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

* Prof. Dr. Rita Haverkamp is an endowed professor of crime prevention and risk management at Eberhard Karls University in Tübingen, Germany. Prof. Dr. Johannes Kaspar is professor of criminal law, criminal procedure, sanctions law and criminology at Augsburg University, Germany.

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 ofte imposed certain custodial sentence lengths, whilst on the other hand, they often mad little or no use of others. In contrast to *Cox*, *Galton* turned against wide discretion as i leads to "[t]he extreme irregularity of the frequency of the different terms of imprisonmen [...] 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.

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]

---

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]

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).

---

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.