Legal knowledge based systems
JURIX 92
Information Technology and Law

The Foundation for Legal Knowledge Systems
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J.C.M. Leijten, Uniformity and Sentencing Policy, in: C.A.F.M. Grütters, J.A.P.J. Breuker, H.J. van den Herik, A.H.J. Schmidt, C.N.J. de Vey Mestdagh (eds.), Legal knowledge based systems JURIX 92: Information Technology and Law, Lelystad: Koninklijke Vermande, 1992, pp. 5-9, ISBN 90 5458 031 3.

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UNIFORMITY AND SENTENCING POLICY

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1 . Introduction

If two different causes are possible for the occurrence of one phenomenon then an interested party is highly tempted to indicate, as the actual cause, the one which suits him best. If the minister sees a watering-down of standards he pushes the calculating citizen to the centre of the stage and not the self-failing government. If the employer prefers applicant A to applicant B in a selection procedure, he explains that this is because A is more suitable and more competent, not that he does not like employing foreigners in his company. If the professionals in the field of jurisprudence have noted that, for apparently similar cases, dissimilar sentences are handed down, then they reason that this is because in criminal law every case is different and not that some courts of law or individual judges hand down stiffer sentences than others.

That politician, that employer, that judge, they could, by definition, be correct because my starting point was that each of the two causes could create the result. This must be investigated. One of the causes must be extrapolated and then it would be possible to see if and when the result recurs and in the same fashion. In the physical world that investigation is a lot easier than in the world of human relations. It is also even more complicated if the phenomenon is, each time, a mixture of both causes, whilst that mixture is differently constituted each time.

Inequality of sentencing can be the result of dissimilarity in the cases to be judged. That will often, at least in part, be the true reasons. It is obvious that the petty thief will be given a different sentence to the murderer or the rapist, but it is also just as evident that this petty thief does not get the same gain as the man who also contravenes art. 310 Sr but makes off with a fortune. But personal circumstances can be of great influence on the sentence. I remember a case in which we, as a court, sentenced a woman, who had poisoned her husband and thus had committed a murder, to three or four months' imprisonment. The public prosecutor did not appeal. But that aspect is not only generally difficult to trace but will also be regarded in very different ways. It is the Achilles' heel of jurisprudence in criminal cases.

There are, in particular, two circumstances which can both explain the difference in sentencing and at the same time cause an unreasonable inequality in sentencing. First of all, the seriousness of the offence as such and secondly the influence of the personal circumstances of the perpetrator. With respect to this seriousness and this influence, which are in themselves reasons for different sentencing for two people, there can be, with regard to one person a difference in the opinion of one judge compared to the opinion held be another, with the result that the severity of sentencing is dependant on where he lives and on the judge(s) who is (are) sitting on the day that his case comes before the court.

I am convinced, based on the thousands of criminal cases which I have seen and my experience that people when judging good and evil use different criteria, and that great differences exist in sentencing, which are the result, not of the personality of the perpetrators but of the judges. The research carried out by [Berghuis, 1992] did not, in any case, prove this statement to be incorrect. (I am skipping the fact that very important differences in sentencing are the result of the application of the principle of discretionary powers and of the wide possibility of discharge of liability to conviction by payment of a fixed penalty to the Public Prosecutor as set out in art. 74 Sr.)

Are judges independent of each other? First a question which is linked to this: is it reprehensible that judges have differing opinions about the sentence and put these into practice? Seen from their point of view the answer must be: no. A judge who hands down a lesser sentence than he, taking everything into consideration, thinks he should hand down, is not acting properly. In the last instance judges are also independent of each other. A court of law can produce a judgement which differs to that of the fixed jurisprudence of the Supreme Court if it feels it is obliged to. And it does happen, both in civil law and in criminal law. But more often as a gesture and very occasionally because the suspect or the party in the civil case will be subject to nothing but trouble, since there is one highest authority with a decisive voice. And this is one which will reverse the scrupled decision of the court of law. I know that I am expressing this in a simplistic way when I state the following: however for sentencing, which is still the most important element of the criminal case, we do not have one single such highest authority, which can ensure the unanimity of that judicial phenomenon. The Supreme Court is on this point all but powerless.

It is for this reason that I have pleaded for many years that - for the sake of preventing flagrant injustices - one *court of justice* or at least *a national legal chamber for sentence assessment* should be created. This would be an institution which can insure the unity of sentencing at the top, because what is seen sometimes from the judges' point of view as being their duty: to hand out that punishment which they consider justifiable, can, from the suspect's viewpoint, produce the challenged inequality which was envisaged in the constitution art. 1 first clause, in the same or at least similar cases. This is a distinction which, with respect to the suspects, is not justifiable.

The court of justice or legal chamber for sentence assessment, associated with a criminal court, has a double function: its objective is the promotion of equality of sentencing in the sense that no-one will be given a sentence which is obviously harsher than others. I am not saying: than he deserves, because equal sentences can also be too severe or even - theoretically too mild. The second function is just as important: a court of justice like this is an important factor in speeding up criminal cases in which the suspect takes his case to appeal and those are the cases in which a unreasonable or undesirable delay occurs.

The remainder of this paper is as follows. First of all I describe (2) briefly the working method of the court of justice and the consequences which this method of working has for the conduct of criminal law. Then I review (3) five much-aired objections which can be raised against such a court of justice. The third topic which I then deal with (4), is the significance of information technology and data banks with respect to equality of sentencing according to this model. The fourth part (5) briefly discusses a number of alternatives and finally (6) there is a very short epilogue.

2 . Working method

The court of justice, consisting of five, and in simple cases three, judges who may be nominated from within the entire profession of Dutch judges, sits only initially when a prison sentence has been handed down which is, at least, in part unconditional and/or a considerable fine of, for instance, two thousand five hundred guilders or more has been imposed.

The court of justice assesses the sentence according to the appeal made against it by the defendant. It does not review in a marginal way but the entire case, although of necessity with some margin of freedom for the first judge.

This form is certainly not unknown elsewhere. In England there is an important distinction made between appeal against conviction and appeal against sentence. This latter is very comparable to the appeal against sentence here.

Whoever appeals against sentence chooses thereby, in my proposal, to be dealt with in a way in which he unconditionally gives up his right to all previous defence ploys: invalidation of the summons, incompetence of the judge, non-responsiveness of the public prosecutor, and he can also no longer plead for acquittal nor call for discharge from prosecution. But why should someone choose this route when the other, the ordinary appeal, offers so many more possibilities? Firstly because these other possibilities are in many cases illusory, but primarily because he does not run the risk in this case of a more severe sentence. Whenever the Public Prosecutor feels that the sentence of the court is too mild then it has to instigate an ordinary appeal which take precedence. The Public Prosecutor's office cannot take the case to the court of justice for sentence assessment because it is no concern of theirs, in this manner, to remove the defendant's right to his other grounds for defence. In this situation, after the public prosecutor has appealed, the opportunity arises for the defendant to make an appeal to the court of justice for sentence assessment. The judgement of this court of justice need only contain the motivation for the sentence. Nothing else need be discussed. An appeal for reversal of the judgement is, in principle, excluded, after all the sentence assessment is a topic on which the Supreme Court has no actual authority. Given the very large number of cases of appeal to higher courts in which the defendant is only aiming to reduce the sentence, then this method of dealing with them could drastically reduce the length of a number of cases without eroding the rights of the defendant. Thus the greatest defect in the Dutch criminal law system: the excessive amount of time spent on criminal cases involving more than one authority, could be much reduced.

3 . Objections

All the objections which I mention in the following should be taken seriously even though there is a distinction in the degree of seriousness. In every proposed criminal law reform the result or the lack of result is the consequence of balanced consideration, often between the importance of due process and that of crime control. One objection I will lay aside; it is that of the geographical distance now there is only one court of justice. Such a court must be situated centrally and then it will be accessible to everyone who doesn't land in a traffic jam or is faced with train delays within a couple of hours.

1. I have already implicitly dealt with the first objection. Every case, certainly of any significance, and that is what we are discussing here, has a certain individual character. Cases are never exactly the same because the people involved are different. Equality of sentencing could therefore still occur in, what are in actual fact, unequal cases. I am being deliberately brief on this point for fear of entirely filling the time allocated to me with the discussion of this problem. As far as the particular personal circumstances are concerned, a certain degree of indifference is unavoidably necessary. We may not harbour the pretension of really getting down to the nitty-gritty details except in very obvious cases. In as much as this task is part of the judicial proceedings it is also carried out by humans and therefore very fallible. But think of the many times that three robbers or drugs dealers in a case are given the same sentence, think of the guidelines for sentencing from the Public Prosecutor's office, for example in art. 26 Traffic Law cases and it will be obvious that in ordinary, not exceptional cases the seriousness of the offence is and must be, by far, the most important factor with respect to the toughness of the sentence.
2. Why should someone not appeal against the sentence if he will be no worse off? On this point firstly this: if many people are deterred from making an appeal because they risk being given an even stiffer sentence, then that is not good, because the most respectable will also be the most deterred. But to go further: someone who wishes to achieve something other than reduction of their sentence has to make an ordinary appeal and take that risk. Accordingly: judges typically hold the misconception that people should not only experience having to appear before a criminal judge as a punishment which they wish to avoid as much as possible. They do not blindly make an appeal. And if the objections still remain in

part then I could imagine that for the sake of the greater good that a court fee would be levied for this appeal, which would be returned if the appeal is instigated on appropriate grounds or that in this case, as in many other countries, the possibility exists of having part of the costs awarded, but only if the opportunity to appeal is used in a frivolous way.

3. There may be matters in the first instance, in which the defendant only appeals against the sentence, but in which there have such unacceptable errors made in the conduct of the case, that it would be contrary to public order to allow them to persist. Now I would say that this happens or can happen if the defendant and the Public Prosecutor in general make no appeal. And furthermore that this situation will only rarely occur. In these cases the public prosecutor - charged with maintaining public order - would have the right to set an appeal for quashing of the sentence in motion, which lies somewhere between an ordinary appeal for reversal of judgement and the reversal in the interest of the law.
4. The boring and monotonous nature of this work for judges has also been raised. I cannot imagine that this should be considered a reason for not performing what is otherwise necessary and beneficial work. Cleaning toilets is also no picnic and yet ... One could furthermore specify that no-one should have to be a member of such a court justice or legal chamber for any longer than a certain period of time, such as is also regulated within the examining magistrate for criminal cases. Moreover the judges in this court of justice could and should have other work to do.
5. The most important objection which I have heard is this: a court of justice for sentence assessment, as such, has, in the long run, the consequence that the sentences are harsher. If that were true then I would immediately pull the rug from under my imaginary high court. The thought process is thus: this court of justice will still approve a particularly harsh sentence in a particular case and that sentence will also be determinate for those cases in which these exceptional circumstances, which resulted in a harsher sentence, do not occur or occur to lesser degree. I have, in all honesty, to acknowledge that I have heard that in some states in the U.S.A. where such a body exists, that it does have this effect. But I firmly belief that this does not need to happen when the court of justice in its judgement clearly states why this harsh sentence in this case was still acceptable. It can have precisely the opposite effect.

4. Information technology

If such a court wants to work well then properly set-up and accessible data banks are necessary, which provide information about the sentence in connection with the case (the seriousness of the crime) and truly special details concerning the character of the offender. It is now already extremely important that the judges involved in criminal cases in courts of justice and courts of law can, quickly and extensively, get to know the sentences passed by other courts and in particular by courts of justice. I have said on occasion: I want to have the right to have a difference in opinions, but it is useful and pleasant to know that I have that difference. That will lead to exceptional grounds being put forward.

Once a court of justice for sentence assessment exists then it will be very interested in data from the different courts of justice to be able to get some insight into the present state of affairs: the existing differences between the courts, the way of approaching this point, the vulnerable areas etc. If the court of justice has won a place within the existing order, if it has built up a certain system (which furthermore, as far as the data are concerned, must not be endowed with the permanence of centuries) then the reverse will become a pressing matter: the courts of justice, and in particular the courts of law, will benefit immensely form the data which come from the central court of justice, with as interaction the steady reduction in the number of appeals with respect to sentences, because it will

become general knowledge that the sentence handed out by the court of law is accepted by the court of justice.

5 . Alternatives

I do not consider leaving everything as it stands a real alternative. But I have no desire to air a pet subject. What concerns me is that, having seen thousands of criminal case dossiers in the last twelve years from throughout the country, and looking at them from the point of view of the defendants' right to equality, it must be said that unjustifiable inequality in sentencing exists and that such inequality must be rectified. If that can happen in a better way than via the court of justice for sentence assessment, than it must be carried out in that way. If such a chamber is perhaps the best solution, but politically or otherwise not achievable, whilst other possibilities are, then the relative improvement which is achievable should not be shelved in the hope of a better solution which is not achievable. Of the alternatives, one of them seems to me to be, in any case, desirable, another seems to me to be very undesirable and I have my doubts about a third one. The desirable alternative is clear: in any case good data banks should be set up, specifically aimed at the subject of sentence assessment. The undesirable alternative is: replacement of the general minimum for all offences: one day's imprisonment or a five guilder fine, with a particular minimum for each offence, for instance for manslaughter, never less than, say, five years. That would bring a certain equality, but only downwards. Moreover judges would no longer be able to take into account the exceptional circumstances of the case or there would, as elsewhere, have to be so many exceptions to that minimum, that the system would still not work. The alternative about which I have my doubts is: drastic expansion of the guidelines set out by the public prosecutor's office for sentencing in special cases. These guidelines encourage the unity of sentencing, in the judgements too, and still allow the judge freedom. In part my doubt is based on the fact that many judges are not inclined to make much use of that freedom.

6 . Conclusion and epilogue

Inception of our Constitutional Law: all those who are in the Netherlands, will be treated equally in similar cases.

Let this also be for those who most clearly are involved with the hard hand of our government.

7 . Acknowledgement

This article was translated by Mrs. K.M.M. Hudson-Brazenall.

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This article may only be cited as: Leijten, J.C.M., Uniformity and Sentencing Policy. In: Grütters, C.A.F.M., J.A.P.J. Breuker, H.J. van den Herik, A.H.J. Schmidt and C.N.J. de Vey Mestdagh (eds), *Legal Knowledge Based Systems: Information Technology & Law, JURIX '92*, Koninklijke Vermande, Lelystad, NL, 1992.

[Berghuis, 1992] Berghuis, A.C., *Trema¨* , March 1992.