Višnja Ranđelović*

DETERMINATION OF CRIMINAL PUNISHMENT AND THE INFLUENCE OF HUMAN FACTORS

Abstract

The process of determination of criminal punishment includes the application of legal norm to the circumstances of a given criminal offence. In the Republic of Serbia there are four prescribed criteria that the judge has to take into consideration in the process of determination of criminal punishment: prescribed punishment, purpose of punishment, aggravating and mitigating circumstances and the achievement of justness and proportionality between the committed criminal offence and the gravity of the criminal sanction. However, this does not mean that the judges simply mechanically apply the legal norm, but rather that the judges, within their discretionary power, assess given circumstances of specific criminal offence. This involves their intellectual activities, where many human factors are engaged, like their wisdom, intuition, attitudes and beliefs, moral and ethic values etc. Through observing the process of decision-making not as a simple mechanical process, but as a human process, the aim of this paper is to point to some relevant human factors that could affect the court decision. In that sense, we have to be aware that the role of judges is to use their knowledge, experience, intuition and wisdom in order to determine punishment which is just and proportionate to the committed criminal offence and the degree of guilt of the offender.

Key words: sentencing, decision-making, criminal punishment, *ratio decidendi*, human factors.

I. INTRODUCTION

By imposing a criminal sanction on the individual offender for having committed an act prescribed as a criminal offence, the type of criminal sanction and its measure reflect the gravity of committed criminal offence and the level of culpability of the offender. The sentencing is formal stage of criminal procedure, and it is not based only on the prescribed normative criteria, but rather involves the simultaneous action and interaction of normative, psychological and social factors. The determination of criminal punishment is justifiably considered to be the crown of all the activities of the court in the criminal procedure, because in this final stage all the provisions of the criminal legislation in some way get their embodiment. The decision on punishment is primarily important for the perpetrator of the crime, but also for the injured party and the public, who is often interested in the outcome of the criminal proceedings. In that sense all the persons involved in criminal proceedings and

* Višnja Ranđelović, LL.M., Teaching Assistant, Faculty of Law, University of Kragujevac, Serbia, e-mail: vmilekic@jura.kg.ac.rs

the decision-making process have significant influence on the determination of criminal punishment.

The legislator in the Republic of Serbia prescribed four criteria that court has to take into consideration in order to determine the punishment, and those are prescribed punishment, purpose of punishment, aggravating and mitigating circumstances and the achievement of justness and proportionality between the committed criminal offence and the gravity of the criminal sanction. However, the process of determination of criminal punishment is not the simple mechanical process of application of legal norm and prescribed criteria, but rather involves the intellectual activity of the judge. This means that the process of determination of criminal punishment has its normative, psychological and sociological perspective. Further, this also means there is a need for judicial decisions to be made on a case-by-case basis, through the exercise of discretionary power of each judge and the engagement of his intellect, instincts, emotions, moral attitudes and wisdom.

Observing the process of determination of criminal punishment as a human process, the aim of this paper is to point to some relevant human factors that could affect this process, precisely the choice of the type and the measure of criminal punishment.

II. CRITERIA FOR DETERMINATION OF CRIMINAL PUNISHMENT IN CRIMINAL CODE OF REPUBLIC OF SERBIA

The legislator in Serbia has determined the basic criteria that the court has to take into consideration when determining a punishment, which include *prescribed punishment* for a particular criminal offense, the *purpose of punishment, aggravating and mitigating circumstances*, as circumstances that affect that in a specific case the punishment is higher or lower, and finally *the achievement of justness and proportionality between the committed criminal offence and the gravity of the criminal sanction*.

Prescribed punishment is the starting point in the process of determination of punishment, and is provided in a penalty range between special minimum and special maximum for each criminal offence. It could be said that prescribed punishment in some way reflects the abstract assessment of the legislator on the gravity of the specific criminal offence and its social danger. There are three systems of prescribing the punishment by legislator: the system of absolutely indeterminate punishments, the system of absolutely determinate punishments, and the system of relatively determinate punishments.[1] In the system of absolutely indeterminate punishments, the legislator does not determine the type or measure of the punishment, but it is left to the judges to decide, by their free assessment, which type of punishment is appropriate and justified for the perpetrator of a specific criminal offence, and in which measure. This system is not recommended nowadays because it leads to great arbitrariness of the court and inequality of treatment. The system of absolutely determinate punishments means that for each criminal offence there is a precisely determined punishment, in type and measure, so there is no possibility for the court to assess the circumstances under which the criminal offence was committed, but only to apply the prescribed punishment. This system was first established in French Criminal Code from 1710, because a French legislator found that the only way to provide justness within criminal legislation is by prescribing precisely determined punishments for each criminal offence, so the judges are disabled to determine different punishments for the same criminal offences.[2] This system is not recommended and accepted nowadays, because it disables the court to assess the punishment according to the

[1] Вељко Икановић, "Одмјеравање казне", in: Станко Бејатовић (ed): *Савремене тенденције кривичне репресије као инструмент сузбијања криминалитета*, Бијељина, 2010, p. 310.

[2] Ibid., p. 311.

circumstances of each specific case. The fact that, according to the legal description, two same criminal offences are committed, does not mean neither that all the circumstances of two cases are absolutely the same, nor that absolutely the same type and measure of punishment is required.

Because of these disadvantages of two mentioned systems, the new system was established and accepted - the system of relatively determine punishments. In this system, for each criminal offence the legislator determines the scope of punishment from its special minimum to its special maximum, in that way leaving it to judges to assess and determine the precise measure of the punishment in every specific case, taking into account all the criteria for determination of the punishment. In this way, the legislator determines the type and the measure of punishment according to abstract gravity of the criminal offence, which reflects the criminal-political dimension of legal penal policy. According to the contrary opinions, the prescription of a punishment by the legislator can`t be considered as determination of punishment *in abstracto*, because in some cases there is a very wide range between special minimum and special maximum, so it is not justified to claim that the legislator gave some abstract assessment regarding the determination of punishment.[3] The concrete gravity of committed criminal offence is being assessed in the criminal procedure and expressed in the punishment to which the accused is sentenced.

The purpose of punishment, as the second criteria for determination of the punishment means that specific purpose of punishment has to be achieved through determined punishment. There are three theories of purpose of punishment: the absolute theory, the relative theory and mixed theory.[4] According to the absolute theory, the purpose of punishment is returning evil for the evil done. Historically, the only purpose of punishment was *retribution*, expressed through the principle of talion, where the only purpose of punishment was to respond to the evil done through the commission of criminal offence, also by evil.

Later, the purpose of punishment got the other dimension, based on the development of some humanistic ideas, and relative theory was developed, so instead of retribution, according to this theory, the main purposes of punishments are directed to the prevention of criminal offences, which could be special and general prevention. The *special prevention* includes influencing the concrete perpetrator of criminal offence in order not to commit criminal offence in the future. Although the idea of special prevention originates in classic philosophy, its revival at the end of the XIX century is attributed to the activities of sociological school of Franz von List.[5] At the beginning there was a great enthusiasm with the idea of special prevention and resocialization, but there is a particular disappointment in its potential influence on the offender. The main shortage of the idea of special prevention is related to the lack of specific criteria for the determination of the duration of the punishment. Namely, as emphasized in literature, if the purpose of punishment is to fix the offender, then it means that he stays in prison until the termination of the process of resocialization, which leads to re-acceptance of theory of absolutely indeterminate punishments.[6] The *general prevention* is oriented towards influencing all potential perpetrators of criminal offences in order to prevent them from committing criminal offence in future. The general prevention could be *negative*, which is being realized through deterrence of potential perpetrators, and *positive*, reflected

[3] Zoran Stojanović, *Krivično pravo, opšti deo*, Pravna knjiga, Beograd, 2013, p. 341-315.

[4] Ibid., p. 292.

[5] Igor Vuković, "Svrha kažnjavanja kao kriterijum odmeravanja kazne", in: Đorđe Ignjatović (ed), *Kaznena reakcija u Srbiji*, IV deo, tematska monografija, Beograd, 2014, p. 154.

[6] Ibid., p. 154.

through supporting and strengthening of those social and moral norms which present barriers to perpetration of criminal offences.[7]

According to the mixed theory, the purposes of punishments are both, prevention and retribution. The main shortage of mixed theory is setting two completely different aims as purposes of punishment, raising in that way the question could they be achieved at the same time.[8]

In the Criminal Code of Serbia the purposes of punishment are prescribed in article 42 as: preventing perpetrators from committing criminal offences and influencing him not to commit criminal offences in the future (par. 1); influencing others not to commit criminal offences (par. 2); and expressing social condemnation for the committed criminal offence, strengthening of moral and reinforcing the obligation of compliance with the law (par. 3). The formulation of the article 42 of the Criminal Code of Serbia reflects the strong influence of relative theory of the purposes of punishment, because it prescribes special prevention (par. 1), negative general prevention (par. 2) and positive general prevention (par. 3) as purposes of punishment. However, it is difficult to defend the attitude that retribution is not contained in the article 42 of the Serbian Criminal Code, because the punishment by itself presents a kind of retribution. According to the attitudes in the literature, the phrase "expression of social condemnation for committed criminal offence" reflects the idea to respond to the committed criminal offence by proportional punishment, in that way achieving retributive goals. Interpreted in this way, Serbian legal solution matches with mixed theory of purposes of punishments, which nowadays dominates in European legislatures and literature.[9]

The potential problem in practice could be the situation when different purposes of punishment require different punishment, so the judge has to choose the most adequate punishment in a specific case. For example, if the offender has committed a few criminal offences which are not serious, the fact that he is a recidivist could require the punishment of longer duration in order to achieve offender`s resocialization as a purpose of punishment, and that the duration of the punishment is not justified in terms of general prevention as a purpose of punishment (taking into account the gravity of the offences).

Aggravating and mitigating circumstances are those circumstances that affect that in a specific case the punishment is higher or lower. There are two legislative approaches to regulation of these circumstances: giving the list of these circumstances as *numerus clausus* and general guidance of circumstances that court has to take into consideration when determining the punishment. In the Criminal Code of Serbia the second approach is accepted, and some of the general aggravating and mitigating circumstances are: the degree of guilt, incentives for the commitment of the criminal offence, the severity of the injury or endangering of the protected property, the circumstances under which the criminal offence was committed, the previous life of the perpetrator, personal occasions of the perpetrator, the behavior of the perpetrator after the criminal offence was committed, other circumstances related to perpetrator`s personality, and other circumstances besides these listed. As can be seen, these circumstances are related to the criminal offence (as a human action or omission), the offender and the victim, which implies that, in assessing all these circumstances, the judge inevitably has to take into consideration all human factors involved. During the process of determination of the punishment, the court should assess each of these circumstances separately, and than all of them together, by using the analytical-synthetic method.

As opposed to this approach, in some Anglo-Saxon legal systems so-called *sentencing guidelines* are prescribed in order to help judges to determine the punishment according to

[7] Zoran Stojanović, op.cit., p. 293.

[8] Ibid., p. 294.

[9] Igor Vuković, op.cit., p. 157.

specific points system. For example, in the United States, the Sentencing Commission was found with authority "to establish sentencing policies and practices for the criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes".[10] According to USA Sentencing Reform Act of 1984, the basic purposes of criminal punishment are: deterrence, incapacitation, just punishment and rehabilitation, and The Guidelines Manual should further develop and promote these purposes. There are three goals of sentencing guidelines.[11] The first goal is to combat crime through an effective, fair sentencing system, and in order to achieve this goal, honesty in sentencing is required. This goal is necessary in order to break up with the practice of imposition of indeterminate sentence of imprisonment and its later substantial reduction by the parole commission. The second goal is the achievement of `reasonable uniformity` in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offences committed by similar offenders. Finally, the third goal is providing proportionality in sentencing through the system that imposes appropriately different sentences for criminal conduct of different severity. The Sentencing Commission was aware that there are a lot of different criminal offences and a lot of different offenders, and that the larger number of subcategories of offence and offender characteristics included in the guidelines, more complex task would be imposed on the courts and that would raise the question on workability of the guidelines system. Additionally, complex combinations of offence and offender characteristics would interact in an unforeseen way and unforeseen situations, so the guidelines system would not be able to cure the unfairness. The main problem for the Sentencing Commission was to reconcile the different perceptions of purposes of criminal punishments, because the Commission had to choose between them by giving one primacy over the others.[12]

According to the Guidelines Manual, the classification of criminal offences was established, which consists of 43 offence levels. However, for each level there isn't a precisely determined criminal punishment, but penalty ranges are proposed. Only for the 43rd offence level, which refers to the most severe criminal offences, life sentence is prescribed as the only one sentence. For this reason, the sentencing guidelines system is criticized, because it keeps the penalty range for each offence level, and the penalty ranges are sometimes set very broadly.[13] The attempt to classify human delinquency in a precise way leads to new questions and issues which arise constantly, which is why the euro-continental legal systems`[14] attitude that the process of determination of criminal punishment cannot be subjected to any mathematical principles and rules is more appropriate and acceptable.[15]

Finally, *the achievement of justness and proportionality between the committed criminal offence and the gravity of the criminal sanction*, is a new criteria for determination of punishment in the Criminal Code of Serbia, according to the 2019 amendment, which came

[10] USA, Guidelines Manual 2018, available at: https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/CHAPTER_1.pdf, accessed: November 2019

[11] Ibid., p. 3.

[12] Ibid., p. 3-5.

[13] Norbert Koster, "Odmeravanje kazni u praksi na osnovu pravnih propisa Nemačke", Časopis za održiv i skladan razvoj prava, no. 2/2018, p. 32.

[14] Macedonia is the country which belongs to euro-continental legal system, but where were two attempts in 2014 to overcome the problem of inequality between courts in determination of type and measure of punishment, through the strong influence of American model, without any critical and profound analysis of its functioning. The Macedonian solution obliged the judge to apply strictly criteria and quantifications for all relevant circumstance expressed in points. More on this topic: Vlado Kambovski, "Zakonsko i sudsko odmeravanje kazne: diskurs o sudskoj nezavisnosti", Правна ријеч, no. 44/2015, p. 256-259. Because of a lot of problems that the Macedonian solution had in practice and o lot of critics of its main ideas, it was abandoned.

[15] Norbert Koster, op.cit., p. 33.

into force on the 1st of December 2019, and it is yet to be seen how courts in Serbia will assess this criteria in the process of determination of punishment. Currently, this new criteria is explained as a result of "earlier announced shift towards retribution".[16]

By taking into account all these criteria, it is left to the courts in Serbia to determine the punishment in each specific case according to their discretionary power. The basic task of the court here is to apply, in accordance with the principle of legality, a legal norm to the given criminal case and to determine appropriate type and measure of criminal punishment. But, in this decision-making process there is a joint action of the principle of legality and the principle of individualization of punishment, and the latter enables judges` attitudes and assessment to find their expression.[17] The attitude that the law could be mechanically applied without any creative role of the court is not realistic, and that is why the requirement for the legal norm to be *lex certa* does not mean that there is no possibility for judicial interpretation, because there is a need for the legal norm to be determined enough, and not absolutely determined.[18]

Namely, the choice of the type and level of punishment is not simply a mechanical process of application of the legal norm, but it also implies the intellectual activity of the judge, and a very complex task for judges who need to determine a sentence that will be just and proportionate to the gravity of the offence and the degree of guilt of the perpetrator. The court applies the law when imposing a sentence, but has a wide scope for assessment in terms of evaluating the given circumstances. As the perpetrator of the criminal offence, that is, his personality and personal circumstances, are an important factor in determining the sentence and greatly affect the decision of the court, so the judge himself, his personality, should not be ignored. This means that the influence of the human factors on the sentencing is great. This is why in criminology literature different researches can be found related to human factors which could influence that in specific case the punishment is higher or lower. In that sense, it is interesting to examine the influence of the human factors on the judge's side when determining the sentence. This would include factors that influence judicial culture, such as judicial education and background, as well as a wider cultural milieu of politics, morality and social life, judges` attitudes, emotions involved, their sex, family status etc.

III. DISCRETIONARY POWER AND THE DETERMINATION OF CRIMINAL PUNISHMENT

Discretion is descriptively explained as "residual concept", "the room left for subjective judgment by the statutes, administrative rules, judicial decisions, social patterns and institutional pressures which bear on an official`s decision."[19], or discretion is "like the hole of a doughnut, which does not exist except as an area left open by a surrounding belt of restrictions".[20]

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[16] Miodrag Majić, "Doživotni zatvor i proizvodnja pristanka", Blog sudije Majića, available at: https://misamajic.com/2019/05/04/dozivotni-zatvor-i-proizvodnja-pristanka/; accessed: November 2019

[17] Дијана Јанковић, "Одмеравање и индивидуализација казне у кривичном законодавству и судској пракси Републике Србије", Анали Правног факултета у Београду, no. 2/2010, p. 373.

[18] Zoran Stojanović, "Garantivna funkcija krivičnog prava", in: Đorđe Ignjatović (ed), *Kaznena reakcija u Srbiji*, VI deo, tematska monografija, Beograd, 2016, p. 4-5.

[19] James Vorenberg, "Narrowing the Discretion of Criminal Justice Officials", Duke Law Journal, no. 4/1976, p. 654.

[20] Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, 1977, p. 31., According to: Erik Luna, "Sentencing", in: Markus D. Dubber, Tatjana Hörnle, *The Oxford Handbook of Criminal Law*, Oxford University Press, 2014, p. 969.

As has been argued, the process of determination of criminal punishment is not the simple mechanical process of application of legal norm, but rather involves the intellectual activity of the judge. This means that the process of determination of criminal punishment does not include only the *normative perspective* (simple application of prescribed criteria for determination of criminal punishment), but also *psychological perspective* related to psychological process of decision-making.[21] *Psychological perspective* includes action and interaction of many different factors that could influence the process of sentencing, such as preferences, prejudices, instincts, emotions, moral attitudes, customs and beliefs, which could be ethical, moral, religious, social, economic, political and other beliefs and attitudes. Further, the process of determination of criminal punishment also includes the *sociological perspective*, related to the social environment in which sentencing takes place and the relationship and interaction of the judges` role with roles of other people who take part in the decision-making process.[22]

Many legal scholars pointed to the influence of judge`s moral attitudes to his exercise of discretionary power in the process of decision-making. If we observe the relation between criminal law and moral through the relation of criminal offence and moral transgression, there are three understandings about the relationship between criminal law and moral.[23] According to the first understanding criminal law should include only the ethical minimum, namely, criminal offences should present only the most severe injuries of moral. According to the second understanding, criminal law should be neutral and independent in relation to the moral. And finally, the third understanding is based on the idea that criminal law should even provide protection to moral attitudes, and develop and strengthen new moral values. Traditionally, the relationship between criminal law and moral is understood as two circles that intersect, meaning that only some behaviors are at the same time both - criminal offence and moral transgression.[24] As criminal law and moral are intertwined in many ways, with a lot of similarities and differences,[25] in this paper we will only point out some of them which are related to the process of the determination of criminal punishment.

As it was argued, one of the purposes of punishment is positive general prevention, expressed in formulation "strengthening of moral and reinforcing the obligation of compliance with the law". This phrase should be understood as a strengthening of moral of the society as a whole. So, the judge, as a human being with his own system of moral values, has to take care that determined punishment in specific case will contribute to the strengthening of moral of the society. In this sense it is maybe interesting to mention Croatian solution related to positive general prevention, which is formulated as "impact on citizens` awareness of the dangers of criminal offences and the fairness of punishing their perpetrators", which reflects in a better way the idea of positive general prevention.[26]

Further, in the process of assessment of criteria for determination of criminal punishment and all relevant circumstances of each criminal case, the judge exercises his discretionary power, where the influence of his moral and other attitudes and beliefs have a great role. Nowadays, the discretionary power of judges and psychological perspective of sentencing are observed through the idea of mechanical judiciary. Computers can help legal profession in three ways:

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[21] Ralph Henham, *Sentencing and the legitimacy of trial justice*, Routledge, 2012, p. 126.

[22] John Hogarth, *Sentencing as a Human Process*, University of Toronto Press, 1971, p. 16.

[23] Zoran Stojanović, Krivično pravo, op.cit., p. 13.

[24] Ibid., p. 13.

[25] More on this topic: Kristian Kühl, "Strafrecht und Moral - Trennendes und Verbindendes", Crimen, no. 3/2017, p. 230-241.; Kristian Kühl, "Pet poglavlja iz nenapisane knjige o (krivičnom) pravu i moralu", Crimen, no. 1/2014, p. 3-17.

[26] More on this topic: Igor Bojanić, Marin Mrčela, "Svrha kažnjavanja u kontekstu šeste novele Kaznenog zakona", Hrvatski ljetopis za kazneno pravo i praksu, vol. 13, no. 2/2006, p. 431-449.

computers can help find the law, they can help analyze the law and they can help lawyers and judges to predict or anticipate decisions.[27] It is indisputable that computers can help find and analyze the law, but the question remains if the computers are capable of predicting or anticipating judges` decisions, and if they are - to what extent and with what percentage of success. If we want the prediction in law to be successful, that requires understanding the law, understanding the facts and understanding the people, especially judges.[28] The main challenge presents understanding the people because they are not completely predictable.[29] This means not only to be familiar with their personality, their moral, social, political and other attitudes, but also to be familiar and to understand their logic. In the case of judges it is necessary to study judicial logic, in order to understand *ratio decidendi*. This could be enough for prediction of their future decisions, but only if individual judges are consistent, because if individual judges are not consistent with themselves, modern sciences will not be so successful in predicting their future judgments.[30]

The use of computer programs and mechanical judiciary is rather applicable in countries of common law legal system because they are based on the use of legal precedents. In the process of determination of criminal punishment, the main task is to establish the facts, and then to set aside those facts that are relevant for court`s decision. So, the use of mechanical judiciary in order to fulfill this task is more appropriate in those legal systems where the base of legal precedents exists (common law legal system), than in those legal systems that are based on the strict use of the principle of legality (continental legal system).[31]

It is truth that mechanical judiciary is multiply useful for the process of sentencing, especially when it can be used in order to help judges to find and analyze the law, but it shouldn't be ignored that the judge himself is the only one who can, by exercising his discretionary power, apply the legal norm to circumstances of each specific case and to adapt the law to those specific circumstances. Mechanical judiciary cannot replace the judge in this field, especially if we take into account the previously mentioned judges` unpredictability. Decision-making in some complex criminal cases when judges have to take into consideration some complex issues of moral, politics and principles, couldn’t be subjected to any computer program and mechanical judiciary.

Beside all the benefits that computer programs and mechanical judiciary bring, it is still hard to imagine that they could completely replace judges in the process of decision-making. Is it possible to predict all life situations that could have happened and to determine all different circumstances and factors that could affect those life situations? In criminal law that is very hard to imagine. Criminal offence, by its nature, presents human action or omission, so the human factor is involved. In that sense, it is very hard to imagine that some computer program could predict all possible ways of committing many different criminal offences with many different specific circumstances involved. That is why the human being, in this case criminal judge with his discretionary power, is irreplaceable in decision-making process. The question is raised: which are those human factors that could have an impact to the process of determination of criminal punishment?

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[27] Reed C. Lawlor, "What Computers Can Do: Analysis and Prediction of Judicial Decisions", American Bar Association Journal, vol. 49, no. 4, April 1963, p. 337.

[28] In the literature could be found some interesting attempts of application of mathematical methods, via computers, to analyze psychological attitudes of members of the Supreme Court on some important political and economic issues, in order to make quantitative investigations of the influence of personal attitudes of judges on their decisions. See more: Reed C. Lawlor, op.cit., p. 339-340.

[29] Reed C. Lawlor, op.cit., p. 339.

[30] Ibid., p. 340-341.

[31] Dragutin Avramović, "Analiza predvidljivosti postupanja sudija - povratak mehaničkoj jurisprudenciji?", Crimen, no. 2/2018, p. 159.

IV. THE INFLUENCE OF HUMAN FACTORS IN SENTENCING

In order to impose appropriate punishment in a particular case, the offender and criminal offence that he has committed must be judged individually, taking into account context-sensitive evaluation of the offender`s personal background and the specific conduct at issue, but also taking into consideration a true-life assessment of the larger community which has shaped the individual and affected his behavior.[32] U.S. Supreme Court highlighted "wisdom, even the necessity, of sentencing procedures that take into account individual circumstances", recognizing the "judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failing that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.".[33]

Sentencing should be understood as a human process, where many human factors are involved and have impact to the determination of criminal punishment. In each criminal process there is, among other factors, a simultaneous interaction of the personal characteristics of the judge, personal characteristics of the offender and the type of criminal offence that he has committed, as well as personal characteristics of the victim. Whenever some criminal offence is committed, there are many different combinations of facts related to the offender, the offence and the surrounding circumstances which could affect the decision on the type and measure of the criminal punishment. Further, not only the personality of persons involved in the process of sentencing, but also different social contexts in which court operate (differences in crime rate, in public opinion, or in resources to deal with offenders which are available locally) affect the decision on criminal punishment.[34]

Researches have shown that complementary action and interaction between legal factors, personality and the environment of a judge take place in the process of decision-making, but the involvement of legal, psychological and sociological factors in decision-making process produces difficulties of selecting those variables from each category that are likely to be most relevant.[35]

As legal factors in sentencing were discussed earlier, psychological and sociological factors will be addressed in this part of the paper.

Mostly, judges tend to keep a certain social distance between themselves and other persons involved in the process of sentencing, but this is not always the case, because sometimes the influence of others, like prosecutors or barristers, can affect their decisions to a certain extent. Further, public opinion can have a great role in the way of judges` thinking, because researches have shown that judges could identify very strongly with their communities. Also, the committed criminal offence, especially in sensational criminal trials, could receive a lot of attention in the community and mass media, and in that case the judge will often direct his sentence to the general public too. However, the greatest social influence in the environment of the judges is their relationship with each other, because they work together, sometimes share their office, they talk to each other and exchange opinions and knowledge.[36] One interesting data that emerged during the research is that more punitive judges appear to be more socially isolated to some extent and are more likely to deny the influence of other in their sentencing behavior.[37]

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[32] Erik Luna, op.cit., p. 973.

[33] Koon v. U.S., 518 U.S. 81, 92, 113 (1996), According to: Erik Luna, op.cit., p. 973.

[34] John Hogarth, op.cit., p. 6-7.

[35] Ibid., p. 17-18.

[36] Ibid., p. 179-180.

[37] Ibid., p. 201.

Further, there are many researches that have shown the existence of relationship between the social background and past experience of the judge and their conduct in the court, namely the relationship between political affiliation, social class background, age, religion and ethnic background, on the one hand, and judicial behavior, on the other.[38]
Considering psychological perspective, researches have shown that the huge influence upon sentencing has the personality of the judge, his personality in terms of his social background, education, religion, expressive temperament, and social attitudes. Although the age of the judge is not a psychological factor, his attitudes and beliefs are very dependent on his age. For example, older judges tend to be more offence-oriented than offender-oriented, and more discriminatory in assessing criminal offence, taking into account a large number of factors as essential to the proper assessment of a criminal act. As older the judges get, they are less concerned about political interference in the judicial procedure, they have a greater feeling of independence, self-reliance, confidence and moderation.[39] Family background also has an impact to judges` attitudes and beliefs and therefore affects the process of decision-making. Judges with professional family background attach more importance to the background of the offender than to the offence, and attach more weight to reformation of the offender, while the judges from working-class background are more "punitive" in their attitudes and beliefs.[40] Education is supposed to be an influential factor in the sense that legally-trained judges have more creative and flexible approach to the law, more offender-oriented penal philosophy, and more confidence in self, while lay judges tend to respect strictly the requirements of the law.[41] Further, judges` attitudes on race and ethnic have some impact to decision-making process, for example, in America there are significant racial and ethnic differences in criminal justice outcomes,[42] and one research even shown that defendants charged with killing white victims were 4.3 times more likely to receive a death sentence than defendants charged with killing blacks.[43] Religion is closely related to racial and ethnic background, and so far the researches have shown the influence of judges` religion to their offender-oriented or offence-oriented approach in decision-making process.[44]

V. CONCLUSION

Historically, there were many attempts to provide justness and fairness within the criminal procedure. At one time this included the establishment of the system of absolutely determinate punishments, in type and measure, so there was no discretionary power for the court nor the possibility for the court to assess the circumstances of each specific criminal case. In modern age, this includes the sentencing guidelines where relevant circumstances are presented through a point system and the role of judge is to apply these criteria and

[38] See: Sidney Ulmer, "The Political Party Variable in the Michigan Supreme Court", Journal of Public Law, no. 11/1962; John R. Schmidhauser, "Stare Decisis, Dissent and the Backgrounds of Justice, of the Supreme Court", University of Toronto Law Journal, no. 14/1962; Stuart Nagel, "Ethnic Affiliations and Judicial Propensities", Journal of Politics, vol. 24, no. 1/1962
[39] John Hogarth, op.cit., p. 211-212.
[40] William Lentz, "Social Status and Attitudes toward Delinquency Control", Journal of Research in Crime and Delinquency, vol. 3, no. 2/1966, p. 147-154.
[41] John Hogarth, op.cit., p. 213.
[42] See summarized U.S. studies on this topic: Robert Crutchfield, April Fernandez, Jorge Martinez, "Racial and Ethnic Disparity and Criminal Justice: How Much Is Too Much?", Journal of Criminal Law and Criminology, vol. 100, no. 3/2010, p. 903-932.
[43] David C. Baldus, George Woodworth, Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis*, Upne, 1990, according to: Erik Luna, op.cit., p. 975.
[44] John Hogarth, op.cit., p. 214.

quantifications in order to get the appropriate punishment. Although there are good intentions behind these attempts, expressed in the idea of reaching justness and fairness within criminal procedure, their main shortage is the reduction of decision-making process to a simple application of legal norms. Determination of criminal punishment is considered to be the most difficult and most complex task of the judge in criminal procedure. Decision-making process is a human process, which requires all circumstances of a specific case to be assessed, separately and than together. This means that intellectual activity of the judge is engaged, with the influence of his experience, intuition, instincts, emotions, attitudes and beliefs, moral and ethic values. The influence of all these human factors is reflected in court decision, where judicial logic and the *ratio decidendi* are provided. In that sense, as it is emphasized in the literature, "a sentence which may appear irrational to the outside observer may be perfectly rational to the sentencing judge".[45]

In decision-making process there is a constant simultaneous action and interaction of psychological and sociological factors. Among psychological factors the influence of moral, ethic, political and other attitudes and beliefs is great, and behind these factors there is an influence of judges` age, family background, education, religion etc. When it comes to sociological factors, it is reasonable to assume that attitudes and practice of other judges who work together, public opinion in one community (especially in sensational criminal trials), as well as attitudes of other individuals involved in criminal process and especially in decision-making process, will greatly affect the final judge`s decision on criminal punishment.

The same as a criminal offence, by its nature, presents human action or omission, so in decision-making process there must be space for judges` free assessment of all given circumstances of each specific criminal offence, with belief in judicial logic, based on his knowledge, previous experience, wisdom and intuition. The application of prescribed criteria for determination of criminal punishment (*normative perspective*) to the given criminal case is followed by intellectual activities of the judge, that is his thinking and reasoning, which are always to some extent shaped under the influence of psychological and social factors (*psychological and sociological perspectives*). In that sense, "court decision on punishment is at the same time an act of application of legal norm, as well as an act of value assessment of given circumstances."[46]

Bibliography:

1. David C. Baldus, George Woodworth, Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis*, Upne, 1990
2. Дијана Јанковић, "Одмеравање и индивидуализација казне у кривичном законодавству и судској пракси Републике Србије", Анали Правног факултета у Београду, no. 2/2010
3. Dragutin Avramović, "Analiza predvidljivosti postupanja sudija - povratak mehaničkoj jurisprudenciji?", Crimen, no. 2/2018
4. Erik Luna, "Sentencing", in: Markus D. Dubber, Tatjana Hörnle, *The Oxford Handbook of Criminal Law*, Oxford University Press, 2014
5. Igor Bojanić, Marin Mrčela, "Svrha kažnjavanja u kontekstu šeste novele Kaznenog zakona", Hrvatski ljetopis za kazneno pravo i praksu, vol. 13, no. 2/2006
6. Igor Vuković, "Svrha kažnjavanja kao kriterijum odmeravanja kazne", in: Đorđe Ignjatović (ed), *Kaznena reakcija u Srbiji*, IV deo, tematska monografija, Beograd, 2014
7. James Vorenberg, "Narrowing the Discretion of Criminal Justice Officials", Duke Law Journal, no. 4/1976
8. John Hogarth, *Sentencing as a Human Process*, University of Toronto Press, 1971
9. John R. Schmidhauser, "Stare Decisis, Dissent and the Backgrounds of Justice, of the Supreme Court", University of Toronto Law Journal, no. 14/1962

[45] John Hogarth, op.cit., p. 23.

[46] Дијана Јанковић, op.cit., p. 374.

10. Kristian Kühl, "Pet poglavlja iz nenapisane knjige o (krivičnom) pravu i moralu", Crimen, no. 1/2014
11. Kristian Kühl, "Strafrecht und Moral - Trennendes und Verbindendes", Crimen, no. 3/2017
12. Miodrag Majić, "Doživotni zatvor i proizvodnja pristanka", Blog sudije Majića, available at: https://misamajic.com/2019/05/04/dozivotni-zatvor-i-proizvodnja-pristanka/
13. Norbert Koster, "Odmeravanje kazni u praksi na osnovu pravnih propisa Nemačke", Časopis za održiv i skladan razvoj prava, no. 2/2018
14. Ralph Henham, *Sentencing and the legitimacy of trial justice*, Routledge, 2012
15. Reed C. Lawlor, "What Computers Can Do: Analysis and Prediction of Judicial Decisions", American Bar Association Journal, vol. 49, no. 4, April 1963
16. Robert Crutchfield, April Fernandez, Jorge Martinez, "Racial and Ethnic Disparity and Criminal Justice: How Much Is Too Much?", Journal of Criminal Law and Criminology, vol. 100, no. 3/2010
17. Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, 1977,
18. Sidney Ulmer, "The Political Party Variable in the Michigan Supreme Court", Journal of Public Law, no. 11/1962
19. Stuart Nagel, "Ethnic Affiliations and Judicial Propensities", Journal of Politics, vol. 24, no. 1/1962
20. USA, Guidelines Manual 2018, available at: https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/CHAPTER_1.pdf
21. Vlado Kambovski, "Zakonsko i sudsko odmeravanje kazne: diskurs o sudskoj nezavisnosti", Правна ријеч, no. 44/2015
22. Вељко Икановић, "Одмјеравање казне", in: Станко Бејатовић (ed): *Савремене тенденције кривичне репресије као инструмент сузбијања криминалитета*, Бијељина, 2010
23. William Lentz, "Social Status and Attitudes toward Delinquency Control", Journal of Research in Crime and Delinquency, vol. 3, no. 2/1966
24. Zoran Stojanović, "Garantivna funkcija krivičnog prava", in: Đorđe Ignjatović (ed), *Kaznena reakcija u Srbiji*, VI deo, tematska monografija, Beograd, 2016
25. Zoran Stojanović, *Krivično pravo, opšti deo*, Pravna knjiga, Beograd, 2013