Legal knowledge based systems
JURIX 92
Information Technology and Law

The Foundation for Legal Knowledge Systems
Editors:
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

L.C. Meijers, Instruments for Sound Sentencing, 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. 11-15, ISBN 90 5458 031 3.

More information about the JURIX foundation and its activities can be obtained by contacting the JURIX secretariat:

Mr. C.N.J. de Vey Mestdagh
University of Groningen, Faculty of Law
Oude Kijk in 't Jatstraat 26
P.O. Box 716
9700 AS Groningen
Tel: +31 50 3635790/5433
Fax: +31 50 3635603
Email: sesam@rechten.rug.nl

 http://jurix.bsk.utwente.nl/

INSTRUMENTS FOR SOUND SENTENCING

L.C. MEIJERS
Advocate General of the Supreme Court of the Netherlands and Member of the Working Party on Sentencing Guidelines of the Dutch Association for the Judiciary (NVVR)

1 . Introduction

In the penal systems of the continental European tradition and in those of the common law countries some safeguards have been built in, without any essential differences between them, which are aimed at limiting, to some extent, the freedom of judges in the sentences they hand down. For instance I can indicate safeguards like the division of indictable offences into two or three categories, the concomitant maximalisation of the sentence which can be meted out and the motivation criteria which the law sets for the judge giving the punishment.

In the preparations made for the Model Penal Code in the United States of America, much was expected of the division into categories. During a hearing of the Subcommittee on Criminal Laws and Procedures of the American Senate on 24 May 1971 concerning the Model Penal Code, Herbert Wechsler, the former director of the American Law Institute (ALI) and co-reporter of the Model Penal Code emphasised that criminal law and the application of it "should be as rational and as just as law can be". The division of felonies into three categories which each have a maximum prison sentence which can be given (life for the first degree felonies and ten or five years respectively for the other categories) he called the beginning of an "inroad on the problem of disparity of sentence, which everywhere is felt to be extreme" [Hearings, 1971][Wechsler, 1968]. The MPC itself contains a Sentencing System with criteria for the judicial choice from a number of forms of sanction.

The Dutch Code on Penal Law (Sr) has, as far as imprisonment is concerned, a finely meshed, but also - in part as a result of this - hardly transparent system of a maximum punishment per offence and thereby generic maxima for fines (divided into six categories) with one minimum which applies to all imprisonable offences and fines, this being a minimum of one day or five guilders. (art. 10 clause 2 and 23 clause 2 Sr). In addition there are also strict rules for sentence motivation. I do not wish to discuss that now, but will limit myself to the observation that none of these legal rules nor any combination of them has been sufficient to safeguard against the accusation of irrationality and arbitrariness.

2 . Disparity of sentencing

It is obvious that within national penal systems a search has been and is being carried out into more adequate measures with which to tackle the old problem of disparity of sentencing. Thereby the question which immediately arises is: which authority should be involved: the legislator, the government (the justice minister) or the judiciary? I believe that we should keep to the following, somewhat broadly formulated scheme:

1. The legislator defines both the facts on which the sentence is based as well as the maximum sentence which can be handed down for that offence (or category of offences).
2. Only judges may hand down a sentence (a rule for which a cue has been given in art. 6 of the European Treaty for the protection of human rights and the fundamental freedom).
3. The executive power should not interfere in the penalisation, whilst

4. Neither the legislator nor any executive body may be allowed to meddle with the sort and severity of the punishment which will be given for the actual offence.

This, somewhat broadly formulated scheme is based on the combination of two basic principles which make a democratic state into a constitutional state: the principle of the division of power and that of legality. The abandonment of these principles would leave the sentencing system open to political influence. (I will not, at present, consider questions concerning the imposition of administrative sanctions, such as, for instance, the competence of the European Economic Community to impose a fine for disregarding a competition rule - art. 15 of the Guidelines EC 17/62) [Sevenster, 1992].

2.1. Sentencing Commission

One of the instruments which has been developed is the establishment of an independent sentencing commission, like the U.S. sentencing commission, created as a result of the Sentencing Reform Act 1984. "The purpose of the Act was to attack the tripartite problems of disparity, dishonesty and for some offenses, excessive leniency, all made seemingly worse by a system of near unfettered judicial discretion" [Nagel, 1992]. The commission established binding guidelines for sentencing. Divergence is possible, but requires individual motivation. The Judicial Commission of New South Wales, Australia, has an advisory role, which Ivan Potas mentioned in his contribution to the first U.N. Workshop on Computerisation of Criminal Justice Information (Havanna, Cuba, 1990) [Potas, 1992, pp. 189-190].

2.2. Guidelines

Other instruments already in existence are:

a. the *guidelines judgements by superior courts* (such as in England, where in the jurisprudence of the Criminal Division of the Court of Appeal sentences for a number of groups of offences are developed)
b. the *reference points for sentencing* as developed by the legislator in the Swedish Criminal Law Code [Frijda, 1992]
c. for the Netherlands, the *guidelines* produced by the Public Prosecutor for the sentence demand (the demand for type of punishment and sentence). The proposal made by the first speaker, Prof. J.C.M. Leijten, for the establishment of a Court of Justice for Sentence Assignment integrates into the guidelines judgements resources which exist in the U.K [Leijten, 1992].

For those who are not familiar with the position of the Public Prosecutor within the Dutch state system, the phenomenon of guidelines from the Public Prosecutor requires some explanation. In the early seventies a start was made in the Netherlands with the development of sentence demand guidelines for the public prosecution, amongst other things. This was an important step in the direction which Wechsler had envisaged, although these guidelines are almost solely concerned with offences which follow a standard pattern and in which the personal circumstances of the offender, for the purposes of making a judgement on the merit of a punishment, play a secondary role (whoever drinks a lot before driving a car, should not attempt to make excuses). That the guidelines, aimed at the public prosecution, are an important contribution to a balanced meting-out of sentences, is due, in particular, to the constitutional position of the Dutch public prosecutor within the judiciary. The public prosecutor's duties include (he is selected and trained for this purpose) demanding the type of punishment and sentence which he considers in the actual offence to be justified according to the pre-trial investigation, independent of any form or sort of political influence.

In the sentencing of someone for a offence in a category for which no guidelines exist (this includes theft, murder, manslaughter, environmental pollution, causing a serious road accident under the influence of alcohol) much significance is attached to the public prosecutor's demand or claim. For the judge the demand serves as a point of reference and the law requires him, if he wishes to hand down a more severe punishment than was demanded, to state the reasons for this in his judgement.

3 . Guarantees?

Is one or a combination of these measures sufficient guarantee for a rational assignment of sentences? I would not like to concur without reservation. There is certainly, as is already the case in the Netherlands with guidelines from the Public Prosecutor, an important effect of uniformisation brought about by judicial guidelines. Legally established criteria for the choice of punishment and sentence, as in Sweden, provide in my opinion, depending on their nature and origin, a net with too wide a mesh to prevent undesirable disparities from slipping through. It is even more the case with guidelines which are being prepared by the Select Committee of Experts on Sentencing within the Counsel of Europe on which Frijda reported in 1992 [Frijda, 1992]. Furthermore I am of the opinion, that it would be true to say of each of the instruments that the restraint on disparity, which cannot be justified, lies too far from the judge who initially adjudicates the facts and makes a decision about the punishment. Therefore, independent of which of the instruments mentioned or which combination of them is chosen, there will have to be one criterion that they must meet for the sake of a rational meting-out of sentences. This criterion is the establishment of an information system which can provide judges immediately with complete and reliable data which they need to make the decision about the sentence. To return once again to the New South Wales situation; there is a need for "more informed judiciary, and sentencing consistency is promoted through the process of disseminating reliable and timely information via the Commission's Sentencing Information System" [Potas, 1992, p. 190]. In other words: Judges do not need guidelines but rather information [Schmidt & Koning, 1992].

4 . Information technology and sentencing

Following from this train of thought - I will now limit myself to the Dutch situation - the executive committee of the Dutch Association for the judiciary (the association to which nearly all judges and public prosecutors belong) decided in 1984 to create a study group on the Criteria of Sentencing. The study group was, in the first place, concerned with the question of how one could acquire sufficient knowledge about the thousands of criminal cases brought before the courts each year to be able to establish whether a particular case comparable is with other cases. With material help from the Department of Justice, the study group has developed a data bank for sentence assignment (called Murphy) which at present is aimed at theft (divided into various forms by the criminal law code), grafted on the Canadian Sentencing Database System. The search program was written in 1986. The form and content of the program are in need of improvement, as was apparent from an investigation carried out in 1990 by drs. W. Vollbehr, then employed within the Institute for Computer Science and Law of the University of Amsterdam [Vollbehr, 1987] [Vollbehr, 1990][Gerbrandy, 1992]. After an initial stalemate, caused by the adoption of a fairly unsympathetic stance by the Department of Justice, preparations are now being made for a follow-up investigation into the development of a knowledge system for sentence assignment decisions. The investigation will be carried out by the Department of Law and Computer Science of the University of Leiden.

4.1. Objectives

The objective of the investigation is to establish a knowledge system for sentence assignment, which can inform the judge about the (differentiated) averages which have been calculated using a selection of comparable cases and against which the judge can measure the sentence which is in his judgement appropriate in the actual case.

4.2. Restrictions

It is probably gilding the lily, but I would still like to state that only the professional group of judges (a commission appointed from within their own membership ranks) will define the structure and control of and the access to the knowledge system.

4.3. Knowledge-based system: conditio sine qua non

Why is such a knowledge system a conditio sine qua non for a rational sentence assignment? I can give three reasons.

The first: the administration of justice, by which divergent interests (for example, that of the suspect, a witness, society) are amalgamated into a reasonable conclusion, supposes the operation of a method of comparison between cases which are suitable for this purpose. The former president of the Supreme Court and of the European Court for Human Rights in Strasbourg, G.J. Wiarda described in a essay, which has become a classic, this way of interpreting judicial rules which is inherent to the law [Wiarda, 1980]. No guidelines, sentence assignment commissions, legal limits for sentencing or motivation criteria can provide the data required for the comparison.

In the second place: the availability of such a knowledge system to the judge who is making the decision does not only accentuate - better that any system of guidelines - his responsibility for a just punishment, but in particular provides that responsibility with a factual basis. The factual judge is in the first instance indubitably also - to borrow an expression of T.S. Eliot (Whispers of Immortality) - *an expert beyond experience*, i.e.: an expert in a field of experience which lies behind the empirical (interpretation W. Bronzwaer), but his sentencing decision is only reasonable and just if he knows what his colleagues are doing, which factors they take into account and which average punishment for an offence is generally meted out country-wide.

The third reason is this. In each country we are now - rightly - concerned about unjustifiable differences in sentences within the national administration of justice. The time in which there will be a "espace judiciare pénal européen" [Delmas-Marty, 1992] is not very distant. There is an increasing need for comparison not only of national yardsticks with criteria for sentencing elsewhere, but also of concrete sentences here with decisions in similar cases in other countries within the Council of Europe.

5. Conclusion

Without a computerised knowledge system with averages from European sentencing jurisprudence it will be very difficult to make national criminal proceedings and its results accord to the European standard for a fair trial.

6. Acknowledgement

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

7. References

This article may only be cited as: Meijers, L.C., Instruments for Sound Sentencing. 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.

[Delmas-Marty, 1992] Delmas-Marty, M., Contraintes européennes et politique criminelle. In: *Revue Trimestrielle des droits de l'homme*, 1992, p. 435.

[Frijda, 1992] Frijda, L., Enkele Straatsburgse aanbevelingen over straftoemeting. In: *Trema¨* , 1992, pp. 94-101.

[Gerbrandy, 1992] Gerbrandy, J.C., Naar een consistent straftoemetingsbeleid. In: *Trema¨*, 1992, pp. 102-105.

[Hearings, 1971] Hearings before the Subcommittee on Criminal Laws and Procedures (etc) U.S. Government Printing Office 1971, pp. 519-558.

[Leijten, 1992] 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.

[Nagel, 1992] Nagel, I.H., Structuring Sentencing Discretion: The New Federal Guidelines. In: *Journal of Criminal Law & Criminology*, 1990, p. 883, cited by: J.A.W. Lensing in: *Trema¨*, 1992, pp. 94-101.

[Potas, 1992] Potas, I., The sentencing information system of New South Wales: Promoting consistency in sentencing through computerization. In: Scherpenzeel R. (ed), *Computerization of Criminal Justice Information Systems*, vol. 2, HEUNI Publications Series no. 19, The Hague, 1992, pp. 185-195.

[Schmidt & Koning, 1992] Schmidt, A.H.J. and H.G. de Koning, Rechtsgemiddelden. In: *Nederlands Juristenblad*, 1992, p. 894 .

[Sevenster, 1992] Sevenster, H.G., Criminal Law and EC Law. In: *CML Review*, 1992 p. 32.

[Vollbehr, 1987] Vollbehr, W., Verslag van een experiment. In: *Trema¨*, 1987, pp. 281-284.

[Vollbehr, 1990] Vollbehr, W., *Straftoemeting*, Instituut voor Informatica en Recht, VU Amsterdam, 1990.

[Wechsler, 1968] Wechsler H. In: *Columbia Law Review*, 1968, no. 686, p. 1453.

[Wiarda, 1980] Wiarda, G.J., *Drie typen van rechtsvinding*, 2nd ed., Tjeenk Willink, 1980.