

# **Sentencing of Drug Offenders: Legislators' Policy and the Practice of the Courts in South Eastern Europe**

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# Country Report Croatia





## Preface

As part of the activities of the project “Drug law reform in South East Europe” Diogenis presents in this publication the findings of the research “Sentencing of Drug Offenders: The Legislator’s Policy and the Practice of the Courts in South Eastern Europe”.

The research deals with an important issue which –in our opinion- needs to be addressed with evidence based data of the everyday practice. The unilateral choice of punishment and imprisonment as an effective response to the drug problem has been proven to be one of the major weaknesses of the current drug control system. Criminal law responses have been considered as the most effective means to tackle it. This fact has nourished the prevailing public opinion that the more severe penalties, the better. The interaction between severe repressive measures of the legislature and a large part of the public perception that tougher penalties are needed to eliminate drug use and dependence is particularly evident in South East Europe.

However, during the last twenty five years drug laws have been amended in nearly all the countries of South East Europe. Although the focus on the importance to provide public health-oriented assistance has increased steadily and the overall approach to drug use and addiction has improved, several drug law provisions remain problematic and need to be adapted to the current scientific insights and the changing social conditions.

The country reports of this research are a contribution to the search of legal provisions that are more consistent and will lead to greater efficiency. They contain valuable information about the current state of drug laws per country, summarize the problems concerning legislation and practice on sentencing of drug law offenders and suggest alternatives.

The current discussion about the shift in drug policy and drug legislation from repressive measures and actions to public health, social inclusion and respect for human rights is supported by the findings in this research. The identification of sanctioning practices on the state (macro) level and the analysis of the practice in drug offence cases on a county (micro) level, confirm facts that are generally shared. Most drug offenders are prosecuted for and convicted of possession of drugs for personal use. Statistics also show that a significantly

A small number of drug traffickers are convicted as compared with all the other groups of offenders.

A significant finding of the research is that judges are interpreting legislation in different ways. There is a small number of judges who impose sanctions which are harsher than those required by the legislator. Some of them see drug possession per definition as drug trafficking. The vast majority of the judges, however, is more lenient than the legislator, because they take into consideration all aspects of the situation of the offender (family, social and economic situation, previous convictions etc.) It is more and more common practice that the courts pronounce very often a suspended sentence by absence of prior conviction or other extenuating circumstances and see drug offenders primarily as persons in need of treatment. In this context we may say that the judiciary must be consulted and be taken seriously by the responsible politicians and the governments before proposing new legislation on drugs.

In several countries –and also in international level– an intense discussion is taking place about punishing or not drug possession for personal use and minor drug offences. Decriminalization of drug possession for personal use is introduced in some countries with success and positive results. At the United Nations meetings, several high rank officials express the opinion that the international drug control conventions do not impose on Member States obligations to criminalise drug use and possession for personal consumption. The recent UN General Assembly Special Session (UNGASS) calls Member States to “encourage the development, adoption and implementation, with due regard to national, constitutional, legal and administrative systems, of alternative or additional measures with regard to conviction or punishment in cases of an appropriate nature” and “Promote proportionate national sentencing policies, practices and guidelines for drug-related offences whereby the severity of penalties is proportionate to the gravity of offences and whereby both mitigating and aggravating factors are taken into account”. We hope that member states in the region of South East Europe will consider these calls as an encouragement to continue reforming their drug legislation in this direction.

This research is an example of co-operation between civil society organisations and the scientific community. Diogenes owes thanks to the researchers who have been willing to do this work with very scarce resources and great enthusiasm. Thanks also to the European Commission and the Open Society Foundations for their financial support.

## Country Report Croatia

### Sentencing of Drug Offenders: Legislators' Policy and the Practice of the

Courts by Dalida Rittossa <sup>1</sup>

## 1. National legislative policy on drugs

### 1.1. Drug legislative policy and the most important legal instruments that regulate suppression of abuse of narcotic drugs

**How is the drug legislative policy constructed in your country? What are the most important legal instruments that regulate suppression of abuse of narcotic drugs?**

According to numerous media headlines and political statements by Croatian government officials, there appears to be today a significant interest in the criminal justice system's response to suppression of drug abuse.<sup>2</sup> Significant interest has

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  2. Croatian Radiotelevision: *Raste zloporaba metadona, marihuane i sintetičkih droga* / The Increase in Abuse of Methadone, Cannabis and Synthetic Drugs, <<http://vijesti.hrt.hr/raste-zloporaba-metadona-marihuane-i-sintetickih-droga>> (accessed Jan. 28, 2014); Government of the Republic of Croatia: *Stabilan trend zlouporabe droga u Hrvatskoj, nove prijetnje u obliku tzv. "novih droga"* / Stable Trend in Drug Abuse in Croatia, SoCalled "New Drugs" as New Threats, <[http://www.vlada.hr/hr/naslovnica/novosti\\_i\\_najave/2013/lipanj/stabilan\\_trend\\_zlouporabe\\_droga\\_u\\_hrvatskoj\\_nove\\_prijetnje\\_u\\_obliku\\_tzv\\_novih\\_droga](http://www.vlada.hr/hr/naslovnica/novosti_i_najave/2013/lipanj/stabilan_trend_zlouporabe_droga_u_hrvatskoj_nove_prijetnje_u_obliku_tzv_novih_droga)> (accessed Jan. 28, 2014); Tripalo, D.: *Zlouporaba droga prema novom Kaznenom zakonu* / Drug Abuse According to the New Criminal Code, *Novine u kaznenom zakonodavstvu* / Novelties in Criminal Legislation, Supreme Court of the Republic of Croatia, Zagreb, 2012, pp. 27-48.; Cvjetko, B.: *Kazneno zakonodavstvo i kaznenopravna reakcija na kazneno djelo zlouporabe opojnih droga u Republici Hrvatskoj* / Criminal Legislation on and Criminal Legal Reaction to the

Criminal Offence of Narcotic Drug Abuse in the Republic of Croatia, Croatian Annual of Criminal Law and Practice, Vol. 10, No 2, 2003, p. 917.



been evidenced recently by criminal legal practitioners and scholars who debated over the latest Criminal Code amendments aimed at decriminalisation of drug possession for personal use.<sup>1</sup> How to control and suppress narcotic drug abuse by means of state repression and what are the limits of such control is currently perceived as an important social issue. Just like in other countries, the issue of drug sentencing has gone mainstream.<sup>2</sup> The relevance of the questions posed cannot be disputed, although it seems as if it is forgotten that the same issue was under the legislator's scrutiny centuries ago. In order to properly understand the problem in its current manifestations, it is crucial to explore the evolution of criminal norms prohibiting the use of drugs in an historical context.

As far as is known, herbs were commonly used in the past for healing purposes. The healing effects of plants were associated with mysticism and magic,<sup>3</sup> thus, under the influence of the Catholic Church, local feudal rulers began to impose restrictions on herbal healing through criminal norms.<sup>4</sup> Treating sickness with herbal medicants was considered witchcraft and identified with poisoning; therefore, it was one of the heaviest criminal offences mostly punishable by death. Examples of imposing the death penalty against those who prepared medical potions with herbs can be found in the

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<sup>1</sup> . The 2012 Amendments to the 2011 Criminal Code, Official Gazette No 144/2012.

<sup>2</sup> . Tucker, E.: Holder Endorses Proposed Drug Sentencing Changes, abc News, <<http://abcnews.go.com/Politics/wireStory/holder-endorses-proposed-drug-sentencing-22891155>> (accessed Mar. 13, 2014)

<sup>3</sup> . Although three separate acts, witchcraft, herbal healing and poisoning were interrelated and bound by mysticism and the unknown in Middle Age societies. (Redep, J: *Moć Vradžbine* / Power of Sorcery, published in: Šeparović, Z.. (ed.): Collected Papers, Conference on the Statute of Korčula, 28th and 29th April 1988, Yugoslav Society for Victimology, Zagreb, 1989, p. 237 (237-251). This connection has been preserved to date in certain cultures in which consumption of plants containing psychedelic substances is used for initiating mystical enlightenment (Lerner, M. and Lyvers, M.: A Cross-Cultural Comparison of Values, Beliefs, and Sense of Coherence in Psychedelic Drug Users: Summary of Findings from a MAPS-Funded Study, Maps, Vol. 14, No 1, 2004, pp. 9-10; Pahnke, W., N.: Drugs and Mysticism, The International Journal of Parapsychology, Vol. 8, No 2, 1966, pp. 295-313).

<sup>4</sup> . Grozdanić, V. and Rittossa, D.: *Povijesni razvoj kaznenopravnog statusa žena* / A Historical Review of the Criminal Legal Status of Women, published in: Grozdanić, V. (ed.): *Kada žena ubije* / When a Woman Kills, Faculty of Law University of Rijeka, 2011, p. 41.

first Croatian medieval statutes. For example, the Statute of Korčula imposes a capital punishment by burning upon anyone who makes potions using herbs for poisoning or sorcery.<sup>5</sup> As the keeper of the peace, a feudal prince in Hvar and his judges possessed full discretionary power as regards the sentencing of offenders who prepared poison potions with herbs.<sup>6</sup> A middle solution between granting full sentencing powers to a local ruler and determining sanctions by a written statute as a means to avoid arbitrariness was introduced in the Statute of Dubrovnik. According to Article 7 of the 6th Book, death by burning was a penalty for herbal tonic and potion makers whose victims were killed or went mad. If the potion was made but the victim did not suffer such fatal consequences, a territorial prince was vested with power to sanction.<sup>7</sup> A similar provision can be found in the Statute of Bala where the penalty for a completed offence was hanging for male and burning for female offenders. In case of an attempt, the offender was branded and whipped in public according to local customs in order to deter.<sup>8</sup> As the process of devolution of women from healers to witches was progressing, criminal offences were shaped accordingly.<sup>9</sup> Sorcery, healing with herbs and poisoning got gender connotations while being exclusively perceived as female offences. Once herbal healers, women became devil dealers; consequently, according to the

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<sup>5</sup> . Art. 17 of the 1214 Statute of Korčula, published in: Šeparović, Z. (ed.): *Statut Grada i otoka Korčule / The Statute of Korčula City and Island*, Yugoslavian Academy of Sciences and Arts, Zagreb, 1987, p. 38; The exact same punishment for witchcraft was prescribed under Art. 87 in the 4th Book of the Statute of Split, published in: Cvitanić, A. (ed.): *Statut Grada Splita / The Statute of Split*, Literary Circle Split, Split, 1998, p. 681.

<sup>6</sup> . Art. 10, 3rd Book of the Statute of Hvar dated 1333, Literary Circle Split, Split, 1991, p. 128.

<sup>7</sup> . Art. 7, 6th Book of the Statute of Dubrovnik City dated 1272, Historical Archive Dubrovnik, Dubrovnik, 1990, p. 176.

<sup>8</sup> . Art. 10 of the Statute of Bala City dated 1477, published in: Margetić, L. (ed.) *Statut Grada Bala / The Statute of Bala City*, Adamić, Rijeka, 2007, p. 115.

<sup>9</sup> . For more information on the process of devolution of women from healers to witches, see McPhee, M.: *Herbal Healers and Devil Dealers: A Study of Healers and Their Gendered Persecution in the Medieval Period*, California State University, Sacramento, 2009, pp. 47-65.

provisions of certain Croatian medieval statutes, the criminal offences in question could have been committed only by women perpetrators.<sup>10</sup>

Although magic was treated as a material crime causing injuries to life, health and property in the first local statutory laws, this offence was not clearly distinguished from poisoning. An important attempt to divide these offences was made in *Constitutio Criminalis Carolina* dated 1532. The Imperial Criminal Code established material and procedural rules for witchcraft prosecutions;<sup>11</sup> in practice, however, the application of local territorial norms prevailed.<sup>12</sup> Due to this fact, in the following period there were no codifications valid for the provincial territories in Croatia containing substantially different provisions prohibiting the use of plants with hallucinatory effects. A significant turning point in the nomotechnical construction of drug-related crimes is the 1852 Austrian Criminal Code, which was applied throughout the Empire. Under Article 343, whoever treated the sick with ether vapours (narcotism) without medical schooling and without being legally licenced to treat the sick as a physician or surgeon was responsible for a petty misdemeanour punished by strict arrest from one to six months. If a death occurred due to the offender's fault, he was punished for a gross misdemeanour by strict arrest up to three years.<sup>13</sup> In accordance with

<sup>10</sup> . Art. 26, 2nd Book of the 1322 Statute of Trogir City, Literary Circle Split, Split, 1988, p. 81; Art. 14 of the 1388 Krk (Vrbnik) Statute, published in: Margetić, L.: *Srednjovjekovni zakoni i opći akti na Kvarneru* / Medieval Laws and General Acts in Kvarner, Globus, Zagreb, Rijeka, 2012, p. 521. According to both statutes, death by burning was the sanction for female poisoners.

<sup>11</sup> . Levack, B., P.: *The Oxford Handbook of Witchcraft in Early Modern Europe and Colonial America*, Oxford University Press, Oxford, 2013, p. 194.

<sup>12</sup> . The *Constitutio Criminalis Carolina* had subsidiary validity due to its "salvatorische Klausel". According to this provision, the maintenance of good and ancient customary laws was guaranteed to each State. The clause was a sign of State autonomy and imperial failure to accomplish its legislative pretensions, as well as of the direct, indisputable need to maintain sentencing stability by applying criminal provisions which were put in practice years ago. Hofmann, H., H.: *Quellen zum Verfassungsorganismus des Heiligen Römischen Reiches Deutscher Nation 1495-1815*, Darmstadt, 1976, p. 84; Esmein, A.: *A History of Continental Criminal Procedure: With Special Reference to France*, The Lawbook Exchange Ltd., New Jersey, 2007, p. 306.

<sup>13</sup> . Art. 337 and 343 of the 1852 Austrian Criminal Code, published in: *The Austrian Penal Act, The American Series of Foreign Penal Codes*, Fred B. Rothman & Co., Sweet & Maxwell Ltd., Littleton, London, 1966, p.133.

Article 377, it was prohibited to boil poppy capsules and use it as a remedy for children.<sup>14</sup> Both aforementioned offences were classified as misdemeanours, not felonies, against the safety of life as

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<sup>14</sup> . Art. 377 of the 1852 Austrian Criminal Code, published in: Kranjčić, S. i Rušnov, A. (eds.): *Kazneni zakon o zločinstvih, prestupcih i prekršajih od 27. svibnja 1852. s naknadnimi zakoni i naredbami i sa svim važnijimi rješitbami Vrhovnog suda u Beču* / Criminal Code Concerning Felonies and Gross and Petty Misdemeanours with Additional Laws and Regulations and All Important Judgments of the Supreme Court in Vienna, Lav Hartman Bookshop, Zagreb, 1890, p. 153.

an interest to be protected. This particular fact reflects the historical circumstances, social conditions and political background of the time. Revolutionary ideas affected the philosophical foundations of criminal law, offering new insights into criminal policy and establishing the notion of the limits of protection afforded by criminal law. Moreover, Article 343 establishes the protection of patients, enforces standards for the medical profession and mirrors the appreciation of medical knowledge of the time.<sup>15</sup> Historically, the medical and social use of opium developed concurrently.<sup>16</sup> The medical value of opium was accepted by medical professionals and its habitual use as a soporific beverage was widespread among everyday people in Europe, as well as in the New World.<sup>17</sup> On the other hand, there was no unanimity on the gravity of its daily use and comments on opium dependence began to appear in medical writings.<sup>18</sup> Moreover, the prohibition to use poppy capsules as a remedy for children was part of a disciplinary policy against local customs aimed at the fulfilment of the central state role of creating behavioural policies to enhance the well-being of state subjects.

It is important to apply the same approach when elaborating on drug-related crimes in the criminal codes that followed, keeping in mind the broader

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<sup>15</sup> . Protecting the medical profession was part of a greater state policy to intervene and shape public health. The second half of the nineteenth century was a period of promulgation of laws concerning various aspects of public health and shaping legal medical practice in Europe. On the other hand, state regulations on the medical profession were scarce in the United States and this resulted in negative consequences for the general progress of medical jurisprudence in that country. Chaillé, S., E.: Origin and Progress of Medical Jurisprudence 1776-1876, *Journal of Criminal Law and Criminology*, Vol. 40, No 4, 1949, pp. 400-401.

<sup>16</sup> . Quincey's epical work *Confessions of an English Opium-Eater*, published in 1821, and the far-reaching influence it had on readers to experiment with opium probably best describes the scale of opium use.

<sup>17</sup> . Giving opium to children to help them sleep better was also widespread in the Ottoman Empire in the nineteenth century. (Demirci, T. and Somel, S., A.: Women's Bodies, Demography, and Public Health: Abortion Policy and Perspectives in the Ottoman Empire of the Nineteenth Century, *Journal of the History of Sexuality*, Vol. 17, No 3, 2008, p. 411). For an historical account of opium use and trade routes that brought opium to Europe, see: History of Opium, Opium Eating, and Smoking, *The Journal of the Anthropological Institute of Great Britain and Ireland*, Vol. 21, 1892, pp. 329-332.

<sup>18</sup> . Terry, C. E.: The Development and Causes of Opium Addiction as a Social Problem, *Journal of Educational Sociology*, Vol. 4, No 6, 1931, pp. 335., 339.

framework of diverse state policies. In accordance with the 1929 Criminal Code

it was forbidden to give to another person without authorisation morphine, cocaine or any other similar beverages harmful to health.<sup>21</sup> The offence was punishable with imprisonment for up to six months and a fine up to 5,000 dinars.<sup>19</sup> The explicitly enumerated narcotic drugs were commonly used as analgesic drugs; however, a significant amount of medical evidence pointed to the conclusion that the free use of opioid pain relievers was injurious. In certain medical circles, strong criticism was more frequently expressed against patent remedies containing opium or its derivatives. The first anti-opium movements emerged in Europe, significantly influencing certain countries' official governmental policies on opium trade.<sup>20</sup> Moreover, the FrancoPrussian War and World War I contributed to aggravating the problem of opium addiction.<sup>21</sup> For that reason, as one of the offences against public health, the drug-related offence of the 1929 Criminal Code was no longer primarily aimed at the protection of the medical profession. No matter the shift in value protection, the level of criminal repression remained the same.

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<sup>19</sup> . Art. 268(3) of the 1929 Criminal Code, published in: Šilović, J. and Frank, S.: *Criminal Code for the Kingdom of Serbs, Croats and Slovenes*, Yugoslav Press, Zagreb, 1929, p. 199.

<sup>20</sup> . On opium trade at the turn of the nineteenth century, British involvement in opium trade and first anti-opium movements, see Brown, J. B.: Politics of the Poppy: The Society for the Suppression of the Opium Trade, 1874-1916, *Journal of Contemporary History*, Vol. 8, No 3, 1973, pp. 97-111.

<sup>21</sup> . Opium addiction was also common among soldiers of the American Civil War and, in America, it came to be known as the "army disease". (Terry, C., E., *op. cit.*, pp. 338-339). The use of opium and its derivatives as a possible threat to public health was marked as such by the American legislator in 1906, when the Pure Food and Drug Act was passed. That was the first consumer protection law prohibiting mislabelled morphine, opium, cocaine, heroin and certain other drugs. In other words, the enumerated drugs were still legally available as long as they were labelled with contents and dosage. A demand for accurate labelling under threat of imprisonment for up to one year was legally formulated as a response to accidental drug addiction caused by popular use of unlabelled medications exotically called elixirs, which contained up to thirty or forty percent morphine or opiates by volume. Bonnie, R., J. and Whitebread II, C., H.: *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, *Virginia Law Review*, Vol. 56, No 6, 1970, pp. 983-985.

The 1929 Criminal Code, just like the one of 1852, was directed solely at the unauthorised dispensation of drugs, not expanding the boundaries

21. Dolenc, M.: *Tumač Krivičnog zakonika Kraljevine Jugoslavije* / Interpretation of the Criminal Code of the Kingdom of Yugoslavia, Tipografija, Zagreb, 1930, pp. 345-346.

of criminalisation over their distribution. However, this initial legislative policy began to change after World War II. A strong sentiment against drugs developed gradually, which led to more severe prohibition of their unauthorised sale and manufacture.<sup>22</sup> The 1951 Criminal Code for the first time entirely prohibited the distribution of drugs. In accordance with Article 208, whoever, without authorisation, manufactured, processed, sold or in any other way put into circulation, or bought or transferred for the purpose of selling opium, cocaine, morphine or any other narcotic drug or poison, was guilty of a crime punishable with imprisonment for a term of three months to three years.<sup>23</sup> If the offence was committed habitually or by way of occupation or by a group of members who organised themselves to distribute drugs, the imposed punishment was imprisonment for no less than six months or severe imprisonment for up to five years.<sup>24</sup> The legislative embodiment of what should be criminalised was a direct response to state obligations assumed by becoming a party to various international conventions on drugs.<sup>25</sup> From that

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<sup>22</sup> . The first signs of the development of a more comprehensive antidrug policy which notably relied on punitive measures can be found in the League of Nations intense activities. A League of Nations call for more severe regulations and prohibition of opium use and “its ills” in any form other than for medical purposes resulted in the first international drug-related conventions. For example, the 1912 Hague Opium Convention contained provisions whereby the contracting parties had reached a mutual agreement to gradually and effectively suppress the manufacture and trade of opium and its derivatives for non-medical purposes. Wright, Q.: The Opium Question, The American Journal of International Law, Vol. 18, No 2, 1924, p. 283.

<sup>23</sup> . A definition of narcotic drugs was provided in the Law on Narcotic Drugs, Official Gazette No 16/1950. The Law was crucial for the interpretation of the offence described above, considering that under the Criminal Code the offence was an incomplete criminal norm (*blanket norm*) and had to be supplemented by another norm in order to acquire its complete meaning.

<sup>24</sup> . Art. 208 of the 1951 Criminal Code, Official Gazette No 13/1951.

<sup>25</sup> . More precisely, the offence constructed like this was in accordance with the 1912 Hague Convention, the 1925 Geneva Convention, the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs and the



moment on in the Croatian criminal legal history, drug-related offences have always been constructed according to outlines provided by drug conventions and their criminal repression has steadily intensified over time.

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corresponding protocols. For further insights into the binding international instruments, see Tahović, Đ., J.: *Krivično pravo posebni dio* / Criminal Law Special Part, Scientific Book, Belgrade, 1955, p. 261.

In line with this policy, the 1959 Criminal Code amendments brought harsher punishments for drug offenders,<sup>26</sup> while legal alterations in 1973 both increased the penalties and broadened the description of the criminal offence.<sup>27</sup> Six new criminal acts were added as elements of the basic drug offence, i.e. possessing drugs intended for unauthorised sale, offering drugs for unauthorised sale, mediating in their sale or purchase, inducing another to use drugs, giving drugs to another for his/her or another person's use and procuring a location to use drugs. It is important to note that before these amendments the offence was committed only if a seller and a buyer had reached a consensus with respect to drugs and their price; however, after 1973 the mere possession and offer of drugs with intent to sell them without authorisation constituted a criminal offence. Certain legislative alterations were introduced with respect to the aggravated offences, as well. Aside from offending within a group, an aggravated offence could have been committed if the basic offence was committed against a minor or if severe consequences arose from the commission of the basic offence. The prescribed sentence for the basic offence was imprisonment for a term of at least three months or severe imprisonment for up to five years, while the aggravated offence was punishable with severe imprisonment for up to ten years. These shifts in legislator's policy were strongly influenced by the 1961 UN Single Convention on Narcotic Drugs and the 1971 UN Convention on Psychotropic Substances.

For the next twenty years, the drug punishment policy remained unchanged. The main issues concerned the nomotechnical construction of the offence and the minimum punishments. In accordance with the 1976 Criminal Code, drug-related criminal acts were divided in two separate offences: unauthorised manufacture of drugs<sup>28</sup> and their placing on the market, and enabling the use of drugs.<sup>29</sup> New aggravating circumstances were introduced (organising a

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<sup>26</sup> . After 1959, the basic drug offence was punishable with imprisonment for a term of at least three months, while offenders who committed an aggravated offence were sanctioned with imprisonment for no less than one year or severe imprisonment for up to five years. The 1959 Amendments to the 1951 Criminal Code, Official Gazette No 30/1959.

<sup>27</sup> . The 1973 Amendments to the 1951 Criminal Code, Official Gazette No 6/1973.

<sup>28</sup> . Art. 245 of the 1976 Criminal Code, Official Gazette No 44/1976.

<sup>29</sup> . Art. 246 of the 1976 Criminal Code, Official Gazette No 44/1976.

network of resellers or mediators,<sup>30</sup> committing the offence against a greater number of people<sup>31</sup> and with particularly dangerous drugs or psychotropic substances<sup>32</sup>) and the legislative minimum sentence rose from three to six months in case of basic unauthorised manufacture of drugs and to one year in case of aggravated manufacture and aggravated enabling the use of drugs.

After a period of stable and moderate sentencing of narcotics offences, the legislative sentencing policy in post-socialist Croatia changed course towards the use of incarceration as the prevailing method of drug abuse suppression. In line with the “tough on crime” policies, there was no distinction with respect to type of drugs due to the fact that all drugs were considered dangerous to health. What was once prescribed as a punishment for aggravated offending became a punishment for the basic offence. Offenders who manufactured and sold drugs under the aggravated circumstances could be punished with imprisonment for three to fifteen years. The manufacturing of equipment, material or substances used to produce drugs without authorisation was also criminalised and offenders were sentenced to imprisonment for six months to five years, i.e. the sanction for basic drug offences under the 1976 Criminal Code.<sup>33</sup> Criminalisation of these preparatory acts significantly broadened the legislative description of drug offences.

Another major step in harsher sentencing was taken in 1996, when for the first time the mere possession of drugs without any intent to sell them or put them into circulation was pronounced as a criminal offence punishable with a fine or one year’s imprisonment.<sup>34</sup> No matter the fact that such legislative decision

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<sup>30</sup> . Art. 245(2) of the 1976 Criminal Code, Official Gazette No 44/1976.

<sup>31</sup> . Art. 246(2) of the 1976 Criminal Code, Official Gazette No 44/1976.

<sup>32</sup> . Art. 245(2) and Art. 246(2) of the 1976 Criminal Code, Official Gazette No 44/1976.

<sup>33</sup> . Art. 196 of the 1993 Basic Criminal Code of the Republic of Croatia, Official Gazette No 31/1993. The legislative construction of enabling the use of drugs in Art. 197 has not changed, except in respect of the aggravating circumstances. Causing severe consequences by committing the basic offence was reintroduced.

<sup>34</sup> . The 1996 Amendments to the 1993 Basic Criminal Code of the Republic of Croatia, Official Gazette No 28/1996. The same amendments broadened the aggravated circumstances, imposing harsher penalties for offenders who committed the offence against a child, a mentally ill person or a person suffering from temporary mental disorder. Pavišić, B. and Grozdanić, V.: *Komentar Osnovnoga krivičnog zakona Republike Hrvatske* / Commentary on the Basic Criminal Code of the Republic of Croatia, Faculty of Law University of Rijeka, Rijeka, 1996, pp. 258-259.

was strongly criticised as an unnecessary political decision,<sup>35</sup> the possession of drugs remained an offence under the 1997 Criminal Code. Although the wording of the offence was left untouched, the sentencing policies were tightened with the introduction of long-term imprisonment as an alternative sentence for distribution of drugs and aggravated offending within a group.<sup>39</sup> The subsequent sentencing reforms further focused on the implementation of repressive policies targeting the reduction of drug crime. Even though long-term imprisonment was repealed as a punishment for distribution of drugs under the 2000 amendments, the upper end of the sentencing range for the same offence was increased to twelve years of imprisonment.<sup>40</sup> Six years later, the sanctions for abuse of narcotic drugs were again augmented, as if the legislator was not entirely satisfied with his earlier decision to renounce the imposition of longterm imprisonment for drug distribution: the new sentence ranged from three to fifteen years of imprisonment. The minimum sentence for organised drug distribution was also amended: offenders could be sentenced to imprisonment for a term of at least five years. Preparatory acts, as well as aiding and abetting a drug offence, were punishable with imprisonment for between one and five years.<sup>41</sup>

Over the past six decades, the legislator's policy on drug abuse suppression has strongly relied on institutionalised repression provided by the criminal law. Incarceration has been the dominant response to drug offences, leaving the issues of prevention and harm reduction on the margins of consideration. There have been certain shifts towards less punitive policies (e.g. the introduction of the National Drug Control Strategies and Action Plans for the Suppression of Drug Abuse);<sup>42</sup> however, the overall situation still has a predominant punitive tone.

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D.: Country Report Croatia, published in: Apostolou, T. (ed.): *Drug Policy and Drug Legislation in South East Europe*, Nomiki Bibliothiki Group, Athens, 2013, pp. 114-115.

39. The 1997 Criminal Code, Official Gazette No 110/1997.

40. The 2000 Amendments to the 1997 Criminal Code, Official Gazette No 129/2000.

41. The 2005 Amendments to the 1997 Criminal Code, Official Gazette No 71/2006.

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<sup>35</sup> . Tripalo, D., Drug Abuse According to the New Criminal Code, *op. cit.*, p. 36.; Rittossa,

42. National Drug Control Strategy in the Republic of Croatia for the Period 2006-2012, Official Gazette No 147/2005; National Drug Control Strategy in the Republic of Croatia for the Period 2012-2017, Official Gazette No 122/2012; Action Plans for the Suppression of Drug Abuse on a three-year basis (2006-2009, 2009-2012), <[http://nijd.uredzadroge.hr/wp-content/uploads/2011/01/Action\\_Plan\\_on\\_Combating\\_Drugs\\_Abuse\\_in\\_Croatia\\_2009\\_2012.pdf](http://nijd.uredzadroge.hr/wp-content/uploads/2011/01/Action_Plan_on_Combating_Drugs_Abuse_in_Croatia_2009_2012.pdf)> (accessed Jan. 28, 2014).

## 1.2. Compliance of legal instruments with basic international conventions on drugs

### Are the documents in 1.1. in compliance with basic international conventions on drugs?

The criminalisation of drug abuse, the gradual broadening of the description of criminal offences and the sentencing reforms with harsh sentencing requirements are part of a policymakers' deliberate decision to be "tough on drug crime". The legislative reforms targeting the reduction of drug abuse were partially explained by lawmakers' willingness to adequately implement the UN international conventions on drugs. As one of the republics of the Yugoslav federation, and later due to a note of succession, Croatia was bound by the 1961 UN Single Convention on Narcotic Drugs and its 1972 Geneva Protocol, the 1971 UN Convention on Psychotropic Substances and the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>36</sup> These conventions were a product of nationally fought and internationally shaped "war on drugs" policies.<sup>37</sup> Such policies were part of a

<sup>36</sup> . On Croatian national policy on drugs within the national legislative and the international framework, see Kovačević-Čavlović, J.: *Protiv zlouporabe droge na nacionalnoj i međunarodnoj razini* / Against Drug Abuse on National and International Level, Official Gazette, Zagreb, 1996.

<sup>37</sup> . The phrase "war on drugs" and similar phrases are commonly used in government officials' public speeches. During his presidency, Ronald Regan habitually mentioned the "war on drugs" phrase, while George Bush incorporated it in his first address to the nation. (Knapp, K.: *The War on Drugs*, Federal Sentencing Reporter, Vol. 5, No 5, 1993, p. 294). In his last year interview on the Criminal Code amendments, the Croatian Minister of Justice, Orsat Miljenić, talked about drug dealers as "our enemies". The war against offenders as "the enemy within" was also fought by Richard Nixon. Veznaver, F.: Orsat Miljenić: *Dileri su naši protivnici, a ne klinci u parkovima* / Orsat Miljenić: Dealers Are Our Enemies, Not Kids in Parks, <<http://www.novolist.hr/Vijesti/Hrvatska/Orsat-Miljenic-Dileri-su-nasi-protivnici-a-ne-klinци-u-parkovima>> (accessed Jan. 28, 2014).

broadier “war on crime” perspective, the progressive and comprehensive policy action to eradicate crime by incapacitating offenders.<sup>38</sup> Various provisions of the key international conventions on drugs reflect the strategy of drug offender incapacitation, by demanding that various actions involving drugs be criminalised by State Parties.<sup>39</sup> In line with punitive policies, the conventions also allow for the adoption of more strict or severe control measures than those provided for by their provisions.<sup>40</sup> Although by far the most controversial provision, Article 3(2) of the 1988 UN Convention demanding criminalisation of possession of narcotic drugs for personal consumption was implemented in whole within the Croatian criminal justice system, with the ensuing severe and far-reaching consequences.

### 1.3. Practical application of the legal instruments

#### Are the documents in 1.1. adequately applied in practice?

The relevant criminal law provisions regarding drug abuse have been adequately applied in practice, leading to a spike in drug offences.<sup>41</sup> The “war on drugs” was fought predominantly against drug possessors. Previous research shows that about two thirds of all drug offenders were sentenced for drug possession. For example, in the period 1998-2011, 72.70% of all adult drug offenders abused drugs for personal use.<sup>42</sup> Those criminal cases have significantly overloaded the court system and, consequently, the system itself

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<sup>38</sup> . Dubber, M., D.: The War on Crime and the End of Criminal Law, The Journal of Criminal Law and Criminology, Vol. 91, No 4, 2001, p. 831.

<sup>39</sup> . See the Preamble of the Single Convention on Narcotic Drugs according to which “addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind” and State Parties have a “duty to prevent and combat this evil”, as well as Art. 1(5) b), Art. 22, Art. 31, Art. 33, Art. 36 (Official Gazette No 2/1962). See also Art. 22 and 14 of the 1972 Geneva Protocol (Official Gazette No 3/1978), as well as Art. 7(1) a) f), Art. 10(2), Art. 12(3) b) and c), Art. 13 and Art. 22 of the 1971 UN Convention on Psychotropic Substances (Official Gazette No 40/1973). The obligation to impose criminal sanctions on drug offenders is also prescribed by Art. 3 of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Official Gazette No 14/1990).

<sup>40</sup> . Art. 39 of the 1961 UN Convention, *op. cit.*; Art. 23 of the 1971 UN Convention, *op. cit.*; Art. 12(10) b) of the 1988 UN Convention, *op. cit.*

<sup>41</sup> . Tripalo, D., Drug Abuse According to the New Criminal Code, *op. cit.*, p. 31.

<sup>42</sup> . Rittossa, D., Country Report Croatia , *op. cit.*, pp. 117-118.

gradually started to apply the available legislative measures to reduce the overload.<sup>43</sup> There were more and

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<sup>43</sup>. In addition to overburdening the criminal justice system, the criminalisation of drug possession may have also negatively influenced the social services system. Whenever penal sanctions are employed to deal with problems of social service, scholars have warned us that the consequences are almost always unfortunate (deterioration of social service, impairment of law enforcement and corruption and demoralisation of crimi-

more cases in which public prosecutors used their discretionary powers under the principle of opportunity and did not instigate criminal proceedings against drug possessors. They also dismissed crime reports, applying the institute of “insignificant offence” in cases of reporting drug possession on condition that the reported person offended for the first time and possessed a small quantity of drugs.<sup>51</sup> Furthermore, court statistics show that, in a certain number of trials, a criminal court judge rendered a judgement of acquittal due to the fact that the offender’s possessing drugs was assessed as an insignificant offence.<sup>52</sup> The change of course in drug offenders’ prosecution and sentencing as well as the rapid increase in incarceration forced policymakers to review their repressive policies, move away from the strict punitive solutions proclaimed by international conventions and adopt more lenient sentencing policies in the 2011 Criminal Code.<sup>53</sup>

#### 1.4. Important drug issues left unregulated

##### Are there any important drug issues left unregulated in your country?

Aside from relying on punishment as an adequate response to drug abuse, the basic UN conventions on drugs have also paved the way for prevention, treatment, rehabilitation and social reintegration of drug abusers.<sup>54</sup> The issues are addressed in the 2012 National Drug Control Strategy, primarily as part of drug demand reduction policies.<sup>55</sup> The strategy likewise sets a clear guidance to

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nal justice agencies). Allen, F., A.: The Borderland of the Criminal Law: Problems of “Socialising” Criminal Justice, *Social Service Review*, Vol. 32, No 2, 1958, p. 109.

51. The same conditions have to be met in order to refrain from prosecution in Germany. In drug possession cases, public prosecutors also take into consideration other circumstances, such as the amount and type of drugs, involvement of others, personal history and public interest in prosecution. European Monitoring Centre for Drugs and Drug Addiction: Country overview: Germany, <<http://www.emcdda.europa.eu/publications/country-overviews/de>> (accessed Feb. 28, 2014).

52. Bill on Amendments to the 2011 Criminal Code, Government of the Republic of Croatia, Zagreb, 2011, p. 4.

53. The Criminal Code, Official Gazette No 125/2011, 144/2012.

54. Art. 38 of the 1961 UN Convention, *op. cit.*; Art. 20 of the 1971 UN Convention, *op. cit.*; Art. 3(4) b), c), d) of the 1988 UN Convention, *op. cit.*



55. Art. 4.1 of the National Drug Control Strategy in the Republic of Croatia for the Period 2012-2017, *op. cit.*

implement projects aimed at prevention and drug offenders' social reintegration, while considerable involvement of the probation service is expected. Although the provisions concerning probation officers' work with drug addicted offenders present a new solution compared to the previous national strategy, certain legislative provisions embodied within the 2011 Criminal Code have already introduced preventive measures consisting of activities comparable to probation work.

In order to stimulate offenders' active participation in the process of rehabilitation and facilitate reintegration into society, the Criminal Code contains provisions whereby one or more special obligations can be pronounced to the offender together with conditional sentence, partial conditional sentence, release on parole and community work. If the offender is in need of assistance, guidance or supervision by the probation officer, the court may impose upon him protective supervision. The probation office is actively involved in the implementation of special measures, as well as in protective supervision.<sup>44</sup>

Although the primary aim of the provisions cited above was to offer additional help to those sentenced for a criminal offence so as not to re-offend in future, the 2011 Criminal Code contains a provision on protective supervision after serving a full prison sentence, a new sanction with far-reaching implications to offenders' rights. Under Article 76(1), the court may subject the offender to protective supervision immediately upon release from prison, *inter alia*, if s/he was sentenced to imprisonment for five or more years for an intentionally committed criminal offence –all drug offences fall within this sentencing framework.<sup>45</sup> The period of supervision lasts for one year and may be prolonged for an additional year if the absence of such supervision would pose a risk of committing again the criminal offence for which the offender had been imprisoned. The said sanction was a direct response of the Croatian

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<sup>44</sup> . Art. 62(2) 1-3, 15 and Art. 64 of the 2011 Criminal Code, *op. cit.*; Grozdanić, V., Škorić, M. and Martinović, I.: Criminal Law, General Part, Faculty of Law, University of Rijeka, Rijeka 2013, pp. 237.-240.

<sup>45</sup> . For additional information on protective supervision after serving a full prison sentence, see Turković, K. *et al.*: *Komentar Kaznenog zakona* / Comments on the Criminal Code, Official Gazette, Zagreb, 2013, p. 112.

legislator to the European Court for Human Rights criticism regarding the deficiencies of the national system for the protection of others from acts of dangerous criminals in the Tomašić case.<sup>46</sup> Even though the central question of the case was about the State's duty to protect the right to life, the conditions according to which one can be subjected to protective supervision after serving a full prison sentence are too extensive. Due to the fact that not only violent offenders can be supervised, the sanction constructed like this bears the sign of the criminal justice system's failure to fulfil the preventive purposes of criminal law sanctions.

## 1.5. Role of criminal legal regulations in national legislative policy on drugs

### **Please describe the role of criminal legal regulations in national legislative policy on drugs.**

Bearing in mind the short historical overview of the criminal legislative policy and the newly-introduced criminal legal provisions to restrict drug offenders' basic rights following release from prison, criminal legal regulations have had a dominant role in constructing the legislative policy to suppress narcotic drug abuse. Notwithstanding the fact that in recent years a more extensive approach has been implemented through the national drug strategies, drug policy is mostly developed within the field of state repression.<sup>47</sup>

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<sup>46</sup> . *Branko Tomašić and others v. Croatia*, judgment of the European Court for Human Rights, application No 46598/06, 15 January 2009.

<sup>47</sup> . For example, issues like drug possession for personal use and drug addiction treatment have been primarily addressed in debates over the Criminal Code amendments. Whenever there is a shift in the official government policy on drugs, it has been noted that the policy is firstly implemented through the promulgation of new Criminal Code amendments and then developed in other areas of law. This strategy can be clearly seen in the 2012 Report on the Implementation of the National Strategy and Action Plan for the Suppression of Drug Abuse in the Republic of Croatia, submitted by Prime Minister Milanović to the Croatian Parliament on October 3<sup>rd</sup>, 2013. When describing the official drug policy, the report starts with explanations regarding the "...significant improvement in the development of criminal legislative policy in the field of drugs, most notably with the entering into force of the new Criminal Code that contains, *inter alia*, alterations related to the criminal offence of drug abuse". The leading strategic documents, the national strategy and the action plan, are mentioned in the second sentence. The order of sentences reflects government priorities in methods for the development of the national drug strategy. The Government of the Republic of Croatia:

## 2. Criminal legislative policy on drug offences

### 2.1. Laws in force according to which drug abuse is an offence punishable with a criminal sanction

#### **According to which laws presently in force is drug abuse an offence punishable with criminal sanctions?**

State repression of non-conforming, threatening and dangerous behaviours has been for the most part developed and moderated by the Criminal Code. There is almost a mutual understanding on the necessity to respond with repression to various acts involving drugs.<sup>48</sup> It is not questionable whether or not to suppress drug abuse by criminal law; however, intensive discussions have been held recently between government officials and the scientific community on the borders of criminalisation.<sup>49</sup> According to the original version of the 2011 Criminal Code, drug abuse was criminalised by two distinct criminal offences: unauthorised possession, manufacture of and trade in drugs and substances banned in sports under Article 190, and enabling the use of drugs or substances banned in sports under Article 191.<sup>50</sup>

Except from the fact that drug offences were shaped according to the nomotechnical division accepted in the 1976 Criminal Code, which drew a distinction between unauthorised distribution of drugs and enabling others to use drugs, no significant change towards a less repressive approach was introduced, thus leaving the highly punitive nature untouched. Moreover, more acts were criminalised, such as those involving substances banned in sports or those involving selling or giving drugs to children or in places intended for education, sports or social activities or in their immediate vicinity, or in a penal institution. The aforesaid criminal acts constitute an aggravated criminal offence punishable with imprisonment for a term of between three and fifteen years. The same sanction is prescribed for drug offenders who are public officials and commit the offence in relation to their function or public

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The Report on Implementation of National Strategy and Action Plan for the Suppression of Drug Abuse in the Republic of Croatia in 2012, Zagreb, 2013, p. 3.

<sup>48</sup> . For example, criminal law professionals and theoreticians strongly agree on the need to suppress drug organised crime by imposing severe penalties on drug traffickers. Tripalo, D., Drug Abuse According to the New Criminal Code, *op. cit.*, p. 27.

<sup>49</sup> . Bill on Amendments to the 2011 Criminal Code, *op. cit.*, p. 4.

<sup>50</sup> . Art. 190 and 191 of the 2011 Criminal Code, Official Gazette No 125/2011.

authority.<sup>51</sup> The idea to create drug offences related to children, penal institutions and public officials stems from the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which imposed the obligation on States Parties to ensure that these specific circumstances make the commission of the offence particularly serious.<sup>52</sup> In the same convention, possessing drugs for personal consumption was retained as a criminal offence.<sup>53</sup>

## 2.2. Court practice with respect to the *ne bis in idem* principle

**Is a certain type of prohibited conduct qualified as a criminal offence and as a misdemeanour at the same time? If yes, how do the courts in your country resolve a situation in which a drug offender was previously found guilty in misdemeanour proceedings and subsequently in criminal proceedings before a criminal court? Is the court practice problematic with respect to the *ne bis in idem* principle?**

Shortly after the enactment of the 2011 Criminal Code, the legislator's decision to keep the possession of drugs for personal use criminalised proved to be highly problematic. In two separate cases the European Court for Human Rights warned Croatia that a certain conduct cannot be classified as a misdemeanour and a criminal offence at the same time, for the reason that such double qualifications infringe the *ne bis in idem* principle enshrined in Article 4 of

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<sup>51</sup> . Art. 190(4) and Art. 191(2) of the 2011 Criminal Code, *op. cit.*

<sup>52</sup> . Art. 3(5) f) and g) of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *op. cit.* In case a child is a victim of a drug offence, the 1988 UN Convention demands that the first basic act to be criminalised is offering drugs to a child. Croatian criminal courts and public prosecutors have been interpreting the act of offering as a repeated act with intent to create habitual use of drugs. However, the wording of Art. 191(1) and (2) is much more concrete. "Offering drugs" has to be interpreted in such a way that the mere fact that drugs were given on one occasion constitutes a criminal offence. Besides, broader protection with respect to the 1988 UN Convention is given under Art. 191(2), due to the fact that aggravated circumstances exist if enabling others to use drugs is committed not only by a public official, but also by a health worker, a welfare worker, a teacher, a supervisor or a trainer.

<sup>53</sup> . Art. 190(1) of the 2011 Criminal Code, *op. cit.*; Art. 3(2) of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *op. cit.*

Protocol No 7 to the Convention.<sup>54</sup> Due to the fact that drug possession for personal consumption was a misdemeanour punishable with a fine according to the Drug Abuse Prevention Act<sup>67</sup> as well as a crime according to the Criminal Code,<sup>68</sup> it was possible to prosecute and try a drug possessor for a second time in criminal court for an offence of which he had already been convicted by the misdemeanour court. A different legal classification of the same offence can result in duplication of criminal proceedings and violation of the right not to be tried or punished twice.

According to one of the key principles of Croatian criminal law, the time spent in pre-trial detention, as well as any other deprivation of liberty due to a criminal offence, has to be included in the pronounced sentence of imprisonment. According to the same reasoning, a fine or imprisonment for a misdemeanour is regularly taken into consideration by criminal courts and included in the final sentence for a criminal offence, if the description of such an offence corresponds to the misdemeanour for which the sentence has already been pronounced.<sup>69</sup> However, the European Court for Human Rights strongly emphasised that the aforesaid practice of deduction of sentences does not alter the fact that the offender was tried twice for the same offence. Being faced with sharp and determined criticism and possible future applications before the European Court for Human Rights, the Croatian legislator has taken a decisive step towards a more lenient sentencing policy on drugs by decriminalising the possession of drugs for personal use in the 2012 Criminal Code amendments.<sup>70</sup>

The decision was highly controversial, as it created a deviation from fifteen years of punitive practice accepted by the general public.<sup>71</sup> On the one hand,

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aspx?i=001-107047> (accessed Jan. 28, 2014); Art. 4 of Protocol No 7 to the European Convention for Human Rights and Fundamental Freedoms, <<http://conventions.coe.int/Treaty/en/Treaties/Html/117.htm>> (accessed Jan. 28, 2014).

67. Art. 54. of the Drug Abuse Prevention Act, Official Gazette No 107/2001, 87/2002, 164/2003, 141/2004, 40/2007, 149/2009, 84/2011.

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<sup>54</sup> . *Maresti v. Croatia*, ECHR final judgment on 25th September, 2009, application No 55759/07, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90625>> (accessed Jan. 28, 2014); *Tomasović v. Croatia*, ECHR final judgment on 18th January, 2011, application No 53785/09, <<http://hudoc.echr.coe.int/sites/eng/pages/search>.

68. Art. 190(1) of the 2011 Criminal Code, *op. cit.*

69. Art. 63 of the 1997 Criminal Code, *op. cit.*

70. Art. 50 of the 2012 Criminal Code amendments, Official Gazette No 144/2012.

71. For example, in one of his scientific articles published in 2003, Tripalo expressed concerns regarding the negative effects of decriminalisation on the presentation of evidence in a criminal trial. Once a defendant, the drug possessor would become a witness in a drug distribution case, with a right to decline to answer certain questions which

the UN conventions had been demanding the imposition of criminal sanctions against drug possessors and, on the other hand, it had become obvious that certain provisions could have been in collision with the European Convention for Human Rights and its Protocols. Moreover, a great number of recent studies have shown that punitive criminal norms are not an adequate response to this specific type of behaviour.<sup>55</sup> Although decriminalisation of drug possession for personal consumption infringes the supremacy of UN international convention law over national legislative norms, the Croatian legislator decided to redefine criminal conduct as regards drugs and to formally leave the possession of illegal drugs out of the criminal law sphere. Precedence was given to the European Court for Human Rights case law and the firm implementation of *ne bis in idem* principle.<sup>56</sup>

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<sup>55</sup> . According to recent reports, the model of criminal norms enforcement adopted in numerous countries has had little impact on the levels of drug use; on the other hand, criminalisation of drug users causes significant harms to the individual and society. Rosmarin, A. and Eastwood, N.: A Quiet Revolution: Drug Decriminalisation Policies in Practice across the Globe, Release, Drugs, the Law and Human Rights, 2013, <[http://www.release.org.uk/sites/release.org.uk/files/pdf/publications/Release\\_Quiet\\_Revolution\\_2013.pdf](http://www.release.org.uk/sites/release.org.uk/files/pdf/publications/Release_Quiet_Revolution_2013.pdf)> (accessed Feb. 28, 2014).

<sup>56</sup> . Although there is a concrete legal basis and empirical research results to decriminalise drug possession for personal use, it has been proven once more that this decision is associated with strong political connotations. Possessing drugs for personal use was no longer a criminal offence under the 2012 amendments to the 2011 Criminal Code. At the time of the amendments, the Code was promulgated but without legal force due to the fact that *vacatio legis* ended on January 1<sup>st</sup>, 2013. Bearing in mind that the *Maresti* judgment was delivered in 2009 and the *Tomasović* judgment in January 2011,

would expose him, *inter alia*, to heavy stigma, and buying drugs and consuming them might be considered to be a highly stigmatising fact. Consequently, the presentation of evidence concerning the distribution and sale of drugs would entail difficulties. In 2013, Tripalo cited the *Maresti* case while advocating for the decriminalisation of drug possession for personal use. Tripalo, D.: *Kazneopravni aspekti zlouporabe droga / Criminal Legal Aspects of Drug Abuse*, Croatian Annual of Criminal Law and Practice, Vol. 10, No 2, 2003, p. 584; Tripalo, D., *Drug Abuse According to the New Criminal Code*, *op. cit.*, p. 36.

## 2.3. Description of drug-related offences prescribed by the Criminal Code and other relevant legal acts

**Please provide a short description of drug-related offences prescribed by the Criminal Code and other relevant legal acts.**

After the 2012 Criminal Code amendments, drug-related offences are distributed in two separate articles. Article 190 prohibits the unauthorised manufacture of and trade in drugs and Article 191 prescribes sanctions for enabling the use of drugs. The prohibited acts concerning manufacture of and trade in drugs are divided in six different paragraphs depending on their gravity and degree of danger to the health of people as a protected value.

- ***Unauthorised manufacturing and processing of drugs***: Whoever, without authorisation, manufactures or processes substances which are declared by law to be drugs shall be sentenced to imprisonment for a term of between six months and five years (Art. 190(1)).
- ***Distribution of drugs***: Whoever manufactures, processes, transports, imports or exports, procures or possesses substances referred to in paragraph 1 of this Article that are intended for unauthorised sale or placing on the market in some other way, or offers them for sale without authorisation, or sells them or mediates in their sale or purchase, or markets them in some other way, shall be sentenced to imprisonment for a term of between one and twelve years (Art. 190(2)).
- ***Aggravated distribution of drugs***: Whoever offers for sale, sells or mediates in the sale of substances referred to in paragraph 1 of this Article to a person with severe mental difficulties or to a child, or does this in a school or at another place providing education to children or at which children engage in sporting or social activities, or in its immediate proximity, or in a penal

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it seems that the political will to renounce criminalisation of personal drug possession was missing when the original version of the 2011 Criminal Code was enacted.

institution, or whoever in order to commit the offence referred to in paragraph 2 of this Article uses a child, or a public official who does this in relation to his/her function or public authority, shall be sentenced to imprisonment for a term of between three and fifteen years (Art. 190(3)).

- ***Offending within a group***: Whoever organises a network of resellers or mediators to commit the offence referred to in paragraphs 2 and 3 of this Article shall be sentenced to imprisonment for a term of at least three years (Art. 190(4)).
- ***Criminal responsibility for more severe consequences***: Whoever, by the criminal offence referred to in paragraphs 2, 3 or 4 of this Article, severely impairs the health of a great number of persons or causes the death of a person to whom s/he sold the substance referred to in paragraph 1 of this Article or to whom the substance was sold through his/her mediation shall be sentenced to imprisonment for a term of at least five years (Art. 190(5)).
- ***Unauthorised manufacturing of equipment, material or substances used to produce drugs and analogues thereof***: Whoever produces, procures, or possesses equipment, material or substances which can be used in the production of substances referred to in paragraph 1 of this Article, which equipment, material or substances s/he knows are intended for their unauthorised production, shall be sentenced to imprisonment for a term of between six months and five years (Art. 190(6)).

Bearing in mind that court practice does not have a unanimous stance on what should be considered to be manufacturing of drugs, the legislator has offered a precise definition according to which drug production within the meaning of this law shall also mean the unauthorised cultivation of a plant or mushroom from which a drug can be obtained.<sup>57</sup> The substances referred to in Article 190(1), the substances which can be used for their production, plants, mushrooms or parts of plants or mushrooms from which the substances referred to in paragraph 1 can be obtained, the means of their production or processing, the means of transport adapted for the purpose of concealing these substances and the paraphernalia for their use shall be seized. The same article also provides for remitting the punishment of offenders who substantially contribute of their own free will to the discovery of offences in order to

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<sup>57</sup> . Art. 190(7) of the 2011 Criminal Code, *op. cit.*



stimulate offenders' collaboration, facilitate prosecution and speed up criminal proceedings.<sup>58</sup>

Under Article 191, enabling the use of drugs consists of different acts which are divided according to their gravity in different paragraphs.

- ***Encouragement of others to use narcotic drugs and creation of conditions for such use:*** Whoever induces another to use the substances referred to in Article 190(1) of this Code or gives them to him/her for his/her or another person's use, or makes available to another a location in which to use them, or otherwise enables him/her to use them shall be sentenced to imprisonment for a term of between six months and five years.

- ***Aggravated encouragement of others to use narcotic drugs and creation of conditions for such use:*** If the criminal offence referred to in paragraph 1 of this Article was committed against a child or a person suffering from a severe mental disorder, or in a school or at another place providing education to children or at which children engage in sporting or social activities, or in its immediate proximity, or in a penal institution, or against a number of persons, or if the offence referred to in paragraph 1 of this Article is committed by a public official, health worker, welfare worker, teacher, supervisor or trainer through abuse of his/her position, the perpetrator shall be sentenced to imprisonment for a term of between one and ten years.

- ***Criminal responsibility for more severe consequences:*** Whoever by the criminal offence referred to in paragraphs 1 or 2 of this Article causes the death of a person to whom s/he gave the substance referred to in paragraph 1 of this Article shall be sentenced to imprisonment for a term of between three and fifteen years.

Following the same normative logic, the legislator has ordered a mandatory seizure of narcotic drugs and the means for their consumption. The last paragraph of the same Article prescribes the court's discretionary pardoning powers on the same conditions as those prescribed in Article 190(9). The court may remit the punishment of the perpetrator if s/he has voluntarily and substantially contributed to the discovery of the drug-related offence. Both conditions have to be satisfied, for the reason that the court's discretionary powers are not a mere act of mercy. A person whose actions have significant positive effects on the criminal proceedings and whose guilt is substantially

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<sup>58</sup> . Art. 190(8) and (9) of the 2011 Criminal Code, *op. cit.*

diminished has to have an opportunity to enjoy mitigating or entirely remitting the punishment, in accordance with the principle of individualisation of punishment and the principle of proportionality.<sup>59</sup>

#### **2.4. Severity of prescribed penalties for drug offenders compared to sanctions prescribed for other crimes and accordance with the principle of proportionality**

**When comparing sanctions for drug-related offences with sanctions imposed for other crimes, how would you grade the severity of the prescribed penalty for drug offenders? Do you think that the prescribed sanctions are in accordance with the principle of proportionality (penalties should be proportionate in their severity to the gravity of the offence)?**

Both principles are among the basic criminal law principles and constitute leading directions for the construction of the Special Part of the Criminal Code. The provisions in the Special Part are phrased in such a manner that penalties reflect the gravity of the offence and offer enough discretion for the courts to select and measure the type and the amount of sanction with respect to subjective and objective circumstances of the offence in each particular case. A closer examination of drug offences indicates that they are classified as one of the most serious offences. The seriousness of the basic drug offences and the amount of punishment someone convicted of the crime can receive (incarceration of six months to five years) shows that such offences are equally dangerous to society as threatening to commit terrorist acts,<sup>60</sup> preparing criminal offences against values protected under international law,<sup>61</sup>

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<sup>59</sup> . The above mitigating and remitting powers vested in Croatian courts are justified on theoretical and practical grounds. The legislator has to recognise and accept that there are situations in which an inflexible sentencing policy for certain crimes will have negative effects on perpetrators and crime suppression in general. More lenient sentencing, like the one prescribed within the upper and lower end of the sentencing range for drug offences, offers a necessary intervention in cases in which the prescribed sanctions are not seen as justifiable and effective. The court's pardoning powers are not a sign of imperfection of the criminal law, as it was seen in early scientific writings on punishment (see for example Craig, J.: *Elements of Political Science*, James Ballantyne and Company, Edinburgh, 1814, p. 379); rather, they are an important element of a comprehensive state sentencing policy.

<sup>60</sup> . Art. 97(2) of the 2011 Criminal Code, *op. cit.*

<sup>61</sup> . Art. 103 of the 2011 Criminal Code, *op. cit.*

transportation of slaves,<sup>62</sup> procuring human body parts and human embryos,<sup>80</sup> infanticide<sup>63</sup>, negligent homicide<sup>64</sup>, female genital mutilation<sup>65</sup> or serious bodily injury.<sup>66</sup> The minimum and maximum sentences prescribed for aggravated encouragement of others to use narcotic drugs are constructed in accordance with the legislator's zero tolerance policy to impose strict sanctions upon drug offenders who offend against the most vulnerable members of society or use their official or professional position to commit a drug crime. The severity of such acts corresponds to the severity of inciting genocide<sup>67</sup> or crime of aggression,<sup>86</sup> financing terrorism,<sup>68</sup> torture and other cruel, inhuman or degrading treatment or punishment,<sup>69</sup> slavery<sup>70</sup> or trafficking in human beings.<sup>90</sup> Drug distribution is graded as a highly dangerous conduct, as is the case with aggravated abuse of position and authority.<sup>71</sup> The most serious drug offences punishable with prison between three and fifteen years are graded as greatly severe and correspond to terrorism,<sup>72</sup> aggravated slavery<sup>73</sup> or aggravated trafficking in human beings.<sup>74</sup> Drug offending within a group and drug distribution causing more severe consequences are placed at the top of the most serious offences together with

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<sup>62</sup> . Art. 105(2) of the 2011 Criminal Code, *op. cit.*

<sup>80</sup> . Art. 107(3) of the 2011 Criminal Code, *op. cit.*

<sup>63</sup> . Art. 112(2) of the 2011 Criminal Code, *op. cit.*

<sup>64</sup> . Art. 113 of the 2011 Criminal Code, *op. cit.*

<sup>65</sup> . Art. 116(1) of the 2011 Criminal Code, *op. cit.*

<sup>66</sup> . Art. 118(1) of the 2011 Criminal Code, *op. cit.*

<sup>67</sup> . Art. 88(3) of the 2011 Criminal Code, *op. cit.*

<sup>86</sup> . Art. 89(3) of the 2011 Criminal Code, *op. cit.*

<sup>68</sup> . Art. 98(1) of the 2011 Criminal Code, *op. cit.*

<sup>69</sup> . Art. 104 of the 2011 Criminal Code, *op. cit.*

<sup>70</sup> . Art. 105(1) of the 2011 Criminal Code, *op. cit.*

<sup>90</sup> . Art. 106(1) of the 2011 Criminal Code, *op. cit.*

<sup>71</sup> . Art. 291(2) of the 2011 Criminal Code, *op. cit.*

<sup>72</sup> . Art. 97(1) of the 2011 Criminal Code, *op. cit.*

<sup>73</sup> . Art. 105(3) of the 2011 Criminal Code, *op. cit.*

<sup>74</sup> . Art. 106(3) of the 2011 Criminal Code, *op. cit.*

aggravated war crimes,<sup>75</sup> aggravated terrorism,<sup>76</sup> murder,<sup>77</sup> aggravated crimes against sexual freedom,<sup>78</sup> aggravated child sexual abuse and exploitation, aggravated robbery<sup>79</sup> or high treason.<sup>100</sup> According to the legislator's punitive policy, these two aggravated drug offences are among the top 2% of the worst and most heinous crimes treated by the Criminal Code.

The gravity of drug offences mirrors the legislator's political decision that drugrelated misconducts must be harshly punished. Such a decision is in line with the

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<sup>75</sup> . Art. 91(2) of the 2011 Criminal Code, *op. cit.*

<sup>76</sup> . Art. 97(3) of the 2011 Criminal Code, *op. cit.*

<sup>77</sup> . Art. 110 of the 2011 Criminal Code, *op. cit.*

<sup>78</sup> . Art. 154(3) of the 2011 Criminal Code, *op. cit.*

<sup>79</sup> . Art. 166(2) of the 2011 Criminal Code, *op. cit.*

100. Art. 340 of the 2011 Criminal Code, *op. cit.*

well-settled principle that the most heinous offences are universally cognizable and require robust national and international responses.<sup>80</sup> It can be argued that criminalisation and strict punishment advocated by the international drug conventions have been taken on board in the current Croatian sanctioning system, and that, therefore, the prescribed sanctions are proportionate in their severity to the gravity of drug offences. However, in recent years the climate for drug sentencing has drastically changed. Most European countries and the USA have adopted a more lenient approach towards drug punishment. Sentencing adjustments are made on grounds of achieving fairness in the criminal justice system, reducing state prison spending and focusing on the most serious threats to public safety.<sup>81</sup> The aforementioned reasoning clearly shows that drug-related offences are no longer considered to be among the most serious crimes and that international conventional law has to be moderated accordingly to make room for national sentencing reforms.

## 2.5. Amendments to drug-related offences

**How often does the legislator introduce amendments to drug-related offences? Are the amendments mostly related to a punishable act or a sanction? Please describe the latest amendments and specify the legislator's official explanation.**

A closer analysis of the historical overview of drug offences shows that the Croatian legislator's interventions are frequent and intended to broaden the scope of criminalisation and increase penalties. After World War II, almost all the amendments to the Criminal Code contained provisions which introduced alterations to drug crimes. In the course of time, the legislator's punitive policy

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<sup>80</sup> . Kontorovich, E.: The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation, *Harvard International Law Journal*, Vol. 45, No 1, 2004, p. 185.

<sup>81</sup> . On March 13, 2013, the USA Attorney General Eric Holder supported the "All Drugs Minus Two" prison sentencing reform proposal. If accepted, the proposed sentencing reforms would lower by two levels the current mandatory ranges judges apply when deciding about the sentence for drug offences. For example, a judge might impose a prison sentence between 97 and 121 months, instead of 121 and 151 months as currently prescribed, on an offender convicted of an offence involving 1 kilogram of heroin. "Attorney General Holder Urges Changes in Federal Sentencing Guidelines to Reserve Harshes Penalties for Most Serious Drug Traffickers", The United States Department of Justice, <<http://www.justice.gov/opa/pr/2014/March/14-ag-263.html>> (accessed Feb. 28, 2014).

became harsher and harsher. It is interesting to note that the punitive policy of the Criminal Codes of the socialist period was significantly more lenient than the one of post-1991 Criminal Codes. While enforcing the rights and freedoms of Croatian citizens, the young democratic state was more and more repressive towards drug offenders. The amendments have mostly been related to sanctions, imposing more severe sentences. No matter the new trends in the punishment of drug offenders, the Croatian legislator maintained a policy of harsher sentencing.

A significant deviation from severe punishment was introduced by the 2012 amendments, which decriminalised drug possession for personal use. The government's official position was largely cautionary, relying on legal explanations. According to the working group of the Ministry of Justice, decriminalisation was necessary in order to avoid double criminality, contrary to the *ne bis in idem* principle, and to harmonise national legislation with ECtHR case law. Moreover, the amendments were aimed at ensuring legal certainty and avoiding different interpretations of the laws. Retaining the penalisation of drug possession as a misdemeanour would significantly reduce "drug addicts' crime" and the prison population. The amendments were part of non-punitive strategies to address drug problems and to support the thesis that a person should not be punished for his or her lifestyle, which had already been accepted in Spain, Portugal, Italy, Luxemburg, Belgium and Slovenia.<sup>82</sup> The main scope of the legislative alterations was to enhance citizen's basic rights. Discussions focused on the decriminalisation of drug possession; however, critics failed to notice that the same amendments once again raised certain penalties for manufacturing of and trade in drugs. The original sentence for unauthorised manufacturing and processing of drugs (imprisonment not exceeding three years) was substituted with imprisonment from six months to five years. The upper level prescribed for distribution of drugs was increased from ten to twelve years' imprisonment. The sentences for other forms of drug offences were already of a highly punitive nature and there was no room for additional increase. No matter the steps taken towards relaxing the official government's sentencing policy, the increase in penalties shows that the war against drug offenders continues on the normative level.<sup>83</sup>

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<sup>82</sup> . Bill on Amendments to the 2011 Criminal Code, *op. cit.*, p. 4.

<sup>83</sup> . Harsher sentencing was partially the outcome of a political desire to support and further consolidate a public opinion-based drug sentencing model with severe sen-

### 3. Crime rates of drug-related offences on state (macro) level

#### 3.1. Prevalence of drug crimes committed by adult offenders with respect to total crime according to official state statistics

**According to official state statistics, what is the prevalence of drug crimes committed by adult offenders with respect to total crime in your country in the last ten years? Total crime includes offences committed by adult offenders against the Penal/Criminal Code, excluding misdemeanours.**

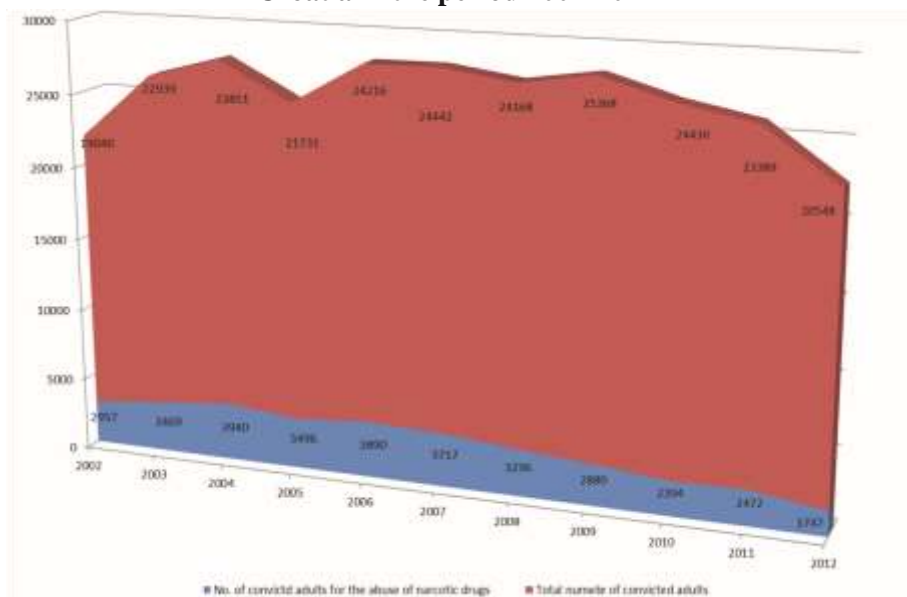
Drug crime rates and their fluctuations are indicators to assess the necessity and reasonableness of the legislative measures taken to suppress drug offences. A general presumption is that a successful legislative sentencing policy would reduce drug crime or at least keep it stable within acceptable parameters which would not impact on the penal system. Further elaboration of this presumption has led to the disputable conclusion that an increase in drug crime statistics is a sufficient basis for further Criminal Code amendments imposing harsher penalties. The general policy that “tough sentencing means less crime” is strongly associated with misleading advocacy that incarceration would reduce crime, clean streets from drugs and improve community safety. These assumptions are highly debatable due to the fact that they simplify a correlation between crime and punishment. The phenomenology of crime is influenced by a complex set of factors, and the identification of certain patterns and validities among these factors is a precondition for a valid crime policy.

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tences for dealers. It is not a rare occasion that highest government officials or parliamentarians in their interviews or speeches support this model and point at new drug issues which require a tough punitive response. For example, while discussing the implementation of the New National Drug Strategy and Action Plan in October 2012, members of the Croatian Parliament expressed their deep concern about the drug situation in Croatia. Drugs like cannabis or heroin are easily accessible, and although the number of new clients admitted to treatment dropped compared to the past, there has been a significant increase in synthetic drug abuse. The industry of death is profiting from the current situation, which calls for immediate reaction. See *supra* note 43 and *Kajin Marasoviću tijekom rasprave u Saboru: To kao da odaje čovjeka na teškim drogama...* / Kajin to Marasovic During the Panel Discussion in Parliament: As If This Discloses a Man on Hard Drugs..., Free Dalmatia,

<<http://www.slobodnadalmacija.hr/Hrvatska/tabid/66/articleType/ArticleView/articleId/191585/Default.aspx>> (accessed Feb. 28, 2014).

**Graph 1**  
**Proportion of drug offences over total criminal offences in Croatia in the period 2002-2012<sup>84</sup>**



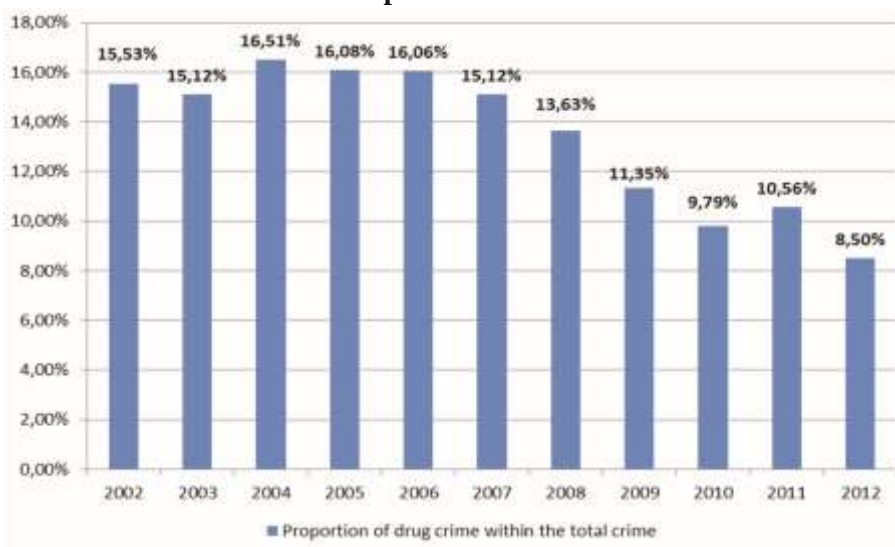
Based on official state statistics for the last ten years, there has been a significant decrease in drug crime rates in Croatia. After an initial boom in offences in the first five years, the total number of drug crimes dropped noticeably. Drug crime rates fell significantly by 55% in 2012 compared to 2006 when they peaked at 3,890 drug offences. Not only did drug-related offences decline at the lowest rate in 2012 but, according to the Central Bureau of Statistics reports, so did total crime. Two years ago approximately 8.50% of all offenders were convicted of drug offences compared to 16.51% in 2004. Over the 2004-2006 period, legislative activity was at its height ahead of the 2006 Criminal Code amendments that imposed more severe sanctions for drug offences. However, it would be inaccurate to conclude that the harsher penalties caused lower drug crime rates, since the reduction in drug crime rates followed the overall reduction of crime in total. Moreover, a similar research has shown that the fluctuation of drug offences over the total volume and rate

<sup>84</sup> . Statistical Reports, The Central Bureau of Statistics, <[http://www.dzs.hr/default\\_e.htm](http://www.dzs.hr/default_e.htm)> (accessed Mar. 20, 2014).



of crime may be significant depending on the research period. For example, in the period 1998-2001, the share of drug offences over all offences committed in Croatia varied from 8.50% (1998) to 15.53% (2001).<sup>85</sup> Possible fluctuation factors may be identified in the statistical dispersion of various drug offences.

**Graph 2:**  
**Drug crime over total crime expressed as a percentage in Croatia**  
**in the period 2002-2012<sup>86</sup>**



### 3.2. Statistical prevalence of various drug law offences committed by adult offenders

**What is the statistical prevalence of various drug law offences committed by adult offenders in the last ten years? Please provide the analysis of crime rates in relation to different types of drug-related offences by year, outlining their trends.**

<sup>85</sup> . Garačić, A.: *Zakonska i sudska politika kažnjavanja županijskih sudova u Republici Hrvatskoj za kaznena djela silovanja i zlouporabe droga* / Legislative and Court Sentencing Policy of County Courts in the Republic of Croatia for Rape and Abuse of Narcotic Drugs, Croatian Annual of Criminal Law and Practice, Vol. 11, No 2, 2004, p. 509.

<sup>86</sup> . Statistical Reports, The Central Bureau of Statistics, *op. cit.*

### 3.3. Proportion of drug possession offences committed by adults over all drug offences

**If drug possession for personal use is penalised, what is the proportion of drug possession offences committed by adult offenders over all drug offences in the last ten years?**

The statistical analysis shows that most drug offenders were prosecuted for and convicted of drug possession for personal use. In the observed period, 71.18% of all adult drug offenders were charged with possession of drugs without intent to sell them or put them into circulation. After the initial two year period, the share of drug possessors over total drug crime follows a marked downward trend. In 2004, 79.23% of all drug offenders were found guilty under Article 173(1) of the Criminal Code. In 2011, only 62.50% of drug cases were prosecuted for drug possession. One year later, possession cases dropped at 55.40% of all drug offences. As shown in the previous research, the downward trend for drug possession offences in the observed period can be attributed to various internal criminal justice measures to reduce the number of cases getting to the criminal courts.<sup>87</sup> In recent years, the criminal case overload has been one of the major issues in Croatia and various efforts have been made to reduce it (prosecutorial discretion according to the principle of opportunity and the institute of “insignificant offence”). Decriminalisation of drug possession for personal use in 2012 was endorsed as part of the strategy to reduce same crime cases.<sup>88</sup>

**Table 1**  
**Statistical prevalence of various drug law offences committed by adult offenders in the period 2002-2012<sup>89</sup>**

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	TOTAL NO OF CASES

<sup>87</sup> . Tripalo, D., Drug Abuse According to the New Criminal Code, *op. cit.*, p. 32; Rittossa, D., Country Report Croatia , *op. cit.*, pp. 116-117.

<sup>88</sup> . To find out more about crime cases reduction strategies in Europe, see Jehle, J.-M. and Wade, M.: *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe*, Springer, Berlin, Heidelberg, New York, 2006.

<sup>89</sup> . Statistical Reports, The Central Bureau of Statistics, *op. cit.*

Art. 173 of the 1997 CC, Para. 1.	2318	2686	3122	2662	2872	2599	2313	1869	1383	1545	968	<b>24337</b>
Para. 2.	413	483	515	576	695	799	697	732	709	653	593	<b>6865</b>
Para. 3.	22	36	23	37	51	54	49	28	101	96	51	<b>548</b>
Para. 4.	7	10	24	17	24	13	26	18	7	17	9	<b>172</b>
Para. 5.	131	184	184	144	180	186	147	188	149	110	84	<b>1687</b>
Para. 6.	66	66	72	60	68	66	64	45	45	51	42	<b>579</b>
$\Sigma$												<b>34188</b>

Distribution of drugs under Article 173(2) of the Criminal Code is the second most frequent drug offence committed by adult offenders in Croatia. Some 20.08% of all drug offenders were sentenced for unauthorised manufacturing, selling, buying or other similar prohibited acts of putting drugs into circulation. According to the official criminal justice statistics, a great majority of distribution cases concern “small” drug offenders who manufacture or process drugs to satisfy their own addiction.<sup>90</sup> Bearing in mind that such acts are generally considered to be less dangerous for society, the new Criminal Code currently in force provides for considerably milder sanctions for manufacturers and processors of drugs for personal use than for offenders with intent to sell or circulate drugs.<sup>112</sup> Due to the new legislative construction of the offence of unauthorised manufacture of and trade in drugs, it seems realistic to expect a further reduction in drug offences and differentiation in drug offenders’ sentencing.

### 3.4. Sanctions pronounced against adult drug offenders

**Please provide data regarding sanctions pronounced against adult drug offenders in the last ten years. A graph or a table should show the number of adults convicted of drug-related offences with respect to the pronounced sanctions in the given period.**

<sup>90</sup>. Tripalo, D., Drug Abuse According to the New Criminal Code, *op. cit.*, p. 37.

<sup>112</sup>. See *supra* p. 15.

**Table 2**  
**Sanctions pronounced against adult drug offenders**  
**in the period 2002-2012<sup>91</sup>**

									Imp			
	Educational measures	Juvenile imprisonment	Juvenile prison suspension	Convicted person, but no penal sentence	Judicial admonition	Fine	Suspended fine	Suspended sentence	30 days	1-6 months	6-12 months	1-12 years
2002	170	1	32	6	189	543	15	1579	34	151	87	
2003	123	3	76	1	246	786	33	1749	31	161	101	
2004	98	7	75	5	352	772	23	2135	38	171	80	
2005	48	7	65	5	246	732	10	1760	32	243	134	
2006	49	2	81	6	201	776	18	1974	35	311	167	
2007	44	8	46	8	160	757	24	1713	37	411	193	
2008	37	6	47	6	105	592	16	1600	21	326	170	
2009	18	8	50	14	91	438	22	1344	20	308	129	
2010	15	11	48	12	74	347	14	998	14	218	113	
2011	11	6	60	9	188	297	9	1108	7	164	75	
2012	6	8	47	4	29	195	19	704	3	190	79	
Σ	619	67	627	76	1881	6235	203	16664	272	2654	13282	

Table 2 presents the sanctions imposed upon drug offenders in a period of 10 years in Croatia. The most commonly pronounced sanction is a suspended sentence. The predominance of suspended sentences is a consistent statistical conclusion, confirmed by previous drug-related research.<sup>92</sup> Statistical analysis

<sup>91</sup> . Statistical Reports, The Central Bureau of Statistics, *op. cit.*

<sup>92</sup> . Garačić, A., Legislative and Court Sentencing Policy of County Courts in the Republic of Croatia for Rape and Abuse of Narcotic Drugs, *op. cit.*, pp. 507.

shows that in 18.20% of all drug-related cases the offenders were ordered to pay a fine.<sup>93</sup> This is an important finding, since previous research on offenders' sanctioning has shown that Croatian courts only impose fines in a small number of cases.<sup>94</sup> More than 5% of drug offenders received a curative instruction by the court about the dangers and harms of their offence, without any further restriction of their rights (judicial admonition). The marked prevalence of alternative sanctions may indicate that sending drug offenders to prison is not an appropriate response of the society and that the boundaries of criminalisation of drug possession are too rigid and the prescribed sanctions too harsh. This conclusion is further corroborated by statistical data on the length of prison sentences. Offenders who abused drugs were mostly sentenced to imprisonment from one to six months. A slightly smaller number of offenders were sentenced to a term between one and three years. Prison sentences above this range have been highly exceptional.<sup>95</sup>

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<sup>93</sup> . Comparative empirical research showed that Croatian and Slovenian courts mostly impose suspended sentences for drug-related offences, while Austrian and German courts commonly impose fines. Turković, K.: *Komparativni prikaz osnovnih obilježja zakonske i sudske politike u Sloveniji, Austriji, Italiji, Njemačkoj i republici Hrvatskoj* / Comparative Analysis of Sentencing Policy in Austria, Germany, Italia, Slovenia and Croatia, Croatian Annual of Criminal Law and Practice, Vol. 11, No 2, 2004, p. 985.

<sup>94</sup> . Grozdanić, V.: *Sistem sankcija u Nacrtu novog hrvatskog kaznenog zakonika* / The System of Sanctions in the Bill on New Croatian Criminal Code, Croatian Annual of Criminal Law and Practice, Vol. 1, 1994, pp. 49-62.

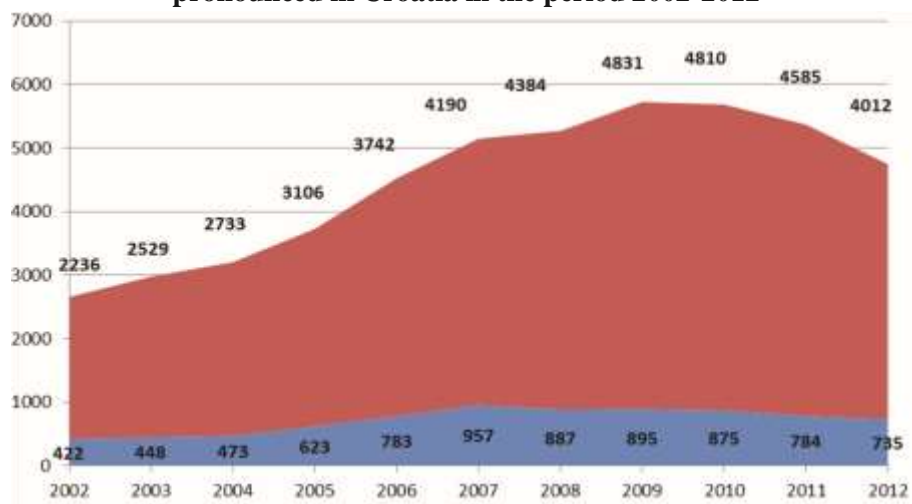
<sup>95</sup> . The crime data collected for the purpose of this research do not differ from the statistical outcomes on drug crime from similar past studies. While exploring the court sentencing policy on drug offences in the period 1993-1997, Garačić also found that the most commonly pronounced criminal sanction was suspended sentence. Prison sentences not exceeding one year prevailed in the statistical sample. Garačić, A., Legislative and Court Sentencing Policy of County Courts in the Republic of Croatia for Rape and Abuse of Narcotic Drugs, *op. cit.*, pp. 498-499.

### 3.5. Proportion of prison sentences imposed on adult drug offenders over all prison sentences

What is the proportion of adult offenders sentenced to imprisonment for drug-related offences over the total number of prison sentences pronounced in your country in the last ten years?

Graph 3

Proportion of adult offenders sentenced to imprisonment for drug-related offences over the total number of prison sentences pronounced in Croatia in the period 2002-2012



Although prison sentences do not prevail among the sanctions imposed upon drug offenders, the share of drug offenders sentenced to prison over the inmate population is significant. Between 17.09% (2011) and 23.29% of all prisoners serve time for drug offences.<sup>96</sup> A prison population comprising a large share of drug offenders could have serious criminal policy and prison management implications.<sup>97</sup> Moreover, this statistical conclusion is of great concern, given that a stable proportion of drug offenders over all imprisoned offenders

<sup>96</sup> . Drug offenders represent a large share of the inmate population in other countries, too. For example, 51% of inmates in US federal prisons in 2010 served time for drug offences. Guerino, P., M., Harrison, P., M., Sabol, W., J.: Prisoners in 2010, Bureau of Justice Statistics, 2011.

<sup>97</sup> . Simon, E.: The Impact of Drug-Law Sentencing on the Federal Prison Population, Federal Sentencing Reporter, Vol. 6, No 1, 1993, p. 29.

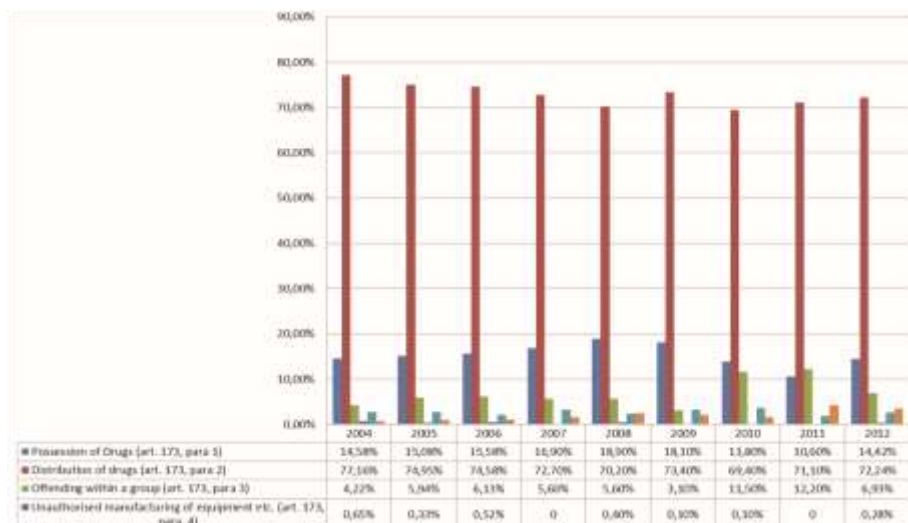
indicates that these two statistical variables are tightly interrelated. As shown on Graph 3, the number of inmates who committed a drug-related offence more or less follows the overall flow of the prison population. Consequently, it seems reasonable to conclude that prison population growth is, in part, caused by the increased number of drug offenders who enter the prison system. Furthermore, data from Table 2 and Graph 3 firmly point to the conclusion that more and more drug offending prisoners are admitted each year to serve longer sentences. Increased admissions and prolonged length of stay in prison have substantially overburdened the Croatian prison system to the point that the internal administrative measures are not sufficient to improve the current situation. A meaningful reorganisation of sentencing supported by an in-depth analysis of the legislative and court sentencing policies are needed in order to identify and address the causes that have triggered prison growth. Profiling drug offenders sentenced to prison by type of offence is an indispensable part of this strategy.

### **3.6. Proportion of adult drug offenders sentenced to prison by type of drug-related offence**

**What is the proportion of adult drug offenders sentenced to prison with respect to type of drug-related offence in your country in the last ten years?**

#### **Graph 4**

**Proportion of adult drug offenders sentenced to prison with respect to type of drug-related offence in Croatia in the period 2004-2012**



Due to the diverse statistical methodology applied in collecting data on drug-related offences for the years 2002 and 2003, the analysed sample covers a slightly shorter period than the one presented above. Although the reduction of the sample disrupts coherence and may be considered to be a certain limitation of this study, its negative influence should be negligible, bearing in mind that the demarcation line between pre- and post-sentencing amendments period is set in 2006. This was the year in which legislative sentencing policies for drug offenders were tightened by increasing sanctions for almost all drug-related offences (distribution of drugs, offending within a group, unauthorised manufacturing of equipment, material or substances used to produce drugs, as well as enabling the use of drugs).

According to the data presented in Graph 4, the new legislative revision of the sentencing policy did not influence the courts' sentencing practice. The increase in prescribed sanctions was not followed by the courts. Moreover, the share of drug distributors and those who organised themselves in a group decreased after the legislative amendments. In 2007 and 2008, the positive sentencing trends were associated with imprisonment for possession of drugs.

<sup>98</sup> The proportion of prisoners who encouraged others to use drugs or caused

<sup>98</sup> . The data on prison sentences imposed upon drug possessors over the total number of imprisoned drug offenders are highly significant. Given that this share is between 10.60% and 18.90%, it would be incorrect to conclude that the prevalence of short prison sentences is caused by criminalisation of drug possession, as it was concluded by Garačić. Garačić, A., Legislative and Court Sentencing Policy of County Courts in the Republic of Croatia for Rape and Abuse of Narcotic Drugs, *op. cit.*, pp. 508.



more severe consequences also reached higher levers, although repressiveness of the prescribed offence remained unchanged. A slight increase was noted in the proportion of persons sentenced under Art. 173(2) in 2009 and under Art. 173(3) in 2010 and 2011, immediately followed by a decrease in the following years. Besides, if we compare sentencing levels in the pre- and post-2006 period, the overall share of persons sentenced to prison for drug distribution was higher in the pre-amendment period (76.05% vs. 71.56%). The same cannot be concluded for drug offending within a group, due to the statistical distortion in 2010 and 2011 (4.22% vs. 5.30%). In those years, the proportion of organised drug offenders sent to prison doubled; nonetheless, this resulted in a minimal increase in the overall proportion of prisoners for drug offending within a group after the 2006 amendments (1.08%).

### **3.7. Influence of legislative amendments to drug offences on drugrelated crime rates**

**According to your legislative and statistical analysis, could the legislative amendments to drug offences in 2.5. influence statistical changes in drugrelated crime rates, if any? If amendments were also introduced to the pre- scribed sanctions, is it possible to track different statistical patterns in relation to the pronounced sanctions against drug offenders after the enactment of such amendments?**

The overall statistical analysis of drug offences on the state level shows a significant discordance between legislative and court sentencing policy on drug abuse suppression. While the legislator's drug sentencing policy mostly relies on repression and increases the sentencing framework of drug offences, the courts are reluctant to impose harsher penalties. Although the Croatian courts did not pronounce more severe prison sentences for drug abuse, the prison system was already hardly hit by the initial boom of drug crime over total crime in 2004 and by the increase of drug offenders sentenced to prison in the first five years of the research period. In the following years, the courts continued to predominantly sentence drug offenders to alternatives to incarceration. The number of drug possessors dropped noticeably, just like the number of offenders who were sent to prison for a term not exceeding one year. The courts' sentencing trends in recent years have been in line with prosecution policies not to instigate criminal proceedings against drug possessors and other less serious offenders. The gap between the legislator's and the courts' approach towards drug offenders' sentencing was narrowed by

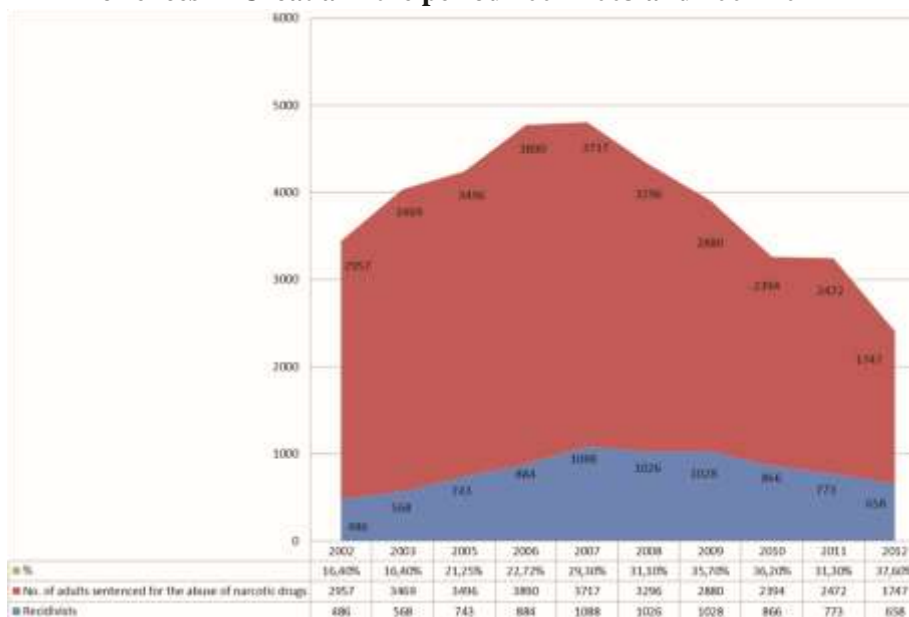
the 2012 amendments endorsing the decriminalisation of drug possession for personal use.

### 3.8. Statistical deviations with respect to recidivism rates of drug offenders following the legislative amendments

Were there any statistical deviations with respect to recidivism rates of drug offenders following the legislative amendments? Is it possible to conclude that such statistical phenomenon could be, inter alia, caused by legislative amendments?

Graph 5

Recidivism of adult offenders sentenced to prison for drug-related offences in Croatia in the period 2002-2003 and 2004-2012



Graph No 5 presents data on the proportion of previously convicted drug offenders in two separate periods, i.e. in 2002-2003 and 2004-2012. Data are divided in two periods due to the fact that statistics on drug-related offences are not available for 2003. Missing data are a significant limitation of this study, because their unavailability has caused a gap in recidivism rates flow. However, by distributing data in two periods it is still possible to make a

meaningful comparison. In spite of the increase in the total number of sentenced drug offenders and of those previously convicted in the first two years, recidivism rates remained unchanged (16.40%). On the other hand, the second period sees the highest percentage increase of drug recidivists (from 21.25% to 37.60%). The percentage of drug offenders who were previously convicted more than doubled between 2002 and 2012. Therefore, the statistical data on drug offenders' recidivism show that the increase in sanctions did not have any effect on drug abusers' reoffending. Whether drug enforcement practices on a county court (micro) level support the same conclusion will be discussed below.

#### **4. Crime rates of drug-related offences on county court (micro) level**

##### **4.1. Details of the research sample**

**Please provide relevant details of your research sample (name of the county court, its jurisdiction, number of analysed final court decisions, research period, etc.). If the offenders in the sample were sentenced according to different Criminal/Penal Code provisions (the original and the amended one), divide your sample accordingly.**

The analysis on state level provides an overall phenomenological picture, a rough framework which cannot give precise indications of the phenomenon that is studied. In order to draw more scientifically precise conclusions, statistical data on drug-related cases were collected from the County Court in Rijeka for the period 2010 to 2012, and 50 final court judgments were analysed in detail. Due to the fact that in a certain number of cases the court acquitted the defendant of the charge or rejected the charge, the sample was broadened to include 4 additional court judgments (1 in 2008 and 3 in 2009). An additional reason for extending the sample lies in the fact that not all case files were available at the time of the research. According to the official court statistics, criminal proceedings are mostly carried out for drug offences. In the research period, in 58% of all court cases the offenders were charged with abuse of narcotic drugs. No matter the high incidence of drug cases and the fact that the research was intentionally conducted between December 23rd and 31st, 2013, when court judges are less active, a significant number of case files were not archived at the central court archive, and tracing them was an insurmountable obstacle. The statistical broadening could have an effect on research coherence; however, this limitation may have minimally impacted

the findings and conclusions of this study, bearing in mind that the 2008 and 2009 cases were adjudicated according to the 2006 amended version of the 1997 Criminal Code and the 2011 Criminal Code in the great majority of sampled cases (47 cases in total).

Only four criminal offences from the sample were committed before 2006 and, consequently, the offenders were sentenced according to the original version of the 1997 Criminal Code although, at the time of trial, the 2006 amendments were already applicable.<sup>99</sup> Due to the principle of application of the more lenient law, the court did not consider the 2006 amendments when deciding about the type and length of punishment. According to the same principle, the Supreme Court of the Republic of Croatia modified the legal qualification and the sanctions pronounced by the lower county court in six cases.<sup>122</sup> The judgments had been delivered in 2012; however, when the appeal reached the Supreme Court, the 2011 Criminal Code was already in force and the case had to be adjudicated according to the new, more lenient provisions.

Bearing in mind that one of the aims of this research was to verify whether the Croatian courts follow shifts in legislative sentencing policy, the research sample was divided in three different categories. The first category covers cases adjudicated according to the original version of the 1997 Criminal Code (1997OCC group). The second group consists of 37 cases in which the amended version of the 1997 Criminal Code including the 2006 amendments was applied (2006ACC group). The final group comprises 10 judgments delivered by the County Court in Rijeka and corrected by the Supreme Court according to the new Criminal Code currently in force (2011CC group). Therefore, the statistical data present the court sentencing policy against 82 drug offenders in total in the research period, according to three different versions of the Criminal Code.

#### **4.2. Statistical prevalence of various drug law offences committed by adult offenders**

**What is the statistical prevalence of various drug law offences committed by adult offenders in your sample?**

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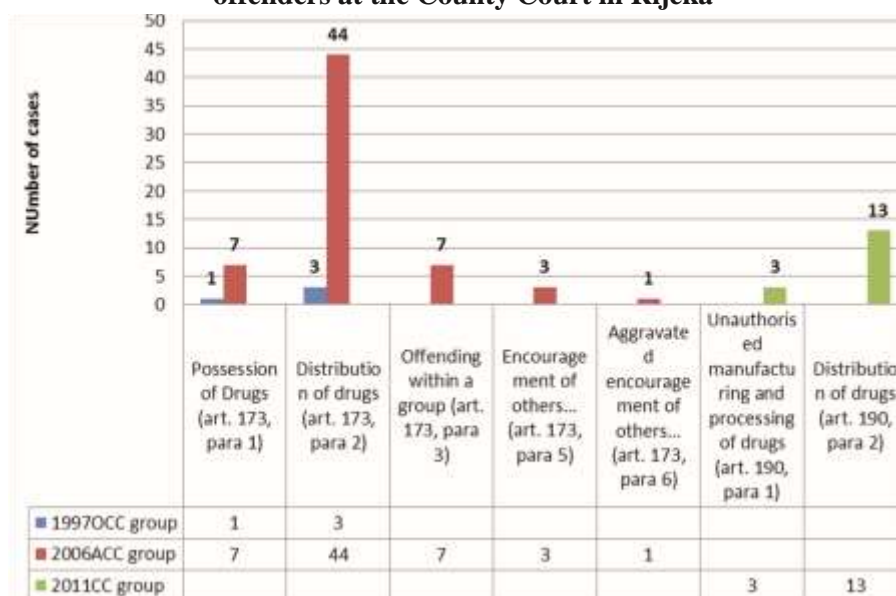
<sup>99</sup> . Judgment of the County Court in Rijeka, K-42/2010 on September 21st, 2010; Judg-

ment of the County Court in Rijeka, K-47/2010 on October 5th, 2010; Judgment of the County Court in Rijeka, K-15/2013 on November 17th, 2013.

122. Judgment of the Supreme Court of the Republic of Croatia, I Kž 796/2012-4 on October 1st, 2013; Judgment of the Supreme Court of the Republic of Croatia, I Kž 797/2012-4 on October 10th, 2012; Judgment of the Supreme Court of the Republic of Croatia, I Kž 883/2012-4 on March 20th, 2013; Judgment of the Supreme Court of the Republic of Croatia, I Kž 69/2013-4 on March 21st, 2013; Judgment of the Supreme Court of the Republic of Croatia, I Kž 75/2013-4 on February 28th, 2013; Judgment of the Supreme Court of the Republic of Croatia, I Kž 245/2013-4 on April 25th, 2013.

**Graph 6**

**Statistical prevalence of various drug offences committed by adult offenders at the County Court in Rijeka**



At the County Court in Rijeka, drug offenders are mostly prosecuted for and found guilty of distribution of drugs. This is the most common offence, followed by offending within a group and drug possession for all drug offenders from the sample. The statistical prevalence of drug offences differs from the statistical outcome at the state level; this incoherence was expected due to the fact that the county court has jurisdiction to rule at first instance mostly on cases of offences punishable by imprisonment for a term of more than ten years or by long-term imprisonment.

**Table 3**  
**Sanctions pronounced against adult drug offenders who committed a single drug offence at the County Court in Rijeka**

						imprisonment									
	Community work	Juvenile prison suspension	Convicted person, but no penal sentence	Judicial admonition	Suspended sentence	50 days	6 months	1 year	1-2 years	2 years	2-3 years	3 years	3-4 years	4 years	4-5 years
1997 O CC group	2				1	1									
2006 AC C group	11	4	1	1	4		0	2	1	11	7	3	4	1	5
2011 CC group	11		1				1	2	2	1	1				
Σ	24	4	2	1	5	1	1	4	3	12	8	3	4	1	5

The most commonly pronounced sentence is imprisonment up to three years, although community work shows a strong increasing trend.<sup>100</sup> Bearing in mind that only 10 judgments were analysed in the third part of the sample (cases adjudicated according to the 2011 Criminal Code), it seems realistic to expect

<sup>100</sup> . A sentence of 50 days' imprisonment is a sort of individualised sentencing phenomenon within the sample. This was the only short prison sentence delivered by the court for drug distribution. The case analysis also shows that, according to its sentencing practices and especially the evaluation of mitigating and aggravating circumstances, the court had every possibility to impose an alternative sentence. The offender was a final year student without any prior conviction who confessed his intent to distribute drugs at a music concert. He was also a foreign citizen without permanent residence in the Republic of Croatia, who was detained in custody for 14 days and deprived of his liberty for 37 days on the basis of a previous conviction for the same offence when he was tried *in absentia*. It should be noted that the imposed sanction almost entirely corresponds to the fraction of the offender's time spent in prison. Judgment of the County Court in Rijeka, K-41/2010-24 on September 21<sup>st</sup>, 2010.

an additional increase in alternatives to incarceration. The community work-oriented sentencing policy has been part of the growing trend in Croatia to divert drug offenders from prison into a system of less restrictive sanctions. On the other hand, the research shows that the aggregate sentences are of a highly punitive nature.<sup>101</sup> Although the individual sentences of 2 and 3 years' imprisonment are in accordance with the court sentencing policy for drug offenders who committed a single drug offence, the level of use of the criminal frameworks for the aggregate sentence in each particular case is incomparably higher than the one used by the court when pronouncing sentences for a single offence. For example, in the first case on Table 4 (aggregate sentence of 9 years' imprisonment), the framework for aggregate sentences ranges from imprisonment of 3 years and 1 month to imprisonment of 11 years and 11 months.

**Table 4**  
**Sanctions pronounced against adult drug offenders**  
**who committed several drug offences for which they**  
**were tried concurrently at the County Court in Rijeka**

1st individual sentence	3 years	2 years	1 year	5 years
2nd individual sentence	3 years	2 years	3 months	3 years and 3 months
3rd individual sentence	3 years	2 years		
4th individual sentence	3 years	2 years		
aggregate sentence	9 years	5 years	1 year and 2 months suspended for 3 years	8 years

#### **4.3. Difference in the court's sentencing practice for the same criminal offences in non-suspended and suspended sentences**

<sup>101</sup> . The same conclusions have been reached in a study on the sentences imposed upon drug possessors by the County Court in Pula under Art. 173(1) of the 1997 Criminal Code. Sirotić, V. and Krbec, I.: *Zakonska i sudska politika kažnjavanja na području Županijskog suda u Puli* / The Legal and Judicial Policy of Punishment on the Territory under the Jurisdiction of the County Court in Pula, Croatian Annual of Criminal Law and Practice, Vol. 11, No 2, 2004, pp. 552, 557-558.

### **Is there a difference in the court's sentencing practice for the same criminal offences in non-suspended and suspended sentences?**

Analysis on the micro level shows that suspended sentences are extremely rare. The court imposed imprisonment and then suspended it for a certain period of time only upon six drug offenders from the sample. The last suspended sentence is an aggregate sentence. The infrequent pronouncement of suspended sentences confirms that the court's sentencing policy for drug offenders has changed considerably. Only until recently previous researches have shown that Croatian criminal courts mostly pronounced suspended sentences in their practice and neglected other sentences, thus creating the "mild sentencing policy".<sup>102</sup> According to current research results, the County Court in Rijeka does not principally rely on suspended sentences as a sanction to reduce drug crime.

The research analysis has also shown that the levels of imprisonment in suspended sentences were higher with respect to "ordinary" prison sentences for the same criminal offence. One of the explanations for this sentencing deviation was the court's focus on additional methods to convince the offender not to offend in the future. Moreover, the longer prison sentence was considered a logical consequence due to the fact that imprisonment after revoking the suspended sentence has to reflect a double punishment of an offender who continues to act criminally, first for committing the original offence and second for betraying the court's trust.

The current analysis of the practice of the County Court in Rijeka does not support such findings, except in case of drug possession. In four cases, criminal court judges suspended the prison sentence of 3 and 5 months for possessing drugs. Considering that the prescribed sentence for drug possession was at the time of trial imprisonment up to one year, the pronounced and then suspended prison sentences are harsh. The same conclusion is supported by the more recent county court practice analysed for the purpose of this research, according to which drug possessors are convicted but no criminal sanction is imposed upon them or are sent to probation office to fulfil community service.

<sup>103</sup> Moreover, the research on state level shows that in a significant number of

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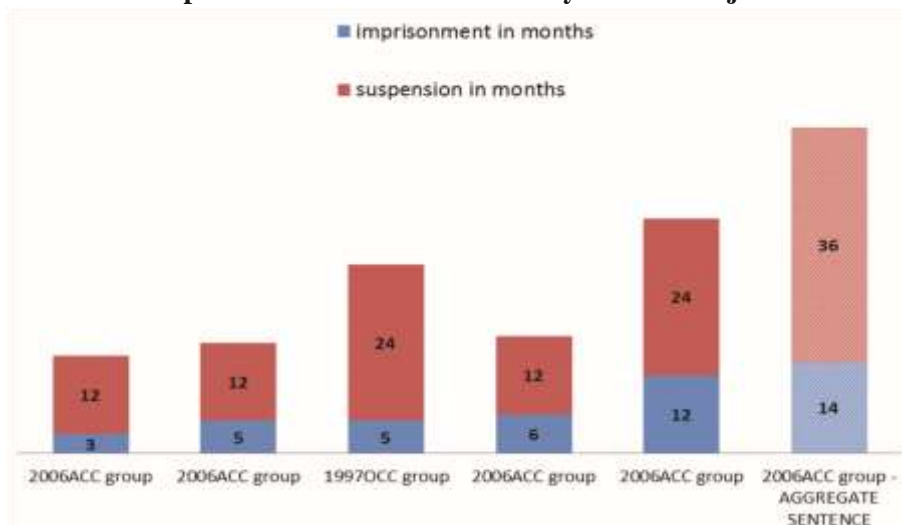
<sup>102</sup> . Cvitanović, L. and Glavić, I.: *Prvi pogled na uvjetnu osudu u novom Kaznenom zakonu* / A Preliminary View of the Suspended Sentence in the New Criminal Code, Croatian Annual of Criminal Law and Practice, Vol.18, No 2, 2011, p. 756.

<sup>103</sup> . Judgment of the County Court in Rijeka, K-48/2010 on March 1<sup>st</sup>, 2012; Judgment of the County Court in Rijeka, K-54/2010 on February 14<sup>th</sup>, 2011; Judgment of the



cases public prosecutors dismissed crime reports and did not instigate criminal proceedings against drug possessors under the principle of opportunity.<sup>104</sup>

**Graph 7**  
**Suspended sentences at the County Court in Rijeka**



#### **4.4. Extent to which the court uses the range of punishment between the special minimum and maximum prescribed for a specific drug-related offence**

**What is the extent to which the court uses the range of punishment between the special minimum and maximum prescribed for a specific drug-related offence? Does this extent support claims that the prescribed legal frameworks are too low?**

County Court in Rijeka, K-14/2011 on September 27<sup>th</sup>, 2011. The court practice in question is one of the strategies already tested in other countries to divert drug possessors to non-prison sanctions because they pose a low risk to public safety and there is no need to incarcerate them. Demleitner, N., V.: Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions, Stanford Law Review, Vol. 58, No 1, 2005, p. 340. On diversion to treatment for those charged with drug possession, see Demleitner, N., V.: Replacing Incarceration: The Need for Dramatic Change, Federal Sentencing Reporter, Vol. 22, No 1, 2009, p. 4.

<sup>104</sup> . Bill on Amendments to the 2011 Criminal Code, *op. cit.*, p. 4.

Bearing in mind that the sample of judgments adjudicated according to the original version of the 1997 Criminal Code consists of only three final court decisions and that the court imposed imprisonment upon the offender in only one case, it was impossible to make any meaningful comparison of court sentencing practices. On the other hand, certain conclusions can be drawn when comparing the 2006ACC group and the 2011CC groups in the sample. In the 2006ACC group, the average sentence pronounced for drug distribution was 29 months, i.e. 7 months below the prescribed minimum. In around 68% of all final judgments the court mitigated the punishment. In all other cases the punishment equalled the prescribed legislative minimum (27%) or was pronounced slightly above that minimum (5%). The court did not even once sentence offenders who organised themselves within a network to distribute drugs to imprisonment above the legislative minimum. All sentences in the sample were mitigated, while the average sentence was imprisonment of 31 months.

Similar results can be found in sentencing patterns for drug offences in the third group of judgments. The pronounced sentences for drug distribution range from 6 to 30 months. The court began by using the prescribed sentencing framework, but the sentences were settled around the special legislative minimum and rendered within the first quarter of the prescribed range of punishment. The analysis shows that the sanctions pronounced for drug distribution in the two periods do not differ significantly and that the sentences reached the prescribed threshold in the second period due to the fact that the legislative minimum for the same offence was lowered by the latest amendments. Therefore, the analysed court practice does not support in any way claims that the prescribed legal frameworks in the Criminal Code are too low.<sup>105</sup>

#### **4.5. Application of the Criminal Code provisions on mitigation of punishment, grounds for mitigation and prevalence of mitigated punishments**

**Were the Criminal Code provisions on mitigation of punishment applied? If yes, what were the grounds for mitigation (special institutes from the general part of the Criminal/Penal Code, e.g. attempt, renunciation or judicial discretionary powers in sentencing)? What is the prevalence of mitigated punishments in your sample?**

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<sup>105</sup> . To find out more about the court's use of the prescribed legal frameworks and scien-

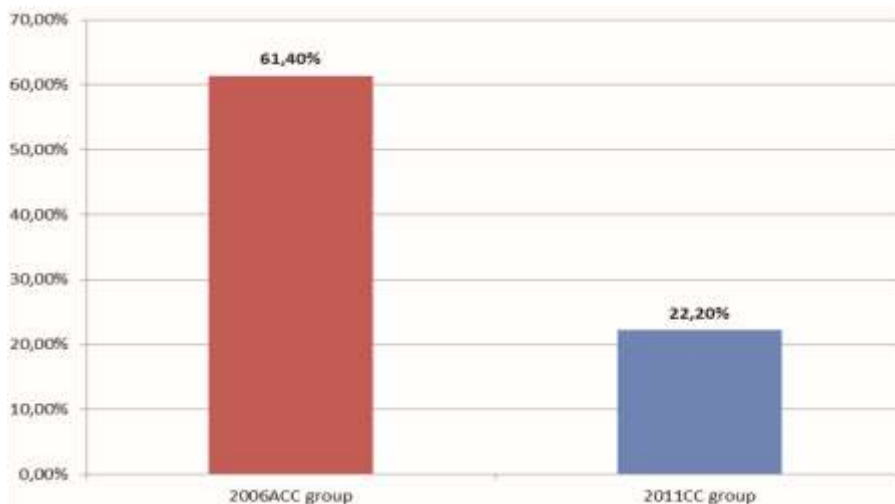
One of the reasons supporting the claims that the prescribed legal frameworks are not too low lies in the broad range of mitigation practices of the County Court in Rijeka. As shown on Table 3 and Graph 8, a significant number of offenders were given prison sentences below the legislative minimum (78% of all offenders in the sample). The mitigation of punishment was almost three times more frequent in cases adjudicated according to the 2006 amended version of the Criminal Code. The analysed case law shows that courts will mitigate the punishment more often if the level of prescribed punishment is not in line with their sentencing patterns. For example, in the first cohort, drug distributors were predominantly sentenced to two years' imprisonment and, to pronounce this sanction, judges mitigated the punishment in a large majority of cases. Following the legislative lowering of the minimum sentence for drug distribution in the 2011 Criminal Code, the mitigating practices significantly dropped since the average sanction pronounced for drug distribution remained the same.

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tific understanding of legislative and court sentencing policies, see Horvatić, Ž.: *Izbor kazne u jugoslavenskom krivičnom pravu i sudskoj praksi* / Selection of Punishment in Yugoslav Criminal Law and Court Practice, Informator, Zagreb, 1980.

### **Graph 8**

#### **Mitigating practices in drug-related cases at the County Court in Rijeka**



The court used various criminal legal institutes to mitigate the punishment.<sup>106</sup> In a significant number of cases the court pronounced a less punitive sanction than the one prescribed for the drug offence committed, as it determined special mitigating circumstances. For example, the court imposed six months' imprisonment upon the offender and then substituted it with community service, considering that the offender was an addict *tempore criminis* and abstained from drug use at the time of trial. The court also evaluated the fact that the offender had no prior conviction, she was regularly employed and a mother of one underage child.<sup>107</sup> According to court practice, special mitigating circumstances also include severe health problems caused by diabetes and addiction<sup>108</sup> and small amount of drugs as the object of the criminal offence,<sup>132</sup> young age,<sup>133</sup> regular student status,<sup>109</sup> two years of dating a girl introduced to the offender's family,<sup>110</sup> entering into marriage,<sup>111</sup> parents'

<sup>106</sup> . Horvatić, Ž.: *Institut ublažavanja kazne u našem krivičnom pravu i nesporazumi u ocjenjivanju tzv. kaznene politike* / The Institute of Mitigation of Punishment in Our Criminal Law and Misjudgements about Evaluation of the So-Called Criminal Policy, Our Legality, Vol. 42, No 11-12, pp. 1282-1307.

<sup>107</sup> . Judgment of the County Court in Rijeka, K-40/2010 on January 10th, 2013.

<sup>108</sup> . Judgment of the Supreme Court of the Republic of Croatia, I Kž 245/2013-4 on April 25<sup>th</sup>, 2013.

<sup>109</sup> . Judgment of the County Court in Rijeka, K-42/2010 on September 21st, 2010.

<sup>110</sup> . Judgment of the County Court in Rijeka, K-61/2010 on May 20th, 2011.

<sup>111</sup> . Judgment of the County Court in Rijeka, K-6/2011 on April 7th, 2011.

illness,<sup>112</sup> mental illness of a spouse,<sup>113</sup> confession of a crime,<sup>114</sup> timely call for medical assistance,<sup>115</sup> cooperation with the police and the fact that the criminal act was committed with cannabis as the least dangerous drug<sup>116</sup> and that cannabis was sold only to one person.<sup>117</sup> The effect of special mitigating circumstances in their totality in certain cases can be so intensive that it outweighs the effect of aggravating circumstances, e.g. the fact that the offender was *tempore criminis* distributing a significant amount of heroin.<sup>118</sup>

The 1997 and 2011 Criminal Codes contain provisions according to which the

132. This practice is in line with the legislative solutions accepted in Austria. Mandatory suspension of proceedings has to be issued if it is proven that the offender bought a small amount of drugs for personal use. Fischer, G., Metz, V. and Postl, G.: The National Policy Toward Alcohol and Substance Use Among Juveniles, Medical University of Vienna, p. 8, <<http://www.aaaprevent.eu/doc/AustriaNP.pdf>> (accessed Feb. 28, 2014).

133. Judgment of the County Court in Rijeka, K-16/2010 on July 13th, 2010; Judgment of the County Court in Rijeka, K-18/2011 on September 2nd, 2011; Judgment of the County Court in Rijeka, K-32/2011 on February 23rd, 2012.

court may remit the punishment if the drug offender has substantially contributed of his/her own free will to the discovery of the drug offence.<sup>144</sup> According to the court, it was necessary to apply that favourable sentencing provision due to the fact that the police did not have any evidence or indication

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<sup>112</sup> . Judgment of the County Court in Rijeka, K-22/2011 on November 8th, 2011.

<sup>113</sup> . Judgment of the County Court in Rijeka, K-65/2011 on November 22nd, 2011.

<sup>114</sup> . Judgment of the County Court in Rijeka, K-15/2013 on October 17th, 2013. Almost the same personal circumstances (father of two underage children, severe functional cardiac health problems, sick leave at the time of trial, addiction and 5-6 years of abstinence) were evaluated as special mitigating circumstances in the Judgment of the County Court in Rijeka, K-Us-8/2009 on February 4th, 2001.

<sup>115</sup> . Judgment of the County Court in Rijeka, K-32/2011 on February 23rd, 2012.

<sup>116</sup> . Judgment of the County Court in Rijeka, K-1/2010 on April 29th, 2010; Judgment of the Supreme Court of the Republic of Croatia, I Kž 812/2009-7 on January 20th, 2010.

<sup>117</sup> . Judgment of the Supreme Court of the Republic of Croatia, I Kž 105/2011-4 on April 12th, 2011.

<sup>118</sup> . Judgment of the County Court in Rijeka, K-50/2010 on December 29th, 2010.

that the drug offence was committed.<sup>145</sup> In another 2010 case, the court emphasised while deliberating on the selection of the sanction that the offender's self-incriminatory acts speeded up the trial providing evidence to support the prosecutor's claims about the criminal offence.<sup>119</sup> Although complete exoneration of the drug offender was extremely rare,<sup>120</sup> in numerous cases the court used this legal basis to overpass the prescribed legislative minimum.<sup>121</sup> In recent scientific writings and criminal studies the institute of effective regret has been exposed to strong criticism, especially in corruption cases;<sup>122</sup> however, this analysis points to the conclusion that effective regret is recognised and well used as a correctional sentencing methodology in drug cases.

The court mitigated the punishment imposed upon a young adult offender

144. Art. 173(8) of the 1997 Criminal Code, *op. cit.*; Art. 190(9) of the 2011 Criminal Code, *op. cit.*

145. Judgment of the County Court in Rijeka, K-48/2010 on March 1st, 2012.

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<sup>119</sup> . Judgment of the County Court in Rijeka, K-23/2010 on October 15th, 2010.

<sup>120</sup> . Judgment of the County Court in Rijeka, K-40/2010 on January 10th, 2013; Judgment of the County Court in Rijeka, K-48/2010 on March 1st, 2012; Judgment of the County Court in Rijeka, K-54/2010 on November 14th, 2011.

<sup>121</sup> . Judgment of the County Court in Rijeka, K-16/2010 on July 13th, 2010; Judgment of the County Court in Rijeka, K-23/2010 on October 15th, 2010; Judgment of the County Court in Rijeka, K-54/2010 on November 14th, 2011; Judgment of the County Court in Rijeka, K-7/2011 on September 13th, 2011; Judgment of the County Court in Rijeka, K-26/2011 on October 28th, 2011; Judgment of the County Court in Rijeka, K-55/2011 on November 7th, 2011; Judgment of the County Court in Rijeka, K-74/2011 on June 1st, 2012; Judgment of the County Court in Rijeka, K-21/2012 on July 13th, 2012; Judgment of the County Court in Rijeka, K-26/2012 on July 9th, 2012; Judgment of the Supreme Court of the Republic of Croatia, I Kž 796/2012-4 on October 1st, 2013; Judgment of the Supreme Court of the Republic of Croatia, I Kž 797/2012-4 on October 10th, 2012; Judgment of the Supreme Court of the Republic of Croatia, I Kž 883/2012-4 on March 20th, 2013; Judgment of the Supreme Court of the Republic of Croatia, I Kž 75/2013-4 on February 28th, 2013.

<sup>122</sup> . The Council of Europe's Group of States against Corruption (GRECO): Third Evaluation Round Compliance Report on "the former Yugoslav Republic of Macedonia", Strasbourg, 2012, pp. 7-8.

exercising its discretionary powers under Article 106(1) of the Juvenile Courts Act.<sup>123</sup> The socio-anamnestic data of the offender's case history (young age, offender's personal satisfaction with his working time, work conditions and earnings, acquired working habits, positive orientation towards the future, stable emotional relationship, termination of contacts with persons who engage in antisocial behaviour) confirmed that it was acceptable to pronounce a sentence below the legislative minimum.<sup>124</sup>

The court may also pronounce a less severe sentence than the one prescribed for a particular criminal offence when the public prosecutor and the defendant have agreed on this. A special agreement between the parties was used as a mitigating basis in eight criminal court cases.<sup>125</sup> It is interesting to note that the court has discretionary powers to accept the agreement, but in all cases the court did not substantially evaluate the circumstances of the case and whether the proposed sanction is appropriate to fulfil its purpose (special and general prevention). The evaluation was limited to an assessment of the formal requirements that are necessary to establish an agreement and of the legislative framework for the range and type of sanction. If the agreement was established in accordance with the law and if the proposed sanction in it was within the legislative framework, the court accepted the agreement without any further scrutiny. This, however, was not the lawmakers' intention.

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<sup>123</sup> . In accordance with the said article, the court is not obliged, subject to limitations provided for by the Criminal Code provisions on mitigation of punishment, to impose the minimum term of punishment for a criminal offence committed by a young adult if the court applies the general criminal law. Art. 106(1) of the Juvenile Courts' Act, Official Gazette No 84/2011, 143/2012, 148/2013 (previously Art. 110(1) of the Juvenile Courts' Act, Official Gazette No 111/1997, 27/1998, 12/2001).

<sup>124</sup> . Judgment of the County Court in Rijeka, K-9/2010 on June 1st, 2010; Judgment of the County Court in Rijeka, K-25/2010 on September 2nd, 2010.

<sup>125</sup> . Judgment of the County Court in Rijeka, Kov-Us-9/2011 on September 15th, 2011; Judgment of the County Court in Rijeka, Kov-Us-12/2011 on November 3rd, 2011; Judgment of the County Court in Rijeka, Kov-Us-8/2012 on May 5th, 2012; Judgment of the County Court in Rijeka, K-21/2012 on July 13th, 2012; Judgment of the County Court in Rijeka, K-26/2012 on July 9th, 2012; Judgment of the County Court in Rijeka, Kov-40/2012 on February 19th, 2013; Judgment of the County Court in Rijeka, K-55/2012 on March 14th, 2013; Judgment of the County Court in Rijeka, K-10/2013 on March 6th, 2013.

#### **4.6. Amendments to the prescribed criminal frameworks of punishment for drug offences and their implementation by the court**

**If the prescribed criminal frameworks of punishment for a drug offence were amended, did the court follow the newly-prescribed sentencing policy?**

Data from the case law analysis clearly point to consistency in drug offenders' sentencing. Even when the criminal legal provisions are amended on several occasions, the courts' sentencing decisions are not significantly influenced. If the amendments reduce the legislative minimum, it would be exaggerated to say that the courts will follow the newly-prescribed sentencing policy. The average sanctions imposed upon drug offenders remain the same.<sup>126</sup> The only effect of the reduced repression embodied within the Criminal Code provisions is a decrease in the number of mitigated sentences. Therefore, there is no scientific basis to support the claim that the courts' sentencing policy can be substantially moderated by taking new directions in the legislative sentencing policy.

### **5. Individualisation of imposed sanctions**

#### **5.1. Methods used by judges to individualise a sanction imposed on an individual drug offender**

**What kind of methods did judges use to individualise a sanction imposed on an individual drug offender? Did they provide a sufficient explanation concerning the selection of the type and range of sanction?**

The analysed court practice reveals significant deficiencies and weaknesses in the court's rationale concerning the selection of the type and range of sanction. The explanation of the court's sentencing decision in most judgments is insufficient and reduced to a value judgment or poor prediction of the

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<sup>126</sup> . Empirical research shows that there are different methods to maintain a consistent level of punishment for a certain group of offenders. For example, Engen and Steen found certain evidence supporting the position that after the sentencing reforms in the period from 1986 to 1995 the courtroom workgroups in Washington State manipulated charges to maintain the average lengths of sentence for drug offenders. Engen, R., L. and Steen, S.: *The Power to Punish: Discretion and Sentencing Reform in the War on Drugs*, American Journal of Sociology, Vol. 105, No 5, 2000, p. 138.



offender's future behaviour.<sup>127</sup> In certain judgments, the court's holding with respect to sentencing consists of a couple of sentences in which it enumerates some objective and subjective circumstances of the case and states that "a given sentence is suitable for achieving the purpose of punishment" or that "court holds that the determined sentence will have sufficient influence on the offender so as not to commit the same or a similar criminal offence and on other offenders in terms of general prevention".<sup>155</sup>

The lack of a meaningful analysis of sentencing circumstances is especially evident in judgments in which the court mitigates the punishment due to special mitigating circumstances.<sup>156</sup> In most judgments the court's holding is limited to an enumeration of circumstances and there is no in-depth analysis to provide explanations about the quality of circumstances as *special* mitigating circumstances. This phenomenon has been a permanent issue in court practice and, to stress the difference between "regular" and "special" mitigating circumstances, the legislator has provided for additional explanation on judicial discretion to mitigate the sentence under Art. 48(2) of the 2011 Criminal Code. Special mitigating circumstances exist, in particular, if the perpetrator has reconciled with the victim, if s/he has fully or largely repaired the damage caused to the victim by the criminal offence or if s/he has made serious efforts to repair the said damage.<sup>157</sup> The research results show that such special mitigating circumstances have not been determined not even once in the court judgments analysed, although judges based their decision to impose a less severe sentence invoking the said article in 39% of all mitigated cases.

Although there are notable examples of good practice in providing explanations

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ically enumerate mitigating and aggravating circumstances without any further analysis. Mrčela, M. and Tripalo, D.: *Zakonska i sudska politika kažnjavanja na području Županijskog suda u zagrebu* / Prescribed Punishment and Sentencing Policy in the Territory under the Jurisdiction of the County Court in Zagreb, Croatian Annual of Criminal Law and Practice, Vol. 11, No 2, 2004, p. 673.

155. See for example the Judgment of the County Court in Rijeka, K-1/2010-14 on April 30th, 2010 and K-32/2010-102 on December 20th, 2010.

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<sup>127</sup> . Mrčela and Tripalo point to the same conclusion, stressing that courts often stereotyp-

156. The insufficient explanatory techniques of criminal courts in drug possession cases were also noted in Kurtović, A. *et al.*: *Zakonska i sudska politika kažnjavanja općinskih sudova na području Županijskog suda u Splitu* / Prescribed Punishment and Sentencing Policy of the Municipal Courts in the Territory under the Jurisdiction of the County Court in Split, Croatian Annual of Criminal Law and Practice, Vol. 11, No 2, 2004, p. 638.

157. At. 48(1) of the 2011 Criminal Code, *op.cit.*

on the selection of the type and range of punishment,<sup>128</sup> in the great majority of court decisions it is not possible to establish any relation between mitigating and aggravating circumstances and the pronounced sanction.<sup>129</sup> The pronounced sanction is more a product of the court's impression of the offender and of the circumstances of the case than of analytical evaluation.<sup>130</sup> The most common method used by the court to provide explanations in the statement of reasons for the decision on the criminal sanction is the "synthetic" method, which makes it difficult to draw a clear, unambiguous and coherent conclusion about the criminal justice policy of the County Court in Rijeka in drug-related cases.

## 5.2. Mitigating and aggravating circumstances relevant for the choice of the type and range of punishment and circumstances mostly relied on when deciding about the punishment

**What were the mitigating and aggravating circumstances relevant for the choice of the type and range of punishment? Which circumstances were mostly relied on when deciding about the punishment?**

**Table 5**  
**List of mitigating and aggravating circumstances relevant for the choice of the type and range of punishment**

mitigating	aggravating
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<sup>128</sup> . For more details see Judgment of the County Court in Rijeka, K-Us-8/2009 on 4th of February, 2010, and the Supreme Court of the Republic of Croatia, I Kž 812/2009-7 on 20th of January, 2010.

<sup>129</sup> . The same conclusion was reached in Grozdanić, V., Sršen, Z. and Rittossa, D.: The Penal Policy of Municipal Courts in the Area of the County Court in Rijeka, Croatian Annual of Criminal Law and Practice, Vol. 11, No 2, 2004, p. 608.

<sup>130</sup> . See for example Judgment of the County Court in Rijeka, K-16/2010-25 on 13th of July, 2010;

offender's personal characteristics		objective characteristics of the offence		offender's personal characteristics		objective characteristics of the offence	
type	frequency of evaluation	type	frequency of evaluation	type		type	frequency of evaluation
partial confession	7	small quantity of drugs	9	previous conviction	18	large amount of drugs	13

confes- sion	31	long time period between the com- mission of the offence and the trial	1	offence com- mitted during probationary period	2	social dangerousness of the criminal offence	13
parent of a minor	12	cannabis as the object of crime	12	mis- behaving at trial	1	drawing others into criminal activity	1
first-time offender	39	manner of drug offence com- mission	4	persistence in offending	1	drug offence with international element	3
single or primary family breadwinner	1	situa- tional delict	2	high degree of guilt	2		
serious health problems	7						
drug addiction	14						

regular employment	9						
voluntary client in substance abuse treatment	1						
drug abstinence	3						
lack of profit from offending	2						

marital status	3						
family circumstances	10						
stable emotional relationship	2						
young age	29						
regular student status	1						
degree of guilt	2						
manner of commission of drug offence	2						



court judgments, judges only enumerated the circumstances without any further analysis. However, examples of good explanatory analysis are also noted. For example, the fact that the offender is a father of two minor children was not routinely taken for a mitigating circumstance. The court analysed additional facts (the offender did not have any contact with his children, the offender's father was the one who financially supported the grandchildren and their mother) and concluded that the nature of circumstances with respect to parenthood did not support the offender's claim that his parental status should direct the court's sentencing decision towards a lower level of punishment.<sup>133</sup>

On the other hand, the aggravating circumstances are rarely evaluated by the criminal court, and even if circumstances such as prior conviction, large amount of drugs and social dangerousness of the offence are taken into consideration, their effect on the selection of the type and the range of punishment is minimal or entirely disregarded by the courts.<sup>134</sup> Moreover, the case law analysis confirms the conclusions of a previous research that in a significant number of cases the said aggravated circumstances were insufficiently reflected in the pronounced sentence, as the sentence imposed upon previously convicted socially dangerous distributors of large quantities of drugs was below the prescribed legislative minimum.<sup>165, 166</sup> Six months' imprisonment was imposed upon the offender for drug distribution and then substituted with community service, although he deliberately disrupted the trial with his misbehaviour.<sup>135</sup> In another case dated 2009, the court decided not to evaluate prior convictions as aggravating, considering that "the enumerated criminal offences were committed by the offender while he was abusing drugs".<sup>136</sup>

The principle of guilt is a central principle to Croatian criminal law, so it has to be crucial when the court decides about the punishment imposed on an individual offender. The Criminal Code clearly states that the court shall first assess the degree of guilt and the purpose of punishment, and then all the other

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<sup>133</sup> . Judgment of the County Court in Rijeka, K-51/2010-54 on April 19<sup>th</sup>, 2011.

<sup>134</sup> . The research findings correspond to the conclusions regarding drug possessors' sentencing reached in Grozdanić, V., Sršen, Z. and Rittossa, D., *op. cit.*, pp. 570-571.

<sup>135</sup> . Judgment of the Supreme Court of the Republic of Croatia, I Kž 245/2013-4 on April 25<sup>th</sup>, 2013.

<sup>136</sup> . Judgment of the County Court in Rijeka, K-Us-8/2009 on February 4<sup>th</sup>, 2010.

circumstances when determining the type and measure of punishment.<sup>137</sup> However, the research results show that the degree of guilt has been evaluated by the court in only four cases. These findings give rise to concerns: the fact that the court considers that the offender's guilt is unrelated to sentencing goes against the fundamentals of criminal law.<sup>138139</sup>

165. Garačić, A., Legislative and Court Sentencing Policy of County Courts in the Republic of Croatia for Rape and Abuse of Narcotic Drugs, *op. cit.*, p. 515.
166. Judgment of the County Court in Rijeka, K-26/2008-131 on March 26th, 2012; Judgment of the County Court in Rijeka, K-9/2010-17 on June 1st, 2010; Judgment of the County Court in Rijeka, K-39/2010 on October 26th, 2010; Judgment of the County Court in Rijeka, K-40/2010-131 on January 10th, 2013; Judgment of the County Court in Rijeka, K-42/2010-24 on September 21st, 2010; Judgment of the County Court in Rijeka, K-50/2010 on December 29th, 2010; Judgment of the County Court in Rijeka, K-61/201041 on May 20th, 2011; Judgment of the County Court in Rijeka, K-18/2011 on September 2nd, 2011; Judgment of the County Court in Rijeka, K-22/2011 on November 8th, 2011; Judgment of the County Court in Rijeka, K-32/2011 on February 23rd, 2012; Judgment of the County Court in Rijeka, K-45/2011 on October 17th, 2011; Judgment of the County Court in Rijeka, K-74/2011 on June 1st, 2012; Judgment of the County Court in Rijeka, K-5/2012 on October 4th, 2012; Judgment of the County Court in Rijeka, K-12/2012-29 on July 11th, 2012; Judgment of the County Court in Rijeka, K-15/2013 on October 17th, 2013.

### **5.3. Analysis of the personal characteristics of the offenders (age, sex, family status, education, employment, health condition, etc.)**

**Who were the offenders? Please provide the analysis of their personal characteristics (age, sex, family status, education, employment, health condition, etc.).**

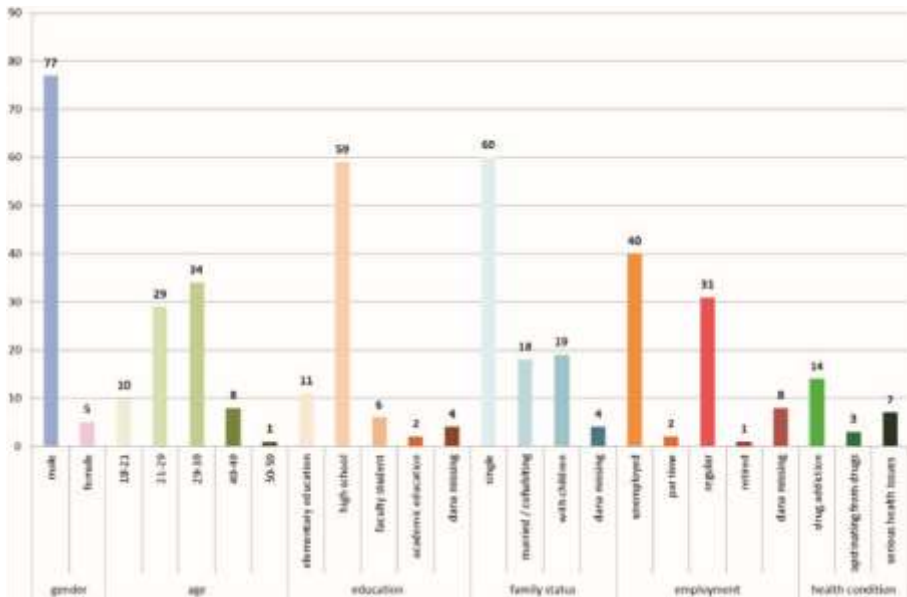
#### **Graph 8** **Offender's personal characteristics in drug-related cases** **at the County Court in Rijeka**

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<sup>137</sup> . Art. 47(1) of the 2011 Criminal Code, *op. cit.*

<sup>138</sup> . Subjective conceptions related to the offender's criminal responsibility in drug sentencing have also been disregarded in the US. Weinstein, J., B. and Bernstein, F., A.: The Denigration of *Mens Rea* in Drug Sentencing, Federal Sentencing Reporter, Vol.

<sup>139</sup> , No 3, Thinking about Guidelines as a Criminal Code, 1994, pp. 121-124.



Phenomenological research has been pointing to the conclusion that crime is coloured by gender as a predominantly male activity. 95% of all drug offences in the sample are committed by male offenders. This research result is in line with recent criminological studies suggesting that women rarely commit criminal offences when compared with men. Statistics on the state level show that female involvement in criminal activities is around 4% of all crime.<sup>140</sup> The connection between age and criminality is almost unanimously supported by criminologists.<sup>141</sup> Most of the offenders who engage in drug crime are in their thirties. This age group is the most criminally active group. Drug offences have a dynamic nature. They consist of different phases and, quite often, offenders are interrelated and act together in various unlawful situations. When compared with other criminal offences, in most cases offenders must make an additional effort to commit the offence. Therefore, intensive criminal activity is directly related to the offenders' age and mutual participation.

Research findings on offenders' education and working status suggest an average educational background and considerable unemployment.<sup>173</sup> As shown in

<sup>140</sup> . Statistical Reports, The Central Bureau of Statistics, *op. cit.*

<sup>141</sup> . Snacken, S.: Penal Policy and Practice in Belgium, published in Tonry, M. (ed.): *Crime*,



Graph 8, 72% of the convicts are high-school graduates and the rest of them only received elementary schooling (13%) or pursued an academic diploma (7%). Research results concerning employment show that a significant number of offenders are unemployed (49%). In professional literature, criminal activity has always been associated with poor schooling and scarce employment. According to the criminologists, the basic social norms are received and accepted at a young age within the framework of the closest family and the school environment. Their influence is a crucial factor in the future social development of a young person. The lack of positive authority may contribute to low ability for social adaptation, bad social functioning, emotional insecurity and immaturity, which result in distorted social inhibitors. Due to the weakened restraint mechanisms that prevent deviant behaviour, offenders have a tendency to break social norms. Having no sufficient internal control, they hardly manage to keep their jobs. All in all, offenders have a strong predisposition to engage in deviant activities and are highly likely to become drug addicts.

#### **5.4. Proportion of drug addicted offenders: drug addiction recidivism and criminal recidivism as a prevalent contributing circumstance to offending and their influence on judges' decision about the type and range of sanction**

**What was the proportion of drug addicted offenders? Are drug addiction recidivism and criminal recidivism prevalent contributing circumstances to**

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*Punishment, and Policy in a Comparative Perspective, Crime and Justice*, Vol. 36, The University of Chicago Press Books, Chicago, 2007, p. 173.

173. Significant attention has been paid to drug offenders' unemployment and its effect on the sentencing outcome in scientific writings. See for example Unnever, J., D.: *Direct and Organisational Discrimination in the Sentencing of Drug Offenders*, *Social Problems*, Vol. 30, No 2, 1982, pp. 212-225.

**offending? Did these circumstances influence the judges' decision about the type and range of sanction?**

Research findings have confirmed that offenders fought with drug problems in 20% of all cases.<sup>142</sup> Drug addiction is a frequent contributing factor to an offence and it operates in a cause-effect-cause circle. Criminological researchers have almost unanimously concluded that a certain number of drug offenders engage in illegal manufacture or distribution of drugs driven by the urge to procure means to sustain their own addiction.<sup>143</sup> Moreover, the rates of property crime are extremely high among drug addicted offenders who resort to crime in order to pay for drugs.<sup>144</sup> There is a certain probability that these criminological findings have influenced court sentencing policy due to the fact that drug addiction, when determined, was always evaluated as a mitigating circumstance. In addition, the County Court in Rijeka refused to evaluate criminal recidivism of a drug addicted offender as an aggravating circumstance, although according to standard court practice, prior offending is evaluated as a negative criminological factor which pushes the punishment towards the prescribed legislative maximum.<sup>145</sup> Even if drug recidivism and criminal recidivism are prevalent contributing circumstances to offending,

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<sup>142</sup> . This supports the thesis that incarceration is an increasingly important social factor resulting from drug use behaviour. Galea, S. and Vlahov, D.: *Social Determinants and the Health of Drug Users: Socioeconomic Status, Homelessness, and Incarceration*, Public Health Reports, Vol. 117, Supplement 1, 2002, p. 139.

<sup>143</sup> . Daly, K. and Tonry, M.: *Sentencing Disparity and Discrimination, A Focus on Gender*, published in: Spohn, C., C. (ed.): *How Do Judges Decide?, The Search for Fairness and Justice in Punishment*, SAGE Publications, Thousand Oaks, London, New Delhi, 2009, p. 127.

<sup>144</sup> . Woods, J., B.: *A Decade after Drug Decriminalisation: What Can the United States Learn From the Portuguese Model*, University of the District of Columbia Law Review, Vol. 15, No 1, 2011, p. 11.

<sup>145</sup> . Caulkins, J., P. and Kleiman, M., A., R.: *Drugs and Crime*, published in: Tonry, M. (ed.): *The Oxford Handbook of Crime and Criminal Justice*, Oxford University Press, Oxford, New York, 2011, p. 280; Gaines, L., K. and Kremling, J.: *Drugs, Crime, and Justice: Contemporary Perspectives*, Waveland Press Inc., Long Grove, 2014, p. 516; Allen, C.: *Crime, Drugs and Social Theory: A Phenomenological Approach*, Ashgate Publishing Ltd., Hampshire, 2007, p. 26; Douglas Anglin, M. and Speckart, G.: *Narcotics Use, Property Crime, and Dealing: Structural Dynamics Across the Addiction Career*, Journal of Quantitative Criminology, Vol. 2, No 4, 1986, p. 355.

they are not negatively reflected on the court's sentencing decision.<sup>178</sup> It seems reasonable to conclude that Croatian courts are aware of the problem that prior sanctions do not always impair the criminal tendency of a person; however, the same courts do not share the view that increasing punishment is an effective approach to solving drug addiction problems.<sup>146</sup> According to the court sentencing policy, drug addicted offenders are primarily viewed as persons in need of treatment and subsequently as offenders who should be punished for committing a crime.<sup>147</sup>

178. The research findings do not support the thesis that defendant characteristics that are thought to be associated with a stable, enduring predisposition for future criminal activity or dangerousness (i. e. criminal and drug recidivism) are hypothesised to increase sentence severity, as stated in Albonetti, C., A.: Sentencing under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and

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<sup>146</sup> . The research results show that Croatian courts do not support the widely accepted position that drug crime recidivists should be treated with increased penalties. This position goes against the legislator's sentencing policy for "repeaters" which has been highly debated among legal professionals, supported by the public and enforced in the United States in the mid-sixties of the last century. Recidivism and Virginia's "ComeBack" Law, Selected Articles on Eminent Domain Compensation and Valuation Problems, Virginia Law Review, Vol. 48, No 3, 1962, pp. 597-641.

<sup>147</sup> . The same approach has been detected in other countries. For example, Anderson stresses that while being faced with increased drug use, Germany has shifted its focus from treating drug use as a criminal issue to a public health issue. Anderson, S.: European Drug Policy: The Cases of Portugal, Germany, and The Netherlands, EIU Political Science Review, 2012, p. 4. The same approach was followed in California with Proposition 36 passed in 2000. Klein, D., Miller, R., E., Noble, A. and Speiglmann, R.: Incorporating a Public Health Approach in Drug Law: Lessons from Local Expansion of Treatment Capacity and Access under California's Proposition 36, The Milbank Quarterly, Vol. 82, No 4, 2004, pp. 723-757. Policymakers' attitudes towards drug offences were long ago anticipated with scholars' proposals based on scientific research. For example, after providing evidence for his claims, Vitiello explains that drug treatment should be increased as a better alternative to incarceration. Vitiello, M.: Three Strikes: Can We Return to Rationality?, Journal of Criminal Law and Criminology, Vol. 87, 1997, pp. 395-481, 460-461.

Departures on Sentence Outcomes for Drug Offences, 1991-1992, *Law & Society Review*, Vol. 31, No 4, 1997, p. 797.

### **5.5. Irregularities or patterns in judicial selection of sanction and accordance of imposed sanctions with the principle of proportionality and the principle of equality before the law (likesituated offenders who commit similar offences should receive similar punishment)**

According to your analysis, is it possible to detect certain irregularities or patterns in the judicial selection of sanction? Do you think that the imposed sanctions are in accordance with the principle of proportionality (penalties should be proportionate in their severity to the gravity of the offender's criminal conduct)? Do you think that the imposed sanctions are in accordance with the principle of equality before the law (like-situated offenders who commit similar offences should receive similar punishment)? The research analysis supports the scientific understanding that discrepancies between the legislative and judicial selection of sanctions for drug offenders do exist in Croatia. This notable phenomenon should not be taken for anomaly, due to the political, social and preventive forces that direct courts' and legislative sanctioning. While the coherent classification of offences according to their gravity in the Special Part of the Criminal Code has to be the leading principle for legislative imposition of penalties, the court has to determine the type and measure of punishment according to the degree of guilt, the purpose of punishment and all relevant subjective and objective circumstances of the individual case.

The analysis also shows that the court sentencing policy is homogenised, stable and unaffected by changes in legislative sentencing policy. The uniformity in court sentencing and its evaluation of mitigating and aggravating criminological factors is so highly persistent that certain doubts could be raised about whether the courts' policy is in accordance with the principle of proportionality and equality before the law. It seems highly unlikely that all offenders are like-situated and that the gravity of their criminal conduct is almost the same. Yet, objections that Croatian criminal courts sentence offenders according to "tariffs" are without grounds if it is proven that the pronounced sentence is founded on the law.<sup>148</sup> The courts apply the law when

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<sup>148</sup> . A similar conclusion can be found in Horvatić, Ž.: *Problem odnosa u zakonu propisane i sudskim presudama primijenjene kaznenopravne represije prema*

they deliver judgments in each particular case based on the authority granted to them by the constitution and the laws. If there is discrepancy between the political will about the manner in which the laws should be interpreted and applied and the courts' real application of the laws with respect to sentencing, this is no negative predictor of a nonfunctional criminal justice system, but rather a good indicator for future drug policy reforms, as long as they are in accordance with judicial and legislative competences under the constitution.

## **6. Proposals for future amendments of legislative drug policy and court sentencing practice**

The research analysis conducted for the purpose of this study has shown that the legislative drug policy based on punitive reactions to illicit drug use has traditionally received strong public support in Croatia. While "war on drugs" discourse and a health protection-oriented approach were part of political speeches, the legislative measures inevitably consisted of Criminal Code amendments broadening the boundaries of criminalisation and increasing sanctions for drug offences.<sup>182</sup> At a certain point in time, drug law enforcement measures overburdened the entire criminal justice system. Croatian courts had to tackle criminal cases overload caused by, among other factors, inflow of drug-related cases. Punitive legislative policies also affected the Croatian prison system. Courts pronounced more and more prison sentences to drug offenders, which resulted in increased admissions and prolonged length of stay in prison. Due to the negative effects of drug legislative policies, the criminal justice system was in urgent need of substantial reorganisation. The administrative measures were not sufficient and the system started to reanimate itself by applying the available internal legislative measures to prevent a collapse. For example, public prosecutors applied the principle of

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Towards Criminal Offenders and that which is Applied through Court Judgments, Croatian Annual of Criminal Law and Practice, Vol. 11, No 2, 2004, p. 434.

182. Under the "war on drugs" policies, legislators in other countries increased sanctions for drug offences. To find out more about such legislative practices, see King, N., J.: Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties, University of Pennsylvania Law Review, Vol. 144, No 1, 1995, p. 103. On scholarly

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*počiniteljima kaznenih djela* / The Problem of the Relation of Legally Prescribed Criminal Repression

support to the consistent exercise of restrictive policies, see Kleber, H., D. and Rosenthal, M., S.: *Drug Myths from Abroad: Leniency Is Dangerous, Not Compassionate*, Foreign Affairs, Vol. 77, No 5, 1998, pp. 141-144.

opportunity not to instigate criminal proceedings against drug possessors and dismissed crime reports recalling the institute of “insignificant offence”. Under the same institute and the *ne bis in idem* principle, in a certain number of trials a criminal court judge rendered a judgement of acquittal.<sup>149</sup> The change of course in the prosecution and sentencing of drug offenders was a clear sign that time had come to enact the Criminal Code amendments that would improve and relax punitive policies against drug offenders.

Decriminalisation of drug possession for personal use imposed by the 2011 Criminal Code had the first positive effects on the criminal justice system in the direction of reducing the number of drug offences. In a number of cases in the research sample, the Supreme Court overruled the County Court in Rijeka first instance judgment rendering a judgement of acquittal due to the fact that drug possession for personal use was not a criminal offence in accordance with the law.<sup>150</sup> Moreover, the Court lowered the prison sentence imposed on drug distributors by the first instance court under the principle of application of a more lenient law.<sup>151</sup> The new shifts in court sentencing policy are examples of the formal moulding of punitive responses to drug offenders by the application of the new Criminal Code provisions. On the other hand, the research has also

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<sup>149</sup> . Judgment of the County Court in Rijeka, K-26-2010 on July 9<sup>th</sup>, 2010; Judgment of the County Court in Rijeka, K-47-2011 on December 15<sup>th</sup>, 2011. The County Court in Rijeka acquitted the offender who had planted eight stems of cannabis to relieve headaches after traumatic head injury due to the fact that said actions were insignificant and that the offender had already been convicted of the same offence by the Misdemeanour Court in Mali Lošinj. For more information, see the Judgment of the County Court in Rijeka, K-10/2010 on July 12<sup>th</sup>, 2010.

<sup>150</sup> . Judgment of the Supreme Court of the Republic of Croatia, I Kž 796/2012-4 on October 1st, 2013; Judgment of the Supreme Court of the Republic of Croatia, I Kž 75/2013-4 on February 28th, 2013.

<sup>151</sup> . Judgment of the Supreme Court of the Republic of Croatia, I Kž 796/2012-4 on October 1st, 2013; Judgment of the Supreme Court of the Republic of Croatia, I Kž 797/2012-4 on October 10th, 2012; Judgment of the Supreme Court of the Republic of Croatia, I Kž 883/2012-4 on March 20th, 2013; Judgment of the Supreme Court of the Republic of Croatia, I Kž 69/2013-4 on March 21st, 2013; Judgment of the Supreme Court of the Republic of Croatia, I Kž 75/2013-4 on February 28th, 2013; Judgment of the Supreme Court of the Republic of Croatia, I Kž 245/2013-4 on April 25th, 2013.

shown that courts did not wait for the new legislative rules to moderate their sentencing policies. Offenders' drug addiction and efforts to abstain from drugs have always been evaluated as mitigating circumstances. Moreover, in a number of cases courts were reluctant to pronounce harsher punishments against drug offenders who had already been sentenced if the previous criminal offences had been committed during their addiction phase.

The specific court sentencing practices show that the substantial moulding of court sentencing policies is strongly influenced by harm minimisation rather than incapacitation in the context of sentencing philosophy. On the other hand, the legislative sentencing policy is still oriented towards targeting drug manufacturers, drug traffickers and other "big drug dealers" and guided by illicit drug supply reduction approaches. The research findings do not support such policies, given that most drug offenders are "small drug distributors" who offend in order to sustain their own addiction. If the political will to take a decisive step towards less punitive and treatment-oriented measures to suppress drug abuse is missing or seems to be radical, court practice becomes an important indicator for drug policy interventions *de lege ferenda*. Therefore, additional scientific research has to be carried out in order to monitor and analyse courts' practice in drug-related cases, evaluate current drug policies and detect issues that may not have been sufficiently addressed in previous legislative amendments. Future research should particularly focus on alternatives to punishment and programs to prevent future re-offending of drug abusers as persons with drug-related health problems.

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The Drug Law reform Project in South East Europe aims to promote policies based on respect for human rights, scientific evidence and best practices which would provide a framework for a more balanced approach and will result in a more effective policy and practice. A major aim of our activities is to encourage open debate on drug policy reform and raise public awareness regarding the current drug policies, their ineffectiveness and their adverse consequences for individuals and society.

Το Πρόγραμμα Μεταρρύθμιση της Νομοθεσίας για τα Ναρκωτικά στη Νοτιοανατολική Ευρώπη στοχεύει στην προώθηση πολιτικών που βασίζονται στο σεβασμό των ανθρωπίνων δικαιωμάτων, την επιστημονική τεκμηρίωση και τις βέλτιστες πρακτικές που θα προσφέρουν ένα πλαίσιο για μια περισσότερο ισορροπημένη προσέγγιση και θα οδηγήσουν σε αποτελεσματικότερες πολιτικές και πρακτικές. Ιδιαίτερα σημαντική επιδίωξή μας είναι να ενθαρρύνουμε την ανοιχτή συζήτηση για μεταρρύθμιση της πολιτικής των ναρκωτικών και να ευαισθητοποιήσουμε την κοινή γνώμη για τις δυσμενείς επιπτώσεις και την αναποτελεσματικότητα της ισχύουσας πολιτικής των ναρκωτικών για τα άτομα και την κοινωνία.

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