



Words matter: judges' value judgments in sentence pronouncements remarks

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Abstract

This study examines judges' value judgments on their remarks during sentence pronouncements. We performed a content analysis of 93 sentence pronouncements from the 13 judges from a Portuguese criminal court. Within these discourses, 299 discourse units were codified as judges' value judgments, that is, personal contents beyond strict legal issues. From these 299, 107 were recommendations (comprehending advice to change, to not reoffend, to rethink life, and action instructions), and 192 were opinions about the individual, the society, and the judicial system. The existence of value judgments in sentence pronouncements carries important implications for the sentencing process. Namely, these value judgments allow the identification of judges' personal ideas, and issues particularly vulnerable for simplistic reasonings, as well as subjective considerations. This identification and the discussion on the powerful role of language in the context of sentencing are key features to strengthen judges' training and, consequently, to improve the implementation of penal justice.

Keywords Sentencing · Penal justice · Judicial decision-making process · Judges' value judgements · Sentence pronouncements · Qualitative methodology · Judges' training

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Introduction

Judicial sentences often raise public concern about the fairness of the decisions and the adequacy of the law in action. Recent cases of gender crimes (specifically rape and intimate violence) in Portugal, where judges' victim blaming attitudes were noticed, highlighted the importance of analyzing how judges exercise discretion, and how they say and explain their sentencing decisions. This paper aims to fill the gap of qualitative studies about judges' judicial discourses in the literature, analyzing judges' remarks during sentence pronouncements, namely their value judgements about criminality, people who committed crimes, and the judicial system.

Sentencing: From a simplified view to a more complex perspective

In a strictly legal perspective, sentence decisions must be the result of applying the law to a criminal offense. However, the sentencing process cannot be simplified to this, having been discussed as more complex and still an enigma (Tata, 2020).

In the classic perspective, judges' roles include the passive arbitration of offenses in a neutral, impartial, and emotionless reasoning (Mack & Anleu, 2011). In a "radically oversimplified view of the rule of law" (Bandes, 2009, p.134), judges would merely apply the rules, without allowing their experiences, perceptions and/or beliefs to influence their decisions (Bandes, 2009). Research has discredited this view, highlighting not only that making judgements about individuals is inherently challenging (Weiss et al., 2006), but also a responsibility that engages both the intellect and emotion (Shaman, 1996; Côté-Lussier & David, 2022). The belief in the possibility of dissociating these two dimensions – intellect and emotion – advocated by legal formalism, is based on a simplistic and naïve perspective of the human beings. Although judges represent the court during a trial, they remain social and human (Chase & Hora, 2000), vulnerable to the motivations and limitations of human behaviour (Oldfather, 2007; Engel, 2022). The classic perspective of mechanical jurisprudence has been thoroughly deconstructed as a myth with little relationship to the reality of judicial functioning (Shaman, 1996; Engel, 2022). The idea of judicial decision-making as a mere cognitive balancing act has been undermined as more psychologically plausible models are presented in the literature (Dhami & Belton, 2017), and other perspectives arise such as the sentencing as an interpretative, processual, and performative social process (Tata, 2020). Although some practices of abstaining from expression of beliefs and ideas may cultivate an appearance of neutrality, this may be more a matter of appearance than reality (Shaman, 1996), or merely the performance of what judges conceive as the judicial role (Tata, 2020).

Sentencing: An objective process or not so much?

Sentencing is susceptible to the influence of a variety of aspects in the same manner other decision-making processes are. Research has revealed some difficulties in

finding a consensual and unified theoretical framework that exhaustively describes the judicial decision-making process (Castro-Rodrigues & Sacau, 2014), as it relates to a complex, individualized, and uncertain process, with serious difficulties related to verifying its extra-judicial veracity.

Different professionals seek to build legitimacy through the defense of the objectivity of their decision-making (Dixon, 1995). Nevertheless, several perspectives defend that objectivity cannot be fully achieved, since people are incapable of being totally rational, due to the incapacity to equally consider all the available options for a decision (Michon & Pakes, 1995; Engel, 2022). Also, it is important to re-conceptualize objectivity as something that does not exist in absolute and cross-cutting terms but needs to be defined in relation to each specific domain (Postema, 2001).

When thinking about the objectivity of the judicial sentences, we must also consider the room for the judges' opinion and beliefs. According to Weiss et al. (2006), judgements about people are frequently based in opinions. However, as these authors discuss, one might question the existence of people whose opinions deserve special credibility, because in many domains there is no external and objective reference in relation to which those opinions may be verified. Although in sentencing judges have the law as reference, the legal codes do not stress all the issues addressed in sentence decisions. In addition, law interpretation is mediated by a particular cognitive functioning and a personal frame of references and values. The idiosyncrasies derived from those distinct interpretations might result in failures in a consistent application of the rules (Weiss et al., 2006). Wagenaar and colleagues (1993, as cited in Michon & Pakes, 1995) claim that judges make mistakes in a disturbing frequency, especially in complex cases. Thus, the confidence placed in 'specialists' such as judges assumes an enormous importance and great impact, although it is not easy to verify the accuracy of those specialists' opinions, and that status might be more frequently applied to someone that plays a certain role, rather than based on the rigor of their opinions (Murray et al., 2011).

Judges' individualities in sentencing

Research has demonstrated that judges carry with them their personal histories, experiences, emotions, and meanings (Shaman, 1996; Engel, 2022). Judges' personal experience has been noted as the major premise in the sentencing decision process, overlapping juridical and fact dimensions (Sacau & Rodrigues, 2009). Personal backgrounds, professional and life experiences, and political ideologies might impact judges' decision-making, which makes the judicial decision-making a highly variable process (Harris & Sen, 2019).

The way judges perceive the cases is inevitably filtered by their individuality and may result in different interpretations and applications of the law (Sacau & Castro-Rodrigues, 2011). Thus, differences in the way judges approach the sentencing process according to their individuality have been considered inevitable (Maguire, 2010). Also, the degree of agreement/disagreement between judges seems to vary from case to case (Dhami, 2005). Sentencers tend to select and prioritize the information that goes in line with their own attitude, either in terms of

the most valued aims, or in terms of the sentence that they already have in mind, or that they apply most frequently (Maguire, 2010). As such, judges should be viewed as strategic agents who may decide, bringing the law as close as possible to their preferential positions (Baum, 1994, 2009).

It is expectable, more than just possible, that sentencers are not above the influences of the extra-legal aspects that impact other people (Sacau et al., 2011), sharing the generally prevailing stereotypes of their communities (Johnston & Alozie, 2001). This places judges as social agents among others, functioning in accordance with the same strategies and suffering from the same limitations (Pais, 2001; Engel, 2022).

Judges' value judgments, including stereotypes and personal attributions, may influence sentence decisions by reducing uncertainty in the sentencing decision-making process (Farrell & Holmes, 1991), and simplifying the complexity of situations. The integrative complexity research discusses the complexity of cognitive styles, namely its relation to political orientations and group dynamics – e.g., conservative attitudes have been linked with more rigid and simplistic cognitive styles (Gruenfeld, 1995; Zmigrod, 2020). The complexity of cognitive styles may be represented by a continuum, and each end of that continuum would characterize distinct cognitive profiles. People at the low end of the complexity continuum would tend to interpret events relying on rigid and evaluative rules, and to make decisions grounded only in limited salient items of information. By the opposite, people at the high end would tend to interpret reality in multidimensional terms, grounding their decisions on evidence from multiple perspectives (Gruenfeld, 1995). As such, the complexity of court decisions would be attributed to judges' individual values and beliefs (Gruenfeld, 1995).

Judges' adoption of such strategies of simplifying the complexity of situations through the recourse to stereotypes, may reinforce and amplify the development of decision-making biases about the defendant and the offense (e.g., their innocence or guilt) (Engel, 2022), which may function as self-fulfilling prophecies (Steffensmeier & Demuth, 2001). In accordance, Shaman (1996) considers disconcerting the frequency of biased remarks made by judges in court.

These personal considerations and decision-making biases from judges may result in prejudice towards certain individuals or groups, namely those considered being from the outgroup. The sociofunctional threat-based approach to prejudice (Cottrell & Neuberg, 2005) state that in the base of the different beliefs people hold towards different groups there are rich textured emotions developed towards those groups, which are related to the distinct threats they perceive those groups to pose. For example, and according to these authors, specific groups tend to be stereotypically perceived as lazy because they are thought to contribute to society less than they should, or as aggressive because they are perceived to be a threat to physical safety. Also, these emotions in the form of perceived threats are linked to behavioral intentions, which may explain prejudice (Aubé & Ric, 2019).

Another theoretical approach that has been focusing on the development and maintenance of prejudice towards specific groups is social dominance theory, which addresses the processes shaping human societies, specifically, how social learning, cognitive, motivational, and identity processes are linked to stereotyping, and

discriminating (Pratto et al., 2006; Pratto et al., 2013). According to this approach, people develop social dominance orientations towards groups of individuals, which are psychological orientations towards group-based dominance, and, in this process, institutions serve different functions regarding hierarchy maintenance (Pratto et al., 2013). Group-based social hierarchy is formed by intertwined effects of discrimination happening at multiple levels, such as institutional, individual, and intergroup. Such discrimination is coordinated at those distinct levels to favor dominant groups over subordinate groups, which are defined by several social aspects related to power, such as nationality, ethnicity, class, descent, etc. As such, individual and institutional practices, including discriminatory decisions and behaviors, are formed by legitimizing myths, which consist in consensually shared values, attitudes, beliefs, stereotypes, and cultural ideologies (Pratto et al., 2006). Consequently, as these authors state, negative social value may be disproportionately left to these groups in various forms, such as disproportionate punishment and/or stigmatization.

Judges hold the symbolic role of representing the state in the defense of the citizens, as well as the social function of accomplishing the interface between the judiciary ideals and reality. To focus on the approach and not (only) on the result of the sentencing decision-making must be the most adequate way of addressing the consistency of decisions (Krasnostein & Freiberg, 2013).

Studies focusing the analysis of sentences have been criticized, because these documents are written after judges had reached and rationalized the decision (Sherwin, 2010). There is a lack of research capturing the aspects that influence judges' during sentencing decisions and the influences that occur beyond the conscious level (English, 2006). It is expected that the judges' mental processes while deciding the sentences vary according to different circumstances, and variation is expected among what they pursue with the sentences, and the way they perceive the decision process. Nevertheless, these questions concerning the decision process beyond the sentencing output have been neglected by the traditional research (Klein, 2010).

Moreover, judges' perceptions about their interpersonal and intrapersonal disparities might not be the most accurate. Indeed, it seems to exist a failure in judges' self-knowledge on the elements that might influence their decisions, especially in situations of uncertainty. Besides, what judges say they do, in terms of their primary considerations, might be different from what they do, that is, judges' descriptions of the aspects that motivate their sentence decisions rarely corresponded to their sentencing practice (Goodman-Delahunty & Sporer, 2010).

Most sentencing studies analyzed the written decision or focus on the judges' perceptions about their sentence decision processes, asking them to decide over unreal materials and in artificial contexts of sentencing decisions (vignettes, theoretical cases). Few studies focus on real cases (Dhami & Belton, 2017), or personal sentencing outputs in the context of real trials.

This study intends to overcome these limitations, revealing important features of the sentencing decision-making process, through the analysis of sentence pronouncement remarks. We explored the actual practice of sentencing and how judges pronounce their sentences, namely examining if there is room for value judgments, compounding a study with high legal realism as deemed by the literature

(Holste & Spamann, 2023). The fact that this study has been developed in Portugal is an additional value, since international research is needed, as the literature is very centered in a few countries (U.S.A., U.K., and Canada).

Study objectives and grounding

The sentence pronouncement is the final moment of the trial when judges verbally state their decision. This moment consists of two parts, a first mandatory part, in which the judge reads the written sentence (or a summary), and a second part in which the judge may directly address the defendant. The Portuguese Code of Criminal Procedure states that “after reading the guilty verdict, the Judge President can decide, if appropriate, to direct a short speech to the defendant urging him/her to reform himself/herself”. This material constitutes a rich resource for research because it is a part of the process that is not clearly defined by the law, giving judges enough room to develop it as they consider appropriate. The result is then a sum of their sentencing decision, according to their perception on what is most relevant to explain and reinforce the decision. In addition to the fact that the sentence pronouncement summarizes the judges’ essential ideas on their sentencing decision, as Foucault (1999) states, institutional language imposes its power by replicating the values that shape individuals. As Maner et al. (2007) discuss, power may be defined as a person’s ability to exercise control over others, in the form of rewards, punishments, and outcomes. The concept of power can help explaining how inequality arises or/and is maintained, namely through institutionalizing practices that generally favours some groups in detriment of others (e.g., Pratto et al., 2006), such as courts do. Indeed, when judges make legal speeches, they are exercising a form of direct control over defendants (Philips, 1998) and sentencing working as a culturally reflective and instructive practice over society (Tata, 2020).

The main objective of this study is to analyze how judges fill the ‘speech’ that might be delivered during sentence pronouncements, that is, their sentencing remarks. The specific objectives are to identify the specific topics judges address to the defendants, namely related to value judgements, and to analyze these value judgements both in quantitative and qualitative terms. This will allow to identify issues particularly sensitive to prejudice and simplistic perspectives.

First, we spent two months attending trial sessions and observing the formal and informal functioning of one of the biggest criminal courts of Portugal – an institutional ethnographic approach to the practice of sentencing (XX, 2012, 2014, 2018). This period led us to conclude that studying judges’ spontaneous speeches during sentence pronouncement, rather than analyzing the written sentences, is an important and overlooked component of the sentencing process.

The qualitative research with an ethnographic and phenomenological approach, according to Creswell (1998), is an adequate way to reach a deeper understanding of the meaning that judges give to their own decisions, especially in a context where research on sentencing is still scarce.

This study is particularly relevant since it was developed in a very structured legal context, which intends to precisely limit judges’ room for personal considerations.

Portugal has a civil law tradition derived from Roman civil law, and guides sentencing decisions by Civil and Criminal Laws, which define the types and quantum of penalties, according to the proven facts during the trial, the offender, and their circumstances (for further explanations about the Portuguese judicial system please see XX, 2014).

Data and methods

Instruments and data collection procedures

Authorization to conduct the investigation was obtained from the Supreme Judicial Council. We then contacted the Presiding Judge of the Criminal Court to define the procedures to adopt in the data collection and to obtain authorization to record the sentence pronouncement sessions.

To collect our *corpus* (Bardin, 2009), we audio recorded all the sentence pronouncement during a period of six months. We established as inclusion criteria: the presence of the offender in the session because our focus was on the elements of the final decision that judges highlighted to the defendants; the offender being criminally responsible for the offense; and cases of a guilty verdict, since in the case of acquittal verdicts, judges are not supposed to make a speech to the defendant.

We collected 93 sentence pronouncements from the total of judges ($n = 13$). Since these 93 sentence pronouncements correspond to the total of sentences delivered in one of the major Portuguese criminal courts, in a period of six months, they compound a good representation of the criminal reality judged in this context. The transcriptions of this material were restricted to the sentencing remarks, i.e., excluding the read contents of the written sentence.

Informed consent was obtained from all individual participants included in the study.

Ethical approval

All procedures performed in studies involving human participants were in accordance with the ethical standards of the national research committee [since this study was funded by the Portuguese Foundation for Science and Technology, which funded this research] and with the 1964 Helsinki declaration and its later amendments or comparable ethical standards.

Data analysis

We analyzed data through the method of content analysis (Bardin, 2009). The categories and sub-categories derived inductively by a sequential categorization of each unit, organized by semantic proximity, in terms of content. To ensure the reliability and objectivity of the results, different validation strategies were adopted: intentionality in the sampling process; constant comparative analysis; dense description of

the meanings identified (i.e., detailed presentation and illustration of each category with examples of participants' speech); and reflexivity (i.e., constant self-analysis and self-criticism of the process) (Cunha & Gonçalves, 2014). The categorization grid resulted from an inter-coder agreement, and the material codification was made independently by two coders and subsequently compared and discussed until a consensus was reached.

The 'idea' was the unit of analysis considered most appropriate for this case. This relates to the fact that spontaneous oral discourse is not well organized in terms of punctuation as written texts are (Navarro & Díaz, 2007). The coding procedure involved counting the frequency of each idea related to the sub-categories.

Results

In this paper, we will focus on the content coded as judges' value judgments. Table 1 shows the content analysis grid describing the categories and subcategories and the number of units (u) in each of them.

We divided the content of judges' value judgments into recommendations and opinions, although these are not necessarily independent – that is, recommendations have implicit opinions, but for clarity and methodological rigor, we will maintain our analysis on the explicit content. The distinctions between these two types of content are important in describing features of judges' sentencing.

Recommendations are the content where judges give the defendants suggestions or indications on what to do or how to conduct their lives. We found both less action-oriented recommendations including recommendations to change (15u) and to rethink life (20u), and more action-oriented recommendations such as recommendations with action-instructions (25u) and recommendations to not reoffend (47u).

Opinions are the content where judges expose their conceptions regarding the offense, the offender, the victims, the society, the criminality and its causes, and the penal justice, either in terms of judicial procedures, or in terms of legal principles,

Table 1 Judges' value judgments content analysis grid

	Category	Sub-category	N° of units ^a	Total
Judges' value judgments	Recommendations	To change	15	107
		To rethink life	20	
		With action instructions	25	
		To not reoffend	47	
	Opinions	Judicial	37	192
		Social	65	
		Individual	90	
				299

^a N° of units – number of units (ideas) codified in each sub-category, from the total of the judges' remarks

philosophies, and purposes. These themes were grouped into 3 subcategories: individual (90u), social (65u) and judicial (37u).

Value judgments showed great disparity in terms of quantity and format among the judges, ranging from 4 to 97 units for each judge, with a mean of 23 units. From the 13 judges, 12 had fewer than 34 units, and one had 97. All judges expressed recommendations of at least one kind, and all except one expressed opinion regarding the individual, his social context and/or the judicial system. Thus, each judge chose to say something of this value judgments' nature, varying from brief recommendations to long personal considerations and warnings.

A second aspect that emerges from Table 1 is that opinions (192u) were made almost twice as often as recommendations (107u), although these recommendations have underlying opinions that focus on individual change.

We will now develop the qualitative analysis to describe the contents of these value judgments.

Recommendations

Recommendations to change

The 15 units of this subcategory included different appeals for the individual to change, most of them referring to the hope that the individual will take the opportunity and the vote of confidence given by the court. Other units use the family and the familiar impact of the crime as an argument to change. Recommendations to take advantage of the imprisonment are also given, revealing a positive perspective over prison sentences, almost as if the imprisonment was an opportunity to change the court was giving to the defendant, and not a last resort sanction.

You will try to demonstrate to this court that you really deserved the opportunity we will give you.

So, try to take advantage of the good things prison must have.

Recommendations to rethink life

The 20 units of this subcategory appeal for the individuals to reflect both on their criminal act, and on the consequences that it might have had carried out, namely, imprisonment. The units also appeal to reflect on the future in general or use family and intimate partners as arguments, and/or motivation to rethink their lives and to not reoffend, even in a highly moralist tone as the following citation illustrates. The importance of taking the time while imprisoned to reflect on all this and to take life decisions was also referenced.

You know what is to be imprisoned? You have kids, don't you? Is that what you want for your life? To get your kids to visit you in jail? It looks like you want that.

Recommendations with action instructions

The 25 units of this subcategory are more action-oriented, referring to judges' conceptions regarding a normative lifestyle or what should be done, or avoided, to achieve social reintegration. These units include recommendations within educational and professional domains, family or intimacy, drugs use, time in prison, the crime committed and alternative actions and attitudes, and the defendants' routine, peers and life contexts. Some of these units consist of actions that are not achievable or aspects that are poorly adapted to the defendants' life, such as recommendations to avoid the spaces where they actually live, and their familiar and peer nets, revealing stereotypes of places and people that threaten normative lifestyles. This kind of recommendation may contain the risk of the suggested actions to be considered unreasonable by the defendants, and out of the realm of feasibility.

So, in what regards your relation to that place, I want to tell you something: if you have family there, you just get up there, see you relatives, and get out of there immediately.

Some recommendations are composed of several of the above domains (educational and professional, familiar or intimate, drugs use), compounding constellations of what might be done to achieve social reintegration.

It is important that you work, that you try to solve this health issue [...], and that you deal with it in a positive manner, and, as important as all this, it is important that you don't commit any crimes again and don't use drugs anymore.

Recommendations to not reoffend

The types of recommendations with higher numbers of units are those in which the defendant is told to not commit any more offenses (47u), with distinct arguments, and in both more and less directive ways. This higher value is expectable since the main purpose of penal justice is to avoid reoffending, in other words, deterrence.

Many of these recommendations are general and direct appeals to not commit any more crimes or to have no more contact with the justice system, while others are more specific, invoking the specific situation of the individual and highlighting the importance of avoiding its reoccurrence.

The court hopes that one day, after serving your time, you don't commit any more crimes and don't have any more troubles with justice.

These recommendations to not reoffend were also made in an indirect form, drawing on distinct content: highlighting the importance of viewing the penalty as a warning or as way of preventing the commission of new crimes, advising that the court will not be so benevolent again, and calling for the consequences that might arise from new crimes.

You have to be conscious that if you ever do something like this again, whether by the influence of others or not, you will go to prison as anybody else, because you know the difference between right and wrong...

Opinions

Judicial opinions

The type of opinions with the lowest number of units (37u) consists of judicial considerations which includes contents related to the penal system, and to the penalty applied.

The units related to the penal system (15u) refer to distinct aspects. Include judges' assessments regarding the sanctions in general, as well as their logic and purposes. Specifically, the judges discuss prison sentences in opposite terms, either as a measure that cannot bring anything positive to young people, or as a penalty with several potentialities. These judicial considerations concerning the penal system also include the aspects considered when deciding the penalty, namely, in drug trafficking, again revealing opposed perspectives in terms of the differential judgement of hashish in relation to heroin and cocaine, as well as personal judgements about specific aspects of the penal process and the penal codes.

The fact that what is at stake is hashish, by itself, does not alter the juridical framework, that is, it is not a minor drug trafficking just for being that...

But we are in a time when this kind of drug already takes other shapes... the court has always other considerations when we are dealing with heroin and cocaine than when we are dealing with hashish.

Opinions related to the penalty imposed (22u) include the following: the qualification of penalties, namely, highlighting the benevolence of the court (especially in cases of suspended prison sentences); referring to the worst-case scenarios that might occur in case of reoffending; the sentence and its effectiveness; and the logic and purposes of the penalty chosen.

This will only get worse, you know, every time you persist in this behaviour, of course that the sanction must be... and anyway, the court was benevolent... And I think that remaining in freedom you would never be able to get free from drugs...

Social considerations

The 65 units of this subcategory refer to the way society functions and the current social context, including aspects related to criminality and deviant contexts, and the offender's relationships and provenience, again revealing stereotypes regarding places and people that seem to be view are as threats to society and normative lives.

Most of the units related to criminality consist of issues such as the dynamics of the crimes sentenced, several of which regard drug trafficking, and the motivations that judges relate to the crime. Many of these opinions seem to aspire to give

meaning to the act of the offenders as if they are them, as if the judges were able to understand offenders' acts and motivations through their eyes. Another theme is the judges' assessment regarding the specific reprehensibility, unlawfulness and understandability of the crimes committed, as well as considerations towards the causes of criminality and the reactions of society to criminality. The theme of drug use calls by itself for various remarks, exposing how judges consider the different substances, and the dynamics and consequences they relate to drug crimes and use, even though drug use is no longer criminalized in Portugal.

The defendant said that she had starved and did not want her son to go through the same, which may seem revealing of a great maternal love, but it is not. Did not the defendant consider that worse than seeing a son to have some financial difficulties is it to see a son addicted to drugs, as a consequence of keeping some of the drugs of a drug dealer? More important than giving the son material assets, isn't it giving him good examples?

This quotation also raises other aspects. It was made in reference to a very young woman that was responding for having kept a bag in her house containing drugs (which she alleged not to know), being paid for that, from a drug dealer. The way her act was aggravated reflected the double punishment that affects women that commit crimes, since it seems that she was being punished by her criminal act, as well as by not responding to her maternal role as the judge considered she should (nevertheless being a young single mother working in a bakery, earning a very low amount of money for a very demanding work schedule). We will not go in much detail on this issue since we had a very little number of women responding to crimes in our corpus.

The other group of social considerations refers to the contexts related to deviance and marginalization, and to defendants' life, namely, socio-professional, familiar, relational and trajectory dimensions. Several of these considerations reveal a naive view of defendants' realities, as well as the professional and economic context, for example, in terms of the opportunities that result from their involvement in educational initiatives, which are not, in current times, linear at all. These were developed as if enrolling in a training course would open up multiple appealing professional opportunities, diminishing the challenge and complexity of overcoming hard life circumstances.

There are educational courses, vocational training, adult education, several courses, several opportunities...

We also know that your life circumstances are not the easiest, but there are several examples everywhere, that, sometimes, hard circumstances make stronger and not weaker men...

Opinions about the individual

Finally, 90 units, almost half of all the opinions expressed by the judges, regard the individual, and refer to four types of content: the act (10u), the internal/personal

aspect from the offender (43u), their trajectory (21u), and their self-determination (16u).

Concerning the offender's act, its 10 units assess the criminal act, either in a critical mode or in a more neutral manner. The critical units highlight its reprehensibility, seriousness, and (lack of) understandability.

because, in fact, there's a time for everything, (...) It doesn't cross anyone's mind that you having felt the need in your idea to do what you did, then not letting either the driver of the vehicle or the chief of the vehicle know that in a black bag proper for garbage you had put the binoculars. You may leave. The way you reacted was not the best, that is, if the situation annoyed you, you should have reacted in a different way than you did, revealing respect towards the people in cause.

The neutral units emphasize the disbelief that the act causes to the court, mentioning the consequences that might have resulted from the crime, or conducting a positive prognosis evaluation.

Okay, I think this will have been an incident, as you mentioned here, that will not be repeated.

The opinions related to the internal/personal aspects of the offender include judges' assessments about the offenders' individual and internal functioning, which judges consider to be possible to infer from the defendants' behaviour in court. This category includes 43 units of different types. One of the most prevalent themes is the consideration regarding the way defendants view their own act, either in a negative or in a positive way. The negative considerations state that the offender did not assimilate the seriousness of the crime committed, an assessment that is based on the offenders' behaviour during the trial, or in the absence of a confession or a guilty assumption. These negative considerations refer to judges' assessments of the offenders' absence of assimilation, or of the disapproval of their offense, which they infer in quite a linear way, from how the individuals behaved after serving the penalties, namely, when they did not demonstrate to have gained new skills while imprisoned, or when they committed new crimes when released.

Although you have confessed the facts, you don't reveal that you have really assimilated the disapproval of your behaviour. You did not show a very honest regret, which would be expectable, considering your young age, your instruction... we expected a different valuation of your act from you. Indeed, the defendant spent a great part of his life imprisoned, even though the prison sentences have not been enough to retrace your steps, and you haven't made use of the time you were in jail to improve your skills to be able to improve your life when released.

The positive considerations within the judges' assessments on how defendants see their act include ideas on the assimilation of the disapproval and seriousness of the criminal act, or on the assumption of guilt. Some of these opinions have a more

neutral tone, appealing to the capacity of the offenders to reconsider their behaviour, namely, considering the experience of being brought to justice. Other positive considerations are related to judges' assessments on positive efforts from the defendants, which go beyond what is stated in social reports. These reveal the judges' belief on their capacity to infer this kind of information from the defendants' behaviour in court or their assumption of guilt or regret.

I believe that some incidents that happened recently made you think, and the proof is that you have been trying to change some things in your life.

Other units related to the internal and individual aspects of the defendants were also found, with a focus on the defendants' (real or expectable) way of functioning, their capacities, skills or the absence of such. These types of content reveal the establishment of associations between behaviour and underlying motivations or personal impacts. An extrapolation is made, therefore, from the manifest to the non-manifest, from what may be objectified to what judges consider legitimate to interpret and perceive as being the attitudinal basis of an act or its absence. These associations and extrapolations tend to simplify situations that are much more complex than being reduced to the simple dichotomy of 'wanting or not wanting', such as extreme life changes or socio-professional integrations of individuals involved in deep processes of social exclusion, in several dimensions highly valued by the justice system. Other content related to the internal level of the individuals focused on the causes of the crimes committed.

The defendant cannot keep saying that when he gets out of jail, no one gives him any opportunity. To get those opportunities, first, one must want that change in his life and you haven't yet truly wanted that.

The third subcategory of these opinions about the individual regards their trajectories. The 21 units comprise qualifications of the trajectory as uncertain or favorable, the positive evolution, the difficulties, in general terms, or referring specifically to certain aspects such as drug use, criminal career, or familiar and/or socio-professional situation.

We have read your social report and saw that, unfortunately, drugs have ruined your life. You got married, which could not have been easy - you divorced 9 years after because of the drugs, right?

Lastly, these considerations about the individual also include judges' ideas about the defendants' potential of self-determination (16u). Some of these highlight the defendants' exclusive responsibility for their future, as if familiar, social, and cultural circumstances did not play a role in peoples' lives. Most of the remarks of this nature relate to the eventuality of serving the prison sentence, in the situations of suspension, according to the defendant behaviour. Others are more general, referring to the idea that changing life rests only in the defendants' effort and motivation, revealing a naive perspective on the complexity of the social problems frequently related to the criminal careers most represented in the criminal justice system.

This sentence is a blank cheque that only you may write out from now on. So, the defendant if he wants to, may change this life course...

Discussion and conclusions

This study described how judges pronounce their sentences, analyzing if there is room for value judgments and, if so, describing this material in detail. Indeed, we did find these, even in a judicial system very well structured by legal codes, and even when judges realized they were being recorded for research purposes.

Data showed that all the judges expressed value judgments, comprising what might be called as the personal level of the judicial opinions (Wrightsmann, 1999). Most value judgements relate to defendants' lifestyle (Del Villar et al., 2022) and the need to change it, revealing a conception of penal justice as having the legitimacy of advising and defining the future of the condemned, more than limiting to the establishment of conditions to avoid recidivism. As such, criminal justice systems are viewed as important mechanisms of group dominance and control even because, these subordinate individuals and groups are over-represented (Pratto et al., 2006). In line with this, inequality and social hierarchy are maintained by institutional practices, and judicial punishment appears as an exercise of control of others (Maner et al., 2007).

Moreover, many recommendations concerning the defendants' lifestyle reveal a simplistic and stereotyped perspective over offenders' circumstances. Frequently, a moral tone pervades these sentencing remarks judges provide to the defendants, even in the recommendations that are more consistent with the legal purposes of the sentences, namely, the prevention of crime. Mills (1999) argues that in these situations when judges unnecessarily make judgements about defendants' lives and choices, they seem to consider that they know better about those issues than the defendants themselves, and that the defendants want their advice. This relates to power basis theory, since this approach discusses how individuals usually assume that others have the same needs and desires they have, thus, projecting their sensitivities and needs onto others (Pratto et al., 2013). In the practice, the advice may be seen as unwanted intrusions on privacy and personal issues, considering that they often reveal judges' tendency to stereotype (Mills, 1999).

This stereotyped view over society and the defendants' social, economic, and professional realities, also found in other studies (Castro Rodrigues et al., 2019), was present in many opinions expressed. Particularly concerning the individuals' self-determination, when judges expressed their belief in the total domain of the individuals over their future, even when referring to social and psychological complex issues - such as major lifestyle changes, or the absence of employment skills and values, in very challenging social exclusion situations. Many of these judges seem to minimize and have difficulties on feeling empathy towards the personal and social circumstances of the individuals (Bandes, 2009; Posner, 2008), seen as the out-group. This is consistent with the sociofunctional threat-based approach (Cottrell & Neuberg, 2005), probably linked to the threats they conceive these individuals to invoke, namely viewing them as 'lazy' (Aubé & Ric, 2019), for not doing enough for their own lives, and the internal attributions for poverty (Pratto et al., 2006).

Results also highlight the establishment of some linear and simplistic associations from some judges, extrapolating from behaviour (or its absence) to internal

domains. Among these are the extrapolation of motivations or personal impacts from defendants' actions, conclusions surrounding the presence or absence of remorse, or the assimilation of the offense or of previous sentences, based only on behaviour or verbalizations (or its absence) in court. Another simplistic association frequently established was between recidivism and the defendants' life situations, such as unemployment. This association reveals stereotyped views surrounding normative versus crime-prone lifestyles but also a perspective that disregards the current tendency of societies for not being able to provide every citizen with a full-time job. Again, this simplistic view of defendants' lives and circumstances might also reveal some lack of empathy by some judges (Bandes, 2009; Posner, 2008).

Also here, our data seem to go in line with Cottrell and Neuberg (2005) sociofunctional threat-based approach to prejudice, when it states that specific groups among individuals who committed crimes, may evoke different threats and consequently different profiles of emotions from judges. In these results, this seems to be happening specifically to people that committed drug crimes, people from socio-economic lower classes, and least represented in our sample but very explicitly, to women that committed crimes. It is also possible that the constellation of some of these status even worst the emotion evoked – namely women that commit traffic of drugs, as illustrated in our results. This goes in line with Cottrell and Neuberg (2005) statements that groups are perceived as posing multiple threats and eliciting distinct emotions, frequently in interesting combinations. In this study, the sample being European American university students may implicate that their reactions may not correspond linearly with the reactions of other groups, since these reactions relate to the functional relationships towards the target group (Cottrell & Neuberg, 2005). In the case of judges these emotions, threats and prejudice may even be more amplified, since some of these groups are overrepresented in the Justice system (Pratto et al., 2006). This overrepresentation has several obvious consequences, namely being more easily linked to recidivism and the overload of the system and the burden over society (as the already discussed lazy figures) (Aubé & Ric, 2019).

In line with this, we may evoke the concept of hierarchy-enhancing legitimizing myths, which serve as moral and intellectual justification for group-based oppression and the maintenance of inequality, and have been used to argue that such inequality is fair, legitimate, natural, or moral (Pratto et al., 2006). Our results illustrate some of the examples, given by these authors, of these group-based oppression, namely, combined forms of sexism, stereotypes, notions of “fate”, just world beliefs, the doctrine of meritorious karma, classism, and internal attributions for poverty (Pratto et al., 2006). Indeed, criminal justice systems are discussed as being one of the powerful hierarchy-enhancing institutions, since they might foster and maintain inequality by a disproportional attribution of more positive social value or less negative social value to dominant groups than to the outgroup, or subordinate groups (Pratto et al., 2006). Therefore Pratto et al. (2006, p. 307) call the use of the criminal justice system to enforce social hierarchy “the most robust and proximate causes of group-based dominance”.

Another aspect we must discuss is that although some judges had voiced being against those discourses during sentence pronouncement (considering it a

sentence that cannot be subject to appeal), every judge had value judgments, at least in some of their sentence pronouncements. This study allowed us to analyze this important confrontation between what judges think they do, and what they do (Konecni & Ebbesen, 1984; Goodman-Delahunty & Sporer, 2010). These data reflect important features of the sentencing process, such as judges' lack of sensitivity regarding the boundaries that should be set to their opinion (Bandes, 2009), and their considerable power and discretion (Alfini et al., 2018; Engel, 2022). Thus, we argue that judges' discretion allows the inclusion of subjective and personal views when pronouncing their sentences. If this occurs when they publicly announce their decision, and when they realize they are being recorded, it is expectable that it occurs (even more) in the sentencing decision-making process. Indeed, these opinions were expressed even though judges are aware that what they are supposed to pursue within the Portuguese justice system is to prevent recidivism, and not to define the defendant's lifestyle, according to each judge's subjective references. However, they comment and give advice on several aspects, probably because they consider they are related to recidivism prevention. Nonetheless, these relations are based on judges' beliefs, emotions and stereotypes about society, deviance, and specific groups, and not necessarily on social sciences empirical data, and/or not necessarily applied to all individuals. Although many of these contents relate to risk factors, it is important to highlight that risk factors should be used to adequate intervention to the individuals' needs and responsivity (Bonta & Andrews, 2017) – not to ground their condemnation and turn static what is supposed to be dynamic, thus, with potential to change.

The results of this study stress the difficulty of abstracting judicial decision-making processes from personal frameworks. Several sentencing judgements were influenced by judges' opinions, and not in a consensual way. This result goes in line with Graycar's study, where judges' quotes "illustrate the belief by judges in a pre-existing body of 'knowledge' in which they can at least in part base their judgements" (Graycar, 2008, p.13), especially in social and psychological issues, which are more prone to prejudice and common sense.

Our intention is not to advocate judges are more vulnerable to influences in their professional decision-making processes than other professionals. What we argue is that there seems to be no reason to think that they are less, as the mythology of legal decision-making (Konecni & Ebbesen, 1984), and the idea of a blind justice might imply - and as many magistrates still believe. Deepening all these issues is the way For Justice to do better (Holste & Spamann, 2023).

Overall, we must highlight that sentencing occur within a context where personal valuations might have very concrete and powerful implications on societal ideas on harm, authority, and community (Tata, 2020) and on the lives of defendants and their families. As shown, the negative implications of adhering to prejudice views of these groups and individuals may be substantial (Cottrell & Neuberg, 2005). Namely, research has shown that individuals who fit criminal stereotypes may be disadvantaged over the course of the criminal justice process (Smalarz et al., 2016). Indeed, legal discourses are an agent of constructing reality and a form of direct control over defendants, validating versions of that reality (Graycar, 2008). This notion links to de Sousa Santos's (2010) discussion on the capacity of justice to be emancipatory,

where he argues that what we must demand from justice is that, at least, it does not reproduce the social injustice that results in inequality and marginalization.

Recommendations and practical application

Our results show that the psychological assessment of judges in the selection process to enter the school of judges is not sufficient to ensure that this kind of bias will not happen – as such, these processes must be continuously improved. Besides, the results highlight the importance of increasing judges' training (Krasnostein & Freiberg, 2013), especially concerning social and psychological issues, to ensure as much as possible that their personal positions are grounded on validated knowledge, and not on subjective opinions and personal experiences. We also advocate for the inclusion of forensic psychologists in courts, with a consulting role. This study identified sensitive issues, or blind spots (Bandes, 2009), on the influence of personal frameworks. If research has shown that judges inevitably exercise empathy, the essential questions might then be “for whom they exercise it, how accurately they exercise it, how aware they are of their own limitations and blind spots, and what they do to correct for those blind spots” (Bandes, 2009, p.135). The identification of those limitations or blind spots might be useful to the selection of topics to be addressed on judges' training. This identification might help to foster judges' self-awareness on the aspects they must be particularly careful and critical to. This self-awareness enables judges to control the tendency to fall in common sense judgements that might have the function of ordering the information chaos they might be subjected to, when dealing with criminal proceedings. We call for the importance of Penal Law to break with common-sense evidence, necessarily conservative and fixated (de Sousa Santos, 1989).

In line with this, we must question if the moral judgments should have a place in a highly ethical and facts-focused sentence pronouncement moment. Some recommendations, namely those concerning the appeal to not reoffend, may exist since this is the purpose of penal sanctions (at least in rehabilitative and not retributive judicial systems such as Portugal), and considering the non-strictly legal nature of sentencing. However, it must be considered whether other value judgments, revealed in our results, should have a place in the implementation of justice. If the content is relevant to the sentence pronouncement, to a ‘human exercise of judging’, and to the aim or urging the individual to change, then it should be carefully considered by the law, and their boundaries clearly defined. This is way we are in line with Harris and Sen (2019) when they argue that bias and judging is an issue that implicates the entire judicial system, and not just individual judges.

Therefore, more than expanding on the assessment of the morality, conservatism, or justice of the value judgments, we argue that it would be more adequate to avoid it when deciding on, and pronouncing the sentence, keeping justice in an objective form, based on the overt and concrete, and on specialized knowledge (forensic, medical, ballistic, between others) when needed, as much as possible. This would imply avoiding the establishment of some abusive links, some of them from what is externalized in court, which should not be done even by specialists on behavioural and psychological issues. When considering these issues, there are links that are so vulnerable to error

and stereotyped perspectives that they should always be explicated very cautiously, and in relative terms, and never from an absolute and deterministic standpoint. This does not mean that we defend any backward step into not considering the individuals and their circumstances when deciding for the sentence, but instead, what we support is the exercise of a rigorous, technical, and evidence-based assessment of the facts that should and might be assessed by the court. Indeed, our data allow us to realize that the consideration of the offender by the law has limits that are not always clear and perceived by all the judges in the same way. The codes still make it possible for each judge, within their own discretion, to decide how much consideration may be allowed for the offender, and how this may occur, when the sentence is pronounced.

Limitations, suggestions for future studies and concluding remarks

A limitation that might be pointed to this study is the small number of participants and the variability problem that can be associated. As such, it would be very useful to continue this exploratory study in other countries, both English-speaking and not, covering a large range of distinct justice systems, allowing for a comparative perspective. Although we consider that future studies could replicate this study with more judges and courts of distinct jurisdictions, we must highlight some ideas on this issue. First, we analysed 93 sentence pronouncements which is a very reasonable number of documents for a qualitative study. Second, developing this study in one of the major Portuguese criminal courts assures for a good variability of judges. With these conditions we believe we were able to have a good perspective over Portuguese reality.

Another limitation of this work is that the quantity of value judgments in these sentence pronouncements may not correspond linearly to the moral judgments of the sentence decision-making, thus only reflecting the content exposed in the sentence pronouncement. In other words, this material allows us to identify important features of judges' ideas and personal positions, but their ideas might not be reduced to this material - many others may have been unseen, which does not imply that they do not exist. As Shaman (1996) argues, although the control for abusive remarks or comments of judges is important, we must keep in mind that the structural problem lies in the minds where bias and prejudice have a place. The content may have been blunted because the judges knew they were being recorded. Nevertheless, this fact also raises the importance of the results of our study, since if this might result from a possible influence of a social desirability process, the reality without any interference might be even more expanded.

In conclusion, the inevitability of subjective aspects in judges' sentence decisions (Sacau & Rodrigues, 2009) reinforces the importance of the sentencing research from the social sciences standpoint, and specifically from a qualitative approach. We argue that an adequate path to reduce uncertainty and the disparity in the assessments of the facts might be through an increase in judges' self-knowledge about the aspects more vulnerable to these subjective considerations (Grossman et al., 2023). This is essential to assure that justice properly considers the difference between distinct situations and defendants, moving away from possible (and expectable) differences between the judges (Sacau & Castro-Rodrigues, 2011).

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Data availability The empirical data analysed in this paper has been collected for a PhD dissertation by the first author. The partly confidential raw material and qualitative analyses are available, in Portuguese, from the corresponding author on reasonable request.

Declarations

Ethical approval This paper fulfills all the ethical concerns, regarding human participation and data use and preservation, as the funding from the Portuguese Foundation for Science and Technology and the Portuguese Ministry of Science, Technology and Higher Education ensures.

Informed consent After the approval from the Superior Council of Magistrature, each judge signed an informed consent, agreeing to participate in the study, where all the relevant information about the study was available, namely the confidential and anonymous nature, and the conditions of data preservation.

Statement regarding research involving human participants and/or animals The research involved Human participation, but no harm or direct benefit should be expected, since we only analyzed their sentencing remarks.

Competing interests The authors have no relevant financial or non-financial interests to disclose.

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