

# Crime, Social Control & Legitimacy

**Structuring Sentencing in Europe:  
Recent Developments and Challenges**

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# Structuring Sentencing in Europe: Recent Developments and Challenges

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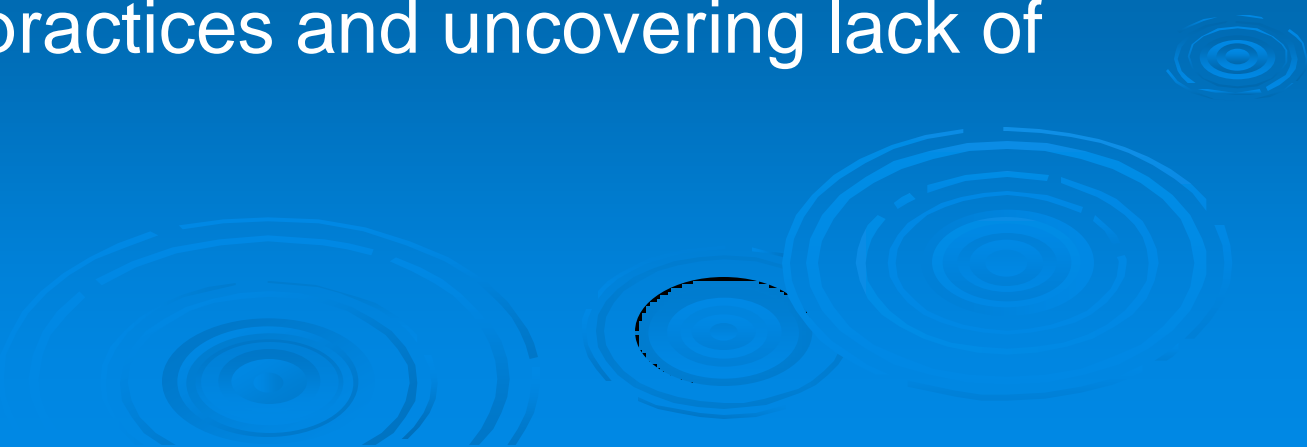
# Outline

- Need for a more pan-European approach to sentencing – Model Sentencing Code?
- Recent reform developments –in England – lessons for Europe?
- Encourage a European conversation about sentencing.

# Sentencing in Europe

- 40 years since Council of Europe report on sentencing (1974);
- 20 years since “Consistency in Sentencing” (1993);
- Since then, little progress in sentencing although greater harmonization in other areas of criminal law.

# Among other reforms, R 92 called for...

- Grading offences into levels of seriousness;
  - Sentence ranges and Starting point sentences within the ranges;
  - Identification of the major Aggravating and Mitigating factors;
  - Limits on the influence of prior convictions;
  - Sentencing statistics capable of revealing sentencing practices and uncovering lack of consistency.
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# Comments on recent Developments

- Sentencing laws have evolved haphazardly, and reflecting individual jurisdictions' experiences;
- Continued evidence of disparity in sentencing practices;
- As much variation within Europe as between Europe and other regions of the world;
- Absent a 'best practices' review, no learning from others;
- Best practices approach needed because problems are common to many EU states (e.g., high use of custody; minority over-representation in prison stats)

# England and Wales: A potential model?

- System is prescriptive but flexible;
- Offence-specific guidelines containing a step by step methodology for courts;
- 'Generic' guidelines affecting issues such as guilty plea reductions;
- Statutory, independent sentencing authority (Sentencing Council);
- Sentencing data: derived directly from the judge.

# Overview of Guidelines methodology

- **Step 1:** Identify level of seriousness;
- **Step 2:** Use the Starting point sentence to fine-tune the sentence (move up or down to reflect aggravating and mitigating factors).
- **Steps 3-9:** Proceed through the remaining steps of the guideline



# Assault Definitive Guideline

DEFINITIVE GUIDELINE

## STEP ONE

### Determining the offence category

The court should determine the offence category using the table below.

<b>Category 1</b>	Greater harm (serious injury must normally be present) <b>and</b> higher culpability
<b>Category 2</b>	Greater harm (serious injury must normally be present) <b>and</b> lower culpability; <b>or</b> lesser harm <b>and</b> higher culpability
<b>Category 3</b>	Lesser harm <b>and</b> lower culpability

The court should determine the offender's culpability and the harm caused, or intended, by reference **only** to the factors identified in the table below (as demonstrated by the presence of one or more). These factors comprise the principal factual elements of the offence and should determine the category.

#### Factors indicating greater harm

Injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence (must normally be present)

Victim is particularly vulnerable because of personal circumstances

Sustained or repeated assault on the same victim

#### Factors indicating lesser harm

Injury which is less serious in the context of the offence

#### Factors indicating higher culpability

##### *Statutory aggravating factors:*

Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)

Offence motivated by, or demonstrating, hostility to the victim based on the victim's disability (or presumed disability)

##### *Other aggravating factors:*

A significant degree of premeditation

Use of weapon or weapon equivalent (for example, shod foot, headbutting, use of acid, use of animal)

Intention to commit more serious harm than actually resulted from the offence

Deliberately causes more harm than is necessary for commission of offence

Deliberate targeting of vulnerable victim

Leading role in group or gang

Offence motivated by, or demonstrating, hostility based on the victim's age, sex, gender identity (or presumed gender identity)

#### Factors indicating lower culpability

Subordinate role in group or gang

A greater degree of provocation than normally expected

Lack of premeditation

Mental disorder or learning disability, where linked to commission of the offence

Excessive self defence

## STEP TWO

### Starting point and category range

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Offence Category	Starting Point <i>(Applicable to all offenders)</i>	Category Range <i>(Applicable to all offenders)</i>
Category 1	1 year 6 months' custody	1 – 3 years' custody
Category 2	26 weeks' custody	Low level community order – 51 weeks' custody
Category 3	Medium level community order	Band A fine – High level community order

<b>Factors increasing seriousness</b>	Exploiting contact arrangements with a child to commit an offence
<i>Statutory aggravating factors:</i>	Established evidence of community impact
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction	Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution
Offence committed whilst on bail	Offences taken into consideration (TICs)
<i>Other aggravating factors include:</i>	<b>Factors reducing seriousness or reflecting personal mitigation</b>
Location of the offence	No previous convictions <b>or</b> no relevant/recent convictions
Timing of the offence	Single blow
Ongoing effect upon the victim	Remorse
Offence committed against those working in the public sector or providing a service to the public	Good character and/or exemplary conduct
Presence of others including relatives, especially children or partner of the victim	Determination and/or demonstration of steps taken to address addiction or offending behaviour
Gratuitous degradation of victim	Serious medical conditions requiring urgent, intensive or long-term treatment
In domestic violence cases, victim forced to leave their home	Isolated incident
Failure to comply with current court orders	Age and/or lack of maturity where it affects the responsibility of the offender
Offence committed whilst on licence	Lapse of time since the offence where this is not the fault of the offender
An attempt to conceal or dispose of evidence	Mental disorder or learning disability, where <b>not</b> linked to the commission of the offence
Failure to respond to warnings or concerns expressed by others about the offender's behaviour	Sole or primary carer for dependent relatives
Commission of offence whilst under the influence of alcohol or drugs	
Abuse of power and/or position of trust	

# 7 Remaining Steps

- Consider assistance to the prosecution
- Reduce sentence for guilty plea
- Consider dangerousness provisions
- Apply totality principle for multiple offence cases
- Consider compensation/ ancillary orders
- Give reasons for sentence
- Reduce sentence to reflect time in remand

# Statutory Duty of a Court:

## *Coroners and Justice Act 2009*

- “Every court must follow any sentencing guidelines which are relevant to the offender's case....unless the court is satisfied that it would be contrary to the interests of justice to do so.

...but nothing in this section imposes on the court a separate duty to impose a sentence which is within the *category range*”. (*emphasis added*)

# Benefits of the reforms

## ➤ We can determine:

- % sentences compliant with the guidelines (high because of great width);
- Extent of plea-based sentence reductions;
- The relative importance of mitigating and aggravating factors (e.g., remorse; previous convictions).

# Compliance Rates, Selected Assault Offences, 2011

Offence	% of sentences < range	% of sentences within range	% of sentences > range
Assault occasioning actual bodily harm	1%	97%	2%
Inflicting grievous bodily harm/ unlawful wounding	0%	97%	3%
Causing Grievous Bodily harm/ Unlawful Wounding	7%	92%	1%



# Clarity, Transparency and Predictability in Sentencing

- Sentencing provisions in most European jurisdictions lack clarity – e.g., recent provision regulating sentencing discounts for a guilty plea in Slovenia.
- In contrast, the English (and US) schemes provide clear indications of the way that provisions such as guilty plea reductions are applied by the courts.

# GP reductions, Slovenia

- The sentence of an offender, who pleads guilty at his first hearing or who pleads guilty after reaching an agreement with the prosecution, may be reduced in accordance with the following:
- 1) if a prison sentence for a term of 10 or more years is prescribed as the lowest limit for a specific offence, such a limit may be lowered to 3 years of imprisonment
- 2) if a prison sentence for a term 3 to 10 years this limit may be lowered to 3 months of imprisonment;
- 3) if a prison sentence for a term of less than 3 years is prescribed as the lowest limit, such a limit may be lowered to 1 month of imprisonment
- 4) if a prison sentence for a term of less than 1 year is prescribed as the lowest limit, a fine may be imposed in place of the prison sentence

# English Guilty Plea Guideline Recommendations

In each category, there is a presumption that the recommended reduction will be given unless there are good reasons for a lower amount.

First reasonable  
opportunity

After a trial  
date is set

Door of the court/  
after trial has begun

===== | ===== | ===== |

recommended 1/3

recommended 1/4

recommended 1/10

## Conformity with the Guideline in England

	None	1-10%	11-20%	21-32%	33% or more	Expected Sentence Reduction
First opportunity	<1%	<.05%	2%	9%	88%	33%
After first opportunity but before trial	<1%	6%	22%	34%	37%	24%
On or after day of trial	6%	48%	24%	9%	12%	12%

# Problems remain in the English scheme...

- Failure to constrain prison population – guidelines simply institutionalise current practice;
- Only modest improvements in consistency;
- No attempt to improve the *effectiveness* of sentencing.



# But there has been progress

- A permanent, independent statutory authority for sentencing;
- Creation of a system **capable** of reducing prison population by changing judicial practice;
- Development of offence-specific, and generic guidelines;
- Creation of first sentencing survey derived directly from sentencers to monitor compliance and provide accurate information about sentencing trends;
- Promotion of a more consistent approach to sentencing?

# Conclusions

- Need a pan-European sentencing model, along the lines of the 1993 recommendations.
- This would promote important sentencing principles and objectives, enhance consistency across the Union.
- Jurisdictions would be able to implement derogations from the model to accommodate legitimate local variation.
- At the end of the day, however, fundamental issues such as proportionality are universal.
- Opposing a more uniform approach to sentencing in Europe is tantamount to opposing universal jurisdiction or the creation of international tribunals such as the ICC.

# Finally

- Thanks for your time and attention!
  - Hvala za vaš čas in pozornost!