Sentencing Guidelines vs. Free Judicial Discretion – Is German Sentencing Law in Need of Reform?

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1 Introduction: Sentencing in the light of German Constitutional Law

If punishment is the sharpest sword in the armory of possible measures the state can impose on its citizens, then sentencing is the process of deciding how deep the perpetrator is to be wounded. This quite common metaphor indicates that the process of sentencing has an extremely burdening effect on the convict as it decides on the extent of a serious interference with their fundamental rights.[1] This again makes it necessary for reasons of constitutional law that the legislator establishes sufficiently precise standards and rules in order to provide a binding and at the same time restricting framework for sentencing courts.[2] In the light of German constitutional law, sentencing regulations should be able to provide for legal certainty, equality and proportionality of sentencing.[3]

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* The following text is a summary of Kaspar, Sentencing Guidelines vs. freies tatrichterliches Ermessen – Brauchen wir ein neues Strafzumessungsrecht? Gutachten C für den 72. Deutschen Juristentag, 2018.

1 Kaspar 2018, C 10; cf. also Kaspar 2014; MüKo-StGB-Miehbach/Maier § 46 Rn. 1.

2 Kaspar 2018, C 86 et seq.

3 These three major dimensions of constitutional law with regard to sentencing are discussed in more depth in Kaspar 2019.

However, the presently applicable German law on sentencing does not sufficiently comply with these requirements. In many cases the ranges of sentences for certain types of offences show a significant width which is at least questionable when it comes to legal certainty and definiteness that are demanded by Art. 103 section 2 of the German constitution (Grundgesetz, GG). The principle of legality regulated in this provision relates not only to the question whether a certain type of behavior is punishable or not, but also to the question of what kind of punishment one has to face in case of a violation of the law.[4] Each citizen should be able to answer both questions in advance just by checking the criminal law – which is obviously quite hard if possible punishment ranges (e.g.) from 1 to 10 years of prison (cf. § 249 StGB, robbery) or from a small fine up to five years of prison (cf. § 242 StGB, theft).

The problem is aggravated by the fact that judges are also granted remarkable discretion by the legislator in other areas, e.g. when deciding about unspecified particularly serious or less serious cases (unbenannte besonders schwere/minder schwere Fälle). Here, the choice of the range of sentences is supposed to depend on a quite vague overall assessment by the judge, whereas the legislator does not even indicate which constellations are meant by "particularly serious" or "less serious". The most problematic provision in this regard is § 212 section 2 of the German Penal Code (StGB) which regulates that the judge may impose a lifelong prison sentence (instead of a prison sentence between 5 and 15 years) if he or she deems a concrete case of homicide to be a "particularly serious" one.[5] If we combine particularly serious and less serious cases, the range of sentences for homicide reaches from one year of prison up to lifelong imprisonment.[6]

The central legal provision concerning sentencing, § 46 I StGB, is not very helpful in this regard either. It is a mere compromise, which soon after its introduction was criticized as a "first rank mistake"[7] and is still criticized today.[8] Indeed, many essential questions have remained without an answer.[9] This also touches on the issue of relevant purposes of punishment, which directly affects sentencing: if we as a judge would have to choose between two or three years of imprisonment, which both seem approximately appropriate in the particular case, the question of one more (or less) year of prison cannot be reasonably answered without relating to the question of "why" or respectively for what purpose do we punish in this (and not in another) way. We have to keep in mind here that the principle of proportionality

4 Cf. BVerfGE 25, 269 et seq.; BVerfGE 105, 305 et seq. (Vermögensstrafe).

5 The majority of the Criminal Law Department of the German Convention of Legal Scholars and Practitioners (Strafrechtliche Abteilung des Deutschen Juristentags) voted in favor of abolishing this type of provisions in 2018.

6 Cf. Radtke DRiZ 2018, 251.

7 Stratenwerth 1977, 13.

8 Kaspar 2018, C 58 ff.; Radtke DRiZ 2018, 251; Hoven KriPoZ 2018, 287; Grosse-Wilde ZIS 2019, 134.

9 Cf. Lackner 1978, 7.

based in the German constitution requires the state to keep infringements into liberty rights as lenient as possible – therefore, state representatives always have to look for the mildest measure that is sufficiently appropriate to achieve the purpose pursued (principle of necessity, Erforderlichkeit). Coming back to our example: If the purposes of punishment also would be served in a satisfying way by the two-year prison sentence, the judge would be obliged to choose this alternative – without any discretion! The problem, however, is obviously that there are a lot of assumptions here that are themselves not clear and open for a quite broad subjective assessment by the judge: What are the relevant purposes of punishment? And when and how are they sufficiently fulfilled in a concrete case?

Little is gained (in terms of legal certainty and proportionality) by the vague commitment to guilt ("Schuld") as the 'basis for sentencing' in § 46 I 1 StGB.[10] Quite remarkably, the legislator does not explicitly state that punishment serves a particular aim of "retribution" or "compensation of guilt". We can only conclude that "guilt" is meant to be an important sentencing factor, that it is supposed to influence the amount of punishment – but the question of what actual aim we want to achieve by punishing people is not clearly answered. Furthermore, the question of what exactly the term 'guilt' is supposed to mean in the context of sentencing is very controversial.[11] While the prevailing opinion favors a concept of 'guilt regarding the criminal act' (Tatschuld) and rejects concepts of guilt concerning lifestyle or character (Lebensführungsschuld/Charakterschuld),[12] it still remains to be justified why aspects like the behavior after the criminal act that have nothing to do with the actual offence should be relevant for the determination of "guilt" (in the sense of the "blameworthiness" of the act) as § 46 II StGB indicates.

In addition to this, the prevailing opinion's concept of guilt contains the risk that – compared to the objective gravity of the offence – too much emphasis is placed on personal factors like the offender's 'attitude' or the number of previous convictions.[13] The sound principle, according to which not the person of the offender as such, but the offence as an external incident is to be addressed and condemned by the sentence,[14] is thereby put at risk and the dividing line to mere preventive measures of rehabilitation and incapacitation (Maßregeln der Besserung und Sicherung, §§ 61 ff. StGB) as the second type of sanctions in the German two-track system of criminal sanctions (zweispuriges System) becomes blurred.

10 Verrel JZ 2018, 811; Kudlich/Koch NJW 2018, 2762 et seq.

11 Streng StV 2018, 595.

12 Cf. Epik StV 2019, 490 fn. 17; Streng 2012 recitals 524 et seq.; Meier 2015, 187.

13 Cf. among others Hörnle JZ 1999, 1080 (1083).

14 Frisch ZStW 1987, 384 et seq.

Even the catalogue of sentencing factors in § 46 II StGB helps only partially as it contains an explicitly non-exhaustive list of rather heterogeneous circumstances without making clear how these are to be weighted and to be taken into consideration.[15] Relevant factors are (inter alia) the offender's motives and objectives, the degree of the breach of the offender's duties, the modus operandi and the consequences caused by the offence, the offender's prior history, personal and financial circumstances and the offender's conduct in the period following the offence, in particular efforts to make restitution for the harm caused as well as efforts at reconciliation with the victim.

Overall, legal requirements for sentencing are de lege lata rather vague. Especially the entry point into the broad range of sentences as a "key problem" of sentencing[16] remains without any legal provision guiding the judge in this difficult task. In practice, courts obviously react to this situation by following the locally or regionally common level of sentencing.[17] This level is partially laid down in informal guidelines[18] or at least transmitted by the advice of experienced colleagues.[19] It is obvious that in this way selective and subjective, certainly not representative empirical figures become quite important in practice.[20] And it is no surprise that we can see quite broad differences in sentencing between different courts and different regions all over Germany, as will be discussed later. This orientation towards local sentencing traditions cannot be a satisfactory solution, for it lacks the necessary transparency and state-wide uniformity; furthermore, it is to be considered problematic with regard to the principle of equality according to Art. 3 I GG, which allows a different treatment only if there are justifying reasons – in my opinion, the mere fact that there is a certain local sentencing tradition itself is no such justifying reason as it is not linked to any of the purposes or rationales of punishment.

Finally, the vagueness of the law with its huge discretion for the judge does not sufficiently guarantee that the principle of proportionality in the abovementioned sense is obeyed as a guiding principle for sentencing. Even though the level of sentencing in Germany is comparably modest (as will be shown below), the fact that we can see quite different sanction levels for similar offences in different regions shows that there is some potential for a further mitigation of punishment. Inequalities can always be dissolved in two ways, by adjusting one figure to the other or vice versa. In other words: the aim of equal sentencing could also be pursued by aggravating the level of punishment in regions with hitherto comparably lenient sentences. But

15 SSW-StGB-Eschelbach § 46 recital 13; Hörnle, GA 2019, 282 et seq.

16 Schöch 1972, 128.

17 Streng 1984, 239.

18 SSW-StGB-Eschelbach § 46 recital 3; cf. also Schäfer/Sander/van Gemmeren 2017 recital 1719 et seq. (sentencing table regarding traffic offences).

19 Hörnle 2011, 113 (114).

20 Schöch 1972, 128 (129).

in the light of the principle of proportionality and its limiting character, constitutional law is in favor of going in the other direction and focusing on the lower sentencing levels.

2 The role of sentencing theories

When approaching this problem of vagueness with regard to the common sentencing theories one will find that neither of them is suitable to solve it in a satisfying way.

Especially the prevalent so-called margin theory (Schuldrahmenlehre/ Spielraumtheorie)[21] is problematic. Following this theory, the judges operate within a framework of sentences in line with the level of guilt, from which they can choose quite freely on the basis of complementary preventive considerations. Yet, they are not obliged to specify the limiting points of the scope of possible guilt-related sentences, which weakens the theory's explanatory power and at the same time raises doubts whether judges actually do proceed in this way. A major point of criticism is that the assumption of a certain level of "guilt" that is of crucial importance in this approach is not based on objective empirical findings which allow for a rational discussion. The method of considering preventive purposes and the relation of special and general preventive aspects (i.e. rehabilitation, selective incapacitation and individual and general deterrence) remain unclear as well. Regarding the actual effect, the often-propagated general preventive aggravation of sentencing[22] is just as much to be questioned as special preventive aggravations. After all the margin theory is based on the idea that the mere compensation of guilt (Schuldausgleich) as an end in itself can justify the sentencing, even if there are no special or general preventive needs for this kind of punishment in the individual case. Yet, this idea has to be rejected as the allegation that punishment has to necessarily reach a certain level for reasons of "guilt compensation" or retribution does not meet the requirements of a legitimate interference in fundamental rights, pursuant to the principle of proportionality based on the German constitution.[23]

A more recent theory (Tatproportionalitätslehre)[24] rightly stresses the seriousness of the act's wrongfulness as the decisive standard for sentencing. In this context, the common differentiation between the wrongfulness of the result (Erfolgsunrecht) and the wrongfulness of the act (Handlungsunrecht) in German criminal law

21 This traditional position of the judicature was founded in BGHSt 7, 28. Cf. also Schäfer/Sander/van Gemmeren 2017 recital 828 et seq.

22 Schäfer/Sander/van Gemmeren 2017 recital 839 (with reference to empirical findings contradicting the general assumption that higher sentencing would automatically lead to a higher level of deterrence and less offences respectively).

23 Cf. Kaspar 2014.

24 Cf. Hörnle 1999; Frisch/v. Hirsch/Albrecht 2003.

theory can be applied. The vague term of 'sentencing guilt' (Strafzumessungsschuld)[25] loses its central importance. The sole question is whether the wrongfulness of the act is fully or (e.g. in the case of § 21 StGB) only to a limited extent reproachable. However, an intensification of 'guilt' beyond full blameworthiness is not possible. All in all, this doctrine offers a better connection of sentencing with the doctrine of wrongfulness (Unrechtslehre) and avoids some flaws of guilt-related sentencing theories.

However, even the theory of proportionality of the act cannot answer the question of purposes of punishment in a satisfying way. The reproach incorporated in punishment proportionate to the criminal act is not a justifying purpose for punishment but only describes its nature. Punishment as a disapproval or reproach of the criminal act is only justified to the extent that its use for society can be made at least plausible.

The theoretical concept defended in this paper is a general preventive combination theory predominantly referring to the restoration of peace under the law by a sentence proportionate to the wrongfulness of the act (which is called "positive general prevention" in the German discussion)[26]. The upper limit of guilt for a certain sentence ("Schuldobergrenze") as a requirement of human dignity (Art. 1 I GG) remains untouched.[27] Yet, if preventive needs are lacking or are strongly reduced there is no compulsory reason for a certain level of punishment only for reasons of absolute 'guilt compensation'. The idea of a minimum level of guilt leading necessarily to a certain amount of punishment without regard to its preventive usefulness is therefore to be rejected. The judge is obliged to find the 'general preventive minimum', i.e. the mildest sentence that sufficiently expresses the wrongfulness of the act. This refers to a level of sentence that is in principle appropriate enough to be accepted by the general public and thus to restore peace under the law. The decisive point in time for this assessment is not the criminal act, but the time of the verdict. If anything relevant for the positive general preventive need for punishment has happened in between, e.g. efforts of compensation or victim-offender mediation by the perpetrator, it is no problem to argue for a mitigation of punishment – whereas the theoretical basis for the assumption of lesser "guilt" in these cases is quite fragile.

To some extent, one will have to work with plausible assumptions in this regard due to the lack of hard empirical data. This fact together with the idea of "in dubio pro reo" support the restrictive concept of aiming at the lowest possible sentence. It has some similarities with the so-called "asymmetric margin theory" (asymmetrische Spielraumtheorie) put forward by Streng where in case of doubt, the judge is supposed to choose the lower end of the sentencing margin.[28]

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25 Cf. the criticism raised by Hörnle JZ 1999, 1080.

26 Cf. Schünemann et al (eds.), Positive Generalprävention, 1998.

27 It is questionable, however, if the so-called guilt principle (Schuldprinzip) is actually necessary to come up with this result. According to the author's opinion, it also follows from general proportionality requirements, cf. Kaspar 2014, 821 et seq.

28 Cf. Streng StV 2018, 597 f.

I am aware that this is a very controversial point and I would have to elaborate much more on this – but in my opinion, empirical findings about the population's expectations regarding sentencing should be taken into consideration here in order to get at least some more solid ground under one's feet.[29] "Legal peace" should not be understood in a mere normative sense in order to distinguish the theory from a mere retributive point of view. Insofar as representative surveys can be used to support lower sentences (or even the partial abolishment of criminal law) compared to the status quo, there are no objections – neither based on criminal theory nor based on constitutional law.[30] On the contrary, in this way the constitutional principle of proportionality (with its requirement of always looking for the least intrusive alternative of equally appropriate measures that has already been described above) would be taken into account. A good example for this approach are empirical studies by Sessar that showed that the general public in Germany is much in favor of Restorative Justice measures like compensation or victim-offender mediation and is willing to accept them as a reason for mitigating or even refraining from punishment.[31] The sentencing concept oriented towards 'proportionate general prevention' addressed thereby is supposed to be reflected in the suggested new wording of § 46 StGB (see infra).

3 Empirical findings

Empirical findings confirm the problem of vague regulatory standards with regard to sentencing.[32] It was found in different studies that offences with an identical range of sentences often show quite a varying distribution of levels of sentence. And we can see that sentences tend to remain quite stable even if the legislator changes the end points of the scale, e.g. raises its upper end. These findings contradict the idea of a range of sentences in form of a 'continuous severity scale' ("kontinuierliche Schwereskala") predefined by the legislature that constitutes a decisive orientation guide for judges.

Besides, empirical studies show that the wide span of the range of sentences is not made use of in many cases. In general, a 'downward trend' can be observed: Concrete sentences are often taken from the lower third of the range of sentences while the upper range (e.g. for offences against property) rarely becomes relevant at all.[33] Moreover, it is striking that for some offences (e.g. robbery, §§ 249 ff. StGB)

29 See the contributions in Kaspar/Walter 2019.

30 Kaspar 2014, 668 et seq.; Kaspar 2019a; cf. also Kaspar/Höffler/Harrendorf NK 2020 (forthcoming) for considerations on the use of Legal Tech in this regard.

31 Sessar 1992.

32 For the following cf. Kaspar 2018, C 16 et seq.

33 Cf. Götting 1997, 224; Verrel 2013, 804.

courts often allege less serious cases,[34] which indicates that the regular range of sentences with its increased minimum sentence of at least one year of prison is perceived as "too high".[35]

Ultimately, the idea of moderate, proportionate sentencing is thereby considered, however this is a development of the judicial practice, which cannot be clearly ascribed to normative requirements or limitations by the legislature and is therefore not ensured for the future.[36]

Finally, different studies repeatedly detected significant differences in the German sentencing practice of different persons and within different regions respectively.[37] Regional differences were already shown in a famous sentencing study by Exner published in 1931; [38] in a study conducted by Schöch in the 1970s, these differences also appeared in the area of traffic offences. [39] And the results of a quite recent research project by Grundies made clear that these differences have not disappeared: [40] We can still see local and regional sentencing patterns, not only between the German federal states, but also within these states. Generally speaking, sentencing in the southern states is more severe that the one in northern ones.

The existence of such inequalities (despite overall similarities in the underlying cases) is broadly acknowledged today in spite of all methodical problems of the respective studies.[41]

One reason for this phenomenon should have become obvious: The law itself gives much discretional space for assessing the individual sentence by the judge. And there is only very little control exercised by the appellate courts: in most cases, the individual sentencing decision of the judge (as his "natural domain") will be accepted by the higher courts.

Studies have shown that the judge's personality and his personal characteristics and opinions do play quite a role in this regard. One study (where judges had to come up with sentences for fictitious cases) showed e.g. that the preferred choice of purposes of punishment was relevant. Judges who preferred retribution or general deterrence tended (unsurprisingly) to higher sentences than judges who were in favor of rehabilitation.[42] According to a study conducted in Israel even the question of whether judges were hungry or not has shown to be relevant for the severity of sentencing decisions.[43]

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34 Albrecht ZStW 1990, 610; cf. also Verrel JZ 2018, 814.

35 Kudlich/Koch NJW 2018, 2763.

36 Cf. also Hörnle, GA 2019, 295.

37 Cf. e.g. Kaspar 2018, C 18 et seq.

38 Exner 1931.

39 Schöch 1973.

40 Grundies 2016, 518 et seq.

41 Cf. also Albrecht 1994.

42 Streng 1984, 227.

43 Danziger et al. PNAS 2011, 6888 (https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3084045/).

As mentioned above, a certain standardization is achieved by an orientation towards the (perceived) 'common' level of sentences, but the latter is based on unwritten and informal traditions and often does not reach beyond the local or regional area. Obviously, this cannot be a comprehensive and satisfactory solution as it lacks transparency and does not serve the needed nationwide homogeneity. As mentioned above, local customs alone are not an objective reason for differentiation according to Art. 3 I GG.[44] "Guilt" does not weigh more in Bavaria than it does in Hamburg. And the famous term coined by Dreher, according to which the judge uses a "secret measurement" (geheimes Metermaß) when coming up with the sentence,[45] clearly accentuates the problem: In a constitutional democracy with a strong emphasis on "due process" (Rechtsstaatsprinzip), there is a need for clear and transparent legal standards to prevent inequalities and arbitrariness.

And this is not just a matter of justice or equality as a value in itself but also stabilizes the functioning of the state and it's legal system. The intuitions of justice of the general public demand similar punishment for similar crimes.[46] Discrepancies between these intuitions of justice and the judicial practice can in the long run lead to harmful consequences like the loss of trust in the legal system and its moral credibility and – together with that – a declining willingness to obey the law oneself.[47]

All things considered, the current law should be reformed in a manner that provides for more equality, legal certainty and proportionality of sentencing.

4 Sentencing guidelines as a solution?

A possible way to tackle the problem and to narrow the scope of discretion of the judges could be differentiated sentencing guidelines, e.g. based on the US-American model. Their operating principle can be described by means of the Federal Sentencing Guidelines (FSG) applying at the federal level[48] introduced in 1987 (in full awareness that a wide range of different models and systems does exist on the US state level or in other countries, which cannot be addressed here[49]). The FSG were created by an expert commission established by law in 1984. By means of these guidelines with their two main parameters the judge can read the comparatively narrow range of sentences provided for the respective offence off a table. First the offence level is to be determined on a scale from 1 to 43.[50] The second central category is the criminal history with six stages. In general, previous convictions lead to drastic increases of the already very highly set range of sentences.

44 Cf. also Hörnle, GA 2019, 284 et seq.

45 Dreher MDR 1961, 344.

46 Streng StV 2018, 594.

47 Cf. Robinson 2014, 152 ff.; Hörnle, GA 2019, 293 and the contributions in Kaspar/Walter 2019.

48 Reichert 1999, 199 et seq.

49 For the U.K. cf. Hörnle, GA 2019, 282 et seq.; Grosse-Wilde ZIS 2019, 131 et seq.

50 Meyer ZStW 2006, 517 et seq.

In its original form, the FSG were binding for the courts inasmuch as deviations from the given range of sentences were only possible under certain conditions and with a respective justification. Since a US Supreme Court decision in 2005,[51] the FSG are only considered to be "advisory"[52]. Still they have at least some factual orientation effect; many judges seem to have become used to the provisions of the FSG, which obviously have a certain 'anchor effect'.

In the described form, however, the sentencing guidelines are not a recommendable model.[53] Even though they do not represent a complete 'mathematization' of sentencing, which is to be rejected as too schematic considering the complexity of the sentencing process and too restrictive regarding the judge's autonomy of decision, it is clearly apparent that the categorization of an offence by means of the two main factors offence level and criminal history still leads to a remarkable reduction of relevant factors.[54] Other (perhaps only in individual cases) particularly relevant factors risk becoming marginalized.[55] The 'calculation' of the sentence by means of the FSG results in seemingly exact 'pseudo point (i.e. precisely defined) sentences' (Pseudo-Punktstrafen) determined by the legislature on an abstract and general level, whose adequacy in the individual case is possibly no longer questioned with due diligence. In this way, very different cases would be schematically treated in a similar manner, which is also problematic with regard to the principle of equality (Art. 3 I GG).[56]

In addition, the construction principle of the FSG probably led (among other factors) to a drastic increase of the level of sentencing in the US, especially through the abovementioned heightened minimum sentences.[57] At the same time a table system automatically results in a simplification of the range of sanctions; it is no coincidence that the FSG consider prison sentences (expressed in months) as the standard form of sanction.[58]

Altogether, the aim of proportionate (i.e. moderate) sentencing based on Constitutional Law is thwarted by making use of this kind of guidelines. The possible advantage of predictable and definite sentences does not come without cost. By now, deviations from the jurisdiction scheme of the Supreme Court are readily possible anyway. If ultimately the sentencing depends on an overall assessment, where the previously complexly determined range of sentences of the FSG is just one of many factors, the system seems inefficient and unnecessarily complicated.

51 U.S. vs. Booker/Fanfan 543 U.S. 220.

52 Meyer ZStW 2006, 512 et seq.; Walther MSchKrim 2005, 362.

53 Kaspar 2018; cf. also Giannoulis 2014, 255 et seq.; a more positive opinion is expressed by Reichert 1999, 247 et seq.; Hoven KriPoZ 2018, 289 et seq.; Grosse-Wilde ZIS 2019, 130 et seq.

54 Meyer ZStW 2006, 74, 85; Kudlich/Koch NJW 2018, 2764.

55 Streng 1984, 315.

56 BVerfGE 42, 64, 72.

57 Uphoff 1998, 150.

58 Fischer 1999, 138.

At least the idea of an independent expert commission, which on the basis of empirical findings frames 'standard sentences' for certain offences as non-binding recommendations, should be adopted in my opinion. These recommendations could take the place of the so far partly used (informal and more or less "secret") sentencing guidelines without restricting judicial independence too much. At the same time, unnecessary margins that open up the possibility of arbitrary decisions should be eradicated in the area of criminal law. By this means, the charged relationship of justice to each individual case on the one hand and legal certainty and clarity on the other hand could be balanced in a new and better way.

5 Reform proposals

As § 46 StGB does not contain a sufficiently determined program for the judges to establish and evaluate the exemplary factors in section 2 of the norm, a reform should, inter alia, be targeted at adjusting its wording – in full awareness that such general legal provisions will only have a limited effect on the equality of sentencing[59] and that additional points of orientation are needed.

5.1 New version of § 46 StGB

Based on the thoughts only roughly sketched and summarized above, the following new version of § 46 StGB is suggested:

§ 46. Principles of sentencing

(1) The sentence serves the purpose of restoration of peace under the law through a proportionate effect upon the general public and the offender. The sentence is to be oriented towards the extent of the interference with peace under the law that was caused by the offence and still exists at the time of the sentencing decision.
(2) The sentence required for restoring peace under the law is primarily determined based on the extent of the wrongfulness of the offence as far as it was culpably executed. The wrongfulness of the act is determined especially by the manner of the execution of the offence, the degree of the violation of the offender's duties and the motives and aims of the offender. The wrongfulness of the offence's consequences is determined in particular by the seriousness of the results of the offence attributable to the offender.
(3) Other circumstances, which reduce the need for restoration of peace under the law, namely a confession, efforts of compensation or victim-offender mediation, a long passage of time between the offence and the sentencing decision as well as procedural delay contrary to the rule of law have to be regarded in favor of the

[59] Epik StV 2019, 492.

offender. The same applies to severe consequences of the act that affect the offender and to exceptionally burdensome effects of the sentence for the future life of the offender in society.
(4) The offender's prior history and their personal and financial circumstances are only to be taken into consideration as far as it is essential for evaluating the facts in paragraph 2 and 3. An aggravation of the sentence because of already committed offences which are currently not up for sentencing is only to be considered if their commission was bindingly established or was admitted by the offender and if they (namely because of the point of time of the commission and the type of offences) increased the menace of the offence and thereby the level of interference with peace under the law. The aggravation of the sentence must not exceed a third compared to the sentence without regarding this factor.

In section 1, the norm contains a reference to the primary (positive) general preventive aim of restoring peace under the law and proportionality of state sentencing, which has to be targeted concurrently. The most important sentencing factors are named in section 2, with the wrongfulness of the act and the wrongfulness of the act's result to be differentiated. The wording clarifies that 'culpability' in the sense of personal fault regarding the committed wrong is not unlimited but can only either fully exist or exist to a limited extent.[60] The problematic factor of the offender's 'attitude' (Gesinnung, cf. § 46 II StGB) is too vague and is consciously disregarded.[61] It is made clear that the results of the offence are only considered insofar as they are attributable to the offender, which, inter alia, requires that the results of the offence are covered by the protective purpose of the violated norm.[62]

In section 3 the broadly recognized factors for reducing the sentence are explicitly listed, the relevance of which for the determination of the blameworthiness of the offences itself is at least questionable, but which can clearly reduce the need for punishment if we consider the aspect of restoring peace under the law.[63] As clarified in section 1, this depends on the date of the sentencing decision. Therefore, positive behavior after the commission of the offence is clearly relevant as well. Mentioning the post-offence behavior as a reason for aggravating the sentence is deliberately desisted from in order to reliably exclude the risk of covert penalization of insubordinate behavior or the mere exercise of procedural rights (like the right to remain silent).[64] A recent article published by a high-ranking state attorney (and at the same time co-author of a well known book on sentencing[65]) has shown that this is a real

60 Cf. also Epik StV 2019, 489 et seq. with further references.

61 Cf. also Streng StV 2018, 598; Schäfer/Sander/van Gemmeren, 2017 recital 614 et seq. are proposing a restrained use of this sentencing factor.

62 Frisch ZStW 1987, 753.

63 Schäfer/Sander/van Gemmeren 2017, recital 848.

64 SSW-StGB-Eschelbach § 46 recital 11.

65 Bruns/Güntge 2019.

threat: The author openly admits that judges will most likely tend to impose higher sentences if the unappealing defendant stubbornly defends himself.[66]

Section 4 clarifies that a comprehensive exploration of the offender's personality must not happen (for their protection). The offender's prior history and their personal and financial circumstances should only be taken into account insofar as they are relevant for evaluating the aspects mentioned in sections 2 and 3. Moreover, the practically very relevant number of prior offences or convictions[67] is recognized as an aggravating factor, but is limited to a third of the sentence regardless of this circumstance. This prevents the drastic sanction leaps based on previous convictions that we can see in German jurisprudence; thus, especially the problem of prison sentences of several months for repeat offenders of absolutely minor petty crimes[68] can at least be reduced if not completely avoided.

5.2 Reform of the range of sentences

Besides this, several changes are advisable in the field of range of sentences. Two central ideas are pursued here: Where abstract-general decisions by the legislature are possible, unnecessary discretionary power of the courts should be avoided. In addition, the legal system of the range of sentences shall enable (and secure) moderate and proportionate sentencing.

For this purpose, the partially very broad range of sentences should be reduced by lowering some of the (in practice almost irrelevant) upper limits.[69] One example is the range of up to five years of imprisonment for regular larceny without any aggravating circumstances as per § 242 StGB.

Increased minimum sanctions are not to be generally abrogated, but in cases where the judges currently often assume a minor case, one should consider lowering the minimum sanction. Eventually, less serious cases provided for by law, which are shaped very differently for the individual offences, should be abolished; instead there should be a general regulation[70] that is to be integrated into § 49 StGB, which allows for a mitigation of the sentencing frame if mitigating circumstances are clearly predominant.

The unspecified particularly serious cases ("unbenannte besonders schwere Fälle") should be abolished as well;[71] if the legislature sees the need for an aggravation of sentences, it will have to work with explicit (binding or non-binding) qualification attributes. The technique of non-binding qualification attributes serving as

66 Güntge ZIS 2018, 386.

67 This fact is widely criticized, cf. e.g. Hörnle 1999, 159 et seq.; Streng StV 2018, 598.

68 Cf. Kaspar 2014, 845 et seq. with further references.

69 Streng 2012, 293 et seq.; Streng StV 2018, 594.

70 Streng StV 2018, 595; Kudlich/Koch NJW 2018, 2765.

71 Verrel JZ 2018, 813; Kudlich/Koch NJW 2018, 2765.

mere examples ("Regelbeispiele") is, despite all criticism, a suitable compromise between legal certainty and justice in each individual case. In its modified form (i.e. without the possibility of assuming an unspecified particularly severe case) it could be carefully extended.

Abrogating the absolute sanction of lifelong imprisonment for murder in § 211 StGB that prevents any consideration of special circumstances in the individual case[72] should also be part of a reform. If the life sentence is to be upheld at all,[73] the possibility of imposing a fixed-term imprisonment should be included as an alternative.

Finally, for the extenuating excuses as designed by law, where a lower need for punishment is to be assumed generally, namely for § 21 (limited culpability), § 23 (attempt) and § 46a StGB (victim-offender mediation and compensation), the merely facultative extenuation of the range of sentences should be made obligatory.

5.3 Improved level of information about sentencing

Finally, more information about sentencing should be provided on different levels. The very practical question of sentencing should play a stronger role in the area of university education in the future.[74] Sentencing research should be strengthened and subsidized by public funds.[75] For the reasons stated above, this should also involve studies concerning the attitudes and needs of the public (including victims of criminal offences) in relation to sentencing by the state. This should aim at a nationwide set of statistics which contains differentiated data about the practice of sentencing.[76]

In the long term, establishing a sentencing database should be considered,[77] which could serve as a source of information for the actors of criminal justice. In doing so, the experiences in Japan with such a database (introduced in 2009) should be taken into account.[78] The Japanese database contains features of more than 12,000 cases of severe crimes falling into the jurisdiction of courts with lay judges (so-called Saiban'in). It was introduced to make sure that the traditionally very homogenous level of sentencing in Japan would be continued after the installation of the lay judge system. This was successfully achieved: The level of sentencing changed only slightly in certain areas, but has remained quite stable on the whole; in cases with remarkable deviations from the usual sentencing, the Japanese High Court has

72 Cf. also BVerfGE 45, 187 et seq. where the Constitutional Court demands the possibility of avoiding life long imprisonment at least in exceptional cases for reasons of Constitutional Law. Unfortunately, the legislator has remained inactive until today.

73 Cf. Höffler/Kaspar GA 2015, 453.

74 Güntge ZIS 2018, 387; Kudlich/Koch NJW 2018, 2766.

75 Kudlich/Koch NJW 2018, 2766.

76 This has already been demanded by Schöch 1972, 66 et seq.; for current developments cf. Heinz, NK 2020, 3.

77 Streng 1984, 309 et seq.; Streng StV 2018, 599.

78 Cf. Nakagawa 2011, 209; Kaspar/Höffler/Harrendorf, NK 2020 (forthcoming).

overridden the court's decision if the deviation was not thoroughly explained. The German High Court (Bundesgerichtshof) has a similar tendency – the huge difference, however, is that only in Japan, the High Court has a clear empirical base for the assumption of a "usual sentencing standard", whereas in Germany, the High Court can only rely on subjective impressions of a limited and unrepresentative number of cases. The introduction of a sentencing database could thus serve as an important tool to make both sentencing decisions and their judicial control more transparent.[79]

Finally, an expert commission should be installed[80] in order to formulate 'standard sentences' for certain offences based on already existing and if necessary newly collected empirical data. These standard sentences could function as anchor points with mere recommendatory character which would have to be modified with regard to the circumstances of the individual case. At least these recommendations would be explicitly laid down, transparent and standardized on the Federal level, which would be some progress compared to the status quo.

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[79] This proposal was accepted by the majority of the Criminal Law Section of the German Assembly of Jurists (Strafrechtliche Abteilung des Deutschen Juristentags) in 2018.

[80] Streng StV 2018, 600; s. auch Hörnle, GA 2019, 287 et seq. The proposal was rejected by the majority of the Criminal Law Section of the German Assembly of Jurists in 2018.

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