonment, such an enforceable penalty is commuted to a fine or to a restriction of liberty, assuming that one month deprivation of liberty is equivalent to 60 times the daily fine or two months of restriction of liberty. Finally, if the new law abolishes criminal responsibility for a given criminal act, the sentence already imposed for such an act shall be expunged by virtue of the law. While establishing which law is more favorable for a defendant, the court shall take into account all legal consequences stemming from both or more concurring laws and should relate them to the particular circumstances of the case. So, this assessment shall be made *in concreto*.[6]

Special rules apply to the so-called cumulative penalty imposed in a cumulative judgment which may be issued with reference to a person convicted by more than one judgment to the penalties eligible for aggregation. Article 85 of the CC provides that "If the perpetrator has committed two or more crimes before the first, even non-final sentence has been passed with regard to any of these crimes, for which the penalties of the same type or other penalties eligible for aggregation have been imposed, the court imposes an aggregate penalty based on the separate penalties imposed for the concurring crimes." With reference to cumulative penalty imposed by cumulative judgment the rule of retroactive application of less severe law indicated in Article 4 § 1 of the CC does not have absolute application. It may be excluded by special regulation included into the new law amending the regulations concerning cumulative penalty.[7]

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5 Judgment of the Constitutional Tribunal of 10 July 2000, SK 21/99, OTK – A 2000, No. 5, Item 144.

6 Resolution of the Supreme Court of 12 March 1996, I KZP 2/96, OSNKW 1996, no. 3-4, item 16; judgment of the Supreme Court of 3 February 2015, IV KK 294/14, Supremus.

7 See, for instance, Article 19 para. 1 of the Act of 20 February 2015 amending the Criminal Code and other laws (Journal of Laws of 2020, Item 396), which provided that new regulations on cumulative penalty, even if more favorable to a convict, shall not be applied to judgments which became final before the entry into force of the new law, unless there is a need to issue a cumulative judgment aggregating penalties from these judgments and the new judgment which will become final after the entry into force of the new law. This

The principle of legality is also provided in Article 7 of the European Convention on Human Rights and Fundamental Freedoms[8] and in Article 15 of the International Covenant on Civil and Political Rights.[9] Neither of these provision has so far been successfully invoked against Poland with reference to the sentencing process. This is most likely due to the fact that understanding of this principle adopted by the Constitutional Tribunal takes into account the Strasbourg acquis.[10]

3 Human rights requirements as regards the sentencing process and the enforcement of sentences

Both the process of sentencing as well as execution of penal sanctions shall be subject to the requirements of Article 40 of the Constitution, which prohibits "torture or cruel, inhuman or degrading treatment or punishment" and *expressis verbis* states that "the application of corporal punishment shall be prohibited." Additionally, with reference to penalties consisting of deprivation of liberty Article 41 para. 4 of the Constitution requires that anyone deprived of liberty be treated in a humane manner. Both standards are repeated respectively in Article 3 of the CC stating that "penalties and other measures provided for in this Code shall be applied with a view to humanitarian principles, particularly with the respect for human dignity" and in Article 4 of the Code of Execution of Criminal Sentences.[11] The latter provision rules that penalties, penal measures, compensatory measures, forfeiture, security measures and preventive measures shall be executed in a humane manner, with due respect to human dignity. Additionally, Article 4 § 1 of the CECS again provides for the prohibition of torture, inhuman or degrading treatment of a convict. Furthermore, it underlines that a convict preserves all citizen's rights and freedoms and their limitation may be provided exclusively by the statue or by final decision issued on the basis of the statute (Article 4 § 2 of the CECS).

Human rights standards concerning the sentencing process and the enforcement of sentences also stem from international conventions ratified by the Republic of Poland. The prohibition of torture or inhuman or degrading treatment or punishment is provided in

provision was assessed as being not contrary to the Constitution by the Constitutional Tribunal in the judgment of 4 July 2018, K 16/16, OTK – A 2018, Item 52.

8 Ratified by Poland in 1993 and published in: Journal of Laws of 1993, no. 61, item 284, with subsequent amendments; thereafter referred to as 'the Convention' or 'ECHR'.

9 Ratified by Poland in 1977 and published as attachment in: Journal of Laws of 1977, no. 38, item 167; thereafter referred to as 'the Covenant' or 'the ICCPR'.

10 See, for instance judgment of the Constitutional Tribunal concerning application of principle of legality to statute of limitations containing exhaustive analyses of the case-law of the ECHR on this issue: judgment of 14 October 2009, P 4/08, OTK – A 2009, no. 9, item 133.

11 The Act of 6 June 1997, consolidated text published in: Journal of Laws of 2021, item 53, with amendments; thereafter referred to as 'the CECS'.

Article 3 of the Convention and in Article 7 of the Covenant. Since Poland is a Member State of the European Union, it is also bound by the Charter of Fundamental Rights, including its Article 4.

With reference to the enforcement of sentences two main problems have been identified in the case-law of the European Court of Human Rights concerning Poland: overcrowding in prisons associated with bad living-conditions while serving a sentence of deprivation of liberty,[12] and excessive application of the "dangerous prisoner" regime.[13] Both issues were identified by the ECHR as violation of Article 3 of the Convention (prohibition of torture, inhuman and degrading treatment, or punishment). Currently, no overcrowding is reported by Polish penitentiary facilities.[14] With reference to "dangerous detainees," the ECHR stated that this regime is not *per se* contrary to Article 3. However, the Court criticized continued, routine and indiscriminate application of the full range of measures that were available to the authorities under this regime (i.e. cumulation of many additional restrictions such as personal checks upon every leave and entry into cell, use of solitary confinement, increased supervision, restrictions of movement within penitentiary facility, restrictions on visits, etc.) as well as its duration (for example, in the *Horych* case this regime was applied for 7 years and 9 months). It seems that measures adopted by Polish authorities to solve this problem have been accepted by the Committee of Ministers as satisfactory. In 2016 the Committee of Ministers decided to close examination of the execution of judgments belonging to "Horych group".[15]

12 See, *inter alia*, the ECtHR, Judgment of 22 October 2009, *Orchowski v. Poland*, Appl. 17885/04. The group of judgments concerning overcrowding is known as "*Orchowski*" group: Resolution M/ResDH(2016)254 Execution of the judgments of the European Court of Human Rights. Seven cases against Poland (available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Orchowski%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22,%22RESOLUTIONS%22]}) (access: 3 November 2020).

13 ECtHR, Judgment of 17 April 2012, *Piechowicz v. Poland*, Appl. 20071/07; ECtHR, Judgment of 17 April 2012, *Horych v. Poland*, Appl. 13621/08; see also later judgments: ECtHR, Judgment of 16 February 2016, *Świderski v. Poland*, Appl. 5532/10.

14 As transpires from the information available at the official Website of the General Prison Services, on 30 October 2020, prisoners and detainees occupied 85,66 % of all places available in penitentiary facilities (see: file:///C:/Users/MWW/Downloads/Komunikat%20w%20sprawie%20zaludnienia%20zak%C5%82ad%C3%B3w%20karnych%20i%20areszt%C3%B3w%20%C5%9Bledczych.pdf) (access: 3 November 2020). At the end of 2021, 87,6% available places were occupied. See statistics published at: https://www.sw.gov.pl/strona/statystyka-roczna (access: 1 October 022).

15 Résolution CM/ResDH(2016)128 Exécution des arrêts de la Cour européenne des droits de l'homme Cinq affaires contre Pologne; report on measures undertaken by Polish authorities (available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805ac7b7) (access: 3 November 2020).

4 Judicial discretion in sentencing in general: position of the independent judge and responsibility for fairness

The principle of the independence of judges is related to the principle of the independence of courts. For the purpose of this study, we may posit that the independence of judges is guaranteed on two basic levels: the system level and the process level. Despite the recent changes in the legal system of Poland, which considerably weakened the structural guarantees of the independence of judges,[16] there are still regulations on the position of the judge and judicial power in the three-branch system of powers, designed to guarantee both independence of judicial power in general and independence of individual judges. On the second level, i.e. the process-related guarantees of the independence of judges, we see concrete solutions provided for in the Code of Criminal Procedure[17] and other acts regulating the course of each type of proceedings,[18] intended to guarantee free and independent decisions, and ensure that litigants' cases are heard by an impartial and independent judge. The two levels are inextricably linked, since process guarantees would be irrelevant without system guarantees.

Thus, this implies two concepts in the Polish legal doctrine: independence of courts and independence of judges.[19] It is difficult to clearly separate and precisely define the two. However, it is possible, with a certain degree of simplification, to assume that the independence of courts applies to organizational issues, whereas the independence of judges pertains to their internal freedom, independence in sentencing. Nevertheless, there are no independent judges without independent courts, and vice versa.[20]

Judicial independence is guaranteed directly by the single most important Polish law, i.e. the Constitution of the Republic of Poland of 2nd April 1997. Under Article 178 para. 1 of the Constitution, judges perform their function independently and are subordinate only to the Constitution and the statute. The Constitution also guarantees the requirement of ensuring working conditions and remuneration commensurate with the dignity of the office and responsibilities of the judge (Article 178 para. 2 of the Constitution). Other guarantees of independence of judges directly provided for in the Constitution include:

16 See, inter alia, Thomas Wahl, *Threat of Rule of Law in Poland – Recent Developments, Eucrim* (2020), issue 1, p. 2-4; issue 2, p. 68-69; Michał Ziółkowski, 'Two Faces of the Polish Supreme Court After "Reforms" of the Judiciary System in Poland: The Question of Judicial Independence and Appointments', 5 *European Papers. A Journal on Law and Integration* (2020), p. 347-362.

17 Act of 6th June 1997, consolidated text published in: Journal of Laws of 2022, item 1375, hereinafter: 'CCP'.

18 In addition, the Polish legal system has separate normative laws regulating civil proceedings, administrative proceedings, administrative court proceedings and proceedings in petty offence cases.

19 See. e.g. Stanisław Włodyka, *Ustrój organów ochrony prawnej*, Warsaw, 1975, p. 39; Barbara Stępień-Załucka, *Niezawisłość sądownictwa a niezależność sądów i niezawisłość sędziów*, Przegląd Prawa i Administracji, 2011, no. 85, pp. 136-144.

20 See, Paweł Wiliński, *Niezależność sądu – standard konstytucyjny i konwencyjny*, Kwartalnik Prawa Publicznego, 2010, no. 1-2, p. 27-28.

appointment of judges for life tenure,[21] non-movability and non-transferability (except for disciplinary responsibility – Article 180 para. 1 and Article 180 para. 2 of the Constitution), judicial immunity (Article 181 of the Constitution) which prevents a judge from being held criminally liable or deprived of liberty without prior consent of a court specified in statute, including the prohibition of arresting or detaining the judge, unless caught in the act. As for the latter issue, the Constitution allows the president of the competent court to order an immediate release of the arrested judge. On the other hand, the independence of judges is also guaranteed by certain restrictions; judges are not allowed to be members of political parties, trade unions or perform public activities irreconcilable with the principles of judicial independence (Article 178 para. 3 of the Constitution).

It should be noted that judges in Poland are appointed for an unspecified period by the President of the Republic of Poland, at the request of the National Council of the Judiciary (Article 179 of the Constitution). The National Council of the Judiciary is an entity composed partly of judges (15 each), currently elected by the Parliament, previously elected by judges themselves.[22] In addition, the NCJ is composed of the First President of the Supreme Court and the President of the Higher Administrative Court. They automatically become members of the Council. Nevertheless, several members of the National Council of the Judiciary are politicians: the Minister of Justice, four deputies of the Polish Sejm, four senators as well as a politician or non-politician nominated by the President of Poland. As transpires from the recent judgments of the ECtHR, panels of the Supreme Court of Poland which are composed of judges appointed by the new National Council of the Judiciary, are not "independent and impartial tribunals established by law" within the meaning of Article 6 of the ECHR.[23] Several new cases concerning judicial independence in Poland are currently pending before the ECtHR.[24]

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21 In general judges retire at the age of 65.

22 Article 8-9a of the Act of 12th May 2011 on the National Council of the Judiciary (consolidated text: Journal of Laws of 2021, item 269). The amendments to the Law on National Council of the Judiciary introduced by the Act of 8 December 2017 (Journal of Laws of 2018, item 3) changed the rules concerning appointment of judges to the NCJ. Prior to this amendment they were elected by their peers; this amendment gave the competence to elect judges to the ECJ to the Parliament. It is argued that this manner of appointment is inconsistent with the Polish Constitution. See, *inter alia*, The Position of the Board of the Faculty of Law and Administration at the Jagiellonian University of 8 May 2017 regarding the proposed amendments to acts concerning the judiciary (at: https://ruleoflaw.pl/the-position-of-the-board-of-the-faculty-of-law-and-administration-at-the-jagiellonian-university-of-8-may-2017-regarding-the-proposed-amendments-to-acts-concerning-the-judiciary/) (access: 3 November 2020); on the new manner of appointment of judges to sit in the NCJ: see also Court of Justice (Grand Chamber), Judgment of 19 November 2019, joined cases C 585/18, C 624/18 and C 625/18, *A. K. v. Krajowa Rada Sądownictwa* (C 585/18), and CP (C 624/18), DO (C 625/18) *v. Sąd Najwyższy*, ECLI:EU:C:2019:982, paras. 141-145.

23 See, ECtHR, Judgment of 22 July 2021, *Reczkowicz v. Poland*, Appl. 43447/19, HUDOC; ECtHR, Judgment of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland*, Appl. 49868/19 and 57511/19, HUDOC; ECtHR, Judgment of 3 February 2022, *Advance Pharma Sp. z o.o. v. Poland*, Appl. 1469/20.

24 See, press release of the Registry of the ECtHR, no. 248 (2022) of 25 July 2022, (at: https://hudoc.echr.coe.int/eng-press#{%22sort%22:[%22kpdate%20Descending%22]}) (access: 1 October 2022).

The scope of independence of judges arising from the Constitution has also been determined in judicial practice. It is worth noting that when defining independence of judges, the Polish Constitutional Tribunal in its old case-law found that it includes five components: 1) impartiality towards the participants of proceedings, 2) independence from non-judicial entities (institutions), 3) autonomy of the judge from authorities and other judicial entities, 4) independence from political influence, especially political parties, 5) the judge's internal independence.[25]

In a subsequent judgment, the Constitutional Tribunal found that the principle of the independence of courts (provided for directly in Article 173 of the Constitution) and the independence of judges overlap and are inextricably bound to one another. They preclude any forms of influence on courts' decision making, both from other public authorities and various other entities. The Tribunal emphasized that court judgments may be modified only by competent judicial entities, and the only permissible exceptions in this respect identified by the Tribunal included the presidential pardon and legislator's right to make amnesty laws.[26]

System-related guarantees to secure the independence of judges are therefore intended to create such conditions for decisions in which the judge, under Article 178 para. 1 of the Constitution, is bound by the content of the Constitution and statute, and the judge's work may not be influenced by lower-tier laws (executive regulations) contrary to a statute.[27] The guarantee of non-movability and non-transferability is designed to ensure that the judge does not refrain from handing down a specific decision which is lawful in the context of the findings of the case in fear of repressions from state authorities. Judicial review is guaranteed only through of a system of ordinary measures of appeal (proceedings in two instances) and extraordinary measures to reverse final and binding judgments (mostly as a result of the work of the Supreme Court).[28]

In terms of the relationship between the judiciary and the executive branch, in Polish criminal procedure the General Public Prosecutor, whose function in the present state of law is performed by the Minister of Justice, may file an appeal of cassation against any final and non-appealable judgment to the Supreme Court (Article 521 § 1 of the Code of

25 Judgment of the Constitutional Tribunal of 24th June 1998, K 3/98, OTK 1998, no. 4, item 52.

26 Judgment of the Constitutional Tribunal of 14th April 1999, K 8/99, OTK 1999, no. 3, item 41.

27 A judge may refuse to apply an unconstitutional lower-tier law – B. Banaszak, 'Komentarz do art. 178', in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2012, Legalis, point 9.

28 Polish criminal proceedings offer two extraordinary measures of complaint against final and non-appealable judgments: cassation (Articles 518-539 of the CCP) and re-opening the proceedings (Articles 540-548 of the CCP). Both measures are examined by courts. If proceedings are re-opened, these include common courts (regional courts or courts of appeal) or the Supreme Court (depending on the court which rendered the non-appealable judgment); a cassation may only be examined by the Supreme Court.

Criminal Procedure). Moreover, as the head of the prosecution service,[29] the General Public Prosecutor may cause appeal proceedings to be initiated in any case in which an appealable judgment was rendered. However, note that such instruments do not interfere with the independence of judges, since both ordinary (appeals, complaints) as well as extraordinary measures (i.e. a cassation filed by the General Public Prosecutor) are examined by an independent court (the Supreme Court).

Importantly, the Minister of Justice supervises common courts, albeit only in terms of organization and administration, and, as stipulated in the statute, this supervision must not encroach upon judicial independence (Article 9-9b of the System of Common Courts Act of 27th July 2001[30]). The Minister of Justice also appoints the president of each court from among judges (Articles 23-25 of the System of Common Courts Act) to manage the courts directly. However, the work of the presidents of courts may not interfere with the independence of individual judges.[31]

The amendments of 2020 in the System of Common Courts Act and the new Act on the Supreme Court empowered the new Disciplinary Chamber of the Supreme Court with the exclusive competence to decide in disciplinary proceedings concerning judges of the Supreme Court and also to decide as a last instance court in disciplinary proceedings conducted against judges of ordinary courts. This Chamber was also exclusively competent to decide on judicial immunity. Thus, it decided whether criminal charges may be brought against a judge. In accordance with the amendments of the laws on judiciary of 2020,[32] disciplinary responsibility was provided for "actions questioning the judge's status, the effectiveness of the appointment of a judge or the legitimacy of a constitutional body of the Republic of Poland." Recently, the status of the Disciplinary Chamber of the Supreme Court was examined by the Court of Justice of the European Union upon the motion of the Commission. The CJEU found this judicial formation to be contrary to the requirements of Article 19 (1) of the Treaty of the European Union.[33] This resulted in the amendments of the Act on the Supreme Court. On 15 July 2015 the Disciplinary Chamber was replaced

29 According to Article 1 para. 2 of the Prosecution Act of 28th January 2016 (consolidated text: Journal of Laws of 2022, item 1247), the General Public Prosecutor is the head of the prosecution service, and pursuant to Article 7 para. 2 of the Act, a public prosecutor must follow the orders, guidelines and instructions of his or her superior.

30 Consolidated text: Journal of Laws of 2020, item 2072.

31 The competences of the president of courts are clearly defined in statute and restricted to administrative competences and job hierarchy; they do not concern judicial decisions (Article 22 of the System of Common Courts Act).

32 The Act of 20 December 2019 amending the Act on the Supreme Court and the System of Common Courts Act which entered into force on 14 February 2020 (Journal of Laws of 2020, item 190).

33 See, Court of Justice of the EU, Judgment of 15 July 2021, *European Commission v. Republic of Poland*, case C-791/19, ECLI:EU:C:2021:596. On 8 April 2020 the Court of Justice (Grand Chamber) issued a decision on interim measures in this case (case no. C-791/19R).

by the Professional Liability Chamber.[34] Since judges of the new Chamber were indicated by the President of the Republic of Poland upon the approval of the Prime Minister from among judges drawn from the chambers of the Supreme Court, voices are raised that also this new judicial formation may not fulfill the requirements of effective judicial protection in disciplinary cases.[35]

Moving on to key process-related guarantees for the independence of judges in criminal cases, it should be explained that Polish criminal proceedings are characterized by the principle of jurisdictional independence set forth in Article 8 § 1 of the CCP, according to which a criminal court makes independent decisions on matters of fact and matters of law and is not bound by previous decisions of any other court or authority. Without delving deeper into the aforementioned principle,[36] suffice it to say that with the exception of final and constitutive judgments of another court, which are binding, a criminal court is not generally bound by any other judgments or decisions made by public administrative authorities. In practice, the matter is relevant primarily in proceedings concerning petty fiscal offences and fiscal offences regulated in the Fiscal Penal Code,[37] where judicial practice consistently emphasizes that a criminal court is not bound by any decision of administrative authorities with respect to the amount of tax: the criminal court may independently determine the presence (or absence) of tax obligation and its amount, e.g. in a case involving persistent tax evasion on part of the taxpayer.[38]

Another important process-related guarantee for the independence of judges is the disqualification of a biased judge (Article 40-41 of the CCP). On the one hand, the solution guarantees that the parties will be heard by an impartial judge; on the other hand, the judge on his or her initiative may submit a statement of perceived reasons for his or her disqualification from the examination of the case, allowing the judge to avoid hearing a case in which he or she would find it difficult to be unbiased. The legislator provides for situations in which a judge is disqualified from the case by operation of law (Article 40 of

34 The Act of 9 June 2022 r. amending the Act on the Supreme Court and other laws (Journal of Laws of 2022, Item 1259; the Act entered into force on 15 July 2022.

35 See: https://www.prawo.pl/prawnicy-sady/nowa-izba-sn-z-11-sedziami-wygeneruje-odszkodowania,517384.html (access: 1 October 2022). On current situation of the judiciary in Poland, see: Commission Staff Working Document 2022 Rule of Law Report. Country Chapter on the rule of law situation in Poland, Luxembourg, 13.7.2022 SWD(2022) 521 final (available at: https://ec.europa.eu/info/sites/default/files/48_1_194008_coun_chap_poland_en.pdf) (access: 1 October 2022).

36 The principle is discussed in depth e.g. in: Piotr Hofmański, *Samodzielność jurysdykcyjna sądu karnego*, Katowice, 1988, *passim*; M. Wąsek-Wiaderek, 'Zasada samodzielności jurysdykcyjnej sądu', in: P. Hofmański & P. Wiliński (eds), *System prawa karnego procesowego. Zasady procesu karnego*, vol. III, part 2, Warsaw, 2014, pp. 1271-1360.

37 The Fiscal Penal Code of 10th September 1999, (consolidated text published in: Journal of Laws of 2022, item 589). According to Article 113 § 1 of the Fiscal Penal Code, the proceedings concerning petty fiscal offences and fiscal offences are regulated by the provisions of the Code of Criminal Procedure, unless the Fiscal Penal Code provides otherwise.

38 See e.g. the Supreme Court's judgment of 29th October 2015, IV KK 187/15, Lex/el. no. 1929133.

the CCP – "iudex inhabilis"), e.g. in the case of close consanguinity to one of the parties, but also if he or she has witnessed the act, as well as situations in which the decision on the judge's disqualification from the case must be made by the court (of different judges) at the motion of a party or due to the judge's statement that there may be grounds (other than those listed in Article 40 of the CCP) for reasonable doubt as to the judge's impartiality in the case (so -called "iudex suspectus").

Those two, probably most significant, guarantees are not the only process-related guarantees for the independence of judges. The remaining ones referred to in literature include: the court's superiority to parties in litigation, collective ruling (which applies only in certain, generally most serious cases, and in second-instance courts), the principle of objectivity (the obligation to consider all circumstances of the case, both beneficial and detrimental to a defendant see – Article 4 of the CCP) as well as the unremovable confidentiality of deliberations and vote on the judgment.[39]

Judicial independence and the autonomy of the judiciary from other authorities is ensured by the presence of fundamental guarantees in the Constitution, the highest source of Polish law. Since, as was mentioned above, Poland is also a party to the ECHR, all criteria concerning independent courts developed by the European Court of Human Rights on the basis of Article 6 of the Convention shall also apply to the Polish legal system. However, it must be stressed that in reaction to the above mentioned judgments of the ECtHR concerning judges appointed by the new National Council of the Judiciary,[40] the Constitutional Tribunal stated that Article 6 of the ECHR is partly contrary to the Polish Constitution and as such should not be applied by judges.[41]

5 Judicial discretion within a framework: guidelines, mandatory sentencing, etc.

In the Polish legal system, judicial discretion in sentencing is subject to two basic limitations. The first limitation concerns statutory penal sanctions, both in terms of the choice of the type (with exceptions) and severity of penalty: for each type of offence, the legislator defines both upper and lower limits of statutory sanctions. According to Article 53 § 1 of the CC, the court imposes a penalty in its own discretion, albeit *within the limits prescribed by statute*. Secondly, even within the constraints of statutory sanctions the court must take into consideration statutory guidelines on the severity of punishment specified primarily in Article 53 § 2 of the CC (to be discussed later on).

39 Stanisław Waltoś, Piotr Hofmański, *Proces karny. Zarys systemu*, Warsaw, 2020, pp. 170-171.
40 See, footnote 23.
41 Judgment of the Constitutional Tribunal of 10 March 2022, K 7/21, OTK – A 2022, Item 24.

5.1 Penalties, penal measures and other sanctions

The Polish legal system includes a limitative list of basic penalties and penal measures. Basic penalties include: *a fine* (charged in 10 to 540 daily rates, PLN 10 to 2000 each); *restriction of liberty* (mostly in the form of unpaid, controlled community work: 20 to 40 hours per month for up to 2 years, or (less frequently) in the form of amounts withheld for a social purpose from monthly remuneration (from 10% to 25%) – also for a period of up to 2 years; *deprivation of liberty* (from a month to 15 years) and, separately, *25 years' deprivation of liberty* and *life imprisonment*.[42]

There are eleven penal measures: 1) suspension of civil rights; 2) disqualification from specific posts, the exercise of specific professions or engagement in specific economic activities; 3) disqualification from activities involving raising, treating and educating minors, and taking care of them; 4) a prohibition from occupying a position or practicing a profession or performing work in public and local self-government authorities and institutions, as well as in commercial companies in which the State Treasury or local self-government entity hold directly or indirectly through other entities at least 10% of stocks or shares; 5) a prohibition on being in certain communities and locations, a prohibition on contacting certain individuals or on leaving a specific place of residence without the court's consent; 6) a prohibition to enter mass events; 7) a ban on entering gaming centers or participating in games of chance; 8) an order to leave premises jointly occupied with a victim; 9) disqualification from driving; 10) pecuniary measure; 11) public announcement of the judgment. All penal measures are listed in Article 39 of the CC.

The system of reactions to a criminal act comprises also four additional measures: forfeiture (Articles 44-45a of the CC), a compensatory measure (Article 46 of the CC), a supplementary payment (Polish: nawiązka – Article 47 of the CC), and preventive measures (Polish: środki zabezpieczające – Article 93a – 100 of the CC).

5.2 Statutory limits of choice of sanction and its scope

Nevertheless, courts do not have absolute freedom to impose penalties within the aforementioned limits for each offence. The Polish legislator decided to restrict courts' freedom and provided for limits to statutory sanctions for each type of offence. For example, standard theft (Article 278 § 1 of the CC) is punishable by a penalty of deprivation

42 Imposition of life imprisonment requires special justification. This penalty is seen as "elimination" of an offender from the society. Thus, while imposing such sentence, the court shall explain why other, less severe penalties are not sufficient for reaching the goals of the sentencing process indicated in Article 53 of the CC. It is stressed that this penalty may be applied only to offenders who do not offer any chance of rehabilitation; see, inter alia, judgment of the Katowice Appeal Court of 15 May 2008 r., II AKa 13/08, OSAKat 2008 no. 3, item 3.

of liberty for a term between 3 months and 5 years (only), whereas criminal threat (Article 190 § 1 of the CC) is punishable by either restriction of liberty or deprivation of liberty of up to 2 years. For standard homicide (Article 148 § 1 of the CC), the statutory punishment is a term of deprivation of liberty for minimum 8 years, 25-year's deprivation of liberty or life imprisonment.

At this point it is worth noting that for offences carrying a sentence of imprisonment for maximum 8 years the legislator provided for the possibility to impose a penalty other than deprivation of liberty even if statutory penalties for a particular offence include such penalty (Article 37a of the CC). To this end, the court must carry out a preliminary examination whether the term of imprisonment which could be imposed given the circumstances of the case does not exceed a year; only then the court may impose a penalty of restriction of liberty for at least 3 months or a fine equal to minimum 100 daily rates instead of the said term of deprivation of liberty. At the same time, the legislator obliges the court to impose a penal measure, a compensatory measure or forfeiture. This provision (replacement of a penalty of deprivation of liberty by "non-isolatory" penalties) does not apply to convicts having committed an offence while acting in organized criminal group or in association whose purpose is to carry out criminal offences or fiscal offences as well as to perpetrators accused of terrorist offences (Article 37a § 2 of the CC).

Another general provision which enables the court to modify statutory penalties is found in Article 37b of the CC. This provision may be applied in cases concerning misdemeanors[43] subject to penalty of deprivation of liberty. In such cases, Article 37b of the CC allows imposition of the so-called "combined sentence": a penalty of deprivation of liberty for a period up to 3 months (regardless of the statutory limits of this penalty provided for a specific offence) or for a period up to 6 months (if the maximum statutory penalty provided for a specific offence is not less than 10 years) combined with a penalty of restriction of liberty for up to 2 years. In this situation, the imprisonment sentence is served first; it cannot be conditionally suspended by the court. The provision is applied if the lower limit of the statutory penalty is relatively high, and the court believes it is possible to sentence below such lower limit in the absence of other basis for extraordinary mitigation of the penalty.

43 All criminal offences in Poland are classified as misdemeanors or felonies. In accordance with Article 7 § 2 of the CC, felony is a prohibited act subject to penalty of deprivation of liberty of not less than 3 years or to a more severe penalty. A misdemeanor is a prohibited act subject to penalty of a fine higher than 30 daily rates or 5000 Polish zloty, penalty of restriction of liberty exceeding one month or penalty of deprivation of liberty exceeding one month (Article 7 § 3 of the CC).

5.3 *Extraordinary mitigation/aggravation of penalty*

The Criminal Code also sets special rules concerning extraordinary mitigation of penalty as well as extraordinary aggravation of penalty. Both institutions are tools which allow the court a certain degree of discretion in imposing penalties outside the limits set by the legislator. On the other hand, such solutions limit the discretion of the court whenever mitigation or aggravation of penalty is mandatory.

Extraordinary mitigation of the penalty is optional in the following situations (Article 60 §§ 1-4 of the CCP):

> 1) if explicitly allowed by the legislator in regulations concerning individual solutions, e.g.: in case of severely diminished capacity (Article 31 § 2 of the CC); if the perpetrator acted in trespass of the limits of self-defense (Article 25 § 2 of the CC); if a person incited or facilitated the commission of a prohibited act by another person but finally its commission was not attempted, the court may apply an extraordinary mitigation of punishment, or even issue an absolute discharge (Article 22 § 2 of the CC).
> 2) with regard to a young offender,[44] if justified by educational considerations.
> 3) in specially justified circumstances, when even the lowest penalty for the offence would be disproportionately severe, particularly: 1) if the victim has reconciled with the perpetrator, the damage has been redressed or the perpetrator and the victim have agreed on the method of redressing the damage; 2) in view of the perpetrator's attitude, especially if the perpetrator endeavored to redress or prevent the damage; 3) if the perpetrator of an unintentional offence or his or her next of kin suffered severe harm due to the offence.[45]
> 4) at the request of the public prosecutor with regard to a perpetrator of an offence punishable by more than 5 years' imprisonment who, regardless of his or her explanations given in the case, has disclosed important and previously unknown facts to the investigating authorities.

44 Young offender (Polish: "młodociany") is defined in the CC as a person who, at the time of committing a prohibited act, has not reached the age of 21 years, and has not reached the age of 24 years at the time of the trial in the first-instance court (Article 115 § 10 of the CC).

45 It is underlined in the case-law that the list of optional mitigating circumstances provided in the Criminal Code is not exhaustive. Moreover, it is not possible to create such a list of circumstances justifying imposition of a penalty below the minimum statutory limits. The court must always decide taking into account the particular circumstances of the case and taking care of not abusing this institution (see: judgment of the Kraków Court of Appeal of 16 September 2004, II Aka 173/04, KZS 2004, no. 10, item. 13).

Mandatory extraordinary mitigation of the penalty is applied to a perpetrator who collaborated together with other persons in committing the offence, if the perpetrator discloses to the investigating authorities competent for criminal prosecution information about persons participating in the offence and relevant circumstances of the offence (Article 60 § 3 of the CC). Extraordinary mitigation of penalty (both optional and mandatory) involves imposing a penalty below the lower limit of the statutory sanction or a more lenient form of penalty according to detailed principles set forth in the Criminal Code (Article 60 § 6 of the CC).

In addition, extraordinary mitigation of a penalty is sometimes provided for in the special part of the Criminal Code, e.g. for aiding and abetting unlawful obstruction of justice, if the perpetrator was helping next of kin or acted in fear of his or her own or next of kin's criminal liability (Article 239 § 3 of the CC), or with reference to a perpetrator who voluntarily redressed the damage caused by theft (Article 295 § 1 of the CC).

Furthermore, pursuant to Article 61 § 1 of the CC, the court may grant an absolute discharge (understood as resignation from imposing a penalty) in the cases specified by law or in the case provided for in Article 60 § 3 of the CC, particularly if the offender played a minor role in committing the act, and the information provided helped to prevent another offence from being committed. When granting such absolute discharge, the court may refrain from ordering a penal measure, even if ordering it is mandatory. It is argued in the doctrine that an absolute discharge, although optional, shall be applied if all conditions of discharge have been fulfilled. Thus, if all prerequisites of discharge occur, the court is in fact obliged to resign from sentencing and not waiving the penalty requires specific justification.[46]

In certain situations, judicial discretion in sentencing may be limited in a manner not beneficial to the sentenced person.

First and foremost, we should mention *sentencing in the event of re-offending*,[47] which may take two forms. Special re-offending in the ordinary form enables the court to (optionally) impose a penalty for the offence attributable to the perpetrator up to the upper limit of the statutory sanction increased by half. The court will have such alternative if the offender sentenced to imprisonment for an intentional offence commits a similar intentional offence within 5 years after serving at least 6 months of the sentence (Article 64 § 1 of the CC).

46 See, Zbigniew Ćwiąkalski, 'Komentarz do art. 57', in: W. Wróbel, A. Zoll (ed), *Kodeks Karny. Komentarz*, 2016, Lex el., point 12.

47 On relapsing into crime in Poland, see: Konrad Buczkowski, Paulina Wiktorska, 'Relapsing Into Crime Versus a Notion of Criminal Career in Polish Criminological Studies', *Biuletyn Kryminologiczny* INP PAN No. 25 (2018), https://czasopisma.inp.pan.pl/index.php/bk/article/view/2324?articlesBySameAuthorPage=2 (Access: 1 October 2022).

When multiple re-offending has taken place (multiple special re-offending, Article 64 § 2 of the CC), the court *must* impose a prison sentence for the offence attributable to the offender above the lower limit of the statutory sanctions, and may impose a penalty up to the upper limit of statutory sanctions increased by half. Such mandatory aggravation of penalty applies if the offender has already been sentenced for a repeated offence of the ordinary form under Article 64 § 1 of the Criminal Code and served an imprisonment sentence for at least a year in total, and within 5 years after the entire sentence or part thereof has been served he or she again commits an intentional offence against life or health, statutory rape, robbery, burglary, or another offence against property with the use of force or a threat to use force.

However, even the mandatory aggravation of the penalty referred to in Article 64 § 2 of the CC is not extensive: although the possibility of imposing the minimum sentence for a given offence is excluded, in reality, if the offence is punishable by e.g. up to 10 years' imprisonment, the shortest possible sentence for a re-offender under Article 64 § 2 of the CC is a year and a month. Obviously, in practice the sanction will usually be more severe, yet the issue is one of the severity of the penalty, which will be discussed later.

In addition to the above discussed general prerequisites of aggravation of penalty, mandatory extraordinary aggravation is a specific solution provided for by the Polish legislator with reference to specific offences. In particular, it is provided for causing a disaster on land or water or to air traffic, causing a threat of such disaster or causing a car accident in which the victim sustained severe injury or died, if the offender was intoxicated or fled from the place of the incident. Consequently, the court is obliged to impose a penalty of imprisonment prescribed for the offence attributable to the offender of at least the statutory minimum increased by half, and in the event of causing a fatal accident – of at least 2 years of deprivation of liberty, up to the upper limit of the sanction increased by half (Article 178 of the CC).

Other examples of extraordinary aggravation of penalty prescribed in the Criminal Code include certain offences against property, if the value of the damage exceeds PLN 200 000 or the offence has been committed against property of special cultural importance (Article 294 § 1 and 294 § 2 of the CC), and the possibility of imposing a penalty in the amount of up to 3000 daily rates for certain offences against business transactions, including money laundering (Article 309 of the CC).

Pursuant to Article 57 § 1 of the CC, if there are several independent grounds for the extraordinary mitigation or aggravation of a penalty, the court may mitigate or aggravate the penalty only once, having considered all the grounds for mitigation or aggravation. If there are coinciding grounds for extraordinary mitigation and aggravation, the court may adopt an extraordinary mitigation or aggravation of the penalty (Article 57 § 2 of the CC).

It does not matter whether the coinciding grounds are of an optional or a mandatory character.[48]

Another important aspect of relatively many offences provided for in the Criminal Code is that the legislator prescribed mitigated or aggravated forms of offences in addition to their standard forms. Respectively, such offences carry penalties which are either mitigated or aggravated in relation to the standard form. At the same time, provisions regulating standard or aggravated forms contain circumstances which influence the qualification of a given act under a specific law. Take, for example, the offence of homicide in its standard form, which is punishable by a term of imprisonment of 8 to 15 years, a term of imprisonment of 25 years, or life imprisonment, whereas the aggravated form of the offence (e.g. murder with special cruelty) carries a sentence of 12 to 15 years, 25 years' imprisonment, or life sentence; the mitigated form, i.e. homicide committed under the influence of an intense emotion justified by the circumstances is only punishable by a term of imprisonment of 1 to 10 years (Articles 148 § 1, 148 § 2, 148 § 4 of the CC).

Another noteworthy and significant limitation of judicial discretion in imposing a penalty of deprivation of liberty is the fact that the legislator provided for grounds for passing a conditionally suspended sentence of imprisonment. Pursuant to Article 69 § 1 of the CC, this power can be exercised when the duration of imprisonment does not exceed one year, and only if the perpetrator has not been previously sentenced to a term of imprisonment (on the date of the offence). In order to apply conditional suspension of a deprivation of liberty, the court must establish the so-called "positive criminological prognosis" with reference to the offender. For this purpose the court shall primarily take into consideration the attitude of the offender, his or her personal characteristics and conditions, his or her lifestyle and his or her conduct after committing the offence.[49] In addition, with regard to decisions to apply a period of probation, the legislator imposes an obligation on the court to subject a young offender to supervision by a probation officer. The same applies to recidivists, to the perpetrator of an offence committed in connection with disorders of sexual preference and an offender who used violence to the detriment of the person sharing the place of residence (Article 73 § 3 of the CC).

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48 W. Wróbel, 'Komentarz do art. 57 Kodeksu karnego', in: W. Wróbel & A. Zoll (eds), *Kodeks karny. Komentarz*, 2016, Lex el., point 9. See also: decision of the Supreme Court of 8 January 2010, II KK 153/09, OSNwSK 2010, item 17; judgment of the Wrocław Appeal Court of 24 March 2015, II Aka 55/15 (available at: http://orzeczenia.wroclaw.sa.gov.pl/details/$N/155000000001006_II_AKa_000055_2015_Uz_2015-03-24_002); judgment of the Katowice Court Appeal Court of 3 April 2017, II AKa 450/16, Lex no. 2401014; judgment of the Supreme Court of 10 September 2020, IV KK 57/20, Supremus.

49 While deciding on a conditional suspension of a penalty of deprivation of liberty, the court shall also take into account the general directives of application of this penalty, including the need to develop legal awareness in society (see: judgment of the Kraków Appeal Court of 30 September 1998 r., II AKa 184/98, KZS 1998, no. 11, item 29).

5.4 Court's discretion in applying penal measures

In addition to basic penalties, the Polish criminal law system contains a range of penal measures, the application of which may be more problematic for the offender than the basic penalty itself (e.g. ban on performing a job or disqualification from driving). In terms of the court's discretionary powers in sentencing, in certain circumstances the application of individual penal measures is mandatory, and sometimes the legislator dictates the minimum duration of the penal measure (obviously exceeding its basic, overall limits, most commonly from 1 to 10 years, and 15 years for some penal measures).

For instance, in accordance with Article 41 § 1a and 41 § 1b of the CC, the court imposes a penalty of disqualification from performing all or specific functions, performing all or specific jobs or activities related to the education, instruction, treatment of minors or caring for minors – for a fixed period, or for life in the case of an offence against sexual freedom or morality of the minor; if the sentence is imposed for a repeated offence of this type, the ban must be imposed for life. Another example is the mandatory penal measure in the form of an order to vacate residential premises shared with the victim if the offender is sentenced to imprisonment without conditional suspension for an offence against sexual freedom or morality of the minor (Article 41a § 2 of the CC). Moreover, if ordering temporal removal from residential premises shared with the victim for offences against sexual freedom or morality or against family and childcare, the court must prohibit the offender from approaching the victim during the same period (Article 41a § 3 of the CC).

Another restriction of judicial discretion in sentencing applies in cases frequently heard in Polish courts, namely those concerning drunk driving (Article 178a of the CC). In such cases, the imposition of the penal measure of disqualification from driving is mandatory, and this measure is imposed for the period of 3 years (Article 42 § 2 of the CC), although, as a general rule, the court may impose the measure for one year. Moreover, in the event of a repeated sentence for an offence under Article 178a § 1 of the CC (specific aggravated offence similar to re-offending: Article 178a § 4 of the CC) or in case of sentencing for an offence specified in Articles 173 of the CC (causing traffic disaster) or in Article 177 § 2 of the CC (car accident) that results in a fatality or serious damage to health, the offender was drunk, under the influence of narcotics or fled from the scene of the incident, without any justification, the court disqualifies the offender from driving any vehicles for life, unless exceptional situation justified by specific circumstances occurs (Article 42 § 3 of the CC). Determining whether such exception applies in a particular case lies within the court's discretion.[50] However, in the event of repeat sentencing under

50 It is argued that the use of the notion "exceptional situation justified by specific circumstances", i.e. the use of double identification of extraordinary circumstances, what is done in the CC only in this provision, proves an intention of the legislator to apply this exception absolutely rarely. Such exception may be consider as justified for example if other people's contributed to the commission of an offence or if there is

Article 178a § 4 of the CC (i.e. the offender has been convicted of drunk driving three times), the disqualification from driving any vehicles is mandatory without exception (Article 42 § 4 of the CC). In addition, if the offender is sentenced for an act under Article 178a § 1 of the CC, the court must impose an additional penal measure in the form of payment to the state-run Fund for Crime Victims and Post-Penitentiary Aid in an amount of minimum PLN 5000, and if the offender is sentenced under Article 178a § 4 of the CC, in an amount of minimum PLN 10 000[51] (Article 43a § 2 of the CC).

To summarize this part of the discussion, in the Polish criminal law judicial discretion in sentencing is limited mostly by statutory regulations concerning types of penalties and penal measures provided for a given offence (choice of penalties for a given offence made by the legislator). Furthermore, courts are also bound by general statutory limits of particular penalties and penal measures, and particular severity of penalties and penal measures prescribed with regard to individual offences. At the same time, the legislator provides criminal courts with instruments which allow them to modify statutory sanctions, i.e. by giving them power to impose a penalty below the lower statutory limit, choose a less severe type of penalty or a penalty above the upper limit. On the other hand, in many situations the Polish legislator obliges the court to determine a specific sentence (mandatory penal measures), which are also restricted as to their minimum duration and scope (mandatory extraordinary aggravation of basic penalties and penal measures).

5.5 Statutory sentencing guidelines

Nevertheless, the foregoing issues do not exhaust the subject of judicial discretion in sentencing. On the contrary, in the Polish system of criminal law the legislator decided to define statutory sentencing guidelines to be considered by the court in the context of a given case when determining the type and severity of the penalty.[52] These guidelines deserve some comments.

Namely, pursuant to Article 53 § 1 of the CC the court passes a sentence in its own discretion, within limits defined in the statute, bearing in mind that its severity should not

lack of causal link between drunk driving and causing a car accident (see: Wojciech Górowski, Maria Szewczyk, 'Komentarz do art. 42 Kodeksu Karnego', in: W. Wróbel & A. Zoll (eds), *Kodeks karny. Komentarz*, 2016, Lex el., point 8.

51 In 2020, the minimum monthly remuneration for work in Poland was PLN 2600.

52 The jurisprudence underlines that the sentencing process, although based on judicial (subjective) assessment, must, at the same time, take into account objective criteria. It is also subject to control of the court of higher instance and should be diligently and exhaustively explained in the written justification of the judgment (see: judgment of the Kraków Appeal Court of 1 January 1991 r., II AKa 7/90, KZS 1991, no. 1).

exceed the *degree of guilt* (*degree of culpability*),[53] taking into account *the social harm of the offence*, *the preventive goal of the sentence* (individual prevention) and *its educational goal* (general prevention). Directives referred to under that provision do not remain in a hierarchic relationship of supremacy and inferiority, which as a result means that none of them aspires to the role of a dominant directive.[54]

More detailed criteria to be considered by the court in sentencing are specified in Article 53 § 2 of the CC, although they do not constitute a closed list. Under that provision, when sentencing, the court takes into account the following: the offender's motivation and conduct, especially when the offence was committed to the detriment of a person vulnerable due to their age or health, or if the offence was committed together with a minor, the type and extent of the breach of the offender's duties, the type and extent of negative impact of the offence, the offender's living conditions, the offender's lifestyle prior to the offence and behavior after the offence, particularly attempts to redress the damage or satisfy the social sense of justice in a different form, as well as the victim's conduct.[55]

Legal doctrine suggests that the principle of freedom in sentencing is strictly connected with the constitutional principles of judicial independence. Furthermore, it is emphasised that the principle concerns the choice of the type of basic penalty, penal measure and the use of optional sentencing solutions: extraordinary mitigation or aggravation of penalty or discharge from punishment.[56]

The legislator does not leave the court complete freedom in assessing the degree of social harm of the offence, since there are criteria which need to be taken into consideration by the court, and in this respect the list is a closed one. Namely, according to Article 115 § 2 of the CC, when determining the degree of social harm the court considers the type and nature of infringed interest, the extent of inflicted or imminent damage, the manner and circumstances in which the offence was committed, the importance of the duties infringed by the offender, as well as the offender's intention, motivation, and the type of precautionary rules breached and the degree of the breach.

In judicial practice, if the sentencing judge takes into consideration the degree of social harm or any other criteria outside the list or omits a criterion, this constitutes error in substantive law and often necessitates modification of the judgment in appellate

53 It is underlined that the notion of 'guilt' has two basic functions in criminal cases: it is a condition *sine qua non* for bearing criminal responsibility but it also limits the choice and scope of penalty which may be imposed on the perpetrator (see: Włodzimierz Wróbel, 'Komentarz do art. 53 Kodeksu Karnego', in: W. Wróbel & A. Zoll (eds), *Kodeks Karny. Komentarz*, 2016, Lex el., thesis 24.

54 See, Agnieszka Kania, 'General directives of judicial sentencing. Remarks in the context of the Polish Criminal Code', *Nowa kodyfikacja prawa karnego*, vol. XLVII, Wrocław, 2018, p. 13 (available at: https://wuwr.pl/nkp/article/view/8202) (access: 1 October 2022).

55 The criteria apply respectively to additional penalties (Article 56 of the CC).

56 Włodzimierz Wróbel, 'Komentarz do art. 53 Kodeksu Karnego', in: W. Wróbel & A. Zoll (eds), *Kodeks Karny. Komentarz*, 2016, Lex el., thesis 1 and 3.

proceedings. Conversely, if the court attaches too little weight to some circumstances listed in Article 115 § 2 of the CC, the allegation that findings of fact were erroneous may be justified.[57] As transpired from Article 424 § 2 of the CCP, in written motives of the judgment the court shall indicate circumstances taken into consideration when imposing a penalty, especially if extraordinary mitigation or preventive measures are applied in the judgment.

As for detailed sentencing guidelines, it is worth noting that in Polish legislation the court must consider the positive outcomes of mediation between the victim and the offender (Article 53 § 3 of the CC),[58] while for juvenile offenders (those who did not attain the age of 18 at the time of committing the offence) or young offenders, the court, as a priority, must seek to educate the offender (Article 54 § 1 of the CC). Finally, we should also point out significant exclusions of available penalty types. Life imprisonment, the most severe sanction in the Polish criminal law system, cannot be imposed with respect to an offender who has not attained 18 years of age (Article 54 § 2 of the CC).

6 Sentencing by non-judicial entities

In the Polish legal system, the administration of justice is the exclusive role of the Supreme Court, common courts, administrative courts and military courts (Article 175 § 1 of the Constitution). Obviously, administrative courts do not have jurisdiction in criminal cases. Further, pursuant to Article 2 para. 1 and 2 para. 1a of the System of Common Courts Act of 27th July 2001, tasks related to administration of justice are performed by *judges*, and in district courts also by *judge's assessors* (with certain exceptions such as remand in custody during pre-trial proceedings). Thus, a criminal sanction cannot be imposed by any entity other than an independent court. Penal order proceedings (Polish: "postępowanie mandatowe") may be the only exception to this principle. Such proceedings involve imposing a fine in the form of a penal order by non-judicial authorities (mostly by the police, and officers of customs and tax services in petty tax offence and fiscal offence cases). Penal order proceedings[59] apply to petty offences and petty fiscal offences, i.e. acts which are generically different from serious offences and involve much smaller social harm. Liability for a petty offence does not constitute criminal liability in the strict sense.

57 See e.g. the Supreme Court's judgment of 19th October 2004, II KK 355/04, Lex el. no. 141299.

58 It should be stressed that failure to reach an agreement cannot be treated as aggravating circumstance. However, conclusion of an agreement may be treated as a circumstance mitigating for a defendant. It is underlined that lack of remorse of the accused, no admission of guilt and the lack of reconciliation with the victim may often simply be the exercise of the accused's right to defense (see: judgment of the Wrocław Appeal Court of 21 August 2013 r., II Aka 228/13, Legalis no. 999547).

59 Article 95-102 of the Code of Petty Offences Procedure of 24th August 2001 (consolidated text published in: Journal of Laws of 2022, item 1124) and Article 136-142 of the Fiscal Penal Code.

In any case, the person against whom the application of a penal order is being considered has the right to refuse to accept such notice, as a result of which the case is examined in proceedings before a common court.

7 Administrative discretion in the enforcement of sentences

Enforcement of judgments delivered in criminal proceedings for offences, as well as judgment for petty fiscal offences and fiscal offences proceedings is regulated by the CECS. Basic judicial entities in enforcement proceedings include the trial court which enters the judgment to be enforced and the penitentiary court. Pursuant to Article 27 of the CECS, the enforcement of forfeiture and collection of supplementary damages for the benefit of State Treasure is the responsibility of the head of the tax office, whereas according to Article 25 § 1 of the CECS the enforcement of civil claims, fines, monetary performance is carried out under the provisions of the Code of Civil Procedure,[60] i.e. by the court enforcement officer. The court enforcement officer is a public official operating at a district court, their work is supervised by the court and the president of the district court.[61]

It should be emphasised that the question of the enforcement of the amount of judgment is in fact a technical one, and the head of the tax office is the only entity outside of the judiciary (with court enforcement officers being subordinate to judicial power): his duties are limited to the enforcement of forfeiture and supplementary damages awarded for the account of State Treasury. At this point it is worth noting that decisions on the replacement of a fine with community work, decisions concerning substitute custodial sentence *in lieu* of an unpaid fine, and decisions to order payment of the fine by instalments are always made by the court (Articles 45-46 and 49 of the CECS).

In terms of discretionary powers in the most important question, i.e. the enforcement of the sentence of deprivation of liberty, within the Polish legal system all decisions pertaining to imprisonment lie with the court. Obviously, the Prison Service is the entity competent for the organization of the operation of prisons, hence for the order- and organization-related issues, as well as any penitentiary work with regard to the sentenced person.[62] Pursuant to Article 1 of the Prison Service Act, the Prison Service is a uniformed, armed and non-political force reporting to the Minister of Justice and having its own organizational structure.

60 Act of 17th November 1964, Journal of Laws of 2021, item 1805.

61 Act of 22nd March 2018 on court enforcement officers (Journal of Laws of 2022, item 1168).

62 Detailed responsibilities of the Prison Service are regulated in Article 2 of the Prison Service Act of 9th April 2010 (consolidated text: Journal of Laws of 2021, item 1064). Basic responsibilities of the Prison Service include penitentiary and social rehabilitation work with the persons sentenced to imprisonment, as well as performing specialist therapeutic work or remand in custody in a manner ensuring the correct course of criminal proceedings concerning a criminal offence or a fiscal offence.

However, all key decisions relating to sentenced persons, such as ordering an interruption in serving the custodial sentence (Articles 153-158a of the CECS), giving consent to serve the sentence in the form of electronic surveillance (Article 43a-43zae of the CECS) or ordering a conditional release from the execution of part of the sentence (release on parole – Articles 159-163 of the CECS) are made by the penitentiary court, which is part of the system of common courts, hence an independent court, with its judges enjoying the same independence as any other justices in Poland. In its decisions on the merits, the penitentiary court will rely on information communicated by the Prison Service, but the penitentiary opinion on the sentenced person prepared by the administration of the prison will form only part of the evidence to be examined by the penitentiary court when making decisions.

Of course, a penitentiary court is bound by statutory limits concerning release on parole. It may be granted only if the offender's attitude, personal attributes and features, the circumstances of the offence and the offender's conduct after committing the offence and while serving the sentence, justify the assumption that he or she will, after release, respect the legal order, execute penal measures imposed on him, and in particular that he or she will not re-offend (Article 77 § 1 of the CC).[63] A convict may be released on parole after serving at least half of the sentence of deprivation of liberty (Article 78 § 1 of the CC). The convict specified in Article 64 § 1 of the CC (a recidivist) may be released on parole after serving two-thirds of the sentence, and the convict specified in Article 64 § 2 of the CC (multi-recidivist) after serving three-quarters of the sentence (Article 78 § 2 of the CC). Additionally, a person sentenced to 25 years imprisonment may be released on parole after serving 15 years of the sentence, and a person sentenced to life imprisonment – after serving 25 years of the sentence (Article 78 § 3 of the CC).

As was underlined above, it is a penitentiary court which decides on release on parole. However, in accordance with Article 77 § 2 of the CC, in particularly justified cases the court while issuing a judgment may order more severe conditions for applying for release on parole than these indicated in Article 78 of the CC. This opportunity is used relatively rarely, usually by increasing the time limit for application for parole by a convict sentenced to life imprisonment. However, this opportunity cannot be used in such a way that in practice would prevent a convict from applying for release on parole (for example by stating that 50 years old convict may apply for release on parole only after serving 40 years of imprisonment). The Supreme Court underlines that in case of life imprisonment the court is allowed to limit the opportunities for applying for release on parole but only to

63 In the resolution of 7 judges of 26 April 2017 (I KZP 2/17, OSNKW 2017, no. 6, item 32) the Supreme Court underlined that while deciding on release on parole, the court shall take into account all criteria indicated in Article 77 § 1 of the CC. Hence, the sentencing guidelines as set in Article 53, Article 54 § 1 and Article 55 of the CC are not relevant for deciding on this issue.

such limits which are not contrary to the principle of humanitarian treatment and the principle of respect for human dignity. Thus, even a person sentenced to the most severe sentence provided in the Polish legal system cannot be deprived of the right to apply for release on parole.[64]

Non-judicial entities which are parties to enforcement proceedings, e.g. the director of the prison or the penitentiary committee, are also entitled to take decisions which are significant to the sentenced person. However, all these decisions are related rather to the way of execution of a sentence but not its duration, interruption or conditional release. For example, the director of the prison decides on rewarding or imposing disciplinary penalties on the sentenced person (Articles 137-149 of the CECS); the penitentiary committee directs the sentenced person to the prison of the appropriate type, if the court does not determine the type of prison in the sentence (Articles 74-76 of the CECS). The penitentiary committee is also entitled to apply "dangerous detainee regime" mentioned in first part of this report. However, the sentenced person may make a formal complaint against the decisions of the prison director and the penitentiary committee to the court (Article 7 of the CECS).

Considering the above, it seems reasonable to conclude that non-judicial entities, particularly the Prison Service, play an important role in enforcement proceedings. However, the question of enforcing a penalty in the Polish legal system also pertains to the broader issue of administration of justice, which is a responsibility of independent courts and judges, and which in practice means that the Polish legislator transfers competences in key decisions concerning enforcement of penalties to trial courts and penitentiary courts.

8 Conclusions

The process of sentencing in Poland is based on the principle of legality. No penalty or penal measure may be imposed on a convict if such a penalty or penal measure was not provided by law at the time of commission of a criminal act. Moreover, in case of change of the law after commission of the criminal act, the court is obliged to choose and apply the law which is more favorable for a defendant (*lex mitior retro agit*). Fortunately, freedom to decide left to the courts in the sentencing process is relatively large. The Criminal Code only in exceptional circumstances provides for an obligation to impose penal measure without leaving any discretion to the court. With reference to penalties such discretion is much higher: there are no provisions in the Criminal Code which would "force" the court to impose a predetermined penalty, without leaving any freedom to judges as to the choice

64 Decision of the Supreme Court of 22 November 2001, II KKN 152/01, Lex no. 51603.

of length of penalty to be imposed. On the other hand, guidelines concerning sentencing as well as statutory limits of penalties provided for particular offences protect offenders from arbitrariness in the sentencing process.

At the end it is worth noting that in June 2019 the Polish Parliament adopted the law considerably limiting judicial discretion in sentencing. It raised the upper limit for prison sentences to 30 years, restricted possibility of handing down non-custodial sentences; extended the period of eligibility for conditional release and raised from 25 to 35 years the period of imprisonment after which life-sentenced prisoners or those sentenced to at least 20 years of imprisonment may apply for conditional release. It also introduced the penalty of life imprisonment without parole.[65] Adoption of the law was strongly criticized by specialists on criminal law.[66] They successfully intervened, requesting the President of the Republic of Poland refer the law to the Constitutional Tribunal. On 14 July 2020 the Constitutional Tribunal ruled that this act is inconsistent with the Polish Constitution.[67]

Unfortunately, this did not terminate efforts of the legislator to limit judicial discretion in the sentencing process. On 7 July 2022 the Polish Parliament again adopted the Act amending the Criminal Code which provides, *inter alia*, more severe prerequisites for applying for conditional release (the increase from 25 to 30 years of the period of imprisonment after which life-sentence prisoners may apply for conditional release; introduction of legal basis for not granting conditional release at all to persons convicted to life imprisonment) and indicates the list of aggravating and mitigating circumstances which should be taken into account in sentencing process (the new Article 53 § 2a-2e of the CC). In general, the amendments aim at increasing the punitiveness of the Criminal Code. Up to now (1 October 2022) the legislative process concerning the amendments has not been completed.

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65 Committee against Torture. Concluding observations on the seventh periodic report of Poland, adopted on 5 August 2019, p. 4 (available at: https://www.rpo.gov.pl/sites/default/files/Uwagi%20ko%C5%84cowe%20Komitetu%20Przeciwko%20Torturom%20wobec%20Polski%20%28j%C4%99z.%20angielski%29.pdf) (access: 6 November 2020). See also: Dagmara Woźniakowska-Fajst, Katarzyna Witkowska-Rozpara, 'How neoclassical criminology, penal populism and COVID-19 helped to escalate the repressiveness of criminal law – the case of Poland?', 44 *Archives of Criminology* 1 (2022), p. 77-106 (available at: https://czasopisma.inp.pan.pl/index.php/ak/article/view/2210/2439) (access: 1 October 2022).

66 The protest was signed by 158 scientists (see: https://oko.press/158-karnistow-apeluje-do-andrzeja-dudy-prezydenciezawetuj-kodeks-karny/) (access: 5 November 2020).

67 Judgment of the Constitutional Tribunal of 14 July 2020, Kp 1/19, OTK – ZU A 2020, item 36.

Legality, non-arbitrariness and judicial and administrative discretion in sentencing and enforcement of sentences in Portugal

Anabela Miranda Rodrigues, Sónia Fidalgo and Celso Manata[*]

1 Introduction

Questions related to the purposes of punishment and the determination of the concrete measure/severity of the penalty are among those that attract more attention in legal systems that are concerned with law enforcement to respond to specific concrete cases. On the other hand, questions regarding the legal regulation of the execution of the sentence have been of concern to the legislators and the doctrine in recent years, above all in systems that recognize that punishment has a socializing purpose.

In this context, after making a brief reference to the characterization of the judge's functions in Portuguese criminal proceedings, we will give an account of the main characteristics of the Portuguese sanctioning system, paying attention to the relationship between the legislator and the judge in the process of sentencing. We will also focus on the human rights requirements as regards the sentencing process. We will then refer to the legal status of the detainee, relating this issue to the Administrative discretion in the execution of sentences.

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2 The principle of legality as regards criminal punishments

2.1 The principle of legality of criminal offences and penalties

Under Portuguese law, there is no crime or sentence without pre-existing and written criminal law and only in its strict terms (*nullum crimen, nulla poena sine lege praevia, stricta et scripta*). The principle of legality is provided for in Article 29 of the Constitution of the Portuguese Republic (hereafter, CPR),[1] as well as in Article 1 of the Portuguese Penal Code (hereafter, PC).[2]

It is usual to say that this principle has effects or consequences on five different levels: on the extension level, on the level of the source, in terms of determinability, in terms of the prohibition of analogy and in terms of the prohibition of retroactivity.[3] In terms of scope or extension, it should be noted that the principle of legality does not cover all criminal matters, but only those which entail an aggravation of the agent's responsibility. At the source level, the principle of legality leads to the requirement of formal law: only a law of the Assembly of the Republic or competently authorized by it can define the regime of crimes, penalties and security measures. In terms of determinability, the principle of legality means that the description of the prohibited conduct and all other requirements on which the punishment depends, have to be taken to a point where prohibited and sanctioned behaviors become objectively determinable. In terms of the prohibition of analogy the principle means that an appeal to analogy is not permitted to qualify an act as criminal, to define a case of perilousness, or to determine a penalty or a corresponding security measure. In terms of the prohibition of retroactivity, the principle of legality

1 According to the Article 29 CPR, no one may be sentenced under the criminal law unless the action or omission in question is punishable under a pre-existing law, nor may any person be the object of a security measure unless the prerequisites therefore are laid down by a pre-existing law (no. 1); these provisions do not preclude, however, the punishment up to the limits laid down by internal Portuguese law of an action or omission which was deemed criminal under the general principles of international law that were commonly recognised at the moment of its commission (no. 2); no sentence or security measure may be applied unless it is expressly sanctioned by a pre-existing law (no. 3); no one may be the object of a sentence or security measure that is more severe than those provided for at the moment of the conduct in question, or at that at which the prerequisites for the application of such a measure were fulfilled, while criminal laws whose content is more favourable to the accused person shall be applied retroactively (no. 4).

2 According to the Article 1 PC, an act may only be criminally punished if it was determined punishable by law before the act was committed (no. 1); security measures may only be applied to cases of perilousness, if its conditions are determined by law previous to its fulfilment (no 2); and an appeal to analogy is not permitted to qualify an act as criminal, to define a case of perilousness, or to determine a penalty or a corresponding security measure (no. 3).

3 See Figueiredo Dias, *Direito Penal. Parte Geral. Tomo I* (with the collaboration of Maria João Antunes, Susana Aires de Sousa, Nuno Brandão, Sónia Fidalgo), 3rd. ed., Coimbra: Gestlegal, 2019, p. 209 f. and 215 f.

reflects the idea that only the fact described and declared punishable by a pre-existing law may be punished.

By establishing, in a general and abstract way, the facts which are considered crimes and the penalties that correspond to them, the criminal law requires a complementary regulation to be carried out in practice – this is the subject of criminal procedural law.[4]

2.2 *An accusatorial procedural system recognizing the principle of instruction*

Since 1988, the Portuguese criminal procedure system is an accusatorial one recognizing the principle of instruction. The Portuguese system is an accusatorial system because of the principle of indictment and the status of *active participants* (*sujeitos*) that is given to certain interveners in procedure.

The administration of criminal justice is fundamentally carried out through the activities of two distinct entities, the public prosecutor and the judge, who share between them the functions of investigating, indicting and judging the infraction. In this accusatorial system of criminal procedure – which is imposed by Article 32, no. 5 CPR – it is the responsibility of the public prosecutor to investigate the existence of a crime, to find its perpetrators and to find and collect the necessary evidence for the purpose of deciding whether or not to prosecute (Article 262 of the Portuguese Code of Criminal Procedure – hereafter, CCP). The judge has, then, the function of judging (Articles 311 and f. CCP). Besides the court of justice and the public prosecutor, the defendant, the defense counsel and the victim (*assistente – i.e.* the party assisting the public prosecutor) are also considered *active subjects* in Portuguese criminal procedure: all of them benefit from autonomous rights to influence the actual course of the proceedings as a whole, in view of a final decision.[5]

The structuring of Portuguese criminal procedure according to an accusatorial model is especially related to the adoption of the principle of instruction. According to this principle, judges have the power and the duty to clarify and investigate *ex officio* the facts presented to them for judgment (Article 340 CCP). As such, the court itself creates the necessary basis for its decision, independently of the contributions of the prosecution and the defense. However, the principle of instruction assumes a subsidiary nature, as the

4 Concerning the "mutual relationship of functional complementarity" between criminal law and criminal procedural law, see Figueiredo Dias, *Direito Processual Penal*, Lições coligidas por Maria João Antunes, Secção de Textos da Faculdade de Direito da Universidade de Coimbra, 1988/1989, p. 5 f.

5 See Figueiredo Dias, 'Sobre os sujeitos processuais no novo Código de Processo Penal', in: *O Novo Código de Processo Penal. Jornadas de Direito Processual Penal*, Coimbra: Almedina, 1988, p. 34, and Maria João Antunes, *Direito Processual Penal*, Coimbra: Almedina, 2018, p. 21 f.

court´s intervention can only occur when it is necessary for the purpose of discovering truth.

The common criminal procedure has three phases: the inquiry (*inquérito*), the examining stage (*instrução*), and the trial hearings (*julgamento)*. The examining stage is not compulsory, and its purpose is to have the examining judge (*juiz de instrução*) confirm the decision to prosecute or to discontinue the proceedings with a view to establishing whether the case is to be tried in a higher court (Article 286 CCP).

2.3 Legality and discretion in sentencing

Nowadays, the sentencing process is considered to require a close cooperation – but, at the same time, a separation of tasks as clear as possible – between the legislator and the judge. It is up to the legislator to establish the criminal frameworks for each type of acts described in the Penal Code. The legislator must also provide the judge with the criteria that the judge must use in the specific determination (and choice) of the penalty. The judge, for his part, carries out a double (or triple) task, within the framework provided by the legislator. The judge has to determine the abstract penal framework for the facts that have been proven in criminal proceedings. He then has to find, within this framework, the concrete *quantum* of the penalty on which the accused should be sentenced. Along with these operations – or after them – the judge has to choose the type of penalty to be applied, whenever the legislator has made more than one available to him.[6]

In Portugal, the legislator took an express position on the meaning, limits and purposes of punishment, and stated his position on three political-criminal propositions: criminal law aims to protect legal assets; guilt is only the limit of the penalty, but not its foundation; socialization is the purpose of the penalty.[7]

There are three rules in the PC that are of utmost importance to this matter: Articles 40, 70, and 71. Article 40 PC – which was introduced in the PC in 1995 – establishes the purposes of penalties and security measures. According to this provision, the application of penalties and security measures aims at the protection of juridical assets and at the agent's reintegration in society (no. 1); the penalty should in no case exceed the extent of the guilt (no. 2); the security measure can only be applied if it is proportional to the gravity of the act and the dangerousness of the agent (no. 3). Article 70 PC focuses on the criterion for the choice of penalty, and establishes that if a liberty depriving penalty and a non-

6 See Figueiredo Dias, *Direito Penal Português. Parte Geral, II. As consequências jurídicas do crime*, Lisboa: Editorial Notícias, 1993, p. 192 f.

7 See Anabela Miranda Rodrigues, 'Medida da pena de prisão: desafios na era da inteligência artificial', 149 *Revista de Legislação e de Jurisprudência* 4021 (2020), p. 260, and the same author, 'A questão da pena e a decisão do juiz – entre a dogmática e o algoritmo', in: Anabela Miranda Rodrigues (coord.) *A inteligência artificial no direito penal*, Coimbra: Almedina, 2020, p. 222.

liberty depriving penalty are alternatively applicable to the crime, the court prefers the second whenever its execution is adequate and sufficient for the purpose of punishment. According to Article 71, no. 1 PC, the determination of the penalty measure is done according to the agent's guilt and prevention needs, within the law's defined limits. The legislator further clarifies that the reasons for the measure of the penalty are expressly mentioned in the sentence (Article 71, no. 3 PC). In addition, according to the Article 205 CPR, court decisions shall set out their grounds in the form laid down by law. These provisions contain very concrete normative requirements that must be put into practice by the judge.

Although it is recognized that in the process of determining the penalty there is always a margin of discretion for the judge, the *legalization* of this process intends to *limit* this discretion of the judge, allowing an evaluation of the question on appeal by higher courts.[8] The Supreme Court of Justice judgment of 24 February 1988 is pointed out in Portugal as a decision that opened the way to a praiseworthy jurisprudence, where clearly the judicial activity of determining the penalty was seen as a legally bound activity: "the criminal judge has a wide margin of discretionary power, which, however, is neither unlimited nor uncontrollable: it is a legally bound discretion, its use being subject to review in appeal, by the higher courts, including the Supreme Court of Justice, to whose censorship powers only escape certain individual components of the judge, which are not entirely rationally controllable".[9]

Along with the legislator, the Portuguese doctrine has developed a rational model for sentencing (for the determination of the concrete measure/severity of the penalty), thus seeking to subtract the decision on the measure of the penalty from the arbitrariness and the *art* of the judge. The Portuguese doctrine has developed the "theory of preventative scale."[10] As we have already seen, according to Article 40 PC, the application of penalties aims at the protection of juridical assets and at the agent's reintegration in society. In this way, the measure of the penalty must be found on the basis of the measure of the need to protect the legal assets in the specific case. However, according to this theory, the need for protection of juridical assets is not likely to be given in an exact measure – in an exact *quantum* of penalty. Thus, then, within the legal framework, the judge will create the preventative framework in the concrete case. This scale has as its upper limit the optimum

8 See Anabela Miranda Rodrigues, 'Medida da pena de prisão…', p. 260, and the same author, 'A questão da pena e a decisão do juiz…', p. 223.

9 Supreme Court of Justice, judgment of 24 February 1988 (Manso Preto), *Boletim do Ministério da Justiça*, 374, p. 239. About this decision, see also, Anabela Miranda Rodrigues, 'O modelo de prevenção na determinação da medida concreta da pena', *Revista Portuguesa de Ciência Criminal* 12 (2002), p. 151.

10 This theory was developed by Figueiredo Dias and Anabela Miranda Rodrigues: see Figueiredo Dias, *As consequências jurídicas do crime*…, p. 227 f, and, in detail, Anabela Miranda Rodrigues, *A determinação da medida da pena privativa de liberdade (os critérios da culpa e da prevenção)*, Coimbra: Coimbra Editora, 1995, p. 545 f.

point of protection of legal assets and as a lower limit the minimum requirements for the defense of the legal system. Within this framework based on preventative concerns, the concrete measure of penalty will be found in terms of special prevention needs. The agent's guilt will always be the limit of the penalty – it is the insurmountable limit of both the general preventative requirements and the special preventative ones.[11]

Despite the effort made by the Portuguese legislator and doctrine to *legalize* the process of determining the concrete measure of the sentence, the truth is that this process is an eminently practical one. It is up to the judge to determine the *substrate of the penalty measure*.[12] In Article 71, no. 2 PC, the legislator sets out, by way of example, a set of factors for measuring the penalty. According to this rule, on determining the concrete penalty, the court considers all circumstances that, not being elements of the type of crime, are in favour of the agent or against him, taking into consideration, namely: a) the degree of unlawfulness of the act, its form of execution and the seriousness of its consequences, as well as the degree of violation of the duties imposed on the agent; b) the strength of the intent or of the negligence; c) the feelings manifested on the perpetration of the crime and the aims or motives that determined it; d) the agent's personal situation and his economic condition; e) the conduct prior to the act and after it, especially when the latter is aimed at repairing the consequences of the crime; f) the lack of preparation to maintain a lawful conduct, manifested in the act, when that lack of preparation must be censured by the imposition of a penalty.

However, it is the judge who will have to identify which factors of measurement of the penalty are relevant in the specific case. And the judge must identify these factors on the basis of preventative concerns and in the light of the agent´s guilt in the specific case. In order to assess the agent's guilt, the judge must consider factors that refer only to the committed act and, thus, to circumstances that are only related to the seriousness of the unlawful act committed by the agent and with the guilt that he has manifested in his practice. In turn, the determination of the preventative requirements in the specific case will imply the assessment of circumstances unrelated to the fact and related to the person of the agent.[13] In this process there will always be a moment of subjectivity that cannot be completely eliminated – the *normative* rationality has limits here. It is difficult to find a normative criterion that binds the judge so that he *mathematically* finds a single and correct correspondence between the gravity of the fact – from the point of view of the agent's guilt and the preventive requirements – and the appropriate penalty in the case.

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11 Portuguese jurisprudence follows this "theory of preventative scale". See, *e.g.* Supreme Court of Justice, judgment of 19 February 2015 (Process no. 617/11), and Supreme Court of Justice, judgment of 12 March 2015 (Process no. 651/13) (available at: www.dgsi.pt).

12 Or, as Anabela Miranda Rodrigues has already said, to determinate the "fact for the purpose of determining the length of the penalty" (Anabela Miranda Rodrigues, *A determinação da medida da pena…*, p. 580 f.).

13 See Anabela Miranda Rodrigues, *A determinação da medida da pena…*, p. 658 f.

In any case, following the criteria provided by the legislator and the model proposed by the doctrine, this discretion – that will always be a *discretion in law enforcement*[14] – will have a 'guiding substrate for the measure of the penalty' that will help the judge in his activity of *discovering* the final penalty.[15]

Even when the CCP establishes the principle of the free evaluation of evidence – the evidence is evaluated according to the rules of experience and the free judgment of the competent entity (Article 127 CCP) – this 'free evaluation' means that the judge must value the evidence according to the duty to reach material truth. The judge's free conviction should never be understood as pure discretion, as a purely personal or emotional conviction. This free evaluation of the evidence must be objective and therefore must be subject to control.[16]

3 Human rights requirements as regards the sentencing process and the enforcement of sentences

3.1 The defendant as an active participant *of the criminal procedure*

One of the purposes of criminal proceedings is to protect citizens' fundamental rights – namely, the defendant's fundamental rights – against the State. In Portugal, the defendant has the status of an *active participant* (*sujeito*) of the process. This defendant's procedural status has three fundamental dimensions: the safeguards of the defence; the principle of presumption of innocence until the sentence in which the defendant was convicted has transited *in rem judicatam*; the principle of respect for the defendant's will.[17]

According to the Article 32, no. 1 CPR, the criminal procedure shall ensure all the safeguards of the defence, including the right to appeal. Article 60 CCP states that from the moment when a person acquires the status of defendant, he is ensured the exercise of procedural rights and duties, without prejudice to the enforcement of coercive and patrimonial guarantee measures or to the implementation of evidence formalities, as provided for by law. The defendant has, in particular, the right to attend all procedural acts that directly affect him; the right to be heard by the court or by the examining judge

14 See Anabela Miranda Rodrigues, *A determinação da medida da pena…*, p. 81 f.

15 See Anabela Miranda Rodrigues, 'Medida da pena de prisão…', p. 270, and the same author, 'A questão da pena e a decisão do juiz…', p. 237-238.

16 See Figueiredo Dias, *Direito Processual Penal…*, p. 135, and Anabela Miranda Rodrigues, 'A questão da pena e a decisão do juiz…', p. 241 f.

17 About the defendant's procedural status, see, Figueiredo Dias, 'Sobre os sujeitos processuais…', p. 7 f., Anabela Miranda Rodrigues, 'A defesa do arguido: uma garantia constitucional em perigo no 'admirável mundo novo'', *Revista Portuguesa de Ciência Criminal* 12 (2002), p. 549 f.; and Maria João Antunes, *Direito Processual Penal…*, p. 36 f.

whenever they render a decision that personally affects him; the right to refuse to answer any questions addressed by an authority on charges against him; the right to choose a lawyer or ask the court to appoint him a defence counsel; the right to be assisted by a defence counsel in all procedural acts where he takes part and, when detained, to contact such counsel in privacy; the right to take part in the inquiry and examination, propose evidence and require any necessary measures; the right to plead his defence before the close of the trial hearing (articles 61º, no. 1, *a), b), d), e), f) g)*, 341º, no. 1, and 361º CCP).

In Portugal, the inquiry is directed by the public prosecutor, but where the act may affect the rights, freedoms and guarantees of the defendant, the intervention of the examining judge is required (see articles 263, 268 and 269 CCP). For instance, the remand in custody (*prisão preventiva*) – a coercive measure – is always applied by a judge, even during the inquiry stage (articles 194 and 268 CCP).[18]

Concerning evidence, Article 32, no. 8 CPR establishes that all evidence obtained by torture, coercion, infringement of personal physical or moral integrity, or improper intromission into personal life, the home, correspondence or telecommunications is null and void (see Article 126 CCP).

3.2 Human rights requirements in the sentencing process

In Portugal, a principle with undeniable political-criminal relevance is the guilt principle: there can be no penalty without guilt; the measure of the penalty cannot exceed the measure of guilt. Among us, it is understood that the guilt principle finds its axiological foundation (not in a retributive conception of the penalty, but rather) in the principle of inviolability of personal dignity: an essential axiological principle to the idea of the democratic rule of law (Articles 1, 13 and 25, no. 1 CPR).[19]

Another characteristic of the Portuguese sanctioning system is the refusal of the death penalty and the sentence of life imprisonment (articles 24, no. 2, and 30, no. 1 CPR), which reveals a principle of humanity.[20] In addition, the CPR establishes that no sentence

18 About the inquiry stage see Anabela Miranda Rodrigues, 'O inquérito no novo Código de Processo Penal', in: *O Novo Código de Processo Penal. Jornadas de Direito Processual Penal*, Coimbra: Almedina, 1988, p. 61 f.

19 See Figueiredo Dias, *As consequências jurídicas do crime*…, p. 73 f., Maria João Antunes, *Direito Processual Penal*…, p. 15, and, in detail, Anabela Miranda Rodrigues, *A determinação da medida da pena*…, p. 389 f. Concerning this foundation of the guilt principle, see, among others judgements of the Portuguese Constitutional Court, for instance, Processes nos. 43/86, 426/91, 274/98, 605/2007 and 80/2012 (available at: www.tribunalconstitucional.pt).

20 The death penalty was abolished for political crimes by Article 16 of the Additional Act to the Constitutional Charter of July 5, 1852; for all civil crimes, except treason, by the Law of July 1, 1867 and for all crimes (including military crimes) by Article 22 of the CPR of March 21, 1911. See Anabela Miranda Rodrigues, 'Portugal como país pionero en la abolición de la pena de muerte en Europa', in: *Pena de muerte: una pena*

or security measure that deprives or restricts freedom may have an unlimited or undefined duration (Article 30, no. 1); and that no one may be subjected to torture or to cruel, degrading or inhuman punishment (Article 25, no. 2).

On the other hand, according to Article 30, no. 4 CPR, no sentence shall automatically involve the loss of any civil, professional or political right (see also Article 65 PC). This principle of non-automaticity of the penalties' effects materializes the political-criminal idea of the necessity to eliminate the stigmatizing effect of penalties.[21]

In addition, the Portuguese sanctioning system is based on the basic conception that custodial sanctions are the *ultima ratio* of the criminal policy. The principle of preference for non-custodial criminal reactions prevails, with compliance with the political-criminal principle of the need / subsidiarity of criminal intervention and the proportionality of criminal sanctions (Article 18, no. 2 CPR, and Articles 70 and 98 PC).[22]

3.3 Human rights requirements in the enforcement of sentences

Another guiding principle of the Portuguese criminal political program is that convicted persons who are the subject of a sentence or security measure that deprives them of their freedom retain their fundamental rights, save for the limitations that are inherent to the purpose of their convictions and to the specific requirements imposed by the execution of the respective sentences (Article 30, no. 5 CPR).

According to Article 42 PC, the execution of imprisonment sentence, which serves the defence of society and prevents the perpetration of crimes, should be guided to enable the social reintegration of the prisoner, and to prepare him to lead his life in a socially responsible way, without committing crimes (no. 1); the execution of imprisonment sentence is ruled in its proper legislation, in which the duties and the rights of the prisoners are fixed (no. 2).

Currently, the execution of custodial sentences is mainly regulated by the Code for the Execution of Sentences and Measures of Deprivation of Liberty (hereafter, CE). According to Article 2, no. 1 CE, the execution of sentences and security measures with deprivation of liberty has as its goal the social reintegration of the agent, the protection of legal assets

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cruel e inhumana y no especialmente disuasoria, Ediciones de la UCLM, 2014, p. 79 f., and Inês Horta Pinto, 'A pena de morte no mundo em 2017: um retrato, por ocasião do 150.º aniversário da abolição da pena de morte em Portugal', *Revista Portuguesa de Ciência Criminal* 3 (2017), p. 517 f.

21 See Figueiredo Dias, *As consequências jurídicas do crime*…, p. 53 f. The Portuguese Constitutional Court has already considered unconstitutional on the basis of the Article 30, no. 4 CPR, the norms of several electoral laws which provided for the electoral incapacity of those sentenced to a prison sentence for intentional crime while they were serving the sentence (see Portuguese Constitutional Court, Process no. 748/93, *Diário da República*, I Série A, 23 December 1993).

22 See Figueiredo Dias, *As consequências jurídicas do crime*…, p. 52-53, and Maria João Antunes, *Direito Processual Penal*…, p. 16-17.

and the defense of society. Thus, the main purpose of the application of the prison sentence is the agent's socialization (prevention of recidivism); while also recognizing the presence of general prevention objectives (protection of legal assets and defense of society).

The State has a duty to promote the socialization of the prisoner.[23] And, before being socializing, the execution of the sentence must be *non-desocializing*.[24] This idea is reflected in Portuguese law which provides that execution of the sentence, "to the extent possible, avoids the harmful consequences of deprivation of liberty and approaches the conditions of community life" (article. 3, no. 5 CE). The detainee, by his condition, continues to be a citizen subject to a special status which does not however exclude the benefit of fundamental rights.

The idea of socialization is, therefore, directly related to the *legal status* of the detainee.[25] The relationship between the prisoner and the administration is no longer a *special power relationship* (outside the legal world), but a legal relationship in which both the prisoner and the administration have rights and obligations. Even the Constitution has recommended, since 1989, in its Article 30, no. 5, that the rights of the detainee are limited to the extent that this is necessary for the execution of the sentence.[26] This idea finds expression in Article 6 CE (*Legal status of the detainee*):

> The detainee retains the ownership of fundamental rights, with the exception of the limitations inherent to the meaning of the condemnatory sentence or to the decision to apply a measure involving deprivation of liberty, and those imposed, under the terms and within the limits of this code, for reasons of order and security of the prison.

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23 On the debate on socialization, see A. M Rodrigues, 'Polémica actual sobre o pensamento da reinserção social', Separata de *Cidadão delinquente: reinserção social*, 1980, *passim*; the same author, *A determinação da medida da pena privativa da liberdade*, Coimbra Editora, 1995, p. 317 f., 558 f.; the same author, 'L'exécution de la peine privative de liberté. Problèmes de politique criminelle', in: *L'exécution des sanctions privatives de liberté et les impératifs de la sécurité – Actes du colloque de la FIPP*, Budapest, Hongrie, 16-19 févr. 2006, Wolf Legal, 2006, p. 52 f.; the same author, 'Aspectos jurídicos da reclusão', in: *Educar o outro – Humana Global*, 2007, p. 115 f.; and, still the same author, 'Superpopulação carcerária. Controlo da execução e alternativas', *Revista Electrônica de Direito Penal AIDP-GB*, ano 1 (2013), p. 13 f. On the 'new' right to socialization in the new emerging State model, see Anabela Miranda Rodrigues, 'Execução penal socializadora e o novo capitalismo – uma relação (im)possível?', *Revista Brasileira de Ciências Criminais* 23 (2015), p. 17 f. and 30 f.

24 See Anabela Miranda Rodrigues, *Novo olhar sobre a questão penitenciária*, Coimbra: Coimbra Editora, 2002, p. 45 f.

25 See Anabela Miranda Rodrigues, *Novo olhar…*, p. 65 f.

26 According to the Article 30, no. 5 CPR, 'convicted persons who are the object of a sentence or security measure that deprives them of their freedom retain their fundamental rights, save for the limitations that are inherent to the purpose of their convictions and to the specific requirements imposed by the execution of the respective sentences'.

Three consequences can be drawn from the relationship between the regime provided for in the Constitution and in the law: the detainee retains, during the execution of the sentence, all his fundamental rights (Article 6 CE); all limitations of these rights must be provided for by law (Articles 18 and 165 no. 1, *b* CPR); the law can only limit these rights when this limitation is inherent to the meaning of the condemnatory sentence or imposed for reasons of order and security of the prison (Article 6 CE), keeping all the requirements of the restrictive laws of rights.

Thus, the detainee is the holder of a set of rights provided for in Article 7 CE. For instance, the detainee has the right to the protection of his health and may access the national health service under conditions identical to those of other citizens (Article 7, no. 1 *a* and *i*, and Article 32 and f. CE). The detainee has the right to the exercise of civil, political, social, economic and cultural rights, including the right to suffrage, except when that is incompatible with the meaning of the condemnatory sentence (Article 7, no. 1 *b*). The detainee has also the right to the protection of private and family life and to the inviolability of the confidentiality of correspondence and other means of private communication, without prejudice to the limitations arising from reasons of order and security of the prison and prevention of the practice of crimes (Article 7, no. 1 *f*). The detainee has still the right to the freedom of religion and worship (Article 7, no. 1 *c*), and the right to participate in work activities (Article 7, no. 1 *h*).[27]

4 Position of the independent judge and responsibility for fairness

The Constitution enshrines the separation of powers, and establishes that the President of the Republic, the Assembly of the Republic, the Government and the Courts are sovereign entities, and establishes that the latter are independent and subject only to the law (Articles 110, 111 and 203 CPR). This principle of judicial independence means independence from the remaining powers of the State, from any groups of public life, from the judicial administration and from other courts. This principle also implies a requirement of impartiality.[28]

Therefore, judges may not – even free of charge and with the exception of non-remunerated teaching or legal scientific research – perform any other remunerated public

27 Concerning the detainee´s rights, in detail, see Anabela Miranda Rodrigues / Sónia Fidalgo, 'Le système pénitentiaire portugais', in: Jean-Paul Céré & Carlos Japiassú (eds) *Les systèmes pénitentiaires das le monde*, Paris: Dalloz, 2017, p. 300 f.

28 See Figueiredo Dias / Maria João Antunes, 'La notion européenne de tribunal indépendant et impartial. Une approche à partir du droit portugais de procédure pénale', *Revue de science criminelle et de droit pénal comparé* (1990), p. 734 f.

or private function and may not be held liable for their decisions, subject to the exceptions provided for by law (Article 216, no. 4 CPR). On the other hand, judges can only be transferred, suspended, retired or dismissed in the cases provided for by law, and their management is the responsibility of the Superior Council of the Magistracy (Article 217 CPR).[29]

The Statute of the Judges[30] also provides for a set of rights (*e.g.* free transit, special jurisdiction or special guarantees in criminal proceedings) and special duties (*e.g.* they may not engage in political activity of a party and of a public nature and are required to submit a declaration of income and assets) aimed at reinforcing their independence and impartiality.

In short, judges take their decision only according to the Constitution and the law and are not subject to orders or instructions, except for the duty of compliance by lower courts with decisions issued, on appeal, by higher courts (Article 4, no. 1, of the Statute of the Judges).

However, Articles 39 and 40 of the CCP provide for several situations in which the judge is prevented from judging: *e.g.* due to the existence of a family relationship, kinship or guardianship (*e.g.* because he is or has been the spouse of the defendant or of the victim) or because he has previously performed other professional duties in the case (*e.g.* as a prosecutor, defender or criminal expert), or because he has intervened or must intervene in the case as a witness. In these circumstances the judge is obliged to declare his impeachment and the interveners in the case (*e.g.* the defendant or the victim) may also raise the issue (Article 41 CCP).

On the other hand, the same Code provides in Article 43 the possibility for the judge to ask for his own replacement in the case or for the public prosecutor's office, the defendant or the victim to request it, because there is a risk of it being considered suspicious, due to the existence of serious, grave and appropriate grounds for mistrust about his impartiality.

The impeachment statement is irrevocable (Article 42 CCP) and the request for excuse or the applications of refusal shall be considered by an immediately higher Court (Article 45 CCP).[31]

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29 The Superior Council of the Magistracy is presided over by the President of the Supreme Court of Justice and is composed of: two members appointed by the President of the Republic; seven members elected by the Assembly of the Republic and seven members elected by their peers, in accordance with the principle of proportional representation (Article 218 CPR).

30 Law 21/85, 30 July (last amended by Law 2/2020, 31 March).

31 See Maria João Antunes, *Direito Processual Penal*…, p. 31-32.

5 Judicial discretion within a framework

The Criminal Policy Framework Law[32] establishes in its Article 2 that the definition of criminal policy objectives, priorities and guidelines cannot: a) prejudice the principle of legality, the independence of the courts and the autonomy of the Public Prosecution Service; b) contain directives, instructions or orders on specific cases; or c) exempt from prosecution any crime.

However, the criminal courts must obey the decisions of the Constitutional Court and not only those handed down in the specific case under examination but also those declaring a certain rule illegal or unconstitutional with general binding force (Articles 233, no. 1, and 277 and f. CPR).

Until the revision of the CCP of 1998, in the event of a conflict of jurisprudence, Portuguese law provided for the possibility of the Supreme Court of Justice issuing decisions that constituted mandatory jurisprudence for judicial courts. Nowadays, CCP only provides for the existence of an extraordinary appeal to the Supreme Court of Justice to establish jurisprudence (Articles 437 and f. CCP), and the respective decisions only have effect in the process in which they were rendered. These decisions are handed down when, in the field of the same legislation and in relation to the same legal issue, there are two decisions of the Supreme Court of Justice sections in the opposite direction, or when, in the same circumstances, decisions are handed down by two higher courts in the opposite direction and without the possibility of an ordinary appeal. In any case, these kind of decisions – which are published in the Official Journal – always have great persuasive force and are usually followed by all the Courts. Moreover, under Article 446 CCP, any decision that runs counter to the jurisprudence established by the Supreme Court of Justice may be appealed directly to it.[33]

Finally, although the legislator cannot give orders or instructions to the judge, he can create circumstances that, to some extent, may direct him to make certain choices.

For instance, in the aforementioned Criminal Policy Laws, the legislator establishes which are the criminal phenomena and crimes that deserve a priority response, what solutions should be adopted with regard to petty crime and that the presiding judge of the district must ensure compliance with these guidelines.[34] And this intention is sometimes expressed even more clearly, requiring an increased justification in case the judge does not want to follow the 'orientation'.[35]

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32 Law 17/2006, of 23 May – this law aims at defining (biannual) objectives, priorities and guidelines on crime prevention, criminal investigation, prosecution and enforcement of sanctions and security measures.

33 See Maria João Antunes, *Direito Processual Penal*…, p. 224 f.

34 Cf. Articles 3, 5 and 6 of Law 55/2020, of 27 August (criminal policy for the biennium 2020-2022).

35 For example, according to Article 6, no. 5 of Law 55/2020, of 27 August, 'unless the judge, with good reason, decides otherwise, the attribution of priority in the inquiry stage shall also lead to a prioritization on the

6 Sentencing by non-judicial entities

In Portugal, the principle of the monopoly of the jurisdictional function is in force, under which it is the judge's responsibility to apply and declare the law of the case through decisions with *res judicata*. The judicial courts are the competent entities to decide criminal cases and apply penalties and security measures (Article 8 CCP) and to administer justice in the name of the people, repressing breaches of democratic legality (Article 202, nos. 1 and 2 CPR).

The execution of custodial sentences and measures is also carried out by a public entity (General Directorate of Probation and Prison Service),[36] and there are some persons placed in private health establishments, whose activity is supervised under the terms of CE, the General Regulation of Prison Establishments (hereafter, GRPE) and the provisions of the Dec. Law 70/2019, of 24 May.

7 Administrative discretion in the execution of sentences

The situation in which prisoners find themselves (*e.g.* the place where they are placed) and the extent to which they can enjoy some of their rights depends on the prison regime in which they serve their prison sentence. In Portugal there are three different regimes: the common, the open and the security regime (Articles 12 and f. CE). Open and security regimes depend on the verification of requirements and are assigned on a case-by-case basis by the Administration. Common regime is applied to prisoners who are not in open or security regime.

The granting of the open regime (Article 14 CE and 179 and f. GRPE), in general, depends on the consent of the convict and the verification of two requirements:[37] a) there is no reason to fear that the inmate will not execute the sentence or the measure involving deprivation of liberty, or that he will take advantage of the possibilities that this regime gives him to continue practising crime; b) this regime is adequate to inmate´s prison behaviour, as well as to the safeguard of order, security and discipline in prison, and the protection of the victims as well as to the defence of social order and peace.

Inmates who have been sentenced up to 1 year or who, having been sentenced to a higher sentence, have already served 1/6 of it may be placed in an *open internal regime* (Article 14, no. 3 CE). In this situation prisoners can spend the day outside of their cells

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determination of the date for the execution of acts of instruction, the carrying out of an investigative debate and a trial hearing (…)'.

36 There is only one prison managed in partnership with a private social entity (Santa Casa da Misericórdia do Porto).

37 In detail, see See Anabela Miranda Rodrigues / Sónia Fidalgo, 'Le système pénitentiaire portugais'…, p. 307 f.

(*e.g.* working or studying) but they may not leave the prison perimeter. This regime is granted by the prison director, after consulting the internal technical council (Article 14, no. 6 CE).

Prisoners who, in addition to those general conditions, have already served ¼ their sentence, have successfully benefited of a leave and have no pending case demanding remand prison may be placed in *external open regime* – to work, study or attend a health programme. This regime is granted (and revoked) by the general director of the prison services but needs the approval of the sentence enforcement judge (Article 14, no. 8 CE).

On the other hand, inmates are placed in a security regime when their legal/criminal situation or their behaviour in prison shows mainly a danger that is incompatible with their placement in any other execution regime (Articles. 15 CE, and 193 and f. and 221 of the GRPE). The decision to place (maintain or revoke) this regime is a competence of the director general of the prison services, must be communicated to the public prosecutor's office within a maximum period of 24 hours and may be challenged before the sentence enforcement judge (Article 15, nos. 4 e 6 CE).

In addition, there are many situations in which prisoners' rights may be restricted for reasons of order and security. According to the provisions of Article 86, no. 1 CE, order and discipline are indispensable conditions for the performance and purposes of a prison sentence, for the maintenance of an organised and safe life inside prison establishments and security is also necessary for the protection of fundamental legal assets, for the defence of society and to avoid that the prisoner escapes from the prison. However, as stated in Article 86, no. 4 CE, order, safety and discipline shall be maintained subject to the principles of necessity, adequacy and proportionality. Therefore, these decisions that restrict prisoners' rights cannot be arbitrary, inadequate or disproportionate and must always be subject to registration and reasoned order.

In any case, in Portugal the execution of the sentence is subject to the supervision and control of the Court of Execution of Sentences. Thus, the public prosecutor (of this Court) must visit the prisons and speak with the prisoners regularly, verify the legality of the decisions of the Prison Services and challenge those that it deems not to be in accordance with the law (Articles 141 CE and 178 GRPE). In this sense, the Prison Administration is obliged to notify the public prosecutor of the taking of various decisions such as those concerning the application of the security regime (Article 15, no. 6 CE), the seizure of correspondence addressed to the prisoner (Article 69, no. 2 CE) or the placement in a security cell or room (Articles 92, no. 6, and 93, no. 5 CE).

On the other hand, the sentence enforcement judge is responsible for ensuring respect for the rights of prisoners, ruling on the legality of decisions of the Prison Administration, as well as monitoring and supervising the execution of the prison sentence and preventive

internment (Article 138 CE).[38] This activity is carried out through the homologation (or not) of certain decisions of the prison services (*e.g.* those relating to the individual recovery plan, the therapeutic and rehabilitation plan of those legally incapable in criminal terms and the granting of open regime) or through the possibility of revoking various decisions (Articles 200 and f. CE), namely those relating to the non-authorization of visits or telephone contacts (Articles 65, no. 5, and 70, no. 5 CE), the non-authorization of contact with the media (Article 75, no. 4 CE), the application of a disciplinary measure of confinement in a disciplinary cell (Article 114 CE).

Moreover, in Portugal, prisoners have extensive rights of complaint, petition, claim and exposition (Articles 116 and f. CE, 177 and f. GRPE). For instance, at the internal level, prisoners may submit their complaints to the prison director, the general director of prison services, the Audit and Inspection Service of Prison Services (which are coordinated by judges and public prosecutors) and to the General Inspection of Justice Services. Externally, these complaints are mainly addressed to the Ombudsman and to the Assembly of the Republic, which recently has created the Sub-Commission for Reinsertion and Prison Affairs to deal specifically with these matters and has frequently visited prison establishments. Internationally, prisoners may lodge complaints with the European Court of Human Rights, the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment or the United Nations Sub-Committee for the Prevention of Torture.[39]

8 Conclusion

The determination of the concrete measure of the penalty is a special moment of application of the law, in which the weight of the demand for security is felt in a particular way in contemporary societies. In Portugal, some fundamental questions in the process of determining the concrete measure of the penalty – the relationship between guilt and prevention, on the one hand, and, with regard to prevention needs, the relationship between general and special prevention, on the other – find an answer in the PC. Portuguese doctrine has also shown concern with the sentencing process. Only a judicial decision linked to the law and rationally justified is essentially *legitimizing* the judicial power.[40]

On the other hand, only a prison system that sees the prisoner as the holder of fundamental rights can claim to attribute to the penalty a real socialization function. In Portugal, the legal status of the detainee, on the one hand, and the broad rights of

38 See Anabela Miranda Rodrigues / Sónia Fidalgo, 'Le système pénitentiaire portugais'…, p. 309.
39 See Anabela Miranda Rodrigues / Sónia Fidalgo, 'Le système pénitentiaire portugais'…, p. 314 f.
40 See Anabela Miranda Rodrigues, 'Medida da pena de prisão…', p. 272.

complaint, petition, claim and exposition he holds, on the other, are seen as a way to prepare the prisoner to lead his life in a socially responsible way, without committing crimes.

Judicial and administrative discretion in sentencing and enforcement of sentences in the Spanish legal system

José Luis Ramírez Ortiz and José Antonio Rodríguez Sáez[*]

1 Introduction: the regulatory framework

In the Spanish criminal justice system, once the trial has concluded, the Court must pass a document in which it must declare to be proven or not proven the facts that are the subject of the accusation and the participation of the defendant in them. If they are found to be proven, in the same document the Court must impose the corresponding penalty for the offence committed in accordance with the provisions of the Penal Code (CP in Spanish). Once the sentence has become final, the declaratory phase of the proceedings ends and the enforcement phase begins.

In the enforcement phase, the necessary intervention of the Administration to produce the material activity required to guarantee the objectives of this phase, is complemented by the provision of specific judicial control. In the case of non-custodial sentences, such control is carried out by the same Court that issued the sentence, which is generally competent to ensure compliance and resolve all incidents that may occur.[1] In the case of custodial sentences, this control is divided between two types of judicial bodies: the Sentencing Courts and the Prison Supervision Courts (JVP in Spanish). The latter were created by the 1979 General Prison Organic Law (LOGP in Spanish), approved one year

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1 With the sole exception of work for the benefit of the community, which is executed by the *Juzgados de Vigilancia Penitenciaria*.

after the promulgation of the 1978 Spanish Constitution (CE in Spanish), with the aim of assuming full jurisdiction over enforcement. However, subsequent legal modifications and judicial practices of reverse tendency have prevented the implementation of this model. In a very brief way, and without prejudice to the details that will be clarified later, it can be said that the JVPs have their own space: that referring to the conditions of enforcement (thus, the protection of the rights of inmates and correction of abuses by the Penitentiary Administration).

But there is also another shared area: that relating to the temporal dimension of the sentence,[2] in which the JVP grants any prison benefits that may involve a shortening of the sentence and decides on appeals against decisions by administrative bodies, while the Sentencing Court has jurisdiction in matters of settlement of the sentence, deciding on the actual duration of the sentence and agreeing on the date of release.

The rules governing the judicial determination of sentences and their enforcement are contained in several legislative instruments. Firstly, in the CE, which enshrines a number of central principles. These include the principle of legality[3] (from which the Constitutional Court (TC) has deduced the principle of forbidding double jeopardy or *ne bis in idem* principle, and the principle of proportionality), the principle of orientation of sentences towards re-education and social reintegration,[4] the principle of respect for the dignity and fundamental rights of the convicted person,[5] and the principle of jurisdictional control.[6]

The second fundamental text is the LOGP, which substantially changed the legal regime of prisons. The law responded to three main objectives: to enshrine re-education and social reintegration as a priority purpose of punishment, to establish guarantees of respect for the rights of the convicted person as a person and as a citizen, and to impose the principle of legality in the enforcement of criminal penalties and measures. The Act essentially regulates the material conditions for the enforcement of custodial sentences with a very progressive approach, making a clear distinction between prison regime and

2 In the terminology used by Caffarena Mapelli and others, Ejecución de la pena privativa de libertad: una mirada comparada, Programa Eurosocial para la cohesión social en América Latina, Documento de Trabajo nº 17, Serie Guías y Manuales, Área Justicia, Madrid, 2014, p. 171-178.

3 Artículo 25.1 CE: Nadie puede ser condenado o sancionado por acciones u omisiones que en el momento de producirse no constituyan delito, falta o infracción administrativa, según la legislación vigente en aquel momento.

4 Artículo 25.2 CE: Las penas privativas de libertad y las medidas de seguridad estarán orientadas hacia la reeducación y reinserción social y no podrán consistir en trabajos forzados.

5 Artículo 25.2 CE: El condenado a pena de prisión que estuviere cumpliendo la misma gozará de los derechos fundamentales de este Capítulo a excepción de los que se vean expresamente limitados por el contenido del fallo condenatorio, el sentido de la pena y la ley penitenciaria. En todo caso, tendrá derecho a un trabajo remunerado y a los beneficios correspondientes de la Seguridad Social, así como al acceso a la cultura y al desarrollo integral de su personalidad.

6 Artículo 117.3 CE: El ejercicio de la potestad jurisdiccional en todo tipo de procesos, juzgando y haciendo ejecutar lo juzgado, corresponde exclusivamente a los Juzgados y Tribunales determinados por las leyes, según las normas de competencia y procedimiento que las mismas establezcan.

treatment. The entire regulation of prison treatment, which is extensive and comprehensive, involves a new and total reconfiguration of prison reality by introducing the system of scientific individualization, with different degrees, including serving sentences in a regime of semi-freedom. The other great historical contribution of the law, as we saw before, was the establishment of jurisdictional control of enforcement through the JVP. Royal Decree 190/1996, of 9 February, regulating the Prison Regulations, was issued in development of the Law, replacing the 1981 Prison Regulations.

The third relevant text is the CP approved by Organic Law 10/1995 of 23 November, which contains rules for determining sentences and also various rules relating to enforcement. The doctrine criticizes the fact that this Act, due to what is called punitive populism, is being constantly reformed, distorting its structural principles, and that many of the changes that have been made introduce or maintain prison-related concepts which, by their very nature, should be regulated by the LOGP.[7]

On the other hand, Organic Law 5/2000, of 12 January, regulates the criminal responsibility of minors, with specific rules. In addition, the Law of 18 June 1870 regulates the legal regime for pardons. Finally, from the procedural perspective, reference should be made to Organic Law 6/1985, of 1 July, on the Judiciary (LOPJ), which regulates the jurisdiction of the different Courts and contains some general principles and rules of procedure, and the Criminal Procedure Act of 1882, which regulates criminal procedure, both at the declaratory stage and, to a lesser extent, at the enforcement stage.

2 The principle of legality in criminal sanctions

A) The principle of legality, in force in criminal matters, is also projected on the penal and executive spheres. Recognized at the constitutional level in Article 25, it is reflected in other legislation. Firstly, in Article 3 CP, from which it follows that in order to enforce a sentence, due process must have been followed before a judicial body which must have handed down a final judgement, the only valid form of sentence. Article 33 CP contains a list of possible penalties, distinguishing between serious, less serious and minor penalties. Similarly, Title III of Book I CP regulates the content of each of the penalties envisaged, offering detailed regulation that makes it possible to determine the form in which they are to be served. Lastly, Article 2 LOGP states "prison activity shall be carried out with guarantees and within the limits established by law, regulations and judicial decisions".

However, despite the recognition of the principle of legality and its criminal, penal, jurisdictional and enforcement guarantees, practice shows the existence of certain problematic areas. Let us examine the most important ones.

7 Cristina Rodríguez Yagüe, El sistema penitenciario español ante el siglo XXI. Iustel, Madrid, 2013, p. 13.

B) As a possible legal consequence of the offence, the Spanish system provides for the imposition of security measures, in addition to the sentence. Thus, Article 6 CP establishes:

> The security measures are based on the criminal dangerousness of the subject on whom they are imposed, externalized in the commission of an act planned as a crime. The security measures may not be more onerous or longer than the penalty applicable in the abstract to the act committed, nor exceed the limit of what is necessary to prevent the dangerousness of the perpetrator.

The normative approach is therefore the traditional one, as it reserves security measures, legitimized in terms of dangerousness (as a risk of recidivism) and not in terms of culpability (as a capacity to be responsible), for persons who are declared totally or partially not to be liable to prosecution in criminal proceedings. Generally, because there is a cause for total or partial exemption, based on the lack of understanding of the illegality of the act or the lack of capacity to act in accordance with that understanding, because of some psychiatric pathology. However, this approach was abandoned after a reform of the CP in 2010 by introducing the possibility of imposing the security measure of supervised parole on defendants liable to prosecution, in cases expressly determined by the Legislator, which has allowed its extension to cases of crimes against sexual freedom and of terrorism.

B.1) The imposition of a custodial security measure (internment in a psychiatric centre, special education centre, or rehabilitation centre) is made dependent on a judgment of necessity that must be made by the Court that has issued the sentence and has declared the defendant not to be liable to prosecution in the same sentence. Necessity must have as a reference the prevention of dangerousness (Article 6.2 CP), which means that the reason for the imposition of the measure must be the need for therapeutic treatment, because the causes of non-liability are criminogenic factors (psychological alteration or anomaly, alterations in perception, drug dependency) whose incidence to provoke recidivism can be reduced with therapeutic treatment.

B.2) This also explains that the duration of the internment measure is determined by the mechanism of setting a maximum time limit in the sentence, having as reference the "penalty abstractly applicable to the act committed" (art. 6.2 CP), which is that provided for in the corresponding article defining the crime, taking into account the degree of enforcement (consummation and attempt) and participation (authorship and complicity), and without regard to the aggravating or mitigating circumstances of a generic nature (Supreme Court Decision (STS) 705/2017). The maximum limit may be as high as the penalty provided for in the abstract, but it must be set in relation to what is necessary to prevent non-recidivism deriving from the cause of non-lability, as mentioned above.

Setting a maximum duration, acts as a guarantee of proportionality (of non-excess) and of legal certainty, because the concrete duration of the measure will depend on the

circumstances of the case and, very especially, on those deriving from the therapeutic needs presented by the person who is not liable. Therefore, it is obligatory for the Sentencing Court to periodically review the situation of the person affected by the measure in relation to the cause of non-liability (evolution in the therapeutic treatment and against the criminogenic factor). The review must result in a court decision which may be to maintain, suspend, replace or terminate the measure (Article 97 CP) and which is always in response to a previous proposal by the JVP (Article 98 CP).

B.3) When the judgement declares the defendant partially immune from prosecution, the Sentencing Court may impose a prison sentence and, in addition, a safety measure of internment. The criterion for opting for the cumulative duality is, again, that of therapeutic need, and a maximum length of sentence must also be established. The form of compliance is that of prior compliance with the security measure, if possible or feasible, with reduction of internment time regarding the prison sentence (Article 99 CP). On the other hand, if the time of internment is less than the duration of the prison sentence, the Sentencing Court may suspend the enforcement of the remaining time on the basis of the successful or unsuccessful outcome of the therapeutic treatment received during the enforcement of the measure (the successful outcome will lead to a reduction in the risk of recidivism and, therefore, of the need to resort to the prison environment).

C) In the area of determining the penalty to be imposed in each case, there are no excessive problems in practice, since the CP establishes specific penal frameworks for each crime and specific rules of quantification. Thus, each offence has a minimum and a maximum penalty. In addition, Articles 61 to 74 provide rules for calculating penalties in individual cases on the basis of various parameters. On the other hand, the principle of legal certainty and the guarantee of the right to a defence are reinforced by the introduction, in the case law of the TC,[8] of the principle that the Court cannot impose penalties that exceed those requested by the prosecution, because of their seriousness, nature or amount, regardless of the type of proceedings in which the case is being heard, even though the penalty in question does not exceed the legally prescribed penalty for the type of offence resulting from the description of the facts formulated in the prosecution and discussed in the proceedings. However, in cases where the circumstances envisaged by the CP for the quantification of penalties do not apply (e.g., when there are no aggravating or mitigating circumstances), certain problems of determination may arise. We will examine this question in detail in section 5.

D) In the prison environment, the theory of special subjection relationships has traditionally been used to justify certain practices. This theory postulates the decoupling of administrative activity from external subjection to the law, especially in cases where there is a strong link between the prisoner and public authorities, considering that such

8 Desde la STC 155/2009, de 25 de junio de 2009.

activity could be governed by internal rules of the Administration itself. This has led to the defence of the Prison Administration's position that it limits or restricts the exercise of certain rights of prisoners on the basis of rules that do not have the force of law, rules that are created internally by the Administration itself, or on the basis of customary principles such as *loyalty* (administrative offences are justified by the frustration of certain expectations, without the need to specify a certain regulatory infringement). Although belatedly, the TC stated that such a theory "must be understood in a reductive sense compatible with the preferential value of fundamental rights" (SSTC 57/1994 of 28 February and 97/1995 of 20 June), the issue becomes particularly clear in relation to the disciplinary regime. Thus, the principle of legality with regard to disciplinary offences is satisfied with purely regulatory rules, since no catalogue of offences is provided in the LOGP and Articles 108 to 110 of the 1981 Prison Regulations remain in force, which provide a list of behaviours that are punishable by sometimes very vague formulae.[9] Perhaps that is why the TC has had to devote many resolutions to resolving appeals for protection in this area, of extraordinary importance in everyday prison life. This is because the concept of "good conduct", an indispensable requirement in the granting of ordinary prison leave and parole, is understood to be satisfactory by the prison authorities, exclusively, with the presence of an empty disciplinary file.

E) The principle of double jeopardy (*ne bis in idem*). Along the same lines, the thesis of the relationship of special subjection has served as a basis for defending the qualitative differences between administrative prison offences and criminal offences. The compatibility of the two disciplinary orders is abused by allowing, in general, prisoners to be punished twice for the same acts. With regard to the previous section, it should be borne in mind that there are many disciplinary rules produced internally by the prison administration, known as *internal rules*, whose violation may lead to the loss of clear expectations of rights (to communicate with the outside world or to have access to productive workshops, for example).

F) Principle of non-retroactivity of the unfavourable penal norm in the enforcement phase. According to a widespread doctrinal trend, enforcement rules are not substantive penal rules, so that, as with procedural rules, their effectiveness is not based on the time the offence was committed but on the time of enforcement, in other words, the time of application of the rule. This has consequences on the guarantee of non-retroactivity of the unfavourable rules. This doctrine is based on an argument, of very dubious soundness, consisting in the fact that the rules of enforcement are not addressed to the citizen by motivating their conduct. The well-known rule of enforcement may have the capacity to dissuade people from carrying out socially undesirable acts. From that perspective, there

9 V.gr. artículo 108 RP de 1981: Es falta muy grave *atentar contra la decencia pública con actos de grave escándalo y trascendencia*.

is no use in a message of penal harshness after the offence. There can be no split in the framework of general prevention between the criminalization of the conduct of the penalty and the way in which it is carried out. On this point, it is necessary to refer to the Judgment of the European Court of Human Rights of 21 October 2013 (*Inés del Rio v. Spain*), in which Spain was condemned for the retroactive application of the modification of a jurisprudential interpretation (the so-called *Parot Doctrine*), in this case related to an enforcement norm, such as the calculation of the so-called prison benefits (prison leave, day release, conditional liberty, etc.), when a sentence has been established as a maximum limit of compliance (accumulation of sentences). It follows from that judgment that the principle of non-retroactivity of unfavourable rules also applies to rules governing enforcement.

3 Relevant human rights at the time of sentencing and enforcement

A) When determining the sentence, the protection of freedom and the principle of proportionality are verified through due compliance with the constitutional requirement to state the reasons for the judicial decision, which we will develop in sections 4 and 5.

B) At the time of enforcement of the sentences, the fundamental rights referred to in the previous section may be affected in general, but at least a reference is necessary because of the special repercussion that these rights have in the effective enforcement of prison sentences, that is, to the situation of risk that they run while they are effectively in force, due to the legal and factual structures created in the penitentiary institution.

Those deprived of their liberty as convicted persons are entitled to fundamental rights or human rights, as regulated by Articles 14-25 of the Constitution, which are not limited by the content of the conviction, the meaning of the sentence and penitentiary law (Article 25.2 Constitution). However, they are in a situation of dependence on the prison Administration to be able to exercise them, so that in some cases the validity of the rights will require positive action by the Administration to implement the necessary conditions for their exercise, and in other cases an authorisation will be required, in the form of an administrative act or resolution itself. It is for this reason that there are deficits in enforcing fundamental rights in prison. The Administration does not always act in the interest of their effectiveness, but in response to other interests.

B.1) The right to life and physical integrity, i.e. the right to health, is well protected from a legal, even organizational, point of view. Thus, there are suicide prevention programs, there are nurses and there is medical assistance in each centre, there are agreements with the public health system for hospital assistance, but, certainly, there are serious deficits derived from budgetary limits that are imposed.

B.2) The right to education or the right to work are also covered by the law, but end up depending on assessments of prison behaviour, that is, on disciplinary factors.

B.3) The rights linked to the protection of privacy (inviolability of correspondence and other communications), despite their undoubted importance, have clearly insufficient legal protection. It is possible to monitor such communications for reasons of public order simply by informing the JVP, a body which does not usually consider itself obliged to act to verify the appropriateness of the intervention (including the veracity of the reasons given by the Administration, Article 51 LOGP). In the same way, it is possible to make the enjoyment of the communications dependent on disciplinary factors.

B.4) On the other hand, the prohibition of cruel, inhuman or degrading treatment and punishment, as a manifestation of the right to dignity, poses a special problem in the prison environment, due to the tendency towards opacity by prison institutions. There are reports, such as those of the Spanish Ombudsman (in his/her role as National Instrument for the Prevention of Torture with respect to the UN Committee for the Prevention of Torture), in which insufficient investigative spaces over allegations of ill-treatment are detected, especially in the area of solitary confinement (closed regime) and in the use of provisional isolation (as a means of coercion).

B.5) Finally, generalization in the use of actuarial instruments of risk assessment, an issue to which we will refer in section 7, can clash with the right to dignity, which implies for every accused and convicted person individualized treatment, and even with the right to due process with all guarantees, given the fallibility of these techniques.

4 Judicial discretion in general: the position of the independent and responsible judge to ensure the fairness of the decision

A) Discretion, as a form of shaping or constructing the judicial decision, is closely linked to the legitimizing force of motivation. Over and above the general duty to state reasons for judicial decisions, as set out in Article 120 of the Constitution, there is constitutional doctrine which seeks to place judicial decisions within highly demanding parameters when the decision is taken to determine the penalty or to determine the specific content of the penalty to be imposed as a criminal response.

The traditional difference between *optional* decisions ("the judge may") and *mandatory* decisions ("the judge shall") allowed many to defend the non-requirement of reasons in the former. However, both Constitutional and Supreme Courts have made it very clear that discretion cannot lead to arbitrariness when it comes to setting the punitive quantum or the form of enforcement of a penalty. Such areas affect the Constitutional value Justice (prohibition of excess) in any case, and the Constitutional value Freedom (*favor libertatis*) in many of the cases that comprise them. For this reason, the TC has offered a doctrinal

construction on the requirement of a reinforced motivation reference in discretionary resolutions that are characteristic of the enforcement phase of the criminal process.

This doctrine has, as an unavoidable reference, the need for judicial decisions to be based on the analysis of the particular circumstances of the case and the personal circumstances of the convicted person. From this point of view, it can be said that the two basic concepts proposed are individualization and the rejection of automatism as a bureaucratic process of decision-making. The jurisdictional function, as the materialization of Justice in the specific case, is legitimized because the legal system allows it to carry out this motivated work of individualization with independence and impartiality. Without a discretionary margin to determine the contents of each criminal response, individualization would become impossible.

From this perspective, some dangers are perceived in the position that the Spanish Legislator has adopted in recent legislative reforms. Thus, as a reflection of a certain lack of confidence in the way Judges pass judgment, in order to satisfy the needs expressed by the Executive, some penal responses have been established, with clear penological and afflictive content (restrictive of fundamental rights), in a mandatory manner, without the possibility of judicial assessment of necessity or suitability in the specific case. The mandatory prohibition of approach in crimes of gender violence (Article 57.2 CP), or the replacement of prison sentence by expulsion from Spain in the case of foreign convicted persons (Article 89 CP), are clear examples of such risks.

B) The duty of motivation in the work of determining the penalty. Following the reform of Organic Act 15/2003, Article 72 CP establishes a general and express clause on the duty to give reasons for the penalty to be imposed: "When sentencing, judges or courts shall, in accordance with the rules contained in this chapter, provide reasons in the sentence for the degree and specific length of the penalty imposed."

The Legislator reacts to reality: there is a significant deficit in the reasoning behind the decision to fix the penalty within the margins offered by the penal model. The traditional conception of this decision had placed it in relation to discretion and judicial arbitrariness, concepts that were associated with an ontological judicial quality: *a priori* use of prudence and moderation.

The requirement (need) for reasons has been accepted and demanded by the Supreme Court: "Sentences, which are the maximum sanctions in the legal system, always involve an infringement of some of the rights that make up the catalogue of citizens' rights – when it comes to custodial sentences – and other fundamental rights" (Supreme Court Sentence 1047/2013, 24 September). Doctrinally, it has relied on two constitutional arguments: the general principle of the prohibition of arbitrariness (Article 9.3 of the Constitution), and the guarantee of the fundamental right to effective judicial protection (essentially, the right to know the reasons for the decision in order to have the possibility of challenging the decision to set the penalty). The principle of proportionality has also been accepted in

this area. The Supreme Court takes advantage of the fact that it had been granted constitutional status (STC 136/1999), because of its relationship with the Constitutional value Freedom (*favor libertatis*) and with the Constitutional value Justice (prohibition of excess), as well as, subsequently, the declaration of this principle in Article 49 of the European Union Charter of Fundamental Rights, in order to establish around it a true legitimizing presupposition ("defining axis" is the term used, textually, for example, by Supreme Court Sentence 658/2014) of the judicial work of individualizing the sentence. Therefore, because it considers that the penalty imposed is disproportionate, the Supreme Court has gone so far as to revoke the application of an aggravating circumstance without a request from any party, that is, *ex officio*.

C) The reinforced demand of motivation in the phase of enforcement of the process.[10] The Constitutional Court, at the stage of enforcement of custodial sentences, has taken a very explicit role in the way judges should take discretionary decisions at the stage of enforcement of the proceedings.

C.1) Firstly, it established the existence of a reinforced demand of motivation when the right to effective judicial protection has some impact on freedom as a superior value of the legal system (TC Sentence 8/2001 of 15 January).

C.2) Secondly "the power legally conferred on a judicial body to take a decision in one direction or the other at its discretion does not in itself constitute sufficient justification for the decision finally taken, but on the contrary, the exercise of that power is closely conditional on the requirement that such a decision must be reasoned, since only in that way can a subsequent review of the decision be carried out" (STC 25/2000 of 31 January).

C.3) Thirdly, it states that where fundamental rights (to freedom, Article 17(1) Constitution, or to legality in criminal proceedings, Article 25(1) Constitution) may be affected, the standard of requirements deriving from the duty of motivation, beyond their reasoned nature, must reflect a nexus of coherence between the decision adopted, the rule on which it is based and the purposes which justify the institution. The decision must contain an expressive reasoning of the elements taken into account by the judicial body when interpreting the rules relating to the institution in question, on the understanding that this interpretation must be governed by the *ratio legis* or protective purpose of those rules (STC 97/2010, in relation to the prescription of the penalty).

C.4) Finally, it is stated that "the duty to substantiate these judicial decisions requires weighing the individual circumstances of the offender, as well as the legal values and assets involved in the decision, taking into account the main purpose of the institution, re-education and social reintegration, and the other purposes of general prevention that

10 José Antonio Rodriguez Sáez, 'La motivación de las resoluciones judiciales discrecionales en la fase de ejecución del proceso penal', *Cuadernos Penales José María Lidón*, número 15 (2019).

legitimize the penalty of deprivation of liberty" (STC 320/2016, of 14 December, in relation to the suspension of enforcement).

D) Jurisdictional guarantee in the enforcement of prison sentences: the JVP Article 106 of the CE states that: "The Courts control the regulatory power and the legality of administrative action, as well as its submission to the purposes that justify it."

It became essential at the time, therefore, to create a system of jurisdictional control of the activity of the Penitentiary Administration, a control that had not existed before and an activity that developed without control during the decades of the Franco dictatorship. This system of control is established in the LOGP, and specifically in the wording of Article 76 thereof. The control functions of the JVP have the following structure:

D.1) Functions of enforcement, which derive from the expression of Article 76 LOGP "to enforce the sentence imposed". Here we find the competences to:

– approve parole, as the final phase of the progressive system in prison treatment.
– approve ordinary prison leave (longer than two days).
– resolve appeals against administrative rulings on classification into grades of treatment. Among them, the first grade involves close custody and isolation and the third grade contains the semi-open regime. Its importance is evident.
– approve the application of the general regime of classification in third degree (semi-open regime) without a period of security (completion of half the effective sentence), in the case of prison sentences of more than five years (Article 36 CP).
– approve the general enforcement regime in cases where it has been agreed that sentences are to accumulate (actual concurrency of crimes) and the resulting sentence is less than half of the sum of the sentences imposed (in these cases, according to Article 78 CP, the Sentencing Court has the power to order that the served part of the sentence required to enjoy ordinary prison leave – one quarter – or probation – two thirds or three quarters – should be calculated with respect to the total sum of the sentences and not the sentence resulting from accumulation).

D.2) Administration Control functions. Article 76 refers to them with the expressions "to safeguard the rights of inmates and to correct abuses and deviations that may occur in compliance of the precepts of the penitentiary regime". This was the most important challenge for the new judicial body, since the prison regime, as a set of rules and actions aimed at keeping order in the prison (direct control of conduct and application of the disciplinary regime), had been developed for decades by the prison authorities without the presence of a system of guarantees for prisoners and without any kind of judicial supervision. As specific acts of control we find:

– supervising the agreements of the Director of the Penitentiary Centre for monitoring and suspending all communications of inmates.
– supervising the application of coercive means, including provisional isolation.

– approving sanctions of isolation for more than fourteen days.
– resolving appeals against administrative rulings that impose a disciplinary sanction.
– direct control of the closed regime (solitary confinement) for inmates in provisional detention.
– resolving prisoners' requests and complaints concerning the exercise of their fundamental rights or the application of prison regulations.

D.3) Relationship with the sentencing judicial body. Article 76 contains a general statement or clause to the effect that the JVP, with regard to the generic function of seeking the enforcement of the sentence, assumes "the functions that would correspond to sentencing judges and courts". However, this has not been fully implemented. The impact of the sentencing bodies in the enforcement phase has been maintained, in a clear decision of criminal policy of major importance.

The judicial forms that directly influence the effective duration of confinement (prior to the intervention of the prison authorities themselves) are
a) accumulation of sentences (Article 76 CP), which implies the establishment of a maximum limit of confinement in cases of actual concurrency of crimes (a limit that can be three times the highest sentence imposed, or also 20, 25, 30 or 40 years, depending on the gravity of the concurrent sentences);
b) the special compliance regime in cases of accumulation of sentences (Article 78 CP), which the sentencing court has the power to order that the served part of the sentence required to enjoy ordinary prison leave (one quarter) or probation (two thirds or three quarters) should be calculated with respect to the total sum of the sentences and not the sentence resulting from accumulation; and,
c) the security period (Article 36 CP), which may be imposed in respect of sentences of more than five years and which means that access to the semi-open regime is not possible if half the sentence has not been served.

The judicial decision in all three cases has been expressly entrusted to the Court that handed down the sentence, and is therefore outside the jurisdiction of the JVP. This option is of maximum importance because it implies that the decisions are taken in the sentence itself or, in any case, without evaluating the circumstances derived from the effects of time served in prison. The moment of the decision necessarily conditions the motivation (these are discretionary decisions) because the variables to be considered, which should be related to elements of special prevention, do not appear in the debate itself on the oral proceedings. This means that the practice of Sentencing Courts, although they present as a justifying factor the *dangerousness* of the accused, in reality integrate this concept with general preventive and retributive elements, essentially, the seriousness of the act

committed (its result and/or the way it was committed). This approach entails a structural problem of motivation deficit.

It is therefore understood that, in the latter two cases, a review of the decision is allowed, with a return to what would be the general or ordinary sentence regime, and that this corresponds to the JVP. This body, which, due to proximity to the prison must have greater knowledge of the particular circumstances of the case (above all the personal circumstances of the prisoner), is the one that decides on the basis of reports of the prison bodies (essentially those of treatment) and, as always, on the basis of a prognosis of reinsertion (special preventive elements).

This trend (deviating from the LOGP perspective) has been clearly reflected in the regulation of the reviewable permanent prison sentence, a sentence that was introduced in 2015 and which has provoked an important social and legal debate by proposing a sanction that may involve deprivation of liberty for life. The possibility of reviewing the duration of imprisonment in the regulation of the penalty was an essential prerequisite for overcoming the demand of constitutionality, not only for the basic right to dignity but also for the mandate of orientation towards resocialization. The decision on this possibility of review, which is a form of suspension and generally requires 25 years of effective imprisonment, is left to the Court that handed down the sentence.

At the same time, the JVP assists the sentencing bodies in the enforcement of security measures (including non-custodial measures such as probation, Article 106 CP) and non-custodial sentences such as community service, or in other functions such as credit for periods of provisional imprisonment (Article 58 CP) or in sentence suspension for ensuing illness (Article 60 CP).

D.4) The first judgments of the TC on the subject (73/1983, of 30 July or 2/1987, of 21 January) resolved questions relating to the disciplinary regime, so that they emphasized the importance in the criminal system of the prison monitoring function to "ensure that situations affecting the fundamental rights and freedoms of prisoners are monitored" and that this is entrusted to a "body independent of the administrative authority". These judgements state that the action of this Court must contain constitutional requirements in order to guarantee respect for the fundamental rights of inmates (protection purpose). However, the development of judicial activity over almost four decades shows us a profile of JVP more concerned with the functions of guaranteeing the enforcement of the sentence (assuming strict controls in the administrative decisions that may involve the inmate's release from the prison) than with those related to the control of the disciplinary system.

5 The framework of judicial discretion

A) In the area of penalty determination, as noted above (section 2. B) the CP regulation is very detailed, which reduces the margins of discretion. We will use the example of the crime of homicide to clarify the operation of the system.

A.1) Arithmetic rules. Article 138 CP punishes this crime with a prison sentence of between 10 to 15 years. The lower half of the sentence has a minimum limit of 10 years and a maximum limit of 12 years and 6 months. The upper half of the penalty is limited to a minimum of 12 years and 6 months and a maximum of 15 years. The higher grade penalty is formed by taking the maximum figure indicated by law for the offence (15) and increasing it by half the amount (7 years and 6 months), with the resulting sum constituting the upper limit (22 years and 6 months). The lower grade penalty is formed from the minimum figure indicated by law for the crime (10 years) and deducting from it half of the amount (5 years), the result of which constitutes its minimum limit (5 years).

A.2) General material rules. The system is based on the general principle that the penalties laid down are intended for the perpetrators of the offence committed. Perpetrators of attempted crimes incur a penalty one or two grades lower than that prescribed by law, considering "the danger inherent in the attempt and the degree of accomplishment achieved". Accomplices to the crime incur a lower grade penalty than that prescribed for the perpetrators. On the other hand, Articles 20, 21 and 22 of the Code regulate, respectively, the grounds for exemption from criminal liability (e.g., mental derangement, alcohol intoxication, self-defence), the circumstances that mitigate liability (e.g., those referred to in Article 20 when not all the circumstances permitting exemption, compensation for damage caused, or action motivated by drug addiction are present) and those that aggravate it (e.g., recidivism, premeditation, or abuse of trust). Articles 66 *et seq*. establish rules of determination that take into account the concurrency of such circumstances. Thus, the presence of a mitigating circumstance makes it necessary to impose the penalty in the lower half. If two or more or one stronger mitigating factors concur, the lower penalty may be imposed in one or two grades. If there are one or two aggravating factors, the penalty must be imposed in the upper half. If more than one aggravating factor is present, the higher grade penalty may be imposed. If both mitigating and aggravating factors are present, the Court will rationally assess and compensate for them. If there are no mitigating or aggravating factors, the Courts will apply the penalties to the extent they deem appropriate, within the limits of each offence, taking into account the personal circumstances of the offender and the greater or lesser seriousness of the act.

A.3) In some Courts, when there are no mitigating or aggravating factors, the practice is widespread of imposing penalties in the middle of both extremes. However, if we conceive of criminal law as a technique for limiting the punitive power of the State, specific

reasons for exceeding the minimum criminal thresholds become indispensable. As established by the jurisprudence of the Supreme Court:

> The duty to provide reasons for the individualization of criminal law derives directly from Article 72 CP and indirectly from Articles 120.3 and 24.1 of the CE. This intensifies when increases in sentences are to be justified. A very powerful reason to impose the legal minimum is to lack grounds for any increase. Not finding, nor consequently explaining, reasons for another more serious option, implicitly supposes an argument of enormous legal potential: favor libertatis. If in doubt one must favour the widest degree of freedom. On the other hand, increasing the sentence always requires justification, an explanation that guarantees that we are not dealing with a voluntary or arbitrary decision by the Court, but rather with a meditated option supported by reasons that may or may not be shared, but which can only be disputed if they are exteriorized.[11]

To this end, as legal doctrine has pointed out, the purpose of the penalties may be used, since the term "personal circumstances of the offender" referred to in Article 66 CP, can easily be associated with special preventive aspects, and "greater or lesser gravity of the act" with general preventive and retributive purposes.[12] In any case, the guidelines to be taken into account must be directly connected retrospectively with the act under judicial trial, including in that same approach assessment of the personal circumstances of the offender, in order to avoid the displacement of the "criminal law of the act" by the "criminal law of the perpetrator", giving rise to differentiated treatment against identical behaviours.

From the point of view of the act, the objective and subjective devaluation of the action and the devaluation of the result must be weighed; that is, respectively, the concrete way in which the typical conduct is carried out, intensity of deceit or of negligence, and extent of injury or endangerment to the legal interest. Along these lines, Silva Sánchez[13] proposes a model for quantifying the specific punishment in function of the illicit objective and the degree of subjective imputation. Thus, the former includes the unfair *ex ante*, according to the degree of probability and expected scope of the injury, as well as according to the infringement or not of special duties, or risk to other assets. Also, what he calls unfair *ex post*, as an effective measure of the injury or endangerment. Within the subjective imputation, evaluation occurs based on the degree of intention and knowledge. Therefore,

11 STS 922/2016.

12 Juan Igartua Salaverría, *El razonamiento en las resoluciones judiciales*, Bogotá: Temis, 2009, p. 227.

13 Jesús Silva Sánchez, 'La teoría de la determinación como sistema (dogmático): un primer esbozo', *Indret*, Abril 2007.

as he explains, the management scheme of intermediate cases must move between the most serious case (maximum probability + maximum damage + maximum breach of duty + maximum denial of law + intention and certain knowledge) and the least serious case (minimum probability + minimum damage + minimum breach of duty + minimum denial of law + only probable knowledge), thus allowing a comparative system of specific solutions to be established.

From the author's point of view, certain factors should be assessed such as the age of the accused, his/her intellectual and cultural background, his/her degree of maturity, his/her family and social environment, his/her professional activity, his/her specific personal qualities related to the criminal act, or his/her behaviour after the event. Jurisprudentially, it has been considered that among such circumstances are to be found the motives or reasons that led to the offense, as well as those features of his/her criminal personality that also make up those differential elements that must be corrected in order to avoid repeated offending. However, regarding those differential elements, as we said before, precautions must be taken against the risk of colonization of the system of determination of penalties with considerations of the "criminal law of the perpetrator". Therefore, the personal circumstances of the offender to be considered must necessarily relate to the act that is subject to prosecution. In any event, penalties should not be applied to an extent that exceeds the legal minimums without the slightest justification, even when there are no aggravating or extenuating circumstances.

To conclude this point, it should be remembered that in the Spanish criminal justice system, there are no guidelines from the Judiciary or the Ministry of Justice that establish principles or rules for determining penalties.

B) For enforcement of sentences of imprisonment, the CP establishes a bifrontal system.[14]

B.1) It is a system made up of different elements or instruments, which are related to each other, and among which the Judge has to find the most appropriate (penal) response to the circumstances of the case, from the perspective of its purposes (constitutional orientation). The TC has made this clear: "…it is not so much a question of the isolated assessment of a specific custodial sentence, but rather of its weighting within a system of which institutions such as condemnation or conditional remission are key pieces, substitute forms of imprisonment, or, finally, the different regimes for serving the prison sentence are key elements" (STC 120/2000, of 7 June).

B.2) It is bifrontal, because it presents two quite different and clearly differentiated subsystems (although they share the same source of constitutional legitimacy aiming at

14 More extensively see, Julián Rios Martín, José Antonio Rodríguez Sáez y Esther Pascual Rodríguez, *Manual Jurídico para evitar el ingreso en la cárcel*, Editorial Comares, Colección Estudios de Derecho procesal Penal, número 33, 2015.

social reintegration, that is, in order to prevent the offender from committing another crime):

B.2.1) that of prison sentences of more than two years, in which only the use of the prison environment is contemplated, with all that this entails: effective deprivation of liberty (confinement), intervention by prison treatment bodies, submission to the disciplinary logic of an institution, and so on.

B.2.2) that of deprivation of liberty of up to two years, which includes subsidiary personal liability for non-payment of a fine and permanent monitoring, and which provides for other forms of compliance without making use of the prison environment. These forms, called substitutes in the CP, are integrated around suspension of sentence enforcement. This is a penal instrument that seeks to avoid (harmful) contact with the prison world when the person is a first offender and has a prognosis of non-recidivism, a purpose which, by rendering prison instruments unnecessary, makes it the appropriate or correct response. This has been argued by the TC, for example in STC 209/1993, of 2 August.

This is a penological option in which the offender can avoid the serious effects of imprisonment, but always in a conditioned manner. Regulation of the suspension allows the Judge to establish a certain intensity in the control of the activity of the released prisoner, depending on his/her personal circumstances and the needs that appear to ensure the objective of non-recidivism. The greater or lesser intensity of control is achieved through the use of a series of conditions and/or obligations, which may range from the basic one of not committing another crime, to payment of a fine or community service, and including participation in training programs or prohibitions of communicating with people or approaching places (Articles 83 and 84 CP). It is important to note that the regulation of sentence suspension has incorporated the postulates of Restorative Justice, giving much relevance to the element of a *reparative effort* by the convicted person in the decision to suspend, especially as regards fixing the conditions of the suspension. This implies greater demands on the enforcement Judge, who must act *ex officio* to verify that the offender complies with his/her commitments regarding payment of civil liability derived from the crime (an express provision has even been included for the possibility that a mediation agreement has been reached).

It should also be noted that one of these *substitute* forms is suspension in relation to offenders of crimes committed as a result of drug addiction. In such cases, it is possible to avoid the prison environment for sentences of up to five years, and the prisoner is always required to undergo treatment for drug addiction (if he/she is not already rehabilitated) and not to abandon the program.

B.3) Thus, the first step in judicial discretion, even during the enforcement phase of the sentence and the serving the penalty of deprivation of liberty, is the decision as to whether or not it is necessary to go to the prison environment "to prevent the future commission

by the convicted person of new offences" (Article 80.1 CP), a decision corresponding to the Enforcement Judge, who is almost always the same as the one who handed down the sentence.

Here it is essential to take account of all that has been said concerning the grounds for discretionary decisions (reinforced demand), with particular emphasis on the judge's obligation to assess the specific circumstances of the case and above all the personal circumstances of the offender. This obligation, which had already been declared by the TC (STC 75/2007, 23 May), is now set out in Article 80.1 CP:

> In adopting this decision, the judge or court shall assess the circumstances of the offence committed, the personal circumstances of the offender, his/her background, his/her conduct after the event, in particular his/her efforts to repair the damage caused, his/her family and social circumstances, and the effects that may be expected from the suspension of the enforcement itself and from compliance with the measures that may be imposed.

It is also fundamental to understand that the essence of the decision (the object of the resolution) is in risk assessment and the prognosis of recidivism. In order to be handled correctly, these concepts require the acquisition of certain criminological knowledge and, above all, the disregard of prejudices and biases that condition the decision and prevent individualization. At present fulfilment of this requirement has important and serious deficits in the reality of the jurisdictional function.

B.4) The essence of this (discretionary) decision of the Enforcement Judge is fundamentally compatible with most of the decisions of the JVP, whether in the area or sub-system of prisons. In order to reason and resolve, the Judge will almost always have to go through a risk assessment of the offender and establish a prognosis of recidivism.

The most important decisions of the JVP are those relating to the interruption of confinement, that is, the (provisional) release of the prisoner from the prison:

B.4.1) Here we find, in the first place, ordinary prison leave, which can have a maximum duration of seven days (usually three days) and cannot exceed 36 days per year. In the approval procedure, the prison makes a proposal and it is up to the Supervisory Judge to authorise the permit. Prison leave has its normative justification in preparing for life at liberty (avoiding the risks of irreversibility of the harmful effects of deprivation of liberty for long periods of time).

In order to assess whether prison leave is appropriate at the time of the decision, it is mandatory that one quarter of the sentence is completed and that an assessment is made of the risk of breach of parole (of escape) and also of recidivism. To this end, it is necessary to take into account the length of the sentence imposed, time served and time remaining to be served, the presence of any criminogenic factors, the existence of family ties or also

of socio-labour ties, etc. To these parameters must be added that relating to *prison conduct*, added as a matter of course.

B.4.2) Secondly, the crucial decision on progressing to grade three of treatment, which entails access to a semi-open regime, with the possibility of daily prison leave and the possibility of weekend leave. In this case, the decision is taken by the Prison Administration, and the JVP intervenes only after an appeal, normally lodged by the Public Prosecutor's Office.

In the event of progressing to grade three of treatment, the risk of breach of parole will no longer be assessed, because, although it can be undertaken at any time during the sentence, it has usually been ruled out after previously monitoring several ordinary prison leaves with punctual return by the inmate to the centre. The need to assess the risk of recidivism will therefore remain, although it will have been the subject of prior analysis and empirical verification of low risk for the same reason.

This decision usually has repercussions in the media in certain cases, making it the ideal place to make speeches calling for measures of general prevention (validity of penal norms, exemplary sentencing, etc.) and demands for the retributive purpose of sentencing (v.gr. identifying semi-open regime with impunity or with empty sentencing). But these arguments are incompatible with the normative content of such regulation (as well as with the declaration in Article 25.2 CE). They are stock or static arguments, that is, they are proposed independently of the moment of enforcement in question and the concurrent circumstances in the specific case, which means that they present an ontological difficulty in complying with the requirements for obtaining a duly motivated resolution (individualized and not mechanical; see section 4.A).

B.4.3) Finally, the JVP decides on probation, as the last phase of a progressive system (the necessary prerequisite is prior classification to grade three treatment) and which implies effective separation from the institution, so that control of the offender inherent in the sentence (in his/her activity, in his/her behaviour) is carried out by an external agent and periodic meetings, consistent with the assessment of maximum confidence in a favourable reintegration prognosis. Since 2015, probation has been a form of suspension of the sentence (of the remainder of the sentence to be served), so that the temporary period of control of the offender can go beyond the quantum of the sentence. It also means that the Supervisory Judge may impose conditions or obligations provided for in suspension of sentences of up to two years (see 5.B.2.2).

C) The discretionary framework of the Sentencing Court during the prison enforcement phase.

It has already been explained that the Spanish legislature has maintained (and increased with various reforms) the leading role of the sentencing bodies in the area of prison enforcement. We refer to the decisions that have the greatest impact on the effective duration of imprisonment (see 4.D.3). The problem of the discretionary framework of

such decisions has also been explained, both for the procedural moment in which they must be taken and for the indefinite nature of the variables that must be subject to assessment and weighting, which can be referred to as a situation that promotes a structural motivation deficit.

In this area, the revision regulation of the revisable permanent prison sentence should be highlighted. The length of the sentence is an essential element of its content. The principles of legality and legal certainty require that it be set with enough guarantees to avoid arbitrariness in absolute terms. However, Article 92 CP proposes as variables elements or factors of a static nature that should necessarily have been taken into account when deciding whether to impose the penalty (no doubt with a general preventive charge), such as the "circumstances of the offence", the convicted person's previous record, or the "relevance of the legal assets that could be affected by a repetition of the offence". Deciding on the review after 25 years after the beginning of enforcement (on unlimited maintenance of deprivation of liberty), if we consider that the convicted person has accumulated 25 years of confinement, the review should depend exclusively on criminological factors of a dynamic nature, resulting from the evolution of the convicted person during enforcement (family and social circumstances, conduct during confinement or the "effects that can be expected from the suspension itself … and from the measures that were imposed").

D) The discretion framework of the Sentencing Court in the enforcement of custodial security measures. We can speak of various moments and decisions in which fundamental rights (essentially the right to freedom) and constitutional principles, such as the principle of legality, are significantly affected. This relevance should have as a consequence the extension to this area of the doctrine elaborated to justify the demand for a reinforced standard of motivation.

D.1) The decision on whether to impose the security measure of internment in a specific case is not usually the subject of any reasoning aimed at justifying it.[15] This contravenes the legal provision (Article 101 CP) which empowers the Sentencing Judge to impose an internment measure "if necessary". The Judge is therefore obliged to make a judgement of necessity, assessing the circumstances of the specific case and, above all, taking into account its *raison d'être*, which is none other than to avoid the "state of social danger inherent in the mental derangement assessed" (STC 124/2010). This means that if the mental pathology that gave rise to the irresponsible act has disappeared (diminished), or if the prescribed therapeutic (medical) treatment does not require internment, the Court will not be able to motivate or justify the imposition of a custodial security measure, but only another type of response (one or more non-custodial security measures).

15 José Antonio Rodriguez Sáez, 'El fundamento ético-jurídico de la medida de seguridad de internamiento psiquiátrico', *La Ley*, número 7762, 26 de diciembre de 2011.

In Spanish judicial practice this approach is minority. The pronouncement of acquittal for non-liability is always accompanied by a custodial response, so the need for the measure is presumed because the existence of criminal danger is assumed, as an ontological element to the pathology at that time diagnosed.

D.2) Decision on the maximum length of detention. The penal norm requires that a maximum time be set as a guarantee against the perpetuity of detention (the danger may not disappear), and that this maximum be the penalty imposed in the abstract for the crime committed. This means that this maximum, numerically speaking, may be greater than the quantitative dimension of the penalty that would have been imposed on a person charged. Therefore, in order not to violate the principle of Article 6.2 CP (not to make it more burdensome), it must be understood that the maximum limit need not necessarily be imposed, that such an option would have to be reasoned. The criterion of necessity to decide whether internment is appropriate, understood as therapeutic need, would have to be extended here. Judicial practice, however, shows a tendency to impose the maximum duration without any justifiable argument, which entails a very high risk that the person declared to be unimpeachable will end up being deprived of his/her liberty for longer than if he/she had been judged to be imputable.

D.3) Decision on the centre where the detention measure is to be served. The rule indicates that it must be an "establishment appropriate to the type of psychological abnormality or alternation that is observed" (or a "rehabilitation centre… duly accredited or approved", or a "special education centre"). Determining which is the appropriate centre also requires a reasoned judicial decision (the criterion of therapeutic need reappears), but judicial practice tends to entrust confinement to the Prison Administration, without considering the possibility that the appropriate centre could be a psychiatric centre of the public health network. The person declared not to be liable ends up complying with the measure of internment in the prison environment (even if it is in some type of prison health centre) but without being able to resort to the rules of prison treatment for regulated access to the outside.

6 Determination of the penalty by non-judicial entities

The possibility that non-judicial bodies may impose penalties is not contemplated in the Spanish penal system.

7 Administrative discretion in the enforcement of sentences

A) Scope of Penitentiary Administration. There is a set of powers that correspond to the Administration and to which, in principle, the reviewing or controlling power of the JVP

would not reach. This would include everything related to the organization and management of prison activity, including the creation of administrative regulations, as well as specific agreements and decisions on the application and development of such regulations. In this area, judicial control corresponds to Administrative Jurisdiction and could include decisions relating to or affecting individual inmates. For this reason, a distinction must be made between the content of the decision, since if it affects any of the inmate's fundamental rights or one of his/her basic rights under prison regulations, even if it is an organizational matter, the JVP would be competent to review the decision (since it has the power to resolve inmates' petitions and complaints).

Of practical interest is the question of the administrative decision to determine the prison to which a prisoner should be assigned. It is in principle part of the organizational field and for years it was considered that the JVP could not revoke it due to lack of competence. However, it is a decision that can determine or condition the exercise of basic rights of inmates: personal communications and contact with the outside world; access to productive workshops or certain levels of education and training, etc. Moreover, it must be considered that the assignment to a specific establishment determines the territorial and functional competence of a JVP and not of another, so that the Administration may "choose" the Court that will intervene in relation to a specific inmate only by assigning him/her to another centre (in this specific case, it could violate the fundamental right to the Judge predetermined by law). It is for all these reasons that the JVPs have assumed the power of review in cases where the fundamental rights of the assigned inmate have been affected.

It should also be borne in mind that Article 77 LOGP recognizes this area of competence, which is specific to the Administration, when it provides for the power of the JVP to "formulate proposals concerning the organization and development of surveillance services, the organization of internal coexistence in the establishments, the organization and activities of workshops, schools and, in general, the activities of prison administration and treatment in the strict sense".

In short, a residual formula can be applied: the scope of administrative action that cannot be reviewed by the JVP can be reviewed by Administrative Jurisdiction, in the same way as any administrative body or authority.

B) There is a space in which the bodies of the Prison Administration have a very wide and especially important margin of discretion. This is all activity aimed at making a prediction or forecast of the future conduct of the prisoner or inmate, known as *risk assessment or evaluation*.[16] It is in the prison environment that this activity has been most developed in theory and practice, overcoming the obsolete concept of criminal

16 Yolanda Rueda Soriano y Eduardo Navarro Blasco, 'Los sistemas actuariales de prevención y gestión de riesgos en el ámbito penitenciario', Jueces para la Democracia, *Información y debate*, nº 94, marzo 2019.

dangerousness (obsolete because it is a static concept that does not take into account the possibility of change, evolution, response to treatment instruments and withdrawal processes) and materializing theoretical studies and technical advances in reports and agreements that make up the daily functioning of the prison. Prison management bodies have technical instruments, specific to particular types of crime, in which, by entering certain data taken from observation and interviews with the inmate, they provide a numerical percentage of the risk of a convicted person breaking the sentence after enjoying a release permit, or committing a violent crime or a crime against sexual freedom again.

In Spain, two different instruments are used to assess the risk of breach of parole and recidivism in prison leave. The Risk Variable Table (RVT) with the Concurrence of Particular Circumstances (CCP) in prisons, dependent on the General Administration of the State and managed by the General Secretariat of Penitentiary Institutions, and the multiscale protocol RisCanvi in the prisons, dependent on the Autonomous Community of Catalonia. The Risk Variable Table is an actuarial protocol consisting of ten risk factors, each with a valuation of 0 to 3 depending on the presence or absence of the risk factor. Once the scores on each variable have been obtained, an internal algorithm is applied and the overall score is determined which will correspond to some level of risk (very low, low, normal, high, fairly high, very high and maximum). Subsequently, the assessment is complemented by the Concurrence Table of Peculiar Circumstances, which are variables that must be considered to assess whether leave is granted.

The RisCanvi multiscale protocol allows the future risk of four types of risk to be predicted: breach of parole, intra-institutional violence, violent recidivism and self-directed violence. This protocol is administered through the eRiscanvi computer program and consists of two formats: the Screening (screening with ten risk factors which with the application of an actuarial algorithm gives a final valuation of high or low risk), and the Complete (composed of forty-three risk factors, which, with the application of an actuarial algorithm, gives a final assessment of high, medium or low risk).

From the point of view of their predictive effectiveness, these risk prediction methods have been the subject of several criticisms. Firstly, they focus on static factors, which are those dealing with aspects of the prisoner's biography that are not susceptible to change over time, instead of considering dynamic factors, which are those that can be modified over time, such as the subject's personal or work relationships. Secondly, both risk assessment instruments are also accused of using risk factors or variables that do not have a statistically significant relationship with the behaviour to be predicted, and therefore have a negative influence on the future assessment of risk, for example breach of parole, preventing the identification of the dynamic factors that would be possible to change and improve with prison treatment. On the other hand, these instruments overestimate dangerousness, the danger of recidivism, generating many false positives, classifying as dangerous those subjects who are not. Very illustrative is Martínez Garay's criticism when

she relates the result of the study on the 2014 recidivism rate in Catalonia, coordinated by Capdevila i Capdevila, with the risk assessment that had been carried out through the Riscanvi on a total of 410 inmates. In her opinion, the study concludes that the difference between sensitivity and the predictive value of the predictive instrument has been taken into consideration. As she puts it very graphically "the predictive value would say: knowing how many we said would be dangerous, let's see how many of them have really offended afterwards. Sensitivity would say: knowing how many have offended, let's see how many of these we had been able to identify with our predictive tool". And she concludes that of the 301 subjects predicted as probable recidivists (high risk 130 + moderate or medium risk 171) only 54 relapsed, 17.94%, that is, a very low predictive value.

The results of these instruments, despite the significant margin of error they present and the fact that they overestimate danger, and the bureaucratic techniques and methods used in penitentiary operations (assessment of misconduct), are used to produce the technical reports on which the administrative bodies end up taking the most important decisions regarding the way in which the sentence is served and the extent to which inmates' rights are affected: the favourable proposal for the authorization of prison leave, progression to the third degree of treatment, and many others. This implies a very wide margin of discretion, because on this basis the Administration itself takes far-reaching decisions, but also because the content of those reports ends up being the only source of information for the JVP when those decisions must be reviewed. There are no sources of evidence available, within the field of the Administration of Justice, that could serve as a counterweight or to question the content of the technical reports of the prison administrative bodies.

8 Conclusions

A) The establishment of a constitutional system in Spain in 1978, after four decades of dictatorship, brought about a profound change in the penal system, and especially in the penal subsystem, both in the area of determining sentences and in the area of serving and enforcing custodial sentences. The principle of legality became more important, incorporating others such as double jeopardy (*ne bis in idem*) or proportionality. For the first time, jurisdictional control of the activity of the prison administration was introduced through the JVP, at the same time as the intention was to modernize the prison institution by adopting the purposes of prison treatment. Also, the duty to provide reasons for judicial decisions in the enforcement phase of criminal proceedings was introduced in an innovative way.

B) One of the great challenges that the application of fundamental rights in Spain has posed, and which has not yet been fully met, is the assumption that effective judicial

protection, in the area of criminal enforcement, with a direct impact on constitutional values and principles, requires that discretionary decisions at this stage must provide a higher level of motivation than can normally be expected in judicial decisions. There are still significant deficiencies in the need to identify the motivation for the most important decisions, among other reasons because there is no tradition or even theoretical work on the variables and criteria that serve as a reference for motivation. The TC has carried out doctrinal work that has not yet produced the expected results in judicial practice.

C) The deficiencies in motivation are reflected in relevant issues, such as determining the sentence when the framework offered is overly broad, imposing security measures of internment or suspending enforcement of short sentences. The element of the personal circumstances of the convicted person is not yet visualized in its relevant contents, and there is a tendency to resort instead to static factors that are closer to general prevention and retribution purposes.

D) In the penitentiary field, it can be said that the monitoring functions of the JVP have shifted towards the legality and content of the prison sentence, with some abandonment of the monitoring aspects of the regime, especially the disciplinary system. Thus, the work of the judicial body has become more and more bureaucratic, and it has become the decision-making body when each inmate has to have contact with the outside world, deciding whether or not the time set by the Administration is premature. This minimization of the role of the JVP has been helped by the option of maintaining important decision-making spaces in enforcement for the sentencing courts.

E) The lack of individualization in the motivation is particularly important regarding the suspension of enforcement of short prison sentences. The bureaucratic model of decision-making continues to prevail and, despite the fact that the Legislator expressly establishes its avoidance as the purpose of the norm, this means that many people have access to the prison system even though this is not necessary to achieve the goal of non-recidivism, or also a delay in the introduction of parameters derived from victimology and restorative justice.

F) In the penitentiary field, the use of risk prediction tools has become widespread, which, combined with individualized clinical trials, could provide useful information. However, it is essential to be aware of the limitations of these predictive instruments, and especially of their tendency to overestimate the danger of recidivism, generating high rates of false positives, which frustrates the central purpose of punishment: resocialization. In an international context in which the use of these instruments is becoming more widespread, not only in the area of sentence enforcement but also in the area of determination of the penalty, it is essential to be aware that there are decisions for which what is relevant is not the relative risk posed by a subject with respect to the other members of the group to which he/she belongs, but rather their absolute risk of recidivism (e.g., sentence suspension, prison leave, parole or review of revisable life sentences). These

instruments cannot therefore replace the essential individual analysis of the specific circumstances of the offender, nor the critical judgement of the judge, who is ultimately called upon to take a decision that may irreversibly limit fundamental rights on the basis of a mere estimate of the future, an estimate that is difficult to verify and refute, which is a dangerous widening of administrative and judicial discretion.

Judicial and administrative discretion in sentencing and enforcement of sentences in Switzerland

Stefan Trechsel[*]

1 Introduction

This chapter will first address in general the principle of legality and its effect on sentencing. The focus will be on the interpretation of the principle of *nullum crimen sine lege* (*ncsl*), which all over Europe applies in a uniform way under the control of the European Court of Human Rights (ECtHR). Notwithstanding I will also include a short sketch of the history of human rights in Switzerland. Then I shall ask what the sanctions are to which the principle is supposed to apply.

The following section will focus on human rights' requirements as regards the sentencing process and the enforcement of sentences, followed by a section on discretion in sentencing in general, as opposed to the sentencing within a framework. Finally, there will follow observations on sentencing by non-judicial entities and administrative discretion in the execution of sentences.

2 The principle of legality and the rule of law as regards criminal punishment

2.1 The role of human rights in Swiss Law

Switzerland is a federal State which traces its origins back to a confederation founded in 1291 by three rural Cantons north of Gotthard, an important gateway to the South, namely Uri, Schwyz and Unterwalden. They were certainly democratic, but not all inhabitants were equal. This is also true for the urban Cantons such as Lucerne, Zurich and Berne, where the power was vested in guilds or aristocracy.

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Human rights are the fruit of the age of enlightenment in the 18th century. They were introduced after the French, in 1798, had conquered the land and imposed the Helvetic Republic. It lasted only for five years, but it had a lasting effect. Later constitutions listed rather few human rights. Up to the year 2000, the main source was the guarantee of equality before the law in Art. 4 which, however, was interpreted very broadly by the Federal Supreme Court.

On November 28, 1974, Switzerland ratified the European Convention on Human Rights (ECHR, the Convention) and also recognized the right of individuals to file applications with the European Commission of Human Rights. This immediately introduced a rather complete catalogue of fundamental rights into Swiss law.[1] The Convention has become Swiss law with the ratification and has precedent over Swiss statutes[2] – the last word is spoken in Strasbourg.

A new Constitution was introduced in 2000. Art. 5 establishes the rule of law for the country by saying that all activities of the State and all limitations of rights must be based on law (*Recht*). Furthermore, the Constitution adopted, sometimes almost verbatim, the fundamental rights of the Convention.

The principle of *nullum crimen sine lege (ncsl)* is not mentioned in the Constitution. However, in substance it undoubtedly is an aspect of the rule of law. Legal scholars find the source of that in Art. 9: "Protection against arbitrary conduct and principle of good faith. Every person has the right to be treated by state authorities in good faith and in a non-arbitrary manner."[3] Furthermore, it is explicitly restated in Art. 1 of the Swiss Criminal Code (SCC); this demonstrates the fundamental importance of this principle for the interpretation of the SCC. The text corresponds almost verbatim to that of Art. 7 of the Convention.

> Art. 1 SCC:
> No penalty without a law
> A penalty or measure may only be imposed for an act that has been expressly declared to be an offence by law.

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1 Later, on 18 June 1992, Switzerland also adhered to the International Covenant on Civil and Political Rights; as the practical importance of this instrument is minimal in comparison to that of the European Convention, it will not be considered in this Report.

2 This is disputed, see Eidgenössisches Departement für auswärtige Angelegenheiten, *Das Verhältnis von Völkerrecht und Landesrecht in der Schweiz*, Bern: EDA, 2018 (at: www.eda.admin.ch).

3 See, e.g., Peter Popp & Anne Birkenmeier, 'Art 2 N 8', in: Marcel Alexander Niggli, Marianne Heer & Hans Wiprächtiger (eds), *Basler Kommentar, Strafrecht 1*, Basel: Helbing & Lichtenhahn, 2019; Grace Schild Trappe, 'Allerlei zum neuen Allgemeinen Teil des Strafgesetzbuches', in: Felix Bänziger, Annemarie Hubschmid & Jürg Sollberger (eds), *Zur Revision des Allgemeinen Teils des Schweizerischen Strafrechts und zum neuen Jugendstrafrecht*, 2nd ed., Bern: Stämpfli, 2006, p. 7; Stefan Trechsel & Mark Pieth (eds), *Schweizerisches Strafgesetzbuch. Praxiskommentar*, 3rd ed., Zürich/Basel: Dike, 2018.

> Art. 7 ECHR:
> No punishment without law
> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

If we compare these texts, we see that the Swiss text is wider in that it explicitly adds the reference to "measures", i.e. sanctions not related to guilt of the offender but to deficits in socialization due to mental illness or abnormality.[4]

The fact that these measures are not mentioned in the Convention has to do with the difference in the method of interpretation of domestic statutes and the international treaty. There is a fundamental difference between the way national lawyers interpret a statute, e.g. the Criminal Code, and the approach taken by international organs. On the domestic level, interpretation starts with an analysis of the text. There is also a doctrinal aspect with the basic concept that law follows a logical structure. This does not work with an international treaty.

The challenge international courts face, lies in the fact, that their ruling must take into account the broad variety of national legal orders. While in German doctrine – I shall limit myself to this example – *nullum crimen sine lege* includes the specification *sine lege scripta*. This would not "fit" the common law. Therefore, the Convention will be interpreted directly so as to reach its purpose, the protection of the individual. In Swiss doctrine therapeutic measures and measures of security differ fundamentally from penalties because these are not punitive, no *poena*. The Convention organs will not be impressed by that analysis – the decisive element is that the convict will be involuntarily faced with internment which sometimes differs hardly from imprisonment. The term "penalty" is understood in a broad way. For the domestic law it was felt that it was necessary to make this absolutely clear. For Switzerland, no such problem exists. It can safely be affirmed that the principle of legality is deeply rooted in the legal order.

4 For an example of Art. 7 as applied to sanctions see ECtHR, Judgment of 28 August 2018, *Seychell v. Malta*, Appl. 43328/14, § 41.

2.2 The elements of ncsl

Ncsl can be analyzed under different aspects; it must satisfy several requirements. Traditionally, it means *sine lege praevia, scripta* and *certa*.[5] What I want to comment on here is the element of *lex certa*. The case-law of the ECtHR is aptly and reliably summed up in a guide prepared by the Directorate of the Jurisconsult of the Court.[6] I see no merit in repeating what is stated there and just cherry-pick essential points which I find relevant for our subject, the application of *ncsl* to sentencing, an aspect which is not addressed in the publications referred to here. I want to focus on the element of foreseeability. In German, the term used is *Bestimmtheitsgebot*, the requirement of precision.[7]

Note that the two terms have different standpoints: "foreseeability" takes the perspective of the citizen, the potential offender. The German term, however, addresses the legislator. It formulates an order addressed to whoever drafts the statute. This is probably due to the fact that in the common law there is no such addressee. I cannot see that there is any difference in the two approaches in practice.

This is borne out by the fact that in both systems the definition is the same; the European Court says: "This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable."[8]

According to the Swiss Federal Court, the statute "must be termed with such precision that the citizen can take it as a guideline for his behavior and foresee the consequences of a certain behavior with the degree of certitude in light of the circumstances."[9]

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5 Peter Popp & Anne Birkenmeier, 'Art. 1', in: Marcel Alexander Niggli, Marianne Heer & Hans Wiprächtiger (eds), *Basler Kommentar, Strafrecht 1*, Basel: Helbing & Lichtenhahn, 2019.

6 ECtHR, *Guide on Article 7of the European Convention on Human Rights*, finalized in January *2016, updated on 30 April 2020 (at:* https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf*)*.

7 Robert Roth & Laurent Moreillon (eds), *Commentaire romand, Code pénal I*, Basel: Helbing & Lichtenhahn, 2009; Josè Hurtado Pozo & Thierry Godel, *Droit pénal général*, 3ème éd., Zürich: Schulthess, 2019; Peter Popp & Anne Birkenmeier, 'Art. 1', in: Marcel Alexander Niggli, Marianne Heer & Hans Wiprächtiger (eds), *Basler Kommentar, Strafrecht 1*, Basel: Helbing & Lichtenhahn, 2019. See also Emanuel M. A. Cohen, *Im Zweifel für die Strafe? Der Umgang mit dem Legalitätsprinzip im materiellen Strafrecht unter besonderer Berücksichtigung des Bestimmtheitsgebotes und des Analogieverbotes*, Zürich: Schulthess, 2015.

8 ECtHR, Judgment of 18 April 2013, *Rohlena v. the Czech Republic* [GC], Appl. 59552/08, § 50, and the cases cited therein; *Vasiliauskas v. Lithuania* [GC], Appl. 35343/05, § 154.

9 See judgment BGE 138 IV 13, p. 20, my own translation; see also BGE 119 IV 242 E. 1c; BGE 117 Ia 472 E. 3e with further references.

2.3 The elements of ncsl

The quotation taken from the courts case-law just referred to does not relate to the sentence, albeit there is no doubt that it is also under the limitation, in Latin it must be termed *nulla poena sine lege*. But what does it mean? What exactly is it that the citizen must be able to foresee?

There are two aspects which fall to be distinguished. The first one relates to the legal classification of the sanction. It must be regulated by a statute, at least in broad terms. The statute must fix its minimum and maximum duration or amount of any fine, the brackets of the sanction. Unless these rules are respected, the sanction becomes arbitrary and there is a violation of *nulla poena sine lege*. To give a banal example, assume that XY, "for his own or for another's unlawful gain, appropriates moveable property belonging to another person with the object of permanently depriving the owner of it is liable to a custodial sentence not exceeding five years or to a monetary penalty", in ordinary language, he commits a theft.[10] The first part of this norm will be understood by everybody – special questions have been answered by the case-law of the Federal Court which is easily accessible – they will find it on the internet or in academic publications.

But the second part means that the penalty may not be lower than three daily penalty units; these, in turn, ought not to be less than CHF 30.-, exceptionally, if the offender's personal or financial circumstances so require, CHF 10.-.[11] The idea behind this rule is that the fine must take into account the financial capacity. How does the judge assess this capacity? "The court decides on the value of the daily penalty unit according to the personal and financial circumstances of the offender at the time of conviction, and in particular according to his income and capital, living expenses, any maintenance or support obligations and the minimum subsistence level."[12] It appears rather doubtful whether XY will have the capacity to make such a calculation.

The prospective thief, then, can foresee that he or she will be sanctioned by anything between a modest fine or deprivation of liberty for five years. Can it fairly be said that such a norm is sufficiently precise? At this point, we shall need to look at the path which leads the judge to the fixing of the sentence.

2.3.1 The essential elements in sentencing

a. First, the aims pursued. The starting point for interpretation of legal rules is the wording of the statute. Unless this is quite clear, other methods apply, including the analysis of their purpose. What is to be achieved by the sanction? The question is famously a subject of

10 Art. 139 par. 1. SCC.
11 Art. 34 par. 1. SCC.
12 Art. 34 par. 2 SCC.

dispute and was already addressed by Plato. The literature on the subject could fill libraries, probably every professor of criminal law has commented on it, but also philosophers, sociologists, psychologists and others. This is definitely not the place to enter into this arena; I shall therefore only summarily mention the most important purposes and their significance for sentencing.

Deterrence is a popular answer. Following this philosophy, the sentence must be measured so that it will motivate the convict not to commit a crime again, or so that it will motivate others not to engage in criminal activities. A primitive behavioral psychology would then call for severe and visibly severe punishment. This idea was behind the public execution of capital punishment such as the hanging of thieves; the event used to attract crowds of onlookers, including pocket thieves who were not demotivated, but stole regularly on these occasions. The theory is not very convincing – there is widespread consent that it is not the severity of the sentence incurred, but the probability of being caught which has a deterrent effect.

Resocialization is another popular goal: The sanction for criminal behavior ought to have a positive effect on the perpetrator, educative or therapeutic. Plato was already calling for this aim in punishment, it also was the leading maxim of the so-called *défense sociale* of Marc Ancel. The problem with this is that it hardly works. Only very intensive programs have been proven to bring some result. As to sentencing, it would tend to very long, but also rather short sentences.

Socio-psychological considerations change the paradigm – they do not focus on the actual or potential criminal but on the victims. Crime arouses aggressive feelings, a call for revenge. The punishment is a surrogate for revenge, inflicted by the State in the amount necessary to stifle the need for revenge. For the severity of the sanction this leads to adapting it to the gravity of the offence – the appeasement of the victim will call for more or less.[13]

Just desert is a term used by Andrew von Hirsch. Previously it was called *retaliation*. Its idea is that punishment must inflict upon the criminal an amount of suffering which is proportional to her or his guilt. It is the traditional goal of punishment allowing for a sanction which is regarded as just from every perspective. Of course, it is far from leading to a precise result. There are no fool-proof methods to measure the amount of guilt, and it is even less obvious what amount of guilt calls for what severity of sentence – we are actually faced with incommensurable scales.

b. So, the most mysterious step is in linking the elements established to an amount of penalty. There is a famous quotation by Sarstedt with regard to this aspect: "Is it not the

13 Stefan Trechsel, 'Die Entwicklung der Mittel und Methoden des Strafrechts', *Schweizerische Zeitschrift für Strafrecht* 90 (1974), p. 271ss.

crux that using the same irreproachable reasons one can arrive at a sentence of six months or 1 ½ years of imprisonment while nobody could point out the least 'rationally' ascertainable mistake."[14] In recent years, however, the Federal Court has made a great effort at improving the transparency of sentencing. The statute, in Art. 50 SCC calls for a justification of the sentence, and the Court since the nineties has increased its requirement for this justification.[15]

c. *Swiss law* has opted for a compromise. Basically, it is the last of these approaches which is in the foreground: "The court determines the sentence according to the culpability of the offender. It takes account of the previous conduct and the personal circumstances of the offender as well as the effect that the sentence will have on his life."[16] Basically, the sanction is to answer the guilt of the offender. As a secondary consideration, the judge has to examine the offender's previous life. In what sense, with which effect? Do previous convictions call for a more severe punishment or, to the contrary, are they the symptoms of difficult circumstances, including, perhaps, the nefarious effects of imprisonment which would lead to more leniency?

The reference to possible effects on the future life of the convict is inspired by the idea of (re)socialization. It must be modestly looked at the possible negative effects on the family and professional life in the first place rather than speculate on eventual positive consequences of punishment. While these arguments have some convincing quality, it cannot seriously be asserted that they improve the foreseeability of the sentence which expects the convict.

d. The factors relevant for the assessment of the guilt of the offender. Art. 47 par. 2 SCC lists the elements to be taken into account. They are "the seriousness of the damage or danger to the legal interest concerned, the reprehensibility of the conduct, the offender's motives and aims, and the extent to which the offender, in view of the personal and external circumstances, could have avoided causing the danger or damage." One will have to add the rules which lead to the opening of the bracket given by the statute to the sentence, namely mitigating circumstances. They lead to lowering the penalty, even if they are only realized in part and do not directly apply. What happens in fact is that the judge will switch methods and turn to case-law, comparing the facts before her to similar cases.

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14 As quoted by Hans-Jürgen Bruns, *Strafzumessungsrecht. Allgemeiner Teil*, Köln: C. Heymann, 1967. See, e.g., Gabi Hauser, *Die Verknüpfungsproblematik in der Strafzumessung*, Freiburg: Universitätsverlag, 1985, p. 605s.

15 Stefan Trechsel & Marc Thommen, 'Art. 50 N 2' with references in Stefan Trechsel & Mark Pieth (eds), *Schweizerisches Strafgesetzbuch. Praxiskommentar*, 3rd ed., Zürich/Basel: Dike, 2018.

16 Art. 47 par. 1. SCC.

This is not so easy, as not all judgment are published[17] and often the reasoning for the sentence is not published in an effort to spare the private sphere of the person concerned. There are publications, however, which feature examples.[18]

2.3.2 Intermediate results

Thus far, the result of our examination is not really satisfying. As far as the quantity of the penalty is concerned, there is rather little foreseeability. It is not difficult to understand this. Unfortunately, we know very little about the effects of criminal sentences,[19] let alone about the importance of the severity of prison sentences for their consequences, apart from, perhaps, the finding that the death penalty has no tangible deterrent effect.

Human rights inherently incorporate the principle of proportionality. It is expressed very clearly in the second paragraphs of Art. 8-11 ECHR, according to which interference with human rights are acceptable when they pursue a legitimate aim and are "necessary in a democratic society." Logically, this ought also to apply to criminal sanctions, but, as we have seen, their aim is disputed and therefore, from the outset, the test of proportionality is doomed to fail. This is also evident in Art. 5 para. 1(a) which allows "the lawful detention of a person after conviction by a competent court." It is a purely formal justification – the drafters seem to have been well aware of the fact that any attempt at giving substantive justification must fail.

Unfortunately, we must conclude that sentencing is a process which is, to a considerable extent, irrational.

3 Human rights requirements as regards the sentencing process and the enforcement of sentences

There can be no doubt that both the sentencing process and the enforcement of sentences are matters which call for scrupulous respect for human rights.

17 The judgments of the Federal Supreme Court of Switzerland are accessible on the internet (at: https://www.bger.ch/fr/index.htm), those of cantonal Supreme Courts are partly, first instance judgments only exceptionally.

18 See, e.g., Stefan Trechsel & Marc Thommen, 'Art. 50 N 47', in Stefan Trechsel & Mark Pieth (eds), *Schweizerisches Strafgesetzbuch. Praxiskommentar*, 3rd ed., Zürich/Basel: Dike, 2018.

19 For a thorough study, see Frieder Dünkel, *Legalbewährung nach sozialtherapeutischer Behandlung. Eine empirische vergleichende Untersuchung anhand der Strafregisterauszüge von 1.503 in den Jahren 1971-1974 entlassenen Strafgefangenen in Berlin-Tegel*, Berlin: Duncker & Humblot, 1980.

3.1 The sentencing process

The process of sentencing is part of the decision on a criminal charge, be it a mere misdemeanor or an atrocious crime. The ECHR sets out, in Art. 6, which corresponds almost verbatim to Art. 14 of the International Covenant on Civil and Political Rights and is also part of Swiss law, the standard of fairness for such proceedings. In substance, the rules are also integrated into Art. 28ss of the Swiss Federal Constitution. There is an enormous amount of case-law, international, European and domestic on this.[20] It is not really germane to the subject of this Report.

3.2 The execution of sentences

3.2.1 Preliminary observations

The term "execution of sentence" covers more than one aspect. First, and obviously, it cannot be the same for every kind of sentence – the payment of a fine, the prohibition to exercise a certain profession, expulsion, to mention just a few examples. To simplify, I shall limit the presentation to what may first come to mind, namely imprisonment. Second, we must distinguish two issues. On the one hand, there are matters which affect directly the deprivation of liberty in its quantity, including the issue of early release on probation. On the other hand, there is the regulation regarding the quality of prison life. These two aspects fall to be dealt with separately.

3.2.2 Variations in the duration of imprisonment

Prison sentences are not to be taken at face value; five years do not mean, normally, 60 months. As a rule, there are possibilities of early release on parole after the prisoner has served half or two thirds of his or her term.[21] But the execution of a prison sentence may start even before a suspect is convicted and sentenced. Swiss law allows for accelerated execution of sentences and measures.[22] This means that the suspect who is held on remand

20 See, e.g., Daniela Demko, *«Menschenrecht auf Verteidigung» und Fairness des Strafverfahrens auf nationaler, europäischer und internationaler Ebene. Dargestellt anhand eines Strafrechtsvergleichs zum Konfrontationsrecht des Angeklagten gegenüber Belastungszeugen und unter Zugrundelegung von Erkenntnissen aus Philosophie und Psychologie*, Berlin: Duncker & Humblot and Bern: Stämpfli, 2014; John D. Jackson & Sarah J. Summers (eds), *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms*, Oxford: Hart Publishing, 2018; Karsten Gaede, *Fairness als Teilhabe. Das Recht auf konkrete und wirksame Teilhabe durch Verteidigung gemäß Art. 6 EMRK*, Berlin: Duncker & Humblot 2007; Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford: Oxford University Press, 2005.

21 Art. 86ss SCC.

22 Art. 236 Swiss Criminal Procedure Code (SCPC): Accelerated execution of sentences and measures:
"1 The director of proceedings may authorise the accused to begin a custodial sentence or custodial measure in advance of the anticipated date, provided the status of the proceedings permit this". See, e.g., Bernadette Rüegsegger, *Die strafprozessuale Figur des vorzeitigen Strafvollzugs mit Blick auf die neuere*

may be allowed, if the proceedings are sufficiently advanced, to start serving a prison sentence or a therapeutic measure even before she or he is convicted. The person concerned may wish to do this because life in a proper prison is more attractive and much less boring than in detention on remand; there is the possibility to work and to be in contact with other prisoners. If that person revokes the consent, the question arises of whether she or he still is under suspicion and whether there exists a justification for detention on remand such as the risk of tampering with the evidence or of absconding.[23] If this is the case, detention on remand will be resumed, otherwise, the person is released. This happens under the authority of the magistrate responsible for the preliminary examination, a judge. There is the possibility of appeal to the "compulsory measures court." In the last instance, if personal liberty is at stake, the Federal Court is always competent to decide.[24] Let me illustrate the situation by recalling a situation which was recently before the Federal Court.

Swiss law is very flexible as far as criminal sanctions are concerned. It aims at limiting the interference with fundamental rights of the individual to a minimum. Therefore, it is possible to replace imprisonment with various surrogate measures.[25] One of them is semi-detention, which means that the prisoner works outside the institution, ideally at his former workplace, and only stays there for rest if imprisonment of up to one year is open.[26] It is the administration which grants this privilege.[27]

What authority has the power to decide on this matter – an administrative one or a judicial one? Here, the federal structure of the country has led to leave it to the Cantons to decide. The matter is dealt with below in Chapter 7.

3.2.3 Human rights relevant to the quality of prison life

Prison is a "total institution" as Goffman puts it.[28] Inmates have hardly any autonomy left. Food, clothing, shelter, entertainment etc. are almost exclusively provided by the institution. Human rights are, therefore, intrinsically limited. At the same time, these

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Praxis im Kanton Zürich, Lucerne: Master of Advanced Studies in Forensics, 2013; Art. 31 Abs. 1 Cst.; Art. 212, 221 und 236 SCPC. Accelerated execution of sentence is justified only as detention on remand. If the person concerned askes to be released, the relevant criteria are those covering detention on remand, see the judgments of the Federal Supreme Court of Switzerland BGE 6B_571/2015 and BGE 6B_73/2017.

23 Art. 221 SCPC; BGE 143 IV 160 S. 161.

24 BGE 145 I 319, 143 I 241.

25 Günter Stratenwert & Felix Bommer, *Schweizerisches Strafrecht, Allgemeiner Teil II: Strafen und Massnahmen*, Bern: Stämpfli, 2020, p. 89 ss.

26 Art. 77b SCPC.

27 1B_82/2020. See also the comment by Olivia Sieber, 'Kompetenzwirrwarr bei vorzeitigem Strafantritt', *Plädoyer* 4/2020, p. 18.

28 Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates*, New York: Anchor Books, 1961.

limitations are, in turn, also limited. An important source for the rights of prisoners are the European Prison Rules, even though they do not have the quality of binding law.[29]

Which human rights are relevant to the execution of prison sentences? The answer is radical: all of them, with hardly any exceptions – perhaps the freedom of peaceful assembly is an exception. To see how the limits to limitation works, take, for example, the freedom of correspondence, Art. 8 ECHR. The case of Silver and others[30] shows what the legitimate aim means – restrictions are only permitted to the extent necessary in view of the scope of the imprisonment. A letter may be censured to see whether it deals with plots to escape or attack guards, but may not be withheld because the prison staff feels that it disqualifies them unfairly. The Swiss authorities, judicial or administrative, follow exactly the case-law of the ECtHR, in substance as well as in method.

4 The position of the independent judge

Independence and impartiality of the judge follows, in Switzerland, the general rules as specified in the case-law of the European Court of Human Rights and the Swiss Federal Court.[31] I cannot see any specificity with regard to sentencing. There is no issue a country report could usefully comment on.

5 Judicial discretion within a framework: guidelines, mandatory sentencing, etcetera

The legislator is free to introduce mandatory sentences. If they exist, they exclude any margin of appreciation, any discretionary power for the judge. The original Swiss Criminal Code of 1937 featured one example of this kind in Art. 112: life imprisonment was mandatory for murder. This has since been abolished. There is always a risk that courts which regard the mandatory sentence as too severe stretch mitigating circumstances in order to avoid it.

Except for petty misdemeanors, mandatory sentencing does not exist in Swiss law. There is a special statute on this matter[32] and a corresponding Regulation.[33] An attachment

29 Council of Europe, "Recommendation Rec (2006)2 of the Committee of Ministers to member states on the European Prison Rules". They provide legally non-binding standards on good principles and practices in the treatment of detainees and are also taken into account by the Swiss courts, BGE 118 Ia 64, 69ss.

30 ECtHR, Judgment of 25 March 1983, *Silver & Others v. The United Kingdom*, Appl. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75.

31 See, e.g., Regina Kiener, *Richterliche Unabhängigkeit. Verfassungsrechtliche Anforderungen an Richter und Gerichte*, Bern: Stämpfli, 2001.

32 Ordnungsbussengesetz (OBG) of 18 March 2016 (SR 314.1).

33 Ordnungsbussenverordnung (OBV) of 16 January 2019 (SR 314.11).

to the regulation contains a long list of misdemeanors with the corresponding fine – a real tariff. It lists some 400 misdemeanors. The fines reach from CHF 10.- to CHF 300.-. The notice of such a fine is an offer the person can accept or reject (without giving reasons). It is a matter of "take it or leave it." If the person concerned is not prepared to accept the spot fine, the case will be dealt with in ordinary proceedings. The person concerned incurs a risk of considerable costs. The judge is not bound by the tariff, the general rules apply, there is not restriction to his power of discretion.

There are no guidelines, whether official or unofficial. There have been proposals for using mathematical systems to achieve more precision and consistency in sentencing, again with regard to traffic offences, particularly driving under the influence of alcohol.[34] While some courts for a while applied this system, it was soon abandoned, the reason being that judges preferred to remain free in using the power of discretion.

6 Sentencing by non-judicial entities

As I have pointed out above, Switzerland has ratified and is therefore bound by the ECHR. According to Art. 6 of the Convention, anyone under a criminal charge "is entitled to a … hearing … by an independent and impartial tribunal established by law." In Switzerland there used to exist proceedings in which administrative authorities were empowered to sanction certain petty misdemeanors. The ECtHR put an end to this in the case of *Belilos v. Switzerland*.[35] Since then, there is no way in Switzerland that a non-judicial entity would be competent to pass criminal sanctions of any kind.

7 Administrative discretion in the execution of sentences

In this final chapter, I shall discuss the role of administrative authorities in the execution of sentences, focusing on early release. The SCC – a fruit of federalism – has left it to the cantons to determine whether the "competent authority" must be a judicial one or not.[36] The vast majority have attributed this competence to an administrative body, the minister of justice or an element of her or his ministry. As an exception, four Latin cantons opted for a judicial authority, a court for the execution of sentences; they are Geneva, Vaud, Valais and Ticino. What are the reasons behind this duality?

34 Stefan Trechsel, 'Strafzumessung bei Verkehrsstrafsachen, insbesondere bei SVG Art. 91 Abs. 1', in *Rechtsprobleme des Strassenverkehrs*, Berner Tage für die juristische Praxis 1974, Bern: Stämpfli, 1975, p. 71ss.

35 ECtHR, Judgment of 29 April 1988, *Belilos v. Switzerland*, Appl. 10328/83.

36 Art. 86 SCC.

Governments and politicians dominate legislation. They are responsible for public safety and security, they rightly regard it as their obligation to protect citizens from all sorts of dangers, including that of other citizens who cannot be relied upon to adapt their behavior to the rules established by the State. The prisoner is in the hands of the administration; these persons, mostly civil servants, get acquainted with the personality of inmates and are therefore well qualified to assess the degree of danger impersonated in the prisoner eligible for release. Even in democracies respecting the rule of law authorities struggle to keep or increase their power. This power is, inter alia, vested in the decision on provisional release of a prisoner before the latter has fully served their sentence. An argument presented to support the solution adopted by all German-speaking cantons is that the administrative authorities are more familiar with the problems to be solved. This argument could also be used to support the opposite opinion: it is a typical feature of courts that they are familiar with the law rather than with the subject matter of a dispute – it is precisely the fact that they are distant from the subject matter which allows them to form an objective opinion based on the interpretation of the law rather than familiarity with the realities behind the dispute.

One explanation which is rather convincing is that, at the head of the administration, there is a politician, usually the minister of justice. And politicians' primary concern is to be re-elected. Political considerations, the attitude and expectations of the electorate may therefore prevail over juridical motives.

On the other hand, the champions of the rule of law have long insisted that this decision ought to be within the province of the judiciary. One of the pioneer activists on this issue is Dick Marty.[37] More recently, the postulate has been repeated.[38] As early as 1974, before Switzerland had even ratified the ECHR, he pled for the judicial competence in matters concerning the execution of prison sentences. The discussion is continuing.

8 Conclusion

Legality is a principle deeply rooted in the legal order of Switzerland. An essential effect of this principle, as far as criminal law is concerned, is foreseeability. While it operates well with regard to conviction, it is somewhat reduced in sentencing. Here, the discretion is limited in the sense that the law presents an impressive number of elements which must be considered and the judge is obliged to justify his or her decision, indicating the elements

37 Dick Marty, *Le rôle et les pouvoirs du juge suisse dans l'application des sanctions pénales*, Lugano: Tipografia La Commerciale, 1974.

38 Matthias Brunner, 'Strassburg pocht auf das Grundrecht auf Haftprüfung', *Plädoyer* 1/2017, p. 2; Gian Andrea Schmid, 'Gerichte sollen über Entlassungen entscheiden', *Plädoyer* 3/2020, p. 12.

taken into account and their weight. Still there remains a considerable space for discretion which is under limited control of legal remedies.

The IPPF's future follows from its 150-year-old history

Geneva, Thursday 8 September 2022

Piet Hein van Kempen, IPPF Secretary General[1]

Ladies and gentlemen, dear listeners,
It is very easy to destroy a wonderful dinner with a long and tedious speech. And although it is always a bit tempting to do the easy thing, I will try to avoid spoiling your evening. So …, you can rest assured that I will not take more than two hours.
I will go into the history of the International Penal and Penitentiary Foundation (IPPF) to address three themes. Briefly. So let's get started.

1.
The first theme is the nature of the IPPF.

The roots of the IPPF go back to the international penitentiary congresses of the nineteenth century. The first real international conference already took place in 1846 in Frankfurt, Germany.[2] But it took until 1872 for Enoch Wines (1806-1879), an American prison reform advocate, to launch his idea for an international forum that was to be designed to have the official backing of the governments of the world.[3] To that end he initiated the International Congress on the Prevention and Repression of Crime from 3 to 13 July 1872 in London. At this congress the IPPF's predecessor, the International Penitentiary Commission (IPC) was founded.[4] From 1926 onwards it was seated in Bern, just like the IPPF today.

An influential feature of the International Penitentiary Commission (IPC) and of its congresses was that its delegates represented a great variety of experts, including from

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2 Negley K. Teeters, 'The First International Penitentiary Congresses, 1846 – 47 – 57', *The Prison Journal* 1946, Vol. 26(3), p. 190-196.

3 Negley K. Teeters, 'The First International Penitentiary Congresses, 1846 – 47 – 57', *The Prison Journal* 1946, Vol. 26(3), p. 196.

4 See also Alejo García Basalo, 'El sesquicentenario del primer Congreso Penitenciario Internacional y la labor de la Fundación Internacional Penal y Penitenciaria' (for the IV Jornadas de Estudios Penitenciarios Miradas latinoamericanas al pasado y presente de las cárceles, Montevideo, 24 y 25 de noviembre de 2022).

government, parliament, academia, and non-governmental organizations, often of a philanthropical nature.[5]

Much of this is still inherent to the International Penal and Penitentiary Foundation (IPPF), and is arranged for in the IPPF Statutes. Although the IPPF is a foundation, created under Swiss law on the 5th of July 1951, our DNA is not that of an NGO, but rather that of a quasi-inter-governmental body, an organization *sui generis*.[6] This is not only our historical background, it is also in the IPPF's formal and actual structure, where there are member countries and official representatives from the judiciary, the criminal justice and prison system, and academia. Enoch Wines' idea, about the connection with governments, is still very much alive within the structure and operation of the IPPF.

Moreover, the historical great variety of non-governmental experts is also still at the core of the IPPF. It follows from our Statutes that one-third of our members must be from academia. And with the introduction in the 2016 Statutes of the Second Committee of Associate Members, we also have experts from other international organizations as well as NGO's amongst our midst.

It is exactly this combination of members from governments, the judiciary, academia, and civil society that makes the IPPF unique and of added value to its members and to the national and international criminal justice discourse. To put it differently: it is not only the IPPF's history, it is also our future.

As to the nature of the IPPF, it is furthermore important to stress that both that history and that future are not limited to penitentiary issues only, but clearly also involve criminal law. Relevant to this is the name change of the organization in 1929, which changed from the International Penitentiary Commission to the International Penal and Penitentiary Commission (IPPC). The inclusion of criminal law in the name through the word "penal" happened on the initiative of Carl Torp from Denmark. The purpose of this was to interface with international cooperation in criminal law. Indeed, the IPPC started to regularly

5 See Chris Leonards, 'Visitors to the International Penitentiary Congress. A Transnational Platform Dealing with Penitentiary Care', *Österreichische Zeitschrift für Geschichtswissenschaften* (*ÖZG*) 2015, vol. 26(3), p. 80-101. Between 1872 and 1935 there were in total eleven international penitentiary congresses; see Negley K. Teeters, *Deliberations of the International Penal and Penitentiary Congresses, Questions and Answers, 1872-1935*, Philadelphia, 1949.

6 See Freda Adler & G.O.W. Mueller, 'A very personal and family history of the United Nations Crime Prevention and Criminal Justice Branch', in: M.Ch. Bassiouni (ed.), *The Contributions of Specialized Institutes and Non-Governmental Organizations to the United Nations Criminal Justice Program. In Honor of Adolfo Beria Di Argentine*, The Hague, 1995, p. 3-13 at 4-5. See also Bolle, who explains that the General Assembly of the UN decided on the IPPF's *sui generis* status in a Resolution which made the FIPP, not an NGO, but an entity in charge of a mission on behalf of the UN, but, curiously enough, without having to give account at the UN; Pierre-Henri Bolle, 'L'influence de la Fondation Internationale Pénale et Pénitentiaire (FIPP) sur les politiques criminelles nationales et internationales', in: Georges Kellens & Michaël Dantinne (eds), *ONG scientifiques et politiques criminelles/Scientific NGOs and crime policy*, Nijmegen: Wolf Legal Publishers, 2009, p. 27-42 at 27.

publish changes in criminal law from various countries.[7] Law or more particularly penitentiary law and criminal law has always been at the core of the IPC/IPPC.

The IPPF has continued these activities, both as regards the penitentiary system and the criminal law. As a very brief overview, I just mention that the IPPF did so through its advisory role in relation to a variety of instruments concerning international prison rules and principles (like the Mandela Prison Rules, the Tokyo Rules, and the Bangkok Rules), during many colloquiums (29 since the IPPF was founded, including this one here in Geneva), and in its book series (48 volumes in total up till now).[8]

2.

My second theme is that the IPPF has a role as a truly international organization, and that it can also learn from its history in that regard.

When the IPC was initiated in 1872 in London, the endeavor to obtain the official backing of the governments was met most favorable by European Governments.[9] In order to learn from each other and to positively influence criminal justice and prison systems around the world, it was felt of great importance that the IPC/IPPC would operate as a genuinely international organization in which also non-Western countries were broadly involved. Although the IPPC managed to become one of the organizations in the penal and penitentiary field with the greatest diversity in membership backgrounds, Western and particularly European countries and members remained the center.[10]

The same has long applied for the IPPF. This was due to its organizational structure in the 1951 and 1965 IPPF Statutes. To allow the IPPF to become more of a genuinely international organization, we have introduced 75 new membership seats in the 2016 Statutes, with the establishment of the so called Second or Associates Committee, which I already mentioned. These seats are reserved for experts who are from another country then our 25 member countries (who also have 75 seats) or who are affiliated with a public or private international organization that is relevant to the field of crime prevention and the treatment of offenders.

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7 It did so in a newly founded journal, *i.e.* the *Recueil de Documents en Matière Pénale et Pénitentiaire*. See Martina Henze, 'Crime on the Agenda. Transnational Organizations 1870-1955', *Historisk Tidsskrift* 2009, vol. 109(2), p. 371-417 at 396; and at 378.

8 See elaborately on the influence of the IPPF Pierre-Henri Bolle, 'L'influence de la Fondation Internationale Pénale et Pénitentiaire (FIPP) sur les politiques criminelles nationales et internationales', in: Georges Kellens & Michaël Dantinne (eds), *ONG scientifiques et politiques criminelles/Scientific NGOs and crime policy*, Nijmegen: Wolf Legal Publishers, 2009, p. 27-42.

9 See Ernest Delaquis, 'Work and Activities of the International Penal and Penitentiary Commission, 1872 1942', *Recueil de Documents en Matière Pénale et Pénitentiaire* (Bulletin de la CIPP), 1942, p. 62.

10 Martina Henze, 'Crime on the Agenda. Transnational Organizations 1870-1955', *Historisk Tidsskrift* 2009, vol. 109(2), p. 371-417 at 396; and at 412.

This novelty has already let to the appointment of new IPPF members from, for example, Colombia, Kazakhstan, Nigeria, Peru, and Taiwan. It seems to me that it is an important task for us to keep improving on a more balanced geographical distribution across our membership.

But with that, also comes a warning from history, as my third and last point will illustrate.

3.

For that I first start in 1951, before I go a bit further back in history. In 1951 the assets and library of the International Penal and Penitentiary Commission were transferred to the IPPF.[11] Moreover, the IPPF Statutes refer back to its predecessor, the IPPC, while they also stipulate aims that are very similar to that of the IPPC.[12] As to the name of the organization, there was only the change from Commission to Foundation. And although the IPPC's tasks of organizing a congress every five years went over to the UN,[13] the IPPF has continued to organize international conferences. As mentioned, 29 so far. The IPPF is therefore nothing less than the genuine continuation of the IPC/IPPC, a fact which we celebrate this week as a 150-year anniversary.

In relation to the IPPF's aim "to promote studies in the field of the prevention of crime and the treatment of offenders", the rule of law and respect for fundamental human rights are very important to the IPPF, as is underscored by many of our books and colloquia. Through scientific research, publications, teaching and advising, the IPPF aims to contribute to improvement of the penal and penitentiary situation in countries. Also in countries where the rule of law and democracy are troublesome or nonexistent. This implies a major responsibility: doing our work without compromising our integrity.

It is exactly on this point that history holds a dreadful and important warning. After 10 successful congresses, the IPPC (the commission) organized its 11th congress in 1935 in

11 See Martina Henze, 'Crime on the Agenda. Transnational Organizations 1870-1955', *Historisk Tidsskrift* 2009, vol. 109(2), p. 371-417 at 396; and at 408.

12 See 'International Penal and Penitentiary Commission', *International Organization* 1950, vol. 4(3), p. 543-544 at p. 543: "The commission took as its terms of reference responsibility for promoting exchanges of views among expert penologists of all countries in order to develop standards and advise as to the development of progressive methods of preventing crime and treating offenders." The IPPF Statutes of 1951, 1965, and 2016 (present) hold: "The Foundation shall have as its aim to promote studies in the field of the prevention of crime and the treatment of offenders, especially by scientific research, publications and teaching. To this end, it shall use the income from the remaining assets of the former International Penal and Penitentiary Commission (IPPC), as well as funds which the Foundation may itself receive."

13 UN General Assembly, 5th session, 314th plenary meeting, 1 December 1950, Resolution 415 (V) on the Transfer of functions of the International Penal and Penitentiary Commission; and the Annex: Plan prepared by the Secretary General of the United Nations in consultation with the International Penal and Penitentiary Commission.

Berlin in cooperation with the League of Nations.[14] At the congress the high Nazi officials Joseph Goebbels, Hans Frank, Ronald Freisler, and Franz Guertner gave official speeches in which the Nazi ideology was promoted for the penal and penitentiary field. In a revealing report on the conference, Dutch professor Jakob van Bemmelen (1898-1982) remarked "that among many foreign guests there was a closely restrained, profound discontent about the way in which law is enforced in the receiving country" and that on the work of the conference "politics pressed heavily".[15] And although there was "much hostility among the delegates" against proposed resolutions that were based on National Socialistic doctrine, with a majority of Nazis under the participants, the resolutions could be forced.[16]

Negley K. Teeters (1896-1971), an American pioneer in penology, wrote about the Berlin conference: "*The Nazi ideology was reflected even in penal philosophy and prison administration. The war was the natural result of such conflicting concepts.*"[17] A reviewer of his book[18] added to this: "*How true it is that ideological concepts of government are reflected in penal philosophy and prison administration*."

It is certainly also for such reasons that the IPPF constantly strives and must stay alert to hold high the torch of the rule of law and respect for fundamental human rights in the work that we do.

Ladies and gentlemen, dear listeners,
In the 150-year history of the International Penal and Penitentiary Foundation, much valuable work has been done in the field of criminal justice and the prison system. I am confident that, with your help, the IPPF can and will remain to do so.

Let us toast to the IPPF's future!

14 See G.H.C. Bing, 'The International Penal and Penitentiary Congress, Berlin, 1935', *The Howard Journal of Crime and Justice* 1935, vol. 4(2), p. 195-198 at 195; United Nations Archives and Records Management Section, 'Fonds AG-010 – International Penal and Penitentiary Commission (1872-1955)', at: https://search.archives.un.org/international-penal-and-penitentiary-commission-1872-1955.

15 J.M. van Bemmelen, 'Het congres te Berlijn', *Weekblad van het recht* 1935, nr. 12962, p. 1-2.

16 See Martina Henze, 'Crime on the Agenda. Transnational Organizations 1870-1955', *Historisk Tidsskrift* 2009, vol. 109(2), p. 371-417 at 396-397; J.M. van Bemmelen, 'Het congres te Berlijn', *Weekblad van het recht* 1935, nr. 12962, p. 1.

17 N.K. Teeters, *Deliberations of the International Penal and Penitentiary Congresses: Questions and Answers, 1872-1935*, 1949.

18 A.G. Fraser, 'Book Reviews: Deliberations of The International Penal and Penitentiary Congresses. Questions and Answers – 1872-1935, Negley K. Teeters', *The Prison Journal* 1949, vol. 29 (4), p. 98-99 at 99.

L'avenir de la FIPP résulte de ses 150 ans d'histoire

Genève, jeudi 8 septembre 2022

Piet Hein van Kempen, Secrétaire général de la FIPP[1]

Mesdames, Messieurs,
Il est très facile de gâcher un excellent diner avec un long discours ennuyeux. Et même s'il est toujours un peu tentant de choisir la facilité je vais essayer d'éviter de gâcher votre soirée. Donc, n'ayez crainte, mon discours ne durera pas plus de deux heures.

Je vais retracer l'historique de la Fondation internationale pénale et pénitentiaire (la FIPP) pour aborder trois thèmes. Brièvement. Commençons sans plus tarder.

1.
Le premier thème est la nature de la FIPP.

L'origine de la FIPP remonte aux congrès pénitentiaires internationaux du 19e siècle. La première vraie conférence internationale a eu lieu en 1846 à Francfort, Allemagne.[2] Mais il a fallu attendre 1872 pour que Enoch Wines (1806-1879), un défenseur américain de la réforme des prisons, lance son idée d'un forum international qui devait être conçu pour rallier le soutien officiel des gouvernements du monde entier.[3] C'est à cette fin qu'il a porté sur les fonts baptismaux le Congrès pénitentiaire de Londres qui s'est tenu du 3 au 13 juillet 1872. C'est à l'occasion de ce congrès que fut créé l'organisme qui précédait la FIPP, la Commission internationale des prisons (CIP).[4] Son siège a été établi à Berne dès 1926, comme c'est le cas de la FIPP aujourd'hui.

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1 M. Piet Hein van Kempen est professeur titulaire de la chaire de droit pénal et de procédure pénale à l'université Radbout aux Pays-Bas. Il a occupé la fonction de Secrétaire général de la Fondation internationale pénale et pénitentiaire de 2010 à 2023.

2 Negley K. Teeters, 'The First International Penitentiary Congresses, 1846 – 47 – 57', *The Prison Journal* 1946, Vol. 26(3), p. 190-196.

3 Negley K. Teeters, 'The First International Penitentiary Congresses, 1846 – 47 – 57', *The Prison Journal* 1946, Vol. 26(3), p. 196.

4 Egalement, Alejo García Basalo, « El sesquicentenario del primer Congreso Penitenciario Internacional y la labor de la Fundación Internacional Penal y Penitenciaria » (pour les IV Jornadas de Estudios Penitenciarios Miradas latinoamericanas al pasado y presente de las cárceles, Montevideo, 24 y 25 de noviembre de 2022).

Un élément déterminant de la Commission internationale des prisons (CIP) et de ses congrès était que les délégués représentaient une grande variété d'experts, provenant à la fois de gouvernements et d'organisations non gouvernementales, souvent de nature philanthropique.[5]

C'est encore largement le cas à la Fondation internationale pénale et pénitentiaire (la FIPP), et ceci est d'ailleurs prévu dans ses statuts. Bien que la FIPP soit une fondation de droit suisse créée le 5 juillet 1951, notre ADN n'est pas celui d'une ONG, mais plutôt celui d'un organe quasi-inter-gouvernemental, une organisation *sui generis*.[6] Ce n'est pas seulement notre fondement historique, cela figure aussi dans la structure formelle et actuelle de la FIPP composée de pays membres et de représentants officiels de systèmes judiciaires, de systèmes de justice pénale et pénitentiaire et d'universités. S'agissant du lien avec les gouvernements, l'idée d'Enoch Wines reste largement d'actualité au sein de la structure et du fonctionnement de la FIPP.

En outre, la grande variété d'experts non gouvernementaux, conservée tout au long de son histoire, demeure également au cœur même de la FIPP. Il est inscrit dans nos statuts qu'un tiers de nos membres doit être issu de l'Université. De plus, après l'introduction dans les statuts de 2016 du Deuxième comité, le « Comité des Associés », nous comptons également parmi nous des experts d'autres organisations internationales et d'ONG.

C'est précisément cette combinaison de représentants de gouvernements, du système judiciaire, de l'Université et de la société civile qui rend la FIPP unique, qui lui donne une valeur ajoutée aux yeux de ses membres et renforce l'impact du discours sur la justice pénale nationale et internationale. En d'autres termes, ce n'est pas seulement l'histoire de la FIPP, c'est également notre avenir.

Quant à la nature de la FIPP, il convient en outre de souligner qu'aussi bien cette histoire que cet avenir ne sont pas limités aux questions pénitentiaires mais englobent également et clairement le droit pénal. J'en veux pour preuve le changement du nom de

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5 Chris Leonards, « Visitors to the International Penitentiary Congress. A Transnational Platform Dealing with Penitentiary Care », *Österreichische Zeitschrift für Geschichtswissenschaften* (*ÖZG*) 2015, vol. 26(3), p. 80-101. Il y a eu entre 1872 et 1935 onze congrès pénitentiaires internationaux au total; voir Negley K. Teeters, *Deliberations of the International Penal and Penitentiary Congresses, Questions and Answers, 1872-1935*, Philadelphia, 1949.

6 Freda Adler & G.O.W. Mueller, « A very personal and family history of the United Nations Crime Prevention and Criminal Justice Branch », in: M.Ch. Bassiouni (ed.), *The Contributions of Specialized Institutes and Non-Governmental Organizations to the United Nations Criminal Justice Program. In Honor of Adolfo Beria Di Argentine*, La Haye, 1995, p. 3-13 à p. 4-5. Voir également Bolle, qui explique que L'Assemblée générale des Nations Unies a décidé du statut *sui generis* de la FIPP dans une résolution qui faisait de la FIPP non pas une ONG mais une entité chargée d'une mission pour le compte de l'ONU mais, curieusement, sans devoir rendre compte à l'ONU; Pierre-Henri Bolle, « L'influence de la Fondation Internationale Pénale et Pénitentiaire (FIPP) sur les politiques criminelles nationales et internationales », in: Georges Kellens & Michaël Dantinne (eds), *ONG scientifiques et politiques criminelles/Scientific NGOs and crime policy*, Nijmegen: Wolf Legal Publishers, 2009, p. 27-42 à p, 27.

l'organisation qui s'appelait la Commission internationale des prisons et qui est devenue la Commission internationale pénale et pénitentiaire (CIPP). L'inclusion du droit pénal dans son nom a été à l'initiative de Carl Torp du Danemark. Son objectif était la création d'une interface avec la coopération internationale en matière de droit pénal. En effet, la CIPP a commencé aussitôt à publier des changements apportés au droit pénal dans différents pays.[7] Le droit, et plus précisément le droit pénitentiaire et le droit pénal, a toujours été au cœur de la CIP/CIPP.

La FIPP a poursuivi ces activités, tant en ce qui concerne le système pénitentiaire que le droit pénal. A titre d'exemple, je mentionnerai simplement que la FIPP l'a fait grâce à son rôle consultatif par rapport à différents instruments relatifs aux règles et aux principes internationaux applicables dans les prisons (tels que les Règles Nelson Mandela pour les prisons, les Règles de Tokyo et les Règles de Bangkok), durant de nombreux colloques (29 depuis la création de la FIPP, y compris celui qui se tient en ce moment à Genève), et dans sa série d'ouvrages (48 volumes au total à ce jour).[8]

2.

Mon second thème est que la FIPP joue le rôle d'une véritable organisation internationale et qu'elle peut également tirer des enseignements de son histoire à cet égard.

Lorsque la CIP a été créée en 1872 à Londres, ce sont les gouvernements européens qui avaient accueilli le plus favorablement l'initiative visant à obtenir le soutien officiel des gouvernements.[9] Il a été estimé que, pour apprendre les uns des autres et pour exercer une influence positive sur les systèmes de justice pénale et pénitentiaire du monde entier, mieux valait que la CIP/CIPP agisse comme une véritable organisation internationale avec une bonne représentation de pays non occidentaux. Bien que la CIPP ait réussi à devenir une des organisations dans le domaine pénal et pénitentiaire dont les membres venaient d'horizons les plus diversifiés, les pays occidentaux, et notamment les pays et membres européens, continuaient à y jouer un rôle clé.[10]

Il en sera longtemps de même de la FIPP, en raison de sa structure organisationnelle prévue dans les statuts de 1951 de 1965. Afin de permettre à la FIPP de devenir une

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7 Elle l'a fait dans une revue nouvellement créée, le *Recueil de Documents en Matière Pénale et Pénitentiaire*. Voir Martina Henze, « Crime on the Agenda. Transnational Organizations 1870-1955 », *Historisk Tidsskrift* 2009, vol. 109(2), p. 371-417 à p, 396; et à p. 378.

8 Pour en savoir plus sur l'influence de la FIPP: Pierre-Henri Bolle, « L'influence de la Fondation Internationale Pénale et Pénitentiaire (FIPP) sur les politiques criminelles nationales et internationales », in: Georges Kellens & Michaël Dantinne (eds), *ONG scientifiques et politiques criminelles/Scientific NGOs and crime policy*, Nijmegen: Wolf Legal Publishers, 2009, p. 27-42.

9 Ernest Delaquis, « Work and Activities of the International Penal and Penitentiary Commission, 1872 1942 », *Recueil de Documents en Matière Pénale et Pénitentiaire* (Bulletin de la CIPP), 1942, p. 62.

10 Martina Henze, « Crime on the Agenda. Transnational Organizations 1870-1955 », *Historisk Tidsskrift* 2009, vol. 109(2), p. 371-417 à p. 396; et à p. 412.

véritable organisation internationale nous avons introduit 75 nouveaux sièges de membres dans les statuts de 2016, en créant le Deuxième Comité ou « Comité des Associés », déjà mentionné. Ces sièges sont réservés aux experts venant d'un autre pays que nos 25 pays membres (qui ont également 75 sièges) ou qui sont affiliés à une organisation publique ou privée qui concerne le domaine de la prévention des crimes et du traitement des délinquants.

Cette nouveauté a déjà permis la désignation de nouveaux membres de la FIPP qui viennent, par exemple, de Colombie, du Kazakhstan, du Nigéria, du Pérou et de Taiwan. Il me semble important de continuer à améliorer la répartition géographique de nos membres.

Mais ceci s'accompagne également d'un avertissement que nous donne l'Histoire, comme l'illustrera mon troisième et dernier thème.

3.

Je commencerai par l'année 1951 avant de remonter plus loin dans l'Histoire. En 1951, les actifs et la bibliothèque de la Commission internationale pénale et pénitentiaire ont été transférés à la FIPP.[11] En outre, dans ses statuts, la FIPP mentionne l'organisation qui la précédait, la CIPP, tout en se donnant des buts qui sont très semblables à ceux de la CIPP.[12] Quant au nom de l'organisation, seul le mot « Commission » a été remplacé par « Fondation ». Et bien que la tâche de la CIPP qui consistait à organiser le congrès tous les cinq ans ait été transférée à l'ONU,[13] la FIPP a continué à organiser des conférences internationales. Comme dit, il y en a eu 29 à ce jour. La FIPP n'est donc rien d'autre que le successeur de la CIP/CIPP, et nous en célébrons cette semaine le 150e anniversaire.

Quant au but de la FIPP qui est « d'encourager les études dans le domaine de la prévention du crime et du traitement des délinquants », l'État de droit ainsi que le respect des droits humains fondamentaux sont très importants pour la FIPP, comme le montrent

11 Martina Henze, « Crime on the Agenda. Transnational Organizations 1870-1955 », *Historisk Tidsskrift* 2009, vol. 109(2), p. 371-417 à p. 396; et à p. 408.

12 « International Penal and Penitentiary Commission », *International Organization* 1950, vol. 4(3), p. 543-544 à p. 543: "The commission took as its terms of reference responsibility for promoting exchanges of views among expert penologists of all countries in order to develop standards and advise as to the development of progressive methods of preventing crime and treating offenders." Les statuts de la FIPP de 1951, 1965, et de 2016 (actuels) stipulent: « La Fondation a pour but d'encourager les études dans le domaine de la prévention du crime et du traitement des délinquants, notamment par la recherche scientifique, les publications et l'enseignement. A cette fin, elle utilisera les revenus du reliquat des biens de l'ancienne Commission Internationale Pénale et Pénitentiaire (CIPP), ainsi que tous les biens que la Fondation pourrait recevoir ».

13 Assemblée Générale des Nations Unies, 5e session, 314e plénière, 1er décembre 1950, Résolution 415 (V) relative au Transfert des fonctions de la Commission internationale pénale et pénitentiaire; et l'annexe: Plan préparé par le Secrétaire général de l'Organisation des Nations Unies en consultation avec la Commission internationale pénale et pénitentiaire.

nombre de nos livres et de nos colloques. La FIPP vise, par le biais de la recherche scientifique, de publications, de l'enseignement et de ses avis, à contribuer à l'amélioration de la situation en matière de droit pénal et pénitentiaire dans les pays. Y compris dans les pays où l'État de droit et la démocratie libérale sont ébranlés ou n'existent pas. Ce qui donne lieu à une responsabilité majeure: nous devons effectuer notre travail sans compromettre notre intégrité.

C'est précisément sur ce point que l'Histoire nous donne un avertissement terrible et important. Après 10 congrès réussis, la CIPP (la Commission) avait organisé son 11e congrès en 1935 à Berlin, en collaboration avec la Société des Nations.[14] Au congrès, les hauts responsables nazis, Joseph Goebbels, Hans Frank, Ronald Freisler et Franz Guertner, ont prononcé des discours officiels pour promouvoir l'idéologie nazie dans le domaine pénal et pénitentiaire. Dans un rapport révélateur sur la conférence le professeur Néerlandais Jakob Van Bemmelen (1898-1982) remarquait que « il y avait chez beaucoup d'invités étrangers un sentiment très contrôlé de mécontentement profond quant à la manière dont le droit était appliqué dans le pays hôte » et que « la politique pesait lourdement » sur les travaux de la conférence ».[15] Néanmoins les résolutions ont pu être imposées, malgré « la forte hostilité parmi les délégués » aux projets de résolutions fondés sur la doctrine nationale socialiste, grâce à une majorité de nazis parmi les participants.[16]

Negley K. Teeters (1896-1971), un pionnier américain en pénologie, écrivait à propos de la conférence de Berlin que « *l'idéologie nazie se reflétait même dans la philosophie pénale et l'administration pénitentiaire. La guerre était le résultat naturel de ces concepts inconciliables.* »[17] Un critique de son livre[18] ajoutait: « *Comme il est vrai que les concepts idéologiques de l'action gouvernementale se reflètent dans la philosophie pénale et l'administration pénitentiaire.* »

Il va sans dire que c'est aussi pour ce dernier motif que la FIPP s'efforce inlassablement de porter haut le flambeau de l'État de droit et du respect des droits humains fondamentaux dans le travail que nous accomplissons.

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14 G.H.C. Bing, « The International Penal and Penitentiary Congress, Berlin, 1935 », *The Howard Journal of Crime and Justice* 1935, vol. 4(2), p. 195-198 à p. 195; United Nations Archives and Records Management Section, 'Fonds AG-010 – International Penal and Penitentiary Commission (1872-1955)', à l'adresse: https://search.archives.un.org/international-penal-and-penitentiary-commission-1872-1955.

15 J.M. van Bemmelen, « Het congress te Berlijn », *Weekblad van het recht* 1935, nr. 12962, p. 1-2.

16 Martina Henze, « Crime on the Agenda. Transnational Organizations 1870-1955 », *Historisk Tidsskrift* 2009, vol. 109(2), p. 371-417 à p. 396-397; J.M. van Bemmelen, « Het congress te Berlijn », *Weekblad van het recht* 1935, nr. 12962, p. 1.

17 N.K. Teeters, *Deliberations of the International Penal and Penitentiary Congresses: Questions and Answers, 1872-1935*, 1949.

18 A.G. Fraser, « Book Reviews: Deliberations of The International Penal and Penitentiary Congresses. Questions and Answers – 1872-1935, Negley K. Teeters », *The Prison Journal* 1949, vol. 29 (4), p. 98-99 à p. 99.

Mesdames, Messieurs,
Un travail extrêmement précieux a été accompli dans le domaine de la justice pénale et des systèmes pénitentiaires durant les 150 années de l'histoire de la Fondation internationale pénale et pénitentiaire. Je suis convaincu que, avec votre concours, la FIPP pourra poursuivre dans cette voie et sera là pour le faire.

Levons nos verres à l'avenir de la FIPP!

(Traduit de l'anglais par François Butticker)

About the International Penal and Penitentiary Foundation

Activities of the IPPF

The International Penal and Penitentiary Foundation (IPPF) has a long history and can trace its roots back to 1872. It shall have as its aim to promote studies in the field of the prevention of crime and the treatment of offenders, especially by scientific research, publications, teaching and international colloquiums. The IPPF strives to foster the rule of law and internationally recognized human rights standards. The members of the IPPF are from around the world, are recognized experts in penal and penitentiary matters, and are either high judges, high officials of the prison system, or university professors. Recent publications of the IPPF regard, *e.g.*, "Prison policy and prisoners' rights", "Minorities and cultural diversity in prison", "Pre-trial detention", "Prevention of reoffending: the value of rehabilitation and the management of high-risk offenders", "Women in Prison: The Bangkok Rules and Beyond", "Overuse in the Criminal Justice System: On Criminalization, Prosecution and Imprisonment" and "Mental Health and Criminal Justice: International and Domestic perspectives on Defendants and Detainees with Mental Illness".

History of the IPPF

International efforts to harmonize criminal justice policy date back to the nineteenth century, when representatives of various European nations met periodically to exchange information and to consider common standards in the treatment of offenders. In 1872, cooperation took a step forward when an International Prison Commission (IPC) was set up to collect national prison statistics and make recommendations for prison reform in Europe. When the League of Nations was formed in 1919, it saw as part of its mandate the promotion of the rule of law in the international community. The IPC became affiliated with the League and continued to hold conferences, meeting in 1925, 1930 and 1935. In the latter year, the IPC became the International Penal and Penitentiary Commission (IPPC).[1] When the new United Nations was created in 1945, it incorporated crime prevention and standards of criminal justice into its policy-setting role. In December 1950, the IPPC was dissolved, to be replaced by the International Penal and Penitentiary

1 See United Nations, *The United Nations and Crime Prevention*, New York: United Nations, 1991, p. 3-4.

Foundation. The IPPF is a foundation governed by the Swiss Civil Code and created on the 5th of July 1951.

À propos de la Fondation Internationale Pénale et Pénitentiaire

Les activités de la FIPP

La Fondation internationale pénale et pénitentiaire (FIPP) est une institution dont les origines remontent à 1872. Elle vise à promouvoir les études dans Ie domaine de la prévention de la criminalité et Ie traitement des délinquants, plus particulièrement en menant des recherches scientifiques, en éditant des publications, des cours et par l'organisation de colloques internationaux. La FIPP s'efforce de promouvoir l'état de droit et les normes internationales des droits de l'homme. La FIPP compte des membres dans Ie monde entier, tous experts reconnus dans les matières pénale et pénitentiaire: hauts magistrats, hauts fonctionnaires du système pénitentiaire ou professeurs d'université. La FIPP a entre autres récemment publié « Politiques pénitentiaires et droits des détenus », « Minorités et diversité culturelle en prison », « Détention avant jugement », « Prévention de la récidive; valeur de la réhabilitation et gestion des délinquants à haut risqué », « Femmes en Prison; Les règles de Bangkok et au delà », «Le recours excessif au système de justice pénale; Aux sanctions et poursuites pénales et à la détention » et « Santé mentale et justice pénale: Perspectives internationales et nationales sur les prévenus et les détenus atteints de maladie mentale ».

Histoire de la FIPP

Les efforts internationaux entrepris pour harmoniser la politique pénale et pénitentiaire remontent au 19e siècle, quand des représentants de plusieurs États européens ont commencé à se réunir périodiquement pour échanger de l'information et élaborer des standards communs dans le domaine du traitement des délinquants. En 1872, la coopération s'intensifia avec l'instauration de la Commission Pénitentiaire Internationale (CPI), chargée de réunir des statistiques nationales sur la prison et de formuler des recommandations pour la réforme des institutions carcérales en Europe. Instituée en 1919, la Société des Nations s'est vue confier le mandat de promouvoir des règles de droit en la matière auprès de la communauté internationale. La CPI devint affiliée à la Société des Nations et continua d'organiser des conférences et rencontres, en 1925, 1930 et 1935,

avant de devenir la Commission Internationale Pénale et Pénitentiaire (CIPP).[1] Quand en 1945, à la suite de la Société des Nations, fut créée l'Organisation des Nations Unies, cette dernière maintint parmi ses objectifs principaux la promotion de la prévention du crime et de standards en matière de justice criminelle. En décembre 1950, la CIPP fut dissoute et remplacée par la Fondation internationale pénale et pénitentiaire. Instituée le 5 juillet 1951, la FIPP est une fondation, au sens des articles 80ss du Code civil suisse.

1 Traduction libre tirée de: United Nations, *The United Nations and Crime Prevention*, New York: United Nations, 1991, p. 3-4.