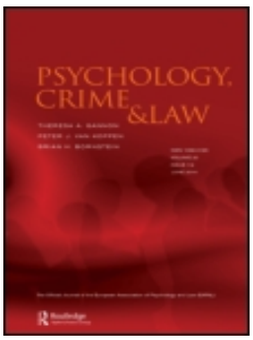

Psychology, Crime & Law

ISSN: 1068-316X (Print) 1477-2744 (Online) Journal homepage: http://www.tandfonline.com/loi/gpcl20

Prison sentences: last resort or the default sanction?

Andreia de Castro Rodrigues, Ana Sacau, Jorge Quintas de Oliveira & Rui Abrunhosa Gonçalves

To cite this article: Andreia de Castro Rodrigues, Ana Sacau, Jorge Quintas de Oliveira & Rui Abrunhosa Gonçalves (2018): Prison sentences: last resort or the default sanction?, Psychology, Crime & Law, DOI: 10.1080/1068316X.2018.1511788

To link to this article: https://doi.org/10.1080/1068316X.2018.1511788

Accepted author version posted online: 17 Aug 2018.
Published online: 23 Aug 2018.

PSYCHOLOGY, CRIME & LAW
https://doi.org/10.1080/1068316X.2018.1511788

Routledge
Taylor & Francis Group

Prison sentences: last resort or the default sanction?

Andreia de Castro Rodrigues [a,b], Ana Sacau [c], Jorge Quintas de Oliveira [d] and Rui Abrunhosa Gonçalves [a]

[a]CIPsi - School of Psychology, University of Minho, R. da Universidade, Braga, Portugal; [b]Universidade Lusíada of North (Porto), Porto, Portugal; [c]Faculty of Human and Social Sciences, University Fernando Pessoa, Porto, Portugal; [d]School of Criminology, Faculty of Law, University of Porto, Porto, Portugal

ABSTRACT

This paper discusses the sentencing purposes for penal penalties, judges' perceptions of sentencing purposes and prison sentences, and the effects of penal sanctions. We examine judges' positions towards different penalties, with a focus on imprisonment, since their views on the different penalties are related to their sentencing decision-making. Understanding these views is then critical for several practical and political purposes, including bridging the gap between academic discourse and legal practice. We accessed judges' views on penal sanctions through a questionnaire and an interview. Our sample is compounded by the judges of the criminal courts from the three major cities in Portugal. Despite the most recent criminological empirical knowledge, judges valued imprisonment as the most adequate sentence, both for different crimes and for different judicial purposes. This result is not consistent with viewing imprisonment as a 'last resort' solution. Indeed, we did not find this 'last resort' position in our data, and it is not apparent in the judicial statistics on imprisonment rates. Our data highlight the importance of increasing judges' training on criminological and sociological issues as well as the importance of changing the influence of their personal beliefs regarding penal sanctions into research-based positions.

ARTICLE HISTORY
Received 2 October 2017
Accepted 28 July 2018

KEYWORDS
Correctional effectiveness; prisons; penal sanctions; sentencing; judges' accounts

Introduction

In the last few decades, several disciplines, such as criminology, have analyzed the criminal justice system and discussed its implications for society and offenders. One of the most relevant issues is the effect of penal sanctions, specifically imprisonment, on recidivism or criminal desistance. The discussion of the effects and use of penal sanctions is often examined by considering the impacts on offenders and also from a critical perspective on imprisonment. We argue that an important missing link in this issue is understanding judges' sentencing purposes and their penal ideologies, which includes the effects that judges pursue with their sentences, as well as their attitudes towards using imprisonment

CONTACT Andreia de Castro Rodrigues andreiagtcr@gmail.com https://www.linkedin.com/in/andreia-de-castro-rodrigues-92025210/ CIPsi - University of Minho, R. da Universidade, Braga 4710-057, Portugal Universidade Lusíada of North (Porto), R. Dr. Lopo de Carvalho, 4369-006 Porto, Portugal

compared to alternative sanctions. To understand judges' choices in deciding a sentence, it is important to listen to their intentions related to the different penalties and to recognize their perceptions towards differential adequacy. Judges decide sentences in accordance with judicial law and privilege the sanctions they consider the most relevant. However, the part of the equation that they primarily consider is not always clear in practice. That is, what do judges want to achieve when they sentence? Specifically, how is imprisonment valued compared to the other available penalties? Additionally, are the actual effects of penal sanctions close to judges' ideas on the potential of the penalties'?

This paper briefly examines the sentencing purposes for penal sanctions, judges' perceptions of sentencing purposes, prison sentences, and perceived effects of penal sanctions. We will assess judges' positions towards different penalties, with a focus on prison sentences, through quantitative and qualitative data.

Judges' views on the different penalties are inextricably related to their sentencing decision-making and, as Andrews and Bonta stated, 'through their sentencing powers courts have a tremendous impact on offenders' (Andrews & Bonta, 2010, p.50). Understanding judges' views on the issues we exposed is critical for several practical and political purposes, including bridging the gap between academic discourse and sentencing practice, in order to transform sentencing practice into a research-based approach.

Theories of punishment and sentencing purposes

The rationale underlying the imposition of punishment and penal sanctions is based on the social contract, in which the state has the power to exert control to avoid social chaos (Pollock, 2010). However, punishment, as an intentional and avoidable infliction of harm or suffering, is morally problematic, because it would be considered wrong if it were not grounded in legal (de Keijser, van der Leeden, & Jackson, 2002; Spohn, 2002). Thus, punishment must be morally justified (Spohn, 2002). The question of the purpose of penalties is the baseline question in penal law – and constitutes the penal law paradigm (Dias, 2001). Despite the longstanding discussion of judges' discretion, it could be expected that punishment reflected a solid and commonly shared legitimizing framework (de Keijser et al., 2002). In reality, the penal law in different contexts incorporate different and contrasting sentencing purposes. Additionally, a recursive relationship seems to exist between sentencing practice and the penal ideology of these sentencing purposes upon which the perceived legitimacy of punishment depends (Henham, 2012). Thus, understanding these purposes is an important pathway for understanding the sentencing process (de Keijser et al., 2002; Spohn, 2002) and the sanctions that judges choose to impose.

Distinct philosophies of punishment provide different narratives for why and whom to punish. Therefore, the potential answers to the question of why we punish those who transgress the law may be categorized according to five sentencing purposes: rehabilitation, general deterrence, special deterrence, incapacitation and retribution (Ashworth, 1996; Carroll, Perkowitz, Lurigio, & Weaver, 1987; Hogarth, 1971; Spohn, 2002).[1] Both general and special deterrence may have positive and negative forms, referring to the nature of the process, that is, the sentence might reach a special or a general deterrence through positive or negative means. Positive and negative special deterrence aim to

rehabilitate or incapacitate the individual. Positive and negative general deterrence aim to reinforce societal norms or intimidate society with the threat of the sanction.

These sentencing purposes can be classified into two distinct perspectives: utilitarian (result-based, consequentialist or instrumentalist theories) and retributive (de Keijser et al., 2002; Spohn, 2002). The retributive theory is a backward-looking, desert-based approach because it focuses on the offense and the offender and is justified on moralistic grounds, which is why it is also referred to as retrospective or non-consequential. The utilitarian theory, which includes the sentencing that is based on deterrence (special and general), incapacitation and rehabilitation, focuses on the positive results that the penalty could achieve and on the future criminal behavior of both the person being punished and other members of society to justify the punishment as a rational means to deter crime (Kleck, Sever, Li, & Gertz, 2005; Spohn, 2002).

Another perspective on penal purposes reveals two contrasting attitudes: harsh treatment (deterrence, incapacitation, desert and moral balance) and social constructiveness (rehabilitation and restorative justice) (de Keijser et al., 2002).

According to retributive theories, the penalty is primarily a retributive and compensatory instrument that makes the offender pay a fair price for a crime, in equivalence to the imposed harm and the guilt of the offender (Dias, 2001). In other words, retribution is a negative-social doctrine that has questionable compatibility with modern law principles. That doctrine may be illegitimate in the rule of law because the state should be limited to protecting legal assets and not acting as a 'sanctioning entity of the sin' (Dias, 2001, p.71). Also, Spohn (2002) argued that 'if no "good consequences" would result from punishing an individual, no punishment would be justified' (Spohn, 2002, p. 9). Additionally, the 'new penology' movement asserts that offenders should be treated rather than punished (Kaufman, 1973).

In contrast, deterrence theories claim that a sanction should be a preventive instrument that results in but is not limited to harm for the offender because it is obligated to achieve the positive-social goal of crime prevention. Specifically, special deterrence doctrines maintain that the sanction should aim to prevent recidivism, deterring the offender from committing future crimes; this deterrence occurs through his/her social reintegration and rehabilitation (Dias, 2001). According to this author, deterrence is an essential sentencing purpose that reveals harmony with the role of penal law in preventing recidivism. The state should only inflict a penalty that causes harm to an individual when a positive-social goal can be associated with that harm (Dias, 2001; Spohn, 2002).

Is it possible to base a judicial system on just one sole sentencing purpose? This question calls for a discussion of the 'cafeteria systems' that were discussed by Mackenzie (2005), in which the plurality of available and legitimate aims brings with it the potential for inconsistency (Mackenzie, 2005). In contrast, Dias (2001) provides two examples to illustrate how the defense of an overriding sentencing purpose, even if it is special deterrence, inevitably entails conflicts and paradox. On one hand, a penalty is justified through the need for rehabilitation, which could result in inhuman punishments for minor offenses, which are frequently associated with a persistent criminality and a continued need for resocialization. On the other hand, it is difficult to apply these principles to situations where socialization and rehabilitation might not be relevant – for example, to some economic crimes or in some kinds of passionate homicide, where the probability of a new crime is almost non-existent. In these situations, we might question if the need to apply a sanction does not represent sentencing purposes close to retribution.

As such, sentencing purposes should essentially be preventive – whether through general or special deterrence – which suggests that penal sanctions should primarily aim to prevent future crimes and restore the juridical peace that was undermined by the offense (Antunes, 2013; Dias, 2001).

These sentencing purposes are put into practice in different judicial systems. As the present study has been conducted in Portugal, we introduce a brief explanation about the Portuguese criminal justice system, namely the process of prosecution and sentencing.

In Portugal, the process at the prosecution is organized on a national basis. After a crime is uncovered or reported, the execution of acts of investigation is led by a public prosecutor and issued or authorized by an investigating judge. If investigation gives sufficient evidence about the commission of the crime, the case goes to court for trial. Portuguese criminal system follows an inquisitorial procedure so a single judge or a bench of three judges have the complete control of the proceedings, inspecting the facts of the case and the evidence, hearing the defendant, witnesses, forensics, etc. Independently of what happened in previous steps as, for example, police interrogation, judges must decide during the judgment if each fact presented at court is proved or not. Then, the public prosecutor requests a verdict and a penalty. After oral procedure, judges deliberate about how the facts fit a particular crime as defined by the penal code and which the limits of the penalties for this particular crime are. After that, judges must weigh the specific characteristics of each case, as we describe above, and define the concrete penalty (sentencing).

Portuguese criminal sentencing is based on civil law tradition, which strongly guides sentencing by the writing penal and procedural codes. Penalties and their minimum and maximum limits are defined by the law for each offense as well as penal purposes of sentencing (e.g. retribution is not supposed to be the purpose for sentencing). Portuguese criminal law provides two mandatory penalties: prison and fine. Prison penalty can be substituted by other non-custodial sanctions as fine, suspended prison term, or community service, between others. Still, penalties can lead associated ancillary sanctions such as the prohibition of driving (e.g. driving without a license crime) or the obligation to respect certain rules of conduct. If a specific crime could be penalized with custodial and non-custodial penalties, criminal law establishes that court should prefer non-custodial penalties (art. 70 of Portuguese Penal Code). Only prison sentences under 5 years of imprisonment can be suspended. The judge must decide for a particular sanction depending on the specific characteristics of each case, namely, mitigating and aggravating circumstances, social alarm, etc. The discretionary power of judges is particularly evident at this moment because these characteristics of each case must be weighed by the judges without specific procedure guides.

In practice, if it is not feasible to select a single overriding aim and there are no prescribed proposes for the specific categories of offense or offender, we raise the same question as Mackenzie (2005): how are purposes implemented? And, we add, how much do the different penalties judges may impose respond to each purpose?

Judges' perceptions of sentencing purposes and prison sentences

The sentences that judges impose, as well the potential discrepancies among the sentences, are strongly related to the penal philosophies and attitudes of the judges

(Carroll et al., 1987; Hogarth, 1971; McFatter, 1978). Mackenzie (2005) referred to the lack of consistency and accountability in applying sentencing aims and purposes after describing how judges differed in the use of purpose for specific offenses.

These attitudes appear to be involved in the way that information is perceived during the sentencing process (de Keijser et al., 2002). As such, penal philosophies and attitudes predispose judges who sentence to respond to certain types of crime in specific ways that are based on their personal beliefs about what the penalties are supposed to achieve and their different adequacies (Hogarth, 1971; Spohn, 2002). In his classic study, Hogarth (1971) found that although judges believe that it is their role to prevent crime through sentencing, they had differing ideas on how to prevent crime and the penalties' effects. Judges believed in the efficacy of the penal sanctions that they imposed but largely disagreed about the effectiveness of each sanction (Hogarth, 1971). In that study, judges differed in their penal philosophies but had individual and consistent beliefs that were based on those penal philosophies (Hogarth, 1971). Additionally, besides having reasonable differences regarding their colleagues' penal philosophies (Hogarth, 1971), the judges did not appear to be sensitive to the importance of the sentencing purpose, sharing the idea that the sentencing purpose was not a high priority in the sentencing process (Mackenzie, 2005).

Additionally, many of the judges' sentencing considerations on penal philosophies and sentencing purposes appeared to be based on judges' experiences in court, as opposed to the aims and purposes that are prescribed by law or criminological theories of punishment (Mackenzie, 2005). In addition to raising the issue about the connections (or absence of them) between academic evidence, prescribed laws and sentencing practices (Mackenzie, 2005), this point reinforces the idea that imposing a penal sanction is marked with inconsistencies between intentions and implementation (Pollock, 2010). Besides, previous studies raise the question of the extent to which legal norms and processes facilitate the transformation of sentencing purposes (or penal ideologies as the author states) into guides for action through the routine practice of sentencing (Henham, 2012).

As such, we argue that it is important to understand judges' perceptions and attitudes towards the sanctions they inflict to inform the development and imposition of a continuum of penalties that accurately embodies criminal justice system principles (Moore, May, & Wood, 2008).

In relation to penal philosophies and the purposes for sentencing, Mackenzie (2005) found that judges mentioned the balancing theme, as they did when discussing the sentencing process in general. de Keijser et al. (2002) also noted that judges' attitudes did not tend to mirror a specific moral framework but instead merged into a 'more streamlined and pragmatic approach to punishment' (de Keijser et al., 2002, p. 333).

As early as in Hogarth's study (1971), individual deterrence and retributive punishment appear to assume greater significance in the actual sentencing than in judges' images of their behavior, as they gave little weight to those two philosophies, when questioned. Under a philosophy of community protection and offenders' correction through punishment, judges found legitimacy in imposing rather severe penalties (Hogarth, 1971). Several decades later, Mackenzie (2005) reinforced that when judges claimed to be using deterrence, in many cases, they were sentencing based on just deserts or retribution.

The discussion on the extent to which the administration of penal sanctions and, specifically, imprisonment, is justifiable as a punishment for crime is not new and

reflects the 'prison dilemma' (Kaufman, 1973). Although judges believe that prison is the most punitive sanction (Moore et al., 2008), statistics show that judges are strongly oriented towards using prison, as imprisonment is treated more as an option of choice (Spohn, 2002) or the default sanction rather than as a last resort (Maguire, 2014). While this may be the result of limited sentencing options instead of a desire for punitive and tough sentences, it may also reflect the narrow and punitive attitudes that dominate the system (Maguire, 2014).

In addition, Tata (2016) argues that the idea of last resort, in a certain way, makes it possible for the prison to be the only option that does not have to prove itself, because it can always be imposed using justification that no other options seem to work (Tata, 2016). In fact, that was one of the three circumstances that judges highlighted as a possible exception for using prison as a last resort, combined with the seriousness of the offense and the persistence of the offender (Maguire, 2014). Maguire (2014) also revealed that judges had certain 'pet hates', as some crimes are so serious that judges believe they must employ a severe approach. This study showed that judges agree with the principle of last resort in theory, but, in practice, they often depart from it based on the demands of the case. As such, Maguire (2014) concludes that 'current definitions of the last resort are vague, malleable and easily manipulated by judges to fit their interpretation of when it is appropriate to use prison as a sanction' (p. 16).

Indeed, it is not easy to define the endpoint at which prison can be used as a last resort or to identify when 'enough is enough', and it is not clear how judges make this decision, although they believe that their decisions are clear (Maguire, 2014; Tombs & Jagger, 2006). The situations for which judges concluded that prison was the only option, usually for dealing with persistent offenders and minor offenses, 'clearly revealed an underlying retributivism, aimed not at the offence, but at the offender' (Tombs & Jagger, 2006, p. 818). This reasoning allows us to question the validity of Kaufman's (1973) conclusion that retribution was the primary, if not the only, purpose that most correctional sanctions served.

Simultaneously, judges believe that sending someone to prison is very difficult, and they appear to be skeptical about the effects of imprisonment – especially the extent to which prison sentences achieve their traditional purposes, specifically individual deterrence – and are aware of reoffending rates (Mackenzie, 2005; Tombs & Jagger, 2006). Although this skepticism was also manifested towards the potential for prison rehabilitation and the effectiveness of the programs that are available in the system (Mackenzie, 2005), judges believed that sending some individuals – often grossly deprived people – to jail could provide these offenders with access to rehabilitative treatment and care that is not available to in the community (Tombs & Jagger, 2006).

Several important problems that were related to the prison system were also raised by the judges who participated in Mackenzie's study. These problems included the following: the inadequacy of prisons for some offenders due to their circumstances; the fact that prison is, at best, a temporary solution to someone's criminality; and the conflict between pretending to foster an offender's responsibility for his/her life and offending behavior and a penalty that strips them of almost all responsibilities and decisions (Mackenzie, 2005).

Despite the known challenges, prison sentences are currently used worldwide. According to Tombs and Jagger (2006), prison use is related to a normalization of routine imprisonment by deploying a series of techniques of neutralization, including denying alternatives, appealing to a higher authority, routinization, appealing to necessity, refusing

empathy, interpretative denial, moral prioritizing, and role distancing. In Portugal, the latter technique is facilitated by the fact that the judge who sentences is not the judge who applies and monitors the penalty's enforcement.

The effects of penal sanctions

There are two different rationales for prison sentences. The first asserts that locking offenders behind bars will reduce recidivism by teaching them and their communities that 'crime does not pay', as imprisonment is a painful and costly penalty. An alternative perspective was primarily developed by criminologists, and views imprisonment not simply as a 'cost' but also as a social experience that deepens illegal involvement (Cullen, Jonson, & Nagin, 2011). Indeed, as it has been functioning, imprisonment has not been shown to have a positive and significant impact on recidivism (Andrews & Bonta, 2010; Bales & Piquero, 2012; Beijersbergen, Dirkzwager, & Nieuwbeerta, 2016; Cochran, Mears, & Bales, 2014; Cullen et al., 2011; Lipsey & Cullen, 2007).

Globally, there is variation in the effects of prison as a deterrent, depending on several factors, such as the type of offender (Cullen et al., 2011; Ritchie, 2011), the nature of the prison experience and the history of prior sanctions (Mears, Cochran, & Cullen, 2015).

Furthermore, several studies assert that prison does not reduce reoffending more than non-custodial sanctions (Cochran et al., 2014; Cullen et al., 2011), considering all crimes and all offenders (Ritchie, 2011). Many authors even argue that a criminogenic effect is, at least, plausible (Durlauf & Nagin, 2011), based on an increase in recidivism compared to non-custodial sentences (Bales & Piquero, 2012; Gendreau, Goggin, & Cullen, 1999), a higher probability for developing an oppositional culture (Listwan, Sullivan, Agnew, Cullen, & Colvin, 2013), a feeling of resentment towards society (Sherman, 1993), and the strengthening of a deviant identity (Matsueda, Kreager, & Huizinga, 1992). As such, it is not logical to choose a prison sentence to reduce future crimes. Thus, imprisonment should only be imposed for specific groups of offenders and only when it is expected to have better results than non-custodial sanctions (Cullen et al., 2011).

Despite the evidence that suggests that imprisoning individuals is, without additional rehabilitative measures, inadequate for reducing recidivism and promoting rehabilitation (Lipsey & Cullen, 2007), prison sentences are used all over the world.

For example, in Portugal, as well as in many other countries, there has not been a decrease in the use of imprisonment sanctions, notwithstanding several important changes in the law. For example, changes in the law allow for sentences that are less than 5 years to be suspended, have decriminalized drug use and have increased the use of alternative sanctions, such as community service and electronic monitoring. Indeed, in 2017, the 49 Portuguese prisons continued to be over capacity, with an average occupation rate of 108.9%, comprising 13,943 inmates (World Prison brief – Institute for Criminal Policy Research, Retrieved from www.prisonstudies.org). According to this international database, Portugal ranks 25th out of the 56 European positions for the prison population rate (ranked from highest to lowers) and ranks 8th for occupancy level. Additionally, comparisons between the numbers of custodial and non-custodial sentences show that both imprisonment and non-custodial sentences rates continue to grow (after a decline on prison sentences in 2008, which is probably related to the introduction of a law that allowed sentences that were less than 5 years to be suspended) (Direção Geral de Reinserção e

Serviços Prisionais, Retrieved from http://www.dgrs.mj.pt/web/rs/estat). According to national official statistics, on 31 December 2016, 13,779 prison sentences were being enforced, in contrast to 7126 terms of community service and 14,762 suspended prison sentences.

Thus, it appears that there is a gap between criminological empirical knowledge and sentencing practices, as these two processes seem to operate independently.

This gap between the lack of evidence for the benefits of prison terms and the continued high rates of imprisonment, as well as an absence of significant decreases in prison sentences despite changes in the law, may suggest, as Tombs and Jagger (2006) assert, that judges decide sentences not only based on the impositions of the law but also in line with their own beliefs about the penalties' differential potentials and disadvantages. Additionally, since moral and social values and the way these values impact punishment are in a constant change, descriptive accounts or discussions of the possible paradoxes in criminal justice are insufficient to understanding the forces that actually drive these changes (Henham, 2012).

All of this calls for the importance of studying judges who are actually involved in sentencing practice, on their perceptions about penalties, since these perceptions should be related to their sentencing decision-making process. As Henham states, 'more emphasis should be given explaining the moral foundations that underpin human perceptions of "justice" in sociological accounts of the "reality" of sentencing' (2012, p.80).

In this paper, we aim to explore judges' perceptions about sentences purposes and penalties efficacy (particularly prison sentence). Thus, we ask the following questions:

> How judges assess the different sanctions to distinct crimes and the sentencing purposes?
>
> How do they qualify imposing a prison sentence compared to the other available alternatives when deciding a sentence?

We used a questionnaire and in-depth interviews to address these questions. The questionnaire mainly covers the former, assessing judges' perceptions about the adequacy of sentencing purposes to different crimes and the adequacy of distinct penal sanctions to the same crimes. By the other hand, the interview explored judges' discourses about penalties, in particular the prison sentence, revealing their ideas about its efficacy, the distinction between a practical and abstract discussion on penalties and imprisonment features, as well, as the personal experience of applying penalties and prison sentences.

Data and methods

Instruments and data collection procedures

The data reported in this paper were collected with two different methods – a questionnaire and an interview. The goal was to complement the quantitative findings with in-depth information to allow for an exploration and understanding of the previous results.

These instruments were developed as part of a larger research project (Castro Rodrigues & Sacau, 2012, 2014, 2015), but this paper focuses on the contents that are related to the prison sentence.

The questionnaire was developed for this purpose and was based on previous similar studies (Carroll et al., 1987; Hogarth, 1971; Mackenzie, 2005; Sobral & Prieto, 1994) as

well as on our observations from several court sessions. The questionnaire was a self-report assessment and was organized into 10 groups of items, plus socio-demographic and political questions. The final questionnaire was revised by two retired judges to assure that it was suitable for the intended purpose and target population with respect to vocabulary, question formulation and sensitive issues. The questionnaire was given directly to the judges in their courts during the initial research phase.

The questionnaire is composed by 10 groups of items covering topics as causes and justifications for crime, sentencing aims and penal ideologies, aspects related to the offender, to the judge, to the criminal act, considerations about the different criminal sanctions, between many others; plus a socio-demographic information section. There were two groups of questions that assessed judges' views on prisons. One group evaluated judges' perceptions of the adequacy of the different penalties (cautions, fines, community service, suspended prison sentences, prison) for the legal purposes that sentences may pursue (retribution, rehabilitation, positive special deterrence, negative special deterrence, positive general deterrence, negative general deterrence, and incapacitation), while the other group assessed the adequacy of different penalties for different crimes (drug-related offenses, sexual crimes, economic crimes, theft/burglary, and homicide).

The items that are included in this paper were scored on a five-point Likert scale that ranged from 'not at all' (point 1) to 'totally' (point 5). For the five-point Likert scale, we defined values from 1 to 2.50 as low, 2.51 to 3.50 as neutral, and 3.51 to 5 as high.

An in-depth interview followed a semi-structured interview guide, composed of 30 questions. The initial version of the interview guide was piloted by two of the judges from Porto court to examine the suitability, accuracy and clarity of the questions, as well as the impact of the number of questions, which resulted in the final version.

The interviews were conducted in a later phase of the research, after being in court for almost a year, to maximize the judges' willingness and comfort in speaking to the research team. Interviews were scheduled according to each judge's availability.

The interviews were audio recorded and transcribed *verbatim*. Data were analyzed through a process of content analysis. A codification grid was developed through an inductive process, that is generating categories from the material obtained, and codifying the units according to their semantic proximity. The units coded were defined as the judges' ideas exposed in the interviews, which is a choice most suitable to spontaneous discourses than sentences or paragraphs are. The codification of the material was controlled by an independent judge, through a process of co-encoding, both for generating the codification grid, and to codify the material, in an initial phase of the codification, until reaching a total agreement. In the end of the codification, the units in each category were checked by the two researchers to warrant their semantic proximity and their adequacy to the category where they were codified.

Data collection took place during the years of 2009 and 2010.

Participants

A total of 49 judges from the criminal courts in the three larger cities in Portugal completed the questionnaires (27 from Lisbon, 14 from Porto and 8 from Coimbra). All of the judges from these courts were personally and individually contacted to fulfill the questionnaire and no one refused to participate in the study. Therefore, our sample

corresponds to the population of judges actively working on those courts, in the period of data collection. The sample was gender balanced and included 26 women. Participants' ages ranged between 32 and 55 years old ($M = 44.5$, $SD = 5.5$). For professional experience, the least experienced judge had five years of experience, while the most experienced judge had 23 years of experience ($M = 16.1$; $SD = 4.6$).

The respondents to the in-depth interviews were all the judges in Porto, except for the two who had participated in the pilot testing of the interview guide, resulting in a total of 12. This group of judges was chosen because their court was the primary research location. It was the court in which the observations that guided the methodological definitions occurred and, consequently, where we developed trusting relationships with the judges, which allowed them to be properly and sufficiently involved in the interviews and maximized the genuineness of their viewpoints.

Results

Study 1 – the questionnaire

The adequacy of the different penalties for different judicial purposes and crimes

As previously mentioned, this section of the questionnaire examined the degree to which judges believed that each of the most utilized penalties of Portuguese legal code was adequate for each different judicial purposes that sentencing might pursue and each category of crimes. In order to compare the adequacy of each penalty we perform, for each of different purposes or crimes, a repeated-measures general linear model, with a least significant difference adjustment for multiple comparisons. A significant difference between the estimated marginal means shows the different evaluation of each penalty to achieve a purpose or to respond to a specific crime.

The results are described in Table 1.

Our data revealed that there are significant differences among judges in the way they assess the ability of each penalty to achieve sentencing purposes, as well as each penalty adequacy for different crimes.

In relation to sentencing purposes, prison term was considered the most suitable penalty in order to achieve all sentencing purposes except rehabilitation, showing significant differences with all remaining penalties. Such suitability of prison includes retribution, special and general deterrence and incapacitation purposes. This belief might explain the high rate of imprisonment shown by official statistics. In contrast, caution was systematically the most devalued. Fines, community service and suspended imprisonment were assessed near the mid-point of the scale.

Judges considered that rehabilitation is more achievable through community service and suspended imprisonment but not through prison term or other sanction. In line with this, if judges valued rehabilitation as a main purpose for sentencing it could be expectable a higher use of non-custodial sentences. Unexpectedly, the ability of prison term to achieve incapacitation purposes although having the higher score was valued as neutral, even though a prison term may be the penalty that can most effectively incapacitate individuals from committing crimes, during imprisonment. Additionally, prison was also considered highly adequate to achieve positive special purpose, even though this is not congruent to the recent results of rehabilitation literature, since this aim is focused on deterring the individual from committing more crimes through positive means.

Table 1. Adequacy of the penalties to the judicial purposes and to different crimes.

	Caution M (SD) Min–max	Fine M (SD) Min–max	Community service M (SD) Min–max	Suspended prison term M (SD) Min–max	Prison term M (SD) Min–max	F (df)
Sentencing purposes						
Retribution	2.52^{a} (1.03) 1–5	3.40^{b} (.79) 2–5	3.44^{b} (.99) 2–5	3.51^{b} (1.00) 1–5	4.41^{c} (.67) 3–5	26.526** (4.44)
Rehabilitation	3.42^{a} (1.27) 1–5	3.35^{a} (1.06) 1–5	4.04^{b} (.96) 2–5	3.98^{b} (.95) 1–5	3.31^{a} (.98) 1–5	9.295** (4.44)
Positive special deterrence	3.50^{a} (1.19) 1–5	3.52^{a} (.95) 1–5	3.94^{b} (.93) 2–5	3.92^{b} (.79) 2–5	3.96^{b} (.85) 2–5	6.314** (4.44)
Negative special deterrence	2.76^{a} (1.05) 1–5	3.23^{b} (.98) 1–5	3.25^{b} (1.02) 1–5	3.35^{b} (1.18) 1–5	3.85^{c} (1.12) 1–5	8.802** (4.41)
Positive general deterrence	2.79^{a} (1.22) 1–5	3.31^{b} (.90) 1–5	3.58^{c} (.94) 2–5	3.50^{bc} (.74) 2–5	4.31^{d} (.72) 3–5	13.445** (4.44)
Negative general deterrence	2.38^{a} (1.11) 1–5	2.90^{b} (.99) 1–5	2.94^{b} (.94) 1–5	3.06^{b} (1.04) 1–5	3.96^{c} (1.13) 1–5	12.936** (4.42)
Incapacitation	1.75^{a} (.91) 1–4	1.94^{b} (.95) 1–4	1.96^{b} (1.04) 1–4	2.14^{b} (1.12) 1–4	2.67^{c} (1.38) 1–5	4.685* (4.43)
Crimes						
Drug-related offenses	1.65^{a} (.96) 1–5	1.98^{b} (.90) 1–4	3.22^{c} (1.03) 1–5	3.49^{cd} (.94) 1–5	3.90^{d} (.92) 1–5	59.970** (4.44)
Sexual crimes	1.24^{a} (.56) 1–3	1.41^{b} (.67) 1–3	1.90^{c} (1.03) 1–5	2.84^{d} (1.16) 1–5	4.23^{e} (.78) 1–5	115.671** (4.44)
Economic crimes	1.71^{a} (1.02) 1–5	2.98^{b} (1.22) 1–5	2.84^{b} (1.18) 1–5	3.35^{c} (.97) 2–5	3.57^{c} (.94) 1–5	27.522** (4.45)
Theft/burglary	1.92^{a} (1.04) 1–5	2.61^{b} (1.00) 1–4	3.16^{c} (1.05) 1–5	3.51^{d} (.87) 1–5	3.69^{d} (.94) 1–5	26.482** (4.45)
Homicide	1.02^{a} (.14) 1–2	1.12^{ab} (.33) 1–2	1.33^{b} (.77) 1–5	2.08^{c} (1.17) 1–5	4.55^{d} (.91) 1–5	170.649** (4.44)

Notes: Scale 1–5. Repeated measures: different letters reflect a significant difference between the estimated marginal means.
*$p < .05$; ** $p < .001$ two-tailed.

Overall, we must point out that as the severity of the penalty increases (from caution to imprisonment), the mean score for each judicial purpose also increases, with the exception of rehabilitation. This result seems to reveal a judges' tendency to believe that the fulfillment of sentencing purposes is related to the severity of the sanction.

Results also show some variability of judges' positions about the adequacy of each penalty to the different sentence purposes. For most penalties including prison term, the range of the assessment of their ability to fit different sentencing purposes is between 1 and 5 (see Table 1). An analysis of the range of the responses and also the standard deviations revealed that the higher variability occurred when judges assessed the adequacy of caution to the different sentencing purposes, and of the adequacy of suspended imprisonment and imprisonment to achieve incapacitation and negative special or negative general deterrence. Some exceptions to this high variability occurred: the assessment of the capability of prison term to achieve retribution and positive general deterrence purposes (with a score variation between 3 and 5 points and a low standard deviation); and, the assessment of suspended imprisonment to achieve positive general or positive special deterrence.

In relation to the adequacy of each penalty to different crimes, again, prison term is the most valued penalty, especially when considering sexual crimes and homicide. Regarding drug-related crimes, economic crimes and theft/burglary, prison still reveals higher means even though not significantly different to the possibility of suspended prison. In contrast, caution was the most devalued penalty for all crimes.

Our data also showed a variability of the assessments of the adequacy of the penalties to the different crimes, with exception, as expected, to the application of caution and fines to homicide and sexual crimes. Interestingly, judges vary in their positions between the two extremes of the scale when evaluating the adequacy of the prison sentence for all different crimes. This discrepancy is also showed when judges assessed community service and suspended prison term.

Study 2 – the interviews

The interview content that was related to prison sentences were coded into four categories: the efficacy of the different penalties; prison in the abstract sense, that is, what should it be and what it should it seek to do; prison in the practical sense, that is, what it may achieve and what it is; and the personal experience of imposing terms of imprisonment.

The efficacy of the different penalties

Several judges believed that it was difficult to have an opinion on the efficacy of the different penalties, placing the onus on the way inmates live – in other words, the penalty that is assumed by each individual.

> I think that it has to do with so many things, you know? Let's say, for example, someone that does not have any purpose in life, just sitting on a wall all day [just doing nothing all day], it might be the same to be seated in a wall or to be seated in a cell … It may be … But it may not … Sometimes, all that is necessary is to find a girlfriend or a boyfriend … other times, it only takes having a child, other times they have all of that and nothing matters and they keep committing crimes, I don't know, I have no idea … I think that the human being is so complex and the situations are so diverse that I can't say.

There was often skepticism regarding the penalties' effectiveness. Specifically, except for the prison sentence, which should scare people, judges viewed the other sanctions as not taken seriously by the individuals. This position is demonstrated with an example of a suspended prison term, which many defendants perceive as an acquittal. Underlying these judges' views appears to be a criterion for the efficacy of the penalties that is based on their degree of punitiveness, rather than their rehabilitation potential.

> People seem to think that they can do everything and nothing will happen to them. And so … it seems that they are only afraid of a prison sentence. The rest is seen as 'ok, so I guess I was convicted on that', some of them don't accept any of that, they even laugh about it … I have already judged several cases of driving with a blood alcohol level or driving without a license, you know, for which the sentence doesn't work at all … I guess that they would be capable of going away from the court where they had just been convicted and driving again … Overall, I think the penalties … I don't know if this is not to believe in the justice system, when you say that the penalties don't work at all, but you know …

There was also a different view that was focused on the rehabilitation of the individuals. The penalty considered to have a substantial potential for resocialization was probation, which includes monitoring and is often imposed for small- and medium-scale crimes. In contrast, community service is mentioned in a divisive manner, as some judges believe that it is very effective for rehabilitation, while others discredit it, and the latter usually occurs after having previous failures with its application.

Another issue that was mentioned was the criticism of recent changes in the penalties implementation law with respect to their definition and enforcement, which appears to address more economic than effectiveness-oriented criteria. Examples of these changes include reducing the amount of time served to be able to apply for a conditional release or the generalized application of electronic monitoring.

Another criticism was related to the rehabilitating effect of prison sentences. Nevertheless, incarceration was viewed as the only penalty that had punitive power or the potential to reduce the commitment of new crimes.

These judges made several suggestions to improve the penalties effectiveness. First, they recommended widespread use of weekend detention and the day release, specifically for recurrent minor offenses, such as driving without a license or with an illegal alcohol level. In contrast to prison terms, these penalties allow the offender to maintain his professional situation and remain connected to familiar and social bonds. Another potentially useful measure was to sentence individuals to short prison terms to have a strong impact on the offender without incapacitation or disconnection from the realities to which they will return.

Another criticism focused on the inconsistency of the justice system towards different crimes, for example, comparing the penal frameworks of theft and sexual crimes (penalties are higher in the first case). Moreover, for enforcing penalties, some judges indicated that drug dealers usually serve a higher proportion of their sentence (5/6) before they can request a conditional release compared to serious crimes that include harm to humans (in some cases, these offenders might be eligible in the middle of their sentence).

> We have to make distinctions, otherwise … because the drug dealers that go inside for 4 years have to serve 5/6 and the guys who are trampling people may just serve half of the sentence, you know? It is not credible, even for society!

The importance of being thorough when determining sentences was highlighted so that a non-reasonable sequence of suspended penalties would not ultimately result in such a long prison sentence that it would compromise an individual's life.

> An incorrect suspended sentence is a half way for a sequence of sentences to be served. Because a wrong positive prognosis means that the offender will commit another crime, for which he will eventually be convicted, which, although not automatically, will lead him to incarceration, due to the revocation of the suspension of the sentence. Then, he will serve the first and the second sentences. And meanwhile, if other judges did the same with that guy, that is, if he has concurrent convictions, he will serve all of them. That is, a wrong positive prognosis may ruin a person's life. One may think that it is making a generous legal interpretation but could be doing the worst for the offender.

Overall, we denoted a (more or less explicit) disbelief in offenders' resocialization. Several judges emphasized the importance of the penalties that curb illicit behavior, as it is an essential condition for offenders to initiate the processes of change.

> For many years, I believed that people were disposed not to offend, but nowadays, I am obliged to agree that without repressive measures, people don't accept rules. Although I believe that it is possible to change people and resocialize them, without repression, people won't do it.

This is an interesting perspective because it denotes a type of learned punitiveness and disbelief in the system but also shows that resocialization was generally viewed in a simplistic manner. Indeed, in their discourse, many judges viewed resocialization as an obvious or linear process that is derived from giving an individual the possibility of serving a prison sentence in a suspended form, as something that linearly occurs inside the prisons, or when forced by something aversive. Regardless, the complexity of the process of personal change and reorganizing criminal careers are often devalued or not sufficiently addressed.

Prison in the abstract sense

This category reviews contents that are related to the purpose of the prison and the aims that are intended to pursue, in abstract, in addition the contents related to what prison should be, how it should function and the limitations to this optimal functioning.

The most frequently discussed aims that imprisonment should pursue were general deterrence (providing society with a message that crime has consequences) and punishing the offenders. Negative special deterrence and re-socializing delinquents were also mentioned, although these were often viewed as more theoretical than achievable aims.

> General deterrence, which is a message to society or to some individuals that may fall in the commission of crimes: 'watch yourself, this could happen to you' … It is a message to society that 'after all, justice works, that means that these guys that do this and that, will pay, will go to prison' … On the other hand, for the offender, the penalty should work also as a punishment, we cannot evade the question, but it is a punishment with a view to his rehabilitation – that is, we have that intention, it is not possible, in reality, but ideally it is intended …

Some judges stated that the imprisonment period itself had a potential rehabilitative effect because it is a time that allows for reflection and creates conditions for acquiring emotional and professional skills.

> May that period be a time for internalization and positive evolution towards the right for the construction of that personality …

Several judges noted, as skeptic and optimistic on prison potentials, that there were failures in implementing the sentence. The most frequently stated concern was the inefficacy of promoting offenders' rehabilitation, as provided by law, due to the lack of resources. Many believed that achieving this rehabilitation aim depended on putting inmates to work, as work is essential for promoting inmates' inclusion, and fostering professional skills that will be required in the future.

> There is a modesty regarding putting offenders to work! I think that they should have to work inside prisons. They should be kept busy, looking for competencies, even professional ones, to be able to become mechanics, bricklayers, mathematicians, for those who were willing to study, you know? That possibility should exist … It should be explained to them … That had to be done … And so they should not be able to stand there doing nothing! Or at least, if they wanted to stand that way, the others should have some kind of advantage … A reduction in the prison term, something … The possibility of a conditional release …

One judge mentioned that prisons should function in a way that is analogous to the old district prisons, which, in his opinion, were closer for offenders and rarely mixed distinct inmates, whether in terms of crimes, ages, or attitudes inside the prison. The potential for working with individuals in similar conditions is highlighted as an important condition for fostering rehabilitation during the completion of the penalty. In addition, overcrowding is an obstacle to rehabilitating inmates. The importance of defining a limit for the prison term was also mentioned, as it may provide the inmate with a foreseeable end that could motivate his/her involvement in preparing for the future.

Prison in the practical sense

The third category includes contents that are related to the specific aims that imprisonment seeks to achieve, as well as the contents that are related to how prisons actually work.

Judges believed that the main purpose of imprisonment is general deterrence, that is, the message to society on the consequences of committing crimes and the effectiveness of justice in protecting citizens and communities.

> Above all is the societal security … Usually when we arrest someone … We won't do it unless we think that person is doing harm to society. I think that is the main principle and I think that … it is just for that prisons exist. Above all, that focus on societal insecurity … under the control of the penitentiary system …

For those who are convicted, the most frequently discussed goal was preventing new crimes and protecting the convicted from himself with physical constraints.

> Social reintegration works only in the theory … On various occasions, I gave an individual a suspended sentence and then, after some months, another suspended sentence, and another, until I cannot do it anymore and I have to arrest him. And then we know that sending an individual to prison is more to deter him from committing more crimes … We know that they won't learn anything in prison … Sometimes the idea that we have is that we are protecting the individual from himself …

Another goal that the prison can achieve is addiction treatment for the physical impediment of continuing to use drugs – which, in practice, is not necessarily the case, given

that Portuguese prisons are not absolute drug-free environments, drug treatments are not available for all inmates who want to be treated, and prison is not the most adequate context for effective treatment.

> In my opinion, the prison has only one positive side, and that concerns drug addicts. Knowing how hard it is to stop using, only when in jail and in a situation of a total absence of drugs, some of them can do it.

Overall, there is the strongly emphasized idea that prison does not enable positive special deterrence purposes or resocialization because there are so few positive resources.

> And so, the resocialization of inmates during custody is a myth … because prisons are overcrowded, there are no means, because monitoring is almost nonexistent, many people don't understand … it is a number of factors …

Furthermore, many judges highlighted that detention can do more harm than good to inmates – the idea of prison as a school of crime.

> As it is commonly said, a person goes to prison to learn the school of crime … When a prison is only a storage for people, with no conditions … In truth, what we are doing is just to protect society from those people, for a period, but in the end, I don't know if they leave better than when they entered. I think that many of them become worse because … they used to know some delinquents but when they get out of there they know those delinquents and many more, probably now the leaders, isn't that right?

However, some judges also mentioned that regardless of how prisons function, it is the individual who has the power and the ability to actively build his experience of reclusion. This reveals a tendency to place the onus of the rehabilitation on inmates, whatever their circumstances.

> I think that idea of the prison as a school of crime is kind of a myth … the prison has already got many individuals out of more trouble. And there are some guys that if they had been in pre-trial detention, they wouldn't have committed more than 20 or 30 crimes like they did … besides, we cannot forget that it is the convicted himself who builds his own reclusion. So, if he devotes himself to his resocialization, anyhow, the system obviously must help him … alone, he won't be able to do it all, but the system might try to help him and he can refuse to collaborate. And we have examples of inmates that do what is proposed, even if it is collecting training courses. Keep themselves active … and there the others who won't accept anything. And the system is the same for both, isn't it? So, the penalty also starts from them. Starts and ends … So, it is not good, but is not as bad as is commonly said either …

Some judges describe prison as the continuity, for many inmates, of a 'life of leisure', with respect to where they came from and where they will go after serving their time, more uprooted than before and with an increase in crime related skills. Accordingly, imprisonment is an ultimate solution that should only be used for very serious crimes or in situations in which all other possibilities have been exhausted. There were also references claiming that prisons are a less evolved area in the system of justice because no better solution has appeared over time to address limited situations.

> I think that with respect to penitentiary law, we are still in the Middle Ages. But for now, it is what we have, the prison … many times, it imposes itself as the lesser evil, doesńt it?

A crucial point was the idea of a large divide between the judge who imposes the penalty and the judge who controls its enforcement, with a loss of judicial purpose. As

such, there is a general idea that judges are obliged to impose penalties, regardless of how things operate (namely, in terms of enforcement, monitoring, etc.).

The personal experience of imposing imprisonment terms

Finally, the fourth category includes the issues related to judges' personal experiences of imposing prison sentences. Overall, we found two opposing views that were related to the associated difficulty.

Some judges said that imposing a custodial sentence was not difficult or distressing, as they safeguarded their attitudes about the fairness of the decision because the penalty would only be utilized when no other option was suitable or when their task was merely to define the sentence instead of enforcing the penalties.

> It was never painful for me. I must be aware of what my job is. I can't do my job and the job of 5 or 6 other people. Besides, when applying the law, I must adhere to what the law imposes me to do. And not to consider the poor implementation of the penalty, right? So, I shouldn't feel the compunction of the inadequate enforcement of other persons. Nor can I justify that I don't impose a prison term because it is not properly applied. But I think that, not as a judge, but as a citizen, I must intervene as much as possible … and as a judge, if I have a defendant reporting any abuse from me, or a judicial agent, or another judge, whoever, I have the responsibility of denouncing it … But it does not distress me to apply a prison term.

Other judges held the opposite position and stated that it was always painful because the freedom of a human being was at stake. Many of these judges emphasized that the difficulty occurs in the period prior to making the decision and that they are pacified after making the decision.

> In a certain way, it is always painful. And it is harder for me when the defendant overtly accepts the decision … it is always distressful. But I don't live chased by that … because the great weariness happens before I get to the decision. When I made the decision, I turn off myself from previous involvement … Because many times I decided for a prison term and then, in the middle of the night, I changed the decision and suspended the imprisonment, as I have done the contrary several times … So, for me, the difficulty happens before making the decision in my mind. Then, saying it to the person … I think that if I make that decision it is because I believe in it, so there is no constraint in pronouncing it …

There were also judges who distinguished between the painful situations of addressing intermediate cases of illegality and serious crimes, specifically with respect to human assets.

> The hard cases are those that are not very serious, you know? Those situations when someone gets arrested more due to recidivism … due to a circumstance, those are difficult situations, aren't they? … But when we are considering those severe penalties, of someone who brutally kills another, rapes, I don't know, I mean, in those cases it is not hard at all. Frankly I can't say it is hard for me. … In those when I am sure that person did it … The hard cases are the ones of minor offences, like a series of robberies …

Discussion

Given the results from study 1 on the adequacy of the different penalties for different judicial purposes and crimes, we highlight that there is a tendency for adequacy to be highly rated in both cases, as there is an increase in the severity of the penalties. This increase in

severity culminated with the valuation of the prison sentence as the most adequate, both for different crimes and for different judicial purposes, with the exception of rehabilitation. This result is not consistent with viewing imprisonment as a 'last resort' solution, as judges referred to it in theoretical terms. Although they do not necessarily use imprisonment as a default sentence, as they also choose for the alternatives available, judges definitively show a preference for this sanction.

Judges preference for prison compared to non-custodial sentences and the perception of that penalty as more adequate for recidivism cases, even in the case of minor offenses, are also found in other studies (e.g. Maguire, 2010). Tata (2016) argues that the policy and mentality that currently underlie the last resort use of prison is a problem that renders custody as the default sentence because imprisonment must be imposed every time the alternatives are not adequate. According to this author, we must invert this mentality and specify circumstances and purposes as normally non-imprisonable. In turn, Tombs and Jagger (2006) suggest another transformation, in which non-custodial sentences are the norm from which any prison sentence would require justification. Our results, obtained in a judicial reality where this suggestion already occurs, show that these efforts may not be enough because sentencing justifications can easily be grounded in general and individual deterrence purposes, specifically recalling the defense of the community's sense of security and belief in justice and the persistence of the offenses. Again, the sentences' theoretical justification might not reflect underlying intentions (Maguire, 2014), which allows for a broader use of a prison sentence than as a last resort. As Goodman-Delahunty and Sporer also discussed, 'concerns have been raised that reasons articulated in judicial decisions are crafted to withstand appeal and to fit the parameters of model defensible legal guideline judgments but may not correspond with the decision-making process itself' (2010, p. 20).

To make prison sentences a last resort, an alternative could be rethinking sentencing categories. For example, Portugal defines imprisonment and fines as primary penalties, while others are categorized as alternative sanctions (Antunes, 2013). This definition makes alternatives to function in reference to the primary sanctions.

Although these recategorizations might play an important role in constructing a common ground, we argue that it may not be enough. Our results also show the relevance of altering judges' personal positions towards prison and other penalties, focusing on their attitudes and not only on their practices and sentencing procedures. Then, we must be able to identify those underlying attitudes and ideas to increase judges' knowledge through research-based training.

The categories of crimes that we used corresponded with the most common types of crimes that were judged by these criminal judges. This may have led different judges to consider different levels of severity for each crime, but this would not be consistent with considering the prison sentence as the most adequate for all crimes.

The pattern of disagreement among the judges in this study is consistent with the results from other research (e.g. Ifill, 2009; Lynch, 2012; Maguire, 2010; Posner, 2008). Although this disagreement might be seen as a positive objective and something that is 'substantively desirable' (Lynch, 2012, p. 36) for the assurance of diversity, in our study this disagreement revealed opposite perspectives towards something that is basilar to the sentencing decision – perceptions of the penalties, crimes and judicial purposes. A similar pattern was reported in Maguire (2010) and Mackenzie (2005). These

studies showed that, with the exception of imprisonment and suspended prison terms, judges did not agree on the judicial purposes that penalties can achieve. Mackenzie (2005) referred to a lack of consistency and accountability in applying sentencing aims and purposes after describing how judges differed on aligning purposes with specific offenses. This disagreement can be related to sentencing disparities and inconsistencies, which suggests that judges' perspectives influence their beliefs about the adequacy of the distinct penalties to the different offenses and offenders (Mackenzie, 2005; Maguire, 2010).

The interviews from study 2 highlight several issues. We emphasize a certain degree of naivety on certain issues, specifically social needs that are central to the offenders' prognosis and successful rehabilitation. For example, this occurred when judges revealed their belief on the total absence of drugs in prison, a totally internal causality for rehabilitation, and other aspects of the complex social world of offenders. Additionally, the prison sentence is presented in a paradoxical way, sometimes as a place where individuals will only get worse and sometimes as a penalty that achieves better results. This is consistent with the dissociation between the responsibility for assigning a penalty and its enforcement, which judges appear to accept. If it is understandable that judges must cope with reality and with what is and is not part of their official duties, it is important to note that they uncritically accept the discrepancy between their judicial purposes when sentencing and the practical results of the penalties, which are often viewed as distinct from the former. This appears to reflect judges' denial of the final responsibility for their decisions, which was described by Tombs and Jagger (2006). Specifically, we have described the role distancing or the 'selective interpretation of the world' that was described by Hogarth (1971): 'Through selective interpretation of the world and their relationship to it, magistrates protect themselves from acknowledging the harsh realities that there are fundamental contradictions in the criminal justice system and that it is frequently impossible for them to resolve them' (Hogarth, 1971, p. 355). As privileged agents in the judicial process, when the system reveals significant failures, such as no conditions for fulfilling the sentencing objectives, it could be expected that judges would act, or at least report the situation, rather than accepting it with no manifested action or criticism.

Overall, we found a skeptical perspective on the efficacy of the penalties, with exception to imprisonment. In contrast to the most recent views from criminological studies (e.g. Lipsey & Cullen, 2007), several judges viewed the prison sentence as the most adequate punishment for changing offenders' behavior, as discussed by Cochran et al. (2014) and for preventing new crimes. When discussing prison in general terms, several judges stated that imprisonment is the only penalty that has an effect on individuals. In addition to not being based on empirical data, this position is also inconsistent with judges' in-depth ideas on the fragilities of prisons in practice, which reveals an asymmetry between the superficial and the in-depth discussion on prison features (Paternoster, 2010). Specifically, the discrepancy between what prison is thought to be in the abstract, what it is and can promote in practice[2].

Indeed, research demonstrates that penalties and supervision have little (Paternoster, 2010) to no effect on the rate of reoffending. Imprisonment often results in a greater rate of recidivism (Bales & Piquero, 2012; Ritchie, 2011) and a negative impact on offenders, which is primarily due to an increased exposure to criminogenic risk factors (Cullen et al., 2011). In contrast, corrections that are based on the rehabilitation of

offenders, which do not characterize most correctional systems in western societies, have had positive effects on offenders' recidivism rates (Andrews & Bonta, 2010).

The widely held notion that penalties are ineffective appears to reflect judges' disbelief on the capacity of the criminal justice system to rehabilitate offenders. Some judges believed that this skepticism resulted from their own professional experience, which is consistent with the classic study of Bond and Lemon (1981). These authors found that judges became less oriented to rehabilitation objectives (viewed this possibility with more skepticism) with an increase in professional experience. Indeed, in their professional experience, judges are presented with many offenders who reoffend and return to the system, which increases their salience in the judges' cognition. However, it is important to acknowledge that this does not suggest that recidivism is a linear part of the pathway for all offenders, but that the individuals who desist from committing crimes do not return to the system. Thus, it is critical to examine the effects of sentencing experiences and the danger of highlighting the most visible part of reality.

An important idea to highlight in this discussion is the 'criminal justice funnel'. That is, in all the phases of a criminal case processing, there are many decision-makers that obviously influence the result of the process. Nevertheless, even being aware of this, penal judges still have a central role in the final decision of those who reach that part of the judicial process. Specifically, in the decision on the best penal sanction to apply to a specific case, which is precisely where we locate our research goal, that is, exploring judges' ideas about imprisonment. As Henham puts it, 'sentencing performs a pivotal role in the criminal justice process, representing the point at which the aims and purposes of punishment are given public expression, and providing a link between the rhetoric of punishment and a site for assessment of its legitimacy' (Henham, 2012, p.77). The specific probability of a case to move on further in the process is something very difficult to attain. However, what we realize is that the cases most likely to reach the phase of the application of a criminal sanction are the ones related to the most visible forms of criminality, the most exposed to the formal justice mechanisms, and the most vulnerable defendants to these mechanisms, namely the ones with lower resources and, then, with lower possibilities to active the best defense possible.

Our data also demonstrated that judges seem to have some difficulties in defining the point at which an offender must be stopped or put in prison. Indeed, this evaluation was clearly subjective and was vulnerable to a high degree of variability, although many judges appear to believe that such a common understanding exists (Tombs & Jagger, 2006).

Finally, these findings reinforce the idea that correctional policy and practice should be evidence-based (Mackenzie, 2006), which is rarely practiced. Indeed, policy implications from research indicate that prison does not reduce recidivism and, in some cases, may have a criminogenic effect (Bales & Piquero, 2012; Gendreau et al., 1999), suggesting that apart from the crime reduced through incarceration (due to incapacitation), using custodial sanctions may have an unanticipated consequence of making society less safe (Cullen et al., 2011). Conversely, many studies 'confirm that the correctional goals of rehabilitation and treatment for offenders are workable. To rehabilitate does not mean to learn how to behave in theory, but, rather, to be taught and trained in how to behave' (Kolstad, 1996, p. 33). Based on these ideas, many studies currently sustain abolishing prison for low-risk offenders and providing humane incarceration and meaningful rehabilitation to the highest risk offenders (Minucci & Monster, 2004). Therefore, it does not seem

wise to imprison offenders based on the specific deterrence effect of prison (Ritchie, 2011). However, if prison should only be used to punish and (temporarily) incapacitate chronic and high-risk offenders (Gendreau et al., 1999), where does that leave us? Although it may be used to pursue an end of general deterrence, caution related to the type of offender and the crime should be exercised. In addition, caution is important for ensuring that treatment does not simply become a euphemism for punishment (Kaufman, 1973).

If correctional policy and practice were evidence-based and judges shared this knowledge, we would probably see a decrease in imprisonment rates and prison terms, as well as judges' negative perceptions towards this sanction. However, for judges' perceptions of the prison sentence, we found contrasting evidence. Our results reveal that judges evaluate prison sentences as more adequate and effective than the other penalties and are skeptical to the rehabilitative potential of the criminal justice system. Moreover, the penal purpose that is best addressed by a prison term is punishing the individuals. Given the continued tendency to sentence individuals to prison despite its limitations for promoting rehabilitation, judges still pursue, through sentencing, a punitive purpose that focuses on sanctioning offenders rather than rehabilitating them (Tombs & Jagger, 2006). As such, Maguire (2014) discusses the existing consensus that judicial punitiveness is a key explanatory variable for unraveling what is behind the failure of using prison as a last resort. Mackenzie's interviews (2005) revealed this issue, when one judge said that his/her colleagues might not believe that they are sentencing based on retribution, when in fact this was what they were doing.

However, judges' training in the law should make them aware of those processes, empower them to resist punitive urges that may influence the public (Cairns & Koehler, 2014), and empower them to think at a higher and more sophisticated level in ethical terms. If sentences' justifications are broad enough to allow for retribution and punitiveness to be surreptitiously exercised, as seems to be the case, sentencing systems are allowing judges to punish convicts based on the purpose of retribution that they believe is appropriate, which, in the words of Stephenson (1992), cannot make us uneasy.

Several issues to be explored in future studies raised from this research. First, exploring judges' ideas specifically on community sanctions, as an alternative to custodial sanctions, and its obstacles. Second, doing a systematic identification of the sentencing purposes included in the sentence decisions of imprisonment for different crimes. Finally, doing a survey on inmates' perceptions about the sentencing purposes they believe to be associated to the penalties they are serving, allowing to compare judges' intentions and inmates' perceived effects, in other words, comparing the theory and the application of the law.

Conclusion

Because judges are the agents who sentence, their ideas are practiced in the sentencing process regardless of the distance between these ideas and actual criminological knowledge on the effects and efficacy of correctional measures.

This highlights the importance of increasing judges' training on criminological and sociological issues as well as the importance of changing the influence of their personal beliefs to positions that are closer to the scientific evidence while moving 'towards more certainty-oriented, crime-prevention strategies' (Durlauf & Nagin, 2011, p. 14).

As Cullen and colleagues asserted,

> in the end it is essential to test our understandings, including those about prisons, with the best scientific data available. And depending on what the evidence tells us, we need to have the intellectual and moral courage to change our minds and our policies' (Cullen et al., 2011, p. 59).

Thus, we are arguing for a choice in the penalties that are grounded in their related purposes and actual effects. Policy decisions should also ensure that the penalties in practice are implemented in a manner that promotes the desired effects. We maintain that this should be the way to map and fill the divide between the academic, practical and policy levels to minimize the use of imprisonment.

Going back to the beginning, we finish quoting Hogarth, who argued that, 'while it is judges who must sentence, and offenders who must bear the brunt of such sentences, it is society itself that pays the price and reaps the results' (Hogarth, 1971, p. 398).

Notes

1. There are many additional authors who proposed distinct categorizations, such as McFatter (1978), who only considered the three sentencing strategies of retribution, rehabilitation and deterrence, and Mackenzie (2005), who replaced retribution with denunciation.
2. Foucault (1999) discusses several reasons that may justify why prisons did not trigger a strong negative reaction by the criminal justice system, foreseeing it as the bleakest area of that system.

Disclosure statement

No potential conflict of interest was reported by the authors.

Funding

This study was conducted at Psychology Research Centre (UID/PSI/01662/2013), University of Minho, and supported by the Portuguese Foundation for Science and Technology and the Portuguese Ministry of Science, Technology and Higher Education through national funds and co-financed by FEDER through COMPETE2020 under the PT2020 Partnership Agreement (POCI-01-0145-FEDER-007653). The study was also supported by Grant SFRH/BPD/108602/2015 from the Portuguese Foundation for Science and Technology awarded to the first author.

ORCID

Andreia de Castro Rodrigues http://orcid.org/0000-0002-0992-8572
Ana Sacau http://orcid.org/0000-0002-8459-8104
Jorge Quintas de Oliveira http://orcid.org/0000-0001-5965-4517
Rui Abrunhosa Gonçalves http://orcid.org/0000-0002-5978-8141

References

Andrews, D. A., & Bonta, J. (2010). Rehabilitating criminal justice policy and practice. *Psychology, Public Policy, and Law*, *16*(1), 39–55. doi:10.1037/a0018362
Antunes, M. J. (2013). *Consequências jurídicas do crime*. Coimbra: Coimbra Editora.

Ashworth, A. (1996). Sentencing. In M. Maguire, R. Morgan, & R. Reiner (Eds). *The Oxford handbook of criminology*. Oxford: Oxford University Press.
Bales, W. D., & Piquero, A. R. (2012). Assessing the impact of imprisonment on recidivism. *Journal of Experimental Criminology*, *8*, 71–101. doi:10.1007/s11292-011-9139-3
Beijersbergen, K. A., Dirkzwager, A. J. E., & Nieuwbeerta, P. (2016). Reoffending after release: Does procedural justice during imprisonment matter? *Criminal Justice and Behavior*, *43*(1), 63–82. doi:10.1177/0093854815609643
Bond, R. A., & Lemon, N. F. (1981). Training, experience, and magistrates' sentencing philosophies – A longitudinal study. *Law and Human Behavior*, *5*(2/3), 123–139.
Cairns, J. A., & Koehler, J. J. (2014). Cruel and unusual punishments: A comparison of public and judicial opinion. *Jurimetrics*, *54*(2). Retrieved from http://ssrn.com/abstract=2334963
Carroll, J. S., Perkowitz, W. T., Lurigio, A. J., & Weaver, F. M. (1987). Sentencing goals, causal attributions, ideology and personality. *Journal of Personality and Social Psychology*, *52*(1), 107–118.
Castro-Rodrigues, A., & Sacau, A. (2012). Letting the field show us the way – A mixed methodology to understand judicial decision making. *International Journal of Applied Psychology*, *2*(5), 92–97. doi:10.5923/j.ijap.20120205.03
Castro-Rodrigues, A., & Sacau, A. (2014). Sentence pronouncements: What judges say when sentencing. *European Journal of Criminology*, *11*(3), 379–397. doi:10.1177/1477370813500887
Castro-Rodrigues, A., & Sacau, A. (2015). Judges' perception on causes of criminality and justifications for crime. *European Journal of Probation*, *7*(2), 124–142. doi:10.1177/2066220315595906
Cochran, J. C., Mears, D. P., & Bales, W. D. (2014). Assessing the effectiveness of correctional sanctions. *Journal of Quantitative Criminology*, *30*, 317–347. doi:10.1007/s10940-013-9205-2
Cullen, F. T., Jonson, C. L., & Nagin, S. D. (2011). Prison do not reduce recidivism: The high cost of ignoring science. *The Prison Journal*, *91*(3_suppl), 48S–65S. doi:10.1177/0032885511415224
de Keijser, J. W., van der Leeden, R., & Jackson, J. L. (2002). From moral theory to penal attitudes and back: A theoretically integrated modeling approach. *Behavioral Sciences and the Law*, *20*, 317–335. doi:10.1002/bsl.494.
Dias, J. d. F. (2001). *Temas básicos da doutrina penal*. Coimbra: Coimbra Editora.
Direção Geral de Reinserção e Serviços Prisionais. Retrieved from http://www.dgrs.mj.pt/web/rs/estat
Durlauf, S. N., & Nagin, D. S. (2011). Imprisonment and crime: Can both be reduced? *Criminology & Public Policy*, *10*(1), 13–54. doi:10.1111/j.1745-9133.2010.00680.x
Foucault, M. (1999). *Vigiar e punir: A história da violência nas prisões*. Petrópolis, RJ: Vozes.
Gendreau, P., Goggin, C., & Cullen, F. T. (1999). *The effects of prison sentences on recidivism*. Ontario: Public Works and Government Services Canada.
Goodman-Delahunty, J., & Sporer, S. L. (2010). Unconscious influences in sentencing decisions: A research review of psychological sources of disparity. *Australian Journal of Forensic Sciences*, *42*(1), 19–36.
Henham, R. (2012). Penal ideology, sentencing and the legitimacy of trial justice. *Crime, Law and Social Change*, *57*, 77–98. doi:10.1007/s10611-011-9342-1
Hogarth, J. (1971). *Sentencing as a human process*. Toronto: University of Toronto Press in association with the Centre of Criminology.
Ifill, S. (2009). Judicial diversity, 13 Green Bag 2d, 45-58. Retrieved from http://www.greenbag.org/v13n1/v13n1_ifill.pdf
Kaufman, I. R. (1973). Prison: The judge's dilemma. *Fordham Law Review*, *41*(3), 495–516.
Kleck, G., Sever, B., Li, S., & Gertz, M. (2005). The missing link in general deterrence research. *Criminology; An interdisciplinary Journal*, *43*(3), 623–660.
Kolstad, A. (1996). Imprisonment as rehabilitation: Offenders' assessment of why it does not work. *Journal of Criminal Justice*, *24*(4), 323–335. doi:10.1016/0047-2352(96)00020-7
Lipsey, M. W., & Cullen, F. T. (2007). The effectiveness of correctional rehabilitation: A review of systematic reviews. *Annual Review of Law and Social Science*, *3*, 297–320. doi:10.1146/annurev.lawsocsci.3.081806.112833
Listwan, S. J., Sullivan, C. J., Agnew, R., Cullen, F. T., & Colvin, M. (2013). The pains of imprisonment revisited: The impact of strain on inmate recidivism. *Justice Quarterly*, *30*(1), 144–168.

Lynch, A. (2012). Judicial diversity: Is disagreement a positive objective in law? *University of New South Wales Faculty of Law Research Series*, *41*, 1–37. Retrieved from http://law.bepress.com/cgi/viewcontent.cgi?article=1373&context=unswwps-flrps12

Mackenzie, D. L. (2006). *What works in corrections: Reducing the criminal activities of offenders and delinquents*. Cambridge, UK: Cambridge University Press.

Mackenzie, G. (2005). *How judges sentence*. Sydney: The Federation Press.

Maguire, N. (2010). Consistency in sentencing. *Judicial Studies Institute Journal*, *2*, 14–54.

Maguire, N. (2014). *When is prison a last resort? Definitional problems and judicial interpretations*. Retrieved from https://www.academia.edu/30477822/When_is_prison_a_last_resort_Definitional_Problems_and_Judicial_Interpretations

Matsueda, R. L., Kreager, D. A., & Huizinga, D. (2006). Deterring delinquents: A rational choice model of theft and violence. *American Sociological Review*, *71*(February), 95–122.

McFatter, R. M. (1978). Sentencing strategies and justice: Effects of punishment philosophy on sentencing decisions. *Journal of Personality and Social Psychology*, *36*(12), 1490–1500.

Mears, D. P., Cochran, J. C., & Cullen, F. T. (2015). Incarceration heterogeneity and its implications for assessing the effectiveness of imprisonment on recidivism. *Criminal Justice Policy Review*, *26*(7), 691–712.

Minucci, A., & Monster, M. (2004). It's about time to hear their stories: Impediments to rehabilitation at a Canadian provincial correctional facility for women. *Journal of Criminal Justice*, *32*, 515–530.

Moore, N. T., May, D. C., & Wood, P. B. (2008). Offenders, judges, and officers rate the relative severity of alternative sanctions compared to prison. *Journal of Offender Rehabilitation*, *46*(3), 49–70. doi:10.1080/10509670802143276

Paternoster, R. (2010). How much do we really know about criminal deterrence. *Journal of Criminal Law & Criminology*, *100*(3), 765–823.

Pollock, J. M. (2010). *Ethical dilemmas and decisions in criminal justice* (6th ed.). Wadsworth, OH: Cengage Learning.

Posner, R. (2008). *How judges think*. Harvard: Harvard University Press.

Ritchie, D. (2011). *Does imprisonment deter? A review of the evidence*. Melbourne Victoria: Sentencing Advisory Council.

Sherman, L. W. (1993). Defiance, deterrence and irrelevance: A theory of the criminal sanction. *Journal of Research in Crime and Delinquency*, *30*, 445–473.

Sobral, J., & Prieto, A. (1994). *Psicologia y ley – Un examen de las decisiones judiciales*. Madrid: Eudema, S.A.

Spohn, C. (2002). *How do judges decide – The search of fairness and justice in punishment*. Thousand Oaks: Sage Publications, Inc.

Stephenson, G. M. (1992). *The psychology of criminal justice*. Malden, MA: Blackwell Publishing.

Tata, C. (2016). How can prison sentencing be reduced in Scotland? *Scottish Justice Matters*, *4*(1), 23–24.

Tombs, J., & Jagger, E. (2006). Denying responsibility – Sentencers' accounts of their decisions to imprison. *The British Journal of Criminology*, *46*, 803–821.

World Prison Brief – Institute for Criminal Policy Research. Retrieved from www.prisonstudies.org