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Sentencing Elsewhere: Structuring Sentencing Discretion in Post-communist Europe

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Abstract
Former socialist European countries (FSECs) have largely been overlooked in the scholarly debate on sentencing disparities and structuring sentencing discretion. The article addresses this gap by analysing the specific sentencing characteristics in FSECs, which differ from those in their Western counterparts. Specifically, FSECs place greater emphasis on the principle of individualisation and exhibit distrust towards the executive branch. Whilst recent studies have documented important unwarranted disparities in FSECs, scholarly and professional debates on sentencing issues in these countries have been rare and often superficial to date. In this paper, we describe the specifics of sentencing in FSEC, emphasising the broad discretion provided to sentencers, the lack of interest from sentencing stakeholders, and the frequent neglect of procedural factors influencing sentencing. Drawing on existing scholarship and empirical evidence, we put forward general principles for structuring sentencing discretion in a manner specific to FSEC. We identify key actors who might provide guidance and discuss how our suggestions might be implemented in practice.

Keywords Sentencing · Discretion · Guidance · Continental · Post-communist

Introduction

The way sentencing discretion is structured in a given system depends not only on the technicalities of the legal decision-making framework but also on various circumstantial and contextual factors such as the legal tradition, cultural setting, historical experiences, and societal attitudes (Ashworth, 1992 and 2002; Council of Europe, 1993; O'Malley, 2013). Therefore, it is not surprising that sentencing systems vary significantly, yet they often group into clusters of similar systems. Unrelenting research into some of those systems and

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clusters has incrementally deepened our knowledge of them to the point that we now feel we understand them quite well [most notably systems in the West (Tonry, 2016; Tonry & Frase, 2001)], but this is certainly not the case for all of them. We add to this knowledge by shedding light on sentencing in an often-overlooked group of European countries clustered together by a shared history of socialism.

There has never been a thorough discussion of what measures best enhance sentencing consistency in the countries that were once behind the Iron Curtain. In defining the region, we focus on former socialist European countries [henceforth 'FSECs', see Šelih, (2012)]: former countries of the USSR, members of the Warsaw Pact, and countries of former Yugoslavia.[1] Such a broad approach naturally involves making crude brush strokes and searching for commonality rather than emphasising differences. Beyond their well-known historical similarities, most of these countries share historically similar attitudes towards crime and punishment, authority, and the law. Nevertheless, today, they are far from a homogeneous group of systems with varying degrees of crime and varying intensities of response to that crime. However, after familiarising ourselves with the various systems, we believe there are enough similarities among them to warrant a joint analysis that, despite its limitations, could be beneficial.

Generally, scholarship describing sentencing in Europe pays little attention to FSECs. In the 'European sentencing practices' chapter of The Routledge Handbook of European Criminology (Snacken et al., 2013), FSECs are referred to in only 4% of cases when a European country is mentioned, even though the prison population rate in FSECs is 1.5 higher than in Western countries (World Prison Brief, 2023). Similarly, the chapter that categorises continental legal systems into three groups lists all Western countries but omits mentioning eleven FSECs. Whilst we are aware that this may be due in part to a lack of sentencing scholarship, especially written in English, from these countries, and other limitations, the omission serves to highlight the lack of sentencing scholarship focusing on FSECs, where 'the social context of sentencing is seen at its most vivid' (Ashworth, 2002, pp. 230–231).[2]

The solution to this lack of discussion is not simply to copy-paste the debates currently held on sentencing in the Western context; we need to discuss structuring sentencing discretion in ways appropriate to FSECs. This discussion is particularly urgent in the wake of recent research identifying high levels of sentencing disparities in FSECs (Drápal, 2020; Mamak et al., 2020). Moreover, FSECs are currently in the process of adopting or considering adopting various measures structuring sentencing discretion, such as sentencing guidelines in Moldova, North Macedonia and Kosovo, detailed statutory provisions in Poland, sentencing databases in Slovenia and normal (reference) punishments in Czechia. Considerations and guidance on the suitability of these measures thus seem essential. Additionally, research from FSECs has shown that in some countries, penal elites (legislature, executive and judiciary and leadership of penal agencies, see Garland, 2013) are sometimes willing to reform the system and to provide additional guidance with the aim of lowering the level of punitivity, yet—lacking any scholarly discussion or insight—often use the wrong tools (Drápal, 2023a; Krajewski,

[1] For the purpose of this paper, we are excluding Belarus and Russia from our analysis. We believe this to be justified due to their different political and legal backgrounds, albeit we acknowledge there might be significant similarities as well.

[2] In writing this article, we have faced these same issues and are thus unable to fully reference some of our findings.

2016). Finally, our article examines the appropriateness of various measures in different contexts, which is an often-omitted endeavour in sentencing scholarship.

The article is structured as follows: initially, we explore the most effective measures for structuring sentencing discretion in post-communist countries. This involves a detailed examination of the historical evolution within FSECs, focusing on the dominant paradigm of individualisation and the increasing concerns about disparities. Next, we examine the current structure of sentencing discretion and analyse the roles of different stakeholders involved. Following this, we propose measures tailored for FSECs, starting with an overview of general guidance measures and then delving into specific methods for implementing this guidance in individual cases. We conclude the article with a reflection of the potential limitations and challenges of our proposed measures.

Historical Background on Sentencing Discretion in the Wider Region

The foundational reference for discussions on sentencing within the European context is the 1992 Council of Europe (CoE) Recommendation on consistency in sentencing [Recommendation]. This pivotal document was developed in response to the policy debates and reforms that swept across Western Europe during the 1970s and 1980s. Key precursors to the Recommendation were the CoE's 1974 report on sentencing and the insights gathered from the 8th Criminological Colloquium in Strasbourg in 1987, as outlined in Council of Europe, (1989). These reports, deeply influenced by the sentencing debates and reforms in individual Western European countries during the latter half of the twentieth century (Hinkkanen & Lappi-Seppälä, 2011), formed the basis for Recommendation (Council of Europe, 1993, pp. 363–364). The Recommendation is a sort of consensus on appropriate strategies for Western European nations to structure judicial discretion in sentencing.

That consensus based on shared academic discussions did not last long, however. After the fall of the Iron Curtain, virtually, all the remaining European states joined the CoE, and these new states differed from the existing members. Before becoming members of the CoE, the FSECs had not taken part in critical debates on sentencing, structuring sentencing discretion, or empirical findings documenting sentencing disparities. Nor was the Recommendation tailored to these countries: none are among the 16 Western European states that responded to the questionnaire (Ashworth, 1989, p. 134), nor is there any mention of them in the reports. This was only natural: the CoE had focused on its member states and could hardly have considered in 1987 the coming sudden dissolution of the Warsaw Pact and of Yugoslavia a couple of years later.

After they joined the CoE, the new countries began to implement various CoE recommendations, but the Recommendation concerning consistency in sentencing was not of primary interest. Most of the new countries were still struggling at that time with breaking free from their previous regimes, instituting democracy, the rule of law, and a free-market economy; some had further to establish their independence (Šelih, 2012). In these circumstances, structuring sentencing discretion was simply not a pressing matter.

Individualisation and Disparities: Prevailing Paradigm and Emerging Debate

Concerning sentencing paradigms, the FSECs are, in many ways, still experiencing what Western countries experienced in the 1960s: the emphasis is placed on individualisation and rehabilitation and not on proportionality of punishment. The emphasis in sentencing is thus not on consistency, principled decision-making, or equality but rather on the need to impose a sentence that reflects the unique features of the offence and the offender (Plesničar, 2013). It exemplifies the every-case-is-unique approach represented by the judicial defensive strategy (Tata, 2020, p. 18).

Whilst the every-case-is-unique approach goes beyond individualisation as a reaction to the offender's risks and needs (Ashworth, 1989), individualisation has been long linked to an offender rather than to an offence, especially in countries of the former Soviet Union and many other Eastern block countries. The 1920s' progressive penal policy of the Soviet Union emphasised the necessity to rehabilitate the offender, introduced and emphasised non-custodial sanctions, and reduced sentencing range minimums (whilst also enlarging the scope of offences). Whilst the 1930s reversed many of these decisions (Solomon, 1980), the utilitarian approach to sentencing—requiring a wide level of individualisation—was deeply engrained in both criminology and criminal justice scholarship in FSEC (Schubert, 1959; Solomon, 1974).

Moreover, individualisation is not merely a theoretical artefact or general idea; it has strong implications for the practice of the courts, which is still reflected through various contemporary case law examples. For example, the Czech Constitutional Court recently stated that 'the process of the judicial individualisation of the sentence is unique in every criminal case' due to unique combinations of factors in each case, and as a result, it is impossible to compare sentences imposed in different cases.[3] In another example, a Slovenian Higher court stated that 'the factual circumstances of a particular crime, as a unique life event, cannot be identical to the circumstances of other specific cases, and therefore, when deciding on the choice and imposition of a criminal sanction […] the Court's consideration of circumstances of allegedly comparable offences […] is irrelevant.'[4] Individualisation is thus accorded a more important role than in, e.g. common law countries (compare Harris, 2022, pp. 102–104).

Finally, the ethos of individualisation also manifests in judges' sentencing options. Greater scope for individualisation has been used as an argument in support of suspended prison sentences (Horváth, 1969; Ancel, 1971, p. 12, 71), whose frequent use is a common feature of FSEC sentencing systems: suspended prison sentences are the most commonly imposed sanctions in most FSECs, in some of which they are imposed on the majority of offenders (Aebi et al., 2021, p. 217).

Whilst scholars worldwide consider individualisation important in sentencing, such a vigorous defence of individualisation without any mention of consistency may signal a predicament. When done properly, individualisation should enable the system to avoid

[3] Decision IV. ÚS 950/19 from 14. 4. 2020, point 81.

[4] Decision III Kp 23,259/2017 from 10. 10. 2018, point 14. To some extent, similar outcomes can be achieved in other systems, e.g. the German one, where higher instance courts also do not engage with specific sentencing issues, but with a different rhetoric of "margin" or "leeway" theory ("Spielraumtheory", see Hörnle, 2013). Theoretically, German approach is, however, different and more structured than the one expressed in FSECs.

unwarranted rigidity and consider a broader range of circumstantial characteristics of both the offender and the offence. In practice, however, individualisation is sometimes only a rhetorical exercise: FSEC courts generally have very limited information about offenders since probation services are only gradually being introduced across FSECs and have limited resources. Truly individualised sentencing is thus more of a myth than a possibility in FSEC, albeit it is the dominant rhetoric. When the idea of individualisation is not met with sufficient safeguards or an appropriate practical structure, the danger of unequal treatment is great (cf. von Hirsch, 1976).

This individualisation ethos has been downplayed in many Western countries by research into sentencing disparities, yet similar empirical research in FSECs has remained scarce until recently (Drápal, 2020, in Czechia, Mamak et al., 2020, in Poland and Plesničar, 2022, in Slovenia). Yet, there is substantial scope for such research to influence policy: we have personally observed judges who opposed proposals to structure sentencing discretion change their views after seeing experimental evidence of disparities and sometimes even publicly announce their support for measures aimed at increasing consistency.

Structuring Sentencing Discretion in FSECs

Sentencing discretion is structured quite similarly across FSECs. In many ways, these features are similar to other continental legal systems, and many of the observations we make here may thus also be valid for other continental European systems (Plesničar, 2013). Nevertheless, we focus our inquiry explicitly on FSECs, which allows us to include region-specific circumstances in our assessment of how discretion is structured. We identify three clusters of sentencing discretion features that we consider most indicative of FSECs: (i) disinterested sentencing stakeholders, (ii) broad sentencing discretion, and (iii) unresolved procedural issues.

The Who: Disinterested Sentencing Stakeholders

The powers held by stakeholders involved in setting general guidance and applying it in individual cases—and how they use those powers—tell us the most about how sentencing discretion is structured in FSECs. We limit ourselves to sentencing *strictu* sensu and do not discuss all the participants involved in pre- and post-adjudication sentencing (Frase, 2001). Therefore, we focus on the legislature, judiciary, and prosecution and broaden our scope to include academia. Whilst these various stakeholders have different powers, resources, and positions, they frequently know little about sentencing and are little inclined to deliberate over or think about how sentencing discretion should be structured.

The Legislature

The statutory legislation typically sets each system's sentencing framework and, most visibly, sentencing ranges. The main decision-maker here is the legislature, although criminal justice reforms are often prepared by the executive branch in collaboration with practitioners, especially judges and prosecutors (sometimes with an academic background), whose contribution to FSECs' criminal codes or codes of criminal procedure ranges from heavy involvement to mere presence in working bodies. As institutions, the judiciary and prosecution service are often proponents of specific reforms, frequently those that will streamline

their own work. Since these practitioners are rarely in contact with sentencing scholarship and often frown upon initiatives to structure sentencing discretion, such legislation is hard to pass. Moreover, the legislature is rarely interested in in-depth, long-term considerations regarding sentencing. The existing sentencing systems in FSECs are thus typically the result of a status quo attitude where introducing novelties is slow, uninspired and non-radical, except in response to violent crimes (which we discuss further below). Changes to sentencing legislation in the FSECs are rarely made with much aforethought, strategy or clear purpose (see, e.g. Drápal, 2023a; for a different example, see Plesničar, 2023).

This inattentiveness to the complexity of sentencing sometimes results in provisions that oversimplify sentencing. We see one such example in the Slovak provisions stipulating that the number of aggravating or mitigating circumstances (and not their significance; see Novocký, 2020) determines an increase or decrease in the sentencing range: if there are more aggravating than mitigating circumstances, the sentencing range minimum increases by one-third, and if there are more mitigating circumstances, the sentencing range maximum decreases by one-third.[5] Meanwhile, in Hungary, provisions dictate that sentences should, on average, be imposed in the middle of the sentencing range,[6] failing to take into account that there are usually more offences with lower relative seriousness and that it is thus reasonable to expect the average sentence to be well below the mid-point of the sentencing range (Hinkkanen & Lappi-Seppälä, 2011). The occasional legislative spur can thus structure sentencing discretion in a wrong way.

Judges

Generally, in FSECs, just as elsewhere, judges hold the greatest power over sentencing. Typically, sentencing is a matter for judges at first-instance courts. These judges' discretion is generally much less limited than that of their counterparts in comparative *common law* systems, and they are often not accountable for their discretion (see discussion below on judicial reasoning). However, appeal courts can and sometimes do question sentencing decisions—providing a sort of judicial overview that might tame sentencing discretion (cf. Weigend, 2001). By nature, this is a sporadic and unsystematic form of regulation, and when the appellate courts decide on the basis of sentencing principles, those principles often contradict the sentencing scholarship, recommending, for instance, very long sentences for petty offence recidivists (Drápal & Vanča, 2023).

Supreme Courts worldwide can often decide on sentencing principles in individual cases. By doing so, they unify the application of the law across the country. However, most FSECs' Supreme Courts are not allowed to do so or believe they are not allowed to decide on sentences (Drápal, 2018). This is likely due, at least in part, to uncertainty over how to define conditions in which Supreme Courts could decide on sentencing principles without having to rule on every sentence.

However, in many FSECs, the Supreme Court is granted an atypical power to issue general unifying opinions (not linked to any individual case). Those opinions are not binding for judges, but judges widely respect them due to their quasi-precedential nature, persuasive power, and the ease of reference they provide. Their origin can be likely traced to the USSR Supreme Court, which was granted the power to survey lower courts' work

[5] Slovak Criminal Code, law n. 300/2005 Coll., s. 38/3,4.

[6] Hungarian Criminal Code, Act C of 2012, s. 80/2.

and issue guiding (and sometimes binding) instructions on various legal issues—a power it fully made use of throughout the twentieth century (Solomon, 1990). The use of similar powers today differs across FSECs: some Supreme Courts issue unifying opinions frequently, some rarely, whilst a few systems lack this option entirely.[7] Since the fall of the Iron Curtain, such unifying opinions have rarely been used to provide sentencing guidance, yet they remain an available tool and could be revived. For example, in Moldova, they have recently been used to enact sentencing guidelines (Nicolaev & Vidaicu, 2015).

Prosecution

A third and rather more newly emergent stakeholder in sentencing in many FSECs is the prosecution. Its powers lie primarily in recommending sentences. This practice differs across FSECs: voluntary (e.g. currently in Slovenia, where it was previously forbidden until the 1980s) or compulsory (e.g. in Estonia, Moldova, and since 2020, Czechia). Where they are made, prosecutorial sentencing recommendations are rarely based on a principled consideration of all factors because, like judges, prosecutors lack a principled sentencing framework (Plesničar, 2022). In some countries (e.g. Czechia), prosecutorial recommendations are subject to approval by the head prosecutor, which might reduce unwarranted disparities (Žibřidová & Drápal, 2023). Prosecutors in some FSECs have further gained additional power via the introduction (or at least formalisation) of plea bargaining or increased possibilities to plea-bargain.

However, we have not (yet) seen the level of replacement of judicial discretion by prosecutorial discretion as observed in the USA or some Western European countries. Prosecutors do not typically have the powers to impose sentences (as they have, e.g. in Switzerland or the Netherlands). However, they have slowly acquired certain powers over imposed sentences and have become able to change sentencing practices if and when they decide to do so. For example, this occurred in Czechia, where the Supreme Prosecutor achieved the biggest change in sentencing practice in a decade by simply instructing prosecutors to take certain actions (Drápal & Dušek, 2023). Thus, scholars and practitioners should start paying more attention to prosecutors than they did up to this point.

How appropriate it is for prosecutors to play an influential role in sentencing depends largely upon how independent the prosecution is; that independence varies across FSECs. In some countries, such as Slovenia and Czechia, the prosecution service is considered independent, and any intrusion by the government would generally be strongly denounced. However, the same cannot be said in countries such as Slovakia and Poland, where the prosecution has been known to defer to governmental pressure (Mamak et al., 2020). Prosecutorial measures for structuring sentencing discretion—modelled, for example, on the Dutch prosecutorial sentencing guidelines—could thus be appropriate in Czechia and Slovenia but not in Poland (Drápal & Wingerden, 2018; Mamak et al., 2020; Plesničar, 2022).

In some countries, including Czechia, Slovenia, and Moldova, unifying instructions for prosecutors (binding or otherwise) can also be issued by the Supreme Prosecution or Prosecutor General; these have been used to formulate both substantive and procedural sentencing guidance (Plesničar, 2022).

[7] Moldova (former USSR), Slovenia (former Yugoslavia and Austria-Hungary), Czechia, and Slovakia (former Warsaw pact and Austria-Hungary) all allow unifying opinions; Estonia, for example, does not; in Poland, they were abolished in 1989 and 1990.

Academia

As an active onlooker rather than a stakeholder per se, academia has often provided and promoted significant developments in the field of sentencing by investigating sentencing principles, developing and studying various measures designed to improve the sentencing structure, and providing a theoretical grounding for sentencing decisions. However, universities and research institutions in FSECs have been much less active in this area than their international counterparts. There is a dire lack of textbooks and basic reference books on sentencing in FSECs, and sentencing is often portrayed as a less important part of criminal procedure or substantive criminal law in these countries' core criminal law books.

The scarcity of empirical or theoretical research on sentencing in these countries results primarily from a severe historical lack of funding for academic research and insufficient importance granted to sentencing. Sentencing is frequently not taught in detail (or at all!) at universities, nor do judges or prosecutors receive specific training on it (which is also true for some non-FSEC continental countries). Hence, when designing reforms, these countries cannot presuppose that sentencers or lawyers will be fluent in sentencing jargon, understand the complexities of sentencing, or be familiar with sentencing scholarship published in English. Our claims have exceptions, but overall, this is the situation across most FSECs.

Broad Sentencing Discretion

An often-overlooked issue with sentencing discretion is its sheer breadth. In FSECs, sentencing guidance is still offered in a rather rudimentary way similar to that common in other parts of Europe in the late nineteenth and early twentieth centuries. The sentencing framework is generally part of the statutory criminal legislation: criminal codes typically provide general instructions regarding sentencing, which include a vague provision on the purpose of punishment and a general directive indicating what is relevant to sentencing. Criminal codes further detail some aspects of sentencing, usually listing some sort of proportionality requirement including the severity of the crime and the culpability of the offender. This is usually followed by a lengthy (but not necessarily exhaustive) list of circumstances to be considered, sometimes separated into groups of mitigating and aggravating circumstances. Furthermore, some basic instructions for sentencing multiple offenders or those with previous convictions are provided. Even so, these statutory provisions only provide very general guidance about how sentencing discretion should be structured and leave ample space for inconsistency and disparities (Drápal, 2018).

The most direct sentencing guidance and the most stringent limits it places on judges' discretion in sentencing are given by statutory sentencing ranges for individual offences listed in the special parts of the criminal codes. Offences are usually divided into several (sub)sections or offence types according to specific features, making them less or more severe. These offence types are assigned specific sentencing ranges, which are, however, only mandatory as to the maximums they provide whilst generally allowing judges to go below the set minimums if the circumstances call for such action (Kert et al., 2015; Krajewski, 2016; Plesničar, 2013; they typically contain a more or less limited 'escape clause', Harris, 2022, p. 179). However, minimum sentences are much more frequent than, e.g. in

the UK (Harris, 202, p. 180) and often higher than in non-FSEC countries: In a study of minimum sanctions in the EU, the average sentencing range minimums for all five selected offences were higher in FSECs than in other EU countries (Kert et al., 2015, p. 164).[8]

Since sentencing ranges play such a crucial role, it is surprising how little attention has been paid to how they are defined and how little research has been conducted into whether they are appropriate for the behaviours they are supposed to sanction. When new penal codes were enacted in the FSECs after the fall of the socialist regimes, the sentencing ranges were typically copied from the previous codes without sufficient attention or empirical research (or any at all). Amendments to those ranges adopted over the past 30 years have often been equally unsystematic (Wintr & Raček, 2010), further fragmenting a once relatively stable system. FSECs have sometimes fallen prey to the same penal opportunism as their Western counterparts (Plesničar, 2014; Pratt, 2007), enacting stricter legislation for specific crimes, sexual offences against minors being a prime example. Serbia, for example, passed two new pieces of legislation known as Marija's law and Tijana's law[9] that ultimately pushed the maximum sentence for sexual offenders against children to a previously unthinkable level: life imprisonment without the possibility of parole.

At other times, various international treaties and EU directives have required member states to adopt certain offences whilst leaving the sentencing ranges for them to the discretion of the member states. A perfect example of how little consideration these issues have received is the offence of 'Glorification of terrorist acts' in Czechia. The relevant directive[10] does not mandate any minimum sentence, yet this offence was adopted into the Czech system with a sentencing range of 5–15 years. After several offenders had been found guilty, the range was criticised as abhorrently high by both judges and prosecutors (Koutská, 2020; Veselá, 2023).

The situation that has arisen as a result of these dynamics in many FSECs is unenviable, with plenty of repressive spikes (incriminations with disproportionally high sentencing ranges) and repressive depressions (incriminations with disproportionately low sentencing ranges) (Korošec, 2019). Some sentencing ranges fail to reflect even basic theoretical considerations: in Slovakia, for instance, the threshold between (regular) bodily harm and grievous bodily harm depends on whether or not the victim was incapable of working for 42 days. The lesser offence of bodily harm carries a sentencing range of 6 months to 2 years, whilst grievous bodily harm of between 4 and 10 years.[11] One additional day in the victim's recovery could thus result in a sentencing difference of at least 2-year imprisonment, which is incomprehensible at the theoretical and inexcusable at the practical level.

However, even if these sentencing ranges were adequately set to respect ordinal proportionality, there is a lack of theory in FSECs on what specific guidance they should provide. There have been no real reflections on whether the average offence should fall in the middle of the sentencing range, at its minimum or towards its maximum. If sentences are imposed within the given sentencing ranges, the Higher and Supreme Courts typically restrain themselves from ruling on sentencing principles or the lower courts' use of sentencing discretion. In other words, there are no baseline offences—and there is no real baseline at all.

[8] Authors' own calculations. Murder was not considered due to difficulty of operationalising life sentences.

[9] "Marija's" law, Sl. glas. RS, 32/2013–3, 8. 4. 2013; "Tijana's law", Sl. glas. RS, 35/2019, 21. 5. 2019.

[10] Directive (EU) 2017/541 on combating terrorism, art. 5 and 15.

[11] Compare s. 156/1, 155/1, 123/3/i and 123/4 of Slovak Penal Code, law n. 300/2005 Coll.

Procedural Issues

An often hidden feature of sentencing systems is the procedure through which courts decide on specific sentences in individual cases. Several features of the sentencing procedure are important in the FSEC context specifically. First, one of the most striking differences between continental and *common law* systems is the continental unified criminal procedure, wherein the verdict and the sentence are passed simultaneously (Henham, 2012; Tonry & Frase, 2001). This means that throughout the process, there is less focus on the sentencing decision and on gathering evidence relevant for sentencing, as the verdict is typically seen as the more demanding decision (cf. Nestler, 2003). This often results in fewer reasons being provided for the sentence passed.

In general, accountability for the imposed sentences and limited oversight over the cases are restricted to what the judges provide as reasoning for the sentences they impose. That reasoning is often very poor (as evidenced for Czechia, Estonia, Moldova, Slovakia, and Slovenia in Drápal et al., 2024), rendering it nearly impossible for appellate courts to review the decision-making process. Moreover, the requirement to give written reasons is often loosened by procedural options designed to boost efficiency—in Slovenia, for example, written reasoning is no longer required unless an appeal is announced at sentencing (Šugman Stubbs et al., 2020). In Poland, written reasons are only necessary when the parties motion for them.[12]

Other procedural options meant to improve efficiency are widely used in FSECs. Two seem most relevant: penal orders and guilty pleas (plea bargaining), both abbreviated procedures designed to save time. Penal orders have been a more traditional feature of many FSEC systems for a longer time, whilst plea bargaining has gradually been introduced in recent decades as a transplant from *common law* systems (as in many non-FSEC continental systems). What these two shortened procedures have in common regarding sentencing is that they limit judges' options to a significant degree. For instance, they may prevent the imposition of any non-suspended prison sentence via penal order or limit the extent to which a judge may deviate from the prosecutors' recommendations (in some systems, such as Slovenia, this is true both for penal orders and plea-bargaining). The imposed sentence is thus a result of both substantive and procedural considerations, incentives, and limitations—a combination rarely explored in sentencing research in FSECs or elsewhere.

How Can the Sentencing Structure in FSECs Be Improved?

We do not pretend to have a fully conceptualised idea of what an ideal system of sentencing would look like (see van Wingerden & Plesničar, 2022). Moreover, sentencing functions in a complex social setting that influences and is influenced by it (Tata, 2020), so, any ideal system would be unlikely to work perfectly in practice. Hence, we have set ourselves the possibly less wholesome but more feasible objective of sketching some potential routes towards more consistent sentencing, which we specifically tailor to FSECs considering their distinguishing or dominant features.

Before discussing our proposals for individual measures aimed at achieving a more principled and consistent structuring of sentencing discretion and their appropriateness for

[12] S. 422/1 of the Polish Code of Criminal Procedure.

FSECs, we outline some general principles these measures should fulfil that supplement the general sentencing principles applicable worldwide (Ashworth, 1989, p. 129; Roberts & Plesničar, 2015) and are specifically relevant for FSECs due to their historical and cultural context.

1. Any new measures in the use of discretion should be enacted as transparently as possible since there is a long historical tradition of misuse of power in FSECs.
2. For similar reasons, if any power over enacting the general principles is granted to the executive branch, there should be clear mechanisms disallowing any potential intrusion into individual cases. More generally, individual branches of power should be mindful of respecting the separation of powers and interacting in an appropriate manner and over appropriate channels of communication.
3. Structuring sentencing discretion requires effort from those providing guidance and those applying it: sufficient resources must be deployed, and time allowed for planning and implementing any reforms. Reformers should expect resistance, especially from the judiciary, so persuasion should be a necessary part of the efforts.
4. Any strategy should combine various measures rather than relying on just one or a few. These could be developed consequently, as a thorough wide sentencing reform is unlikely to occur. Reforms could begin with the most common and the most serious offences.
5. Sentencing rationales should not be underestimated. Proportionality should be emphasised in particular.[13]
6. Finally, academia should provide support by investigating comparative systems and carrying out empirical research.

Providing Guidance

Some guidance seems necessary if the sentencing systems in FSECs are to adopt more coherent frameworks, allowing for more consistent sentencing with the right amount of discretion. In this section, we first discuss the topics that guidance should address and subsequently address the questions of who should introduce them and how.

Guidance About What

First, to function properly, any decision-making system needs to be built with well-defined and understandable aims. With regard to sentencing, this is a long-acknowledged truth: clear sentencing aims provide for a more coherent sentencing practice (Harris, 2022). Nevertheless, this knowledge is hard to implement in practice—the multitude of sentencing aims used in modern systems often obscures the prevalent ideology, if one is to be found at all. Quite similarly, sentencing rationales are not properly elaborated in FSECs. These countries either adopt a menu approach (such as Slovenia or Poland), giving a wide range of possible sentencing rationales with mere hints at the predominant feature, or they

[13] This is important, as there are too many examples of current distortion of the relationship between the seriousness of committed offenses and the severity of imposed sanctions, e.g. repeated hungry thieves receiving sentences of several years during the COVID-19 crisis or suspended prison sentences imposed for aggravated forms of rape in Czechia.

willingly fail to enact them at all (as in Czechia). This poses problems not only for formulating a coherent sentencing policy throughout the penal code but also for interpreting individual principles. We believe sufficient examples of good practices might guide FSECs in formulating clearer sentencing rationales (see, e.g. suggestions in Roberts & von Hirsch, 1995).

Secondly, general sentencing principles should be elaborated in more detail. For example, the role of previous convictions is often unclear at present, and comparisons of sentencing provisions have sometimes shown that certain states lack provisions regarding sentencing specific groups of offenders, such as multiple-conviction offenders (Drápal, 2023b). Unfortunately, there is no Europe-wide project that would present statutory provisions regarding individual sentencing issues in order for countries to gain inspiration (for benefits, see Ashworth, 1994). However, we believe that the Swedish example of statutory reforms (Jareborg, 1995) could serve as a particularly good example in this respect.

A third crucial consideration is guidance on sentencing ranges. In an ideal setting, the legislature would establish a system in which criminal offences and sentencing ranges are set considering society's values and their complex interplay, examining what criminal acts are actually sentenced and to what. Following such an analysis, sentencing ranges could be redrawn considering ordinal and cardinal proportionality. If the legislature does not do this, it should at the very least set very low sentencing minimums, especially for aggravated forms of offences, because 'it is more important to prevent overly harsh and unjustified penalties than to prevent overly lenient ones' (Hinkkanen & Lappi-Seppälä, 2011, p. 356).

Guidance by Whom and in What Form

Bearing in mind the areas in which guidance is needed, we now turn to look at who should be giving such guidance and what form that guidance should take. These two questions are interlinked and cannot be answered separately, given the context of the FSECs; hence, we address them together.

We first look for potential guidance-givers from among the main stakeholders in sentencing: the judiciary and the prosecution. These stakeholders are typically those most involved in sentencing decisions and deal with sentencing regularly. Moreover, existing measures could be used within each of these institutions to implement such guidance. However, each institution's guidance would carry different weight and outreach.

Many FSECs already use tools usually known as 'unifying opinions' or 'unifying instructions'. These are aimed at unifying dissonant case law and could be well used to provide guidance for sentencers as well [indeed, they have been used so in the past, see Solomon, (1990)]. Since their rationale is to limit wayward decisions, they could be easily employed to limit unwarranted disparities in sentencing by structuring sentencing discretion in various ways. Considering the sentencing procedure, these unifying instructions could easily specify how the sentencing process should be carried out. With regard to substantive law, they could specify how certain factors should influence sentencing, for example, clarifying the role of previous convictions. Unifying instructions for prosecutors could be further used to specify what information the prosecution needs to collect in order to secure sufficient evidential basis for sentence recommendations and possibly sentencing. Unifying instructions or opinions could be employed to provide sentencing orientations, such as presenting 'normal' punishments or whole case scenarios. Although such a practice would be in line with the current conception of unifying opinions (unifying divergent practices), we believe it would be met, at the very least, with strong suspicion by judges.

A similar measure—guideline judgments—would be likely considered inappropriate due to the different understandings of precedents' role in FSECs compared to other legal traditions.

For unifying opinions to carry the necessary authority, any such move would need to be grounded in an empirical analysis of sentencing decisions and thorough theoretical considerations. At present, we are not convinced that Supreme Court judges in FSECs are sufficiently aware of the theoretical issues surrounding sentencing or of sentencing scholarship on such issues. Similarly, it is unclear whether Supreme Courts can carry out proper empirical research: lawyers typically have very little training in research methodology, and it is not common for Supreme Courts to employ social scientists. Additionally, it is unclear to what extent Supreme Court judges are in touch with current practices since sentencing is carried out primarily by lower-level judges, and many Supreme Court judges have not sentenced an offender for a decade or more. Hence, in order to succeed, such unifying opinions should not be prepared by Supreme Court judges alone but in coordination with sentencing scholars and first-level and second-level judges. How feasible this would be in practice—especially whether Supreme Court judges would be willing to participate—remains unclear.

The most restricting measure conceivably acceptable in FSECs might be prosecutorial sentencing guidelines with starting points similar to those in the Netherlands (Drápal & Wingerden, 2018). Compared to unifying opinions, these would assure a higher level of compliance, as FSEC prosecutors are used to a hierarchical leadership style. Such recommendations have strong anchoring effects (Englich & Mussweiler, 2001) and, if coupled with principled sentence recommendations from prosecutors at the indictment, could lead to increased consistency.

Nevertheless, sentencing guidelines would likely not be welcomed by practitioners. Within FSEC systems, they would need to be much more detailed than the typical sentencing framework. As such, practitioners might perceive them as overly detailed and too restricting. For their successful implementation in FSECs, they would thus have to be voluntary rather than mandatory: sentencers would be able to refer to them for guidance whilst retaining a sense of ownership over the sentencing process. Moreover, any numerical guidelines are unlikely to be well received as they would be considered to directly oppose the proclaimed principle of individualisation. Narrative guidelines would likely be more successful.

As far as we are aware, the only FSEC countries that have adopted sentencing guidelines for judges are Moldova, Kosovo, and North Macedonia. In Moldova and Kosovo, Americans financed and led the endeavour (Nicolaev & Vidaicu, 2015, 2020).[14] These sentencing guidelines are not as strict as Minnesota-style sentencing guidelines, yet they are not as detailed as, e.g. Dutch prosecutorial or English and Welsh sentencing guidelines (typically containing, e.g. only few starting points). Overall, they might be the easiest way to structure discretion in the very specific contexts, yet more detailed (and less US-inspired) guidelines might be appropriate for most FSECs. This more structured approach would clash with established legal traditions worthy of retaining and developing further rather than just getting discarded for a novel concept. The North Macedonian guidelines seem to have had many flaws, especially posing too much restriction on judicial discretion

[14] In both Kosovo and Moldova, they were enacted by the Supreme Court, for Kosovo, see https://supreme.gjyqesori-rks.org/wp-content/uploads/legalOpinions/Udhezues%20per%20Politiken%20ndeshkimore_Shkurt%202018.pdf.

(Buzarovska et al., 2016) and were eventually struck by the Constitutional Court due to interference with the judiciary's independence (European Commission, 2018, p. 20).

Moreover, it is unclear who would implement such guidelines in FSECs as there is a strong distrust towards the idea of the executive having influence over the judiciary that has both historical and present rationales. FSEC systems are used to a tripartite individualisation process wherein the legislature and the judiciary share responsibility for setting and passing sentences, which the penitentiary sector then enacts (Plesničar, 2013). Institutions such as sentencing councils or sentencing committees, especially when appointed by the executive branch, may raise questions over the separation of powers that are particularly delicate in this region. There have been recent examples of problematic tendencies in this respect, such as the Polish and Hungarian governments' interference in judicial matters and Serbian politicians' pressure on judges to impose higher sentences (Tripkovic, 2016). There is thus a strong reluctance in FSECs to establish sentencing commissions as we know them in many *common law* countries. Both the public and professionals would likely and rightly be fearful of politicians giving general instructions to judges, imagining their potential misuse to influence individual cases. However, sentencing commissions or councils composed of members of the judiciary, potentially with representatives of the prosecution and criminal defense attorneys, academics, and other relevant figures gathered to give advice or set general priorities, may be a feasible way forward. However, these would be rather different bodies and with somewhat different powers than the sentencing commissions or councils we know elsewhere. Deliberation over sentencing commissions in a way symbolises the similarities and differences in suggested measures in FSECs and non-FSECs.

Applying Principles in Practice

Whilst it would be preferable to begin by addressing sentencing issues conceptually, several measures could be undertaken or improved at the very practical level in FSECs with immediate or near-immediate effect. In most FSECs, generally, sentences for individual cases are proposed by the prosecution and then passed by the court after a closed-door deliberation on an open list of mitigating and aggravating circumstances within a relatively wide statutory sentencing frame. However, increasingly, they are in fact finalised by the prosecution through plea-bargaining or penal orders (Hodgson, 2020) and merely confirmed by the courts. An appellate court and sometimes a supreme court can then review the sentence in the case of an appeal.

Principled prosecutorial sentence recommendations could be helpful for defendants. First—in cases of potential guilty plea considerations—and second, when presenting information and evidence relevant for sentencing circumstances in a full trial. Moreover, principled recommendations benefit the court by providing good insight into the evidentiary requirements for sentencing and clarifying the gravity the prosecution assigns to the offence. More thorough prosecutorial sentence recommendations may be achieved through more stringent sentencing protocols or internal guidelines within the prosecution (such as the previously mentioned Dutch guidelines).

Furthermore, more structured recommendations might include detailed reasons for the recommendation. The level of reasoning could be improved both when sanctions are recommended and when they are imposed: currently, the reasoning courts provide for their sentencing decisions is rarely satisfactory (Plesničar, 2017; Tomšů & Drápal, 2019) despite the fact that FSECs adhere to international and national standards of procedural and sentencing law. To achieve greater consistency in sentencing, courts could provide more

Fig. 1 Structuring sentencing reasoning

structured reasoning, in which they would specify how they considered various circumstances, how they weighted them, and how they arrived at specific sentences. Using principles developed by Schuyt, (2010), we have formulated what such reasoning might look like: we present one example, adapted to the requirements of the Czech Code of criminal procedure, in Fig. 1. By presenting such reasoning upon indictment, prosecutors would enable a proper discussion of the issues noted above. When used by first-instance courts, it would clarify which factors played what role in determining the sentence, enabling a simpler and more principled overview of the sentencing principles applied and the weighting of different factors by an appellate court. This approach would suit FSECs' requirements

for individualisation, as it does not limit judicial discretion in any way. On the contrary, it encourages judges and prosecutors to consider the individual features of the given offender and to be transparent about how they weight those features.

This more transparent means of expressing how individual factors were considered at sentencing would enable appellate and supreme courts to take a much more principled stance than they are able to take today. Together with publishing the full-text decisions of both first instance and appellate courts in some FSECs (i.e. Estonia, Moldova, Slovakia), a certain amount of common sentencing law could be developed by these means (similarly for Ireland see O'Malley, 2002), albeit not a full-scale sentencing reform (O'Malley, 2013). Appellate and supreme courts making more decisions about sentencing principles would further improve the situation. A balance would need to be sought to avoid overwhelming supreme courts and to ensure their decisions were restricted to principles—which they could elaborate on in unifying opinions—rather than individual sentences.

In terms of procedural changes, it might be appropriate to consider separating the verdict and sentencing phase, especially when severe sentences are to be passed, highlighting the importance of sentencing and the necessity of thoroughly investigating all aspects that might influence sentence decisions. Some such examples have already appeared together with guilty-plea abbreviations to regular proceedings that allow courts to skip the main hearing and fast forward to a sentencing hearing in the case of a guilty plea (e.g. Slovenia). It would seem wise to explore options to include more such separate sentencing hearings in other procedures as well. However, such structural reforms should consider the broader impact that such changes may bring to criminal procedure in practice (e.g. length of trial).

Research and Training

As discussed earlier, knowledge on sentencing is not easy to come by in FSECs. In many FSECs, notions of sentencing have not been discussed or examined thoroughly for decades, and few people are aware of where they originate. Hence, our final suggestion would be to enhance academic and professional scrutiny of sentencing. Establishing sentencing research centres or focus groups that could provide theoretical background and empirical research on both the substantive and the procedural aspects of sentencing would be a sensible way to achieve this and would enable researchers to disseminate their sentencing knowledge further, provide sentencing training, offer analysis of proposed legislation, and write textbooks on sentencing, filling the current gap. Whilst parts of that may be done within criminal justice institutions, we believe an independent body would bring a more nuanced outlook and be better willing and able to criticise, conceptualise theories, and carry out empirical studies of the practice.

Many of the proposed measures would rely on sufficient theoretical backing provided by academia: at the very least, this should include relevant academic discussions conducted in English being summarised and reported in the FSECs' national contexts since many practitioners cannot or do not read in English. To illustrate this on sentencing multiple offenders: a simple description of the Borgeke formula, the Finnish 'one-third-rule', or research carried out in Australia and Germany and the respective theories they are built on could provide possible solutions.[15] Academics should then write textbooks for students, new judges,

[15] These rules and theories specify basic approaches to sentencing multiple offenders consisting in counting fractions of sentences imposed for additional offenses, e.g. adding 1/3 of a sentence that would be imposed for a second offense to the sentence imposed for the first offense, 1/6 of a sentence imposed for the third offense, 1/9 for the fourth offense, and so forth (Ryberg et al., 2018).

and prosecutors to give them a basic reference framework. Every state should have sentencing scholars to whom policymakers could turn when considering particularly difficult sentencing issues.

Moreover, practitioners need to be supported in their work by continued training and discussion. Although training courses for (novice) judges and prosecutors are not a novel idea in FSECs, they currently vary widely according to the extent to which they are compulsory and what subjects they cover—which often do not include sentencing. Judges and prosecutors should be given accessible opportunities to learn more about sentencing; the system should not rely on them figuring it out on their own or with occasional help from colleagues. In our recent experience in Czechia and Slovenia, multiple-day seminars for judges and prosecutors are an attractive option.

Conclusion

Although they all formally share the conviction that 'judicial discretion should not be stamped on, or thwarted. It should be guided, supported, made more rational and informed' (Council of Europe, 1989, p. 148), there is a different climate in the FSECs than there is in the West when it comes to sentencing discretion. Society in FSECs is generally (rightfully) more sceptical of the executive power influencing the judiciary's work. In many systems, the civil service and academia is often decimated and underfunded, so reforms are largely within the control of practitioners. When judges and prosecutors play such important roles, measures structuring sentencing discretion are harder to enact and persuading sentencers of reforms being meaningful is not a helpful suggestion but a necessary requirement. The sentencing scholarship is also underdeveloped, and there is a lack of empirical sentencing studies in these countries. On the other hand, the legal traditions of the FSECs offer new possibilities since these countries are used to different measures unifying divergent practices than those traditionally accepted in the West.

Sentencing reformers who want to achieve more principled and consistent sentencing practices are offered fewer options in FSECs than in other European countries. We believe that their goal of sufficiently consistent and principled sentencing can be achieved by a combination of (a) reviewing and properly implementing existing sentencing rationales, sentencing ranges, statutory provisions, unifying opinions, reasoning provisions, control by appellate courts, sentencing scholarship, and judicial training and (b) adopting new measures, such as reforming the sentencing procedure, creating sentencing research centres, supreme courts deciding on sentencing principles, or providing sentence orientations via unifying opinions of supreme courts or via enacting prosecutorial sentencing guidelines. There is no need to enact measures unsuitable to the FSECs' legal traditions, such as mandatory sentencing guidelines or guideline judgments. Such reforms would aim to complexly and incrementally improve consistent and principled sentencing without unduly limiting discretion—as in the USA (Aharonson, 2013)—thus resisting the temptation of elegance (O'Malley, 1994).

In stating these recommendations, we stress that our conclusions should be accepted cautiously. Whilst we have presented as many examples from different FSECs as possible, we are most familiar with our own systems: Slovenia and Czechia, and only secondarily with the Bosnian, Croat, Estonian, Hungarian, Moldovian, Polish, Serbian, and Slovak systems. When discussing these and other countries, we rely on the scarce literature, anecdotal evidence or interactions with colleagues more familiar with those systems. Our

recommendations should be thus taken primarily as inspirations or starting points for discussions in each respective country and not as directly applicable solutions.

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Declarations

Conflict of Interest The authors declare no competing interests.

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