

The Taiwan Law Review

月旦法學

建構現代法學新座標 · 展望廿一世紀法治國

金鼎獎

推薦優良雜誌



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May
2023

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寰宇法訊 Legality and Sentencing Discretion: Consistent
Individualisation through the Principles of Proportionality,
Guilt, and Equality P.H.P.H.M.C. van Kempen



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Legality and Sentencing Discretion: Consistent Individualisation through the Principles of Proportionality, Guilt, and Equality*



相關文獻

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Abstract

Judicial discretion in sentencing is fundamental to match the sentence to the individual features of a case and to achieve a just and appropriate punishment. Nevertheless, discretion in sentencing may also be at odds with the interest of legal certainty in connection with foreseeable and consistent sentencing. This raises the question how the legality principle is of importance to sentencing. Although it demands, for example, that the sanction system is defined clearly and in an accessible way, it generally does not require foreseeability of the sanction which one can expect specifically as regards type and level for any concrete criminal offence. Consequently, the legality principle offers little concrete guidance for consistency while maintaining individualization in sentencing. More helpful in this regard could be the principles of proportionality *strictu sensu*, punishment in proportion to the degree of guilt and equality with sanctioning. It will be asserted that courts should not aim for consistent equality of sentences imposed, but rather for a more consistent and less

DOI: 10.53106/1025593133611

Keywords: Sentencing, Legality Principle, Proportionality, Guilt Principle, Equality Principle, Sentencing Discretion, Rule of Law, Consistency, Foreseeability, Aggravating Circumstances, Mitigating Circumstances

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subjective and arbitrary way of achieving individualization in varying cases, i.e.: consistency in individualization. All the four principles mentioned above have a role to play in that.

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1. Introduction

In many countries, the legal sanctioning system affords the trial or sentencing court a considerable degree of discretion in sentencing. The system may offer this range of options because it, for example, provides for a wide variety of penalties (e.g., imprisonment, home detention, community service, fine, or a combination of these) and/or allows for broad margins between the minimum and maximum of each of those penalties applicable to a specific offence (e.g., imprisonment for murder between detention for one day and a life sentence).¹ Discretion in sentencing means that within these wide legal frameworks, the court is at liberty to decide the type and level of the sanction to be imposed, and free to choose and weigh the factors that it deems relevant in the specific case. That freedom allows the court to match the sentence to the individual features of the case, such as the circumstances of the crime, the nature and seriousness of the fact proven, the characteristics and personal circumstances of the defendant and all other interests concerned. This offers the court the possibility to decide on a sentence that is just and appropriate in the specific case, in the light of the penal objectives to be achieved.

However, discretion in sentencing may also be at odds with the interest of legal certainty in connection with foreseeable and consistent sentencing. This calls for extra attention in proportion to

¹ In Europe, courts have at least a fairly wide sentencing discretion in, for example, Belgium, France, Germany, Ireland, Italy, Lithuania, the Netherlands, and Switzerland. See, on several of these and other countries, for example the contributions in M. Tonry (ed.), *Sentencing Policies and Practices in Western Countries: Comparative and Cross-National Perspectives*, published in: *Crime and Justice*, vol. 45 (2016), and P.H.P.H.M.C. van Kempen, M.J.M. Krabbe, J.L. Guzman Dalbora & F. Molina Jerez (eds.), *Legality and other requirements for sentencing*, The Hague: Eleven/Boom 2023 (expected).

the degree of discretion the court has in deciding the sanction type and level. Especially with positive positioning of discretion in sentencing, it is important to keep in mind that the purpose of that discretion cannot be to create room for arbitrary administration of justice, personal and subjective views of judges about penal objectives, bias or noise. Discretion in sentencing is only to serve sanctioning which is appropriate to the concrete, individual case, on objective grounds. Individualisation may then account for and justify differences in sentencing. However, the opposite does not apply automatically: differences in sanctioning between similar cases do not always relate to relevant legal differences regarding for example the seriousness of the offence, the circumstances of the case, the personality of the defendant and other interests concerned.

This raises the question whether it is possible to provide a legal framework for the use of the court's discretion in sentencing which truly offers room for individualised sentencing and yet guarantees more consistency and foreseeability in sanctioning and fosters the prevention of arbitrariness. Bearing this in mind, I will now first discuss requirements that from a European perspective spring from the principle of legality and may be relevant for sentencing. This will be followed by a discussion of, in this order, proportionality *strictu sensu*, punishment in proportion to the degree of guilt and equality with sanctioning. The reason for this is that there are various countries where in addition to the principle of individualisation, one or more of these very principles play a central part in sentencing. Finally, I will argue that it may be useful to have a statutory sentencing framework, the application of which is supervised by the highest court in the interests of uniformity in the application of the law.

2. Relevance of the legality principle

The legality principle has a bearing not only on the constitution of criminal offences, but also on the sanctions that criminal offences carry. This follows explicitly from Article 7 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms² (ECHR or European Convention) of the Council of Europe, which holds that no 'heavier penalty [shall] be imposed than the one that was applicable at the time the criminal offence was committed'.³ The same guarantee is enshrined in Article 49 (1) of the Charter of Fundamental Rights of the European Union⁴ (CFREU or EU Charter), which in addition holds that '[i]f, subsequent to the commission of

² Rome 4 November 1950, *ETS* 5.

³ See also ECtHR (GC), Judgment of 21 October 2013, *Del Río Prada v. Spain*, Appl. no. 42750/09, para. 77. Case law is only quoted in full in the first reference and subsequently only by court and case name.

⁴ Nice 7 December 2000, *OJ EU C* 364/1 (18.12.2000). On the principle that penalties must have a proper legal basis, see also the Court of Justice of the European Union (CJEU), Judgment of 11 November 2004, *Antonio Niselli*, Case C-457/02, ECLI:EU:C:2004:707, para. 30.

a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.’ Consequently, requirements for criminal sanctions arise from these legality provisions – that is to say: penalties and (at least punitive⁵) criminal measures and orders – which aim to guarantee legal certainty and prevent arbitrariness.⁶ According to consistent jurisdiction of the European Court of Human Rights (ECtHR or European Court), it follows from the object and purpose of Article 7 ECHR that it should be construed and applied in such a way as to provide “effective safeguards against arbitrary prosecution, conviction and punishment”.⁷

In so far as this pertains to “punishment”, the European Court sets the bar rather high. Therefore, the question is whether the legality principle really makes or could make an essential contribution to promoting legal certainty and thereby preventing arbitrariness in the concrete sanctions imposed by courts that remain within the legal framework. I am of the opinion that this is the case only in a limited way. The framework for sanctions ensuing from the legality principle is simply inadequate for steering the judge passing sentence in such a way that the specific sanction to be imposed becomes truly foreseeable.

First of all, that legality framework means that the court can only impose sanctions that are *knowable and clearly defined* in law.⁸ Therefore, in determining the sanction the court is not allowed to go beyond the possibilities provided by law. In accordance with the requirement of *lex certa*, it must be clear which sanctions are applicable to a criminal offence and what the potential scope (minimum and maximum) of those sanctions is.⁹ There are no special requirements aiming to make it more foreseeable which sanction one can expect specifically as regards type and level for any concrete criminal offence.

Obviously, it is not up to the European Court to decide what the appropriate penalty would be in any case under assessment.¹⁰ Having said that, that does not in itself rule out that it might become a requirement that the national sanction regime provides insight into the sanction that can concretely be expected. The European Court also seems to be doing this when it considers that an “individual must know from the wording of the relevant provision [...] what penalty will be imposed for the act

⁵ See, e.g., ECtHR (GC), Judgment of 28 June 2018, *G.I.E.M. S.r.l. and Others v. Italy*, Appl. no. 1828/06, para. 210-226.

⁶ See, e.g., M. Timmerman, *Legality in Europe. On the principle nullum crimen, nulla poena sine lege in EU law and under the ECHR*, Cambridge/Antwerp/Portland: Intersentia 2018, p. 34-38.

⁷ See, e.g., ECtHR, *Del Río Prada*, para. 77.

⁸ ECtHR, *Del Río Prada*, para. 78-79.

⁹ ECtHR (GC), Judgment of 12 February 2008, *Kafkaris v. Cyprus*, Appl. no. 21906/04, para. 140, 148-150.

¹⁰ ECtHR (GC), Judgment of 9 July 2013, *Vinter and Others v. the United Kingdom*, Appl. no. 66069/09, para. 105.

committed and/or omission”.¹¹ Such a foreseeability of the sanction that “will be” – instead of: “could be” – imposed is not assessed by the Strasbourg Court though, so that its general considerations are firmer than what it ostensibly (for the time being?) wishes to achieve.

Thus, the legality principle in Article 7 ECHR does not oppose open sanction regimes in which the court has considerable flexibility in deciding the type and level of the sanction. This does not alter the fact that the sanction regime itself must be sufficiently clear, and with respect to application, foreseeable. That is not the case if it is not reasonably clear with regard to a specific sanction imposed just what “the scope of the penalty imposed” and the “manner of its execution” is. For example, when imposing a specific prison sentence, it must be clear what the scope of that sentence actually is, normally.¹² If the sanction regime depends on the court passing judgment on the criminal offence, it must in addition also be foreseeable when a criminal offence will be dealt with by which court.¹³

Secondly, the legality framework prohibits the *retrospective* application of sanctions detrimental to the defendant: the courts are not allowed to hand out a harsher sentence than the one that was applicable at the time the criminal offence was committed.¹⁴ This requirement too does not fundamentally contribute to increasing the foreseeability of the specific sanction imposed for a concrete punishable act. The same is true for a third requirement: with sanctions too, the principle that “the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy” applies.¹⁵ Adherence to this *prohibition of an overly extensive interpretation* prevents the court from overstepping the boundaries of the legal sanction regime, but it does not in any way determine how the available leeway within is to be used.

Another legality requirement – the fourth one – that usually garners less attention concerns *the principle of guilt*. According to the Strasbourg Court, the legality principle also means that there can only be room for punishment in the event of ‘a finding of liability’, because otherwise both the punishment and the legality requirements of accessibility and foreseeability would be pointless.¹⁶ That determination of liability must bear on ‘personal liability, involving a mental link with the

¹¹ ECtHR, *Kafkaris*, para. 140; ECtHR, Judgment of 22 January 2013, *Camilleri v. Malta*, Appl. no. 42931/10, para. 35; ECtHR, Judgment of 22 October 2020, *Melnikov v. Ukraine*, Appl. no. 66753/11, para. 50. Confer ECtHR, *Del Río Prada*, para. 79.

¹² ECtHR, *Kafkaris*, para. 150; ECtHR, *Del Río Prada*, para. 103.

¹³ ECtHR, *Camilleri*, para. 39-45.

¹⁴ This is literally apparent from Article 7 paragraph 1 ECHR. See also e.g., ECtHR, *Del Río Prada*, para. 78.

¹⁵ ECtHR, *Del Río Prada*, para. 78, 89; ECtHR (GC), Judgment of 8 July 1999, *Başkaya and Okçuoğlu v. Turkey*, Appl. no. 23536/94, para. 36-42.

¹⁶ ECtHR, Judgment of 29 October 2013, *Varvara v. Italy*, Appl. no. 17475/09, para. 67-71.

offence’.¹⁷ The ECtHR therefore recognises a certain form of the principle ‘no punishment without guilt’, though not the principle of ‘punishment in proportion to guilt’.

The legality principle does not lay down specific requirements as regards the foreseeability of the specific sanction imposed in concrete cases in connection with any of the four perspectives discussed above. Against that background, in the following paragraphs I will assess whether a focus on proportionality *strictu sensu*, punishment in proportion to the degree of guilt and equality can contribute to foreseeability in sentencing. That will reveal that in some countries these principles are linked with the legality principle.

3. Principle of proportionality (*strictu sensu*)

As regards sentencing, the principle of proportionality *strictu sensu* is about a certain relation between the criminal sanction and the seriousness of the offence. In a positive sense, the principle demands that the punishment is proportionate to that seriousness: in a negative sense, it requires that the punishment is not disproportionate to it. Although the principle of proportionality is considered of fundamental importance to sentencing by many national jurisdictions, neither the European Convention nor the European Court’s case law recognizes a general positive or negative proportionality requirement for sentencing.¹⁸

However, the ECtHR – with a problematic formulation – presents as its view that a sanction by the court within the legal sanction regime must result in a punishment that is deemed to be proportional by the legislator.¹⁹ Since the legislator gives the courts room to assess what the legislator itself cannot determine, i.e., what is an appropriate sanction in a concrete case, the legislator does not label a certain sanction as proportional, nor does the sanction margin provided by the legal sanction regime imply that the legislator considers every sanction within the framework as proportional for each concrete case. At best, one can claim that the legislator usually considers sanctions that transcend the legal framework to be disproportionate and regards sanctions that fall

¹⁷ ECtHR, *G.I.E.M. S.r.l. and Others*, para. 242-246.

¹⁸ This does not alter the fact that that blatantly disproportionately harsh sanctioning may in certain circumstances run counter to Article 3 ECHR (cf. ECtHR, *Vinter*, para. 102), while at the same time obviously disproportionately lenient sentencing may conflict with positive obligations to apply criminal law in order to protect, among other things, life and people’s physical integrity effectively (cf. ECtHR (GC), Judgment of 30 March 2016, *Armani Da Silva v. the United Kingdom*, Appl. no. 5878/08, para. 238, 285).

¹⁹ ECtHR (GC), Judgment of 17 September 2009, *Scoppola v. Italy (no. 2)*, App. no. 10249/03, para. 108, in which the Court, in connection with the imposition of a penalty exceeding the margins of the sanctions regime that applies (by that time), considers the following: “In the Court’s opinion, it is consistent with the principle of the rule of law, of which Article 7 forms an essential part, to expect a trial court to apply to each punishable act the penalty which the legislator considers proportionate.”

within the framework as potentially proportional.

The proportionality requirement as a fundamental right formulated negatively has been included in Article 49 (3) of the EU Charter: “The severity of penalties must not be disproportionate to the criminal offence.” Furthermore, Recommendation (92) 17 of the Council of Europe on ‘Consistency in Sentencing’ merits mentioning here; this recommendation, also couched in positive terms in part, calls for proportionality between the seriousness of the punishable act and the punishment.²⁰ In so far as the requirement proscribes disproportionate sanctioning, it can be seen as a rule of law principle, since it is a guarantee against an unbridled exercise of power by the state and moreover, it imposes a limit on violations of fundamental rights made by sanctioning. Consequently, the principle plays a part in sentencing in many countries adhering to the rule of law.²¹ Finally, proportional sentencing, in particular from the perspective of retribution-based theories, is a prerequisite for justice and fairness.²²

In view of the importance of the proportionality requirement *strictu sensu* for sentencing, the question presents itself of how it relates to the legality principle or at any rate to foreseeability and legal certainty. Superficially, they appear to be unconnected. A consistent application within the legal sanction regime of very harsh punishments for what are actually minor offences implies sentencing that is disproportionate yet foreseeable. Nevertheless, a link between the legality principle and proportionality of sentencing can be shown in at least two respects.

The most tenuous link, it seems to me, is that imposing a sentence that is outside the legal sanction regime, which runs counter to the legality principle, would be a sentence that the legislator considers to be disproportional. As we saw earlier, the European Court connects proportionality and the legality principle with each other in that sense.²³ The ECtHR bases the principle that sanctions must be necessary (and therefore proportional), on the rule of law and subsequently makes it part of Article 7 ECHR, which consequently no longer embodies only the notion of legal certainty.²⁴

²⁰ Proportionality is discussed under A.4, D.1 and D.5 of the Appendix to the Recommendation. With regard to that recommendation, see A. Ashworth, ‘Towards European Sentencing Standards’, *European Journal on Criminal Policy and Research*, vol. 2, no. 1 (1994), p. 7-11.

²¹ For example, see T. Lappi-Seppälä, ‘Humane Neoclassicism: Proportionality and Other Values in Nordic Sentencing’, in: M. Tonry (ed.), *On One-Eyed and Toothless Miscreants. Proportionality, Punishment and Sentencing*, Oxford: OUP 2019, p. 209-235, and the contributions of B.L. Berger (Canada), T. Grosse-Wilde and J. Kaspar (both: Germany) and J.V. Roberts & N. Padfield (England & Wales), in: K. Ambos (ed.), *Strafzumessung. Angloamerikanische und deutsche Einblicke/Sentencing. Anglo-American and German Insights*, Göttingen UP, 2020 (in German and English).

²² For example, see A. von Hirsch, ‘The “Desert” Model for Sentencing: Its Influence, Prospects, and Alternatives’, *Social Research* 2007, vol. 74(2), p. 413-434.

²³ See ECtHR, *Scoppola* (no. 2), para. 108, and the observation quoted above in footnote 19.

²⁴ Advocate-General Knigge, advice (para. 8.22-8.32) for the Supreme Court of the Netherlands (Hoge Raad der

However, there is something to be said against the Court's point of view. For example, I do not think that sanctions which fall outside the sanction regime are always regarded as disproportional by the legislator. Although considerations of proportionality will often be reasons for the legislator to refrain from declaring a heavier sentence applicable to a criminal offence than it has done or to modify the applicable sanction regime in ways favourable to defendants, these reasons may also emanate from an effort to achieve, for example, consistency, simplicity, effectiveness or to keep costs in check.

It seems more important to me that the proportionality requirement might contribute to foreseeability of sentencing in concrete cases, at least when it is applied in each case and in a consistent way. That is not easy. It will not suffice that proportionality is given a central role in a sanction regime and/or that the courts always carry out a proportionality test in each criminal case. If the aim is to achieve consistency, that appears to be rather pointless, given the different ways in which the proportionality requirement can be interpreted and the extremely variable results that are possible because of this. The question therefore is whether it is possible and desirable to achieve consistency and foreseeability of concrete sentencing by means of a proportionality requirement. This brings me to the inherently problematic nature of proportionality as a requirement.

The first complication is the inexact nature of determinations of proportionality. That which qualifies as proportional depends very much on the "spirit of the times", and then again, reasonable contemporaries may think quite differently about what is proportional in any particular case. The seriousness of crimes, both in abstract and in concrete terms, cannot be determined by measurements, so it is inevitably highly normative in nature. The same is true for determining the effective severity of sanctions. Another consideration is that the seriousness of a concrete punishable act and the level of a concrete sentence are incomparable entities. In order to achieve consistency and in its wake, foreseeability in sentencing via a requirement of proportionality, the courts will need a proportionality framework which they can refer to and use time and again in a uniform, consistent way.

That gives rise to a second problem, namely that such a proportionality framework can only lead to consistency if it settles a sizeable number of questions. It will have to make clear in which form the proportionality requirement applies: as a ban on negative disproportionality or as an imperative for positive proportionality? And in the latter case: does proportionality only determine the upper limit of sanctions or the lower limit too? Furthermore, it must be clear which parameters are important for determining proportionality. How are the courts to determine the seriousness of the

Nederlanden) in the case: HR 12 July 2011, ECLI:NL:HR:2011:BP6878, *NJ* 2012, 78, with case note by N. Keijzer.

punishable act, what is relevant in that respect and what is not: the circumstances under which the act was committed, the consequences of the act, the degree of culpability on the part of the perpetrator, the way in which the victim experiences the punishable act? And does some kind of ranking apply to all of this?

Such questions also arise in relation to the sanction, for example whether the impact which the sanction is likely to have on the specific defendant should be taken into account in determining the severity of the sanction. Because an ineffective sanction can hardly be called proportional, reasonably speaking, it must also be possible to assume that a sanction makes an effective contribution to achieving the objective of imposing that sanction in the first place. Therefore, the first thing to be established is which penal objectives sentencing must be focused on, how these must be understood and what the hierarchy, if any, between these objectives is when proportionality tests in relation to various objectives yield different results.

Is the penal objective of retribution the only thing that matters for the proportionality test? Because the punishment in the case of retribution is in principle both the means and the end, effectiveness usually does not pose any obstacles for punishment. It gets more complicated when objectives focused on the future, such as rehabilitation and special and general prevention, are also considered relevant to the punishment. Then the question arises whether the lower limit and upper limit for proportional punishment in a concrete case must also be determined by the sanction that is required as a minimum for achieving those utilitarian objectives, and/or the sanction beyond which punishment has insufficient added value for achieving said objectives. Such a test may well have a different outcome than that of the proportionality test for retribution. Does the most lenient proportional punishment then act as an upper limit, as the higher proportional sanction is disproportionate according to one of the tests? Or could that be different because of a hierarchy between the penal objectives? Consistent application of the proportionality requirement by the courts presupposes that such points are clear as well.

Thirdly, the proportionality test is not suitable to include all potentially interesting and important sentencing factors in sentencing. One could think of the personal circumstances that do not relate to the seriousness of the offence or the culpability of the perpetrator (e.g., the responsibility for a family, the advanced age of the defendant or an increased chance of a repeat offence because of the actual circumstances) or the reaction to the punishable act shown by the perpetrator (e.g., a genuine expression of regret, a refusal to take full responsibility for the act).

The above illustrates that the requirement of proportionality without further specifications can hardly be said to lead to true consistency. On top of that, it cannot be the factor that decides everything in sentencing. This is especially true if the requirement is used as a cast iron principle

which means that a sentence which is proportional to the seriousness of the offence must be imposed and that therefore neither a harsher nor a more lenient sentence is allowed. Such a proportionality requirement leaves little room for incorporating future-focused penal objectives in the punishment, such as rehabilitation and special and general prevention, and it does not square with individualisation of sentencing.

This is less of a problem if the proportionality requirement is only applied as an upper limit in sanctioning, in the sense that no punishment may be meted out that is harsher than the severest punishment which can still be called proportionate. However, even then the proportionality limitation may eventually be an impediment to special or general prevention for example, if the realisation of those aims necessitates a punishment exceeding that proportional punishment. Moreover, in this form, the requirement will do even less for consistency in sentencing. In my opinion, it is therefore not desirable to use such a requirement as a hard and fast rule.

Finally, the proportionality requirement can also be construed as a prohibition of disproportionality. Because disproportionate sanctioning – whatever that may be precisely in concrete terms – is hard to reconcile with requirements relating to the rule of law, human rights and humanitarian principles, it appears to me that the prohibition of disproportionality should at the very least apply as a minimum requirement in sentencing. Because non-disproportional sanctioning can be something different from genuine proportional sanctioning, the prohibition of disproportionality still leaves a lot of discretion for sentences aimed at achieving future-focused penal objectives. The flip side of this is that the prohibition of disproportionality falls short with respect to providing guidance in order to contribute to consistency in sentencing.

4. Punishment in proportion to the degree of guilt

A specific type of proportionality requirement is expressed in the principle that sentencing must be determined by the degree of guilt in the sense of culpability. However, international human rights instruments do not guarantee this principle as such. There are a few countries, though, that have codified the principle in one form or another. To gain some insight into the potential function, application and scope of a “degree of guilt” principle, it is worth our while to briefly look at some of those foreign provisions.

First of all, § 46 of the German Criminal Code (Strafgesetzbuch, StGB), in which the general principles on sentencing are laid down, is interesting. The first sentence of the first paragraph reads as follows: “Die Schuld des Täters ist Grundlage für die Zumessung der Strafe.” (The offender’s

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guilt provides the basis on which the penalty is fixed).²⁵ This provision applies not only because of the guilt principle, it is also underpinned by the concept of “Menschenwürde” (human dignity).²⁶ Moreover, the guilt criterion just like the other sentencing reasons in § 46 StGB aims to effectuate the requirement of *lex certa* (Bestimmtheitsgebot; offences must be clearly defined) and to make sentencing by the courts foreseeable by placing the courts’ discretion in sentencing in a structured framework.²⁷ Nevertheless, § 46 paragraph 1 StGB, much criticised in German literature for its vagueness, does not set clear boundaries to sentencing by homing in on guilt as “basis” of the punishment.

However, according to the Federal Constitutional Court of Germany, das Bundesverfassungsgericht (BVerfG), the degree of individual guilt is unmistakably the framework for sentencing and it provides room for determining the penalty in a concrete case by means of the recognised penal objectives; there can also be a focus on prevention.²⁸ Although culpability (“Tatschuld”) for committing the offence is relevant for sentencing, other factors are allowed to be taken into account, including circumstances that are not directly related to the offence but preceded or followed it.²⁹ This may also involve aggravating circumstances, provided that these furnish insight into the unlawfulness of the punishable act or the offender’s internal attitude towards it.³⁰

Another perspective is used in Portugal, where Article 40 Código Penal, which concerns penal objectives, in the second paragraph constitutes a prohibition, namely that the sentence must never exceed the degree of guilt.³¹ Guilt does not serve as the basis or the objective of the penalty, but only as a limitation of the penalty.³² Here, the degree of guilt also limits the possibility to attain

²⁵ Provisions similar to the German one can also be found in other countries; see, e.g., § 32 paragraph 1 StGB Austria and Article 47 paragraph 1, first sentence, StGB Switzerland.

²⁶ BVerfG, Beschluß of 21 December 1994, 2 BvR 1697/93, para. 1c; J. Kaspar, ‘Sentencing Guidelines versus freies richterliches Ermessen – Empfiehlt sich eine Reform des Strafzumessungsrechts?’, *NJW-Beil* 2018, p. 37-40 on 38; S. Maier, in: Volker/Schäfer, *Münchener Kommentar zum StGB*, München: Beck 2020, comm. § 46 StGB, para. 20-21.

²⁷ BVerfG, Urteil 20 March 2002, *BVerfGE* 105/135, 2 BvR 794/95, para. 73; see also Maier 2020, *supra*, comm. § 46 StGB, para. 23.

²⁸ BVerfG, Urteil 5 February 2004, 2 BvR 2029/01, para. 147, 168. See also § 47 paragraph 1 StGB. See also Kaspar 2018, *supra*, p. 38, who defends the notion that guilt does not come with a lower limit.

²⁹ F. Streng, in: Kindhäuser/Neumann/Paeffgen, *Strafgesetzbuch* (Kommentar), Nomos, 2017, comm. § 46 StGB, para. 22-25; J. Kinzig, in: Schönke/Schröder, *Strafgesetzbuch* (Kommentar), München: Beck 2019, comm. § 46 StGB, para. 4, 8-9b.

³⁰ See of the Federal Court of Justice of Germany (der Bundesgerichtshof, BGH): BGH, Beschluß 1 March 2001, 4 StR 36/01, *NStZ-RR* 2001/295.

³¹ Article 40 Código Penal reads as follows: “Em caso algum a pena pode ultrapassar a medida da culpa.” (In no case may the penalty exceed the degree of guilt).

³² See Supremo Tribunal de Justiça 1 March 2006, Processo 05P3789, which upholds the judgment of the trial court relevant to this point (para. 7.17), and Acórdão do Tribunal da Relação de Coimbra 17 December 2014,

preventative penal objectives through penalties.³³ Lack of culpability, however, does not preclude the application of security measures (“medidas de segurança”), which must be distinguished from penalties (“penas”), provided that such measures are proportional to the seriousness of fact and the danger posed by the offender.³⁴ The rule in Article 40 paragraph 2 Código Penal derives from the principle of human dignity, which is included in the Portuguese Constitution.³⁵

By contrast, a similar “degree of guilt” principle, is not included in criminal law of the Netherlands for example, nor is it accepted by the Hoge Raad, the Supreme Court of the Netherlands.³⁶ The desirability of recognising the principle of “punishment in proportion to the degree of guilt” has been regularly discussed in the literature in the Netherlands.³⁷ Only recently, the rejection of the principle by the Hoge Raad again came in for criticism.³⁸ One of the objections is that the jurisprudence of the Hoge Raad has led to a blurring of the dividing lines between penalties that aim to punish (e.g., imprisonment) and measures that are primarily aimed at security, restoration or reparation (such as entrustment orders for mentally disordered offenders)³⁹, the result of which is that it is possible to impose penalties aimed at special prevention that exceed the degree of guilt, even though the available non-punishment measures are actually intended for just that. It is said that recognition of the principle ‘punishment in proportion to the degree of guilt’ should prevent that

Processo 872/09.3PAMGR.C1; see also e.g., A.M. Rodrigues, ‘A questão da pena e a decisão do juiz – entre a dogmática e o algoritmo’, in: A.M. Rodrigues et al., *Inteligência Artificial no Direito Penal*, Coimbra: Almediana 2020, p. 222.

³³ A.M. Rodrigues et al., *Non-Custodial Sanctions and Measures in the Member States of the European Union. Portugal*, Coimbra, 2021, p. 9; P. Caeiro & M.J. Costa, ‘Country Report Portugal’, in: Helmut Satzger (ed.), *Harmonisierung strafrechtlicher Sanktionen in der Europäischen Union*, Nomos 2020, p. 379-426 on 386. See also Acórdão do Tribunal da Relação de Coimbra 4 March 2015, Processo 30/14.5PAACB.C1.

³⁴ See Article 40 paragraph 3 Código Penal: “A medida de segurança só pode ser aplicada se for proporcionada à gravidade do facto e à perigosidade do agente.” (The security measure can only be applied if it is proportionate to the seriousness of the fact and the danger of the agent). Likewise M.J. Costa & P. Caeiro, ‘Portugal’, in: G. Contissa et al. (eds.), *Effective Protection of the Rights of the Accused in the EU Directives*, Leiden: Brill 2022, p. 170-191 on 173 (fn 11).

³⁵ Rodrigues 2021, *supra*, p. 9.

³⁶ See for example HR 10 September 1957, *NJ* 1958, 5 with case note by W. Pompe, and HR 15 July 1985, ECLI:NL:HR:1985:AC4252, *NJ* 1986/184.

³⁷ See, with further references, among others, F.W. Bleichrodt & P.C. Vegter, *Sanctierecht*, Deventer: Wolters Kluwer, 2021, para. 2.4.1; J. de Hullu, *Materieel strafrecht*, Deventer: Wolters Kluwer 2021, para. IV.1.7, IV.7.4.

³⁸ J. Bijlsma, S. Franken & P. van Kampen, ‘Altijd een komma, nooit een punt? Reclassering, toezicht en resocialisatie’, in: *De repressieve samenleving* (Nederlandse Juristenvereniging), Deventer: Wolters Kluwer 2022, p. 261-262, 268.

³⁹ On the system of sanctions in the Netherlands, see e.g., P.H. van Kempen, M. Krabbe & S. Brinkhoff (eds.), *The Criminal Justice System of the Netherlands. Organization, substantive criminal law, criminal procedure and sanctions*, Antwerpen/Cambridge: Intersentia 2019, p. 137-170.

blurring of lines, because it delineates penalties more clearly from the aforementioned measures, it emphasises the exceptionality of intervention which is exclusively special and preventative, and it makes it clear that a different framework of standards is or should be applicable.

In my view, it is not required nor desirable to embed “punishment in proportion to the degree of guilt” as a general *hard and fast* binding legal rule. Having said that, I am of the opinion that retribution must not exceed the degree of culpability, but a sentence can in addition to or instead of retribution also serve the purpose of rehabilitation and special and general prevention. This means that for the penal objectives focused on the future, the degree of guilt should in my opinion not constitute an absolute upper limit, but it should explicitly be granted the status of *starting point* or principle for sentencing. Any deviation from it would then only be allowed for compelling reasons, for example if an important need for prevention will not otherwise be satisfied.⁴⁰

With respect to my point of view, the first important consideration is that the principle of ‘no punishment without guilt’ which underpins substantive criminal law does not automatically presuppose “punishment in proportion to the degree of guilt” as well. Antoine Mooij has already explained that this involves different concepts of guilt.⁴¹ For criminal liability, so called “guilt of cause” (a person is guilty of something whenever he, directly or indirectly, caused it) and “guilt by default” (a person falls short of reaching an objective or standard) are relevant. These types of guilt are not relational as the third type is, which is about settlement, compensation, and retaliation: “guilt of settlement,” which means that a person is indebted to other persons. This type of guilt is relevant for sentencing. It is related to different emotional and moral matters than the first two types.

On top of that, punishment exceeding culpability does not need to be at odds with the assumption that the application of criminal law to an individual is based on that individual’s moral responsibility.⁴² One can argue convincingly that the punishment could be legitimised by the moral responsibility of the offender as long as the punishment is proportionate to the seriousness of the punishable act he culpably committed (at which point the prohibition of disproportionality heaves into view again). Thus, culpability here merely serves as a threshold for being able to presume moral responsibility for the punishable act. That moral responsibility then centres around the notion that the

⁴⁰ Guilt is seen as a primary legal criterion for sentencing in Greece (Article 79 Ποινικός Κώδικας); *see also* England & Wales (Section 63 Sentencing Act 2020), Finland (Article 6:4 Rikoslaki) and Italy (Article 133 Codice Penale). For countries outside Europe, *see for example* New Zealand (Section 8, preamble and under a, Sentencing Act 2002: “degree of culpability of the offender”).

⁴¹ A.W.M. Mooij, *Intentionality, Desire, Responsibility: A Study in Phenomenology, Psychoanalysis and Law*, Leiden/Boston: Brill 2010, p. 254-255.

⁴² For a more detailed discussion, *see* P.H.P.H.M.C. van Kempen, ‘Verantwoordelijkheid en strafrecht’, in: *Op zoek naar evenwicht* (Groenhuijsen-bundel), Deventer: Wolters Kluwer 2021, p. 377-391 on 389-391.

offender was in control of his decision to violate criminal law and in doing so would bring upon himself the potential application of criminal law (acceptable according to the rule of law and therefore not disproportionate). Another legality condition is involved here. Because moral responsibility on the part of the offender can only be presumed to the extent that he had the aforementioned control, it is necessary that the potential consequences under criminal law were sufficiently foreseeable. This means that the penalty cannot unexpectedly deviate dramatically from penalties that are usual for approximately equally serious offences with similar conditions.

Thirdly, the recognition of culpability as an upper limit for sentencing will reduce the usability of sentences for attaining penal objectives such as special and general prevention. This may be unsatisfactory in respect of the legitimate interests of society and the victim with regard to protection for example, while it is not necessarily an advantage for defendants either when the court, instead of imposing a sentence exceeding culpability, decides on a lighter sentence but combined with an equally intrusive measure. If it is impossible to use the penalty to achieve special and general prevention for example, because of the recognition of culpability as an upper limit for sentencing, the courts are more likely to resort to criminal security measures. In other words, defining the formal dividing line between sentences and measures more clearly, to me is not necessarily an advantage. It limits the court's possibilities to arrive at an appropriate sanction in each individual case and may actually result in unduly severe sanctions. I will return to this question in the final paragraph.

5. Principle of equality

In various other countries, the principle of equality is expressed with varying degrees of directness in the sentencing framework for the court. For example, the Finnish Article 6:3, first section, Rikoslaki (the Finnish Criminal Code) states that the “uniformity in sentencing practice” must always be taken into consideration. Equality and consistency even have a central position in the sentencing system of Finland and for example also in that of Denmark and Sweden.⁴³ This is less so in England and Wales, but in those countries Section 59 (1) Sentencing Act 2020 requires the court to follow the applicable sentencing guidelines in imposing a penalty, “unless the court is satisfied that it would be contrary to the interests of justice to do so”.

I will now take a brief step outside of Europe. Particularly interesting from the perspective of legality here is jurisprudence from the High Court of Australia, which qualifies “equal justice” as an aspect of “the rule of law,” legality and lawfulness and expresses the view: “Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that

⁴³ Lappi-Seppälä 2019, *supra*, p. 212, 214-215.

are different in some relevant respect.” “Consistency in the punishment of offences against the criminal law is ‘a reflection of the notion of equal justice’ and ‘is a fundamental element in any rational and fair system of criminal justice.’ It finds expression in the ‘parity principle’ which requires that like offenders should be treated in a like manner. As with the norm of ‘equal justice’, which is its foundation, the parity principle allows for different sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances.”⁴⁴ The idea that violation of the equality principle is related to the legality principle is in any case understandable in the sense that the legality principle aims to counter arbitrariness, while it is exactly the unequal treatment of identical or similar cases that points towards arbitrariness.

A different though equally principled approach can be seen in Germany, where both the legality principle and the equality principle also have constitutional status.⁴⁵ According to the German Federal Court of Justice, der Bundesgerichtshof (BGH), in sentencing accomplices in a case, the court must ensure that those sentences are commensurate with each other, but otherwise a focus on comparing cases is dismissed as fundamentally wrong.⁴⁶ The reasons given for this – which as a whole I find convincing – are primarily that it is up to the trial court to find a suitable sentence in each individual case by weighing all the relevant circumstances of the case,⁴⁷ the fact that it is impossible for the courts to make proper comparisons with cases dealt with by other courts, the question why the courts should even follow suit with any other court, and the key principle of guilt in German sentencing: the court should make its sentencing decision “exclusively according to the leading principle for sentencing, namely of punishment based on guilt”.⁴⁸

According to the Bundesgerichtshof, the fact that the court has an autonomous responsibility to arrive at its own conclusion, coupled with the fact that there is no generally accepted opinion following from case law about just what the reference point for fair sentencing is, even implies a prohibition for the judge to tailor his sentence to the sentences imposed by other judges that do not entirely convince him.⁴⁹

⁴⁴ High Court of Australia 3 August 2011/6 December 2011, *Green/The Queen*, case no. S146/2011, *HCA* 49, 244 *CLR* 462, para. 28 (footnotes included in the original text quoted have been omitted).

⁴⁵ See the legality principle in Article 103 paragraph 2 Grundgesetz (which is also applied to sanctions; see e.g. BVerfG, Urteil 20 March 2002, *BVerfGE* 105/135, 2 *BvR* 794/95, para. 73) and the equality principle in Article 3 Grundgesetz.

⁴⁶ BGH 28 June 2011, 1 *StR* 282/11. See also for example BGH 7 February 2017, 1 *StR* 231/16, *BeckRS* 2017, 104189.

⁴⁷ As for the importance and position of an individualised assessment by the criminal court, see BVerfG, Urteil 20 March 2002, *BVerfGE* 105/135, 2 *BvR* 794/95, para. 67-70.

⁴⁸ Translation mine (original: “ausschließlich nach dem die Strafbemessung leitenden Grundsatz der gerechten Schuldstrafe”).

⁴⁹ See also Patzak/Volkmer/Fabricius, *Betäubungsmittelgesetz* (Kommentar), München: Beck 2022,

It is important to realise that this German “Verbot des Strafmaßvergleichs” (i.e., the prohibition on comparing sanction levels as it were) is in force in a sanction regime that has been standardised by the law in some detail in Articles 46 ff. StGB. That legal standardisation is to a large degree founded on the idea that it contributes to a more consistent sentencing approach by the courts, in which the sentencing rules, principles and objectives chosen by the legislator are expressed.⁵⁰ That is also true for the many other countries that have legal sentencing frameworks.⁵¹ The notion that such standardisation improves consistency is evidently also a basic idea of the Recommendation (92) 17 of the Council of Europe already referred to above about ‘Consistency in Sentencing’, which instructs legislators to communicate the objectives of sanctioning and the hierarchy between those objectives.⁵² In the literature too it is sometimes emphasised that a coherent moral sentencing framework is important for consistent and justified sanctioning.⁵³

The question is whether a focus on equality is detrimental to nuanced and individualised sentencing. It appears to me that this is indeed a risk in so far as one looks at equality in sentencing. Equal sentencing, however, is not quite the same as equality in the way in which the courts arrive at determining a sentence based on a casuistic approach. The equality principle and individualisation of sentencing are not polar opposites either. It can even be argued that a necessity for individualisation ensues from the equality principle, in the sense that the principle can also be understood as a requirement that dissimilar cases are treated differently to the extent that they are dissimilar. The consistent imposition of fixed sentences for a certain criminal offence can produce consistency and legal certainty, but it is not required by the legality principle. Always imposing the same sentences in cases that differ widely with regard to, for example, the intensity of the behaviour, the consequences of the crime or culpability of the offender, also constitutes a sort of systematic arbitrariness, which is just as problematic as the highly unequal sentencing in cases that are similar in such respects. Despite the fact that such equal sentencing results in consistency, it does not satisfy the legality principle, which after all actually aims to prevent arbitrariness.

Vorbemerkungen zu §§ 29 ff. BtMG, under 3.H.X, para. 119.

⁵⁰ See BVerfG, Urteil 20 March 2002, *BVerfGE* 105/135, 2 *BvR* 794/95, para. 73.

⁵¹ Several European countries have somewhat detailed statutory sanction frameworks, but this does not necessarily mean that the courts have rather limited sentencing discretion. Countries with such frameworks are, e.g., Austria (§ 32 ff. StGB), Germany (§ 46 ff. StGB), England & Wales (Sections 57 ff. Sentencing Act 2020), Finland (chapter 6 Rikoslaki), Greece (Article 79 ff. Ποινικός Κώδικας), Portugal (particularly Article 40, 70 and 71 Código Penal), Spain (Article 61 ff. Código Penal), and Switzerland (§ 47 ff. StGB).

⁵² See A.1 to A.9 of the Appendix to the Recommendation.

⁵³ J.W. de Keijser, *Punishment and purpose*, Amsterdam: Thela Thesis 2000, p. 162-165 and more broadly about his framework p. 1-31, 157-165.

6. The importance of a substantive statutory sentencing framework

The legality principle requires that the sanction system is defined clearly and in an accessible (knowable) way, that it is not applied retroactively to the detriment of the defendant or on the basis of too extensive an interpretation, and that sentencing only takes place when a certain culpability has been established. However, under international law and in most countries (with Germany as an exception, see below), the principle does not mean that the legislator is legally required to offer a framework of sentencing rules, principles and objectives. Nevertheless, there are various arguments, whether or not in combination with other principles, which call for that framework based on the ratio of the legality principle, which seeks to promote legal certainty and more particularly, foreseeability of the administration of justice and countering arbitrariness.

Consistency in sentencing can promote foreseeability and prevent arbitrariness. The key question then though is what that consistency relates to. Consistently using the same punishment for fundamentally dissimilar cases may result in consistency and foreseeability, but as noted before, that actually constitutes arbitrariness. Such an approach also comes at the expense of just and effective sentencing, which rather requires room for casuistic individualisation of the sanction.

The importance of legality and equality in sentencing must therefore not be weighed against the importance of individualisation of sentencing. This is why in my opinion it is not desirable to limit the discretion of the courts in sentencing by means of, for example, minimum sentences, statutory quantitative points of reference or prescribing the sanction type or level. With respect to the latter issue, it is interesting to note that according to the German Bundesverfassungsgericht the legislator is not permitted to require the trial court to impose a sentence which in the court's opinion would not be appropriate for the offender's culpability, in view of the findings in the case.⁵⁴ The guilt principle and the proportionality principle preclude that.

If individualised sentencing is the starting point, it is still extremely difficult to make foreseeable which sentence will be imposed for committing a concrete criminal offence. The reason for this is that the number of factors relevant to determining the sanction type and level is simply too high, and the weighing of those factors too complicated. That is why it should not be about the consistent equality of sentences imposed, but rather about a more consistent and less subjective and arbitrary way of achieving individualisation in varying cases. In other words: consistency in individualisation.

Consistent individualisation can be fostered by a structured sentencing framework in which at

⁵⁴ BVerfG, Urteil 20 March 2002, *BVerfGE* 105/135, 2 *BvR* 794/95, para. 73; BVerfG, Beschluß 16 April 1980, *BVerfGE* 54/10, 1 *BvR* 505/78.

any rate rules, principles and objectives have been included which the courts must use in the application of their discretion in sentencing in concrete cases. If only because of the many questions of interpretation that present themselves with sentencing principles (see also the previous paragraphs), a sentencing framework will not bring full consistency in the manner in which individualised sentencing takes place within reach either. Simultaneously, it is difficult to see why such a framework would not result in more consistency and transparency in sanctioning as opposed to the courts going about their business without such a framework.

To that end, it is also important that the existence of a sentencing framework should lead to the debate about sentencing in concrete cases being based more clearly on the rules, principles and objectives laid down in that framework, namely in accordance with the structure the framework presupposes. This applies to both the debate between parties in court and subsequently between the judges in the deliberation room. In this way, the defence, prosecution and the judge can urge each other to focus more consistently on the framework. The framework can enable trial courts to provide an insight into and explain the considerations underlying their sentencing decisions in a way that is both clearer and more amenable to testing.

Another factor is that although a sentencing framework is not required by the legality principle, at least not according to international human rights law and the law of most national jurisdictions, it definitely can satisfy the ratio of that principle. A framework can provide the defendant with some further support and transparency in connection with the sentence.⁵⁵ If genuine foreseeability of concrete sanctioning is hard to achieve, a framework can at least help combat arbitrariness and provide a modicum of clarity about the way the sentence will be arrived at. More clarity for the outside world about how the criminal court decides on sentencing seems like an unalloyed improvement to me. That can also reinforce the communication function of criminal law: particularly when penal objectives are expressed in the framework, it can clarify the purposes of criminal law.

Who should create the framework if it is not provided by law already? Taking into account that designing a framework rather sooner than later involves choices on legal policy and politics, it would be beyond the law-making function of the courts to bring this framework about. Moreover, a legal framework satisfies the ratio of the legality principle better than a framework based on case law. In contrast to for example the European Court of Human Rights and most countries, the German Bundesverfassungsgericht even derives from the legality principle a duty for the legislator to provide assessment criteria for sentencing with a view to legal certainty, because: “Only with the help of

⁵⁵ As was remarked by C. Kelk, ‘Het nulla poena-beginsel behoeft opfrissing’ (originally 2007), in: C. Kelk, *De kunst van een humaan strafrecht*, Den Haag: Boom 2018, p. 407-427 on 417, 422-425.

codified sentencing rules that are concretized in case law will it be possible in individual cases to make wide ranges for sentencing manageable under the rule of law. [...] Only in this way is [the sentence] foreseeable for the norm addressee and controllable for the criminal justice system.”⁵⁶

A legal framework can provide the highest court in criminal cases with support to check and guide consistency in sentencing. Even through marginal checks of the reasons for a sentence against the framework, and in particular through explaining and developing the concepts in the framework in the same way this is currently happening with the words and elements of criminal offences for example, a contribution in cassation can be made to both uniformity and equality in the application of the law in respect of sentencing. In view of the interests involved with consistency, that seems of considerable importance.

What should become clear from that structured sentencing framework at any rate? If the legislator in a country were to introduce or revise a full design, it would be desirable to see which sentencing frameworks are used in other countries and what the experiences there have been. However, based on the discussion so far, the following recommendations can already be made.

First of all, the framework would preferably have a *prohibition* on disproportionality stating that the sentence must never be disproportionate to the seriousness of the punishable act.⁵⁷ As explained before, it can be disadvantageous to include a proportionality *requirement* of a peremptory nature stating that the sentence must absolutely be proportionate to the seriousness of the crime, even if this only happens in order to determine the upper limit of sanctioning. In addition to that, defining the degree of guilt (culpability) with regard to the punishable act as a hard upper limit of the applicable sanction gives rise to objections.

However, the notion that no harsher sentence is handed out than the one that is proportional *strictu sensu* given the seriousness of the punishable act and the degree of guilt can serve as the primary point of departure. There is a lot to be said for making guilt the cornerstone of the system, instead of proportionality *strictu sensu*. After all, because the guilt criterion is not about guilt as such, but rather about culpability for a concrete offence of a certain seriousness, the proportionality requirement is already part of the criterion to a major extent. There is no ground for retribution

⁵⁶ BVerfG, Urteil 20 March 2002, *BVerfGE* 105/135, 2 *BvR* 794/95, para. 73. See also BGH 7 October 2003, 1 *StR* 274/03, para. 15; translation mine (original: “Nur mit Hilfe der kodifizierten und richterrechtlich konkretisierten Strafzumessungsregeln wird es im Einzelfall gelingen, weite Strafraumen rechtsstaatlich handhabbar zu machen. [...] Nur so ist sie [de straf] für den Normadressaten voraussehbar und für die Strafjustiz kontrollierbar.”)

⁵⁷ See also P.A.M. Mevis, in: P.H.P.H.M.C. van Kempen, M.J.M. Krabbe, J.L. Guzman Dalbora & F. Molina Jerez (eds.), *Legality and other requirements for sentencing*, The Hague: Eleven/Boom 2023, who argues for a ‘hard law’ international human rights law right to be protected against disproportionate sentencing.

beyond the degree of culpability. Furthermore, it should only be acceptable to go beyond the degree of culpability in exceptional cases for weighty reasons of prevention. In my opinion, there may be room for such an exception if the available set of measures is fundamentally inadequate or if its application is far less proportional or subsidiary (i.e., necessary) than a more severe sentence, and provided that the sentence is not disproportionate to the seriousness of the punishable act. Also in view of the subsidiarity requirement, it is possible, however, on the basis of a normal weighing of interests, to opt for a lighter sentence than the one that would follow from the guilt criterion. One reason for that could be the negative effect of the sentence on the convict's chances to leave crime well alone.⁵⁸

The foundations of the legality principle and the equality principle require that judges assess the casuistic details of an individual criminal case as much as is reasonably possible in a way consistent with how the judge generally does this professionally. Where sentencing is concerned, it seems to me that this is not essentially different from what judges do in connection with the explanation and application of elements of a punishable act, for example. Also because of this, it seems worthwhile to include in the framework the most important general reasons for reductions and increases of sentences, with a view to promoting a more uniform approach in sentencing assessments and considerations in that respect as well. After all, it is perfectly conceivable that a certain circumstance in similar situations leads to the court waiving a custodial sentence in one case, whereas that same circumstance is not even taken into account in the next case. Reasons for reductions and increases of sentences can also help shape the structure of the sentencing debate, and checks on the application thereof in cassation can have a beneficial effect on the uniformity (consistency) of the application of the law.♣

(本文已授權收錄於月旦知識庫及月旦系列電子雜誌 ♣ www.lawdata.com.tw)

⁵⁸ In various countries where guilt or proportionality is a primary legal sentencing criterion, the court has to take such circumstances into account; for example, *see* Germany (§ 46 paragraph 1, second sentence, StGB), Greece (Article 79 paragraph 1, second sentence, Ποινικός Κώδικας), Portugal (Article 40, under 1, Código Penal) and Switzerland (§ 47 paragraph 1, second sentence, StGB).

The Recent Development of Product and Service Liability in Taiwanese Consumer Protection Law

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Abstract

From the perspective of social activity safety obligations, Taiwan supreme Court imposes that business operators should ensure the safety of their business environment and auxiliary facilities in accordance with Article 7 of Taiwanese Consumer Protection Law. The nature of this obligation is almost an obligation of result, and it belongs to a no-fault liability with no reason for exemption. In addition, the right to claim punitive damages in Article 51 of Taiwanese Consumer Protection Law should be limited to a consumer, not accessible to a third party. In case of his death, it is affirmed that the heir or the administrator of the estate is the subject of the request in practice, and the scope of the request should include property and non-property damages.

Keywords: Pure Economic Loss, Business Environment, Secondary Obligation, Obligation of Result, Safety Obligation, Punitive Damage, Non-property Damage

A Research on Responsibility of the Manufacturer of Goods in Service Lacking Safety Focusing on Civil Judgement of Taiwan Supreme Court (110) No. 1425 and (105) No. 1905

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Abstract

The responsibility of the manufacturer of goods includes the safety of goods and services. In order to reduce the burden of proof on consumers, the Consumer Protection Act adopts strict liability. However, there is no clear definition of “service” in the law, which makes it difficult to apply the law. Scholars have different views on the concept of “service”, including the “broad interpretation” and the “limited interpretation”. The application of the “broad interpretation” has invariably expanded the scope of responsibility of the manufacturer of goods in the Consumer Protection Law, while the “limited interpretation” seems to be more reasonable in limiting the scope of services. Rather, the Judgements usually determine whether the services provided by the entrepreneur are unsafe or not through the specific circumstances of the case, leaving room for discussion of the concept of service.

Keywords: Definition of Service, Service Lacking Safety, Strict Liability, Safety of Premises, Responsibility of Manufacturer of Good

The Past and Future of Consumer Protection Legal System

— Discussion on a Myriad of Legal Issues Regarding Goods and Services Liability through Two Practical Cases

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Abstract

In our daily lives filled with a wide variety of goods and services, not only is the number of disputes created thereby considerable, but the issues involved is also wide-ranging. How to interpret the legal concepts involved therein has profound impact on keeping up with the times to demonstrate a modern meaning, and shaping the direction of development of consumer protection.

In view of this, this article observes as a basis the progress of goods and services liability, and starts by reviewing our country's development and history of consumer protection legal system, and introduces through the regulations of consumer protection law and civil law the dual regulatory system presented by the current product liability laws.

Then, through two practical cases, we discuss: what is a state of providing service, what is a lack of safety in goods and services, deficient products and other such important topics. This provides a clearer picture on goods and services liability, and assists in reasonably strengthening consumer protection.

Keywords: Consumer Protection, Product Liability, Service Liability, Product Manufacturer Liability, Lack of Safety

Recent Developments in German and Taiwanese Civil Law Regarding Clausula Rebus Sic Stantibus

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Abstract

Can circumstantial factors affect the validity of a contract? The question has been a controversial one for centuries. Art. 227-2 para. 1 of the Taiwan Civil Code follows the legislative principle of civil law formalism and adopts the doctrine of clausula rebus sic stantibus in its objective form to solve part of the problem. Following a systematic shift towards substantive justice, the German Civil Code has codified the subjective form of the system relating to the foundation of legal acts in its para. 313, which offers a more comprehensive solution to the related problems. If the goal is for the Taiwan Civil Code to achieve the same normative scope of para. 313 of the German Civil Code, the existing differences between the civil law systems of Taiwan and Germany would need to be bridged by means of legislation or the accumulation of case law through the use of the principle of good faith. The expansion of the normative scope of Art. 227-2 para. 1 of the Taiwan Civil Code by means of closing legal loopholes would not be suitable.

Keywords: Impact of Circumstantial Factors on the Validity of Contracts, Art. 227-2 para. 1 Taiwan Civil Code, Clausula Rebus Sic Stantibus, Para. 313 German Civil Code, System Relating to the Foundation of Legal Acts (Geschäftsgrundlage)

An Analysis on the Non-Solicitation Clause Signed during M&A Dealing from the Perspectives of Protection of Trade Secrets and Competition Laws

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Abstract

The article argues that non-solicitation clauses that companies sign with potential acquirers in order to protect their trade secrets and facilitate smooth mergers are different from no-poach agreements that serve no legitimate purposes other than restricting each other from soliciting or poaching each other's employees. These two types of agreements differ significantly in terms of their form, purpose, effects on competition, and possible justifications. Competition law should strictly regulate and prohibit no-poach agreements, but as for non-solicitation clauses, as long as they are reasonable in terms of their targets, scope, degree, and duration, and have legitimate reasons such as protecting trade secrets, ensuring the rights of both parties to the merger, and promoting merger transactions, they usually do not have undue anticompetitive effects on the relevant labor market and should be recognized as reasonable and legal.

Keywords: Fair Trade Act; Non-Solicitation Clause; No-Poach Agreements, No-Hire Agreements, or No-Switch Agreements; Mergers and Acquisitions; Labor Market; Trade Secrets

Accountability for Vaccine Adverse Reaction

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Abstract

Vaccination is a primary measure in the fight against COVID-19. A number of legal issues arise from vaccination are noteworthy. Can an employer mandates vaccination for people who must be in frequent contact with crowds at work, but refuse to be vaccinated because of various beliefs? How should the causation be determined in the cases of deaths or serious injuries caused by the vaccination. These legal issues involve criminal responsibility and compensation. In some cases, the determination of causation are even more controversial, for example, adverse reactions caused by overdose of vaccination, requesting health care workers to vaccinate when the recipient is of dangerous constitution, mixing and matching vaccines, etc., and how should these causations be properly determined? Each of these questions are discussed and answered in this article.

Keywords: COVID-19, Vaccination, Causation, Compensation, Criminal Responsibility

A Reflection on the Legal System Protecting Intermediate Category of Workers in Italy

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Abstract

With the growing prevalence of the gig economy, the labor rights of gig workers have drawn increasing attention, and the issues concerning labor protection for workers without labor status have received great attention as well. The legal system of “intermediate worker” has been widely discussed worldwide and has gradually become important in Taiwan. Among them, Italy established a type of worker status in the Civil Procedure Law in 1973, which is on the spectrum between “subordinate worker” and “self-employed worker.” The intermediate type is called “Continuous and Coordinated Collaborators” (shortly referred to as “Co. Co. Co. ”), and the related legal system has been continuously revised. Some workers engaging in the gig economy have been included in recent years, and they have been explicitly protected. The country’s experience of the development and implementation of the legal system for almost half a century, which should be of reference value for our country and must be inspiring to our country’s future establishment of a legal system for intermediate workers.

Different from our country’s focus on the protection of workers’ occupational safety and health, the intermediate-type workers’ legal system in Italy provides protection standards in addition to the protection of litigation procedures, as well as legal suspension of contract performance during the effective periods of contract. The compensation system for work, the prohibition of employment discrimination, privacy protection, the right to enter into written contracts, access to all information that helps protect their rights and safety are also regulated ; in terms of the protection and development of collective labor rights, the country’s development of the event is very prosperous, and many collective agreements have been signed in recent years, which is worthy of attention.

Keywords: Continuous and Coordinated Collaborators, Intermediate Category of Workers, Gig Economy, Collective Agreement

An Analysis of the Structure of the Sex-based Employment Discrimination System in Mainland China and the Resolution of the Dilemma

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Abstract

Sex discrimination in employment violates both citizens' equality rights and labor rights, and is the most important aspect of the employment discrimination system in each country. The mainland China's sex-based employment discrimination system consists of labor law and law on the protection of the rights and interests of special groups, and its actual legal structure is basically in line with international standards, featuring abundant protection measures, complete protection stages, and quasi-judicial and judicial relief. Judicial practice has shown that the system has failed because the burden of proof is too heavy for employees, the legal liability for employers is too light, and the concept of sex discrimination is too narrow. In order to fully realize citizens' equal employment rights, the system's dilemma can be resolved by extending the concept of sex discrimination, establishing a mechanism for transferring the burden of proof, increasing the legal liability for employers, and facilitating administrative relief channels, with appropriate reference to overseas experience.

Keywords: Sex Discrimination, Equal Employment Rights, Labor Law, Law on the Protection of the Rights and Interests of Special Groups

Injunction in Patent Infringement Cases: Lessons from Japan's Experience

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Abstract

Pursuant to article 96 of Taiwan Patent Act, a patentee of an invention patent may demand a person who infringes or is likely to infringe the patent right to stop or prevent such infringement. This Article provides patentees with injunctive relief, which is an important, if not the main, legal remedy when patent infringement occurs. However, with regard to the enforcement of injunction in Taiwan, there has been debates in recent years on whether it should be limited to a certain extent. On the other hand, it is worth noting that Japanese government has repeatedly brought together patent law experts, including government representatives, law scholars and practitioners, to discuss the above-mentioned issue under Japanese legal system. Their discussions may provide insights for the direction of enforcement of injunction in the context of Taiwanese law. This paper thus first briefly describes the enforcement of the right to exclude infringement claims under Japan Patent Act, as well as the related discussions in Japan, and then gives a brief opinion concerning this issue in Taiwan.

Keywords: Injunction, Standard Essential Patent, Non-practicing Entity, Patent Assertion Entity, Abuse of Right

The Recovery Registration of Restoration Ownership of River Land

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Abstract

Article 12 of the Land Law stipulates: “ Wherever private land becomes part of a lake or navigable waterway by the operation of natural forces, the ownership thereof shall be deemed to have been extinguished. When any land referred to in the preceding paragraph reverts to its original condition and its original owner produces evidence to substantiate his original ownership, his ownership thereof shall be restored. ” For a long time, the application of the provisions of Paragraph 2 of this article has caused many legal controversies.

In this article, there are three main points: 1. Explain the legal issue of Article 12, Paragraph 2 of the Land Law on restoring the original land ownership. 2. When the original owner restores his land ownership, how to apply to the registration authority for registration of restoration ownership. 3. Explain the content of the Supreme Administrative Court's 110-year Shangzi No. 3 judgment regarding the dispute on the restoration of land ownership registration.

Keywords: Land Registration, Cancellation of Registration, Ownership Registration, Recovery Registration, River Land