The Problem of Disparity in Sentencing: A Comparative Insight and what can be done to Make Sentencing More Uniform?

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Abstract

Criminal sentencing is one of the most challenging fields in criminal law and also a subject that judges frequently find to be their least favorite. When imposing a sentence to a perpetrator who has been found guilty, a judge has to find the proper balance between two diametrically opposed tendencies. On one side, there is the tendency towards justified sanctions, which serve to fulfill the purpose of general deterrence and a sense of justice. On the other side, there is the unquestionable need to adjust the punishment to the circumstances of the case and the perpetrator. Only criminal law that considers both the interest of the general public and the victim, but also the circumstances of the case, is able to serve as a true keeper of state order and the peace. This paper contributes to debates on disparity in sentencing. The authors first explain the theoretical basis of sentencing and the purpose of punishment in modern criminal law. In the second part, they discuss the problem of disparity and equality in sentencing from the comparative perspective of four different legal systems: German, Croatian, Serbian, and that of the United States. In the final part, the authors provide an explanation on their standpoint regarding this issue.

Key words: *sentence, punishment, guilt, equality, disparity, individualization, deterrence, prevention, justice, purpose.*

Introduction

Criminal sentencing is one of the most challenging fields in criminal law. According to *Fletcher*, "the institution of punishment invites a number of philosophical queries".[1] It is also a subject that judges frequently find to be their least favorite.[2] When imposing a

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[1] G. P. Fletcher, *What Is Punishment Imposed For?* in R. L. Christopher, *Fletcher's Essays on Criminal Law* (Oxford – New York: Oxford University Press, 2013), p. 43.

[2] M. A. Myers and S.A. Talarico, *The Social Context of Criminal Sentencing* (New York: Springer Verlag, 2012), p. 7.

sentence to a perpetrator who has been found guilty, a judge has to find the proper balance between two diametrically opposed tendencies.

On one side, there is the tendency towards a justified sanction, which will serve to fulfill the purpose of general deterrence and sense of justice. On the other side, there is the unquestionable need to adjust the punishment to the circumstances of the case and the perpetrator. Only criminal law that considers both the interest of the general public and the victim, but also the circumstances of the case, is able to serve as a true keeper of state order and peace. This problem has also been recognized at the regional[3] and international criminal law level.[4]

This paper is intended to contribute to the debates on disparity in sentencing. In the first part, the authors explain the theoretical basis of sentencing and the purpose of punishment in modern criminal law. In the second part, they discuss the problem of disparity and equality in sentencing from the comparative perspective of four different systems: German, Croatian, Serbian, and that of the United States of America. The results of such analysis show certain mutual characteristics in sentencing and the authors describe those characteristics and categorize them as global problems in sentencing. In the final part, the authors explain their standpoint on this issue.

1. Challenges in sentencing: the *"antinomy"* of sentencing purposes and the need for an individual approach

The question of adequate sentencing is actually a question of what is the (dominant) purpose of punishment. This question has its philosophical background in *absolute* theory, established by German philosophers *Immanuel Kant* and *Wilhelm Friedrich Hegel. Kant's* idea of punishment as a "categorical imperative" of reaching justice and *Hegel's* idea of punishment as a double negation (negation of negation) led to the development of the idea of retribution as the main purpose of punishment. To punish the perpetrator of a criminal offence means to achieve *aequilibrium societatiis (malum passionis quod infligitur propter malum actionis).* The punishment is, therefore, released from its later effects on the perpetrator, victim or society *(poena absoluta ab effectu)*.[5]

Although absolute theories were later abandoned, their unquestionable value is in the fact that they provoked further debates, not only in German but also in literature of other countries. At the end of the 19th century, *Franz von Liszt* advocated (special) prevention as the main purpose of punishment. The punishment must serve only to prevent the perpetrator from further criminal activities. Conversely *Anselm v. Feuerbach* saw the purpose of punishment in general prevention and believed that the main purpose was, on the one hand to deter other potential perpetrators, and on the other to foster the trust of citizens in the functioning of the legal order.[6]

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[3] *See* Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, Brussels, 30 April 2004, COM (2004) 334 final

[4] *See* e.g. S. D'Ascoli, *Sentencing in International Criminal Law: The UN and ad hoc Tribunals and Future Perspectives for the ICC* (Oxford and Portland, Oregon: Hart Publishing, 2011), p. 54.

[5] *See* e.g. H.-H. Jeschech and T. Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil. 5., vollst. neubearb. und erw. Aufl.* (Berlin: Duncker & Humblot, 1996), p. 66 and further.

[6] For details on both schools of thought *see* e.g. P. Novoselec, *Opći dio kaznenog prava, Peto, izmijenjeno izdanje* (Osijek: Pravni fakultet, 2016), pp. 362–364.

Nowadays there is the consensus that neither absolute theories nor theories of prevention provide a complete answer to the question of the purpose of punishment. Instead, modern literature argues that only a mixed and comprehensive approach, one combining both standpoints while adding something new, can solve the dilemma of why someone should be punished for a crime. In that sense, the discussion in this paper will follow a mixed approach.

According to representatives of mixed theories, the purpose of punishment has at least the following three aspects:[7]

1. General deterrence – in the abstract phase, when the legislator is proscribing punishment for certain criminal offences;
2. Retribution and justice – during sentencing, when the court decides on the duration of the measure; and
3. Special prevention (resocialization) – during the serving of sentence time.[8]

A mixed approach, although considered to be the best in modern society, is faced with the problem of *antinomy* of punishment purposes. If A, who is a highly socialized person (*e.g.* lawyer or professor) commits a negligent crime (*e.g.* traffic accident resulting in the death of a person), the purposes of retribution and (especially) of general deterrence require prison sentencing. At the same time, special prevention agitates strongly against such a sentence, since it will have negative consequences on the defendant's further life. Therefore, every society must strive to establish a complex sentencing system in which all of the above mentioned purposes will combine and complement each other in the best way possible.[9]

Another problem concerns the principle of legality and the demand that criminal law sanctions need to be as predictable as possible (*nullum crimen sine poena certa*). If understood literally, this principle requires that sentences are absolutely determinate already at the legislative level, as was established in the French *Code Pénal* (1791). However, such interpretation fails to take into account the circumstances of the exact case.[10]

If A steals 500 dollars from the cash register in a grocery store while the cashier is away on break, modern criminal law has to have the capacity to differ between at least three possible scenarios:

- A took the money because he or she needed it to buy his baby daughter medicine, food and diapers (and had no alternative because he or she is unemployed), or
- A took the money because he or she is a drug addict and needs the money to buy drugs, or
- A took the money because he wanted to buy himself a nice watch.

In each of these three hypothetical situations (and it is imaginable that there could be many more possible scenarios) the motives of the perpetrator and circumstances of

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[7] *Id*, p. 365.

[8] There are authors who claim that an individual approach towards sentencing is "an illusion" that leads towards arbitrarity and misuse of power by judges. *See* e.g. B. Schünemann, *Tatsächliche Strafzumessung, gesetzliche Strafdrohungen und Gerechtigkeits- und Präventionswertungen der Öffentlichkeit aus der deutscher Sicht* in H. J. Hirsch, *Krise des Strafrechts und der Kriminalwissenschaften* (Berlin: Duncker & Humbolt, 2001), p. 345.

[9] For the idea of *coalescence* of different punishment purposes *see* e.g. C. Roxin, *Strafrecht, Allgemeiner Teil, Band I: Grundlagen. Der Aufbau der Verbrechenslehre, 4. Auflage* (München: Verlag C.H. Beck, 2006), p. 85–87.

[10] P. Novoselec, *op. cit.*, p. 56.

the act are significantly different and they require very different approaches in sentencing. Therefore, it is essential that judges always have the option to weigh the opposed tendencies and to find a proper balance.

2. Comparative experiences: examples of Germany, Serbia, Croatia, and the United States

This section is devoted to the problem of disparity in sentencing in comparative law. An insight into comparative literature testifies to the problem of inconsistent penal policy being present in the majority of countries around the world. Disparity in sentencing, however, is not limited only to less developed legal systems; it is present in developed Western democracies with long-standing legal traditions. Here we analyze four legal orders, three being European: German, Croatian and Serbian. These three legal orders have much in common (since they are all established on the basis of German legal tradition). On the other hand, they are also very different: while Germany and Croatia are member states of the European Union, Serbia still does not enjoy such status; while Germany (or at least its Western part) is considered as one of the cornerstones of democracy and capitalism, Croatia and Serbia are transitional and post-socialist societies. The fourth system which will be analyzed in this chapter is the law of the United States. It has been chosen, not only as a representative of common law tradition, but also for its controversial approach to sentencing through mathematical algorithms and big data.

2.1. German experience: disparity in sentencing as a part of legal tradition

The problem of sentencing and concerns about disparity (and equality) in the sentencing process have been the subject of debates in German criminal law for so long that German authors have even developed a special branch called "sentencing law" (germ. *Strafzumessungsrecht*), and several monographs and textbooks have been written on the subject matter.[11] Such a development is not a surprise if one considers the fact that concerns about sentencing disparity in German law appeared soon after the first federal criminal code was passed in 1871 (germ. *Reichsstrafgesetzbuch*) which took the place of the diverse and partial criminal codes of the German states. From that moment on, different authors from both theory and practice have pointed to the legal uncertainty and disparity in sentencing as being one of the key issues of German criminal law.[12]

The majority of earlier writing on the topic of disparity of sentencing was based primarily on the personal experiences and observations of the authors (and was, therefore, deprived of any structured empirical confirmation of the research results). *Franz Streng* was the first German author who conducted a comprehensive empirical study on 500 criminal law practitioners (judges, prosecutor and legal trainees) in Lower Saxony and proved a very significant discrepancy in their attitudes towards proposed

[11] One of the very best and most comprehensive monographs on this subject in Germany is certainly the one by B.-D. Meier, *Strafrechtliche Sanktionen, 3. aktualisierte Auflage* (Heidelberg – Berlin: Springer, 2009).

[12] For a chronological overview of these standpoints *see* W. Frisch, *From Disparity in Sentencing Towards Sentencing Equality: The German Experience*, 28 Criminal Law Forum (2017), pp. 437–439.

sentencing. Participants were asked to suggest proper sentences in six different hypothetical cases. The results demonstrated very different views among the participants and those differences were mostly determinate by the following factors:

- participant's role in the criminal justice system (whether they were judges, prosecutors or trainees),
- which penal aims they thought of as being the most important,
- which court they were situated at etc.[13]

In more recent German literature, *Altenhain, Dietmeier* and *May* wrote a book exploring the disparities in sentences in cases of plea-bargaining.[14] German procedural law allows negotiation of a sentence between the prosecution, defense, and the trial judge in cases when the defendant wishes to give a full or partial confession for a criminal offence. The above mentioned authors conducted a comprehensive study on the sentencing policy of German criminal courts in such cases and found that there are quite substantial differences among specific courts, not only in all of Germany but also inside the German federal republics themselves.[15]

Several other German authors have also conducted similar empirical studies which all led to the mutual conclusion: the German sentencing system in practice is facing the problem of disparity and diversity.[16] In German literature, there is a consensus by the authors that despite the improvements throughout the years there is still a significant need to "further reduce sentencing disparity".[17]

After specifying the diagnosis of the problem, German authors and jurisprudence have started to put efforts into solving this important practical issue. One potential solution (often suggested by the offenders themselves) was to seek a quite rigid interpretation of the (Constitutional) principle of equality. The German Constitution[18] obliges courts to treat similar cases in the same manner. With reference to that Constitutional provision, several convicted offenders over the years have appealed their convictions, claiming that they contained much heavier punishments than others in related cases and therefore constituted a breach of the principle of equality. However, the German Federal Constitutional Court (germ. *Bendesverfassungsgericht*) had no understanding for such arguments. It rejected them by stipulating that the principle of equality requires only that the judgment was not based on any prejudice against the accused and that it is not arbitrary in the matter of law application.[19] German authors approve this standpoint and add that individuals have no right to have their case decided in the same manner as another similar case because each case has its own individual characteristics. Moreover, it is always possible that some mistakes have been made in certain cases and it would be unacceptable to repeat those mistakes only because of a similarity in the cases.[20]

Some German literature by criminologists and sociologists of criminal law has tried answering the question of what are the causes of sentence disparity in German

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[13] *Ibid.*

[14] K. Altenhain, F. Dietmeier and M. May, *Die Praxis der Absprache im Strafprozess* (Baden-Baden: Nomos Verlag, 2013).

[15] *Id*, pp. 116 f, 182 and further.

[16] For a brief overview of such studies *see* F. Frisch, *op. cit*, pp. 441–442.

[17] *Id*, p. 444.

[18] Article 3 of the German Constitution.

[19] F. Frisch, *op. cit*, p. 445.

[20] *Id*.

jurisprudence. The authors have mostly agreed on three main causes of the disparity, these being:

- the absence of objective criteria regarding the appropriate measure of punishment (meaning that the sentencing process is still under the substantial influence of the personal attitudes of judges, their inspiration and temperament)
- legislative reforms have failed to address the real deficits (since relevant provisions of the Criminal Code are too abstract to provide firm guidelines), and
- the available literature, as well as the jurisprudence of high courts, has failed to offer adequate solutions or guidelines.[21]

German authors are considering the possible solutions for ensuring consistency in sentencing *pro futuro*. Those solutions vary from ideas to establish quantitative algorithms similar as that in the U.S. (see further, at *3.4.*), to ideas of developing specialized bench manuals and data collection with information regarding other similar cases.[22] In addition, some authors point out that the legislator should avoid prescribing sentencing frames in the Criminal Code that would be too broad.[23]

2.2. Serbia

Serbian criminal law, as with other modern criminal legal systems nowadays, applies the system of relatively prescribed sentences. The legislator provides the framework and it is up to the judge to decide on a concrete measure, given the circumstances of each case. In that sense, the Serbian legislator also emphasizes the need for an individual approach when envisaging the prescribed punishment, the purpose of the punishment, and extenuating and aggravating circumstances as guiding principles in sentencing.[24]

The Serbian Criminal Code contains a specific provision regarding the purpose of the punishment.[25] In that provision, the legislator proclaims special and general deterrence as a dominant purpose, and it does not mention retribution at all. Serbian literature recognizes all of the three mentioned purposes of punishment (special and general prevention, retribution) and also points to the possible antinomy between them. As for retribution, some authors recognize this as one of the purposes of punishment and even claim that retribution is the guiding principle for the court when the latter needs to determine the maximum length of a sentence.[26]

Serbian authors have noticed the problem of sentencing disparity in the practice of Serbian courts, especially in cases of systematic corruption. *Jovan Ćirić* has explored several cases of bribery and reached the conclusion that Serbian courts tend to treat very similar cases in diametrically opposite ways. *Ćirić* accepts that it is not possible to establish jurisprudence that would be equal in every detail. However, he claims that the disparities he has spotted are far beyond acceptable. As an example, he describes two very similar cases of bribery. In the first case, a traffic police officer took EUR 100 from a participant in a traffic accident to write a report that would be more favorable for the driver. Despite the fact that he was married, with no previous convictions and the father

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[21] *See* details on all three causes in *id*, pp. 447-453.
[22] *Id*, pp. 454–469.
[23] C. Roxin, *op.cit,* p. 177.
[24] Serbian Criminal Code, Art. 54, para. 1.
[25] *Id*, Art. 42.
[26] Z. Stojanović, *Krivično pravo, opšti deo, XV. Izdanje* (Beograd: Pravni fakultet, 2009), p. 281.

of a minor child, he was sentenced to two years of imprisonment. In the second case, a financial inspector asked for EUR 35,000 from a company owner to write a report in which he would cover up the loss of US$200,000. The financial inspector was sentenced to just ten months of house arrest. The procedure lasted for ten years and the inspector married in the meantime, so the court took that as being a mitigating circumstance.[27] *Ćirić* finds similar cases regarding corruption in health, where a neurosurgeon was sentenced to four years of (unconditional) imprisonment for taking a EUR 300 bribe, while other doctors in similar situations were usually sentenced up to parole.[28] *Ćirić* points out that such cases have a very negative effect in the public because they undermine the reputation of the justice system. Moreover, the described practice fails to accomplish the effect of special prevention because the offender believes the sentence to be unjust and unequal.[29]

Ćirić also points to the fact that disparity in sentencing causes problems in the system of plea-bargaining, which was introduced in Serbian law relatively recently. Namely, the main purpose of plea-bargaining is to speed up criminal proceedings. If a defense counsel wishes to talk his client into pleading guilty he or she has to explain to the defendant what punishment is most likely to be imposed in such case. In case when there is no consistency in sentencing, the defense counsel is not able to estimate the sentencing issue and it is most likely that the defendant will not be motivated to plead guilty.[30] However, Serbian authors have not yet offered any practical suggestions on how to solve this problem.

2.3. Croatia

Similar as with Serbia, the Croatian Criminal Code also contains provisions with the purpose of providing certain guidelines for sentencing. In order to prevent disparity in sentencing, but at the same time leave enough discretional space for individualization of a sentence, Art. 47 of the Croatian Criminal Code regulates the *grounds* for sentencing and *aggravating and mitigating* circumstances. Grounds for sentencing point to the synthesis of general and special prevention (resocialization) along with retribution as goals that judges should be guided by when imposing a sentence. Aggravating and mitigating circumstances are listed only as an exemplar, as a guide in sentencing.[31]

Petar Novoselec points out that guarantees of objective sentencing are not posed only in substantive, but also in criminal procedural law. The Criminal Procedure Code regulates the court's duty to enlist and explain all relevant circumstances which were decisive in the sentencing. Failing to do so will constitute grounds for appeal. *Novoselec* emphasizes the need for individualization in sentencing, but at the same time, he warns that an "overemphasis of the principle of individualization can lead to the inequality of citizens by the law so it is the task of criminal law to establish a balance between these two principles".[32]

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[27] J. Ćirić, *Neujednačenost kaznene politike sudova* in S. Gavranović et al, *Kaznena politika kao instrument državne politike na kriminalitet* (Banja Luka: Ministarstvo pravosuđa Republike Srpske, 2014), pp. 148–150.

[28] *Id*, pp. 154, 155.

[29] *Id*.

[30] *Id*, p. 156.

[31] P. Novoselec, *op.cit*, pp.

[32] *Id,* p. 413.

However, despite the efforts of the legislator to avoid disparity in sentencing, it seems that such practice is not consistent in the interpretation of mentioned article. This problem has attracted the attention of several authors in Croatian literature. In one such empirical study, the authors conducted research into 160 verdicts of the County Court in Rijeka for the period between 1993 and 2002. Based on the results, they concluded that the Court, instead of having an analytical approach (which is much more reliable), used a "synthetic" approach in sentencing, meaning that the imposed sentence was "nothing more than the personal impression of a particular judge, which has no real connection with the mitigating or aggravating circumstances that the court tries to subsequently justify in the verdict".[33]

In another similar research conducted on 277 verdicts of all Croatian courts in the period between 1992 and 2002, *Damir Kos* concludes that courts paid much more attention to mitigating than aggravating circumstances and that they tend to mitigate punishment, sometimes even in cases where that was not the intention of the legislator.[34]

Other authors also criticize the superficiality of courts in the determination of aggravating and mitigating circumstances in Croatian jurisprudence. *Horvatić, Derenčinović* and *Cvitanović* note that Croatian courts tend to interpret certain circumstances as one or another without putting them in the context of the concrete case. They illustrate their standpoint on the example of treating a defendant's persistent denial of guilt as an aggravating circumstance, despite the unquestionable argument that the defendant is entitled to defend himself or herself in any way as he or she chooses.[35] Such examples are present in very recent jurisprudence of Croatian courts.[36]

In 2008, the institution of plea bargaining among the parties was introduced into Croatian criminal procedure law, where the court was assigned a passive role to control the legality of the settlement reached among the parties and to reject or accept such an agreement without the possibility of introducing alterations. Regarding the agreed sentence, the court is only authorized to check if such sentence is legal, or whether this sentence is in accordance with the stipulations of the Criminal Code.[37]

As opposed to the stipulated passiveness of the court, the State Attorney was given substantial freedom, both with regards as to what criminal offences they can settle with the defendant, and what sanctions they can offer to the defendant. Namely, plea bargaining is legally possible for all criminal offences and according to the direct stipulation of Article 49, Paragraph 2 of the Criminal Code, in case of plea bargaining between the State Attorney and the defendant, it is possible to apply up to a half milder

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[33] V. Grozdanić, Z. Sršen, and D. Rittossa, *The criminal justice policy of the municipal courts in the area of the County Court in Rijeka*, 11 Croatian Annual of Criminal Sciences and Practice 2 (2004), p. 607.

[34] D. Kos, *Zakonska i sudska politika kažnjavanja županijskih sudova u RH – ubojstvo, razbojništvo i teško djelo protiv sigurnosti javnog prometa*, p. 32, available at http://www.vsrh.hr/CustomPages/Static/HRV/Files/DKos-Zakonska_i_sudska_politika_kaznjavanja.PDF (30 Nov 2017)

[35] Ž. Horvatić, D. Derenčinović, and L. Cvitanović, *Kazneno pravo – opći dio II. Kazneno djelo i kaznenopravne sankcije, prvo izdanje* (Zagreb: Pravni fakultet, 2017), p. 245.

[36] E.g. the Municipal Court in Osijek qualified a defendant's persistent denial of theft "*without any shame or embarrassment*" as an especially aggravating circumstance. *See* Municipal Court in Osijek, No. 25. K-888/2013-173, p. 64.

[37] For details on the position of the court and introduction of plea bargaining *see* Z. Tomičić and A. Novokmet, *Nagodbe stranaka u kaznenom postupku – dostignuća i perspektive*, 28 Pravni vjesnik 3-4 (2012)

sanction than the lowest the court would normally be able to apply by observing all of the available mitigating stipulations.

Thus the sentencing was actually left to the parties, specifically to the State Attorney, which is clearly visible from the practice of the courts. Consequently, the County Court in Zagreb has not rejected any of the plea bargains among the parties since 2016, when the institution was first introduced.[38]

Since with plea bargaining the State Attorney always has to offer a sentence lower than the one that the defendant might expect in a criminal proceeding on trial before the court, or the defendant would not accept the offer, it is quite obvious that the application of the institution of plea bargaining additionally increases disparity in sentencing. This can be especially expected in cases when the State Attorney enters into plea bargaining with the defendant in order to reveal other criminal offences or perpetrators, and which is, according to Article 74, Paragraph 2 of the Act on the State Attorney's Office, a valid reason for plea bargaining. In such cases, sentencing often comes down to pure mathematics with the goal to mitigate the sentence, all the way to avoiding unconditional imprisonment. In such cases, there is a just reason for analyzing the purpose of sentencing, although the sanction is still within the extended legal framework of the aforementioned stipulation of Article 49, Paragraph 2 of the Criminal Code.

It can be clearly seen from the research conducted by the State Attorney's Office in 2010 on 6500 effective verdicts with the purpose of determining the expected sentencing for certain criminal offences that there was a large disparity in sentencing even before introducing the plea bargaining institution. Such expected sentences would be the starting point for mitigating in case of pleading guilty; however, the large disparity in sentencing disabled the providing of specific instructions.[39]

If, along with the aforementioned, we consider the increasing trend of plea bargaining, we can expect a further increase of disparity in sentencing. Namely, according to the research conducted at the County Court in Zagreb, the share of verdicts based on the plea bargaining of parties grew from 30% in 2013 to 60% in 2015 if we observe the cases from the jurisdiction of the Croatian State Prosecutor's Office for the Suppression of Organized Crime and Corruption, or from 1.4% in 2013 to 19% in 2015 if we observe the cases from the First Instance Criminal Department.[40]

2.4. U.S. and the digitalization of sentencing: can big data replace judges?

Sentencing is one of the most argued issues concerning the justice system in the U.S. It has been and still is the subject of many debates, academic and non-academic, especially in the context of disparity of sentences and racial discrimination in sentencing. Several criminological research projects illustrate that American judges tend to impose harsher sentences against black or Hispanic defendants.[41] In literature, it is

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[38] I. Turudić, T. Pavelin Borzić, I. Bujas, *Sporazum stranaka u kaznenom postupku – trgovina pravdom ili?*, 28 Pravni vjesnik 1 (2016), p. 148.

[39] http://www.dorh.hr/PresudaPoSporazumu, Naputak o pregovaranju i sporazumijevanju s okrivljenikom o priznanju krivnje i sankciji (30 Nov 2017)

[40] I. Turudić, T. Pavelin Borzić, and I. Bujas, *op. cit.*, pp. 147–148.

[41] *See* e.g. D. Steffensmeier, J. Ulmer, and J. Kramer, *The interaction of race, gender, and age in criminal sentencing: the punishment cost of being young, black, and male*, 36 Criminology 4 (1998), pp. 763–798.

considered that the chronological development of the sentencing practice in the U.S., from its beginnings until today, has undergone four stages (or four *generations*):

- "1G" approach, that relied only on the clinical and professional judgment of judges;
- "2G" approach, that started to rely on simple additive point scales and a few standardized factors;
- "3G" approach, which developed in the late 1970s and introduced empirically based and theory-guided sentencing with a broader selection of criminogenic factors; and
- "4G" approach as the most controversial, which introduced a computerized system of sentencing based on algorithms.[42]

The "4G" approach became the center of legal debates in 2016, after the Supreme Court of Wisconsin issued its appeals decision in *State v. Loomis*.[43] In 2013 Eric Loomis was charged with five criminal counts for a drive-by shooting. He denied participation in the shooting, but admitted to driving the car involved in the shooting. He pleaded guilty to two charges. During sentencing, the trial court referred to the COMPAS (*Correctional Offender Management Profiling for Alternative Sanctions*) risk assessment of Loomis's potential future risk of recidivism. COMPAS is used for several purposes but in the field of criminal sentencing, its main purpose is to estimate the risk of recidivism and to mark certain defendants as (non)eligible for parole or probation. The COMPAS assessment is based on an interview with the offender and information from his criminal records.[44] Based on such assessment, Loomis was sentenced to six years of imprisonment and five years of extended supervision.

Loomis appealed, claiming that the court's reliance on COMPAS constituted a breach of his right to due process. His appeal was based on the fact that COMPAS considers data relevant only to particular groups of offenders. In addition, the methodology used to make COMPAS reports is kept as a professional secret and cannot be subjected to objective and independent reviews. Therefore, Loomis objected that his conviction breached his right to an individualized sentence as well as his right to be sentenced according to accurate information and that the court had used gender at sentencing.[45] The Supreme Court did not uphold Loomis's arguments. Instead, it affirmed the decision of the trial court. Justice *Bradley* rejected all of Loomis's arguments by stating that he did not provide sufficient evidence that the sentencing court had actually considered gender, especially because COMPAS is based only on data which is publicly available. That presumes that Loomis had the opportunity to either explain or even deny any information that was used to make the relevant report, so he was able to verify the accuracy of the information which was used as the grounds for sentencing in this case. Justice *Bradley* also explained that the report was not the sole basis for the decision and that courts keep their discretion right and are still able to approach each

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[42] Details of all four *see* in T. Brennan, W. Dieterich, and B. Ehret, *Evaluating the Predictive Validity of the Compas Risk and Needs Assessment System,* 36 Criminal Justice and Behavior 1 (2009), pp. 21–22.

[43] Supreme Court of Wisconsin, State of Wisconsin v. Eric L. Loomis (further: State v. Loomis), No. 2015AP157-CR, July 13, 2016.

[44] *See* more in A. Christin, A. Rosenblat, and D. Boyd, *Courts and Predictive Algorithms* in Data & Civil Rights: A New Era of Policing and Justice, p. 3 and further; available at http://www.law.nyu.edu/sites/default/files/upload_documents/Angele%20Christin.pdf (25 Nov 2017)

[45] *State v. Loomis,* para. 7.

case individually.[46] Giving concurring opinion, Justice *Abrahamson* expressed her concern that the court had difficulty understanding a COMPAS risk assessment. She criticized the court's rejection to call the company that developed COMPAS to file an amicus brief.[47] In literature, *States v. Loomis* has been emphasized as a landmark decision that, unlike some other decisions, attempts to lower the growing enthusiasm for algorithms in sentencing.[48] However, we cannot help but notice that computerization of the sentencing process, if seen as the extent of a general trend of introducing artificial intelligence into the legal system,[49] could eventually lead to the complete objectification of sentencing. In such case, this could pose a new dilemma: will judges no longer be necessary?

2.5. Summary

In the previous sections, we closely examined the sentencing law, theory and practice of four countries. Each of these has its own specifics in the sense of a unique social and legal background, as well as in the different level of development of criminal justice as a system. While Germany and the U.S. are considered as world leading economies with a good justice infrastructure, Croatia and (especially) Serbia are still partially struggling with the repercussions of the transitional process. Yet it seems that they are all facing the same challenges regarding criminal sentencing. Therefore, challenges can be marked as being *global* ones. In our opinion, the comparative analyses have shown the following mutual characteristics (or issues) of sentencing policy:

1. There is a significant disparity in criminal sentencing;
2. It has existed for decades in each of the observed countries;
3. It contributes to legal uncertainty and raises the (constitutional) question of (in)equality;
4. This has a negative effect on preventive tasks of punishment and criminal law, because there is no predictability of sentences; and
5. There is no unique formula in how to solve this important theoretical and practical problem.

3. Appendix: is there a solution to the dilemma?

Using the comparative method led us to the conclusion that four different countries face almost the same sentencing issues, despite the fact that their legal background and justice infrastructure originates from very different social circumstances. All of the observed systems have great practical problems with sentencing disparity. Another conclusion that arises from an overview of comparative literature is that none of the

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[46] *Id,* para. 104-128.

[47] *Id,* para. 143 – 151.

[48] *See* more in D. Kehl, P. Guo, and S. Kessler, *Algorithms in the Criminal Justice System: Assessing the use of Risk Assessments in Sentencing,* Responsive Communities Initiative, Berkman Klein Center for Internet & Society, Harvard Law School (2017), pp. 20 – 21; available at https://dash.harvard.edu/bitstream/handle/1/33746041/2017-07_responsivecommunities_2.pdf?sequence=1 (30 Nov 2017)

[49] *See* e.g. N. M. Richards and W. D. Smart, *How should the law think about robots?* in R. Calo, A. M. Froomkin, and I. Kerr, *Robot Law* (Cheltenham, UK – Northhampton, MA, USA: Edward Elgar Publishing, 2016), pp. 3–22.

observed countries has yet managed to design and apply a model which would end disparity in sentencing as an unwanted practice. The U.S. has gone the furthest in these attempts. By implementing algorithms into the sentencing process, it has tried to maximize the objectiveness of judges, however not without legal consequences on basic constitutional principles and due process rights.

In our opinion, it is difficult to seek a potential solution in substantive criminal law, or to be more precise: in the provisions of a criminal code that concern sentencing. Sentencing is a very individual process that usually depends not only on the circumstances of the case but also on the characteristics of a specific judge: his or her personal attitudes, character, level of social awareness, consciousness, and similar. Therefore, it would be pointless to search for an adequate solution in this (subjective) area.

We believe that a realistic solution to disparity in sentencing can be found only at the procedural level, especially when it comes to institutions such as plea bargaining. We find plea bargaining is one of the very significant causes of disparity in sentencing. In systems such as Croatia, the main problem in sentencing during plea bargaining arises from the passivity of the court, which is generally against the accusatory principle (as one of the basic principles of criminal procedure). In such systems, the main role at this stage is played by the prosecutor. However, the prosecutor should not go beyond his original role – to prosecute. Instead, the court should become more involved and take over the key role in sentencing. If a prosecutor makes a final decision on sentencing (as is the case in Croatia), without even the option for the court to react in an adequate manner, then the prosecutor has *de facto* taken over the role of running a trial. This makes the criminal proceeding lose its basic characteristics and raises the question of due process.

A suitable idea for solving the problem of disparity in sentencing, in our opinion, is to consider the solution of Art. 19e of the Croatian Criminal Procedure Code. This provision predicts the possibility of establishing a specialized type of court – a high criminal court – that would be entitled to act exclusively as an appeal court for the entire state.[50] Such court would decide on appeals against decisions of all criminal courts (both at the municipal and county level) and would be in a position to have a comprehensive overview into the jurisprudence in a certain country. The concentration of such authority in the hands of one entity would, in our opinion, also contribute to solving (or minimizing) the problem of disparity in sentencing. This solution could be a proper one for smaller countries, such as Croatia or Serbia. For larger countries, such as Germany and the U.S., we believe that the only adequate solution would be if such high court would establish specialized councils divided by types of criminal offences. These councils would then monitor and harmonize sentencing policy for the entire country (each council for offences from their jurisdiction).

[50] Unfortunately, a high criminal court has still not been established in Croatia due to financial problems (lack of sufficient financial funding).