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Exploring sentencing: Sentencing theory and practice in contemporary criminal justice. Introduction

Refleksje nad wymiarem kary: teoria i praktyka współczesnego wymiaru sprawiedliwości. Wstęp

Abstract: Sentencing, imposition of punishment and possibly other measures as a consequence of committing a crime is the fundamental goal of criminal law and the process of doing justice. This formulation, while essentially self-evident in practice, is linked to a vast number of problems that have preoccupied the theory and practice of criminal law for centuries. Problems that were never satisfactorily resolved. From that point of view it is paradoxical, that both, in the theory and practice of criminal law, much more attention is paid to the rules of criminal liability than to the rules of sentencing. It is also noteworthy that justifications for court judgments regarding guilt are usually detailed and elaborate, while justifications of sentences imposed are in most cases brief and schematic. This is particularly important in Europe, where detailed sentencing guidelines are unknown, and judges have significant discretionary powers when it comes to sentencing. This is true even though the theoretical discussion on the purposes and functions of punishment was much richer over the centuries, as evidenced by the perennial dispute between retributive and consequentialist (utilitarian) rationalizations of punishment. However, these disputes are often conducted at a relatively high level of abstraction, and not always easily translated into the language of judicial practice. This issue of the "Archiwum Kryminologii" presents studies on the normative and empirical issues of sentencing in several European countries. They do not concern directly theoretical concepts of punishment, but more down-to-earth problems and challenges that the contemporary criminal justice systems in various countries have to deal with. This does not mean that they are devoid of theoretical context.

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Abstrakt: Orzekanie kary, czyli wymiar kary i orzeczenie ewentualnie innych środków w odpowiedzi na popełnione przestępstwo, to podstawowe cele prawa karnego i działalności określanej mianem wymiaru sprawiedliwości. Z tym sformułowaniem, mającym w zasadzie oczywisty charakter, w praktyce łączy się ogromna liczba problemów trapiących od stuleci teorię i praktykę prawa karnego. Problemów, które do dzisiaj nie znalazły satysfakcjonującego rozwiązania. Z tego względu jest swoistym paradoksem to, że zarówno w teorii, jak i praktyce prawa karnego o wiele więcej uwagi poświęca się regułom odpowiedzialności karnej niż regułom orzekania kar i innych środków. Również uzasadnienia wyroków sądowych w zakresie sprawstwa i winy są najczęściej szczegółowe i rozbudowane, a uzasadnienia wymiaru kary – najczęściej skromne i schematyczne. Ma to szczególne znaczenie w Europie, gdzie sędziowie dysponują znacznymi uprawnieniami dyskrecjonalnymi, jeśli chodzi o wymiar kary. Jest tak, nawet jeśli dyskusja teoretyczna nad celami i funkcjami kary jest od wieków o wiele bardziej bogata, o czym świadczy odwieczny spór między retrybutywnymi a utylitarnymi jej racjonalizacjami. Ale są to często spory toczone na relatywnie wysokim poziomie abstrakcji, nie zawsze łatwe do przełożenia na język praktyki wymiaru sprawiedliwości. Niniejszy tom „Archiwum Kryminologii" zawiera opracowania dotyczące normatywnej i empirycznej problematyki wymiaru kary w kilku krajach Europy. Nie dotyczą one bezpośrednio koncepcji teoretycznych kary, ale bardziej przyziemnych problemów i wyzwań, z jakimi współcześnie boryka się wymiar sprawiedliwości w różnych krajach. Nie znaczy to jednak, że analizy te są pozbawione kontekstu teoretycznego.

Słowa kluczowe: wymiar kary, kara, prawo karne, ocena normatywna, praktyka sędziowska, architektura instytucjonalna

Sentencing as the heart of criminal justice

The most immediate answer to the question of what criminal law is about would likely be punishing wrongdoing. Punishment, in turn, materialises institutionally through sentencing: the imposition of penalties and other measures provided by criminal law. In this sense, sentencing may be regarded as the ratio for criminal law's existence, the culminating moment of criminal justice, the point at which the authority of the state responds formally to the commission of a crime – an association reflected in the very language of penal law.

At the same time, sentencing is of course not a purpose in itself. Criminal law represents a highly formalised societal reaction to conduct that the state considers sufficiently harmful or dangerous to warrant public condemnation and a coercive response. In other words, criminal law operates as an instrument of formal social control under the fundamental assumption that crime implies punishment and that punishment is usually imposed to achieve certain purposes or tasks.

What those purposes and tasks are and how sentencing is meant to realise them is a contested issue. What is clear, however, is that they are expected to be fulfilled through the act of sentencing itself. These seemingly simple and commonsensical

statements quickly unfold into what Ernest van den Haag (1975) once described as "a very old and very painful question." The meaning and justification of punishment as a way for society to control crime have been the subject of never-ending debates for centuries. Such debates constitute the essence of theoretical discourse in criminal law, penology and criminology, and they pose serious dilemmas for the practice of contemporary criminal justice systems.

At the same time, one may observe a certain paradox in both the realities of criminal justice and public perceptions of it. There is little doubt that "doing justice" (von Hirsch 1976) ultimately involves punishing offenders. For punishment to be imposed, however, the fact that a crime has been committed must first be established, the perpetrator found, and guilt proven. Criminal proceedings therefore devote considerable time and institutional effort to investigation, prosecution and trials (often over months or even years) in order to make sentencing possible.

However, these often lengthy efforts, involving months or even years of collecting and evaluating evidence, have only one ultimate purpose: to make possible the imposition of punishment and other penal measures. From that perspective, sentencing constitutes the crowning achievement of the entire process, although the final stage of sentencing and imposing punishment and other measures usually takes only a small proportion of the time and effort involved in deciding criminal cases. Moreover, it is often among the least visible parts of the criminal procedure. Trials devoted to establishing guilt are in most instances public, and in notorious cases widely reported on by the media. The facts of certain crimes are therefore often broadly available, and the reasoning behind findings of guilt is, at least in principle, open to scrutiny. Decisions on punishment, by contrast, often take place largely in the privacy of judicial deliberations, and the reasoning behind them is frequently not made public, or only in an abbreviated form.

A further dimension of this relative invisibility concerns differences between procedural traditions. In Anglosphere systems, criminal proceedings are often formally divided into two phases: one devoted to the determination of guilt and a separate one devoted to sentencing. This structure may give sentencing and sentencing-related evidence a higher degree of prominence, although in practice this may be substantially diminished by the widespread use of plea bargaining and other simplified procedures. In most continental European systems, by contrast, decisions on guilt and punishment are not separated but are taken and announced jointly (Plesničar 2017; Roberts, Petzsche 2025). Where judicial decisions follow this "two in one" formula, the question arises of which of these two aspects receives greater attention.

It is striking that in many jurisdictions the justification for guilty verdicts provided orally in court or in written judgments are lengthy, detailed and even sophisticated, whereas the parts devoted to sentencing outcomes are often much shorter, less detailed and comparatively superficial (Drápal 2024). What is supposed to constitute the crowning achievement of the criminal procedure thus frequently attracts relatively minor attention. This tendency is aggravated by the

broad discretion that continental judges typically enjoy in sentencing: the way this discretion is exercised often escapes precise reconstruction or transparent justification.

A similar imbalance can often be observed at the appellate level. In many continental systems, higher courts devote the overwhelming majority of their attention to questions of fact, the determination of guilt and the interpretation of substantive and procedural rules governing criminal responsibility. Comprehensive appellate reasoning concerning punishment or discussing the choice of sanctions, their severity, proportionality or rehabilitative and deterrent effects remains comparatively rare, and is often limited to technical questions of sentencing law.

It is somewhat different for jurisprudence. The legal, penological and criminological literature on punishment is sometimes extensive (less so for sentencing), and controversies in this area have often been intense. Yet, especially in continental European contexts (or some of them), many academic lawyers have traditionally treated questions of criminal responsibility as the primary subject of doctrinal debate, while paying comparatively less attention to punishment and sentencing. Moreover, discussions of sentencing principles have frequently remained relatively abstract. Against this background, the relative marginality of sentencing is not only a feature of judicial practice, but also of criminal law scholarship itself.

Given the key role of sentencing in criminal law, however, sentencing should be placed at the forefront of criminal-law scholarship. Such a move would constitute a significant shift, as doctrinal debates within substantive criminal law would then be both theoretically and empirically evaluated in light of the outcomes they produce. Discussions about what constitutes attempt, negligence, continuation or joint enterprise (and almost any other substantive law principle) should thus be guided by what sentence is considered appropriate, since sentencing is the ultimate – and often the only tangible – outcome of criminal law.

Even the stigma attached to criminal justice intervention is inherently linked to the sentence that is imposed. That stigma does not simply depend on the conduct being formally classified as criminal, but on the severity and nature of the resulting sanction. Some countries, for example, place administrative offences such as speeding under criminal law, although there is little stigma attached to such conduct. This relative absence of stigma is likely due to the sentences that are typically imposed. If driving above the speed limit regularly resulted in several months' imprisonment, being charged with such an offence would almost certainly carry the stigma traditionally associated with criminal law.

An emphasis on punishment should come naturally, particularly to continental criminal lawyers. In many continental European countries, there is no exact equivalent to the term *criminal law*; instead, the discipline is labelled *penal law*, deriving from the Latin *poena*, meaning "punishment." In Czech, punishment is *trest*, and criminal law is *trestní právo*. In Polish, punishment

is *kara*, and criminal law is *prawo karne*. In Slovenian, punishment is *kazen*, and criminal law is *kazensko pravo*. The same seems to be true for many if not all non-English language systems (e.g. *droit pénal* in French, *diritto penale* in Italian, *derecho penal* in Spanish and *Strafrecht* in German). The very name of the discipline and of the penal codes themselves reflects the centrality of punishment. Yet it seems that the discipline has, to some extent, forgotten this origin. Scholarly discussions of individual criminal-law institutions are often vague when addressing their implications for sentencing, if such implications are addressed at all.

The lack of such discussions inevitably affects practice. When criteria other than sentencing outcomes guide the design of individual criminal-law institutions, attention is drawn away from punishment. If the legal scholarship does not develop principled guidance on how variations within these institutions should be reflected in sentencing, judges are left with little concrete direction. The burden of principled sentencing is thus placed on judges' shoulders, but judges frequently lack the necessary resources (e.g. time, theoretical frameworks and empirical data) to develop and test coherent approaches to how variations within criminal-law institutions ought to influence sentencing. The situation is further complicated when those institutions are themselves designed without sufficient regard to their sentencing consequences, thereby undermining a coherent, principled approach. The inevitable result is a certain degree of fragmentation and inconsistency in theory, jurisprudence and practice.

The comparatively limited reasoning and legal argumentation devoted to sentencing in judicial practice arguably reinforces a degree of scholarly neglect. If judgments provide little detailed reasoning concerning punishment, criminal-law scholars may ask what there is to analyse. A vicious circle emerges: limited scholarly engagement with sentencing leads to limited doctrinal development, which in turn contributes to limited judicial reasoning. This circle is unlikely to break by itself. Judges are unlikely to begin systematically articulating sentencing theories or specifying the precise weight of individual factors without conceptual tools and frameworks to rely on. It is therefore the responsibility of criminal-law scholars to intervene by refocussing attention on punishment and sentencing.

Such an approach does not require that criminal-law scholarship be reduced to the study of sentencing alone; rather, it requires recognition that sentencing is the crowning achievement of the criminal process and, as such, should guide deliberations concerning the structure and content of individual criminal-law institutions.

Retributivism, consequentialism and the normative blueprint of sentencing

It is within this broader neglect of sentencing that the tension between retributive and consequentialist conceptions of punishment continues to structure sentencing thought and practice. The controversies surrounding punishment became particularly intense in the second half of the 19th century, when the classic school of criminal law encountered the challenges posed by emerging criminological positivism. The resulting dispute between retributive and consequentialist conceptions of punishment has since provided the central normative blueprint for modern sentencing systems, shaping how courts understand proportionality, prevention and the purposes of penal severity.

Retributive approaches assume that the infliction of pain or hard treatment is essential to any punishment and is justified as a response to past wrongdoing. Punishment fulfils a social need for retribution; it is meant to "fit the crime." From this perspective, proportionality becomes the central organising principle of sentencing. As Andrew von Hirsch (1976) argued under the banner of "doing justice," punishment must reflect the gravity of the offence and the blameworthiness of the offender. This assumes that "there exists a broad moral or practical equivalence or comparability between two different phenomena: a wrongful act and a punishment" (Lacey 2021: 80). Yet even within this seemingly straightforward framework, the practical problem remains formidable: how is proportionality to be determined? Apart from the *lex talionis*, no obvious metric exists. How many months or years of imprisonment are proportionate to the theft of a given amount, to a burglary committed by a repeat offender or to a violent assault? Proportionality is indispensable, but its operationalisation is rarely self-evident.

Consequentialist approaches, by contrast, regard punishment not as an end in itself, but as a means to further goals – most prominently the prevention of future offending. Here punishment is to "fit the offender" rather than solely the offence. Franz von Liszt famously formulated this approach by emphasising that punishment is imposed on the offender, not on the offence (Liszt 1883). In this view, sentencing requires forward-looking assessments of risk, of rehabilitative potential and of deterrent impact. Such assessments often presuppose knowledge drawn from the behavioural and social sciences.

This move, however, has long been viewed with scepticism by many lawyers. Retributive reasoning appears closer to traditional legal thinking: judges and other legal professionals may feel institutionally competent to assess the gravity of an offence and impose proportionate punishment, whereas preventive approaches are often seen as requiring broader expertise and predictions about the offender's future behaviour. After all, lawyers are not psychiatrists, psychologists or social workers. The involvement of experts, envisaged by the founders of criminological positivism (Pifferi 2016: 13–35), complicates the criminal process and challenges the traditional boundaries of legal reasoning. As Karl von Birkmeyer (1907)

provocatively asked, "What does von Liszt leave of criminal law?". The implied concern was that an expansive preventive approach might dissolve criminal law, undermines its retributive core, and transform it into something amounting rather to social work. Penal law, in this view, is about justice and retribution, not about broader projects of social intervention.

The impact of these competing paradigms differed significantly across jurisdictions. The controversies between retributive and consequentialist conceptions of punishment exploded in the second half of the 19th century and shaped penal law and sentencing on both sides of the Atlantic in distinct ways. In Europe, despite the development of the Italian *scuola positiva* and related criminological concepts (Radzinowicz 1991a; Pifferi 2016; 2022), lawyers often remained sceptical about consequentialism. This scepticism limited its progress and the adoption of its penological ideas on the European continent. Consequentialist approaches therefore tended to strike compromises with retributive principles, and European penal codes and sentencing policies developed in an eclectic and pragmatic manner, combining preventive aims with enduring commitments to blameworthiness and proportionality (Weigend 1982). Sentencing never completely abandoned classical principles of desert, even where preventive rationalities gained influence.

By contrast, the United States went through a much longer period dominated by indeterminate sentencing grounded in utilitarian and rehabilitative ideals. Punishment was expected to be adjusted primarily to the goals of reforming the individual lawbreaker and preventing future reoffending. In Europe, indeterminate and preventive principles were expressed mainly in more limited forms, such as dual-track systems in which purely consequentialist measures were reserved for special categories of offenders – incorrigible, chronic or professional lawbreakers – and their application remained relatively narrow and restrictive.

Growing dissatisfaction with the effectiveness of the rehabilitative ideal in the United States eventually led to a profound critique of indeterminate sentencing and to a decisive swing of the pendulum in the opposite direction. Consequentialism was criticised not only for its alleged ineffectiveness in reducing crime, but also for producing disproportionate sentences and unequal treatment of similar offences. This reaction implied a return to the classic language of "doing justice" and "just deserts," grounded in proportionality between the harm caused by an offence and the punishment imposed (von Hirsch 1976). In this phase, desert-based reasoning appeared to promise both fairness and restraint.

However, subsequent developments in American penal policy did not simply restore classic moderation. Increasingly, the emphasis shifted from proportionality to deterrence and incapacitation. As Michael Tonry observed, "policy makers in the mid-1980s lost interest in procedural unfairness, sentencing disparities, and racial injustice. Instead, they enacted rigid, severe laws that promoted personal, political, and ideological agendas" (Tonry 2021: 4). In practice, this amounted to another form of consequentialism, albeit one far more punitive in character. If the earlier rehabilitative model could be described as a comparatively "'benign'

consequentialism," then the post-1980s orientation prioritised crime control and risk management with far less regard for proportionality constraints. This transformation of penological paradigms had profound consequences. It contributed to sustained increases in sentencing severity and to the unprecedented growth of prison populations, phenomena that reached particularly dramatic proportions in the United States (Garland 2001a; 2025).

These developments have been variously described as "mass imprisonment" (Garland 2001b), the "culture of control" or the "punitive turn" (Garland 2001a) and the "new punitiveness" (Pratt et al. 2005). Their influence extended beyond the United States to other countries of the Anglosphere, and to some extent also affected European sentencing practices (Snacken, Dumortier 2012; Dünkel 2017). Nevertheless, the European continent is often characterised as displaying "penal moderation," albeit unevenly distributed, with notable differences between Scandinavia and parts of Central Europe (Krajewski 2023a; 2025). Legislative frameworks frequently remained eclectic, and sentencing rules were rarely organised around a single "pure" penal ideology. Sentencing practice in Europe has therefore often been less susceptible to abrupt ideological swings than in the United States, shaped instead by a more restrained and pragmatic blending of principles.

From penal ideologies to sentencing outcomes: The translation problem

There is probably no way to trace back in detail the many changes in sentencing provisions across European countries over the last fifty or sixty years, or, if one attempted to do so, it would prove nearly impossible. The precise influence of American "neoclassicism" and the "punitive turn" on European criminal codes, and especially on resulting sentencing practice, is therefore very difficult to measure.

More generally, the impact of penal law reform on sentencing outcomes is rarely obvious or direct. Our own national experiences illustrate this complexity. Several examples from Poland indicate that shifts in sentencing policy after World War II often took place independently of legislative intentions, and sometimes even against explicit legislative purposes (Krajewski 2019; 2023b). Importantly, these shifts developed in both directions, involving periods of increasing as well as decreasing punitiveness. Similarly, in Czechia the persistence of certain punitive punishment patterns appears to result not necessarily from any vigorously implemented punitive turn, but rather from legislative passivity (Drápal 2023). By contrast, in Slovenia a comparable legislative passivity appears to have contributed to the persistence of a comparatively non-punitive sentencing profile (Plesničar, Jankovič 2026).

Explaining changes in sentencing outcomes in Europe is further complicated by the substantial judicial discretion characteristic of many continental systems.

Statutory sentencing directives are often formulated in relatively general terms, and the manner in which they are translated into concrete sentences in concrete cases is by no means self-evident. Even where attempts are made to structure discretion (Drápal, Plesničar 2025), European jurisdictions usually refrain from adopting detailed sentencing guidelines of the Anglosphere type. This may of course generate sentencing disparities (Drápal 2020), yet in many countries – such as Germany – it does not necessarily provoke major concern or systematic intervention by appellate courts (Weigend 2001: 205–206). It is therefore no easy task to explain the differences in penal ideologies and sentencing outcomes between criminal justice systems, whether between Europe and the United States or within Europe itself. The impact of penal philosophy on legislation, and of legislation on the sentences imposed by concrete judges in concrete cases, may be mitigated by a plethora of institutional and contextual factors.

Let us imagine a hypothetical case of a 21-year-old burglar, with a prior record consisting of two convictions: one for drunken driving resulting in a fine and another for minor property damage resulting in community service. What would his sentence be under legislation guided by a consequentialist, preventive approach? And what would it be under an opposing retributive framework centred on proportionality? Judging from theoretical assumptions, one might expect quite different outcomes. But what if, in practice, sentences imposed under these ostensibly opposing penal ideologies turned out to be similar or even identical? Such a possibility would suggest that translating penal ideologies into sentencing rules, and sentencing rules into concrete judicial decisions, may be an extremely problematic process. Sometimes the causal relationships may be relatively direct and visible; sometimes they are far more complex and opaque. The papers included in this special issue explore selected sentencing-related issues largely independent of the grand penal ideologies outlined above. Yet they also invite broader reflection on how such ideologies continue to shape, constrain or refract sentencing practices in the jurisdictions examined in this volume.

Sentencing as normative design, judicial practice and institutional architecture

Against this background, examining sentencing requires attention not only to abstract penal ideologies, but also to the institutional settings, discretionary practices and procedural forms through which punishment is produced. The contributions assembled in this special issue engage with sentencing precisely at this intersection between normative design and institutional practice. They explore sentencing along three interrelated dimensions.

Firstly, several papers revisit the normative and structural foundations of sentencing, examining proportionality, penal meaning and the boundaries of punishment.

Secondly, a set of empirically grounded studies analyse how sentencing principles are operationalised in courtroom practice, highlighting the role of discretion, reasoning and disparity. Between these levels lies the question of translation: how legislative reforms and penal policy ambitions are mediated by judicial discretion and institutional practice.

Thirdly, the issue examines ongoing procedural and institutional transformations that redistribute sentencing power beyond the judge, particularly through prosecutorial influence and fast-track forms of criminal justice. These developments alter not only who participates in sentencing decisions, but also how penal rationalities are articulated, negotiated and implemented in practice. By shifting the loci and mechanisms of decision-making, such procedural innovations provide further insight into how normative frameworks are filtered, refracted or even reshaped before they become concrete sentencing outcomes.

Taken together, these contributions offer a layered perspective on sentencing in contemporary European systems, addressing sentencing as a normative project, a practical decision-making activity and an evolving institutional field.

The special issue

Within this broader debate, *Archiwum Kryminologii* has in recent years devoted sustained attention to questions of penal policy and sentencing. "Criminal Justice in an Age of Penal Populism" was the subject of Vol. 44 (2022), No. 1, edited by John Pratt and Magdalena Grzyb. It examined the rise of penal populism and its implications for contemporary criminal justice systems. "Changing Penologies and European Crime Policy: Theory and Practice in the Global Context" was the subject of Vol. 45 (2023), No. 2, edited by Joanna Beata Banach-Gutierrez, Tom Daems, Anthea Hucklesby, and Jarosław Utrat-Milecki. It focussed more broadly on developments in European penology and the penal ideologies underlying contemporary crime policy.

The present volume approaches sentencing from a more concrete and practice-orientated perspective. Rather than concentrating primarily on overarching penal ideologies or macro-level transformations, it brings together contributions that examine selected sentencing problems within specific legal contexts. While most of the papers focus on Austria, Czechia, Germany and Slovenia – jurisdictions which share broadly similar continental traditions – the questions they raise resonate well beyond these national settings.

Set 1: Normative foundations and the boundaries of punishment

The first group of papers turns to the normative foundations of sentencing, examining how proportionality is structured, how penal meaning is constructed and where the boundaries of punishment are drawn. Rather than treating proportionality as a settled principle, these contributions examine the assumptions and institutional forms through which it operates, thereby providing the conceptual basis for the later exploration of how sentencing rationalities are translated into practice.

Axel Holmgren's paper investigates the statutory architecture of proportionality itself. By analysing statutory penalty scales and the concept of "penalty value" within the Swedish sentencing framework – a system often regarded as a paradigmatic example of structured proportionality – the paper raises the question of how legislatures translate assessments of the seriousness of an offence into structured frameworks of penal severity. It thus invites scrutiny of whether proportionality can function as a coherent ordering principle within sentencing law, or whether the very scales designed to rationalise punishment already contain tension and ambiguity.

Matjaž Ambrož shifts attention from formal structure to normative assumption. By focussing on individuals' sensitivity to punishment, the paper challenges the idea that proportionality can be adequately captured through formally equal sanctions. If the burden of punishment is experienced unevenly among convicted people, sentencing systems must confront whether justice requires attention to the varying impact of punishment as well as abstract comparability.

Rita Haverkamp and Johannes Kaspar extend this inquiry beyond the formal sentence imposed by the court, examining collateral consequences as an increasingly significant dimension of contemporary punishment. Their analysis problematises the boundaries of sentencing itself, showing how the effects of conviction often reach far beyond the penalties articulated in criminal codes or pronounced in court. In doing so, the paper challenges conventional distinctions between sentencing as a judicial act and punishment as a broader field of legal and social burdens.

Taken together, these contributions depict sentencing as a normative project shaped not only by doctrinal principles of proportionality, but also by deeper questions about coherence, experience and the expanding reach of penal sanctioning.

Interlude: Legislative toughening and the pathways of translation

Sebastian Gölly's contribution occupies an important position between these normative debates and the realities of sentencing practice. Examining processes of legislative "toughening" through the example of Austria – a jurisdiction often

underrepresented in broader sentencing discussions – the paper analyses how policy ambitions to reshape penal severity are received and operationalised within courtroom decision-making. In doing so, it highlights the buffered and indirect pathways through which normative frameworks travel from statutory design into judicial outcomes. The analysis thus illustrates the translation problem at the heart of sentencing: the gap between the rationalities embedded in legal reforms and the discretionary practices through which punishment is ultimately produced.

Set 2: Discretion, reasoning and disparity of sentencing in courtroom practice

If the first group of contributions investigates the normative blueprint of sentencing, the second turns to sentencing as it unfolds in the courtroom. These papers examine how abstract principles – proportionality, deterrence and culpability – are translated into concrete decisions through judicial reasoning, evidentiary assessment and discretionary judgment. They reveal sentencing not as the mechanical application of statutory frameworks, but as a socially embedded practice shaped by interpretation, institutional routines and evaluative assumptions about defendants.

Lora Briški and Mojca M. Plesničar's analysis of sentencing for sexual offences in Slovenia provides a detailed empirical study of how courts construct penal severity in a particularly normatively sensitive field. By examining judicial reasoning and sentencing patterns, the paper exposes tensions between statutory frameworks and actual practice, including compressed sentencing ranges, formulaic reasoning and disparities in the treatment of aggravating and mitigating factors. It shows how proportionality is not simply applied, but actively interpreted and negotiated within courtroom practice.

Nina Kaiser and Ida Leibetseder's contribution focusses on the role of specific deterrence in sentencing decisions. Although preventive aims are formally embedded in sentencing doctrine, the empirical findings suggest that their practical implementation is often limited and opaque. Courts invoke deterrence rhetorically, yet tend to rely heavily on past conduct, especially prior convictions, rather than forward-looking assessments of rehabilitative prospects. The paper thus illustrates how consequentialist rationales persist in judicial discourse, but are translated into practice in selective and uneven ways.

Nicole Bögelein, Dyana Rezene and Levin Reichmann's ethnographic study of German magistrate courts deepens this perspective by examining the central role of "social prognosis" in sentencing decisions. Based on extensive courtroom observations, the paper shows how judges assess defendants' employment status, housing situation, education, family ties and demeanour when determining probation or imprisonment. While these criteria appear formally neutral, their

application disproportionately disadvantages racialised and marginalised defendants. Judicial assessments of credibility, emotional expression and "stability" become decisive in shaping outcomes. The study thus makes visible the micro-level processes through which discretionary judgment and structural inequalities intersect in sentencing practice.

Taken together, these contributions illuminate sentencing as a practical activity in which normative principles are filtered through social evaluation, institutional culture and discretionary reasoning. They demonstrate that sentencing ideologies are not translated into outcomes within a vacuum, but within courtroom settings structured by implicit norms, expectations and power asymmetries.

Set 3: Procedural transformations and the redistribution of sentencing power

But sentencing decisions are not shaped solely through judicial deliberation. Contemporary criminal justice systems are marked by procedural innovations and institutional transformations that redistribute sentencing authority and restructure the pathways through which punishment is determined. In this sense, sentencing can be understood not only as a matter of judicial reasoning, but as part of a broader sentencing architecture, an institutional configuration that allocates power, defines procedural shortcuts and determines at what stage and by whom penal severity is effectively decided.

The final group of contributions in this issue examines these structural shifts. Rather than focussing on how judges apply sentencing principles, these papers explore how sentencing power may migrate beyond the traditional courtroom setting, altering both the actors involved and the dynamics through which punishment is produced.

Alena McClure's contribution examines the expanding role of prosecutors in shaping sentencing outcomes. By analysing the extent to which prosecutorial discretion influences penal severity, whether through charging decisions, plea negotiations or informal practices, the paper challenges the assumption that sentencing remains primarily a judicial function. It demonstrates that key determinations of punishment may very likely occur earlier in the process, often outside public scrutiny, thereby reshaping the balance of power within criminal proceedings.

Tomáš Vanča's study of penal orders in Czech criminal proceedings further illustrates this institutional transformation. Fast-track procedures and simplified forms of adjudication allow punishment to be imposed without full trials, streamlining case resolution but simultaneously altering the procedural safeguards and deliberative structures traditionally associated with sentencing. The paper raises

important questions about transparency, participation and the quality of justification in such contexts, highlighting how procedural efficiency may reconfigure the sentencing architecture itself.

Taken together, these contributions reveal sentencing as an evolving institutional field in which authority, discretion and accountability are redistributed across actors and procedural stages. They underscore that the translation of penal ideologies into sentencing outcomes is shaped not only by judicial reasoning, but also by the institutional design of criminal process.

Conclusion

Sentencing remains one of the most consequential yet least transparent dimensions of criminal justice. It is the point at which abstract penal rationalities – proportionality, prevention, desert and rehabilitation – are converted into concrete decisions that shape individual lives and broader patterns of penal severity. Yet, as the preceding discussion suggests, this translation is rarely straightforward. Sentencing outcomes emerge not only from normative principles embedded in law, but also from discretionary judicial practices, institutional routines and evolving procedural architectures that redistribute power across actors and stages of the criminal process.

The contributions assembled in this special issue illuminate sentencing from these complementary angles. By engaging with the normative foundations of punishment, the realities of courtroom decision-making and the institutional transformations reshaping contemporary criminal justice, they offer a layered account of sentencing in contemporary Europe. Importantly, the special issue brings together perspectives from a range of continental jurisdictions, voices that are still too rare in dialogue within the broader, often Anglosphere-dominated sentencing literature. Creating such a shared space for comparative reflection is essential, not only for understanding national sentencing practices, but also for grasping the common challenges that European systems face in translating penal principles into practice.

Taken together, the papers collected here show sentencing as a normative project, a practical judicial activity and an evolving institutional field. They demonstrate that sentencing is not merely the endpoint of criminal adjudication, but a domain in which penal meaning, authority and legitimacy continue to be negotiated.

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architecture" and "Reconstructing sentencing." It is our hope that these contributions will stimulate further comparative engagement and encourage continued attention to sentencing as one of the most revealing and contested expressions of criminal justice in Europe today.

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Sentencing practice and specific deterrence: Unveiling relevant factors in decision-making behaviour in Austrian criminal proceedings

Praktyka orzekania kary a prewencja indywidualna: analiza czynników wpływających na proces decyzyjny w austriackim postępowaniu karnym

Abstract: According to Austrian criminal law, court decisions must be made in a way that serves specific deterrence. This principle emphasizes that judges must weigh a variety of factors in order to impose a sentence that supports the offender's rehabilitation and the prevention of future offences. Although some norms offer insight into the range of information to be considered, the underlying concepts remain vague, leaving significant room for discretion. Additionally, judges are not obliged to provide comprehensive reasons for their considerations in their final judgment. These aspects not only lead to the lack of detailed justifications for sentencing decisions in individual cases but also result in hardly any appellate decisions that address the relevance of individual factors. Furthermore, there are no relevant studies in this area, resulting in a lack of detailed information on the factors considered in the decision-making process, leaving the following research question unresolved: What factors play what role in the reasoning-behavior within the Austrian sentencing practice?

The study "Intuition in criminal proceedings? – On the interdisciplinarity of factors in specific deterrence decision-making practice," funded by the Province of Styria (Austria), has set itself the goal of quantitatively surveying the reasoning behavior of judges and public prosecutors through questionnaires, as well as qualitatively through interviews and file analysis. By collecting both qualitative and quantitative data, the study seeks to uncover the key factors that contribute to the decision-making

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process and offer a more detailed understanding of the judicial reasoning behind individual sentences. In this paper, we present some of the findings, focusing on the empirical relevance of various factors of specific deterrence in everyday court practice, as well as on how their importance varies across different types of sanctions and between judicial and prosecutorial decisions.

Keywords: sentencing, specific deterrence, deterrence, decision-making behavior, interdisciplinarity

Abstrakt: Zgodnie z austriackim prawem karnym orzeczenia sądowe powinny być wydawane w sposób realizujący cel prewencji indywidualnej. Zasada ta zakłada, że sędziowie muszą rozważyć szereg różnych czynników, aby wymierzyć karę sprzyjającą resocjalizacji sprawcy oraz zapobieganiu przyszłym przestępstwom. Chociaż niektóre przepisy wskazują, jaki zakres informacji powinien być brany pod uwagę, podstawowe pojęcia pozostają nieostre i pozostawiają znaczną swobodę uznania. Ponadto sędziowie nie są zobowiązani do szczegółowego uzasadniania swoich rozważań w końcowym orzeczeniu. Prowadzi to nie tylko do braku pogłębionych uzasadnień decyzji dotyczących wymiaru kary w poszczególnych sprawach, lecz także do niewielkiej liczby orzeczeń drugiej instancji odnoszących się do znaczenia poszczególnych czynników. Dodatkowo brak jest istotnych badań w tym obszarze, co skutkuje niedostatkiem szczegółowych informacji na temat czynników branych pod uwagę w procesie decyzyjnym. W konsekwencji nierozstrzygnięte pozostaje pytanie badawcze o to, jakie czynniki i w jakim stopniu odgrywają rolę w sposobie uzasadniania decyzji w austriackiej praktyce orzekania kar.

Projekt badawczy „Intuicja w postępowaniu karnym? O interdyscyplinarności czynników w praktyce decyzyjnej dotyczącej prewencji indywidualnej", finansowany przez austriacki land Styria, stawia sobie za cel ilościowe zbadanie sposobu uzasadniania decyzji przez sędziów i prokuratorów za pomocą ankiet, a także jakościowo — poprzez wywiady i analizę akt spraw. Dzięki połączeniu danych jakościowych i ilościowych badanie ma na celu identyfikację kluczowych czynników wpływających na proces decyzyjny oraz dostarczenie bardziej szczegółowego obrazu uzasadniania orzeczeń sądowych w konkretnych sprawach. W niniejszym artykule przedstawiamy część wyników, koncentrując się na empirycznym znaczeniu różnych czynników prewencji indywidualnej w codziennej praktyce sądowej oraz na tym, jak ich rola różni się w zależności od rodzaju sankcji oraz między decyzjami podejmowanymi przez sędziów i prokuratorów.

Słowa kluczowe: wymiar kary, prewencja indywidualna, prewencja ogólna, proces decyzyjny, interdyscyplinarność

Introduction

Judges and prosecutors are faced with a variety of factors that have to be considered when determining sentences. In addition to the more apparent reference categories, such as the crime itself, its sentencing range and the available types of sanctions, it is also crucial to account for offender-related differences. After all, sentencing decisions must also (and probably primarily) serve the purpose of specific deterrence, which requires a careful consideration of relevant individual, person-centred criteria (Jerabek, Ropper 2024: 16–18; Pina-Sánchez, Dham, Gosling 2024: 450).

It is the judges' responsibility to comprehensively evaluate these factors (Jerabek, Ropper 2024: 19). Judges in Austria, however, are not legally obligated to thoroughly substantiate their reasoning for individual verdicts (Riffel 2023b: 21). Additionally,

there is a lack of research on which factors are taken into account, the frequency with which they are considered and the extent to which they influence sentencing decisions. A research project funded by the province of Styria, called "Intuition im Strafverfahren? – Über die Interdisziplinarität der Beweggründe in der spezialpräventiven Entscheidungspraxis" [Intuition in criminal proceedings? – On the interdisciplinarity of factors in the specific deterrent decision-making practice], investigated the decision-making behaviour of judges and public prosecutors in Austria. It was guided by the following research questions: Which factors play what role in the sentencing process in Austria? Are there any differences in the relevance of each factor depending on the reaction form chosen? And, last but not least, are there any differences between judges and prosecutors in rating these factors? By using a mixed-methods approach with a quantitative questionnaire, qualitative interviews and case file analysis, this study aimed to extract and analyse contributing factors of specific deterrence as they appear in Austrian sentencing practice. The collected data offer explanatory potential for numerous research questions in the field of judicial practice and specific deterrence, such as the key findings presented in this article.[1]

1. Specific deterrence in Austrian criminal law

As in other countries, Austrian judges must base their decisions on the individual offender's guilt while adhering to the sentencing range provided by the Austrian Criminal Code (StGB) (Stricker 2016: 3; Riffel 2023b: 21). Unlike the justification of guilt as prerequisite for any guilty verdict – which is based on a "characterological" and non-quantifiable concept of guilt and thus relies on an accusation of having not behaved as one would expect from a reasonable person while being capable of doing so – the sentencing process in Austria, for determining the type and severity of the penalty, is understood to rely on a different concept of guilt. This concept is more comprehensive because it not only focusses on the reproachable criminal behaviour itself, but also considers the personality of the offender and their behaviour both before and after the crime (Burgstaller 1982: 134; Riffel 2023b: 2–3). As a result of a preventive approach to justice, which sees prevention as the main purpose of punishment – referred to as "outcome-based sentencing" (Kienapfel, Höpfel, Kert 2024: 337) – these guilt-related preventive factors must also be taken into account (Tipold 2016: 10; Riffel 2023b: 21). Therefore, contemporary Austrian law emphasises that the court not only has to take into account aggravating and mitigating factors of the crime, but must also give due consideration to the implications of punishment and other anticipated consequences of the offence on the perpetrator's future life in society (StGB 2025: § 32 as translated by Schloenhardt,

[1] The questionnaire and collected data are currently not publicly available, but may be provided to interested researchers upon request.

Höpfel 2021). While general deterrence aims at promoting legal compliance through trust in the legal system and reinforcement of social values as well as through deterring others– and therefore addresses society in general – specific deterrence focusses on the individual offender and the prevention of individual recidivism (Riffel 2023b: 27). According to the prevailing opinion in Austria, specific deterrence is more important than general deterrence for the sentencing process in an individual case (Jerabek, Ropper 2024: 18). General deterrence is rather considered a "braking function against a minimisation of the penalty when having a favourable prognosis" [translation by the authors] (Riffel 2023b: 24) through limiting the range of punishment or the possibility of certain reactions (e.g. granting/non-granting of conditional suspension of prison sentences) (Riffel 2023b: 25–26). In the absence of empirical evidence for the effectiveness of general deterrence, it is generally advisable to refrain from tightening penalties based on it (Grafl 2006/2007: 199; Hirtenlehner 2020: 221). Additionally, more formal aspects, such as procedural efficiency through a disproportionate duration of proceedings, can also have an impact on the sentencing decision (Riffel 2023b: 48). In this respect, Austrian judges must determine the sentence within the framework – which is to be determined more abstractly according to the severity of the offence and what is appropriate in terms of general deterrence – and then adjust it to the individual case by considering aspects of specific deterrence (Riffel 2023b: 25).

In summary, punishment in Austria must ensure compensation for the offence that was committed (principle of guilt), address the individual needs of the offender (principle of specific deterrence) and take into account the enforcement of the legal system as a whole (principle of general deterrence), the three aims that Heinz Zipf (1979: 198) describes as the "magic triangle of sentencing" [translation by the authors]. According to Austrian sentencing theory, these different sources of information are considered step by step. In the first step the applicable penalty framework is to be determined (as a range between the minimum and maximum penalty established by law); in the second step aggravating and mitigating factors are taken into account; and in the final step the anticipated effects on the offender within society are to be considered (Zipf 1977: 6–7; Riffel 2023b: 51). However, not all of these steps need to be articulated and explained in detail in the respective written judgment. According to § 270 (2) no. 5 of the Austrian Code of Criminal Procedure (StPO 2025), judges only have to substantiate any mitigating and aggravating factors they consider. When handing down a fine, they must detail the personal circumstances and financial capacity of the convicted person that are relevant to the determination of the penalty. What is particularly interesting at this point is that judges are not further obligated to provide their preventive considerations. Although the sentencing framework and the most common mitigating and aggravating factors used in practice are stipulated by law, there is no law guiding the consideration of preventive factors. Despite being crucial for balancing the sentence according to the circumstances of a given case, there is hardly any information on how this is done in everyday court practice (Riffel 2023b: 51).

2. Unveiling sentencing factors

As a result of the rather flexible but opaque process of sentencing, Austria has to deal with sentencing disparities (Grafl 2020: 40) – as in other countries (Krasnostein, Freiberg 2013: 256; Pina-Sanchez, Linacre 2013: 1118; Drápal 2020: 151). Historical efforts to codify sentencing in order to counteract these disparities have largely failed (Riffel 2023a: 4), and modern approaches such as sentencing guidelines are facing challenges in the international discourse (Pina-Sanchez, Linacre 2014: 747; Yang 2014: 1268). Moreover, because Austrian judges are not legally required to provide a narrative justification of the sentencing process, there are hardly any decisions from the appellate judge that take a position on questions of preventive considerations or on individual sentencing factors. In the rare occasions where the court of appeal addresses the sentencing, the argument is often rather restrained and imprecise, for example: "The trial court has fully and correctly stated the reasons for sentencing and assessed their weight appropriately" [translated by the authors] (12 Os 87/88 1988), with these being the sole remarks regarding the determination of the sentence. Only a few individual cases provide further insight and take into account the social situation (e.g. loss of one's livelihood and "life's work") (15 Os 114/89 1989), emotional state (e.g. "mental agitation" due to a breakup) (14 Os 133/99 1999), the brazen nature of the offence (13 Os 91/86 1986) or the personal circumstances of the victim (12 Os 33/78 1978). Further insight is also provided by international literature: for example, the role of a caregiver (Kane, Minson 2022: 366), the showing of remorse (Maslen 2015: 173) or the number of offences (Dhami 2022: 55).

After all, the step-by-step theoretical approach to sentencing, which consists of successively defining the sentence according to the specific case, can hardly ever be observed in practice. In fact, sentencing is usually carried out in a single act (Riffel 2023a: 94). This bears the risk that in the absence of transparency the consideration of preventive aspects also involves factors such as considerations of ethnicity, race and gender (Mustard 2001: 113), as well as emotional shock (Eren, Mocan 2018: 171) or judicial experience (Drapal, Pina Sanchez 2023: 211). Also, there is a potential influence of these concepts on the way judges consider permissible factors (Guilfoyle, Pina-Sánchez 2025: 241).

Mitigating and preventing biases requires a more transparent process and a deeper understanding of the factors being considered and those that should be. Therefore, the question arises as to which factors are actually taken into account in this third and final step of sentencing, and how they are weighed by judges as preventive elements for specific deterrence. This is the first issue addressed in this paper.

In addition to the general consideration of preventive aspects in all decision-making processes, as outlined above, the Austrian Criminal Code explicitly emphasises the particular importance of preventive aspects for certain forms of punishment, such as the conditional suspension of sentences (StGB 2025: § 43) or the withdrawal of prosecution through diversionary measures (StPO 2025: § 198) (or "diversion").

Austrian criminal law allows the suspension of a sentence if "the mere prospect of the enforcement of the sentence, by itself or in combination with other measures, will suffice to prevent the person committing other offences, and that the enforcement of the sentence is not needed to thwart the commission of offences by others" (StGB 2025: § 43 as translated by Schloenhardt, Höpfel 2021: 51). Thus, it explicitly demands consideration of the factors of specific and general deterrence. In addition, the Austrian legislature expands on the factual basis to be created for this: "In this context, particular consideration has to be given to the nature of the offence, the character of the person, the degree of the person's culpability, the person's prior record, and the person's behaviour after the offence" (as translated by Schloenhardt, Höpfel 2021: 51). Also, the legal framework allowing for diversion has to be granted if punishment "does not appear to be warranted in order to prevent the accused from committing criminal offences or to deter others from committing criminal offences" (as translated by Schloenhardt, Eder 2024: 258).

Other provisions, however, do not provide for any explicit consideration of preventive requirements, like the imposition of a fine (StGB 2025: § 19). Even if the preventive purpose of punishment in general implies a justificatory pressure for any judicial act by providing indications for the theoretically "correct" design of a sentence (Bock 2019), different sentences may align with the purpose of sentencing to varying degrees. Therefore, the study also examines whether differences in the *verba legalia* for various types of punishment or other measures lead to variations in how preventive aspects – particularly those related to specific deterrence – are considered in sentencing decisions.

The question also arises as to what influence the decision-maker has on the extent to which considerations of specific deterrence are taken into account within their discretionary powers. In our study we compare judges and prosecutors. The role of the prosecution in Austrian sentencing practice is to assess the sentence from the prosecution's perspective and appeal against it in the event of a discrepancy between their (factual or legal) perceptions and those of the court. In addition, as mentioned above, Austrian criminal law provides for the possibility to withdraw the prosecution. Although this can still be done by the court in the main proceedings, it primarily occurs during the preliminary proceedings and is the responsibility of the public prosecutor's office. Furthermore, it is up to prosecutors to order pre-trial detention or to refrain from further prosecution in juvenile criminal proceedings due to considerations of specific deterrence. Therefore, the law provides for the incorporation of specific deterrence in the practice of public prosecutors as well. The uniform nature of mandatory training for "candidate judges" to become a judge or a prosecutor, the legal framework that applies equally to both groups and the influence on both groups of decision-making practices of Higher Regional Courts could all lead to consistent decision-making behaviour across both groups. Nevertheless, distinct working methods and differing organisational cultures give rise to markedly different structural contexts. The final question to be addressed is thus whether the varying operational practices embedded in everyday working life favour a particular mode of decision-making regarding the impact factors of specific deterrence, despite sharing a nearly identical theoretical foundation.

3. Method

To address these questions and to determine which factors are considered and weighed by judges in relation to specific deterrent sentencing, a mixed-methods design was employed. Following an exploratory design, we initially adopted a qualitative approach, utilising file analysis and expert interviews to identify factors relevant to specific deterrence. These factors informed the development of a questionnaire, which was subsequently used to gain deeper insights into the practical application of specific deterrence in sentencing.

In the first step, 15 criminal court judgments containing the sentencing decisions were analysed, and 15 judges from the Higher Regional Court of Graz were interviewed on the topic of specific deterrence. During the interviews, conceptual questions regarding the concept of specific deterrence in everyday court life were combined with more factual questions based on case studies and case narratives to capture aspects that are uniquely embedded in practical working contexts. Through this multifaceted approach to the subject, the researchers sought to align as closely as possible with the relevant professional structures.

The resulting material was subsequently analysed using Philipp Mayring's approach of qualitative content analysis. The main categories were formed deductively, grounded in theoretical frameworks and primarily informed by statutory provisions, explanatory legislative materials and leading legal commentaries on pertinent provisions regarding sentencing (such as Tipold 2015; Stricker 2016; Riffel 2023b), while the respective subcategories were derived inductively from the material itself (Mayring 2014). These results were used to create a pool of potential items and to draw conclusions about the relevance and complexity of the respective categories for constructing the questionnaire. Categories that were deemed particularly relevant or versatile were more strongly represented in the questionnaire. The final questionnaire consists of 28 items representing potentially relevant factors of specific deterrence in sentencing practice. In terms of categories, four items assess offender-related factors such as "conduct in the hearing" or an "aggressive personality." Three items assess the criminal record, with one additional item for "previous diversions." Four items cover the social integration of the offender, such as a "robust social network" or "proactive acceptance of social responsibility." Two items were included to assess the moral reprehensibility of intent, covering different potential motives and triggers such as "provocation" or "commission of the offence as a result of crisis" (Riffel 2023b: 13–14). One item targets the reprehensibility of the "manner in which the offence was committed." Three items address post-offence behaviour, such as "self-initiated restitution" or a "remorseful confession." One item addresses the family situation. Three items cover incident management, which also includes the aspect of life planning, such as a "willingness to change." Three items cover potential factors of a systematic sentencing approach, referring to the consideration of "expectations of the prosecution or higher courtss." or the "progressive escalation of sanctions." The latter

describes a stepwise aggravation of the sanction, e.g. after a suspended prison sentence, any subsequent offence necessarily entails an unconditional prison sentence. Other items address "substance-influenced offences," "the attributes of the victim" and the "income and financial burdens" of the offender.

Overall, this approach aimed at generating a practice-orientated questionnaire through a representative depiction of the topics mentioned by the practitioners in the interviews. This approach was also supported by using the participants' original wording from the interviews. In addition, examples from the interviews were given for each item to increase the validity of the measurement. The items constructed in this way were rated on a 7-point rating scale (1 = never, 7 = always) with regard to the "frequency" with which they are used in sentencing. The term frequency was chosen to avoid an evaluation of the items according to their theoretical relevance, and thus a reproduction of "textbook knowledge," and instead to assess the practical relevance of the items. Each respondent had to evaluate the item set for each of the following four reaction forms: diversion, fine, prison sentence (ps) and suspended prison sentence (sps). The data were used to generate descriptive statistics in the software program R version 4.4.0.

3.1. Sampling

The subsequent survey was conducted online via *limesurvey*. Judges, public prosecutors and district prosecutors in the judicial district of the Higher Regional Courts of Graz and Vienna were defined as the population. Therefore, the publicly accessible judicial business allocation plan of the courts and public prosecutor's offices on the website of the Ministry of Justice were used for sampling. The link to the questionnaire was sent via personalised emails. All participants received the same invitation directly from the authors; in some courts, department heads merely forwarded this invitation unchanged within their department. Thus, the sampling procedure itself was uniform. The sample size suggests an overall response rate of 20%. In total, a sample of $N = 105$ was achieved, consisting of 55 judges and 50 prosecutors.

3.2. Missing values

The requirement for inclusion in the following analysis was a complete questionnaire, which was understood as one in which no more than four responses per sanction were missing. This was ensured by means of technical settings when processing the questionnaire. The missing values were ignored in the analysis because the MCAR test (missing completely at random) did not yield a significant result, indicating that there was no connection between the missing values and the characteristics of the individuals or the items, so the values were assumed to be missing at random. Furthermore, visual plausibility checks were carried out. Questionnaires that showed a systematic response bias such as extreme responding with a clear repetitive

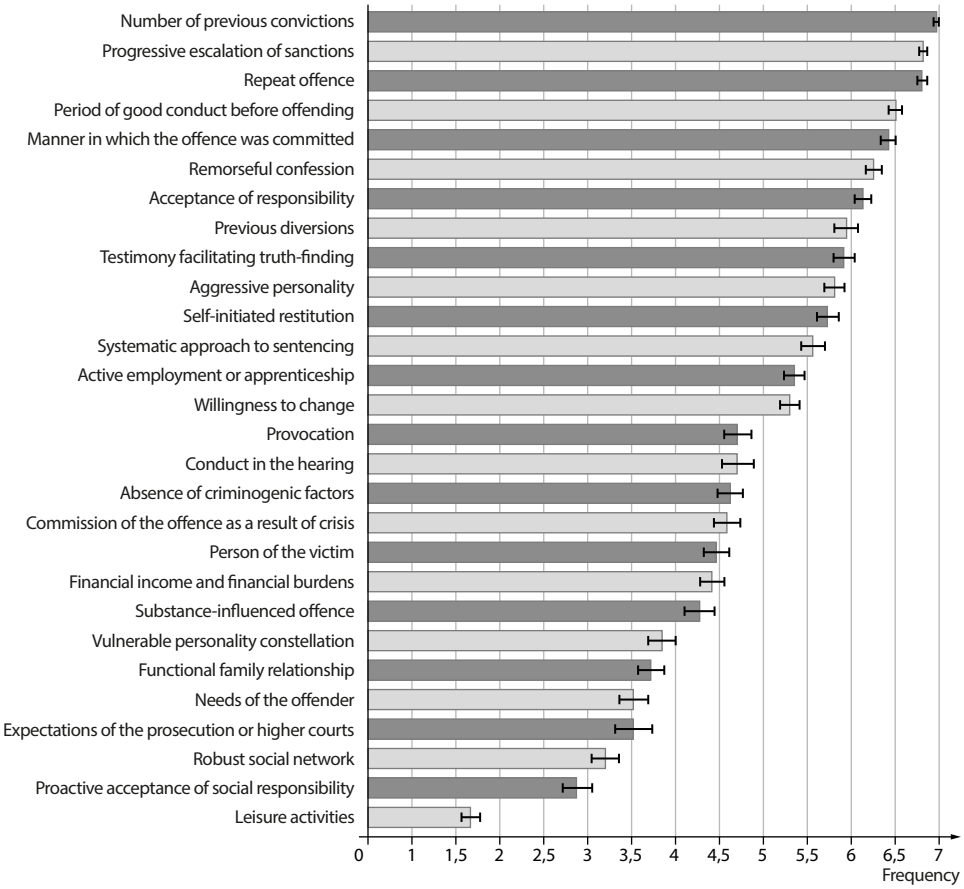
pattern or straight-lining were excluded. The remaining sample size after running the exclusion of biased questionnaires was $N = 99$.

4. Factors of specific deterrence

4.1. Analysis

To investigate the practical relevance of different factors of specific deterrence, both the overall mean value of each item across all sanctions and its standard deviation were calculated. By analysing the mean values and standard deviations of the items, we aimed to gain an overview of the roles of specific factors in sentencing practice.

Figure 1. Mean frequency scores for individual factors as rated by judges and prosecutors (1 = never, 7 = always)



Source: Authors' own elaboration.

4.2. Results

The first analysis showed interesting differences in the practical relevance of different factors of specific deterrent sentencing to everyday court life. The first item complex that proved to be particularly relevant was previous convictions (M = 6.25). The consideration of "number of previous convictions," "repeat offence" and "period of good conduct before offending" showed the most frequent use in sentencing practice across all reaction forms. This reflects the importance given to it in the interviews. The "manner in which an offence was committed" was also rated as very relevant in sentencing practice. Two sets of items that also turned out to be practically important for sentencing were the post-crime behaviour, which includes "remorseful confession," "testimony facilitating truth-finding" and "self-initiated restitution," which had an overall mean value of M = 5.96, and incident management, which includes "acceptance of responsibility" for one's actions, the "willingness to change" and an "absence of criminogenic factors," which showed an overall mean value of M = 5.37. Regarding the personality of the offender (M = 4.46), an "aggressive personality" was rated as the most relevant factor in sentencing, followed by their "conduct in the hearing," whereas the "offenders' needs" were rated as the least important aspect. Aspects of systemic sentencing were rated very heterogeneously. "Expectations of the prosecutor or higher courts" showed only modest importance, whereas the "progressive escalation of sanctions" was perceived as very practically relevant. The item set of social integration was rated as the least relevant (M = 3.52), covering a "functional family relationship" and "robust social network." However, "active employment or apprenticeship" showed a relatively high relevance.

Table 1. Mean and standard deviation for each factor

Variable Name	M	SD
Willingness to change	5.31	1.07
Absence of criminogenic factors	4.66	1.37
Functional family relationship	3.80	1.42
Proactive acceptance of social responsibility	2.99	1.63
Income and financial burdens	4.47	1.28
Commission of the offence as a result of crisis	4.63	1.42
Provocation	4.75	1.50
Remorseful confession	6.23	0.90
Testimony facilitating truth-finding	5.91	1.16
Manner in which the offence was committed	6.39	0.83

Variable Name	M	SD
Previous diversions	5.93	1.28
Self-initiated restitution	5.73	1.21
Attributes of the victim	4.51	1.39
Conduct in the hearing	4.75	1.71
Aggressive personality	5.80	1.12
Acceptance of responsibility	6.12	0.93
Vulnerable personality constellation	3.92	1.51
Needs of the offender	3.61	1.56
Active employment or apprenticeship	5.37	1.13
Robust social network	3.29	1.47
Leisure activities	1.82	1.01
Progressive escalation of sanctions	6.78	0.45
Expectations of the prosecution or higher courts	3.61	1.99
Systematic approach to sentencing	5.57	1.30
Substance-influenced offence	4.33	1.63
Period of good conduct before offending	6.47	0.71
Number of previous convictions	6.92	0.25
Repeat offence	6.77	0.54

Source: Authors' own elaboration.

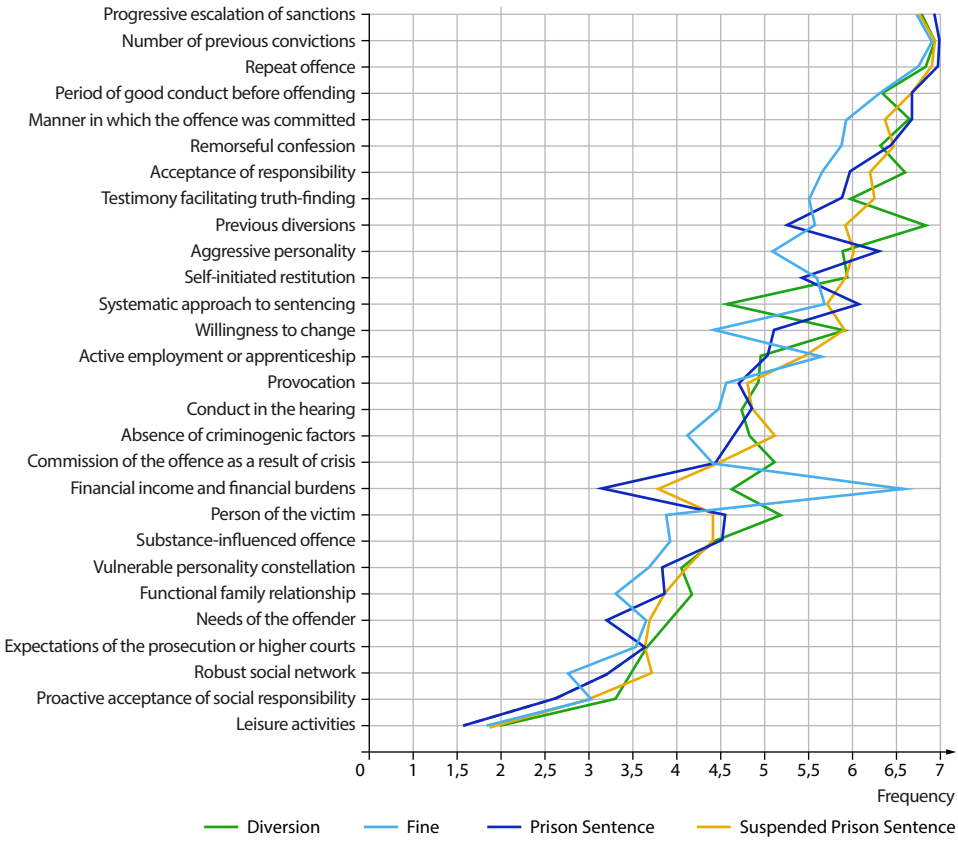
5. Different forms of punishment, reactive measures and specific deterrence

5.1. Analysis

To investigate the dependence of the relevance of different factors of specific deterrence on the respective forms of punishment or other reactive measures, mean comparisons across the four forms per item were performed using analysis of variance (ANOVA). Figure 2 shows the mean values of the items for each type in the

form of a colour-coded line plot. This figure was used to illustrate potentially relevant differences, which were subsequently tested for significance using ANOVA and post hoc comparisons (reported differences are significant at $p < .05$, corrected for multiple comparisons). Where the assumption of sphericity was violated, Greenhouse–Geisser-corrected degrees of freedom were reported (Geisser, Greenhouse 1958: 885), in addition to adjusted test statistics and effect sizes. The normality of residuals was inspected visually, which revealed deviations for some item complexes (e.g. willingness to change, systematic approach to sentencing and aggressive personality). Simulation studies, however, have shown that ANOVA can be considered robust under mild to moderate violations of both sphericity and normality, given our sample size (Blanca et al. 2024: 476). We therefore continued with the analysis as planned and advise the reader to keep these limitations in mind when interpreting the results. The items to be analysed (see Figure 2) were "acceptance of responsibility," "previous diversions," "aggressive personality," "systematic approach to sentencing," "willingness to change," "attributes of the victim," "income and financial burdens," "functional family relationships" and "absence of criminogenic factors."

Figure 2. Frequency of each factor by sanction



Source: Authors own elaboration.

5.2. Results

The greatest difference in relevance between the different sanctions, as shown in Table 2, was the offender's financial situation, which includes both income and liabilities. While the "income and financial burdens" played a subordinate role for prison sentences, it was more relevant to diversions and played a dominant role for fines. The item "previous diversions" showed a further difference in mean value depending on the type of sanction, with the highest mean value for diversions, which differed significantly from the mean values of other reactions. Another factor that stood out and seemed less important for diversions compared to other forms of sanction was a "systematic approach to sentencing." The "attributes of the victim" also played different roles depending on the type of sanction, being more important in diversions than in others. Significant differences in the mean can also be observed for "aggressive personality," indicating that this factor plays a greater role in the imposition of prison sentences and diversions compared to fines. Furthermore, "acceptance of responsibility" for one's actions was more relevant to diversions in practice compared to fines and prison sentences. The same can be observed for "functional family relationships," although the difference in mean values here was only statistically significant in relation to fines. The item "willingness to change" drew a more diverse picture: on the one hand, this seemed to be particularly relevant for diversions, as this difference was clearly significant for both fines and prison sentences; however, it was also significantly more relevant for suspended prison sentences than prison sentences. Similarly, an "absence of criminogenic factors" also appears to be more relevant to suspended prison sentences and diversions than for fines.

Table 2. Differences in factor frequency by sanction

Item	F	p	η^2	Differences in sanctions
Income and financial burdens	F(2.41, 224.37) = 72.79	< .001	.44	M_{ps} = 3.13^{d}, M_{sps}=3.21^{c}, $M_{diversion}$ = 4.62^{b}, M_{fine} = 6.60^{a}
Previous diversions	F(2.55, 234.53) = 19.55	< .001	.18	$M_{diversion}$ = 6.84^{a}, M_{fine} =5.59^{b}, M_{sps} = 5.93^{b}, M_{ps} =5.24^{b}
Systematic approach to sentencing	F(2.11, 173.28) = 23.10	< .001	.22	$M_{diversion}$ = 4.55^{c}, M_{fine} = 5.68^{ab}, M_{sps} = 5.71^{b}, M_{ps} = 6.08^{a}
Attributes of the victim	F(2.60, 247.13) = 16.73	< .001	.15	$M_{diversion}$ = 5.20^{a}, M_{fine} =3.89^{c}, M_{sps} = 4.43^{b}, M_{ps} =4.57^{b}
Aggressive personality	F(2.38, 219.06) = 17.29	< .001	.16	$M_{diversion}$ = 5.89^{b}, M_{fine} = 5.10^{c}, M_{sps} = 6.03^{b}, M_{ps} =6.32^{a}

Item	F	p	η^2	Differences in sanctions
Acceptance of responsibility	F(2.67, 245.69) = 21.27	< .001	.19	$M_{diversion} = 6.61^a$, $M_{fine} = 5.66^b$, $M_{sps} = 6.20^a$, $M_{ps} = 5.83^c$
Functional family relationships	F(3,291) = 6.33	< .001	.06	$M_{diversion} = 4.17^a$, $M_{fine} = 3.30^b$, $M_{sps} = 3.84^a$, $M_{ps} = 3.85^{ab}$
Willingness to change	F(2.67, 245.69) = 21.27	< .001	.19	$M_{diversion} = 5.95^a$, $M_{fine} = 4.40^c$, $M_{sps} = 5.92^a$, $M_{ps} = 5.10^b$
Absence of criminogenic factors	F(2.76, 265.20) = 9.59	< .001	.09	$M_{diversion} = 4.82^{ab}$, $M_{fine} = 4.12^c$, $M_{sps} = 5.12^a$, $M_{ps} = 4.63^{bc}$

Source: Authors' own elaboration.

Note: Degrees of freedom are corrected for violation of the sphericity assumption. η^2 of <.01, <.06 and <.14 can be interpreted as small, medium and large effects, respectively. Letters indicate grouping for significant differences and rank order of values (a = highest mean, d = lowest mean). If two means share the same value, the post hoc tests were unable to show a statistically significant difference in the p-values corrected according to Holm (1979).

6. Analysis by profession: Judges versus prosecutors

6.1. Analysis

For a comparison of the practical relevance of specific deterrence in the practice of judges versus public prosecutors or district attorneys, the same item sets mentioned above were examined for differences between groups (e.g. combining all item values relating to previous convictions into an averaged "previous conviction value"). Where the skewness and kurtosis indicated a highly skewed, non-normal distribution within one item complex, an MWU test was conducted. Otherwise, a *t*-test was used to compare the group values.

6.2. Results

This exploratory comparison did not yield significant results for any of the item groups. Although a conservative approach was adopted and the methods have relatively low statistical "power" given the sample size, this does not automatically mean that relevant differences would emerge with a larger sample. The sample, though small, is representative and the observed differences between the professions are only modest and can be supported theoretically. Nevertheless, the overall

picture shows that judges rated all but one item set higher than the prosecution ("manner in which the crime was committed"). Although it was not statistically significant, our data indicate possible discrepancies between judges and prosecutors in the practical relevance of "provocation and crisis," "the attributes of the victim," "the person of the offender" and "income and financial burdens."

7. Discussion

7.1. Discussion of relevant factors

A comparison of the material from the interviews and questionnaires reveals a discrepancy between the aspects that are theoretically part of the concept of specific deterrence and those factors that are actually used in everyday Austrian sentencing practice. This can be observed in the variety of variables mentioned in the interviews that concern the individual circumstances of the offender, including personality, behaviour, needs, life planning, self-esteem and language skills, which made up the majority of the content of the interviews while being underrepresented in practice according to the questionnaire responses. This is also particularly evident in the case of social integration, which emerged as the third most frequent category in the interviews, yet whose individual aspects are clearly the least frequently addressed in practice according to the questionnaire.

It is irritating that in practice, no greater attention is paid to prevention-relevant factors such as a "robust social network," an "absence of criminogenic factors," "functional family relationships," "active employment or apprenticeship" or the "needs of the offender" – especially since forensic criminological research on the relevance of risks and needs in an individual case shows that (re-)offenders and non-offenders differ precisely in their "social relations," referring to the offender's behaviour towards all life domains, e.g. relationship to the family of origin or self-chosen contacts, leisure behaviour and performance behaviour (education and occupation) (Göppinger 1983; Jehle 1992; Bock 1995: 1–28; Göppinger 2008; Bock 2019). Instead, the quantitative analysis of results is dominated by those items that deal with past (criminal) behaviour: "number of previous convictions," "repeat offence," "period of good conduct before offending" and "previous diversions." The "number of previous convictions" in particular plays a dominant role in every type of reaction form.

This focus is not surprising, as its particular significance in the Austrian practice has been repeatedly highlighted in the literature (Laubenthal, Baier, Nestler 2010; Grafl, Haider 2018; Riffel 2023b: 36). However, in view of the relevant Austrian law, it is surprising and requires further reflection. Although previous convictions are included in the demonstrative list of aggravating circumstanc-

es in the Austrian Criminal Code (StGB 2025: § 33), the law does not provide for a particular emphasis on this factor, but mentions several other aggravating factors and allows for the application of case-specific (not explicitly mentioned) aggravating factors. In light of individual considerations of criminogenic factors, previous convictions do not necessarily lead to the exclusion of an orderly way of life as a mitigating factor under Austrian criminal law (Riffel 2023b: 6). Furthermore, the assessment of the same malicious propensity of previous convictions should not simply be based on the fact that the offender has prior convictions in the same legal category of offences, but should consider whether or not similar behaviour from a criminological (!) point of view can be observed (Riffel 2023b: 6; Kaiser, Leibetseder 2024: 129). Only the aggravation of punishment for recidivism (StGB 2025: § 39) and the mandatory extension of the sentencing range according to the Protection against Violence Act 2019 (Gewaltschutzgesetz 2019) could necessitate such a focus on previous convictions under Austrian criminal law, provided the requirements are met in the individual case (Flora 2021: 35; Higher Regional Court Linz 2019; Public Prosecutor General's Office Innsbruck 2019; Beclin 2019: 2f). However, despite this mandatory extension of the sentencing range, the guiding principle of Austrian criminal law on the necessity of assessing aggravating and mitigating factors while giving due consideration to the implications of punishment and other anticipated consequences of an offence on the future life of the perpetrator in society (StGB 2025: § 32) continues to be the "common thread" of sentencing. Thus, the consideration and weighing of differentiating factors is indispensable irrespective of the application of aggravating provisions and cannot be substituted by mere consideration of previous convictions (Flora 2021: 35; Kaiser, Leibetseder 2024: 129). Moreover, prevention-orientated sentencing cannot simply consist of weighing mitigating and aggravating factors against each other.

The concept of specific deterrence and the individual appropriateness of an intervention require a more differentiated approach. The overall analysis of the factors of specific deterrence shows that while Austrian criminal law does not prioritise either culpability-related (and thus primarily retrospective) or prevention-related (and thus primarily future-orientated) factors (Zipf 1979: 197), judges appear to focus predominantly on past circumstances when determining a sentence. This raises the question of the extent to which the current sentencing practice upholds the principles of individuality, as it takes factors into account without sufficiently considering the individual context, topicality (as it is not sensitive to changes) or completeness (as the consideration is limited to a few factors) (Kaiser, Leibetseder 2024: 130). The question now arises as to whether these theoretical requirements are at least fulfilled when imposing selected forms of sanction, as they may follow a more differentiated approach.

7.2. Discussion of differences in forms of sanctions

One of the first things to notice is the overarching dominance of the offender's financial situation when imposing a fine. On the one hand, it is evident that this is based on theory, as according to Austrian criminal law (StGB 2025: § 19) the financial situation must be considered when deciding on the amount of the fine. On the other hand, the financial situation also appears relevant to the choice of form of sanction, supposedly in order to be able to estimate the success of the sanction. Given that the potential cases eligible for fines involve less serious offences, where the court has greater discretion in choosing the sanctions, this would depict situations in which an individually shaped intervention according to risks and needs could pay off preventively. However, the offenders' "social relations" are often overlooked due to the focus on their financial situation. Therefore, whereas diversions focus on the offender's social relationships, particularly in terms of their future life in society, these aspects appear to be underrepresented in case of fines. This is surprising when considering that these two reactions often apply to similar cases (low criminogenic risk, no prior [serious] convictions, etc.). When looking at prison sentences, "previous convictions" and a "systematic approach to sentencing" play a dominant role. Multiple convictions applied in a systematic approach seem to depict prison sentences as a logical response. Also, an "aggressive personality" seems to be important when considering a prison sentence. This suggests that in the case of an "aggressive personality" or a high number of "previous convictions," there appears to be no area of application left for alternative interventions based on the individual needs of the offender. In both forms of reaction, there is no observable balanced assessment of all aspects relevant to specific deterrence – only an assessment of a few dominant factors related to the offender's (criminal) past. The differentiated image of defendants tends to play a subordinate role. In the case of diversions, on the other hand, it is noticeable that preventive and personal factors are of greater relevance. In particular, the greater importance of "accepting responsibility," a "willingness to change" and the "commission of the offence as a result of crisis" are consistent with the nature of diversionary proceedings. One can speak of a theory-driven effect in the "assumption of responsibility." insofar as this proves to be particularly relevant in the subsequent articles in Austrian criminal law – for example, those connected with community service (StPO 2025: § 201(2)) or compensation for an offence (StPO 2025: § 204(1)). The more frequent use of information about the "attributes of the victim" (see above all victim–offender mediation, StPO 2025: § 204) and the "manner in which the offence was committed" (StPO 2025: § 198) results conclusively from the legal requirements. The special significance of "previous diversions," however, does not result from legal requirements, as the law does not stipulate a "maximum" number of possible "previous diversions." However, it appears that this particular significance of prior sanctions has become firmly established in practice. Similar to diversions, the offender's personality and prevention-related factors also play a greater role

when deciding on suspended prison sentences. Accordingly, the "willingness to change," an "absence of criminogenic factors" and a "robust social network" are of greater importance in practice, but still not as important as "previous convictions." Particularly in the case of this sanction, however, greater consideration of circumstances relevant to prevention would be legally required and criminologically desirable, as Austrian law requires, when imposing a suspended prison sentence, "particular consideration […] to the nature of the offence, the person of the offender, the degree of the person's culpability, his previous life and the behaviour after the offence" (StGB 2025: § 43(1) as translated by Schloenhardt, Höpfel 2021: 51), and therefore portrays a much broader and more balanced basis for assessment than seems to be the common practice.

All in all, the analysis of the different relevance of specific factors between different reaction form show alignment with the relevant law. Those sanctions which explicitly require consideration of specific deterrent aspects, according to the law (StGB 2025: § 43(1); StPO 2025: § 198), show more diverse and balanced considerations, while factors decisive for specific deterrence play a significantly subordinate role in considerations in connection with fines or prison sentences. This is surprising insofar as all sanctions, whether implicitly or explicitly, have specific deterrence as one of the underlying purposes of punishment, so that no explicit reference to their inclusion would be necessary to ensure uniform consideration. These findings apply to both judges and public prosecutors, as the analysis showed no statistically significant differences in decision-making behaviour, which – as indicated above – is likely due to the uniform training and uniform law.

Conclusions

These results indicate two aspects that need to be further addressed when thinking about appropriate and criminologically reasonable sentencing practice that is in accordance with the law. Firstly, they indicate that specific deterrence as a theoretical principle lacks practical implementation strategies that could lead to a uniform alignment of sentencing decisions according to it. Our study does not indicate that specific deterrence is already established as a guiding principle in sentencing, and its application appears to be dependent on the specific wording of the relevant norm. Potential approaches to solutions could therefore be seen in the law itself, so that specific deterrence as a guiding principle is not only implied through § 32 StGB, but also explicitly stipulated in the respective paragraphs on the relevant sanctions and their specific provisions. Secondly, taking into account the various factors that proved to be practically relevant in specific deterrent sentencing according to the interviews, the question must be asked to what extent jurisdiction itself can actually elaborate on these factors in legal proceedings. In contrast to the domain

of "previous convictions," where the type of sanctions, a "period of good conduct before offending" and a "repeat offence" can all be definitively determined from the case file – and the offender's official criminal record in particular – a more differentiated view on the offender requires more time and financial resources, as well as eclectic professional knowledge. Furthermore, aspects regarding the future life of the offender can never be determined with any degree of accuracy, but can only offer a prognostic assumption. The resulting susceptibility to errors must be taken into account and dealt with instead of continuing to assume that a complete clarification of the future is possible if one sticks to the hard facts. Furthermore, it must also be questioned whether jurisprudence alone is at all capable of assessing such a systemic aspect as a person's future behaviour in accordance with the requirements. Does sentencing require stronger interdisciplinary working practice? What does a sentencing approach which actually implements the purpose of the punishment instead of just implying it even look like? After all, this discrepancy between the requirements and practical implementation in everyday sentencing may ultimately lead to the thoroughly unsatisfactory sentencing practice portrayed above.

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Collateral consequences of conviction – a hidden punishment?

Uboczne konsekwencje skazania – ukryta kara?

Abstract: Traditionally, the focus of research lies on the process of sentencing and on criminal sanctions. However, these criminal sanctions are often accompanied with supplementary ramifications. These diverse ramifications are legal and social, intentional and unintentional, immediate and distant and temporary and lifelong. Especially in the United States, they are known among other terms as "collateral consequences" of a criminal conviction or criminal punishment. These collateral consequences may have serious negative effects for the convict. For example, a fine for tax evasion in the context of a trade can be followed by a trade ban. As trade bans are administrative acts, the criminal court does not usually take the impending trade ban into account in its sentencing decision. However, the trade ban might strike the convicted person much harder due to the loss of their livelihood. Collateral consequences concern a wide area of application extending beyond the well-known criminal sanctions. In doing so, they do not depend on a specific legal system and its dogmatic assumptions. In this article, the definition and nature of collateral consequences are introduced first. Afterwards, the focus turns to the wide spectrum of collateral consequences. Then, the criminal provisions and penal purposes of collateral consequences come to the fore with an emphasis on Germany. Even before a conviction, media coverage can lead to prejudgment: an example from Germany illustrates these negative side effects of criminal investigations, i.e. of potential convictions in future. Finally, it is important to raise awareness of the collateral consequences of a conviction and to establish (legal) mechanisms to regularly take them into account.

Keywords: ancillary ramifications, collateral consequences, hidden punishment, media coverage, penal purposes, sentencing

Abstrakt: Tradycyjnie badania koncentrują się na procesie wymiaru kary oraz na sankcjach karnych. Sankcjom tym często towarzyszą jednak dodatkowe następstwa. Mają one zróżnicowany charakter:

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mogą być prawne i społeczne, zamierzone i niezamierzone, bezpośrednie i odroczone w czasie, tymczasowe lub długotrwałe. Szczególnie w Stanach Zjednoczonych określa się je – między innymi – mianem ubocznych konsekwencji (*collateral consequences*) skazania lub ukarania. Uboczne konsekwencje mogą mieć dla osoby skazanej poważne negatywne następstwa. Przykładowo do grzywny za przestępstwo skarbowe popełnione w związku z prowadzeniem działalności gospodarczej może następnie być dodany zakaz prowadzenia tejże działalności. Ponieważ zakaz taki ma charakter administracyjny, sąd karny zazwyczaj nie uwzględnia go przy wymiarze kary. Tymczasem to właśnie zakaz prowadzenia działalności gospodarczej – ze względu na utratę źródła utrzymania – może okazać się dla skazanego dotkliwszy niż sama kara zasadnicza. Zakres ubocznych konsekwencji wykracza daleko poza klasyczne sankcje karne i obejmuje szerokie spektrum sytuacji. Nie są one przy tym zależne od konkretnego systemu prawnego ani jego dogmatycznych założeń. W niniejszym artykule w pierwszej kolejności przedstawiono definicję oraz charakter ubocznych konsekwencji skazania. Następnie omówiono ich szerokie spektrum. W dalszej części analizie poddano karnoprawny charakter i cele penalne tych konsekwencji, ze szczególnym uwzględnieniem prawa niemieckiego. Jeszcze przed wydaniem wyroku negatywne skutki może wywoływać samo zainteresowanie mediów – przykład z Niemiec ilustruje uboczne konsekwencje postępowań karnych, a więc potencjalnych przyszłych skazań. Na koniec podkreślono potrzebę zwiększenia świadomości istnienia ubocznych konsekwencji skazania oraz stworzenia (prawnych) mechanizmów umożliwiających ich systematyczne uwzględnianie.

Słowa kluczowe: dodatkowe następstwa, uboczne konsekwencje, ukryta kara, relacje medialne, cele kary, wymiar kary

Introduction

For a long time, sentencing and punishment have been subjected to scholarly debate. The controversy starts with the theoretical foundation and extends to the criteria and effects of sentencing. Although sentencing principles and judicial discretion differ across national jurisdictions (Haverkamp, Kaspar 2023), there exists a similar corpus of typical aggravating (e.g. reoffending) and mitigating circumstances (e.g. confession).

Despite these known criteria of sentencing, further considerations may come into play. German law provides an example: "The effects which the penalty can be expected to have on the offender's future life in the society are to be taken into account" (Sec. 46 para. 1 sent. 2 German Criminal Code; translation by Bohlander, Reusch 2021). The wording is vague and points inter alia to the dissocialising impact of punishment. These consequences may add to a punishing effect if they impose an additional burden on the convicted person. Another German provision regulates removing the right to hold public office or to vote and be elected when the accused person is sentenced to at least one years' imprisonment for a serious crime (Sec. 45 German Criminal Code). Apart from such statutory or legal "side effects" of a criminal conviction that are regulated in the German Criminal Code itself, there are many possible legal consequences of a conviction outside the realm of criminal law, such as extraditing foreign offenders to their home countries or

banning, say, doctors or lawyers from working in their profession. One can also include the mere factual negative consequences of a conviction (and the following punishment), e.g. social isolation and stigmatisation or difficulties in finding a home or a job due to a criminal record.

Until recently, these so-called "collateral consequences" of criminal conviction have been neglected in the European scholarly debate (Corda 2023; Corda, Rovira, Henley 2023; Fitrakis 2018). Their distinctive feature is their rather hidden or invisible nature, as they stem from different sources with different degrees of formalisation: they might serve as an add-on to punishment within the criminal proceedings, be separate from them as an administrative or civil restriction or even represent mere informal factual consequences. The term "collateral consequences" was coined in the United States. There, the federal and state systems list around 45,000 collateral consequences in a database called the National Inventory of Collateral Consequences of Conviction (American Bar Association n.d.; National Inventory of Collateral Consequences of Conviction n.d.). Since they are well established there, a considerable body of research has developed (Hoskins 2019). According to Brian Murray, "collateral consequences […] are the harshest sanctions because they limit opportunity, they can be timeless, and inhibit full reentry" (Murray 2020: 1032). Both the huge amount and the detrimental effects are beyond compare in Europe, where collateral consequences are "more narrowly targeted, less comprehensive, usually imposed directly and publicly, not retroactive, and time-limited" (Demleitner 2018: 512). Nevertheless, these consequences are widespread in Europe and heterogenous in their impact, nature, scope and dimension (Rovira, Henley 2023: 528–532). They are legal and social, intentional and unintentional, immediate and distant and temporary and lifelong.

In our paper, we introduce a definition of collateral consequences within the criminal system. The broad spectrum of these consequences is then addressed, including the question of how they affect third parties such as family members or employees. Then, our focus turns to the question of whether collateral consequences should become relevant to sentencing decisions. Finally, we discuss a concrete example of negative media coverage. In our conclusion we stress the need to raise awareness of the existence of collateral consequences and to establish mechanisms to promote their relevance within the sentencing process.

1. Definition of collateral consequences of conviction

The term "collateral consequences" of criminal conviction seems to be most frequently used in academia and practice. However, other labels are preferred to highlight their nature, such as "invisible" (Mauer, Chesney-Lind 2002; Kilchling 2025: 435) and "hidden" (Kaiser 2016: 123; de la Cuesta 2021: 1095) punishment or sup-

plementary ramification, "disordered" (Corda, Lageson 2020: 245) punishment, "additional sanctions" (Corda, Kaspar 2022: 420) or "quasi-criminal" (Haverkamp 2026) consequences. The civil character is emphasised by the expressions "civil penalties" (LaFollette 2005: 241) or "civil disqualifications" (von Hirsch, Wasik 1997: 599), while the quasi-administrative character is highlighted by the term "regulatory measures" (Murray 2020: 1050). This last term falls short because – unlike in the United States (Uggen, Stewart 2015: 1874) – collateral consequences are situated both outside criminal law and within it, as is the case in Germany.

According to Alexander Corda and Johannes Kaspar, the collateral consequences of conviction are "(a) formally non-punitive 'side effects' of being found criminally liable imposed, either *de jure* or *de facto*, automatically or discretionarily, by state as well as non-state actors; and (b) those ancillary, formally punitive ramifications of conviction that, while internal to the criminal law, are not usually included in the common understanding of criminal punishment in scholarly work and policy debates, and, at least in part, share the same stated preventive rationale and purpose of most formally non-punitive collateral consequences" (Corda, Kaspar 2022: 393–394).

This definition is a good start, but there are some points to be discussed further. Firstly, as mentioned above, collateral consequences may also have an impact on third parties, especially if one takes into account not only the formal conviction and its consequences, but also the punishment that follows a conviction. Therefore, one could clarify the definition above by stating that some of these side effects might also unintentionally affect third parties such as family members or employees (Haverkamp 2026).

Another question is whether sanctions such as "measures of rehabilitation and incapacitation" (*Maßregeln der Besserung und Sicherung*) in the German twin-track system of criminal sanctions are embraced by this definition (Corda, Kaspar 2022: 408). Unlike a fine or imprisonment, which are understood as criminal punishments, these measures share a non-punitive character. Their common objective is to prevent recidivism based on the supposed dangerousness of the offender. On the one hand, one could argue that in many cases they accompany criminal punishment and that they should be taken into account to avoid a disproportionate cumulative "sanction package" – which is one of the reasons why the debate on "collateral consequences" is an important one (Corda, Kaspar 2022: 409). On the other hand, it is of course doubtful whether these statutory legal consequences that are imposed by a criminal court as a different and independent type of criminal sanction can really be called "ancillary." Some scholars argue that a line could be drawn between custodial measures (which are even more independent from the imposition of criminal punishment) and non-custodial measures, such as the supervision of conduct, a driving ban or disqualification from practising a profession (Haverkamp 2024).

We ask further whether the debate should be extended to consequences that are not necessarily linked with a formal criminal conviction, but may stem from merely being a suspect in a criminal investigation; one could speak of collateral

consequences of a potential conviction in these cases. Since the purpose of this paper is to explore the meaning of collateral consequences with regard to sentencing, it is reasonable to include these pre-conviction consequences, as they might also become relevant to the sentencing decision. One obvious example is stigmatising media coverage of criminal investigations and proceedings. Below, we discuss a recent German example.

Lastly, as collateral consequences are spread throughout different areas of law, they blur the legal distinctions between them (Meijer, Annison, O'Loughlin 2019: 1). One example is deportation following a prison sentence of at least six months (section 54 German Residence Act), which is the most serious collateral consequence for foreigners without established residence status and demonstrates the merging of migration and crime (so-called crimmigration) (Stumpf 2006: 367; Corda, Rovira, Henley 2023: 534). The dynamism of crimmigration is expressed in the increasing intertwining and interchangeability of migration and crime control (Walburg 2016: 380; Werkmeister 2018: 187–189). Crimmigration serves as an example of growing possibilities for merging criminal and administrative law in different areas.

It has to be noted that at least some collateral consequences of administrative law (e.g. disciplinary proceedings under civil-service law) are indeed considered in sentencing by criminal courts. In contrast, those of civil law remain more hidden. Therefore, the criminal court may be unaware of the civil-law ramifications for the accused; consequently, critics fear that the acknowledged safeguards of criminal law may sometimes be circumvented regarding civil collateral consequences (Meijer, Annison, O'Loughlin 2019: 1). Such overlaps can be found in the areas of application that are discussed as examples in the following section.

2. Areas of application and affectedness of third parties

The broad definition of collateral consequences of actual or potential conviction used in this paper already reveals the wide spectrum of their application. It ranges from education and science, employment and business activities, through family and domestic rights, free movement, residence, immigration and related areas, to permits and ownership, political and civic participation, property and social and public welfare (Kilchling 2021: 1075–1078).

Convictions – and the subsequent prison sentences in particular – entail adverse effects for employment and business activities, which typically are affected the most by collateral consequences. A known criminal record is a strong barrier for getting employed (Hoskins 2019: 11–13). In Europe, various options are available to obtain a person's criminal records, "ranging from court records, databases and government criminal history repositories to multiple online platforms operating

for commercial and non-commercial purposes" (Corda, Lageson 2020: 246). The general public or selected segments have no or limited access to criminal records because the data is sensitive and protected. Nevertheless, the digital age opens up backdoors to private companies that undermine data protection, as happened in Sweden, where databases on judgments are easily accessible. One private company took advantage of this situation and created a legally compliant, fee-based database for background checks (Corda, Lageson 2020: 245–266). Due to the Swedish principle of openness, complaints have so far been in vain (Österdahl 2016: 31–33). Besides, the business of a trader might be forbidden as an administrative consequence of a conviction connected with trading. In Germany, the owner of a bratwurst stall accepted a penalty order for tax irregularities (Kilchling 2021: 1078). After the penalty order took legal effect, the trader's licence was revoked with immediate effect. Not only did the trader lose his licence, but his employees also lost their jobs. Thus, in addition to the convict himself, the employees were affected as third parties by the administrative act following the conviction.

When it comes to education and science, exclusionary clauses are applied to restrict access to examinations, academic titles, scholarships and research funding from public funds. At the EU level, exclusionary clauses are safeguards for its financial interests and are therefore common in framework programmes and topical funding lines. According to Article 13 para. 1 of EU Regulation 390/2014, "the financial interests of the Union are protected by the application of preventive measures against fraud, corruption and any other illegal activities, by effective checks and, if irregularities are detected, by the recovery of the amounts unduly paid and, where appropriate, by effective, proportionate and dissuasive administrative and financial penalties." The indeterminate term "any other illegal activities" entails checking research funding and is heavily criticised as "a blank cheque to invent further exclusions" (Kilchling 2021: 1079). The "Declaration on honour on exclusion criteria and selection criteria" precludes funding of research in case of bankruptcy or a criminal conviction relating to fraud, corruption, money laundering or human trafficking, for example (European External Action Service 2022).

An important target group is serious sex offenders, especially those who sexually abused a minor (Corda, Rovira, Henley 2023: 534–537). If they are released, they are usually exposed to various restrictions of movement and residence. Child sex offenders are banned from kindergartens, parks, playgrounds and schools. To monitor these bans, they are mostly subjected to electronic monitoring that might last their lifetime. Despite the commonalities between EU Member States, one observes remarkable differences in national jurisdictions. In Germany, electronic monitoring is in principle intended for serious violent or sex offenders who are at risk of reoffending and have served full imprisonment of at least three years or completed a measure of prevention and security (section 68b para. 1 sent. 1 no. 12, sent. 3 German Criminal Code).

Furthermore, prisoners are often confronted with the removal of their political rights, which has an exclusionary effect as they receive the stigmatising signal of

being "second-class citizens" (Ripollés 2016: 240). In 2005, the European Court of Human Rights declared that the blanket ban on voting by all prisoners in the United Kingdom violates their right to free elections (Art. 3 Protocol No. 1 to the European Convention on Human Rights) (ECtHR 2005). Despite the binding character of the verdict, the UK delayed its enforcement until 2018, when the Council of Europe approved the UK's proposals and dismissed the case (Johnston 2023: 4). The Court of Justice of the European Union (CJEU 2015) acknowledged the voting ban for French prisoners. However, this ruling does not contradict the verdict by the European Court of Human Rights. In contrast to the former UK voting ban for all prisoners, the French law restricts the voting ban to inmates sentenced to at least five years' imprisonment (Caird 2016). In Germany, a voting ban of between two and five years is established by law (section 45 para. 5 German Criminal Code), such as the possible voting ban for persons sentenced to imprisonment for at least six months for a crime against the state (section 92a German Criminal Code).

Another severe restraint is the deportation of legal foreign residents who are convicted of a crime. The deportation may happen before a sentence, during its enforcement or after its completion. In 1998, the German case against "Mehmet" (a pseudonym) even attracted international recognition (Bös 2010: 1–2). When the Turkish boy turned 14 years old, he was deported without his parents to Turkey. Even before he had reached the age of criminal responsibility, he was known to the police as a so-called "chronic offender." At the age of 14 he robbed a victim and caused injuries that had to be treated in hospital. For this crime he was sentenced to unconditional juvenile imprisonment, which he never served because the Munich municipality denied the prosecutor's request to prolong his residence permit. A long legal dispute followed Mehmet's deportation to Turkey. When the German Federal Administrative Court declared the deportation unlawful, Mehmet came back to Germany – after spending four years in Turkey. The case law of the European Court of Human Rights considers the deportation of a child without their parents to be a violation of the right to respect for private and family life in Article 8 of the European Convention of Human Rights (ECtHR 2006; Collinson 2020). Third-party involvement is obvious in this case, as the parents' human rights were affected by the deportation of their child (Corda, Rovira, Henley 2023: 535).

Another crucial ramification is the loss of social and public welfare, which threatens basic human needs and life itself. In particular, ex-prisoners without residency are dependent on public housing. Even during preliminary proceedings, a suspect's residency can be at risk in case of relapse combined with a threat to the neighbourhood. In Germany, repeated drug dealing may be cause for terminating tenancy without notice, even if the tenant – who is not the suspect – claims not to have known about it (Frankfurter Neue Presse 2019). The local and regional courts have accepted several summary dismissals by the municipal housing company due to drug dealing (Frankfurter Neue Presse 2019). One case turned out to be particularly unfortunate, as a family of six, including a girl who was severely disabled, were affected because one son was suspected of dealing drugs

(Teutsch 2019). This family moved to a flat in another part of the city, while the suspected son was banned from the house (Teutsch 2019).

Two more examples distinctly show third-party involvement. To date, research on collateral consequences has not addressed third parties who are associated in different ways with the convicted person. However, these third parties are also affected by collateral consequences, even though they are not connected to the crime, but only to the convicted person. They are unable to avoid these collateral consequences that were not directed at them. Therefore, the following differentiation makes sense: direct consequences are aimed exclusively at the offender, whereas indirect consequences might also affect innocent third parties. As the examples illustrate, these indirect consequences not only include family members, but also other third parties such as employees. The pivotal question that arises from this is whether all the aforementioned consequences, including those that affect third parties, are (or at the very least should be) relevant to the sentencing decision.

3. Relevance to sentencing

When discussing the relevance of the collateral consequences of conviction to sentencing, we focus on the German legal situation as an example and show that this relevance can be substantiated not only by certain provisions of German criminal law, but also by penal theories that are independent of national law.

As mentioned above, an important regulation in this regard is section 46 para. 1 sent. 2 of the German Criminal Code (Corda, Kaspar 2022: 428–429). It complements section 46 para. 1 sent. 1 of the German Criminal Code, where the "blameworthiness" or "guilt" (*Schuld*) of the criminal act serves as the "basis" for the sentencing decision, which is obviously a retributive element of German sentencing law. However, section 46 para. 1 sent. 2 of the German Criminal Code states that the "effects which the penalty can be expected to have on the offender's future life in the society" are also to be considered within the sentencing decision, thereby directly influencing the punishment that is imposed. With this provision, the legislature obviously does not refer to retribution, but to the purpose of individual or (as it is called in the German discussion) "special" prevention (*Spezialprävention*), which aims to avoid future crime by the sanctioned person. The wording can be read in two ways, containing quite different views of punishment: either as a means of positively influencing the offender's behaviour or as a burden that comes with special difficulties for the offender's future life and that should therefore be restricted. The latter view of punishment, especially in the form of imprisonment, is not only supported by criminological theories and empirical research but has also been acknowledged by the German

legislature: state prison law (e.g. section 5 para. 2 Bavarian Prison Law) demands that any "harmful consequences" of imprisonment should be met with suitable countermeasures. The possibility to consider a specific and individual impact of collateral consequences on the offender is also stressed by section 46 para. 2 of the German Criminal Code, with its catalogue of potential sentencing factors, where inter alia "personal circumstances" are mentioned.

Another important normative foundation for the relevance of collateral consequences regarding sentencing is dispensing with penalty pursuant to section 60 of the German Criminal Code (Corda, Kaspar 2022: 428–429), which reads as follows: "The court dispenses with imposing a penalty if the consequences of the offence suffered by the offender are so serious that the imposition of penalties would clearly be inappropriate. This does not apply if the offender has incurred a penalty of imprisonment for a term of more than one year for the offence."

This provision is meant for exceptional cases of a *poena naturalis*, like the case of a mother killing her own child in a negligent car accident (Albrecht 2023: margin number 4). A punishment imposed by the state would not seem to be an act of justice serving any meaningful purpose, but instead a cruel and merciless burden (BGH 1977). We can draw important conclusions from this provision: First of all, the provision clearly shows that mere factual circumstances which are not imposed by the state on a legal basis, but by nature or fate itself, can be a reason not only to mitigate punishment, but even to completely desist from punishing at all. In other words, these factual (in our example, dramatic) consequences can actually serve as a functional equivalent to regular punishment, even though their nature is obviously non-punitive. Secondly, we can conclude that even less dramatic negative consequences that do not meet the quite high requirements of section 60 of the German Criminal Code should be relevant to sentencing in the sense of a mitigating factor. It would not be convincing to assume that there is a "tipping point" where all of a sudden dramatic collateral consequences become a reason to completely abstain from punishment, despite being completely irrelevant before this point is reached. The assumption of such a "double relevance" for different aspects of the sentencing phase also appears in the example of victim–offender mediation and compensation. Under certain circumstances, section 46a of the German Criminal Code allows the court to completely refrain from imposing a penalty after restorative efforts by the offenders. Apart from that, if the prerequisites of section 46a of the German Criminal Code are not fulfilled, the court at least has to take these efforts into account within its general sentencing decision (see section 46 para. 2, sent. 2 German Criminal Code).

The relevance of collateral consequences to sentencing decisions is not only supported by these legal provisions, but also by penal theory (which is the basis for sentencing). If one focusses on retribution for a start, punishment appears as an evil that is supposed to make the offender suffer – they get what they deserve, their "just deserts" (von Hirsch 2007: 413). If part of the suffering comes from

elsewhere, one could argue that the need for suffering by punishment itself is diminished. From a puristic point of view one could of course insist that retribution of guilt (*Schuldausgleich*) could only be reached exclusively by criminal punishment alone, but not by other, non-punitive legal measures, let alone by mere factual consequences. We can see this thinking (and its problems) within the German twin-track system: even though preventive detention for fully responsible offenders that are considered dangerous (*Sicherungsverwahrung*) resembles regular imprisonment in many ways, it is seen as a non-punitive, merely preventive criminal sanction that does not add to the retributive function of punishment. Therefore, it just comes "on top" of the prison sentence and is not supposed to mitigate it. However, the view of such a "functional exclusivity" of punishment is doubtful. Firstly, the constitutional principle of proportionality demands that when the state interferes with liberty rights, it always has to look for the mildest possible measure that is "equally apt" to fulfil the purpose in question. If one declares retribution to be a purpose that can only be reached through criminal punishment, this important constitutional instrument for limiting the exercise of state power is undermined in the field of criminal law. Furthermore, we must keep in mind that "retribution of guilt" is a highly normative purpose that cannot be tested empirically, but strongly depends on legal assumptions, including constitutional law, statutory law and, last but not least, decisions by criminal courts. Therefore, the legislature is free to decide that the purpose of retribution can be achieved (fully or partially) by non-punitive measures or consequences. Thus, they can be a legitimate reason for mitigating or even abstaining from punishment, as is explicitly evident from section 60 of the German Criminal Code, referenced above.

Even once this standpoint is accepted, a plethora of points remain contentious. In this paper, these points can only be referenced but not discussed in depth. This prompts the following questions: What is the scope and the limit for such a reduction of punishment? Should every burdensome side effect of punishment somehow be considered, or just extraordinary ones? What about the "expressive function" of the sentencing decision that is stressed by some scholars, if the final punishment seems very low compared to the crime in question? Would it suffice that one could explain to the public (including the victim) that part of the "censure" by criminal punishment was not necessary because of certain other burdensome circumstances?

From the perspective of preventive purposes, collateral consequences are relevant in different ways. Some of them, such as a ban from working in a certain profession, have an immediate preventive effect in the sense of incapacitation. Apart from that, as they are burdens themselves, they might all function as means of individual and general deterrence. They contribute to the notion that crime does not pay but has burdensome consequences that make offending less attractive. This again helps to restore trust in the legal order and legal peace (which is the purpose of "positive general prevention" in the German discussion), even

through a mitigated punishment. And if we assume that by such mitigation, the potential stigmatising or dissocialising effects of punishment can be attenuated or even avoided, this contributes to the special preventive effect of rehabilitation and reintegration into society.

The crux of the issue is the absence of explicit regulations concerning the circumstances in which and to what extent collateral consequences should be taken into account during the sentencing process. But that is a general problem within sentencing in Germany, at least, where judges have a huge margin of discretion within the broad legal framework that the legislature has provided them with. It would nonetheless be an important step forward to raise the court's general awareness concerning the problem of collateral consequences, even though it is hard to come up with a precise general regulation of their relevance within sentencing. Such an awareness would help to avoid the "danger of a potentially disproportionate cumulative effect" (Corda, Kaspar 2022: 409) of a punishment and other legal and factual consequences. To promote the relevance of collateral consequences, the legislature could introduce the "consequences of the offence suffered by the offender," which appear as the key element in section 60 of the German Criminal Code, into the catalogue of general sentencing factors in section 46 para. 2 of the German Criminal Code. Whether and how these consequences would actually influence sentencing decisions would still remain an open question (as it is *lege lata*), since courts would still enjoy a broad margin of discretion within sentencing. Existing case law by the Federal Court of Justice (*Bundesgerichtshof* or BGH) shows that the relevance of collateral consequences is decided upon in a rather selective and inconsistent manner. General negative side effects are usually not discussed within the sentencing decision; non-punitive sanctions or measures are not part of the consideration of negative and positive sentencing factors.

An exception is made especially for formal legal work-related consequences such as the (upcoming) loss of the ability to work in certain professions (e.g. as a doctor, lawyer or public servant) or the loss of a public servant's pension. Here, a paradox exists that is challenging to avoid: German public service law regulates the loss of one's position as public servant, including pensions, if the court imposes a prison sentence of at least one year. Some courts try to avoid this consequence by handing down (if possible) sentences under one year's imprisonment; thus, in the end, the potential collateral consequence that has been taken into account as a mitigating factor does not materialise at all. The question of timing is a general problem in this regard: for the criminal court it will not be certain at the time of the verdict if particular consequences of a conviction will actually occur or not. In the event of an administrative sanction – such as the withdrawal of a business licence (section 35 para. 1 Trade Regulation Code) – being issued subsequent to a conviction, the revocation will not be certain in many cases, especially if the respective regulations leave some margin of discretion for the relevant administrative bodies. It is understandable that criminal courts tend to consider only collateral consequences that are certain or at least likely to

occur (Lubin 2020: 178; BGH 2022). At least in the case of a withdrawn business license, the problem is attenuated by a specific regulation in section 35 para. 3 of the Trade Regulation Code, according to which the administrative authority is bound by some of the criminal court's findings, as there can be no deviation from the judgment to the detriment of the convicted person concerning the following circumstances: the assessed facts of the case, the assessed question of the guilt and the assessment of the question of relapse. In other words, whether the convicted person will commit significant unlawful offences within their trade which would disqualify them from practising their profession (section 70 German Criminal Code) and whether it is appropriate to prohibit the trade to avert these dangers is for the Criminal Court to decide. This regulation connects criminal and administrative law consequences; it makes it possible for the criminal court to, for example, impose a criminal sanction but to exclude further administrative measures by finding no relevant danger of future offences. The criminal court in the above-mentioned Bratwurst case did not do so, perhaps because it was not aware of the administrative-law implications of its verdict. We will come back to the problem of judicial awareness in the concluding section of our paper.

4. Negative effects of media coverage – A case study from Germany

An illustrative recent example of collateral pre-conviction consequences is the case of Joachim Wolberg, the former mayor of Regensburg, a historic Bavarian city with a population of 150,000. Wolberg was (inter alia) accused of having accepted payments by the owner of a local construction company that were seen as bribes. Wolberg spent several months in pre-trial detention and lost his job and his reputation. He and his family were verbally attacked and there was widespread (negative) media coverage of the case. In the end, not only Wolberg, but also his wife and children suffered from psychological problems.

In its verdict of 4 July 2019, the District Court of Regensburg found that the defendant had indeed committed the crime of accepting benefits (section 331 German Criminal Code). Nonetheless, the court did not impose any punishment (section 60 German Criminal Code) (LG Regensburg 2019). The court highlighted the various serious impacts of criminal investigations on the personal life of the offender and his family, especially with regard to the stigmatising media coverage (that included false reports of a huge amount of cash that was allegedly found in the defendant's house, for example). The court stated that the frequency and intensity of media coverage in this case was unprecedented compared to other previous cases. The Federal Court of Justice, however, overruled the verdict (BGH 2021). The Court stressed that section 60 of the German Criminal Code is only applicable in exceptional cases when it is absolutely clear that criminal

punishment would not serve any meaningful purpose. In the Wolberg case, the Court found no such exceptional circumstances. According to the Court, negative media coverage (as a typical side effect of criminal allegations) as well as regular work-related consequences for public servants should be considered usual consequences of pre-conviction that do not call for mitigation of punishment. The Court stated that prominent persons holding a public office such as Mayor Wolberg had to assume that the public and the media would be particularly interested if they committed offences in the course of their profession (BGH 2008). The reasoning of the verdict shows that the Federal Court of Justice not only tries to restrict the application of section 60 of the German Criminal Code, but also the general relevance of "usual" collateral consequences as mitigating factors. It referred to other verdicts where relevance was denied, e.g. with regard to large financial claims by third parties following the offence (as the offender could have foreseen such a typical consequence) (BGH 2005) or extensive media coverage as a general sentencing factor independent of section 60 of the German Criminal Code (BGH 1999; BGH 2008; Knauer 2009: 541; Groß, Kulhanek 2023: Section 60 margin number 11; Maier 2023: Section 46 margin number 68). The verdict implies that the High Court is rather sceptical about mitigating punishment with regard to collateral consequences and tries to limit the scope of such mitigation to atypical, extraordinarily burdensome and unforeseeable consequences for the offender. The scope of this mitigation remains unclear, however. Where is the cut-off for an "atypical" consequence? And does it really exclude any mitigation if the offender could have foreseen (even very drastic) consequences such as the complete destruction of their professional and private life?

Conclusion

In this paper we argue that collateral consequences of conviction are an important, yet still neglected aspect of criminal sanctioning. A common and broad definition encompasses, on the one hand, formally non-punitive consequences for convicted persons, which are imposed de jure or de facto, automatically or discretionarily, by state or non-state actors and, on the other hand, ancillary, formally punitive consequences belonging to criminal law; both ramifications share, at least in part, the same stated preventive rationale and purpose. We expand this definition in two respects: firstly, collateral consequences also include the accused person before their conviction and, secondly, they have direct and indirect effects; the direct effects relate exclusively to the accused or convicted person, whereas indirect ones might also affect third parties such as close family members or employees.

The judiciary is only partially aware of the variety of these ancillary ramifications, which usually concern those expressly regulated in the German Criminal Code and those for certain professional groups in other legal contexts (e.g. public

servants). However, other administrative-law and (even more so) civil-law consequences are frequently overlooked or forgotten. One striking example in our paper refers to the prohibition of a trade after a conviction that can be prevented by the criminal court: its judgment has a certain legally binding effect, but only if the criminal court expressly assesses no risk of committing further offences, also in view of a trade prohibition (section 35 para. 3 Trade Regulation Code). Therefore, it is crucial that criminal courts as well as public prosecutors know about the multitude of negative side effects for the offender, their family and other parties involved. Only then are they able to take these effects into account within their sentencing (or non-prosecution) decision. Arguments in favour of this relevance can be found in penal theory as well as in German criminal and constitutional law.

It is reasonable that criminal courts will not always have a complete overview of all non-punitive legal or factual consequences that a conviction will have for the offender's future life or for third parties. Therefore, the introduction of a database that lists and systematises these consequences – as in the USA (NICCC 2025) – seems to be a good idea for other countries, including Germany. The new possibilities of AI-driven tools could improve efficiency by making it possible for the courts to enter some concrete facts about the case and receive a full picture of the vast range of potential collateral consequences within seconds. Due to the lack of specific and detailed regulations and the wide margin of discretion, there will still be huge differences concerning the question of whether and how collateral consequences actually do influence sentencing and non-punishment decisions. These shortcomings are not restricted to the topic of collateral consequences but rather represent a general problem of sentencing. And apart from the area of sentencing, a general awareness of destructive collateral consequences seems to be necessary, as in some cases the harm caused by these effects may greatly exceed the severity of punishment. This consciousness could promote the famous and wise (yet often neglected) principle of *ultima ratio*, i.e. the idea of using criminal law and punishment only as the last resort if other means do not suffice.

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The normative weight of individual sensitivity to punishment

Normatywne znaczenie indywidualnej wrażliwości na karę

Abstract: This article examines the normative relevance of individual sensitivity to punishment, focussing on prison sentences. While financial penalties are widely accepted as requiring adjustment to individual means, there is significantly less normative consensus on whether custodial sentences should reflect differences in personal vulnerability. The author explores whether considerations of fairness and proportionality justify a more systematic inclusion of the subjective experience of suffering. The discussion addresses both practical and principled objections, paying particular attention to the risk of introducing class justice: differential treatment based on socioeconomic background. The article concludes that heightened sensitivity may justifiably be treated as a mitigating factor, where it is important that the court addresses the issue openly rather than disguising it by embedding it within a network of other, presumably less controversial factors.

Keywords: punishment theories, individual sensitivity, proportionality, sentencing, hard treatment

Abstrakt: Artykuł poświęcony jest analizie normatywnego znaczenia indywidualnej wrażliwości na karę i skupia się na karze pozbawienia wolności. Podczas gdy w przypadku sankcji finansowych powszechnie akceptuje się konieczność ich dostosowania do sytuacji majątkowej sprawcy, znacznie mniejszy jest konsensus co do tego, czy kary izolacyjne powinny uwzględniać różnice w osobistej podatności na dolegliwość. Autor rozważa, czy względy sprawiedliwości i proporcjonalności uzasadniają bardziej systematyczne uwzględnianie subiektywnego doświadczenia cierpienia. Dyskusja obejmuje zarówno argumenty praktyczne, jak i główne zastrzeżenia, ze szczególnym uwzględnieniem ryzyka wprowadzenia sprawiedliwości klasowej, czyli zróżnicowanego traktowania ze względu na pochodzenie społeczno-ekonomiczne. W konkluzjach autor stwierdza, że zwiększona wrażliwość może być słusznie traktowana jako okoliczność łagodząca, pod warunkiem że sąd odniesie się do tej kwestii wprost, a nie będzie ukrywał jej wśród innych, rzekomo mniej kontrowersyjnych, czynników.

Słowa kluczowe: teorie kary, indywidualna wrażliwość, proporcjonalność, wymiar kary, dolegliwość kary

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Introduction: Hard treatment and its distribution

Punishment involves a variety of restrictions, discomforts, suffering and other forms of deprivation. A typical example is imprisonment, where the sociology of prisons famously led to the term "pains of imprisonment" (Sykes 2007: 63–83), capturing the layered nature of the suffering imposed by incarceration.[1] In normative theorising about punishment, however, it is more common to use the broader term "hard treatment." This concept more clearly conveys that pain and discomfort are not merely an epiphenomenon or unintended side-effects of punishment, but rather its integral elements – something deliberately inflicted by the state as part of its penal response.

Hard treatment should be understood as a linguistic convention, an umbrella expression encompassing the various unpleasant experiences inherent in the practice of punishment. It ought not to be associated exclusively with authoritarian prison regimes, where strict discipline prevails and living conditions are reduced to the bare minimum. Even a modern correctional facility, offering nutritious meals, decent bedding and a range of structured activities, still entails a significant intrusion into personal autonomy. In this sense, hard treatment does not refer merely to outdated or inhumane prison environments, but more broadly to the restrictions, discomforts and forms of suffering that stem from the deprivation of liberty, self-determination and – whether temporarily or more lastingly – access to life opportunities.

It is a well-known fact that individuals differ in their thresholds for pain and in their reactions to suffering. Dentists can confirm that there are extraordinary individuals who can endure molar extraction without local anaesthesia, while others may feel faint at the mere sight of a tray of dental instruments. The same applies to the subjective experience of punishment, which can differ markedly from person to person (Kolber 2009). Imprisonment, as the most prominent example, may be unpleasant yet tolerable for one individual, while for another, it may verge on the unbearable (Kolber 2019: 571). This raises a crucial normative question, whether the demands of fairness and justice require that such individual sensitivity to punishment be taken into account at sentencing.

This question has been well resolved for one type of punishment, at least: the monetary fine. The system of day fines is designed to account for individual sensitivity to financial loss. Day fines are based on the principle that the total fine should correspond to the financial capacity of the individual; by imposing higher absolute amounts on the wealthy than on the poor, the aim is to ensure that the

[1] It is worth noting Ben Crewe's re-evaluation of the pains of imprisonment, carried out some half a century after Gresham M. Sykes's seminal account (Crewe 2011). Crewe argues that, although imprisonment has become less overtly harsh and authoritarian, it has grown more psychologically burdensome. He suggests that prisoners today experience subtler but more deeply internalised pressures, adding to Sykes's original list a new dimension of suffering which he refers to as "ontological insecurity" – a form of distress linked to uncertainty, anxiety and the erosion of personal stability under the conditions of long-term confinement.

punishment causes a roughly equal degree of discomfort or burden for everyone, irrespective of their financial status.

It would be tempting to claim that fines and imprisonment are not comparable in this respect. While the subjective value of money is clearly influenced by one's financial situation, it could be argued that the passage of time is, in principle, the same for everyone. Time is often considered one of the most egalitarian metrics, as everyone has exactly 24 hours in a day (Eriksson, Goodin 2007: 125). However, the burdens of imprisonment do not lie in the mere passage of time, but in the deprivations and constraints imposed within that time frame. The ability to cope with these deprivations and constraints varies from individual to individual, depending on factors such as physical and psychological constitution, as well as life experiences prior to imprisonment. Generally, it can be said that the experience of imprisonment will be more distressing for those accustomed to a comfortable life than for those whose previous life was one of constant struggle for survival.

At this point, we might encounter a clash of intuitions concerning fairness and justice. One intuition suggests that proportionality in sentencing must account for individual sensitivity to punishment, as it affects the overall amount of subjectively experienced hardship that a person endures. To ignore individual sensitivity would effectively mean punishing more harshly those who are more sensitive to suffering. The other intuition, however, warns against taking individual sensitivity to punishment into account, fearing that it might inadvertently open the door to class justice infiltrating sentencing decisions. By class justice, I refer to the practice of treating individuals differently within the legal system based on their socioeconomic status, where the punishment might vary not due to the nature or severity of the crime committed, but because of the defendant's background or financial standing. The concern is that considering an individual's heightened sensitivity to hardship might lead to unequal treatment: those who are more accustomed to a comfortable life – and thus less able to endure the deprivations of imprisonment – could be treated more leniently, while those from more disadvantaged backgrounds, who may be more accustomed to hardship, could face harsher sentences. In modern constitutional democracies, such differential treatment based on socioeconomic status is considered a taboo at all stages of legal proceedings, including sentencing.

How is this clash of intuitions to be resolved, and what would be the right normative answer to this judicial dilemma? Since individual differences in sensitivity to hard treatment are at the heart of the problem, one might try to resolve the issue by reformulating punishment itself. If it no longer contained hard treatment, the problem of individual sensitivity would cease to be relevant. But is it even conceptually possible to conceive of a punishment that does not involve some form of unpleasant treatment?

1. Hard treatment challenge

Hard treatment being an integral part of punishment is often taken for granted – after all, a punishment that does not hurt would arguably not qualify as punishment at all. At the same time, this idea can cause a certain discomfort, especially among those who work professionally with punishment, even in a purely academic setting. The discomfort resembles cognitive dissonance: most people have a natural aversion to the deliberate infliction of suffering. And yet, the fact remains that the justice system routinely sends people to prison and, in doing so, intentionally imposes distress and hardship.

This tension is addressed by theories of punishment, at least abstractly. These theories seek to justify punishment and the hard treatment it involves as either fair or beneficial, or ideally both. Since not everything that produces beneficial outcomes is necessarily ethically justifiable, theories of punishment also take up the question of legitimacy; they aim to explain why, despite the tangible infringements of the offender's rights, the person being punished has no compelling grounds for protest or objection. These explanations vary: because they are guilty; because the norms prescribing punishment were adopted through a democratic process; because, at some point in the past, we (at least hypothetically) entered into a social contract; because we owe loyalty to the state; or because punishment takes away the symbolic advantage the offender allegedly gained by committing the offence (Ambrož 2018).

Nevertheless, although a vast body of literature seeks to legitimize hard treatment as an integral part of state punishment, this idea is once again coming under scrutiny. The renewed controversy has emerged in the context of expressive theories of punishment, which have gained considerable traction in recent decades, including within continental European penal theory. While the expressive dimensions of punishment have long been acknowledged by sociologists (notably by Durkheim 2013), it was Joel Feinberg's pioneering work that brought the notion of punishment as a form of expression to the forefront of normative theorizing about punishment. According to Feinberg, punishment is "a conventional device for the expression of attitudes of resentment and indignation, and of judgements of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted" (Feinberg 1995: 74).

If it is true that punishment should be understood as a specific form of communication, the question arises as to why it should also include hard treatment. One can express disapproval without wielding a stick, and indeed this is generally considered a more appropriate way of engaging with others (think of the many ways in which non-violent communication has been promoted from kindergarten onwards). Klaus Günther (2014: 16) goes even further, arguing that communication and hard treatment are mutually exclusive: it seems contradictory to emphasise the importance of communication (which is inclusive), but then subject one of the communication partners to hard treatment (which is exclusionary).

More broadly, this question concerns the relationship between the condemnatory statement (censure) and the hard treatment of offenders in expressive theories of punishment. In one view, hard treatment is the means (medium) by which the censure is expressed (Feinberg 1995: 76); in another view, the censure is first expressed verbally and then reinforced symbolically by non-verbal means (Hörnle 2011: 41–43). Both views share a common idea: without hard treatment, punishment would be a mumbling of words that none of the addressees (offender, victim and community) would take seriously.

The starting point, then, is to recognise the limited expressive power of words alone. Language cannot convey everything, and hard treatment steps in where words fall short. From everyday life, we know that verbal messages are often reinforced by non-verbal elements that lend weight and seriousness to what is being said: a promise accompanied by a handshake; a recognition of achievement marked by a formal award ceremony and – if the recipient is fortunate enough – a financial prize; a verbal warning about the harms of smoking supplemented by graphic images of diseased lungs; or a television commercial reminding us that even a simple "thank you" feels more heartfelt when paired with a small gift – a box of chocolates from a global confectionery brand.

These non-verbal additions are largely matters of social convention. And if they are conventional, then they might be alterable or replaceable. We can imagine celebrating without champagne, but can we imagine censuring offenders without imposing some form of inconvenience or distress?

Perhaps in theory. Some authors (Hanna 2008: 137–139; Günther 2014: 17) view hard treatment as a historically contingent convention for expressing censure, one that could, in principle, be replaced or substituted by less drastic measures, such as the criminal procedure itself[2] or, in particular, a guilty verdict. But would this suffice? Tatjana Hörnle (2019: 218–219) points out that in today's egalitarian and secular societies, judges cannot be expected to have the full authority to ensure that their words are taken seriously. While there have been efforts to emphasise the special communicative status of the court (the robes and the architecture of courtrooms), even such a solemn atmosphere will usually not be enough to adequately convey the seriousness of the censure in words alone. In this respect, expressivism is not fundamentally different from retributive or preventive theories

[2] It is undeniable that the criminal procedure itself can carry significant expressive power, conveying society's condemnation of the crime through various forms of symbolism (e.g. the practice of handcuffing defendants when they are brought to the main hearing, even when this is not strictly necessary for security reasons). However, arguing that the criminal procedure itself suffices to express censure is formally problematic: as long as the criminal proceedings are ongoing, the individual's guilt has not yet been established, meaning it is, at least from a formal perspective, too early to express censure. To address this issue, Nathan Hanna (2008: 137) proposes the following solution: while the criminal proceedings are still underway, they do not express censure towards the specific defendant, but towards the person who committed the offence. A conviction, if it is reached, serves as a formal equation between the accused and the person whom society has censured. I view this as more of a rhetorical device than a solution to the underlying problem.

of punishment. While it aims to distinguish itself by prioritising communication over retribution or deterrence, this communication is ultimately supported by the same firm hand of unpleasant treatment.

Authors who view hard treatment as an indispensable element of punishment typically assign it two key functions: it serves as a symbolic reinforcement of censure (the amplifying function) and as a means of calibrating its severity (the grading function) (von Hirsch 2019: 88–89). Both functions support the broader view that punishment is, at its core, a communicative enterprise. Yet, the necessity of hard treatment can also be defended on grounds that go beyond the now widely endorsed expressive theories of punishment. Traditional preventive rationales for criminal sanctions cannot be neglected; sanctions that involve a degree of hardship are generally assumed to be more effective at deterring future misconduct than hypothetical, entirely painless alternatives. Put differently, the prospect of facing only verbal condemnation and possibly compensating the victim is far less dissuasive than the threat of more tangible deprivations, such as imprisonment.

2. Sparing the more sensitive? Conceptual considerations

Given the above, it seems likely that hard treatment will continue to accompany punishment for the foreseeable future. And whenever individuals are subjected to such treatment, the question of how they will endure it arises. One thing is certain: when blows are being dealt, it matters greatly whether the recipient is a robust sumo wrestler or a frail, undernourished boy. Does this also imply that courts ought to take an individual's sensitivity into account when determining prison sentences?

There is a body of literature that answers this question with a straightforward "No," offering a bundle of practical and principled reasons. Alec Walen (2021) identifies four main practical reasons against considering individual sensitivities when imposing prison sentences: firstly, it could invite defendants to game the system, for example by simulating increased sensitivity; secondly, it might be perceived as unfair, since those who claim to be extra-sensitive could appear to receive undue leniency; thirdly, it could undermine the predictability of punishment; and finally, it could lead to an abuse of sentencers' powers, allowing for arbitrary or inconsistent sentencing.

Furthermore, there are two main principled reasons against taking individual sensitivity into account. Criminal sanctions are known in advance, and if a person is aware of their sensitivities to punishment, which they can reasonably foresee, they may be expected to exercise extra caution in avoiding criminal behaviour (Markel, Flanders 2010: 961). Additionally, there is a distinction between the purposive and collateral consequences of punishment (Markel, Flanders 2010: 961). Any additional suffering experienced by more vulnerable convicts is not intentionally

inflicted by the courts, but rather results from a combination of circumstances. Therefore, formally speaking, it should not be considered an inherent part of the sentence imposed by the court.

Evaluating these arguments is best done from the bottom up. The view that the additional suffering of the more vulnerable is irrelevant because it is not caused on purpose is hardly convincing. From the perspective of the person being punished, the discussion on the fine nuances of the psychological attitude with which their punisher imposes the punishment seems rather irrelevant. In other words, for more sensitive convicts, the explanation that their additional suffering is caused by a conditional intent (*dolus eventualis*) provides little consolation. The fact that the actual effects of a measure or sentence are more important than the "mental attitude" of the imposing authority is evident in the regulation of pre-trial detention, for example (Kolber 2019: 580). Courts do not impose pre-trial detention for punitive purposes. However, pre-trial detention is as stressful and restrictive for the person concerned as a custodial sentence, and no-one today questions the reasonableness or fairness of counting time spent in pre-trial detention towards a custodial sentence, despite the fundamentally different purposes of each.

Nor is it particularly convincing to argue that criminal sanctions are known in advance and are therefore avoidable by anyone, including more sensitive individuals. This line of reasoning suffers from the same flaw as all attempts to justify the legitimacy of punishment by merely pointing to the fact that penalties are known in advance and therefore avoidable. An excessively harsh or even cruel treatment does not become ethically acceptable simply because it is known in advance and could have been avoided by a rational and disciplined individual (Hörnle 2011: 52). The fact that punishment is foreseeable does not mitigate its potential harm or alter the ethical considerations surrounding its severity. In other words, acknowledging the potential for avoidance does not inherently justify the punitive measures themselves.

What about the practical challenges of taking individual sensitivities into account during sentencing? It is reasonable to expect that a system in which heightened sensitivity influences sentencing outcomes could incentivise defendants to portray themselves as particularly sensitive individuals. This should not come as a surprise: when people face the prospect of a significant restriction of their freedom and autonomy, they have strong reasons to take advantage of any leniency the penal system may offer. The same holds true for defences and mitigating circumstances, which defendants frequently invoke, even in cases where the factual basis for them is doubtful. It is, of course, the court's responsibility to assess such claims and to distinguish between those that are substantiated and those that are merely simulated. The same standard should apply to claims of heightened sensitivity. It is certainly possible that, in doing so, decision-makers may overstep or misuse their authority. However, I would argue that this possibility alone should not be a cause for particular concern. Any legal mechanism that vests discretion in decision-makers is, by its nature, open to potential misuse, but that, in itself, does not constitute a sufficient reason to reject it outright.

Still, assessing individual sensibilities with sufficient precision is undoubtedly challenging. Reactions to the deprivations of the prison environment only become apparent during imprisonment, and they tend to fluctuate over time. The literature on imprisonment also highlights the phenomenon of hedonic adaptation, the idea that individuals may, over time, return to a baseline level of subjective well-being. While such adaptation might occur after the initial phase of incarceration, recent criminological research has cast doubt on the possibility of full hedonic adjustment within the prison context (Wildeman, Turney, Schnittker 2014).

In other words, the response to altered living conditions in prison – as well as the possibilities and limits of adaptation, and the temporal dynamics involved – is a highly individual matter, one that courts can hardly predict with sufficient precision at the sentencing stage. If such individual sensitivities were to be taken into account, sentencing would need to become more flexible, allowing for the individual's actual responses during imprisonment to play a role in the final outcome. In practical terms, however, such a system of relatively indeterminate sentences would be difficult to implement, and it would run counter to the principle of predictability, which is an essential component of legal certainty.

Finally, one must take seriously the concern that shorter prison sentences or more comfortable living conditions for vulnerable offenders might be perceived by the public as unjustified privileges. This impression becomes especially likely when defendants used to a life of luxury are treated more leniently, based on their presumed greater sensitivity. In the penological literature, this dilemma is known as the "Paris Hilton problem" (Montag, Sobek 2014). She was initially issued a caution for a traffic offence, namely reckless drink-driving. However, after failing to comply with the conditions attached to the caution, the court converted it into a custodial sentence of 45 days. For someone used to a much higher standard of living, the prison environment proved particularly distressing. According to reports, Paris Hilton experienced episodes of claustrophobia. One of her lawyers claimed that, in light of her circumstances, the punishment was disproportionately harsh (Cohen 2007).

Public reaction to Hilton's heightened sensitivity was largely unsympathetic. Few seemed moved enough to argue that her punishment should have been mitigated. In this regard, it is worth highlighting the findings of an empirical study by Josef Montag and Tomáš Sobek (2014), which shows that people across different political affiliations and income levels tend to reject the idea that an individual's accustomed comfort should play any role in sentencing decisions. This is, of course, "only" an expression of public opinion. While opinion polls are not a sound basis for shaping sentencing policy, certain basic intuitions about fairness cannot be dismissed without putting at risk the criminal justice system's credibility and the public's trust in it.

This brings us to one of the central tensions in the justification of punishment more broadly, and in sentencing decisions in particular. If individual sensitivity is declared irrelevant, two people may end up being punished unequally for the

same offence: the more sensitive one more harshly than the less sensitive. Yet, once we agree that sensitivity should be taken into account, we face two difficulties: the challenge of assessing individual sensitivity with sufficient precision and the risk of creating the impression that certain defendants are being granted preferential treatment.

Can this tension be resolved?

3. Fairness intuition, class justice and the principle of equal treatment

When we consult our intuition about the fairness of punishment sensitivity and sentencing, the picture that emerges is often complex and ambivalent. Much depends on the specific details of whichever case we take as the starting point of our reflection, particularly the causes to which we attribute the individual's heightened sensitivity. The factors contributing to heightened sensitivity are diverse and may include age (McLennan et al. 2025), social and demographic background (Logan et al. 2019), mental health disorders (Armas, Spicknall, Sheehan 2025), identifying as LGBT (Morgan et al. 2025) or having been convicted of a sexual offence (van den Berg et al. 2018). When considering the role of increased sensitivity in sentencing, these underlying factors are often taken into account, whether consciously or unconsciously. For instance, discussions with students in an elective course on penal sanctions reveal considerable leniency towards offenders whose sensitivity is linked to age or illness, and significantly less towards those perceived to suffer from "rich kid syndrome."[3]

Can these intuitive standpoints be rationally justified, and how do they correspond to existing sentencing rules? Sentencing provisions usually do not address the issue directly. The Slovenian sentencing scheme, for example, only vaguely empowers the courts to take into account "the offender's personal circumstances" as mitigating circumstances (Article 49(2) of the Criminal Code). In this respect, the literature (Nerat 2021: 731) refers to the state of the offender's health as one of these "personal circumstances" and cites case law in which the court considered as a mitigating circumstance the fact that the offender was a pensioner with a disability.

The consideration of illness or old age as a mitigating circumstance is usually taken for granted and rarely subjected to a more thorough reflection on why the

[3] Naturally, both examples represent ideal-typical extremes, deliberate abstractions intended to provoke reflection and debate. In reality, there are numerous grey zones and "mixed cases" in between, where decisions become far more complex (e.g. where should we draw the line between ordinary sensitivity and pathological hypersensitivity?). Moreover, sustained debate often brings to light underlying biases that shape our judgments, such as a conscious or unconscious aversion towards those who have enjoyed a life of excessive comfort.

sick and the elderly should be spared in sentencing. We can imagine two argumentative paths that one might take. It could be argued that old age and illness in themselves entail a certain amount of hardship (past and present suffering), which it seems fair for the court to take into account when imposing a sentence. Such a view would be close to the all-encompassing idea of metaphysical justice or a moral ledger, where past and present suffering creates some sort of "credit," which may partially balance the ledger and thus has to be considered each time the court imposes a sentence. Such meticulous and all-encompassing bookkeeping of our past sins, merits and suffering may perhaps serve as the basis for the Final Judgment, but it is clear that secular courts lack a precise, holistic insight into an individual's "account of past suffering," and therefore such an ambitious idea of justice is impossible to put into practice.

The second, less ambitious argumentative path is that the reason for leniency is simply that the sick and the old find it harder to tolerate the concrete limitations of imprisonment. It could be said that this leniency is not only an expression of a "gentlemanly gesture," "mercy" or "humanity," but can also be defended in a purely formal way, by reference to the legal principle of proportionality. Punishment is, by its very nature, a deprivation, which is a relative concept: the same restrictions affect the sick and the old more than the healthy and the young.

Up to this point, the discussion has remained relatively uncontroversial. However, age and illness are not the only factors that can make prison conditions more difficult to endure. The challenge with other sources of heightened vulnerability lies, first of all, in their relative intangibility. As decision-makers, we tend to feel more secure when our judgments can be anchored in an officially confirmed medical diagnosis (preferably accompanied by its Latin designation), or at least in an unambiguous numerical indicator such as chronological age. A further complication arises from the fact that a person's pre-incarceration living conditions may significantly shape their experience of punishment. It is here that the slope becomes slippery: the concern emerges that one's socioeconomic background might begin to influence sentencing decisions and the allocation of prison regimes, raising the spectre of *Klassenjustiz*.[4]

As elsewhere, there can be a certain gap between the spoken and the unspoken, the declarative and the factual. At the declaratory level, socioeconomic class is nowadays declared an absolute taboo in the assessment and execution of sentences (Pallin 1982: 54; Meier 2006: 205). However, it is not excluded that the criterion of social class is expressed indirectly, through other, morally less loaded concepts, such as personality orderliness.

In the Slovenian prison system, for instance, white-collar convicts may relatively quickly gain access to the semi-open and open wards of penitentiaries. The

[4] The refusal to adapt the selection, calibration and enforcement of sanctions to an individual's socioeconomic status is a relatively recent development. For a thorough historical account of how penal sanctions were once adjusted according to the status of the convicted person (see Whitman 2005: 79–150).

key justification for such transfers often rests on the aforementioned notion of personality orderliness. However, without questioning the sincerity of this reasoning, one may reasonably suspect that another, less readily acknowledged factor plays a role: namely, the tacit assumption that such convicts would find the conditions in a closed ward disproportionately difficult to endure, certainly more so than their generally hardier counterparts from the world of street crime.[5]

This suggests that certain ostensibly neutral criteria – such as personality orderliness – may, in practice, serve as proxies for broader patterns of social differentiation. While these criteria are not explicitly linked to socioeconomic status, their application may correlate with it in ways that reflect systemic tendencies whereby class-related factors influence penal outcomes through indirect channels.

This aspect is rarely acknowledged explicitly, as the idea that those used to better might somehow deserve better would likely provoke public outrage. The aforementioned statement by Paris Hilton's lawyer, that his client finds prison harder to bear than the average convict, might be accurate. And yet, empirical research suggests that the vast majority of people would not favour a more lenient approach on these grounds (Montag, Sobek 2014). This implies a broader acceptance of the fact that, in such cases, more vulnerable individuals may end up being punished more severely in terms of how they experience it.

Paris Hilton and the transfer of white-collar offenders to more lenient prison regimes are merely two ideal-typical examples selected for illustrative purposes. Any potential special sensitivity to imprisonment, however, is not limited to celebrities or members of the economic elite – it may concern the entire imprisoned middle class. What do we currently know about the specific hardships that imprisonment entails for this group of offenders?

Andrzej Uhl (2024) argues that imprisoned members of the middle class experience incarceration in qualitatively distinctive ways that remain largely overlooked in prison sociology. Upon entry, middle-class prisoners often suffer an acute shock and abrupt relative deprivation due to the sudden loss of status and accustomed living standards (Uhl 2024: 182). Although the special sensitivity hypothesis has been empirically challenged, Andrzej Uhl suggests that middle-class prisoners may experience a specific form of suffering characterised by double exclusion: they are simultaneously expelled from the law-abiding community and perceived as outsiders of the prisoner subculture (Uhl 2024: 188). This social marginality produces adaptation difficulties distinct from those faced by street offenders.

At the same time, middle-class prisoners often mobilise imported cultural, social and organisational capital to cope with institutional constraints. Drawing on Bourdieu's theory of capital, Andrzej Uhl shows that educated and professionally

[5] There is a lively debate in the literature concerning the alleged special sensitivity of white-collar offenders. In the European context, this issue has been addressed in particular by Andrzej Uhl, who, based on empirical research, demonstrates that white-collar offenders are generally sufficiently resourceful and socially skilled to adapt well, even to prison conditions (Uhl 2023). Elsewhere, Andrzej Uhl is even more explicit, characterising the hypothesis of the special sensitivity of white-collar offenders as a neoliberal dogma (Uhl 2020: 36).

experienced prisoners may treat prison as another form of bureaucracy, which demands compliance, negotiation with staff and non-confrontational adaptation strategies (Uhl 2024: 188–189). Their conformity and maintenance of a non-criminal identity might enable relatively stable adjustment (Uhl 2024: 186–187). The central point convincingly advanced by Andrzej Uhl is that the issue is not black and white. While certain aspects of imprisonment may be particularly painful for middle-class offenders, their social skills and cultural capital may at the same time enable forms of adaptation that render the prison experience more bearable.

Within the limits of this article, I cannot delve further into the empirical literature on middle-class prison experiences. I therefore confine myself to the normative question of how the justice system should respond in cases in which an individual's heightened sensitivity to imprisonment appears relatively uncontroversial. What we face here is a tension between two competing intuitions about the fairness of punishment: one that holds the subjective experience of punishment to be morally relevant and worthy of consideration, and another that resists accommodating such considerations when they would entail a more lenient treatment of otherwise privileged offenders. The latter intuition appears to carry greater normative weight in the public imagination.

Why is this so? Among other factors, the prevalence of the second intuition may be explained by the human expectation that, in a world rife with glaring inequalities, individuals should be treated in a manner that appears formally equal in at least some extreme circumstances, such as when sentenced before the court or when serving a prison sentence. There is some reassurance in the idea that we are all in the same boat when it comes to certain, extreme situations – much like the Danse Macabre fresco, where, in a grotesque procession, both a king and a beggar walk equally helpless, paired with their respective bony companions.

The tension between the competing intuitions described above is not an isolated occurrence within the field of sentencing and punishment. Similar conflicts arise, for instance, when we assess the mitigating circumstances that influenced a defendant's actions. Our readiness to treat a given circumstance as mitigating appears to depend not only on its causal strength, but also on the degree of sympathy or antipathy it evokes in us. Put simply, a person may be driven to commit a property offence either by deprivation or by greed, yet few would be inclined to treat greed as a mitigating factor, even if both motives exert a comparable influence. In this context, Michael Moore (2016: 60) observes that our ideological orientations shape how we evaluate mitigating circumstances, often carrying more weight than the mere causal relevance of a particular factor in the defendant's conduct.

A similar dynamic can be observed in our willingness to take into account an individual's heightened sensitivity to hard treatment. In practice, our assessment tends to reflect not only the extent of that sensitivity, but also the degree to which we find its underlying causes sympathetic or relatable. This response may not be strictly rational, yet it appears so deeply rooted in human intuition and prevailing notions of justice that the criminal justice system can neither ignore it nor fully

eliminate its influence. Rather than attempting to suppress such intuitive reactions, it may be more productive to understand how they shape our judgments.

Conclusion

What, then, can we conclude about the problem of increased individual sensitivity to the burdens of punishment? As long as the imposition of hard treatment remains a central element of the state's response to crime, this issue will remain relevant, not merely as a question of compassion or mercy, but as a matter of proportionality in the strict, legal sense of the term. It is therefore important to address it openly: in judicial reasonings, in the practical administration of prison sentences and in theoretical reflections on the justification of punishment.

True, individual sensitivity is elusive and cannot be measured with precision. But that alone is no reason to disregard it. After all, we are equally unable to determine the amount of defendant's culpability with mathematical accuracy – yet we do not exclude it from sentencing. Instead, we rely on rational and reasoned deliberation to assess it, knowing full well that it resists precise quantification.

Increased individual sensitivity should therefore be taken into account in principle, with possible limitations in cases where this would risk undermining public confidence in the fair administration of justice.[6] In any case, however, the following points should be borne in mind. Any punitive leniency shown towards the more sensitive has a dangerous flip side: it can serve as an alibi for punishing more harshly those who appear more robust, those who seem better able to endure suffering. It is therefore all the more important that the penal policy of the courts remains generally moderate, and that the conditions of imprisonment are decent. While this does not resolve the problem of relative differences in sensitivity, it does help prevent the brutalisation of punishment for those deemed less sensitive.

Even in ideal contexts, such as moderate sentencing policies and relatively good prison conditions, there will always be individuals for whom the hardships of punishment are particularly burdensome. While it is now largely uncontroversial to show leniency towards the elderly or those who are seriously ill, there seems to be no compelling reason to limit the consideration of increased sensitivity to this group alone.

An extension of this consideration beyond those boundaries can proceed along two paths. On the one hand, courts may exercise their discretion and take punitive sensitivity into account without naming it explicitly – embedding it in-

[6] The proposed solution could be described as a "principled stance tempered by pragmatic reasons" (this concise formulation owes much to the insights of an anonymous reviewer). Since it entails a pragmatic compromise, it is likely to raise more than a few critical eyebrows. Yet in the field of sentencing and punishment, (temporary) compromises are sometimes simply the most that can realistically be achieved.

stead within a network of other, presumably less controversial factors. Something along these lines is proposed by Franz Streng (2012: 359), who first rejects the idea that heightened sensitivity should influence sentencing, but then suggestively adds that, in such cases, the offender's culpability is often lower and the preventive needs less pressing – thus allowing for a more lenient sentence without explicitly invoking increased sensitivity. In this way, sensitivity is taken into account *de facto*, while remaining unspoken, thus avoiding any "irritation" of the public's legal sensibilities. This kind of compromise may be pragmatic, but it can hardly be described as transparent.

On the other hand, courts may choose to address the problem of heightened sensitivity openly in the reasoning of the judgment, thereby inviting commentary and critique from the prosecution, higher courts, academic observers and the press. The second route is undoubtedly more demanding and riskier for the decision-maker, but it is also the only approach that aligns with the principle of transparency, according to which sentencing decisions must be justified openly.

Would such an open-handed approach be too risky for the courts? Some courts are indeed capable of meeting this challenge and can afford to do so. A notable example is the German Federal Court of Justice (BGH), which, in one of its rulings (2 StR 106/98 1998), confronted the issue directly and took the position that heightened sensitivity must be considered in sentencing. According to the court, this consideration does not violate the principle of equality – quite the contrary: it follows from that very principle that such sensitivity must be taken into account. If a sentence affects a defendant substantially more harshly than someone who does not share the same personal circumstances, then – in order to ensure approximate equality in the effect of the sentence – a reduction in the sentence must be made to create a balance. In the court's view, heightened sensitivity must surpass a certain threshold. Only circumstances of substantial weight may be considered in sentencing, and a reduction in punishment is only warranted if the defendant's increased sensitivity results in a measurable difference in the burden imposed by the sentence. Once this threshold is met, such heightened sensitivity is, in principle, to be considered a mitigating factor. The court does not attribute normative relevance to the causes of heightened sensitivity; indeed, it does not engage with them at all. As for the offender's prior awareness of their own susceptibility, the court holds that a reduction in sentence may not be denied (apart from exceptional cases) on the grounds that the offender acted knowingly despite being aware of their heightened sensitivity to punishment.

Broadly speaking, the court appears to have adopted a bold stance on the matter, demonstrating a notable resilience to the expectations of public opinion. As always, though, what matters are not only the general principles, but also the practical details. One of the most important among these is the threshold at which heightened sensitivity becomes significant enough to warrant consideration. In the present case, the court held that the offender's pregnancy did not meet the required threshold. The impression remains that the bar for recognising heightened sensitivity as a relevant sentencing factor was set exceptionally high.

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"No education, no job, no plan": An analysis of the relationship between social prognosis, nationality, race and sentencing in Germany

„Brak wykształcenia, brak pracy, brak planów". Analiza związku między prognozą społeczną, obywatelstwem, rasą a wyrokami skazującymi w Niemczech

Abstract: While courts assume the law does not allow biases based on race, the legal reality says otherwise. Non-nationals receive harsher sentences; in Germany this means more daily rates in penal fines, imprisonment rather than suspended sentences and longer prison terms. We know little about why this is so. This paper draws on data from courtroom observations and interviews with defendants from a project called "Performances and Manifestations of Institutional Racism in the Criminal Justice system." During 8 months of fieldwork, ethnographic data from more than 300 cases of low-level offences were gathered. The court's evaluation of the defendant's social circumstances – the so-called "social prognosis," is an important determinant in decision-making. We found that the factors which account for a positive assessment are often more difficult for marginalised groups to meet, resulting in more negative outcomes.

Keywords: institutional racism, stereotypes, prejudices, sentencing, court hearings, courtroom ethnography

Abstrakt: Chociaż sądy zakładają, że prawo nie dopuszcza uprzedzeń na tle rasowym, rzeczywistość prawna mówi co innego. Wobec osób niebędących obywatelami wydawane są surowsze wyroki. WNiemczech oznacza to wyższe stawki dzienne grzywien, kary pozbawienia wolności zamiast wy-

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roków w zawieszeniu oraz dłuższe okresy pozbawienia wolności. Niewiele wiadomo o przyczynach takiego stanu rzeczy. Niniejszy artykuł opiera się na danych pochodzących z obserwacji z sal sądowych i wywiadów z oskarżonymi przeprowadzonymi w ramach projektu „Przejawy i manifestacje rasizmu instytucjonalnego w systemie wymiaru sprawiedliwości w sprawach karnych". W trakcie badań terenowych trwających osiem miesięcy zebrano dane etnograficzne z ponad 300 spraw dotyczących przestępstw o niewielkiej wadze. Sądowa ocena sytuacji społecznej oskarżonego – tzw. „prognoza społeczna" – jest ważnym czynnikiem determinującym podejmowanie decyzji. Stwierdzono, że warunki determinujące pozytywną ocenę są często trudniejsze do spełnienia dla osób z grup marginalizowanych, co skutkuje bardziej negatywnymi wynikami prognoz.

Słowa kluczowe: rasizm instytucjonalny, stereotypy, uprzedzenia, orzecznictwo, rozprawy sądowe, etnografia sali sądowej

Introduction

One of the main reasons for oral proceedings in criminal trials is to allow judges and prosecutors to establish an impression of the defendant, in order to gain a comprehensive understanding of the circumstances surrounding the alleged offence and to assess the likelihood of reoffending based on the defendant's social circumstances. When the decision between a custodial sentence and probation is being considered, German criminal proceedings rely on the concept of "social prognosis" (*Sozialprognose*). According to the German Penal Code (*Strafgesetzbuch*), the criteria for the social prognosis include the defendant's personality, their criminal history (prior convictions and criminal behaviour), the circumstances of the offence (contextualisation of the crime committed) and post-offence behaviour (remorse, compensation to the victim or apologies). Although a positive/negative social prognosis is typically discussed in the context of allowing probation (instead of custodial sentences), these factors are relevant in any hearing. According to criminal prosecution statistics, 39% of convictions in Germany involve individuals without a German passport (Statistisches Bundesamt 2025), although they make up 16% of the population (Ausländerzentralregister 2025). This suggests that race and nationality play a significant role in criminal justice. With the increasingly multinational citizenry of many states, the question of them feeling represented touches on the foundation of the rule of law, democracy and societal peace. If, as in the case of Germany, one fourth of all citizens have a migration history and might face harsher sentences, mistrust in the judicial system becomes relevant, eroding the foundations of a democratic state. Building on this, this text addresses the research question of what role the social circumstances of defendants from migrant or minority backgrounds play in court decision-making. We first examine the criteria that are considered relevant in courts' decision-making. Drawing on ethnographic data from court observations and interviews with lawyers, we examine how these criteria are applied during hearings and might contribute to

disparities in sentencing. We focus on observable practices and interactions, as well as lawyers' accounts.

The data analysis, and the research project as a whole, are grounded in a critical race perspective that does not question the existence of racism, but takes it as a social reality. Alongside other systems of oppression, structural racism shapes societal power dynamics, operating on all levels. Matthew Clair and Jeffrey S. Denis define racism as follows:

> At root, racism is 'an ideology of racial domination' (Wilson 1999: 14) in which the presumed biological or cultural superiority of one or more racial groups is used to justify or prescribe the inferior treatment or social position(s) of other racial groups. Through the process of racialisation […], perceived patterns of physical difference […] are used to differentiate groups of people, thereby constituting them as 'races'; racialisation becomes racism when it involves the hierarchical and socially consequential valuation of racial groups. (Clair, Denis 2015: 857)

They argue that racism is not synonymous with racial discrimination or inequality, clarifying that racial discrimination refers to the unequal treatment of individuals based on race, while racial inequality is racially disparate outcomes (Clair, Denis 2015: 857). Although racism can influence both phenomena, they are not necessarily direct consequences of it. From this perspective, we understand institutions as part of the system whereby processes of racialisation[1] produce exclusion and disadvantage.

1. Legal background

Under German criminal law, sentencing follows a two-tier system, with legislation predisposing the general framework of the sentence and setting out a sentencing range that can be used discretionally. German criminal law entails the general framework for each particular offence; for example, theft can be punished with a fine or up to five years' imprisonment. The judge sets the sentence for an individ-

[1] Ethnographic research and analysis inherently involve processes of categorisation. This is especially true for our study, which examines the question of (institutional) racism. To identify and make visible the processes of racialisation – processes that are socially learnt – we repeatedly had to draw on and confront our own internalised racist knowledge. In this text, we refer to "Whiteness" in line with the dominant racialised knowledge in the German context in which this analysis was developed. We ascribe Whiteness primarily to individuals perceived as part of the dominant population because of their "typically" Central European appearance and/or "typically" German-sounding names. (In fact, we rarely encountered cases where White individuals were from other Central European countries.) By "racialised," we refer to individuals who, within this racist framework, are perceived as "others," "and therefore as not belonging to the dominant society. During our research, we often encountered the limitations of such (non-fixable) categories. A deeper exploration of these complexities, however, would go beyond the scope of this paper.

ual case at their discretion. In contrast to developments in common-law countries such as the United Kingdom, for example, there are no specific sentencing guidelines separating levels of culpability for each offence. Instead, there is only one general section in the penal code – section 46 – outlining a broad framework of factors to consider while determining a sentence for each offence. Section 46 of the German Penal Law obliges judges to consider two key aspects: the individual's guilt and the punishment's effect on the offender. The section states what judges must consider: how reproachable the offence is, the perpetrator's sentiments towards the victim or the degree of disregard for the law. Also, the personal and economic status of the offender and their past life are decisive, especially their criminal record, pace of recidivism, employment, living situation or relations with family members. By considering these factors, the judge decides what effect the sentence could have on the defendant.

If a judge elects to hand down a custodial sentence, they must consider probation, as stated in section 56 of the German Penal Law. In Germany, suspending a prison sentence with probation means the convicted individual will avoid imprisonment. The court determines the length of the probation period, which can include specific conditions. If the convicted person commits any offences during this time, the court has the authority to revoke the probation. Again, the key points to consider mirror judicial sentencing factors: the circumstances of the offence and the offender's personality, past life, behaviour after the offence and living situation. Aspects might include drug dependency, past criminal record, past volunteering, so-called stable living circumstances, job security or attending therapy. Marginalising factors such as unemployment or homelessness generally lead to a "negative" social prognosis, as the probability of future recidivism is rated higher. On both levels – sentencing and social prognosis – the decision depends largely on judicial discretion, exercised by both judges and the prosecution. Although the concept of "social prognosis" in a strictly legal sense refers only to a prison sentence being suspended on probation, we use it as an analytical lens for the broader social assessment of defendants. This includes evaluating their circumstances and estimating their likelihood of remaining crime-free in future. Our ethnographic observations suggest that, in judicial practice, the criteria used to assess the social prognosis are often the same as those used to evaluate a defendant's social background when determining other sanctions, including fines.

2. Literature review

2.1. Racism in the criminal justice system

Structural racism shapes the central institutions of a society, including the judiciary, which subsequently practices institutional racism. Decision-makers reproduce societal power relations (Murakawa, Beckett 2010; Henricks 2021) and laws are created within them. Qualitative research from different national contexts indicates that race plays a significant role in the criminal justice system. Though the law claims to be objective, it adopts a White position (Gonzàles Hauck 2022). People of colour (PoC) who attempt to address racism and racial discrimination in court struggle because of the dominance of White knowledge (e.g. Liebscher et al. 2017: 146). In courts, experiences of racism are trivialised and judicial staff tend to side with White people. Nevertheless, judicial staff are unaware of this, as they internalise their mandate to administer justice regardless of social or ethnic origins and consider it impossible to be biased. In a US interview study, Rebecca Richardson Dunlea (2022) showed how prosecutors assume they are "colour-blind," dismissing their role in reproducing racial disparities. This complicates "the discussion of racism beyond the societal self-satisfaction engendered by the appearance of neutral norms and formal inclusion" (Crenshaw 1988: 1384). In a study of US courts, Matthew Clair (2020) interviewed 63 defendants with different racial and social backgrounds and observed court proceedings. He found that underprivileged, racialised defendants distrust their lawyers and feel misunderstood and unrepresented. Racialised defendants more often give up, confess or accept the verdict. Court staff are often racially biased and decouple defendants' drug use and mental illness from the crime. Court experiences of privileged, White defendants are the exact opposite. The relationship with their lawyers, who they often hire themselves, is one of trust, bolstered by the fact that they have had few negative experiences with the authorities. This is seen as cooperative behaviour in court and usually has a positive effect on the verdict.

Ellen A. Donnelly (2022) examined sentencing disparities based on neighbourhood and race in the US-American state of Delaware, using attribution theory supplemented by the three macro-level perspectives of racial/ethnic threat, symbolic threat and prevalence theories. Using criminal processing records from Delaware's criminal justice information system, she tested the hypotheses – based on a three-level hierarchical generalised linear modelling approach – that a defendant's neighbourhood influences variations in the probability and length of their prison sentence beyond their individual characteristics and the circumstances of the case. These effects, she says, also vary with the defendant's race. The results show that defendants' residential community influences their chances of going to prison. Effects varied with the ascribed race of the defendant: when White defendants committed an alleged crime in an economically disadvantaged area,

it decreased their odds of incarceration and reduced the length of their prison sentences; for Black defendants, it increased their likelihood of going to prison and the length of their sentence. The study found that while the economic disadvantages of an area were associated with shorter sentences and criminal rates did not influence sentencing, the defendant's relationship with their neighbourhood was a factor.

Peter S. Lehmann and Anna I. Gomez (2020) examined the effect of offenders' race on split sentences in the USA; the results suggest that Black and Hispanic offenders, especially minority males, are less likely to receive split sentences relative to traditional prison terms. Celesta A. Albonetti (1991) examined how judges exercise discretion during sentencing; her data shows that criminal record, race, weapon use, pre-trial release status and the interaction between race and bail outcomes significantly impact sentencing severity. Albonetti concluded that when judges face uncertainty they rely on stereotypes and causal attributions, leading to disparities in sentencing outcomes. Using Spanish data on 2,673 convicts, Steven Kemp and Daniel Varonna (2022) found that non-Spaniards were more likely to be imprisoned during the proceedings – with nationality having no effect on sentence severity. Alexander Testa et al. (2023) investigated differences in the sentencing of racialised defendants in Brazil using a random sample of 786 people convicted of murder. While the racialisation of victim and perpetrator had no effect on the likelihood of conviction, sentence length varied: it was longer if the victims were White, but shorter if the defendants were White and the victims were Brown or Black. Overall, White defendants faced the shortest sentences.

It can be observed that race and citizenship play a role in the sanctioning of "others," not only in the US context. For instance, Michael Light's (2017) comparative study shows that while citizenship has a stronger impact on sentencing outcomes in the United States, significant differences in punishment between nationals and non-nationals can also be found in Germany. It is important to consider empirical findings on structural racism. For Germany, it is known that racialised individuals are over-represented in marginalised groups (cf. Salikutluk, Podkowik 2024). This affects all sides of structural inequalities (poverty, homelessness, citizenship, migration status, racialisation, health, etc.). Therefore, we see structural inequalities impacting individual assessment in many ways. And that may then lead to what criminology calls "cumulated disadvantages" – they add up when in contact with the criminal justice system (Kurlychek, Johnson 2019). For example, most people living on the street also have mental health disorders and/or drug problems (Knörle et al. 2022). At the same time, homelessness increases the likelihood of contact with the police (Müller 2006), which in turn increases the likelihood of ending up in court.

The following section examines in greater detail the findings related to the German criminal legal system.

2.2. Sentencing disparities between Germans and non-Germans

For the German context, there are mainly quantitative studies indicating that nationality and race are important determinants of prosecution and sentencing. Studies based on individual data from police and criminal prosecution statistics prove that non-Germans are three times more likely to be criminalised than Germans (Mansel, Albrecht 2008). This disparity results from an interplay of several factors: on the one hand, selective police control practices play a crucial role (Müller, Wittlif 2023), while on the other hand, studies suggest that racialised individuals are more likely to be reported to the police (Krieg et al. 2025: 90). Likewise, proceedings against non-Germans are more frequently discontinued by prosecutors due to insufficient evidence, supporting the theory of discriminatory reporting behaviour (Mansel 2008; Häßler, Greve 2012).

Non-nationals in Germany are much more present in the criminal justice system than nationals, as mentioned above. According to sanctioning research, non-nationals receive harsher sentences. This could be due to discretionary power that allows significant differences in individual sentences: defendants' social status influences sentencing if decision-makers assume that charges are usually correct for certain groups (Lautmann 2011 [1972]). Importantly, official statistics record nationality, but people are over- or under-recorded, as people with German citizenship can be racialised as much as people without German citizenship can be perceived as nationals. At the same time, studies may incorporate the products of racism into their models if they include prior convictions that were racially conditioned (cf. Murakawa, Beckett 2010). Judicial reservations against non-nationals and assumptions about the social marginalisation or integration of groups and their cultural practices are incorporated into decisions (Light 2017). In 2,470 crime records for theft among juveniles, Jörg Hupfeld (1999) found that sanctions were much more intrusive in comparable cases for non-nationals. Volker Grundies and Michael Light (2014) examined all convictions under general criminal law from 2004 to 2007; 20% of the data concerned non-nationals. They received longer sentences and had less chance of probation; this was independent of other factors and particularly true for offences with possible sentences of 5 years or more. The nationality effect was particularly strong for counterfeiting, receiving stolen goods, aggravated theft, narcotics and robbery. The authors attribute this to the search for domestic security and the assumed proximity of these offences to organised crime.

Interviews with judges revealed how they see crimes by non-nationals as abused hospitality and view a higher propensity to violence and crime as culturally anchored. Non-Germans are three times more likely to be remanded in custody, regardless of case-specific factors (Light 2016); citizenship also has an effect on the number of daily units for fines. Judicial treatment varies according to citizenship. Juvenile proceedings for theft, damage to property and bodily injury in two magistrate court districts led to harsher treatment of Turkish juveniles (Ludwig-Mayerhofer, Niemann 1997). Furthermore, the chances of being heard vary

with "the relative social power of those involved" (Feest, Blankenburg 1972: 19). "Crimmigration" is a form of interlocking criminal and migration law, especially in pre-crime, which increasingly restricts the protective rights and procedural guarantees of those affected (Graebsch 2019).

Court observations can record everyday practice without bias (Weischer, Gehrau 2017; Bögelein et al. 2022), providing a detailed look at the field. "Observers simply can see things in natural settings and interactions that will not show up on surveys, and this is not only owing to deceptiveness on the part of participants, but also to the contextual representations presented" (Sandberg 2010). While ethnographic research on racism in the courtroom is established in the English-speaking world (e.g. Van Cleve 2016; Clair 2020), few studies in German-speaking countries have worked with court observations (mainly Lautmann 2011 [1972]). Activist researchers have investigated specific cases (Schlüter, Schoenes 2016; Allianz Gegen Racial Profiling 2022). Justizwatch has monitored court proceedings since 2014, together with organisations such as ReachOut and KOP. Justice Collective, an NGO and our partner institution in this research project, identified three drivers for systemic injustice: racist policing practices, the criminalisation of poverty and courts acting to enforce borders. They point to courts routinely failing to hold police accountable for discriminatory behaviour and controlling practices, judges showing little understanding of defendants' structural circumstances and people facing pretrial detention due to their foreign citizenship (Justice Collective n.d.).

Against this backdrop and the many findings on the discrimination of non-nationals and racialised groups, our project investigates how institutional racism manifests in German courts.

3. Method and data

The project "Performances and Manifestations of Institutional Racism in the Criminal Justice System" consists of two subprojects. The one presented here was carried out at the Institute of Criminology of the University of Cologne, Germany. The project explores the role of racialisation in the judicial context, especially institutional racism in criminal courts (Bögelein, Rezene 2023). The ethnographic data was gathered and analysed by the research team through courtroom observations. We focussed on minor everyday crimes such as theft, fraud and fare dodging, which are judged by single judges at magistrate courts. The observations were of main hearings concerning mass offences, which largely consisted of petty crimes. These make up the majority of cases tried in local (district) courts and thus constitute the core workload of such courts. It is important to note that most minor offences are either dismissed or processed through the so-called written summary proceedings (*Strafbefehlsverfahren*), in which the verdict is sent to the

defendant by mail without a court hearing. The court proceedings we were able to observe therefore represent only that portion of minor criminality in which the court decided to bring formal charges. These cases nevertheless offer valuable insight into how the judicial handling of mass offences can contribute to reproducing the effects of racialisation.

The court observations were conducted over more than 8 months in a magistrate court in Germany; the hearings were non-participatory and open (Weischer, Gehrau 2017). The observed hearings were usually adjudicated by a single judge. In many instances, the defendants either had no legal representation or were assigned a court-appointed public defender. Most proceedings resulted in a fine. The observed trials typically lasted between 20 and 60 minutes and were open to the public. The data was collected in the form of non-standardised trial observation protocols and, in most cases, recorded by two individuals to ensure inter-subjectivity. Field notes were compiled into observation protocols in a non-standardised and anonymised way. Protocols were used for analysis, which took place in interpretation groups in various constellations. Our sample consists of 304 cases involving a total of 326 defendants. The cases were selected based on the type of offence rather than the defendants' race. Of the cases analysed, 113 involved defendants identified as White and 190 as non-White. Of these defendants, 247 were male, 61 were female and one was transgender. In the remaining cases, the defendants did not appear in court. In some instances, only the defendants' names were mentioned, allowing us to make assumptions about whether they were likely to be racialised or not.[2]

In addition to the ethnographic data, which constitutes the main body of our data set, we also conducted expert interviews with legal professionals (defence lawyers, prosecutors, judges and legal trainees). In this text, the analysis of four semi-structured interviews with defence lawyers offer supplementary insights, while the ethnographic data is the primary focus of our analysis. The data was analysed gradually using grounded theory methodology (Strauss, Corbin 2010) through regular joint evaluation sessions with teams of at least four researchers. The aim was to develop a theory-generating approach built on Strauss and Corbin's grounded theory methodology (Strauss, Corbin 2010). The multi-level approach by Nicole Bögelein, Kerstin Eppert, Viktoria Roth and Anja Schmidt-Kleinert (2022) informed this analysis.

3.1. Limitations of the research

Our analysis has some limitations, which we want to point out here to give readers the opportunity to contextualise our findings. A quantitative and qualitative li-

[2] Our assumptions regarding racialisation are not arbitrary, but stem from the shared common-sense knowledge about race that circulates within a given society. Consequently, the researchers' assumptions about who is perceived as racialised are likely to align with those of other court actors.

mitation in the interview data is the relatively small number of expert interviews. Most likely, the lawyers who made time to speak to us about racism in the criminal justice system were aware of the issue. Another methodological limitation to consider is that ethnographers observe their subjects from an external position. Thus, the things we can see depict only a part of a much broader process, whose beginning goes far back and whose details cannot be traced by the observer. Also, since observation is never objective, it is essential for researchers to critically reflect on how their own positionality shapes their interpretations. For this reason, a substantial part of our data analysis was conducted collaboratively in group settings, where we were continuously required to articulate and justify our perspectives to one another. Ethnographic research about racism in institutions is complicated, as it cannot be done without reproducing racism. Using these constructions includes the constant reproduction and reconstruction of these ascriptions via a racist way of thinking. As researchers, we must consider this complexity.

4. Findings: Constructing the social assessment of a defendant

The research question against which this section is to be read is what role the social circumstances play in court decision-making when the court faces a defendant ascribed to a migrant or minority group. As outlined above, we do not limit our understanding of *Sozialprognose* (social prognosis) to its narrow legal definition. Instead, we propose a broader conceptualisation that assesses a defendant's character and social circumstances as part of a general "social assessment." This broader notion is relevant when suspended prison sentences are handed down, in the context of minor sanctions such as fines and in determining whether proceedings are discontinued altogether. Section 5.1 focusses on specific cases in which a custodial sentence was suspended. However, the other sections also draw on proceedings with less severe penalties, such as fines or case dismissals. This broader perspective is essential, given that the majority of criminal cases in Germany are resolved through fines (up to 90% of sentences) or discontinuation rather than imprisonment. In our results we examine which criteria are relevant in courts' decision-making and look into how these criteria are taken up during hearings.

4.1. Social prognosis – imprisonment versus probation

In this section we point out cases in which a custodial sentence was considered and therefore the "social prognosis" was determined. Major factors in assessing a defendant's eligibility for a suspended sentence were mostly congruent with what was pointed out above as legal provision, namely past criminal record, probation, employment, family and social environment and therapy. However, how these

factors were considered and weighed varied in every case. One factor mentioned in nearly every hearing was the defendant's criminal record, which was generally considered negative. Criminal records appeared to be the crucial factor in the judge's explanatory statements on the grounds of their assessment. Sometimes, the defendant's criminal record led to judges assessing a sort of naturalisation of criminality, seeing the defendant as "incurable" of their ascribed criminal tendency.

> Judge: 'You have a problem with impulse control.' He argues this would be unchallenged by 'everybody else in the room'. The judge goes through the criminal record again 'robbery, extortion… ' and says this would support his statement […]. 'I don't want to unpack all of the old stuff, but…', he states, 'the defendant's past would show a definite proclivity.' (Case 158)

Judges assumed a natural tendency towards crime, always deriving a negative social prognosis that resulted in a custodial sentence without suspension. Other factors considered negatively for the social prognosis were the accused having committed the crime while on probation, or if the crime occurred a short time after prior court proceedings.

Factors leading to a positive prognosis were employment, promising future prospects and positive outside influences, such as therapy or contact with family members. If defendants did not fulfil this image of an "upright citizen," the court again assumed a negative social prognosis. In Case 229 the prosecutor argued that the custodial sentence should not be suspended because of poor future prospects: she stated the defendant had "no education, no job and no plan." Another reason for a negative outcome would be an "unsteady lifestyle" (Case 186). Family members could be considered either way. They were taken to be a positive influence on the defendant's rehabilitation and a factor that can prevent recidivism for fear of involuntary separation by incarceration. However, association with family members was considered negative when the judge and prosecutor deemed them a negative or criminal influence (Case 229). We found another factor to be key when it came to judges' discretion to overrule an otherwise negative social prognosis – we call it the "promise of amendment." While defendants mostly assured the court that the offence had been their last and that they would become law-abiding citizens, judges only considered it in their favour in certain cases. The decision for or against suspending the custodial sentence, when the social assessment factors were otherwise negative, depended on whether or not the judge believed the word of the defendants. When judges believed the promise, they "allowed one last chance," even when all other legal factors of social assessment were not in their favour.

The credibility of the defendant seems to be decisive for a custodial sentence and suspension. Being mostly based on judicial discretion, the opinion of the judge and the defendant's behaviour in court are deciding factors. We found that the lawyer advocating for the defendant and being engaged in the case might be relevant to the probability of judges deciding in their client's favour (section 5.5), but social circumstances are also a very basic factor for determining the social prognosis, as we demonstrate below.

4.2. The impact of marginalisation

What became apparent in our observations was the impact of marginalisation on the court's assessment. The following examples demonstrate how race and class intersect in the context of criminal prosecution (Rezene et al. 2024). Living on the street is an aggravating factor, not only for being heard in court, but also regarding the likelihood of being reported to the authorities in the first place. As described above, many people who live on the street suffer from mental health problems (Knörle et al. 2022) and homelessness increases the likelihood of contact with the police (Müller 2006). How this leads to ending up in court is explained below.

> Defence lawyer: 'He was probably checked at the station.' Defendant: 'I was beaten.' He now speaks to the interpreter in Slovakian. Interpreter: 'They pulled me to the ground. I was without clothes and that violated my privacy!' (Case 216, pos. 22)

The accused felt exposed and harassed by the officers' actions, but this played no role in the proceedings. Only rarely did we see the defence citing such behaviour as a justification or mitigating factor for the alleged crime, even though the way police officers treat PoC often leads to court proceedings (cf. KOP, 2016).

In all hearings, living conditions were addressed. Some hardships are only faced by non-nationals, namely housing in refugee accommodation (e.g. Case 90). This has a more negative outcome, as it is not recognised by the administration as proper accommodation.

Another factor that judges assess is a person's education. This proved to be more disadvantageous for people who had not gone to school or completed a formal apprenticeship in the national system, as they often did not meet the judge's expectations. In many cases interpreters had to go back and forth and explain what was meant, how there was no certified school diploma for certain jobs or a typical need for professional education. Judges then tried to fit this into their understanding of which German certificate it would equate to. If an accused person states they are unemployed or only work occasionally, it can be perceived negatively by the court – as illustrated in the example above (Case 229), where the prosecutor argued against suspending a prison sentence on the grounds of a lack of stable employment. Financial security was another common topic. When inquiring about income, financial obligations to one's family in the face of irregular work were considered (Case 293). In one case it became obvious that the court expected lower incomes from racialised defendants. In Case 74 the defendant had a good salary:

> The prosecutor states it would be disadvantageous of him to admit to a higher salary than he actually would get. The judge supports the prosecutor. The defendant shrugs and says, this was what he was earning.

The topic of health was also discussed often, whether mental illness, as in Case 81, or addiction. Specifically, the use and abuse of illegal drugs, medication and alcohol were a recurring theme. This was subject to an assessment of the case

(e.g. driving under the influence [Case 36]) or, as shown below, if the person was inclined to drink, which could be a mitigating factor. Judges also always asked about family; if there were children, they wanted to know whether they lived in the same household and how old they were (e.g. Case 83).

While one could say all these factors are the same for either nationality – and may be more connected to classism – previous racialisation processes also negatively impacted racialised defendants' financial security, housing, health and education. Racialised people were therefore also more likely to have issues within the class-based categories of social prognosis. Moreover, some crimes, such as illegal entry or residence, can only be committed by foreign nationals, thereby increasing the likelihood of criminal record entries that contribute to a negative social prognosis. One disadvantage in this area is that, even though these offences are treated as criminal matters, most criminal judges fail to consider the impact of the penalties on the residence of asylum seekers, as one defence lawyer stated:

> The Foreigners' Registration Office, as it is unfortunately called, is then … notified of the corresponding entries or assessments. … [T]here are real problems with your residence status. (Lawyer 4)

4.3. How defendants' impressions shape judicial perception

As mentioned above, the criteria used for sentencing are broadly outlined in the Penal Code. German law grants judges a margin of discretion, which is significant in the case of everyday offences:

> Rational court actors are forced to make predictions about an offender's future positive or negative behaviour based on the nature and scope of a particular crime, as well as legal (i.e. prior record), and sometimes, extra-legal factors (i.e. family history). (Munoz, Freng 2008: 31)

The court collaborates to create a shared image of the defendant; all actors in the room (judges, prosecutors and defence lawyers) contribute to how the defendant is perceived. In this context, race is one of the factors shaping the process (cf. Tata 2020). The processes at play likely begin well before the defendant enters the courtroom, but for an empirical approach working with data, this is our first glimpse. Also, for the judicial staff, the defendant becomes a person (not just a file) once they enter the room. Their appearance includes their voice, articulation, entrance into the courtroom and the way they are seen by others.

What becomes apparent from the start is whether the defendant is accompanied by someone. For instance, an interpreter signals a lack of understanding and may be framed as a lack of integration (cf. Berk-Seligson 2017; Bögelein, Rezene forthcoming). Alternatively, a legal representative may accompany the defendant. They may communicate for the defendant (in Case 161 the legal representative informed the judge that the defendant was not coming because of a headache). We got the

impression that legal representatives are trusted. When it comes to assessing the accused's social circumstances, representatives also imply there are people in the person's social environment who take care of them and their charges, which is viewed positively. Their assessment of their clients – the accused – can therefore be all the more consequential, as in Case 81, where the legal representative claimed that he and the defendant had already discussed how it would be preferable to go to prison instead of paying a fine.

One point often considered by court actors was the perceived "emotionality" of racialised defendants. Sometimes, defendants would act differently than culturally expected. While a courtroom requires "rational" and non-emotional action, we noted that when racialised people show any emotions, it is often seen negatively by the court. In Case 270, while the lawyer took his defendant outside to consult with him, the prosecutor tried to confide in the judge that "they" will often swear on "their mother's eyesight" and be very wordy, alluding to the racist image of orientalised migrants who lie and swear on everything just to get away with it. This was a rare occasion where stereotypes were expressed so openly. One aspect we found important was the impression management performed by the defendants. They often presented themselves as remorseful (e.g. Case 36). The importance of this is underscored by their lawyers, who tell the witness how sorry their defendant is (e.g. Case 140). In any case, they always encouraged the defendant not to say much, but let them speak.

Having a lawyer also adds to what we call the power to complain and be heard. Many defendants had a hard time understanding what was happening; some asked in the time between the final words and the verdict whether they were done and could leave (although the very essential event of the day had not yet happened). Also, sometimes they did not understand why they were in court in the first place, as in Case 7, where the defendant wondered why he had been summoned to court but others' charges had been dropped. One lawyer stated that too many cases were happening without a lawyer, which had a very negative effect on the defendants' power to make themselves heard: "My client didn't understand that it wasn't okay until I told him it wasn't okay" (Lawyer 4). Another thing that makes court cases much more existential for non-nationals is the fact that they are three times more likely to face pre-trial detention than nationals (Light 2016) because of the alleged risk of flight. One lawyer pointed out that it seemed that "having a brother of one's brother-in-law in Morocco" would suffice, even if the accused had spent all his life in Germany (Lawyer 4).

While all of these factors not only mark institutional racism but also intersect with classism, we found specific racialised prejudices, which are presented next.

4.4. Stereotypes, othering and the court's assessment of credibility

When observing cases of theft, we often realised it was no coincidence that this person's theft was discovered. While most acts of shoplifting remain unregistered

(one study estimates that only 1.6% are registered [EHI 2023]), witnesses – often shop detectives – would point out how they were focussing on this person because of a certain outer appearance (cf. Case 74). They would then focus on them and view them taking goods without paying. This means that "racial profiling" is a matter of other policing professions in addition to the police – and therefore what we see in registered crime is not equal. In the case of benefit fraud, being a non-national seems to influence certain ideas, i.e. that people only come into the country to receive benefits. In one such case, 276, the judge asked for the reasons for the defendant's alcohol addiction. The lawyer assumed it was because of his hopes of living a better life here: "He thought we would come to Germany and be welcomed with arms wide open" – but in fact he was living on the street today. In general, alcohol, and how people handle it, also influence prejudices; in Case 285 a common stereotype surfaced, when the court assumed that the defendant from an Eastern European country "needed to steal" two small bottles of alcohol, reasoning that drinking was what he and his friend did. Othering was a recurring pattern we witnessed. Othering means a group or a person differentiating themselves from another group by describing the "other" group as different and foreign. Mostly, this entails a power imbalance; those described as different are affected by discrimination and have few opportunities to defend themselves. The emotionality of others (see above) is one point.

Our data also shows how stereotypical representations of the lifestyles of racialised groups can influence the process of defining and legitimising deviance. When debating shoplifting by a Roma woman, the defence lawyer based his defence on how shoplifting children's clothes was due to a supposed Roma culture "These people have lots of children, you know" (Case 184).

In this case, the defendant was held responsible for her social role; the judge appealed to the defendant to think about her children before stealing next time – so she would not face a custodial sentence. While a defendant's gender is more often addressed with women than with men, it seemed to be even more important when the female defendant was a PoC. Roma women faced additional prejudices, as they were usually considered part of a group of thieves. The court would often suspect an organised, collaborative approach to stealing, as in Case 74, where the judge appeared to find it unlikely that a Romanian woman could have been in the shop at the same time as two others without being connected to the group involved in the theft. The case of these three prosecuted women was based on the fact that all three spoke the same language and were in the shop at the same time. These examples illustrate how stereotypes can negatively influence the perceived credibility of racialised defendants. On the other hand, we often observed that when defendants explicitly stated their intention to return to their country of origin, this was often viewed as a positive factor in their social prognosis. Some defence lawyers even incorporate this aspect into their defence strategy: "the defence lawyer says she wanted to use the money from the loot to get a bus back home" (Case 74).

Regarding other offences, we saw how some crimes seemed to fit certain stereotypes perfectly – violence, for example. In Case 89 the defendant had allegedly

threatened and insulted a craftsman. Strong words were used, and the defendant used the word "respect," which signals a connection to racialised people. This framing of PoC as dangerous arose on several occasions. One witness said:

> he was very afraid when the three of them approached him, and he thought that if something happened, he would become a nursing case, because one would hear a lot in the media. (Case 89)

The stereotype of the "dangerous other" can directly shape the court's assessment of how a defendant is likely to behave in future and, consequently, the conclusions drawn about appropriate sentencing. This perception plays a role not only in decisions between a prison sentence and probation, but also in determining the amount of a fine.

4.5. The role of representation in the court's assessment

Every day, defendants fail to appear for hearings, as individuals charged with low-level offences are disproportionately affected by poverty, and some do not have a fixed abode that summons can be served at. When defendants do not show up, a penal order is often issued. In cases where imprisonment is a potential outcome, a public defender is appointed. This defender is obliged to file an objection to the penal order if they cannot reach the defendant, which leads to a full hearing. If the defendant also fails to appear, the penal order becomes legally binding. Much depends on the individual engagement and capacity of the defence lawyer, and how many resources they use to contact their client. We met one lawyer in the hallway of the court who told us she was waiting for a defendant who had received a penal order; but as he would not appear there was nothing she could do (Case 94). Penal orders can also be issued when defendants fail to appear for a scheduled hearing, and the absence of information about their personal and financial circumstances often leads to higher daily rates. The judge determines the daily rate, which can result in significant disparities between cases.

> The judge calls the defendant, no-one appears. … She flicks through the file and says that his criminal record contains burglary and drug offences. Then she looks at the prosecutor: 'Would you like to issue a penal order?' Prosecutor: 'Yes. I would say 60. Is that too much?' The judge looks at the file: 'It's hard to say… it's clear he has no fixed abode. There may not be much money there.' Prosecutor: '€10.' (Case 38)

The defendants' absence also works against the defence. One lawyer told us about a case where he had invested considerable effort on behalf of his client, a man who had been deeply traumatised by experiences of persecution and flight.

> It was all quite bizarre, … he admitted it to me after all, and then I had already made an announcement to the court to read out his confession. But then he stayed away and then it couldn't be introduced and it couldn't actually be taken into account in

> mitigation of the sentence, because then a judgment in absentia was issued against him, in which my lawyer statement was smoke and mirrors unless he confirmed it as his statement. And then we had a goodwill agreement with the court behind the scenes, so to speak, to actually treat him like the defendants around him who had confessed. (Lawyer 1)

The lawyer had negotiated a more lenient sentence in exchange for a confession. But when the court date came, the client failed to appear. Only later did the lawyer learn the defendant had panicked for fear of being imprisoned again and had fled. Although the lawyer was ultimately able to secure a suspended sentence, he admitted this was a stroke of luck. Since a defence lawyer's explanation carries little weight without the defendant's confirmation in court, a defendant's failure to appear can be seen as a lack of cooperation. In such cases, especially when the accused does not hold German citizenship, this absence is often taken as evidence of an assumed flight risk.

The most significant advantage for defendants is that lawyers usually see it as their responsibility to have the most important documents translated, arrange for interpreters and say what the court needs to hear as mitigating factors. They organise for the defendant to understand and be understood, contributing to a positive assessment. The lawyer is like the defendant's mouthpiece. One lawyer explained that, as a general rule, she does not allow her clients to speak in court. Another described his "compensation strategy," which he applies particularly to individuals with limited German language skills – but also to those who are fluent:

> to take the floor before a statement by my clients and to put things into words that I know fit into the communicative channels of the judges. (Lawyer 1, pos. 25)

Lawyers possess the knowledge and linguistic repertoire to positively influence the court's assessment of the defendant, which can give defendants with committed legal representation a real advantage. Some lawyers appear to have a "protective instinct" towards their clients, which is evident during hearings – in the way they communicate with judges and prosecutors, and in how they present themselves alongside their clients.

Whether defendants are able to present themselves well in court is often a matter of eloquence. However, most individuals involved in proceedings do not speak the legal language of the court. For those facing language barriers or relying on interpreters, there is even less expectation – from the court and their lawyer – that they will be able to express themselves in a way that leads to the best possible outcome. This is reflected in how rarely defendants who do not speak German are directly addressed by judges, or in instances where lawyers actively silence their clients. This form of control is exercised from multiple directions: by the court, whose authority lies in its ability to compel individuals who have violated the law to account for their actions, and by the lawyer, since the defendant is, to varying degrees, under their control during the hearing. The asymmetrical power dyna-

mic between legal professionals and defendants is not resolved by the presence of a lawyer. Still, legal representation almost always leads to more lenient sentences, which works in the defendant's favour. Defenders point out that working for a person not born and raised in Germany makes it harder for them, as they need to explain more.

> With non-German clients, … I really try to explain to them over the course of several meetings. I try to explain the German criminal proceedings to them at a high altitude and in layman's terms, how they work, how the individual stages of the proceedings proceed, which is much more than with my German clients, well, actually just more than with my German-speaking clients. (Lawyer 3, pos. 10)

Lawyer 3 elaborated that being legally represented means one's story is heard, in a way that is appropriate and understandable by the prosecutor and judge. He highlighted the importance of language and money in being legally represented – things that defendants often do not have.

Discussion and conclusion

We addressed the question of what role social circumstances play in court decision-making – specifically when judging people ascribed to a minority group, i.e. that of non-German nationals. Courtroom observations and interviews with defence lawyers showed that racialisation (including citizenship, legal status, language skills, etc.) plays a substantial role in the processes that influence the social assessment of a defendant. While, in theory, the latter should be formally assessed irrespective of their background, nationality or language skills, in practice these factors shape the decision-making process. "No education, no job, no plan" – the quote we used for the title of this paper – exemplifies how the very factors that contribute to a defendant's social marginalisation lead courts to a negative assessment of their social circumstances. As a result, this may adversely affect the sentencing outcomes. Defendants' criminal records are often interpreted by judges as signs of "ingrained criminality." This came up in cases involving undocumented individuals who rely on petty theft to survive. Homeless people's contact with police would lead to them being taken to court (cf. Müller 2006). Individuals were framed as having a "criminal energy" or a lack of impulse control, overlooking the fact that their offences are rooted in poverty, addiction and/or mental health issues (cf. Knörle et al. 2022). This is largely a result of the framework against which a "positive social prognosis" is measured, namely an idealised image of the "law-abiding German citizen" whose belonging is unquestioned. This image, as in many European contexts, is implicitly linked to Whiteness and middle-class norms. It becomes evident in the courtroom's emphasis on education, training and

current employment status as indicators of stability and the ascribed potential to reintegrate into society. While the fundamental idea is that incarceration should not unnecessarily disrupt the lives of those who are stably employed, this ignores the reality of individuals working in precarious, informal or undocumented employment. Reasons to take on such jobs are manyfold, e.g. a lack of opportunities or legal barriers to employment (such as the ban on work for people seeking asylum), as well as the reality of people living on the streets.

In addition to the so-called "hard facts" (e.g. prior convictions), a defendant's demeanour plays a crucial role in the court's assessment. How people perform in front of a court is influenced by a person's knowledge of how to present themselves – what to say, what not to say, when to speak. As demonstrated above, certain displays of "emotionality" may unintentionally reinforce racial stereotypes, which can undermine a defendant's credibility (e.g. Case 270). This is especially consequential given that expressing genuine remorse is often associated with more lenient sentencing outcomes. This knowledge requires a form of familiarity with courtroom norms that most defendants in these types of proceedings do not possess. As a result, defendants with representation are more likely to receive lenient sentences. Lawyers have the legal knowledge and rhetorical skills to frame the facts in ways that align with the court's expectations and increase the likelihood of a favourable outcome. Racist prejudices play a role in multiple ways. As we have shown, they often begin long before a courtroom appearance: certain individuals are more likely to be "caught" in the first place because societal stereotypes mean they are more frequently subjected to police stops and controls (e.g. Cases 74 and 216). These dynamics create a vicious cycle that continuously reinforces and reproduces structural racism within society.

Since racism produces forms of structural disadvantage, the intersection with classism also plays a significant role in these proceedings, another instance where disadvantages accumulate. As shown by the case of a racialised defendant with a relatively high income, courts often assume racialised individuals are poor. This prejudice is rooted in the judiciary's daily experience, where the majority of defendants appearing in their courtrooms are socioeconomically disadvantaged. The criminal justice system thus perpetuates a cycle in which individuals who are already privileged because of their nationality, education or social status are both less likely to become entangled in the system and more likely to leave with minimal consequences. Another argument where being a non-German national proves to be a particular disadvantage is the practice of when pretrial detention is enforced. For non-nationals, and even for racialised German citizens with family ties outside Germany, this is very often the case, the reason being that family ties abroad would lead to a flight risk.

All things considered, we see that while the criteria for evaluating the social circumstances appear to be applied uniformly, their implementation is shaped by normative assumptions that systematically disadvantage already marginalised defendants. The findings highlight how race and citizenship, especially when

compounded by other structural disadvantages, can lead to the accumulated disadvantages (Kurlychek, Johnson 2019) of marginalisation. Structural racism disadvantages people of colour in all important aspects of life (poverty, housing, wages, health, etc.; cf. Salikutluk, Podkowik 2024). These structural inequalities then play out negatively in courts' individual assessment – which viewed from a wider perspective are not so much individual but shaped by structural factors. This leads to what criminology calls "cumulated disadvantages" (Kurlychek, Johnson 2019) adding up when in contact with the criminal justice system. Our analysis shows that the interplay of social prognosis, nationality, race and sentencing is most often disadvantageous to racialised people.

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Disentangling sentencing for sexual offences: An analysis of Slovenian court decisions

Złożoność praktyki wymiaru kary za przestępstwa seksualne – analiza orzecznictwa sądów słoweńskich

Abstract: Sentencing for sexual offences demands heightened scrutiny due to the moral gravity, public sensitivity and enduring social consequences of these offences. This study examines sentencing practices in Slovenia through an analysis of court decisions from 2016 to 2021. Focussing on four offences – rape, sexual violence, sexual abuse of a defenceless person and child sexual assault – we identified a notable gap between the breadth of statutory sentencing ranges and the narrow portion of those ranges used in practice. Courts frequently imposed suspended sentences or custodial terms close to the statutory minimum and rarely used the upper limits, even in cases involving significant harm. Judicial reasoning was frequently minimal or inconsistent, with courts variably assessing aggravating and mitigating factors and occasionally even relying on controversial rationales. Our findings suggest systemic inconsistencies in sentencing for sexual offences in Slovenia and point to a broader tension between a traditionally restrained penal culture and the need for sentences that differentiate meaningfully between levels of harm and culpability in violations of sexual autonomy.

Keywords: sexual offences, sentencing, penal policy, punishment, judicial reasoning, Slovenia

Abstrakt: Wymiar kary za przestępstwa seksualne wymaga szczególnie wnikliwej analizy ze względu na ich ciężar moralny, wrażliwość tematu oraz długotrwałe konsekwencje społeczne. Niniejsze badanie analizuje praktykę orzeczniczą w Słowenii na podstawie wyroków sądowych z lat 2016–2021. Koncentrując się na czterech typach czynów zabronionych – zgwałceniu, przemocy seksualnej, wykorzystaniu seksualnym osoby nieporadnej oraz seksualnym wykorzystaniu dziecka – zidentyfikowaliśmy wyraźną rozbieżność między szerokim katalogiem ustawowych zagrożeń karnych a wąskim zakresem ich faktycznego stosowania w praktyce. Sądy często orzekały kary z warunkowym

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zawieszeniem ich wykonania lub kary pozbawienia wolności zbliżone do ustawowego minimum. Z kolei górne granice ustawowego zagrożenia karą były wykorzystywane rzadko, nawet w sprawach obejmujących poważną krzywdę. Uzasadnienia sędziowskie były często lakoniczne lub niespójne. Sądy w różny sposób oceniały okoliczności obciążające i łagodzące, a niekiedy odwoływały się nawet do kontrowersyjnych argumentów. Wyniki badania wskazują systemowe niespójności w orzekaniu kar za przestępstwa seksualne w Słowenii oraz szersze napięcie między tradycyjnie powściągliwą kulturą penalną a potrzebą wymierzania kar w sposób wyraźnie różnicujący stopień wyrządzonej krzywdy i winy w przypadkach naruszenia autonomii seksualnej.

Słowa kluczowe: przestępstwa seksualne, wymiar kary, polityka karna, kara, uzasadnienie sędziowskie, Słowenia

Introduction

Public rhetoric around sexual offences is often characterised by strong calls for harsher sentencing, framed as a necessary response to the violation of one of society's most proclaimed fundamental values: the right to sexual autonomy. In political and media narratives, sexual violence offences are portrayed as among the most serious crimes, and demands for higher sentences are frequent and forceful. Despite this heightened attention, however, we know surprisingly little about how courts actually sentence sexual offences in practice, particularly in Central and Eastern Europe. Empirical research on sentencing patterns in these jurisdictions remains scarce, and public expectations often rest on assumptions rather than verified knowledge.

This gap between public portrayal and judicial practice is not unique to Slovenia, on which our paper is based. In jurisdictions such as the United Kingdom and Australia, courts have been criticised for imposing non-custodial or short custodial sentences for serious sexual offences, including rape – sentences widely viewed as too mild, given the gravity of the crimes (Warner 2002). Surveys consistently show that the public perceives sentencing for sexual offences as too lenient, and concerns persist about inconsistency both within and across jurisdictions. Although statutory frameworks often prescribe severe maximum penalties, the actual sentences imposed tend to be much lower, and life imprisonment remains rare – even in aggravated cases. Reforms introducing mandatory minimum sentences, particularly for offences against children, have sought to address these issues, but critics argue that sentencing outcomes still fall short of public expectations and fail to fully capture the harms involved.

Moreover, public expectations are not, and should not be, a direct criterion for sentencing. Survey research repeatedly shows that laypeople's views on punishment are often based on simplified or incomplete case information and tend to be more severe at the abstract level than when respondents are presented with concrete cases (Roberts et al. 2003; Keijser, Koppen, Elffers 2007; Kääriäinen 2019). At the same time, criminal law is designed, at least in part, to reflect core societal values

about the relative seriousness of different harms. When there is a persistent and unexplained gap between how the law classifies sexual offences and how they are sentenced in practice, this can undermine the perceived legitimacy of the system and fuel pressure for reactive legislative change (Roberts, Plesničar 2015).

In this paper, we approach sentencing for sexual offences from the perspective of internal proportionality and consistency. What concerns us is not the pursuit of harsher penalties as such, but whether sentences meaningfully reflect differences in the gravity of offending and align with the serious harm recognised in the statutory framework. A sentencing system in which markedly different intrusions into sexual autonomy result in similar outcomes or in which sexual offences are sentenced more leniently than other offences of comparable statutory seriousness raises questions about equality, coherence and the communicative function of criminal law. From this vantage point, the narrow and uneven use of the existing sentencing ranges is not simply a matter of severity, but of principled and transparent judicial reasoning (Roberts, Plesničar 2015).

This broader international debate underscores two persistent tensions that this paper engages with: firstly, the tendency of sentencing practice to make narrow and uneven use of the available statutory ranges, and secondly, the gap between public perceptions and judicial decision-making in cases involving sexual offences. To this, we add a third concern: how sentencing reasons are constructed and how judicial narratives can either reinforce or challenge problematic stereotypes.

Against this background, it is striking that sentencing decisions, especially in sensitive cases such as sexual violence, remain among the most difficult and consequential judicial tasks. Sentencing demands important and far-reaching choices that profoundly affect not only the defendant, but also victims and sometimes the general public (Albonetti 1991; Keijser, Koppen 2007; Lundberg 2015). While sentencing practices in common-law systems have been extensively studied, much less is known about European contexts, and even less about Central and Eastern Europe (Drápal, Plesničar 2025).

Where empirical research has been conducted, findings suggest a more complex and sometimes troubling reality (Amirault, Beauregard 2014). Studies have highlighted that in addition to expected and intended circumstances considered at sentencing, sentencing for sexual offences may be shaped by persistent "rape myths": stereotypical narratives that shift responsibility from perpetrators to victims and subtly undermine the seriousness of sexual violence (Lees 1996: xii–xiii; Zydervelt et al. 2016a; Gray, Horvath 2018: 16). Critically, criminal justice professionals are not immune to these biases (Smith, Skinner 2017), and such influences may find their way into sentencing reasoning. These interpretive tensions raise difficult questions – not only about the appropriateness of sentences, but also about the symbolic function of punishment and the discomfort that judges may experience when sentencing these cases.

In Slovenia, initial research has revealed a significant mismatch between the severity suggested by statutory sentencing ranges and the actual sentences imposed

for sexual offences. Existing studies found that courts make limited use of the upper halves of statutory ranges, with a substantial proportion of suspended sentences even for offences classified as among the most serious in the Criminal Code, such as rape (Plesničar, Jankovič 2022; Plesničar, Jankovič, Briški 2022). While courts typically cite appropriate aggravating and mitigating factors, some judgments refer to unusual or problematic circumstances, raising concerns about the consistency and fairness of sentencing practices. Moreover, stereotypical narratives have been known to infiltrate judgments (Briški 2021).

In this paper, we aim to explore what truly happens at sentencing for sexual offences in Slovenia. By combining a concise quantitative analysis with an in-depth qualitative review of court judgments from 2016 to 2021, we seek to provide a fuller picture of judicial practice beyond assumptions and public rhetoric. While a moderate penal culture is generally considered a strength of Slovenia's justice system, emphasising proportionality and restraint, it may pose distinct challenges in the context of sexual offences, where the gravity of harm and societal expectations push in a different direction. Our findings reveal not only that sentencing is often confined to a narrow segment of the available range, but also that courts struggle to explain their decisions in ways that reflect the structure of statutory ranges, the seriousness of the harms described or the interpretive commitments expressed elsewhere in their reasoning. In the discussion, we consider how to understand this reality – not only by examining the formal reasoning provided by courts and the structure of statutory frameworks, but by interrogating the deeper interpretive and institutional dynamics that shape sentencing logic in cases of sexual violence.

In the remainder of the paper, we proceed as follows. In Section 2, we review the relevant literature on sentencing for sexual offences, focussing on statutory reforms, empirical patterns and the interpretive frameworks that courts use in practice. Section 3 outlines our methodological approach, including the structure of the dataset and the rationale for combining quantitative and qualitative analysis. Section 4 presents the results of our empirical study, detailing the sentencing patterns and judicial reasoning for four categories of sexual offences. In Section 5, we discuss our findings in relation to broader debates about sentencing consistency, judicial reasoning and the influence of stereotypes and extra-legal narratives. Finally, in Section 6, we conclude by reflecting on the broader implications of our findings for sentencing policy, judicial discretion and the place of sexual autonomy within criminal justice.

1. Literature review

A consistent trend in the literature is increasing punitiveness in responses to sexual offences, particularly evident in the United States during the decades be-

fore and after the turn of the century. Sexual offences became a central focus of criminal justice reform, with the intensification of punitive measures often being driven by moral panic or advocacy linked to victim protection movements (Ackerman, Sacks, Greenberg 2012; Hsieh, Hamilton, Zgoba 2018; Rydberg, Cassidy, Socia 2018). This shift was manifested through both the expansion of statutory sentencing ranges – especially for offences involving children – and additional post-sentence restrictions, including residency limits, sex offender registration and medical interventions (i.e. chemical castration) (Reyes 2003; Ackerman, Sacks, Greenberg 2012).

In parallel to increasing statutory severity, studies have highlighted a persistent gap between formal sentencing frameworks and sentencing outcomes. Despite the existence of formal sentencing frameworks designed to ensure consistency, actual sentencing outcomes for sexual offences are highly variable and influenced by the local context, gender and case-specific factors. This disconnect between sentencing frameworks and outcomes raises concerns about consistency, transparency and equality before the law (Levesque 2000; Amirault, Beauregard 2014; Butrus 2018; Rydberg, Cassidy, Socia 2018; Thompson et al. 2020).

Slovenian research has likewise highlighted a substantial gap between statutory sentencing ranges and the sentences actually imposed. Quantitative analysis of data from the Statistical Office of the Republic of Slovenia indicates that a large proportion of sexual offence cases result in suspended sentences, with overall sanctions that are considerably lighter than might be expected given the seriousness of the offences. This may partly reflect Slovenia's generally moderate sentencing culture, but the findings also suggest that sexual offences are sanctioned more leniently, even compared to other serious crimes such as robbery or grievous bodily harm. However, a full explanation of this disparity requires a closer examination of judicial reasoning – something beyond the scope of a quantitative study (Plesničar, Jankovič, Briški 2022). While these studies identify patterns of leniency and disparity, they do not explore in detail how judges reason about these cases. This paper builds on these findings by analysing the qualitative dimensions of sentencing decisions for sexual offences in Slovenia.

A related but distinct concern is the disconnect between public expectations and judicial decisions. Public opinion research consistently finds that members of the public favour significantly harsher penalties for sexual offences than courts typically impose, particularly in cases involving child victims or male perpetrators (King 2019; Socia, Rydberg, Dum 2019). These punitive attitudes are strongly shaped by misconceptions about the nature and prevalence of sexual offences and do not always align with the complexities of judicial reasoning or evidence-based sentencing practices (King 2019). High levels of public support have been recorded for severe sanctions, including long custodial sentences, strict post-release supervision and even measures such as public sex offender registries and residency restrictions (Comartin, Kernsmith, Kernsmith 2009). Demographic factors such as lower levels of education and income and being the parent of a young child

are also associated with support for more severe penalties (Comartin, Kernsmith, Kernsmith 2009). While courts have, in some cases, responded to this pressure by increasing the severity of sentences, they generally remain more moderate than public opinion would suggest and rarely apply the most extreme sanctions allowed by law (Cochran et al. 2020).

Reforms such as mandatory minimum sentences have sometimes been introduced in response to perceived leniency. Legislative reforms in countries such as Canada, the United States, South Africa and Australia were often motivated by a desire to block access to more lenient options (such as suspended or conditional sentences) and to reflect public and political pressure for harsher penalties, particularly in cases involving child victims (Baehr 2008; Bradfield 2016; Benedet 2019). These measures have led to immediate increases in sentence lengths, with judges and prosecutors adapting to the new rules (Albonetti 1991; Penney, Lehrer, Galan 2024). However, the resulting sentences often cluster at or near the mandatory minimum, and critics argue that such reforms limit judicial discretion and may produce outcomes that are disproportionately harsh or insufficiently responsive to the specifics of individual cases (Baehr 2008; Benedet 2019; Nir, Liu 2021).

As with other sentencing contexts, sentencing for sexual offences is shaped by a complex mix of legal, social and contextual factors, many of which extend beyond the formal boundaries of sentencing law. Sentencing outcomes in such cases often reflect high levels of judicial discretion, particularly in European systems without sentencing guidelines (Kemp, Varona 2022; Drápal, Plesničar 2025). While judicial decisions are expected to rely primarily on the seriousness of the offence and the offender's culpability, research has shown that a range of extra-legal variables can influence sentencing outcomes, often leading to inconsistency between judges and courts in otherwise similar cases (Pina-Sánchez et al. 2019). Factors such as the offender's ethnicity (Damiris et al. 2020), the offender 's gender (Socia, Rydberg, Dum 2019; Beeby et al. 2020; Damiris et al. 2020; Shields, Cochran 2020; Burgstedt et al. 2022) and even characteristics of the court or local community (Thompson et al. 2020) have been shown to shape judicial decision-making in ways that may undermine the principle of equality before the law.

Gender is a particularly significant source of disparity. Female sexual offenders are consistently sentenced more leniently than male sexual offenders, even when the severity of the offence and the characteristics of the victim are comparable (Socia, Rydberg, Dum 2019; Beeby et al. 2020; Damiris et al. 2020; Shields, Cochran 2020; Burgstedt et al. 2022). Judicial reasoning tends to frame female offenders as less culpable, emphasising their vulnerability, background trauma or psychological fragility, while male offenders are more likely to be portrayed as predatory or deviant (Damiris et al. 2020; Burgstedt et al. 2022). These disparities are evident across a range of offence types, including child sexual abuse (Socia, Rydberg, Dum 2019; Beeby et al. 2020; Shields, Cochran 2020), where courts sometimes focus more on the abuse of parental trust than on gender per se (Damiris et al. 2020).

Beyond the offender's characteristics, sentencing severity is also shaped by features of the offence and the victim. Sentences tend to be harsher in cases involving violence, child victims or male victims (Amirault, Beauregard 2014; Butrus 2018; Socia, Rydberg, Dum 2019). Offences against children are generally sanctioned more severely, both legislatively and in judicial practice (Amirault, Beauregard 2014). Public opinion is especially punitive in these scenarios (Socia, Rydberg, Dum 2019; Cochran et al. 2020), and judges may respond to this sentiment (consciously or not). Media coverage and broader public concern about sexual violence have also been found to influence judicial behaviour, sometimes leading to harsher penalties independent of changes in crime rates or legislative reforms (Cochran et al. 2020).

One particularly contested issue in sentencing in general, and in cases of sexual offences in particular, is how courts interpret and weigh expressions of remorse or the lack of a guilty plea. While remorse is often accepted as a mitigating factor, scholars warn that its assessment is inherently subjective and can easily be conflated with procedural cooperation (see Tudor et al. 2021; Field, Tata 2023). The absence of remorse or a guilty plea should generally not be treated as aggravating, yet some courts appear to penalise defendants who do not express the expected emotions (Bandes 2016; Proeve, Tanvir 2022; Field, Tata 2023) – raising concerns about fairness and the limits of judicial inference.

Beyond individual-level factors, broader systemic and contextual influences also shape sentencing outcomes. Local court size, jail capacity, political context and the characteristics of the surrounding community (such as religious or cultural homogeneity) have all been linked to variations in sentencing severity (Thompson et al. 2020). Even well-intentioned reforms, such as those aimed at protecting child victims or promoting consistent sentencing, may not fully neutralise these local disparities and may themselves become a new source of inconsistency. Moreover, sexual offence cases often give rise to "reactive legislation" – laws adopted in response to specific, high-profile events, despite broader criminal-law principles that caution against such ad hoc responses (Plesničar 2014; Plesničar, Jankovič 2022).

In addition to these factors, persistent cultural narratives about sexual violence, commonly known as rape myths, continue to influence judicial reasoning in some cases. These myths involve false or stereotypical beliefs about rape, its perpetrators and its victims, often shifting blame away from the offender and minimising the harm they cause (Lees 1996; Gray, Horvath 2018). Despite being empirically discredited, they remain deeply embedded in social attitudes and occasionally surface in judicial discourse (Zydervelt et al. 2016b; Smith, Skinner 2017).

Qualitative studies from the United Kingdom, Norway, Sweden and Slovenia have shown, through the analysis of written court decisions and courtroom observations, that myths and stereotypes about sexual violence can be found in sentencing decisions for sexual offences (Bitsch, Klemetsen 2017; Smith, Skinner 2017; Briški 2021; Wallin et al. 2021; Rinde et al. 2024). In the Slovenian context, a qualitative study examining judicial reasoning found that courts occasionally relied on stereotypical narratives when justifying sentencing decisions (Briški 2021).

In Norway, Bitsch and Klemetsen (2017: 184) identified an apparent sentencing hierarchy based on extra-legal factors, with rape by strangers in public places being punished most severely, and acquaintance or party-related rapes sanctioned more leniently. Other research also shows systematic reductions in sentences when the perpetrator had a prior intimate relationship with the victim, which scholars trace to lingering assumptions about the private nature of such harm (Rumney 1999; Bitsch, Klemetsen 2017). A recent study of Norwegian judgments compared sentencing outcomes in rape cases that included language consistent with rape myths (as defined by the Illinois Rape Myth Acceptance Scale) with cases that did not, and found that the former were associated with more lenient sentences – suggesting that the influence of rape myths remains a real and measurable concern (Rinde et al. 2024). These findings suggest that rape myths are not only socially resilient, but may continue to influence legal outcomes, even in jurisdictions that have undergone substantial legal and cultural reform.

The literature thus highlights several intersecting challenges in sentencing for sexual offences: discrepancies between statutory frameworks and judicial outcomes; divergence between public expectations and legal practice; and the influence of extra-legal and contextual factors, including gender, offender–victim dynamics and persistent cultural narratives such as rape myths. However, much of this research is drawn from Anglo-American or Northern European contexts, and few studies have explored these dynamics in detail within Central and Eastern European jurisdictions. This paper addresses this gap by examining how sentencing for sexual offences unfolds in Slovenia through a combined quantitative and qualitative analysis of court decisions.

2. Methodology

Our study examines sentencing practices in Slovenia for four specific offences: rape, sexual violence, sexual abuse of a defenceless person and sexual abuse of a child. The analysis is based on criminal case files and judgments from 2016 to 2021 obtained from Slovenian district courts.

Full-text judgments from first-instance and many second-instance courts are not publicly available in Slovenia, which necessitated direct requests to the courts. The initial sampling frame was drawn from a list provided by the Supreme State Prosecutor's Office. For each offence and each year, from 2021 to 2016, we aimed to include approximately 100 cases. Where fewer than 100 cases were available for a specific offence in a given year, all available cases were included. In total, 462 cases were requested from all 11 Slovenian district courts, of which 431 were received. These included 70 cases of rape, 82 of sexual violence, 38 of sexual abuse of a defenceless person and 255 of child sexual abuse.

To ensure that each case reflected a single unit of analysis, we disaggregated judgments involving multiple perpetrators or multiple victims. For example, a single judgment involving three co-offenders was treated as three separate cases, and the same approach was taken where multiple victims were involved. This process resulted in a final research sample of 498 cases.

The relatively low number of cases for some offence categories, particularly rape and sexual abuse of a defenceless person, is primarily due to the few convictions for these offences during the study period. We deliberately chose not to extend the sample further back in time, as older cases would be less reflective of current sentencing practices and might introduce legal or cultural variability that would undermine comparability across cases. It is also important to note that our sample includes only convictions; cases where the defendant was acquitted were not requested or received. While this sampling strategy would limit the scope of large-scale statistical modelling or predictive analysis, it is appropriate for the aims of this study, which relies on simple descriptive statistics and, more centrally, qualitative analysis of sentencing reasoning in established convictions.

The analysis combined both quantitative and qualitative methods. The quantitative component focussed on the characteristics of the offence, defendant and victim, the course of criminal proceedings and the type and length of the sanction that was imposed. The qualitative analysis employed a thematic approach described by Virginia Braun and Victoria Clarke (2019; 2021), involving a systematic process of familiarisation with the data, coding, identifying candidate themes and interpretative analysis. The process was primarily inductive, allowing themes to emerge from the data, but also informed by established sentencing frameworks and existing empirical studies. While certain themes varied among offence types, several core sentencing considerations emerged consistently across the dataset; these formed the focus of our analysis.

Both the quantitative and qualitative analyses were constrained by the structure of some judgments. In cases resolved through a guilty plea, reasoning is often reduced to a reference to Article 285c of the Criminal Procedure Act (ZKP), which permits limited reasoning when the accused pleads guilty. In other cases, where no appeal was lodged and no custodial sentence was imposed, reasoning may be omitted altogether under Article 368 ZKP (see also Drápal et al. 2024). In such instances, no analysis beyond the formal outcome was possible. Nonetheless, the overall sample provides a representative and robust insight into sentencing practices for sexual offences in Slovenia during the study period.

It is important to note that this research covers sentencing decisions taken under the legal regime in force prior to the 2021 amendment to the Slovenian Criminal Code (KZ-1), known as KZ-1H. The amendment introduced a consent-based definition for the sexual offences of rape and sexual violence, replacing the previous requirement of violence or coercion, and aligned Slovenian law more closely with international standards.

The basic form of the offence of rape since the reform (KZ-1: Art. 170) is sexual intercourse or an equivalent sexual act with another person without their consent;

it is punishable by 6 months to 5 years of imprisonment. If the offender uses force or threatens an attack (the former basic form of the offence), it now constitutes a qualified form, punishable by 1 to 10 years of imprisonment. The prescribed penalty for the qualified form is the same as before the reform, when this conduct constituted the basic form of the offence.

The new basic form of the offence of sexual violence (KZ-1: Art. 171) is any other sexual act not covered by rape, committed against another person without their consent; it is punishable by up to five years of imprisonment. If the offender uses force or threatens an attack (the former basic form of the offence), it now constitutes a qualified form, punishable by 6 months to 10 years of imprisonment. The prescribed penalty for the qualified form is the same as before the reform.

At the time this study was conducted, the new provisions had not yet been put into force or applied in practice. The cases analysed in this study thus involve offences committed under the former legal framework, which would now correspond to qualified (aggravated) forms of rape and sexual violence under the reformed code.

The statutory penalty ranges for the sexual offences examined in this study place them among the most serious offences in Slovenian criminal law. The prescribed range for rape (1 to 10 years' imprisonment), for example, is identical to those for manslaughter in sudden passion (KZ-1: Art. 117), particularly grievous bodily injury (KZ-1: Art. 124), bodily injury resulting in death (KZ-1: Art. 123(2)), the aggravated form of kidnapping involving a minor (KZ-1: Art. 134(2)), inciting a minor to suicide (KZ-1: Art. 120(2)) and torture (KZ-1: Art. 135a). Only a limited number of offences carry higher ranges, such as manslaughter (5 to 15 years), hostage-taking resulting in death (KZ-1: Art. 373(2)) or murder (15 to 30 years).

Although these ranges may appear comparatively low when viewed from jurisdictions with more punitive sentencing frameworks, they are fully consistent with Slovenia's historically moderate penal culture and with the structure of the Criminal Code more generally. Understanding this normative context is essential for interpreting our findings. The issue raised in this paper is therefore not the absolute level of statutory penalties, but the extent to which courts make use of the available range within Slovenia's established sentencing tradition.

3. Results

In this section, we present the main findings from our analysis of 498 convictions for sexual offences in Slovenia, combining quantitative insights with thematic qualitative interpretation. The results are structured by offence category – rape, sexual violence, sexual abuse of a defenceless person and child sexual assault – and distinguish between the statutory sentencing frameworks, the sanctions imposed in practice and the reasoning used by the courts.

Before turning to the results, some general clarification of Slovenian sentencing rules is necessary. Under the Slovenian Criminal Code (KZ-1), sentences are prescribed through statutory sentencing ranges. Courts impose a sentence within the limits set for each offence, taking into account the seriousness of the act and the offender's culpability. In doing so, they must consider both mitigating and aggravating circumstances. These are not exhaustively listed in the law, but are provided by way of example: the degree of the offender's guilt, the motives for committing the act, the extent of endangerment or violation of protected legal interests, the circumstances in which the offence was committed, the offender's previous conduct and personal or financial circumstances, the offender's behaviour after the act – particularly whether any damage has been compensated – and other circumstances relating to the offender's personality and the expected impact of the punishment on their future life in society. If the motive for the offence relates to the victim's nationality, race, religion, ethnicity, gender, skin colour, origin, financial status, education, social status, political or other beliefs, disability, sexual orientation or any other personal circumstance, it is considered an aggravating circumstance (KZ-1: Art. 49). In all other cases, both the identification and evaluation of mitigating and aggravating circumstances fall within the judge's discretion. Judges also retain broad discretion to impose a sentence below the statutory range or to replace a custodial sentence with a warning sanction, such as a conditional sentence or judicial admonition (KZ-1: Art. 57; 70).

When presenting quantitative data on mitigating and aggravating circumstances, we report the circumstances exactly as they appear in the written judgments and in the proportions in which they were used for each specific offence type. Most judgments cite a combination of mitigating and aggravating factors, but the frequency and type of circumstances vary considerably across cases and offences. Across the full dataset, courts explicitly mentioned at least one aggravating circumstance in 48% of cases and at least one mitigating circumstance in 49%, while 13% of all convictions included mitigation below the prescribed statutory minimum. These aggregate figures provide context for the more detailed, offence-specific patterns presented in the subsections that follow.

While statistical data allows us to identify broad sentencing patterns, the thematic analysis provides insight into how judges interpret and justify their sentencing decisions. Together, these findings reveal key trends and inconsistencies in sentencing practice, particularly around judicial discretion, the use of mitigating and aggravating factors and the occasional presence of problematic narratives.

3.1. Rape

3.1.1. Statutory sanctions and imposed sanctions

Rape carries some of the most serious statutory penalties of all criminal offences, and it is subject to intense public and political scrutiny. Yet, as the following analy-

sis shows, the sentences imposed in practice often occupy a much narrower and lower segment of the statutory range than the spectrum of harm recognised in the legal framework would suggest. This pattern is not problematic because many cases fall towards the bottom of the range – that is common in Slovenian sentencing more broadly and is generally seen as positive in discussions of punitivism. It is problematic because the upper parts of the range appear effectively unused, even where the facts reflect substantial harm or clearly aggravating circumstances. This under-utilisation of the statutory spectrum, rather than any general expectation of severity, is what warrants closer examination.

For the purposes of this paper, we use the term rape to refer to cases in which the perpetrator forced another person to engage in sexual intercourse or an equivalent sexual act through the use of force or threat of direct violence to life or limb, as defined under the former Article 170/1 of the Criminal Code (KZ-1), now Article 170/3. The prescribed penalty for this offence ranges from 1 to 10 years of imprisonment. Because the statutory minimum is less than 3 years, courts are permitted to impose a conditional sentence instead of actual imprisonment under Articles 57 and 58 of the KZ-1. This legal possibility was used in nearly one third of the cases in our sample: of the 79 rape convictions, 68% resulted in prison sentences, while 32% resulted in conditional sentences. In a smaller number of cases, courts also imposed additional sanctions, such as the deportation of a foreign national (4%), safety measures (1%) and conditional sentences with supervision (1%).

The average prison sentence was 21.7 months (SD = 13.7), ranging from 6 to 60 months. In the case of the shortest sentence – 6 months – the court reduced the penalty below the statutory minimum by applying the general mitigation provision. For conditional sentences, the average sentence was 14.1 months, with an average probation period of 4.4 years.

While conditional sentences, wherein the court imposes a sentence that will not be enforced if the offender does not reoffend during the probationary period, may appear lenient, their use should be viewed in light of the broader Slovenian sentencing context. Conditional sentences are commonly imposed in Slovenia, especially for first-time offenders and in cases where imprisonment is considered unnecessary for future crime prevention. With the exception of the most serious crimes, the conditional sentence remains a standard and widely accepted judicial response (Plesničar, Tripkovic 2024). Nevertheless, its significant use in cases of rape raises important questions about proportionality and the perceived seriousness of such acts in judicial practice, as further discussed below.

Only two safety measures were imposed in the rape cases analysed for this study: one involving a restraining order and prohibition of contact with the victim and another involving the confiscation of objects used in the offence. Because our sample includes only judgments of conviction, it does not cover cases in which the court imposed compulsory psychiatric treatment due to an offender's lack of criminal capacity.

3.1.2. Judicial reasoning of the sentencing decision

When analysing the reasoning used by courts for the sentences in rape cases, three patterns stand out: how courts assess the gravity of the offence, the role of mitigating circumstances and the treatment of aggravating circumstances.

3.1.2.1. Gravity

Courts frequently referred to the gravity of the offence when justifying the sentence, but their approach varied considerably. These references could be broadly grouped into three types of assessment.

Abstract or formulaic: The most common approach involved generic statements about the seriousness of rape as a grave act. In these cases, no specific features of the case were linked to the seriousness of the offence, and the gravity remained a formal observation rather than a substantive factor in sentencing.

Referencing statutes: In a number of cases, courts supported their assessment of gravity by referring to the statutory sentencing range. These judgments stated that the prescribed penalty reflected the seriousness with which the legislature regarded the offence, sometimes describing rape as a "most serious violation of the sexual integrity of an individual." Such references suggest that the court viewed the offence in relation to the broader hierarchy of criminal acts and acknowledged that the statutory framework itself was indicative of the harm and seriousness involved. However, even in these cases, courts rarely elaborated on how the statutory range translated into the specific sentence they imposed.

Context-specific: In some cases, courts assessed the gravity of the offence in relation to similar or comparable offences, or based on the degree of threat posed to the value being protected. These judgments often cited particularly severe or aggravated forms of rape, or highlighted specific features of the case that elevated the seriousness of the act, such as extreme violence or the victim's vulnerability. However, it is frequently unclear whether the court is treating gravity as an overarching evaluative category or simply subsuming it within the list of aggravating circumstances. This lack of conceptual distinction makes it difficult to determine how the assessment of gravity functioned within the overall sentencing logic.

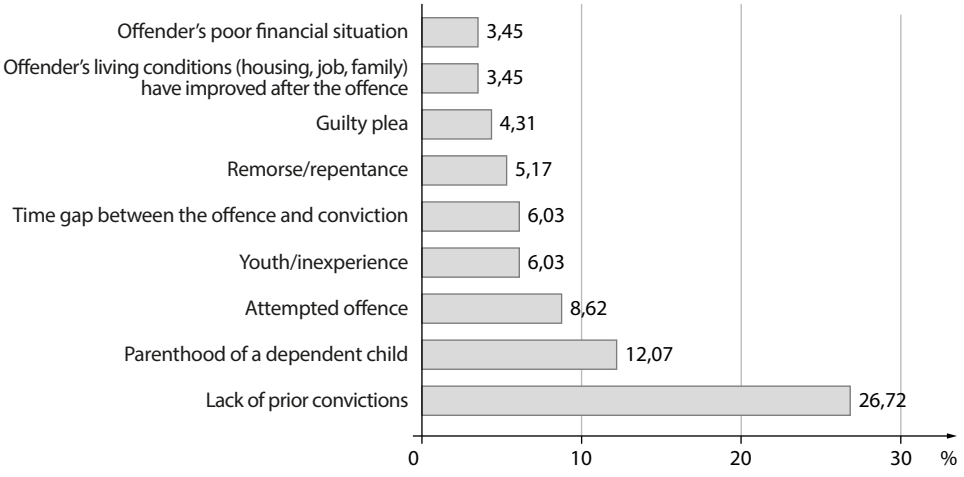
3.1.2.2. Mitigating circumstances

In most cases, courts cited a combination of mitigating and aggravating circumstances, with the mix varying considerably from one judgment to the next. The offender's lack of prior convictions was the most frequently mentioned mitigating circumstance, cited in just over a quarter of the cases. It was typically presented as the principal mitigating circumstance. However, this figure contrasts sharply with the data showing that 65% of all defendants had no previous

criminal record, suggesting that many courts either omitted this consideration or failed to explicitly articulate it in their reasoning. This gap may partly reflect the high number of judgments with limited or no reasoning, in which the influence of such circumstances cannot be discerned. Even when cited, the courts rarely explained how the absence of prior convictions affected the sentence they imposed.

The second most frequently mentioned mitigating circumstance, cited in around 12% of cases, was the offender's role as a parent, typically the father of a dependent child. The reasoning courts provided in these cases varied significantly. In some cases, the fact of parenthood was merely stated without elaboration. In others, courts noted that the offender had a duty to care for or support a minor, implying a social responsibility, but without evaluating the extent to which this duty was actually fulfilled. A smaller group of decisions provided more concrete context, describing the offender as actively caring for his children. These assessments were occasionally supported by statements from the defendant, witnesses or, rarely, external sources such as the social work centre.

Figure 1. Mitigating circumstances for rape



Source: Own elaboration.

Only those mitigating circumstances cited in at least four cases are shown in Figure 1. Among those mentioned more rarely, significantly diminished capacity and a prior long-term intimate relationship with the victim were each cited in three cases. Several others, such as poor health, a dysfunctional family background, less violence or the offender "giving up quickly," were referenced in only two cases each. Other circumstances appeared just once across the dataset: the victim's contribution to the offence, the offender's adverse childhood experiences, forgiveness by the victim, the fact that "the offender has been single for a long

time," the emotional distress of the offender when he realised that the relationship with the victim has ended, post-offence financial support for the victim, lack of further contact with the victim, personal circumstances and the fact that it was "a one-time event."

Some of these rarely cited mitigating circumstances raise normative concerns. In particular, the use of a prior intimate relationship with the victim as a mitigating circumstance is highly problematic. Moreover, while some courts treated it as evidence of reduced culpability, others viewed it as aggravating, emphasising the betrayal of trust involved in such cases. This inconsistency suggests a lack of principled reasoning and may reflect deeper discomfort with offences that blur public and private boundaries.

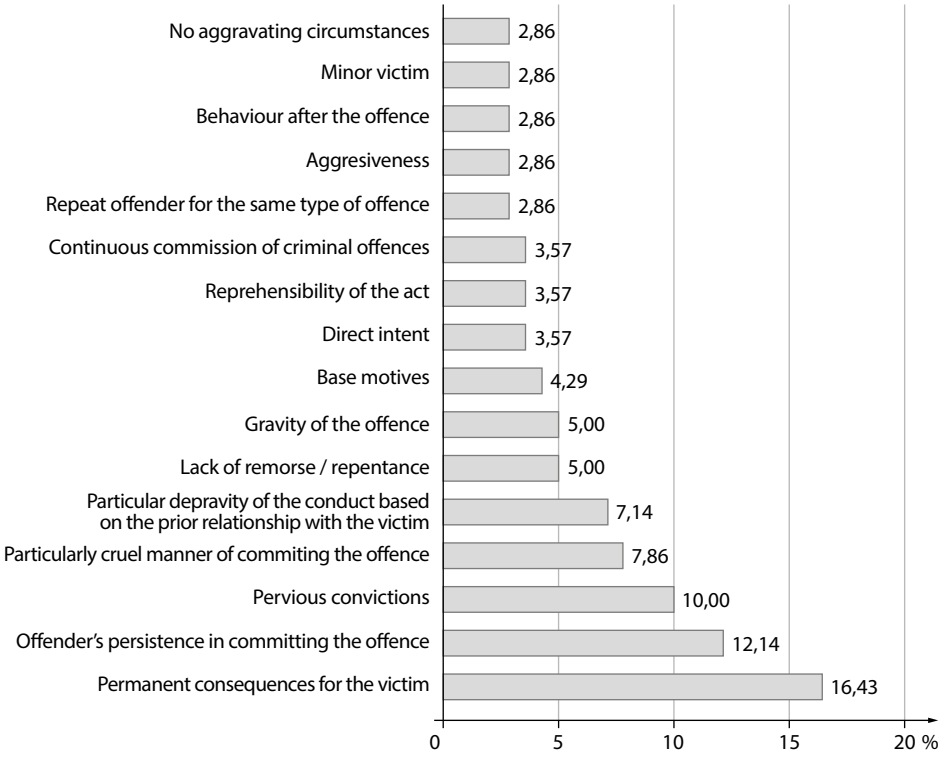
A few judgments also cited the victim's behaviour as a mitigating circumstance, for example, that the victim had "naively agreed to drive alone with the offender," that the offender "was in a relationship with the victim and went to the rented room voluntarily" or that "the victim voluntarily came to his apartment in the morning drunk." On one reading, these remarks may be seen as attempts to frame the case as less serious than other instances of the same offence. However, the way this "lower seriousness" is constructed is problematic: the reduced gravity of the offender's conduct is attributed to the victim's prior behaviour, which is unrelated to the core element of rape, namely sexual acts connected with force or coercion. As Lora Briški (2021) argues, such reasoning treats ordinary, socially accepted behaviour (visiting a friend, consuming alcohol or being alone with a trusted person) as a "contribution" to the offence, effectively shifting part of the responsibility for the harm onto the victim.

While some courts may imply that rape by a stranger is more serious, there is little justification for treating intimate partner rape as less serious. Indeed, one judgment explicitly took the opposite view, stating that the defendant had "grossly abused the victim's feelings when she voluntarily came to his home to have sexual intercourse with him because she was in love with him, while he used her as an object to satisfy his […] sexual fantasies."

3.1.2.3. Aggravating circumstances

The aggravating circumstances cited by courts can be grouped into three broad categories, as illustrated in Figure 2. The first includes circumstances relating to the nature and manner of the offence itself – for example, the persistence of the offender, the degree of violence used or the prolonged or repeated commission of the act. The second group concerns the offender's characteristics, such as prior convictions, being a repeat offender for similar offences or perceived aggressiveness. The third group focusses on the consequences for the victim, including psychological harm and the victim's particular vulnerability.

Figure 2. Aggravating circumstances for rape



Source: Own elaboration.

One circumstance that deserves closer scrutiny is a lack of remorse, which was cited in several judgments as aggravating. In our view, this is inappropriate in the context of the Slovenian legal system. Criminal procedure in Slovenia is designed as a single, integrated process, where the court rules on both guilt and sentencing in the same phase – except in cases where a guilty plea is entered and a separate sentencing hearing follows (Plesničar 2017; cf. Roberts, Petzsche 2025). Until a verdict has been rendered, the defendant is presumed innocent and enjoys the full protection of the privilege against self-incrimination. This includes the right to remain silent and to refrain from expressing remorse or confessing to the offence.

While remorse and a guilty plea may justifiably be considered mitigating circumstances, their absence should be treated as neutral – not aggravating. Using silence or passivity during the trial against the defendant risks undermining procedural fairness and conflating a refusal to admit guilt with a lack of moral awareness or contrition. This practice is particularly problematic in cases where the only evidence of a lack of remorse is the defendant's decision to not speak, rather than any active display of contempt or harm towards the victim.

3.2. Sexual violence

3.2.1. Statutory sanctions and imposed sanctions

In this paper, the term sexual violence refers to cases in which the perpetrator forced another person to engage in a sexual act that is not equivalent to sexual intercourse, using force or the threat of direct violence to life or limb, as defined under the former Article 171/1 of the Criminal Code (KZ-1), now Article 171/3. The prescribed sentence for this offence ranges from 6 months to 10 years of imprisonment (KZ-1: Art. 171/1). Since the minimum falls below 3 years, the court is legally permitted to impose a conditional sentence instead of imprisonment under Articles 57 and 58 of the KZ-1.

Of the 85 convictions for sexual violence in our sample, 58% resulted in prison sentences, 34% in conditional sentences and 8% in conditional sentences with supervision. Safety measures were imposed in two cases (2%). Among those sentenced to imprisonment, the average term was 13.8 months (SD = 10.7), with a minimum of 4 months and a maximum of 48 months. In the case involving a 4-month prison term, the court reduced the sentence below the statutory minimum by applying the general mitigation provision. For conditional sentences, the average term was 10.2 months, with an average probation period of 3.2 years.

Again, the use of conditional sentences in cases of sexual violence may seem lenient given the nature of the offence, but it is consistent with broader sentencing practices in Slovenia, where such sanctions are commonly imposed in a wide range of cases, particularly for first-time offenders.

In the two cases where safety measures were applied, the courts ordered the confiscation of objects used in the commission of the offence. As in the rape cases, the sample includes only judgments of conviction, and thus excludes cases in which the defendant was acquitted or found to lack criminal capacity and subjected to compulsory psychiatric treatment.

3.2.2. Judicial reasoning of the sentencing decision

When we analysed the reasoning of the sentencing decisions, we were particularly interested in the references the courts made to the gravity of the offence and the mitigating and aggravating factors mentioned as having influenced the sanction.

As in the rape cases, courts referred to the gravity of the offence in various ways. In some judgments, they simply reiterated the seriousness already defined by the legislature, citing the statutory sentencing range or describing the act as a serious breach of sexual autonomy. Others noted specific features of the case – such as repeated abuse or degrading conduct – but these references were often brief and not clearly connected to the sentence that was handed down. In several instances, the gravity of the offence was not treated as a distinct evaluative step,

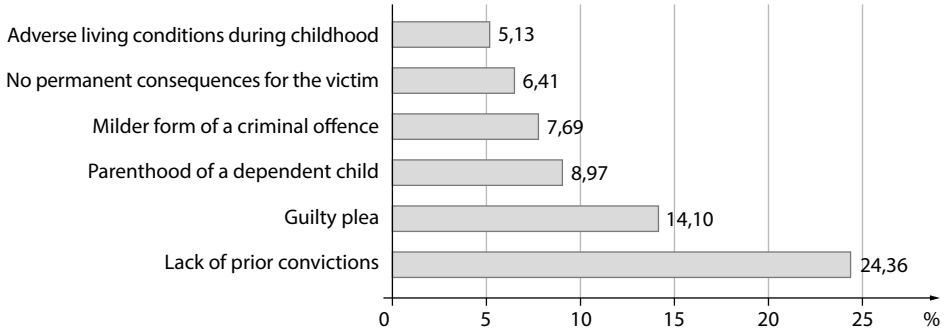
but was part of a list of aggravating circumstances, making it difficult to determine its independent influence on sentencing.

3.2.2.1. Mitigating circumstances

As with rape cases, the most commonly cited mitigating circumstance was the offender's lack of previous convictions, mentioned in nearly a quarter of all cases. This is broadly consistent with the general sentencing practice in Slovenia, where first-time offenders are often treated more leniently. Another frequently referenced mitigating circumstance was the offender's confession, cited in approximately 13% of the cases. In some of these judgments, the confession was framed as a sign of remorse or cooperation with the authorities, although courts seldom explained how it affected the severity of the sentence.

Only mitigating circumstances cited in at least four cases are displayed in Figure 3. Among those appearing less frequently, courts referred to the offender's stable social circumstances (e.g. housing, employment and family) or significantly diminished capacity, the time elapsed between offence and conviction, expressions of remorse and – in three cases –forgiveness from the victim. Other rare circumstances included attempted rather than completed offences, a low risk of reoffending and personal health or psychological factors. These were generally mentioned without detailed justification and seemed to serve as additive rather than decisive elements in sentencing.

Figure 3. Mitigating circumstances for sexual violence



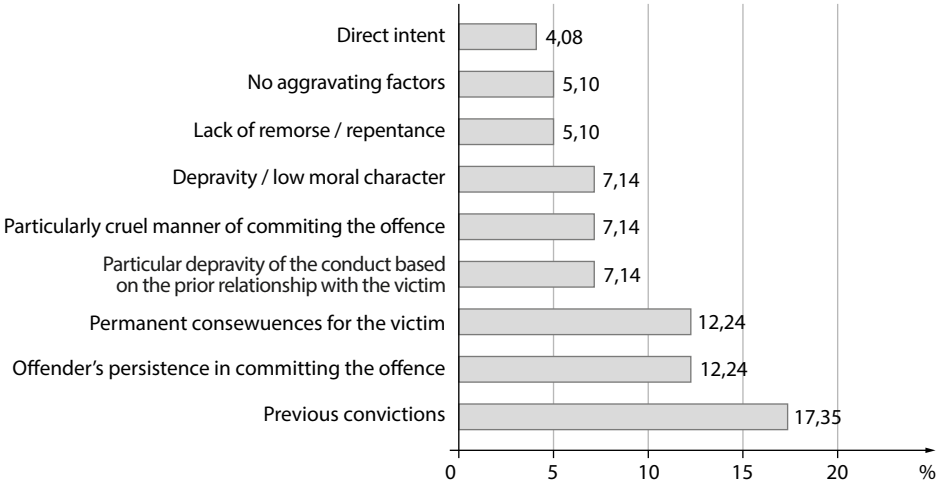
Source: Own elaboration.

Interestingly, in a handful of cases, courts also clarified what they did not consider a mitigating circumstance. For example, one judgment stated that although the offender "was a young person, what he did cannot be attributed to youthful recklessness, and therefore this circumstance was not considered mitigating." Such explicit exclusions suggest that judges sometimes consciously reflect on the limits of mitigation, even if these reflections are relatively rare.

3.2.2.2. Aggravating circumstances

Aggravating circumstances were more clearly articulated in judgments involving sexual violence than in some of the other offence types. As shown in Figure 4, the most common aggravating circumstance was the offender's criminal history, especially prior convictions for similar offences. In addition, courts often highlighted the nature and persistence of the conduct, referring to acts that were prolonged, repeated or particularly degrading. Some judgments described the offences as "systematic" or "prolonged assaults," emphasising the psychological toll on the victim and the abuse of power or control exercised by the offender. For instance, one court stated that the violence "was not a one-time act, but a continuous and systematic violation of the victim's sexual and general integrity."

Figure 4. Aggravating circumstances for sexual violence



Source: Own elaboration.

Other aggravating circumstances, though cited less frequently, included the offender's aggressiveness, the calculated or humiliating nature of the act and situational factors such as committing the offence during a probationary period or while under the influence of alcohol. A small number of courts also referenced a high degree of culpability, premeditation or the offender's base motives, such as a desire to dominate or humiliate.

As with rape cases, some of the aggravating circumstances overlapped conceptually with assessments of gravity, blurring the line between general seriousness of the offence and case-specific aggravation. However, courts appeared somewhat more explicit in sexual violence cases about what they found particularly reprehensible, especially when the offence involved sustained coercion or psychological harm.

3.3. Sexual abuse of a defenceless person

3.3.1. Statutory sanctions and imposed sanctions

Cases classified in this study as sexual abuse of a defenceless person involve situations where the offender exploited the victim's diminished capacity to resist – whether due to mental illness, a temporary mental disorder, severe intellectual disability, physical weakness or another condition that impaired their resistance. This offence is defined under Article 172 of the Slovenian Criminal Code (KZ-1) and carries a prescribed sentence of 1 to 8 years of imprisonment. Given that the minimum sentence is less than 3 years, courts are legally permitted to impose a conditional sentence under Articles 57 and 58 of the KZ-1.

Of the 40 convictions for sexual abuse of a defenceless person, 62% resulted in conditional sentences and 38% in custodial prison sentences. Safety measures were imposed in a small number of cases (3%). Among those sentenced to imprisonment, the average sentence was 19.4 months (SD = 9.6), with a minimum of 10 months and a maximum of 42 months. In the case involving a 10-month sentence, the court reduced the penalty below the statutory minimum of 1 year by applying the general mitigation provision. For conditional sentences, the average prison term was 15.8 months, with an average probation period of 5.4 years.

As with other sexual offence categories examined in this study, conditional sentences were used in a majority of cases. While this might appear inconsistent with the vulnerability of the victim population in this offence category, it aligns with broader sentencing patterns in Slovenia, where conditional sentences remain common, even in cases involving serious offences.

In the two cases where safety measures were imposed, courts ordered the confiscation of objects. As with the previous offence types, the sample includes only judgments of conviction and does not cover cases where the defendant was acquitted or found to lack criminal capacity and was subjected to compulsory psychiatric treatment.

3.3.2. Judicial reasoning of the sentencing decision

As with the other offence types, courts offered varying reasoning when explaining the sentencing decisions in cases of sexual abuse of a defenceless person. We focussed particularly on how judges articulated the gravity of the offence and how they identified and weighed mitigating and aggravating circumstances.

3.3.2.1. Gravity

References to the gravity of the offence followed familiar patterns observed in the rape and sexual violence cases. In some judgments, the court simply reiterated the

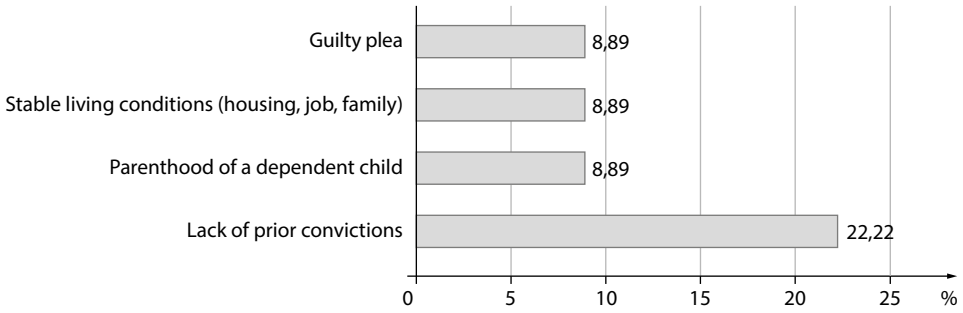
serious nature of the offence as established by the legislature, citing the statutory penalty range or characterising the conduct as inherently reprehensible. In other instances, gravity was framed in relation to the specific circumstances of the case or part of the list of aggravating considerations, making it difficult to distinguish its independent role in sentencing.

3.3.2.2. Mitigating circumstances

The most frequently cited mitigating circumstance, mentioned in over one fifth of all cases, was the absence of prior convictions. However, again, this figure contrasts with the much higher proportion of defendants with no criminal record (75%). This discrepancy may be partially explained by the large number of judgments with minimal or no reasoning, but it also suggests inconsistency in how courts apply or articulate this common mitigating circumstance. In one striking example, a court outright rejected the lack of prior convictions as a mitigating factor.

Other mitigating circumstances were mentioned far less frequently. Three were cited in 9% of cases each: the offender's parenthood (typically fatherhood) of a dependent child, a stable or orderly life situation and a guilty plea. As with the other offence categories, courts varied in how they assessed parenthood. In some judgments, it was noted merely as a fact, while others referred to the duty of care. A few courts went further, evaluating whether the offender had fulfilled this duty. One judgment, however, took a more critical stance: the court explicitly rejected the fact that the offender was expecting a child as a mitigating circumstance, noting that he "committed the offence at a time when he and his partner were expecting a child and he took advantage of the fact that his pregnant partner had left the party before him because she was tired," (whereupon the offender performed sexual acts on the victim without her consent while she was in a state of weakness).

Figure 5. Mitigating circumstances for sexual abuse of a defenceless person



Source: Own elaboration.

Only those mitigating circumstances cited in at least four cases are included in Figure 5. Less frequently mentioned ones were expressions of remorse (three cases), the offender's age, post-offence social stability, diminished capacity, time elapsed since the offence and apologies to the victim or victim's family (each cited twice). Additional rare circumstances included a low risk of reoffending, cooperation with law enforcement, health issues, substance abuse, the victim's contribution to the offence and – uniquely – "involvement in prostitution."

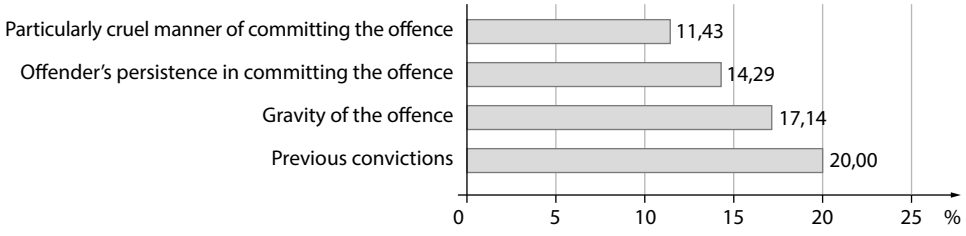
As with the offence of rape, we believe some of these more marginal circumstances raise important normative concerns. Particularly troubling is the use of "the victim's contribution" as mitigation. In one case, for example: "The court also took into account, as a mitigating factor, the conduct of the victim herself, who, as an adult, should have been aware of her responsibility for her own safety, but who, in contrast, became seriously intoxicated and, by her own conduct, exposed herself to the dangers that could arise in such a state." In our view, such reasoning constitutes clear victim-blaming and is inappropriate in judicial decision-making – especially given that the legislation explicitly affords intoxicated victims special protection because of their vulnerability (Briški 2021).

A contrasting and more principled stance was taken in another judgment, in which the court rejected the idea that the victim's vulnerability could justify or mitigate the offence. It emphasised that "a defenceless person is never the one who is to blame for sexual abuse" and that "such acts of the offender deprive the victim of their trust in the opposite sex, as well as the right to a carefree childhood or young adulthood." The same decision reminded the defendant that "the fact that you live with someone as a couple and have children with them does not give you the right to treat them badly, to insult them, to humiliate them, to limit them and to demand that they live up to your standards."

3.3.2.3. Aggravating circumstances

As in the sexual violence cases, the most frequently cited aggravating circumstance was the offender's prior criminal history. This was often considered particularly serious when the prior offences were of a similar nature.

Figure 6. Aggravating circumstances for sexual abuse of a defenceless person



Source: Own elaboration.

Figure 6 displays only those aggravating circumstances which were cited in at least four cases. Less frequently mentioned circumstances included the offender's lack of remorse or repentance, the abusive nature of the act given a prior relationship with the victim (each cited twice), base motives, lasting consequences for the victim, continuous perpetration, a minor victim, a high level of culpability, the fact that the offence occurred in a healthcare institution, the commission of multiple criminal acts and other contextual elements such as premeditation or a calculated attitude. Although each of these was only rarely cited, they reveal the diversity of judicial attention to circumstances that may heighten the severity of this type of offence.

3.4. Child sexual assault

Child sexual assault is criminalised under Article 173 of the Slovenian Criminal Code (KZ-1) and encompasses a range of conduct varying in gravity. The baseline offence (KZ-1: Art. 173/1) criminalises sexual intercourse or other sexual acts with a child under the age of 15. A qualified form (KZ-1: Art. 173/3) applies when the perpetrator abuses a position of trust (such as a parent, teacher or caregiver) to commit the offence. A privileged form (KZ-1: Art. 173/4) refers to less severe forms of sexual interference with a child under 15 that do not involve intercourse or comparable acts.

3.4.1. Statutory sanctions and imposed sanctions

The prescribed penalty for the baseline offence ranges from 3 to 8 years of imprisonment. The qualified form's range increases to 3 to 10 years, while the privileged form carries a lower range of 1 month to 5 years (KZ-1: Art. 173).

3.4.1.1. Baseline offence (Article 173/1)

Among the 135 convictions for the baseline offence, 57% resulted in custodial sentences, while 41% resulted in conditional sentences. A small number of cases involved a fine (3%), a conditional sentence with supervision (2%) or the imposition of safety measures (2%). The average custodial sentence was 26.5 months (SD = 14.2), ranging from 2 to 56 months. Notably, this average falls below the statutory minimum of 3 years, suggesting that courts often reduced sentences based on mitigating circumstances – most frequently, a guilty plea. This reveals a substantial gap between the statutory framework and actual sentencing practice.

3.4.1.2. Qualified form (Article 173/3)

In the 60 cases involving the qualified form of the offence, where the perpetrator held a position of trust, 78% of the defendants were sentenced to imprisonment,

while 20% received a conditional sentence. Safety measures and conditional sentences with supervision were imposed in a small number of cases (2% each). The average custodial sentence was 39.9 months (SD = 21.3), with sentences ranging from 12 to 96 months. Although the average sentence exceeds the statutory minimum, it still tends towards the lower end of the available sentencing range, even in cases involving aggravating circumstances.

3.4.1.3. Privileged form (Article 173/4)

Of the 98 convictions for the privileged form of child sexual assault, 66% resulted in conditional sentences, 26% in custodial sentences and 7% in conditional sentences with supervision. Safety measures were imposed in 4% of cases, and 1% involved the expulsion of a foreign national. Prison sentences imposed by the courts averaged 9.5 months with a standard deviation of 15.93 months. The minimum sentence was 2 months, and the maximum was 84 months.

3.4.2. Judicial reasoning of the sentencing decision

In examining the judicial reasoning behind sentencing for child sexual assault, we focussed on how courts assessed the gravity of the offence and identified the mitigating and aggravating circumstances that had influenced sentencing outcomes. Where relevant, we also highlight distinctions in how certain circumstances were applied to specific forms.

3.4.2.1. Gravity

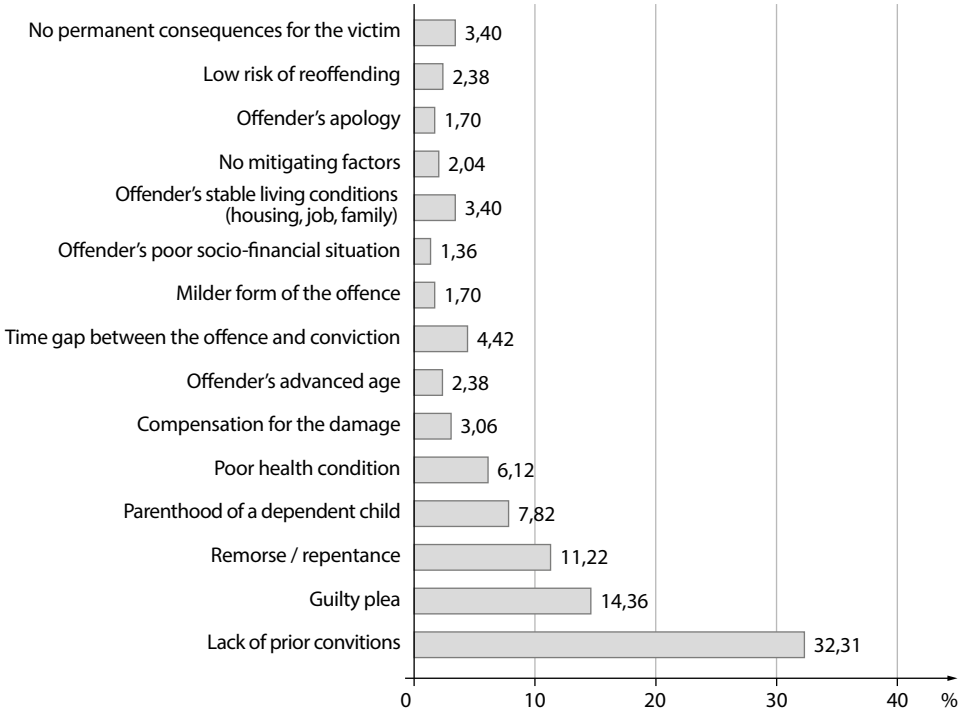
References to the gravity of the offence were present, though uneven across the different forms of child sexual assault. Courts most frequently addressed this explicitly in cases involving the qualified form of the offence (Article 173/3), where gravity was discussed in 43% of judgments and implied in a further 29%. This suggests a heightened recognition of the seriousness of abuse by individuals in positions of trust. In contrast, for the baseline form (Article 173/1), gravity was less commonly mentioned, though occasionally treated as an aggravating circumstance. In cases involving the privileged form (Article 173/4), references to the gravity of the offence were rare. These patterns indicate that courts tend to consider gravity more actively when institutional power or breach of trust is involved.

3.4.2.2. Mitigating circumstances

The most frequently cited mitigating circumstance across all forms of child sexual assault was the offender's lack of prior convictions. The second most common was the defendant's guilty plea. These findings are broadly consistent with patterns observed for other sexual offences.

In cases involving the baseline and qualified forms (KZ-1: Art. 173/1; 173/3), courts frequently referred to the offender's parenthood, most often the fatherhood of dependent children, as a mitigating circumstance. As in other offence categories, the way courts handled this varied. In some judgments, parenthood was stated plainly; in others, courts offered more detailed evaluations of the offender's caregiving role. A broader criminological rationale was also evident, with courts considering the potential impact of punishment on the offender's family. One judgment, for instance, noted that the offender "is the father of three minor children to whom he will still have a maintenance obligation, and that he is married to a wife who is a part-time low-income worker and who bears the burden of maintaining the family." The court concluded that a severe sentence could unduly harm the family and adjusted the sanction accordingly.

Figure 7. Mitigating circumstances for sexual assault of a child (baseline, privileged and qualified forms)



Source: Own elaboration.

In some judgments, courts even cited as a mitigating circumstance the fact that the offender was the parent of the child victim. While this may seem counterintuitive, the reasoning appeared to rest on the perceived consequences of sentencing for the child's family environment. Such reasoning suggests that

courts were balancing the harm caused by the offence with a concern for broader family disruption.

Only mitigating circumstances cited in at least four cases are included in Figure 7. Among those cited less frequently, there were some unusual and noteworthy examples. In several baseline form cases (Article 173/1) involving members of the Roma community, courts mentioned the offender's cultural background as a mitigating circumstance. They noted that the community is "subject to a certain and specific culture and rules, especially with regard to relations between men and women, but by no means one that could justify what [the offender] has done." These judgments suggest an attempt to consider the offender's social context, while simultaneously affirming the illegality and unacceptability of the conduct.

As with other offences discussed in this paper, we believe that some of the rarely cited mitigating circumstances are inappropriate and raise normative concerns. One particularly troubling example appeared in a case involving a stepfather who sexually assaulted his stepdaughter. The court considered as mitigating the fact that the victim's mother "did not protect her in the situation and did not react decisively enough, all of which created the circumstances that made it possible for the defendant to commit offences to the detriment of her daughter." While the degree to which this influenced the final sentence is unclear, the implication that the mother's behaviour somehow mitigates the offender's culpability is deeply problematic.

In contrast, several courts took a clear stand against attempts to mitigate responsibility by blaming the victim or her environment. In one baseline offence case, the court rejected the argument that the minor victim's behaviour contributed to the situation. It stated that "the fact that the victim herself at some point reached for a beer […] cannot be considered a mitigating circumstance, since the defendant, as an adult, should have discouraged the child from doing so – not encouraged her, as he did on [that] day, in the expectation of the victim's 'greater willingness'." In another case, the defence claimed that the offender had begun drinking excessively due to the stress of caring for his mentally ill father-in-law, and therefore lacked normal moral restraint. The court dismissed this line of argumentation, noting the defence's claim that the offender was "not normally inclined to such actions" but firmly rejecting any causal link between that stress and the offence.

3.4.2.3. Aggravating circumstances

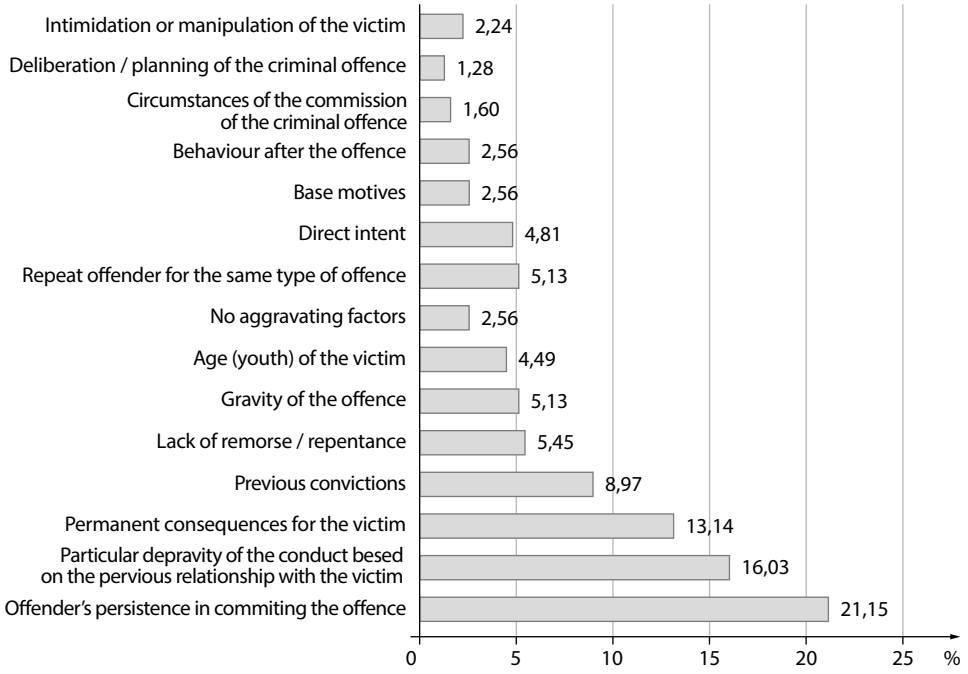
Courts cited a range of aggravating circumstances in sentencing decisions for child sexual assault, many of which appeared consistently across the baseline, qualified and privileged forms of the offence.

In cases involving the baseline and qualified forms (KZ-1: Art. 173/1; 173/3), the most frequently cited aggravating circumstance was the offender's persistence in committing the offence. In several cases, this referred to repeated acts over time or a prolonged pattern of abuse. Courts also often referred to the reprehensibility

of the offender's conduct, particularly in cases involving a breach of trust or a particularly degrading method of committing the offence. Lasting consequences for the victim, including psychological harm or disruption to the victim's development, were also commonly cited and framed as central to sentencing decisions.

In the cases regarding the privileged form (KZ-1: Art. 173/4), the most frequently cited aggravating factor was the offender's criminal history, especially recidivism for similar sexual offences. This was followed closely by references to persistence and the same concerns about the act's gravity and harmful consequences. Although the privileged form of the offence carries a lower statutory range, courts appeared to treat repeated conduct or substantial harm to the victim as reasons for imposing custodial sentences in these cases as well.

Figure 8. Aggravating circumstances for sexual assault of a child (baseline, privileged and qualified forms)



Source: Own elaboration.

Only those aggravating circumstances that were cited in at least four cases are included in Figure 8. Among those mentioned less frequently were a lack of remorse, base motives, high culpability and an institutional or professional setting of the offence (such as a healthcare institution). Other aggravating factors that appeared in one or two cases included long-term emotional manipulation, the offender's calculated or predatory behaviour, the conduct occurring during a probationary period and the victim's especially vulnerable age or state. As with

the sentencing for rape and sexual abuse of defenceless persons, some courts cited a lack of remorse as an aggravating circumstance. As explained above, in our view, this is problematic within the Slovenian legal context.

4. Discussion

This section brings together the empirical findings presented above and considers their broader significance for understanding sentencing practices for sexual offences in Slovenia. Drawing on both qualitative and quantitative analysis, we identified several recurring patterns: a persistent gap between statutory sentencing frameworks and judicial practice; minimal or inconsistent reasoning in sentencing decisions; contradictory treatment of similar circumstances across cases; and the continued, though limited, presence of problematic narratives about sexual violence. Together, these findings point to deeper structural tensions in how sexual offences are judged and sanctioned.

4.1. The sentencing gap: Normative expectations versus judicial practice

One of the more striking findings of our study is the substantial gap between statutory sentencing frameworks and the sentences imposed in practice. Despite the severity of statutory ranges, especially for offences such as rape or child sexual assault, sentences are frequently concentrated near the lower end of the range, both in terms of length and custodial nature. This finding is consistent with previous research in Slovenia (Plesničar, Jankovič, Briški 2022; Plesničar, Jankovič 2022) and resonates with international concerns about the perceived leniency of sentencing for sexual offences (Amirault, Beauregard 2014; Rydberg, Cassidy, Socia 2018; Thompson et al. 2020).

A particularly notable feature of Slovenian practice is the frequent use of conditional sentences for offences formally classified among the most serious in the Criminal Code. In our sample, suspended sentences were imposed in 32% of rape cases, and even more commonly in other offence types: 66% of sexual violence cases, 63% of cases of sexual abuse of a defenceless person and 74% of privileged child sexual assault cases; suspended sentences were also imposed in 42% of baseline and 22% of qualified child sexual assault cases. In several categories, then, the conditional sentence was not only common, but the predominant sanction.

Even when custodial sentences were imposed, they typically fell toward the lower end of the statutory range. With the exception of the privileged form of child sexual assault, the upper half or upper third of the statutory sentencing range was rarely used. Several judgments even imposed prison terms below the statutory minimum by applying general mitigation provisions without clearly distinguishing

between ordinary and special mitigation. This suggests a reluctance to use the full statutory spectrum, even when the facts of the case include elements that would ordinarily be regarded as aggravating.

These findings are broadly consistent with previous Slovenian research comparing sentencing across offence categories. Studies show that sexual offences attract proportionally more conditional sentences than other offences with similar or identical statutory frameworks, such as robbery or grievous bodily harm (Plesničar, Jankovič 2022; Plesničar, Jankovič, Briški 2022). More general sentencing analysis indicates that when penalty ranges are low, Slovenian courts tend to use the whole range; when ranges are high, sentencing gravitates towards the minimum. What appears distinctive in the context of sexual offences is not only this general tendency toward lower-range sentencing, but the almost complete absence of sentences in the upper parts of the range, even in cases involving grievous harm. For other serious offences with comparable statutory gravity, for example robbery, courts appear more willing to use higher segments of the sentencing range when the facts justify it (Plesničar et al. 2023). Comparative findings from other jurisdictions further confirm that Slovenian practice is unusually compressed towards the bottom of the range (Drápal forthcoming).

The gap between statutory gravity and imposed sentences becomes even clearer when considering the nature of the underlying conduct. Some cases in our sample involved limited physical coercion or less intrusive conduct, for which lower-range sentences are unsurprising. However, the dataset also contains cases involving substantial force, repeated assaults, exploitation of highly vulnerable victims or other clearly aggravating features. These more serious cases were often sentenced in the same narrow band near the statutory minimum or resulted in conditional sanctions. This indicates that the overall concentration of sentences at the lower end cannot be explained solely by the "mildness" of the underlying conduct. Rather, it reflects a structural tendency to under-utilise the statutory framework even where the facts might justify a more graduated or differentiated response.

Part of this leniency can likely be attributed to procedural dynamics. Guilty pleas are treated as a strong mitigating factor in Slovenia, and a large number of cases ended with a guilty plea, especially those involving child victims (Plesničar, Lipovac 2026 forthcoming). While this practice is rooted in principles of procedural efficiency and reduced victim trauma, its sentencing effects are substantial (Tata, Gormley 2012; Yan, Bushway 2018; Roberts, Pina-Sánchez 2021). Slovenian law provides broad discretion on the weight of a guilty plea and limited guidance on how it should interact with the severity of an offence (Roberts, Plesničar 2015), resulting in highly variable reduced sentences.

Another contributing factor may be Slovenia's generally moderate penal culture. As noted in earlier studies (Flander, Meško 2016; Plesničar, Tripkovic 2024; Drápal, Plesničar 2025), Slovenian courts rarely impose sentences near the statutory maximum, even in cases involving serious harm. This tendency towards restraint may also shape sentencing for sexual offences. Moderation in sentencing

is not inherently problematic. Indeed, Slovenia's penal restraint is often cited as a strength of its criminal justice system. The challenge arises where moderation becomes indistinguishable from a lack of differentiation, particularly in offences characterised by significant, long-term violations of sexual autonomy.

What our findings reveal, therefore, is not mere restraint, but a pattern of compressed and inconsistently differentiated sentencing for sexual offences. When compared to other serious crimes such as robbery or homicide, where courts more readily use higher portions of the sentencing range (Plesničar et al. 2023; Plesničar, Jankovič, Briški 2022), the near absence of upper-range sentencing in sexual offence cases becomes striking. While lenient sanctions may be understandable for minor property crimes or first-time offenders, sexual offences present qualitatively different concerns due to their moral gravity, the vulnerability of victims and the enduring nature of the harm. The fact that sentencing rarely even enters the upper half of the available range, and that sentences are often suspended, suggests a disconnect between statutory definitions, judicial practice and broader understandings of sexual harm. At the same time, legislative responses that raise statutory maxima without addressing the underlying sentencing culture risk inflating symbolic expectations without altering practical outcomes.

While the tendency towards lower-range sentencing is significant on its own, it is compounded by the limited and sometimes inconsistent reasoning used to justify these outcomes. The following section examines the qualitative patterns in judicial reasoning, including the treatment of aggravating and mitigating factors and the occasional reliance on problematic or stereotypical narratives.

4.2. Reasoning deficits: Missing, minimal or unjustified explanations

A central finding of this study concerns not just the leniency of sentencing outcomes, but the lack or weakness of judicial reasoning that accompanies them. In many judgments courts provided no written justification at all, or relied on formulaic and minimal explanations. While this is procedurally permitted in Slovenia under the Criminal Procedure Act when the sentence is non-custodial and not appealed (ZKP: Art. 368), the widespread absence of reasoning nonetheless raises important concerns about transparency, accountability and the symbolic function of sentencing (Roberts, Plesničar 2015).

Even when reasoning was present, it often lacked depth (cf. Drápal et al. 2024). Courts frequently cited the gravity of the offence in abstract or formulaic terms, without linking this assessment to the specific characteristics of the case or to the sentence being imposed. More importantly, a stark inconsistency emerged when we combined the quantitative findings on sentencing levels with the qualitative analysis of judicial language. Courts often described the offence in severe moral and legal terms, yet imposed sanctions that fell well below what such descriptions might imply. In cases of rape, for example, judgments stated that the offence con-

stitutes "the most serious violation of the sexual integrity of an individual" or that it is "one of the most serious violations of an individual's intimate sphere." One court even described rape as "an extremely reprehensible, negative and immoral act of extreme social danger. The gravity and intensity of the social danger make it one of the more serious offences, as already foreseen by the legislature with the determined sentencing range." In that same case, however, the court imposed a custodial sentence of only one year per rape, well below the mid-point of the statutory range.

These examples are not isolated. Across all offence categories, we found numerous instances where the severity of judicial language did not align with the actual sentence. This dissonance suggests that expressions of condemnation and gravity may function more as performative statements than as genuine determinants of punishment (cf. Tata 2020). As such, they risk undermining the communicative function of sentencing, which is meant to convey to the public and to the parties involved why a particular punishment was imposed (Duff 2003; 2009).

Further compounding this issue is the courts' failure to clearly distinguish between regular mitigating circumstances and "special mitigation" – the legal mechanism allowing sentences below the statutory minimum. In several cases where the sentence fell below the prescribed minimum, courts did not explain whether this was due to special mitigation, nor did they identify the threshold of exceptional circumstances that would justify such a reduction. The absence of this distinction introduces legal ambiguity and contributes to inconsistency across cases, especially when similarly situated offenders receive different sentences with no clear justification.

These reasoning gaps are especially troubling given the high social and legal stakes associated with sexual offences. In a system where sentencing practice already diverges significantly from statutory intent, the absence of transparent, reasoned explanations risks undermining the legitimacy of the process itself. When courts claim to treat offences as gravely serious but impose short, conditional or below-minimum sentences, this sends contradictory messages – not only to the parties in the case, but to society at large.

In sum, the inconsistency between the stated reasoning and the actual sanctions, combined with the frequent lack of reasoning altogether, calls into question whether sentencing in these cases is being applied in a principled and accountable manner. It also reinforces the need for more structured reasoning practices, especially when courts significantly depart from (very broad) statutory expectations, to ensure that sentencing decisions are not only legally sound, but also publicly credible.

Beyond these general deficiencies in sentencing rationale, our analysis also reveals considerable variation in how courts interpret and apply specific mitigating and aggravating circumstances. These inconsistencies have important implications for both fairness and transparency.

4.3. Uneven weights: Inconsistent use of mitigation and aggravation

Another troubling finding of this study is the inconsistent and contradictory use of mitigating and aggravating circumstances across cases. Courts not only varied in whether they took particular circumstances into account but, more strikingly, often treated the same circumstance differently – sometimes as mitigating, sometimes aggravating and sometimes not at all. This variation extended beyond the expected individualisation of sentencing and, in our view, raises deeper concerns about coherence, fairness and equality before the law.

4.3.1. Same circumstance, opposite effect

A key example is the existence of a prior intimate relationship between the offender and the victim. In several rape cases, the courts explicitly cited the prior relationship as a mitigating circumstance. In other judgments, this effect was only indirectly observable – through lenient sentences or the absence of aggravating commentary. In contrast, other courts treated the same circumstance as aggravating, emphasising the betrayal of trust and the particular harm caused by violating the sexual autonomy of someone close to the offender. These opposing interpretations highlight not only the absence of a shared interpretive framework for intimate partner sexual violence, but also fundamentally different normative assumptions about the nature of sexual harm. Similar contradictions have been observed in other jurisdictions (Bitsch, Klemetsen 2017; Wallin et al. 2021).

Moreover, this inconsistency is not merely semantic: it has structural effects on how offences are legally constructed and sentenced. Slovenian courts frequently treat multiple sexual acts committed over time against the same intimate partner as a single unified offence, even when those acts span weeks, months or years. While this approach may be procedurally efficient, its impact is significant: courts often impose sentences comparable to those for a single incident, rather than reflecting the cumulative gravity of repeated assaults. The statutory sentencing range provides ample room to adjust for this, but our findings show that courts do not use that option. In effect, offenders who commit repeated sexual assaults against a partner may be punished more leniently than those who commit a single act against a stranger. This creates a distorted sentencing hierarchy, implicitly treating harm within intimate relationships as less serious or less punishable – despite ample evidence that such assaults can be equally, if not more, traumatic.

Another circumstance treated inconsistently is the offender's lack of prior convictions. Although 65%–75% of the offenders in our sample had no prior criminal record, courts recognised this as a mitigating circumstance in only a minority of judgments. In some cases, this was used as justification for special mitigation, enabling the imposition of sentences below the statutory minimum. In other cases, however, it was dismissed entirely. One court, for instance, explicitly

stated: "The court did not take this [lack of previous convictions] as a mitigating circumstance, as all persons are expected to lead an immaculate life and refrain from committing crimes."

Such divergent assessments of the same circumstance are problematic not only on a case-by-case basis, but also from a systemic and rule-of-law perspective. It leads to unjustified differences in the treatment of offenders in otherwise similar circumstances, raising concerns about equality before the law (cf. Drápal, Plesničar 2025). Moreover, this inconsistency points to an unresolved normative question at the heart of sentencing theory: Should the absence of prior offences be treated as a neutral baseline, since it is expected of all citizens? Or should it be acknowledged as a positive marker of character, deserving of leniency because the individual complied with legal and social norms until this offence? Without clear jurisprudential guidance or consensus on this point, courts continue to apply conflicting standards, which undermines the coherence and credibility of sentencing practice.

A third example is the offender's role as a parent, typically a father of dependent children. Some courts cited this as a mitigating circumstance with little or no elaboration. Others noted the offender's duty to support their family, but did not assess whether that duty was being fulfilled. A few others cited specific evidence that the offender was actively caring for their children – sometimes in contrast to a previously unsettled living situation, sometimes also stating the source for this assessment, such as statements from the perpetrator, witnesses or – in one case – a social work centre. The degree of factual inquiry and normative weight placed on this circumstance thus varied considerably.

The time elapsed between an offence and the sentencing was also treated inconsistently. In some cases, courts considered long delays between the offence and conviction (without further offending) as evidence of reduced risk or social reintegration, and thus mitigation. In others, this circumstance was not mentioned at all, or its relevance was dismissed.

4.3.2. Aggravating/mitigating: Unstable categories

Even where courts used more conventional sentencing logic, the categories of aggravation and mitigation remained unstable. A prime example is the way courts assessed the consequences of the offence for the victim, one of the most frequently cited aggravating circumstances across all offence types. These consequences included psychological harm (often substantiated through expert reports), physical injury or illness (e.g. HIV infection) or broader social fallout (such as the victim being excluded from a shared household where the offender was present).

However, courts varied considerably in how they assessed the existence and intensity of these consequences. Some grounded their evaluations in concrete evidence, citing expert opinions or trial testimony. For example, one judgment noted that the offence "left consequences on the victim, including emotional

distress, which was also evident from her testimony at the main hearing." Others relied on generalised assumptions, such as the court which concluded that "[t]he serious and reprehensible offence […] undoubtedly left a serious impact on the young girl," without providing supporting evidence.

More troubling still, some courts used the absence of lasting consequences (or lesser harm) as a mitigating circumstance. One court stated, for instance, that the offence "left no lasting consequences," thereby justifying a more lenient sentence. Not only is this practice applied inconsistently (many similar cases without demonstrable harm were not treated as mitigating), but it is also problematic from a normative standpoint. A victim's recovery, resilience or ability to function after the offence is not attributable to the offender's conduct. Using it as a mitigating circumstance risks shifting the moral focus of sentencing away from the harm caused and towards the personal characteristics of the victim. It may also penalise victims who suffer less acutely, inadvertently reinforcing a hierarchy of victimhood where only visible or long-lasting suffering merits punitive response.

A similar ambiguity emerged in the treatment of guilty pleas and remorse. Courts generally cited guilty pleas as mitigating, often referring to procedural efficiency or the protection of vulnerable victims. One court explicitly stated that mitigation was due to the guilty plea, allowing the court to conduct the proceedings "without any procedural complications, any additional burden on the minor victim and any unnecessary delays." However, in a number of cases where the defendant did not plead guilty or did not express remorse, this was treated as an aggravating factor ("[d]uring the entire proceedings the accused has not shown or even hinted at a trace of remorse and self-criticism"). As noted in section 3.1.2, this is particularly problematic in systems like Slovenia's, where there is no formal separation between the verdict and sentencing phases (Plesničar 2017; Roberts, Petzsche 2025). Using a defendant's silence or denial of guilt as evidence of moral failure contradicts the presumption of innocence and the right not to self-incriminate.

In addition to doctrinal and interpretive inconsistencies, some sentencing judgments invoke deeply problematic assumptions about victims and offenders. The final part of this discussion turns to these enduring stereotypes and the risks they pose for judicial impartiality.

4.4. Enduring stereotypes and problematic narratives

In addition to inconsistency, some judicial decisions relied – either explicitly or implicitly – on problematic narratives rooted in outdated stereotypes about victims, perpetrators and sexual violence. These narratives, though rare, remain troubling in their persistence and potential impact. Our analysis revealed a small number of cases where courts applied the victim's behaviour as mitigation of the offender's responsibility. In these cases, courts appeared to attribute partial blame to the victim. In one rape case, the court cited as mitigation the fact that the victim "naively

agreed to drive alone with the accused." In another, it was considered mitigating that the perpetrator "was in a relationship with the victim and went to the rented room voluntarily." In a third, the court stated that the victim "significantly" contributed to the offence by voluntarily coming to the offender's home in the early morning, intoxicated and alone. Similarly, in a case of sexual abuse of a defenceless person, the court cited as mitigation "the conduct of the victim herself, who, as an adult, should have been aware of her responsibility for her own safety, but who, in contrast, became seriously intoxicated and, by her own conduct, exposed herself to the dangers that could arise in such a state." These examples reflect a form of victim-blaming that is widely criticised in legal and criminological literature (Lees 1996; Zydervelt et al. 2016b; Gray, Horvath 2018), and which runs counter to contemporary understandings of consent, vulnerability and offender responsibility.

One might argue that the courts were simply acknowledging the lesser severity of the offence. Yet the explanations focussed not on the perpetrator's actions – such as using less physical force against the victim – but on the victim's behaviour, socially accepted and ordinary behaviour (visiting a friend, consuming alcohol or being alone with a trusted person). The reasoning suggests that because the victim engaged in such conduct, the subsequent violation of her sexual autonomy is regarded as less grave. The problematic nature of this logic becomes even clearer if extended to other contexts: applied to rape committed outdoors, it would imply that the victim "significantly contributed" to the offence by failing to remain indoors. Such reasoning effectively blames victims for the violation of their sexual autonomy on the basis of behaviour that is wholly ordinary in everyday life, frames it as supposedly careless and conveys the message that living in constant fear and vigilance against potential perpetrators is socially desirable (Lakes Wood 1973; Briški 2021).

Other judgments invoked biological or gendered stereotypes to explain or partially excuse sexual offences. In one rape case, the court considered as mitigating the fact that the "perpetrator has been alone [single] for a long time; in these conditions he does not have a regular opportunity to follow his natural instincts, which is why he primarily succumbed to temptation." Such reasoning, which frames rape as a consequence of unmet male sexual need, echoes long-debunked myths about male sexuality and minimises the violent and coercive nature of sexual offences. Such explanations shift the focus away from the offender's agency and responsibility, reinforcing problematic cultural narratives of sexual entitlement (Rumney 1999; Smith, Skinner 2017).

Another concerning example comes from a case of child sexual abuse, where the court cited as mitigation the failure of the child's mother to protect her, stating that the mother's passivity "created the circumstances" for the offence. While family dynamics may be relevant in understanding context, attributing responsibility to the victim's guardian in a way that reduces the offender's culpability is legally and ethically troubling.

At the same time, some courts explicitly rejected such narratives. In a case of sexual abuse of a defenceless person, one court stated unequivocally that "a de-

fenceless person is never the one who is to blame for sexual abuse" and that "such acts deprive the victim of their trust in the opposite sex, as well as the right to a carefree childhood or young adulthood." In another case, the court rejected the idea that living in a relationship with someone grants a licence for abuse, stating that "[t]he fact that you live with someone as a couple and have children with them does not give you the right to treat them badly, to insult them, to humiliate them, to limit them and to demand that they live up to your standards." These decisions are important not only for the individual cases, but also as signals to victims, legal professionals and the broader public that such stereotypes are unacceptable in a courtroom.

Thus, this study joins previous research in confirming that the courtroom environment is not immune to enduring myths and stereotypes about sexual violence. Although such reasoning appeared in only a small number of cases – four in total – its very presence in formal judicial decisions is cause for concern. It remains unclear whether these narratives had a decisive impact on the severity of the sanctions that were imposed, but that uncertainty does not diminish their harm. Even if infrequent, the use of such explanations – whether blaming the victim, excusing the offender through gendered tropes or minimising the nature of sexual violence – risks legitimising dangerous societal assumptions. It undermines trust in judicial impartiality and signals to the public that courts may be influenced by the same problematic beliefs that broader legal and criminological scholarship has worked to discredit. Courts wield symbolic authority, and when they invoke stereotypes they do not merely reflect public discourse – they help shape it (cf. Briški 2021).

While some strands of victimological research explore how certain behaviours or situational factors correlate with higher risk of victimisation, these analyses operate at the population level and are not concerned with individual blame or legal responsibility. Their purpose is to illuminate structural vulnerabilities and inform prevention policies, not to identify "risky" or "imprudent" victims or to allocate fault. In a judicial context, however, such correlations cannot be transposed into assessments of culpability. Courts adjudicate the defendant's conduct and the presence or absence of coercion, not the complainant's conformity to idealised behavioural norms. Allowing statistical associations to shape sentencing risks blurring the boundary between empirical risk factors and legal responsibility, and it invites reasoning that resembles victim-blaming. As the literature emphasises, using victims' ordinary social behaviours to mitigate offender culpability can inadvertently revive discredited assumptions about how a "real" or "careful" victim should behave (Cortina 2017; Briški 2021).

Our findings reveal that while most Slovenian courts avoid overtly stereotypical reasoning, the occasional reliance on outdated narratives still raises serious concerns. When courts invoke victim-blaming, biological justifications or other harmful tropes (even infrequently), they risk reinforcing societal myths that the legal system should instead challenge. The persistence of these narratives in judicial

decisions complicates the symbolic function of sentencing in sexual offence cases: rather than affirming norms of consent and sexual autonomy, they sometimes blur them. This tension underscores the need for greater doctrinal clarity and institutional awareness in how sexual offences are understood and adjudicated.

4.5. Concluding reflections

Our analysis highlights several systemic tensions and inconsistencies in the sentencing of sexual offences in Slovenia. While the broader sentencing culture is marked by moderation and penal restraint, this pattern takes on a distinct significance in the context of sexual violence. Across all the examined offence categories, we observed a consistent concentration of sentences at the lower end of the statutory ranges and a widespread reliance on conditional sanctions. Crucially, this narrow use of the available sentencing spectrum persisted even in cases involving serious or repeated violations of sexual autonomy, raising concerns about proportionality, differentiation and the coherence of sentencing practice with the statutory framework.

The substantial sentencing gap we identified can be understood in both ordinal and cardinal terms. Ordinal proportionality concerns the relative ranking of offences: whether more serious intrusions into sexual autonomy are sentenced more severely than less serious ones, and how sexual offences compare to other serious crimes such as robbery or serious assault. Cardinal proportionality concerns the overall level of punishment. Our findings suggest tension on both fronts. Within sexual offences, courts often impose very similar sentences for markedly different harms. In the broader penal landscape, sexual offences sometimes attract sanctions that appear more lenient than those imposed for other offences of comparable statutory gravity, such as robbery, where courts appear more willing to use higher parts of the statutory range (as suggested by national sentencing statistics).

Equally troubling is the frequent lack of substantive reasoning in sentencing decisions, particularly in cases resolved by a guilty plea. The rhetorical recognition of harm often fails to translate into meaningful punitive outcomes, and when reasons are provided they are frequently abstract, inconsistent or underdeveloped. This disjunction between judicial language and sentencing practice risks undermining the communicative and legitimising functions of criminal punishment.

The inconsistent treatment of mitigating and aggravating circumstances further compounds these concerns. Courts differed in whether they applied certain circumstances as well as how they interpreted them – sometimes treating the same factor (such as parenthood, prior convictions or the victim–offender relationship) in fundamentally opposing ways. These divergences suggest the absence of a shared normative framework for interpreting key elements of sentencing, particularly in cases involving intimate or relational harm. Finally, while relatively rare, the appearance of gendered and stereotypical reasoning in some judgments – ranging

from subtle victim-blaming to explicit biological justifications – underscores the lingering influence of outdated cultural narratives. Conversely, those courts that explicitly rejected such reasoning demonstrated the potential for judicial decision-making to affirm principles of equality, dignity and accountability.

Taken together, these findings suggest that sentencing practice for sexual offences in Slovenia is not only lenient, but often incoherent in its justifications. They reveal a disconnect between legal norms, judicial practice and public expectations. These tensions, and the unresolved dilemmas they produce, lead us directly into the final section of this paper, where we reflect on the broader implications of these findings and the difficult normative space they occupy.

Before turning to those broader implications, it is important to clarify the interpretive limits of the material available to us and the scope of the conclusions that can be drawn. While our findings reveal clear structural patterns, determining whether the sentences in our sample are substantively proportionate in a numerical sense requires caution. Court judgments in Slovenia rarely contain the level of factual detail or structured assessments of the seriousness of the offence that would allow researchers to reconstruct a consistent baseline sentence from which proportionality could be measured. Unlike jurisdictions with rich administrative sentencing datasets, Slovenian decisions do not record starting points, quantify the weight of individual mitigating or aggravating factors or indicate whether specific circumstances were overlooked. For this reason, a strictly variable-based evaluation of severity, or a fine-grained calibration of "correct" sentences, is not feasible with the available material. Our aim in this study was therefore not to determine the ideal sentence for any given case, but to examine how courts use the statutory ranges and justify their decisions. In this area, our findings are robust: courts make limited and inconsistent use of the upper halves of sentencing ranges, rely heavily on sentences close to the statutory minima – even in cases with serious aggravating features – and treat similar circumstances unevenly. This pattern is consistent with our previous quantitative work on sentencing for sexual offences in Slovenia, which also found restrained use of the statutory ranges and strong procedural effects on custodial outcomes (Plesničar, Lipovac forthcoming). While future research could combine richer quantitative data with qualitative reasoning analysis, the present findings already reveal structural features of Slovenian sentencing practice, rather than isolated anomalies in single cases.

Conclusion

We set out to examine how Slovenian courts sentence sexual offences, both in terms of the sanctions they impose and the reasoning that accompanies them. What emerges is a landscape shaped by leniency, inconsistency and, at times,

a troubling disconnect between legal norms, judicial language and sentencing outcomes. Suspended sentences were common even in serious cases, sentences rarely approached the upper parts of the statutory range and judicial reasoning was often absent or unconvincing. Aggravating and mitigating circumstances were applied inconsistently, and a small number of judgments relied on outdated or inappropriate narratives that risk perpetuating myths about sexual violence.

These findings return us to the broader tensions laid out in the introduction. On the one hand, there is a long-standing criminological and human rights tradition that resists carceral excess and values restraint, proportionality and procedural fairness. On the other hand, a feminist and victim-centred tradition insists that sexual violence be recognised as a serious harm requiring meaningful accountability and protection of sexual autonomy. These commitments often align, particularly when resisting punitive populism or challenging discriminatory enforcement, but in the context of sentencing they can come into friction.

This conflict produces a kind of cognitive dissonance for scholars, reformers and judges alike. It is deeply uncomfortable, as criminologists, to criticise lenient sentencing. Yet, it is equally difficult to defend patterns that appear so poorly aligned with the seriousness of the harms involved. In a system where the gravest cases of robbery or homicide routinely attract sentences from the higher parts of the statutory range, the persistent reliance on conditional or near-minimum sentences for sexual offences is difficult to reconcile with the principles of internal proportionality and equality before the law, as well as the symbolic function of punishment.

The heart of the tension stems from the nature of sexual offences themselves. They often involve intimate settings, difficult evidentiary questions and a deep entanglement of law with morality, gender and social meaning. They challenge conventional sentencing categories – culpability, consent and remorse – and expose the limits of traditional distinctions. However, this does not imply that indiscriminate harshness is either necessary or desirable. Rather, our data suggest that sexual offences in Slovenia are treated differently in an opposite way – sentenced less severely than comparable offences and, possibly even more troubling, sentenced very inconsistently. In no way do we advocate for a harsher sentencing system; we do, however, argue that the existing framework should be used in a more coherent, differentiated and transparent way.

Our study does not offer easy answers. But it does highlight the need for greater transparency, more consistent judicial reasoning and a deeper engagement with the moral and normative stakes of sentencing for sexual offences. It also calls on scholars and practitioners to sit with the discomfort: to resist both carceral reflexes and complacency, and to work toward a sentencing practice that is principled, humane and responsive to the real harms that sexual violence entails.

These findings also prompt consideration of how such inconsistencies might be addressed. Some jurisdictions respond to perceived leniency by tightening statutory frameworks, most commonly by raising minimum penalties or prescribing

closed lists of mitigating and aggravating circumstances. Our analysis suggests that such measures would not resolve the issues observed here. We do not claim that the minimum penalties are too low; for the majority of cases they may well be appropriate. The difficulty lies instead in the narrow and inconsistent use of the existing statutory range, particularly the near absence of sentences in the upper half of that range – even in more serious cases. Simply increasing minimums would do little more than shift the current pattern upward without encouraging more nuanced, proportionate or transparent sentencing. Likewise, more detailed and closed statutory lists cannot, on their own, prevent inconsistent interpretation or the occasional appearance of problematic narratives.

The challenges exposed in this study are therefore better understood as matters of sentencing practice, interpretive culture and institutional routines, rather than defects of statutory design. More promising avenues might lie in improving the transparency and quality of judicial reasoning. This could include introducing systematic publication of sentencing decisions, clearer articulation of the justification for sentences and more consistent explanation of how mitigating and aggravating circumstances are weighed. Non-binding forms of guidance – such as curated case digests, thematic summaries or judicial training materials – could support greater consistency without undermining the flexibility needed for proportional sentencing (Plesničar et al. 2023).

Finally, our qualitative analysis shows that interpretive frameworks matter. Occasional references to victim behaviour, inconsistent treatment of prior relationships or an overreliance on certain forms of mitigation point to the need for specialised training on the dynamics of sexual violence and the risks of implicit bias. Regular empirical reporting and feedback mechanisms would allow courts to situate individual decisions within broader patterns and foster a more reflective sentencing culture. In this sense, enduring improvement is more likely to emerge from strengthened reasoning, enhanced transparency and institutional learning, rather than from further statutory recalibration.

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Prosecutors as sentencers? Prosecutorial sentencing discretion re-imagined

Prokuratorzy jako sędziowie? Prokuratorska swoboda decyzyjna na nowo wyobrażona

Abstract: Despite its growing influence, the sentencing discretion of continental European prosecutors has remained largely underexplored. This paper seeks to fill that gap by offering a systematic account of prosecutorial sentencing discretion in continental Europe. It identifies five core dimensions through which prosecutors exercise sentencing discretion, illustrating how prosecutorial decisions shape sentencing outcomes, both directly and indirectly. The study sheds light on the critical – yet often overlooked – role of prosecutorial hierarchy in guiding and constraining these decisions. Drawing on psychological, organizational and doctrinal perspectives, the paper identifies key sentencing mechanisms and explores their practical implications. In doing so, it provides a novel perspective on the role of continental prosecutors in sentencing and offers pathways for future research.

Keywords: public prosecution, sentencing, sentence recommendations, continental prosecution, prosecutorial discretion

Abstrakt: Swoboda decyzyjna prokuratorów w Europie kontynentalnej pozostaje w dużej mierze niezbadana, pomimo ich rosnącego wpływu na działanie wymiaru sprawiedliwości. Niniejszy artykuł stara się wypełnić tę lukę, oferując systematyczny opis prokuratorskiej swobody decyzyjnej w Europie kontynentalnej. Zidentyfikowano w nim pięć podstawowych wymiarów korzystania przez prokuratorów ze swobody decyzyjnej, ilustrując, w jaki sposób decyzje prokuratorskie kształtują wyniki wyroków sądowych, zarówno bezpośrednio, jak i pośrednio. Badanie rzuca światło na krytyczną – choć często pomijaną – rolę hierarchii prokuratorskiej w kierowaniu i ograniczaniu tych decyzji. Opierając się na perspektywie psychologicznej, organizacyjnej i doktrynalnej, artykuł identyfikuje kluczowe mechanizmy wydawania wyroków i bada ich praktyczne implikacje. W ten sposób zapewnia nowe spojrzenie na rolę prokuratorów w wydawaniu wyroków i oferuje ścieżki przyszłych badań.

Słowa kluczowe: prokuratura, wymierzanie kar, propozycje kar, prokuratorzy kontynentalni, swoboda prokuratorska

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Introduction

For decades, scholarly discourse has pointed to the *enfant terrible* of the American criminal justice system: the prosecutor. What attracted scholars to prosecutors was their unique position in the criminal justice system, operating with seemingly unlimited discretion under non-existent oversight, together with the ability to single-handedly decide on the most pivotal issues of criminal proceedings (Thomas, Fitch 1976; Sklansky 2016; 2018). The questions of whether prosecutorial discretion should be limited and how quickly became central to the discussion (Sarma 2017; Sklansky 2018).

In continental Europe, prosecutors have largely eluded this scrutiny (Voigt, Wulf 2019). Today however, prosecutors – called by some "gatekeepers," "agenda-setters" or "judges by another name" (e.g. Weigend 2012: 389; Sklansky 2018: 503) – are becoming central figures of the criminal justice systems even beyond the American horizon, as their role in criminal proceedings has significantly expanded (Jehle, Wade 2006; Jehle, Smit, Zila 2008; Sklansky 2016; 2018). Still, this trend has not yet been fully reflected in European scholarly discourse.

Across the various areas in which European prosecutors exercise their power, sentencing remains among the most crucial and least studied. According to contemporary research, a sentence is not a product of the omniscient judge alone, but the result of a collaboration of several key criminal justice stakeholders (Albonetti 1991; Steffensmeier, Ulmer, Kramer 1998; Kim, Spohn, Hedberg 2015). Prosecutors are pertinent among them, having the power to choose from a broad palette of sentence-related actions. Most criminal cases in continental Europe are resolved through simplified procedures or dismissals, where prosecutorial assessments effectively determine the outcome (Krajewski 2012; Hodgson, Soubise 2016; Tonry 2024; 2025; Drápal, Plesničar 2025; Paolini, Kantorowicz-Reznichenko, Voigt 2025). Even in the minority of cases that proceed beyond these simplified pathways, the prosecutor's decisions continue to assert substantial influence over how the case ultimately unfolds. For instance, although prosecutors recommend specific sentences to judges, the effects of these recommendations are largely understudied (Johnson, Van Wingerden, Nieuwbeerta 2010; Kim, Spohn, Hedberg 2015).

Despite the critical role prosecutors play in sentencing, European scholars have been hesitant to comprehensively analyse their sentencing discretion, as most studies focus on prosecutors' decisions related to charges or procedural actions (Goldstein, Marcus 1977; Jehle, Smit, Zila 2008; Luna, Wade 2010). This paper seeks to address this gap by re-imagining prosecutors as actors with meaningful influence over sentencing. It examines three questions: (1) In which areas, and in what ways, do continental prosecutors exercise sentencing discretion? (2) How is this discretion shaped by the prosecutorial hierarchy? and (3) How do prosecutors' interactions with other sentencing actors affect the sentences that are imposed? Answering these research questions will help us gain a clearer understanding of

the role continental prosecutors play in sentencing and, in turn, better inform system design and the creation and implementation of sentencing policy. This paper is theoretical in nature; by synthesising the existing literature and integrating it with relevant theories, it seeks to offer a comprehensive conceptual basis for understanding European prosecutors as sentencers – an approach that has been previously lacking. To explore prosecutorial discretion and sentencing, we turn to the existing scholarship, not just to summarise what is known, but to highlight the critical gaps this paper addresses.

1. Current scope of knowledge

In recent decades, continental European prosecutors have become increasingly important criminal justice actors (Luna, Wade 2010). As continental jurisdictions have introduced new –and increasingly adversarial – tools, the gap between an inquisitorial and an adversarial system has narrowed. This effort to make the criminal process more efficient and flexible has led many countries, historically operating under the principle of legality, to adopt expediency (opportunity) tools (Ma 2002; Luna 2013). In effect, continental prosecutors, previously considered mere civil servants, have been vested with discretionary powers that are either completely new or importantly strengthened (Albrecht 2000; Luna, Wade 2010; Sklansky 2016; 2018; Ligeti 2019). For instance, in some jurisdictions a prosecutor may now dismiss a case for a lack of public interest, negotiate a sentence using plea-bargaining mechanisms or directly impose sanctions (e.g. by issuing a penal order) (Paolini, Kantorowicz-Reznichenko, Voigt 2025; Tonry 2025). The gap between the inquisitorial and adversarial prosecutor is thus closing.

Historically, continental prosecutors – especially when contrasted with their Anglo-American counterparts – form a distinct category, because their institutional status, scope of discretion and organisational structure tend to follow different logics. Across much of Europe, prosecutors operate within hierarchically structured institutions and are subject to formal or informal oversight (Tak 1999; Luna, Wade 2010). Unlike the relatively autonomous and locally elected American district attorney, continental prosecutors function within more bureaucratic frameworks, as professionalised civil servants (Tonry 2024). Moreover, their role has historically differed substantively: While Anglo-American prosecutors would play a central role in plea bargaining and exercise broad discretion over the selection of charges, continental prosecutors in inquisitorial systems often assumed different responsibilities, including oversight of the pre-trial investigations, and thus occupied a less dominant role in sentencing (Ma 2002; Luna, Wade 2010; Hodgson, Soubise 2016). As many continental systems adhere to the principle of legality (mandatory prosecution), prosecutors were required to bring charges

whenever the evidentiary requirements were met, limiting the prosecutors' ability to drop cases. These institutional differences merit a separate analysis of continental European prosecutors, one which this paper undertakes.

Against this backdrop, scholars have paid little attention to continental prosecutors as sentencers or agents influencing the sentencing process and outcome (Luna, Wade 2010). Prior research predominantly addresses the prosecutors' charging decisions or procedural powers (Luna, Wade 2010). By contrast, the sentencing actions of today's prosecutors extend well beyond a simple binary choice, encompassing a wide range of discretionary decisions and interactions with other stakeholders. The way that prosecutors come up with and enforce their sentencing strategy therefore goes largely unnoticed.

To date, the shift in prosecutorial sentencing powers has been documented primarily in two areas: penal orders and plea (sentence) bargaining. A penal order results from a simplified procedure in which the defendant is sentenced through a written verdict based solely on the evidence included in the dossier, thus avoiding a costly trial (Jehle, Wade 2006; Thaman 2012). The rules and use of penal orders vary across Europe: in some criminal justice systems – such as the Dutch, Swiss, Norwegian or Swedish ones – the prosecutor issuing a penal order holds the decision both to charge and to impose a sentence; in others – such as the German, Czech or Slovenian systems – the prosecutor cannot directly impose a sentence. In either case, the penal order presents a significant sentencing advantage for the prosecutor, who can avoid a trial and suggest a sentence, which the court will in most cases simply accept (Luna, Wade 2010; Thaman 2012; Luna 2013; Thommen 2023). Even in countries where penal orders are imposed by the court, the judge so heavily relies on the prosecutor's proposal that some authors consider penal orders a "prosecutorial case-ending" (Luna, Wade 2010: 1449) or an alternative to the American plea bargaining (Luna 2013).

Besides penal orders, a multitude of European systems have adopted plea bargaining, elevating prosecutors to central figures of the criminal justice system in order to make the system more efficient without adopting complex systemic reforms (Ma 2002; Langer 2004; Luna, Wade 2010; Luna 2013; Varona, Kemp 2020; Paolini, Kantorowicz-Reznichenko, Voigt 2025). Though they differ in specifics, most continental systems follow the typical plea-bargaining scenario: the defendant pleads guilty and, through negotiations with the prosecution, reaches a discounted sentence that is not contested (Luna 2013).

In terms of prosecutorial sentencing, scholars have also discussed various guiding measures, including sentencing guidelines and normal punishments (Lappi-Seppälä et al. 2001; Drápal, Van Wingerden 2018; Drápal, Plesničar 2025). Evidence from Czechia suggests that high-ranking members of the prosecutorial hierarchy, through their informal instructions, influenced the implementation of a policy for imposing fines (Drápal, Dusek 2023). Recent work on prosecutorial sentencing has tested the effect of quantity thresholds on sentence recommendations (Drápal, Šoltés 2024), analysed prosecutors' sentencing abilities and coping

strategies (Plesničar 2024) and highlighted the psychological impact of prosecutors' sentencing recommendations (Johnson, Van Wingerden, Nieuwbeerta 2010). Despite their efforts to capture the changing role of prosecutors, these studies each address only a single aspect of prosecutors' sentencing discretion and do not provide a complex theoretical framework. Thus, prosecutorial sentencing discretion and its implications in continental criminal proceedings remain unexplored.

Despite significant institutional changes, the role of the continental prosecutor remains conceptually underexplored. The key limitations of contemporary studies on the prosecutors' role in sentencing are threefold. First, they analyse only a handful of European countries, with most of the attention being directed towards Germany, Italy and France (Ma 2002; Luna, Wade 2010). This gap in scholarship – particularly in some regions of Europe – also limits the present analysis: relying on English-language sources inevitably excludes certain national perspectives, making future research published in English essential to bridge this gap. Second, most of these studies analyse one specific institution at a time (e.g. plea bargaining or penal orders), and they do not offer a "complex picture of prosecutorial adjudication across Europe" (Luna, Wade 2010: 1427). Third, these papers rarely consider the broader sentencing context, such as the power of other sentencing actors and interactions between them.

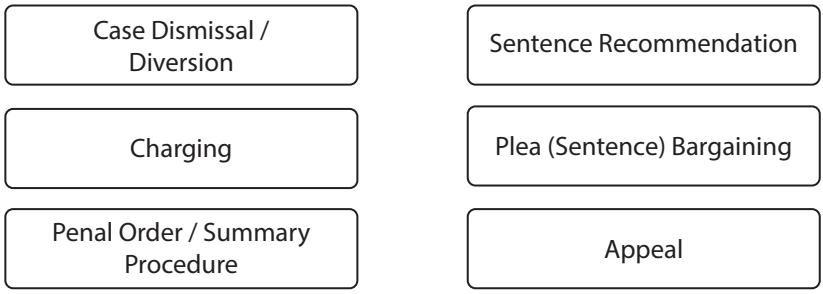
To fill this gap, I first analyse prosecutorial sentencing discretion and explore the different ways in which prosecutors act as agents of sentencing, while taking into account the role of the prosecutorial hierarchy. I then demonstrate what effects these sentencing actions have, using key psychological, organisational and doctrinal theories. To this end, I consider the discretionary actions of principal sentencing actors – prosecutors, defence attorneys/defendants and judges – and analyse their interactions in reaching the final sentence. In doing so, the paper offers a novel conceptual framework that identifies key dimensions of prosecutorial sentence-related decision-making, explains how these decisions interact with judicial and defence behaviour to influence sentencing and explores their significance for both institutional design and sentencing policy. Prior to modelling these interactions, the following section examines in detail the scope of prosecutorial sentencing discretion and the principal dimensions in which it operates within continental criminal justice systems.

2. Prosecutorial sentencing discretion re-imagined

Prosecutors exercise their sentencing discretion in several areas (as outlined in Figure 1). First, in the pre-trial stage, prosecutors decide whether to dismiss or pursue a case. In doing so, they determine whether the defendant should avoid sentencing altogether or face an alternative, quasi-punitive measure; depending on

the jurisdiction, these measures can more or less resemble sentences. For instance, in Slovenia, prosecutors can impose community service by means of diversion; in Belgium or the Netherlands, fines can be used as part of a conditional dismissal; French prosecutors can impose a financial penalty or community service (Jehle, Smit, Zila 2008; Hodgson, Soubise 2016; Weigend 2016; Boone, Pakes, Van Wingerden 2022; Brizioli 2022; Tonry 2024; 2025). In some Western European countries, these conditional dismissals are used very frequently (Weigend 2016; Tonry 2025), transitioning the sentencing power over to the pre-trial stage and onto the prosecutor.

Figure 1. Dimensions of prosecutorial sentencing discretion



Source: Author's own work.

Second, prosecutors take charging decisions that strongly constrain judges by determining the applicable sentencing range; while most European countries rely on the principle of mandatory prosecution, some prosecutorial discretion is typically maintained (Tak 1999; Hodgson, Soubise 2016). As charging decisions have been examined by other authors, they are discussed here only briefly.

Third, in most European countries, prosecutors can engage in some form of plea (sentence) bargaining (Paolini, Kantorowicz-Reznichenko, Voigt 2025). In recent years, plea bargaining has become a significant tool used by prosecutors to negotiate sentences, since it features in almost all continental European jurisdictions, in some form (Paolini, Kantorowicz-Reznichenko, Voigt 2025). Although prosecutors are usually unable to negotiate the charges, they have significant sentencing power to negotiate the sentence and determine what discounted sentence, if any, should be given. This discount is likely to vary across jurisdictions: in some countries, prosecutors are limited to applying pre-defined sentence discounts, whereas in others, the only constraint is the statutory sentencing range, often with possible exceptions (Langbein 1974; Paolini, Kantorowicz-Reznichenko, Voigt 2025).

Fourth, prosecutors can issue or request a penal order (Thaman 2012; Tonry 2024; 2025) or initiate summary proceedings (Ma 2002; Li 2008; Thommen 2023). If issued, a penal order allows the parties to avoid a trial, with guilt being determined from the dossier; the defendant may challenge the order and opt for a full trial, but

is otherwise sentenced on "take-it-or-leave-it terms," making the process simpler and cheaper while increasing prosecutorial influence (Langbein 1974: 457; Albrecht 2000; Hodgson 2020). Even in countries where prosecutors cannot directly issue a penal order, judges rarely challenge their evidentiary or sentencing claims (Luna, Wade, 2010). Bypassing the trial hearing limits the judge's firsthand impression, increasing their deference to the prosecutor's assessment.

Fifth, prosecutors in most continental European countries recommend sentences to the court. These recommendations are either voluntary (e.g. Slovenia) or mandatory (e.g. Poland, Czechia, Estonia or Moldova), can be binding or solely informative and can occur at the pre-trial or trial phase (Leifker, Sample 2010; Melcarne, Monnery, Wolff 2022; Drápal, Plesničar 2025). Prosecutors typically recommend the appropriate type of sentence (e.g. fine, community service or imprisonment) and its severity (e.g. the amount of the fine, number of hours or length of imprisonment) (Hodgson, Soubise 2016; Drápal, Dusek 2023). During the trial phase, in addition to presenting the main narrative of the crime and the evidence, prosecutors – e.g. in France, the Netherlands, Slovenia, Czechia or Poland – recommend a sentence in their closing speech, before the court reaches its verdict (Langbein 1974; Johnson, Van Wingerden, Nieuwbeerta 2010; Krajewski 2012; Hodgson, Soubise 2016; Drápal, Plesničar 2025). This "final" sentence recommendation should account for any changes or information that could not be reflected earlier. Even when not strictly binding to the judge, these recommendations likely influence sentencing significantly, as they provide specific numerical guidance in jurisdictions where such guidance is largely absent (Johnson, Van Wingerden, Nieuwbeerta 2010; Hodgson, Soubise 2016; Pere, Lahti, Sutela 2018; Drápal, Plesničar 2025). Sentence recommendations are thus a strong tool for influencing the sentencing process, and this tool is fully in the hands of prosecutors.

Additionally, prosecutors – e.g. in Czechia – may negotiate a sentence even during a trial hearing (Ščerba 2023). This process may seem redundant, given that the investigation has already been carried out and the case has already burdened the court. However, prosecutors may be willing to use this process to obtain convictions in weak cases, even if it means giving the defendant a discounted sentence, as conviction rates – and not sentence punitiveness – are used to measure continental prosecutors' success (Luna, Wade 2010).

Finally, after a sentence has been imposed, prosecutors can typically appeal it; this gives them yet another way in which they can influence the sentencing outcome. In practice, line prosecutors will compare the recommended and imposed sentences and determine whether the difference between the two is significant enough to justify an appeal, considering their previous experience with the appellate court (Baum 2009; Roberts, Petzsche 2025). Additionally, appeals can be filed for other reasons, for instance, those related to the facts of the case which influenced the sentence.

Recognising the relevance of all dimensions of prosecutorial sentencing, this paper centres on prosecutors' power to recommend sentences: an influential yet

insufficiently examined power whose drivers and effects remain largely unclear. The process of crafting a sentence recommendation is likely similar to that of imposing a sentence. The decision-maker (here, the prosecutor) considers a multitude of factors (e.g. the seriousness of the crime or the criminal history of the accused) and decides on the type and length of the sentence, while trying to achieve certain sentencing aims (Drápal 2024).

The prosecutors' ability to consider all factors and take a principled decision is limited, as continental systems rarely provide guidance beyond a statutory range (Drápal, Plesničar 2025). The actions of continental prosecutors – including recommending or negotiating a sentence – take place within a hierarchical structure (Bibas 2010). Hierarchical accountability mechanisms such as internal guidelines or instructions thus come into play, guiding prosecutors on general sentencing principles or rules for specific offences (Tak 1999; Luna, Wade 2010; Wright, Miller 2010; Krajewski 2012; Hodgson, Soubise 2016; Bowman, Lowrey-Kinberg, Gould 2024). Two levels of prosecutorial hierarchy enter this equation: head/chief prosecutors and higher-tier prosecutors (Albrecht 2000). Head prosecutors – responsible for managing their office – can exert substantial influence, particularly in less centralised systems (Ma 2002; Bibas 2010). By reviewing recommendations and instructing line prosecutors on sentencing principles, head prosecutors can effectively steer office-level sentencing practices and enforce sentencing policy (Tak 1999; Krajewski 2012). For example, in Czechia, head prosecutors have the authority to review each recommendation and modify it as they deem appropriate (Žibřidová, Drápal 2023). Higher-tier (e.g. regional- or state-level) prosecutors likewise shape sentencing: they may direct subordinate offices, formulate or enforce policy or even take on lower-level cases themselves (Luna, Wade 2010; Krajewski 2012). However, head prosecutors may also choose not to intervene, whether out of respect for prosecutor autonomy or due to a view that intervention is ineffective, to workload pressures or to simple inactivity.

In theory, prosecutors have the least hierarchical control once a case goes to trial. Continental prosecutors enjoy broad autonomy in court, illustrated by anecdotes of them reading or dozing during hearings (Langbein 1974; Fassler 1991). On paper, this allows prosecutors at trial to recommend a sentence independently of their superior's preference (Krajewski 2012). Still, head prosecutors can shape trial conduct in advance. For instance, they may set baseline sentences or signal the acceptable size of a sentence discount. Moreover, after-the-fact review is similarly powerful, as the expectation of how decisions will be reviewed drives line prosecutors to align with the head prosecutor's – perhaps assumed – views (Tak 1999; Bibas 2010). Therefore, despite the saying that "the pen is tied but the tongue is free," a tightly-controlled tongue may not be free after all (Vouin 1970: 487). Furthermore, head prosecutors can also influence appeals by formulating explicit criteria or cultivating implicit expectations about when appeals should be filed.

Ultimately, while the prosecutors' discretion remains central, the hierarchical structure above them profoundly shapes how that discretion is exercised (Levine,

Wright 2012). The influence of head and higher-tier prosecutors thus represents one of the most powerful – and least transparent – forces in continental sentencing. Despite that, scholars have offered surprisingly little analysis of its implications for sentencing. Two barriers explain this gap. First, national prosecution services lack transparency, leaving their internal rules largely inaccessible to anyone without insider knowledge. Second, even with substantial insider knowledge, scholars quickly run up against a lack of relevant empirical data, as most systems either do not record detailed prosecutorial actions or do not share them with researchers (Krajewski 2012). As a result, although hierarchical oversight grants substantial power to shape prosecutorial behaviour, we lack reliable ways to assess whether that power is used in line with systemic principles (Sarma 2017). Analysing prosecutorial discretion in isolation provides an incomplete picture. Instead, examining how prosecutors' decisions interact with those of other criminal justice actors is a necessary next step. We turn to that task in the following section.

3. Interactions among sentencers: Theory

Various actions of and interactions between criminal justice actors – prosecutors, judges and defence attorneys – are involved in reaching a criminal sentence. Among these stakeholders, prosecutors are vital. In this section, I focus on the relationship between the sentences recommended by the prosecutor and those which are imposed, building on major psychological, organisational and doctrinal theories. Based on a careful review of the literature, I draw on established theories such as anchoring, as well as underexplored but relevant concepts like judicial discounting and going rates, to capture the nuances of sentencing interactions. These theories – some commonly used in sentencing research and others less so – help provide a more accurate account of how these interactions unfold. Nevertheless, any such account will inevitably be limited in certain respects. I argue that these theories do not operate in isolation, but rather interact and only present an accurate image of the sentencing process if it is considered as an organism – an organism we now turn to study.

3.1. Psychological theories

Given that the previous scholarly efforts to disentangle the relationship between sentencing recommendations and eventual sentences rely heavily on the psychology literature, I first consider psychological theories. In the past, criminologists would identify the role of sentence recommendations as one that relies primarily on the assimilation anchoring effect (Tversky, Kahneman 1974; Enough, Mussweiler 2001; Englich 2006; Kim, Spohn, Hedberg 2015). Assimilation anchoring,

a cognitive phenomenon, suggests that numerical arguments (such as sentence recommendations) significantly influence the decision-maker (here, the judge), and that the initial number – even if it is clearly irrelevant – is assimilated into the outcome (Englich, Mussweiler, Strack 2006). In the context of prosecutorial sentencing, sentence recommendations formulated in a given case likely strongly influence the judge when deciding on the appropriate punishment (Johnson, Van Wingerden, Nieuwbeerta 2010; Kim, Spohn, Hedberg 2015).

Scholars have outlined four principal mechanisms behind the anchoring effect: insufficient adjustment, conversational inferences, numeric priming and selective accessibility (Mussweiler, Strack 1999). The insufficient adjustment model captures how judges, even when actively revising a proposed sentence, rarely adjust far enough, leaving the final decision systematically biased (Tversky, Kahneman 1974). Conversational inferences suggest that judges treat a prosecutor's recommendation as an implicit signal about what constitutes a reasonable sentence, yet the anchoring persists even when such recommendations are arbitrary (Mussweiler, Strack 1999; Englich, Mussweiler, Strack 2006). Numeric priming suggests that since the decision-maker pays more attention to the initial number, this number becomes more accessible to the decision-maker's mind (Jacowitz, Kahneman 1995). Finally, the selective accessibility model illustrates how a prosecutor's anchor can tilt a judge's attention to information that is consistent with it (Mussweiler, Strack 1999); for instance, a high recommendation can highlight aggravating circumstances of the case while diminishing mitigating ones. The term "anchoring," however, simply signals the nature of the effect without clarifying how it occurs or what drives it (Mussweiler, Strack 1999). Further inquiry into the underlying mechanisms and processes related to prosecutorial sentencing recommendations is thus necessary.

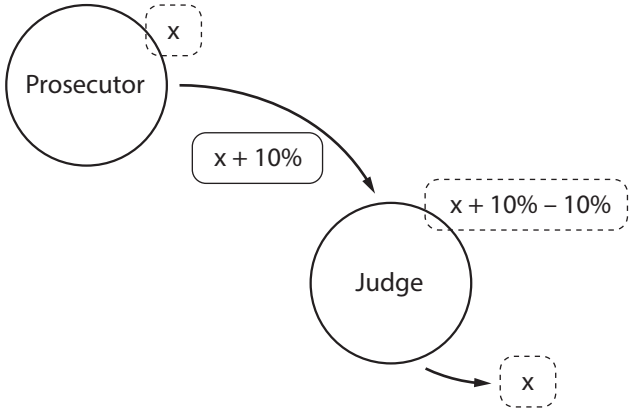
Contrary to traditional anchoring contingent on an irrelevant anchor, a sentence recommendation is surely not (and should not be) irrelevant: the recommendation reflects the seriousness of the crime and other facts of the case, the characteristics of the offender, the personal convictions of each prosecutor, local prosecutorial policies, the realistic expected outcome and other factors. Considering that the prosecutor is an expert and can gauge the appropriate sentence – based on the dossier – better than any other actor, one might argue that their numerical guidance is unproblematic or even good, as it shifts some of the decision-making into the hands of a well-informed prosecutor. However, just like judges, prosecutors likely struggle to translate qualitative ideas into quantitative (numerical) decisions (Hans, Reyna 2011; Teichman, Zamir 2014). As a result, deciding on a sentence using many qualitative factors without clear guidance can be difficult.

Moreover, research suggests that when confronted with a difficult or complex decision, individuals tend to prefer inaction over action, as making an active choice often brings a greater sense of responsibility and more intense regret if the outcome is negative (*omission bias*) (Kahneman, Tversky 1982; Spranca, Minsk, Baron 1991; Teichman, Zamir 2014). In the context of sentencing, the prosecutor's initial (pre-trial) numerical recommendation likely plays an even more crucial role,

as it serves as a standard that the prosecutor and judge are very likely to uphold at trial. Therefore, the less guidance these decision-makers receive, the larger the potential impact of the sentence initially recommended by the prosecutor.

Furthermore, interactions between sentencers complicate the process. As suggested by the judicial discounting theory, prosecutors likely recommend sentences that are slightly more punitive than what they want the judge to impose; the idea is that prosecutors generally expect judges to not match the recommended sentence, but instead impose a slightly more lenient one (Krajewski 2012).

Figure 2. Judicial discounting interaction (prosecutor to judge)



Source: Author's own work.

Why would judges do that? One obvious reason is to minimise the risk of the defence appealing their decision. In some jurisdictions, judges might also try to maximise the chances of both parties waiving their right to an appeal or to a written justification of the verdict (Drápal 2024). Another key argument driving the judge to impose a slightly lower sentence than recommended is the expectation that the prosecutor has already inflated the recommended sentence (by, let's say, 10%). This results in a puzzling situation (as illustrated by Figure 2). The prosecutor wants the judge to impose X, therefore recommends X + 10%. However, the judge, who repeatedly goes through such interactions, refers to the sentences imposed in similar previous cases ("going rates"); they already know what X is, and therefore they impose X. The last actors – the defence attorney and defendant – have limited impact, as the organisational structure of sentencing offers them little means to bridge this gap.

These psychological effects become tangible in the courtroom. The counter--recommendation of the defence attorney also plays an important role, as it adds another dimension (anchor) to the context in which the judge imposes the final sentence. Behavioural research suggests that decisions are contextual: individuals take different decisions when another – although irrelevant – piece of information

is provided to them (Teichman, Zamir 2014). These psychological phenomena – typically the compromise effect and the contrast effect – lead decision-makers to (1) choose the more moderate option instead of the radical one and, (2) when comparing the outcome to another option, to intuitively consider attributes that are rather irrelevant (Simonson, Tversky 1992). This makes the defence attorney's sentence-recommending strategy largely unpredictable and unintuitive.

Although it might seem logical to ask for a significantly lighter sentence or acquittal, research suggests that it might not be an effective strategy; if the counter-recommendation is too far from the original suggestion, the judge will likely disregard it altogether and only consider the prosecutor's side moving forward (Teichman, Zamir 2014). More importantly, given that in most of Europe defence attorneys make recommendations in their closing arguments on both guilt and sentencing, requesting an acquittal while simultaneously suggesting a lenient sentence (in case of a guilty verdict) undermines the request (Roberts, Petzsche 2025). Therefore, it may be unfeasible for the defence to present a specific numerical counter-recommendation.

Moreover, the prosecutor being the first one to recommend a sentence also places the defence at a disadvantage. Merely responding to an existing anchor means never acting independently, but offering an already biased counter-recommendation (Englich, Mussweiler, Strack 2005). Even if the defence attorney uses this as part of the sentencing strategy, the implicit psychological effects persist.

In sum, given the guiding effect of their sentence recommendation, a prosecutor can significantly influence the sentencing process and outcome, both knowingly (strategically) and unintentionally.

3.2. Organisational theories

Let's consider now the organisational aspects of sentencing. Given that the key criminal justice actors – judges, prosecutors and, to some extent, defence attorneys – are repeat players, their experiences influence their expectations, inform their future behaviour and shape the interactions between them (Bibas 2012); some scholars have described this as a "non-cooperative game where prosecutors play first and judges second" (Melcarne, Monnery, Wolff 2022: 12). As repeat players, prosecutors try to maximise the probability of a favourable sentencing outcome (i.e. a sentence imposed in accordance with the prosecutor's recommendation) and minimise the risk of appeal for sentence-related reasons. Over time, typical crimes are matched with typical punishments, eventually establishing "going rates" for common crimes (Leifker, Sample 2010; Luna 2013).

Building on these organisational patterns, the next step is to model the prosecutors' sentencing strategies at different stages of a case. In the pre-trial phase, the prosecutor will likely recommend a more punitive sentence, expecting a subsequent judicial discount. At this stage, the prosecutor typically cannot tailor the recom-

mendation to the particular judge assigned to the case. However, during the trial phase, the prosecutor can adjust the final (post-trial) recommendation based on the presiding judge. For instance, knowing that a particular judge often substantially reduces sentencing recommendations, the prosecutor may feel compelled to propose a higher sentence than they normally would, perhaps contributing to a somewhat cyclical inflation. On the contrary, if the judge is known for solely rubber-stamping prosecutors' recommendations, the prosecutor should be more careful with how high their recommendation is. Either way, most likely, the first sentence recommendation will be less judge-specific (although it can and will still be court-specific) and will leave space for future post-trial adjustment. The post--trial final recommendation will then factor in the individual judges (panel) as well.

When recommending a sentence for a penal order, prosecutors must consider both the types of cases eligible for this simplified procedure and the sentences that can be imposed without a trial (i.e. in some countries, incarceration cannot be imposed via penal order). Suppose a prosecutor can recommend a low, medium or high sentence; the choice will depend on the case and the prosecutor's prior experience with the court. In Scenario A, the case is likely to end in a penal order. If the court typically exercises its own discretion, the prosecutor may recommend a higher sentence, whereas if the court usually rubber-stamps recommendations, a slightly lower sentence may be strategic, minimising the risk of appeal or trial. In Scenario B, the outcome is uncertain, around 50–50. Strong evidence, such as clear video footage or definitive test results, may prompt a harsher recommendation because – from the prosecutor's perspective – a tougher recommendation provides a stronger starting point in the event the case goes to trial; conversely, moderate cases with weaker evidence might lead to a more lenient recommendation, aiming to secure a penal order without the scrutiny of a trial. Even when the evidence is imperfect, prosecutors act under the principle of legality, and in borderline cases the defence likely cannot fully assess the strength of the case, making them more likely to accept a "reasonable" offer than to undergo a trial. In Scenario C, a penal order is unlikely due to the seriousness of the case or procedural constraints. Here, the prosecutor recommends a more severe sentence, leaving room for the judge to adjust in light of trial developments or a guilty plea. Ultimately, the extent to which these recommendations shape the final sentence hinges on the judge's response; however, the set of options available to the judge is largely determined by the prosecutor (Melcarne, Monnery, Wolff 2022).

3.3. Doctrinal theories

Sentence recommendations are suggestions which the judge can follow or not (Krajewski 2012; Melcarne, Monnery, Wolff 2022). However, even if they are not bound by it, judges tend to follow the recommendation for two main reasons. First, they see the prosecutor as a civil servant who communicates a sentencing

strategy set out by the criminal justice system (Krajewski 2012). An example of this mechanism was the effort to impose more fines in Czechia: knowing that prosecutors were recommending significantly more fines than before because they were instructed to do so by the head of the prosecution service, judges were more willing to accept these recommendations (Drápal, Dusek 2023). Second, judges are likely to follow recommendations that align with their own sense of a just punishment.[1]

Typically, the sentence ultimately imposed will be slightly lower than the recommended one, due to the above-mentioned judicial discounting effect and the expected inflation of the prosecutor's recommendation (Krajewski 2012; Roberts, Petzsche 2025). In systems with a more politicised prosecution service and a strict hierarchy, we can expect judges to impose less punitive sentences in order to correct for the overly political influence. Finally, judges can impose even more punitive sentences if the recommendation does not match the seriousness of the crime or does not reflect a principle that the judge considers crucial (Roberts, Petzsche 2025). All in all, even when sentencing recommendations are not in any way binding, they do serve as a starting point from which the judge is less likely to substantially divert.

Finally, one's (self-)perception as a sentencing actor – a prosecutor or judge – is an important factor guiding one's discretionary actions. In most of Europe (e.g. Germany, France, Poland or the Netherlands), prosecutors would typically be seen as civil servants whose main role is to follow the rules communicated through the state's regulations and/or the prosecutorial hierarchy (Luna, Wade 2010; Dechepy-Tellier 2024). If a prosecutor perceives themself merely as a rule-follower without discretion, they will likely closely follow the legal standards and hierarchical instructions. In turn, the judge might consider the sentence recommended by lawmakers (communicated perhaps via sentencing guidelines) more binding – especially if reached through a transparent process – than a discretionary decision of a single line prosecutor (Krajewski 2012; Drápal, Dusek 2023). On the other hand, if prosecutors are seen more as rule-makers, they will – as individuals – take more initiative and be more willing to use their discretion. The effect of going rates will likely be weaker, whereas the effect of an individual prosecutor may be stronger. However, as the judge will likely consider this prosecutor more as a peer criminal justice actor, the recommendation will serve merely as a suggestion that can be freely adjusted, in turn strengthening the influence of the judge.

Likewise, consider the judge's (self-)perception of their role. If the judge is strictly a law-follower, in the absence of specific regulatory guidance they will more likely comply with the practice previously established by the prosecution, thus strengthening the effect of going rates. In turn, the prosecutor, expecting the judge to solely follow the law and previous practice, will be more likely to appeal a decision in which the judge clearly overstepped these limits. On the other

[1] Here, the author draws on anecdotal evidence from interviews with judges and prosecutors conducted as part of a separate research project.

hand, if the judge self-identifies as a rule-maker, they will feel more comfortable taking discretionary decisions, particularly in terms of the type of sentence and its punitiveness, for reasons not only limited to its lawfulness. However, with no other specific numerical guidance, the judge will still be (possibly unknowingly) heavily influenced by the prosecutor's recommendation and their sentencing decisions will echo those of the prosecutor. If the prosecutor perceives the judge to be a rule-maker, they will more likely accept the sentence even if it does not correspond with their recommendation, understanding that the final product is the result of judicial discretion.

Conclusion

The sentencing discretion of continental prosecutors has long escaped sustained scholarly attention. In recent decades, however, prosecutors have become central figures shaping sentencing outcomes. In this paper, I bridge this gap by providing a novel, systematic theoretical account of sentencing discretion as exercised by prosecutors in continental Europe. In doing so, I contribute to the existing literature in the following ways.

As illustrated, the effects through which prosecutors' sentence recommendations influence the sentence outcome are manifold and extend far beyond the previously documented anchoring effect. Prosecutors exercise sentencing discretion across multiple procedural stages and dimensions, offering judges specific numerical guidance in an otherwise abstract process. These sentence recommendations, shaped by both psychological and organisational mechanisms, become powerful instruments translating prosecutorial strategies into judicial outcomes. Sentencing unfolds as a courtroom game in which prosecutors and judges, as repeat players, operate with shared rules and expectations and thus gain an advantage over defence attorneys and defendants; this dynamic gives prosecutors greater sentencing influence than is often recognised – and perhaps more than is appropriate.

This analysis situates prosecutorial sentencing discretion within a broader framework of institutional hierarchy. Prosecutorial hierarchies emerge as crucial accountability mechanisms that shape sentencing strategies and levels of punitiveness across offices. However, such hierarchical control should not be assumed to automatically enhance consistency. Rather, its effects are contingent on local prosecutorial practices, internal communication styles and the broader normative context. Without empirical scrutiny, hierarchical interventions may just as easily reinforce disparities as reduce them.

Moreover, the ambiguity of prosecutorial internal decision-making remains one of the central challenges to understanding their role as *de facto* sentencers. The problem lies not solely in sentencing outcomes, but in the process itself: decisions about sentence recommendations are taken with limited transparency, external oversight or empirical evaluation. Future research should thus focus on

documenting and analysing these internal practices systematically, beginning with national-level studies capable of capturing local variations in prosecutorial behaviour.

Comparative research is particularly promising. By extending the analytical lens beyond a handful of well-documented Western European jurisdictions to include Central and Eastern Europe and the European South, scholars could develop a far richer empirical picture of prosecutorial influence. Collecting and analysing data on prosecutors' sentence recommendations – currently unavailable in most continental systems – would allow for a systematic evaluation of how prosecutorial practices affect sentencing disparities. Such data would also clarify whether prosecutors act as stabilising agents promoting consistency or, conversely, as amplifiers of disparity in sentencing.

Finally, sentencing patterns and norms – especially informal "going rates" negotiated between prosecutors and judges – remain critical yet underexplored components of this dynamic. Understanding how these patterns interact with organisational hierarchy, cognitive mechanisms and institutional rules is essential for building a more transparent and just sentencing system.

In sum, this paper conceptualises prosecutorial sentencing discretion in continental Europe. By identifying the mechanisms through which prosecutors shape sentencing outcomes, it provides a theoretical foundation for future empirical research. However, identifying a potential strong effect entails scrutinising it in detail, both theoretically and empirically. These are steps that future studies will have to take.

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Toughening of criminal law and its influence on sentencing

Zaostrzenie prawa karnego i jego wpływ na wymiar kar

Abstract: The development of criminal law in German-speaking countries has been characterised by a tendency towards strictness and criminalisation in recent years. In light of this, the question arises as to how this toughening of the law affects actual judicial sentencing practice. This article aims to summarise these developments in the toughening of criminal law, using Austria as an example. It also examines whether corresponding tendencies can be found in Austrian judicial sentencing practice, and whether the legislative toughening of Austrian criminal law can be regarded as a decisive factor in any harshening of Austria's judicial sentencing practice.

Keywords: sentencing, criminalization, tightening of criminal law, criminal law developments, sentencing practice, Austrian criminal law

Abstrakt: Rozwój prawa karnego w krajach niemieckojęzycznych charakteryzował się w ostatnich latach tendencją do surowości i kryminalizacji. W związku z tym pojawia się pytanie, jak to zaostrzenie prawa wpłynęło na rzeczywistą praktykę wymiaru kar. Niniejszy artykuł ma na celu podsumowanie zmian w zaostrzeniu prawa karnego na przykładzie Austrii. Analizuje również, czy w austriackiej praktyce sądowego wymiaru kar można dostrzec podobne tendencje oraz czy zaostrzenie przepisów w austriackim prawie karnym może być uznane za decydujący czynnik w ewentualnym zaostrzeniu praktyki wymiaru kar w Austrii.

Słowa kluczowe: wymierzanie kar, kryminalizacja, zaostrzenie prawa karnego, rozwój prawa karnego, praktyka wymiaru kar, austriackie prawo karne

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Introduction

Scientific findings and surveys repeatedly show that feelings of insecurity are widespread in society. In addition, an increase in punitive attitudes is also repeatedly described. At least in German-speaking countries, these developments are also accompanied by a clear tendency towards criminalisation in criminal legislation: new criminal offences and, above all, higher penalties for existing offences are regularly the political means of choice when it comes to reacting to sensational criminal cases or growing social problems.

The (majority of) criminological research, however, indicates that such legislative measures do not have the desired deterrent or preventive effect. In judicial practice, too, there are examples of a reluctance to constantly increase penalties in the law and to toughen criminal law in other ways. This raises the question of whether and to what extent these legislative acts are also reflected in judicial and sanctioning practice. Taking Austria as an example, this paper looks at these developments and, with reference to crime statistics and scientific studies, explores whether the impact of higher penalties can also be seen in corresponding convictions and judicial sentencing practice. The major Austrian criminal-law reform from 2015 will serve as the primary illustrative example; among other things, this also brought about comprehensive legal changes for penalties, which can now be examined for their effects since coming into force. But there has also been a broad variety of other (toughening) amendments to Austrian criminal law by other legal acts in recent decades. Therefore, the paper investigates such legislative influences on sentencing.

1. Toughening of criminal law – recent developments, particularly in Austria

Criminal law can be made stricter in many different ways. When it comes to toughening that may affect sanctioning practice, the form of higher penalties is, of course, particularly interesting. However, a toughening of criminal law can also manifest in a variety of other ways, including criminalisation, i.e. the adoption of new offences making behaviour punishable that was not punishable prior to the amendment. This can involve completely new offences, the expansion of existing criminal offences or the creation of new aggravated penalties associated with aspects of the offence. In addition, the following may be considered further examples for legal amendments that lead to a toughening of criminal law:

- extending the scope of application of a nation's criminal law so that offences committed in foreign countries can be prosecuted to a greater extent
- extending the periods in statutes of limitations for criminal liability (or for enforcing sentences)

- restricting the circumstances that eliminate criminal liability
- increasing the consequences directly associated with sanctions (this area can be understood quite broadly, to include:
  - extending redemption periods
  - extending the appearance of criminal convictions in official registers
  - inhibiting the payment of fines in instalments
  - reducing the possibilities to influence the date that one's prison sentence commences [for reasons worthy of consideration]
  - worsening the conditions of imprisonment or [further] restricting the rights and freedoms of prisoners)
- creating or extending other legal "consequences" of a conviction in addition to the sentence (e.g. occupational bans, loss of voting rights, court directives to avoid specified individuals or places or to abstain from consuming alcoholic beverages)
- reducing the scope of application of alternative forms of sanctions or alternatives to (court-imposed) fines or imprisonment.

If one takes a closer look at the legal developments in the German-speaking criminal-law systems, many examples of such toughening of criminal law can be found. A current example concerning Germany is the recent Coalition Agreement for Germany's 21st legislative period, the majority of which provides for planned changes to criminal law (and criminal procedure law), such as creating new offences, increasing the penalties and expanding investigative competences (CDU, CSU, SPD 2025: 88–92). The scholarly literature repeatedly points out that the development of criminal law in these countries (Germany, Austria and Switzerland) is characterised by a tendency towards criminalisation rather than decriminalisation and towards aggravation rather than mitigation (Singelnstein, Kunz 2021: 305–306; regarding similar criminalisation tendencies in other countries see e.g. Lacey, Zedner 2023 [concerning Great Britain]).

Herein, however, the example of Austria is used to illustrate in more detail how legal amendments have toughened Austria's criminal law in recent years. In doing so, only selected examples of legal amendments are discussed, with a particular emphasis on those that appear to be particularly typical of current developments, especially significant (in practice) or otherwise exceptionally important or illustrative. These are intended to highlight the many facets of criminal-law toughening that far exceed mere increases in penalties. To complete the picture, however, a brief digression will also refer to some examples of decriminalisation and other mitigations of Austrian criminal law during this period that can be found. The analysis focusses on the major criminal-law reform adopted in 2015 (Strafrechtsänderungsgesetz 2015), which stands out due to its wide scope.

It should also be noted at the outset that only changes in substantive criminal law are considered here, not criminal procedural law. Amendments to the Austrian Criminal Code (*Strafgesetzbuch* [StGB]) are therefore of particular interest.

1.1. Toughening from the major Austrian criminal law reform of 2015 (*Strafrechtsänderungsgesetz 2015*)

The *Strafrechtsänderungsgesetz 2015* [Criminal Law Amendment Act 2015] (Austrian Federal Law Gazette I 2015/112[1]) is the most extensive reform of Austrian criminal law in recent history. Among other changes, it entailed a fundamental revision and harmonisation of penalties used in the StGB and criminalised some conduct that had not been subject to criminal liability at all or not to the same extent. Due to the large scope of this reform, the amendments made by the *Strafrechtsänderungsgesetz 2015* have been extensively discussed in the scholarly literature (e.g. Tipold 2017; Grafl, Haider 2018: 6–9).

1.1.1. Penalties raised by the *Strafrechtsänderungsgesetz 2015*

Firstly, the "paradigm example" of toughening criminal law is discussed: raising penalties. Overall, the *Strafrechtsänderungsgesetz 2015* led to harmonised monetary and custodial penalties in the StGB. In particular, it established a uniform ratio between the maximum imprisonment and the maximum fines across all offences in the Austrian Criminal Code. Prior to the *Strafrechtsänderungsgesetz 2015*, the maximum amount of day-fines (*Tagessätze*)[2] for fines within the StGB was 360. For some offences,[3] this maximum fine of 360 day-fines was used as an alternative to imprisonment for up to 6 months, but it was also used as an alternative to imprisonment for up to 1 year for other offences[4] within the StGB (see also Bundesministerium für Justiz 2015: 10).

The *Strafrechtsänderungsgesetz 2015* removed this inequality, but did so by doubling the maximum for day-fines – and therefore significantly toughened the criminal laws in Austria. The new maximum of 720 day-fines became the standard alternative to those offences within the StGB that are punishable by imprisonment for up to 1 year. Accordingly, the alternative fines were standardised to a maximum of 360 day-fines for penalties of up to 6 months' imprisonment, a maximum of 180 for up to 3 months' imprisonment and a maximum of 60 for up to 1 month's imprisonment (see also Bundesministerium für Justiz 2015: 10–11).

Apart from these increases in fines, there were also further offence-specific increases in penalties, particularly for offences against limb and life (*Delikte*

[1] Austrian laws are published in the *Bundesgesetzblatt* (Austrian "Federal Law Gazette") and are accessible online for free: https://www.ris.bka.gv.at/Bgbl-Auth/.

[2] In order to avoid unequal treatment depending on the financial situation of those convicted, maximum fines in Austria are not specified as a specific amount of money, but as an upper limit for day-fines (penalty units). The value of one daily rate is determined individually for each convicted person (in the range from 4 EUR to 5,000 EUR) according to their personal circumstances and financial capacity. The specific fine is therefore obtained by multiplying the number of day-fines by the individual daily rate for the convicted person concerned.

[3] E.g. for Theft pursuant to § 127 StGB prior to the *Strafrechtsänderungsgesetz 2015*.

[4] E.g. for Assault pursuant to § 83(1) StGB prior to the *Strafrechtsänderungsgesetz 2015*.

gegen Leib und Leben). For example, the threat of imprisonment for Serious Assault with Direct Intent (*Absichtliche schwere Körperverletzung*, § 87(1) StGB) was increased from 1–5 years to 1–10 years, and in more severe cases (§ 87(2) StGB) from 5–10 years to 5–15 years.

Furthermore, the *Strafrechtsänderungsgesetz 2015* brought about some additional increases in penalties or sentencing (or similar topics). For instance, new special aggravating factors were introduced in § 33 StGB (due to international obligations[5]) concerning certain intentionally committed offences against limb and life as well as offences against sexual integrity and self-determination, with a special regard to minor victims as well as offences committed in the context of domestic violence or within the family environment. In addition, the possibility of settling criminal proceedings by means of a Withdrawal of the Prosecution (*Diversion*)[6] was restricted for offences against sexual integrity and self-determination by the *Strafrechtsänderungsgesetz 2015* (§ 198(3) *Strafprozessordnung* [Austrian Code of Criminal Procedure]).

1.1.2. Further criminal law toughening by the *Strafrechtsänderungsgesetz 2015*

Besides these aspects concerning penalties, the *Strafrechtsänderungsgesetz 2015* led to a further toughening of Austrian criminal law through the adoption of new offences. Amongst others, the offences of Forced Marriage (*Zwangsheirat*, § 106a StGB), Persistent Harassment Involving Telecommunication or Computer Systems (*Fortgesetzte Belästigung im Wege einer Telekommunikation oder eines Computersystems*), Violation of the Right to Sexual Self-determination (*Verletzung der sexuellen Selbstbestimmung*, § 205a StGB), Unlawful Collusion amongst Bidders in Bidding Processes of Attachment Proceedings (*Unzulässige Bieterabsprachen in exekutiven Versteigerungsverfahren*, § 292c StGB) and the Crime of Aggression (*Verbrechen der Aggression*, § 321k StGB) were added to the Austrian Criminal Code (Bundesministerium für Justiz 2015; see also Tipold 2017: 39; Grafl, Haider 2018: 6–8).

Furthermore, various existing offences were revised, whereby the scope of criminal liability was often extended or new aggravating circumstances were added.[7] This applies to a broad variety of offences against life and limb, especially for intentionally and negligent assaults and (grossly) negligent killings (§§ 80,

[5] Certain changes reflect requirements stipulated by the Council of Europe Convention on preventing and combating violence against women and domestic violence ("Istanbul Convention"; CETS No. 210).

[6] The possibility of settling criminal proceedings by means of a so-called Withdrawal of the Prosecution (*Diversion*) as defined in §§ 198–209 *Strafprozessordnung* [Austrian Code of Criminal Procedure] provides for a conclusion of those proceedings without a formal conviction. Conditions can be imposed (and usually are), such as the payment of a sum of money, engagement in unpaid community service, probation or victim–offender mediation.

[7] However, there have also been some mitigating amendments by the *Strafrechtsänderungsgesetz 2015* (for more details, see section 1.3).

81 and 83–88 StGB). Since the *Strafrechtsänderungsgesetz 2015* came into force in 2016, a distinction has been made between all intentional assaults whether the (particularly severe) injuries were caused with the intent to injure the victim or "just" with the intent to do bodily harm to the victim. Dependent on this intent, different penalties apply.

The scope of criminal liability has also been extended regarding some existing offences, e.g. Unlawful Use of a Computer System (*Widerrechtlicher Zugriff auf ein Computersystem*, § 118a StGB), Damaging Electronic Data (*Datenbeschädigung*, § 126a StGB) or Disrupting the Operation of a Computer System (*Störung der Funktionsfähigkeit eines Computersystems*, § 126b StGB). Additionally, the new aggravating circumstances concerning essential elements of stolen critical infrastructure can serve as another example of the *Strafrechtsänderungsgesetz 2015* toughening Austrian criminal law: pursuant to § 128(1) No. 4 StGB, the theft of such essential elements of critical infrastructure constitutes the Aggravated Offence of Stealing, which entails a sextupled penalty compared to the non-aggravated offence of Stealing (see also Bundesministerium für Justiz 2015: 16, 21 and 23).

The *Strafrechtsänderungsgesetz 2015* also brought about some extensions of the scope of application of Austria's criminal law – providing for new possibilities (see § 64 StGB) to prosecute particular offences when committed in foreign countries, irrespective of the laws of the jurisdiction where those offences occurred (Bundesministerium für Justiz 2015: 12–13).

1.2. Toughening by other legal amendments to Austrian criminal law

During the past two or three decades, Austrian criminal law has been subject to various more or less extensive legal amendments. In fact, in the second half of its existence, the Austrian Criminal Code was amended more than three times as often as in the first: since the turn of the millennium, there have been well over 50 amendments to the StGB. A comprehensive description of these legal amendments (or even just the aggravating changes) is beyond the scope of this article. However, to illustrate the breadth of these amendments, a few particularly typical, interesting or otherwise notable aggravations from the past 10 to 15 years are highlighted as examples (due to their special significance in practice or because they seem exceptionally illustrative for current legal developments). In doing so, it must be accepted that this selection of particular examples of Austria's criminal law toughening could give a somewhat distorted picture of the extent of the issue. For this reason and to complete the picture, some examples of legislative changes in Austrian criminal law that have led to mitigation are discussed in section 1.3.

1.2.1. Additional examples for higher penalties (and related amendments)

Penalties have also been regularly toughened beyond the *Strafrechtsänderungsgesetz 2015*. This applies particularly to offences against sexual integrity and self-determination, where there have been particularly frequent (and sometimes repeated) increases in the penalties – for instance by the Second Protection against Violence Act (*2. Gewaltschutzgesetz*) or the Sexual Offences Amendment Act 2013 (*Sexualstrafrechtsänderungsgesetz 2013*). Those changes involve the introducing or increasing of minimum penalties as well as increasing the maximum penalties. In some cases, the penalty for the very same offence has even been increased several times over the years (see e.g. Grafl, Haider 2018: 11–14). The penalty for Rape (*Vergewaltigung*) pursuant to § 201(1) StGB (Rape without Further Aggravating Circumstances), for example, was increased from 1–10 years' imprisonment (from the previous 6 months to 10 years) to 2–10 years' imprisonment by the Protection against Violence Act 2019 (*Gewaltschutzgesetz 2019*). In the case of the Sexual Abuse of a Vulnerable or Mentally Impaired Person (*Sexueller Missbrauch einer wehrlosen oder psychisch beeinträchtigten Person*, § 205 StGB), the penalties have even been increased several times in recent years (in addition to extending the offence itself). First, a penalty of up to 5 years' imprisonment was applied for the offence, pursuant to § 205(1) StGB (the above-mentioned Sexual Abuse without Further Aggravating Circumstances). With the Second Protection against Violence Act (*2. Gewaltschutzgesetz*), a minimum penalty of 6 months' imprisonment was adopted. Later, the lower and upper limits of this penalty were further increased by the Sexual Offences Amendment Act 2013 (*Sexualstrafrechtsänderungsgesetz 2013*), creating the current penalty of 1–10 years' imprisonment.

The same applies to the aggravating circumstances as defined in § 205(3) StGB, which provide for a more severe penalty in certain cases: if the offence resulted in a serious assault or pregnancy of the victim, a penalty of 1–5 years' imprisonment used to apply; if it resulted in the death of the abused person, the penalty was 5–15 years' imprisonment. The Second Protection against Violence Act (*2. Gewaltschutzgesetz*) substantially increased these penalties: if the abuse pursuant to § 205 StGB resulted in a serious assault or pregnancy of the victim, a penalty of 5–15 years' imprisonment currently applies, as the lower and upper limits of the penalty have both been increased. For such offences resulting in the death of the victim, the same is true: currently, the highest penalty within the Austrian Criminal Code also applies in cases of the Sexual Abuse of a Vulnerable or Mentally Impaired Person that resulted in the person's death: imprisonment for 10–20 years or even life imprisonment.

Regarding other increases in sanctions and tougher sentencing provisions, the option to suspend fines imposed by Austrian courts in full, for example, was abolished by Budget Accompanying Act 2011 (*Budgetbegleitgesetz 2011*). Furthermore, an occupational ban concerning occupations involving the education, training or supervising of minors or other close contact with minors was introduced for certa-

in perpetrators by the Second Protection against Violence Act and later extended by the Sexual Offences Amendment Act 2013 (see also Grafl, Haider 2018: 5–6).

1.2.2. Additional examples of criminalisation and legislative extension of Austrian criminal law

Recent years have seen the creation of several new offences and the expansion of criminal liability by extending existing offences. For example, the following offences were added to the Austrian Criminal Code: Persistent Stalking (*Beharrliche Verfolgung*, § 107a StGB), Persistent Use of Force (*Fortgesetzte Gewaltausübung*, § 107b StGB), Initiating Sexual Contact with Persons under the Age of 14 (*Anbahnung von Sexualkontakten zu Unmündigen*, § 208a StGB; also known as "grooming") or Battery of Public Transport Employees Exercising Specific Functions or of Members of the Health or Emergency Services or the Fire Brigade Tasked with Specific Duties (*Tätlicher Angriff auf mit bestimmten Aufgaben betraute Bedienstete einer dem öffentlichen Verkehr dienenden Anstalt oder Angehörige des Gesundheits- oder Rettungswesens oder Organe der Feuerwehr*, § 91a StGB). These extensions of criminal liability and the increased criminalisation have repeatedly been subject to criticism (e.g. Gölly, Lambauer 2024 [concerning § 91a StGB]).

Additionally, a great variety of existing offences was extended in order to make additional conduct punishable under Austrian criminal law. This applies to offences against sexual integrity and self-determination in particular, but is not limited to them. Thus, criminal liability was also extended concerning various offences against limb and life (e.g. §§ 83(3), 85(2a), 87(1a) and 91a StGB) or concerning offences against the property of another or against the integrity of money or non-cash means of payment (e.g. §§ 147(2a), 148a, 241b, 241f and 241h(2) StGB).

Another example of the toughening of Austrian criminal law concerns an important extension of the statute of limitation (Second Protection against Violence Act, pursuant to § 58(3) No. 3 StGB). Currently, the statute of limitation does not apply to the period of time before the victim of an offence against limb and life, or sexual integrity and self-determination reaches the age of 28 if they were a minor when the offence was committed.

1.3. Brief digression: Examples of decriminalisation and other mitigations of Austrian criminal law in recent years

Although the degree of mitigation of Austrian criminal law in the recent past has (clearly) lagged behind the extent of toughening, it should be noted that there have nevertheless been many examples of mitigation and decriminalisation in Austrian criminal law. A brief selection of such mitigation is mentioned below. Some of these

examples are related to the previously described fundamental reforms of certain offence groups (e.g. assaults), which had both toughening and mitigating effects.

In fact, especially the *Strafrechtsänderungsgesetz 2015* brought about some mitigation, such as alternatively adding fines for some offences that were previously only punished with prison sentences, a lower penalty for burglaries of premises which are not dwellings and higher value and damage limits above which a higher penalty applies (Bundesministerium für Justiz 2015). Some offences were abolished, such as the offence of Advertising for Fornication with Animals (*Werbung für Unzucht mit Tieren*, ex§ 220a StGB), Spreading False, Disturbing Rumours (*Verbreitung falscher, beunruhigender Gerüchte*, ex§ 276 StGB) or Incitement to Disobey the Law (*Aufforderung zum Ungehorsam gegen Gesetze*, ex§ 281 StGB), thereby bringing about some decriminalisation (Tipold 2017: 39). Extending the more flexible and gentler regulations for juveniles to young adults, which was introduced by the Juvenile Courts Amendment Act 2015 (*Jugendgerichtsgesetz-Änderungsgesetz 2015*), can also be seen as mitigation. A particularly significant example from the more recent past is that the requirements for detention in a Forensic Therapeutic Centre (§ 21 StGB: *Strafrechtliche Unterbringung in einem forensisch-therapeutischen Zentrum*) were increased in 2022, making it harder to place individuals who cannot be punished due to mental incapacity in such centres.

1.4. Preliminary result

Despite the fact that, as described above, Austrian criminal law has also been repeatedly "softened" in recent years, it has become clear from the previous sections that there was a lot of toughening of (substantive) criminal law in Austria, affecting a wide variety of criminal-law provisions. However, this should not suggest that the developments and all these toughening amendments are to be seen critically, rejected or even considered illegitimate from a criminal policy perspective.

Some of the toughening amendments were also the consequence of, for instance, (vehement) criticism, e.g. from criminal law academia, which was ultimately responded to. Overall, however, the constant toughening of Austrian criminal law is often subject to (scientific) criticism. This is particularly true for the frequent increases in maximum penalties which lack (sufficient) criminological evidence of their preventive effectiveness. Furthermore, legal amendments are particularly criticised if they seem to be hasty reactions to a certain crime that receives extensive media attention.

In general, however, it should be emphasised that the trend towards toughening and a more punitive or repressive criminal law in Austria, as described above, can be substantiated by a large number of examples of legislative amendments.

2. Toughening in judicial sentencing in Austria?

There are currently no comprehensive empirical studies based on court file evaluations or interviews, for example, on the effects that toughening criminal law has on the sentencing practice of Austrian criminal courts. As such studies cannot be carried out easily, not least due to restricted access and the resources needed for such studies, the only option is often to fall back on other sources of information, such as (publicly) available (official) statistical data. The following therefore examines how criminal law deals with this statutory toughening in practice – where statistical data is available and allows the question to be answered.

2.1. Statistical data regarding the Austrian prison system

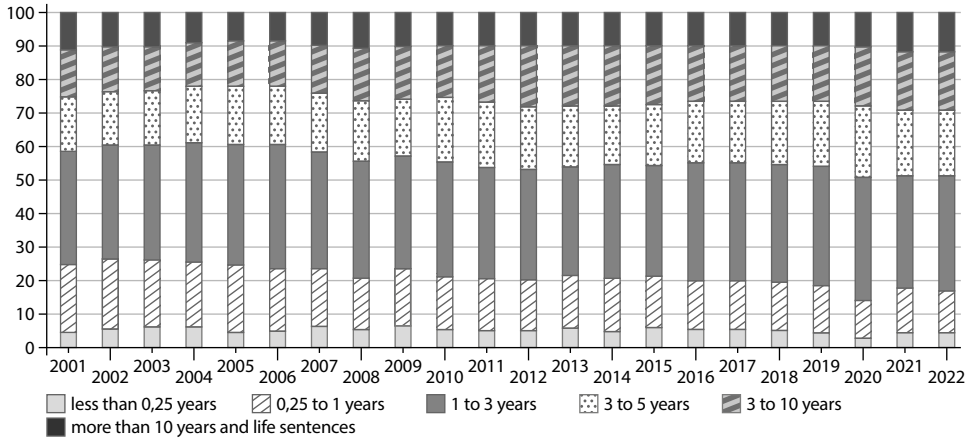
Initially, a general comparison of the total prison population in Austria over the past few decades could be considered in order to evaluate whether Austrian sentencing practice is becoming harsher or not. However, this statistical parameter in itself appears quite unspecific and subject to too many other (potentially distorting) influences, making it less suitable for a reliable assessment of whether the Austrian criminal courts' sentencing practice reflects the toughening of criminal law. Moreover, the total number of prisoners and the number of prisoners per 100,000 inhabitants in Austria have not shown a continuous upward or downward trend since 1980. It has rather fluctuated, although overall it has tended to increase since the turn of the millennium (Bundesministerium für Justiz 2024: 144–145, 160).

It is clear from the prison statistics (Bundesministerium für Justiz 2024: 154), however, that for over 40 years there has been an almost continuous increase in prison sentences exceeding 10 years and an even greater increase in persons detained in mental health facilities (§ 21 StGB: *Strafrechtliche Unterbringung in einem forensisch-therapeutischen Zentrum*).

A review of the Austrian Federal Ministry of Justice's *Strafdauerklassen* (Prison Sentence Duration Categories; these categories serve only statistical purposes) is also enlightening. Since 2001, an overall trend towards longer sentences (as per the courts' verdicts[8]) can also be observed, i.e. a higher proportion of longer Prison Sentence Duration Categories.

[8] The Prison Sentence Duration Categories refer to the duration of the sentences imposed by the courts in their verdicts ("front door"), not to the actual duration influenced by release rules, for example.

Figure 1. Prison sentence duration categories in Austria (as per the courts' verdicts), 2001–2022



Source: Based on data from Bundesministerium für Justiz (2024: 176).

Besides this trend for longer Prison Sentence Duration Categories (as per the verdicts), a considerably clearer upward trend in the "actual duration of imprisonment" can also be observed. The actual average duration of imprisonment has increased almost continuously since 2001, or has at least remained largely constant (Bundesministerium für Justiz 2024: 178). Overall, the available data can be seen as an indication of a generally harsher sentencing practice in Austria in recent years.

2.2. A closer look at the types and lengths of imposed prison sentences

The focus will now be on criminal statistics relating to prison sentences imposed by the Austrian criminal courts in recent years. To determine whether Austrian sentencing practice has become harsher, two aspects seem to be of particular interest: the length of the prison sentences and their specific circumstances, i.e. whether the sentence was (partially) suspended or not.

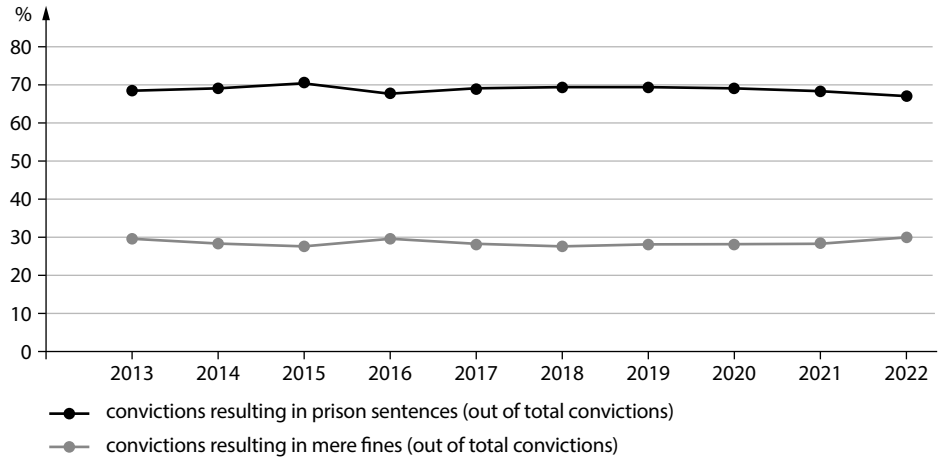
To begin with, however, reference should first be made to a study based on criminal statistics that examined developments in assault and sexual offences (and the corresponding sentencing practices) in Austria between 2008 and 2017 (Grafl, Haider 2018). This study by Christian Grafl and Isabel Haider also evaluated the effects of the *Strafrechtsänderungsgesetz 2015* on Austrian judicial sentencing practices. Concerning the area of assault and sexual offences, which has seen comprehensive legal amendments in recent years, the authors found a tendency towards harsher sentencing practices during the observation period (Grafl, Haider 2018: 78). Although the study observed a rather short period of time after the *Strafrechtsänderungsgesetz 2015* came into force (2 years), and therefore reliable statements on the (lasting) effects of this major criminal-law reform were only possible to a limited extent, there were indications that – at least with regard to

certain offences – the legal toughening could have had a direct impact on judicial sentencing practice (Grafl, Haider 2018: 78). Another study also observed a harsher judicial sentencing practice in Austria (Grafl 2020: 42).

Based on the results of this study, which, by looking specifically at certain groups of offences, revealed some indications of a harsher sentencing practice due to the legal toughening, the development of Austrian (prison) sentencing practice will now be analysed more broadly. Since the aim here is to look at the toughening of criminal law and its effects on sentencing practice as a whole (and not to limit it to specific offences), the following section focusses on Austrian judicial sentencing practice as a totality. It will therefore be examined across all offences and penalties whether an increase in more severe types of punishment and longer prison sentences can be observed in recent years.

Therefore, the data for the last 10 years for which the corresponding statistics are already available for Austria (2013 to 2022) is considered. The data derives from *Statistik Austria* [Statistics Austria] and from the latest[9] Austrian National Security Report for Austria (*Sicherheitsbericht*) for the year 2022 (Bundesministerium für Justiz 2024: 12, 55, 141).[10] Due to the wider availability of more specific and differentiated data, the following section focusses primarily on prison sentences. It can be said, however, that the proportions of convictions in which prison sentences were imposed and those which resulted in mere fines in relation to the total convictions were relatively stable, as can be seen in Figure 2.

Figure 2. Proportions of convictions resulting in prison sentences vs fines (per cent of the total convictions in Austria), 2013–2022



Source: Based on data from Bundesministerium für Justiz (2024). Convictions missing at 100% relate to other types of convictions, e.g. convictions without a sentence.

[9] As of April 2025.

[10] This official data from the Austrian Federal Ministry of Justice is generally considered to be reliable.

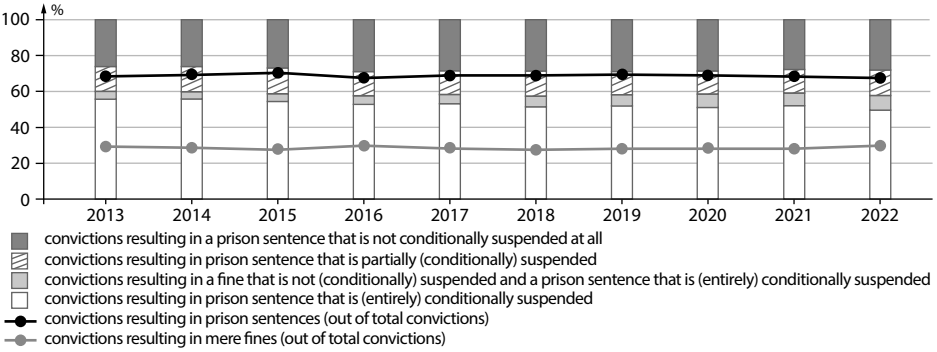
Although there has recently been a slight increase in convictions resulting in fines, as the figure rose by around 1.5 percentage points from 2021 to 2022, in 2022, the figure was only around 0.5 percentage points higher than in the first year of the comparison (2013) and roughly at the same level as in 2016. In view of this overall fairly stable proportion of convictions resulting in fines,[11] the proportions of fines and prison sentences among all convictions do not reveal any clear trend towards harsher or softer judicial sentencing in Austria during this period. However, the relatively constant proportion of convictions resulting in prison sentences allows and justifies a closer examination of those sentences that include imprisonment. A possible shift towards more severe types of sentences or longer prison sentences would indicate a harsher sentencing practice overall.

The following four categories of convictions that include a prison sentence are to be distinguished:

- convictions resulting in a prison sentence that is (entirely) conditionally suspended (§ 43 StGB; *[gänzlich] bedingt nachgesehene Freiheitsstrafen*)
- convictions resulting in a fine that is not suspended and a prison sentence that is (entirely) conditionally suspended (§ 43a(2) StGB)
- convictions resulting in a prison sentence that is partially (conditionally) suspended (§ 43a(3 and 4) StGB, *teilbedingte Freiheitsstrafen*)
- convictions resulting in a prison sentence that is not suspended at all (*[gänzlich] unbedingte Freiheitsstrafen*).

These categories of prison sentences are listed above by increasing severity. In order to make this increase in severity more clearly recognisable in the graphs, the cateogories of convictions are arranged in ascending order of severity. More severe types of sentences are therefore located higher up in the chart. An increase in the bars in the upper part of the chart (Figures 3 to 7) therefore indicates a general toughening of the Austrian judicial and sanctioning practice.

Figure 3. Convictions that included a prison sentence in Austria, 2013–2022, by category

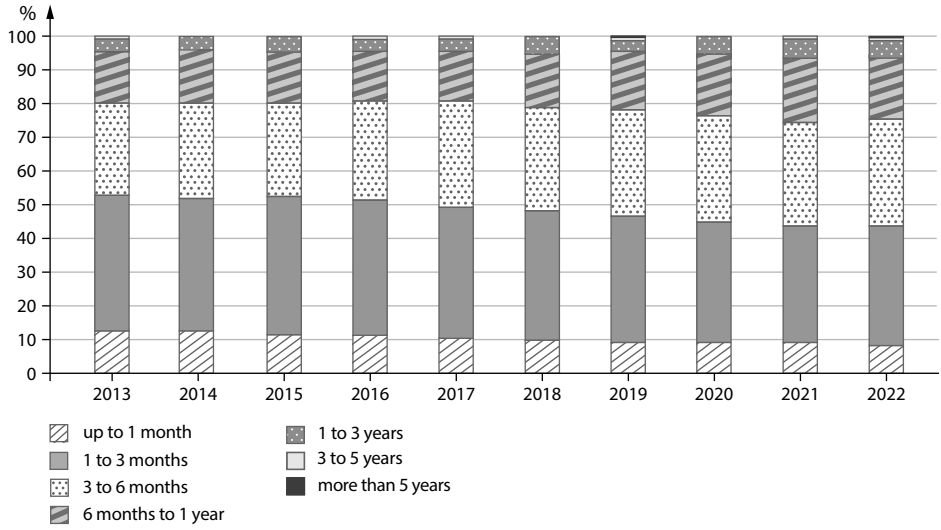


Source: Based on data from Bundesministerium für Justiz (2024: 141).

[11] It should be noted that the sentencing practice within Austria is known to be quite different in the four Higher Regional Court Districts (Bundesministerium für Justiz 2024: 127–128; Grafl 2019, 2020). One of the main differences also concerns the fact that the proportion of fines varies greatly depending on the Higher Regional Court District. Therefore, only the data for Austria as a whole is considered here in order to not overstate regional differences.

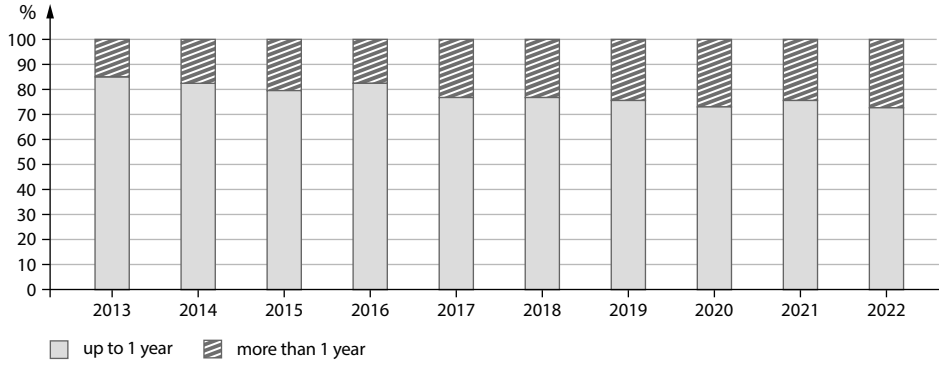
Although upward and downward movements and shifts between individual categories and years can be seen in some cases, a closer look reveals a (slight) increase in the severity of the sentences overall, as the size of the bars located higher up in the chart (indicating harsher types of sentences) increased over time. This trend towards higher severity becomes even clearer when looking at how the respective lengths of the prison sentences have been distributed in the four different categories over the last few years.

Figure 4. Convictions resulting in a prison sentences that were (entirely) conditionally suspended in Austria, 2013–2022, by the length of the prison sentence



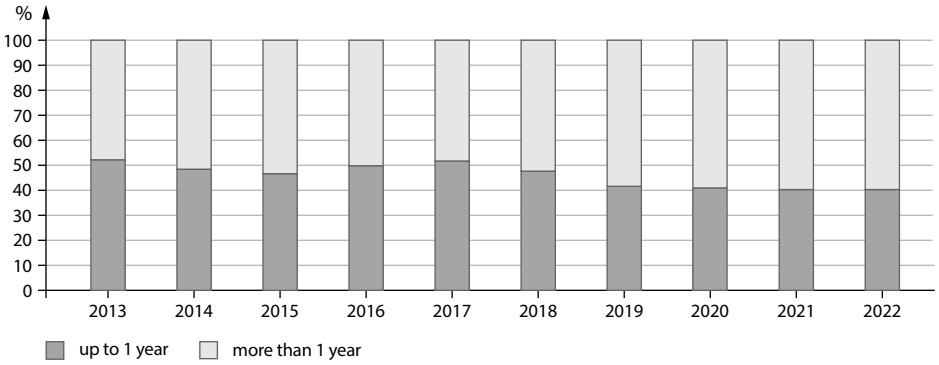
Source: Based on data from Bundesministerium für Justiz (2024: 141).

Figure 5. Convictions resulting in both fines that were not suspended and in prison sentences that were (entirely) conditionally suspended in Austria, 2013–2022, by the length of the prison sentence



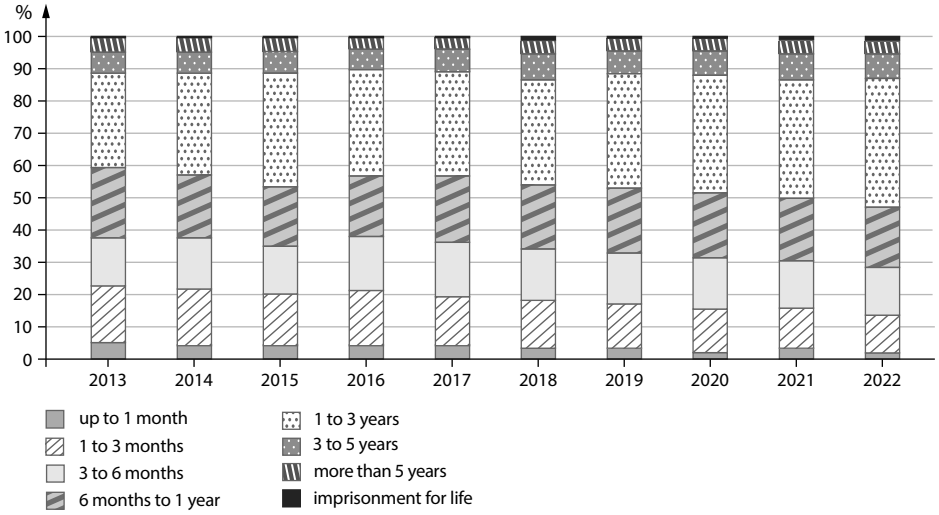
Source: Based on data from Bundesministerium für Justiz (2024: 141).

Figure 6. Convictions resulting in prison sentences that were partially (conditionally) suspended in Austria, 2013–2022, by the length of the prison sentence



Source: Based on data from Bundesministerium für Justiz (2024: 141).

Figure 7. Convictions resulting in prison sentences that were not suspended in Austria, 2013–2022, by the length of the prison sentence



Source: Based on data from Bundesministerium für Justiz (2024: 141).

As Figures 4 to 7 reveal, there was an increase in the severity of all four categories of imposed prison sentences, (indicated by the size of the bars located higher up in the charts growing over time), as their length increased overall from 2013 to 2022. According to this data, again, there is a clear indication of a generally harsher sentencing practice in Austria in recent years, which is consistent with other findings (Grafl, Haider 2018; Grafl 2020).

3. Analysis

The analysis of recent developments in Austrian criminal law and judicial sentencing practice shows that there is evidence of a trend towards a "toughening" in criminal law as well as an increasing harshness in sentencing practice. However, it is not easy to provide reliable evidence of a connection between these two trends based on the data and scientific findings available to date. Overall, however, there are numerous indications that harsher sentencing practices in Austria are – at least in part – due to the "toughening" of criminal law. Firstly, a corresponding correlation, at least with regard to individual offences, can be demonstrated in scientific studies (Grafl, Haider 2018: 78). Furthermore, some other obvious explanations for an increasingly harsh sentencing practice can be precluded (apart from the fact that it could be a consequence of tougher criminal-law provisions), such as a general increase in crimes that were recorded by the police, which could alone motivate the criminal courts to tend to impose harsher sentences in the hopes of stopping a general increase in (recorded) crime. However, there is no evidence of such a general (significant) increase in police-recorded crime in Austria in the period under review; in fact, a significant overall decline in police-recorded crime can be seen from 2013 to 2021, with a (substantial) increase only recorded for 2022 (Bundesministerium für Inneres 2023: 29–30). The harsher sentencing practice therefore cannot be explained by a general increase in recorded crime, especially since no increase in more severe crimes or their proportion of the total number of crimes was observed (Grafl, Haider 2018: 15–16). At the same time, however, there are indications that mitigating legal amendments did not have a corresponding mitigating effect on Austrian sentencing practice (Hochmayr 2024; 2024a).

In contrast, the fact that in practice a certain percentage of the maximum penalty is often used as a starting point for individual sentencing is another indication that the toughening of criminal law – and the increases in penalties in particular – has had an influence on the actual judicial sentencing practice. However, since a certain percentage of the maximum penalty is regularly chosen as the starting point for sentencing, to which the mitigating or aggravating factors specific to the individual case are then applied,[12] an increase in the maximum penalty of an offence carries considerable weight. If, for example, the upper limit of a penalty is doubled, this starting point for individual sentencing is also doubled if the same percentage of the now higher maximum penalty is used.

[12] In Austria, there are no detailed, "mathematically described," sentencing criteria comparable to, for example, the codified Sentencing Guidelines of the USA (United States Sentencing Commission 2025), but only (example) legal catalogues of mitigating and aggravating factors – without specific weighing criteria. These factors are to be applied by the courts in each case individually. Nevertheless, in practice there are traditional guidelines or suggestions that are used as unwritten rules. For example, it is repeatedly referred to that sentencing for a person with no previous convictions can begin at one sixth of the maximum penalty (e.g. Oberlandesgericht Wien 2025), whereby mitigating and aggravating circumstances are then taken into account by reducing or increasing the actual sentence accordingly from the one-sixth basis.

In addition, it is reasonable to assume that the toughening of criminal law, which leaves no room for discretion to public prosecutors and courts, will have a quite strong impact on sentencing practice. This applies, for example, to the abolition of milder forms of sanctions (such as the possibility to suspend fines in full and not only partially) or the introduction of minimum penalties, which then may not be undercut as a rule (except for individual, particularly exceptional cases). On the other hand, in the case of amendments that only increase the courts' discretionary powers (such as providing for a wider penalty range for sentencing), there remains the possibility that the courts will not take the increased range of penalties fully into account when sentencing and could to a certain extent maintain their sentencing practice from prior to the amendment.[13]

If one assumes, based on what has been said so far, that the toughening of criminal law also impacts (harshens) the actual judicial sentencing practice, the question quickly arises as to whether this can be considered appropriate from a criminal policy, criminological and overall societal perspective. This question leads deep into major, enduring areas of research in criminology, such as the general preventive or deterrent effect of higher penalties or the effectiveness of (short or long) prison sentences. However, in order to not exceed the scope of this paper, a few particularly important points shall be briefly addressed here. If sensational criminal cases receive a lot of media attention and the general public is outraged by the crime, the first choice among the means available to politicians in response to this outrage is often to increase the penalties for the corresponding offences (see e.g. Schender 2019; Grafl 2025). It seems to offer a quick solution to an actual problem, and it is thought to be cost-neutral. A closer look, however, suggests otherwise: the prison system is definitely a costly area for the state budget (Bundesministerium für Justiz 2020: 38–39). For example, the average cost per prisoner or detainee in Austria between 2019 and 2022 was around EUR 130 to 157 per day (Bundesministerium für Justiz 2020: 38; Zadić 2022: 5–6). Taking into account these costs, it is clear that toughening the criminal law, which leads to longer prison sentences, must certainly be regarded as a relevant cost factor for the state budget (see also Tipold 2023: 1; for more information on the various problems associated with (excessively) severe increases in penalties, see also HLPR 2024; Independent Sentencing Review 2025). In view of this circumstance, but above all in view of the highly intrusive nature of criminal law and the severe consequences associated with (prison) sentences for those affected, the decision to make such aggravating legislative changes should in any case be preceded by a corresponding, evidence-based evaluation of the objectives that can be achieved by the planned amendments. At this point, reference should be made to the *Zehn Gebote guter Kriminalpolitik* (Ten Commandments of Good Criminal Policy) by the *Netzwerk*

[13] However, it should also be noted that legal changes concerning penalties may have complex effects on judicial sentencing practices. This can also lead to unexpected or undesirable effects, e.g., measures intended to reduce sentencing disparities can result in new inequalities (Drápal, Šoltés 2023).

Kriminalpolitik (Criminal Policy Network), an association of renowned Austrian experts, which rightly call for a rational, fact- and science-based criminal policy (Netzwerk Kriminalpolitik 2017; Grafl 2025; Weißer Ring n.d.).

Apart from questions regarding the effectiveness of (repeated) increases in penalties (and similar criminal-law toughening), it should also be noted that the Austrian courts in practice only exceptionally utilise the upper ranges of the penalties anyway (Schender 2019: 202; Grafl 2025). This adds another facet to the question of whether it makes sense to further increase existing sentencing ranges, one which will have to be assessed on an offence-by-offence basis.

Due to a lack of corresponding scientific research, there is currently little (empirical) evidence for a "punitive turn" in Austria's society and judicial practice, whereas the toughening of criminal law is discussed more extensively. In general, and for many other countries in particular, however, such a "punitive turn" has been researched and described more comprehensively (e.g. Barker 2006; Garland 2013; Garland 2017; Brandariz, Cummins 2021; Newburn, Jones 2022; Sozzo 2025; Starke, Wenzelburger 2025; see also the numerous references in each). However, in summary, it can be assumed that a "toughening" of Austrian criminal law also has a harshening influence on actual judicial sentencing practice. In view of the considerable effects of harsher sentencing practices and the questionable preventive effectiveness of repeatedly increasing penalties, according to criminological research (e.g. Dölling et al. 2006; see also Apel 2013; Bock 2019: 333–335; Singelnstein, Kunz 2021: 347; Grafl 2025), the legislature has a particular responsibility to examine the appropriateness and effectiveness of any planned criminal policy measures. In any case, it will be crucial to critically observe further developments in criminal law and the emerging trends – as well as their influence on the actual judicial sentencing practice.

Conclusions

The statistical data and the (sparse) Austrian literature indicate a toughening of Austrian judicial sentencing practice. There is much to suggest that these developments are at least partly due to tougher criminal law, although this still needs to be researched further. Given the huge impact of punitive trends on the practice of criminal law and sanctions, these developments should continue to be critically monitored and evaluated.

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Justice in the fast lane: The implications of penal orders in Czech criminal proceedings

Sprawiedliwość na szybkim pasie: konsekwencje stosowania nakazów karnych w czeskim postępowaniu karnym

Abstract: This article presents the first systematic empirical analysis of the Czech penal order procedure. It uses a dataset of 623 criminal cases from 66 district courts (2010–2018) in which a penal order was issued and subsequently annulled following an objection. Drawing on theoretical parallels with plea bargaining, the study examines whether objections lead to harsher sentencing outcomes, whether this effect varies depending on who files the objection and how frequently compensation for victims is addressed. The findings show that objections broaden the range of potential sanctions, including a higher incidence of unsuspended prison sentences, yet they also lead to acquittals or dismissals in roughly one quarter of cases. Crucially, defendants who object do not face a systemic trial penalty: sentence severity increases primarily when objections are filed by prosecutors, not by defendants. The analysis further reveals that victims' claims are addressed less frequently and awarded in lower amounts in penal orders compared to judgments following a full trial, highlighting structural limits on victims' participation and access to compensation within fast-track procedures. Overall, the study provides new evidence on how simplified criminal proceedings shape sentencing dynamics and victims' rights in Europe.

Keywords: penal order, sentencing, trial penalty, compensation, plea bargaining

Abstrakt: Niniejszy artykuł stanowi pierwszą systematyczną analizę empiryczną czeskiej procedury nakazu karnego. Wykorzystano w niej zbiór danych obejmujący 623 sprawy karne (z lat 2010–2018) z 66 sądów rejonowych, w których wydano nakaz karny, a następnie unieważniono go w wyniku wniesienia sprzeciwu. Opierając się na teoretycznych podobieństwach do ugody sądowej, celem badania jest analiza, czy sprzeciwy prowadzą do surowszych wyroków, jak również czy efekt ten różni

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się w zależności od tego, kto wnosi sprzeciw. Ponadto analizie podlegało, jak często rozpatrywane są kwestie odszkodowań dla ofiar. Wyniki pokazują, że sprzeciwy poszerzają zakres potencjalnych sankcji, w tym zwiększają częstotliwość orzekania kar pozbawienia wolności bez zawieszenia, ale prowadzą również do uniewinnień lub umorzeń w około jednej czwartej spraw. Co istotne, oskarżeni, którzy wnoszą sprzeciw, nie ponoszą systemowej kary procesowej: surowość wyroku wzrasta przede wszystkim wtedy, gdy sprzeciw wnoszą prokuratorzy, a nie oskarżeni. Analiza ujawnia ponadto, że roszczenia ofiar są w tym postępowaniu rozpatrywane rzadziej, a przyznawane im kwoty są niższe w nakazach karnych w porównaniu z wyrokami wydawanymi po pełnym procesie, co podkreśla strukturalne ograniczenia udziału ofiar i dostępu do odszkodowań w ramach procedur przyspieszonych. Ogólnie rzecz biorąc, badanie dostarcza nowych dowodów na to, jak uproszczone postępowania karne kształtują dynamikę orzekania i prawa ofiar w Europie.

Słowa kluczowe: nakaz karny, orzekanie, kara procesowa, odszkodowanie, ugoda sądowa

Introduction

Penal orders are mechanisms of summary criminal justice that enable courts to impose sanctions without a full public trial. They have become a common response to the growing burden on courts struggling with high caseloads and delays in criminal justice administration. Such delays undermine the rule of law, reduce the quality of adjudication and weaken the certainty of punishment, which may ultimately affect crime rates (Beccaria 1872; Listokin 2007; Dušek 2015). In 1987, the Council of Europe encouraged its member states to simplify criminal procedures through discretionary prosecution, out-of-court settlements and summary proceedings for minor and mass offences (Recommendation of the Committee of Ministers 1987). In line with this, many European countries introduced simplified criminal procedures during the 1990s and 2000s, including plea bargaining and penal orders.[1] These tools, typically reserved for less serious crimes, aim to streamline adjudication by lowering administrative costs and expediting the resolution of cases (Dušek 2014).

Today, most European criminal procedure codes allow minor cases to be tried under simplified procedures. Penal orders in particular serve to speed up justice for minor-to-moderate offences by allowing prosecutors to request punishment orders, which a judge can issue based on the case file without a public hearing. As stated in the Council of Europe's recommendations, penal orders are to be applied "in cases which are minor due to the circumstances of the case." As a widely used sentencing shortcut, penal orders reflect a utilitarian theory of punishment in their focus on efficiency, deterrence and system throughput. While they may also

[1] In the past 30 years the number of penal orders has risen throughout Europe and beyond, in countries such as Italy, France, Croatia, Finland, the Netherlands, Scotland, Hungary, Norway and Slovakia. While it has been historically used in Germany, Switzerland and Sweden (Wade et al. 2008), Greece is the latest country to have introduced penal orders on the model of *Strafbefehle* (Germany's penal order model), in July 2019 (Alvanou 2019).

align with retributive ideas through proportionate punishment, they limit judicial discretion and reduce opportunities for deeper moral evaluation (Bagaric 2001). Typically, only milder sanctions – such as fines or short suspended sentences – can be imposed via this procedure.

Much like plea bargaining, penal orders aim to expedite the resolution of less serious cases by incentivising defendants to waive full trials in exchange for milder sanctions. This procedural shortcut is hypothesised to have similar systemic effects as plea bargaining – namely, reducing the time to conviction, lowering the likelihood of imprisonment and enhancing overall courtroom throughput. Steven Kemp and Daniel Varona (2024) show that plea bargaining produces substantial "trial penalties," as defendants who opt for trial face significantly higher odds of incarceration and longer sentences. I argue that penal orders can be seen as an informal offer similar to plea bargaining: the accused has the option to accept the punishment and resolve the case swiftly without a full public trial. However, by rejecting it, they risk receiving a stricter penalty. This raises an important theoretical and empirical question: Do penal orders offer a sentencing discount, and if so, how large is it? And inversely, do defendants who decline them face a "trial penalty"?

Additionally, this article addresses a frequently overlooked dimension of summary justice: the impact on victims' rights. Victims are often not included in the proceedings and have no opportunity to claim compensation, as penal orders can be issued without their knowledge or involvement. This challenges the broader legitimacy of penal orders as a fair and balanced form of justice.

The article begins with a theoretical discussion of penal orders and their place within the broader framework of punishment theory. It then introduces the Czech legal context, including the legislative development of penal orders and their current application. Particular attention is paid to the issue of victim compensation. After presenting the key research questions, the article describes the empirical design, including characteristics of the research sample and the variables. The core of the article reports the findings, both in terms of sentencing outcomes and victim claims.

1. Theory

Penal orders are not a novel concept; their roots can be traced back to 19th-century Germany, where the *Strafbefehlsverfahren* was developed as a means of handling less serious cases efficiently and with minimal court involvement (Thaman 2012; 2015).[2] Over time, this mechanism became an essential part of

[2] In 1830, the Prussian police struggled to handle the growing number of minor criminal cases due to an uprising in the Polish territories. To address this, a new summary procedure known as *Mandatsverfahren* was introduced and later incorporated into Prussian procedural law in 1845. This system, widely used by police courts across the empire, enabled authorities to

the German criminal justice system, widely applied to expedite adjudication and reduce the workload of courts (Putzke, Putzke 2019). The practical significance of the procedure is evident, yet its application raises concerns about procedural fairness and potential miscarriages of justice – particularly in more complex cases, such as economic and tax-related crimes.

Researchers have examined how prosecutorial and police practices adapt to the logic of the penal order, sometimes simplifying cases or constructing narratives that fit the fast-track model. Mirjam Stoll (2018), for example, identifies how formal and informal strategies can shape the presentation of cases to ensure quick convictions through penal orders. Similarly, Jochen Metz (2019) highlights how the inclusion of auxiliary participants (such as victims, through adhesion procedures) may complicate the simplified structure, potentially undermining the efficiency gains that penal orders aim to achieve.

The penal order procedure, along with other consensual criminal procedure modes such as specific diversions and plea bargaining, grants prosecutors substantial influence in determining trial results in the form of guilt and punishment (Thaman 2015). As the penal order system continues to evolve, it may become a model for resolving a wider range of cases, similar to how plea bargaining has become prevalent in the United States (Thaman 2012).

Plea bargaining is widely used in many jurisdictions to expedite criminal proceedings and alleviate judicial system overload. It allows defendants to plead guilty in exchange for a more lenient sentence, benefiting both the accused and the justice system by avoiding lengthy trials (Johnson 2019). However, this process requires defendants to waive key procedural rights, such as the right to a public hearing and the presumption of innocence (Helm 2019). Additionally, it grants significant discretionary power to prosecutors, often with minimal oversight (Davis 2005; Shermer, Johnson 2010).

A primary justification for plea bargaining is its role in improving the efficiency of overburdened criminal justice systems (Langer 2021). However, studies suggest that it can pressurise innocent defendants into guilty pleas out of fear of harsher trial sentences (Cooper, Meterko, Gadtaula 2019). As with plea bargaining, penal orders have become increasingly prevalent in European justice systems in order to relieve the overloaded courts (Enescu 2020; 2023). While they do offer procedural economy, they also pose similar significant risks of wrongful convictions and erroneous sanctions (Enescu 2020; 2023).

The debate over the magnitude of "plea discounts" (benefits for pleading guilty) versus "trial penalties" (harsher sentences for going to trial) remains unresolved,

swiftly respond to minor offences. Initially, it applied only to cases where imprisonment was not an option, but it was soon expanded to include offences carrying sentences of up to six weeks in prison. If an offender objected to the penalty, the judge had no authority to alter it – only the prosecutor could do so. However, in such cases prosecutors often responded by threatening a harsher punishment. In 1877, this procedure was integrated into the newly established German Empire's Code of Criminal Procedure and became known as *Strafbefehlsverfahren*, or the penal order procedure.

though research generally shows that defendants who plead guilty receive more lenient sentences (Yan, Bushway 2018; Lehmann 2021). Recent research indicates that plea bargaining significantly impacts sentencing outcomes in various jurisdictions. In Spain, defendants who accept plea deals receive shorter sentences and have a lower probability of being imprisoned compared to those convicted at trial (Kemp, Varona 2024). This disparity raises concerns about equality and the presumption of innocence. Suspended sentences are often used to encourage guilty pleas, potentially coercing defendants (Kemp, Varona 2020). In the United States federal system, the trial penalty is substantial, with defendants receiving 64% longer sentences on average when choosing to go to trial rather than plead guilty (Kim 2015).

If penal orders function in practice like plea bargains, as this study hypothesises, they may introduce similar risks of sentencing disparities. Jonathan Hasson and Yosef Zohar (2023) show that in systems with widespread plea bargaining, prosecutors adapt their behaviour over time, exploiting their position to offer individualised deals based on a defendant's perceived willingness to accept guilt. This feedback loop widens the "bargaining range" and leads to a greater variety of sanctions across similar cases that depends not on legal merits, but on subjective negotiation dynamics.

Penal orders, while formally distinct from plea bargains, share some key features: they rely on the defendant waiving their trial rights and consenting to a proposed sanction, often without full judicial scrutiny. If their use becomes widespread, penal orders may similarly enable discretionary and opaque decision--making, leading to unequal outcomes among comparable defendants and raising concerns about transparency, coercion and fairness in sentencing.

This prominent theoretical framework for understanding plea discounts suggests that the likelihood of a conviction at trial and the expected sentencing outcome play key roles in the participants' decision-making (Bushway, Redlich 2012; Bushway, Redlich, Norris 2014). This framework, known as the "shadow of the trial," assumes that defendants act rationally and are likely to accept a plea agreement if the sentence they would receive through a plea is less severe than the anticipated sentence at trial, adjusted for the probability of being convicted. On the other hand, participants in the criminal process have imperfect information or are influenced by the court community culture; they do not base their behaviour on a simple predicted outcome model (Bibas 2004).

Despite their growing relevance, penal orders remain under-researched compared to plea bargaining. Few studies have empirically assessed the sentencing outcomes of penal orders or examined whether objections lead to harsher sanctions. Similarly, the impact of penal orders on other aspects of criminal proceedings – such as victims' ability to claim compensation – remains insufficiently understood.

This article examines the theoretical parallels between penal orders and plea bargaining, focussing on whether penal orders function as an informal offer that reflects the incentive structure found in plea agreements. It explores key aspects

such as the presence of sentencing benefits, the potential penalisation of defendants who file objections and the overall impact on sentencing outcomes.

2. Research questions

The penal order procedure – though procedurally distinct from plea bargaining – increasingly fulfils a similar function: to resolve a large share of criminal cases efficiently, often without a full public trial, and in a manner that relies on the defendant's passive acceptance. While penal orders in Czechia are formally subject to judicial review and offer defendants the opportunity to object without risk, as described below, several features of the system suggest that the decision to object may carry informal consequences. The international literature on plea bargaining consistently identifies the trial penalty – the risk of receiving a harsher sentence after a full trial – as one of the key mechanisms that encourages guilty pleas. Whether a similar dynamic is present in the Czech penal order system remains largely unexplored.

This article therefore seeks to answer the following questions:

1. Do defendants who object to penal orders receive different sentences than those who do not? Specifically, is there evidence that objecting leads to higher penalties – suggesting a form of trial penalty – or are courts generally consistent or even lenient towards defendants who assert their procedural rights?
2. Does the outcome of criminal proceedings depend on who files the objection against the penal order – the defendant or the public prosecutor? Because either of these parties can file an objection against a penal order, it is important to examine whether this distinction influences the subsequent course of the proceedings, particularly the final sentence.
3. How often do penal orders address the claims of injured parties, and what happens to these claims when the procedure is used? Given that penal orders can only resolve victim compensation if the amount is uncontested and clearly established, it is important to understand whether this form of adjudication limits access to restitution or shifts the burden onto victims to pursue civil litigation.

These questions contribute to a growing body of research on the informalisation of criminal justice and the procedural incentives that shape defendants' behaviour. Unlike most studies focussed on plea bargaining, this article explores how similar pressures and outcomes may arise with penal orders. By combining descriptive statistics and outcome comparisons based on case data from Czech district courts, this study offers new empirical insight into how penal orders work in practice. Questions are therefore considered specifically in the context of Czechia.

3. Penal orders in Czechia

A penal order is the most commonly used method of simplified criminal proceedings (diversions) in Czechia.[3] Approximately 50%–60% of all criminal cases are decided by first-instance courts through a penal order.[4] According to the Czech Code of Criminal Procedure, under Section 1(1), the purpose of criminal proceedings is to properly ascertain when a criminal offence occurs and to fairly punish the perpetrators. Considering the fundamental principles of criminal proceedings – particularly the principles of publicity, orality and immediacy – offenders should generally be punished in a main hearing. However, if the factual circumstances are reliably proven by the evidence, a single judge may issue a penal order under the conditions set out in Section 314e of the Code of Criminal Procedure.

This procedure mandates that low-severity crimes with straightforward evidence can be handled through a simplified, "fast-track" process. Under this regime, certain procedural steps are omitted, paperwork is significantly reduced and strict deadlines are imposed. In practice, the penal order "fast-track" approach is mainly applied to cases involving petty theft, traffic offences and other minor offences. Although this procedural economy succeeds in unburdening the courts, it comes at a cost for the defendants.

The essence of a penal order is that the case is not tried in a main hearing, and the court does not decide based on evidence presented before it, but solely on the basis of the case file. A single judge may issue a penal order without a main trial only if the facts of the case are reliably established by the available evidence. A peculiar feature of the penal order is that it is not accompanied by a justification, and a judge may usually impose only certain types of penalties and only within a limited scope. The defendant has the right to file an objection, which directly and automatically annuls the penal order; the case then proceeds to a standard main hearing before a first-instance court. The case remains at the same district court and is decided by the same judge who issued the original penal order.

Therefore, the Czech system of penal orders allows the same single judge who issued the original decision to continue deciding the case. While this approach is administratively efficient, it can raise questions of objective impartiality, as the judge has already expressed a preliminary view on the defendant's guilt and an appropriate sentence. In light of the case law of the European Court of Human Rights and comparative approaches in other jurisdictions, where a different judge

[3] The institution of the penal order was first introduced in the Czech Criminal Procedure Code by Act No. 150/1969 Coll. The deputies of the Federal Assembly then described the penal order as an unlawful institution denying the accused's right to defence and, in repealing that Act and passing Act No. 178/1990 Coll., they simultaneously abolished the penal order by amending the Criminal Procedure Code. Four years later, however, the deputies of the Parliament of the Czech Republic reintroduced the institution by the same name into the Criminal Procedure Code.

[4] Overview of non-standard reports – penal orders, Ministry of Justice of the Czech Republic, CSLAV.

may be assigned at a later stage, this feature of the Czech procedure represents a potentially sensitive aspect of the right to a fair trial that may warrant further attention.

Similarly to the defendants' rights to file an objection, the public prosecutor may challenge the penal order by filing an objection. This dynamic raises important questions about the strategic role of penal orders within the fast-track procedure, particularly since there is no prohibition against *reformationis in peius* and there may be potential consequences for defendants who choose to challenge them. Given this absence, a judge may impose either a lighter or a harsher sentence on the defendant after a penal order is annulled.

The issue of penalties imposed by penal orders has once again become the subject of debate.[5] The possibility to impose an unsuspended prison sentence through a penal order, which existed under the legislation in force since 1994, was abolished as of 1 January 2002. Recently, attention has been drawn to the discussion of a government bill currently under consideration.[6] This proposed amendment would reinstate the possibility of imposing an unsuspended prison sentence through a penal order.[7]

According to the Czech Code of Criminal Procedure, a single judge may issue a penal order if the evidence is sufficient, although there are certain limitations on the sentences that can be imposed. However, the court is not obligated to use this procedure; if there are any doubts, the case proceeds to a full public trial. In general, there should not be major differences between a sentence imposed through a penal order and one issued after a main trial, unless the evidence changes. In practice, however, a penal order can sometimes serve as an informal incentive to accept the punishment without objection – the accused receives a milder sanction, and the court avoids a full public trial. If no objection is filed, the accused is considered to accept the punishment imposed by the penal order. Previous studies (Drápal 2017) have shown that penal orders often result in more lenient sentences.

The Constitutional Court of the Czech Republic has emphasised that a district court must not impose a harsher sentence after the annulment of a penal order as a sort of sanction "for the accused having exercised their right to file an objection" (II. ÚS 213/2000 2002; III. ÚS 39/09 2010). Where the court continues to rely on the

[5] The importance of the penal order is further emphasised by the amendment that came into effect on 1 January 2025, which allows penal orders to be issued in misdemeanour proceedings, which are handled by a single judge. Until the end of 2024, a penal order could only be issued in cases where the maximum statutory penalty did not exceed five years.

[6] In January 2025, the Chamber of Deputies of the Czech Republic discussed an amendment concerning penal orders, which had been reviewed and adopted by the Guarantee Constitutional and Legal Committee. On 17 January 2025, the committee issued a resolution – submitted to the deputies as print 861/1 – that suspended further discussion of the bill.

[7] The explanatory report for the amendment of Section 314e of the Code of Criminal Procedure, introduced by Act No. 265/2001 Coll., stated: "A penal order represents one of the so-called simplified types of proceedings, whose essence lies in the fact that the court does not decide based on evidence presented before it in a main trial but on the basis of the case file containing records of actions carried out by the police and the public prosecutor."

same facts as those in the penal order, it should provide a reasonable explanation for why the newly imposed sentence is more severe.

More recent research (Drápal 2021) has shown that sentences imposed through penal orders tend to be more lenient. Although the sentencing decisions issued after an objection have been empirically analysed, they were not compared with the sentences imposed in the penal orders. Understanding these differences can help clarify an unresolved issue in both legal theory and case law: whether penal orders function as an informal agreement on guilt and punishment.

If the defendant objects, the court may impose a harsher sentence in the main trial, even if the evidence has not significantly changed, as the prohibition against *reformationis in peius* does not apply in these cases. This dynamic can be understood through the "shadow of the trial" theory, which suggests that defendants make rational choices and are more likely to accept a penal order if the sentence is lower than the sentence they anticipate at trial, adjusted for the likelihood of conviction. Understanding this process could shed light on an unresolved issue in both legal theory and jurisprudence: whether a penal order functions as an informal "plea bargain."

In addition to the defendant, the public prosecutor also has the right to file an objection against a penal order. This procedural aspect sets penal orders apart from plea bargaining, where the prosecutor's role in offering a plea deal differs. While plea bargaining is fundamentally a negotiation between the defendant and the prosecution, with the defendant agreeing to plead guilty in exchange for a more lenient sentence, the objection process in penal orders allows the prosecutor to challenge a penal order if they believe the imposed sanction is inadequate.

This dynamic introduces an additional layer of strategic decision-making, where the prosecutor can influence the final outcome by not only issuing the initial charge, but also determining whether the penal order should be upheld or modified. In contrast to plea bargaining, the prosecutor's objection in the penal order process does not involve any negotiation and is solely based on their assessment of the case. This procedural difference means that while both mechanisms involve discretion in sentencing, they operate under distinct rules and are not directly comparable in terms of the balance of power between the defendant and the prosecution.

4. Problems of victims' right to compensation

Recent research highlights growing concerns regarding the position of victims within penal order procedures, particularly with regard to their right to compensation. While penal orders aim to streamline the criminal process, efficiency may come at the cost of victims' procedural and substantive rights. Expanding the

use of penal orders to a wider range of offences raises important questions about whether sufficient safeguards exist for victims, especially in relation to their right to participate in proceedings and to seek redress (Đurđević, Bonačić, Pleić 2021; Saukāne 2023).

From a victims' rights perspective, access to compensation is not merely a procedural technicality, but rather a fundamental element of access to justice. The right to an effective remedy is deeply rooted in legal and philosophical traditions, from early legal codes such as the Code of Hammurabi and Anglo-Saxon law, through the Magna Carta's emphasis on access to justice, to modern international human rights instruments. In particular, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) states that victims should be treated with compassion and respect for their dignity, should have access to justice mechanisms and should receive prompt redress for the harm they have suffered. This framework emphasises that victims are not merely passive observers in criminal proceedings, but rightsholders entitled to restoration, participation and recognition.

These principles closely align with restorative justice theory, which views crime primarily as harm done to individuals and communities, rather than solely as a violation of state law (Zehr 2005). From this perspective, justice should focus on repairing harm, restoring dignity and empowering victims. Research shows that when victims are able to actively participate in the justice process, express their experiences and pursue redress, they experience greater validation, a stronger sense of control and better psychological outcomes (Lloyd, Borrill 2019). Compensation therefore plays a symbolic and psychological role as well as a financial one, signalling acknowledgement of harm and contributing to the victim's recovery and empowerment.

In this context, the possibility for victims to be heard again as witnesses in a main hearing should not be viewed solely as an evidentiary formality, but rather as a concrete manifestation of access to justice. Participating in the main hearing allows victims to present their experience in their own words, to have their harm publicly recognised and to directly engage with the criminal process. Such participation is repeatedly identified in the victimology and restorative justice literature as a crucial factor in restoring dignity, empowerment and procedural fairness (Umbreit 2002).

Within this theoretical framework, penal order procedures appear problematic. As a summary procedure, the penal order is designed to adjudicate cases without a full main hearing. In the Czech context, this creates tension with victims' rights. Victims must assert their claim for compensation at the beginning of the main hearing, yet courts are not obliged to inform them in advance that a penal order is being considered. In practice, a penal order may be issued without the victim's knowledge or participation, effectively eliminating their opportunity to file a claim within the criminal proceedings. This undermines both their procedural rights and their broader right to access justice.

Such exclusion stands in direct contrast to the principles of both restorative justice and access to justice. If access to justice is understood as the ability to claim rights, participate meaningfully and obtain effective remedies, as articulated by the United Nations Development Programme, then a procedure that systematically excludes victims from asserting their claims cannot be considered fully just. It risks reinforcing what trauma-informed scholars describe as secondary victimisation: a process in which institutional practices intensify, rather than alleviate, the harm suffered by victims (Herman 2015).

5. Sample and variables

The empirical dataset consisted of 623 criminal cases decided between 2010 and 2018 in which a penal order was issued and subsequently annulled following an objection. The cases were obtained from 66 of the 86 Czech district courts, representing approximately 76.7% of all first-instance courts in the country. No data were available from 15 courts, and an additional 5 courts failed to provide the follow-up decision that was issued after the penal order was annulled. The most common reason for not providing this data was the high administrative fee required to anonymise court decisions.

The initial population consisted of all cases between 2010 and 2018 in which a penal order was issued and later annulled by an objection. From this group, a random sample of 2,000 cases was generated. From this pool, a further random subsample of 1,000 cases was selected, and formal requests under the Freedom of Information Act were submitted to the respective courts for both the annulled penal order and the subsequent judicial decision following the main hearing. Due to missing or incomplete responses, the final analysable sample consisted of 623 complete case pairs (penal order + subsequent decision).

Each case was manually coded using a structured coding sheet containing predefined variables and fixed categories. These variables were organised into three main groups: (1) identifying information, (2) offence characteristics and procedural history and (3) sentencing outcomes, including both primary and secondary sanctions and variables related to the adhesion procedure and compensation claims. To minimise the risk of individual bias or coding errors, all coding decisions were reviewed at least twice at different stages of data collection and analysis.

However, the chosen method of recording data is inherently limited in that the coding was carried out by a single researcher, which may have increased the risk of subjective influence. This risk is further compounded by the author's professional background: the author is a PhD candidate at the Faculty of Law of Charles University, specialising in criminal procedure and compensation for victims of crime, who also currently works as a trainee lawyer, participating in criminal

cases both as defence counsel and as a legal representative of victims. Although this background provides an informed understanding of criminal procedure, it may also influence the author's perspective. Nevertheless, the study was conducted strictly in an academic capacity and independently.

The sample consists primarily of low-to-medium severity offences typically addressed through the penal order procedure, including property offences (e.g. theft, fraud or damage to property), violent offences (e.g. bodily harm or disorderly conduct), traffic-related offences and other less serious crimes. In terms of the specific offences represented, the most frequent ones were Negligence of Mandatory Support (section 196), Menace under the Influence of an Addictive Substance section 274), Theft (section 205) and Obstruction of Justice and Obstruction of a Sentence of Banishment (section 337), followed by other common property and violent offences such as Fraud (§209), Bodily Harm (sections 146–148) and Disorderly Conduct (section 358). The dataset also contains smaller proportions of offences such as Damage to Property (section 228), Breaking and Entering (section 178) and selected sexual offences (section 241). These offences and their proportions correspond with the use of penal orders in the practice of the Czech criminal justice system.

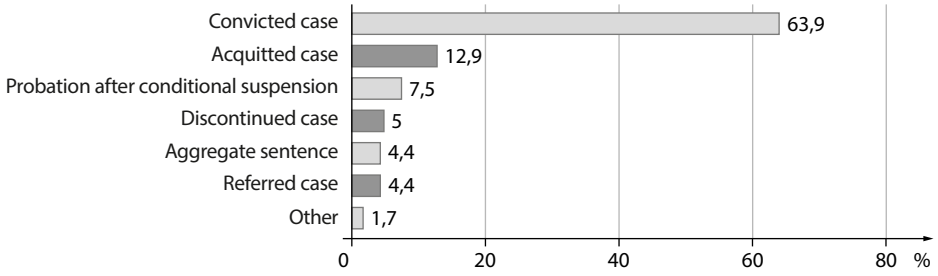
6. Results

Drawing upon the research questions posed, this section presents the empirical findings. Firstly, I examine how filing an objection against a penal order influences the outcome of the criminal proceedings – specifically, whether the defendant is found guilty or acquitted or the case is otherwise resolved. Secondly, I compare the sentences imposed in penal orders and in the subsequent judgments rendered after the objection. I analyse the types of sentences (e.g. suspended sentences, fines, unsuspended imprisonment and community service) and their severity or duration, paying particular attention to whether the entity filing the objection – the defendant or the public prosecutor – impacts the sentences. This aims to ascertain whether filing an objection leads to systematically harsher sentences, potentially indicating a "trial penalty" as seen in plea bargaining. Finally, I address the issue of compensation for victims.

The distribution of outcomes in criminal proceedings, as depicted in Figure 1, provides insight into how cases are resolved following objections to penal orders. Most of the cases (63.9%) resulted in a conviction, reinforcing the idea that most objections do not ultimately overturn the original finding of guilt. However, a notable portion of cases did not lead to a conviction: 12.9% ended in acquittal, and an additional 7.5% were conditionally discontinued, often because the offender was cooperative or the offence minor. Discontinued proceedings (5%) and transfers to other authorities (4.4%) made up the remainder.

This distribution suggests that while the dominant trend was towards confirming guilt, a meaningful share of the objections did result in more favourable outcomes for defendants. In particular, the combined 25% of cases which did not end in a conviction indicates that objecting to a penal order can, in some instances, lead to acquittal or alternative resolutions – supporting the idea that exercising procedural rights does not inherently lead to harsher penalties. Instead, it may offer defendants a chance for re-evaluation, and in some cases, even a more lenient or just outcome.

Figure 1. Percentage distribution of case outcomes



Source: Own elaboration.

Figure 1 shows on x-axis different types of case outcomes (e.g. conviction, acquittal, conditional discontinuation, etc.), while the y-axis represents the percentage of cases. The graph illustrates that convictions make up the majority of outcomes, with smaller proportions for acquittals and other resolutions. It shows that although most objections lead to conviction, a significant share results in alternative outcomes.

Understanding the types of punishment imposed before and after objections to penal orders is essential for evaluating the existence and magnitude of a trial penalty. If objecting to a penal order systematically results in more severe or qualitatively different sanctions, this may indicate that defendants are discouraged from asserting their procedural rights. By comparing the distribution and severity of punishments across both procedures, we can assess whether penal orders operate as a form of coercive sentencing incentive.

Figure 2. Primary punishments distributions

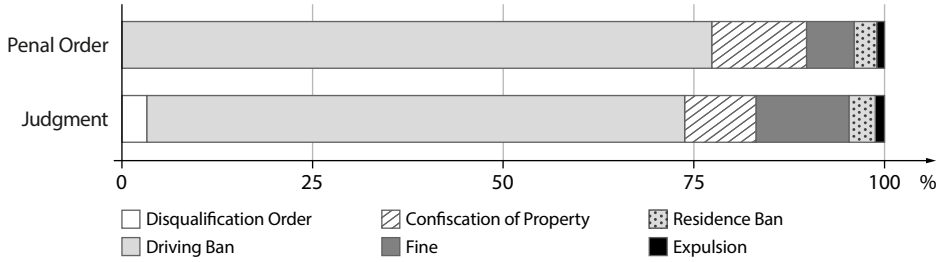
Source: Own elaboration.

Figure 2 displays types of primary punishments (such as suspended sentences, fines, community service, and imprisonment), the y-axis shows their percentage distribution. The graph compares two categories: penal orders and judgments after objection. It demonstrates that penal orders are dominated by suspended sentences, while judgments show a more varied distribution including more severe penalties.

The distribution of primary punishments highlights notable differences between the penal orders and the subsequent judgments, providing further context for understanding the effects of objection. Penal orders overwhelmingly relied on suspended sentences (86.4%), with fines (7.5%) and community service (4.3%) playing a relatively minor role. Other forms of punishment occurred in less than 2% of these cases. Judgments, on the other hand, exhibited a more diverse sentencing profile: while suspended sentences still dominated (73.7%), there were significantly more fines, unsuspended prison sentences and community service orders (roughly 6%–10% each).

This variation suggests that objecting to a penal order and proceeding to trial may expose defendants to a broader range of sentencing outcomes, including more severe penalties such as unsuspended prison terms. While penal orders appear to serve as a streamlined mechanism for handling lower-severity offences – often resulting in lenient, suspended sentences – the judgments were more likely to reflect the complexities and seriousness of individual cases. Importantly, despite this broader range, suspended sentences remained the most common outcome across both mechanisms, indicating a general judicial tendency to prioritise conditional sanctions over immediate incarceration or financial penalties. Nonetheless, the shift in punishment types following an objection suggests that while asserting one's procedural rights does not always lead to harsher sentences, it may introduce greater variability and the potential for more serious outcomes.

Figure 3. Secondary punishments distribution



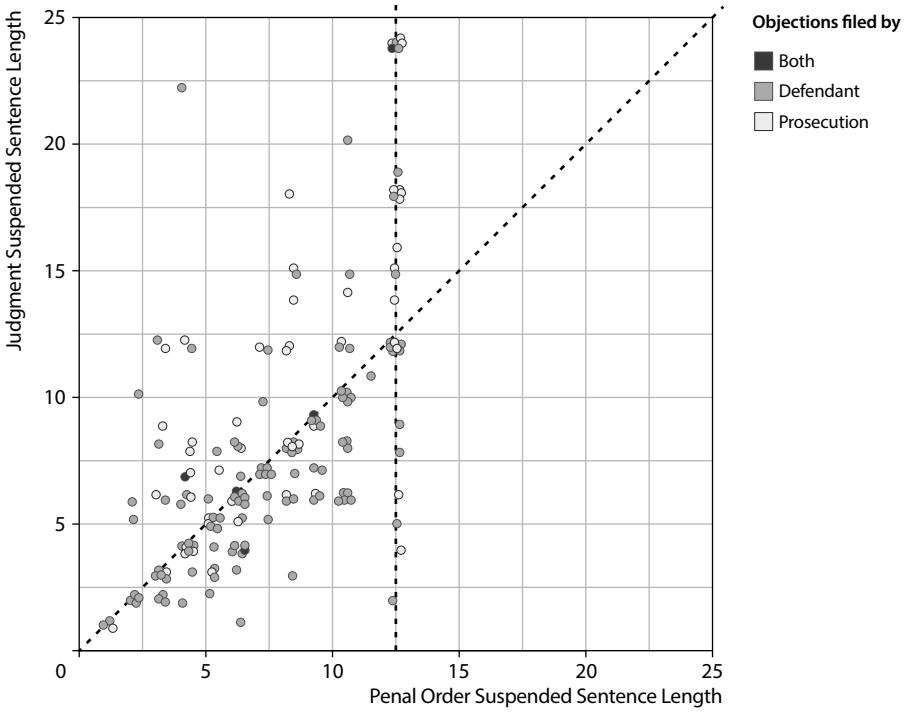
Source: Own elaboration.

Figure 3 lists different types of secondary punishments (e.g. driving bans, fines, confiscation), while the y-axis indicates their proportion. The graph compares how frequently these punishments occur in penal orders versus judgments. It shows that driving bans are the most common in both, but other sanctions vary more in judgments, reflecting broader judicial discretion.

The distribution of secondary punishments reveals significant differences between penal orders and the judgments subsequent to objections. Driving bans constituted the predominant secondary punishment in both procedural outcomes, accounting for approximately 70% of all secondary sanctions. However, the remaining punishment types showed varying patterns of application. Fines represented the second most common secondary punishment (12.1% in judgments), followed by confiscation of property (9.6%). Less frequently imposed ones were disqualification orders and residence bans (3.3% each), with expulsion measures being the least common (1.3%).

These proportional differences highlight how judicial discretion may shift when cases transition from the simplified penal order procedure to a full public trial, potentially reflecting more nuanced considerations of individual circumstances and the impact of defendants directly participating in the judicial process. This pattern suggests that while the core punitive approach remains consistent across both procedural tracks, the distribution of alternative sanctions demonstrates meaningful variation in judicial decision-making. Having examined the distribution of punishment types, we now turn to an analysis of their magnitude – specifically, the length or severity of the sentences that were imposed.

Figure 4. Suspended sentence lengths



Source: Own elaboration.

Figure 4 represents the length of suspended sentences in penal orders on x-axis, while the y-axis shows the length after objection (in judgments). Each point corresponds to a case, and the diagonal reference line indicates equal sentence lengths before and after objection. The graph reveals that sentences tend to increase more when the prosecutor files the objection, while changes are minimal when the defendant objects.

The scatter plot in Figure 4 illustrates how suspended sentence lengths differed depending on who filed the objection, offering insights into whether defendants who object to penal orders receive different outcomes. The analysis revealed that the overall mean suspended sentence was 0.89 months longer for cases that proceeded to trial, suggesting that, on average, judgments result in slightly longer suspended sentences than the original penal orders. This difference may point to the existence of a small trial penalty, where objecting leads to harsher outcomes.

The observations in the plot are colour-coded according to the party who filed the objection, and the jittered points show that most cases in the "Prosecution" group are clustered above the 45-degree reference line, indicating longer sentences following an objection. Specifically, when the public prosecutor objected, the average sentence increased from 8.10 to 10.51 months. In contrast, when the defendant objected, the change was minimal – from 7.35 to 7.59 months – implying that courts are relatively consistent or only slightly more punitive towards defendants who challenge penal orders. The dark green vertical line at the 12-month mark further emphasises how most outcomes remain within typical sentencing boundaries. These findings suggest that while prosecutorial objections are associated with noticeably higher penalties, defendants who assert their procedural rights do not face substantially harsher sentences.

The analysis also shows that defendants who filed objections tended to receive marginally reduced penalties for both probation periods and driving bans. For the former, defendants saw a mean reduction of about 0.44 months (-1.98%), whereas for the latter they experienced a reduction of about 1.21 months (-5.45%). In contrast, prosecutors' objections were associated with slight increases: a 1.42-month increase (5.32%) for probation periods and a 0.78-month increase (2.77%) for driving bans.

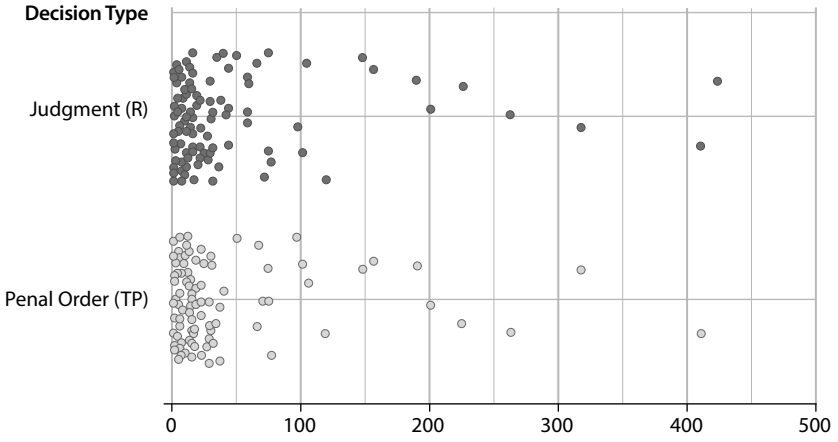
These findings suggest that when defendants assert their procedural rights they might be slightly favoured by the system, compared to when objections come from the prosecution. Overall, while the differences were modest, they provide valuable insight into how the identity of the objecting party can influence sentencing outcomes in penal orders and subsequent judgments.

6.1. Victim compensation

The analysis of compensation for victims in penal orders reveals distinct patterns across different types of offences. Theft (section 205) and Fraud (section 209)

emerged as the most frequent offences where compensation was awarded by penal order. This was followed by cases of Disorderly Conduct (section 358) and Damage to Property (section 228). Bodily Harm cases (section 146) and cases involving Harm to Health out of Excusable Motives (section 147) also comprised a significant part of the compensation awards. The data suggests that property-related offences (Theft, Fraud and Damage to Property) dominate the compensation landscape in penal orders, which aligns with the nature of these offences, where financial losses are more readily quantifiable.

Figure 5. Compensation amounts



Source: Own elaboration.

Figure 5 distinguishes between penal orders and judgments, while the y-axis represents the amount of compensation awarded (in CZK). The graph shows the distribution and spread of compensation amounts for both types of decisions. It illustrates that judgments generally involve higher and more variable compensation amounts compared to penal orders.

Figure 5 shows the distribution of compensation amounts for both decision types, making it easy to compare the typical awards and the spread of values in each category. The analysis of victim compensation in criminal proceedings reveals clear patterns in both the amounts awarded and the outcomes of compensation claims. With penal orders, the victim's claim is most often fully granted, with the majority of cases leading to the entire requested compensation being awarded. In a smaller number of penal order cases, only part of the claim was recognised, while in some instances victims were directed to pursue their claims through civil proceedings rather than within the criminal process.

Judgments, on the other hand, displayed a broader range of outcomes. While some judgments fully granted compensation, others only partially recognised the victim's claim, and a notable portion referred the victim to civil proceedings. This

suggests that penal orders are typically used in more straightforward cases where the facts and entitlement to compensation are clear, allowing for a quicker and more complete resolution for victims. Judgments are more likely to be employed in complex or disputed cases, where the outcome may be less certain or only partially favourable to the victim.

When comparing the amounts awarded, penal orders were associated with slightly lower median and mean compensation than judgments. The median compensation for penal orders was CZK 13,000, while for judgments it was CZK 14,029. The average amount awarded in judgments was also higher, at CZK 52,809, compared to CZK 36,103 for penal orders. This indicates that while penal orders are effective at efficiently resolving less complex claims and providing full compensation in most cases, judgments play a crucial role in addressing higher-value or more complicated claims.

The victims received compensation in judgments approximately 10% more often than in penal orders. Specifically, compensation was awarded in 118 cases with judgments compared to 107 with penal orders, meaning that judgments accounted for about 52.4% of all compensated cases, while penal orders accounted for about 47.6%. This highlights the fact that judgments were slightly more likely to result in compensation for victims than penal orders.

The opportunity to testify in open court may have implications that extend beyond the symbolic or therapeutic dimension. By fully articulating the extent, context and consequences of the harm suffered, victims may influence the court's assessment of the damages, including the seriousness of the offence and the scope of compensation. In this sense, victim participation in the main hearing can also be understood as a factor that may contribute to higher compensation awards in judgments when compared to penal orders, where such interaction is largely absent. The data presented in this study, showing higher mean and median compensation in judgments, may therefore be partly explained by the greater visibility of victims and their harm within the adversarial process.

These findings illustrate a fundamental paradox. On the one hand, penal orders can be efficient instruments for compensation in straightforward cases. On the other hand, their procedural design may exclude victims altogether, depriving them of agency, voice and legal remedy. From a normative perspective grounded in victims' rights, restorative justice and access to justice theory, this tension raises serious concerns. A justice system that seeks legitimacy, equality and fairness cannot prioritise procedural efficiency over the fundamental right of victims to recognition, participation and redress. Consequently, restricting cases to penal order procedures not only reduces opportunities for victims' expressive and participatory rights, but may also indirectly limit the amount of compensation they are able to obtain. From the perspective of access to justice, this further reinforces the argument that summary procedures, while efficient, require additional safeguards to ensure that victims are not systematically disadvantaged in both procedural and material terms.

Penal orders will remain a central feature of contemporary criminal procedures, but stronger safeguards are necessary. These may include mandatory notification of victims when a penal order is being considered, an extended timeframe for submitting compensation claims or alternative mechanisms through which victims can exercise their rights even in summary procedures. Without such reforms, penal orders risk contributing not only to procedural inequality, but also to further psychological and moral harm to those already victimised.

7. Discussion

Firstly, filing an objection alters the nature of the outcome and broadens the range of potential sentences. While penal orders were predominantly associated with suspended sentences (86.4%), filing an objection and proceeding to a full public trial led to a wider spectrum of sanctions. Notably, there was a significantly higher proportion of unsuspended prison sentences, appearing in roughly 10% of cases following an objection. This finding supports theoretical concerns that defendants who choose to challenge a penal order expose themselves to a tangible risk of a more severe punishment.

However, the dynamic is not uniformly punitive; objections frequently result in more favourable outcomes. Despite the risk of a harsher sentence, a substantial portion of cases conclude differently than with a conviction after an objection is filed. As much as 25% of all objections led to an outcome other than conviction, with 12.9% of defendants being fully acquitted and another 7.5% of cases being conditionally discontinued.

These data represent a significant contribution to the theoretical understanding of the "shadow of the trial." While theory suggests that defendants might rationally accept the potentially milder sanction of a penal order to avoid the risk and severity of a trial sentence, the fact that a considerable number of objections resulted in acquittal or discontinuation complicates a simple model of rational choice. It suggests that defendants (or their counsel) may perceive a sufficient chance of a favourable outcome, or that factors beyond just predicting the sentence influence the process. Our findings thus expand on the understanding of defendant decision-making dynamics in systems that make use of simplified procedures.

Thirdly, the analysis reveals that the "trial penalty" is contingent on who files the objection. Our findings demonstrate that the pattern of sentencing after an objection differs based on the objecting party. While objections filed by the public prosecutor were demonstrably correlated with stricter sentences – longer suspended sentences in particular (an average increase of 2.41 months, from 8.10 to 10.51 months) – objections filed by the defendant did not result in harsher punishment overall. The average increase in the length of suspended sentences for

defendant-filed objections was minimal (only 0.24 months, from 7.35 to 7.59 months), and for some secondary penalties such as driving bans and probation periods, there was even a slight average reduction compared to penal orders.

This finding directly addresses a key research question and contributes to the theoretical debate surrounding the "trial penalty." It indicates that in the Czech penal order system, while the risk of a more severe sentence exists (including imprisonment), courts do not systematically penalise defendants merely for exercising their right to object, which aligns with the jurisprudence of the Supreme Court and the Constitutional Court. A stricter outcome after an objection seems more linked to the procedural activity of the public prosecutor, possibly reflecting a different strategic assessment of the case or an effort to achieve a more severe punishment.

Most importantly, this study does not provide evidence of a widespread "trial penalty" affecting defendants who exercise their right to object to a penal order. Although the risk of a more severe sanction, including unsuspended imprisonment, cannot be entirely excluded in individual cases, the data clearly show that the defendants were not, on average, punished significantly more harshly for filing an objection. On the contrary, approximately one quarter of all objections resulted in outcomes other than conviction, including acquittals and conditional discontinuations.

Any observable increase in sentence severity is primarily linked to the objections filed by the public prosecutor, not by the defendants themselves. This finding directly challenges assumptions drawn from the plea bargaining literature and suggests that, in the Czech context, the penal order procedure does not function as a systematic coercive instrument discouraging the exercise of procedural rights.

Finally, the study highlights a significant issue concerning the rights of victims within the penal order procedure. The analysis of the results shows that penal orders most frequently addressed compensation in cases of property crimes, such as theft, fraud or damage to property, where financial losses are more readily quantifiable. The findings of this study indicate that the limited involvement of victims in penal order proceedings may negatively affect not only their procedural rights, but also the amount of compensation they are awarded. Unlike in main hearings, victims in penal order proceedings lack the opportunity to be heard as witnesses and to directly communicate the impact of the offence. From the perspective of access to justice, this represents a significant limitation, as being heard in court is both a symbolic and practical component of recognition and redress. This diminished participation may partly explain why compensation awarded through judgments tended to be higher than that granted through penal orders.

The ability of victims to testify in a main hearing should be understood as a key expression of access to justice. It enables courts to gain a fuller understanding of the harm caused and may directly influence the assessment of compensation. In contrast, the summary nature of penal orders prioritises efficiency over participation, which can result in a more superficial evaluation of the victim's claim. While this procedural simplification benefits judicial economy, it risks placing victims at a structural disadvantage when seeking adequate redress.

These findings suggest that if penal orders are to remain widely used, additional safeguards for victims' rights should be considered. This may include requiring victims to be informed before a penal order is issued, expanding opportunities for written victim impact statements, or strengthening judicial scrutiny of compensation claims in summary proceedings. Such reforms could help balance efficiency with fairness and ensure that victims' access to justice is not compromised by procedural shortcuts.

Conclusion

This study provides the first systematic empirical analysis of penal orders and subsequent objections in Czechia. Based on a dataset of 623 cases from 66 district courts between 2010 and 2018, the findings demonstrate that, while filing an objection to a penal order may broaden the range of potential sentencing outcomes, it does not result in a systemic trial penalty for defendants. Approximately 25% of cases ended in acquittal or discontinuation following an objection, and only a marginal average increase in sentence severity was observed – primarily in cases where the objection is filed by the prosecution rather than the defendant.

The results demonstrate that, although objections broaden the range of potential sentencing outcomes, they do not produce a systemic trial penalty for defendants. Instead, sentencing patterns reveal a more nuanced dynamic: while some defendants faced harsher punishment – including unsuspended imprisonment – approximately one quarter of the objections resulted in acquittal or discontinuation of the case. Any observable increase in sanction severity was driven primarily by objections filed by public prosecutors, suggesting that higher sentences reflect prosecutorial strategy rather than judicial retaliation against defendants who exercise their procedural rights.

These results have broader implications for sentencing discretion. Penal orders shift part of the sentencing process from full judicial reasoning to a streamlined, file-based assessment, which may limit opportunities for individualised judicial evaluation. However, the absence of a consistent punitive response to defendant-filed objections indicates that courts retain – and exercise – discretion in a manner that does not penalise procedural participation. This suggests that sentencing discretion remains meaningfully preserved despite the procedural simplification inherent in penal orders.

The findings also contribute to the trial penalty debate. Much of the literature, particularly from common-law jurisdictions, portrays trial penalties as a structural feature of negotiated justice systems. By contrast, the Czech penal order system shows a more differentiated pattern: while harsher outcomes are possible, they are neither systematic nor automatic. This challenges assumptions that fast-track mechanisms inherently coerce defendants into accepting summary decisions. Instead,

the data point to a hybrid dynamic in which some defendants rationally anticipate favourable outcomes at trial, consistent with the more complex decision-making models emphasised in recent critiques of the "shadow of the trial" theory.

Finally, the study carries significant implications for fast-track criminal procedures in continental Europe. Many European jurisdictions rely increasingly on summary mechanisms to reduce caseload pressures and accelerate adjudication. The Czech case shows that such procedures can operate without generating systemic coercion – yet they may create other structural imbalances, particularly concerning victims' rights and compensation. The limited participation of victims and the lower frequency of compensation awards in penal order proceedings compared to full trials highlight an asymmetry that is not merely procedural but substantive. As fast-track procedures continue to expand across Europe, ensuring fairness for both defendants and victims will be essential to maintaining the legitimacy of simplified justice.

Overall, this study demonstrates that penal orders occupy an ambivalent position within modern criminal justice: they enhance efficiency and reduce delay, yet they raise important questions about discretion, participation and equality. By empirically testing assumptions derived from the plea bargaining scholarship within a civil-law framework, the study contributes to comparative debates on summary justice and highlights several avenues for further research, including international studies of fast-track sentencing and qualitative analyses of decision-making among judges, prosecutors and defence lawyers.

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Making sense of statutory penalty ranges: Proportionality and penalty value in Sweden

Zrozumienie ustawowego wymiaru kar: proporcjonalność i wartość kary w Szwecji

Abstract: This article examines what it can mean for a sentencing system to be built on proportionality, using the Swedish notion of penalty value (straffvärde) as a case study. Penalty value translates the seriousness of an offence into the severity of the penalty, and it structures both statutory scale-setting and judicial sentencing. The analysis contrasts a desert-based account centred on blameworthiness with instrumental accounts in which seriousness is calibrated to preventive or expressive aims. Set against a period of rapid legislative change – involving reforms on organised crime, sexual offences and honour-related crimes – it illustrates how these rationalities interact in the construction of statutory penalty ranges. The article concludes by developing two ideal types and a third, less ideal-typical model to make systematic sense of this interaction. Methodologically, this reconstruction engages criminal policy from within the system's normative structure.

Keywords: penalty value, penal value, proportionality, just deserts, sentencing, sentencing rationalities, Swedish criminal law, statutory penalties, preventive turn, punitive turn

Abstrakt: Niniejszy artykuł analizuje znaczenie systemu wymiaru kar opartego na proporcjonalności i odwołuje się do szwedzkiej koncepcji wartości kary (straffvärde) jako studium przypadku. Wartość kary przekłada wagę przestępstwa na surowość kary i kształtuje zarówno ustalanie ustawowego wymiaru, jak i orzekanie wymiaru kary przez sąd. Analiza zestawia ujęcie oparte na zasłudze, skoncentrowane na stopniu winy sprawcy, z ujęciami instrumentalnymi, w których waga czynu jest określana w zależności od celów prewencyjnych lub symbolicznych. Na tle dynamicznych zmian legislacyjnych – obejmujących reformy dotyczące przestępczości zorganizowanej, przestępstw seksualnych oraz przestępstw związanych z tzw. „honorowymi" motywami – artykuł pokazuje, w jaki sposób te różne racjonalności oddziałują na siebie przy konstruowaniu ustawowych wymiarów kar. Artykuł kończy się opracowaniem dwóch typów idealnych oraz trzeciego, mniej idealnego, typu, które mają

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na celu systematyczne wyjaśnienie tych interakcji. Pod względem metodologicznym polityka karna analizowana jest z wewnętrznej perspektywy normatywnej struktury systemu prawnego.

Słowa kluczowe: wartość kary, wartość penalna, proporcjonalność, zasada zasłużonej kary, wymiar kary, racjonalność wymiaru kary, szwedzkie prawo karne, sankcje ustawowe, zwrot ku prewencji, zwrot ku surowszemu karaniu

Introduction

This text is concerned with what it can mean for a sentencing system to be built on proportionality. It approaches that question through the concept of penalty value (*straffvärde*) in Swedish law, highlighting its historical development, ideological underpinnings and contemporary application. The penalty value is a concern for both the legislature and the courts, and it is described as an expression of proportionality between a crime and its punishment (Prop. 1987/88:120: 77 f.). Penalty value serves to translate the seriousness of an offence into either a number of day-fines or a custodial term of a certain length. The ranges set out in statutes – the prescribed minima and maxima – reflect the "abstract penalty value," whereas the sentence in an individual case, determined by the court within these ranges, is based on the "concrete penalty value." Because the function of penalty value is to ensure that the system and its application adhere to proportionality, it connects to and illustrates more general, principled questions that reach beyond Swedish law: What does it mean for a punishment to be proportionate? What can it mean for a sentencing system to be built on proportionality?

At the outset, it is important to note that this is a work of legal scholarship rather than traditional empirical inquiry of the kind typical in criminology. The primary object of study is not factual questions (such as the consequences of legal norms or the actual drivers behind them), but the legal norms themselves and the system they are presumed to form – in other words, the investigation operates in the realm of the "ought" rather than the "is" (Kelsen 1959–1960). The aim is to bring order to, or reconstruct, this system so that it appears coherent and rational (MacCormick 1978: 107 ff.; Dworkin 2000: 239 ff.). Because the object of study is norms, the inquiry engages with matters that are not empirically falsifiable, such as how blameworthy a particular offence should be regarded, or what level of severity a particular punishment should reasonably have. Put simply: in law we ask whether a norm is valid and how it should be justified, not whether it is true or false (von Wright 1963). Readers are, of course, free to agree or disagree; these conclusions ultimately rest on argumentation and its perceived force. That said, the goal is to present the legal system in a way that allows room for different interpretations and different normative stances.

The text begins by outlining – somewhat schematically – a historical evolution of sentencing rationalities, situating penalty value within broader paradigmatic

shifts. It then turns to proportionality in sentencing and criminal law, setting out the basic assumptions on which the analysis rests. Firstly, proportionality in this context is treated as a backward-looking criterion, concerned with the relation between the seriousness of an offence committed in the past and the severity of a penalty subsequently imposed. Secondly, proportionality is approached as a relative concept: what counts as proportionate is established through comparisons between offences and their corresponding penalties. The discussion then considers the central notion of the seriousness of an offence, and the grounds on which it should be assessed. In the classic – and probably intuitive – understanding, seriousness concerns the blameworthiness of the criminalised act: the determinant is desert, that is, the degree of blame or censure the act deserves. However, when studying the legal order, it can be argued that the seriousness of offences can also, to some extent, be assessed in more instrumental terms. Rather than desert, the determinant then becomes need – what is required to realise certain aims – at the cost of bringing the desert-based relative ordering out of alignment.

Next, the discussion examines the Swedish framework, focussing on different prescribed penalties (abstract penalty values) in relation to blameworthiness (retrospective) and instrumental aims (prospective) such as general prevention and expressive messaging. The analysis is situated in a period of markedly accelerated reform, in which statutory penalties are being raised across several areas. Recent reforms – e.g. higher statutory penalties for organised crime, sexual offences and honour-based crimes – can arguably be read as indicating that seriousness (penalty value) may rest on both desert-based and instrumentality-based reasoning.

Finally, the concluding section returns to the organising question of how a proportionality-based sentencing system is to be understood. It does so by setting out two ideal-typical sentencing rationalities and, against that background, proposing a third model that is less ideal-typical yet still preserves a systematic account of how offences are ranked and penal severity is distributed. The point of insisting on a systematic account is methodological. It makes it possible to engage with the legislature's own terms and to scrutinise criminal policy from within the normative structure, rather than merely concluding that the law is irrational or that particular penalty ranges conflict with abstract principles of justice. In a system-based approach, the central question becomes what grounds the assessment of seriousness should use in different contexts: a backward-looking assessment of blameworthiness or forward-looking considerations such as crime prevention or other policy aims. Once those grounds are made explicit, a further question arises: whether they are legitimate. A related, important question – though one which is not pursued in this article – is whether there is empirical support for the forward-looking assumptions that are allowed to shape the seriousness of offences and penalties.

1. Enduring tensions in sentencing

1.1. Retrospective and prospective rationalities in sentencing

At first glance, if one has not reflected much on these matters, the development of the rules governing sentencing within criminal law may appear akin to that of the natural sciences. One may be inclined to imagine this as a linear, progressive process: a sort of technical progression, an ongoing modernisation in which new breakthroughs are made, suggesting movement towards ever greater perfection. Such a technocratic view of the state of affairs, however, can be misleading. In fact, there is not much new under the sun when it comes to determining punishments; the scope for meaningful advancement is limited. The ideological foundations – and the inherent tensions between competing interests – emerged long ago. A closer examination reveals a cyclical pattern rather than a linear one: past fashions inevitably resurface, and what once seemed modern eventually becomes outdated.

In reflecting on the justification of punishment – why and how we punish – two intuitively competing ideas tend to recur. One ties punishment primarily to the wrong that was committed, the other to the beneficial effects that punishment is hoped to produce. Traditionally, this contrast has been presented as one between retributive and consequentialist theories of punishment (see e.g. Hart 1968; Lacey 1994). One way of characterising this contrast is as a distinction between retrospective and prospective approaches. The retrospective approach emphasizes the relationship between punishment and the criminal act committed in the past. In this sense, punishment is viewed as an almost logical consequence of the crime and should therefore reflect the seriousness of the offence (e.g. Kant 1978: 331 ff.). This involves a general principle of justice: the punishment should fit the crime. By contrast, the prospective rationality focusses more on the purpose of the penal response and what it is expected to achieve in future. According to this view, the intervention is motivated and justified by a particular goal – preventing crime – and this goal should influence both the severity and the form of the punishment (e.g. Bentham 1970: 11 ff.). Naturally, these two positions may come into conflict. What is expedient is not always just, and vice versa. At the same time, it is difficult to adopt only one position and entirely disregard the other; each corresponds to distinct expectations of punishment, both appearing equally necessary and reasonable.

1.2. Three phases in the evolution of sentencing

Over the past two centuries, Western legal thought on how punishment ought to be determined can, in very broad strokes, be divided into three phases. A familiar way of presenting this development is to describe it as a pendulum moving

between more retrospective and more prospective modes of justification. As scholars have pointed out, however, pendulum narratives risk becoming misleading when they are treated as sociological explanations of penal change, purporting to show why criminal justice policy swings from one pole to another (Goodman, Page, Phelps 2017). The present account does not attempt such an explanation. Its purpose is only to provide a simplified intellectual backdrop – an ideal-typical sketch of how different justificatory frameworks have been emphasised at different moments in legal thought. On that basis, three broad phases can be distinguished.

The first of these phases is associated with the intellectual climate of the Enlightenment and the long 19th century that followed. It is to this period that many of the concepts structuring modern law can be traced, such as constitutional rights and liberties and the distinction between public and private law. In continental Europe, modern criminal law took shape, with core components such as the principles of legality and culpability and the idea of proportionality between crime and punishment (see e.g. Feuerbach 1801; Binding 1872; Beccaria 1986). Conceptually, the phase was marked by a predominantly retrospective, act-centred conception of justice. In later accounts, this period has sometimes been collectively referred to as the "classical school of criminal law" (e.g. Wetzell 2022: 43).

Around the turn of the 20th century and in the years that followed, these ideas were challenged by an alternate paradigm. The then-prevailing belief in science, optimism about progress and social engineering aimed to treat criminality as any other social problem. As a result, special-preventive ideas came to the forefront, representing the sort of prospective thinking mentioned above. Society's responses should serve the aims of public protection and rehabilitation, and punishments should be tailored to the offender's dangerousness and potential for reform (e.g. von Liszt 1892). Conceptually, this marked a shift in emphasis from the criminal act to the offender, from what had been done to who was thought to have done it. Concepts such as moral culpability and criminal punishment were to some extent seen as outdated. In its most extreme form, this thinking was based on a deterministic view of human behaviour that wholly rejected the idea of individual responsibility (Lombroso 1876; Ferri 1896). Although special-preventive ideas in sentencing largely persisted, it is worth noting that confidence in its transformative potential was notably tempered in the period following World War II.

In the second half of the 20th century, special-preventive ideas increasingly came under scrutiny in debates that invoked both empirical and normative concerns. The special-preventive approach to sentencing was often portrayed as having failed to deliver on its promise to "treat away" crime (e.g. Martinson 1974; Wilson 1975; Brody 1976), and basing punishment on the offender's personal characteristics was criticised as fundamentally unjust and unpredictable. Attention once again turned to the offence itself, rather than to the individual, and punishment was to be handed down without regard to various preventive considerations in the individual case – equal crimes should result in equal punishments. One buzzword during this transitional period was "just deserts" (e.g. von Hirsch 1976;

Singer 1979). Part of the theoretical framework underpinning these reforms was the distinction between what might be called the "why" and the "how" of punishment. Punishment could be justified (why punish) by reference to general preventive aims, but the distribution of punishment (how to punish) should be dictated by principles of justice, fairness and backward-looking proportionality (see e.g. Hart 1959–1960: 8 ff.; Roxin 1973: 5 ff.). In Sweden and Scandinavia, this line of reasoning gained considerable influence and was sometimes – at least among professionals – referred to as "neoclassical," representing a kind of return to the principles of the classical legal school (e.g. Heckscher 1980; Lahti 2000). This way of thinking also found tangible expression in legislation – through a major reform of the sentencing rules that entered into force in 1989 (Prop. 1987/88:120).

It should be emphasised that both "pendulum swings" – the special-preventive and the "neoclassical" – were primarily changes in theory and legal thought rather than in sentencing practice. There was an aspiration to move in a certain direction, yet the actual impact remained rather modest. Despite the ideological superstructure shifting back and forth over the course of a century, sentencing practice in Sweden, for the most part, appears to have continued to be guided by the same backward-looking, act-orientated conceptions of justice that had been associated with the era of the classical school of criminal law (SOU 1986:14: 427; Prop. 1987/88:120: 38). What the "neoclassical" turn primarily brought was greater transparency and predictability – which, of course, are not insignificant matters.

2. The notion of penalty value in Swedish law

2.1. A juridification of sentencing

Before the aforementioned reform in 1989, the statutory provision governing sentencing was comparatively sparse, reading as follows:[1]

> When determining the appropriate sanction, the court shall, while considering what is necessary to maintain public compliance with the law, place particular emphasis on ensuring that the sanction is suited to promote the offender's reintegration into society. (Criminal Code, ch. 2, s. 7, as then in force; author's translation)

As is evident, courts were required to navigate a delicate balance between general preventive considerations (i.e. ensuring public compliance with the law) and individual preventive concerns (i.e. promoting the offender's reintegration into society). However, as mentioned above, courts in practice made such explicit trade-offs only to a limited extent – sentencing largely adhered to a pattern of re-

[1] Swedish: "Vid val av påföljd skall rätten, med iakttagande av vad som kräves för att upprätthålla allmän laglydnad, fästa särskilt avseende vid att påföljden skall vara ägnad att främja den dömdes anpassning i samhället."

trospective equal treatment based on the severity of the offence. Taken seriously, this balancing would be demanding in practice. The now-repealed provision, for its part, bears some similarities to the current sentencing rule in German law (Strafgesetzbuch § 46(1)). Among other things, the German provision requires consideration of both the offender's culpability (*Schuld*) and the effects that the punishment is expected to have on the offender's future life in society.[2]

However, with the 1989 reform, Swedish law introduced relatively detailed rules for sentencing, which remain largely unchanged to this day (Prop. 1987/88:120). The primary point of departure for both sentencing decisions and the choice of sanction became the concept of penalty value – essentially a quantification of the seriousness of the offence. Regarding the ideological framework, a primarily prospective approach was explicitly replaced by a predominantly retrospective one. This shift can be viewed as an attempt to resolve the tension between retrospective and prospective considerations. Sentencing decisions thus became explicitly retrospective and norm-rational, whereas prospective, goal-orientated considerations were restricted to the legislative domain through decisions concerning criminalisation. In many respects, this major reform also marked what could be described as a juridification of sentencing. An area previously understood to be guided by considerations beyond the legal domain and largely left to judicial discretion manifestly became more rule-bound, predictable and transparent.

2.2. The sentencing rules and role of penalty value

Swedish sentencing rules structure the decision-making process into two distinct stages (for a more detailed account in English, see Asp, Holmgren 2020). The first stage is the measurement of punishment (*straffmätning*), followed by the choice of sanction (*val av påföljd*). There are good reasons for this order, although at first glance, it may appear somewhat backwards. This structure means that before deciding whether imprisonment is appropriate, the court has already determined the severity of a potential prison sentence.

The first – and in many cases only – step of measurement of punishment is when the court determines the penalty value. As noted, the penalty value refers to a quantification of the seriousness of the offence, expressed as a specific sanction, i.e. a certain number of day-fines or a given duration of imprisonment. The central provision for determining the concrete penalty value is chapter 29, section 1 of the Swedish Criminal Code:

> When assessing penalty value, consideration is given to the damage, violation or danger involved in the act, what the accused realised or ought to have realised in this respect, and their intentions or motives. (Criminal Code [*brottsbalken*, SFS 1962:700], ch. 29, s. 1; Government Offices of Sweden, unofficial translation)

[2] German: "die Wirkungen, die von der Strafe für das künftige Leben des Täters in der Gesellschaft zu erwarten sind, sind zu beruchsichtigen."

Thus, one can distinguish between what might be called act-related and culpability-related factors. The act-related factors primarily concern the type and extent of harm, danger or violation brought about by the act; *ceteris paribus*, the greater the harm, the higher the penalty value. The culpability-related factors address *mens rea*, i.e. the offender's intent, awareness and motives. An intentional act will normally result in a higher penalty value than a reckless one, and a carefully planned offence will carry a higher penalty value than the same act committed impulsively. In addition, sections 2, 2a and 3 of chapter 29 list further aggravating and mitigating circumstances that may raise or lower the penalty value, such as whether the offence was committed against a particularly vulnerable victim or whether the offender, owing to a mental disturbance, had a reduced capacity to realise the implications of the act.

Certain mitigating circumstances not related to the penalty value, but rather the offender's personal situation or post-offence actions – including substantial cooperation during the investigation – may reduce this value further, resulting in what is called the punishment measurement value (*straffmätningsvärde*) (ch. 29, ss 5–7).

Once this value has been established, the second stage involves choosing the appropriate sanction. Under chapter 30 of the Criminal Code, the sentencing framework operates with a presumption against imprisonment: where the penalty value is low and neither the nature of the offence nor the convicted person's prior record calls for imprisonment, there is room for non-custodial sanctions. Conversely, where the penalty value is sufficiently high and/or other grounds for imprisonment carry sufficient weight, a custodial sentence will be imposed (Prop. 1987/88:120: 100).

We will not go further into the details of the sentencing rules here. What should be clear, however, is that penalty value plays a central role in structuring sentencing: when the penalty value is relatively high, it will ordinarily determine both the type of sanction (imprisonment) and the length of the custodial sentence.

2.3. The notion of abstract penalty value

As described in the previous section, penalty value represents a quantification of the seriousness of the offence, focussing on past factors – namely, the circumstances of the act. A distinction is also made between the concepts of "abstract" and "concrete penalty value." The abstract penalty value refers to the legislature's assessment of the offence's seriousness; it is expressed through the offence's statutory range (i.e. the minimum and maximum penalties). The concrete penalty value, in turn, concerns the court's assessment of these same factors. As noted, it manifests in the specific penalty set within the statutory range established by the legislature. The premise of the framework is thus that the same underlying rationale informs both the legislature's determination of statutory penalty ranges and the courts'

sentencing within those limits; in both settings, punishment severity is taken to express the penalty value.

3. A systematic understanding of proportionality in sentencing

3.1. Three questions about the meaning of proportionality

In Swedish sentencing law, penalty value is commonly described as an expression of proportionality. In contemporary legal theory, commentators have often remarked that proportionality in sentencing is an elusive idea, difficult to define and operationalise (Lacey, Pickard 2015; Matravers 2019; Tonry 2019; Lacey 2021). The very term "proportionality" may invite expectations of quasi-scientific precision in the relationship between crime and punishment that no plausible theory can satisfy, and there is also disagreement about whether the principle should be understood as a determining rule or rather as a limiting constraint (Morris 1998; von Hirsch, Ashworth 2005). However – arguably – much of the perceived indeterminacy can be traced to three more basic uncertainties: firstly, whether proportionality in sentencing is conceived as a forward-looking or a backward-looking idea (or some combination of the two); secondly, whether it is understood as an absolute or a relative principle; and thirdly, what is meant by the key variable of "seriousness of the offence."

3.2. Proportionality as backward-looking (rather than forward-looking)

In legal contexts, "proportionality" is used in more than one sense. A first distinction is between "forward-looking" and "backward-looking" proportionality (see e.g. Asp 2012: 188 ff.). In general legal discourse, proportionality most often refers to the forward-looking sense: a relation between means and future-orientated ends, typically operating as a constraint on the exercise of public power, both in legislation and in adjudication. In constitutional law, it may structure the assessment of how far the legislature is permitted to go in restricting individual rights; in public law and criminal procedure, it informs judgments about the degree of coercion or force that public officials may legitimately employ.

By contrast, the kind of proportionality that is at stake when one speaks of the relation between crime and punishment is backward-looking – and that is expressed in Swedish law through the notion of penalty value. Here the focus is on the relation between a sanction and an offence that lies in the past: a principle of justice which holds, in simple terms, that the severity of punishment should reflect the seriousness of the offence. This backward-looking principle can be regarded as determining (a sentence that departs from it is, in that sense, unjust) and the-

reby also as limiting, much like its forward-looking counterpart (a sentence that exceeds what the principle allows is unjustified). The two forms of proportionality, however, rest on distinct rationalities. Forward-looking proportionality takes as its point of departure the relation between means and ends, whereas backward-looking proportionality concentrates on the relation between the seriousness of the offence and the severity of the punishment.

3.3. Proportionality as relative (rather than absolute)

Within a backward-looking conception of proportionality, the determining variable is the seriousness of the offence. Plausibly, seriousness is intuitively linked to how morally wrong the conduct is taken to be: one can speak of the degree of blameworthiness associated with a given type of offence. Blameworthiness is a normative notion, and views on how different offences should be evaluated will naturally diverge, depending on people's underlying moral outlook. As a heuristic, one may distinguish between more individualistic and more collectivistic moral conceptions (see e.g. Shweder et al. 1997; Graham, Haidt, Nosek 2009). Even so, it should be relatively uncontroversial to assume that, within a given cultural and historical context, there is at least a rough consensus on how different types of offences can be ranked in terms of their relative blameworthiness. For example, many would regard theft as less blameworthy than rape, which in turn is commonly regarded as less blameworthy than murder. In this view, the concept that links an assessment of the seriousness of an offence to a punishment of a certain severity is that of desert: the question is what punishment is deserved, given how blameworthy the offence is (von Hirsch, Ashworth 2005: 135).

In the literature, a distinction is often drawn between cardinal (absolute) and ordinal (relative) proportionality (von Hirsch, Ashworth 2005: 137 ff.; Duus-Otterström 2019). Different meanings can be attached to the idea of cardinal proportionality, but in one plausible understanding a proportionality principle that rests on blameworthiness is inherently ordinal or relative. It offers guidance as to how different offences and sanctions should be ranked in relation to one another and thereby helps to structure a system. However, distinct penal systems may all satisfy this relative proportionality requirement while operating at very different overall levels of punishment. How severe punishments should be in general – or, put differently, how the system is to be "anchored" – is a question that proportionality cannot answer (von Hirsch, Ashworth 2005: 141). From an ideal-typical perspective (and not as a realistic description of actual legislative practice), that question can instead be seen as depending on how the aims of the penal system are defined and what overall level of punishment is thought necessary to realise those aims – something closer to the aforementioned forward-looking proportionality assessment (Holmgren 2022).

3.4. Proportionality and competing conceptions of seriousness

As noted in the previous section, there is an intuitive link between blameworthiness and assessments of the seriousness of offences. Although blameworthiness is meant to function as the primary yardstick for evaluating how serious a crime is, a sentencing system such as the one just described is not without imperfections; it is not fully coherent. As already emphasised, blameworthiness is a normative and contestable notion. With that reservation, it may nonetheless appear, when comparing different offences and their corresponding punishments, that some crimes are punished more severely than their relative blameworthiness would seem to warrant, and others more leniently. If this discrepancy is not merely coincidental, a plausible explanation is that various instrumental considerations have been prioritised over blameworthiness in determining the relative severity of punishment for some offences. It might involve an ambition to use general deterrence or individual deterrence to combat particular categories of offending, or it might be about sending targeted signals about particular forms of offending. Such patterns do not necessarily reflect a principled or coherent stance on the part of the legislature; more often, they may stem from political expediency – a desire to demonstrate firmness in the face of particular offences, without fully considering the implications for the penal system as a whole. Yet if the system is to remain coherent in theory, one has to assume a degree of rationality that, in practice, may be only partially present.

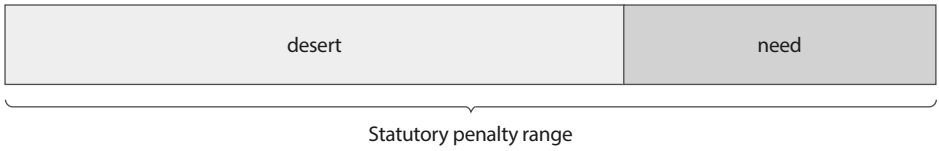
As discussed, blameworthiness is a normative concept, and views on the degree of blame assigned to different kinds of conduct may reasonably diverge. If one were nonetheless to single out an example of the imperfection described above – one which many would arguably recognise, and which is by no means unique to the Swedish system – it might be found in the treatment of drug offences. Substances classified as narcotics are typically both dangerous and addictive, and handling them – particularly with intent to distribute for profit – can certainly be regarded as blameworthy. However, it is at least arguable that the sale of drugs is not, in ordinary moral judgment, considered as blameworthy as serious assault or rape, for example. Yet in many legal systems, serious drug offences are punished on par with, or even more severely than, serious violent crimes. The reason for these harsh penalties is plausibly instrumental; they reflect the goal of curtailing behaviour that is deemed harmful at a societal level. Whether or not such measures actually work, the aim can be understood as deterring individuals from becoming involved with narcotics, or alternatively, incapacitating those who are inclined to do so.

One way of characterising the distortions that then arise within the system is to distinguish between two different senses in which – from the legislature's point of view – a crime can be said to be serious (see Holmgren 2021: 131 ff.). Firstly, there is the form of seriousness, which relates to how blameworthy the offence is when compared with other offences. In this sense, the determining factor is "desert": the punishment is calibrated by how much blame the offender is thought to deserve, relative to other crimes and penalties. Additionally, there is another form of

seriousness that instead relates to various instrumental considerations. Here, one might say that the determining factor is "need": the degree of punishment is made commensurate with the perceived need to realise certain preventive or other penal aims. With this distinction in place, the following section illustrates how need-based reasoning can be discerned in recent adjustments to abstract penalty values.

For many offences, these two conceptions of seriousness will overlap substantially. Murder, for instance, is both highly blameworthy and associated with a strong (perceived) societal interest in deterrence and incapacitation; its statutory penalty can thus be understood as reflecting both desert and instrumental need. In other cases, however, a discrepancy emerges in which instrumental considerations weigh more heavily than blameworthiness. Drug offences can again serve as an example. It can be said that the prescribed level of punishment in such cases is justified by desert only up to a certain point, and that any excess must instead be explained – and potentially criticised – in terms of other instrumental considerations. This relationship could, in principle, be expressed schematically, with desert setting a baseline and instrumental need accounting for a further upward adjustment (see Holmgren 2021: 141 ff.).

Figure 1. Seriousness of an offence (abstract penalty value)



Source: Holmgren 2021.

Moreover, the instrumental rationale is not always about preventive goals in a narrow sense. It may also serve communicative purposes. There may be, for example, a perceived need to employ more severe punishment in order to make a statement against, and mark blame for, a particular type of offence, or to draw attention to and provide recognition or redress for a certain group of victims – again without necessarily taking into account the overall coherence of the system.

4. Contemporary developments

4.1. A shift in paradigm?

Earlier in the article, it was outlined how the history of criminal law – particularly ideas about how punishments should be determined – can be schematically divided into three phases spanning the past two centuries. The first is a "classical"

period, which around the turn of the 20th century was challenged by an approach orientated towards individual prevention. This preventive thinking, in turn, was largely abandoned in the second half of the century in favour of a "neoclassical" renaissance.

This historical development was likened to the movement of a pendulum, with the emphasis moving between backward-looking and forward-looking considerations – that is, between sentencing based on the act itself and sentencing based on the offender as a person. In their ideal-typical forms, these two approaches can be regarded as distinct paradigms: mutually exclusive ways of reasoning about punishment. In practice, however, both types of considerations have likely coexisted in all penal systems. Rather than exclusive dominance, it is more accurate to speak of shifting emphases during particular periods. Nevertheless, in the Swedish context, recent developments invite the question of whether the most recent act-orientated and backward-looking "neoclassical" era is now being replaced by something else – i.e. whether we are moving into a fourth phase. Might the pendulum be swinging back so that the offender once again is becoming the focus at the expense of the act, or is some different configuration taking shape?

4.2. A changing landscape

In certain respects, Swedish criminal law and the rules governing sentencing find themselves in a period of rapid transition. The statutory penalties are being raised, and the general level of punishment is increasing at a pace not previously seen. The Swedish Prison and Probation Service anticipates that the number of people in prison will triple in the next 10 years (see Kriminalvården 2025). While one might certainly debate whether reactive criminal law is the appropriate measure to address organised crime, what primarily drives these legislative changes is the growing influence of organised and network-based criminality – manifested, among other things, in the large number of cases of deadly firearm violence compared to other European countries (Brottsförebyggande rådet 2024).

In this context, it is worth noting that the Swedish legislative process is relatively slow. The constitution provides for an extensive preparatory procedure involving consultations with relevant authorities and stakeholders (Sweden's Instrument of Government [*regeringsformen*] ch. 7, s. 2). Consequently, political ambitions for reform often take several years to translate into enacted legislation. In the present electoral term, however, these constitutional requirements have not prevented a strikingly rapid pace of reform. Legislative reforms are now being taken forward that will increase sentences, both through higher statutory penalties and through changes to the general rules on sentencing (Prop. 2025/26:218; Ett nytt straffrättsligt 2026). Further reforms are expected in 2026, including stricter rules for young offenders and a lower minimum age of criminal responsibility – from 15 to 13 – for certain serious offences (Prop. 2025/26:246). In addition, an

indeterminate custodial sanction has been proposed as an alternative to ordinary sanctions for a limited category of high-risk offenders (Prop. 2025/26:95).

A cautious reading of recent Swedish criminal justice policy suggests a renewed confidence in the capacity of repressive penal measures to bring about change. The retreat from special-preventive ambitions during the final decades of the 20th century was, in part, accompanied by a more sober assessment of what criminal law could achieve: it was increasingly framed as a costly and blunt instrument, ill-suited to remedy the underlying causes of criminality. In that climate, modest sentencing levels were often defended by the view that excessive severity was unlikely to be productive and might even be counterproductive – an orientation that has sometimes been captured under the label of Scandinavian penal "exceptionalism" (Pratt 2008). Against this background, parts of the current discourse may be understood as signalling a shift in expectations towards a more optimistic view of what punishment can achieve.

It should also be noted that the shift towards more severe penalties is not at all, in itself, a new development in Sweden: the legislature has been increasing various statutory penalties for a long time, especially over at least the past two decades. What distinguishes the present moment is the extraordinary, markedly accelerated pace of change – much of it concentrated within the current electoral cycle – and the extent to which criminal law is now mobilised. In the immediate term, as mentioned, this shift is motivated by efforts to address the significant societal challenge posed by network-based criminality. From a longer-term perspective, however, the Swedish trajectory is difficult to separate from broader developments identified in legal scholarship: the "punitive turn" and the emergence of a new "culture of control," with stronger reliance on expressive and exclusionary penal measures (Garland 2001: 6 ff.; Pratt 2007: 1 ff.; Demker, Duus-Otterström 2009; see also Pratt, Miao 2019, on penal populism as a prelude to wider populist politics), as well as what has more recently been described as a "preventive turn" in criminal law, characterised by risk-orientated and security-driven forms of criminalisation (Ashworth, Zedner 2014; Carvalho 2017; Melander 2023).

4.3. Instrumental trends

Though significant changes have been made, and even more are on the horizon, there is little to suggest that the overall rationality of Swedish sentencing will undergo a major transformation. The major reform of the sentencing framework mentioned above does propose a artly different structure, in which certain non-custodial sanctions are abolished in favour of a system of conditional imprisonment (see Ett nytt straffrättsligt 2026). Yet much of what is at stake here may be understood as a largely semantic reclassification of sentencing options – what the available responses are called – rather than a shift in the underlying logic. Whether or not the proposal is implemented, penalty value will retain its dominant influence over sentencing.

One way to describe the current development is therefore that the changes are primarily quantitative rather than qualitative: more punishment rather than punishment based on a fundamentally different rationale. Sentence severity is expected to increase significantly, yet there are few indications that the fundamental principles of sentencing will be altered in any substantial way. Even if certain exceptions exist – such as the above-mentioned proposal for an indeterminate custodial measure, intended for use in a limited number of cases – the general tendency appears to be that sentencing will remain predominantly retrospective, focussed primarily on the criminal act itself, and that sentence severity will continue to be determined primarily by the penalty value of the offence.

However, there are indications that the instrumental rationale described above (see section 3.4) is gaining ground in the legislature's determination of statutory penalties – that is, the abstract penalty values of offences. It can be argued that there are now more instances in which relative blameworthiness alone does not fully explain the legislated assessment of the seriousness of an offence, as reflected in the applicable penalty ranges. As noted in the introduction, the present analysis is not concerned with theories or causal explanations of these changes, but with how they can be rationalised from within the legal framework: how the proportionality principle and the system of rules are to be understood in normative terms. That said, the development can arguably – at least in part – be connected to the broader "preventive turn" outlined above. This does not mean, however, that a more preventive orientation is now guiding the courts' assessment and room for manoeuvre in individual cases; that assessment remains predominantly retrospective. Rather, the preventive rationale operates primarily at the legislative level: it shapes what is criminalised and the degree of penal severity the legislature permits itself to prescribe for different categories of conduct.

The following section discusses some examples in which it can be argued that instrumental, crime-control considerations inform the statutory penalties. Such instrumental rationality, when it leads to more severe penalties than relative blameworthiness alone might justify, can be driven by either the goal of using punishment as a practical tool to combat crime or more purely communicative purposes, such as a perceived intrinsic value in expressing censure to the public or to victims. Often, such objectives may overlap with the requirement of proportionality: punishment may, for example, serve to deter crime or signal societal disapproval while at the same time aligning with relative blameworthiness. In other cases, however, a more pronounced discrepancy emerges (see Figure 1). It is important to bear in mind what was noted already: blameworthiness is a normative notion, and assessments of how blameworthy a criminalised behaviour is may reasonably vary between observers. Consequently, the extent to which particular statutory penalties are perceived as disproportionate – and, in turn, the extent to which an instrumental explanation is thought necessary – will itself be open to debate. The examples discussed below should be read with that caveat in mind; they are intended to illustrate how instrumental rationales may be seen to affect penalty levels, not to offer a definitive ranking of offences in terms of blameworthiness.

As previously mentioned, conceptualising the system in this way is, in a sense, an exercise in retrospective rationalisation. One need not be especially cynical to suspect that legislative decisions often function as political signals or demonstrations of resolve rather than as elements of a coherent strategy. Even so, treating them as if they expressed a certain degree of rationality can be analytically useful: it makes it possible to reconstruct the structure they imply and to engage in a more substantive critical dialogue about questions such as whether particular increases in punishment can be reconciled with the principles the system officially claims to embody.

4.4. Examples of instrumental drift in penalty values

4.4.1. Organised crime

As noted above, a significant portion of recent legislative measures in Sweden are aimed at criminal networks and gang-related violence. These measures include higher penalty values through both stricter statutory minima and new general rules on aggravating circumstances in sentencing. While there is undoubtedly a communicative aspect to these reforms, they are also driven by a clear desire for crime prevention. The aim is to use criminal law as a practical tool to address the societal problem posed by this form of criminality.

Offences involving unlicensed firearms have, in recent years, been strongly associated in policy and public discourse with organised criminal networks and gang-related violence. One offence for which the statutory minimum has been gradually increased is the aggravated weapons offence. This is a purely conduct-based offence built on presumed danger: liability arises solely from possessing a firearm without a permit (Weapons Act [*Vapenlagen*], ch. 9, ss 1 and 1a). To qualify as an aggravated offence, it is sufficient that the weapon in question is an ordinary pistol or revolver. The possession may be brief, and the actual risk of the weapon being used is largely irrelevant. In 2014, the statutory minimum sentence was 6 months; since then, it has been raised in several steps, culminating in a 4-year minimum in 2024. For comparison, the statutory minimum for aggravated assault is 18 months' imprisonment, while manslaughter has a statutory minimum of 6 years.

Firearms are dangerous, and possessing them without legal authorisation is, of course, blameworthy – often carrying a concrete risk that the weapons will be used. From the standpoint of relative blameworthiness, however, it is not straightforward to regard such an offence as directly comparable to crimes that target life and physical integrity. Reasonable observers may of course differ in their assessments: one might emphasise the broader risks associated with the handling and distribution of illicit firearms. Even so, it remains difficult to equate mere possession with using a firearm to harm another person.

The rationale for increasing the abstract penalty value for the aggravated weapons offence is difficult to explain solely in terms of a changed assessment of

blameworthiness. Rather, it appears primarily instrumental. By coupling the offence with a harsher penalty, criminal law is mobilised in a preventive and proactive manner, enabling intervention and incapacitation before harm occurs – without the need to prove intent to commit, or to facilitate, offences such as murder. Moreover, the higher statutory minimum can be expected to have a deterrent effect, strengthening the incentive to refrain from carrying firearms in public spaces (Holmgren 2021: 267 ff.).

Another legislative amendment that aims to address the problem of network-based and gang-related crime, as with the statutory minimum for weapons offences, is the 2023 introduction of certain general sentencing enhancements: so-called particularly aggravating circumstances (*synnerligen försvårande omständigheter*). Among other things, a particularly severe sentencing enhancement applies when an offence both involves a serious attack on someone's life, health or personal security and "has its background in or was intended to provoke a conflict between groups of people in which firearms, explosives or other comparable devices are used" (Criminal Code, ch. 29, s. 2a). When such circumstances are present, the punishment is therefore significantly harsher than it would otherwise be. In the 2026 reform package, this legislative technique is taken further: where the relevant network-related enhancement applies, the penalty value – as a general rule – shall be doubled (Dubbla straff 2026).

Here, too, one may question whether the circumstances that trigger this enhancement genuinely make the offence proportionally more blameworthy. Naturally, committing a crime in such a context is reprehensible, but it is not obvious that the context, as such, increases the censure the offender deserves – at least not to an extent that would justify doubling the penalty value. Is it inherently more blameworthy to commit an act of violence such as assault when it arises from such a conflict, compared to committing the same act purely out of sadism or personal enjoyment? And is violence in the context of gang-related conflicts really more blameworthy – *ceteris paribus* – than domestic violence? One might even argue that the act in the former case is, if anything, somewhat less blameworthy, to the extent that one accepts that the offender is more clearly embedded in a structure and social environment that may, in part, help to explain the offence. In that sense, these sentencing enhancements are ultimately about targeting a specific type of offence and offender. The aim is to respond forcefully to a phenomenon perceived as a major societal problem. However, the stricter penalties introduced on the basis of this instrumental rationale do not necessarily reflect a corresponding increase in blameworthiness.

4.4.2. Sexual offences

Rape is another category of crime for which the statutory minimum has recently been raised: since 2022, the minimum penalty has been 3 years' imprisonment, having previously been 2 years since the 1930s (Prop. 1937:187). However, over

the past decades the legal definition of the offence has been expanded in stages, widening the scope of criminal liability. Violence, threats or a more qualified form of exploitation are no longer required elements. Since 2018, it has been sufficient for the perpetrator to engage in sexual intercourse or an equivalent act (e.g. oral sex or penetration with fingers) while the victim is not participating voluntarily (Criminal Code, ch. 6, s. 1). Whether participation is voluntary is assessed objectively. Merely having an internal unwillingness to participate is not enough; the decisive factor is the victim's ability to freely decide whether to take part (Prop. 2017/18:177: 78).

One might argue that the expansion of criminal liability for sexual offences raises concerns about legal predictability, since the requirement of non-voluntary participation is, by its very nature, an element that may in some cases manifest only to a limited extent in observable external circumstances. Nevertheless, the expansion can, in many respects, be considered justified. From the standpoint of relative blameworthiness, however, it is at least arguable that a statutory minimum of 3 years may be difficult to defend across the full range of cases now encompassed by the offence. A less severe form of the offence, with a more lenient statutory minimum, does exist, but according to the preparatory works it is to be applied restrictively (see Prop. 2004/05:45: 138). It is also noteworthy that there is a negligent form of rape, which likewise carries a lower statutory minimum (Criminal Code, ch. 6, s. 1a). In this case however, the crucial distinction lies entirely in the culpable mental state – the act itself remains the same.

There is strong evidence of a societal shift in attitudes, with behaviours involving a violation of sexual integrity and autonomy – including cases that do not involve more qualified exploitation, violence or threats – now being regarded as more morally objectionable than before. There is also greater awareness of the harms that sexual offences can inflict on victims, and of the extent to which this type of criminality ought to be understood from a gender-equality perspective, as part of a broader pattern of gendered power and inequality. Even so, and leaving room for reasonable disagreement, it is not self-evident that a statutory minimum of 3 years' imprisonment is in line with the offence's relative blameworthiness in all configurations – particularly in cases without violence, threats or exploitation, where the absence of voluntary participation is covered only by the lowest form of intent in Swedish law (*likgiltighetsuppsåt*, close to *dolus eventualis*). As a point of comparison, one might once again consider the sentencing range for aggravated assault, which carries a statutory minimum of 18 months. Engaging in sexual intercourse with someone who does not participate voluntarily is, of course, profoundly blameworthy. But is it truly twice as blameworthy as assaulting someone and causing them severe bodily harm – particularly when no threats, violence or exploitation are involved? The answer is, of course, a matter of judgment. Yet, if one does not accept such a hierarchy of blameworthiness, the relatively high statutory penalty must be explained on other grounds.

Sexual offences are likely an area of criminal law where symbolic significance and norm-setting functions are particularly pronounced (see Holmgren 2021: 274 ff.).

It can be assumed that, perhaps more directly than offences against life and health, sexual offence legislation is expected to uphold social norms and shape public attitudes. It is also an area where the interests of victims are particularly prominent. A conviction, and perhaps even a severe sentence, serves – presumably to an even greater extent than in other types of crime – as a confirmation that the victim has suffered a violation; that the victim's account is vindicated. Regardless of whether the higher statutory penalty has a preventive effect or actually influences social norms, one could argue that there is an inherent value in expressing condemnation and moral censure through severity – primarily for the sake of the victim, but also in relation to the public and the offender. The ambition to realise such an expressive goal may, in turn, result in penalty values that deviate from what would be expected from a relative perspective in a system that otherwise treats blameworthiness as its organising principle.

4.4.3. Honour-related crime

In 2020, a general sentencing provision was introduced, providing for higher penalties when "a motive for the crime was to preserve or restore the honour of a person, family, kin or other similar group" (Criminal Code, ch. 29, s. 2, para. 10). Since 2022, there has also been a stand-alone offence targeting acts that are already criminalised when committed in such a context and resulting in a harsher penalty than would otherwise apply (Criminal Code, ch. 4, s. 4e). These provisions – relying on different legislative techniques – specifically target criminal acts rooted in so-called honour norms and honour-based oppression. The phenomenon is difficult to define with precision here, but broadly refers to a form of control – typically directed at girls and women – based on ideals of chastity and purity, where individual interests are subordinated to collective ones. At its most extreme, honour norms can lead to coercion, threats and violence that constitute criminal offences (see SOU 2018:69: 68 ff.; SOU 2020:57: 98 ff.).

Crimes committed with an honour-related motive are blameworthy, naturally and undeniably. However, as in the previous discussion, one may problematise whether such an offence is more blameworthy, *ceteris paribus*, than a comparable crime committed without such a motive. Opinions may differ on this point. One perspective could be that honour norms function as a tool that individuals use to exert power and oppress others. However, one might also understand these norms – drawing on reasoning similar to that applied in relation to gang-related crime – as part of a broader social structure in which both the victims and the perpetrators are embedded. If one emphasises the structural rather than the individual dimension, it could even be argued – along the lines of the so-called "cultural defence" – that such a context may count as mitigating, from the standpoint of relative blameworthiness. Honour norms may constrain an individual's capacity to comply with the law, functioning as a compelling background condition for actions that might not have otherwise occurred. Even if one does not share – or indeed repudiates – the

view that a family's reputation is tied to the chastity and purity of its members, one could still argue that the motive of preserving such a reputation, compared to motives primarily driven by personal gratification, makes an offence less morally reprehensible than it would otherwise be (Holmgren 2021: 308 ff.).

Yet, even if one can with some effort conceive of honour norms as a factor that, *ceteris paribus*, makes a crime slightly less blameworthy, for many the idea of treating an honour-related motive as a mitigating circumstance is instinctively unthinkable. One might instead argue that the presence of honour motives should make no difference – that such motives should neither be an aggravating nor a mitigating factor. There is a case to be made for the symbolic value of criminal law maintaining, where possible, a principled distance from ideological beliefs and motivations. Treating all crimes equally, regardless of motive, could be seen as reinforcing the principle that harming, violating and restricting the freedoms of others is morally wrong, no matter the underlying justification.

However, if honour motives are to play any role in sentencing, the intuitive response is that they should serve as an aggravating rather than a mitigating factor, as has been the case in Swedish law since 2020. The underlying rationale likely has less to do with blameworthiness and more to do with the instrumental function of punishment. There is strong evidence that honour-based crime and honour-related oppression constitute a relatively widespread problem with significant underreporting. It is an area where there is a particularly pressing need to combat criminality and to send a strong symbolic message of societal condemnation. It is also likely an area where victims are especially marginalised and vulnerable – embedded in broader structures of control and subordination that extend beyond the specific criminal acts to which they are subjected. One could therefore argue that, compared to other victims, these individuals have a particularly strong need for visibility and recognition – something that may be reinforced by explicitly treating honour motives as an aggravating circumstance. From this perspective, the justification for higher penalty values in cases involving honour-related crime is best understood in instrumental terms, rather than as an expression of the view that such motives render the offence inherently more blameworthy, *ceteris paribus*.

5. A less ideal-typical account of a proportionality-based system

5.1. Two ideal types and a third model

To summarise and clarify the preceding discussion schematically, sentencing can be conceptualised through a set of ideal-typical models. The development over the past two centuries was described above as comprising three phases in the history of sentencing rationalities. It can be seen as the movement of a pendulum, in which the relevant factor for determining the criminal justice response has shifted from

the act to the offender, and then back to the act again. Ideal-typically, these phases can be understood as an oscillation between two sentencing rationalities: prospective "goal-rationality," on the one hand, and retrospective "formal-rationality," on the other. Additionally, a third model can be considered to refine the picture and capture more recent developments (Holmgren 2021: 345 ff.).

The first ideal-typical model makes a clear distinction between the legislative and the judicial levels, as well as between prospective and retrospective rationality. In this model, forward-looking, goal-rational considerations are invoked to justify the overall existence of the penal system; its purpose is general prevention – counteracting crime. Such considerations influence the general severity of punishment. On this view, a certain level of punishment is required for the penal system to fulfil its general preventive function or to adequately serve more communicative aims, such as expressing censure and acknowledging victims. However, when it comes to how different types of offences relate to one another within the system – how they are ranked and distributed – the determining factor is blameworthiness: more blameworthy crimes attract more severe punishments, and less blameworthy crimes less severe ones. At the judicial level there is no place for goal-rationality. The severity of the punishment is determined by the penalty value as a measure of the seriousness of the offence in terms of blameworthiness. Crimes of equal blameworthiness deserve equivalent censure and thus receive equally severe punishments.

The second model comprises an arrangement in which the severity of punishment is determined exclusively on the basis of prospective considerations. Here, no distinction is made between the legislative and judicial levels; both are orientated towards the same forward-looking goals. In this model, the above-mentioned distinction between the "why" and the "how" of punishment collapses (see section 1.2). The forward-looking purpose may involve a special-preventive ambition focussed on the offender, aiming to combat crime through incapacitation or rehabilitation. The criteria determining the severity of the sentence would then be the individual's dangerousness or capacity for reform. A forward-looking rationality could also be based on general prevention, where in each case the court considers the need for deterrence or moral education of the public and lets such considerations determine the severity of the punishment. Judicial decision-making, in this view, is fully goal-rational.

Even if a system based purely on this second model might be effective and functional in counteracting crime, it would appear distinctly unjust. It is also likely that its application would lack predictability; while individuals can be treated consistently based on criteria such as reformability and dangerousness, the scope for arbitrariness and uncertainty is much greater when making prospective prognoses compared to a retrospective assessment based on the seriousness of the offence. A system in which punishment is determined solely from a forward-looking perspective – without regard to the act – would also deviate from the concept of individual responsibility that is central to criminal law. The individual would not be held accountable for what they have done, but are rather treated as a means of

achieving certain goals. In a democratic society, there is a strong presumption against responses to crime that do not, in some way, treat offenders as responsible individuals. However, as noted, this model is an ideal type. In its pure form, such a system has never existed and likely never will – though many legal systems incorporate elements of it, for example in relation to young offenders and offenders with mental disorders. In such a system, the concept of penalty value would, in principle, be redundant, since penalty value is a measure of the seriousness of the offence.

Against this backdrop, and as suggested by the understanding of proportionality (section 3.4) and the examples discussed above (section 4.4), one can envisage a third model – one that is arguably less ideal-typical, yet closer to the overall structure of the system. This model incorporates elements of both of the preceding models. Like the first, it maintains a distinction between the legislative and judicial levels. At the judicial level, decision-making remains norm-rational and backward-looking. However, the difference between this model and the second one is that the norms established at the legislative level are shaped and motivated in a partly different way. When it comes to the determining factor – the seriousness of the offence and how different types of crimes are ranked and ordered within the system – this model allows for a degree of forward-looking rationality. In some cases, punishments for certain types of offences are relatively harsher, within the overall ranking, than their blameworthiness would suggest. As illustrated in the preceding discussion, this may be because the legislature wishes to use criminal law as a means of counteracting particular types of crime. It may also be due to a perceived need to communicate condemnation and social disapproval more forcefully in relation to certain offences. When such considerations influence the assessment of the seriousness of an offence, the coherence of the system is strained. Penalty value still serves a function in such a system – as a measure of the seriousness of the offence – but it is determined on partly different grounds. Such an arrangement can lead to outcomes that appear unjust – offences that seem relatively less blameworthy may be punished as severely as, or more severely than, offences perceived as more blameworthy. At the same time, since this third model remains act-focussed and responsibility-based, it must be regarded as more just – and, in practice, likely more predictable – than the second model described above.

5.2. Concluding remarks

Without making a value judgment, one might argue that this third model does, in fact, come closer to reality than either of the two preceding ones. In this text, Swedish law has been the object of analysis; sentencing reasoning is relatively structured and transparent – given the centrality of penalty value and its explicit articulation of the seriousness of an offence. However, this third model can be applied across many legal orders to make some systematic sense of sentencing rules and statutory penalties. The penalties for drug offences were mentioned

earlier as an example, and even though blameworthiness is ultimately a subjective assessment, most would probably agree that the penalties for drug offences are harsher than their blameworthiness would warrant. In many legal systems this has been the case for a long time. However, as demonstrated by several recent legislative developments, one could argue that the conditions underpinning the third model have become increasingly pronounced in Swedish law. Sentencing remains retrospective in form, but we observe a growing willingness to depart from systemic coherence in order to use criminal law instrumentally – either to combat specific types of crime or to send targeted symbolic signals.

About 20 years ago, Duncan Kennedy identified what he called a "third globalization of law and legal thought" – a diagnosis of persistent internal tensions rather than linear development – which he argued has characterised contemporary legal thinking since the latter part of the 20th century (Kennedy 2006: 19 ff.). Two preceding legal globalisations – first the classical legal thought, followed by a socially orientated legal thought – provide the historical context for this third phase. Compared to these earlier epochs, contemporary legal thought is less paradigmatic and more internally contradictory; it constitutes a pluralism in which elements from previous legal traditions coexist. Perhaps the contemporary sentencing system – concretely in Sweden, but arguably also in other legal systems – reflects similar tensions. These tensions stem from the coexistence of competing demands and rationalities. On the one hand, there is a desire and expectation for criminal law to be functional, goal-rational and orientated towards societal purposes. On the other hand, the system remains constrained by juridification, by requirements of predictability and legal certainty, and by a formal, norm-orientated rationality. Within such a system, thesis and antithesis coexist – but a perfect synthesis remains unattainable.

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Note on Swedish preparatory works

Swedish official sources include (i) *Government Bills* (*Prop.*) submitted by the Government to the Riksdag; (ii) *Government Official Reports* (*SOU*) produced by commissions of inquiry; (iii) *Terms of Reference* (*Dir.*) setting up such inquiries; and (iv) other official documents in the legislative process (e.g., *Lagrådsremiss*). These materials are commonly cited in Swedish legal scholarship as legal source and as a part of legislative history and policy background.

Government bills (*Propositioner*)

Prop. 1937:187. Kungl. Maj:ts proposition till riksdagen med förslag till lag om ändring i vissa delar av strafflagen [Bill submitted by the King in Council to the Riksdag with a proposal for an Act amending certain parts of the Penal Code].

Prop. 1987/88:120. om ändring i brottsbalken m.m. (straffmätning och påföljdsval m.m.) [amendments to the Criminal Code, etc. (measurement of punishment and choice of sanction, etc.)].

Prop. 2004/05:45. En ny sexualbrottslagstiftning [A New Sexual Offences Ac].

Prop. 2017/18:177. En ny sexualbrottslagstiftning byggd på frivillighet [A New Sexual Offences Act Based on Voluntariness].

Prop. 2025/26:95. Säkerhetsförvaring – en ny tidsobestämd frihetsberövande påföljd (22 January 2026) [Preventive Detention – a New Indefinite Custodial Sanction].

Prop. 2025/26:218. Dubbla straff för brott i kriminella nätverk och skärpta straffskalor [Double Penalties for Criminal Network Offences and Higher Statutory Penalty Ranges].
Prop. 2025/26:246. Skärpta regler för unga lagöverträdare [Tougher Rules for Young Offenders].

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