

Learning to Judge

An Empirical Study of Judicial Attitudes to
Training and Sentencing in Romania

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'I, Diana Andreea Richards, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.'

ABSTRACT

There has been extensive research on how adults learn and how their learning needs and expectations change as they are exposed to practice, but these developmental learning theories have never been empirically tested with judges. Moreover, while empirical judicial studies have made progress in understanding judicial attitudes to decision-making, including in relation to sentencing, no previous research has examined whether those attitudes might change as judges gain more experience and training.

This empirical study of judicial experiences and attitudes to judicial training connects these separate disciplines and explores the extent to which judges are in a continuous learning cycle throughout their training and career. The thesis aims to empirically test two main hypotheses:

- (1) Judges' approach to judicial training and preference for training methods will vary with experience.
- (2) Judges at different levels of experience will have different informal learning preferences and will approach sentencing practice differently.

To test these hypotheses, a survey was conducted with 226 judges in Romania, encompassing the 3 key groups of judges undertaking training in Romania: newly appointed trainees (with no legal practice experience), newly appointed judges (with legal practice experience) and experienced judges undertaking continuous training.

The thesis was therefore able to compare:

- attitudes of experienced and inexperienced judges;
- attitudes of newly appointed judges without legal experience (typical of civil law judiciaries) with newly appointed judges with legal experience (typical of common law judiciaries).

Key findings include:

- Judges' attitudes vary with experience, both towards their training needs as well as towards sentencing practices.
- Judges' preferences for certain training methods cluster together, suggesting that different judges have different learning styles.

This thesis helps to validate developmental learning theories for the first time in relation to judges, and also provides some practical insights that might help shape future judicial training across jurisdictions.

Table of Contents

Abstract	3
List of figures	9
List of tables	13
Chapter 1: Introduction	15
The uniqueness and challenges of judicial sentencing	15
Academic and empirical research on sentencing	19
Behavioural studies on sentencing	26
Attitudinal studies on sentencing	31
The current study and hypotheses	36
Structure of the thesis	39
Chapter 2: Theories of Learning and Expertise-Building	41
Relevant developments in educational theory	41
Application to education in law and judicial training.....	46
The psychology of informal learning and expertise-building	53
Pattern-building and building expertise through informal learning	54
Building professional expertise, not just life experience	57
Measuring confirmatory feelings	59
Chapter 3: The Romanian Judiciary: Structure and Judicial	
Appointments	63
The Romanian court system	63
Romanian judges	73
Judicial appointments in Romania	76
General requirements for judicial appointment	79
Legal expertise requirements.....	81
Chapter 4: Judicial Training in Romania	83
Romanian judicial training in context	83
The functions of judicial training.....	85

Judicial training models	88
New developments that further increase and shape the role of judicial training	92
The hybridization of judicial training models and the relevance of the Romanian example	94
Organisation of judicial training in Romania	96
Judicial trainers.....	99
Three types of judicial training	100
Initial and induction training	103
Continuous training	108
Chapter 5: Sentencing in Romania	115
Historical development of sentencing in Romania	115
Romania’s sentencing framework.....	121
Aims of sentencing	123
Classification of offences	124
Diversity of available punishments.....	125
Differences in judicial sentencing powers	129
Starting points for sentences.....	131
Sources of sentencing powers.....	134
Sentencing factors	137
Chapter 6: Research Design	145
Research hypotheses.....	145
Research methods.....	146
Survey content and approach	152
The sample	154
The data collection	157
Training observations	158
Interviews	159
Surveys.....	160
Survey questions.....	161
Data analysis.....	163
Data entering and cleaning.....	163
Coding	163

Issues analysed and tests used	164
Chapter 7: Respondents' Prior Experience and Exposure to Training.....	169
Initial trainees	170
Induction trainees	174
Continuous trainees	175
Conclusion: the overall sample stratification	177
Chapter 8: Judicial Attitudes to Formal Training	179
Value of formal training	179
Preferences for judicial training methods	184
Preferences for initial/induction training methods in criminal law	186
Preferences for continuous training methods in criminal law.....	191
Grouping of preferences for judicial training methods	198
Social learning.....	202
Contact with peers	203
Contact with the trainer	206
Attitudes towards judicial training reforms	208
Improving induction training.....	208
Attitudes to e-learning	210
Attitudes to "judgecraft" sessions	213
Summary of key findings	216
Chapter 9: Judicial Approaches to Learning to Sentence	219
Sentencing tools	219
Perceived usefulness of sentencing tools for judicial practice	220
Sentencing tools as learning in the first few years of practice	225
Sentencing factors.....	227
Sentencing advice	236
Self-awareness and sentencing intuitions	238
Reliance on past experience	239
Intuitive expertise and intuitive confidence	242
Summary of key findings	244

Chapter 10: Discussion	247
What the main research findings tell us about judicial development	248
Findings on judicial training	248
Sentencing practice – as informal learning in continuation of the training process.	260
Limits of the current study and future research	271
Focus on Romania.....	271
Not a longitudinal study	273
Limits of the sample	273
Not a behavioural study	274
Policy implications	275
Conclusion	279
Acknowledgments.....	281
Bibliography.....	283
Annexes	303
List of annexes	303

LIST OF FIGURES

Figure 1: Kolb's Learning Cycle.....	44
Figure 2: Kolb LSI 3.1 scores on AC-CE and AE-RO by educational specialty.....	49
Figure 3: Teaching methods mapped onto learning preferences (Reese and Reese)	51
Figure 4: Court system in Romania	65
Figure 5: Proportion of Romanian judges recruited through the main and direct routes, each year (2005-2015).....	78
Figure 6: Type of continuous training offered by NIM and number of participants in 2013-2016	111
Figure 7: Flowchart on computing the interaction of aggravating and mitigating factors in Romanian sentencing.....	143
Figure 8: Distribution of study participants by type of judicial training being undertaken at the time of the survey	169
Figure 9: Internship experience of initial trainees (by type) (N 88).....	171
Figure 10: Prior criminal experience gained by continuous trainees (by source) (N 110)	175
Figure 11: Total amount of prior continuous training for continuous trainees (N 96)	177
Figure 12: Perception of overall usefulness of initial training by type of trainee (N 174)	180
Figure 13: Perceived value of initial training by legal experience (N 113)	181

Figure 14: Perceived value of judicial training by perceived value of university legal education (N 174).....	183
Figure 15: Order of preferences for initial training methods in criminal law (ranked by top 3 preferences) for all judges who experienced initial or induction training (N 162).....	187
Figure 16: Preference for continuous training methods – all judges (N 214).....	193
Figure 17: Grouping of initial training methods using the LSI framework.....	199
Figure 18: Clusters of continuous training methods.....	201
Figure 19: Amount of contact with initial training peers (N 162)	204
Figure 20: Communication methods used for staying in touch with peers (N 162)	205
Figure 21: Have you ever kept in touch with your NIM trainer after a training session on criminal law/procedure (N 75).....	207
Figure 22: Suggestions from induction trainees for improving induction training (N 27).....	209
Figure 23: Preferences for e-learning methods amongst Romanian judges (N 190)	211
Figure 24: Romanian judges’ attitudes to the feasibility and usefulness of judgecraft training (N 102)	215
Figure 25: Romanian judges’ views on the usefulness of existing sentencing tools (N 221).....	221
Figure 26: Preference for sentencing tools judges used/would use in first few years of sentencing practice (N 186)	226
Figure 27: Judges’ ranking of relative importance of sentencing factors (N 216)	229

Figure 28: Relative importance of sentencing factors for Romanian Judges weighted by those considered top 3 in importance (N 216)	231
Figure 29: Clustering of sentencing factors for Romanian judges	232
Figure 30: Relative importance of judge's own experience compared to other factors relied on in sentencing (N 221)	240
Figure 31: Reliance on past experience by category of respondent (N 221).....	241
Figure 32: How judges say they approach sentencing in a familiar case (N 208)..	243
Figure 33: Reese and Reese mapping of law teaching methods onto LSI	253
Figure 34: Clustering of preference for judicial training methods (mapped onto the LSI framework) (aggregated results N 162)	254
Figure 35: Distribution of judges across 4 learning styles, based on their top preferred method (standardised total ratios per style)	256

LIST OF TABLES

Table 1: Criminal cases heard and judges, by level of court per year (2015 data)..	75
Table 2: Terminology used for study participants	103
Table 3: Categories of criminal offences in Romanian law by social value affected	125
Table 4: Diversity of sentences available to Romanian judges.....	127
Table 5: Sentencing jurisdiction of Romanian judges per each court level.....	130
Table 6: Comparative table for sentence ranges in 8 offence types across 23 European countries	132
Table 7: Sample stratification according to the two main input variables.....	155
Table 8: Distribution of respondents by types of training, and comparisons with overall judicial trainee population at the time of study (2014).....	156
Table 9: Data gathered across the study	158
Table 10: Summary of questions asked in the surveys.....	162
Table 11: Initial and induction training delivery methods in criminal law	185
Table 12: Relationship between experience (three categories) and preferred initial training method	191
Table 13: Relationship between experience (three categories) or prior exposure to training and preferred continuous training method	194
Table 14: Relationship between categories of experience and appreciation of sentencing tool.....	222

Table 15: Relationship between judicial training exposure and preferred sentencing tool 224

CHAPTER 1: INTRODUCTION

“There is no doubt that the task of sentencing imposes a great burden on magistrates and judges, and that many of them say that it is the hardest and most disturbing of judicial tasks. Given the momentous consequences it may have for offenders, in terms of deprivations or restrictions on liberty, that is as it should be.”¹

“Judicial training [...] is essential to ensure that justice systems are trusted by the public to resolve disputes with fairness, efficiency, and independence.”²

The uniqueness and challenges of judicial sentencing

Compared to other types of decision-making, sentencing has a particularly important role in the justice system and in human societies. It is a type of decision-making that puts an immense amount of pressure on the decision-maker, due to the repercussions it has on the offender, on the victim, but also on society at large. Just like surgeons, firefighters and other high-risk professionals, judges have people’s fates in their hands when they sentence in criminal cases; their decisions can have far-reaching consequences for the offender. Receiving a sentence can leave an everlasting mark on an offender’s profile and affect his/her chances of reintegrating into society. But through the decisions of the sentencing judge, society and victims

¹ Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press 2010) 413.

² Viviane Reding, ‘Legal Training: An Essential Tool for European Judicial Excellence’ Workshop on the training of legal practitioners – Teaching EU law and judgecraft, Brussels, (28 November 2013) <http://europa.eu/rapid/press-release_SPEECH-13-994_en.htm> accessed 4 January 2015.

are protected from criminals and their harmful actions, and the need for personal retaliation is disarmed.³

Judges have admitted that sentencing is a particularly challenging part of being a judge:

That [sending an offender to prison] causes me more trouble than anything. It's a terrible thing to send a young person to custody – to think your decision could ruin a life – the most difficult decision.⁴

It may be the defining moment of a person's life if you send them off to prison. To take someone away from their family, community, their life...especially a youngster – that's very hard.⁵

There you have the family of the victim and they are baying for blood and you have this tragic figure in the dock whose life you are about to smash by sending him inside and leaving his family without him.⁶

Sentencing also exhibits the range and complexity of factors that a judge must consider when reaching a decision.⁷ Sentencing is far from being a binary or straightforward exercise. The judge is officially mandated by law to take into account not just one or two, but a whole variety of factors that might affect a sentence. Such factors may be included in statutes, but the statutory list in many judiciaries is supplemented by sentencing guidelines or guideline judgments. Moreover, the output of a judge's sentencing decision is not just binary (e.g. custodial/non-custodial) or categorical (fine/community service/ custody/discharge

³ "If the punishment is just, and in proportion to the seriousness of the offence, then the victim, the victim's family and friends, and the public will be satisfied that the law has been upheld and there will be no desire for further retaliation of private revenge." From White Paper to 1991 Criminal Justice Act, apud Ashworth, *Sentencing and Criminal Justice* (n 1) 102.

⁴ Jacqueline Tombs, *A Unique Punishment: Sentencing and the Prison Population in Scotland* (Scottish Consortium on Crime and Criminal Justice 2004) 45.

⁵ *ibid.*

⁶ Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Bloomsbury Publishing 2011) 207.

⁷ "While the process may seem straightforward, the sentencing decision is one of the most difficult facing a judge, for two principal reasons. First, the consequences are high: the sentence may result in the deprivation of a person's liberty for a substantial period of time. And second, there are many conflicting pressures upon the sentencing judge." Julian Roberts and David P Cole, *Making Sense of Sentencing* (University of Toronto Press 1999) 4.

etc.). The judge also has to pronounce judgment on the *amount* and specifics of punishment (such as conditions, timings etc.). As such, sentencing can be seen as one of the most complex types of judicial decision-making, and judges often describe sentencing as an “art”⁸:

The process is [...] more of an art than a science; more intuitive than structured. It’s important to keep an open mind in everything you do so that you’re not applying a policy. Some follow a tariff; for example, that a second time for housebreaking means jail. I can understand that. It gives a degree of internal consistency to one’s own sentencing practice. I resist that tendency because I don’t want to do an injustice to an individual.⁹

Past research has shown that the practice of sentencing is prone to vary with experience. Jacobson and Hough’s 2007 study of mitigation in sentencing involving 52 Crown Court judges revealed that while more experienced judges tended to highlight the subjectivity, instinctual, art-like nature of sentencing,¹⁰ less experienced judges favoured a more ‘structured’ approach:

Notwithstanding the general emphasis on subjective, intuitive decision-making, a number of our respondents (particularly, but not only, recorders and less experienced judges) also stressed that they personally favour a structured approach to sentencing, which they distinguished from the more quickfire or instinctive approach of others. By far the most striking example of this was the judge who described sentencing as ‘a cold, intellectual analysis of the relevant criteria’. [...] A newly appointed recorder spoke of how she had developed her own ‘template’ to guide her through each sentencing decision, although more experienced judges (especially those, unlike her, from criminal law backgrounds) have told her that when it comes to sentencing ‘you just do it’.¹¹

⁸ Ashworth, *Sentencing and Criminal Justice* (n 1) 48.

⁹ Tombs (n 4) 44.

¹⁰ “This intuitive, subjective dimension of sentencing was stressed by a number of our respondents – such as the one who said that sentencing is about a ‘personal and sometimes emotional response to a particular set of circumstances’. In speaking in these terms, the respondents sometimes made the point that sentencing – like advocacy, it seems - is ‘an art, not a science’.” Jessica Jacobson and Mike Hough, ‘Mitigation: The Role of Personal Factors in Sentencing’ (Prison Reform Trust 2007) 47–8.

¹¹ *ibid* 49.

Similar research has confirmed that experience is perceived by judges as playing an important role when sentencing.¹² Yet few studies on sentencing specifically explore the role of experience in how judges in criminal courts perceive such a key responsibility. According to some judges, sentencing is ‘terrifying’¹³ and is the ‘hardest and most disturbing task’¹⁴ judges and magistrates are confronted with. Therefore, it could be argued that the assistance judges receive in learning to sentence is especially important for the proper functioning of criminal justice systems around the world. This thesis provides one of the first empirical studies of judges’ perceptions and experiences of how they learn to sentence.

Today it is widely acknowledged that judicial training is one of the essential institutional mechanisms that ensures judges dispense justice efficiently, fairly and without interference.¹⁵ This view has not always been shared in the past. During the early attempts to institutionalise judicial training in Europe and the United States, judicial training was often seen as “unnecessary, an oxymoron or even an insult”.¹⁶ The now widely accepted belief that judicial training is not just a desirable but also an essential feature of a well-functioning justice system is a fundamental starting point for this research. The purpose of this thesis is to empirically explore how judges perceive the way they learn to make decisions in court, with a specific focus on sentencing in criminal cases. While other scholarly and empirical work exists on judicial training and on sentencing¹⁷, few studies have specifically focused on judges’ experiences of training in general and sentencing in particular. The approach adopted in this study is to examine judges’ attitudes and experiences of training to sentence in criminal cases, with a specific focus on Romania. It does not attempt to

¹² “I’ve been sentencing for [many years]. The decision comes from within.” Tombs (n 4) 44. “The process is structured but the ‘feeling’ you get from experience comes into it.” (ibid 43.)

¹³ Jacobson and Hough (n 10) 48.

¹⁴ Ashworth, *Sentencing and Criminal Justice* (n 1) 413.

¹⁵ Consultative Council of European Judges (CCJE), ‘Opinion No. 4 (2003) on Appropriate Initial and In-Service Training for Judges at National and European Levels’.

¹⁶ Livingston Armytage, *Educating Judges: Towards Improving Justice. A Survey of Global Practice* (Updated edition, Brill | Nijhoff 2015) xv.

¹⁷ This previous work will be explored in more detail in the following sections.

measure judges' behaviour when sentencing, but instead it seeks judges' views about their subjective experience of learning how to sentence. In doing so, the current study aims to provide new insights into both judicial training and judicial sentencing.

Academic and empirical research on sentencing

In 1748, in *The Spirit of the Laws*, Montesquieu was the first to comment on various sentencing practices across Europe, Asia, Japan, including England and France.¹⁸ He was the first to compare how the discretion of the judge in sentencing varied between despotic and democratic states.¹⁹ In 1764, Cesare Beccaria's book *On Crimes and Punishments* became the most influential book in Europe on best practices in sentencing.²⁰ Beccaria was the first scholar to argue persuasively for the proportionality of sentence with the crime,²¹ and for the abolition of capital punishment. Regarding the behaviour of judges while sentencing, Beccaria adopted a normative, rather than a descriptive tone; he argued that judges have no right to interpret the law,²² that their sentencing should be syllogistic,²³ and that they are bound to respect the sentence ranges stipulated in the law:

The laws only can determine the punishment of crimes [...] no magistrate then [...] can, with justice, inflict on any other member of the same society, punishment that is not ordained by the laws. But as a punishment, increased beyond the degree fixed by the law, is

¹⁸ Charles de Secondat Baron de Montesquieu, *The Spirit of the Laws* (Cambridge University Press 1748).

¹⁹ "In despotic states there is no law; the judge makes his own rules. In constitutional monarchies, there is law, and the judge follows it where it is precides; where it is not so, he seeks its general intendment." *ibid* §1 Of legal obligation.

²⁰ Cesare Beccaria, *On Crimes and Punishments* (Transaction Publishers 1764).

²¹ *ibid* Chapter 6: Of the Proportion Between Crimes and Punishment.

²² "Judges, in criminal cases, have no right to interpret the penal laws, because they are not legislators. [...] The sovereign, that is, the representative of society, and not the judge, whose office is only to examine, if a man have, or have not committed an action contrary to the laws." *ibid* 22.

²³ "In every criminal cause the judge [...] should reason syllogistically; the major should be the general law; the minor, the conformity of the action, or its opposition to the laws; the conclusion, liberty, or punishment." *ibid* 23.

the just punishment, with the addition of another; it follows that no magistrate, even under pretence of zeal, or the public good, should increase the punishment already determined by the laws.²⁴

Beccaria's work had a significant impact throughout Europe, and his intellectual reforms are still visible in sentencing codes and practices today,²⁵ including Romanian scholarly work on sentencing.²⁶ For instance, in his 1765 commentary on Beccaria's book, Voltaire adopted the principle that the sentence has to be proportional to the offence, and posited a range of factors that the French judge ought to take into account when sentencing:

In such extraordinary cases, how is the judge to act? He should consider the age of the offender, the nature and degree of his offence, and particularly the necessity of a public example.²⁷

Yet Beccaria's views on judicial discretion in sentencing were not necessarily shared by all sentencing scholars. In 1755 in England, Hutcheson argued that judicial discretion in sentencing could be a positive element if good judges are appointed.²⁸ He was also the first to argue that judges have not just a punishing role, they also have the role to educate the people so as to minimize offences.²⁹

Unlike Hutcheson, William Blackstone openly acknowledged the influence that both Montesquieu and Beccaria had on his recommendations for improving sentencing

²⁴ Beccaria, apud James Heath, *Eighteenth Century Penal Theory* (Oxford University Press 1963) 129–30.

²⁵ *ibid* 111; JM Beattie, 'Punishment, 1750-1800: The Emergence of Imprisonment', *Crime and the courts in England, 1660-1800* (Clarendon Press ; Princeton, NJ 1986) 554.

²⁶ Raluca Muresan, 'Perspective Filosofice Asupra Pedepsei. Teoriile Utilitariste'; George Antoniu, 'Critical Remarks on the New Criminal Code' [2010] *Analele Universitatii 'Constantin Brancusi'* 7.

²⁷ Voltaire, 'Of Crimes and Punishments - Commentary' (1765)
<http://www.constitution.org/volt/cmt_beccaria.htm> accessed 17 February 2016.

²⁸ Francis Hutcheson, *A System of Moral Philosophy* (Millar 1755) 322.

²⁹ "It is poor policy merely to punish crimes when they are committed. The noble art is to contrive such previous education, instruction and discipline, as shall prevent vice [...] The magistrate should ... provide proper instruction for all, especially for young minds, about the existence, goodness, and providence of God, and all the Social duties of life, and the motives to them." Hutcheson apud Heath (n 24) 84–5.

policy.³⁰ In his *Commentaries on the Laws of England* first published in 1769, Blackstone argued against the rule of retaliation (*lex tallionis*): firstly because it does not take into account the various ends of criminal punishment,³¹ and secondly because it does not take into account all the mitigating and aggravating factors of an offence. Blackstone argued that “in general, the difference of persons, place, time, provocation, or other circumstances, may enhance or mitigate the offence, and in such cases retaliation can never be a proper measure of justice”.³² In trying to account for the variety of sentencing factors considered by judges, he was the first to specifically categorise them based on: (1) the object of the crime;³³ (2) the intention of the offender; and (3) the harm caused as “the most destructive of the public safety and happiness”³⁴. Along with Beccaria and Montesquieu, Blackstone argued that crimes are “more effectually prevented by certainty, than by severity, of punishment”.³⁵

Jeremy Bentham, a fervent critic of Blackstone, believed that Blackstone introduced many unacceptable arguments, such as the legitimacy of judicial discretion, because he relied on natural law theories that did not properly distinguish between normative and descriptive accounts of law (and sentencing implicitly). In *An Introduction to the Principles of Morals and Legislation* published in 1789, Bentham was the first to distinguish between accounts that describe how things are in reality

³⁰ Sir William Blackstone, ‘One the Nature of Crimes; and Their Punishment (Vol IV Chapter 1)’, *The commentaries of Sir William Blackstone, Knt. on the laws and constitution of England; carefully abridged, in a new manner, and continued down to the present time: with notes, corrective and explanatory. By William Curry, of the Inner Temple*, vol 4 (printed for WClarke and Son 1796) 18; Beattie (n 25) 556.

³¹ Blackstone (n 30) 11–2.

³² *ibid* 13.

³³ *ibid* 15.

³⁴ *ibid* 16.

³⁵ *ibid* 17.

(‘expository jurisprudence’) and those that describe how things should be (‘censorial jurisprudence’).³⁶

Today Bentham’s distinction between descriptive and normative accounts of sentencing is still followed. Wasik separates the philosophical approach, “which seeks to explain and provide a moral justification for the infliction of punishment by society upon offenders”, from the criminological and sociological approach, “which describes what the various forms of sentence entail as far as the person undergoing the sentence is concerned, and may also suggest what sentences are most effective in deterring and/or reforming criminals”.³⁷ This distinction is important because it draws a clear conceptual line between normative and descriptive accounts of judicial sentencing, but most importantly because it shows the two types of approaches are in fact two sides of the same coin; one cannot be complete without the other. Descriptive, empirical accounts of sentencing only gained traction from the 20th century,³⁸ while academic accounts have been developing since ancient times. The two approaches often developed in parallel by different scholars. For instance, while Montesquieu, Beccaria and Blackstone claimed to underpin their theoretical arguments in an accurate description of sentencing practices in various European countries, their focus is mostly on improving sentencing practice and policy (a *normative* focus on how sentencing should take place), and their underlying descriptions are rather anecdotal. This trend continues today; even if more empirical research is now available than it was in the 18th century, sentencing

³⁶ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation : Printed in the Year 1780, and Now First Published* (Printed for TPayne and Son, at the Mews Gate 1789) s § 2. Jurisprudence, its branches.

³⁷ Colin Munro and Martin Wasik, *Sentencing, Judicial Discretion and Judicial Training* (Sweet & Maxwell 1992) xi.

³⁸ An illustration of a descriptive, empirical account of sentencing policy in the 18th century is Howard’s *Account of the Principal Lazarettos in Europe*, published in 1789. Howard travelled all around Europe and rigorously examined the state of prisons and of the enforcement of sentences in the Netherlands, Germany, Denmark, France and Russia. While it is not focused on judicial sentencing per se, Howard’s research can be considered a precursor of empirical research on sentencing in later centuries, as it offered empirical insights on the impact of judicial sentences on offenders. John Howard, ‘IV. An Account of Foreign Prisons and Hospitals’, *An Account of the Principal Lazarettos in Europe* (1789).

scholars often make assumptions and claims about judges' attitudes towards sentencing.³⁹

The 19th century brought two major innovations that impacted on the study of sentencing. First was the establishment of prison as the main punishment for serious crimes.⁴⁰ Second was the advent of crime statistics. In the mid to late 19th century, some Western countries began publishing annual crime statistics (England since 1805,⁴¹ France in the 1820s, some US states soon afterwards).⁴² Initially, this meant police statistics, but by the end of the nineteenth century most European countries had established national systems for the collection of court data as well.⁴³ Annual crime statistics showed crime rates were relatively stable from one year to another, which led to the idea that crime is a fundamental part of society and it is probably due to a combination of social and biological characteristics.⁴⁴ The crime statistics also improved over time: for instance in England they were very basic in 1805 when first collected, but by 1857 onwards they already comprised "the numbers of indictable offences known to the police, the numbers of people committed to trial for indictable and summary offences respectively, and the numbers and personal characteristics of the people imprisoned upon conviction".⁴⁵

³⁹ For instance, Tonry has several remarks on judicial attitudes towards the tension between the similarity and the difference principle in sentencing, and on the importance judges give on the individualization of the sentence Michael Tonry, 'Punishment Policies and Patterns in Western Countries' in Richard S Frase and Michael Tonry (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press 2001) 20.

⁴⁰ Michel Foucault, *Discipline & Punish: The Birth of the Prison* (Alan Sheridan tr, 2nd edition, Vintage Books 1995).

⁴¹ VAC Gatrell and TB Hadden, 'Criminal Statistics and Their Interpretation', *Nineteenth-century society* (Cambridge University Press 1972) <<http://dx.doi.org/10.1017/CBO9780511896118.009>>.

⁴² Herbert M Kritzer, 'Empirical Legal Studies Before 1940: A Bibliographic Essay' (2009) 6 *Journal of Empirical Legal Studies* 925.

⁴³ "Most European governments opted for court records during the nineteenth century and thus a large body of well-organised and carefully collected court data is available on a national basis while police indexes are diverse and localised." Howard Zehr, *Crime and the Development of Modern Society: Patterns of Criminality in Nineteenth Century Germany and France* (Rowman and Littlefield 1976) 15.

⁴⁴ Kritzer (n 42) 927; See also Emile Durkheim, *The Rules of the Sociological Method* (Sarah A Solovay and John H Mueller trs, Free Press[DG] 1895).

⁴⁵ Gatrell and Hadden (n 41) 336.

Because of these insights, early empirical criminological studies were focused on “patterns of crime, the characteristics of criminals, and the causes of crime”.⁴⁶ In 1833, Guerry revealed the first patterns of crime in France, being interested in how measures of morality correlate with measures of crime.⁴⁷ Quetelet conducted similar research in Belgium, being famous for discovering how patterns of crime change with the age of offenders.⁴⁸ Similarly, in 1867, Georg von Mayr found a strong positive connection between theft and hardship in analysing Bavarian police records.⁴⁹ This new kind of empirical research challenged societal assumptions concerning the relationship between crime and economic conditions, or the assumed increase of crime with the advent of modernity and urbanisation.⁵⁰ In addition, comparative studies across several European countries were conducted, such as Oettingen’s 1868 comparative survey of crime and social patterns in France, England, Russia and several German states.⁵¹

In the US, the beginning of more comprehensive crime surveys happened almost half a century later. The best example of a comprehensive crime survey is the *Cleveland Crime Survey*, conducted by Roscoe Pound and Felix Frankfurter in 1922.⁵² The survey covered a wide range of issues, from “police administration, prosecution, criminal courts, corrections, ‘medical science and criminal justice,’ legal education

⁴⁶ Kritzer (n 42) 927.

⁴⁷ André-Michel Guerry, *A Translation of Andre-Michel Guerry’s Essay on the Moral Statistics of France (1833): A Sociological Report to the French Academy of Science* (Hugh P Whitt and Victor W Reinking trs, Edwin Mellen Press 2002).

⁴⁸ Adolphe Quetelet, *Recherches sur le penchant au crime aux différens âges* (Hayez 1833).

⁴⁹ Georg von Mayr, *Statistik der gerichtlichen Polizei im Königreiche Bayern und in einigen anderen Ländern* (J Gotteswinter & Mössl 1867); apud Zehr (n 43) 33.

⁵⁰ Zehr (n 43) 11.

⁵¹ Alexander Konstantin von Oettingen, *Die Moralstatistik in ihrer Bedeutung für eine Sociolethik* (Erlangen, A Deichert 1868) <<http://archive.org/details/diemoralstatist00oettgoog>> accessed 25 April 2016.

⁵² Roscoe Pound and others, *Cleveland Foundation Survey of Criminal Justice in Cleveland* (Cleveland Foundation 1922).

in Cleveland, and newspaper coverage of crime”; most of these issues had never been surveyed before in the US.⁵³

By the beginning of the twentieth century, as crime statistics and analyses on criminal behaviour became the norm in most European countries and the USA, the intellectual focus in empirical legal research shifted towards how well the justice system actually handles criminal offences. As a result, more attention was focused on judicial sentencing.⁵⁴ This was particularly true in the United States, which pioneered empirical studies of the justice system under the influence of legal realism. The American Institute of Criminal Law and Criminology, created in 1909 at Northwestern University School of Law,⁵⁵ began publishing the *Journal of Criminal Law and Criminology* from 1910.⁵⁶ In comparison, it took another 40 years before the *British Journal of Criminology* appeared and began publishing similar studies in United Kingdom.⁵⁷ In continental Europe, a major development was the establishment of criminology as a science. Cesare Lombroso’s 1876 study, *L’uomo Delinquente*,⁵⁸ had a significant impact on shaping European research priorities by setting up a scientific basis to the identification of offenders.⁵⁹

⁵³ Kritzer (n 42) 930.

⁵⁴ *ibid* 928.

⁵⁵ Jennifer Devroye, ‘The Rise and Fall of the American Institute of Criminal Law and Criminology’ (2010) 100 *Journal of Criminal Law and Criminology* 7.

⁵⁶ *ibid* 8.

⁵⁷ Although in England the amount of research pre-1940s has been significantly less than in the United States, it is nevertheless worth mentioning that in the 1920s the Howard Journal published “summaries and comments on government inquiries and commissions related to criminal justice, as well as some statistical information from regular governmental reports related to crime and corrections and some journalistic-style comments based on a bit of court observation”⁵⁷ but there was virtually no academic empirical research at that time. Kritzer (n 42) 929.

⁵⁸ Cesare Lombroso, *L’uomo Delinquente* (1876).

⁵⁹ “Of course, the impact of Lombroso’s ideas in the rest of Europe had at least as much to do with conditions in each country as with Lombroso and the Italian school. Although this study will focus on German developments, the late nineteenth-century birth of criminology was in many respects a general western European phenomenon, taking place in Italy, France, Germany, and to a lesser extent Britain, among other countries.” Richard F Wetzell, *Inventing the Criminal: A History of German Criminology, 1880-1945* (Univ of North Carolina Press 2003) 31. Also see Marc Renneville, ‘Exploring the History of French Criminology (1885-1939): The Case of the Archives de l’Anthropologie Criminelle’ [2014] *Criminocorpus*. *Revue d’Histoire de la justice, des crimes et des peines* <<http://criminocorpus.revues.org/2753>> accessed 25 April 2016.

The twentieth century empirical research on sentencing is split into two major strands of research: behavioural research on sentencing and research on attitudes towards sentencing. The common premise of both strands is that there is a whole range of factors that impact on the decisions of judges when they sentence. What distinguishes the two strands is a methodological assumption on how best to determine what those factors are. Behavioural research adopted *indirect* measures of judicial attitudes (for instance, votes in panels, variation in sentencing decisions etc.), while the other strand adopted *direct* measures of judicial attitudes (surveys, interviews, judicial notes).⁶⁰ But the choice of methodology of past empirical studies on sentencing seems to rely on the researcher's view of whether judges can or cannot reliably and accurately self-report their attitudes towards various factors that come into play in their sentencing decisions.

Behavioural studies on sentencing

Everson's 1919 study on "The Human Element in Justice" was the first study to systematically identify a variation in judicial behaviour in sentencing.⁶¹ Everson studied 155,000 cases disposed of by 42 judges in the New York Magistrates' Court in 1914. Everson's assumption was that there are no significant differences in the cases coming before different judges, as they were assigned randomly and the judges were constantly rotated. He looked at differences in sentences and assumed that they are caused by differences in judges' personalities. Nevertheless, he did not take into account the potential differences between cases that might have caused the difference in sentencing.⁶² In addition, Everson was criticised for not taking into

⁶⁰ But for an excellent introduction into direct and indirect methods for measuring attitudes, see Richard E Petty and John T Cacioppo, *Attitudes And Persuasion: Classic And Contemporary Approaches* (Westview Press 1996) 9–17.

⁶¹ George Everson, 'The Human Element in Justice' (1919) 10 *Journal of the American Institute of Criminal Law and Criminology* 90.

⁶² *ibid.*

account the distribution of sentences per judges, which was skewed, therefore rendering the analysis of means misleading.⁶³

Everson's methodological assumption that the random allocation of cases and the rotation of judges ensures the control of unwanted variables has also been used by other behavioural studies on sentencing. In 1933, Gaudet *et al* employed the same methodology in evaluating court records for 7,442 cases heard by six New Jersey county court judges across nine years.⁶⁴ The authors also assumed that ensuring a large enough sample per judge would even out any disparities in the type of offences or offender characteristics, therefore leaving the characteristics of the judge (including judicial experience) as the only factors that could explain variance in sentencing.⁶⁵ While it did not obtain statistically significant results⁶⁶ the preliminary results suggested that "there is no general decrease or increase in the severity of the sentencing tendencies of these judges as they gain experience".⁶⁷

In 1939, Radzinowicz was the first to analyse sentencing patterns in all England and Wales' Crown Courts and Magistrates' Courts between 1900 and 1936.⁶⁸ Although he was able to identify patterns in sentencing (e.g. that imprisonment has constantly decreased, that conditional release became more frequent, or that whipping disappeared completely),⁶⁹ Radzinowicz had no access to data sources on the judges to be able to analyse the sentencing patterns from a behavioural perspective. A

⁶³ "Close inspection of the data reveals, however, that 34 of the magistrates who disposed of 71% of the cases of intoxication discharged from 0.2% to 5.9%. [...] Th[is] fact [...] indicates that the great majority of the magistrates do not differ unduly in their dispositions." Edward Green, *Judicial Attitudes in Sentencing; a Study of the Factors Underlying the Sentencing Practice of the Criminal Court of Philadelphia*. (Macmillan; St Martin's Press 1961) 12.

⁶⁴ Frederick J Gaudet, George S Harris and Charles W St John, 'Individual Differences in the Sentencing Tendencies of Judges' (1933) 23 *Journal of Criminal Law and Criminology* (1931-1951) 811.

⁶⁵ "one is justified in saying that the factors which determine this difference in the sentencing tendencies are to be found outside of the circumstances of the crime and those of the prisoner, and hence probably in the judge since he is the other factor which is always present." *ibid* 813.

⁶⁶presumably due to the limited sample of judges and of years analysed, *ibid* 814.

⁶⁷ *ibid*.

⁶⁸ Leon Radzinowicz, 'The Present Trends of English Penal Policy' (1939) 55 *Law Quarterly Review* 273.

⁶⁹ *ibid* 276–8.

methodological step forward was taken by Hood in his 1962 study of sentencing in 12 English magistrates' courts. Hood's study combined "an analysis of figures derived from official statistics" (done previously by Radzinowicz and others⁷⁰) with interviews and "first-hand observation of a number of courts, to relate these figures to the whole social atmosphere, the characteristics of the magistrates and of the offenders and offences brought before them".⁷¹ Rather than comparing individual differences in sentencing between judges in the same court,⁷² his study compared average sentencing practices across 12 urban magistrates' courts during 1951-1954.⁷³ Hood thought that the difference in sentencing might be explained by a variation in the characteristics of the offenders and of the offences. Thus he (1) controlled for the types of offences by focusing on very specific kinds;⁷⁴ and (2) he built a "typology of offenders" based on their characteristics and used it to measure the variability of sentences across courts for the same types of offenders. Hood also commented on the social composition of the bench in each court, differences in the structure of the bench, and differences in sentencing between magistrates and district judges.⁷⁵ Although Hood's study was more methodologically complex than previous studies on sentencing, his court interviews only included probation officers and magistrates' clerks, not the magistrates and district judges themselves,⁷⁶ with the exception of a few qualitative observations on the "philosophies of punishment" displayed by some of the court chairmen.⁷⁷ Unable to interview the magistrates and

⁷⁰ Hermann Mannheim, John Spencer and George Lynch, 'Magisterial Policy in the London Juvenile Courts' (1957) 8 *The British Journal of Delinquency* 13.

⁷¹ Roger Hood, *Sentencing in Magistrates' Courts: A Study in Variations of Policy* (Stevens 1962) xiii-xiv.

⁷² Because, he argued, in magistrates' courts lay magistrates serve on panels of three, so it would be impossible to distinguish the individual sentencing policies. *ibid* xiv.

⁷³ *ibid* 11.

⁷⁴ He selected two random samples of court records from 1951-54: the main sample consisted of 70 cases per court, focused on property offences (ss. 37-54), offenders found guilty, over 21; second sample: 18 cases from each court, indecent assault on young persons under 16 (ss. 17 and 20), offenders over 21. *ibid* 21-2.

⁷⁵ *ibid* 75-81.

⁷⁶ *ibid* 24-5.

⁷⁷ *ibid* 77.

the district judges, he instead considered the lengths of sentences and the committals to the Crown Court as indirect measures of judicial attitudes towards sentencing.⁷⁸ Hood's study influenced a host of research projects in the UK focused on magistrates' sentencing attitudes for the next four decades.⁷⁹

Little empirical research on judicial sentencing behaviour from the twentieth century is available from continental Europe.⁸⁰⁸¹ This could be partly explained by significant language barriers,⁸² as empiricism is an approach that emerged in English-speaking countries⁸³. English scholars often cite research from the United States, Australia and Canada exclusively, on grounds that these jurisdictions have a most similar judicial structure.⁸⁴ Nonetheless a handful of studies were conducted in Germany, Denmark and Spain.

In 1931 in Germany, Exner was among the few to empirically demonstrate that crime patterns are not just influenced by biological or individual social factors of the offenders, but also by the behaviour of criminal policy agents, such as judges,

⁷⁸ See subsection 'Attitudes Towards Short-Term Imprisonment', *ibid* 81–5.

⁷⁹ Gordon Rose, 'An Experimental Study of Sentencing' (1965) 5 *British Journal of Criminology* 314; Rod A Bond and Nigel F Lemon, 'Changes in Magistrates' Attitudes during the First Year on the Bench' [1979] *Psychology, Law and Legal Processes*. London: Macmillan; Andreas Kapardis and David P Farrington, 'An Experimental Study of Sentencing by Magistrates.' (1981) 5 *Law and Human Behavior* 107; Andreas Kapardis, *A Psychological Study of Magistrates' Decision Making* (University of Cambridge 1984); Andreas Kapardis, *Sentencing by English Magistrates as a Human Process* (Asselia Publishers 1985); Ralph Henham, 'The Importance of Background Variables in Sentencing Behavior' (1988) 15 *Criminal Justice and Behavior* 255; Claire Flood-Page and Alan Mackie, *Sentencing Practice: An Examination of Decisions in Magistrates' Courts and the Crown Court in the Mid-1990's* (Home Office 1998).

⁸⁰ For instance, the major preoccupation of German legal researchers at the beginning of the 20th century was the issue of individual legal responsibility given the criminological advances had demonstrated how strong heredity, biological and social factors determine criminal behaviour. Wetzell (n 59) 76. The same for France: Renneville (n 59) para 33.

⁸¹ In Germany, "The most striking aspect of the development of the sociological study of crime in Germany before the Second World War is the virtual absence of sociologists or other social scientists working on the subject." Wetzell (n 59) 107.

⁸² Rob Van Gestel, Hans-W Micklitz and Miguel Poiaras Maduro, 'Methodology in the New Legal World' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2069872> accessed 24 April 2016.

⁸³ CM Campbell and Paul Wiles, 'The Study of Law in Society in Britain' (1976) 10 *Law & Society Review* 547; Max Travers, 'Sociology of Law in Britain' (2001) 32 *The American Sociologist* 26.

⁸⁴ Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011).

prosecutors or police officers.⁸⁵ Exner studied the sentencing patterns in all German courts between 1882 and 1928 and noticed that German judges had consistently become more lenient in their sentencing over time, although this did not correspond to a lower crime rate or to any changes in legal or policy context.⁸⁶ He concluded that the attitudes of judges had most probably been influenced by criminological research, translated into societal beliefs that crime was an outcome of heredity, upbringing, and various other environmental factors beyond the offender's free will.⁸⁷ Although Exner had some followers in the empirical study of judicial sentencing,⁸⁸ German empirical scholarship was eventually monopolised by criminal biology, psychiatry and eugenics for the most part of the 20th century.⁸⁹

In Denmark, an early survey conducted by William von Eyben in 1950 reviewed Danish judges' choice of sentences in a few district courts and two high courts.⁹⁰ One of his main findings is that the two major predicting factors in sentencing are the severity of the crime and prior convictions.⁹¹ This finding was subsequently replicated in other studies around the world.⁹²

In 1989, a German empirical study raised the problem that judges might already make up their minds instinctively with regards to the correct sentence, and then retrofit the sentencing remarks to fit their intuition.⁹³ An experimental psychology

⁸⁵ Wetzell (n 59) 116.

⁸⁶ Franz Exner, *Studien über die Strafzumessungspraxis der deutschen Gerichte* (Wiegandt 1931).

⁸⁷ Wetzell (n 59) 123.

⁸⁸ Rupert Rabl, *Strafzumessungspraxis Und Kriminalitätsbewegung* (Wiegandt 1936).

⁸⁹ Wetzell (n 59) 125–294.

⁹⁰ William Edler von Eyben, *Strafudmaling* (GEC Gads Forlag 1950).

⁹¹ apud Rasmus H Wandall, *Decisions to Imprison: Court Decision-Making inside and Outside the Law* / Rasmus H. Wandall. (Ashgate 2008) 3.

⁹² John Hogarth, *Sentencing as a Human Process* (University of Toronto Press in association with the Centre of Criminology, University of Toronto 1971); Howard J Parker, Maggie Sumner and Graham Jarvis, *Unmasking the Magistrates: The 'Custody or Not' Decision in Sentencing Young Offenders* (Open University Press 1989); Britta Kyvsgaard, 'Forholdet Mellem Straffe for Personfarlige Forbrydelser Og for Formueforbrydelser' [2003] *Juristen* 161.

⁹³ Bernd Schünemann and Wolfgang Bandilla, 'Perseverance in Courtroom Decisions' in Hermann Wegener, Friedrich Lösel and Jochen Haisch (eds), *Criminal Behavior and the Justice System*

school in Spain has focused on testing the sentencing behaviour of Spanish judges with the use of case vignettes, video recordings of cases, and/or sentencing sheets.⁹⁴ The Spanish researchers repeatedly found a disparity in the sentencing practices of Spanish judges and anchoring in the sentence recommendations of the prosecutor in the case. No studies of this kind have been conducted in Eastern Europe.⁹⁵

Attitudinal studies on sentencing

While these earlier behavioural studies shed some light on the impact of judges' characteristics on sentencing in various countries, a new wave of empirical studies on sentencing that utilise direct measures of attitudes have also emerged. In the 1970s empirical researchers began to vary their research methods to include direct measures of attitudes; for instance, interviews or surveys with judges and other actors connected to the sentencing process. The first and most influential study of this kind was conducted by Hogarth in 1971 with Canadian magistrates in Ontario.⁹⁶ As well as collecting data on 2,400 cases over 18 months from a wide range of sources (official records, police officers, probation officers),⁹⁷ he also spent 3 months observing the court conduct of magistrates and conducted semi-structured

(Springer Berlin Heidelberg 1989) <http://link.springer.com/chapter/10.1007/978-3-642-86017-1_12> accessed 20 April 2016.

⁹⁴ Jorge Sobral Fernandez, 'Judges and Their Decisions' in Santiago Redondo, *Advances in Psychology and Law: International Contributions* (Walter de Gruyter 1997); Ramon Arce and others, 'Judges' Decision-Making from within' in Raymond R Corrado, Rebecca Dempster and Ronald Roesch (eds), *Psychology in the Courts* (Routledge 2001); Francisca Farina, Ramon Arce and Mercedes Novo, 'Anchoring in Judicial Decision-Making' [2003] *Psychology in Spain* 56; Ramon Arce, Francisco Tortosa and Elisa Alfaro, 'Verdicts and Deliberation Content Analysis of Judges and Juries in the Spanish Legal Context' [2004] *Psychology in Spain* 28.

⁹⁵ The only, fairly recent, study that uses empirical methodology in the study of judicial behaviour was conducted by Dimitrova-Grajzl et al in 2011 in Slovenia – but it was limited to the topic of 'judicial productivity' and used only statistical data available from the judicial council on the background characteristics of judges, without containing any direct method for measuring their attitude. Still, it represents a very promising start. Valentina P Dimitrova-Grajzl and others, 'Judicial Incentives and Performance at Lower Courts: Evidence from Slovenian Judge-Level Data' (Social Science Research Network 2011) SSRN Scholarly Paper ID 1930466 <<http://papers.ssrn.com/abstract=1930466>> accessed 29 October 2014.

⁹⁶ Hogarth (n 92).

⁹⁷ *ibid* 25–6.

interviews with 71 of the then total of 83 Ontario magistrates.⁹⁸ In addition, Hogarth asked the magistrates to fill in a questionnaire on attitudes towards crime and punishment⁹⁹ and to fill in 100 'sentencing sheets' for every sentencing decision they made over 18 months.¹⁰⁰ Hogarth's landmark study¹⁰¹ provided a multi-method approach to understanding the sentencing attitudes of magistrates by measuring more than 100 variables.¹⁰²

Hogarth 1971 study is one of if not the most relevant research for the current study, for several reasons. From the standpoint of research questions and variables measured, Hogarth: (1) measured the magistrates' penal philosophy, and correlated it with other background factors; (2) was the first to measure magistrates' age, legal background, years on the bench, and to verify if these explained variations in their attitudes; (3) measured magistrates' attitudes towards legal instruments (such as guideline judgments from higher courts); (4) analysed the magistrates' interaction with other magistrates and court actors (including asking for sentencing advice); and he was highly innovative in (5) looking at how "magistrates search for and use information in the process of coming to decisions"¹⁰³ – which meant he asked magistrates to rank sentencing factors, as well as the sources of information used in deciding a sentence. All these research questions were also asked in the current study, as part of the effort to understand how Romanian judges think they learn to sentence, both during training but also during their practice in court. Because

⁹⁸ *ibid* 28.

⁹⁹ *ibid* 16.

¹⁰⁰ *ibid* 267–8.

¹⁰¹ Google Scholar indicates it was cited in almost 700 scholarly works: 'Hogarth: Sentencing as a Human Process - Google Scholar'
<https://scholar.google.co.uk/scholar?cites=12134606504843301189&as_sdt=2005&sciodt=0,5&hl=en> accessed 26 April 2016.

¹⁰² Simon Chester (ed), *Sentencing as a Human Process by John Hogarth: An International Review Symposium*, vol 10 (1972)
<<http://heinonline.org/HOL/Page?handle=hein.journals/ohlj10&id=241&div=&collection=journals>>

Hogarth study is so relevant, his findings will be compared with the findings of the current study in the Discussions chapter.

One of Hogarth's major findings was that "About 50 per cent of the variation in sentencing behaviour could be accounted for by knowing nothing about the cases and relying solely on three pieces of information about the magistrate": (1) attitudes of magistrates; (2) magistrates' perceptions of the social constraints in which they operate; and what Hogarth calls (3) cognitive-complexity variables, which define ways in which individual magistrates process information and arrive at decisions.¹⁰⁴ Hogarth's study is thus evidence that interviewing or surveying judges can be informative, and the characteristics of judges and their beliefs about sentencing can be as revealing as case analysis. His study has inspired research across numerous countries around the world.¹⁰⁵ However, most of this research was conducted on lay magistrates rather than on professional judges.¹⁰⁶

One example of a study that measured professional judges' attitudes towards sentencing is the study conducted in 2007 by Jacobson and Hough in England and

¹⁰⁴ Hogarth (n 92) 351.

¹⁰⁵ Carol Bohmer, 'Judicial Attitudes toward Rape Victims' (1973) 57 *Judicature* 303; Nigel Lemon, 'Training, Personality and Attitudes as Determinants of Magistrates' Sentencing' (1974) 14 *British Journal of Criminology* 34; James L Gibson, 'Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model' (1978) 72 *American Political Science Review* 911; Parker, Sumner and Jarvis (n 92); Jan JM Van Dijk, Patricia Mayhew and Martin Killias, *Experiences of Crime Across the World: Key Findings from the 1989 International Crime Survey* (Brill Archive 1990); Marc Ouimet and Edward J Coyle, 'Fear of Crime and Sentencing Punitiveness: Comparing the General Public and Court Practitioners' (1991) 33 *Canadian Journal of Criminology* 149; Elizabeth Gilchrist and Jacqueline Blissett, 'Magistrates' Attitudes to Domestic Violence and Sentencing Options' (2002) 41 *The Howard Journal of Criminal Justice* 348; Andre Kuhn, 'Public and Judicial Attitudes to Punishment in Switzerland' in Julian V Roberts and JM Hough, *Changing attitudes to punishment: public opinion, crime and justice / edited by Julian V. Roberts and Mike Hough.* (Willan 2002); Geraldine Isabel Mackenzie, 'A Question of Balance: A Study of Judicial Methodology, Perceptions and Attitudes in Sentencing' PhD, University of New South Wales (Australia) 2001. <<http://search.proquest.com/docview/304737747>> accessed 5 July 2015.

¹⁰⁶ This could suggest that professional judiciaries have traditionally been less willing to participate in interviews and surveys measuring their attitudes, although this is slowly changing, as Cheryl Thomas, Penny Darbyshire and Andrew Ashworth have separately argued. For example, see Cheryl Thomas, *UCL Laws Inaugural Lecture: Purple Haze* (2012) <https://www.youtube.com/watch?v=oQahSDTvFvA&feature=youtube_gdata_player> accessed 29 December 2014; Darbyshire (n 6).

Wales.¹⁰⁷ The study was not as general as Hogarth's and focused solely on the mitigating factors that judges think influence them in their sentencing, with a particular focus on personal mitigation.¹⁰⁸ The study consisted of observations of sentencing hearings and analysis of sentencing remarks in 5 Crown Courts (a total of 132 cases involving 162 defendants and 52 judges), 40 interviews with individual judges,¹⁰⁹ and an exercise consisting of three sentencing scenarios.¹¹⁰ Jacobson and Hough's findings are consistent with Hogarth's – namely that factors related to the offender are taken into consideration by judges in their sentencing in almost half of cases.¹¹¹ According to Hogarth, this type of factor comes third (49%) after the seriousness of the offence (60%) and the criminal record of the offender (80%) in the importance judges give to various sentencing factors.¹¹²

Outside of England and Wales, there have been few empirical studies using direct methods to measure judicial attitudes towards sentencing (a similar study to Jacobson and Hough was conducted in Scotland¹¹³). Those that do exist are typically part of a wider effort to compare judicial attitudes towards sentencing with more general, public attitudes towards sentencing, especially with the establishment of

¹⁰⁷ Jacobson and Hough (n 10); Also presented with updated insights in Jessica Jacobson and Mike Hough, 'Personal Mitigation: An Empirical Analysis in England and Wales' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011).

¹⁰⁸ defined as the range of mitigation factors related to the offender rather than the offence. Jacobson and Hough (n 10) viii.

¹⁰⁹ Jacobson and Hough (n 106) 147.

¹¹⁰ For each scenario, the judge had to score on a 3-point Likert scale the perceived importance of that particular mitigating factor for that particular sentencing decision *ibid* 154.

¹¹¹ Jacobson and Hough (n 10) viii.

¹¹² Hogarth (n 92) 280–1 Table 86.

¹¹³ Tombs conducted 40 interviews with Scottish judges at different levels of the judiciary and with "very differing levels of experience", also asking them to provide case details where they found sentencing difficult (borderline). She discovered that, in custodial sentence decisions, judges were more likely to consider important factors such as nature of the offence or the criminal history of the offender, while in non-custodial sentence decisions, they relied more on the offender's circumstances or conditions. Tombs (n 4) See especially Table 4.1.

the International Crime Victims Survey (ICVS) ¹¹⁴ since 1989.¹¹⁵ In 1990, Van Dijk *et al* used the ICVS to compare the attitude of judges with that of public opinion to imprisonment in 14 countries (11 European).¹¹⁶ This found that the two types of attitudes are quite highly correlated.¹¹⁷ A decade afterwards, Beyens used the same methodology to compare public and judicial attitudes towards sentencing in Belgium.¹¹⁸ In contrast to Van Dijk, she discovered that the Belgian public was significantly more lenient regarding imprisonment than Belgian judges (20% vs 63%).¹¹⁹

In Switzerland in 2002 Kuhn surveyed a representative sample of 290 Swiss judges and 606 Swiss residents, offering them 4 offence scenarios and asking them to indicate a sentence in each case.¹²⁰ Kuhn also gathered some demographic information on the respondents and asked them a question on the goals of penal sanctions. Kuhn was curious to discover if (1) the public attitudes on sentencing were significantly different from judicial ones; and if (2) any of the background characteristics of the respondents accounted for a variation in their sentences.¹²¹ He discovered that generally the Swiss public on average is more punitive than Swiss judges in sentencing.¹²² Kuhn also found that in all 4 scenarios at least half of the general population would actually be as lenient, if not more lenient, than the

¹¹⁴ Romania only joined the ICVS in 2001. 'ICVS - List of Participating Countries' <http://www.unicri.it/services/library_documentation/publications/icvs/data/participating_20countries.pdf> accessed 26 April 2016.

¹¹⁵ 'ICVS - International Crime Victims Survey' <http://www.unicri.it/services/library_documentation/publications/icvs/> accessed 26 April 2016.

¹¹⁶ Van Dijk, Mayhew and Killias (n 104).

¹¹⁷ (r=0.61) apud Kuhn (n 104) 116.

¹¹⁸ Kristel Beyens, 'Straffen Als Sociale Praktijk' [2000] Een penologisch onderzoek naar straftoemeting.

¹¹⁹ Kuhn (n 104) 117.

¹²⁰ Kuhn (n 104).

¹²¹ *ibid* 119.

¹²² With the exception of scenario 4, a case of white collar crime. *ibid* 120.

judges,¹²³ that both categories of respondents agreed on the high importance of rehabilitation and punishment and assigned a low importance to the satisfaction of the victim.¹²⁴ More recently in Australia, Lovegrove conducted a study of 471 lay participants across 4 sentencing scenarios.¹²⁵ The scenarios had actually been real cases that had been sentenced by Australian judges, so the outcomes of the scenarios were afterwards compared with the actual sentences in the case. The sentencing judges in those 4 cases presented the relevant facts of the case to the study participants and explained the relevant legislation, without seeking to influence the respondents or suggest what they had sentenced. The findings revealed that, on average, lay participants were more lenient in 3 of the 4 scenarios and their opinions were much more varied than it is typically assumed.¹²⁶

The current study and hypotheses

As discussed above, there is only limited empirical research in Europe engaging judges directly by exploring their attitudes towards sentencing. There is even less empirical research on the role of judicial training in sentencing. A few studies (Darbyshire 2011, Jacobson and Hough 2007, Tombs 2004, Hogarth 1981) have suggested that judges' level of experience and training *does* seem to be related to their sentencing as well as their own attitudes towards how sentencing is done. However, neither of these studies actually explored this hypothesis in depth. Instead, these and all other studies that looked at judicial attitudes towards sentencing have a *static* conception of sentencing practice, assuming that what a judge believes his/her role is in sentencing remains immutable throughout his/her career. This conception runs counter to some major findings from psychology and

¹²³ He concluded that the general result is skewed due to a minority of individuals that gave very long sentences. These individuals "are those suffering from a lack of knowledge of the criminal justice system." *ibid* 123.

¹²⁴ *ibid* 122.

¹²⁵ Austin Lovegrove, 'Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community' [2007] *Criminal Law Review* 769, 774.

¹²⁶ *ibid* 776.

educational scholarship, which indicate that a professional's attitude towards his/her duties changes as s/he gains more professional expertise and learns to do the job better. This thesis adopts the approach that judges' attitudes to sentencing can change with time and experience, and that a *dynamic*, developmental approach is needed to understand judicial attitudes towards sentencing. Although empirical findings from psychology and education have long demonstrated the dynamic nature of learning and have been replicated in hundreds of studies on lay people and professionals, almost none of these studies has been conducted with judges.

The underlying premise of this study is that judges are in a continuous learning cycle throughout their training and their career. This is based on Kolb's experiential theory of learning (discussed in more detail in Chapter 2).¹²⁷ This premise has two implications. First is that judges' formal training experiences will not all be the same. As judges first experience legal training then initial/induction judicial training followed by continuous judicial training, they bring their past experience into training and this helps to shape their attitudes and interactions. This produces the first thesis hypothesis based on Kolb's experiential learning theory: **judges' approach to judicial training and preference for training methods will vary with experience.**

A further implication is that judges will learn not just during their formal judicial training, but they learn all throughout their judicial career and not just in but outside the classroom. They do so by putting what they have learned into practice on the job; for instance, they will do this while sentencing by consulting various documents and materials (the "sentencing tools") and by asking their peers for advice in difficult situations. This assumption is supported not just by the experiential theory in education, but also by the experimental work on expertise-building of Kahneman, Gigerenzer and Klein (also discussed in more detail in the next chapter).¹²⁸ In

¹²⁷ David A Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Prentice-Hall 1984).

¹²⁸ *ibid*; Daniel Kahneman, *Thinking, Fast and Slow* (1st edn, Farrar, Straus and Giroux 2011); Gerd Gigerenzer, Peter M Todd and ABC Research Group, *Simple Heuristics That Make Us Smart* (1st edn,

addition, the experience judges accumulate will have an impact on how new informal learning and decision-making experiences are approached. If these theories are correct, then the second hypothesis of this study is that **judges of different levels of expertise will have different informal learning preferences and will approach sentencing differently.**

In view of these two hypotheses, the research is conceptualised into two main categories: formal training and informal learning.

With regards to **formal training**, the study was designed to measure if judges with different levels of experience and/or with different levels of exposure to judicial training regard the various aspects of their formal judicial training differently. This includes their preferences for different training methods related to sentencing, the perceived usefulness of “judgecraft” training, of current e-learning content and methodology, as well as their perceptions of the overall adequacy of judicial training for judicial practice.

With regards to **informal learning**, the research covers several themes, such as learning by doing (through the practice of sentencing itself), as well as learning through peer advice/feedback. In other words, the research explores the extent to which informal tools and sources of knowledge are regarded as useful by judges in their daily sentencing practice; whether informal tools are most useful at the beginning or later in judges’ careers; the extent to which judges rely on advice from other actors when deciding sentences, especially in difficult cases; and, in line with the psychological research on expertise and intuitive decision-making, how do they react when they encounter cases very similar to past ones.

Oxford University Press, USA 2000); Gary Klein, *Intuition at Work: Why Developing Your Gut Instincts Will Make You Better at What You Do* (Currency/Doubleday 2003).

Structure of the thesis

This chapter has set the thesis within the existing research on sentencing. The next chapter will explore how this research on judicial training in Romania fits within existing theories of adult learning. It presents two major strands of research that constitute the theoretical underpinning of this study – first, the developmental approaches to adult and professional learning from education; second, the psychological theories explaining the differences between novices and experts in professional activities, including in their own perceptions of the professional roles they play.

Chapters 3 and 4 then place Romanian judicial training and Romanian sentencing practice in context. Chapter 3 presents the basic structure of the Romanian judiciary and appointment system. Chapter 4 examines judicial training in general (its main aims, functions and the models of judicial training that have developed around the world) and how Romanian judicial training fits in the wider framework. The subsequent discussion of the different types of judicial training and trainees in Romanian in this chapter is important in understanding how the research was designed and carried out in this study. Chapter 5 focuses on the current sentencing framework in Romania, its peculiarities as well as its commonalities with other sentencing frameworks around the world.

Chapter 6 describes the methodology used – the research hypotheses, questions, methods and sampling. Chapter 7 presents the first set of findings from the research on the participants who took part in the research, including their background and experience of training, and it also provides an assessment of the representative nature of the study.

Chapters 8 and 9 provide the main research findings on judicial attitudes. Chapter 8 examines judges' attitudes towards formal judicial training, while Chapter 9 explores judges' attitudes to how they learn to sentence outside of formal education (e.g., informal sources of learning).

Finally, Chapter 10 discusses the main findings of the current project more broadly, their potential value in terms of both academic theory and real-life impact; it highlights some of the study's limitations and formulates recommendations for future research of this kind.

CHAPTER 2: THEORIES OF LEARNING AND EXPERTISE-BUILDING

This study draws on existing theories of learning in both its research design and analysis. Existing theories of learning in education and psychology have helped to shape the research in a number of ways. This includes a focus on both formal and informal learning, where the research explores the role of prior experience on judges' attitudes to judicial training, as well as accounting for how they continue to learn to sentence while on the bench.

It has been already acknowledged by judicial training scholars that “the foundation of any program of judicial education is laid in the principles of adult learning”.¹²⁹ Adult learning theories, and developmental learning theories in particular, help judicial training specialists and judicial studies researchers understand and explain how judges learn at different stages in their career.¹³⁰

Relevant developments in educational theory

The current study draws on one of the major educational theories of the 20th century – the theory of experiential learning. Experiential learning began as a movement opposed to traditional teaching practices in schools, the latter being inspired by scientific rationalism, on one hand, and behaviourism, on the other.¹³¹ One of the

¹²⁹ Armytage, *Educating Judges* (n 16) 112.

¹³⁰ “Developmental theory provides some useful explanations for the existence of particular phenomena pertaining to learning by reference to the stage of life or career at which the adult may be found. These explanations can be utilised by judicial educators.” (ibid 127.)

¹³¹ According to rationalism and behaviourism, the learning process is defined through learning outcomes; these are seen as “accumulated storehouse of facts” or, respectively, of habits representing behavioral responses to specific stimulus conditions. In both cases, knowledge is seen as static, and the learning process is seen as (almost experimentally-) isolated from the other life

founders of the movement, John Dewey, argued in his 1938 book *Experience and Education* that traditional teaching methods were insufficient because they were too teacher-centred, they disregarded the individual differences in life experience and learning styles between learners, and most importantly, they failed to use methods that would demonstrate the practical implications of the things learned.¹³²

The interaction between experience and education can be understood in two ways. First and foremost, the experience that the learner has already accumulated (be it life experience, professional experience, even past educational experience) has an impact on how s/he will perceive and react to a new learning context. This impact is continuous, as experience accumulation is a continuous process. This was first formulated by Dewey as *the principle of experiential continuum*, whereby “every experience both takes up something from those which have gone before and modifies in some way the quality of those which come after”.¹³³ This approach was also adopted by other major educational thinkers such as Jean Piaget,¹³⁴ Kurt Lewin¹³⁵ and David Kolb.¹³⁶

The interaction between experience and learning is *bidirectional*: it is not just the case that prior experience impacts on the learning experience; but also that the learning experience itself is very likely to have consequences for how the individual will act in the future. In fact, it can be argued, this is a defining aim of education – to bring about a positive change in the future experiences of the individual.¹³⁷

experiences of the learner. In contrast, the experiential theory assumes that ideas are not fixed and immutable elements of thought, but constantly formed and re-formed through experience. Kolb (n 127) 26.

¹³² John Dewey, *Experience and Education* (Simon and Schuster 1938) 19–20.

¹³³ *ibid* 35.

¹³⁴ Jean Piaget, *The Origins of Intelligence in Children* (Margaret Cook tr, International Universities Press 1952).

¹³⁵ Kurt Lewin, ‘Field Theory and Learning’, *The forty-first yearbook of the National Society for the Study of Education: Part II, The psychology of learning* (University of Chicago Press 1942).

¹³⁶ Kolb (n 127) 27.

¹³⁷ Dewey argues that for an experience to be truly educational, it has to enable future development: “From the standpoint of growth as education and education as growth the question is whether growth in this direction promotes or retards growth in general.” Dewey (n 132) 36.

The second way to understand the interaction between experience and education is that the individual also contributes to the overall learning experience by bringing his/her own experiential insights. This means that a training session will be all the richer as participants are encouraged to share their experiences. Dewey believed that traditional education ignored the impact of the external environment on the learning process – both in terms of how the environment influences the learner, but also in how the environment reflects in a diversity of perspectives in the classroom.¹³⁸ In the experiential paradigm, “education is essentially a social process”.¹³⁹ For this reason, the current study extended beyond enquiring about the impact of experience on the learning experience of the individual judge; it also looked at the socialising aspects of the judicial learning experience, and at how social interaction is seen as a learning experience in itself. The findings of the study on peer interaction and informal peer learning are discussed within this theoretical framework in the second findings chapter (Chapter 9).

Kolb, in his 1984 work *Experiential Learning: Experience as the Source of Learning and Development*,¹⁴⁰ built on what Dewey and others had already argued, while also noticing that “the process of learning requires the resolution of conflicts between dialectically opposed modes of adaptation to the world”.¹⁴¹ Today, Kolb is most notable for two interrelated aspects of his work: first, his description of the Learning Cycle, and second, his development of the Learning Styles Inventory. Through the

¹³⁸ “An experience is always what it is because of a transaction taking place between an individual and what, at the time, constitutes his environment, whether the latter consists of persons with whom he is talking [...] to the toys with which he is playing; the book he is reading [...] or the materials of an experiment he is performing.” *ibid* 43–4.

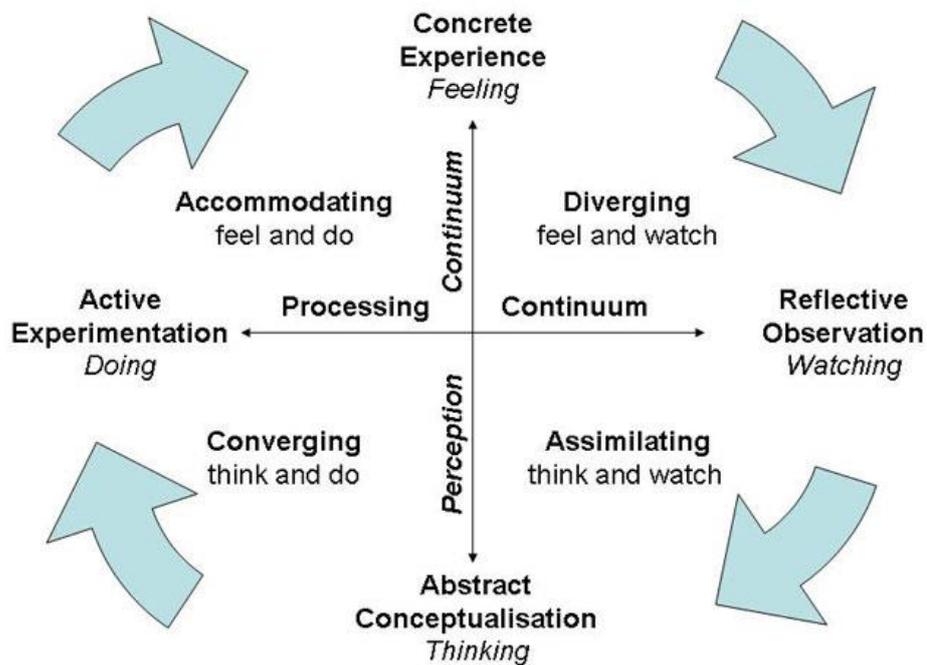
¹³⁹ *ibid* 58.

¹⁴⁰ Kolb (n 127) xi.

¹⁴¹ This dialectical conflict, says Kolb, was drawn differently by different scholars of experiential learning: Dewey saw it as conflict between the impulse that gives ideas their 'moving force' and reason that gives desire its 'direction'. Lewin highlighted two types of conflict emerging simultaneously: on one hand, conflict between abstract concepts and concrete experience; and on the other, a conflict between observation and action. Piaget noticed that there are two modes of learning in children: the accommodation of ideas to external world versus the assimilation of experience into existing conceptual structures. Kolb acknowledged and sought to accommodate all these dialectical conflicts in his Learning Cycle: between action and reflection, between abstract and concrete, between adaptation to and transformation of the world. *ibid* 29–31.

Learning Cycle (see Figure 1 below), Kolb sought to emphasise the continuous and cyclical character of learning, and its constant interaction with experience. Kolb’s Learning Cycle contains four stages of learning, mapped onto two dimensions: the ‘prehension’ dimension (i.e. the way we gather information from the world) and the ‘transformation’ dimension (i.e. the way we process the information).¹⁴² Kolb’s model predicts that we start by having a concrete experience; we then critically reflect on the aspects and features of that experience; in the next step, we try to derive abstract concepts and principles inductively from that experience; which we then try to apply to new similar situations. The cycle then restarts, but our knowledge is more complex, so in that sense it is more accurately depicted as a continuous cycle.

FIGURE 1: KOLB'S LEARNING CYCLE¹⁴³



¹⁴² ibid 43–58.

¹⁴³ ibid 42. Figure reprinted with the permission of the author from <https://www.simplypsychology.org/learning-kolb.html>

Kolb's Learning Cycle is meant to be both descriptive and prescriptive. It is descriptive because it aims to describe how people learn in real life. While Piaget focused very much on children and adolescents, and Dewey referred mostly to formal primary and secondary education, Kolb generalises this learning cycle to all human beings, including adults. In this sense, Kolb's work is in line with other scholars who in the 1980s explored the bases for adult learning theories.¹⁴⁴ But Kolb's work is also prescriptive in that he encourages learners to go through all parts of the cycle for a full learning experience.

The second major contribution of Kolb is his Learning Styles Inventory (LSI).¹⁴⁵ The Kolb inventory categorizes learners into four different types (corresponding to the four quadrants in Figure 1):

1. **Divergers** rely on concrete experiences, learning by reflective observation. Divergers typically excel at generating ideas and interacting with people.
2. **Assimilators** also utilize reflective observation, but unlike divergers rely more on abstract conceptualization than on concrete experiences. Assimilators are less people-oriented than divergers and tend to focus more on the strength of an idea or theory.
3. **Convergers**, like assimilators, depend on abstract conceptualization, but transform these conceptualizations into learning through active experimentation. Convergers are thought to be less emotional than most others, and represent those students searching for "one correct answer."
4. **Accommodators** employ the most hands-on learning style, converting their concrete experiences into learning through active experimentation. Students categorized as accommodators tend to be

¹⁴⁴ Malcolm Knowles, 'The Adult Learner: A Neglected Species'; Malcolm Knowles, *Andragogy in Action* (Jossey-Bass 1984); K Patricia Cross, *Adults as Learners. Increasing Participation and Facilitating Learning*. (Jossey-Bass 1981); Gordon G Darkenwald and Sharan B Merriam, *Adult Education: Foundations of Practice* (Ty Crowell Co 1982); Allen M Tough, Ontario Institute for Studies in Education and Department of Adult Education, *Why Adults Learn; a Study of the Major Reasons for Beginning and Continuing a Learning Project* (Dept of Adult Education Ontario Institute for Studies in Education 1968).

¹⁴⁵ Kolb (n 127) 62–8.

risk takers who flourish in situations where adaptation and problem solving are required.¹⁴⁶

These types represent dominant tendencies, but it does not mean that these tendencies exclude one another or do not change over time – quite the contrary.¹⁴⁷ LSI is founded on the Learning Cycle above, but it delves into studies of individuality and personal characteristics.¹⁴⁸ Kolb builds on Jung’s psychological types and his developmental theory of individuation.¹⁴⁹ But he departs from Jung in that Kolb’s typology refers to individuals’ preferred learning mode, while Jung sought to describe more fundamental personality characteristics.¹⁵⁰ Kolb claims that although each learner has to go through all four modes during the learning cycle, each learner also has natural inclinations towards one of the modes. The LSI is a self-reporting introspective questionnaire designed to measure this natural inclination.¹⁵¹

Application to education in law and judicial training

Kolb’s model is not just a theoretical account of human learning; it is also a model that has been tested empirically and extensively throughout the past 30 years. The latest publicly available technical specifications report on the LSI cites 1,004

¹⁴⁶ Anthony Niedwiecki, ‘Lawyers and Learning: A Metacognitive Approach to Legal Education’ (2013) 13 *Widener Law Review* 53; Kolb (n 127) 68–9.

¹⁴⁷ Kolb has flagged this bias from the very beginning, as being caused by the forced-rank ordering design of the LSI. Kolb (n 127) 76.

¹⁴⁸ *ibid* 62.

¹⁴⁹ *ibid* 16; CG Jung, *Psychological Types / Translated [from the German] by H.G. Baynes*. (Routledge and KPaul 1971).

¹⁵⁰ Kolb compared his typology with that of Jung (i.e. checked if there are statistically significant correlations between responses to his LSI and Jung’s inventory) and claimed that there are indeed some overlaps. For instance, introverted individuals are more likely to be reflective observers; while extroverted individuals are more likely to be active experimenters. In addition, learners who prefer concrete experiences are more likely to score high on sensing (perception) and feeling (judging) dimensions; while learners who prefer abstract conceptualization are more likely to score high on intuition (perception) and thinking (judging) dimensions in Jung’s inventory. Kolb (n 127) 79–80.

¹⁵¹ *ibid* 68.

academic studies that have used the LSI or Kolb's model as a theoretical basis.¹⁵² For the purposes of this research, the findings related to (1) age or experience and (2) specialty are particularly relevant.

With regards to *age*, LSI-based research has revealed that a preference for learning by abstraction *increased* with age, while preference for learning by action “showed an initial increase (up to middle age) and a subsequent decrease in later life”.¹⁵³ In addition, Kolb has further developed the experiential Learning Cycle by defining three stages of age-related development:

(1) **acquisition**, from birth to adolescence, where basic abilities and cognitive structures develop;

(2) **specialization**, from formal schooling through the early work and personal experiences of adulthood, where social, educational, and organizational socialization forces shape the development of a particular, specialized learning style; and

(3) **integration** in midcareer and later life, where non-dominant modes of learning are expressed in work and personal life.¹⁵⁴

This distinction is relevant to this research with Romanian judges. The research explores whether judges undertaking initial training, due to their age, are much more likely to be in their *specialization* development stage (when their preferred learning style becomes accentuated), while more experienced judges may be in their *integration* development stage (when they diversify their preferences). For example, this distinction could be reflected in different preferences for different training methods, as well as in a wider diversity of preferences for learning experience for more senior judges.

¹⁵² Alice Y Kolb and David A Kolb, 'The Kolb Learning Style Inventory — Version 3.1 2005 Technical Specifications' (2005) 17.

¹⁵³ *ibid* 24.

¹⁵⁴ *ibid* 4.

A few studies drawing on Kolb's model were conducted on first-year law school students in the United States.¹⁵⁵ These students are similar in age (mean age 26) to most new recruits to the Romanian judiciary that undergo initial training¹⁵⁶, so from a development standpoint they might be similar. But a significant difference between the two groups is that the US law students are studying law for the first time while Romanian judges have already graduated from four years of law school, so their legal knowledge is significantly more advanced. These studies are discussed in the remainder of this section.

With regard to *specialty*, Kolb's LSI was adopted by educators and researchers in many specialisms. Figure 2 below presents the distribution of LSI scores according to specialty and includes law. Kolb acknowledged that specialisation through study and through work experience is a very important force in the dynamics of individual learning and development.¹⁵⁷ Nonetheless, only a handful of studies have empirically researched differences between professionals and non-professionals or inexperienced professionals; this has been done mainly in medicine,¹⁵⁸ accounting,

¹⁵⁵ John H Reese and Tania H Reese, 'Teaching Methods and Casebooks' (1999) 38 *Brandeis Law Journal* 169; Eric A DeGroff and Kathleen A McKee, 'Learning Like Lawyers: Addressing the Differences in Law Student Learning Styles' (2006) 2006 *Brigham Young University Education and Law Journal* 499.

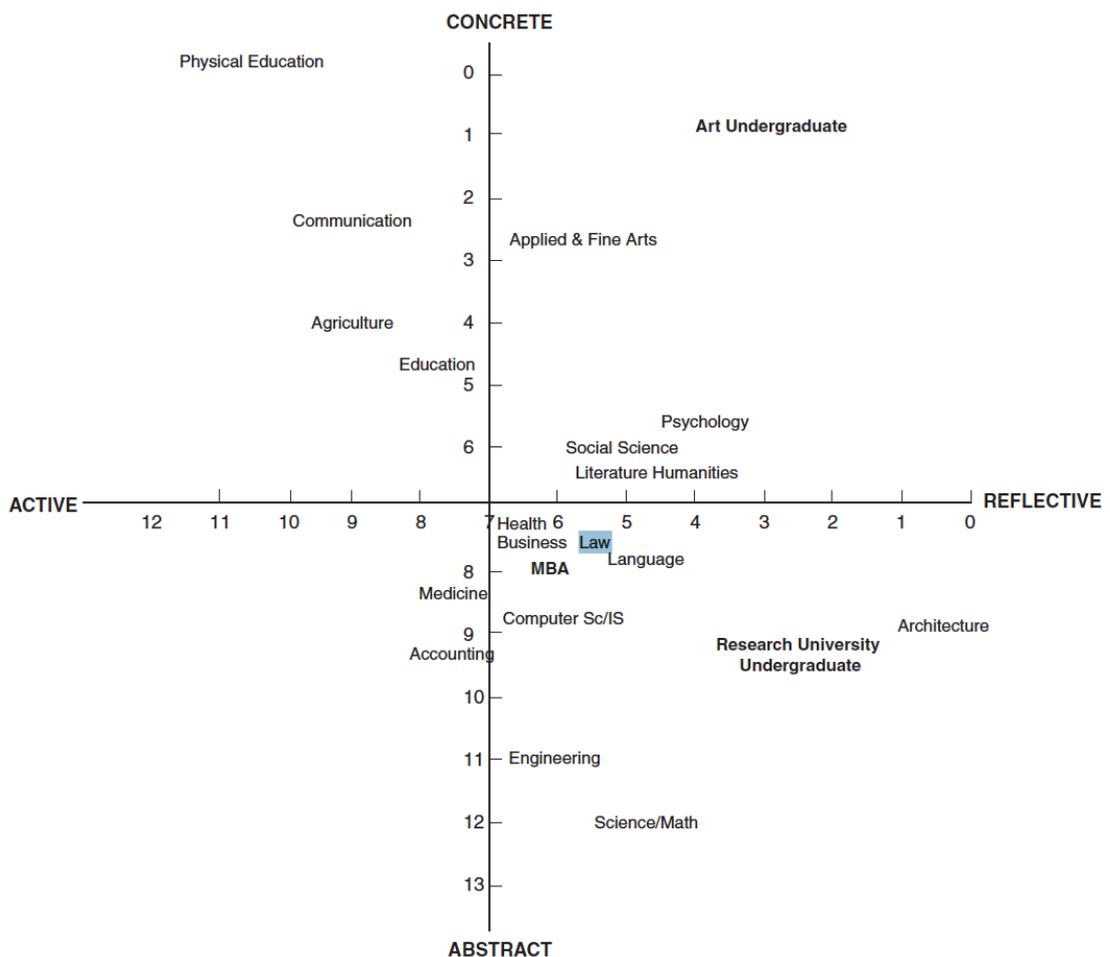
¹⁵⁶ DeGroff and McKee (n 155) 518.

¹⁵⁷ "A third set of forces that shape learning style stems from professional career choice. One's professional career choice not only exposes one to a specialised learning environment; it also involves a commitment to a generic professional problem, such as social service, that requires a specialised adaptive orientation. In addition, one becomes a member of a reference group of peers who share a professional mentality, a common set of values and beliefs about how one should behave professionally." Kolb (n 127) 88.

¹⁵⁸ In medicine: Roger Wunderlich and Craig L Gjerde, 'Another Look at Learning Style Inventory and Medical Career Choice.' (1978) 53 *Academic Medicine* 45; David A Kolb and Mark S Plovnick, 'The Experiential Learning Theory of Career Development'.

marketing,¹⁵⁹ engineering and social work.¹⁶⁰ No studies have so far compared novices with experienced professionals in legal practice.

FIGURE 2: KOLB LSI 3.1 SCORES ON AC-CE AND AE-RO BY EDUCATIONAL SPECIALTY¹⁶¹



¹⁵⁹ “A study of accounting and marketing professions conducted by Clarke et al (1977) illustrated this change in learning style in the later stages of one’s career. Their study compared cross-sectional samples of accounting and marketing students and professionals in school and at lower-, middle-, and senior-level career stages.” D Clarke and others, ‘A Study of the Adequacy of the Learning Environment for Business Students in Hawaii in the Fields of Accounting and Marketing’ [1977] Unpublished paper, University of Hawaii; Apud Kolb (n 127) 192–5.

¹⁶⁰ Jan Ludo Maria Gypen, ‘Learning-Style Adaptation in Professional Careers: The Case of Engineers and Social Workers’ (1980).

¹⁶¹ Kolb and Kolb (n 152).

Even though more than a thousand studies were conducted using Kolb's LSI, only 8 were conducted on law-related learners.¹⁶² The mean score for law learners reflects the empirical results aggregated from these 8 studies, and law students can be seen as mostly in the Assimilators quadrant. Out of these 8 studies, half were focused on law students specifically,¹⁶³ and the two with the largest samples sizes (at least 60 respondents each) were Reese and Reese (1999) and DeGroff and McKee (2006). Although these are not studies on judges, their findings show that two thirds of law students are in the bottom quadrants as either Assimilators or Convergents, which have a strong emphasis on abstract thinking.¹⁶⁴

These two studies compared the learning preferences of the students with the current offering of teaching methods,¹⁶⁵ while others looked at the discrepancy between the learning styles of students and the learning styles of trainers.¹⁶⁶ Reese and Reese mapped various teaching methods used in the legal training context, as they correspond to different learning styles. The figure below from Reese and Reese shows specific methods that are most preferable to specific types of learners. If it is true that most law students are more likely to be Assimilators or Convergents then, according to Reese and Reese, they are also more likely to prefer the following teaching methods: lectures with analogies; the presence of structure and authority; reading texts; independent study/papers/exams; but also practical examples in lectures, what if scenarios, discussions, case studies, problem papers and so forth. According to this model, law students are less likely to prefer Diverger or Accommodator solutions, such as simulations/role playing, peer feedback, feedback/coaching, journaling or homework.

¹⁶² *ibid* 17.

¹⁶³ Reese and Reese (n 155); DeGroff and McKee (n 155); Jane Cameron, 'Continuing Education Learning Preferences and Styles of Legal Clinic Lawyers' (Brock University 2006) <<http://hdl.handle.net/10464/2285>> accessed 7 April 2016; Niedwiecki (n 146).

¹⁶⁴ Reese and Reese (n 155) 177; DeGroff and McKee (n 155) 520–1.

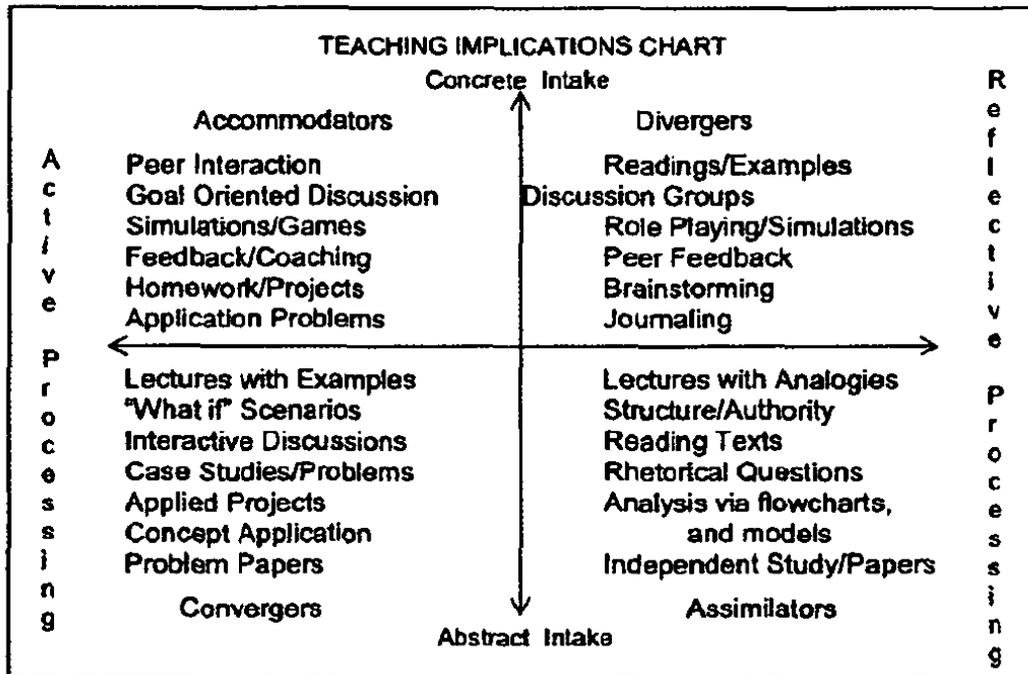
¹⁶⁵ And found the latter too much oriented towards the abstract conceptualization spectrum, or not diverse enough (see Reese and Reese (n 155) 175; DeGroff and McKee (n 155) 542.).

¹⁶⁶ DeGroff and McKee (n 155) 521; Patricia H Murrell, 'Continuing Judicial Education: Cognitive Development as Content, Process, and Outcome' (2004) 11 *Journal of Adult Development* 151, 152.

FIGURE 3: TEACHING METHODS MAPPED ONTO LEARNING PREFERENCES (REESE AND REESE)¹⁶⁷

TEACHING IMPLICATIONS

Connecting with all learners requires the use of teaching strategies that both challenge and match with the learners' preferred learning styles. The following chart identifies certain types of strategies that fit with the intake preferences (by either concrete or abstract methods) and processing preferences (by either active or reflective methods) for each of Kolb's cognitive learning styles.



From a normative standpoint, DeGroff and McKee noted that the learning style of 100% of the law teachers matched 75% of the law students, and they argued that law faculties needed to be more aware of the minority of 25% students whose learning preferences might not be addressed by the current teaching approaches¹⁶⁸ or faculty makeup.¹⁶⁹

¹⁶⁷ Reese and Reese (n 155) 188.

¹⁶⁸ DeGroff and McKee (n 155) 521.

¹⁶⁹ This prescriptive intention is similar to one of the intentions of the current study: the current study seeks to highlight the immense diversity of different preferences for teaching methods, to explore some of the underlying causes for the differences, and to argue for a greater diversity in the methods offered in judicial training.

Three other studies were focused on judges, but while they acknowledge Kolb's model as a solid foundation for understanding judicial learning, neither provides empirical support apart from some anecdotal insight.¹⁷⁰ In 1995, Armytage claimed that "judges as a profession exhibit preferred learning styles and utilise preferred learning practices developed over the course of their careers", but did not provide any empirical evidence to support this apart from his "own clinical experience and observation".¹⁷¹ In 2004, during a continuous judicial training session, Murrell asked an unreported number of American judges to complete a Learning Style Inventory, to stand in the four corners of the training room based on their learning type, and to discuss the results with each other.¹⁷² The distribution of learning styles among American judges Murrell found is consistent with what Reese and Reese (1999) and DeGroff and McKee (2006) discovered about law students – namely that Assimilators constitute the largest group, followed by Convergents, with Divergers and Accommodators being least numerous. But Murrell does not report the sample size, thus preventing an assessment of validity of the research. Finally, Brooks et al (2010) sought to evaluate the impact of "participation in the Institute for Faculty Excellence in Judicial Education (IFEJE)¹⁷³ played in the personal and professional development of four judges", by employing a mixed-methods qualitative approach (interviews, program evaluations, photographs, and e-mail correspondence from Institute participants).¹⁷⁴ The findings revealed the importance of peer interaction and informal learning mechanisms:

Judges are limited on their home turf in discussing cases and why they make the decisions they make. At the Institute, judges were

¹⁷⁰ Livingston Armytage, 'Judicial Education on Equality' (1995) 58 *The Modern Law Review* 160; Murrell (n 166); Patricia H Murrell, Gary F Schneider and Philip D Gould, 'Courts as Learning Organizations: Towards a Unifying Vision' (2009) 93 *Judicature* 14; Carrie Allison Brooks, Barbara Mullins Nelson and Patricia H Murrell, 'Personal and Professional Development for Judges: The Institute for Faculty Excellence' (2010) 18 *Journal of Adult Development* 135.

¹⁷¹ Armytage, 'Judicial Education on Equality' (n 170) 176.

¹⁷² Murrell (n 166).

¹⁷³ The Institute "taught participants how to design and develop effective educational sessions in an active, supportive learning environment" between 1989 and 2007 at the University of Memphis, USA. NASJE, 'Dr. Patricia H. Murrell Retires — Her Impact Reverberates' [2014] *NASJE* <<http://nasje.org/dr-patricia-h-murrell-retires-her-impact-reverberates/>> accessed 12 August 2017.

¹⁷⁴ Brooks, Nelson and Murrell (n 170).

liberated from media and public scrutiny and able to have frank discussions with judges from other jurisdictions who genuinely understood their dilemmas. Ellen described how the sharing and learning took place inside as well as outside the classroom walls. [...] Participants described the informal and structured discussions equal to or even more informative than what was presented by faculty or written in the curricular texts.¹⁷⁵

Although these studies informed by Kolb's theory provide interesting insights, no empirical research has so far verified the applicability of LSI or Kolb's learning cycle model to judicial learning on a larger scale.

The psychology of informal learning and expertise-building

These theories of experiential learning, and Kolb's model in particular, provide a widely accepted theoretical framework for this research project on judicial training in sentencing. For instance, they can help to explain why, during the *formal* training process, judicial learners might have different needs at different points of the learning process depending on their prior exposure to training and their experience prior to the training they receive. Similarly, these existing theories provide a basis for understanding the importance judges may attach to different *informal* learning tools they use on a day to day basis.

But psychological theories on expertise-building are also relevant to further refining our understanding of what happens once a judge finishes judicial training and begins to sentence in court. One underlying assumption of this study is that the learning process does not end with formal training, and that judges learn to sentence all throughout their time in court. While this is recognised in principle by Kolb's theory, experiential learning theory does not actually explain *how* professionals learn through practice, by doing their job. It simply takes for granted that this happens.

¹⁷⁵ *ibid* 142–3.

In contrast, psychological theories on expertise-building attempt to explain how a professional, by virtue of the repetition of similar tasks (even if each situation is slightly different) and with the aid of feedback and readjustment of tactics is able to form decision-making patterns over time. The theories claim that these patterns eventually become unconscious, faster, more effective, more refined and produce what the judges quoted earlier in this study called “subjective”, “intuitive”, “instinctive”, “quickfire” decisions regarding the right sentence. Applied to sentencing, such theories would claim that judicial sentencing skills develop over time by judges practicing sentencing day after day. The most notable proponents of the psychological theories of expertise-building are Kahneman (theory of dual-process reasoning),¹⁷⁶ along with refinements of this theory by Klein,¹⁷⁷ Gigerenzer¹⁷⁸ and more recently Sinclair and others.¹⁷⁹

Pattern-building and building expertise through informal learning

Daniel Kahneman’s work on dual-reasoning is best summarised in his 2011 work *Thinking Fast and Slow*.¹⁸⁰ The core of his theory claims that, as human beings, we are hardwired to think in two different ways depending on the mental task we are facing.¹⁸¹ Kahneman calls these two different modes System 1 and System 2. System 2 is the ‘slow-thinking’ system. Our brain uses System 2 when we are faced with a task for the first time or when the task is complex. The operations of System 2 require our full attention, time, and mental energy. If we run low on mental energy,

¹⁷⁶ Kahneman (n 128).

¹⁷⁷ Gary Klein, *Sources of Power: How People Make Decisions* (MIT Press 1998); Klein, *Intuition at Work* (n 128); Daniel Kahneman and Gary Klein, ‘Conditions for Intuitive Expertise: A Failure to Disagree’ (2009) 64 *American Psychologist* 515.

¹⁷⁸ Gigerenzer, Todd and Group (n 128); Gerd Gigerenzer and Henry Brighton, ‘Can Hunches Be Rational’ (2007) 4 *Journal of Law, Economics & Policy* 155.

¹⁷⁹ Marta Sinclair, ‘Misconceptions About Intuition’ (2010) 21 *Psychological Inquiry* 378; Marta Sinclair, *Handbook of Intuition Research* (Edward Elgar Publishing 2011).

¹⁸⁰ Kahneman (n 128).

¹⁸¹ Jonathan Evans, ‘Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition’ (2008) 59 *Annual Review of Psychology* 255; Seymour Epstein, ‘Cognitive-Experiential Self-Theory of Personality’, *Handbook of Psychology* (John Wiley & Sons, Inc 2003).

or our attention is diverted, System 2 is less effective or shuts down completely.¹⁸² Translating this into learning terminology, System 2 is most probably the one we use when we learn a new thing, be it a new skill, acquiring new substantive knowledge, or being engaged in a learning activity that displays elements we did not know already. In a learning setting, for instance, that could be the situation when a judicial trainee learns to write sentencing remarks for the first time, based on a template provided by the trainer. Even when we are not in formal training settings, System 2 gets activated when we have to learn to make decisions in situations that are new (e.g. when, for instance, a judge has to sentence in a new case that is unlike any prior cases from his past experience), or in situations where new elements influence the decision-making process (e.g. when, for instance, a new source of information appears, such as a new landmark case, so a judge needs to take that new element into account when computing the sentence in a new case, even though the new case is similar to others in the past).

In contrast, Kahneman claims we use System 1, 'fast thinking' system, in most of our daily tasks, especially highly repetitive ones where we have created decision-making or behavioural patterns and habits. System 1 uses significantly less mental energy, much less time, takes into account only a limited amount of information, and perhaps most importantly, its decision-making process is *unconscious*.¹⁸³ In other words, we are not aware of the process itself, and of the ingredients that go into it, but we are aware of the result, i.e. the resulting decision or behaviour. Translated into learning terms, System 1 represents the structure that operates with things we have already learned – either with mental operations and heuristics that are now fast and unconscious, or with mental content that we have already integrated.

The functioning of System 1 is said to be useful from a psychological standpoint, as it saves enough time and energy on unproblematic aspects so we can focus on the challenging aspects of our life. For instance, an experienced judge will more likely be much quicker at knowing what sentence to apply in a case that is very similar to

¹⁸² Kahneman (n 128) 21–2.

¹⁸³ *ibid* 21.

his past experience. Applied to educational theory, System 1 is the result of the learning process; its existence and smooth functioning demonstrates that we are capable of learning and of building our knowledge in time. It also appears to be a strong theoretical ally to theories of experiential learning; the “experience” that Dewey and Kolb claimed learners build on can be seen as equivalent to System 1 in Kahneman’s terms.

Another essential feature of System 2 is self-control: System 2 can “program memory to obey an instruction that overrides habitual responses”,¹⁸⁴ therefore recalibrating a response or a decision, even if patterns of thought were already created from past similar situations. This feature is powerful from an educational standpoint, as it indicates that human beings are not stuck in their learning patterns once these are created, but can adapt and, in Kolb’s terms, ‘re-learn’ how to behave in a certain situation.¹⁸⁵ From an educational standpoint, the learner should not just learn how to build good System 1 patterns, but also how to train System 2 to critically identify when System 1 fails to give a desirable outcome. Some learning inventories measure this latter variable as ‘critical thinking’.¹⁸⁶

Yet the psychologists’ opinions are split as to how often this happens. On one hand, Kahneman claims that System 2 is “lazy or energy-efficient in that it won’t activate and invest energy as long as System 1 appears to be ‘doing well’”.¹⁸⁷ For this reason, Kahneman and his “heuristics-and-biases” program focus much more on the biases and problems that result from System 1 errors, and how to discover and address them. On the other hand, other psychologists are more optimistic with regards to the improvement of patterns. Gigerenzer and the ‘fast-and-frugal heuristics program’ see heuristics used by System 1 as ‘adaptive toolboxes’ that emerge from

¹⁸⁴ *ibid* 36 footnote 2.

¹⁸⁵ According to Kolb, one of the fundamental characteristics of the experiential theory is that learning is seen as a process, not in terms of outcomes. The experiential theory assumes ideas are not fixed and immutable elements of thought, but constantly formed and re-formed through experience (Kolb (n 127) 26.).

¹⁸⁶ Gary J Conti, ‘Development of a User-Friendly Instrument for Identifying the Learning Strategy Preferences of Adults’ (2009) 25 *Teaching and Teacher Education* 887.

¹⁸⁷ Kahneman (n 128) 31 footnote 2.

our constant interaction with the environment.¹⁸⁸ Gigerenzer's experiments suggest that human beings are able (and do) recalibrate their decision-making patterns all the time, whenever they begin yielding undesirable results. In this way Gigerenzer emphasises human beings' constant capacity to learn from their own mistakes, which is more consistent with Dewey and Kolb's view that human beings are constantly interacting with their environment, and this constitutes learning experiences for them.¹⁸⁹

Building professional expertise, not just life experience

While Kolb's theory and other accounts of experiential learning apply to human learning in any life context, the psychological research on expertise-building tries to explain the necessary conditions for *professional expertise* to be built. This is relevant to studying judicial sentencing because this thesis is concerned with judges' past professional experience. This is why the variables measured in this study are not the judge's age per se, but the judge's years of experience on the bench, years of experience in the legal profession and years of experience in criminal cases. All these variables are strictly related to professional expertise. This study draws on the work of Klein, who has conducted empirical research over the last 35 years on the behaviour of experienced professionals such as fire fighters, airplane pilots and military officers.¹⁹⁰ Unlike Kahneman, Klein places value on professionals 'following one's gut', and his research provides evidence that professionals with significant expertise hold tacit knowledge that helps them make better decisions than novices:

¹⁸⁸ Gigerenzer, Todd and Group (n 128).

¹⁸⁹ "An experience is always what it is because of a transaction taking place between an individual and what, at the time, constitutes his environment, whether the latter consists of persons with whom he is talking [...] to the toys with which he is playing; the book he is reading [...] or the materials of an experiment he is performing." (Dewey (n 132) 43–4.) "The implication of the contextualist world view for the study of human individuality is that psychological types or styles are not fixed traits but stable states. The stability and the endurance of these states in individuals [...] arise from consistent patterns of transaction between the individual and his or her environment." Kolb (n 127) 63.

¹⁹⁰ Gary Klein, 'Jumping to Conclusions Can Make for Good Decisions' (2010) 177 *Science News* 32; Klein, *Intuition at Work* (n 128); Klein, *Sources of Power* (n 177).

With experience, we learn to see things that others don't notice. Knowing when to make a left turn in traffic separates experienced drivers from 16-year-olds. Only an experienced lawyer knows how to read a contract to spot potential problems for a client. Tacit knowledge includes the ability to recognize typical and unusual situations based on one's experience.¹⁹¹

What Klein understands by 'tacit knowledge' is very much equivalent to the ideas of 'experience', 'expertise', 'System 1', 'heuristics' or 'adaptive toolbox' as discussed earlier. It is the amount of experience and know-how that a human being gathers through practice and through learning experiences, and then uses in future situations. The added ingredient is that it is 'tacit' – which can be both understood as 'unconscious' (as determined so far by Kahneman and Gigerenzer), but also as 'difficult to convey through conscious structures'.¹⁹² The latter view is not necessarily shared in this study.¹⁹³

Although traditionally opposed in their views on expertise-building, Kahneman and Klein wrote a piece together in 2009, entitled "Conditions for intuitive expertise: A failure to disagree".¹⁹⁴ The article summarises the necessary conditions both authors think are required for the formation of 'expert intuitions' as opposed to what Kahneman calls 'heuristic intuitions'. First, the [work] environment must be sufficiently regular to allow predictability. Second, the regularities must be learned through prolonged practice. To this, Kahneman also adds the necessity of good-quality and immediate feedback.¹⁹⁵ These three conditions for the expertise-building – regularity, prolonged practice, and feedback – reveal how complementary this theoretical account is to that of experiential learning presented at the beginning

¹⁹¹ Klein, 'Jumping to Conclusions Can Make for Good Decisions' (n 190) 32.

¹⁹² "Laying out all the evidence or following standard procedures interferes with tacit knowledge." *ibid.*

¹⁹³ While it is true that some elements of experience or of the workings of System 1, due to their unconscious nature, cannot be explained by experts, they cannot possibly constitute the entire content of their expertise; there still are elements that can be rationalised and explained to others, otherwise the educational experiences whereby experts transmit domain knowledge to novices would not be possible. This makes a study of attitudes possible.

¹⁹⁴ Kahneman and Klein (n 177).

¹⁹⁵ *Ibid.*, 241

of this chapter. If most of the research on experiential learning focuses on formal training settings (with their methods and practices), Kahneman and Klein's accounts provide a theoretical framework for the necessary elements of learning on the job.

It might not be immediately obvious why theories describing actual decision-making or expertise-building would be relevant for a study of *attitudes* of judges, as the expertise-building process is not necessarily conscious or obvious to the judge, so a judge might have trouble reporting on it. And yet the literature reveals (and it is confirmed by the accounts of judges, including those quoted in the Introduction) that, although the pattern-building process itself is unconscious, the outcome of the process appears in the experienced decision-maker's consciousness as being much more "intuitive", "quickfire", immediate than a decision-maker who is a novice in the "art" of sentencing. These aspects are best accounted for by what psychologists call the "confirmatory feeling" accompanying System 1 outcomes, as well as what Klein and Gigerenzer call "gut feelings". In other words, although this study does not measure how *actual* sentencing differs between novice and experienced judges, the differences in how they *describe* their own sentencing (e.g. structured vs intuitive) might be partly explained by their different levels of expertise-building when asked.

Measuring confirmatory feelings

Even though the actual differences between novice and experienced judges in using System 1 and System 2 cannot be measured in a study of judicial attitudes, there are aspects that can demonstrate that judges do not just learn from formal training but also by forming sentencing patterns throughout their career and through informal learning on the job. One aspect is that experienced judges do not just have a different decision-making process (which cannot be measured in this research), but a different *attitude* towards their own decision-making process altogether (which is

measured in this research). Jacobson and Hough,¹⁹⁶ Tombs¹⁹⁷, Hogarth¹⁹⁸ and others found that experienced judges describe their sentencing decision-making process in different terms than novice judges, with experienced judges consistently using terms that refer to intuition, emotion, feelings, experience. For example:

The process is structured but the ‘**feeling**’ you get from experience comes into it.¹⁹⁹

I, after canvassing all the available material at my command, and duly cogitating upon it, [...] wait for the **feeling**, the **hunch** - that intuitive flash of understanding which makes the jump-spark connection between question and decision. [...] Learning is indeed necessary, but learning is the springboard by which imagination leaps to truth.²⁰⁰

Sentencing is about a ‘personal and sometimes **emotional response** to a particular set of circumstances’. (my emphasis)²⁰¹

The judges quoted above are describing what psychologists call the “confirmatory feeling” that *accompanies* the intuitive decision, which their mind has reached after gaining experience in that kind of decision-making.²⁰² The feeling is not the same as the decision, but its role is to give the decision-maker a sense of *finality*, of arriving at the correct decision (even if that might not in fact be true). As Sinclair highlights, the confirmatory feeling “does not guarantee the correctness of the registered intuition, merely its genuine nature”.²⁰³ Its role is to give the decision-maker the

¹⁹⁶ Jacobson and Hough (n 10) 49.

¹⁹⁷ Tombs (n 4) 42–4.

¹⁹⁸ Hogarth (n 92) 211–2.

¹⁹⁹ Tombs (n 4) 43.

²⁰⁰ Joseph C Jr Hutcheson, ‘Judgment Intuitive: The Function of the Hunch in Judicial Decision’ (1929) 14 Cornell Law Quarterly 274, 278–81.

²⁰¹ Jacobson and Hough (n 10) 47.

²⁰² Sinclair, ‘Misconceptions About Intuition’ (n 179) 381; Diana Richards, ‘When Judges Have a Hunch - Intuition and Experience in Judicial Decision-Making’ (2016) 102 Archiv für Rechts- und Sozialphilosophie 245, 241.

²⁰³ Marta Sinclair, ‘The Use of Intuition in Managerial Decision-Making: Determinants and Affective Moderators’ (2003) <<https://espace.library.uq.edu.au/view/UQ:106258>> accessed 13 February 2017; apud Sinclair, ‘Misconceptions About Intuition’ (n 179) 381.

confidence to end the decision-making process and act (in accordance with time- and energy-saving principles of System 1), rather than to keep weighing the factors. This balancing exercise is central to the sentencing decision-making process, and it hypothesised that experienced sentencers (who had more time to learn and build their sentencing patterns) will be more likely to report having these confirmatory feelings than novice sentencers.

The educational and psychological theories discussed in this chapter help to provide a framework for understanding how judges learn and gain experience, both in formal training settings and in work environments. Yet the role of the judge is multifaceted; their tasks range from evaluating evidence, establishing guilt (in civil jurisdictions), and sentencing, to various managerial and communicational tasks that are nowadays considered integral to the role of the judge.²⁰⁴ These various tasks elicit different skills and knowledge. Thus, an individual study cannot satisfactorily claim to cover all these areas of activity. This is why the current study focuses on one specific area of judicial decision-making – sentencing. Given its complex character, this study considers sentencing, not as exceptional, but rather as representative of judicial decision-making and stereotypical of the balancing of considerations that judges have to learn to make in their decision-making. As a consequence, although this study focuses on sentencing, it is possible that its findings can be generalised to some extent to judicial learning and expertise more generally.

²⁰⁴ Judith Resnik, 'Managerial Judges' (1982) 96 Harvard Law Review 374; Paul H Robinson and Barbara A Spellman, 'Sentencing Decisions: Matching the Decisionmaker to the Decision Nature' [2005] Columbia Law Review 1124; Jennifer K Robbennolt, Robert MacCoun and John M Darley, 'Multiple Constraint Satisfaction in Judging' (Social Science Research Network 2008) SSRN Scholarly Paper ID 1133184 <<http://papers.ssrn.com/abstract=1133184>> accessed 23 September 2014.

CHAPTER 3: THE ROMANIAN JUDICIARY: STRUCTURE AND JUDICIAL APPOINTMENTS

In order to best understand how Romanian judges are trained to sentenced, it is first necessary to examine how the Romanian judiciary is organised and how Romanian judges are appointed. The structure of the Romanian judiciary affects which judicial office holders carry out sentencing; the appointment process for Romanian judges is relevant because judges come into the judiciary with different backgrounds and levels of experience, and this affects how they are prepared (trained) for their judicial roles, including how they are trained to sentence.

The Romanian court system

The Romanian court system is best understood in the larger framework of European civil law jurisdictions. Guarnieri and Pederzoli provide a theoretical framework for understanding differences between different court systems around the world. When looking at how different judiciaries are structured (their “internal dynamics”, as opposed to how their members are recruited²⁰⁵), Guarnieri and Pederzoli highlight two structural variations among court systems: (1) jurisdiction, i.e. “the kind of disputes a judge can be asked to settle”,²⁰⁶ and (2) the relationship between the different layers of courts.²⁰⁷

²⁰⁵ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Cheryl Thomas ed, Oxford University Press 2002) 80.

²⁰⁶ *ibid* 78.

²⁰⁷ Guarnieri and Pederzoli point out that, as a typology, it represents core differences in court systems, and individual countries’ court systems may fit any one of the typologies to a greater or lesser extent. *ibid* 80–1.

In terms of *jurisdiction* (the first dimension), individual judges can have more or less scope in resolving disputes of various kinds, ranging from disputes among private parties (e.g. civil cases), or between individuals and the state (e.g., criminal cases) to conflicts between different branches of government and the scope of government power (e.g. administrative courts, judicial review). Guarnieri and Pederzoli suggest that world jurisdictions are placed along a continuum between two extreme types – the Unified system and the Fragmented system.²⁰⁸ In Unified court systems, judges from ordinary courts can hear a wide range of cases, be it civil, criminal, administrative and judicial review, as well as more specialised topics such as family, immigration, or labour cases. In contrast, in Fragmented systems, there is a wider variety of specialised courts and tribunals, therefore judges from ordinary courts have much narrower jurisdiction, in some cases limited to only private disputes between citizens.²⁰⁹

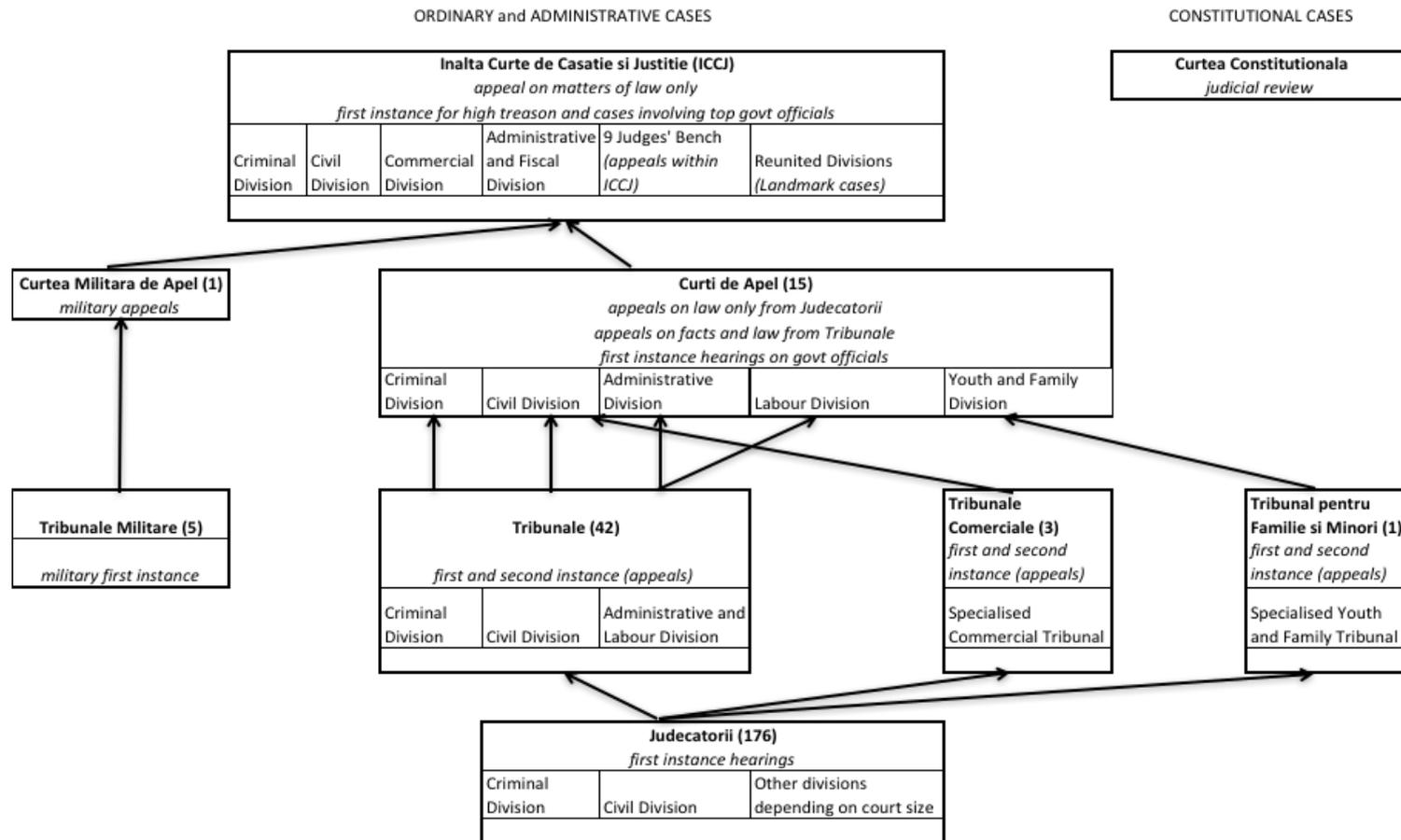
The second dimension refers to the vertical or hierarchical structure of courts, and refers more specifically to how powerful lower courts are in relation to the higher courts by the nature of appeals. Guarnieri and Pederzoli distinguish between two ideal-types – the Hierarchical court systems and the Co-Ordinate court systems. In Hierarchical systems, the parties can appeal unrestrained to higher courts (which means higher courts receive a significant amount of appeals), and the higher courts can substantially re-examine the lower court decisions. In contrast, in Co-Ordinate systems, the routes for appeal are quite restricted, so the bulk of decision-making takes place in lower courts, and the appeal is often a very narrow examination of a specific subset of issues (e.g. often on matters of law not matters of fact).²¹⁰ The specific structure of the Romanian court system is presented below.

²⁰⁸ *ibid* 78.

²⁰⁹ *ibid* 79.

²¹⁰ *ibid* 80–1.

FIGURE 4: COURT SYSTEM IN ROMANIA



Guarnieri and Pederzoli note that in continental Europe it is much more likely that judges have a *narrower* jurisdictional power, as continental European countries typically have a separate Constitutional Court and a fragmentation of administrative courts from the ordinary courts (the latter typically handling only civil, family and criminal disputes).²¹¹ This is largely, but not entirely true for Romania – it is more likely the case that Romania fits a Unified type. Firstly, like other Latin European judiciaries (France, Italy, Spain, Portugal), Romania has a Constitutional Court separate from the ordinary courts, which has the power of judicial review.²¹² The judicial review cases are brought directly to the Constitutional Court without passing through any lower courts. Secondly, it also has a handful of specialist courts, for instance three commercial courts and six military courts,²¹³ although their decisions can ultimately be appealed at the High Court of Cassation, so it is debatable if and to what extent this represents a fragmentation of jurisdiction in the strong sense. It is also true that Romania has specialised family and youth “courts”, just like other European countries.²¹⁴ But while these courts might be regarded as specialist in the sense that judges receive specialist training to deal with family and youth cases, they are not actually “fragmented” in Guarnieri and Pederzoli’s terms because they are in fact part of the ordinary courts, as specialised benches (“sections”).²¹⁵ The same can be said about administrative courts. At first glance, Romania has an administrative court, like France, Spain and Portugal do,²¹⁶ a Court of Auditors (in Romanian ‘Curtea de Conturi’) in charge with overseeing the financial expenditure of the state; but this latter court is in practice an administrative body and is not considered part of the judiciary.²¹⁷ In practice, Romania does not display a separate

²¹¹ *ibid* 79.

²¹² The Romanian Constitution 2003 2003 s 142.

²¹³ Parlamentul Romaniei, Legea 304/2004 privind organizarea judiciara 2004 Annex 2.

²¹⁴ *ibid* 2.

²¹⁵ The exception is the specialised youth and family court from Brasov, which is a separate specialist court. ‘Tribunalul Pentru Minori Şi Familie BRAŞOV - Prezentare’ <<http://portal.just.ro/1372/SitePages/prezentare.aspx>> accessed 23 March 2016.

²¹⁶ Guarnieri and Pederzoli (n 205) 90–6 Figs 2.3, 2.4, 2.5 and 2.7.

²¹⁷ The Romanian Constitution 2003 (n 212) s 140.

hierarchy of courts for administrative matters, like most other European countries; it has benches within the ordinary courts for dealing with administrative cases, but these are considered part of the main judicial structure. In this regard, Romania is much closer to the Spanish court system, where the administrative, youth, family cases are heard in specialised sections of the ordinary courts.²¹⁸ Thus, Spain is not unique in Europe for its cohesive character of the court system.²¹⁹ In fact, it can be argued that, given this unusually cohesive structure of the justice system, Romania is much closer to common law systems in being an example of a Unified court system, as Guarnieri and Pederzoli call it, than Western European countries, although it is true that judicial review remains separate.²²⁰ This is confirmed by data from the latest CEPEJ report, which reveals that only 4% of Romania's first instance courts are specialist courts.²²¹

With regards to the second dimension highlighted by Guarnieri and Pederzoli, namely the relationship between the different layers of courts, Romania is much more typical of Hierarchical systems, mostly encountered in continental Europe.²²² In Romania, each case can typically be appealed not once, but twice, and therefore any judicial decision can be challenged before two superior courts before becoming final.²²³ The first appellate court has jurisdiction on both matters of law and of fact, which means in effect that the original case is retried. Even when the appellate stage is settled, a case can be appealed once more (called 'recurs' in Romanian) on matters of law and procedure only, at the higher court.²²⁴ In both cases, there is no

²¹⁸ Compare with Guarnieri and Pederzoli (n 205) 96 Figure 2.7.

²¹⁹ As the authors suggest at *ibid* 95.

²²⁰ Guarnieri and Pederzoli note that "from a European civil law perspective, the most striking feature of common law judicial systems is the unitary nature of jurisdiction" *ibid* 81.

²²¹ 'CEPEJ Report on "European Judicial Systems - Edition 2016 (2014 Data): Efficiency and Quality of Justice"' (2016) 166
<<http://www.coe.int/T/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%2023%20report%20EN%20web.pdf>> accessed 10 October 2016.

²²² Guarnieri and Pederzoli (n 205) 88.

²²³ Codul de Procedura Civila 2014 s 634.

²²⁴ This is specific to most continental judiciaries. *Ibid* p.96.

preliminary stage where the court would judge the merits of the appeal, thus all appeals are automatically granted.

According to the latest figures released by the Romanian judiciary, there are 176 local courts ('Judecatorii'), 42 county courts ('Tribunale'), 4 specialised courts for commercial and family/youth cases ('Tribunale Specializate'), 15 courts of appeal ('Curti de Apel') and the High Court of Cassation and Justice ('Inalta Curte de Casatie si Justitie').²²⁵ In addition, a separate court, the Constitutional Court, has the power to adjudicate on the constitutionality of laws issued by the Parliament,²²⁶ but, as previously explained, this court is not part of the ordinary court system. Roughly each court²²⁷ (236 out of 244²²⁸) has a corresponding public prosecutor's office.²²⁹

Local courts ('judecatorii'),²³⁰ deal with the large majority of criminal offences,²³¹ typically with the delicts (the lesser offences) involving lesser violence or damage caused (such as assault, making threats, robbery); but also with those crimes against life that have *mens rea* other than criminal intent, such as recklessness or negligence (such as in manslaughter, infanticide, abortion, grievous bodily harm causing death, aiding or abetting suicide).

The county courts ('tribunale') correspond to the 40 Romanian counties and are located in county towns. All county courts contain two sections, criminal and civil. Depending on the size of county and the volume of cases in a specific court, the Ministry of Justice can decide on a case-by-case basis to create specialised sections,

²²⁵ Consiliul Superior al Magistraturii, 'Raport Privind Starea Justitiei 2015' (2016) 3 <<http://www.csm1909.ro/csm/index.php?cmd=24>> accessed 14 February 2017.

²²⁶ The Romanian Constitution 2003 (n 212) s 144.

²²⁷ with the exception of 7 tribunals

²²⁸ Consiliul Superior al Magistraturii, 'Raport Privind Starea Justitiei 2011' (2012) 5 <http://www.csm1909.ro/csm/linkuri/10_04_2012__48486_ro.pdf> accessed 10 June 2013.

²²⁹ With the exception of the High Court, which has 3 assigned prosecutor's offices: the one directly dealing with criminal cases referred to the High Court (the 'PICCJ'), and two specialist ones – the National Anticorruption Directorate ('DNA') and the Directorate for Investigating Organised Crime and Terrorism ('DIICOT'). Consiliul Superior al Magistraturii, 'Raport Privind Starea Justitiei 2015' (n 225) 53.

²³⁰ Noul Cod de Procedura Penala 2014 s 35.

²³¹ Noul Cod Penal (v. 2012) 2014 ss 190–204.

such as administrative sections, commercial sections or labour sections.²³² The county courts hear “aggravated” offences, for instance offences that have resulted in the death of the victim, murder, human trafficking, aggravated destruction of property, torture, or corruption and bribery.²³³

The Courts of Appeal (‘Curti de Apel’) are the appellate courts for all cases starting in local or county courts. There are 15 located in 15 major cities around the country, and typically hear appeals from the previous two or act as a first instance court in several types of serious criminal cases, such as crimes against national security (ss. 394-397 and ss.399-410) and crimes against humanity (ss. 438-444).²³⁴ The offences heard by Courts of Appeal are typically crimes (not delicts) that carry a custodial sentence of 7 years’ imprisonment or more. Courts of Appeal also hear criminal cases where the defendants are lower court judges and prosecutors, public notaries, lawyers or financial controllers.

Within local, county or appeal courts, judges are typically constituted in specialised benches called ‘sections’. The numbers of such sections are decided by the Ministry of Justice depending on the amount of cases coming before a court. The composition of the section is decided each year by the president of the court, who acts as an administrative manager of the court.²³⁵ The distribution of cases per section is done randomly, through a computerized system.²³⁶ In very small local courts where separate sections are not constituted, the judges hear all types of cases,²³⁷ but in most other courts judges specialise in civil or criminal cases.

All courts of appeal, county courts and local courts sit in benches of one judge when deciding matters in first instance, two judges when hearing appeals on facts and

²³² Parlamentul Romaniei Legea 304/2004 privind organizarea judiciara (n 213) Title II.

²³³ Noul Cod de Procedura Penala (n 230) s 36.

²³⁴ *ibid* 38.

²³⁵ Parlamentul Romaniei Legea 304/2004 privind organizarea judiciara (n 213) s 55.

²³⁶ *ibid* 56.

²³⁷ Florea Magureanu, *Organizarea Institutiiilor Judiciare* (3rd edn, Universul Juridic 2003) 48 <<http://www.kubon-sagner.de/opac.html?record=9620092>> accessed 5 November 2012.

law, and of three judges when hearing appeals²³⁸ on matters of law only ('recurs'). If the two judges hearing a case in first appeal have divergent opinions, the case is re-heard by another bench called 'a divergence panel'.

The High Court of Cassation and Justice ('Inalta Curte de Casatie si Justitie') sits in the nation's capital, Bucharest, and hears (1) first instance cases where the parties are top country officials; (2) and appeal cases from the lower courts, typically only on matters of law. The High Court comprises four divisions: civil I, civil II, criminal and administrative.²³⁹ The four divisions hear cases at first instance (on matters of both law and facts) on very specific matters. For example, the criminal division hears first instance criminal cases involving the President, MPs, members of the government, Romanian judges and MPs serving in European courts or in the EU parliament, all magistrates from the Constitutional Court, from the High Court and from the Court of Appeal, and all marshals, admirals and generals from the Romanian army.²⁴⁰ A special offence (that of high level treason by the President or by the country's Defence Council) can only be heard by this court.²⁴¹ The four divisions also hear appeals (on matters of law only) coming from the County Courts and Courts of Appeal. Within each division, the cases are heard by 3 judge panels.²⁴²

In addition to the four main High Court divisions, the High Court also has appellate divisions, called 'the 5-judge benches', which are convened to hear appeals from the criminal divisions of the High Court itself, and they sometimes conduct disciplinary hearings related to judicial behaviour.²⁴³ Although in Romanian law appeals do not have to be granted in advance, the 5-judge benches have the special power of granting or rejecting appeals from cases coming from the High Court divisions.

²³⁸ Parlamentul Romaniei Legea 304/2004 privind organizarea judiciara (n 213) s 57.

²³⁹ Parlamentul Romaniei, Legea 303/2004 privind statutul magistratilor 2004 s 18.

²⁴⁰ Noul Cod Penal (v. 2012) (n 231) s 40.1.

²⁴¹ *ibid* 398.

²⁴² Parlamentul Romaniei Legea 304/2004 privind organizarea judiciara (n 213) s 31.

²⁴³ *ibid* 24 Disciplinary hearings seem to have been removed from the most recent versions of the law.

Finally, the United Divisions are convened in very specific instances, for example when the jurisprudence of the Court is called into question and matters of law and legal interpretation must be settled. Although the doctrine of precedent is not recognized in Romanian law, the High Court of Cassation and Justice, due to its special constitutional status, can impose a legal interpretation on all lower courts in the country. This is called ‘appeal in the interest of the law’ (‘recurs in interesul legii’), and it will be presented in Chapter 5 as an important tool for limiting discretion in Romanian sentencing. The United Divisions can also send recommendations to the Ministry of Justice regarding enacted laws that it believes are in need of reform.²⁴⁴ When in session, the United Divisions must be formed by at least two thirds of the total number of High Court judges, and each decision requires at least 50% of their votes.

As outlined above, criminal cases are heard in specialised sections in all four tiers of ordinary courts: in local courts,²⁴⁵ county courts,²⁴⁶ courts of appeal,²⁴⁷ as well as in the High Court.²⁴⁸ They all serve as trial courts for various offences, depending on the seriousness of the offence and on the public status of the defendant. In this regard, **all judges who hear trials in these courts (in criminal sections) have sentencing powers.** In addition, because the first appeal in criminal cases sometimes amounts to a retrial of the case,²⁴⁹ both on issues of fact and law, **judges from the courts of appeal and the High Court have sentencing powers** even when they are exercising their appellate function.²⁵⁰ The rest of this chapter presents details about the judiciary in Romania, both in general and in the criminal justice system more specifically.

²⁴⁴ *ibid* 27.

²⁴⁵ Noul Cod de Procedura Penala (n 230) s 35.

²⁴⁶ *ibid* 36.

²⁴⁷ *ibid* 38.

²⁴⁸ *ibid* 40.

²⁴⁹ *ibid* 421.

²⁵⁰ With the limit that the new outcome cannot be worse for the appellant. *ibid* 418.

Romanian “magistracy”

In all world jurisdictions, public prosecutors are also “responsible for the judicial application of the criminal law”, and “therefore participate in the process of rule-application”.²⁵¹ Traditionally, there is a distinction between bureaucratic judiciaries and common law judiciaries in the relationship between prosecutors and judges. Guarnieri and Pederzoli explain that, in Latin European judiciaries, public prosecutors have traditionally “assimilated the most” with judges, due to their supportive role in the inquisitorial process and due to a similar requirement of impartiality.²⁵² In contrast, in common law judiciaries, the adversarial nature of the judicial process, including the criminal process, has placed the prosecutor in the position of representative of the victim and of society opposed to the defendant, with the judge taking a completely separate, impartial stance. Here the prosecutorial role is seen as completely distinct from the judicial role.²⁵³

Similar to France and Italy²⁵⁴, but unlike other European countries,²⁵⁵ in Romania judges and prosecutors form a common professional body, called the “magistracy”.²⁵⁶ Whether judges and prosecutors belong to the same professional body or are separate institutions is important, because this has repercussions on how they are appointed, promoted and trained. For instance, in jurisdictions such as Romania where judges and prosecutors belong to the same professional body, transfers from being a judge to being a prosecutor and vice versa are allowed.

²⁵¹ Guarnieri and Pederzoli (n 205) 108.

²⁵² *ibid.*

²⁵³ *ibid* 108–9.

²⁵⁴ Giuseppe Di Federico, ‘Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, Germany, Netherlands and Spain’ (2005) 127 <<http://www.difederico-giustizia.it/wp-content/uploads/2010/09/recruitment-evaluation-and-career.pdf>> accessed 25 March 2016.

²⁵⁵ Germany, Netherlands, or Spain do not consider judges and prosecutors the same body. *ibid* 85, 160, 190.

²⁵⁶ “Magistrature” in French, “magistratura” in Italian and Romanian. Austria has a similar structure *ibid* 10.

Importantly for the purpose of this study, judges and prosecutors undergo initial and continuous training together, which needs to be considered in studying their learning experience. Moreover, they do not need to choose between being or judge or prosecutor until the end of their first year of initial judicial training. This practice is common to other countries such as Austria, France, Italy and Romania where the judicial training institutions train both judges and prosecutors together, while in Spain, Portugal and England and Wales the judicial training institutions focus on professional judges only.²⁵⁷ Although the focus of this study is on Romanian judges, this structural aspect of the Romanian “magistracy” was taken into account, with both Romanian judges and prosecutors taking part in the research about their training and informal learning experience.

Romanian judges

According to the figures available at the time of the study (2015), there are 4,504 judges in Romania,²⁵⁸ which represents a rate of 21 professional judges per 100,000 inhabitants, which coincides with the European average of professional judges per capita.²⁵⁹ Out of the 4,504 judges, 2,060 (45.7%) are local court judges, 1,315 (33.5%) are county court judges, 819 (18.2%) are court of appeal judges, and 116 (2.6%) are High Court judges.²⁶⁰ The ordinary High Court judges are supported in their activity by 105 assistant judges (‘magistrati asistenti’).²⁶¹ Assistant judges are appointed, promoted, trained and evaluated on the same criteria as full-time judges, but enjoy a more limited range of guarantees – for instance they are not “independent” as ordinary judges are, they must obey the order of their superiors

²⁵⁷ Guarnieri and Pederzoli (n 205) 113; Di Federico (n 254) 166.

²⁵⁸ Consiliul Superior al Magistraturii, ‘Raport Privind Starea Justitiei 2015’ (n 225) 34.

²⁵⁹ Table 3.7 Categories and number of judges in 2014, ‘CEPEJ Report on “European Judicial Systems - Edition 2016 (2014 Data): Efficiency and Quality of Justice”’ (n 221) 90.

²⁶⁰ Figures computed from table B, Consiliul Superior al Magistraturii, ‘Raport Privind Starea Justitiei 2015’ (n 225) 34.

²⁶¹ *ibid* 42.

(in their case, the High Court judges).²⁶² There are neither part-time nor voluntary/lay judges in Romania, which is similar to 15 other European states, some of which are “young democracies”, especially found in Eastern Europe.²⁶³ Judges are assisted by a wide range of professionals. There are currently more than 5,000 judicial clerks, 1,427 registrars and other types of clerks, and 1,729 court staff (IT technicians, ushers, drivers etc.). Finally, there are 292 probation officers who, among other duties, are responsible for drafting pre-sentence reports.²⁶⁴

In official statistics, judges are not categorised by jurisdiction/specialty. Most ordinary judges are considered by definition “generalists”, i.e. they are expected to be able to hear any type of case in Romanian courts. For this reason, there are no official statistics regarding the total number of judges hearing criminal cases in Romanian courts. The only exception to this rule are the 169 judicial assistants who sit in county courts, specifically-appointed in a very limited range of cases (labour and social insurance cases – so they are more similar to tribunal judges in England and Wales). They are selected among legal professionals with at least 5 years’ experience, nominated by the Ministry of Justice for 5 years, and enjoy the same status as the other judges.²⁶⁵ The key difference between the judicial assistants and the judges is that the former have a consultative role in panel decisions (the panel is made of one ordinary judge and two judicial assistants).²⁶⁶ Since judicial assistants

²⁶² Ordinary judges enjoy “irremovability” (can only be transferred if they agree, and cannot be removed from office unless according to law) and “independence” (from other state powers) in judicial office. Parlamentul Romaniei Legea 303/2004 privind statutul magistratilor (n 239) s 2. In contrast, assistant judges and prosecutors only enjoy the guarantee of “stability” (they can only be transferred if they agree, but they are not independent, i.e. they have to obey the orders of their hierarchical superiors). *ibid* 66.

²⁶³ ‘CEPEJ Report on “European Judicial Systems - Edition 2016 (2014 Data): Efficiency and Quality of Justice”’ (n 221) 91.

²⁶⁴ European Commission for the Efficiency of Justice, ‘CEPEJ Scheme for Evaluating Judicial Systems 2011: Romania’ (2012) 22
<http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Romania_en.pdf> accessed 10 June 2013.

²⁶⁵ Parlamentul Romaniei Legea 304/2004 privind organizarea judiciara (n 213) ss 110–5.

²⁶⁶ They nevertheless have to sign the decision, and if they have a dissenting opinion, have to record it and present their reasoning. 304/2004 art 55 para 2

do not deal with criminal cases, they do not sentence, so they are not included in this study.

While in theory judges are not specialised, in practice they are. Judges who serve in smaller local courts hear both civil and criminal cases. But judges who serve in large local courts (e.g. in cities), county courts, courts of appeals and the High Court are in practice assigned to benches ('sections'). There are no publicly-available statistics regarding the number of judges hearing criminal cases (and therefore possibly dealing with sentencing) but the table below provides a breakdown of the proportion of criminal cases heard at each court level and the number of judges in each court.

TABLE 1: CRIMINAL CASES HEARD AND JUDGES, BY LEVEL OF COURT PER YEAR (2015 DATA)²⁶⁷

	Total cases	Criminal cases (percent)	Total judges
High court	31,724	29%	116
Appeal courts	233,157	25%	819
County courts	780,778	16%	1509
Local courts	1,994,361	13%	2060
All courts	3,040,020	21%	4504

²⁶⁷ Consiliul Superior al Magistraturii, 'Raport Privind Starea Justitiei 2015' (n 225) 3–28.

Judicial appointments in Romania

In all European countries (whether common or civil law jurisdictions), a law degree is an essential requirement for all candidates to professional judicial office.²⁶⁸ This unanimous requirement reveals a basic assumption about judicial appointment: that a judge is expected to have a good understanding of the law, legislation and procedure in order to be able to apply it correctly.²⁶⁹ This is also true for sentencing more specifically: all law degrees around the world include criminal law and criminal procedure courses.²⁷⁰ As a result, the judge at appointment is expected to be familiar, at least theoretically, with what counts as an offence in his or her country, but also with the legal procedures used when offences are brought to, tried and decided upon in court, including how sentences are decided.²⁷¹

While there is unanimity in acknowledging the role of theoretical knowledge of law, different jurisdictions diverge on the importance they place on legal practice experience prior to appointment. CEPEJ figures published in 2016 reveal that, out of 46 European countries, 16 have a competitive examination as the ordinary appointment process (i.e. not requiring prior legal practice), 6 have a procedure for legal professionals with long-term working experience, 15 countries have a combination of both, and 19 countries use other procedures.²⁷²

At the European level, a comparative analysis of 10 judiciaries including Romania (reproduced in Annex 1), reveals that Latin European countries do not require prior professional experience for the majority of judges (France, Italy, Spain, Romania),

²⁶⁸ 'CEPEJ Report on "European Judicial Systems - Edition 2016 (2014 Data): Efficiency and Quality of Justice"' (n 221) 81.

²⁶⁹ "The law as administered cannot be better than the judge who expounds it [...] the best organization of the courts will be ineffective, if the judges who man it are lacking the necessary qualifications." Arthur T Vanderbilt, *Judges and Jurors: Their Functions, Qualifications, and Selection* (Boston University Press 1958) 2–3.

²⁷⁰ Daniela Piana and Philip Langbroek (eds), *Legal Education and Judicial Training in Europe: The Menu for Justice Project Report* (Eleven International Pub 2013).

²⁷¹ *ibid.*

²⁷² 'CEPEJ Report on "European Judicial Systems - Edition 2016 (2014 Data): Efficiency and Quality of Justice"' (n 221) 81.

some countries require a limited amount (i.e. 1-2 years) of legal practice experience (Austria, Denmark, Finland, Germany),²⁷³ and some countries require a significant amount of legal practice experience before appointment (England and Wales, Netherlands for half of their recruits). Even for those jurisdictions where the clear majority of judges have no legal practice experience on appointment (France, Italy, Spain, Romania), there is nonetheless a separate appointment route recruiting a small number of individuals into the judiciary who come with legal practice experience. This is a trend observed by the latest CEPEJ report in all Europe.²⁷⁴

In Romania there currently are two routes to becoming a judge. The **main route** by which the vast majority of judges are recruited is open to all recent law graduates upon passing a nation-wide competition and a 2-year training and probation period.²⁷⁵ The second route, called the “**direct route**”, is open to law graduates with at least 5 years’ legal experience.²⁷⁶ While there are differences in each appointment route (discussed below), there are a number of general requirements that apply to all candidates for judicial office in Romania. They are presented in the next section.

No demographic data on recruited judges is available. The only publicly-available data is the total number of judges recruited each year, by route. These data were gathered from each SCM annual activity report since 2005 and are summarised in the figure below. Year 2013 cohort, when the study was conducted, is highlighted.

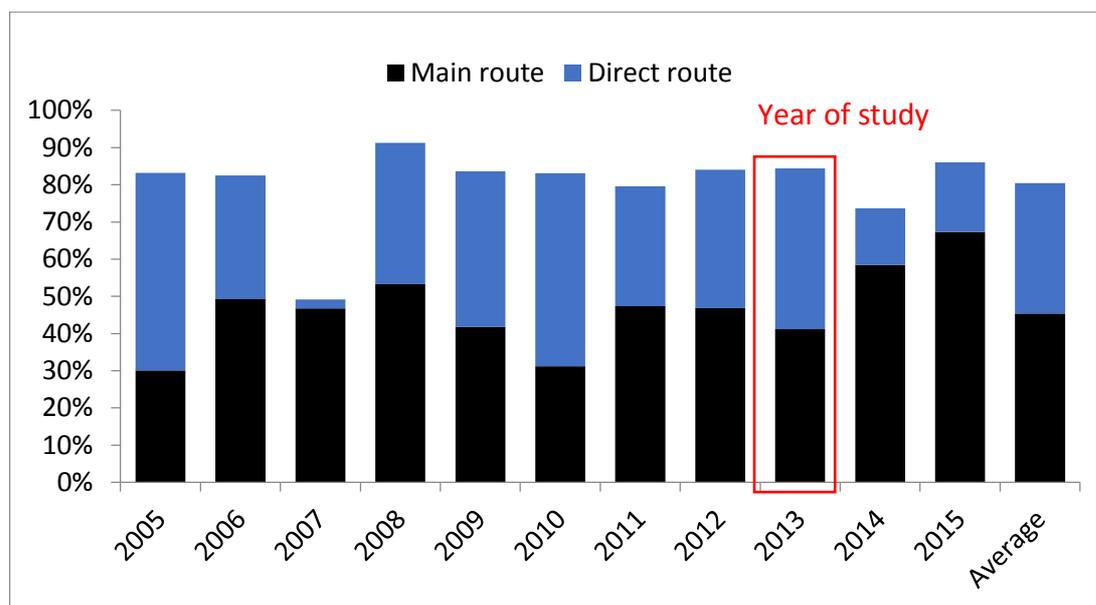
²⁷³ For instance, explanations on why this is the case in Germany, in Guarnieri and Pederzoli (n 205) 39.

²⁷⁴ “One of the trends to be observed concerns the increasingly important place given to the experience of the judge candidates during the selection process. While at the outset this criterion has been characterizing common law countries, currently it is granted a specific significance in almost all the States and entities.” ‘CEPEJ Report on “European Judicial Systems - Edition 2016 (2014 Data): Efficiency and Quality of Justice”’ (n 221) 88.

²⁷⁵ Parlamentul Romaniei Legea 303/2004 privind statutul magistratilor (n 239) ch II.I.

²⁷⁶ *ibid* 33.

FIGURE 5: PROPORTION OF ROMANIAN JUDGES RECRUITED THROUGH THE MAIN AND DIRECT ROUTES, EACH YEAR (2005-2015)²⁷⁷



Direct route appointees represent on average 35% of the total number of judges appointed in the past decade, compared to main route appointees who represent on average 45% of the appointed judiciary since 2005.²⁷⁸ So while it is not the main entry route into the Romanian judiciary, the ‘direct route’ has consistently provided more than a third of the recently appointed judges.²⁷⁹

The SCM data reveals that, in 2013, the proportion of main route appointees undergoing initial training was about average (41%, 100 appointees), while the direct route appointees were slightly higher than average (43%), with 105 new judges being appointed through the direct route that year. That said, at the time of

²⁷⁷ Consiliul Superior al Magistraturii, ‘Raportare Privind Activitatea Consiliului Superior Al Magistraturii’ <<http://www.csm1909.ro/csm/index.php?cmd=24>> accessed 29 March 2016.

²⁷⁸ There are 4,907 total judicial positions in the Romanian justice system. The figures above represent 2,181 new judicial recruitments between 2005 and 2015, which means that 45% of the Romanian judges were recruited from 2005 onwards. In addition, the two routes add up to 80% of recruited judges. The other 20% of judges were appointed directly, through transfers or secondments. See more details in footnote 280. *ibid.*

²⁷⁹ This is comparable to the French practice of recruiting about one third of its judges and prosecutors through its 2^{eme}, 3^{eme} and “sur titre” routes, the alternative routes equivalent in France to “direct route” in Romania. In 2015, 35% of auditeurs were recruited thorough routes other than le 1er concours. Ecole Nationale de Magistrature (ENM), ‘Profil de La Promotion 2015 Des Auditeurs de Justice Issus Des Trois Concours D’acces et Du Recrutement Sur Titres’ (2015) 3.

the fieldwork in Spring 2014, only 70 new judicial appointees were undergoing induction training, while the other 35 judges had already finalised their training and had already started their work in court. For the purposes of the research, only the 70 direct route appointees who had not yet experienced court were part of the induction training population.²⁸⁰

General requirements for judicial appointment

To be eligible to participate in any of the judicial appointment competitions, one has to be a Romanian citizen and resident, speak Romanian, be a law graduate, have no criminal convictions, enjoy a good reputation and be able physically and mentally to be a judge.²⁸¹ The good reputation criterion includes not just *negative* requirements (i.e. a lack of criminal convictions, financial irregularities, professional negligence or complaints), but further expands the “good character” requirements to include misconduct that has not brought any formal charges but had affected the public *reputation* of the candidate is taken into account,²⁸² or past sentences that have been rehabilitated.²⁸³ The good reputation standard also requires *positive* proof of good standing.²⁸⁴

The Romanian judiciary has made special efforts to define and justify the *psychological* standards for evaluating eligibility for the judicial role in an official

²⁸⁰ The numbers also reveal that other, more exceptional, judicial recruitment methods represent a segment of 20% of the total number of judicial appointments since 2005. They consist in (1) requested transfers from prosecutorial positions, (2) requested reconversions based on higher marks in the graduation exam, and (3) direct appointments without judicial training (a very popular method around 2005-2007 for filling in positions in less desirable local courts very quickly, no longer used in recent years).

²⁸¹ Parlamentul României Legea 303/2004 privind statutul magistratilor (n 239) s 14.

²⁸² Institutul National al Magistraturii, Regulament privind concursul de admitere si examenul de absolvire a INM 2013 s 27(1).

²⁸³ Cristi Danilet, ‘Admiterea in Justitie’ <http://admiterejustitie.ro/conditii_de_admitere.php> accessed 26 March 2016.

²⁸⁴ The candidate is required to provide a full curriculum vita, and to provide letters of endorsement from his current employer or university, as well as short letters from the local council. Institutul National al Magistraturii Regulament privind concursul de admitere si examenul de absolvire a INM (n 282) s 27(1).

guideline called “The Profile of the Magistrate in the Romanian Judicial System”, issued in 2005 by the Superior Council of Magistracy (SCM).²⁸⁵ The *Profile* was developed by psychology specialists from the SCM and a group of 19 judges “from all levels of jurisdiction, with a diversity of professional status and age”.²⁸⁶ One source²⁸⁷ for the Profile was the then-recently issued “Black Letter Guidelines for the Evaluation of Judicial Performance” by the American Bar Association, which enumerates a host of knowledge and “judicial temperament” criteria on which American judges would be evaluated.²⁸⁸ The *Profile* contains 6 psychological characteristics that any judge (and, implicitly, any judicial candidate) ought to demonstrate:

1. independent/critical thinking;²⁸⁹
2. integrity/moral consistency;
3. social awareness and dedication;
4. dedication to intensive work and continuous development; intrinsic motivation for the judicial career;
5. clear and logical communication; professionalism; self-control;
6. conscientiousness, diligence and teamwork.²⁹⁰

The current recruitment methodology requires judicial candidates to demonstrate in three phases during the recruitment process that they have all these characteristics: first, during the “logical reasoning” test; second, during interview;

²⁸⁵ Consiliul Superior al Magistraturii, *Profilul magistratului in sistemul juridic din Romania 2005*.

²⁸⁶ *ibid* 1.

²⁸⁷ *ibid* vii.

²⁸⁸ American Bar Association, ‘Black Letter Guidelines for the Evaluation of Judicial Performance’ ch V <http://www.americanbar.org/content/dam/aba/publications/judicial_division/jpec_final.authcheckdam.pdf> accessed 27 March 2016.

²⁸⁹ Although not specifically mentioned in the *Profile*, the critical thinking requirement also assumes that the candidate has a level of intelligence above average – candidates can be rejected if they are not able to demonstrate an above-average level of intelligence. Danilet, ‘Admiterea in Justitie’ (n 283).

²⁹⁰ Consiliul Superior al Magistraturii *Profilul magistratului in sistemul juridic din Romania* (n 285) pt 3.

third, during the psychological assessment. The logical reasoning test is the second eliminatory phase in judicial recruitment, after the legal knowledge exam, and it is based on the American LSATs.²⁹¹ The test contains 120 multiple choice questions²⁹² testing the candidate's legal reasoning, written comprehension and analytical thinking.²⁹³ The interview is conducted by a panel composed of a judge, prosecutor, psychologist, academic professor and an education specialist.²⁹⁴ It aims to assess the mental aptitude, motivations and ethical attitudes of the judicial candidate, according to the criteria above.²⁹⁵ Finally, the psychological assessment is conducted by a certified psychologist, and it comprises a written psychological test and an individual interview.²⁹⁶

Legal expertise requirements

The standard for demonstrating legal expertise is different for candidates who go through the two different Romanian appointment routes. The main appointment route, for recent law graduates, focuses solely on *theoretical* requirements of expertise (i.e. no practical legal experience is required). Having a law degree is a necessary but not a sufficient condition for demonstrating legal expertise.

²⁹¹ The LSATs are standardized tests used in law school admissions in United States and Canada that measure reading and verbal reasoning skills considered essential for legal education and practice. Part of the test includes Logical Reasoning Questions, which "assess the ability to analyze, critically evaluate, and complete arguments as they occur in ordinary language". 'About the LSAT' <<http://www.lsac.org/jd/lSAT/about-the-lsat/>> accessed 18 February 2017. For their impact on the Romanian judicial appointment examination, see Cristi Danilet, 'Admiterea in Justitie: Probe de Concurs' <http://admiterejustitie.ro/probe_concurs2.php> accessed 27 March 2016.

²⁹² Institutul National al Magistraturii Regulament privind concursul de admitere si examenul de absolvire a INM (n 282) s 22.

²⁹³ Danilet, 'Admiterea in Justitie: Probe de Concurs' (n 291).

²⁹⁴ Institutul National al Magistraturii Regulament privind concursul de admitere si examenul de absolvire a INM (n 282) s 23.

²⁹⁵ The interview has two parts: first, the candidate has 30 minutes to analyse and comment, in both writing and orally, a maxim or a famous quote; second, the candidate has to comment on a court case scenario that contains ethical dilemmas. Both the quote and the scenario are formulated/selected in advance by the Scientific Committee of the NIM. Danilet, 'Admiterea in Justitie: Probe de Concurs' (n 291).

²⁹⁶ Institutul National al Magistraturii Regulament privind concursul de admitere si examenul de absolvire a INM (n 282) s 27.

Candidates also have to undergo an eliminatory multiple-choice 2-hour examination testing their knowledge of civil law, civil procedure, criminal law and criminal procedure.²⁹⁷ This examination is organised once a year, every year, by the Superior Council of Magistracy.²⁹⁸

In contrast, the direct appointment route requires both theoretical and practical assessments of legal expertise. The practical requirement is that candidates should have at least 5 years' practical legal experience.²⁹⁹ The theoretical requirement of legal expertise has become, since 2008, identical to the one used in the main recruitment route: direct route candidates have to undergo the same examination as the main route candidates.³⁰⁰ Although the direct route candidates undergo the same theoretical examination, they do not apply for the same vacancies as main route candidates. For them, the SCM establishes a yearly quota, based on specific human resources needs in specific courts.³⁰¹

Statutorily, all judges and prosecutors recruited in the Romanian judiciary *must* undergo judicial training, regardless of the route of entry.³⁰² The following chapter explains the specific structure and content of the judicial training in Romania, which provides important background context to the research study.

²⁹⁷ *ibid* 15(2).

²⁹⁸ Parlamentul Romaniei Legea 303/2004 privind statutul magistratilor (n 239) s 15.

²⁹⁹ *ibid* 33.

³⁰⁰ Guvernul Romaniei, OUG nr. 46/2008, ordonanta de urgenta pentru modificarea art. 33 din Legea nr. 303/2004 privind statutul judecatorilor si procurorilor 2008.

³⁰¹ Consiliul Superior al Magistraturii, Regulamentul privind organizarea și desfășurarea concursului de admitere în magistratură 2012 [279/2012] s 3(1).

³⁰² Parlamentul Romaniei Legea 303/2004 privind statutul magistratilor (n 239) s 16.

CHAPTER 4: JUDICIAL TRAINING IN ROMANIA

Romanian judicial training in context

Romanian judicial training does not exist in a vacuum. Its history, aims and methods are tightly connected to how judicial training was designed and perceived throughout Europe and elsewhere throughout the past century. Before exploring the peculiarities of Romanian judicial training as it is currently organised, this chapter presents the main models of judicial training as they have developed across judiciaries in the world, and places the Romanian approach within this wider context.

Judicial training as an institutionalised practice is relatively recent. Although Spain had plans for a Judicial Academy since 1836,³⁰³ the first judicial training schools were created in the second half of the twentieth century, with European countries such as Spain (1944),³⁰⁴ France (1958)³⁰⁵ and the Netherlands (1960)³⁰⁶ leading the way. Soon after, the United States created the National Judicial College (1963) primarily for state judges and the Federal Judicial Center (1967) for the federal judiciary.³⁰⁷ It took another twenty years for England and Wales to follow suit, with the creation

³⁰³ Consejo General del Poder Judicial, 'Escuela Judicial - Historia' (2015) <<http://www.poderjudicial.es/cgpj/es/Temas/Formacion-Judicial/La-Escuela-Judicial/Historia>> accessed 6 December 2015.

³⁰⁴ *ibid*; Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) <http://www.ucl.ac.uk/laws/judicial-institute/docs/Judicial_Training_Report.pdf> accessed 20 February 2014.

³⁰⁵ Ecole Nationale de Magistrature (ENM), 'Ecole Nationale de La Magistrature : Historique' (2015) <<http://www.enm-justice.fr/presentation/historique.php>> accessed 18 November 2015.

³⁰⁶ Studiecentrum Rechtspleging (SSR), 'SSR: Excellent Training for a Just Society' (2015) <https://ssr.nl/index.php?page=english-page&hl=nl_NL> accessed 5 December 2015.

³⁰⁷ Duane Benton and Jennifer AL Sheldon-Sherman, 'What Judges Want and Need: User-Friendly Foundations for Effective Judicial Education' (2015) 2015 *Journal of Dispute Resolution* 3.

of the Judicial Studies Board in 1979,³⁰⁸ and most Western democratic jurisdictions began to establish more formal judicial training systems in the 1970s and 1980s.³⁰⁹ In most countries, the institutionalisation was led by either national governments, leading groups of the judiciary (e.g. judicial councils), or a collaboration between the two types of entities.³¹⁰ The creation of judicial training institutes across newly democratised Eastern Europe in the 1990s could be considered a “third wave” of institutionalising judicial training in democratic regimes, and the establishment of the Romanian National Institute for Magistracy (INM) in 1991,³¹¹ coinciding with the democratic revolution against the communist government³¹² and the enactment of the new democratic constitution, was part of this third wave.

The institutionalisation of judicial training was initially met with resistance around the world, from both scholars³¹³ and judges,³¹⁴ especially in common law countries where judges had extensive advocacy experience upon appointment.³¹⁵ It was considered that the legal knowledge offered by a law degree, the appointment process and, in common law jurisdictions, the practical experience in advocacy already equipped judges with the required competence.³¹⁶ Some commentators

³⁰⁸ ‘Judicial Studies Board Website’ (*British National Archives*, From 1999).

³⁰⁹ ‘Constitution of Romania 1991 Version’, , *Wikipedia, the free encyclopedia* (2015) <https://en.wikipedia.org/w/index.php?title=Constitution_of_Romania&oldid=694398203> accessed 29 December 2015.

³¹⁰ Thomas, ‘Review of Judicial Training and Education in Other Jurisdictions’ (n 304) 13–5.

³¹¹ Institutul National al Magistraturii, ‘Despre INM’ <<http://www.inm-lex.ro/>> accessed 25 March 2015.

³¹² ‘Revolutions of 1989’, , *Wikipedia* (2015) <https://en.wikipedia.org/w/index.php?title=Revolutions_of_1989&oldid=696732465> accessed 29 December 2015.

³¹³ Delmar Karlen, ‘Judicial Education’ (1966) 52 *American Bar Association Journal* 1049, 1049; Francis C Cady and Glenn E Coe, ‘Education of Judicial Personnel: Coals to Newcastle’ (1974) 7 *Conn. L. Rev.* 423, 424; Armytage, *Educating Judges* (n 16) xv; Robert G Bone, ‘Judging as Judgment: Tying Judicial Education to Adjudication Theory’ (2015) 2015 *Journal of Dispute Resolution* 8, 130.

³¹⁴ Patrick Baron Devlin, *The Judge* (Oxford University Press 1979); GJ Samuels, ‘Judicial Competency: How Can It Be Maintained’ (1980) 54 *Australian Law Journal* 581; Lord Hailsham, ‘Hamlyn Revisited: The British Legal System Today’ (1983) <https://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/Hamlyn_Revisited_The_British_Legal_System_Today.pdf> accessed 22 December 2015.

³¹⁵ Armytage, *Educating Judges* (n 16) xv.

³¹⁶ Guarnieri and Pederzoli (n 205) 33.

pointed out that the necessity of judicial training also entailed increased public costs:

The training of judges, in a formal school or college, as a prerequisite to the commencement of judicial service, or as an accompaniment to years of service, was, in the old days, out of the question. In part, the resistance flowed from the fact that this had never been the way it had been done in England which, in the judiciary (as in so many other things) adored the gifted amateur. In part, doubtless, it was because the English way of doing things was cheap to the public purse and relatively efficient. The private sector, of the advocate's practice, was thought to give the judge the necessary preparation at no cost to the state.³¹⁷

Samuels, writing in 1980, claimed that the institutionalisation of judicial training meant that the selection process had in a sense failed.³¹⁸ More fundamentally, it was often argued that “mandatory in-service training is generally viewed as an infringement of judicial independence”.³¹⁹ Despite this initial resistance, the institutionalisation of judicial training has now become an established worldwide phenomenon,³²⁰ firstly due to its functions, and secondly due to its increasing importance in the light of new developments. Both are discussed in turn.

The functions of judicial training

In her 2006 review of the judicial training offered in various jurisdictions around the world, Thomas summarises a whole range of functions and benefits of judicial

³¹⁷ Michael Kirby, ‘Modes of Appointment and Training of Judges - A Common Law Perspective’ [1999] *Journal of the Indian Law Institute* 3.

³¹⁸ “The best way of maintaining judicial competency is to appoint reasonably competent judges, who already know enough to embark on their task with tolerable efficiency. If it is recognised that a large proportion of new appointees cannot perform competently without prior instruction, then the system of selection has failed, and basic training is little more than a means of propping it up.” Samuels (n 314). Kirby makes a similar point: “The lack of formalised judicial education had the advantage that most governments would hesitate before appointing a person to judicial office who did not have easy acquaintance with the running of a court and the business of law as the courts practise it.” Kirby (n 317) 544.

³¹⁹ Thomas, ‘Review of Judicial Training and Education in Other Jurisdictions’ (n 304) 18.

³²⁰ Armytage, *Educating Judges* (n 16) xxvi.

training – not just for individual judges, but also for the court system and the public at large.³²¹ Among those are five functions and rationales of judicial training that characterise all Western democratic judiciaries, irrespective of peculiarities of jurisdictions or of the judicial training model adopted. At the most basic level, judicial training ensures judicial **competence**. Competence is two-fold; first, judicial training ensures judges are well-equipped to do their job upon appointment; second, it ensures judges are kept up to date on the law, on new improved methods and new judicial practices as time goes by.³²² Some authors have argued that judicial training also ensures judicial competence by screening candidates, especially in career judiciaries.³²³ That said, competence remains the first and foremost aim of judicial training across all judiciaries around the world, and it is often included in their declarations and strategic documents.³²⁴

A second function of judicial training is that it strengthens judicial **independence**.³²⁵ It is thought that more knowledgeable judges,³²⁶ including judges aware of their own biases or of the more general context or consequences of their decision-making, result in judges (and their decisions) being more independent from other branches of the government, from the unacceptable social pressures and even from the influence of their own preconceptions.³²⁷ Dawson posits a more complex

³²¹ Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (n 304) 14.

³²² *ibid* 15; Linn Hammergren, *Judicial Training and Justice Reform*, vol 202 (USAID 1998) 8.

³²³ "While generally not used to screen judicial candidates in common law systems, successful completion of entry-level training [in civil code countries] may be a pre- or post-selection requirement for other judicial professionals and/or administrative staff." Hammergren (n 322) 8–9.

³²⁴ For instance, in the US, NASJE defined the purpose of judicial training "to enhance the performance of the judicial system as a whole by continuously improving the personal and professional competence of all persons performing judicial branch functions." Benton and Sheldon-Sherman (n 307) 24. See also National Association of State Judicial Educators, *Principles and Standards of Judicial Branch Education* 2001.

³²⁵ Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (n 304) 18.

³²⁶ Armytage, *Educating Judges* (n 16) xxvii.

³²⁷ Although it seems rather ironic that judicial independence is used as both an argument for and against judicial training, the irony is only apparent. The critics cited earlier seemed to assume judicial training affects judicial independence by increasing the leverage that other branches of government (e.g. the ministry of justice) have on the judges' activities and on the content of their learning, especially if the training is mandatory. While this might have been the case in the past,

definition of the role of judicial training in relation to independence and self-awareness, arguing that in Canada, judicial training

also assists judges in developing an understanding of the judicial role and their own identity as judges. Appropriately structured judicial education settings allow judges to share information, explore questions, and obtain feedback from peers, thereby learning from one another.³²⁸

In fact, some authors argue that one of the reasons why judicial training gained so much traction in the 1960s is because the role of the judge was undergoing a fundamental shift,³²⁹ and it will continue to do so as judicial training provides a forum for judges to understand and define their role.³³⁰ Reflecting this at the European level, the Consultative Council of European Judges (CCJE) has officially recognized judicial independence as one of the key roles of judicial training, along with competence.³³¹

A third function of judicial training is that it ensures **consistency** in decision-making across the judiciary.³³² This function is particularly relevant for jurisdictions that do not have the doctrine of precedent and are typically confronted with a greater disparity of decisions (such as Romania³³³). Judicial training sessions are a forum that

today most judicial training institutes are independent from the executive branch and “judge-led” in designing and conducting the training.

³²⁸ Brettel Dawson, ‘Judicial Education: Pedagogy for a Change’ (2015) 2015 *Journal of Dispute Resolution* 176.

³²⁹ “Historically, I argue that interest in judicial education caught fire in the 1960s in large part because of prevailing beliefs about law and the proper function of courts.” Bone (n 313) 129.

³³⁰ *ibid.*

³³¹ “It is essential that judges, selected after having done full legal studies, receive detailed, in-depth, diversified training so that they are able to perform their duties satisfactorily. [...] Such training is also a guarantee of their independence and impartiality, in accordance with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms.” Consultative Council of European Judges (CCJE) (n 15) paras 3–4.

³³² Thomas, ‘Review of Judicial Training and Education in Other Jurisdictions’ (n 304) 15; Hammergren (n 322) 8.

³³³ This shall be explained in more detail in Chapter 5.

can reunite judges from different geographical areas or levels of courts and facilitate consensus and uniformity.

A fourth function of judicial training is to increase the social **relevance and connection** of the judiciary within the larger society. This has traditionally been seen as one of the functions of judicial training in the United States, given that the American judiciary has been seen from the very beginning as having an important impact in politics and society.³³⁴

A fifth, more “dynamic” function of judicial training relates to the role judicial training can play in **judicial and legal reform**.³³⁵ In countries undergoing some form of legal or institutional reform, judicial training contributes by (1) helping judges gain new values, attitudes, skills or knowledge of the new legal content; (2) building a “reform coalition within the judiciary or overcom[ing] resistance to reform”³³⁶; and by (3) using the training context as a forum to discover and discuss other elements that need to be reformed.³³⁷ Romania is a particularly good illustration of this function of judicial training, as at the time of the study, the training judicial participants were undertaking was part of a larger reform of the Romanian judiciary.

Judicial training models

While each jurisdiction has its own individual judicial training curriculum, several specific training models exist which can be characterised by 9 main elements:

1. presence or absence of initial training for new appointees;
2. presence or absence of continuous training for fully appointed judges;

³³⁴ Thomas, ‘Review of Judicial Training and Education in Other Jurisdictions’ (n 304) 13.

³³⁵ Hammergren (n 322) 9.

³³⁶ *ibid.*

³³⁷ *ibid.*

3. mandatory, optional or recommended character of the training;³³⁸
4. type of organisational structure that delivers judicial training;³³⁹
5. mix of participants in judicial training;³⁴⁰
6. methods used to assess the training needs³⁴¹ and impact of training³⁴²;
7. types of content available;³⁴³
8. variety of training methods used (lectures, seminars, hands-on activities etc.);
9. presence or absence of appraisal/performance assessment during or at the end of the training.

With regards to initial training, scholars and judicial trainers³⁴⁴ often seem to distinguish between two major models, corresponding to the distinction between common law judiciaries and civil law (or career) judiciaries. While this is an oversimplification,³⁴⁵ for didactic reasons it is useful because it makes two major points. First, it shows that in all jurisdictions there is a tight relationship between the judicial appointment methods and the characteristics of the initial judicial training offered. This is because the selection conditions correspond to implicit assumptions about the level of practical experience of the appointee, and the learning needs that the appointee has in order to fulfil his judicial role. Second, it

³³⁸ Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (n 304) 18–24.

³³⁹ Be it state judicial schools, justice ministry departments, committees of judicial self-governing bodies or multiple organisations, including university-affiliated bodies (ibid 27–32.).

³⁴⁰ In some countries, judges are trained separately, while in others, they are trained together with other court staff, with prosecutors, or with lay magistrates (ibid 33.).

³⁴¹ ibid 36–8.

³⁴² ibid 40–7.

³⁴³ ibid 56–87.

³⁴⁴ Kirby (n 317); Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (n 304); Gianina Radu and Otilia Pacurari, 'Vocational and Continuous Training of Judges and Prosecutors: A Comparative Analysis' in Daniela Piana and Philip Langbroek (eds), *Legal education and judicial training in Europe: the menu for justice project report* (Eleven International Pub 2013); Otilia Pacurari, Jorma Hirvonen and Rainer Hornung, 'Current Developments in Judicial Training Methodology in Europe—Looking for Good Practices' (2015) 2015 *Judicial Education and Training* 68.

³⁴⁵ This is, in a sense, the role of *models* – to offer rough generalisations to help classify instances, even if that means they, by definition, are not able to catch all the specificities.

shows that despite their historical peculiarities, many justice systems do have many common characteristics by virtue of their structure and underlying fundamental philosophies.

In the common law model, the majority of new appointees already have significant practical experience in advocacy. For that reason, there is no lengthy and comprehensive “initial” training. But often there is a much shorter, hands-on “induction” training, meant to focus on the practical aspects of being a judge as opposed to being an advocate.³⁴⁶ New appointees in this model often have full adjudicative powers from the moment they are appointed, and they begin their judicial activity almost immediately.

In contrast, in the civil law or “career judiciary” model, the majority of new appointees have no legal practice experience upon appointment, and the initial training is designed to address this. The initial training is designed to also be part of the evaluation of the candidate, where successful entry into the judiciary is dependent not just upon the entry exam, but also on the successful completion of the initial training programme.

In reality, the variety of judicial training models is significantly wider. Thomas illustrated this variety in her 2006 study where she compared judicial training in 12 Western democratic countries.³⁴⁷ She first summarised the various approaches to *continuing* education for judges across 5 of the 9 dimensions enumerated earlier.³⁴⁸ Additionally, she compared the *initial* training requirements in civil law jurisdictions,

³⁴⁶ For instance, sentencing training, trial management training, in some jurisdictions jury management training etc. See for example Judicial College, ‘Judicial College Prospectus, April 2014 - March 2015’ 35–7 <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/judicial-college-prospectus-2014-15-v8.pdf>> accessed 7 December 2015.

³⁴⁷ Thomas, ‘Review of Judicial Training and Education in Other Jurisdictions’ (n 304).

³⁴⁸ Dimensions included: type of organization delivering training, the training body, the mix of participants, the mandatory/optional character and the amount of entitled/mandatory training per judge. *ibid* 19 Table 1.

reporting on 5 additional dimensions.³⁴⁹ An updated version of this, including Romania and England and Wales, can be found in Annex 1.³⁵⁰

The predominant model (in 10 of the 14 countries) is to train judges together with other court-related professionals, most often with prosecutors (7 countries) but also with court clerks (3 countries) or lay magistrates (Australia only). Romania fits the predominant model, training judges together with prosecutors. England and Wales, Spain, Portugal and Canada are the only jurisdictions where judicial continuous training is dedicated to judges only. Since 2006, Finland has moved from a judges-only model to a mixed model.

Perhaps the most interesting trend since 2006 has been a shift from continuous training as an optional entitlement to a mandatory requirement for all judges. In 2006 almost all countries reviewed had a voluntary entitlement for continuous training,³⁵¹ but ten years later half of the countries included in the review have at least some mandatory requirement for judicial continuous training. The degree of the shift is variable,³⁵² but the trend is unmistakable. This suggests that the importance and necessity of judicial training in general, not just for newly appointed judges, has gained acceptance not just amongst judges but also amongst judicial policy-makers who are likely to be funding training.³⁵³

³⁴⁹ *ibid* 22 Table 2.

³⁵⁰ For an exposition and analysis of the trends from Thomas' study back in 2006 to present judicial training practices (2016), see Diana Richards, 'Current Models of Judicial Training: An Updated Review of Initial and Continuous Training Models across Western Democratic Jurisdictions' [2016] *International Organization for Judicial Training Journal* 41.

³⁵¹ With the exception of some state level judicial training in the US and some promotion-related training in France.

³⁵² Romanic-influence civil law jurisdictions (France, Italy, Romania) imposed the widest restrictions, obliging *all* judges to undergo a minimum number of days/sessions of continuous training at least every few years. Other countries such as Austria, Finland, Germany, and Spain impose mandatory continuous training only in certain circumstances (for managerial positions, when changing jurisdictions, or when major law amendments take place). In view of this trend, it is encouraging to see that the Judicial College has now included minimal mandatory training for both salaried and fee-paid judges in its most recent training prospectus *Judicial College* (n 346) 10.

³⁵³ Richards (n 350) 49.

This updated comparison of 14 Western jurisdictions suggests that the initial resistance to judicial training in the 1960s and 1970s has now not just weakened with regards to initial training, but with continuous training as well. There is no indication that this trend is likely to be reversed in the near future, and the next section explores the reasons why judicial training has continued to gain acceptance and to expand.

New developments that further increase and shape the role of judicial training

During the past few decades, a host of factors have increased the importance of judicial training.³⁵⁴ Increased caseloads and greater emphasis on litigation costs mean that judges need to gain case management and conflict resolution skills, and judicial training needs to cover these new areas of competence.³⁵⁵ There has also been an enhanced interest in the management of the judicial image, an extra-legal extension of the principle that “not only must *Justice* be done; it must also be *seen to be done*”.³⁵⁶ The Consultative Council of European Judges has stated that “training is a prerequisite if the judiciary is to be respected and worthy of respect”.³⁵⁷ For this reason, judicial training now often includes courses teaching judges how to manage their image and that of the institution they represent in public.³⁵⁸ Thirdly, unlike previous eras, technological advances are now making their

³⁵⁴ “Carrying out judicial training is not a goal in itself. An increasing workload; numerous legal reforms with an ever-shorter half-life period; the naissance of technically and socially complex new phenomena, such as the Internet and social media; the shift away from judges and prosecutors as mere law appliers towards judges and prosecutors as managers within their organizations; and, last but not least, increasing expectations of civil society towards a performing judiciary, make a comprehensive concept of “life-long learning” indispensable for judges and prosecutors.” Pacurari, Hirvonen and Hornung (n 344) 73.

³⁵⁵ *ibid*; Thomas, ‘Review of Judicial Training and Education in Other Jurisdictions’ (n 304).

³⁵⁶ *R v Sussex Justices, ex p McCarthy* [1924] KB 1 256.

³⁵⁷ Consultative Council of European Judges (CCJE) (n 15) para 5.

³⁵⁸ Thomas, ‘Review of Judicial Training and Education in Other Jurisdictions’ (n 304) 57.

way into courts and the legal profession,³⁵⁹ thus prompting the need for additional training on new technologies in court.³⁶⁰

An interesting development that further increases the need for judicial training involves judicial recruitment. There has been an increasing demand that the composition of the judiciary reflects the wider demographical profile of a population or, in a softer sense, that a wider diversity of backgrounds of judges is desirable³⁶¹. This has led to significant efforts both in Europe³⁶² and around the world³⁶³ to enlarge the candidate pool to include those from non-traditional backgrounds – be it on considerations of gender, race, socio-economic status or educational and professional experience. In some instances, this means recruiting those with less traditional court advocacy experience, and as a consequence, judiciaries cannot no longer assume that new appointees have been sufficiently exposed to judicial skills, which gives rise to the need to train new appointees in areas such as judgecraft (e.g. dealing with ethical problems, assessing the credibility and reliability of evidence, giving a well-structured oral judgment or decision etc.).³⁶⁴

A second aspect of changes to judicial recruitment that can impact on the need for training concerns the types of routes available to candidates to enter the judiciary. If it was easier in the past to distinguish between different models of judicial

³⁵⁹ Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (OUP Oxford 2015).

³⁶⁰ Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (n 304) 98–9.

³⁶¹ Cheryl Thomas, 'Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policies and Practices' (The Commission for Judicial Appointments 2005) <http://www.ucl.ac.uk/laws/socio-legal/docs/Review_of_Judicial_Diversity.pdf> accessed 10 June 2013; Peter H Russell and Kate Malleson, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press 2006); Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-Making' [2015] *Current Legal Problems* <<http://clp.oxfordjournals.org/content/early/2015/04/27/clp.cuv001>> accessed 2 January 2016.

³⁶² 'The EU Justice Scoreboard: Towards More Effective Justice Systems in the EU' (9 March 2015) <http://ec.europa.eu/justice/newsroom/effective-justice/news/150309_en.htm> accessed 13 April 2015.

³⁶³ Cheryl Thomas, 'Understanding Judicial Diversity: Report to the Lord Chancellor's Advisory Panel on Judicial Diversity' (UCL Judicial Institute 2012).

³⁶⁴ The term is currently used in jurisdictions such as England and Wales to define sets of judicial skills that are not necessarily specific to one area of law (e.g. criminal or family law), and can therefore be trained cross-jurisdictionally. *Judicial College* (n 346) 44.

recruitment and training, these distinctions have become increasingly blurred in the past couple of decades, perhaps partly due to the effects of globalization and intense intellectual exchanges between judicial experts across international networks.³⁶⁵

The hybridization of judicial training models and the relevance of the Romanian example

The story of institutionalised judicial training is a rather short but optimistic one. Two major things happened in the past six decades to make it so. First, judicial training has become a generally accepted and desirable phenomenon. This is reflected not just in the adoption of judicial training models around the world, but also in the decreasing resistance against imposition of judicial training – be it initial or mandatory continuous training.

Second, the judicial appointment and training models have become more hybridized over time. While, historically, civil law and common law jurisdictions had significantly different appointment and promotion practices,³⁶⁶ which also resulted in different approaches to and models of judicial training, those differences have been shrinking in the past few decades.

One major cause for this hybridization has been a shift in appointment practices. These have been discussed earlier – how civil law countries now appoint almost half of their appointees very much similarly to common law countries, from a more experienced pool of candidates, while common law countries at the same time decrease their experience requirements so as to accommodate a more diverse variety of judicial candidates. Thomas explains this hybridization:

³⁶⁵ Pacurari, Hirvonen and Hornung (n 344).

³⁶⁶ “There are great differences among European countries with respect to the initial and in-service training of judges. These differences can in part be related to particular features of the different judicial systems, but in some respects do not seem to be inevitable or necessary.” Consultative Council of European Judges (CCJE) (n 15) para 6.

Many if not most European judiciaries now appoint at least some experienced professionals to the judiciary later in their careers, and their initial training needs are therefore similar to new appointees in common law systems. In addition, common law judiciaries are increasingly becoming “career” judiciaries in which more appointments are being made from among younger, less experienced lawyers and where progress to higher judicial posts is not just possible but encouraged.³⁶⁷

This hybridization has not just been caused by a change in appointment practices, but also by judicial evaluation and appraisal practices. Historically, civil law countries have developed a comprehensive appraisal framework, while common law countries resisted on grounds of interference with judicial independence, just like they had resisted judicial training. This resistance is changing, for instance, in England and Wales, which is currently piloting new appraisal and evaluation frameworks.³⁶⁸

A third major cause for the hybridization of judicial training practices is due to the influence of globalization and the homogenizing influence of international structures. A flurry of transnational organisations, networks,³⁶⁹ exchanges, research projects dedicated to judicial training, as well as international documents providing guidance for the design and implementation of judicial training³⁷⁰ have enabled judicial educators to exchange information on and “bring home” best practices on

³⁶⁷ Thomas, ‘Review of Judicial Training and Education in Other Jurisdictions’ (n 304) 12–3.

³⁶⁸ “Only civil law jurisdictions covered in this report have judicial evaluation and appraisal systems and competence frameworks for the judiciary. There is little to no formal judicial appraisal in the common law countries covered in this report, where appraisal and competence frameworks are seen as incompatible with judicial independence (p.114). In this respect the recent development of judicial appraisal schemes and competence frameworks for some judges in England and Wales highlights a greater compatibility with civil law rather than with common law systems.” *ibid* 12. See ‘Judges Face Performance Appraisals’ [2013] *BBC News* <<http://www.bbc.co.uk/news/uk-25550587>> accessed 7 January 2016.

³⁶⁹ The European Judicial Training Network (EJTN), the International Organization for Judicial Training (IOJT), and the Menu for Justice (JustMen) project being just a few.

³⁷⁰ Jeremy Cooper, ‘EC Study of the Best Practices in the Training of Judges and Prosecutors in EU Member States’ (2015) 2015 *Judicial Education and Training* 47; EJTN Sub-Working Group ‘Training the Trainers’ and European Judicial Training Network (EJTN), ‘Handbook on Judicial Training Methodology in Europe’ (European Judicial Training Network (EJTN) 2014) <http://www.ejtn.eu/PageFiles/6343/EJTN_TT_Handbook_Final.pdf> accessed 4 January 2015; Menu for Justice, ‘Menu for Justice: Training Needs Assessment Tool’ (2012).

judicial training. One of these recent European studies conducted by the European Judicial Training Network (EJTN) in 2014 concludes:

The second conclusion relates to transferability, which includes in particular the transfer of practices between civil and common-law jurisdictions. The study has found little basis for the oft-held assumption that these systems are sufficiently different for there to be little to share between one another in the field of training. Its findings suggest the opposite.³⁷¹

The view that judicial training frameworks are nowadays highly comparable is widely shared by judicial trainers and specialists.³⁷² Major international bodies for judicial training, such as the European Judicial Training Network (EJTN) (with 34 national and transnational members)³⁷³ and the International Organisation for Judicial Training (IOJT) (with 123 members from 75 countries),³⁷⁴ have constituted an important factor in enabling national judicial institutions exchange experiences and homogenise their practices during the past 15 years. This is important for the current study as it helps to reinforce the idea that the lessons one can draw from a one-country study can be relevant to other jurisdictions.

Organisation of judicial training in Romania

This section examines in more detail (1) how judicial training is managed in Romania; (2) information about judicial trainers; (3) the structure and methods employed in

³⁷¹ European Judicial Training Network (EJTN), 'Lot 1 "Study on Best Practices in Training of Judges and Prosecutors"' (European Commission 2014) 113.

³⁷² "Despite all these different institutional and organizational approaches, and despite important divergences in the respective legal concepts that subsist in spite of the unifying tendencies of European Union law, the relevant stakeholders in judicial training throughout Europe share the view that the strategic and methodological challenges in all their countries are very comparable." Pacurari, Hirvonen and Hornung (n 344) 69.

³⁷³ 'Members - EJTN Website' <<http://www.ejtn.eu/About-us/Members/>> accessed 9 March 2017.

³⁷⁴ International Organisation for Judicial Training, 'About Us' <<http://www.iojt.org/About-Us.aspx>> accessed 9 March 2017.

initial and induction training; and (4) the structure and methods employed in continuous training, with a focus on training on sentencing.

Two key institutions are in charge of the appointment and training of judges and prosecutors in Romania: the Superior Council of Magistracy (*Consiliul Superior al Magistraturii*) (SCM) and the National Institute of Magistracy (*Institutul National al Magistraturii*) (NIM). The SCM has mostly a supervisory role, as it reviews and confirms the proposals of the NIM concerning a large range of issues: from who sits on the examination panels, who formulates the exam topics,³⁷⁵ who the trainers are, to what the current curriculum and timetable are for each generation of trainees.³⁷⁶ With regards to continuous training, the SCM has to approve the curriculum and the timetable of all continuous training activities.³⁷⁷ As noted earlier, the SCM also determines the number of judicial posts available and therefore open to the national exam each year.³⁷⁸ Finally, SCM also determines the budget available to NIM, including the stipends dedicated to all initial judicial trainees throughout their initial training,³⁷⁹ as well as the running costs and the salaries for trainers.

The Romanian SCM appears to be one of the oldest independent judicial bodies in the world, having been instituted in 1909 with the aim of “advising on the confirmation, appointment and career advancement of magistrates from all courts”, as well as judging and establishing the sanctions for magistrates who have committed offences.³⁸⁰ In 1909 it was formed of 8 members (5 of them magistrates elected by their courts) and it had an advisory role to the Ministry of Justice. During the communism, in 1952, the SCM was suspended, and reinstated again after the democratic revolution in 1991. Today the SCM has 19 members: 9 judges and 5

³⁷⁵ Parlamentul Romaniei Legea 303/2004 privind statutul magistratilor (n 239) s 15.5.

³⁷⁶ *ibid* 16,5.

³⁷⁷ Consiliul Superior al Magistraturii, ‘Competentele CSM’
<<http://www.csm1909.ro/csm/index.php?cmd=9202>> accessed 15 January 2015.

³⁷⁸ Parlamentul Romaniei Legea 303/2004 privind statutul magistratilor (n 239) s 15.4.

³⁷⁹ *ibid* 17.3.

³⁸⁰ Consiliul Superior al Magistraturii, ‘Scurt Istoric Al Consiliului Superior Al Magistraturii’
<<http://www.csm1909.ro/csm/index.php?cmd=9201>> accessed 15 January 2015.

prosecutors (representing all levels of courts), 2 civil society representatives (lay members), the Justice Minister, the Chief Justice of the Supreme Court and the Chief Prosecutor of the Supreme Court.³⁸¹ All SCM members are elected for 6 years.³⁸² The composition of the SCM is similar to other judicial councils in Latin Europe, although it probably has the lowest ratio of lay members to judicial members.³⁸³

In contrast to the SCM, the National Institute of the Magistracy has an *executive* role concerning the appointment and training of judges and prosecutors, being in charge with organising the entry exam,³⁸⁴ as well as with providing the initial training, continuous training and the training of trainers.³⁸⁵ The NIM is governed by a Scientific Committee, comprised of 13 members: one Supreme Court judge, one Supreme Court prosecutor, one Court of Appeal judge, one Court of Appeal prosecutor – all four being appointed by the SCM; 3 academics representing the top 3 most prestigious universities in Romania; 3 elected representatives of NIM trainers; one representative of the magistrates' associations; one representative of initial judicial trainees, and the executive director of NIM, who also chairs all the Scientific Committee meetings. The Scientific Committee is elected for 3 years (renewable). The only exception is the mandate of the initial judicial trainees' representative, which is re-appointed every year.³⁸⁶

In its daily activities, the NIM is managed by the managing director together with two deputy directors, one in charge of initial training and the other in charge of continuous training. All three directors are appointed by the SCM for 3 years, and they can either be NIM trainers, judges, prosecutors or academics.³⁸⁷ In addition,

³⁸¹ *ibid.*

³⁸² Consiliul Superior al Magistraturii, 'Statutul Membrilor CSM' <<http://www.csm1909.ro/csm/index.php?cmd=920301>> accessed 15 January 2015.

³⁸³ Guarnieri and Pederzoli (n 205) 53.

³⁸⁴ Parlamentul României Legea 303/2004 privind statutul magistratilor (n 239) s 13.

³⁸⁵ Parlamentul României Legea 304/2004 privind organizarea judiciara (n 213) s 103.

³⁸⁶ Institutul National al Magistraturii, 'Organizarea Institutului National Al Magistraturii' <<http://www.inm-lex.ro/>> accessed 6 January 2015.

³⁸⁷ Parlamentul României Legea 304/2004 privind organizarea judiciara (n 213) s 104.2.

the Scientific Committee has an Educational Board (“Consiliul Pedagogic”), which formulates the training objectives and curriculum for all types of training, and makes recommendations to improve the NIM’s work. The Educational Board is formed of trainers and training specialists.³⁸⁸

Judicial trainers

The NIM employs full-time trainers as well as part-time (hourly paid) trainers. The trainers are typically judges or prosecutors with significant judicial experience. While most NIM trainers are typically recruited from the judiciary, the law also allows Romanian legal academics, foreign or Romanian experts, as well as any other legal professionals to apply for trainer positions.³⁸⁹ This approach of recruiting trainers from inside the profession is common to many jurisdictions around the world, irrespective of the model of initial training employed.³⁹⁰ In 2013, there were 17 full-time trainers and 64 part-time trainers dedicated to initial training activities in 15 different subjects, with judicial training experience ranging from 0 to 15 years.³⁹¹ Out of all 2013 initial trainers, 54% are judges, 15% prosecutors and 11% academics.³⁹² Given the focus of this research on sentencing and criminal law training, it is relevant to point out that 10 trainers are specialised in criminal law and procedure (3 full-time and 7 part-time), 4 in criminology (all part-time) and 1 in judicial psychology (part-time). Most initial trainers are also in charge with induction and continuous training.

³⁸⁸ Institutul National al Magistraturii, ‘Organizarea Institutului National Al Magistraturii’ (n 386).

³⁸⁹ Parlamentul Romaniei Legea 304/2004 privind organizarea judiciara (n 213) s 108.

³⁹⁰ Radu and Pacurari (n 344) 193.

³⁹¹ Institutul National al Magistraturii, ‘Echipa de Formatori Implicati in Activitatea de Formare Initiala Aferenta Anului 2013-2014’ <inm-lex.ro/fisiere/d_403/ECHIPA%20FORMATORI%20F.I.%202013-2014%20final.doc> accessed 15 January 2015.

³⁹² In more detail: 44 trainers are judges, 12 are prosecutors, 9 academics, 5 assistant magistrates from the Constitutional Court, 2 lawyers, 2 legal experts from the Ministry of Justice, 2 other legal experts, 1 criminologist, 1 IT specialist and 4 full-time trainers that have suspended their judicial activity. *ibid.*

In Romania, judges who are full-time trainers are considered on secondment to the NIM and can completely suspend their judicial duties during their activity as trainers. In addition to full-time and part-time trainers, NIM also employs internship/practice coordinators, which locally coordinate the court practice that the initial trainees have to go through in their second year.³⁹³

All trainers are recruited based on the current training needs of the Institute, assessed annually and on a rolling basis by the NIM Scientific Committee, through an open recruitment process.³⁹⁴ The applications for an open position are evaluated based on the practical judicial experience of the candidate (years in post), including the level of experience gained on the specific training topic and pedagogical abilities. Knowledge of the topic and pedagogical abilities are evaluated initially through an interview with the selection panel, and afterwards through a practical teaching demonstration in front of a group of initial trainees.³⁹⁵ Academic publications, foreign language and IT knowledge are considered a plus.³⁹⁶ The NIM trainers are evaluated annually³⁹⁷ through a “360° methodology”, using self-evaluation forms, evaluations from at least two-thirds of training participants, evaluation by the subject convenor and evaluation from the NIM specialist in adult education.³⁹⁸

Three types of judicial training

Judicial training in Romania can be categorized into three basic types: (1) initial training for trainee judges who have passed the initial examination to join the judiciary, (2) induction training for the newly-appointed judges that have been

³⁹³ Institutul National al Magistraturii, Statutul personalului de instruire al INM 2012 s 2.

³⁹⁴ *ibid* 10–2.

³⁹⁵ *ibid* 15.

³⁹⁶ *ibid*.

³⁹⁷ *ibid* 32.

³⁹⁸ *ibid* 33.

appointed after a period of legal practice and (3) continuous training for existing judges.

Initial training is for Romanian judicial trainees who have passed the initial judicial state examination and will be appointed as judges or prosecutors after passing a final/graduation examination at the end of their vocational training. During initial training, which is mandatory and lasts for 2 years, the trainees are called “*auditori de justiție*”. They are expected to undertake judicial training full time and are financially supported to do so through a SCM stipend.³⁹⁹ Their status is similar to French “*auditeurs de justice*”.⁴⁰⁰

The first year of initial training is dedicated to theoretical study, with weekly courses and seminars being very similar to a university courses. During the first year, there is no official split between trainee judges and trainee prosecutors; then, based on the average mark they obtain at the end of their first year and the number of positions available for that year, the initial trainees can opt to become a judge or a prosecutor.⁴⁰¹ After making their choice, the second year is dedicated to practical internships in courts and/or prosecutor’s offices. (More detailed information about the content and scheduling of the training is covered in the next section.)

Induction training for those entering the judiciary after a period of legal practice is a recent phenomenon in Romania.⁴⁰² It was controversial at first, as these candidates were initially not required to pass an entry examination, and when the entry exam was established in the following year, it was much easier to pass than

³⁹⁹ Parlamentul României Legea 303/2004 privind statutul magistratilor (n 239) s 16.

⁴⁰⁰ They are also similar to the former Italian title of “*uditore giudiziario*”, which are now referred as “*magistrato ordinario in tirocinio*”. Decreto Legislativo 26/2006 ‘Istituzione della Scuola superiore della magistratura, nonché disposizioni in tema di tirocinio e formazione degli uditori giudiziari, aggiornamento professionale e formazione dei magistrati’.

⁴⁰¹ Parlamentul României Legea 303/2004 privind statutul magistratilor (n 239) s 16.

⁴⁰² See the official motivations offered by the Romanian Government in Guvernul României, Ordonanța de urgență pentru modificarea și completarea unor acte normative în domeniul justiției, OUG nr. 100/2007 [100/2007].

the main route exam that initial trainees have to pass. This was deemed unfair⁴⁰³ to the large majority of judges recruited directly out of law school. It also conflicted with Opinion no 4 of the Consultative Council of European Judges (CCJE) on appropriate initial and in-service training for judges at national and European levels.⁴⁰⁴ In 2012 new regulations were adopted. These now require ‘exceptionally-recruited’ magistrates to pass the same entry exam as the initial trainees and they ensure the training takes place *before* judges begin to hear cases and write judgments in court.⁴⁰⁵ Today induction training consists of 6 months of court practice combined with theoretical training.⁴⁰⁶

Continuous training is available to all Romanian judges. It is seen as an important component of the judicial profession in Romania, as it is believed that by receiving consistent and updated training, judges and prosecutors are more able to maintain their independence and impartiality.⁴⁰⁷ As discussed earlier, this puts Romania in line with the wider international perspective that continuous judicial training is essential for judicial independence and fairness.⁴⁰⁸ The NIM employs a specific algorithm through which it ‘scores’ each judge in terms of how recently s/he has undertaken any continuous training, which enables judges who have not received continuous training recently to be more likely to be accepted in a NIM course.

The following terminology shall be used all throughout this thesis to distinguish between the 3 types of judges undergoing these 3 types of judicial training:

⁴⁰³ Alina Matei, ‘Recrutarea in Magistratura. Orientari’ *JURIDICE.ro* (23 November 2007) <<http://www.juridice.ro/32259/recrutarea-in-magistratura-orientari.html>> accessed 18 January 2015.

⁴⁰⁴ Consultative Council of European Judges (CCJE), ‘Opinion No 4 of the Consultative Council of European Judges (CCJE) to the Attention of the Committee of Ministers of the Council of Europe on Appropriate Initial and in-Service Training for Judges at National and European Levels’.

⁴⁰⁵ Consiliul Superior al Magistraturii, Hotararea nr. 651/03.07.2008 2008 [651] 3.

⁴⁰⁶ Consiliul Superior al Magistraturii, Hotarare CSM nr. 231/2012 referitoare la structura cursurilor de formare pentru magistratii numiti in cond. art. 33 alin. 1 din L303/2004 2012.

⁴⁰⁷ Parlamentul Romaniei Legea 303/2004 privind statutul magistratilor (n 239) s 35.1.

⁴⁰⁸ *ibid* 37.

TABLE 2: TERMINOLOGY USED FOR STUDY PARTICIPANTS

Type of judicial training /judge	Definition
Initial training/trainee	Training for/those recruited into the judiciary directly after law school with no legal practice experience
Induction training/trainee	Training for/those recruited into judiciary after a period of legal practice experience
Continuous training/trainee	Training for/serving judges regardless of their method of recruitment into the judiciary

Initial and induction training

Initial and induction training structure

As previously mentioned, initial training takes 2 years to complete. The first year runs from October to July and is mostly focused on theoretical training, including theoretical training on sentencing.⁴⁰⁹ The second year runs from September to May and comprises 32 weeks that are mainly practice, combined with a bit of teaching and 2 rounds of exams. This way of structuring the initial training is almost identical to other European countries such as France, Italy and Spain.

The first year is split into 3 theoretical modules, combined with short internship periods. The first theoretical module is considered the 'core' module, containing the most important subjects such as criminal law, civil law, commercial law, judicial ethics, the structure of the legal system, but also more generic skills training such as personal development, communication, foreign languages (English and French) and IT.⁴¹⁰ The second year is split into 4 main types of activities: 4 weeks of taught

⁴⁰⁹ Institutul National al Magistraturii, 'Program de Formare Initiala Pentru Anul I 2013-2014' 1 <inm-lex.ro/fisiere/d_208/Program%20de%20formare%20initiala%20pentru%20anul%20I_2013_2014.doc> accessed 17 January 2015.

⁴¹⁰ *ibid* 2.

programmes,⁴¹¹ 23 weeks of practice in the trainee's chosen profession (court for judges, prosecutor's office for prosecutors), 4 weeks of practice in the other profession (prosecutor's office for judges, court for prosecutors), as well as 2 examination sessions and a final examination in May.⁴¹²

In contrast, induction training is significantly shorter (6 months), and it mainly comprises supervised court practice, combined with a few practical modules focused on showing trainees how to draft court documents, including sentencing remarks. It is assumed that induction trainees are already familiar with theoretical aspects of law and procedure.⁴¹³

Both initial trainees and induction trainees begin their judicial career in local courts, where they are transferred based on the final marks they have received during the admission and end of training examinations. For the first year, those who went through initial training are considered probationary judges, who are supervised by a judge at the local court where they are assigned. The range of cases they hear is limited by law.⁴¹⁴ For instance, in criminal law, they hear cases where the victim's complaint is mandatory, such as assault⁴¹⁵ and other forms of violence resulting in bodily harm, bodily harm by negligence,⁴¹⁶ breach of trust,⁴¹⁷ or breach of quiet

⁴¹¹ The preparatory teaching covers 7 core topics which are considered necessary for the good practical preparation of the trainee: criminal law and procedure (40 hrs), procedures for the enforcement of civil and criminal sentences (25 hrs), civil law procedure (15 hrs), forensic medicine (14 hrs), judicial psychology (6 hrs), elimination of racial discrimination (4 hrs), and judicial cooperation on civil matters (2 hrs). Institutul National al Magistraturii, 'Program de Stagiu Judecatori 2013-2014' 2 <http://inm-lex.ro/fisiere/d_208/Program%20de%20stagiu_judecatori_2013_2014.doc> accessed 17 January 2015.

⁴¹² *ibid* 1.

⁴¹³ Institutul National al Magistraturii, 'Tematica Cursurilor de Formare Profesionala Prevazute de Art. 33 Alin 13 Din Legea Nr. 303/2004' <http://inm-lex.ro/fisiere/d_1195/Curricula%20cursurilor%20de%20formare%20profesionala.pdf> accessed 29 March 2016.

⁴¹⁴ Parlamentul Romaniei Legea 303/2004 privind statutul magistratilor (n 239) s 23.

⁴¹⁵ Codul Penal Actualizat 1997 s 180.

⁴¹⁶ *ibid* 184.

⁴¹⁷ *ibid* 213.

enjoyment.⁴¹⁸ At the end of the probationary period, all the initial trainees take another examination, a capacity test, which must be passed before they attain the definitive status of judge. In contrast, those who enter the judiciary after a period in legal practice and go through induction training are considered judges from the very beginning of their training.⁴¹⁹ See Annex 2 for a summary of the structure and timing of the theoretical and practical modules for both initial and induction training.

Initial and induction training methods

For initial training, during the first year, the typical training format is the seminar.⁴²⁰ The trainees are split into seminar groups of 15-16 trainees.⁴²¹ Seminars are held weekly and last for 4.4 hours, while lectures are fortnightly and last for 3 hours. According to the NIM, a large variety of teaching methods is encouraged: “debates, discussions, presentations, small-group work, role-play exercises, brainstorming, film screenings, focus groups, one-to-one discussions with the trainees etc.”⁴²² In addition, the trainers are also encouraged to include real court case analyses, writing exercises on procedural documents and small procedural simulations in their seminars to prepare the trainees for the practical challenges of their job. Four core subjects (including criminal law) also include mandatory mock trials in addition to the seminars.⁴²³

⁴¹⁸ *ibid* 220.

⁴¹⁹ Cristi Danilet, *Admiterea la INM și în magistratură 2012* (Wolters Kluwer 2012) 67 <<http://www.wolterskluwer.ro/product--admiterea-la-inm-%EF%BF%BDi-%EF%BF%BDn-magistratur%EF%BF%BD-2012--362.html>> accessed 6 November 2012.

⁴²⁰ Institutul National al Magistraturii, ‘Program de Formare Initiala Pentru Anul I 2013-2014’ (n 409) 3.

⁴²¹ Institutul National al Magistraturii, ‘Calendarul Programelor de Formare Initiala 2013-2014’ <inm-lex.ro/fisiere/d_208/Calendar%20PI%202013_2014.doc.doc> accessed 17 January 2015.

⁴²² Institutul National al Magistraturii, ‘Program de Formare Initiala Pentru Anul I 2013-2014’ (n 409) 3.

⁴²³ *ibid*.

Induction training also makes much use of small group seminars for its centralised theoretical training. Given that the cohorts are very small, no lectures exist for induction trainees. During the seminars, trainers take a “hands-on” approach, focusing on court document exercises, discussing specific landmark cases or conducting mini-court simulations on various aspects of the judicial process, such as preliminary hearings, trial management, hearing of witnesses etc.⁴²⁴

Initial and induction training on sentencing

For initial training, there are three courses in which trainees learn how to sentence: (1) Criminal Law and Procedure; (2) Judicial Psychology and (3) Criminology.⁴²⁵ During the Criminal Law and Procedure courses and seminars, initial trainees spend a few sessions discussing the rules of procedure in sentencing (e.g. sentencing guidelines, relevant landmark cases for sentencing, sentence ranges for different types of offences), and they are taught how to write judgments and sentencing remarks, both in class and by practicing at home.⁴²⁶ In addition, trainees have the chance to simulate the sentencing process in a mock trial session. The Judicial Psychology course covers the main psychological theories on the behaviour of criminals, and on aspects of their personality that ought to be assessed by the judge in deciding guilt and in sentencing. This is relevant for trainees in helping them assess the psychological aspects of the aggravating and mitigating factors in sentencing.⁴²⁷ Finally, the Criminology course explains the methods that police officers and prosecutors use in their evidence collection. This offers the initial trainees a view on how evidence is produced, its limits, and most importantly, the

⁴²⁴ Institutul National al Magistraturii, ‘Tematica Cursurilor de Formare Profesionala Prevazute de Art. 33 Alin 13 Din Legea Nr. 303/2004’ (n 413).

⁴²⁵ Institutul National al Magistraturii, ‘Program de Formare Initiala Pentru Anul I 2013-2014’ (n 409).

⁴²⁶ Institutul National al Magistraturii, ‘Planul de Invatamant, Formarea Initiala’ <<http://www.inm-lex.ro/index.php?MenuID=30>> accessed 10 June 2013.

⁴²⁷ *ibid.*

weight of each piece of evidence in both establishing guilt and deciding the level of severity of the offence (which contributes to the sentencing decision).⁴²⁸

The first year for the initial trainees concludes with 3 weeks of internship in courts and prosecutor's offices during the month of July. This period is meant to help trainees decide if they wish to become judges or prosecutors, by helping them gain exposure to the professional environment before making their choice at the end of the first year. At the end of the first year, based on the marks obtained in the core courses (from both continuous and final evaluation) and the relative ranking of the trainee compared to his peers, each trainee chooses between becoming a judge and a prosecutor, subject to the number of allocated places for that cohort.⁴²⁹

During the second year of initial training, the main internship is meant to help judicial trainees to obtain "the practical knowledge and skills necessary for their future court activity", while the 'cross-disciplinary' internship has the role of giving judges and prosecutors the chance to understand the functioning and activities of each other's institutions and administrative processes.⁴³⁰ With regards to sentencing, the official rules are not detailed enough, but the internship diary that each trainee needs to fill in during his practice suggests that trainees observe as well as get the chance to write sentencing remarks themselves, under supervision.⁴³¹

NIM provides very specific guidelines regarding the type of cases a trainee has to observe and participate in (e.g. 2/3 civil cases, 1/3 criminal cases), the expected number of cases, the fact that they have to be diverse, or that they have to be typical/representative (rather than of an extraordinary nature).⁴³² In fact the NIM

⁴²⁸ *ibid.*

⁴²⁹ Parlamentul României Legea 303/2004 privind statutul magistratilor (n 239) s 16.3.

⁴³⁰ Institutul National al Magistraturii, 'Program de Stagiu Judecatori 2013-2014' (n 411) 3.

⁴³¹ Institutul National al Magistraturii, 'Structura Caiet Practica Judecatori 2013-2014' <inm-lex.ro/fisiere/d_208/Structura%20Caiet%20practica_judecatori_2013_2014%20-%202.doc> accessed 17 January 2015.

⁴³² Institutul National al Magistraturii, 'Program de Stagiu Judecatori 2013-2014' (n 411) 5.

guidelines are very precise with respect to the content of cases that could constitute good internship material.⁴³³

The curriculum for induction training reflects the same ratio of subjects as for initial trainees, with 30% of the courses being focused on criminal law and procedure.⁴³⁴ The content of the seminars is established by the NIM based on the estimated minimal knowledge and skills that a judge has to have at the time of hearing their first case, which can happen immediately after appointment. The Criminal Law and Procedure module for induction trainees takes 12 days of training (amounting to 72 hours of contact).⁴³⁵ The 12 days are split among 6 topics (each with its lesson plan defined in advance by NIM). For instance, Lesson Plan number 1 addresses procedures and issues in hearing cases in first instance, while Lesson Plan number 3 focuses on aspects of sentencing.⁴³⁶

Months 4, 5 and 6 (12 weeks) are spent by induction trainees in their assigned courts/offices. This time, induction trainees are expected to hear, write judgments (including sentencing remarks) for, and report back to the NIM on at least 10 court cases as part of their monitoring process. During this entire time, induction trainees are supervised by a more senior member of their office, who at the end of the 6-month period is required to write an evaluation report.⁴³⁷

Continuous training

According to Romanian Law 303/2004, Romanian judges and prosecutors are expected to undertake continuous training activities at least every three years, and

⁴³³ *ibid* 6–8.

⁴³⁴ Consiliul Superior al Magistraturii Hotarare CSM nr. 231/2012 referitoare la structura cursurilor de formare pentru magistratii numiti in cond. art. 33 alin. 1 din L303/2004 (n 406) 4.

⁴³⁵ *ibid* 10.

⁴³⁶ *ibid* 14–6.

⁴³⁷ *ibid* 5.

‘continuous training’ is understood as any form of formal training in legal content offered to magistrates either by the NIM, training institutions, or any other vocational training programmes.⁴³⁸ Continuous training is nevertheless expected to cover specific areas of content: national and international law, landmark cases from national courts, the ECHR, and the CJEU; new statute law and institutions; as well as judicial deontological norms, foreign languages and IT skills.⁴³⁹

Continuous training is offered either locally in the 15 Courts of Appeal around the country with the aid of NIM (decentralized training), or at the NIM office in Bucharest (centralized training). Each year, in February, the NIM publishes a training catalogue containing all centralised and decentralised training sessions available that year, and disseminates it through all the Romanian courts and public prosecutor’s offices throughout the country. The courts and offices then solicit from each judge and prosecutor their top 3 preferences from the catalogue and need to approve them locally before submission to NIM.⁴⁴⁰ If NIM receives more requests than the allocated places, it uses 3 selection criteria to determine which magistrate has priority.⁴⁴¹

Since 2006, the NIM has organised an average of 211 continuous training sessions per year. The rate increased substantially in 2013, with NIM organising 255 sessions with 4,522 participating magistrates, 64% being judges and 35% prosecutors.⁴⁴² The main reason for the increase was the preparation offered by NIM in the new civil and civil procedure codes, with 114 seminars and 4 conferences (46% of all training sessions) preparing 2,901 magistrates (63% judges, 36% prosecutors) on the new codes.⁴⁴³ This was continued in 2014, at the time of the research, through 107 local

⁴³⁸ Parlamentul României Legea 303/2004 privind statutul magistratilor (n 239) s 37.

⁴³⁹ *ibid* 35.2.

⁴⁴⁰ Institutul National al Magistraturii, ‘Programul de Formare Continua 2014’ 27.

⁴⁴¹ The selection criteria are: (1) magistrates that have not been through training throughout the past 3 years have priority; (2) magistrates that have to hear cases most related to the training have priority; (3) other criteria, such as the availability of other similar decentralised training in the magistrate’s geographical area. *ibid* 28.

⁴⁴² *ibid* 5–6.

⁴⁴³ *ibid* 7.

seminars and 14 national and international conferences on the new criminal and criminal procedure codes.⁴⁴⁴

In 2014 (study period), 2,941 judges and 1,832 prosecutors underwent continuous training.⁴⁴⁵ There is no publicly-available data on the demographic characteristics of the continuous training participants. Yet, given that the 4,822 participants represent more than 75% of all Romanian magistrates,⁴⁴⁶ and that the selection system is randomised enough to prevent any consistent selection bias, it can be expected that the participants have the same characteristics as the entire Romanian judiciary.

The NIM uses 2 major training formats in its continuous training activities: small-group decentralised seminars at the Courts of Appeal around the country, and large-scale national conferences. A typical Court of Appeal seminar last no more than 2 days, with 15-25 participants and normally one trainer. Given the smaller format, the seminars allow for more interactive discussion. The larger centralised “national conferences” are lecture-based, with one or several trainers lecturing on aspects of the assigned topic. Conferences also have question and answer (Q&A) sessions. Conferences last for 2-3 days and average 60-120 participants.⁴⁴⁷

Continuous training in criminal law and sentencing

The figure below was computed from all the publicly available NIM continuous training reports, which summarise the content and number of sessions/participants for years 2013-2016.⁴⁴⁸ It offers an overview of the proportions of criminal training

⁴⁴⁴ *ibid* 16.

⁴⁴⁵ Institutul National al Magistraturii, ‘Programul de Formare Continua 2015’ 11.

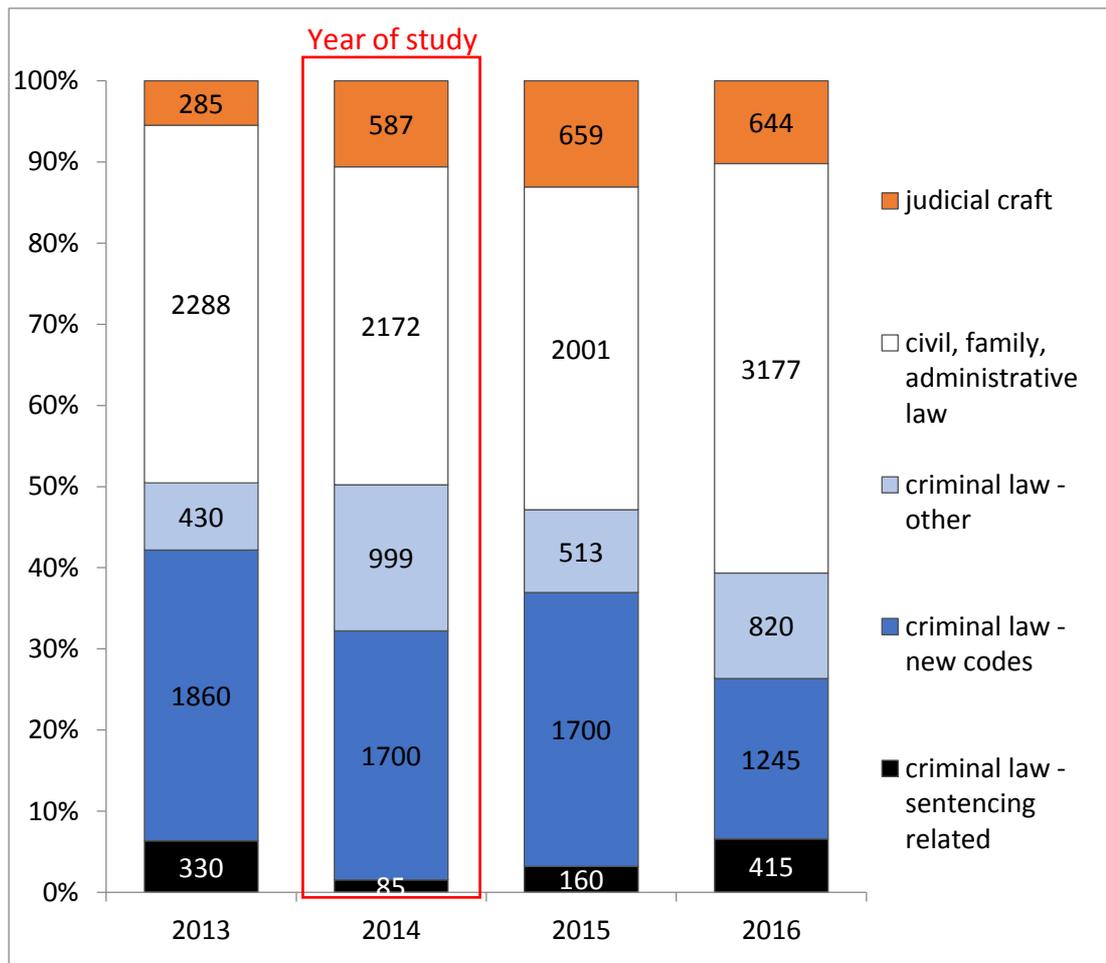
⁴⁴⁶ *ibid* 10.

⁴⁴⁷ Institutul National al Magistraturii, ‘Programul de Formare Continua 2014’ (n 440).

⁴⁴⁸ Institutul National al Magistraturii, ‘Calendarul Seminariilor de Formare Continua Pentru Anul 2013 - Pe Domenii’ <http://inm-lex.ro/fisiere/d_178/Calendarul%20pe%20domenii%20al%20actiunilor%20de%20formare%20continua%20%202013.pdf> accessed 13 October 2016; Institutul National al Magistraturii, ‘Calendarul Seminariilor de Formare Continua Pentru Anul 2014 - Pe Domenii’ <http://inm-lex.ro/fisiere/d_424/Calendar%20seminarii%202014-%20domenii.pdf> accessed 6 January 2015;

delivered compared to other areas of law, as well as the proportion of sentencing-related training (identified as such in a qualitative analysis of the 939 training sessions delivered across the 4 years).

FIGURE 6: TYPE OF CONTINUOUS TRAINING OFFERED BY NIM AND NUMBER OF PARTICIPANTS IN 2013-2016



On average, NIM delivered 235 continuous training sessions per year, training on average 5,518 participants per year (both judges and prosecutors). In general, the sessions were split evenly between criminal law training (47%) and civil law training

Institutul National al Magistraturii, 'Calendarul Seminariilor de Formare Continua Pentru Anul 2015 - Pe Domenii' <http://inm-lex.ro/fisiere/d_814/Calendar%20pe%20domenii%20al%20seminariilor%202015.pdf> accessed 13 October 2016; Institutul National al Magistraturii, 'Calendarul Seminariilor de Formare Continua Pentru Anul 2016 - Pe Domenii' <http://inm-lex.ro/fisiere/d_1227/Calendar%20pe%20domenii%20al%20seminariilor%202016.pdf> accessed 13 October 2016.

(43%) (understood as all areas of law such as civil, family, commercial and administrative law). Around 10% of the continuous training sessions are non-legal “generic skills” or “judicial craft” training, comprising but not being limited to (1) verbal and non-verbal communication training; (2) foreign languages and foreign legal systems (e.g. principles of common law); (3) anti-discrimination training; (4) judicial conduct and ethics; (5) mediation. Since 2016 it also includes judgment drafting.

The figure further highlights the type of criminal legal training offered. It reveals that a very small percentage of continuous training (4% on average) specifically focuses on sentencing-related content. This comprises training on (1) criminology; (2) alternatives to custodial sentences; (3) offender rehabilitation; (4) sentence enforcement; (5) specific type of offences and their peculiarities. At the time of this study (2014), only 2% of the training offered was sentencing-focused.

An important point to note is that sentencing is not treated as a topic *sui generis* in Romanian judicial practice, but rather an integral part of criminal legal practice. For this reason, during continuous training, aspects of sentencing practice may be addressed in relation to specific criminal offences, but there are almost no specific courses “on sentencing” organised by NIM. That said, the exploratory phase revealed that aspects of sentencing are often mentioned and discussed in more general criminal training sessions – therefore they should not be disregarded as environments for continuous training on sentencing. The figure above shows that the bulk (63%) of criminal training in the past 4 years has focused on the stipulations of the new criminal codes (enacted in February 2014). NIM has been training more than 1,600 judges and prosecutors each year on the new legislation.

An added difficulty in reviewing the statistical information is that judges and prosecutors are not separated – they are treated as “participants” in all the NIM statistics and reports. It is therefore impossible to compute exactly how many judges attended continuous training sessions on sentencing or criminal law in a given year. In order to estimate the rough population of judges undergoing continuous training in criminal law during 2014, one could take the overall ratio of

63% judges provided by the 2014 NIM report and assume the same distribution for the 2,784 sessions offered in criminal law subjects during 2014. This would yield **an estimation of 1,726 judges receiving continuous training in criminal law subjects in 2014**. The caveat is that this extrapolation could be wrong, because the participants in criminal law training could have a different distribution; for instance, it is very likely that more prosecutors attend criminal law training than other types of training, as it is most relevant for their job. For this reason, the above judge population is very likely to be an overestimate.

CHAPTER 5: SENTENCING IN ROMANIA

This chapter presents the basic structure of sentencing practice in Romania, and places this within the wider framework of sentencing practices around the world. The scope for judicial discretion in sentencing, the tools available and the structural limits define the environment in which judges in Romania learn to sentence.

Historical development of sentencing in Romania

Romanian criminal law and sentencing practices reflect a wide variety of influences from other jurisdictions, all throughout the history. In ancient times, Romania was a Roman province, therefore inheriting the principles of Roman law directly, through the application of the Justinian code throughout the Roman Empire.⁴⁴⁹ During the Middle Ages the three main provinces of what is now called Romania (Wallachia, Moldavia and Transylvania) were occupied by three large empires – the Ottoman, Russian and Austro-Hungarian empires respectively. Each of these brought their own influences to the customary rules.⁴⁵⁰ The Middle Ages also brought the first written rules, typically written by clerics in monasteries.⁴⁵¹ At that time, punishments focused on retribution, isolation and general deterrence.⁴⁵² There was a wide range of punishments available, most of them violent.⁴⁵³

⁴⁴⁹ Vladimir Hanga (ed), *Istoria dreptului românesc*, vol 1 (Editura Academiei Republicii Socialiste România 1987) 93–116.

⁴⁵⁰ *ibid* 153–68, 458–70.

⁴⁵¹ *ibid* 206–7.

⁴⁵² *ibid* 434.

⁴⁵³ Various types of capital punishment, mutilation, hitting, at least 5 types of imprisonment, fines and confiscation, as well as torture and civil degradation. *ibid* 447 Table XXXI.

During the Renaissance, the first legal *codes* written in Romanian language, called ‘the law of the country’, as well as some laws specifically regulating the criminal offences were issued in the three Romanian provinces.⁴⁵⁴ But regional differences were homogenised as Romania became a unitary state in 1859. In 1865 the first unified criminal code (the ‘Cuza code’), deeply influenced by the French (1810) and the Prussian penal codes (1859),⁴⁵⁵ marked the geopolitical reunification of Vallachia and Moldavia.⁴⁵⁶ In this way, modern Romanian sentencing policy was deeply influenced by French and German codes from which it borrowed a large majority of its legal concepts, principles and norms.⁴⁵⁷

In 1865, the Cuza code stipulated for the first time three main principles of Romanian criminal law: the principle of legality, the principle of equality before the law, and the ‘humanization’ of punishment.⁴⁵⁸ These principles were sourced from European thinkers such as Cesare Beccaria⁴⁵⁹ and Montesquieu,⁴⁶⁰ who advocated the replacement of the death penalty with rehabilitative measures.⁴⁶¹ As proof for this shift in mentality for the aims of criminal sentencing, for the first time in Romanian history, the Cuza code replaced the death penalty with lifelong forced labour. In addition, the range of sentences available was quite wide, including, in order of severity, forced labour (in extremely difficult conditions, e.g. in mines), ‘reclusion’ in a workhouse, ‘detention’ (typically in monasteries, no work required⁴⁶²), ‘correctional imprisonment’ (with or without rehabilitative work), ‘civil degradation’ (loss of a wide range of civic rights), ‘interdiction of some rights’ and

⁴⁵⁴ *ibid* 207–22.

⁴⁵⁵ Alexandru Ioan Cuza, *Codul Penal din 1865* 1864 s Introduction.

⁴⁵⁶ Eugen Plugaru, ‘The Evolution of Romanian Law between 1700 and 1923’ (2003) II Noema 159.

⁴⁵⁷ Dumitru Firoiu and Liviu Marcu (eds), *Istoria dreptului românesc*, vol 2 (Editura Academiei Republicii Socialiste România 1987) 315–20.

⁴⁵⁸ Alexandru Ioan Cuza *Codul Penal din 1865* (n 455) s 2; Firoiu and Marcu (n 457) 325.

⁴⁵⁹ Beccaria (n 20).

⁴⁶⁰ Montesquieu (n 18).

⁴⁶¹ Firoiu and Marcu (n 457) 315.

⁴⁶² Alexandru Ioan Cuza *Codul Penal din 1865* (n 455) s 20.

fines.⁴⁶³ During the 19th century, the European reforms in sentencing brought about a creation and establishment of prisons,⁴⁶⁴ which for Romania meant an improvement of custodial sentences from the salt mines (where the conditions were incredibly harsh) to modern prisons.⁴⁶⁵ Additionally, for the first time the Cuza code classified offences into contraventions, delicts and crimes based on the seriousness of the offence.⁴⁶⁶ These categories are typical of many continental European jurisdictions, especially those influenced by the Napoleonic code.⁴⁶⁷

The inter-war 1938 criminal code⁴⁶⁸ evolved significantly in terms of sentencing principles and practices. First, it added the educational aspect to the general aims of punishment, thus inaugurating several classes of alternative punishments, educational and security measures.⁴⁶⁹ The non-custodial alternatives to punishment policy were more aligned with Western European sentencing policies, whereas in most Central and Eastern European states non-custodial sentences only appeared very late, at the end of the 20th century.⁴⁷⁰ Second, it instituted the sentencing principle that calls for the individualisation of the sentence according to the specificities of the offence⁴⁷¹ and remains a key sentencing principle in Romanian practice, as well as instructing judges how to compute sentences for multiple offences or for reoffenders.⁴⁷² The 1938 code was also the first one to apply to the entire Romanian territory, reflecting the 1918 ‘big reunification’ in which Transylvania joined Wallachia and Moldavia to form ‘Great Romania’.

⁴⁶³ *ibid* 7–9.

⁴⁶⁴ Foucault (n 40).

⁴⁶⁵ Firoiu and Marcu (n 457) 354–7.

⁴⁶⁶ Alexandru Ioan Cuza Codul Penal din 1865 (n 455) s 1.

⁴⁶⁷ Adh mar Esmein, *A History of Continental Criminal Procedure: With Special Reference to France* (The Lawbook Exchange, Ltd 2000) 46.

⁴⁶⁸ Carol II, Codul penal Carol al II-lea 1939.

⁴⁶⁹ *ibid* 25–60, 71.

⁴⁷⁰ Vira Zemlyanska, ‘Justice and Sentencing Traditions in Central and Eastern Europe’ 1 <<http://restorativejustice.org/10fulltext/zemlyansha>> accessed 10 January 2017.

⁴⁷¹ Carol II Codul penal Carol al II-lea (n 468) s 21.

⁴⁷² *ibid* 101–19.

During the communist regime (1947-1989) the 1936 criminal code was not changed per se, but a new principle of legal interpretation was added: 'infractiunea prin analogie' (i.e. criminal offence by analogy).⁴⁷³ This new principle allowed extensive judicial discretion since an individual could be charged with a new, unregulated offence just by it being argued that the deed was analogous to an existing offence.⁴⁷⁴ This principle of the criminal offence by analogy ran counter the principle of legality and turned criminal law into a political instrument of control for the communist regime.⁴⁷⁵ This principle was abolished in 1969 when a new criminal code was enacted.⁴⁷⁶ Although it was modified numerous times, especially during the Romanian democratic revolution of 1989, the 1969 code was in force until very recently (1 February 2014). Its last re-enactment in 1997 marked the post-communist era in Romanian criminal law.⁴⁷⁷

The communist regime re-aligned Romania with the more punitive sentencing systems of Central and Eastern Europe, namely the former Soviet republics or USSR satellite countries.⁴⁷⁸ Unlike Western Europe, Central and Eastern European jurisdictions have highly punitive systems, use custody as the main tool of punishment, often imprison offenders for lengthy periods of time, and the public opinion on crime and punishment is significantly harsher than Western European peoples.⁴⁷⁹ These characteristics are said to derive from the Soviet socialist principles:

⁴⁷³ Siegfried Kahane, *Dreptul procesual penal în R.P.R.* (Editura Didactică și Pedagogică 1963).

⁴⁷⁴ Republica Socialista Romania, Codul Penal din 1936 1948 s 1.

⁴⁷⁵ Kahane (n 473).

⁴⁷⁶ Marea Adunare Nationala, Codul Penal din 1968 1969; Stefan Gheorghies, 'Codul Penal Din 1865/ Codul Penal Din 1969. Principii Generale' <<http://blog.wolterskluwer.ro/2013/01/codul-penal-din-1865-codul-penal-din-1969-principii-generale/>> accessed 10 June 2013.

⁴⁷⁷ Parlamentul Romaniei, Codul Penal din 1968 actualizat in 1997 1997.

⁴⁷⁸ Zemlyanska (n 470) 1.

⁴⁷⁹ Sorin Hanganu, 'Ideologies in Sentencing in Central and Eastern European Countries' Third Conference of the European Forum for Victim-Offender Mediation and Restorative Justice, "Restorative Justice in Europe: Where are we heading?" (2005) <<http://www.justiciarestaurativa.org/mount/www.restorativejustice.org/articlesdb/articles/5935>> accessed 18 January 2017.

Under socialism the penal system was unable to set itself completely free from the legacy of the sadly notorious Stalinist GULAG. [...] While Western European democracies underwent a process of liberalisation in their criminal justice and penal policies after World War II, which included abolition of the death penalty and the development of alternatives to imprisonment, the criminal justice systems of socialist countries did not experience the same type or degree of liberalisation. Contrary to Western world, prison in the Soviet Union was seen as the norm. Peculiarity of the Soviet regime was that prisoners' work was regarded as central to the advancement of the Soviet economy.⁴⁸⁰

The more punitive character of Eastern European sentencing practices (including Romania's) during and after the communist era has also been attributed to the arrival of capitalism after the collapse of the USSR which created new crimes. The transition from socialism to capitalism, coupled with corruption and poverty, led to almost a doubling of property offences such as burglary or motor vehicle theft in Romania.⁴⁸¹ This in turn naturally led to an increase in public fear of crime, and consequently a hardening of public opinion against crime.⁴⁸²

The more punitive and custodial character of sentences in Eastern European criminal justice systems is empirically confirmed by the World Prison Population List, which shows comparative prison figures for the past 15 years. Central and Eastern European countries have the highest average of prisoners per capita (219) compared to Northern (124), Western (81) or Southern (130) jurisdictions, and are higher than the world average (144).⁴⁸³ This is true for all prison figures between 2000 and present. That said, Romania seems less punitive on average than other⁴⁸⁴ Central and Eastern European countries (143 – close to the world average), and it

⁴⁸⁰ Zemlyanska (n 470) 2.

⁴⁸¹ *ibid.*

⁴⁸² *ibid* 2–3; Also see 'ICVS - International Crime Victims Survey' (n 114).

⁴⁸³ Table 4 Roy Walmsley, 'World Prison Population List (11th Edition)' (World Prison Brief 2016) 10–2

<http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf> accessed 18 January 2017.

⁴⁸⁴ Apart only from Bulgaria (125) (*ibid.*).

has been increasingly less punitive for the past 15 years.⁴⁸⁵ This fact can be explained by the historical influences on Romanian sentencing policies (discussed above); despite the influence of Soviet punitiveness, it also has a long history of Western and Central European influences, mainly from civil law jurisdictions.

During the past 15 years, Romania has moved further away from the communist Soviet influence and closer to Western European liberal principles. Romania joined NATO in 2004⁴⁸⁶ and the European Union in 2007, which meant it was bound by the joining conditions to make significant reforms to its criminal justice system as well as to harmonise its legislation with EU regulations.⁴⁸⁷ As a result, a new criminal code and a new criminal procedure code were recently enacted on February 1st 2014.⁴⁸⁸ They include important reforms, some of which will have significant repercussions for the administration of justice in Romania. For instance, the new criminal procedure code (NCPC) marks a paradigmatic shift from the organisation of the criminal trial as an inquisitorial process, towards a more adversarial process.⁴⁸⁹ Moreover, the prosecution now has the power to decide if it is in the public interest to pursue a charge against a defendant or not. This 'public interest test' is established for the first time in Romanian law and it is known as the 'principle of

⁴⁸⁵ *ibid.*

⁴⁸⁶ 'NATO Update: NATO Welcomes Seven New Members - 2 April 2004' <<http://www.nato.int/docu/update/2004/04-april/e0402a.htm>> accessed 11 February 2017.

⁴⁸⁷ Nicholas Watt Alan Travis, 'Romania and Bulgaria to Enter - with a Warning' *The Guardian* (27 September 2006) <<https://www.theguardian.com/world/2006/sep/27/topstories3.immigrationandpublicservices>> accessed 11 February 2017.

⁴⁸⁸ Mihaela Oprea, 'Reforma in Materie Penala: Codul Penal Si Codul de Procedura Penala, Mai Aproape de Intrarea in Vigoare. Actele Normative Care "pregatesc Terenul", Aprobate de Senatori' *AvocatNet* (3 June 2013) <http://www.avocatnet.ro/content/articles/id_30488/Codul-penal-si-Codul-de-procedura-penala-in-vigoare-de-la-1-februarie-2014.html#axzz2GBXLvzyw> accessed 7 June 2013; 'Pivniceru: Sistemul Judiciar Este Pregătit Pentru Intrarea În Vigoare a Noul Cod de Procedură Civilă' *MonitorulSV* (21 December 2012) <<http://www.monitorulsv.ro/Ultima-ora/2012-12-21/Pivniceru-Sistemul-judiciar-este-pregatit-pentru-intrarea-in-vigoare-a-noul-cod-de-procedura-civila#ixzz2VXGqLRQk>>.

⁴⁸⁹ This has taken place in other similar jurisdictions, such as Italy. Sentencing Commission for Scotland, 'Sentencing Guidelines Around the World' (2015) 44 <<https://www.scottishsentencingcouncil.org.uk/media/1109/paper-31a-sentencing-guidelines-around-the-world.pdf>> accessed 28 November 2016.

opportunity for initiating the criminal prosecution'.⁴⁹⁰ The next section presents in more detail the current characteristics of the Romanian sentencing framework, which forms the environment in which Romanian judges sentence (and learn to sentence).

Romania's sentencing framework

The brief historical background suggests that Romania's sentencing practices had multiple influences throughout the centuries, ranging from Roman law, to French, German, Turkish influences, as well as a later influence from Soviet law. In recent decades, Romania's practices have been harmonised with EU legislation and principles – its recently-enacted codes reflect this harmonisation. Due to this multitude of influences over time, it is rather difficult to place Romania within a sentencing model. While previous sections presented useful typologies of justice systems, making it easier to place Romania in a more international framework, explaining where Romania stands in terms of its sentencing practices is more difficult, because the distinctions between "sentencing models" is less clear-cut. In comparing sentencing practices across world jurisdictions, Michael Tonry explains that, in general, there are always two competing principles at play when trying to understand sentencing models: the principle of consistency (treat similar cases alike) and the principle of difference (treat different cases differently). He also argues that focusing on one these principles at the expense of the other does not just make various countries differ in their policies,⁴⁹¹ but also makes judges vary in their day-to-day practice.⁴⁹² Another major study of 26 jurisdictions pointed out the impossibility of building a typology of sentencing models, and instead proposed

⁴⁹⁰ Cristinel Ghigheci, 'Noul Cod de Procedura Penală. Principii (I)' *JURIDICE.ro* (11 November 2011) <<http://www.juridice.ro/169053/noul-cod-de-procedura-penala-principii-i.html>> accessed 7 June 2013.

⁴⁹¹ Tonry (n 39) 21–4.

⁴⁹² "Most judges [...] believe that justice in sentencing depends on ever-provisional resolutions between the injunctions to treat like cases alike and different cases differently." *ibid* 20.

seeing different jurisdictions as being placed on a continuum based on the judicial discretion they allow in sentencing:

Sentencing frameworks can be regarded as lying along a continuum that ranges from, at one extreme, highly prescriptive systems that afford individual sentencers very little discretion in sentencing individual cases to, at the other extreme, systems that impose very few constraints on sentencers' decision making and allow them to exercise wide discretion in sentencing individual cases.⁴⁹³

Therefore, the diversity in national policies and judicial practices in sentencing may best be understood by looking at *seven* dimensions of sentencing practice that can vary across jurisdictions, all which affect judicial discretion in sentencing:

1. **Aims of sentencing:** what are the officially acknowledged aims of sentencing in each jurisdiction? Do some aims get priority in front of others?
2. **Classification of offences:** how are offences classified? By severity? By object?
3. **Diversity of available punishments:** what punishments are available to judges? Can judges choose between custodial/non-custodial sentences?
4. **Starting points for sentences:** do judges get specific, presumptive points, or ranges? Statutory minimums/maximums, presumptive/voluntary sentencing frameworks. Can judges go below/above statutory minimums/maximums/presumptive points?
5. **Official binding sources for sentencing:** what official sources for sentencing do judges *have to* take into account when deciding a sentence? Legislation, case law, guidelines, sentencing information systems etc.
6. **Sentencing factors:** are sentencing factors stipulated in official sources? Are they exhaustive? Are they prioritised?

⁴⁹³ Sentencing Commission for Scotland (n 489) para 2.

7. **Computing sentences:** how are judges guided to compute sentences? Grids, step-by-step guidance, principled guidance, no guidance.

Each of these seven dimensions determines the scope for judicial discretion in sentencing and determines the peculiarities of the environment in which national judges learn to sentence during their professional practice. Each of these is considered below in the Romanian context.

Aims of sentencing

The aims of sentencing guide judges in national jurisdictions as to what category and amount of punishment is best suited for certain offenders in view of protecting social values and furthering social aims. In many world jurisdictions, the aims of sentencing range from *deterrence* (preventing the offender to cause future crimes, as well as discouraging other potential offenders), to *rehabilitation* (helping the offender reintegrate and address the socio-economic causes of their offending), *isolation* (physically protecting the victims or the population from the offender's actions), and *retribution* (repaying/restoring the damage caused by the offence). These aims have been defined by sentencing scholars and policymakers for centuries.⁴⁹⁴ In Romania, in line with the Council of Europe recommendation on consistency in sentencing,⁴⁹⁵ the criminal code defines deterrence, retribution, isolation and rehabilitation as the sentencing aims Romanian judges need to take into account.⁴⁹⁶ According to sentencing scholars, Europe is the only continent to have made a concerted effort to develop common standards for sentencing (through the European Convention of Human Rights, the Council of Europe

⁴⁹⁴ Blackstone (n 30) 11–2; Also see Bentham (n 36) s 13.2.

⁴⁹⁵ Council of Europe, Recommendation R (92) 17 concerning consistency in sentencing 1992.

⁴⁹⁶ Noul Cod Penal (v 1 Feb 2014) 2014; George Antoniu (ed), *Noul Cod Penal Comentat: Volumul I (art. 1-56)*, vol 1 (CH Beck 2006).

recommendations, as well as projects for an EU charter of human rights).⁴⁹⁷ For that reason, Romanian sentencing aims are very much in line with most European jurisdictions.

Yet these aims, although specifically defined in criminal law, are not prioritised against one another, therefore causing differences in sentencing due to the different ranking judges give to different aims in specific cases.⁴⁹⁸

Classification of offences

Amongst all democratic countries, offences are often classified by severity, where more severe offences are primarily punished through custody, while less severe offences are punished by non-custodial, “community penalties”.⁴⁹⁹ In Romania, the offences used to be classified by severity into crimes and delicts (similar to other Latin European jurisdictions)⁵⁰⁰ even in the initial formulation of the 2014 criminal code.⁵⁰¹ However, this formal distinction has been eliminated in the current version of the code.⁵⁰² Instead, the offences are generally classified by the “social value” that is affected by the offence. These are summarised in the table below.

⁴⁹⁷ Andrew Ashworth, ‘European Sentencing Traditions: Accepting Divergence or Aiming for Convergence?’ in Neil Hutton and Cyrus Tata (eds), *Sentencing and Society: International Perspectives* (Routledge 2002) 220–3.

⁴⁹⁸ “The main burden of reconciling the competing goals of the criminal justice system falls on the sentencing judge.” (Hogarth (n 92) 3–4.)

⁴⁹⁹ Tonry (n 39) 3.

⁵⁰⁰ Sentencing Commission for Scotland (n 489) 45.

⁵⁰¹ Antoniu, *Noul Cod Penal Vol I* (n 496) 24–7.

⁵⁰² *Noul Cod Penal* (v 1 Feb 2014) (n 496) s 3.

TABLE 3: CATEGORIES OF CRIMINAL OFFENCES IN ROMANIAN LAW BY SOCIAL VALUE AFFECTED⁵⁰³

Against persons
against life (e.g. murder, euthanasia, assisted suicide, manslaughter)
against corporal integrity and health (e.g. hitting, bodily harm, serious bodily harm)
against freedom (e.g. threatening, blackmail, kidnapping, harassment, slavery, trafficking)
against sexual freedom (e.g. rape, sexual assault)
against home and privacy
Against property (e.g. theft, robbery, breach of trust, embezzlement, electronic fraud, destruction/disturbance of possession)
Against state authority (e.g. affront to signs or symbols, defamation, fraudulent crossing of border)
Against the justice system (e.g. false testimony, non-denunciation of offences, supporting offenders, illegal arrest/abusive prosecution, subjection to ill treatment, torture)
Public office and corruption offences (e.g. negligence, bribe, abuse of power)
Forgery (e.g. forgery of coins, stamps, of official instruments, in documents)
Against public security (e.g. security on railways, public roads, non-compliance with legal treatment of firearms, nuclear material or explosives, against public health)
Against civil society (e.g. against peace and public order, against family, against religious freedom and respect for the deceased)
Electoral offences
Against national security

Diversity of available punishments

There is a wide diversity of available punishments across world jurisdictions, and their judicial usage varies too. For instance, in Germany and Austria, *prison sentences* shorter than 6 months are regarded as “destructive”; in Sweden and Finland, certainty and not severity of punishment is considered important, therefore most custodial sentences are just a few days or weeks long; England, Scotland and

⁵⁰³ *ibid* 188–445 Partea Speciala.

the Netherlands use *community service* often; in Germany and Scandinavia, *day fines* are widely used, but not so much in the rest of Europe; while *electronic monitoring* is only widely used in the US.⁵⁰⁴ One of the factors affecting the diversity of available punishments is the belief among policymakers “about the causes of crime and the capacity of criminal justice policy changes to affect crime rates”.⁵⁰⁵ For instance, England, US and Australia assume that “crime is primarily the result of bad or irresponsible people”, thus resulting in harsher punishments; while in Scandinavian or Germanic jurisdictions, such as Sweden and Finland, “sentencing and punishment play an important backup role in norm-reinforcement, but that primary institutions, such as the family, the church, and the school, play the primary roles in socializing people into law-abiding habits” so the punishment aims to be certain but not harsh.⁵⁰⁶

Romanian law distinguishes between five main categories of sentences available to judges. They are reproduced in Table 4 below. The “principal” (main) sentences available are indicated in the criminal code for each offence. They typically consist in custodial sentences, but for lesser offences the code gives the judge the discretion to choose between a custodial and a non-custodial sentence (a “fine”).⁵⁰⁷ As the table below reveals, a “fine” can actually be replaced by community service or by custody if the judge decides this is appropriate, so in a sense it is more generic than just a financial punishment. In addition to the main custodial or non-custodial sentence, the law also stipulates additional suspension of rights. These suspensions are considered “accessory” sentences if they take place for the duration of the “main” sentence, or considered “complementary” sentences if they are added on top of the main sentence and their effect lasts for a longer time, even after the main sentence is served.⁵⁰⁸ What other countries consider alternative non-custodial sentences, Romania calls “security measures”, as they refer to the sentencing aim

⁵⁰⁴ Tonry (n 39) 4–5.

⁵⁰⁵ *ibid* 3.

⁵⁰⁶ *ibid* 3–4.

⁵⁰⁷ Noui Cod Penal (v 1 Feb 2014) (n 496) ss 56–64.

⁵⁰⁸ *ibid* 65–70.

of isolating the offender and protecting society and the victims from his negative influence. From this perspective, medical, psychiatric, drug treatments and hospitalisations are considered security measures. Confiscation of proceeds of crime and of assets is also considered a security measure (against reoffending).⁵⁰⁹

TABLE 4: DIVERSITY OF SENTENCES AVAILABLE TO ROMANIAN JUDGES⁵¹⁰

Types of sentences	Amount (ranges)
1. "Principal" (main) sentences	
Life (indeterminate) imprisonment	30+ years
Custody	15 days - 30 years
Fine (fine-days)	30-400 days * 10-500 RON per day
Fine only	60-180 days
Fine on top of custody (max 2 yrs)	120-240 days
Fine on top of custody (2+ yrs)	180-300 days
	<i>Can be converted to custody if offender refuses to pay (1 fine-day = 1 day of custody)</i>
Community sentence	equivalent of fine-days (1 fine-day = 1 day of community work)
<i>If defendant is unable to pay fine.</i>	<i>Can be converted to custody if offender refuses to work.</i>
2. "Accessory" sentences (in addition to custody)	
<i>Suspension of:</i>	
Right to be elected	Has the same duration as the custodial sentence (indeterminate or determinate). For indeterminate sentences, offender loses these rights for his entire life even if he is released.
Right to work in the government	
Right of foreigner to reside in Romania	
Right to vote	
Parental rights	
Custodian rights	
3. "Complementary" sentences (after release from custody)	
<i>Suspension of:</i>	
Right to be elected	1-5 years after release
Right to work in the government	
Right of foreigner to reside in Romania	
Right to vote	
Parental rights	
Custodian rights	

⁵⁰⁹ ibid 107–12.

⁵¹⁰ ibid 53–70, 107–12, 115–25.

Types of sentences	Amount (ranges)
Right to practice profession or activity that led to offence	
Right to own arms	
Right to drive certain vehicles	
Right to leave the country	
Right to manage a corporate entity	
Right to approach certain cities, locations, the victim, the victim's work/home, the accomplices	
Military service	
Publication of sentence in national newspapers	
4. "Security measures"	
Medical/psychiatric treatment	
Psychiatric hospitalisation	
Barring from profession	
Freezing, seizure or confiscation of crime assets (limited)	
Freezing, seizure or confiscation of assets (extended)	
5. Young offenders sentences	
<i>Non-custodial sentences (first time offender or adult sentence 7+ years custody)</i>	
Civic training	up to 4 months
Supervision	2-6 months
Curfew (weekend)	4-12 weeks
Daily assistance	3-6 months
<i>Custodial sentences</i>	
In youth educational centre	1-3 years
In youth prison	2-5 years (up to 20 yrs custody for adults), 5-15 years (20+ yrs custody adults)
Complementary/optional requirements	
Educational/professional training	
Barring of right to approach certain cities, locations, the victim, the victim's work/home, the accomplices	
Medical treatment/checkups	
Probation service verifications	

There are also special considerations given to youth offenders. Unlike adult offenders, youth offenders enjoy a wider range of non-custodial sentences (civic

training, supervision, curfew) that emphasise rehabilitative and educational aims.⁵¹¹ Even the custodial sentences are offered in specialised youth educational centres or in youth prisons.⁵¹² To these main sentences, Romanian judges can add a range of complementary measures (professional training, medical treatment etc.) to help young offender reintegrate in society.⁵¹³

Differences in judicial sentencing powers

The difference in sentencing powers between Romanian judges at different court levels is determined by the different types of offences they are by law able to hear in their court. The new criminal procedure code stipulates the level of court that hears specific offences. The general rule is that higher courts deal with more serious offences (involving death as well as demonstrated criminal intent, or involving threats to national security) or with regular offences committed by more “powerful” individuals (legal professionals, judges, politicians). The table below details the offences heard by each level of court.

⁵¹¹ *ibid* 117–23.

⁵¹² *ibid* 124–7.

⁵¹³ *ibid* 121.

TABLE 5: SENTENCING JURISDICTION OF ROMANIAN JUDGES PER EACH COURT LEVEL⁵¹⁴

Court level	Offence types
Local courts ('judecatorii')	- all offences not heard by higher courts: manslaughter, assisted suicide, assault, bodily harm, offences against family/foetus, freedom offences (blackmail, harassment, slavery), sexual offences, theft, robbery, abuse of trust offences, offences against justice, forgery
County courts ('tribunale')	- all offences with criminal intent, which resulted in death or suicide of victim; - manslaughter, murder, human trafficking, destruction causing disaster, immigrant trafficking, torture, public office offences (bribe, corruption), revealing state secrets, nuclear and explosive offences, spreading AIDS, ICT offences;
Military county courts ('tribunale militare')	- military offences by military officers up to colonel (desertion, insubordination, abuse of authority, capitulation, refusing military enrolment during war etc.)
Courts of appeal	- specific high-level offences: offences against state security (treason, coups, espionage), genocide, crimes against humanity, war crimes; - all offences by lower court judges and prosecutors; all offences by legal professionals;
Military courts of appeal	- same as court of appeals, but for military above colonel and high-level military offences;
High Court	- all offences by high public officials, higher tier judges and prosecutors, high rank military.

⁵¹⁴ Noul Cod de Procedura Penala (n 230) ss 35–40.

Starting points for sentences

There are different models used in different jurisdictions on the starting point for a sentence. Some jurisdictions stipulate specific, presumptive starting points for a sentence, which can then be modified based on aggravating and mitigating factors (US, Netherlands).⁵¹⁵ These starting points are stipulated in either matrices, narrative statements, or offence-specific scoring sheets. In contrast, most European jurisdictions have statutory sentencing ranges for types of offences.⁵¹⁶ This is the case in Romania. Table 6 below compares statutory sentence ranges from 23 European jurisdictions, including Romania, for 8 different types of offences (focusing on custodial sentences). The table also reveals how Romanian custodial sentence ranges compare to most European countries. For instance, Romania has the same sentence ranges as most European countries for offences such as intentional homicide (10+ years), robbery (2-5 years), assault (up to 2 years), sexual assault (2-7 years), and drug offences (2-5 years). For theft, Romania has a very wide range (6 months – 3 years) allowing judges a wider sentencing discretion than most other European counterparts;⁵¹⁷ while for burglary, it resembles only England and Wales (2-7 years); most other European countries are more lenient with this category of offence (less than 2 years custody). Finally, regarding rape, European jurisdictions seem to be split, with 10 countries awarding 2-5 years, while another 7 award 5-10 years of custody. Romania offers a wider discretion, allowing judges to award custody anywhere between 3 and 10 years. No geographical or historical patterns can be noticed between countries with similar sentencing ranges, so there are no sentencing clusters.

⁵¹⁵ Tonry (n 39) 21–4.

⁵¹⁶ Ben Politowski, 'Comparative Prison Sentences in the EU' (UK House of Commons 2015) <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7218>> accessed 3 March 2017.

⁵¹⁷ Ashworth notes an increasing leniency for theft across Western Europe in the past few years Christopher Nuttall (ed), *Crime and Criminal Justice in Europe* (Council of Europe 2000) 112.

TABLE 6: COMPARATIVE TABLE FOR SENTENCE RANGES IN 8 OFFENCE TYPES ACROSS 23 EUROPEAN COUNTRIES⁵¹⁸

Country	Intentional homicide	Robbery	Theft (total)	Theft (burglary)	Rape	Sexual assault	Assault (injury)	Drug offences
Albania	10+ years	5 - 10 years	1 - 2 years	-	5 - 10 years	2 - 5 years	1 - 2 years	2 - 5 years
Armenia	5 - 10 years	5 - 10 years	2 - 5 years	-	2 - 5 years	2 - 5 years	2 - 5 years	0.5 - 1 year
Austria	5 - 10 years	1 - 2 years	Less than 6 Months	Less than 6 Months	1 - 2 years	2 - 5 years	Less than 6 Months	Less than 6 Months
Bulgaria	10+ years	1 - 2 years	Less than 6 Months	-	1 - 2 years	1 - 2 years	Less than 6 Months	0.5 - 1 year
Croatia	2 - 5 years	1 - 2 years	Less than 6 Months	0.5 - 1 year	2 - 5 years	2 - 5 years	Less than 6 Months	2 - 5 years
Cyprus	10+ years	2 - 5 years	1 - 2 years	1 - 2 years	5 - 10 years	0.5 - 1 year	Less than 6 Months	2 - 5 years
Czech Republic	5 - 10 years	2 - 5 years	0.5 - 1 year	-	2 - 5 years	2 - 5 years	2 - 5 years	2 - 5 years
Finland	2 - 5 years	0.5 - 1 year	Less than 6 Months	-	1 - 2 years	1 - 2 years	Less than 6 Months	Less than 6 Months
France	10+ years	-	Less than 6 Months	-	10+ years	1 - 2 years	Less than 6 Months	Less than 6 Months
Germany	5 - 10 years	2 - 5 years	0.5 - 1 year	0.5 - 1 year	2 - 5 years	2 - 5 years	0.5 - 1 year	2 - 5 years

⁵¹⁸ Adapted from Politowski (n 516) Table 3. Added data on Romania (From Noul Cod Penal (v 1 Feb 2014) (n 496) ss 189, 194, 218–9, 228–9; and Parlamentul Romaniei, Legea nr 143/2000 privind combaterea traficului si consumului ilicit de droguri 2000 s 4.) and excluded countries without data.

Country	Intentional homicide	Robbery	Theft (total)	Theft (burglary)	Rape	Sexual assault	Assault (injury)	Drug offences
Greece	10+ years	1 - 2 years	Less than 6 Months	-	10+ years	1 - 2 years	Less than 6 Months	Less than 6 Months
Hungary	10+ years	5 - 10 years	0.5 - 1 year	-	5 - 10 years	5 - 10 years	0.5 - 1 year	5 - 10 years
Italy	10+ years	10+ years	5 - 10 years	10+ years	-	10+ years	10+ years	10+ years
Netherlands	1 - 2 years	Less than 6 Months	Less than 6 Months	Less than 6 Months	2 - 5 years	Less than 6 Months	Less than 6 Months	Less than 6 Months
Poland	10+ years	2 - 5 years	1 - 2 years	1 - 2 years	2 - 5 years	2 - 5 years	1 - 2 years	1 - 2 years
Romania	10+ years	2 - 7 years	0.5 - 3 years	2 - 7 years	3 - 10 years	2 - 7 years	0.4 - 2 years	2 - 5 years
Serbia	10+ years	1 - 2 years	Less than 6 Months	-	2 - 5 years	2 - 5 years	Less than 6 Months	Less than 6 Months
Slovakia	10+ years	2 - 5 years	0.5 - 1 year	0.5 - 1 year	2 - 5 years	2 - 5 years	2 - 5 years	2 - 5 years
Slovenia	10+ years	1 - 2 years	Less than 6 Months	0.5 - 1 year	0.5 - 1 year	2 - 5 years	Less than 6 Months	1 - 2 years
Sweden	5 - 10 years	1 - 2 years	Less than 6 Months	-	2 - 5 years	2 - 5 years	Less than 6 Months	Less than 6 Months
Ukraine	5 - 10 years	2 - 5 years	1 - 2 years	Life	5 - 10 years	Life	-	2 - 5 years
UK: England and Wales	Life	2 - 5 years	Less than 6 Months	2 - 5 years	5 - 10 years	2 - 5 years	0.5 - 1 year	2 - 5 years
UK: Scotland	5 - 10 years	2 - 5 years	Less than 6 Months	0.5 - 1 year	5 - 10 years	2 - 5 years	Less than 6 Months	Less than 6 Months

Sources of sentencing powers

Across the world, there is a wide range of instruments that assist judges in their sentencing: from mandatory guidelines (matrices, narrative statements, offence-specific scoring sheets) (US), to statutory sentencing principles (Finland, Sweden), appellate guidelines judgments (England and Wales), sentencing information systems (Canada, Australia, Scotland).⁵¹⁹

In Romania, sentencing guidelines are legally binding and they are included in the Criminal Code (section 74) under the heading “general criteria for individualization of the sentence”.⁵²⁰ The guidelines stipulate that the most important two general criteria a judge ought to take into account are the general harm caused (considered an objective element of the offence) combined with the degree of dangerousness of the defendant (considered a subjective element of the offence). The guidelines then detail the 7 underlying characteristics that could account for the two criteria. In addition, individual offences often also contain specific sentencing factors to be taken into account, apart from the 7 general offence characteristics stipulated at section 74. These 7 offence characteristics and other specific sentencing factors are summarised below. The sentencing guidelines also contain instructions on how to compute a sentence for single, repeated and multiple offences;⁵²¹ and how much to discount from the sentence when the defendant admits guilt.⁵²²

Like most continental justice systems, Romania does not officially acknowledge the doctrine of precedent, so judges are not bound by earlier court judgments on sentencing. Yet since 2005 a new legal instrument, called the “Appeal in the Interest of the Law” (RIL), allows the High Court of Cassation and Justice to issue guideline judgments. These judgments give guidance on interpretations of statutes, including

⁵¹⁹ Tonry (n 39) 21–4.

⁵²⁰ Noul Cod Penal (v 1 Feb 2014) (n 496) s 74.

⁵²¹ *ibid* 35–45.

⁵²² Discount of 1/3 for custodial sentences and 1/4 for non-custodial (fine) sentences. Noul Cod de Procedura Penala (n 230) s 374.

on sentencing practices, and they are binding.⁵²³ For instance, RIL 4/2005 established that certain general aggravating factors (e.g. on a family member) cannot apply for an aggravated form of murder (which already by definition was against family members), as that would have counted the aggravating factor twice.⁵²⁴ RIL 5/2006 guided judges on how to sentence when two victims were attacked but only one died.⁵²⁵ And more recently, RIL 1/2015 debated whether s. 308 on corruption offences by workers other than public servants counts as a separate offence or as a mitigated form of s. 295 of corruption offences by public servants (and therefore the sentence ranges ought to be discounted by 1/3).⁵²⁶ The RIL is a very similar instrument to appellate court decisions in common law jurisdictions.⁵²⁷

Apart from sentence ranges, sentencing guidelines and RILs, which are binding, three other non-binding sources are customarily available to judges in their sentencing practice:

1. **Sentencing information systems/sentences from previous cases:** Although there is no doctrine of precedent and Romanian judges are not bound by previous judgments of their court or by judgments from other courts, these judgments still constitute available sources of information on best judicial practices in sentencing. All Romanian judges have access to ECRIS, an internal database containing judgments from all courts.⁵²⁸ This system is

⁵²³ *ibid* 474.

⁵²⁴ *Recurs ICCJ Decizia nr IV din 26 septembrie 2005 cu privire la problema daca sunt aplicabile dispozitiile de agravare ale art 75 alin 1 lit b) teza a II-a din Codul penal in cazul infractiunii de omor calificat prevazute de art 175 alin 1 lit c) din Codul penal* (Inalta Curte de Casatie si Justitie).

⁵²⁵ *Recurs ICCJ Decizia nr V din 20 februarie 2006 cu privire la aplicarea dispozitiilor art 176 alin 1 lit b) din Codul penal in cazul actelor de violenta savarsite in aceeasi imprejurare, cu intentia de a ucide, asupra a doua persoane, dintre care una a decedat* (Inalta Curte de Casatie si Justitie).

⁵²⁶ *RIL Recurs ICCJ Decizia nr 1 din 19 ianuarie 2015.*

⁵²⁷ Julian Roberts, 'Punishing, More or Less' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011) 7.

⁵²⁸ 'Portalul Instanțelor de Judecată - Despre Portalul ECRIS' <<http://portal.just.ro/SitePages/despre.aspx>> accessed 5 March 2017.

similar to other sentencing information systems implemented in Canada, Australia, Scotland or Israel.⁵²⁹

2. **Pre-sentence reports:** In every case, the Romanian judge can ask the probation officer to write a pre-sentence report on the background and characteristics of the defendant. By law, the probation officer is instructed to “assist the court in the sentencing process”.⁵³⁰ These reports can provide insights into the defendant’s reoffending patterns, social background and circumstances, character and likelihood of reoffending. Pre-sentence reports are a widespread judicial practice in countries such as England and Wales,⁵³¹ United States,⁵³² Canada,⁵³³ and New Zealand.⁵³⁴ In Europe, the Committee of Ministers has recommended all COE member states to allow probation services to formulate pre-sentence reports “on individual alleged offenders in order to assist, where applicable, the judicial authorities in deciding whether to prosecute or what would be the appropriate sanctions or measures”.⁵³⁵
3. **Prosecutor’s sentence recommendation:** In Romania, when charging a defendant, the prosecutor also customarily suggests the best offence allocation and, at the end, may suggest the appropriate sentence.⁵³⁶ The

⁵²⁹ Tonry (n 39) 21–4; Uri J Schild, ‘Statistical Information Systems for Sentencing: The Israeli Approach’ (2000) 14 *International Review of Law, Computers & Technology* 317.

⁵³⁰ Parlamentul României, Legea 252/2013 privind organizarea și funcționarea sistemului de probatiune 2013 s 32.

⁵³¹ Cyrus Tata and others, ‘Assisting and Advising The Sentencing Decision Process The Pursuit of “Quality” in Pre-Sentence Reports’ (2008) 48 *British Journal of Criminology* 835.

⁵³² Green (n 63) 22; Robert M Carter and Leslie T Wilkins, ‘Some Factors in Sentencing Policy’ (1967) 58 *Journal of Criminal Law, Criminology and Police Science* 503; Vladimir Konecni and Ebbe B Ebbesen, ‘The Mythology of Legal Decision Making’ (1984) 7 *International Journal of Law and Psychiatry* 5.

⁵³³ Hogarth (n 92) 240–61.

⁵³⁴ Christina Rush and Jeremy Robertson, ‘Presentence Reports: The Utility of Information to the Sentencing Decision’ (1987) 11 *Law and Human Behavior* 147.

⁵³⁵ Committee of Ministers, Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules 2010 s 42.

⁵³⁶ Noul Cod Penal (v 1 Feb 2014) (n 496) s 390.

judge is not bound to follow the prosecutor's recommendation, but the prosecutor's suggestion constitutes a potential source of insight for the judge in learning what is the customary sentence in a specific type of case. This practice is also encountered in other European countries such as the Netherlands⁵³⁷ or Germany.⁵³⁸

Sentencing factors

Identifying the sentence ranges or the starting points is usually just the first step in establishing the appropriate sentence. Most common law⁵³⁹ and civil law jurisdictions.⁵⁴⁰ around the world stipulate lists of sentencing factors. In Romania, the aggravating and mitigating factors are classified based on four different criteria:⁵⁴¹

1. Based on who regulates them and how important they are for the sentencing process, the factors can be either **legal** or **judicial factors**. Legal factors are mentioned exhaustively in the law and are binding, while judicial factors are not exhaustively enumerated and are not binding.⁵⁴²
2. Based on their connection to the offender or the offence, they can be "**real**" **circumstances** or "**personal**" **factors**. Real factors are connected to the offence itself (offence-related factors), they are objective characteristics or events which influence the degree of social danger of the offence. For instance, the time or location of the offence are real circumstances. To use

⁵³⁷ Sentencing Commission for Scotland (n 489) 37.

⁵³⁸ *ibid* 42.

⁵³⁹ "Almost all common law jurisdictions have placed certain mitigating and aggravating factors on a statutory footing." Roberts (n 527) 6.

⁵⁴⁰ Andrew Ashworth, 'Re-Evaluating the Justifications for Aggravation and Mitigation at Sentencing' in Julian V Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011) 21.

⁵⁴¹ Boroi in George Antoniu (ed), *Noul Cod Penal Comentat: Volumul II (art. 57-171)*, vol 2 (CH Beck 2008) s 88 para 129b.

⁵⁴² Noul Cod Penal (v 1 Feb 2014) (n 496) s 75.

an example, the fact that a theft took place during the night is a real circumstance of the offence. In contrast, personal circumstances are connected to the person of the offender (offender-related factors), his personality, his mental attitude towards his deed and towards its consequences. The social status or function of the offender, the rapport with the victim, or its criminal antecedents are also considered personal circumstances. For instance, if the offender was a person the victim used to trust, this would count as a personal circumstance.

3. Based on the moment relative to the offence, circumstances can be **anterior**, **simultaneous** or **subsequent circumstances**. In the theft example, premeditation of the theft is an anterior circumstance, while concealing the object of the theft when enquired by police would constitute a subsequent circumstance.
4. Based on the cognitive status of the offender, circumstances can be **known** and **unknown**. For instance, the thief could have known that he would meet the victim at night on a certain bus, but could have been unaware that one of the stolen items was part of state-protected patrimony. This distinction is important because the criminal code stipulates that an aggravating circumstance unknown by the offender is not taken into account in sentencing (while a mitigating circumstance is always taken into account even if it was unknown to the offender).⁵⁴³

Aggravating factors

Romanian legal policymakers⁵⁴⁴ distinguish between the 'aggravated form' of an offence and its 'aggravating circumstances' (factors). The aggravated form of an offence represents a form of that offence that essentially has a higher element of

⁵⁴³ Antoniu, *Noul Cod Penal Vol II* (n 541) s 30.3.

⁵⁴⁴ Boroi in *ibid* 88 para 129.

seriousness; the aggravated form is typically included in the formulation of the offence itself, or is formulated in a different section right after the normal form of the offence. For instance, a theft taking place 'at night' represents an aggravated form of theft (theft at s. 228 and aggravated theft at s. 229). In contrast, the 'aggravating circumstances' are contextual elements that the judge *could* take into account when he considers the character of the offender, assesses the harm and individualizes the punishment in the sentencing phase. For instance, the judge could take into account the value of the stolen items, or the fact that the victim would not have been able to defend herself because she is disabled. For some offences, one circumstance can be an essential part of the aggravated form (i.e. helps in classifying the offence), while in other offences, it is a mere circumstance which is balanced when the final sentence is given. For instance, a theft taking place in a public transport is considered an aggravated form of the theft, but a harassment in public transport is not considered an aggravated form of harassment. This distinction is present in other jurisdictions as well: for instance, England and Wales distinguishes between factors that affect harm and culpability on one hand, and 'extraneous factors' on the other, while Sweden distinguishes between factors that affect offence seriousness, versus 'equity' factors.⁵⁴⁵

Legal aggravating factors

The new criminal code specifies eight *legal* aggravating factors that judges are bound to take into account: commission of the offence (1) by three or more persons together; (2) through cruelty; (3) by methods or means that represent a danger to other people; (4) by an adult perpetrator, if it was committed together with a minor; (5) by taking advantage of the victim's vulnerability; (6) when the offender became purposefully inebriated or intoxicated before committing the offence; (7) by a person who took advantage of the situation caused by calamity, siege or state of

⁵⁴⁵ Ashworth, 'Re-Evaluating the Justifications for Aggravation and Mitigation at Sentencing' (n 540) 27.

necessity; or, finally, (8) if committed on any kind of racist or discriminatory basis.⁵⁴⁶ These aggravating circumstances are inherently thought of as increasing the social danger of the offence and therefore calling for a more severe punishment. The judge is *required* to take into account the existence of these circumstances and increase the punishment accordingly.

The aggravating circumstances mentioned above are classified as ‘general’ in that they are theoretically applicable to any type of offence. In contrast, the ‘specific’ aggravating circumstances are mentioned along with the definition of the offence and apply to that offence only. For instance, stealing components of the central power network is a very specific aggravating factor of theft, and increases the custodial sentence ranges from 0.5-3 years to 3-10 years, also disallowing the judge to order a non-custodial sentence instead.⁵⁴⁷

While the *legal* aggravating circumstances need to be well-defined and explicitly mentioned in the law, as they bind the sentencing process, the *judicial* aggravating circumstances are overly discretionary – the criminal code only mentions that anything that aggravates the offence can constitute an aggravating circumstance. Nonetheless, the judge is *required* to explicitly identify which judicial aggravating circumstances have been taken into account, and why they were taken into account, in his sentencing remarks.

Mitigating factors

There are three *legal* mitigating factors officially recognized in the new criminal code: (1) provocation; (2) exceeding the limits of legitimate self-defence; (3) exceeding the limits of necessity.⁵⁴⁸ Provocation acts as a mitigating effect only in certain classes of offences (e.g. assault, murder, destruction of property).

⁵⁴⁶ Noul Cod Penal (v 1 Feb 2014) (n 496) s 77.

⁵⁴⁷ *ibid* 229.3.

⁵⁴⁸ *ibid* 75.

Provocation emerges when the provocative act has already ended, while in legitimate self-defence the provocative act is ongoing at the time of the offence.⁵⁴⁹ To the three factors, the new code adds a fourth one, applicable to a subset of offences: (4) when the offender has completely repaired or compensated the harm caused, by the start of the trial.⁵⁵⁰ These four legal mitigating factors are binding.

In addition to taking into account the legal mitigating factors, the judge has the discretion to point out various *judicial* mitigating factors. A few factors of this kind are described in sec 75.2 of the new code, but the list is far from exhaustive; for instance (1) the offender's endeavour to remove the result of the offence or to repair the damage caused; or (2) the circumstances of the offence which significantly lower the social harm caused or the dangerousness of the offender.⁵⁵¹ For instance, if the thief managed to return all the stolen items to the victim prior to the first hearing, this would count as a *legal* mitigating factor and the judge *is bound* to take that into account and lower the sentence. In contrast, if the defendant managed to return but part of the items, the judge *can* take that effort into account as *judicial* mitigating circumstance, but can choose not to. The judge is free to take into account various judicial mitigating factors, yet he is bound to indicate them and include them in the sentencing remarks.⁵⁵²

Calculating sentences

While most world jurisdictions stipulate a range of statutory and optional sentencing factors, they deal very differently with guiding the judge in prioritising and combining these factors in a sentence. US states such as Minnesota and Pennsylvania have stringent numerical grids, states such as Ohio, Delaware have

⁵⁴⁹ Boroi in Antoniu, *Noul Cod Penal Vol II* (n 541) s 88 para 130.

⁵⁵⁰ Noul Cod Penal (v 1 Feb 2014) (n 496) s 75.1.d).

⁵⁵¹ *ibid* 75.2.

⁵⁵² Boroi in Antoniu, *Noul Cod Penal Vol II* (n 541) s 90 para 138.

narrative guidelines, and Virginia has sentence scoring sheets.⁵⁵³ England and Wales' Sentencing Council has also recently started implementing narrative guidelines, accompanied by sentencing flowcharts.⁵⁵⁴ In countries such as Finland, judges have to look at annual court statistics (i.e. sentence information systems) and at typical cases per offence, where "typical" sentencing factors and sentence calculations are illustrated and follow what is called a "normal punishment".⁵⁵⁵ Some other countries, such as the Netherlands, attempt to reduce sentencing disparity not by issuing sentencing grids for judges but for the prosecutors, who then recommend a sentence to the judge.⁵⁵⁶

In Romania, the order in which the aggravating or mitigating circumstances contribute to the individualisation of the sentence is established by the new criminal code. For instance, mitigating circumstances are always taken into account after any reduction in sentence given to, say, attempt, whereas aggravating circumstances are calculated first, before any consideration regarding reoffending or multiple offences. Finally, when both aggravating and mitigating circumstances exist, the Romanian judge has to first reduce then increase the sentence in this order.⁵⁵⁷ The figure below explains how the calculations should be made by the judge, according to the new criminal code:

⁵⁵³ Sentencing Commission for Scotland (n 489) Table 1.

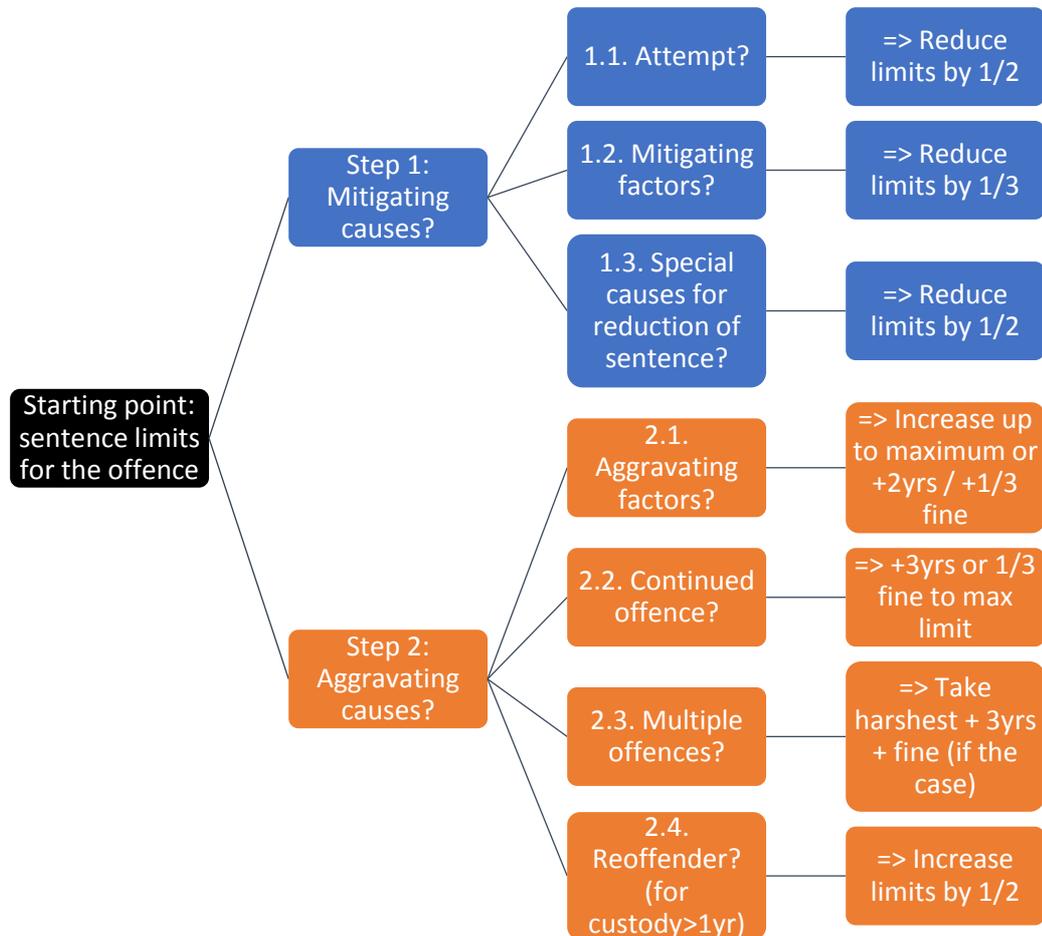
⁵⁵⁴ Sentencing Council, 'Sentencing Guidelines - Publications' (7 March 2017) <<https://www.sentencingcouncil.org.uk/publications/>> accessed 7 March 2017.

⁵⁵⁵ Sentencing Commission for Scotland (n 489) 35–6.

⁵⁵⁶ See the *Polaris* framework and the 'Frame for prosecutorial sentencing guidelines' published by the *Board of Prosecutors' General* in Netherlands apud *ibid* 38.

⁵⁵⁷ *Noul Cod Penal* (v. 2012) (n 231) s 79.

FIGURE 7: FLOWCHART ON COMPUTING THE INTERACTION OF AGGRAVATING AND MITIGATING FACTORS IN ROMANIAN SENTENCING



There are two things to note from the figure. First, the sentencing instructions do not refer to how the judge should increase or decrease *the sentence itself*, but how he should calculate *the legal limits* between which he is able to choose a sentence. Second, the code makes a very subtle distinction between aggravating/mitigating *factors* and aggravating/mitigating *causes* when calculating the sentence – while the factors refer strictly to the legal and judicial factors stipulated in sections 75-8, the causes refer to a wider range of considerations which influence the sentences, including but not limited to the aggravating and mitigating factors: (1) if the offence was carried out entirely or it was just an attempt;⁵⁵⁸ (2) if there are special causes

⁵⁵⁸ Noul Cod Penal (v 1 Feb 2014) (n 496) ss 32–4.

for reduction of the sentence in some specific offences;⁵⁵⁹ (3) if there is a repeated series of offences against the same victim ('continued offence');⁵⁶⁰ (4) if the offender needs to be punished for multiple offences ('multiple offences');⁵⁶¹ (5) or if the defendant is a reoffender.⁵⁶²

For instance, the existence of at least one aggravating factor determines the increase of the punishment up to the legal limit. If the legal limit is reached but the judge considers it is insufficient, s/he can increase the punishment by maximum two years (in custodial sentences, as long as this does not constitute more than a third of the initial maximum) or by one third of the maximum amount (in fines). This can be done only once, irrespective of the number of aggravating circumstances.⁵⁶³ Similarly, the existence of at least one mitigating circumstance can decrease the punishment by one third – and the number of mitigating circumstances is irrelevant.⁵⁶⁴ Although the reduction or augmentation of sentence is done only once, it does not mean that only one circumstance is accounted for and the rest are disregarded – but rather that the reduction/augmentation is an aggregate result.⁵⁶⁵ So although the computation of sentences in Romania seems more precise than in other jurisdictions, the Romanian judge still has some discretion left in deciding which particular sentence to give in a case, within the computed range.

⁵⁵⁹ For instance, in offences against national security, if the offender assists the prosecution. *ibid* 411.

⁵⁶⁰ *ibid* 35.

⁵⁶¹ *ibid* 38.

⁵⁶² *ibid* 41.

⁵⁶³ *Noul Cod Penal* (v. 2012) (n 231) s 78.

⁵⁶⁴ *ibid* 76. One notable exception is the reduction of life sentences due to mitigating circumstances, which necessarily leads to a custodial sentence of 10 to 20 years.

⁵⁶⁵ Boroi in Antoniu, *Noul Cod Penal Vol II* (n 541) s 92 para 145.

CHAPTER 6: RESEARCH DESIGN

This chapter sets out the rationale behind how this study was constructed. It covers the research methods used, hypotheses, the research sample and approach to collection and analysis of data. The first part of this chapter sets out the research hypotheses of this study. The second part explains the choice of methodology, especially in the light of methodologies used by previous research. Part three details what the survey contains and the approach taken to running the survey. Part four defines the sample: why and how it was stratified, and its characteristics. The fifth section details the phases of the study as it was conducted. The last section explains the approach used to analysing the quantitative data from the study.

Research hypotheses

The first fundamental assumption of this study, founded on Kolb's experiential theory of learning, is that judges are in a continuous learning cycle throughout their training and their career.⁵⁶⁶ This has two implications, which shape the two main research hypotheses.

The first is that judges' formal training experiences are not all the same. This would mean that, as individual Romanian judges experience (in order) basic legal training, initial judicial training and then continuous judicial training, they bring in their past experiences and these shape their attitudes and interactions. Therefore, the first research hypothesis (drawing on Kolb's experiential learning theory) is that **judges' approach to judicial training and preferences for training methods will vary with experience.**

⁵⁶⁶ Kolb (n 127).

Second, the study assumes that Romanian judges learn not just during their formal judicial training but throughout their judicial career, not just in but outside the classroom. They do so by putting what they've learnt into practice, by learning on the job, while sentencing, by consulting various documents and materials while having to sentence (the "sentencing tools"), and by asking their peers for advice in difficult situations. This assumption is supported not just by the experiential theory in education, but also by the experimental work on expertise-building of Kahneman, Gigerenzer and Klein.⁵⁶⁷ In addition, it assumes that the experience already accumulated has an impact on how new informal learning and decision-making experiences are approached. Therefore, the second hypothesis of this study is that **judges with different levels of experience will have different informal learning preferences and will approach sentencing differently.**

In view of these two study hypotheses, the research approach and the findings of this research project are split into two major categories: formal training and informal learning.

Research methods

As noted earlier, no previous study has so far combined empirical research questions about how judges learn with questions of judicial practice in sentencing. While this is one of the major strengths of this study, it also creates some challenges in terms of identifying and validating the best methodological approach. As also noted earlier, empirical research on experiential learning has used some methods, while empirical research on sentencing has used others. Both strands of methodologies will be discussed next.

In testing experiential learning, the most common research method has been the application of the Learning Style Inventory (LSI) created by Kolb.⁵⁶⁸ Out of 1,004

⁵⁶⁷ *ibid*; Kahneman (n 128); Gigerenzer, Todd and Group (n 128); Klein, *Intuition at Work* (n 128).

⁵⁶⁸ Other studies interested in measuring learning styles have used similar methods. Gary Conti has developed two other learning style/strategies inventories – SKILLS and ATLAS – since the 1990s.

empirical studies using LSI, the eight studies that focused on judges and law students have not used other methods apart from the LSI itself. The LSI consists of an attitudinal survey containing 20 closed questions asking the respondent to rank 4 items per question. Each question typically begins with “When I learn...” or similar expressions, and the 4 items correspond to different formulations of the 4 quadrants or modes in Kolb’s Learning Cycle, for example:

“When I learn:

- I get involved (CE).
- I like to be active (AE).
- I evaluate things (AC).
- I like to observe (RO).”⁵⁶⁹

Using the LSI has the advantage that the method has both external and internal validity, tested over decades. Yet, while it does not take more than 15 minutes to be filled in, it only answers part of the research questions of this study, and any extra survey questions would have added significantly to that time. One of the major challenges in conducting research on judges (and on busy professionals, more generally) is that their time is limited. As a result, a survey containing multiple-choice answers (with the opportunity, but not requirement to provide comments) was considered the effective method of gathering *generalizable* data about judges’ attitudes towards their learning experiences.

Another limitation of the LSI in its applicability to judicial learning is that it is obvious to the respondents that it is not adapted to their particular professional context. Other researchers who conducted empirical studies on judges have noted how

The SKILLS inventory was applied in 17 empirical studies in US and Canada on 3070 respondents between 1991 and 1998. ATLAS was applied in 36 studies from 2002 to 2009. Conti (n 186). Other learning inventories developed have a similar methodology – attitudinal closed-question surveys with either Likert-scale or ranking questions. VARK was created by Neil Fleming in 1992 and was so far applied on almost 100,000 respondents, out of which only 1,849 had legal background. Neil D Fleming and Colleen Mills, ‘Not Another Inventory, Rather a Catalyst for Reflection’; ‘Research & Statistics | VARK’ <<http://vark-learn.com/introduction-to-vark/research-statistics/>> accessed 2 May 2016. See also Benjamin S Bloom and others, ‘Taxonomy of Educational Objectives. Vol. 1: Cognitive Domain’, *New York: McKay* (1956); Howard Gardner, *Frames of Mind: The Theory of Multiple Intelligences* (Basic Books 2011).

⁵⁶⁹ I am grateful to Professor Kolb and the Hay Group for allowing me to access the latest Kolb LSI (version 4.0).

important it was for the practical success of the study (and a high responsiveness from the part of the judges) to design and apply an instrument that is visibly adapted to the needs and the peculiarities of the judicial profession.⁵⁷⁰ In conclusion, because LSI is not specifically adapted to judges and because it takes significant time to fill in, it was not employed in the current study. However, several LSI-inspired questions about the teaching methods preferred by the respondents for each type of training were included in the survey.⁵⁷¹ Drawing on the LSI approach, judges were asked to rank their learning preferences, which forced respondents to establish a hierarchy of preferences.

Apart from the application of the LSI, judicial training institutes around the world have generally used very limited methodologies in exploring the learning preferences of judges. Most carry out post-session surveys as part of their training programme evaluation. In 2015, Livingston Armytage conducted a survey of 42 judicial educators from 23 countries,⁵⁷² reviewing judicial training practices and judicial training evaluation programmes. He discovered that “uniformly, [judicial educators] agreed that any formalised processes of building knowledge through research was at best ad hoc, and that evaluation was non-existent beyond Kirkpatrick's activity and learning levels”.⁵⁷³ Armytage referred to the four levels identified by Kirkpatrick⁵⁷⁴ at which a training programme can be evaluated, and the use of specific methods of measurement at each level:

⁵⁷⁰ Hogarth noted a certain reluctance of magistrates to respond to instruments that were not tailored to their needs. Hogarth (n 92) 105.

⁵⁷¹ Two questions were included in each survey on preference for training methods – one for initial training (1) and one for continuous training (2). The formulation of questions was adapted to the profile of the respondent. For example: (1) “12. Which of the following initial training elements do you think prepare you best for your future/potential career in criminal cases?”; (2) “13. In a training session on sentencing, which of the following elements of method or content do you find most useful: Rank the importance of the following factors (1 – the most important, 6 – the least important). If you wish to add new factors, modify the ranking accordingly.” (See all questions and answer choices in Annex 4)

⁵⁷² The educators were widely spread: 33% came from US and Canada, 29% from Europe and Middle East, 29% from Asia and Latin America, and 9% international or multi-national specialists. Armytage, *Educating Judges* (n 16) xxv.

⁵⁷³ *ibid* xlii.

⁵⁷⁴ Donald L Kirkpatrick, *Evaluating Training Programs* (Tata McGraw-Hill Education 1975).

1. Reaction - what participants thought and felt about the training (satisfaction; "smile sheets").
2. Learning - the resulting increase in knowledge and/or skills, and change in attitudes. This evaluation occurs during the training in the form of either a knowledge demonstration or test.
3. Behaviour - transfer of knowledge, skills, and/or attitudes from classroom to the job (change in job behaviour due to training program). This evaluation occurs 3–6 months post training while the trainee is performing the job. Evaluation usually occurs through observation.
4. Results - the final results that occurred because of attendance and participation in a training program (can be monetary, performance-based, etc.)⁵⁷⁵

In Romania, apart from the graduation examination for judges who finish initial training, which can be considered at Kirkpatrick Level 2, most of the training evaluation occurs at Level 1. This typically consists in short post-session feedback forms, usually limited to how useful the judges perceived a specific training session to be. According to the NIM educators, the response rate to these post-session feedback forms is very low (below 10%).⁵⁷⁶

Romania is not unique in limiting evaluation of training to post-course feedback from judicial participants. A survey conducted by the European Judicial Training Network (EJTN) across all 28 EU member states in 2014 revealed similar concerns with regards to the limited methodology used in the training evaluation. Judge Jeremy Cooper, one of the leaders of the project, explains:

The study identified the need for a closer interrelationship between the assessment of training needs and the evaluation of training activities. Most judicial-training institutions use standard feedback forms after each training event to test the satisfaction and new knowledge/know-how of participants. However, very few judicial-training institutions have introduced or are planning to introduce evaluation systems and methods that assess *how much of the new*

⁵⁷⁵ *ibid.*

⁵⁷⁶ This was indicated by the NIM training managers during the exploratory phase.

*knowledge/know-how acquired throughout the training is used by judges in the longer term, [emphasis added] or how it impacts upon the performance of the judicial system more generally, using the Kirkpatrick model.*⁵⁷⁷

While the present study was initiated in 2012, before the ENTJ research was conducted, one of its aims was to incorporate a more developmental approach to the evaluation of judicial training, by asking judges not just to characterise the specific training they underwent at the time of the survey application, but the more general, long-term impact that various forms of training have had on their judicial career. Of course, measuring this long-term impact can be done in two major ways. The first way is to measure how judges *think* the training impacted their career (attitudinal study); the second way is to measure how the *behaviour* of judges actually *changed* as a result of the training (behavioural study). The attitudinal study asks judges to identify and self-report how their attitudes, skills and know-how evolved as a result of the training. In contrast, to measure a *change in the behaviour* of judges due to learning is far from an easy task for two major reasons.

First, the learning variable should be isolated from other potential factors that influence a change in behaviour. Although empirical studies on sentencing (such as those reviewed in the Introduction) have made advances in trying to identify and measure these non-learning behavioural factors, it is not known yet for sure the range of all the other factors, apart from learning, that impact sentencing, and how much each factor weights against each other. Second, because even if the other factors were completely known, if the experiential learning cycle or spiral is an accurate depiction of the learning process, then the measurement of change would have to take place at each iteration of the learning cycle. As discussed earlier, educational theorists such as Dewey, Lewin and Kolb believe that, in a new iteration of the learning cycle, the accumulated knowledge is integrated and facilitates a higher level of understanding of the new learning experiences (see their diagrams in Annex 3). In other words, if training programme evaluators aim to measure the change in judicial behaviour due to a certain part of judicial training, they would

⁵⁷⁷ Cooper (n 370) 65 (my emphasis).

have to be careful to isolate the impact of that training from previous or subsequent trainings. This is a very difficult task, and it is thus not surprising that evaluation at Kirkpatrick's Levels 3 and 4 is limited, apart from qualitative observations or task-related KPIs. As a result, this study focuses on what judges can authoritatively convey - their *attitudes* towards their learning.

The current study combines quantitative attitudinal data derived from a closed-question survey with more qualitative insights. The qualitative insights were collected (1) as a preliminary step, as part of the construction of the survey, and constituted observations of training sessions, as well as semi-structured interviews with trainers and trainees; (2) as well as a final step, after the interpretation of the statistical data, and consisted of a series of informal discussions with judicial training institute managers, judicial training scholars and socio-legal academics, in the attempt to search for potential interpretations of the quantitative findings.

Hogarth's study, which by the nature of its research questions, measured variables and methodological approach is the closest to the aims of the current study, had a very important finding that has influenced the methodological choices of the current study. Hogarth discovered that judges' attitudes towards their own practice are a much more powerful statistical predictor than other more indirect attitudinal measures or other aspects of the sentencing practice (such as type of offences or offender profiles).⁵⁷⁸ As consequence, a study of attitudes that asks judges directly what their attitudes are towards their own activity could have a strong predictive power than critics of direct methods might think.

This is why, given the purposes and focus of the current study, employing a direct method for measuring the attitudes of the judges themselves, namely a closed-question survey, was considered the best method. In addition, given the interdisciplinary nature of the study, the survey was a method very common to both

⁵⁷⁸ Hogarth (n 92) 351.

strands of research – on judicial training and on judicial sentencing respectively. In summary, a quantitative survey was considered the best method because:

1. it is the easiest for judges to complete, and the least **intrusive** method to measure judges' attitudes, **generalizable** to the entire judiciary;⁵⁷⁹
2. it is **personalised** to the needs of the respondent, of the Romanian judiciary and to the current context of judicial training more widely;
3. it is a method **common** to both studies on judicial training and studies on judicial sentencing, so there was no need to use two separate methods to measure formal training and informal learning respectively; the consistency in method also insures a smoother comparison between the findings from the two areas of the study;
4. it has previously been found that a judicial attitude survey has a **stronger predictive value** for judicial behaviour on sentencing than previously thought.

Survey content and approach

With regards to **formal training**, the survey was designed to measure if judges with (1) different levels of experience and/or with (2) different levels of exposure to judicial training have different views about their formal judicial training. They were asked about their:

1. perceptions of their (past) initial training, its adequacy to practice and its best training methods;

⁵⁷⁹ In comparison, training observation is less intrusive but slower, less generalizable statistically, and more likely to impact on the behaviour of the subjects observed; while experiments, interviews, vignettes are more reliable in measuring behaviour, but very time-consuming and intrusive.

2. perceptions of continuous training, its overall usefulness and best methods;
3. reflections on the overall usefulness of (past) university law training in the light of current experience;
4. the perceived usefulness and feasibility of judicial skills training (judgecraft), as it is for instance done in England and Wales; and
5. preference for different e-learning methods.

The relevant findings are presented in Chapter 8.

With regards to **informal learning**, the survey attempted to cover several themes, such as learning by doing (through the practice of sentencing itself) and learning through peer advice. As a result, respondents were asked about their:

1. use of various sentencing aids/tools in the first few years of practice;
2. perceived impact of various factors in reaching a sentence;
3. subsequent contact with initial training peers and with the trainer, including the content and the methods of the contact;
4. reaction when confronted with hard cases (if they would ask for advice and whom they would approach);
5. reaction when confronted with cases very similar to those encountered in the past.

The relevant findings for this second set of research questions are presented in Chapter 9.

In addition to the survey questions pertaining to formal training and informal learning practices, a range of demographic questions were included in the survey:

1. the level of professional experience (split into 3 separate variables: years in the legal profession, years on the bench, years in hearing criminal cases, where applicable);

2. the type of prior legal experience, if applicable;⁵⁸⁰
3. the amount of prior exposure to initial, induction and continuous training;
4. the judicial specialty, if applicable (civil, criminal, etc.);

Due to space constraints (length of survey), only demographic questions that were testing experience and exposure-related variables were included. Moreover, given that judges may be sensitive to being asked personally-identifiable information, no questions that did not directly pertain to the theme of the study (such as gender, name of court, etc.) were asked. Chapter 7 presents the profile of respondents as revealed by these key variables.

The next section further explains how the sample was constructed in such a way as to best discriminate between types of relevant respondents across the Romanian judiciary.

The sample

In the context of the research questions presented above, the sample was first stratified according to two variables that are expected to account for differences in perceptions: (1) level of experience and (2) level of exposure to prior judicial training.

⁵⁸⁰ For instance, young newly-appointed judges through the normal route were asked about the type and duration of legal internships taken during university; while newly appointed judges undergoing induction training were asked about other types of experience in the legal sector.

TABLE 7: SAMPLE STRATIFICATION ACCORDING TO THE TWO MAIN INPUT VARIABLES

	No prior experience	Prior experience
No prior judicial training	Judges who have just begun their judicial career and go through initial training (<i>initial trainees</i>)	Judges who have some experience but have never undergone training before (<i>induction trainees</i>)
Prior judicial training		Experienced judges who have gone through judicial training many times (<i>continuous trainees</i>)

In order to identify variations of these two variables, it was important for the sample to contain all 3 categories of Romanian judges: those undergoing (1) initial, (2) induction and (3) continuous training.

The main sample consisted of 226 judges with judicial experience ranging from 0 to 35 years on the bench (the mean experience was 11 years). Judges in Romania are randomly selected from all levels of court and from all around the country to attend centralized judicial training. The selection is made by an automated program operated by the Romanian National Institute of Magistracy, and each court in the country has a number of allocated places (stratified). Judges have to opt in themselves, but the algorithm does not allow them to participate in training more than once in a couple of years to ensure all judges have equal access to judicial training overall. Between two judges who are both allowed and have both opted for the training, the program randomly allocates the place to one of them. This ensures that judicial participation in training sessions is random stratified.

Half of the survey participants had no judicial experience at the time of the survey, while the other half had already been hearing cases in court. The table below summarizes the distribution of respondents per type of judicial training.

TABLE 8: DISTRIBUTION OF RESPONDENTS BY TYPES OF TRAINING, AND COMPARISONS WITH OVERALL JUDICIAL TRAINEE POPULATION AT THE TIME OF STUDY (2014)

	Respondents	Sample	Response rate	Population (2014)	% population
Initial trainees	88	100	88%	100	88%
Induction trainees	28	37	76%	70	40%
Continuous trainees	116	159	73%	1,726 ⁵⁸¹	7%
Total	232	296	78%	1,896	12%

No demographic information is gathered by NIM on the level of judicial, legal or criminal experience of judicial trainees – it is therefore impossible to compare the profile of the sample with that of the general population of Romanian judges.

A secondary sample consisted of prosecutors (N 236) ranging from 0 to 29 years of prosecutorial experience (average experience 11 years). Although this is a study of judicial attitudes to training, prosecutors were also analysed as a secondary sample in order to offer a related viewpoint from legal professionals who undergo the same training and have the same legal background, but have a different role in court. For instance, while the questions to judges asked them about their own sentencing, the prosecutors were asked about how they think judges conduct their sentencing. This provides a supplementary perspective on judicial sentencing. The thesis presents those instances where prosecutors had statistically significant differences in their perceptions of sentencing in comparison to judges.

⁵⁸¹ This figure is estimated from the total number of participants in continuous training in criminal law during 2014, as reported by the NIM Continuous Training report, and the fact that 63% of training participants during that year were judges. The report does not show a breakdown between judges and prosecutors per types of continuous training. Institutul National al Magistraturii, 'Calendarul Seminarilor de Formare Continua Pentru Anul 2014 - Pe Domenii' (n 448).

The data collection

The study consisted of two phases: the qualitative exploratory phase and the main quantitative phase. The qualitative exploratory phase was designed to test and refine the survey questions used in the quantitative phase. It consisted of observations and semi-structured interviews with all three types of judicial trainees and with judicial trainers in charge of conducting sentencing training for initial, induction and continuous trainees.

The qualitative exploratory phase took place between January and March 2014 and covered 12 training session observations (73 observation hours in total) and 13 semi-structured interviews. The quantitative survey phase took place between March and April 2014 and gathered 510 responses in total, out of which 226 were judges.

A preliminary research proposal was submitted to the director of the National Institute of Magistracy (NIM) in September 2013. Based on the director's feedback, a final research proposal was submitted for vetting to the Scientific Committee of the NIM in December 2013, and the proposal was officially approved by the Committee in January 2014. Prior to the exploratory phase (observations and interviews), individual written approval was also granted from the trainers (to be allowed to attend the training sessions) and from all interviewees (both trainers and trainees). Prior to the survey phase, preliminary individual approval was granted from the NIM deputy director on induction training and the NIM deputy director on continuous training in terms of the specific sessions where the survey could be administered. Individual trainers were also verbally asked for prior approval before the survey was run in their session.

The following table summarises all the responses obtained in all phases of the study:

TABLE 9: DATA GATHERED ACROSS THE STUDY

Data gathered	Training observations	Interviews (judges)	Interviews (trainers)	Surveys
Initial training	6 sessions: <ul style="list-style-type: none"> • 2 seminars criminal law • 1 course criminal law • 1 course judicial psychology • 2 court simulations 	3 interviews (different training groups)	2 interviews (different training groups)	174 judges and prosecutors (88 judges and 86 prosecutors)
Induction training	2 seminars criminal law (incl. 1 mock trial)	2 interviews (different training groups)	3 interviews (different training groups)	28 judges
Continuous training	4 sessions: <ul style="list-style-type: none"> • 2 criminal law • 2 criminal procedure 	4 interviews	4 interviews	116 judges 179 prosecutors 14 others
Total	12 observations	9 interviews	4 interviews⁵⁸²	510 responses

Training observations

At each training session observed, the training leader introduced the author, the aim of participating in the session and NIM’s endorsement of the data gathering exercise. The author then introduced herself, the aims of the research and the anonymous and voluntary character of the participation. During the session, the author took notes in observation sheets, without writing any names or identifying characteristics of the participants. The observation notes were structured around 5 main themes:

- content of training

⁵⁸² Along with 2 discussions with NIM directors and education specialists and 1 interview with judge undergoing 2nd year initial training.

- activities/methods used
- trainees (behaviour, attitudes, demographics)
- trainer(s) (behaviour, attitudes, background)
- specific mentions of the role of the judge

Interviews

Trainers from each of the three types of judicial training were identified and contact details provided by the NIM. Each trainer was asked in advance, in writing, if s/he would be willing to contribute in the research. The trainees were asked during the observation sessions to put their contact details on a piece of paper if they were willing to be interviewed. It was emphasised that their contribution would be entirely voluntary and anonymous.

At the beginning of each interview, the participant was reminded of the voluntary and anonymous character of the interview. The interview was recorded and transcribed. The recordings and transcripts were saved electronically without any reference to the respondent's identity (e.g. "induction trainer 1"). The interview guides contain approximately 25 open-ended questions, structured around 5 main themes:

- background information (past experience, career aspirations)
- sentencing training (exposure, difference from university training, learning expectations, best and worst methods, ideal content of sentencing training)
- peers (interaction with peers, post-training outreach, advice in difficult situations)
- trainer (ideal background of trainer, interaction with trainer)
- sentencing practice (opinions on role of the judge, the 'right sentence' and 'judicial expertise', sentencing discretion, sentencing tools, changes in sentencing practice, core principles guiding sentencing)

The insights derived from observations and interviews were used to inform the survey questions (e.g. rewrite or eliminate questions that did not make sense to

respondents, improve terminology for greater understanding) and to formulate the closed questions answer choices.

Surveys

The survey was run during training sessions for all three types of judicial trainees in Romania at the following stages:

- **Initial trainees:** at the end of their criminal law module (including sentencing) during their first year of judicial training; the survey was run during their court internship distribution on 28 March 2014.
- **Induction trainees:** at the end of their criminal law induction training, taking place within the first month of appointment; the survey was run during the last criminal law seminar, across 2 seminar groups (on 31 March and 1 April 2014).
- **Continuous trainees:** during 4 continuous training sessions on criminal law and sentencing (centralised sessions 3/4 March, 10/11 March, 25/26 March, and 1/2 April 2014).

At the beginning of each session where the survey was run, one of the NIM deputy managers or the trainer in charge introduced the author and the aim of the research, and mentioned the entirely voluntary and anonymous character of the participation (in accordance with the “Introductory paragraph” formulated and sent in advance to them by the author). This introductory paragraph presenting the background, aims of research and the voluntary and anonymous character of the research was also included on the front page of every questionnaire (see Annex 4). The survey did not request any identifying information.

The survey had an overall response rate of 68% compared to the sample frame. In total, 510 surveys were received from a possible total of 730 judges and prosecutors taking part in the training sessions.

The chief aim was to derive generalizable insights pertaining to the entire Romanian judiciary – which at the time of the survey comprised 6,949 professional judges and prosecutors. A total of 462 responses were analysed, and this fulfilled the conditions of a minimum representative sample, given a 95% confidence level and a 5% margin of error.

Survey questions

The main phase involved a 20-question paper survey designed to not take longer than 10 minutes to fill in, and for that purpose it mainly contained closed single choice, multiple choice, rating and ranking questions. In addition, each type of participant received a survey only pertaining to their particular profile, which meant that no unnecessary questions were asked. However, most questions were formulated to allow cross-sample comparisons between judges at different stages of training. Table 10 presents a summary of the questions asked across all surveys (all surveys are reproduced in Annex 4).

TABLE 10: SUMMARY OF QUESTIONS ASKED IN THE SURVEYS

Formal learning: judicial training perceptions and needs	Overall usefulness of initial training?
	Overall usefulness of university training?
	Best initial training methods? (general)
	Suggestions for improving induction training?
	Best continuous training methods (sentencing)?
	Best e-learning methods (sentencing)?
	"Judicial craft" training needed/useful?
Informal learning: learning on the job - sentencing	What factors should influence a judge in sentencing?
	What tools are/will be most useful to you in everyday sentencing practice?
	Top 3 factors that would/have influenced you in your sentencing practice in the first few years on the bench?
	Reaction when encountering new case similar to prior cases?
Informal learning: peer interaction and advice	Kept in touch with peers?
	Amount of contact with initial training peers?
	Means of contact with initial training peers?
	Amount of contact with trainer?
	Content of communication with trainer?
	Peer advice in difficult case?
Prior experience /training exposure (independent variables)	What is your current/desired profession? (judge/prosecutor/other)
	What is your current/desired specialty? (civil/criminal/other)
	Years of experience in current profession?
	Years of experience in criminal cases?
	Other prior legal professions? (type and duration)
	Internships and practical experience? (type and duration)
	Perceived importance of prior legal experience for judicial performance
	Undergone initial training?
	Year of initial training start
	Have you ever been to continuous training sessions before?
	How many previous continuous training sessions?
	When graduated law school?
	Judicial philosophy (view on role of the judge in sentencing)

Data analysis

Data entering and cleaning

In the data analysis phase, SPSS was used for coding and analysing the quantitative output from the survey. The author entered the survey data in SPSS and conducted data cleaning. Given there were 4 survey versions (initial, induction, continuous judges and continuous prosecutors), responses were initially entered in 4 separate databases. In step two, the databases were merged (with a new identifying 'dataset' variable introduced). In step three, the merged database was split into two based on the profession (judge/prosecutor) variable. Separate analyses were conducted on the merged dataset, on the judge dataset and on the prosecutor dataset. This thesis reports findings from the judge dataset.

Out of the total of 510 surveys received, 462 surveys were retained for analysis (226 judges and 236 for prosecutors). The other 48 surveys were discarded because:

- 14 continuous trainees were neither judges nor prosecutors ('other specialists');
- 7 initial trainees had not yet made a clear choice between judges/prosecutors ('undecided');
- 12 judges and 15 prosecutors had filled in less than 20% of the survey and could not reliably be included in the analysis.

Coding

In SPSS, single choice survey questions were entered as categorical variables; multiple choice questions had each of their answers recoded as individual categorical variables; rating and ranking answer choices were coded as ordinal variables; questions related to years (of experience) were coded as continuous variables.

A few new variables were created and used in the analyses:

- ‘judicial experience’ (binary) – ‘no’ for initial and induction trainees, ‘yes’ for continuous trainees;
- ‘legal experience’ (binary, only initial and induction trainees) – ‘yes’ for those who entered a value larger than 0 in legal experience variable, ‘no’ for all others;
- ‘criminal law experience’ (binary) – based on values larger than 0 on continuous variable;
- years of judicial, legal, criminal legal experience only for those with experience larger than 0 (to be able to analyse relationship between increase in years and change in attitudes);
- ‘police vs advocacy’ experience (binary) – computed from multiple choice variable ‘other profession in criminal cases’;
- exposure to initial, induction, continuous training (binary variables) – computed from respondents’ profiles and from specific questions in the survey⁵⁸³
- ‘can judicial skills be trained’ (binary) and ‘is judgecraft training sufficient’ (binary) computed from the multiple-choice ‘judgecraft’ variable;
- ‘any peer advice in sentencing’ (binary) from multiple-choice ‘sources of peer advice in sentencing’ variables (‘no’ for ‘no advice welcome’, ‘yes’ for all other answers);

Issues analysed and tests used

Three types of analyses were conducted for each of the main topics⁵⁸⁴ of this study:

1. **Frequency/univariate analysis** – to reveal the overall aggregated attitudes to each topic;

⁵⁸³ For instance, continuous trainees were asked whether they had been exposed to initial or induction training at the beginning of their career. For initial and induction trainees, it was assumed they had not yet been exposed to any continuous training.

⁵⁸⁴ Attitudes towards training, attitudes towards sentencing practice, peer advice etc.

2. **Correlation/regression analysis** – to analyse whether variation in attitudes is associated with experience or exposure to training;
3. **Cluster analysis** – to analyse whether certain attitudes or preferences are related with responses forming distinct clusters.

The issues analysed correspond to the main topics of the study presented in Table 10 above, and also correspond to how the two main findings chapter are organised:

1. Judicial attitudes to formal training:
 - a. overall value of formal training (frequency + correlation analysis)
 - b. preferences for formal training methods (frequency + correlation analysis)
 - c. clustering of preferences for formal training methods (cluster analysis)
 - d. social learning during formal training (frequency + correlation analysis)
 - e. attitudes to formal training reforms (frequency + correlation analysis)
2. Judicial attitudes to informal learning to sentence
 - a. Attitudes to sentencing tools (frequency + correlation + clustering)
 - b. Attitudes to sentencing factors (frequency + correlation + clustering)
 - c. Attitudes to sentencing advice (frequency + correlation)
 - d. Self-awareness and reliance on past experience (frequency + correlation)

The analysis of each topic began with a frequency analysis. All variables were tested for normality and none of them had a normal distribution; for this reason, non-parametric tests were used for all correlation analyses. For instance, Spearman's rank coefficient was used in bivariate analysis of continuous variables; Mann-Whitney and Kruskal-Wallis tests were used for combinations of continuous/ordinal and categorical variables; and Chi-square tests were used for combinations of categorical variables (i.e. contingency tables). In order to test the study hypotheses, ordinal and logistic regression models were also conducted. All of these are clearly

presented, along with their relevant coefficients, in the footnotes in the findings chapters. The main text in the findings chapters presents the findings in narrative form, the more important findings accompanied by figures showing the frequency results (in percentages). When presented in the text, each finding has an associated footnote that contains the p values and magnitudes of each correlation/regression. Finally, all the statistically significant results are also presented in statistical tables in Annexes 5 and 6.

In contrast to other studies that identified clustering in learning preferences by starting from pre-defined clusters (e.g. learning styles),⁵⁸⁵ the current study did not try to cluster the judicial training methods based on the experience of the trainers or the researcher. Rather than trying to fit the data to an existing theory, the analysis was exploratory, with clusters allowed to form without a predetermined structure. For groups of variables that constituted the same rating or ranking question (for instance, initial training methods, continuous training methods, sentencing tools, sentencing factors), cluster analysis (dendrograms) was added to the overall analysis.

Bivariate correlation measures were also calculated for pairs of attitude/preference variables. For instance, if judicial trainees who rank seminars high in their preferences are also more likely to rank lectures high (which would be seen by a high positive correlation coefficient), “seminars” and “lectures” would be part of the same grouping. Analogously, if trainees who rank internship practice very high also tend to rank lectures very low or the reverse (which is revealed by a high negative correlation coefficient), those two methods will belong to different groups of preferences.⁵⁸⁶ When bivariate correlation was used instead of cluster analysis, the findings refer to **grouping** rather than **clustering**.

⁵⁸⁵ Reese and Reese (n 155).

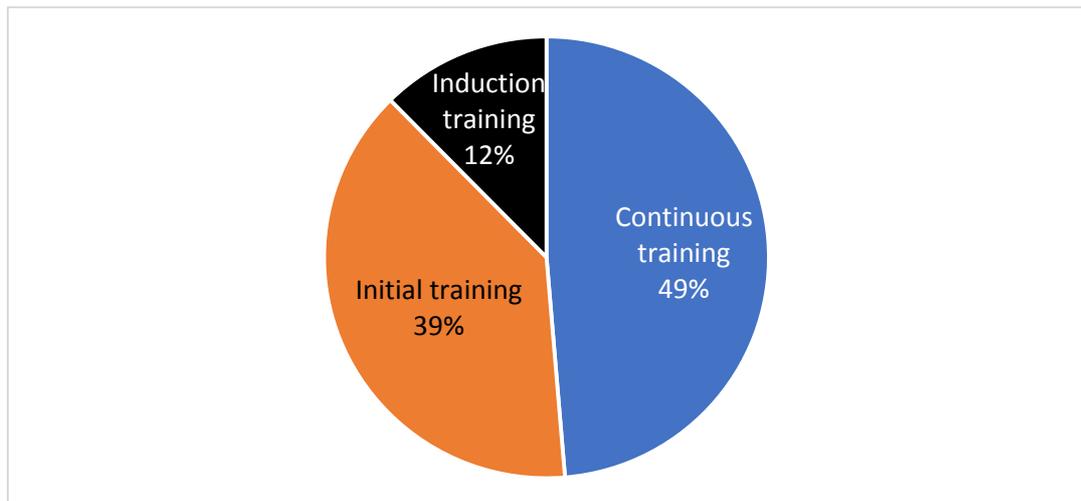
⁵⁸⁶ This can be verified statistically by obtaining a high positive correlation coefficient between “lectures” and “seminars”; or, alternatively, by obtaining a negative correlation coefficient between each of these variables and the other methods. A matrix detailing the relationships (“correlation coefficients”) between all methods can be found in Annexes 5 and 6. Given that ranking of each method is an ordinal variable, Spearman rank correlation coefficients are reproduced in the matrix.

After the data analysis was finalised, the findings were reported on various occasions to groups of judicial training experts, educators, judges and legal academics. Their reactions and comments represented a valuable source of qualitative insights regarding the interpretation of the findings, comparisons with other jurisdictions, as well as future consequences. Some of the feedback received has been integrated in the discussion of the findings.

CHAPTER 7: RESPONDENTS' PRIOR EXPERIENCE AND EXPOSURE TO TRAINING

The methodology chapter explained why the current study sought to include respondents with both (1) various levels of experience and (2) various levels of exposure to judicial training. This chapter details the characteristics of the sample obtained in the survey. The main sample consisted of 226 judges with judicial experience ranging from 0 to 35 years on the bench (mean 11 years). They were randomly selected from all levels of the court and from all around the country.⁵⁸⁷ Half of the respondents had no judicial experience at the time of the survey, while the other half had already been hearing cases in court. The figure below summarizes the distribution of respondents per type of judicial training in the main sample:

FIGURE 8: DISTRIBUTION OF STUDY PARTICIPANTS BY TYPE OF JUDICIAL TRAINING BEING UNDERTAKEN AT THE TIME OF THE SURVEY



⁵⁸⁷ The selection was made by an automated program operated by the Romanian National Institute of Magistracy for selection of judges for centralized judicial training sessions. Each court in the country has a number of allocated places, the judges have to opt in themselves but the algorithm does not allow them to participate in training more than once in a couple of years, to ensure all judges get the same access to judicial training overall.

The following sections reveal more demographic details about the three categories of judges, based on their survey responses.

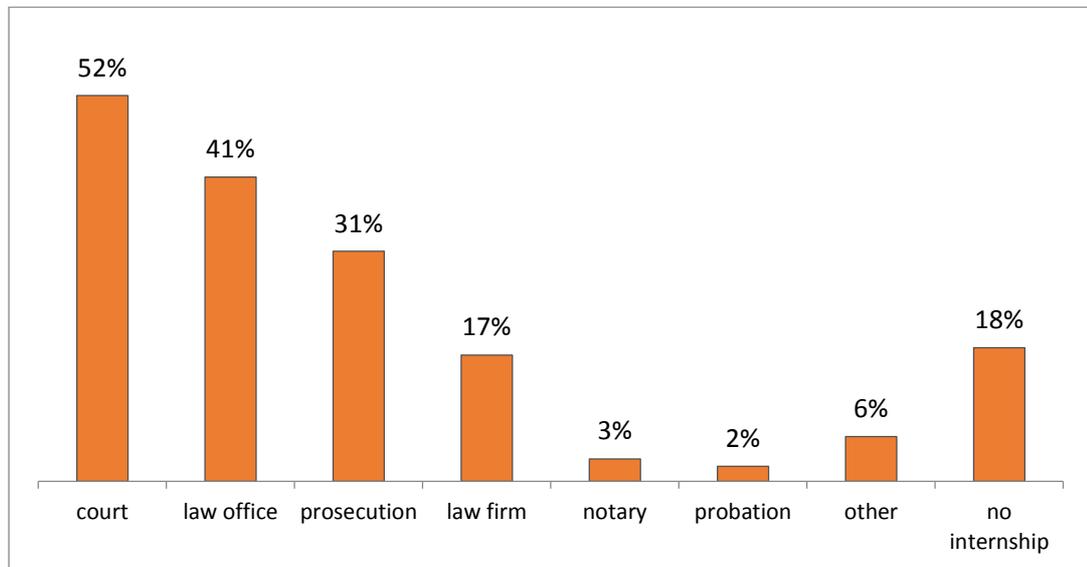
Initial trainees

The **initial trainees** (N 88) represented 39% of the main sample, and 88% of the entire population of initial trainees who had opted for being judges⁵⁸⁸ at the time of the study.⁵⁸⁹ Their responses to the demographic survey questions confirmed that they are representative of the typically young and inexperienced law graduates specific to this route of judicial appointment in continental jurisdictions, especially Latin European jurisdictions (as discussed in Chapter 3). First, 85% of them had graduated from the law school during the past 4 years (median graduation year 2012). Second, only 14% of them had some legal experience (most in law firms – only 7% in criminal law settings), and that experience was in most cases not longer than 1.5 years. Third, more than 80% of Romanian law graduates had some legal internship experience before being appointed (Figure 9).

⁵⁸⁸ At the time they were surveyed, the initial trainees only expressed their preferences for being judges (or prosecutors), but their position was not yet guaranteed. The position becomes guaranteed at the end of the 1st year of NIM initial training, upon passing an exam. Thus they are considered ‘judges’ only in virtue of their option expressed in the survey, not in virtue of their guaranteed position in the system.

⁵⁸⁹ In October 2013 3,733 candidates applied for the 200 places available (19 candidates per place). Out of the 200 selected trainees, 100 will become judges and 100 will become prosecutors. 88 out of the 100 judges of the 2013 generation were included in the study Institutul National al Magistraturii, ‘Tabel Rezultate Proba Eliminatorie de Verif. Cunostinte Jur. (30.08.13)’ (2013) <[http://www.inm-lex.ro/fisiere/d_198/Tabel%20rezultate%20proba%20eliminatorie%20de%20verif.cunostinte%20jur.\(30.08.13\).pdf](http://www.inm-lex.ro/fisiere/d_198/Tabel%20rezultate%20proba%20eliminatorie%20de%20verif.cunostinte%20jur.(30.08.13).pdf)> accessed 20 March 2015.

FIGURE 9: INTERNSHIP EXPERIENCE OF INITIAL TRAINEES (BY TYPE) (N 88)



The average court internship for this sample lasted for 6 weeks (median 3 weeks) and, interestingly, it seems to be associated with different career preferences of the respondents. Those who had prior experience in court were more likely to want to become judges and less likely to become prosecutors.⁵⁹⁰ The length of the internship itself does not seem to have a significant relationship to career preferences,⁵⁹¹ so it can be concluded that court internships are a fruitful exposure that render law students in Romania more likely to consider becoming judges, irrespective of their duration.⁵⁹²

Interestingly, no similar correlation was found between those who underwent an internship in a prosecutor's office (31%)⁵⁹³ and those wanting to become prosecutors. A potential explanation for this (lack of) effect is that respondents who

⁵⁹⁰ $\chi^2_2=12.64$, exact $p= .001$ resid 1.8 (judges) vs z resid -1.8 (prosecutors)

⁵⁹¹ Exact $p .73$

⁵⁹² A similar but weaker correlation suggests that initial trainees who had internship experience in lawyer's offices are also slightly more likely to prefer becoming judges rather than prosecutors ($\chi^2_2=3.6$, exact $p= .042$ resid 1 (judges) vs z resid -1.2 (prosecutors)), but the conclusion is not straightforward.

⁵⁹³ Exact $p .48$

had placements in prosecutor's offices are also very likely to have been exposed to the court environment as well.⁵⁹⁴

Apart from the internship exposure, the *type* of prior legal work experience seems to be associated with the initial trainees' preferences for a specific judicial role and a specialty. For instance, respondents who only had *paid* work experience but no *internship* experience are more likely to want to become prosecutors, and, perhaps not surprisingly, are also less likely to prefer civil law and more likely to prefer criminal law.⁵⁹⁵ This could be explained by the fact that paid work experience is typically in the police force, so police officers apply for the NIM because they wish to become prosecutors. In contrast, internship experience but no paid legal experience has the opposite correlative effect – it increases the likelihood that the respondent will aim to become a judge and will choose the civil law specialty.

An interesting effect in broadening the initial trainees' horizons seems to be played by placements in big law firms as opposed to smaller lawyer's offices. Those who had an internship in a lawyer's office are more likely to pick civil law as their specialty.⁵⁹⁶ In contrast, respondents who had an internship in a law firm are much more likely to desire a specialty different from the mainstream civil/criminal (such as commercial, administrative or family law).⁵⁹⁷ In this sense, big law firms seem to provide the exposure to a wider breadth of areas of law and to inspire young law graduates to take on additional specialties.

Having any kind of internship seems to help initial trainees get a sense of their preferences and help them decide the judicial role they wish to have in the justice system. Those who had no internship experience whatsoever during their studies are, first of all, more likely to be undecided about their judicial role when first

⁵⁹⁴ $\chi^2_1=15.93$, exact $p=.0$, z resid 2.6

⁵⁹⁵ Prefer to become prosecutors, not judges: $\chi^2_6=18.95$, exact $p=.006$ z resid 1.9 vs z resid -2.1 respectively. Prefer criminal law to civil law: $\chi^2_6=16.04$, exact $p=.019$ z resid 1.7 vs z resid -2.2.

⁵⁹⁶ $\chi^2_2=8.71$, exact $p=.026$ z resid 1.6

⁵⁹⁷ Ibid, z resid 2.7

applying at NIM,⁵⁹⁸ and second of all, also more likely to maintain their indecisiveness throughout their first NIM theoretical module.⁵⁹⁹ This is probably ameliorated by the opportunity offered by NIM in the second half of the first year to undergo training in both courts and prosecutor's offices, which could help undecided trainees in making their choice. However, this is only a hypothesis, as the initial trainees in this study were not surveyed *after* they underwent the second year of NIM.

One last finding with regards to internships concerns the age of the respondents and the exposure they were most likely to have had to legal practice. Those who have graduated more recently are more likely to have more than just one internship compared to those who graduated a longer time ago.⁶⁰⁰ This could be explained by the fact that internships became available as a way of gaining practical experience only in recent years. This relationship is more visible if we split graduates into groups and look at the type of prior legal experience they earned: those who have graduated law school very recently are more likely to have just undergone internships⁶⁰¹ and less likely to have undergone paid work as well⁶⁰². In contrast, those who graduated law school 3-5 years ago are more likely to have undergone both internships and work.⁶⁰³ Finally, those who graduated law school 6+ years ago are more likely to have worked without doing any internship.⁶⁰⁴

In conclusion, the initial trainees included in the study were very much in line with the typical the profile of judges undergoing initial training, for Romania and for similar jurisdictions with the same recruitment system (France, Italy, Spain). That

⁵⁹⁸ $\chi^2_4=9.85$, exact p= .038 z resid 1.3 (undecided between judge and prosecutor) and z resid 2 (chose NIM for reasons other than wishing to be part of the judiciary)

⁵⁹⁹ $\chi^2_2=11.57$, exact p= .003 z resid 2.3 (still undecided about choice between judge and prosecutor at the end of the theoretical module)

⁶⁰⁰ mean rank 85 vs 61, U = 3,049 z = 2.862 p .004.

⁶⁰¹ z resid 2

⁶⁰² z resid -2.4

⁶⁰³ z resid 2.6

⁶⁰⁴ z resid 3

is, they were young, with no judicial or sentencing experience, having graduated law school within the last few years, some with no more than a couple of years of legal experience and most with their only exposure to the legal environment through very short-term placements.

Induction trainees

The **Induction trainees** (N 28) represented 12% of the main sample, and 40% of the total population of induction trainees at the time of the study. As explained in Chapter 3, the reason why the number of induction trainees participating in the survey was relatively small was that in 2014 only 73 judges were recruited into the judiciary through this route, and the survey respondents represent 40% from the 2014 cohort.⁶⁰⁵ These respondents were both similar and different to the initial trainees. They were similar in that they had just begun their judicial career and therefore had no judicial experience; but they were different because they had at least 5 years of practical legal experience. On average, the induction trainees in the sample had 7 years of legal experience, with 95% of them having between 5 and 9.5 years of legal experience (SD 3.65). In terms of their experience, their profile is similar to other judicial appointees from European countries such as Italy, France, Spain, but also the Netherlands and some judicial positions in England and Wales.⁶⁰⁶ Amongst the induction trainees who took part in the survey, they were almost evenly split between those who had advocacy experience (43%) and those with experience in the police force (57%). This binary distinction between advocacy and police is used throughout the study to see if a different professional background of induction trainees can also explain variance in their attitudes.

⁶⁰⁵ Apart from being rather small, this sample is also biased geographically because 37 of the judges were located remotely from the survey (based on the location of their courts) and for practical reasons they could not be included in the study. While the small sample prevents generalisations, it does nevertheless offer interesting insight into how judges with some legal experience differ in their attitudes from the first category of respondents, but also from the judges who already gained judicial experience.

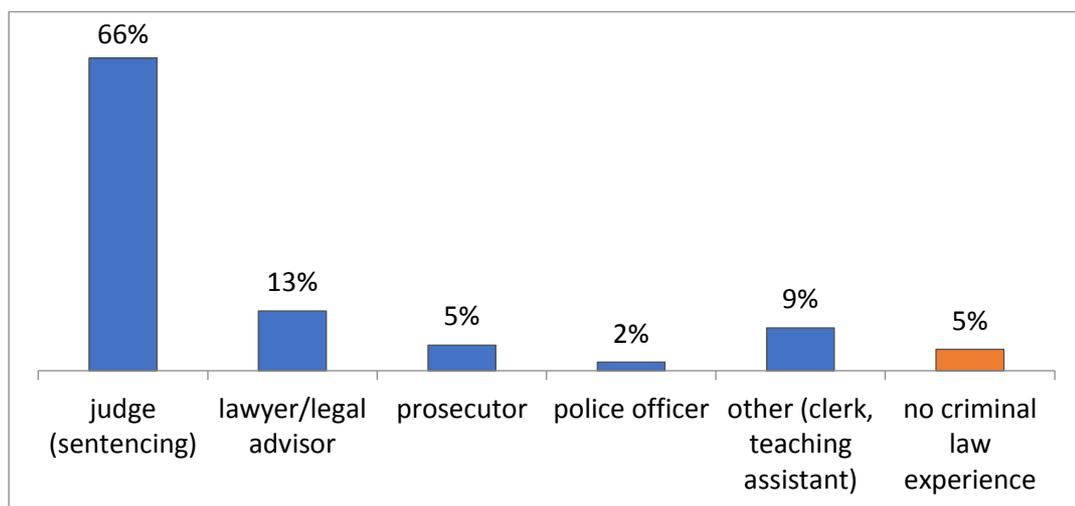
⁶⁰⁶ See Table 1 from Annex 1 reviewing appointment routes in several European jurisdictions.

Continuous trainees

Finally, 49% of the main sample was made up of serving Romanian judges (N=110), all of whom had varying degrees of judicial and sentencing experience. This group of respondents represents 7% of the estimated number of Romanian judges undergoing continuous training in criminal law at the time of the study. The judicial experience of this of this group of “**continuous trainees**” ranges from 8 months to 35 years on the bench, with 12 years of experience on average; 68% of respondents have between 4 and 20 years of experience (SD 7.6).

The continuous trainees were asked about their experience in criminal law more specifically: 95% had prior experience in criminal law (varying from 1 to 28 years, mean 10 years, SD 6.5). Out of these, 66% gained that experience solely as judges (while hearing criminal law cases and sentencing), while others had additional roles in which they gained criminal law experience (Figure 10).

FIGURE 10: PRIOR CRIMINAL EXPERIENCE GAINED BY CONTINUOUS TRAINEES (BY SOURCE) (N 110)



A few aspects are worth highlighting from Figure 10 above: first, two thirds of continuous trainees get to hear criminal cases (and get to sentence) at least some part of their career, even if they end up specialising in other areas of law. In addition,

another 27% get exposure to criminal law practice even if they do not sentence *per se* (the other categories adding up to 95%). The judges who have sentencing experience tend to have more experience on the bench than those judges who had exposure to criminal law in other non-judicial roles.⁶⁰⁷ In total, 95% of continuous trainees have, at the time of the survey, exposure to the criminal justice system in one way or another.

Unlike initial and induction trainees, it made sense to ask continuous trainees what prior exposure to judicial training they had in the past. Only 55% of the surveyed continuous trainees said they had undergone **initial training**, and another 4% said they had undergone **induction training**). An overview of judicial appointments conducted by NIM between 2005 and 2016 presented in Chapter 3 showed that, on average, 20% of Romanian judges have been appointed directly without any judicial training, and another 34% of judges were appointed through the direct, “experienced” route. Therefore, on average, 54% of Romanian judges appointed in the past decade did not undertake initial training. They are slightly under-represented in this sample (41% no initial training).

An additional explanation is that, while initial judicial training has existed in Romania since 1992, it was not mandatory until 1997. So it is to be expected that judges who have more than 22 years of experience as of 2014 did not undergo initial training. This hypothesis is confirmed by the finding that judges who did not undergo initial training have significantly more years on the bench than judges who did.⁶⁰⁸ Furthermore, initial training has been organised in its current form since 2002 (as a two-year long course).

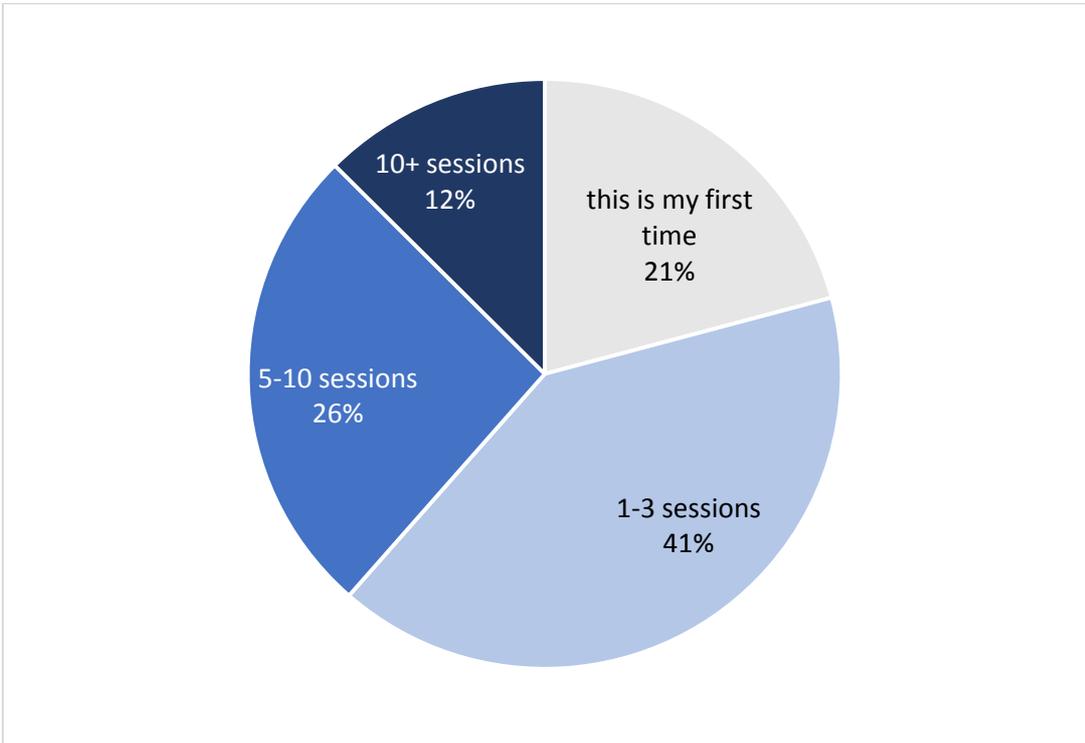
⁶⁰⁷ Mean rank 58 (sentencing) vs 39 (non-sentencing), Mann-Whitney U = 1,563 z = 3.048 p .002

⁶⁰⁸ mean rank 63 (no initial training) vs mean rank 38 (initial training), Mann-Whitney U = 590, z = -4.305, p .000

On average, continuous trainees who did undertake initial training began training in 2005. They graduated between 1992 and 2013, which represents a reasonable spread of the current Romanian judiciary.

With regards to their prior **exposure to continuous training**, 79% of the continuous trainees declared they have been to at least one other continuous training session in the past. The pie chart (Figure 11) shows the distribution of exposure to prior continuous training amongst these judges in the survey.

FIGURE 11: TOTAL AMOUNT OF PRIOR CONTINUOUS TRAINING FOR CONTINUOUS TRAINEES (N 96)



The figure above shows that the survey sample has a good diversity of respondents in terms of their exposure to continuous judicial training.

Conclusion: the overall sample stratification

In conclusion, the stratification by level of professional experience and by exposure to prior training has resulted in a diverse sample for the current study. In terms of

professional experience, the judges involved in the research displayed a wide range of levels of judicial, legal and sentencing experience. Firstly, out of all the judges in the survey, 51% had no **judicial experience** whatsoever (both initial and induction trainees), while 49% had judicial experience ranging from 1 year to 35 years in post (continuous trainees). Secondly, in terms of prior **legal experience** before recruitment to the judiciary, the difference between initial and induction trainees in the study was very stark, as expected from their different recruitment methods.⁶⁰⁹ Thirdly, the respondents in this survey also displayed a wide range of experience in **criminal law**: 55% of judges across all subsamples had criminal legal experience ranging from 6 months to 27 years (mean 6 years). In addition to being diverse in their professional experience, the judges undertaking continuous training had a **wide range of exposure to judicial training**, with respondents ranging from undergoing continuous training for their first time to respondents who have undergone dozens of sessions throughout their career.

⁶⁰⁹ While all the induction trainees had prior legal experience at the time of the survey (mean 7 years), only 23% initial trainees had prior legal experience (mean 1 year, mostly in advocacy or police forces), not required by the recruitment criteria, and significantly less experience than the induction trainees. Not surprisingly, the difference in experience between initial and induction trainees is statistically significant ($H(1) = 28.932$ $p .0$) in that induction trainees are significantly more likely to have more legal experience (mean rank = 45) compared to initial trainees (mean rank = 21).

CHAPTER 8: JUDICIAL ATTITUDES TO FORMAL TRAINING

This chapter presents findings on how judges in Romania experience and perceive formal training. The discussion in the background chapters examined how the hypothesis that “the judges’ approach to judicial training and preferences will vary with experience” can be derived from educational theories on experiential learning. However, it also explained that, prior to this research, that hypothesis had not been tested with judges.

This chapter explores the following five aspects of formal judicial training in Romania:

1. The judges’ perception of the **overall usefulness** of formal training (judicial and legal) for subsequent court practice;
2. The judges’ views on specific formal training **methods**;
3. What **factors** may affect judges’ preferences for specific training methods, such as professional expertise, prior exposure to training, or learning styles;
4. The types of **social interactions** judges have during formal training and their role in the learning process; and
5. The judges’ perceptions of current judicial **training reforms**: improvement of induction training, judgecraft and e-learning.

Value of formal training

The survey explored the extent to which Romanian judges value initial training for their subsequent practice in court. Both initial trainees and continuous trainees who had previously undergone initial training were asked slightly varied versions of the

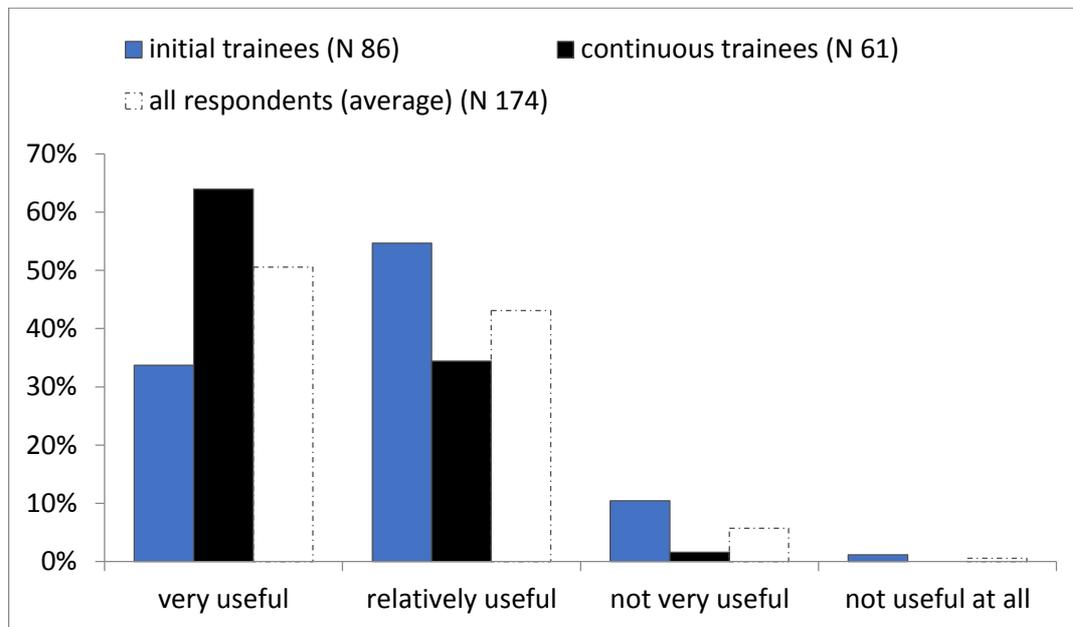
same question, but most features of the question are identical, apart from the experiential element. Respondents could select one of four possible options ranging from “very useful” to “not useful at all” to the following questions.

Initial trainees: *How useful do you find the initial judicial training you’re undergoing for your future judicial career?*

Continuous trainees: *How useful do you now find the initial judicial training you received for your judicial career?*

Figure 12 below displays the distribution of attitudes towards initial training for initial trainees and continuous trainees, highlighting how they compared to the average.

FIGURE 12: PERCEPTION OF OVERALL USEFULNESS OF INITIAL TRAINING BY TYPE OF TRAINEE (N 174)

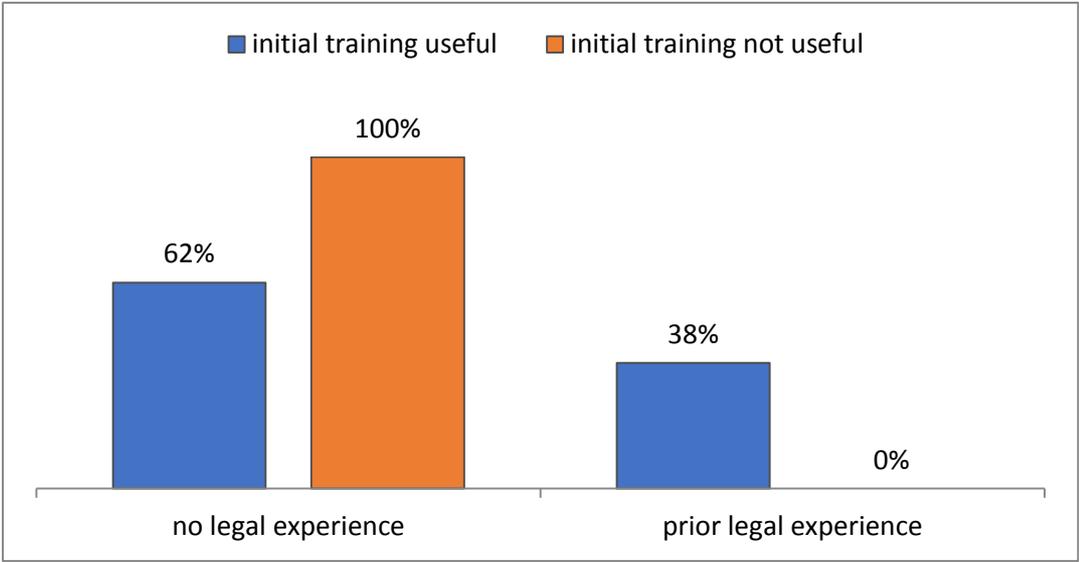


Almost all respondents (94%) considered their initial judicial training at least relatively useful for their subsequent experience on the bench, which highlights the overall value of initial judicial training from the perspective of the Romanian trainees. There was a substantial difference in view between initial and continuous trainees. Almost two thirds (64%) of continuous trainees said they found initial training very useful compared with only 34% of initial trainees.

Further analysis indicated that two independent factors can help to explain this difference in views of initial training.⁶¹⁰ The first factor, professional experience **on the bench**, seems to play an important role in increasing judges' appreciation for initial training: inexperienced judges (e.g. initial trainees) are significantly less likely to appreciate the value of initial training for their career than judges who have gained at least minimal court experience as a judge (e.g. continuous trainees).⁶¹¹ This appreciation seems even stronger for judges with criminal experience.⁶¹²

A second factor explaining the difference above is the prior **legal practice** experience of the respondent, even before becoming a judge. Respondents who have even minimal experience in legal practice seem more appreciative of the value of initial or induction training for their judicial career.⁶¹³

FIGURE 13: PERCEIVED VALUE OF INITIAL TRAINING BY LEGAL EXPERIENCE (N 113)



For instance, induction trainees (with at least 5 years of legal experience) are more likely to be appreciative of their introductory training than initial trainees; and this difference is maintained even as both categories of judges gain bench experience.

⁶¹⁰ The statistical results are presented in more detail in Annex 5.

⁶¹¹ Est -.867 SE .324 Wald 7.137 Sig .008 CI (-1.503, -.231).

⁶¹² Est -1.087 SE .324 Wald 11.238 Sig .001 CI (-1.723, -.452).

⁶¹³ Est -1.419 SE .412 Wald 11.872 Sig .001 CI (-2.226, -.612).

The *type* of legal practice does not seem to matter.⁶¹⁴ This effect is cumulative to the previous one – so judges who have both bench and legal practice experience are most appreciative of the beginning of formal judicial training. But the *amount of years* of experience in legal practice or on the bench does not make a statistically significant difference in the judges' perceptions.⁶¹⁵ In other words, while a judge with 5 years of experience on the bench (or in legal practice) does not differ in his attitude from a judge with 20 years of experience on bench, both are very likely to have a better opinion of their initial judicial training than a judge who has not yet heard cases in court.

In order to isolate the effect of experience in explaining the difference in attitudes, this cross-sectional study would need a way to measure other objective changes, such as changes in judicial training curriculum over the years or a different quality of trainee, corresponding to different levels of entry examinations. While this study, could not measure these objective changes, an analysis of responses split by number of years on the bench could shed some light on whether these other potentially confounding variables may account at least in part for the difference in attitudes. For instance, a statistically significant difference would be expected between, say, experienced continuous trainees who have less or more than 2 years on the bench (when the 'direct route' examination was aligned with the 'main route' examination). Similarly, a statistically significant difference would be expected between continuous trainees who have 22+ years of judicial experience (when initial training was not mandatory) and those below 22 years of experience. Similar differences could have been accounted for by different changes in the curriculum over the years. These hypotheses were tested and revealed that there is no significant difference between respondents based on their level of experience on the bench.⁶¹⁶ This does not entirely exclude an effect of unmeasured variables

⁶¹⁴ For Romanian judges, the only significant distinction concerning the type of legal practice is between former advocates and former police officers. In this case, there were no significant differences in view between the two types of legal backgrounds (Sig .503).

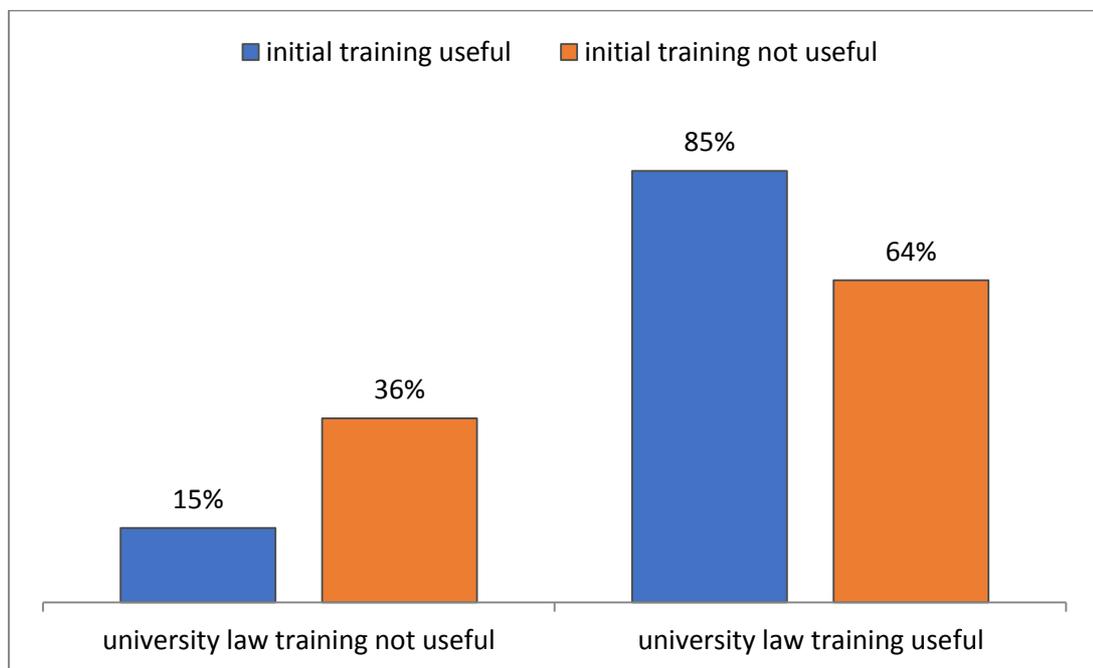
⁶¹⁵ Amount of judicial experience (Sig .965), or legal practice experience (Sig .141).

⁶¹⁶ Amount of judicial experience for experienced respondents (Sig .944).

(changing quality of training, recollection etc.) on judges' attitude towards the value of training, but the lack of effect of years on the bench is a strong signal that these other unmeasured variables have small, or mutually cancelling, effects.

Another finding on the overall appreciation of the value of formal training is that **judges who appreciate their undergraduate law training are also more likely to have a charitable view towards the value of initial judicial training.**⁶¹⁷ Figure 14 below illustrates this finding.

FIGURE 14: PERCEIVED VALUE OF JUDICIAL TRAINING BY PERCEIVED VALUE OF UNIVERSITY LEGAL EDUCATION (N 174)



There are two potential interpretations for this finding, suggested by qualitative input after the findings were disseminated. The first one supports a developmental thesis that a positive past educational experience increases the learner's trust in future educational experiences. The second interpretation suggests a more typological (and less developmental) view: that there might be different types of learners – some who have a more solid trust in formal educational methods, while others distrust formal education and prefer non-formal and informal sources of

⁶¹⁷ Est. .473 SE .136 Sig .001 CI (.205, .740).

learning. In this interpretation, the learner's attitude does not necessarily change in time based on her exposure to training, but is instead correlated with a measure of personality, for instance with conscientiousness. However, the survey did not include questions that could explore which of these interpretations is more likely.

Preferences for judicial training methods

The research also explored the attitudes of Romanian judges to specific methods used by the NIM in judicial training, whether there are any clear preferences and any factors that may help to explain these preferences. The research was structured in order to explore whether judges at different levels of their career prefer training methods that fulfil their learning needs within the learning cycle. This draws on Kolb's Learning Cycle and Learning Style Inventory (LSI),⁶¹⁸ as well as the work of Reese and Reese on the different teaching methods used in law training which also correspond to Kolb's Learning Cycle.⁶¹⁹ While Reese and Reese identified 24 different teaching methods that they thought are most likely to occur in law training, not all of these 24 teaching methods are used in judicial training in Romania. In addition, the exploratory phase revealed important differences between initial and continuous training formats and methods. During initial training and induction training, a wider range of training formats is used than is found in continuous training.⁶²⁰ These are summarised in Table 11 below.

⁶¹⁸ Kolb (n 127); Kolb and Kolb (n 152).

⁶¹⁹ Reese and Reese (n 155) 188.

⁶²⁰ For instance, continuous training is only provided through lectures (centralised at NIM) or seminars (decentralised at courts across country).

TABLE 11: INITIAL AND INDUCTION TRAINING DELIVERY METHODS IN CRIMINAL LAW

Method	Initial	Induction	Definition
Lectures	yes		large size; one-way delivery; Q&A
Seminars	yes	yes	small size; more interactive; focused on practice; trainer asks questions
Supervised court practice	yes	yes	individual; practice supervised by more senior judge; one year (initial trainees), 6 weeks (induction trainees)
Mock trials	yes	yes	supervised court simulations; highly interactive for main court roles; most trainees are active observers
Court document writing sessions		yes	individual or paired exercise; in-class or as homework;
Practical advice from the trainers	yes	yes	practical tips and tricks on court practices from trainers; comparisons between old and new legislation
Discussions with/advice from peers	yes	yes	trainees encouraged to work in pairs or small groups for seminars or exams
Prep for NIM entry exam	yes	yes	important learning experience of current legislation (mentioned by respondents in exploratory phase)
Prep for NIM graduation exam	yes		important learning experience of current legislation and practical aspects of the job (mentioned by respondents in exploratory phase)

In **continuous training**, sentencing is not taught as a separate topic. It is integrated into criminal law courses, and the delivery is limited to the lecture format, but the trainers use **specific techniques** to approach topics related to sentencing more specifically:

1. Legal analysis of the current legislation on substantive criminal law;⁶²¹
2. Discussions of current sentencing procedures;⁶²²
3. Discussions of landmark cases that affect sentencing practice;
4. Commenting on issues encountered by judges in real cases;
5. Discussing case studies where sentencing is problematic; and
6. Sentencing exercises/role-play.

Due to these differences between initial/induction training and continuous training, the survey question that focused on initial and induction training referred to the 9 methods summarised in Table 11, while the survey question that focused on continuous training referred to the 6 specific techniques enumerated above. The findings on initial and induction training methods are presented together because most methods overlap (as Table 11 illustrates).

Preferences for initial/induction training methods in criminal law

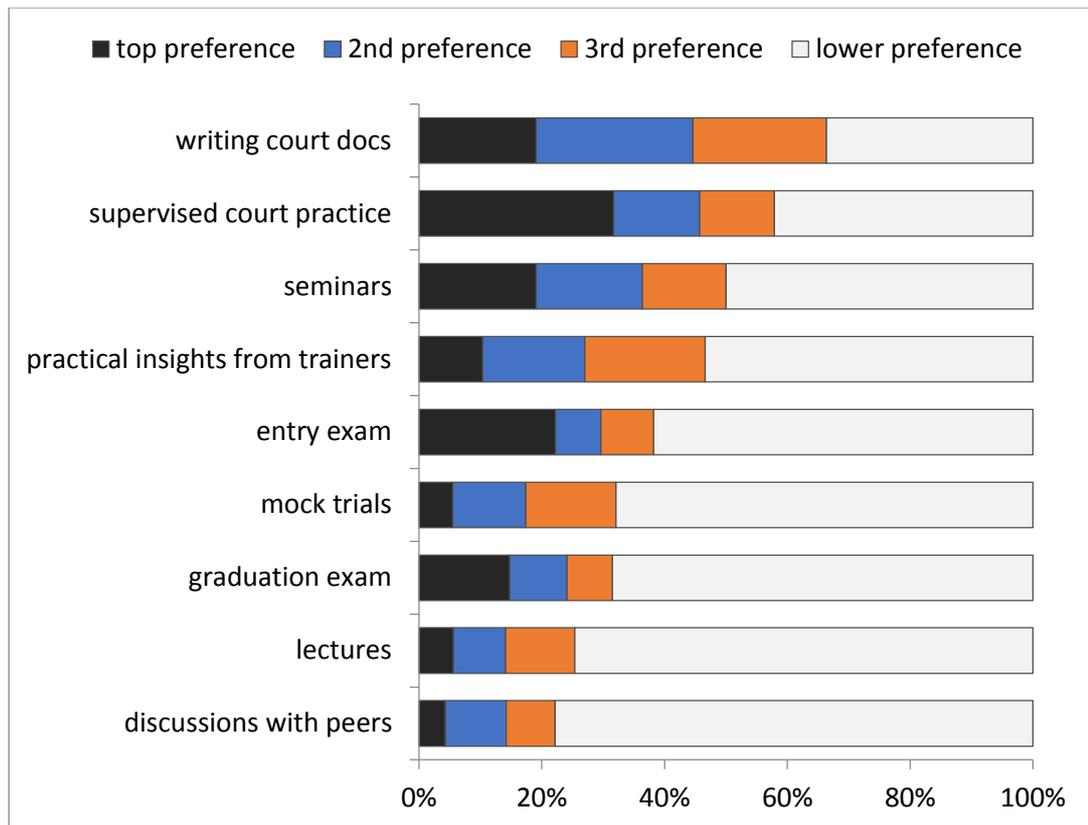
Judges were asked to rank the nine different methods in order of how useful they felt they were to their work in court. The Figure 15 below presents the aggregated responses for all Romanian judges who are undergoing or have had the experience of initial or induction training (all categories of respondents). As Table 11 illustrates, the training methods used in initial and induction training mostly overlap, thus the responses were aggregated across all three subsamples. Following the aggregated responses, differences in preferences between subsamples of respondents are presented.⁶²³

⁶²¹ For instance, how the criminal law defines specific categories of offence, their identifying characteristics, the sentence ranges for each category

⁶²² In contrast to 1., this type of method focuses on procedural aspects of sentencing (e.g. how a sentence is computed, how to identify and compute aggravating and mitigating factors, how to deal with reoffending, with multiple offences etc.)

⁶²³ Annex 5 presents a series of ordinal regressions that were computed to verify if the difference in method preferences between respondents can be explained by a difference in experience. Where significant differences were found, they are highlighted in the paragraphs below.

FIGURE 15: ORDER OF PREFERENCES FOR INITIAL TRAINING METHODS IN CRIMINAL LAW (RANKED BY TOP 3 PREFERENCES) FOR ALL JUDGES WHO EXPERIENCED INITIAL OR INDUCTION TRAINING (N 162)



The most preferred training method consists of practical exercises in writing court documents, with 66% of all Romanian judges ranking them among their top 3 preferred methods. These practical exercises are closely followed by supervised court practice, preferred by 60% of respondents. Both of these methods are very practice-oriented and offer the inexperienced judge a relatively safe (as they are supervised) and yet realistic setting in which to hone their judging skills.

Initial trainees (73%) were more likely than induction trainees (41%) to favour **writing court documents** exercises.⁶²⁴ This difference might be explained by a lack of any legal practical experience of the initial trainees.⁶²⁵ In other words, judicial

⁶²⁴ Kruskal-Wallis H 7.286 Sig .007 (initial mean rank 52 vs induction mean rank 71)

⁶²⁵ Est -1.048 SE .388 Wald 7.298 Sig .007 CI (-1.809, -.288). There was no significant difference between judges who had more legal practice experience than those who had less in their preference, suggesting that even a minimal exposure to legal practice helps judges in gaining document writing skills.

recruits that had no experience of working in legal practice are less likely to have an acquaintance with court documentation, in any legal role, so they may be more eager than others to learn how to draft such documents.

In contrast, both initial and induction trainees seem equally keen on **supervised court practice** (both 64%). Both types of trainees seem to appreciate supervised court practice much more than experienced judges who underwent initial training in the past (46%). This difference may be due to different levels of experience on the bench. The statistical data cannot provide an explanation, but the exploratory interviews with new recruits and trainers suggest a potential interpretation for this difference: that judges who did not hear any case yet (inexperienced judges) appreciate that supervised court practice is a very useful training method for their integration in the judicial profession, while judges who already serve on the bench (experienced judges) do not seem to regard, in hindsight, supervised court practice as such an important training component for their subsequent career.⁶²⁶

Romanian judges' opinions on the value of **seminars** is split (50% ranking them among their top 3 preferences). The percentages of judges who prefer this method increases according to the level of legal and judicial practice experience: only 35% of initial trainees favour seminars, compared with 60% of induction trainees and 70% of experienced judges (continuous trainees, asked about initial training). These differences are associated with an interplay between experience on the bench and more specific exposure to criminal cases. Analysis reveals that experience on the bench is associated with an increased appreciation of judges towards the criminal law seminars in hindsight;⁶²⁷ this appreciation is further increased as soon as judges have minimal exposure to criminal cases.⁶²⁸ Similar patterns are found in judges' attitudes to criminal law **lectures**. Figure 15 suggests, at first glance, that lectures

⁶²⁶ Est -1.044 SE .225 Wald 21.559 Sig .0 CI (-1.485, -.603). The *amount* of experience on the bench did not have a significant impact.

⁶²⁷ Est 1.269 SE .318 Wald 15.880 Sig .0 CI (.645, 1.893). The *amount* of experience on the bench did not have a significant impact.

⁶²⁸ Est .890 SE .317 Wald 7.888 Sig .005 CI (.269, 1.512). The amount of exposure to criminal cases has no significant impact.

are not very popular with Romanian judges (22% top 3). Yet there is a very substantial difference between the views of continuous trainees (50%) and initial trainees (10%). This difference is partly explained by exposure to court practice.⁶²⁹ In conclusion, experience is inversely related to judges' attitudes to seminars and lectures: as soon as begin their job, they prefer seminars and lectures more, and supervised court practice or document writing exercises less. This finding will be further explored in the Discussion chapter, in the context of Kolb's theoretical framework.

Those undergoing judicial training in Romania also have differing views on the value of **judicial trainers' practical insights**. Very few (19%) of induction trainees place value on the practical insights of judicial trainers, compared with 50% of continuous trainees and 52% of initial trainees. This unusual split suggests it is not necessarily caused by a different level of judicial expertise.⁶³⁰ Part of the explanation could be that the induction trainees are all required by law to have had legal practice experience – which means they have already had the chance to see “how the law works” in practice, and this might make them feel less is need of the trainers' insights on the impact of new legislation.⁶³¹ Another explanation is the judge's specialty: for instance, judges specialising in criminal law are much more likely to consider the practical insights given by the trainer on issues in that subject matter a useful source of learning, than judges with other specialties.⁶³²

If past legal practice makes judges less reliant on the judicial trainers' insights, it seems to have the opposite effect on the judges' appreciation of **discussions with their training peers**. Induction trainees were more likely to appreciate discussions with their peers (25%) than initial trainees (16%).⁶³³ In addition, exposure to court practice is associated with an increased likelihood that judges will see their initial

⁶²⁹ Est 2.218 SE .441 Wald 25.249 Sig .0 CI (1.353, 3.083)

⁶³⁰ Sig .231

⁶³¹ Est -1.104 SE .450 Wald 6.021 Sig .014 CI (-1.986, -.222)

⁶³² Est .943 SE .401 Wald 5.538 Sig .019 CI (.158, 1.728)

⁶³³ Est 1.132 SE .481 Wald 5.531 Sig .019 CI (.189, 2.075)

training peers as a good source of insight – although the amount of exposure to court practice is statistically irrelevant.⁶³⁴ Almost a third of judges with experience on the bench (31%) ranked this method among their top three favourites, while only a small proportion of new recruits with no bench experience did (19%). Criminal practice further increases appreciation for discussions with training peers.⁶³⁵

Just over a third (38%) of Romanian judges ranked the individual preparation for the **NIM entry exam** among their top 3 preferred learning methods – but significantly more induction trainees (55%) rated this learning method as preferred. Judges with prior legal experience are proportionally more likely to appreciate the NIM entry exam with each new added year of legal experience.⁶³⁶ In contrast, the judges' appreciation for the individual preparation for the **NIM graduation exam** (32%) increases proportionally with the number of years on the bench.⁶³⁷

Mock trials are far less popular among Romanian judges than might be expected, given how appreciated they appear to be as a training method in legal education in Europe⁶³⁸ and in judicial training more specifically.⁶³⁹ Only 32% of respondents marked mock trials among their top 3 choices of initial training methods. Exploratory observations revealed that the mock trials currently conducted by the NIM are of a good quality, so it is unlikely that the poor rating is due to the quality of the delivery itself. No difference between respondents was found. One potential explanation is that the number of judges who get to have an active role in a mock

⁶³⁴ Est 1.078 SE .215 Wald 25.125 Sig .0 CI (.656, 1.499)

⁶³⁵ Est 1.016 SE .218 Wald 21.821 Sig .0 CI (.590, 1.443) (and increases with each year Est -.088 Sig .0)

⁶³⁶ Est -.419 SE .123 Wald 11.604 Sig .001 CI (-.660, -.178). There was also a small significant difference between judges with different amounts of judicial experience, at odds with the effect of legal experience: appreciation for the entry exam slightly *decreased* with each year of experience on the bench (Est .069 SE .027 Wald 6.710 Sig .010 CI (.017, .121)).

⁶³⁷ Est -.125 SE .048 Wald 6.740 Sig .009 CI (-.219, -.031)

⁶³⁸ Paul Bergman, Avrom Sherr and R Burrige, 'Learning from Experience: Non-Legally-Specific Role Plays' (1987) 37 *Journal of Legal Education* 535.

⁶³⁹ "Simulated hearings and role-play exercises are often used as a part of the curricula or training plan for the delivery of training for judges and prosecutors. A range of methods is used to ensure that the 'live experience' of simulated adjudication enhances the skills of participant trainees." Cooper (n 370) 53.

trial is less than a third in any group; it could be that those who had an active role in a mock trial found it very useful, but the other participants saw it as less relevant for them – but the survey did not ask about participation in mock trials in training sessions.

The association of expertise factors with preferences for initial and induction training methods is summarised in the table below:

TABLE 12: RELATIONSHIP BETWEEN EXPERIENCE (THREE CATEGORIES) AND PREFERRED INITIAL TRAINING METHOD

Experience category	As experience (in each category) increases	
	Greater preference for	Lesser preference for
Legal practical experience	Discussing with training peers Studying for the entry exam	Writing court documents Receiving practical insights from trainers
Judicial experience	Seminars Lectures Studying for the graduation exam Discussing with training peers	Supervised court practice
Experience in criminal cases	Seminars Lectures Discussing with training peers	Supervised court practice

Preferences for continuous training methods in criminal law

Preferences for methods in *initial and induction* training have been presented, and the hypothesis that differences in experience explain differences in preferences has been validated. A similar question was constructed with regards to preferences towards *continuous* training methods. They revealed that **judicial preferences towards continuous training methods also vary with experience.**

As discussed in Chapter 4, continuous judicial training is based, at least in part, on the assumptions that (1) it serves purposes different from initial training, such as

knowledge update, and (2) it serves judges with experience, who by virtue of their experience have different needs and expectations than initial trainees. This research also explores whether there are differences between continuous trainees, given that they come with different levels of experience in continuous training. In other words, it seeks to answer the question: “Does the *prior* experience⁶⁴⁰ of judges also make them have different needs and expectations towards their training and towards their learning experience at large?” If the answer is yes, then continuous training participants should not be seen as a monolith, and further efforts in addressing different learning needs ought to be taken into account by training institutes when they design their continuous training programme.

Two clarifications need to be made here. The first relates to how the question was formulated. Unlike initial and induction training, where training on sentencing is integrated in criminal law modules, training observations revealed that it is easier to identify discussions and methods related to sentencing in continuous training sessions. The preliminary qualitative research identified 6 main techniques that are currently used in Romanian continuous training in relation to learning to sentence:

1. Legal analysis of the current legislation on **substantive criminal law**;⁶⁴¹
2. Discussions of current **sentencing procedures**;⁶⁴²
3. Discussions of **landmark cases** that affect sentencing practice;
4. Commenting on **issues encountered by judges in real cases**;
5. Discussing case studies where sentencing is **problematic**; and
6. Sentencing **exercises/role-play**.

⁶⁴⁰ Here ‘experience’ is intentionally broad to include both ‘prior exposure to training’ and ‘prior judicial/legal/criminal experience’, so all these variables were tested against attitudes towards continuous training.

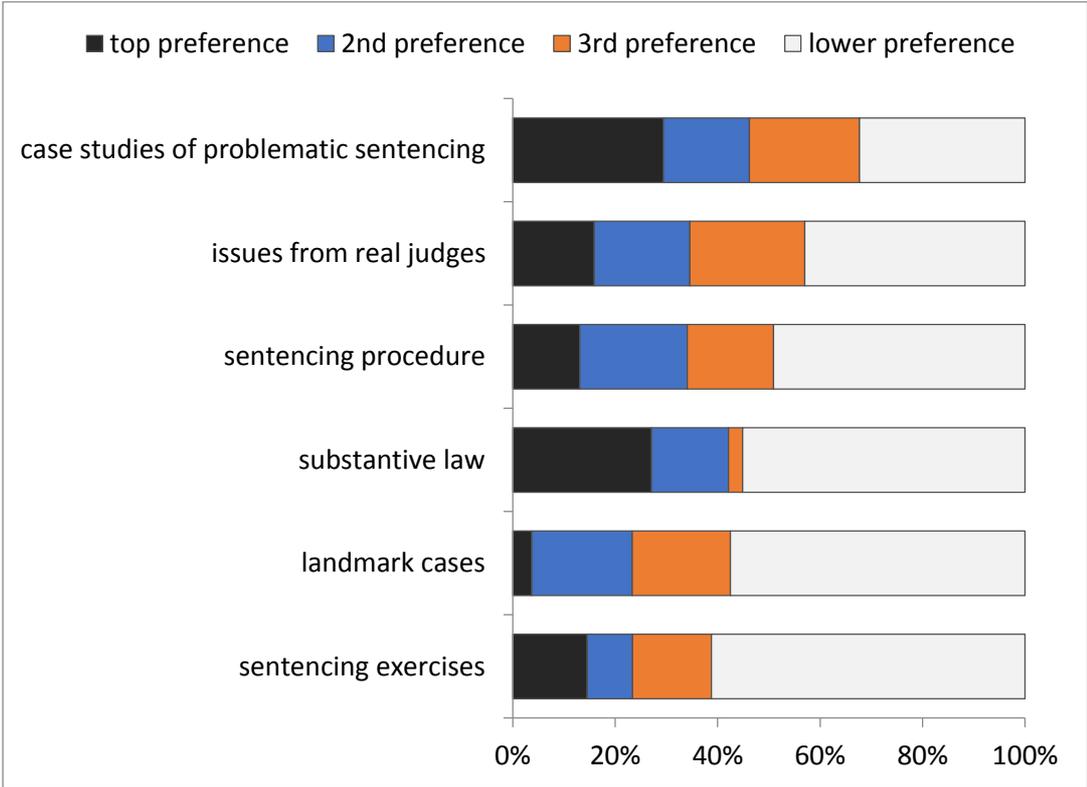
⁶⁴¹ For instance, how the criminal law defines specific categories of offence, their identifying characteristics, the sentence ranges for each category

⁶⁴² In contrast to 1., this type of method focuses on procedural aspects of sentencing (e.g. how a sentence is computed, how to identify and compute aggravating and mitigating factors, how to deal with reoffending, with multiple offences etc.)

The second clarification refers to the sampling for this question. The main category of respondents on preferences for continuous methods are, of course, continuous trainees. Unlike initial or induction trainees, these judges have had exposure to continuous training so they can best reflect on the value of its different methods. But because one of the key input variables of this study is exposure to training, it was important to test if judges who are *not* exposed to a certain type of training have different attitudes to such training than judges who are exposed to it. Therefore, judges not yet having experienced continuous training were also asked the same question, but formulated more abstractly – they were asked to rank what continuous training methods *they would prefer*.

Figure 16 below presents the aggregated responses for all respondents, ordered by how many respondents considered that particular method among their top 3 preferred continuous training methods. The discussion of the findings will be combined with an assessment of the hypothesis that attitudes towards these training methods vary with experience and/or exposure to training.

FIGURE 16: PREFERENCE FOR CONTINUOUS TRAINING METHODS – ALL JUDGES (N 214)



The top two methods preferred in continuous training are case-based methods. Romanian judges prefer to discuss specific case studies where sentencing is problematic or hear about other judges’ experiences in court. Once again, mock trials or sentencing exercises prove less popular among Romanian judges.

A second aspect to note is that, although the methods were ordered in the figure above based on respondents who ranked them among their top 3 choices, almost a third of Romanian judges (27%) ranked discussions of substantive law as their first option, on equal footing with discussing case studies where sentencing is problematic (29%). This perhaps makes sense especially given the recent enactment of the new criminal code in Romania, which means that new legal stipulations are very likely to be at the forefront of Romanian judges’ minds.

Because it focuses on aggregated results, Figure 16 does not display one of the main hypotheses of this study – that attitudes to judicial training methods varies with experience and/or exposure to judicial training. The table below presents a simplified version of the results of a series of ordinal regressions that tested this hypothesis. The full statistical results are presented in Annex 5. These results are discussed next.

TABLE 13: RELATIONSHIP BETWEEN EXPERIENCE (THREE CATEGORIES) OR PRIOR EXPOSURE TO TRAINING AND PREFERRED CONTINUOUS TRAINING METHOD

Experience category	As experience (in each category) increases	
	Greater preference for	Lesser preference for
Legal practical experience	Sentencing procedure	
Judicial experience	Substantive law analysis	Issues from real judges Sentencing exercises
Experience in criminal cases	Sentencing procedure	Landmark cases Issues from real judges

Exposure to continuous training	Sentencing procedure	Issues from real judges
	Substantive law	

The most important finding overall is that, as hypothesised, **experience has a significant relationship to preferences for the methods used in continuous judicial training, just as it had for initial training methods.** This finding is shown in Table 13, where five out of the six tested training methods are associated with at least one of the three experience variables (legal, judicial, criminal). The best illustration of this finding is the stark difference between initial trainees and continuous trainees in their preference for discussing sentencing issues encountered by judges in real cases (“issues from real judges”): 69% of initial trainees rank this method among their favourites, while only 52% continuous trainees rank this method among their favourites.⁶⁴³ The only training method where there are no statistically significant differences between judges of different levels of experience is discussing case studies where sentencing is problematic: equally high numbers of continuous trainees (69%) and initial trainees (67%) prefer this method.⁶⁴⁴

The additional exploratory hypothesis formulated at the beginning of this section also seems to be validated: it is not just that a *minimal* experience distinguishes initial trainees from continuous trainees in their needs and expectations; it is the *increasing amount of experience* that also seems to make judges change their preferences over time. In other words, each year of experience accumulated seems to be associated with a shift in their preferences. But this is only true for attitudes to 4 of the 6 training methods.⁶⁴⁵

⁶⁴³ Kruskal-Wallis $H(3) = 25.522$ SE 8.930 $z = 2.858$ Adj Sig .013 between initial (mean rank 92) and continuous (mean rank 118)

⁶⁴⁴ Sig .978

⁶⁴⁵ Where each year of experience has an additional relationship with a change in attitudes, the regression tables in Annex 5 present the relevant statistical measures in parantheses.

Table 13 also reveals that legal, judicial and criminal law experience have different effects in relation to preferences for different training methods (that is why they are presented separately in the table). For clarity, each is presented in turn.

In the first row, prior exposure to **legal practice** appears as a powerful predictor of judges' preferences for procedure-related methods. Judges with some legal experience have a significantly stronger interest for training methods focused on procedural aspects of sentencing,⁶⁴⁶ and that interest further increases with each year of legal practice.⁶⁴⁷ Although not further explored in the survey, the potential explanation could be that judges who worked in legal practice have learned how important it was for them as legal practitioners to know and respect the legal procedure in order to win cases. In addition, the survey evidence suggests that judges who had legal practical experience are less interested in discussing real issues encountered by other judges in court.⁶⁴⁸ Due to the small sample size of judges with prior legal experience, the statistical results again fall short of significance. But a similar relationship was discovered for this method and all other experience-related variables.

The second row of the table reveals that the **amount of experience on the bench** is clearly associated with an increase in interest for interpreting substantive law⁶⁴⁹ and a decrease in preference for sentencing exercises.⁶⁵⁰ The strongest relationship is nonetheless between the amount of experience on the bench and the judges' preferences for discussing issues encountered by other judges in real cases,⁶⁵¹ perhaps not surprisingly, the experienced judges are not as keen as inexperienced

⁶⁴⁶ Est .900 SE .356 Wald 6.382 p .012 CI (.202, 1.597)

⁶⁴⁷ Est -.174 SE .090 Wald 3.738 p .053 CI (-.351, .002), falling short of significance – perhaps due to small sample size. The difference is especially marked between induction trainees (mean rank 85) and initial trainees (mean rank 118), Kruskal Wallis H(3) = 33.432 SE 13.421 z = 2.491 Adj Sig .038, with the former appreciating procedural discussions much more than the latter.

⁶⁴⁸ Est -.641 SE .353 Wald 3.296 p .061 CI (-1.332, .051), falling short of significance

⁶⁴⁹ Est -.041 SE .016 Wald 6.734 p .009 CI (-.073, -.010)

⁶⁵⁰ Est .037 SE .016 Wald 5.318 p .021 CI (.006, .068)

⁶⁵¹ Est -.581 SE .245 Wald 5.649 p .017 CI (-1.061, -.102). For each year on the bench: Est .055 SE .025 Wald 4.981 p .026 CI (.007, .104)

judges to spend time discussing other judges' individual problems in particular cases. It will be explored in Discussion if this is due to different stages in the learning cycle.

Criminal legal experience (third row) is also associated with judges' appreciation for different training methods, cumulatively or independently to the experience on the bench.⁶⁵² The most noteworthy finding is that criminal law experience makes Romanian judges even more unlikely to want to discuss specific issues encountered by other judges in cases,⁶⁵³ perhaps because they feel they already have enough experience of their own. In addition, judges more experienced in sentencing have more interest in the study of relevant procedures and their application in sentencing.⁶⁵⁴ It is not clear why Romanian judges with minimal sentencing experience are less likely to prefer discussing the relevant landmark cases⁶⁵⁵ during their continuous training than their less experienced colleagues.

The research also examined whether prior exposure to judicial training was related to the respondents' judicial training expectations and preferences in any way. The last row in Table 13 suggests that the answer is mainly "yes" – preferences for three methods out of six are correlated with exposure to continuous training. More specifically, judges with minimal exposure to continuous training appear much less interested in discussing issues encountered by judges in real cases,⁶⁵⁶ and more interested in discussing legal procedures and substantive law pertaining to sentencing than judges who never underwent continuous training. The amount of appreciation does not increase as the amount of exposure to continuous training increases.

⁶⁵² As explained in the presentation of the sample, for 60% of judges the two types of experience are overlapping, as they have gained criminal legal experience as judges; but for 35% judges gained criminal experience outside of sentencing.

⁶⁵³ Est -.790 SE .262 Wald 9.111 p .003 CI (-1.303, -.277)

⁶⁵⁴ Est -.046 SE .019 Wald 6.192 p .013 CI (-.083, -.010)

⁶⁵⁵ Est .037 SE .016 Wald 5.318 p .021 CI (.006, .068)

⁶⁵⁶ Est -.950 SE .250 Wald 14.396 p .000 CI (-1.441, -.459)

Grouping of preferences for judicial training methods

In their study of legal education training models, Reese and Reese devised 4 clusters of training methods from their own personal experience as law teachers, based on Kolb's Learning Styles Inventory.⁶⁵⁷ Using measures of bivariate correlation,⁶⁵⁸ it is possible to verify, firstly, if the judges' views of the existing training methods naturally group in any way; and, secondly, whether any such grouping corresponds in any way with the clusters Reese and Reese identified in legal education. This part of the analysis was carried out only with the judicial training methods used in initial and continuous training, because there were too few responses on induction methods to warrant a cluster analysis. The full table of statistical results can be found in Annex 5.

The correlational analysis reveals four main groups of initial judicial training methods, which are presented here in the theoretical framework provided by Kolb's LSI and Reese and Reese's methods clustering, as these frameworks are able to account for the qualitative differences between groups.⁶⁵⁹

⁶⁵⁷ Reese and Reese (n 155).

⁶⁵⁸ As detailed in the Research Design chapter.

⁶⁵⁹ As explained in the Research Design chapter, I use 'clustering' for when clustering analysis was applied, and 'grouping' for when the groups were determined through bivariate correlational analysis.

FIGURE 17: GROUPING OF INITIAL TRAINING METHODS USING THE LSI FRAMEWORK



Applying the LSI framework to Romania suggests that **judges with different learning styles might prefer different methods**. The “Assimilator” group is made up of methods that place emphasis on abstract rather than case-based thinking and a more passive delivery of knowledge. The analysis reveals that judges who rank lectures highly are very likely to also rank seminars highly,⁶⁶⁰ while being less interested in methods from the other three groups, such as court practice, advice from trainers or mock trials.⁶⁶¹

In contrast, “Diverger” judges who prefer hands-on exercises that emulate real life experience (such as participating in mock trials or trying to write court documents such as example judgments or sentencing remarks) are more likely not to prefer

⁶⁶⁰ Spearman rho .560 p .000

⁶⁶¹ Spearman rho -.204, p.023 (court practice); -.218, p. 012 (advice from trainers); and -.336 p.002 (mock trials).

abstract learning methods such as lectures/seminars⁶⁶² or of independent theoretical study.⁶⁶³

Thirdly, the Romanian judges who most appreciate direct, unmitigated contact with the court experience (i.e. prefer supervised court practice) tend not to value theoretical or independent study methods (Assimilating) as much,⁶⁶⁴ or to a lesser extent hands-on exercises that reflect actual practical experience (Diverging group).⁶⁶⁵

A final group is represented by those judges who place a high value on the insights and the advice of other individuals from the judiciary (the “Accommodators”). In that sense, there is a correlation between those who value the advice of trainers and those who also value their peers’ views in terms of experiences.⁶⁶⁶ Accommodators value concrete information and active learning, and seem to place less value on abstract passive methods specific to the Assimilating group.⁶⁶⁷

A similar cluster analysis was conducted for continuous training methods. The correlations matrix as well as the cluster dendrogram (both reproduced in Annex 5) identify three main clusters of preferences. Once again, these have been overlapped with the Kolb/Reese and Reese LSI framework to better account for the qualitative differences between clusters. The relevant statistical data is also presented in footnotes.

⁶⁶² Spearman rho -.336 p .002 (lectures), -.325 p .002 (seminars)

⁶⁶³ Spearman rho -.305 p .004

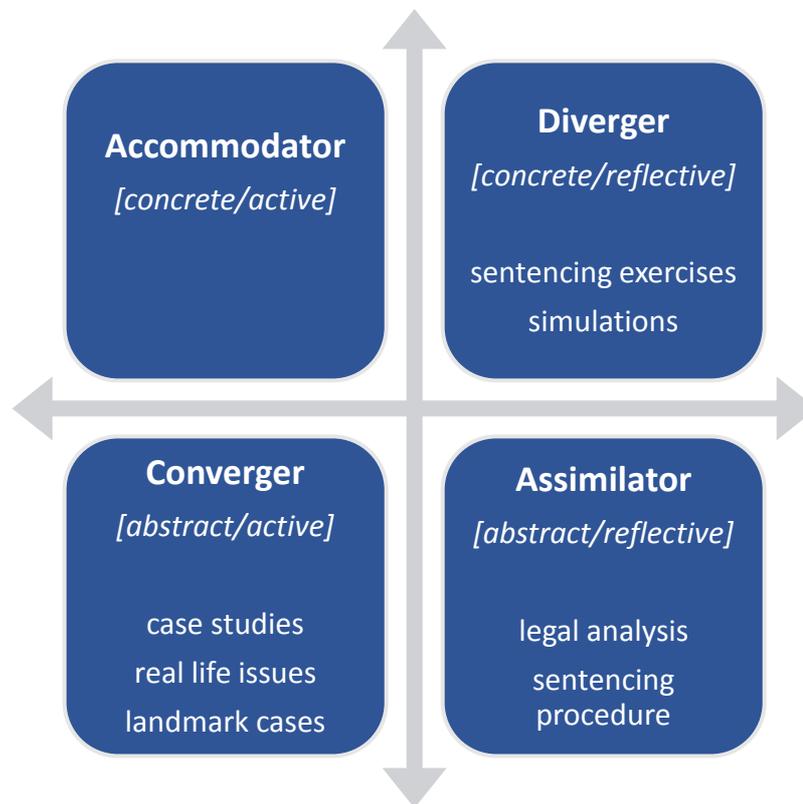
⁶⁶⁴ Spearman rho -.204 p .023 (lectures); rho -.411 p .006 (independent study for graduation exam); rho -.225 p .010 (independent study for entry exam)

⁶⁶⁵ Spearman rho -.210 p .048

⁶⁶⁶ Spearman rho .237 p .005

⁶⁶⁷ Spearman rho -.218 p .012 (lectures)

FIGURE 18: CLUSTERS OF CONTINUOUS TRAINING METHODS



The Assimilator cluster reunites judicial preferences for discussing sentencing procedure and analysis of relevant legislation on sentencing. In other words, the cluster analysis reveals that judges who have a strong preference for legal analysis are also much more likely to also prefer discussions on sentencing procedure.⁶⁶⁸ These two methods focus on a higher level of abstraction, on methods that encourage the analysis of norms and legal stipulations.

In stark opposition with the Assimilator cluster, the Converger cluster contains more hands-on, active methods such as discussing case studies where sentencing could be problematic, discussing landmark cases which affect sentencing or discussing issues encountered by real judges. All these three methods are positively correlated with each other,⁶⁶⁹ and strongly correlated with abstract methods from the

⁶⁶⁸ Spearman rho .512 p .000

⁶⁶⁹ Spearman rho .199 p .005 (case studies/landmark); rho .156 p .030 (real issues/case studies); rho .147 p .042 (landmark/real issues).

Assimilator cluster.⁶⁷⁰ They could also be called “case-based methods” because they focus on analysing and discussing specific real-life cases or situations.

The judges’ preferences for sentence writing exercises and simulations form a third separate cluster, in tension with both Assimilator cluster methods,⁶⁷¹ which tend to be more abstract/theoretical, and with Converger cluster methods,⁶⁷² which are more “active”, i.e. contain more real-life elements.

It should not be surprising that none of the continuous training methods included in this study fits the Accommodator quadrant in the figure above. Previous empirical research on law students revealed that only about 13% of law students fit the Accommodator quadrant.⁶⁷³ In addition, it could be that none of the methods formally used in Romanian continuous judicial training can be classified as Active/Concrete. However, Reese and Reese have classified coaching and peer interaction as Accommodator methods. These are discussed further below.

The existence of clusters of preferences for continuous training lends support to the idea that judges have different learning styles. This finding will be explored further in the Discussion chapter.

Social learning

The exploratory phase revealed that judges have substantial interactions with one another, both during judicial training and afterwards. The interactions judges have with judicial trainers and their judicial peers *during* judicial training have already been explored; it was shown that advice from training peers is not valued highly, especially among inexperienced judges, but that attitude improves among more

⁶⁷⁰ E.g. Spearman rho $-.516$ p $.0$ (real issues vs legal analysis); rho $-.482$ p $.0$ (case studies vs procedure)

⁶⁷¹ Spearman rho $-.376$ p $.0$ (vs legal analysis); rho $-.307$ p $.0$ (vs sentencing procedure);

⁶⁷² Spearman rho $-.155$ p $.0$ (vs landmark cases)

⁶⁷³ Reese and Reese (n 155) 177.

experienced judges. In contrast, the practical insights coming from trainers were generally appreciated by almost half of all the judges, although judges coming from legal practice were less appreciative of this than other judges. Finally, it was revealed that interaction with trainers and with other trainees cluster together to suggest that some judges are more likely to be, in Kolb's terms, "Accommodators".

This section seeks to explore the hypothesis that the relationship of judges with their trainers and with other judges takes place both during and beyond training, and continues to provide a relevant source of inspiration and learning even on the bench. For instance, the initial trainees seem to form a tight-knit community, working in small seminar groups, often living together in the NIM dormitory, and sometimes having to prepare training tasks in teams. They are expected to form strong bonds and maintain them even if initially they do not trust each other's legal advice. In contrast, continuous trainees are more likely to build social connections with judges in their court, and not so much with continuous training colleagues or with trainers, as these are often geographically remote. In exploring these themes, this section of the study sought to investigate (1) if judges indeed communicate and keep in touch with each other after training; and if so (2) to what extent; (3) through what means; and (4) if they feel this communication provides an informal source of learning for them.

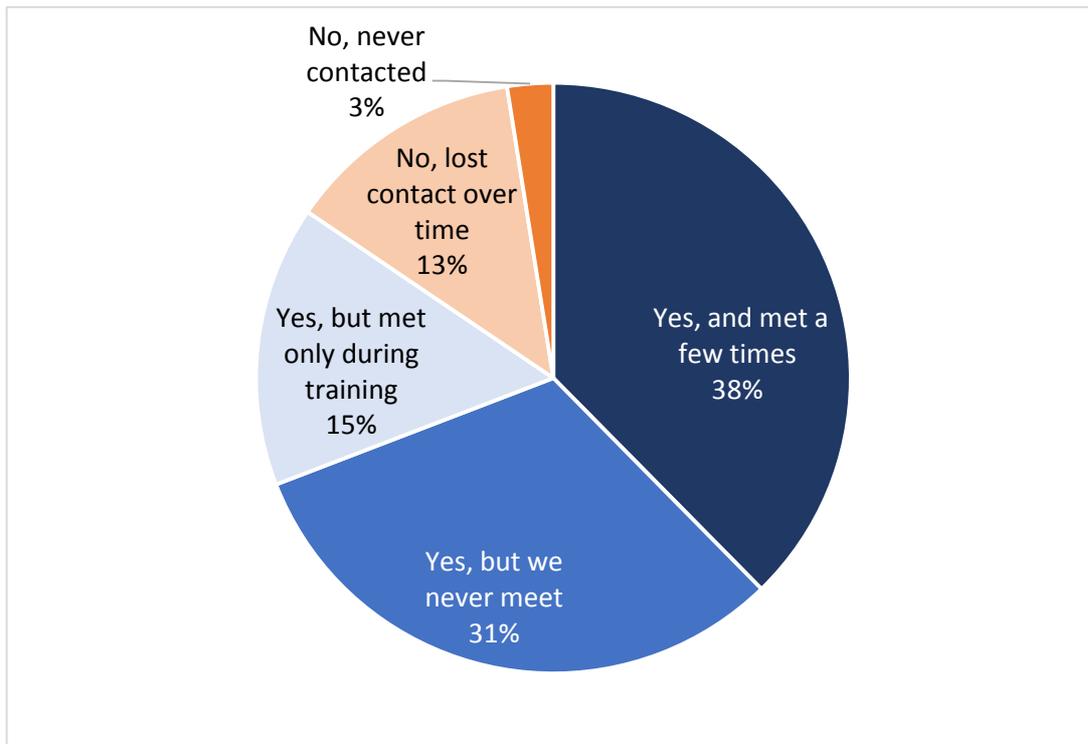
The first part of this section explores the connection of respondents with their initial training peers. Judges from all samples were asked if they keep/kept in touch with their peers, if so, to what extent, and which communication methods they tend to employ. The second part explores the contact of the judges with the trainers – if they keep in touch with the NIM trainers, and if so, on what subjects (implicitly identifying the areas of informal learning).

Contact with peers

The survey responses confirmed that initial training is a socially bonding experience in which judges connect with each other and maintain those relationships over the

years: 84% of judges who underwent initial or induction training kept in contact with colleagues from judicial training over the years, one way or another.⁶⁷⁴ The figure below presents with blue shades the judges who stayed in touch with their peers, and with orange shades those who did not stay in touch.

FIGURE 19: AMOUNT OF CONTACT WITH INITIAL TRAINING PEERS (N 162)



Of those who maintained some contact, just over a third (38%) maintained contact by actually meeting up after initial training, just under a third (31%) kept in contact through other means but never met again after the training, while 15% only met each other again at other judicial training sessions. Romanian judges who appreciated the value of initial training were also more likely to have closer contact with their initial training peers.⁶⁷⁵ But most importantly, time seems to play a role in how tight the relationships between trainees remain: judges who underwent

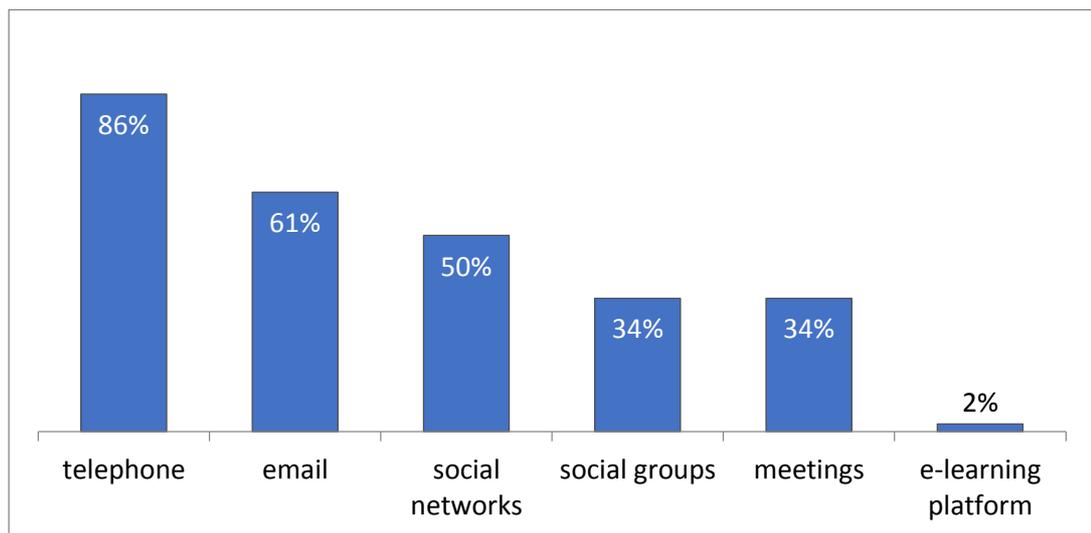
⁶⁷⁴ Their choice to keep in touch or not does not correlate significantly with any other variable measured in the study.

⁶⁷⁵ Rho .165 p .037

initial training a long time ago are much more likely to only meet their peers again during NIM training, or to not stay in touch at all.⁶⁷⁶

When not meeting, Romanian judges use a whole range of tools of communication to stay in touch with their initial training peers:

FIGURE 20: COMMUNICATION METHODS USED FOR STAYING IN TOUCH WITH PEERS (N 162)



The telephone is the most popular form of communication, and it is used by all categories of judges without significant discrepancies. The communication methods that are associated with new technologies – email, social networks and social groups – reveal large discrepancies between judges of various levels of experience and age. Regression analysis was run on each of the communication tools used, and the main finding is that **more experienced judges are less likely to use new technological means of communication (email, social networks, social groups) than younger⁶⁷⁷ and less experienced judges.**⁶⁷⁸ This illustrates a generation gap in the adoption of new technologies, which has already been empirically demonstrated in wider

⁶⁷⁶ H(4) = 21.758 p .000

⁶⁷⁷ Youth is here associated with recency of graduation from law school and/or recency of initial training. U=457.5 z=-2.295 p .022 (increased social network use), U=1,727 z=3.304 p .001 (increased social groups use).

⁶⁷⁸ Judges with more judicial experience use e-mails (U=93 z=-2.4 p .016) and social groups (U=1,536 z=-3.3 p .001) less than those with no judicial experience.

populations;⁶⁷⁹ but also suggests that the adoption of communication methods can also be dependent on the informal rules and communication culture within a profession. For instance, judges in the study with experience in legal practice were less likely to use discussions groups⁶⁸⁰ and meetings⁶⁸¹ than other categories of judges, and this is independent of their experience on the bench or age. So far most studies on ICT in the justice system have very much focused on support systems for court staff, or on communication tools with the parties and the general public, but did not explore how judges communicate with each other.⁶⁸²

Contact with the trainer

The initial and induction trainees were asked if they think they will stay in touch with any of their trainers after the training is over, while the continuous trainees were asked if they did keep in touch with any of their trainers. The discrepancy was significant: 51% initial trainees and 48% induction trainees said they are planning to stay in touch with the trainer; in contrast, only 17% of continuous trainees said they actually kept in touch with their trainer.⁶⁸³ Experienced judges kept in touch with their trainers significantly less than initial and induction trainees seem to expect.⁶⁸⁴

⁶⁷⁹ Tony Bradley, 'Survey Finds Generation Gaps in Adoption of New Tech' *PCWorld* (16 September 2014) <<http://www.pcworld.com/article/2607111/survey-finds-generation-gaps-in-adoption-of-new-tech.html>> accessed 20 June 2016; Forrester Research, 'The Technology Generation Gap Is Widening' *Business Wire* (22 September 2010) <<http://www.businesswire.com/news/home/20100922005168/en/Forrester-Technology-Generation-Gap-Widening>> accessed 20 June 2016.

⁶⁸⁰ $U=39$ $z=-2.140$ $p=.033$

⁶⁸¹ $U=3$ $z=-2.623$ $p=.003$

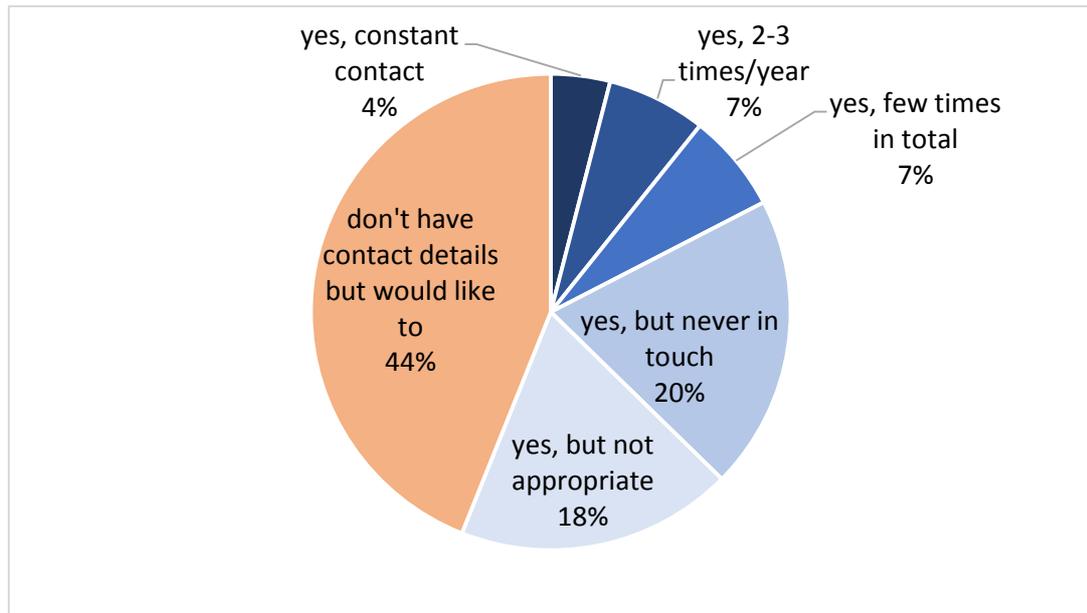
⁶⁸² Dora Reiling, 'Technology in Courts in Europe: Opinions, Practices and Innovations' (2012) 4 *International Journal for Court Administration* <<http://ijca.ubiquitypress.com/articles/10.18352/ijca.75/galley/57/download/>> accessed 20 June 2016; European Commission for the Efficiency of Justice, 'European Judicial Systems - Edition 2014 (2012 Data): Efficiency and Quality of Justice - Full Report' (2014) ch 5.2 Information and communication technology (ICT) in the courts (e-justice and e-courts) <http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf> accessed 15 January 2015.

⁶⁸³ $\chi^2_2(188)=21.23$ $z=4.3$ $p=.000$

⁶⁸⁴ z resid -2.8

The experienced judges were further asked “Have you ever kept in touch with your NIM trainer after a training session on criminal law/procedure?”. The findings are reported in Figure 21.

FIGURE 21: HAVE YOU EVER KEPT IN TOUCH WITH YOUR NIM TRAINER AFTER A TRAINING SESSION ON CRIMINAL LAW/PROCEDURE (N 75)



The responses reveal that 44% of the respondents do not have the contact details of the trainer, although they indicated they would like to. Another 38% have the details but are not actually making use of them, either because they did not need to or because they did not think that was appropriate. Only 18%, as discovered earlier, have some contact with the trainer.⁶⁸⁵

The judges who indicated they tend to or wish to stay in touch with the trainer were further asked what reasons they typically have in doing so. Two thirds of respondents (77%) said **they contact a trainer to ask for a legal interpretation when there are conflicting opinions in their local court.**⁶⁸⁶ Less than a quarter indicated they would also ask about new relevant legislation (24%), about new judicial training

⁶⁸⁵ None of the variables included in the study explain the differences.

⁶⁸⁶ Interestingly, judges who had a higher opinion on the usefulness of initial judicial training for their career were more likely to approach the trainer for this kind of guidance, in contrast with judges who did not think of judicial training too highly (U=722 z=3.061 p .002).

opportunities that might suit them (22%), and to ask them for specific advice in sentencing decisions (22%). Very few said they used these occasions to offer feedback on the judicial training (9%).

Attitudes towards judicial training reforms

There are efforts to improve judicial training in Romania.⁶⁸⁷ During the exploratory research, it was discovered that the NIM managers and trainers were focused on a series of current reforms and challenges of current training, such as shortcomings they perceive in the induction training for induction trainees and plans for the launch of an e-learning platform for continuous trainees.

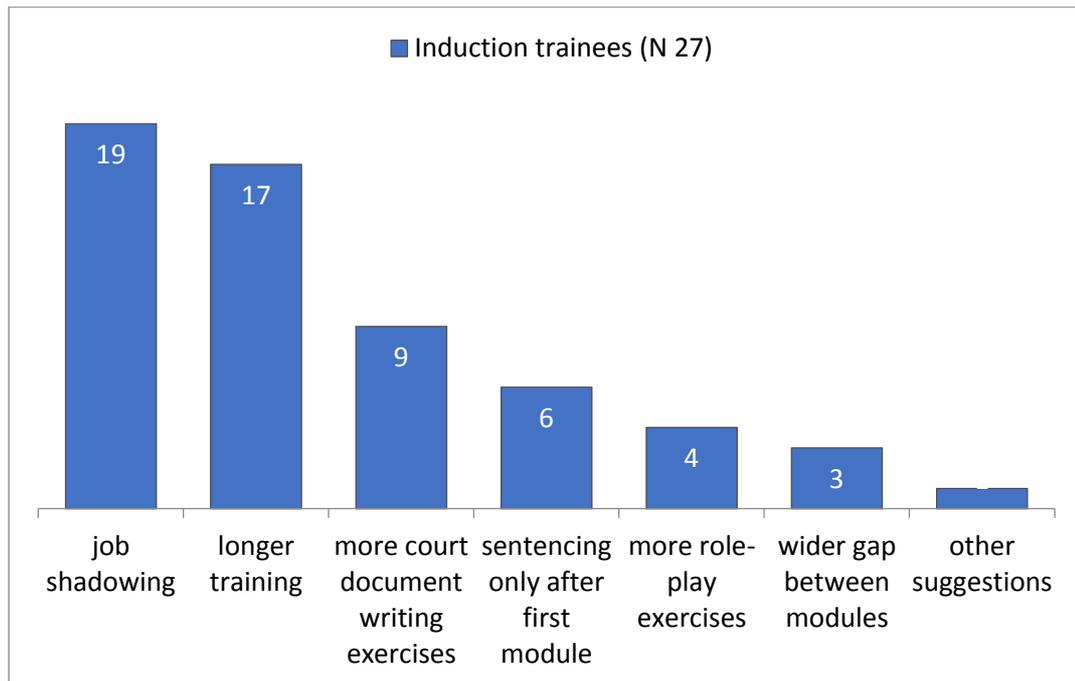
In order to contribute to the practical improvement of judicial training in Romania, the survey included a few questions asking judges what their view was of these issues and reforms, with the aim of sharing the findings with NIM to assist in the reforms. The following findings also serve in painting a more complete picture of judicial attitudes towards formal training.

Improving induction training

The preliminary interviews with induction trainers and induction trainees revealed that respondents saw a few shortcomings in the way induction training is organised. The interviews also provided some suggestions for improvement. Consequently, these suggestions were included in the survey as answer choices to the question “What suggestions would you have for the improvement of the induction training?”, while also allowing induction trainees to add their own suggestions. The responses are presented in Figure 22 below.

⁶⁸⁷ Institutul National al Magistraturii, Strategia Institutului National al Magistraturii pentru perioada 2013-2016 2013.

FIGURE 22: SUGGESTIONS FROM INDUCTION TRAINEES FOR IMPROVING INDUCTION TRAINING (N 27)



The suggestion that attracted most support from induction trainees was the chance to shadow a judge in their assigned court before they have to begin their own judicial activity (N 19, i.e. 70%). This finding is explored further in the Discussion chapter. A second suggestion supported by 63% of the induction trainees (N 17), was to extend the time spent on induction training before beginning court activity. The study did not ask judges to indicate how much longer the training ought to be, nor what it should contain in addition. However, the interviews conducted with the induction trainees suggested that this need for longer induction training might be caused by the respondents' belief they are not sufficiently trained for their new judicial career.

To test this hypothesis, a logistic regression model was run in order to test whether preferences for a longer induction training relate to (1) the amount of legal experience and (2) type of prior legal experience might have on the likelihood that a judge would say the training should last longer.⁶⁸⁸ There was no evidence that the *amount* of prior legal experience is the reason why induction trainees may desire

⁶⁸⁸ Details about the logistic regression model can be found in Annex 5.

longer training. Judges with less experience do not necessarily feel the need to compensate their lack of experience with more training.⁶⁸⁹ In contrast, the *type* of prior legal experience seems to have a very significant effect on preference for longer induction training. **Judges who agree that the training should last longer are 11 times more likely to have had experience as police officers than as lawyers.** One potential explanation for this difference is that, former police officers do not have as much contact with the courts and the sentencing process as former advocates do. They might help prosecutors prepare cases, but they do not have direct contact with the judicial environment that would smooth out their transition to being judges themselves.⁶⁹⁰

Attitudes to e-learning

Virtual Learning Environments (VLE) or e-learning has become widespread in the provision of vocational education around the world.⁶⁹¹ At the time of the research, the Romanian training institute was in the process of designing training content on criminal law and procedure for the newly-launched e-learning platform. For that reason, the respondents were not asked about their past experience with the online criminal law content or their use of the platform. They were asked for their views about using an e-learning platform and whether they had any views on what kind of content and training methods would keep them engaged on an e-learning platform.

⁶⁸⁹ It is not clear if the negative result was due to a very small sample or to a lack of effect. Given how high *p* is, it is very likely that it is a lack of significant effect in the entire population.

⁶⁹⁰ An alternative, more informal, interpretation of this finding is inspired by the interviews with judicial trainers. The trainers suggest that police officers are simply worse prepared in law, which might explain why they feel the need for a longer training before beginning their court activity.

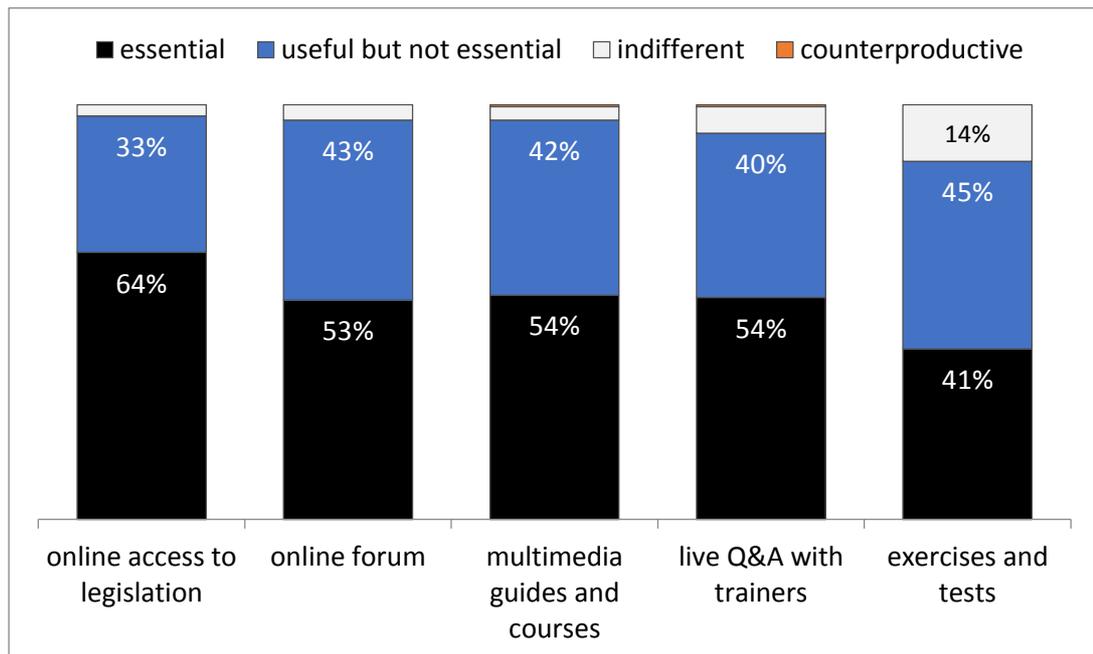
⁶⁹¹ David White and others, 'Study of UK Online Learning: Report to HEFCE by the Department for Continuing Education, University of Oxford' (HEFCE 2010) 11 <http://dera.ioe.ac.uk/11732/1/rd17_10.pdf> accessed 19 July 2015; 'The Top eLearning Statistics and Facts For 2015 You Need To Know' <<http://elearningindustry.com/elearning-statistics-and-facts-for-2015>> accessed 19 July 2015.

All judges were asked to rate five types of e-learning content, identified during the exploratory phase, in order of usefulness for their court practice:

1. online access to legislation
2. online forum for judges
3. multimedia guides and courses
4. live Q&A with judicial trainers
5. online exercises and tests

First, the aggregated results reveal that most judges (85%) considered all methods either useful or essential for their judicial activity, so they are all worth implementing on the e-learning platform. Second, looking in more detail at those judges who considered certain types of e-learning content essential, it is clear that certain types of judicial education would be more readily taken up online than others. Figure 23 displays the results for e-learning type of content, highlighting the proportion of judges who considered each of these types essential for their activity.

FIGURE 23: PREFERENCES FOR E-LEARNING METHODS AMONGST ROMANIAN JUDGES (N 190)



The most important e-learning resource, which 97% of Romanian judges feel is valuable to their court practice, is direct access to relevant legislation. Two thirds

(64%) consider this component essential. This is a rather passive (and non-interactive) learning source, but it can be incredibly useful for a busy judge in court, trying to identify the relevant law in a particular case. This also reflects two aspects of the current situation in Romania that might not be true for other jurisdictions. First, the Romanian legal profession still does not have free and user-friendly access to legislation and case law, although there is work in progress to address this. Second, with the enactment of the new codes, the need to have direct and immediate access to the new laws has become very important to Romanian judges.

There are no significant discrepancies between preferences of Romanian judges for 5 out of 6 e-learning methods. More than 50% of judges consider each of them essential to an e-learning platform, and another 40% of judges consider each necessary but not essential. The only difference is in Romanian judges' attitude to online exercises and tests; only 41% judges said they were essential to their court practice.

A related finding is that, in contrast to preferences for initial or continuous training, preferences for e-learning do not generally vary with experience.⁶⁹² Live Q&A training sessions are the only e-learning method where there is a significant discrepancy between initial trainees and the other judges. Experienced judges are more likely to value these Q&A sessions.⁶⁹³ A potential explanation, not further explored in the survey, might be that, as judges experience more cases in court, they have specific issues of legal interpretation or dilemmas that they would like to clarify with NIM trainers, who might be regarded as repositories of 'correct' interpretations of the law.

Another pattern revealed by the ordinal regression models presented in Annex 5 is that trainer-related methods (i.e. methods where the NIM trainers have a significant role in producing materials or moderating discussions) are sensitive to the

⁶⁹² In order to verify differences between types of respondents, a series of ordinal regression models were run. They are presented in Annex 5.

⁶⁹³ Est -.732 SE .301 Wald 5.908 p .015 CI (-1.321, -.142) (judicial experience); Est -1.167 SE .413 Wald 7.997 p .005 CI (-1.976, -.358) (legal experience)

respondent's prior opinion of initial training. In other words, judges who appreciate the value of the NIM initial training for their career are also more likely to value e-learning methods where the NIM trainers are involved; for instance, multimedia presentations and explanations produced by the trainers on various issues,⁶⁹⁴ or the live Q&A sessions.⁶⁹⁵ The latter is also influenced by the exposure to continuous training: judges who are exposed to continuous training are much more likely to appreciate the trainer-led live Q&As.⁶⁹⁶

Attitudes to “judgecraft” sessions

A “judgecraft” training session is meant to identify those skills that are necessary to a judge irrespective of their legal area of specialisation or specific court jurisdiction and to provide training in these skills. England and Wales is a very good example of jurisdiction in which this type of training has been implemented for a few years (although it has been renamed “The Business of Judging” in 2014). According to the Judicial College, before it was implemented:

Traditionally the College's training for judges has been jurisdiction-based, with separate seminars in civil, criminal, family and tribunal law. However, there are many judicial skills which transcend the jurisdictions and are common to all of them. The Business of Judging offers you an opportunity to develop these in a friendly, collegiate environment and to share your experiences with other courts and tribunals judges.⁶⁹⁷

At the time of this survey, the Romanian continuous training catalogue did not contain a comparable judgecraft session; from interviews conducted for this research, it appears that the Romanian NIM management team traditionally

⁶⁹⁴ Est .399 SE .196 Wald 4.161 p .041 CI (.016, .783)

⁶⁹⁵ Est .515 SE .193 Wald 7.124 p .008 CI (.137, .894)

⁶⁹⁶ Est -1.069 SE .298 Wald 12.885 p .0 CI (-1.653, -.485)

⁶⁹⁷ Judicial College, 'Judicial College Prospectus 2014-2015' 44
<<http://www.judiciary.gov.uk/Resources/JCO/Documents/judicial-college/judicial-college-prospectus-2014-15-v8.pdf>> accessed 9 March 2014.

believed that skills cannot be successfully taught separately from the substantive law and the peculiarities of a jurisdiction.⁶⁹⁸ For that reason, in Romania the necessary judicial skills (including sentencing) are meant to be developed during the relevant seminars (for instance, during the criminal law and procedure seminar). The Romanian and the English training institutes thus represent two competing paradigms with regards to how it is best to teach judicial skills – in England and Wales judgecraft can be conceivably trained separately from substantive law,⁶⁹⁹ while in Romania it is thought that judgecraft can only be taught through jurisdictional training. Both paradigms nonetheless share a common assumption: that skills *can* be taught, and they should form part of the duty of the training institute. It is this latter point that is most relevant to the topic of the survey.

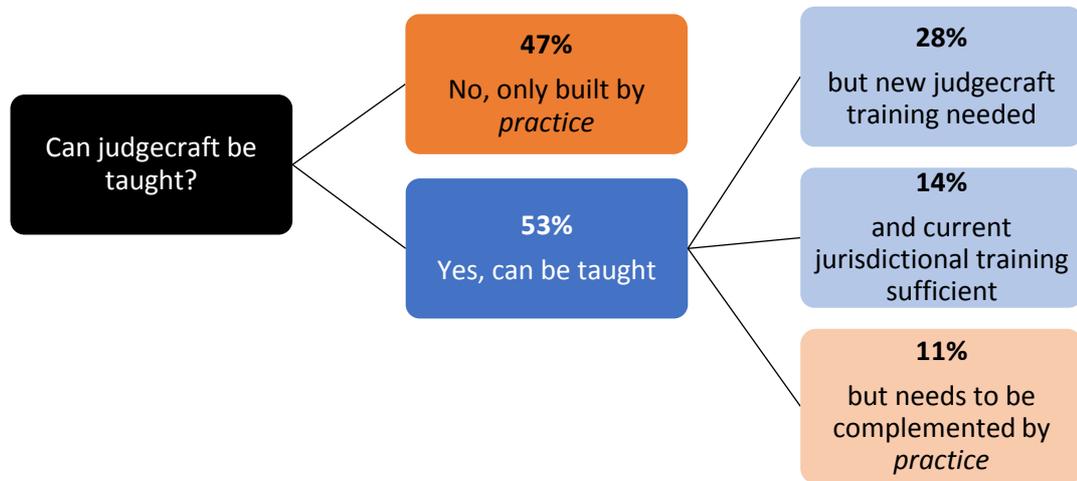
In the study, continuous trainees were asked the following: “Is judgecraft really something that can be taught through formal training, or does it belong to that part of “the art of judging” or “artistry”⁷⁰⁰ that can only be acquired through experience?” Figure 24 shows the results of the views of continuous trainees.

⁶⁹⁸ This position was adopted by the NIM management in several meetings I had with them, both at the beginning of my research in early 2014 and at the end when I presented the preliminary findings in April 2015.

⁶⁹⁹ It is taught both through jurisdictional and cross-jurisdictional training.

⁷⁰⁰ Donald A Schön, *The Reflective Practitioner: How Professionals Think in Action*, vol 5126 (Basic books 1983).

FIGURE 24: ROMANIAN JUDGES' ATTITUDES TO THE FEASIBILITY AND USEFULNESS OF JUDGECRAFT TRAINING (N 102)⁷⁰¹



Continuous trainees in Romania who took part in the survey were almost evenly split about whether they believed judgecraft could be taught. A bare majority (53%) said they felt it could be taught, while just under half (46%) felt that judicial skills can only be acquired through experience and 1% who had another view. Of the 53% who felt judgecraft could be taught, the largest group (28%) felt that judgecraft training was not just possible but necessary, 14% felt that the judgecraft training offered by the NIM is already sufficient, and 11% felt that judgecraft can be taught but it must be complemented by practice. Further analysis examined whether any other variable examined in the survey could account for this difference in view, but there was none.

The findings also reveal that a majority (58%) of Romanian judges expressed the view that *practical experience* is instrumental to judgecraft. This finding can be observed in Figure 24 above, by adding the judges who believe practice is the only necessary element for judgecraft (47%) and judges who believe practice is necessary, but not the sole element for judgecraft (11%) (orange categories). Both these categories agree that practical experience is instrumental in judgecraft, even

⁷⁰¹ The categories in blue highlight responses that do not assume practical experience is key to developing judgecraft. The categories in orange highlight responses that assume practice is essential to the development of judgecraft.

though they disagree on the added role of formal training. In this case as well, neither of the independent experience-related variables tracked seems to have a significant relationship with these differences in opinion.

Summary of key findings

In summary, this study found that almost all Romanian judges consider initial or induction judicial training useful for their judicial career. Judicial training, at least at an attitudinal level, is thus validated as a useful and appreciated method for preparing judges for their role. Moreover, the perceived value of initial or induction training is associated with exposure to court practice. Judges with judicial and/or prior legal experience are more likely to value initial/induction training than judges without prior experience.

Perhaps the most important finding is that the judges' preferences for judicial training methods covary with experience. This research hypothesis is validated in two interrelated ways: (1) judges with court experience prefer other initial training methods than judges with no court experience; and (2) judges with different levels of experience prefer different continuous training methods.

In addition, a clustering of learning styles and preferences for learning methods amongst Romanian judges was shown. The study found that preferences for judicial training are clustered – this suggests that judges can (1) be categorized into different learning styles, and (2) these learning styles are not fixed, but they shift with experience.

Learning does not happen just through formal training methods; judges responses indicate socialising represents an important component of learning for Romanian judges. The study findings indicate that judges value peer support. Almost all judges who took part in the survey (85%) have kept in touch one way or another with their former training peers over the year. But contact tends to fade in time. In addition, most of these judges (77%) said they contact their trainers when they need help

with establishing the right interpretation of the law, when there are differing opinions in their court.

Finally, the study revealed attitudes amongst Romanian judges to judicial training reforms in Romania. For instance, findings showed that judges who come from certain legal backgrounds (e.g. police) are more likely to believe they need longer induction training than others (e.g. advocacy). It also showed that Romanian judges are almost equally split between those who consider judgecraft a teachable set of skills and those who consider that judicial craft is an art that can only be learned through experience. Lastly, unlike attitudes towards initial or continuous training, judicial attitudes towards judgecraft or e-learning methods do not generally vary with experience.

CHAPTER 9: JUDICIAL APPROACHES TO LEARNING TO SENTENCE

This chapter refers to the second research hypothesis tested in this study – namely that “judges of different levels of expertise will have different *informal* learning preferences and will approach sentencing differently”. This hypothesis was based on the assumption that judges do not just learn during judicial training, but also from a variety of situations and sources outside of the training context. To explore this hypothesis, the research asked judges about five main issues related to sentencing:

1. How judges in Romania say they use different tools in sentencing;
2. How does their prior experience relate to the way they say they use sentencing tools;
3. How do judges say they approach the weighing of sentencing factors (and whether this changes with experience);
4. To what extent do judges say they rely on colleagues for advice and guidance in sentencing; and
5. How judges perceive the role of intuition and experience in making sentencing decisions.

Sentencing tools

The first category of findings refers to the so-called “**sentencing tools**”. Sentencing tools represent the wide variety of legal materials and sources of information that the judge can use throughout his court practice in attempting to identify what the best sentence is in a particular case. In this sense, sentencing tools are complementary to formal training. Some of these tools are binding (i.e. the judge is

bound by the law to take them into account in his decision), and some are not binding but still constitute a learning experience for the judge. In Romanian sentencing practice, the legally binding tools are:

1. Sentence ranges (stipulated in Criminal Code);
2. Sentencing guidelines (stipulated in Criminal Procedure Code);
3. Landmark cases (“Appeals in the Interest of the Law” judgments)

While the non-binding sentencing tools are:

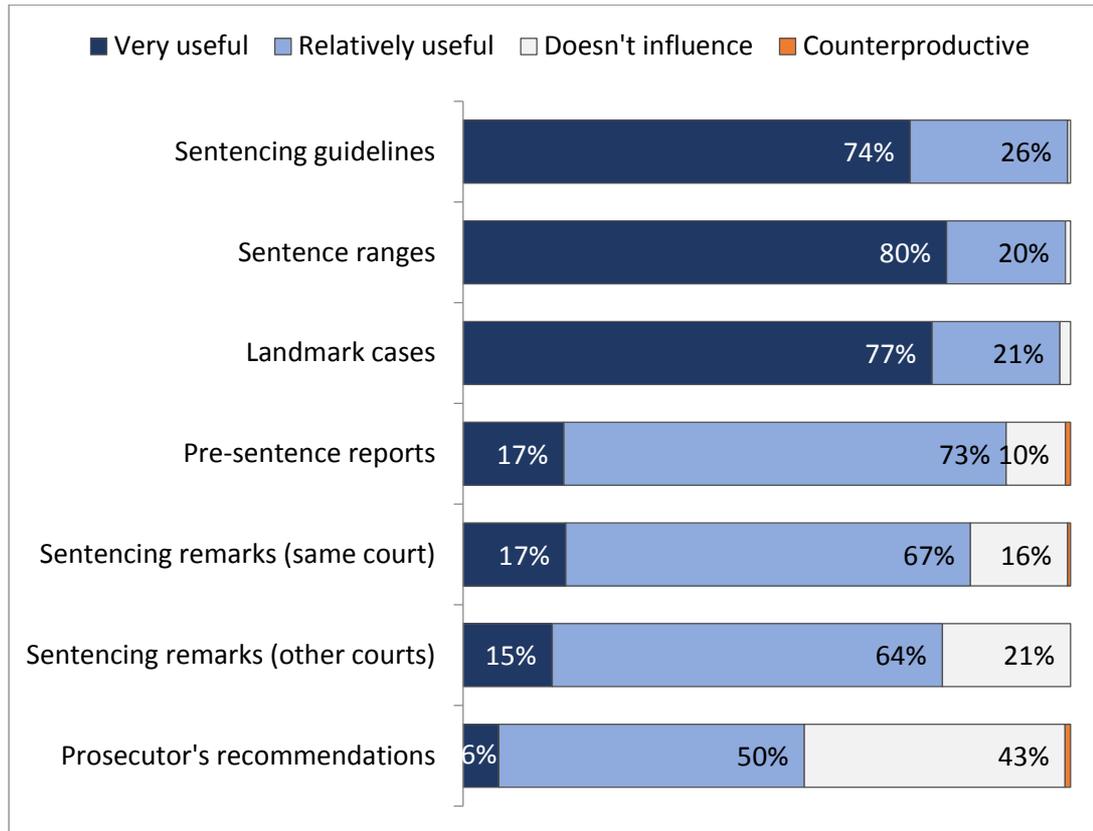
4. Sentencing remarks from a judge’s own court or other courts;
5. Pre-sentence reports
6. Prosecutorial recommendations of appropriate sentence.

All these tools have been described in the Romanian sentencing context in Chapter 5. These 6 tools were included as answer choices in the question on sentencing tools described below.

Perceived usefulness of sentencing tools for judicial practice

Judges from all samples were first asked “How useful are the following elements in sentencing in a particular case?”. Because the question is quite abstract, rather than “which tools do you use”, it was thought to be appropriate to ask new recruits as well, which would highlight any differences in perceptions. The following figure shows the aggregated responses of all judges that took part in the survey ordered by how many respondents considered them very useful and relatively useful:

FIGURE 25: ROMANIAN JUDGES' VIEWS ON THE USEFULNESS OF EXISTING SENTENCING TOOLS (N 221)



The results show that almost all sentencing tools included in the question (apart from the prosecutor’s recommendations⁷⁰²) are considered a useful source of inspiration by two thirds of Romanian judges. They also show a stark difference between binding and non-binding sentencing tools. On one hand, between 73% and 80% Romanian judges considered each of the binding tools (sentencing guidelines, ranges and landmark cases) very useful to their activity, and almost all judges (98-99%) considered them either relatively useful or very useful. This means that virtually all judges say they make use of sentencing guidelines, sentencing ranges and landmark cases in learning what counts as best practice in sentencing. On the other hand, less than 20% of judges considered the non-binding tools very useful in

⁷⁰² The prosecutors included in the study significantly overestimated the influence their sentence recommendation has in the judges’ decision-making. 80% of prosecutors thought their recommendations are considered useful or very useful by judges, when in fact only 56% of judges said they do so (with only 6% of the judges considering them very useful).

their activity, although most of them said they were relatively useful to them in their sentencing.

In conclusion, Romanian **judges look at a variety of tools and sources of inspiration as part of their sentencing practice**. The perceived importance of these sources is mainly dictated by the legal status of these tools, but also by the actors involved in producing those insights. Regarding the actors involved, the tools most appreciated are those produced by other judges, followed by probation officers, with tools produced prosecutors the least valued.

Given the main theme of this study – impact of experience on attitudes – the next step was to test if the expertise of respondents can account for any diversity in their opinions on sentencing tools. The table below summarises the statistically significant differences in judges’ attitudes correlated with differences in experience.

TABLE 14: RELATIONSHIP BETWEEN CATEGORIES OF EXPERIENCE AND APPRECIATION OF SENTENCING TOOL

Experience category	As experience (in each category) increases	
	Greater appreciation of	Lesser appreciation of
Legal practical experience	Sentencing guidelines Landmark cases Sentencing remarks	Pre-sentence reports
Judicial experience	Landmark cases	
Experience in criminal cases	Landmark cases Pre-sentence reports Sentencing remarks (own court)	Prosecutor’s recommendations

Similar to the finding in the previous chapter, experience is once again revealed to have a significant statistical association with differences in judicial attitudes, this time towards informal aspects of learning how to sentence. Almost all sentencing tools above display some level of variation with experience. The key finding here is

that **experienced judges tend to consider a wider range of sentencing tools useful compared to inexperienced judges.**

Prior practice in the legal profession is associated with variations in 4 out of the 8 sentencing tools measured. The general trend is that judges with more experience in **legal practice** say they use a wider range of sentencing tools. More specifically, they consider sentencing guidelines,⁷⁰³ landmark cases⁷⁰⁴ and similar sentences⁷⁰⁵ more useful to their learning experience than judges who have little or no experience in legal practice. These relationships are fairly strong, because it is not just that minimal legal experience relates to this increase in range, but each additional year of legal experience is correlated with a stronger perceived importance of each of these tools.

These findings could be interpreted in several ways, although the survey does not provide further evidence for any of these interpretations. Firstly, it could be that more practical experience in the legal profession brings about a refinement and sophistication of judicial decision-making, by making judges take into account a wider diversity of sources in their decision-making. Secondly, it may be that novice judges are more *formalistic* in their decision-making, focusing on rules and guidelines, while judges with legal expertise are more interested in the peculiarities of individual cases and look for those when deciding sentences. This gap between novice and experienced judges is widened even further by the post-appointment experience on the bench: judges with more years on the bench are significantly more likely to consider landmark cases useful sources in sentencing than novice judges.⁷⁰⁶

The second and third rows in Table 14 above show that the diversity in judges' preferences for sentencing tools is not explained just by their pre-appointment legal

⁷⁰³ Est. .467 SE .235 Wald 3.953 p .047

⁷⁰⁴ Est. .343 SE .160 Wald 4.576 p .032

⁷⁰⁵ Est. .197 SE .098 Wald 4.073 p .044 (own court), Est. .210 SE .097 Wald 4.712 p .030 (other courts)

⁷⁰⁶ Est. -.733 SE .340 Wald 4.656 p .031

experience, but it is also partly accounted for by their different levels of experience on the bench, and in criminal cases more specifically. Experience on the bench brings about a further appreciation of landmark cases.⁷⁰⁷ In addition, minimal expertise in criminal cases correlates with an increased reliance on landmark cases,⁷⁰⁸ pre-sentence reports⁷⁰⁹ and sentencing remarks from similar cases in own court.⁷¹⁰ This reinforces the idea that more experienced judges rely on a wider variety of sentencing tools. The only exception to this is the prosecutor’s recommendation for a sentence in a case; Romanian judges seem to rely on this less and less as soon as they gain minimal experience in criminal cases.⁷¹¹ It is not clear if this is due to a counter-balancing of other tools becoming important, or to an increasing mistrust in the specific sentences that prosecutors recommend in cases.

The study also found an association between formal training and informal sources of learning in sentencing: exposure to formal judicial training accounts for variations in the judges’ perception of informal sentencing tools (Table 15).

TABLE 15: RELATIONSHIP BETWEEN JUDICIAL TRAINING EXPOSURE AND PREFERRED SENTENCING TOOL

Training exposure category	As exposure (in each category) increases	
	Greater preference for	Lesser preference for
Initial training	Pre-sentence reports Prosecutor’s recommendations	Landmark cases
Continuous training	Sentencing guidelines Landmark cases Sentencing remarks (own court)	Prosecutor’s recommendations

⁷⁰⁷ Est. -.733 SE .340 Wald 4.656 p .031

⁷⁰⁸ Est. -.810 SE .341 Wald 5.644 p .018

⁷⁰⁹ Est. .104 SE .035 Wald 8.669 p .003 (stronger with each added year)

⁷¹⁰ Est. -.663 SE .306 Wald 4.680 p .031

⁷¹¹ Est. .622 SE .288 Wald 4.663 p .031

Interestingly, initial training seems to have an opposite correlational effect compared to pre-appointment legal practice: while respondents with legal practical experience consider sentencing guidelines, landmark cases and sentencing remarks (same courts) more useful for sentencing than inexperienced respondents, respondents who underwent initial training consider all these tools *less* useful than those who were not exposed to initial training.⁷¹² It is not clear why this discrepancy between legal expertise and exposure to initial training exists.

These finds all suggest that, when it comes to sentencing, the learning process for judges does not end with formal judicial training; it continues in court, as judges use a whole variety of tools and sources to help them learn how to best sentence in a case. The more experienced judges are, the more sophisticated and less formalistic their approach to these informal sources appears to be.

Sentencing tools as learning in the first few years of practice

The judges were also asked to reflect on which sentencing tools would have been most valuable for their learning *in the first few years of judicial practice*. Continuous trainees were asked “In your first few years of hearing criminal cases, which of the following were your top 3 mechanisms in learning how to sentence correctly?” The 6 sentencing tools were included here⁷¹³, along with two extra answer choices, the peer advice choice⁷¹⁴ and the sentencing intuition choice.⁷¹⁵ The new recruits (initial and induction trainees) were asked the same question, but because they do not yet

⁷¹² Est. .851 SE .365 Wald 5.444 p .020 (sentencing guidelines), Est. .849 SE .387 Wald 4.813 p .028 (landmark cases), Est. .676 SE .305 Wald 4.893 p .027 (sentencing remarks own court).

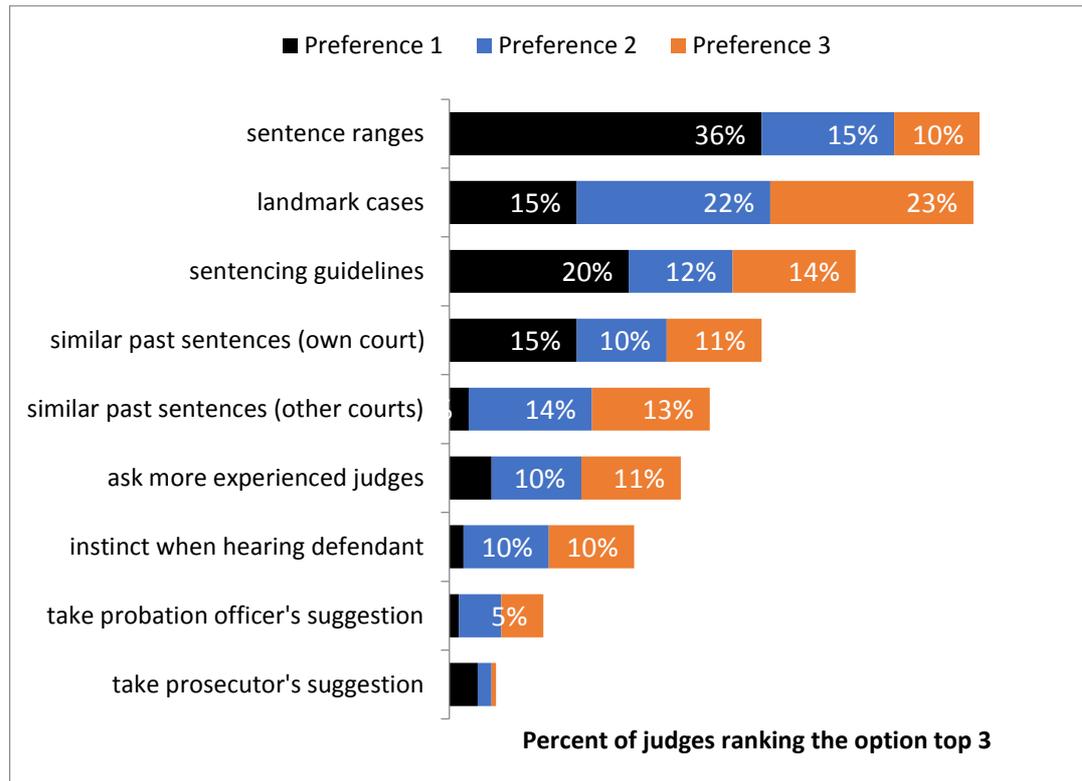
⁷¹³ As action verbs e.g. “I looked at the sentence ranges for that particular type of offence”.

⁷¹⁴ “I asked the more experienced judges in my court what the typical sentence for my type of case is”

⁷¹⁵ “I took into account my instinct when hearing the defendant”

have any sentencing experience, the question was reformulated so as to make them imagine what they would use in their court practice.⁷¹⁶

FIGURE 26: PREFERENCE FOR SENTENCING TOOLS JUDGES USED/WOULD USE IN FIRST FEW YEARS OF SENTENCING PRACTICE (N 186)



The more abstract findings on general attitudes towards sentencing tools can now be compared with what judges say they prefer to use in their first few years of practice. While legally-binding tools (sentence ranges, sentencing guidelines and landmark cases) remain in the top preferences, highlighting their perceived importance from the beginning of the judicial career, sentencing guidelines seem to be less used in practice (Figure 26, rank 3) than they are valued in the abstract (Figure 25, rank 1). That said, initial trainees are more likely to think they will value

⁷¹⁶ “Imagine you will be in court tomorrow and you will have to sentence in a given case. Which of the following will be your top 3 mechanisms in learning how to sentence correctly?”

landmark cases more⁷¹⁷ and sentencing guidelines less⁷¹⁸ than continuous trainees said they actually did in practice. It was interesting to discover that only attitudes towards legally-binding tools shift with experience. More experienced judges were less likely to rely on landmark cases and sentence ranges when they first started, and more reliant on sentencing guidelines. This could be explained by the very basic factual reason that the landmark cases are a relatively-new institution in Romania.⁷¹⁹

Prosecutor's recommendations remain at the bottom of the ranking. The pre-sentence reports seem to shift ranks across the two questions presented in this section. Although deemed useful or very useful in principle by 89% judges, only 11% of them actually declare they valued them in their first few years of practice. This could be explained by the finding that the amount of experience in criminal cases significantly correlates with an increase in the judges' appreciation of pre-sentence reports. Thus, the explanation could be that, although in the first few years on the bench only a small percentage of judges see their value, the value of pre-sentence reports increases for judges as their own experience increases.

Sentencing factors

The previous section revealed that sentencing guidelines are the sentencing tool most used by Romanian judges who took part in the study, with 99% of them considering the guidelines a useful or very useful tool in their sentencing activity. In Romania, sentencing guidelines are legally binding and they are included in the

⁷¹⁷ Kruskal-Wallis $H(2) = 36.8$ SE 8 $z = 4.6$ Adj Sig .0 between initial (mean rank 73) and continuous (mean rank 110)

⁷¹⁸ Kruskal-Wallis $H(2) = -34$ SE 7.7 $z = -4.4$ Adj Sig .0 between initial (mean rank 113) and continuous (mean rank 79)

⁷¹⁹ Liana Gabriela Gheorghiu, 'Recursul in Interesul Legii - Izvor de Drept. Aplicarea Deciziilor Interpretative in Timp' [2006] Revista Curentul "Juridic" <http://revcurentjur.ro/old/arhiva/attachments_200634/recjurid063_48F.pdf> accessed 8 April 2017.

Criminal Procedure Code, under section 74, under the heading “general criteria for individualization of the sentence”.⁷²⁰

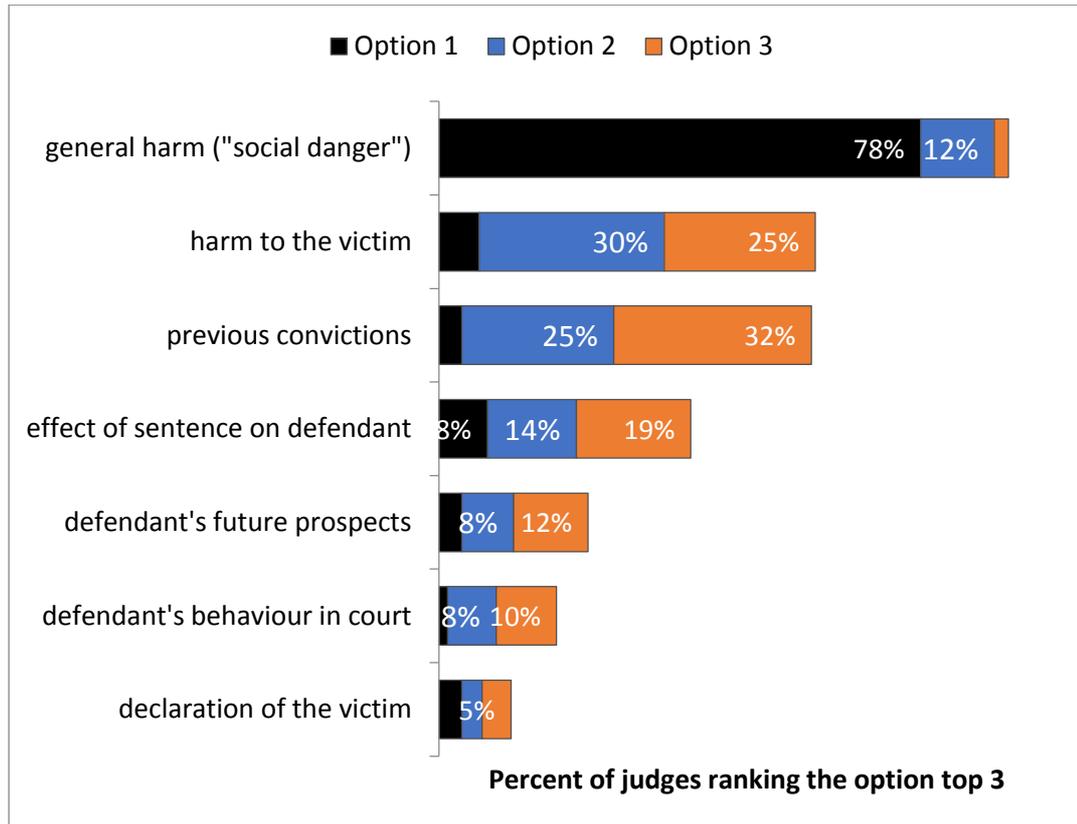
The guidelines stipulate that the most important two general criteria a judge ought to take into account are the general harm caused (considered an objective element of the offense) corroborated with the degree of dangerousness of the defendant (considered a subjective element of the offence). The guidelines then detail the underlying aggravating and mitigating factors that could account for the two criteria. The harm caused is understood in two ways; first is the harm to society at large (the sentencing guidelines mention “socially-protected values”) and the second is the harm to the victim. The dangerousness of the defendant can be assessed by taking into account the offender’s previous convictions, his/her socio-economic and personal background, or his/her behaviour throughout the court proceedings.⁷²¹

Although the guidelines strive to be specific in detailing the main criteria judges must take into account, they do not also provide a hierarchy of importance to guide the judge in assessing which factor is more important than another, or which one to prioritise against another. For this reason, the survey included a ranking question that forced judges to assess the importance they assign to various sentencing factors. The figure below displays the 7 sentencing factors ranked in order of importance by the 216 judges in the sample, highlighting the judges’ top 3 options.

⁷²⁰ Noui Cod de Procedura Penala (n 230) s 74.

⁷²¹ *ibid.*

FIGURE 27: JUDGES' RANKING OF RELATIVE IMPORTANCE OF SENTENCING FACTORS (N 216)



The objective element of the offence (comprised of general *harm* and harm to the victim) represents the most important sentencing criterion in the view of more than 85% of Romanian judges who took part in the survey. Perhaps not surprisingly, the general harm (done to society and the legal order) is considered among the most important sentencing factors (78% ranked it first in importance, 93% ranked it amongst the top three in importance). In many criminal justice systems, civil and common law systems alike, harm to society or to the social values is seen as a definitional element of the criminal offence, in contrast to civil disputes. In addition, although the harm caused to the victim has less importance than general harm overall, it still represents an important sentencing factor for the wide majority of judges in the survey.⁷²²

⁷²² It is interesting to note that, although the harm of the victim is seen as a priority by 61% of respondents, the declaration of the victim is the last in the hierarchy of the sentencing factors (12%). This difference suggests that the judge might take the harm caused to the victim as a

Figure 27 also shows that Romanian judges take a whole range of factors into account when it comes to assessing the *dangerousness* of the defendant (the subjective element of the offence), although they are taken into account in differing degrees. In this category, previous convictions seem to constitute the most important aggravating factor considered by most judges (61%). In addition, 41% of judges considered the impact of the sentence on the defendant as one of the most important sentencing factors, while only a small fraction of judges prioritised the defendant's future prospects (24%) or his behaviour in court (19%). Figure 28 illustrates the *relative* importance that judges give to different sentencing factors, inferred from those factors they rated amongst the top three in importance ⁷²³:

symptom of the dangerousness of the offender, combined with a belief that the harm caused to the victim can be assessed independently of what the victim declares, through hard evidence.

⁷²³ The top three options were given relative weights of 3 (Option 1), 2 (Option 2) and 1 (Option 3) so as to better discriminate between preferences. If all 3 options would have been treated alike, the relative proportion of judges who would have put general harm among top factors would have been 30%, ignoring that more than 70% of those judges actually ranked this as their number 1 option. Therefore the figure displays the *weighted* averages of each factor against the others.

FIGURE 28: RELATIVE IMPORTANCE OF SENTENCING FACTORS FOR ROMANIAN JUDGES WEIGHTED BY THOSE CONSIDERED TOP 3 IN IMPORTANCE (N 216)⁷²⁴

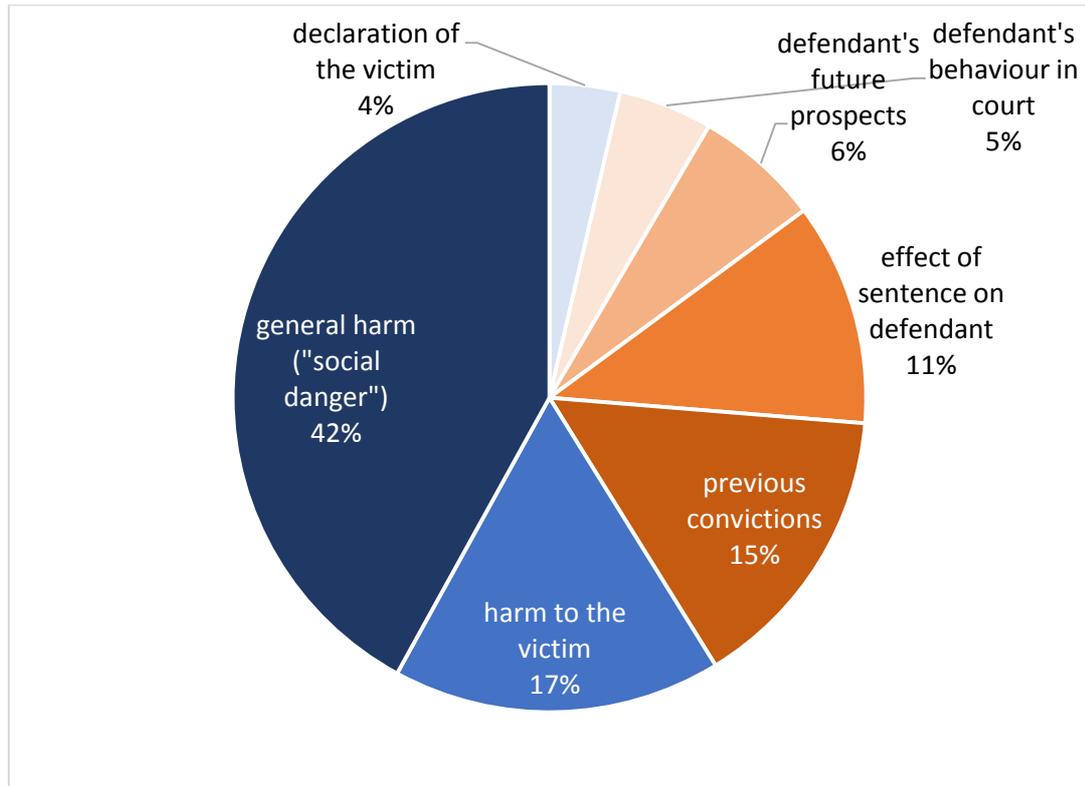
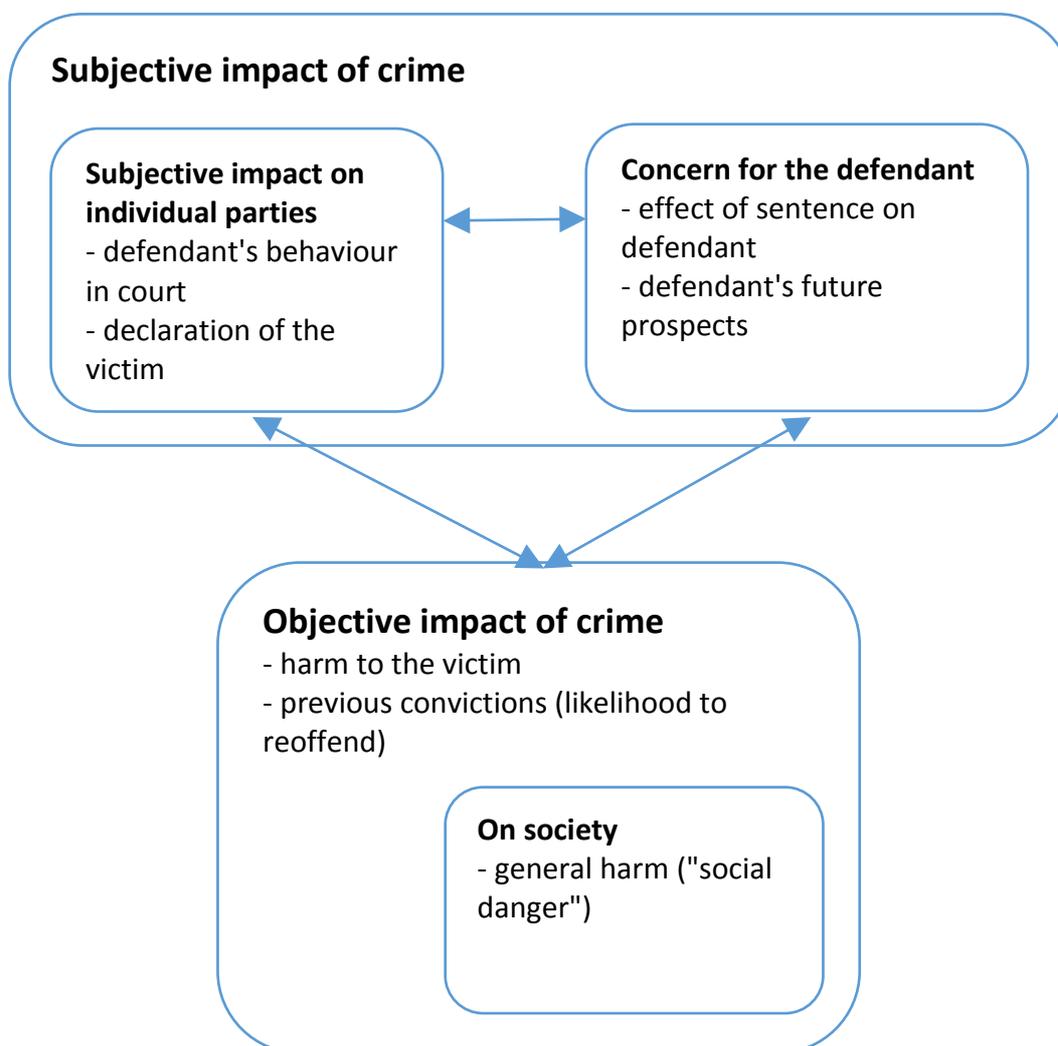


Figure 28 shows that judges feel the objective elements of the offence (general harm and harm to the victim) are weighted somewhat more (59%) than the subjective element of the offence, namely the dangerousness of the defendant (represented by the other 5 factors at 41% combined). Cluster and correlation analyses further showed that some factors have natural affinities (for instance, concern for the effect of sentence on the defendant goes hand in hand with preoccupation for the defendant's future prospects), while other factors are in tension (for instance, concern for the defendant is at odds with concern for the victim). The way sentencing factors clustered is illustrated in Figure 29 below, with more technical details included in the dendrogram in Annex 6.⁷²⁵

⁷²⁴ With blue, victim- and society-related factors. With orange, defendant-related factors.

⁷²⁵ In the annex, the lines between the rectangles represent the weighted distance between clusters.

FIGURE 29: CLUSTERING OF SENTENCING FACTORS FOR ROMANIAN JUDGES



The most interesting finding here is that there seem to be 4 sub-clusters of sentencing factors that further group into two main clusters. One sub-cluster reveals a **concern for the defendant**. Judges who, for instance, prioritise the defendant’s future prospects, are (1) significantly more likely to also prioritise other defendant-related sentencing factors (i.e. the effect of the sentence on the defendant⁷²⁶); and (2) to give less importance to victim-related⁷²⁷ or society-related⁷²⁸ sentencing factors.

⁷²⁶ Rho .440 p .0

⁷²⁷ rho -.371 p .0

⁷²⁸ previous convictions, -.191, p. 005

It could be argued, in principle, that the defendant's behaviour in court and his previous criminal convictions should also be "defendant-related" variables in that they refer to an aspect of the defendant's background, so they should not be in separate clusters as shown above. The cluster analysis nonetheless reveals that these two have a distinct status, for different reasons, even though they both relate to the defendant.

The defendant's previous convictions are tied to more general considerations of the **objective impact of crime** - the criminal record constitutes an objective measure of past harm caused socially (and therefore relates closely to general harm/social danger⁷²⁹), as well as often being equated with propensity to reoffend (which relates to harm to current or future victims). It is also a factor that is almost always an aggravating factor, while the factors clustered under "concern for defendant" often display mitigating valences. In other words, the cluster analysis reveals that, for Romanian judges, previous convictions are closer in their minds to the harm the defendant has caused to the victim, as provided by evidence in the case, and the more objective considerations of the objective impact of crime, as provided by the evidence in the case.

The defendant's behaviour in court falls in a separate cluster for other reasons. Firstly, it is strongly in tension with the objective impact of crime cluster,⁷³⁰ likely because it is not an objective measure of the offender's criminality and danger. When the behaviour of the defendant in court is positive, it counters the effect of concerns for society, and it can become a mitigating factor. More interestingly, the defendant's behaviour in court and the declaration of the victim cluster together. This could be explained by the fact that they both represent expressive and subjective statements of what the individual parties in the case (the defendant and the victim) think. The judge might take into consideration the **subjective impact on individual parties**, but this would be at odds with his more general societal impact

⁷²⁹ rho .164 p. 016

⁷³⁰ rho -.324 p .0 (with previous convictions)

considerations, or even his objective assessment of the impact of sentence on the defendant.

Secondly, the defendant's behaviour is also in tension with the judge's concern for the defendant's future prospects.⁷³¹ Perhaps this tension is explicable in instances where the defendant's behaviour in court is an aggravating factor – in those cases, the judges' concern for the future and rehabilitation of the defendant is in tension with his assessment of the defendant's behaviour. The judge might choose to ignore the particularly bad behaviour of the defendant and instead prioritise his future.

The bottom line is that, in weighting different sentencing factors, Romanian judges seem to have to balance, on one hand, conflicting concerns for the victim and the defendant, on the other hand, conflicting concerns between the more general interests of society and the more subjective interests of the individual parties in the case. These findings show that the balancing of sentencing factors is not just theoretically required of judges as part of their judicial role, but it actually happens in practice in their own minds, as expressed in their survey answers.

Since this study seeks to determine if judicial expertise can also explain variations in judges' attitudes, the next step in the analysis involved assessing the variation in attitudes towards these sentencing factors based on experience and exposure to training. The first most important finding regarding variation with experience is that none of the factors seem to vary with the *amount* of the experience of judges. In other words, each added year of experience is not associated with a reprioritization of sentencing factors. While the amount of expertise does not make a difference, there are nonetheless a few differences between judges who have no experience whatsoever (novices) and those who do (experienced). The overall trend is that **novice judges say they give significantly more weight to the harm caused to the victim,⁷³² and significantly less weight to the defendant's future prospects than do**

⁷³¹ rho -.211 p .002

⁷³² Est -.516 SE .245 Wald 4.444 Sig .035

experienced judges.⁷³³ A potential explanation for this is that when hearing cases, judges are also exposed to the defendant – their claims, their profile, their future prospects – and that could make them more sensitive to the defendant as well, not just towards the victim.

A second finding is that **criminal law expertise is associated with a stronger concern for the defendant’s previous convictions.**⁷³⁴ In fact, there is a very strong correlation between being a criminal law judge with many years of legal experience before appointment and considering that previous convictions are an important sentencing factor.⁷³⁵ This concern is reinforced by the 236 prosecutors who participated in this study: the experienced prosecutors were more likely to think judges put a substantial amount of weight on the defendant’s previous convictions than novice prosecutors.⁷³⁶

One final finding concerns the impact that prior legal practice can have on judges’ attitudes towards sentencing factors. It was found that judges with prior legal experience (both in advocacy and police forces) tended to say that they give less importance to the general harm criterion, although this is not a definitive finding.⁷³⁷ This could perhaps be explained by their contact with various parties of cases in their legal activity that, over time, can increase their sensitivity to the requests and pain of individuals and render considerations of “danger to society” less important to them (the “sensitivity” hypothesis). To explore this idea further, the sample was split by type of prior legal experience (advocacy vs police).

The *sensitivity* hypothesis formulated above – that legal practice renders judges more sensitive towards the claims and needs of individual parties and thus slightly lessens their concern for wider societal values – is not just seen in the results for the

⁷³³ Est .661 SE .245 Wald 7.301 Sig .007

⁷³⁴ Est .608 SE .263 Wald 5.345 Sig .021

⁷³⁵ Bivariate correlation for sample split by judicial specialty (criminal judges), amount of legal experience and concern for previous convictions, rho -.698 p .012.

⁷³⁶ Est 1.186 SE .303 Wald 15.342 Sig .0

⁷³⁷ Est -.846 SE .436 Wald 3.765 Sig .052 (falling short of significance)

entire sample, but it seems to be stronger especially for those judges who have a background in the police. The more experience judges had in the police force, the less likely they were to prioritise the general harm⁷³⁸ or the objective harm caused to the victim⁷³⁹. These associations were not replicated with judges having an advocacy background, suggesting the sensitivity hypothesis is only true for judges coming from police forces.

In conclusion, sentencing guidelines offer Romanian judges a starting point in suggesting the categories of aggravating and mitigating factors to take into account in their sentencing. Although the guidelines do not provide an official hierarchy of these factors, the largest proportion of judges say they prioritise the general harm caused to society first, followed by the harm caused to the victim and then they say they look at a whole range of other factors characterizing the dangerousness of the defendant and his/her likelihood to be a danger to society. There appears to often be a tension between the judges' concerns for the victim, the defendant and the wider society, and factors tend to get clustered under these three headings. Priorities also appear to change with experience: judges with prior experience in legal practice are more likely to say they are sensitized to the parties, judges with criminal experience are more likely to say they care more about defendant's previous convictions, and novice judges are more than experienced judges likely to say they care more about the victim.

Sentencing advice

The survey also examined the propensity of judges to ask for advice in specific sentencing situations. The findings on social interaction presented in the previous chapter showed that only 22% of judges said they would contact a judicial trainer to get specific advice. Non-parametric tests further reveal that judges who have less

⁷³⁸ rho .630 p .012

⁷³⁹ rho .572 p .026

experience on the bench⁷⁴⁰ and have undergone judicial training more recently⁷⁴¹ are more likely to do this than experienced judges. In other words, novice judges are more likely to ask for advice on sentencing from their trainers than experienced judges. As judicial trainers are not the only potential source of sentencing advice, the survey also asked judges if they would ask for guidance when confronted with a sentencing decision, and if so, from whom. The exploratory analysis had suggested the most likely sources of advice might be more senior judges in the respondent's court and judicial trainers, but a plan of instituting an officially designed mentor was also explored. The respondents were able to indicate other options, as well as indicate they are not welcoming advice on sentencing.

The answers revealed that **most judges (87%) say they would welcome some sentencing advice in difficult cases.**⁷⁴² More than two thirds of judges (69%) said they would probably **ask for guidance from a more senior judge in their court**, while judicial trainers (19%)⁷⁴³ and officially designated mentors (13%) were less popular alternatives. Most importantly, **experienced judges are less likely to say that they require advice,**⁷⁴⁴ and also less likely to say they think NIM trainers⁷⁴⁵ or officially assigned mentors⁷⁴⁶ are good source of sentencing advice. Judges who have undergone initial judicial training very recently are more likely to say they need sentencing advice,⁷⁴⁷ and also more likely to say they would ask for advice from a more senior judge in their court.⁷⁴⁸ The amount of exposure to continuous training also seems to make a difference. Judges in the survey with a greater exposure to continuous training were less likely to say that they would welcome sentencing

⁷⁴⁰ U=495 z=-2.541 p .011

⁷⁴¹ U=399 z=2.265 p .023

⁷⁴² N 216

⁷⁴³ Induction trainees were significantly more likely to prefer asking judicial trainers for sentencing advice than other types of judges ($\chi^2_1=6.6$ p .014 z resid 2.1).

⁷⁴⁴ U=3,500 z=3.110 p .002 (judicial experience)

⁷⁴⁵ U=2,753 z=-2.634 p .008 (judicial experience)

⁷⁴⁶ χ^2_1 4.597 p .025 z=-1.4 (judicial experience)

⁷⁴⁷ U=687 z=-2.454 p .014

⁷⁴⁸ U=2,428 z=2.065 p .039

advice from a senior judge in their court,⁷⁴⁹ less likely to say an NIM trainer⁷⁵⁰ or a designated mentor⁷⁵¹ is a good source of advice, and also less likely to identify other sources of advice⁷⁵². These differences do not seem to be explained by different years on the bench, but simply by a wider exposure to continuous judicial training or other factors not examined in the survey.

In conclusion, the results support the hypothesis that judges learn to sentence not just by undergoing training or using sentencing tools, but also by asking for advice from relevant actors. Almost all the judges in the survey (87%) said they ask for advice when confronted with a difficult situation irrespective of expertise, court level or background. It is probably not surprising that novices are more likely to ask for advice than experienced judges – as they are more likely to need more guidance to compensate their lack of expertise. The strongest social connection seems to exist with other judges from their own courts, especially with senior judges who can offer guidance.

Self-awareness and sentencing intuitions

This part of the study tested not just whether expertise is associated with a difference in the learning and decision-making process, but also if judges themselves are *aware* of the importance of expertise and past experience in their own learning and decision-making process. The difference between the two is that, while the former is tested statistically by using the expertise of the respondent as variable and seeing if it correlates with attitudinal measures, the latter directly asks the judge about his/her opinion on the impact of his/her past experience in learning and

⁷⁴⁹ U=1,314 z=2.608 p .009

⁷⁵⁰ U=295 z=-2.223 p .026

⁷⁵¹ $\chi^2_1=7.787$ p .005 z resid -1.8

⁷⁵² U=16 z=-2.086 p .037

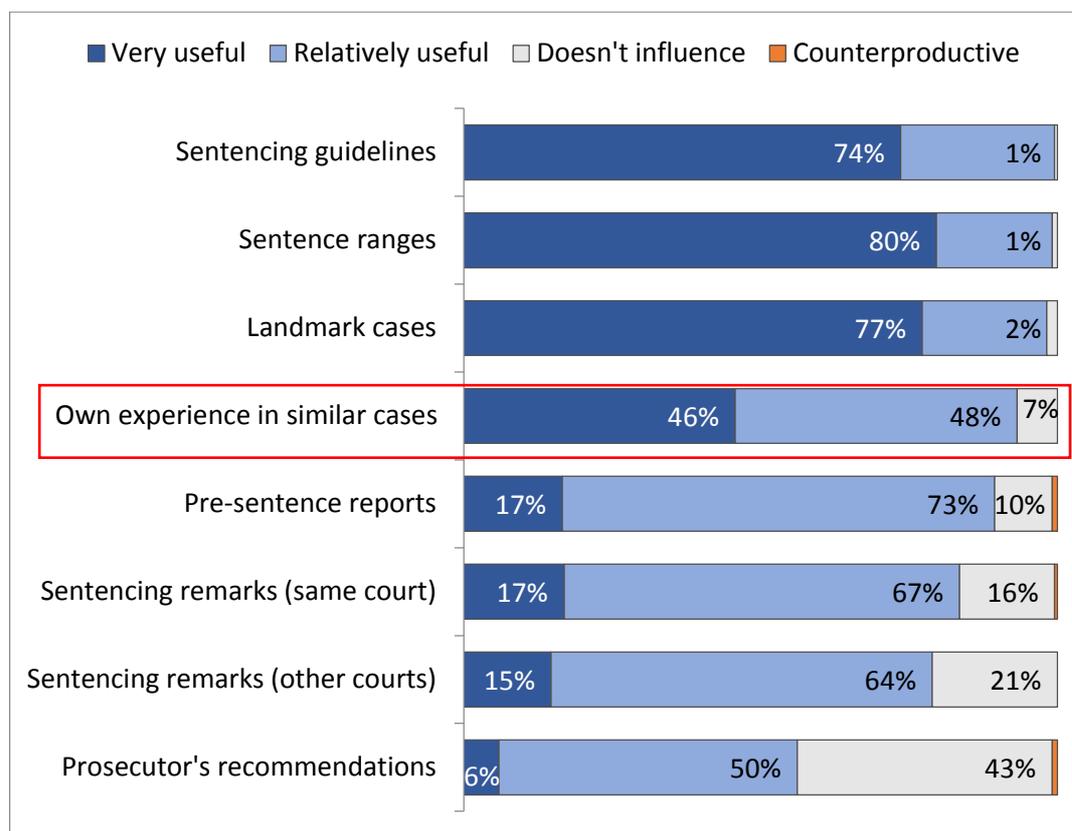
judicial practice. The theoretical framework for this new hypothesis was provided by the psychological literature on expert decision-making and intuition-forming by Kahneman, Gigerenzer and Klein (Chapter 2). But the findings will cover a new theoretical area that must be explored in order to best attempt an interpretation – the empirical literature on intuitive confidence. This will be covered in the Discussion chapter.

The survey asked two closely related questions. The first question measures the degree of self-awareness of and confidence of judges in their own past experience in similar cases (*the “reliance on past experience” question*). The second question measures the likelihood that judges will trust their intuitive expertise in a new case that is very similar to the ones in the past (*the “intuitive confidence” question*).

Reliance on past experience

The first question all judges were asked is how useful do *they* think their own past experience is in their sentencing practice. This is why it was included among the answer choices on the “tools” that help in sentencing, although it is not a tool per se but, rather like the prosecutor’s recommendations, could represent a resource. The earlier figure that showed judges’ attitudes towards informal sentencing tools is reproduced this time highlighting the answers for a judges’ past experience:

FIGURE 30: RELATIVE IMPORTANCE OF JUDGE'S OWN EXPERIENCE COMPARED TO OTHER FACTORS RELIED ON IN SENTENCING (N 221)



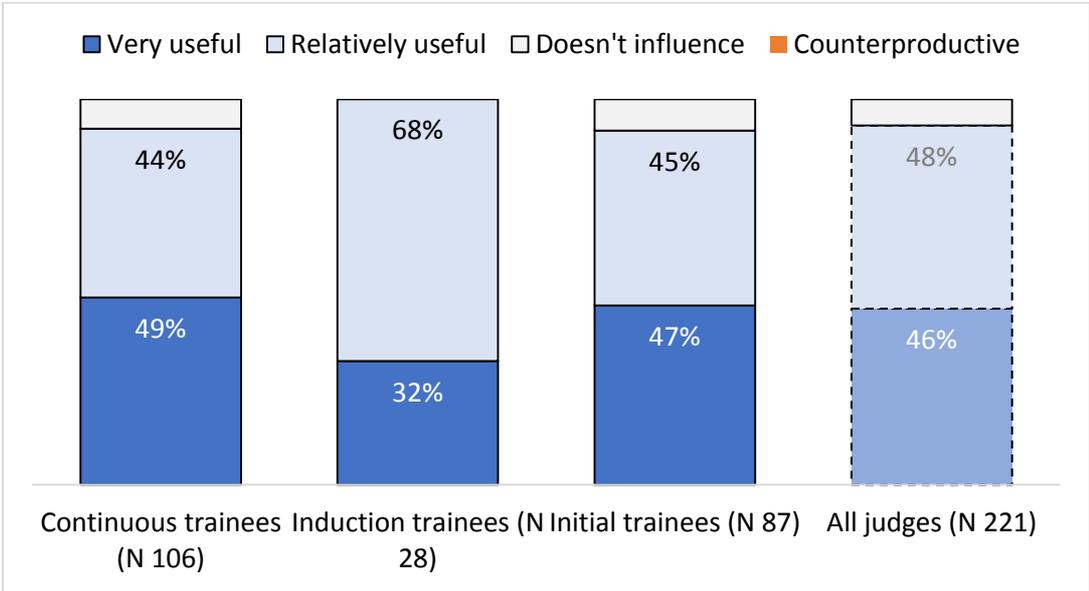
Almost all judges (93%) felt that their own past experience *does* make a difference in sentencing. But with more than with any other sentencing tools, their opinions were almost equally split on the relative importance of their own experience in similar cases: 46% saw it as very useful (essential) to their activity, and 48% saw it as useful but perhaps not an essential resource.

The analysis then explored whether this split was associated with a difference in level of experience. The study has shown so far that novice judges tend to be aware of their lack of expertise, and thus try to compensate for that with more informal advice, practical training methods, and a higher 'formalism'. The preliminary hypothesis was that novice judges would also be less reliant on their own past experience, as they know they don't have enough yet to rely too much on it.

The perhaps counterintuitive finding is that **the experience of judges does not correlate with their own perception of the importance of their past experience in**

sentencing. All regression models that contained a measure of experience (be it judicial, sentencing or legal) failed to establish a significant relationship with the belief that one’s own experience is a more or less useful resource for current sentencing.⁷⁵³ Below shows the split by respondents, but although visually there seems to be a difference between induction trainees and the other judges, that difference is not explained by level of judicial⁷⁵⁴, legal⁷⁵⁵ or criminal law⁷⁵⁶ experience between respondents.

FIGURE 31: RELIANCE ON PAST EXPERIENCE BY CATEGORY OF RESPONDENT (N 221)



Although the appreciation of the value of one’s past experience does not seem to correlate with the amount of experience Romanian judges have, it seems to correlate with another measure which in dual-process psychological terms or jurisprudential terms could be termed “intuitive expertise”. This is explored next.

⁷⁵³ The initial expectation was that more experienced respondents will also rely more on their past experience in sentencing than inexperienced respondents. In the preliminary analysis on the entire sample (both judges and prosecutors), this was confirmed (Est. .044 SE .011 Wald 14.613 p .0). Yet this turned out to be true not for judges, but for prosecutors, meaning that more experienced prosecutors tend to believe that judges rely more their own past experience when sentencing than inexperienced prosecutors (Est. .058 SE .016 Wald 12.753 p .0).

⁷⁵⁴ p .493

⁷⁵⁵ p .912

⁷⁵⁶ p .778

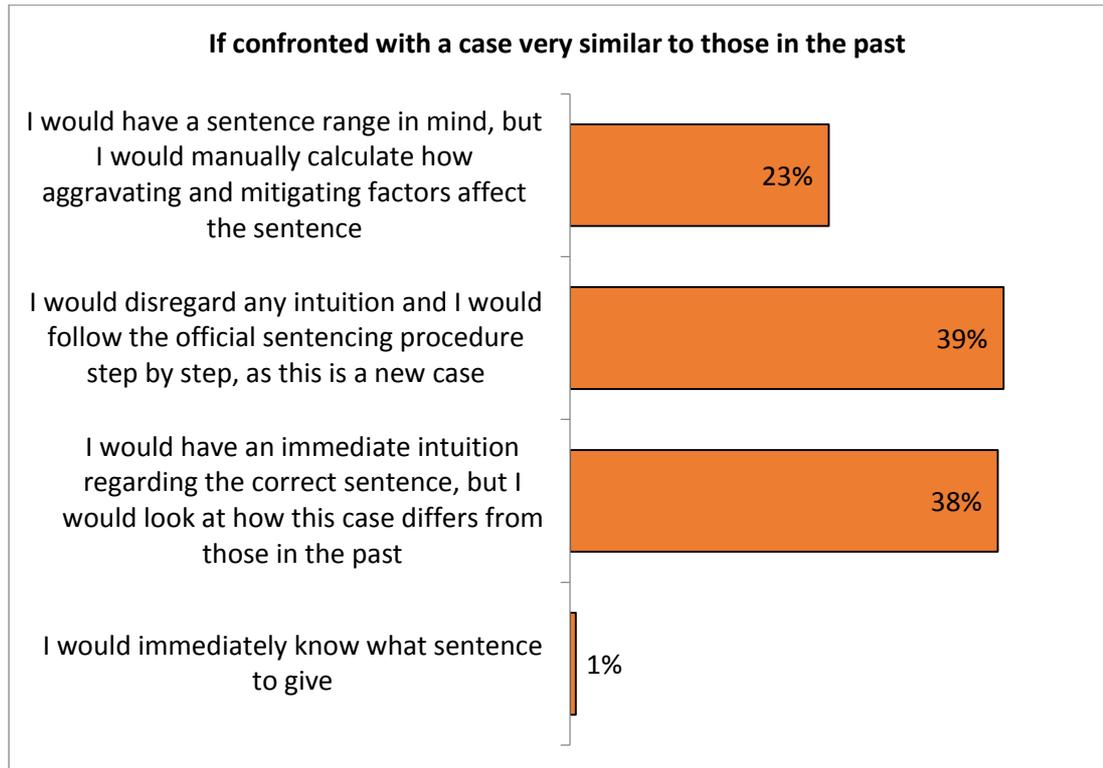
Intuitive expertise and intuitive confidence

The second question of the study sought to test more specifically if judges who have built experience in sentencing will form sentencing intuitions based on that experience in new familiar cases, as inspired by the psychological framework built by Kahneman, Gigerenzer and Klein. But the current study is a study of attitudes – it is not able to test if judges actually use their intuitive expertise in their decision-making. However, it does test if judges have *confidence* in their intuitive expertise – hence intuitive confidence. In order for results to be comparable, the question was formulated hypothetically for all judges: “Confronted with a case very similar to those in the past [what would you do]?”. Judges were provided with 4 answer options.

Figure 32 displays the aggregated answers offered by the respondents. The options were meant to be mutually exclusive, but it is not clear if they were perceived as such by the respondents. Option 1 meant that the judge had an instant intuition and would follow it without hesitation; option 2 would represent judges who have immediate intuitions but they look for distinctive elements of the case that might significantly affect their intuition; option 3 represents judges who prefer to disregard their intuitions and treat the case as a new case; finally, option 4 was meant to be chosen by respondents who knew the sentence range for a particular type of offence, but would not have an immediate intuition, so they would manually calculate the sentences according to the sentencing guidelines.

Just like in previous questions, the question had to account the fact that experienced judges had already sentenced in the past, while novices could only imagine how they would react when confronted with a case similar to their own past experience. The aggregated findings are reproduced below:

FIGURE 32: HOW JUDGES SAY THEY APPROACH SENTENCING IN A FAMILIAR CASE (N 208)⁷⁵⁷



Almost no judge responded that they would immediately know what sentence to give and would not put that intuition to check. Instead, the majority of judges' answers were split between taking their intuition into account (38%) or disregarding it completely (39%). Almost a quarter (23%) chose the option that they would adopt a more methodical process.

A Kruskal-Wallis test revealed a potential association between respondents' use of their intuitions in sentencing and their reliance on their own experience from past cases. In other words, it seems that judges who place a larger trust in their own past experience are also more likely to say they rely on their intuitions (either critically or uncritically) in sentencing, while judges who place less trust on their prior experience are also likely to say they would disregard their intuitions or not have intuitions at all.

⁷⁵⁷ Numbers add up to 101% due to rounding.

In order to test if this relationship is significant, a new binary variable was computed representing the respondent's admitted reliance on intuition (yes/no). An ordinal regression confirmed that judges who do not consider their past experience in similar cases relevant to their sentencing are also less likely to say they have or rely on their intuitions about the right sentence in the case at hand.⁷⁵⁸

In conclusion, the judges' confidence in their intuitions in sentencing does not necessarily depend on their *actual* professional experience, be it judicial,⁷⁵⁹ legal⁷⁶⁰ or in criminal cases.⁷⁶¹ Experienced judges are not necessarily more confident in their intuitions than novice judges. Instead, the judges' intuitive confidence in sentencing is correlated with an increased reliance on one's own prior experience rather than with an increased experience per se. In other words, **judges express more confidence in their sentencing intuitions when they also tend to think that their past experience is an important source of knowledge**. These findings are discussed in the wider scholarly framework of intuitive confidence research in the Discussion chapter.

Summary of key findings

This chapter summarised the findings pertaining to informal sources of learning for Romanian judges, during their sentencing practice. They were structured under four themes: sentencing tools, sentencing factors, sentencing advice, and self-awareness in sentencing.

With regards to **sentencing tools**, most Romanian judges say they consider a wide variety of sentencing tools as useful informal sources of inspiration when deciding

⁷⁵⁸ Est. -.706 SE .285 Wald 6.124 p .013

⁷⁵⁹ p .235

⁷⁶⁰ p 1. In fact, an exact significance of 1 in the Mann-Whitney test suggests that prior legal experience before becoming a judge has no bearing on reliance on intuitions in sentencing whatsoever.

⁷⁶¹ p .479.

a sentence in court. This confirms that the learning process does not just take place during formal training, but continues all throughout judges' careers.

The importance judges say they give to sentencing tools seems to be associated with the legal status of the tool (binding/non-binding) and the role of the agent producing the information (other judges, probation officers, prosecutors). Judges who have more legal expertise pre-appointment and more experience in criminal cases say they use a wider range of tools than novice judges (*increased sophistication*). Judges who have more legal expertise pre-appointment and more experience in criminal cases say they pay more attention to sentencing tools that refer to individual cases/sentences than novice judges (*reduced formalism*).

With regards to **sentencing factors**, judges say they take both the harm caused and the dangerousness of the defendant into account, but say they give priority to the harm caused, especially to the general harm caused to society and to social values (and only after to the individual harm caused to the victim). Although judges have a concern for the objective harm caused to the victim in a specific case, they say they generally do not give the declaration of the victim too much weight in the sentencing process.

When assessing the dangerousness of the defendant, judges say they take into account a whole variety of aggravating and mitigating factors, in varying degrees, such as previous criminal convictions, the presumed effect of the sentence on the defendant, the defendant's future prospects, his behaviour in court, as well as the declaration of the victim. There are tensions between sentencing factors pertaining to 1) the defendant, 2) the victim, and 3) the society at large. Judges who are concerned more with one of the categories tend to place less importance on sentencing factors from the other two categories.

Experienced judges say they give more importance to the situation of the defendant, while novice judges say they give more importance to the situation of the victim. Experienced judges also say they give more importance to the criminal antecedents of the defendant than novice judges, and this trend increases with each

year of experience in hearing criminal cases. Prosecutors' view support this. Finally, judges with previous experience in legal practice (especially in police forces) appear to be more sensitive to the parties and less concerned with general societal values. (*increased sensitivity*)

Most judges (87%) say they welcome **sentencing advice** when they are confronted with a difficult case. Novice judges are significantly more likely to say they would ask for advice than experienced judges (94% vs 79%). When needing advice on sentencing, most judges (69%) say they would approach a more senior judge in their court, rather than a trainer, a specifically designed mentor or another court actor. When contacting their trainer, most judges (77%) said they need help with establishing the right interpretation of the law, when there are differing opinions in their court.

Finally, judges saying they place a higher **reliance on their sentencing intuitions** does not correlate with an objectively higher level of experience (i.e. experienced judges are not more reliant on their sentencing intuitions than novice judges). Nevertheless, judges who believe their past experience is an important source of inspiration for their current cases are also more likely to say they rely on their intuition on what the right sentence is in a new familiar case (*increased intuitive confidence*).

CHAPTER 10: DISCUSSION

“A third set of forces that shape learning style stems from professional career choice. One's professional career choice not only exposes one to a specialised learning environment; it also involves a commitment to a generic professional problem, such as social service, that requires a specialised adaptive orientation. In addition, one becomes a member of a reference group of peers who share a professional mentality, a common set of values and beliefs about how one should behave professionally.”

David Kolb, *Experiential Learning* (1984)⁷⁶²

We live in an era of fully-institutionalised and fully-established judicial training for judges in most countries. And, while judicial training programmes may be designed by education specialists on the basis of educational theories, possibly even experiential learning theories, they display two major limits. First, the evaluation of training programmes is usually limited to quick post-training feedback forms for judges (Kirkpatrick level 1). Second, because of the lack of solid data, the reforms and changes brought to judicial training programmes are often based on anecdote and the experience of trainers and training managers.

This study offers a new type of empirical evidence about judges' attitudes to learning. This study takes a developmental view of judge's learning, not just during or right after training, but throughout the judicial career, allowing the judge to reflect on the strategic impact of judicial training on his or her judicial activity. This study also involved a substantial number of judges, with a wide range of experiences, from all levels of court in a specific jurisdiction. Finally, it is a complex interdisciplinary study, drawing on theoretical frameworks from psychology,

⁷⁶² Kolb (n 127) 88.

education and sentencing studies. This interdisciplinary understanding is needed to describe the complex reality of judicial activity and learning.

This chapter begins by highlighting some of the main findings of the research and placing these findings within the wider theoretical frameworks underlying the research. It discusses whether the empirical findings on both formal training and informal sources of learning support the experiential learning model and Kolb's learning cycle. It also relates the findings to other studies on judicial decision-making, expert decision-making and sentencing. It acknowledges its limits and caveats. Finally, it highlights the implications the current study may have for future theoretical enquiry, future policy and future research on judicial training.

What the main research findings tell us about judicial development

Findings on judicial training

The main purpose of this study was to explore whether judges' approach to judicial training and preference for training methods varies with experience, in line with Kolb's experiential theory of learning. In order to test this hypothesis, the study needed to ask a series of questions such as: Was initial judicial training subsequently useful for your practice on the bench? Which methods were most useful in your training? The responses were then mapped onto demographic experience-related variables (such as prior legal practice experience, experience on the bench, and criminal legal experience), exposure to training (law school, initial/induction training, amount of continuous training) and a few other practice-related variables (judicial speciality, legal speciality before judicial appointment etc.) to explore whether these variables may help explain differences in judicial attitudes.

The findings confirm the main hypothesis: that judges with different levels of experience have different views on judicial training, judicial training methods, judicial socialisation and aspects of judicial training reform. Although the findings have already been summarised in the previous chapters in more detail, in this

section the following three main themes are explored and discussed within the larger theoretical framework of the thesis:

- Appreciation for judicial training
- Preferences for judicial training methods
- Learning as an inherently social process

Appreciation for judicial training

This research provides empirical support for the view that judicial training constitutes a valuable preparation for judicial practice, which is appreciated by almost all judges irrespective of their background. This validates the international trend towards the institutionalisation and establishment of judicial training as a mandatory practice for judges, especially for new recruits. This finding is especially valuable as the judicial respondents in this study had the chance to reflect on the value of judicial training overall, not just on the value of a specific training session; in this respect, the research findings also reinforce the latest EJTN recommendations on the best methodologies for evaluating judicial training.⁷⁶³

An important finding is that the appreciation judges have for initial judicial training seems to increase as they gain more practical experience. More specifically, judges with prior legal practice experience at the time of appointment are more likely to appreciate initial training than judges without that kind of practical legal experience; additionally, any amount of experience as a judge on the bench and subsequent practice in sentencing *cumulatively* increase the judge's appreciation for initial training. One potential explanation for this finding could be that the content taught during initial training only really becomes meaningful to a judge from the moment s/he has the chance to *operationalize* it and put it into practice, in court. This interpretation is consistent with one of the central tenets of experiential learning: that learning is meaningfully integrated only through a back-and-forth process

⁷⁶³ Cooper (n 370) 65.

between theory and practice.⁷⁶⁴ This finding also speaks to the methodological importance of going beyond evaluating programmes with Kirkpatrick level 1 tools,⁷⁶⁵ as they might offer a misleading snapshot of the value of judicial training if they only involve respondents right after they have undergone training.

In addition to evaluating the current overall value of training for judicial practice, the study also acknowledged the current policy efforts to improve and reform judicial training in Romania, and asked judges to feedback on the reform plans. With regards to the improvement of induction training, the suggestion that attracted most support from the respondents was the chance to shadow a judge in their assigned court before they have to begin their own judicial activity. This marks an important experiential learning need that the Romanian induction training, as it is currently designed, does not fulfil; methods corresponding to Kolb's *Reflective Observation* stage are an essential precursor to abstract learning.⁷⁶⁶ The research findings suggest that induction trainees should be offered the chance to participate in court practice, just like initial trainees do during their second year of initial training, but without the immense pressure of having to sentence from day one (which is currently the case). This added pressure might serve the human resources needs of the Romanian judiciary, but the research findings suggest that it does not offer a comprehensive and desirable learning experience for induction trainees.

There are nevertheless aspects of judicial training where opinions remain split. One specific area is in relation to the feasibility of teaching "judgecraft". The respondents were almost equally split as to whether judgecraft can be integrated into judicial training, or whether judging is an "art" that can only be learned through practice. This split reflects competing accounts in the empirical literature on judicial decision-

⁷⁶⁴ Kolb and Kolb (n 152) 2.

⁷⁶⁵ Kirkpatrick (n 574).

⁷⁶⁶ "In instructional terms, this cycle involves the learner first in an immediate concrete experience (such as role plays, exercises, case studies) followed by reflection on the experience from different perspectives (small group discussions, processing of the experience)." Armytage, *Educating Judges* (n 16) 123.

making and sentencing. Researchers such as Tombs (2004),⁷⁶⁷ Mackenzie (2005),⁷⁶⁸ Jacobson and Hough (2007)⁷⁶⁹ and Kapardis (2010) all cite similar conflicting judicial attitudes on this issue.

Preferences for training methods

Perhaps the most significant contribution the empirical findings make to the experiential learning literature is the findings on judicial preferences for training methods. Back in 1984, Kolb had hypothesised that “the [learning] styles can be used by the same individual at different moments in time, different levels of experience, and even during the same learning experience”.⁷⁷⁰ While the Kolb learning cycle and the LSI have already been empirically validated in 1004 studies, only 8 of those were conducted on legal students/professionals, and none of them was reliably conducted on judges in a way that would lead to generalisable insights.⁷⁷¹

This study is the first to confirm that the LSI framework helps to explain how judges’ learning needs change with experience. Preference for almost all methods were shown to have been associated with at least one of the experience factors (legal experience, judicial experience and/or criminal legal experience). This finding was statistically validated for both initial, induction and continuous methods. More importantly, there was a clear difference between initial trainees, who tend to prefer more experience-related, hands-on methods (e.g. supervised court practice), and continuous trainees, who tend to prefer more abstract, theory-driven methods (e.g. lectures). This aligns with previous research with LSI 1, which showed that “preference for learning by abstraction increased with age, as measured by the AC-

⁷⁶⁷ Tombs (n 4) 44.

⁷⁶⁸ Geraldine Mackenzie, *How Judges Sentence* (Federation Press 2005) 16–7.

⁷⁶⁹ Jacobson and Hough (n 10) 47–8.

⁷⁷⁰ Kolb (n 127) 65.

⁷⁷¹ Kolb and Kolb (n 152) 17.

CE scale”.⁷⁷² In addition, prior exposure to training variables were also shown to correlate with current preferences to methods, which confirms the experiential learning assumption that prior learning experiences also inform the new learning experience.⁷⁷³

In addition to validating the Kolb learning cycle for judges, the results also seem to confirm a clustering of preferences for training methods that fit the Learning Styles Inventory (LSI) typology, confirming the intuitions of other researchers on judicial training.⁷⁷⁴ The clustering analysis was conducted for both initial and continuous training.⁷⁷⁵ Reese and Reese’s “Teaching Implications Chart” (initially reproduced in the Introduction, but reprinted again below) was used to map the clusters onto the LSI framework:

⁷⁷² *ibid* 24.

⁷⁷³ Niedwiecki (n 146) 55.

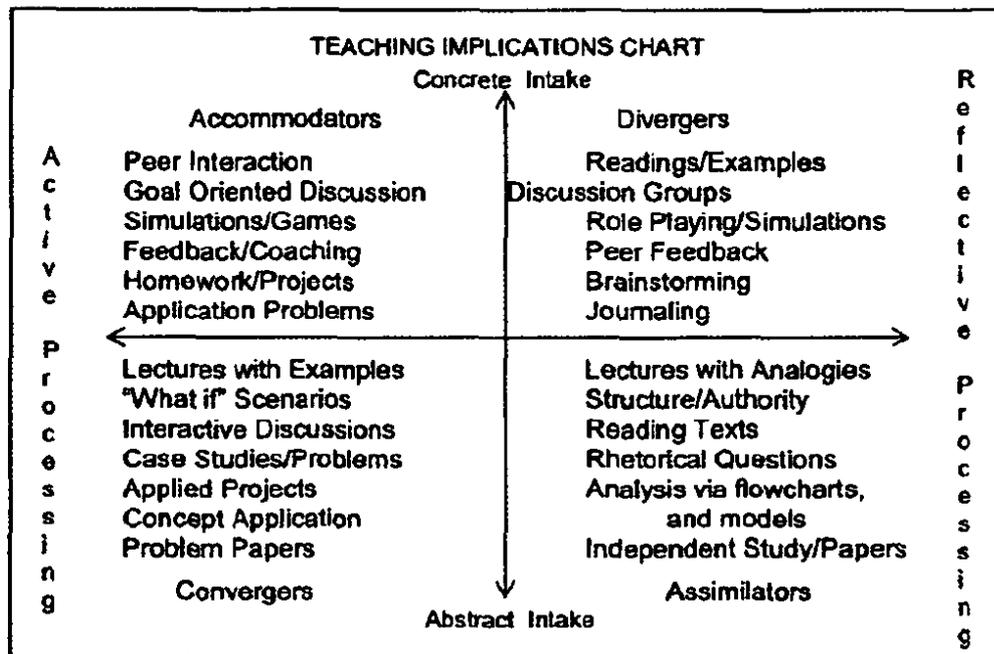
⁷⁷⁴ “There is evidence emerging to suggest that judges as a profession exhibit preferred learning styles and utilize preferred learning practices developed over the course of their careers.” Livingston Armytage, *Educating Judges: Towards a New Model of Continuing Judicial Learning* (Martinus Nijhoff Publishers 1996) 176.

⁷⁷⁵ Excluding induction-specific methods as the sample of respondents was too small.

FIGURE 33: REESE AND REESE MAPPING OF LAW TEACHING METHODS ONTO LSI⁷⁷⁶

TEACHING IMPLICATIONS

Connecting with all learners requires the use of teaching strategies that both challenge and match with the learners' preferred learning styles. The following chart identifies certain types of strategies that fit with the intake preferences (by either concrete or abstract methods) and processing preferences (by either active or reflective methods) for each of Kolb's cognitive learning styles.

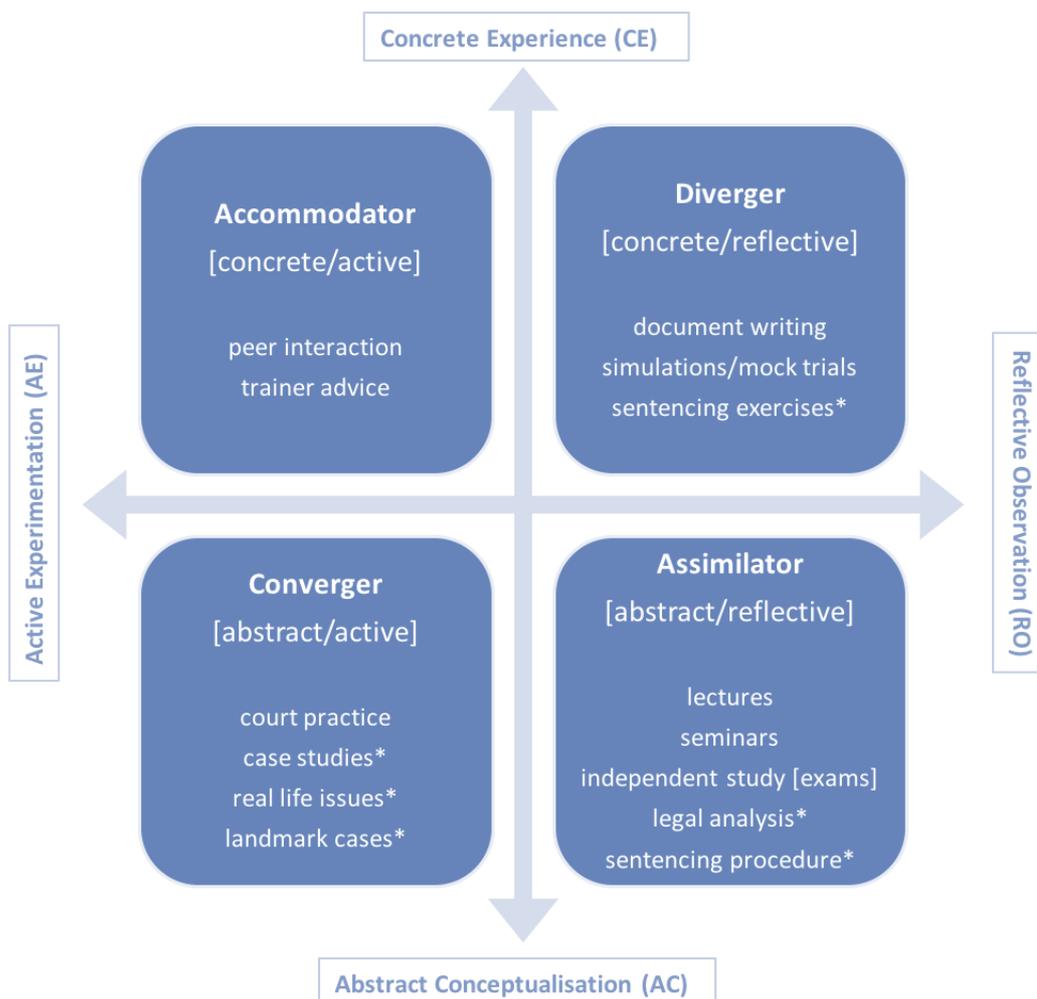


The aggregated results for both types of judicial training are presented again here.⁷⁷⁷

⁷⁷⁶ Reese and Reese (n 155) 188.

⁷⁷⁷ They were also presented separately in the training findings chapter (Chapter 8). Please note that the two sets of methods were presented together in the same figure for efficiency, but it is not implied that the two sets are correlated with each other (e.g. preference for Assimilator-type initial methods is not necessarily correlated with preference for Assimilator-type continuous methods). Assuming that they did would entail that learning styles of respondents do not change over time, when in fact Kolb argues that they do.

FIGURE 34: CLUSTERING OF PREFERENCE FOR JUDICIAL TRAINING METHODS (MAPPED ONTO THE LSI FRAMEWORK) (AGGREGATED RESULTS N 162)



The first result reveals that currently-offered judicial training in Romania covers all four learning styles in LSI through the methods used. This shows that NIM has succeeded in offering a diversity of methods catered to all learning styles, unlike legal institutions from other studies (especially on law schools), which tend to restrict their offer to Reflective Observation (RO) and Abstract Conceptualisation (AC) methods.⁷⁷⁸

The second finding is that the overall distribution of learning styles for Romanian judges is identical to that of law students and other professionals, as measured by previous LSI studies. For instance, DeGroff and McKee had discovered that:

⁷⁷⁸ DeGroff and McKee (n 155) 542; Niedwiecki (n 146) 52; Bergman, Sherr and Burrige (n 634) 537.

Of the 177 respondents, 79 (45%) reflected a preference for the Assimilating learning style (Quadrant Two); 56 (31%) for the Converging style (Quadrant Three); 23 (13%) for the Diverging learning style (Quadrant One); and 19 (11%) for the Accommodating style (Quadrant Four). Thus, just over three-fourths of all respondents were classified as either Assimilators or Convergents (Quadrants Two or Three).⁷⁷⁹

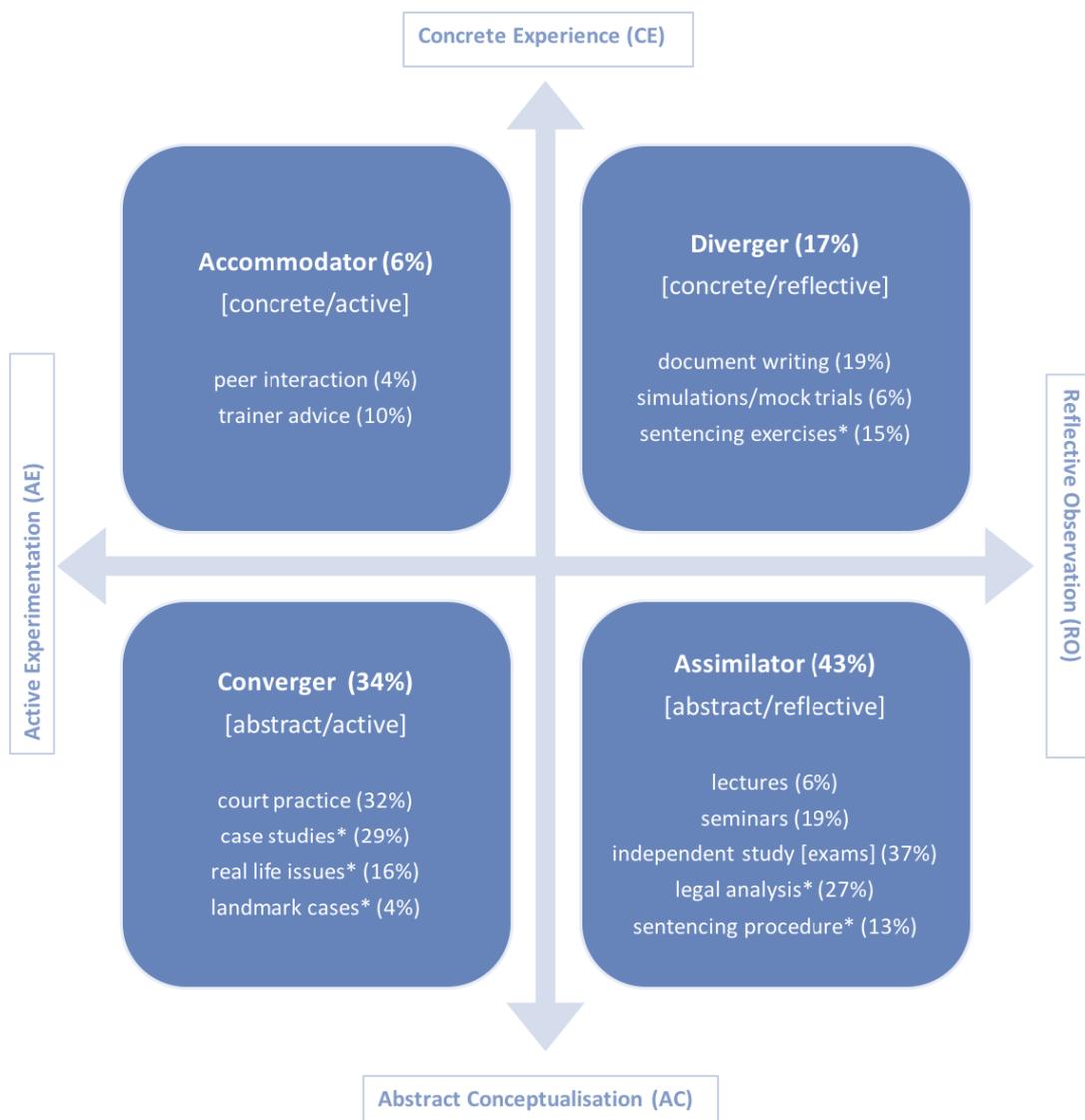
Their results had replicated previous findings by Reese and Reese,⁷⁸⁰ as well as exploratory findings by Murrell on a small, undefined sample of American judges.⁷⁸¹ For this study, the following figure presents, for each judicial training method, the number of judges who voted it as their top preference.

⁷⁷⁹ DeGroff and McKee (n 155) 520–1.

⁷⁸⁰ “These results are consistent with those of Professors John and Tania Reese, at the University of Denver, who also reported a three-to-one split of Assimilators and Convergents over Accommodators and Divergers, thereby reflecting a “heav[y] bias” among law students “toward traditional abstract intake.” (ibid 521.) Reese and Reese had reported, back in 1999: “If merely categorized by quadrants, twenty-six percent of the students are in the top quadrants, about equally divided horizontally. Seventy-four percent of the students are in the bottom quadrants, again, about equally divided horizontally.” Reese and Reese (n 155) 177.

⁷⁸¹ “Although there are individuals in each of the four quadrants, the Assimilators are the largest group, followed by Convergents, then Divergers, then Accommodators.” Murrell (n 166) 152.

FIGURE 35: DISTRIBUTION OF JUDGES ACROSS 4 LEARNING STYLES, BASED ON THEIR TOP PREFERRED METHOD (STANDARDISED TOTAL RATIOS PER STYLE)



The percentages were then added for each of the 4 learning styles, then standardized so as to add to 100%.⁷⁸² The figure confirms that:

1. Most judges are Assimilators (43%), followed by Convergents (34%);
2. Two thirds of judges are in the bottom two quadrants (77%);
3. Accommodators tend to be the least encountered learning style among judges.

⁷⁸² Because the methods are aggregated from initial, induction and continuous training, they add up to more than 100%. In order to compare the distributions to previous literature, a standardisation was needed.

The replication of the previous studies suggests that (1) Kolb's LSI has an explanatory power that extends to judges as learners; (2) the Learning Styles Inventory describes learning preferences and patterns that go beyond profession, age or jurisdiction and seemingly apply to all human beings; (3) it should not be surprising that judges and law students have similar LSI distributions, as the latter forms the recruitment pool for the former.

The third result revealed that judicial preferences for different training methods *shift* with experience. This constitutes an empirical validation for the core experiential learning principle that the learner progresses through the learning cycle and therefore his/her preference for training methods changes correspondingly over time.⁷⁸³ An important finding in this study was that, as judges gain experience on the bench, they are less likely to be interested in practical methods such as supervised court practice, and much more interested in theoretical approaches, such as lectures and seminars. This finding confirms prior research on other categories of learners:

[Kagan and Witkin (1970)] find, in support of Piaget, that there is a general tendency to become more analytic and reflective with age, *but* that individual rankings within the population tested remain highly stable from early years to adulthood.⁷⁸⁴

A surprising finding of this study was that, although minimal court experience associates with shifts learning preferences, each added year of court or professional experience does not further associate with a change in preference of initial or induction training methods.⁷⁸⁵ In 1980, Gypen had a similar finding for engineering and social work alumni: "Surprisingly, these patterns were not significantly different

⁷⁸³ Kolb (n 127) 63–5; Kolb and Plovnick (n 158) 17–9.

⁷⁸⁴ apud Kolb (n 127) 77.

⁷⁸⁵ None of the 9 initial and induction training methods were associated with a change in the amount of experience, while 5 out of 6 continuous training methods were associated with a change in the amount of experience.

for different alumni years; alumni only three years out of school showed the same pattern as alumni 23 years out.”⁷⁸⁶

Learning as an inherently social process

Anecdotally, prior research on judges and other learners had emphasised that the learning process is inherently social.⁷⁸⁷ This is supported by the experiential learning paradigm; Dewey postulated that “education is essentially a social process”,⁷⁸⁸ and Kolb included peer interaction among the environmental factors that affect the learning process.⁷⁸⁹ Respondents from the exploratory phase of this research in Romania mentioned peer interaction and interaction with the trainers as useful sources of learning. The findings revealed that almost half of judges surveyed (47%) ranked the interaction with the trainer among their top 3 favourite learning sources, while fewer judges (22%) appreciated the peer interaction. The willingness to receive advice from the trainer was associated with experience in legal practice (judges with legal experience were less interested in the trainer’s advice). In contrast, the willingness to learn from peers was associated with the judge’s legal and judicial expertise (experienced judges were more interested to interact with and learn from their peers). Perhaps the explanation is that a novice judge will also assume that his or her training peers are equally inexperienced so will not find reasons to trust their judgment and advice. These two sources of learning clustered together under the Accommodator learning style, which was defined by Kolb as the type of learner who “tends to solve problems in an intuitive trial and error manner relying heavily on other people for information rather than his own analytic ability”.⁷⁹⁰

⁷⁸⁶ Gypen (n 160) 196.

⁷⁸⁷ “Appropriately structured judicial education settings allow judges to share information, explore questions, and obtain feedback from peers, thereby learning from one another.” Dawson (n 328) 176.

⁷⁸⁸ Dewey (n 132) 58.

⁷⁸⁹ Kolb (n 127) 63.

⁷⁹⁰ Kolb and Plovnick (n 158) 9.

It was found that the social aspect of the judicial role continues well after judicial training is completed, but the actors change. Almost all (85%) of new recruits claim they keep in touch with their judicial colleagues, but the contact with judicial trainers gradually fades away as judges become more experienced. Instead, the mentorship role is taken over by the more senior judges in their court, whom judges often approach for specific advice (e.g. on sentencing). Most judges (87%) admitted that they welcome sentencing advice when confronted with a difficult case, with two thirds (69%) approaching a more senior judge in their court. This empirically validates an old myth that, despite their public image as solitary and independent sources of decision-making, judges rely on their colleagues for advice and input. Anecdotal evidence supports this in common law jurisdictions:

You just apply yourself and you learn each time... I didn't have any inhibitions of finding other [judges and asking for advice] ... You have just got to learn and very fast.⁷⁹¹

A few of our respondents talked about how helpful it can be to talk informally about sentencing options with other judges. One judge commented, 'I make no bones about bouncing ideas off other people; and people stick their heads round the door and say - what do you think about this?'⁷⁹²

[Crown Court judges] routinely popped into one another's rooms to ask for a second opinion and it was one of the most popular dining room topics.⁷⁹³

And in civil law jurisdictions as well:

More significantly, [the new judges'] professional socialisation [in continental countries] is achieved almost exclusively within the judiciary itself, which is therefore likely to become a crucial reference point for judicial attitudes.^{794 795}

⁷⁹¹ Darbyshire (n 6) 76.

⁷⁹² Jacobson and Hough (n 10) 49.

⁷⁹³ Darbyshire (n 6) 206.

⁷⁹⁴ Guarnieri and Pederzoli (n 205) 43–4.

⁷⁹⁵ Even in jurisdictions that do not offer mandatory judicial training “individuals learn their roles and adapt their behavior by observing their peers”. Susan L Goldberg, ‘Judicial Socialization: An

While all these accounts and studies have qualitatively explored the idea of judicial socialisation, this study quantitatively validates the value judges give to social interaction in learning to judge. It is also the first study to test the behavioural hypothesis formulated by Kahneman and Klein that one of the essential conditions for the building of expertise is receiving feedback.⁷⁹⁶ Prior to this study their conditions for expertise-building had not been tested in relation to judicial expertise. Perhaps not surprisingly, the value of peer advice as a learning mechanism decreases as the judge gains more experience. New judicial recruits declare they are more likely to ask for advice (94%) than experienced judges (79%). This finding replicates Hogarth's finding about Canadian magistrates that "the older the magistrate is, the less likely he is to consider it important to discuss sentencing with other magistrates".⁷⁹⁷

Sentencing practice – as informal learning in continuation of the training process

According to Hogarth, "the socialising and educative influences of legal experience are far more important in controlling judicial behaviour than the formal rules laid down by parliament and the appeal courts."⁷⁹⁸ This research goes beyond the study of formal training, by positing a more advanced understanding of learning – namely, that learning does not stop with formal training and, in fact, continues all throughout the professional life of the individual. As discussed earlier, this is a view already accepted by the experiential learning paradigm.⁷⁹⁹ It has also been officially acknowledged by major international institutions, such as UNESCO,⁸⁰⁰ under the

Empirical Study' (1984) 11 *Journal of Contemporary Law* 423. Also Hogarth has an entire chapter on social constraints, and he concludes "perhaps the greatest social influence in the environment of magistrates is their relationship with each other". Hogarth (n 92) 180.

⁷⁹⁶ Kahneman and Klein (n 177).

⁷⁹⁷ Hogarth (n 92) 212.

⁷⁹⁸ *ibid* 177.

⁷⁹⁹ Dewey (n 132) 35–8; Kolb (n 127) 26–7.

⁸⁰⁰ Edgar Faure, Felipe Herrera and Abdul-Razzak Kaddoura (eds), *Learning to Be: The World of Education Today and Tomorrow* (6 impr, UNESCO 1972).

overarching concept of lifelong learning that sees out-of-school education as important as institutionalised education.

Writing around the same time as Hogarth, Coombs in 1973 defined informal learning as:

the truly lifelong process whereby every individual acquires attitudes, values, skills and knowledge from daily experience and the educative influences and resources in his or her environment—from family and neighbours, from work and play, from the marketplace, the library and the mass media.⁸⁰¹

In the case of judges, prior empirical research and prior cognitive behavioural theories (summarised in Chapter 2) pinpointed to various elements of judges' work that play the role of feedback mechanisms: legally-binding regulations, guidelines, role models of ideal decision-making (such as landmark cases), wider legal practice, specific philosophies or principles, as well as the direct input of other actors such as other judges, prosecutors and other justice system agents. In the more specific case of sentencing, as a paradigmatic case of judicial decision-making, prior studies identified more specific tools and factors⁸⁰² and input from other actors⁸⁰³ as the environmental factors that enable sentencers to learn from mistakes and become better at their job. For instance, Hogarth made a significant effort in exploring “the search for information”,⁸⁰⁴ identifying, among many other variables, the influence that legal regulations, presentence reports, landmark cases, prosecutorial recommendations and sentencing factors have on sentencing.

Similarly to Hogarth, and in line with the acknowledged importance of informal learning in the professional development of the sentencing judges, the secondary purpose of this study was to explore how judges perceive the sources of informal learning available to them on the bench, and whether these perceptions also vary

⁸⁰¹ PH Coombs, *New Paths to Learning* (International Council for Educational Development 1973).

⁸⁰² such as criminal legal regulations and procedures, sentencing guidelines, officially-defined sentencing factors

⁸⁰³ such as presentence reports or prosecutorial sentence recommendations

⁸⁰⁴ Chapters 14-19 Hogarth (n 92) 229–340.

with experience. Whether their view of sentencing aspects varies with experience would inform both studies in sentencing and behavioural studies on expertise-building.

In order to test this secondary hypothesis, the study needed to ask a series of questions such as:

1. Which of these sentencing tools do you find⁸⁰⁵ most informative in your sentencing practice? Which ones helped you most in your first few years of sentencing practice? [the sentencing tools question]
2. What sentencing factors do you consider most important in arriving at the correct sentence? [the sentencing factors question]
3. When confronted with a difficult decision, do you ask for advice, and if so, whom? [the social learning question – included in the previous section]
4. When faced with a case very similar to the ones in the past, how do you react? [the expert intuition question]
5. What is your role as a judge? [the judicial philosophy question]

The responses were mapped onto demographic experience-related variables,⁸⁰⁶ exposure to training⁸⁰⁷ and a few other practice-related variables⁸⁰⁸ to verify whether these variables account for a difference in attitudes. Although the findings have already been summarised in the previous chapter in more detail, in this section three main themes are explored and discussed within the larger theoretical framework of the thesis:

- Sentencing tools
- Sentencing factors
- Sentencing intuitions

⁸⁰⁵ Or “you would find”, when asking new recruits.

⁸⁰⁶ such as prior legal practice experience, experience on the bench, and criminal legal experience

⁸⁰⁷ law school, initial/induction training, amount of continuous training

⁸⁰⁸ judicial speciality, legal speciality before judicial appointment etc.

Sentencing tools

In 1971, Hogarth had explored the attitudes of Canadian magistrates towards a variety of constraints affecting their sentencing, as well as the way they go about searching for information. He argued that “sentencing takes place within a legal and social framework”,⁸⁰⁹ and he explored, one by one, perceptions towards legal constraints (sentencing-related statutes,⁸¹⁰ Appeal Courts decisions⁸¹¹), and social influences (from other magistrates,⁸¹² from probation officers,⁸¹³ crown prosecutors⁸¹⁴). Hogarth then explored the manner in which magistrates search and process the information relevant to sentencing, including “the ordering of priorities among information” (e.g. ordering of sentencing factors),⁸¹⁵ what sources of information are used and which are more important in the sentencing process.⁸¹⁶ Some of his findings are directly comparable with those of the current study.

This study revealed that most Romanian judges say they consider a wide variety of sentencing tools as useful informal sources of inspiration when deciding a sentence in court. This confirms that the learning process does not just take place during formal training, but continues all throughout judges’ careers. In this study, 6 out of 8 main sentencing tools were considered useful by more than two thirds of judges.

The importance Romanian judges say they give to sentencing tools seems to be associated with the legal status of the tool (binding/non-binding) and the role of the agent producing the information (other judges, probation officers, prosecutors). In contrast to Hogarth’s conclusions that legal constraints are rather marginal (for Canadian magistrates in the 1950s), for today’s Romanian judges legally-binding tools have a significantly more important role (with 74%-80% considering them

⁸⁰⁹ Hogarth (n 92) 166.

⁸¹⁰ *ibid* 166–73.

⁸¹¹ *ibid* 173–7.

⁸¹² *ibid* 181–8.

⁸¹³ *ibid* 188–91.

⁸¹⁴ *ibid* 191–3.

⁸¹⁵ *ibid* 233–6.

⁸¹⁶ *ibid* 239–44.

essential) than non-binding sentencing tools. For instance, only 13% of Canadian magistrates found Court of Appeal landmark cases of considerable help,⁸¹⁷ while 77% Romanian judges say they find the High Court landmark cases very useful. The current finding also confirms some qualitative findings in Scotland that highlighted the importance judges placed on how the Court of Appeal might view their sentences.⁸¹⁸

This study also reveals lower confidence on the part of Romanian judges in the prosecutor's recommendations than found amongst judges in other studies. In Hogarth's study, 49% of Canadian magistrates found that prosecutor's "views as to sentence are helpful to them in determining the appropriate disposition to impose".⁸¹⁹ Additionally, Arce et al. mention "an effect of decisional anchoring of the sentences in the recommendations of the public prosecutor",⁸²⁰ which is, at least consciously, not acknowledged by Romanian judges. A potential discrepancy between the self-reporting and the actual impact of prosecutorial recommendations has been previously reported by Konecni and Ebbesen, who discovered "that judges' bail and sentencing decisions were heavily influenced by a small number of factors – such as the prosecutor's recommendation or the presentence report, respectively – which the judges systematically downplayed in their self-reporting".⁸²¹

Indeed, the influence of pre-sentence reports has also received relatively low scores by Romanian judges in this study. Only 17% said they considered them very useful, and only 11% declared they used these as top sources of influence at their beginning of their sentencing career. In Hogarth's study, 34% of Canadian magistrates

⁸¹⁷ *ibid* 175.

⁸¹⁸ "Several, in discussing the stages in the sentencing task, stressed that the process was structured by their perception of how the Appeal Court would be likely to view the sentence. [...] In addition, they mentioned that they took account of the guideline judgements in *Ogilvie* and *Du Plooy* in appropriate cases." Tombs (n 4) 43.

⁸¹⁹ Hogarth (n 92) 193.

⁸²⁰ Arce, Tortosa and Alfaro (n 94) 36–7.

⁸²¹ Konecni and Ebbesen (n 532).

indicated they “would welcome specific recommendations in all cases”,⁸²² and in fact they actually requested a probation report in 42% of the cases.⁸²³ None of the previous research asked judges to rank sentencing tools by their relative usefulness to sentencing practice.

Sentencing factors

Unlike the scarcity of research on sentencing tools, a few previous studies have attempted to establish a ranking of sentencing factors as perceived by judges. In Hogarth’s study, 71 Canadian magistrates were asked to indicate the 3 most important factors in order of importance, in 2,354 cases. The top 3 in order of importance were: (1) culpability of the offender in this offence (80%), (2) absence of a significant criminal record (60%), and (3) offender’s need for supervision (49%)⁸²⁴

In Tombs’ study on 40 Scottish sentencers, the top two cited factors considered in 108 borderline cases were the nature of the offence (40%) and criminal history (34%) for custodial cases, in contrast to the offender’s circumstances (28%) and condition (24%) for non-custodial cases.⁸²⁵ Tombs did not distinguish in her categorisation between offence-related factors, such as harm caused to victims vs social danger.

In this study, the general harm caused was the most important factor (93%), followed by harm caused to the victim (61%) and the offender’s previous convictions (61%). If the two first factors were aggregated under a more general category of the “nature of the offence” (which both Hogarth and Tombs did, as they did not discriminate between social harm, harm to victim or culpability), this category would remain the most important in Romanian judges’ attitudes (59%

⁸²² Hogarth (n 92) 190.

⁸²³ Information from 2354 cases over an eighteen-months’ period across 7 offences (ibid 239–40.).

⁸²⁴ Table 86 ibid 281.

⁸²⁵ Table 4.1. Tombs (n 4) 49.

standardised), followed by criminal history (15%) and effect of sentence on the defendant (11%). In this interpretation, the current study reinforces Hogarth's and Tomb's findings, but given that these studies have not used the same categorisations, the comparisons ought to be treated with some caution. These findings are also difficult to compare with Jacobson and Hough's study on personal mitigation factors, as they asked sentencing judges not what factors influence their sentencing, but what factors influence their mitigation (i.e. what makes them give a more lenient sentence).⁸²⁶

In addition to the actual ranking of the factors, the study also revealed a clustering between defendant-related, victim-related and society-related factors. There are tensions between sentencing factors pertaining to (1) the defendant, (2) the victim and (3) the society at large. Judges who are concerned more with one of the categories say they tend to place less importance on sentencing factors from the other two categories. A similar categorisation has been proposed in the past by Shapland,⁸²⁷ Andrews et al⁸²⁸ and Jacobson and Hough.⁸²⁹ All of these have been created apriori by the researchers, while the clustering in this study was arrived at through the data analysis. Various judges have expressed this tension in the past:

There you have the family of the victim and they are baying for blood and you have this tragic figure in the dock whose life you are about to smash by sending him inside and leaving his family without him.⁸³⁰

⁸²⁶ "All forty sentencers interviewed for this study were asked the following open-ended question: 'What kinds of personal mitigation most frequently influence the sentences that you pass?'" Jacobson and Hough (n 106) 152.

⁸²⁷ Joanna Shapland, *Between Conviction and Sentence: Process of Mitigation* (Routledge & Kegan Paul Books 1981).

⁸²⁸ DA Andrews and others, 'Some Psychometrics of Judicial Decision Making Toward a Sentencing Factors Inventory' (1987) 14 *Criminal Justice and Behavior* 62.

⁸²⁹ Jacobson and Hough (n 10) 9.

⁸³⁰ Darbyshire (n 6) 207.

Variation of attitudes to sentencing tools and factors with experience

Perhaps the most important finding concerning sentencing tools, given the approach of the research, is that Romanian judges who have more legal expertise pre-appointment and more experience in criminal cases say they use a wider range of tools than novice judges (**increased sophistication**). This finding seems to reinforce Hogarth's finding that "length of experience appears to be associated with a more moderate and more coherent penal philosophy."⁸³¹ Since no previous research has ranked sentencing tools, it is difficult to discuss this finding in a wider theoretical framework.

Secondly, experience also seems to bring a **reduced formalism**. Romanian judges who have more legal expertise pre-appointment and more experience in criminal cases say they pay more attention to sentencing tools that refer to individual cases/sentences than novice judges. In addition, judges with previous experience in legal practice (especially in police forces) appear to be more sensitive to the parties and less concerned with general societal values (**increased sensitivity**). These findings replicate results from Hogarth⁸³² and Jacobson and Hough.⁸³³

Finally, experience also appears to bring a **focus on the offender**. Experienced judges in Romania say they give more importance to the situation of the offender, while novice judges say they give more importance to the situation of the victim. Moreover, experienced judges say they give more importance to the criminal

⁸³¹ Hogarth (n 92) 216.

⁸³² "[Older magistrates] also appear to be rather more discriminating in assessing offences. [...]The general picture which emerges is one of a relationship between the age of a magistrate and a greater feeling of independence, self-reliance, confidence, and *moderation*. [...] Lay magistrates appear to be more 'legalistic' in their approach to sentencing. They tend to conform rigidly to the requirements of the law [...] lay magistrates adhere strictly to the formal requirements of the law. In contrast, legally-trained magistrates are likely to interpret the law more flexibly, responding more to what they believe to be its true meaning and spirit." *ibid* 211–3.

⁸³³ "[A newly-appointed recorder] thinks that her approach not only reflects her lack of experience, but also the fact that sentencers receive more training today than they did in the past, and this training tends to emphasise structured decisionmaking. Another recorder said that she takes longer than most sentencers to make a decision because she always looks up the relevant legal guidelines and provisions, thinks about the issues carefully, and drafts her sentencing remarks in advance." Jacobson and Hough (n 10) 49.

antecedents of the defendant than novice judges, and this trend increases with each year of experience in hearing criminal cases.

Expertise and intuitions

The study could not demonstrate a statistically significant relationship between the experience of Romanian judges and their reliance on intuitions in sentencing. This hypothesis had been inspired by the psychological literature on expertise-building, summarised in Chapter 2, which suggests that, as professionals become more experienced, they tend to rely on their intuitions more in their decision-making tasks. A failure to replicate previous research does not necessarily mean the theories are false. This is a study of attitudes – it does not measure whether experienced judges *actually* rely on their intuitions in their sentencing. Instead it measures their *confirmatory feelings* and attitudes. In other words, it measures whether judges *think* they rely on their intuitions, by assuming they are familiar with the confirmatory feelings they have when they have arrived at a sentence through a heuristic process. It was expected that more experienced judges would be more likely to have experienced confirmatory feelings than novice judges, and they would report them in the “intuitive confidence” question. This expectation was not met.

Instead, the results suggest an alternative interpretation. It was discovered that Romanian judges who report they trust their past experience as a good source of inspiration for their sentencing decisions are also more likely to report a reliance on intuitions. This finding replicates a suite of psychological studies that have sought to measure the relationship between the confidence people have in their own intuitions and their actual reliance on those.⁸³⁴ Most noticeably, Simmons and

⁸³⁴ Chip Heath and Amos Tversky, ‘Preference and Belief: Ambiguity and Competence in Choice under Uncertainty’ (1991) 4 *Journal of Risk and Uncertainty* 5; Dale Griffin and Amos Tversky, ‘The Weighing of Evidence and the Determinants of Confidence’ (1992) 24 *Cognitive Psychology* 411; Anthony G Greenwald and Mahzarin R Banaji, ‘Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes’ (1995) 102 *Psychological Review* 4; Michaela Wänke and Herbert Bless, ‘The Effects of Subjective Ease of Retrieval on Attitudinal Judgments: The Moderating Role of Processing Motivation’ in H Bless and JP Forgas (eds), *The message within: The role of subjective experience in social cognition and behavior* (Psychology Press 2000); Nicholas Epley and Rebecca Norwick, ‘Confidence as Inference from Incidental Experience’ [2006] Unpublished manuscript, University of

Nelson had claimed that “people use intuitive confidence to decide whether to cling to an intuition when confronted with constraint information. [...] People will choose intuitive options with greater frequency as intuitive confidence increases.”⁸³⁵ Their 2006 experiment included 14 separate study designs, measuring the American adults’ reliance on their intuitive confidence while betting in sporting events. One of the study designs compared experts with novices.⁸³⁶ Simmons and Nelson demonstrated that:

The most important aspect of our account suggests that intuitive confidence is in large part responsible for intuitive biases and that **intuitive confidence increases the frequency of intuitive choices**. This hypothesis was unequivocally supported. Increased intuitive confidence was associated with more predictions of favorites, [...] **whether the study included novices or experts**, [...] and whether the feeling of confidence was relevant or irrelevant to the decision context [emphasis added].⁸³⁷

In other words, just like the current study, Simmons and Nelson found that intuitive confidence has a direct bearing on use of intuitions, and the difference in experience between novices and experts is largely irrelevant.

The Simmons and Nelson study replicates an earlier study by Heath and Tversky (done on American university students), which had discovered that students chose to bet on a judgment that they reportedly held with 90% confidence rather than a chance event that offered them a 90% chance of winning. However, this preference changed when subjective confidence was lower: students frequently chose to bet on the chance event when they were merely 55% confident in their own judgment

Chicago; Joseph P Simmons and Leif D Nelson, ‘Intuitive Confidence and the Prominence Effect: When Consumer Choices Are Sensitive to Matching Prices’ [2006] Manuscript in preparation <https://www.researchgate.net/profile/Joseph_Simmons2/publication/228960738_Intuitive_confidence_and_the_prominence_effect_When_consumer_choices_are_sensitive_to_matching_prices/links/09e4150f5ccd61d4aa000000.pdf> accessed 14 April 2016; Richard E Petty and Jon A Krosnick, *Attitude Strength: Antecedents and Consequences* (Psychology Press 2014).

⁸³⁵ Joseph P Simmons and Leif D Nelson, ‘Intuitive Confidence: Choosing between Intuitive and Nonintuitive Alternatives’ (2006) 135 *Journal of Experimental Psychology: General* 409, 411.

⁸³⁶ *ibid* 414.

⁸³⁷ *ibid* 424.

and the chance event offered a 55% chance of victory.⁸³⁸ Although Heath and Tversky also compared “experts” and “novices” in their experiments (along with a measure of subject competence), none of the experimental psychology literature is conducted on judges. In that sense, this study quantitatively validates the intuitive confidence hypothesis for the first time in judicial decision-making.

The only sentencing researcher that has apparently touched upon the issue of confidence and reliance on past experience is Hogarth, and his findings are at odds with those of the current study. When analysing the attitudes of Canadian magistrates in relation to their experience on the bench, Hogarth discovered that

It appears that length of experience is associated with a feeling of confidence and self-reliance among magistrates. [...] Since age and length of experience are highly correlative, it is difficult to know which of the two variables is more important in shaping attitudes and beliefs. It should be pointed out, however, that the pattern is much stronger with respect to length of judicial experience than to age.⁸³⁹

In other words, Hogarth seems to have found a statistically significant correlation between length of judicial experience and what he calls ‘confidence’ and ‘self-reliance’. A closer look at his findings nonetheless suggests that he uses these terms slightly differently than the ‘intuitive confidence’ literature. When detailing the findings, Hogarth refers to the magistrates’ greater satisfaction with the conditions under which they work, a greater confidence in their independence (including from political interference), and a greater satisfaction with the community attitude towards the court and towards their role.⁸⁴⁰ Hogarth also seem to include the lower reliance on other magistrates’ sentencing advice in the ‘self-reliance’ measure.⁸⁴¹ While these findings are valuable, they do not seem directly comparable to how ‘intuitive confidence’ and ‘reliance on past experience’ are used in the current study. In this study, ‘confidence’ and ‘reliance’ refer more to the inner mental processes of

⁸³⁸ Heath and Tversky (n 829).

⁸³⁹ Hogarth (n 92) 216.

⁸⁴⁰ *ibid.*

⁸⁴¹ *ibid* 212.

judges while sentencing, and less to the various external aspects that make up the social environment in which judges sentence.

Limits of the current study and future research

As with any empirical legal project, methodological choices and considerations bring limits that are important to highlight. There are some limitations with the current study which qualify its findings, but none of them is so fundamental so as to affect the reliability of the main research findings.

Focus on Romania

In an ideal world, a generalisable thesis about how judges learn would have included a comparative element and would have included as many different jurisdictions as possible. Although a peculiar candidate at first glance, Romania represents an interesting case study for several, perhaps unexpected, reasons. First, as shown in the background chapters, Romania has implemented a **hybrid judicial appointment and training model** during the last decade. It did not just focus on appointment of young, inexperienced judges, as many European continental civil law systems typically do. It also ran a parallel appointment and training route for experienced lawyers, akin to what common law jurisdictions run around the world. From the standpoint of comparative empirical legal research, this provided an opportunity to study two categories of judges who have the same cultural and political background, but have very different life experiences and working knowledge of the law. In other words, by studying the Romanian hybrid judicial system, one avoids the comparative problem of controlling for factors such as different political systems, variable socio-economic factors or different legal educational backgrounds between the respondents. Moreover, the two different subsets of judges – the new inexperienced recruits (comparable to judges from other continental European jurisdictions) and the new experienced recruits (comparable to new appointees from common law jurisdictions) – received training from the same trainers, on the

same legislation and legal procedure, under the same educational vision of the leadership of the NIM. With so many societal and environmental variables controlled, the conclusion that the differences in attitudes between the two types of Romanian judges reflect differences in their advocacy and life experience in general are more reliable.

Second, although rather recently turned into a democracy with independent judicial appointment and training bodies, Romania had benefited during the last decade from forward-thinking, younger policy-makers both in the Superior Council of Magistracy and the National Institute of Magistracy. This translated into the implementation of reformed appointment and training practices for the Romanian judiciary. This effort has been recently highlighted by the European Judicial Training Network (EJTN) in a report approved by the European Commission on the best training practices for judges and prosecutors throughout Europe. The EJTN has praised the Romanian NIM for good practices in four key areas: 1) the training needs assessment, 2) in providing a comprehensive package to deliver large-scale training on new legal instruments, 3) the recruitment and evaluation of judicial trainers, as well as 4) making training content available online.⁸⁴²

This is relevant because when studying the attitudes of judges and prosecutors to the training they received, their trainers or the online learning instruments they have access to, it is important to distinguish between the objective quality of the training itself and their own subjective perceptions. If Romania is internationally recognised as providing models for good practice in judicial training, then one can then focus on analysing the differences in perceptions not necessarily as differences in the quality of training, but as differences which reflect other characteristics of the respondents – such as their amount of experience, their perception of what a judge is bound to do in his role, or their individual learning style. That said, future research could consider replicating this study in other jurisdictions, to enable more valid generalisations of the findings.

⁸⁴² Annex 5 European Judicial Training Network (EJTN) (n 371) 139–42.

Not a longitudinal study

This study did not follow new recruits for decades to measure their shift in attitudes. This would not have been possible in a time-limited, PhD research project. However, its core independent variables are time-related, such as experience, so when time-related variables were found to have a statistically significant effect on the dependant variables, it can rightfully conclude that experience variables have a relationship to a variation in attitudes. The limit of a study is that it cannot account for any other untracked variables that can act as confounding variables and have an impact on the variation. In other words, it is difficult to decisively conclude, for instance, whether a difference in attitudes to initial judicial training is explained by the change in the judicial training itself, or by an increase in experience.

Limits of the sample

This is the largest study so far to test the attitudes of judges to learning (and sentencing practice), and the total sample size was 226 judges. At the end of the data gathering phase, the study had received 470 valid responses, but roughly half of them (236) came from Romanian prosecutors who were also receiving judicial training. In the end, given the focus of this thesis was *judicial* attitudes, the secondary prosecutor sample was excluded, and the presentation of findings in this thesis focused on the three sub-samples of judges that made up the 226 respondents. While working with the entire sample of 470 responses, some statistical results would have certainly been more reliable, they would have been less meaningful for the purposes of this thesis. Although the overall sample was still large enough to be statistically representative of the entire judicial population in Romania, the sample of induction trainees was unfortunately too small to provide statistically significant findings and the related results ought to be seen only from an exploratory standpoint.

In addition, the data gathering did not include experienced judges who were participating at that time in court-based, decentralised continuous training. This

choice was made as the decentralised training was being conducted in no less than 40 different cities and towns across the country, and sampling them all would have taken significantly more time and resources. Given that, in principle, all judges who undergo decentralised training also attend centralised training and that this selection is done randomly, this helped to mediate against a sampling bias in the study. This bias was also minimised as the survey did not ask anything specific about the session during which the survey was run, but rather focused the respondent to reflect on all previous training experiences, including decentralised training experiences. However, this can only be verified empirically in a future study that would include decentralised training as well.

A second limit caused by the geographical location of the data gathering process was that, in the initial training subsample, only first year judges were included in the survey, not the second-year judges. All first-year judges, irrespective of the geographical location of their future appointment, are trained at the NIM centre in Bucharest – therefore they could be surveyed directly. In contrast, all second-year judges are spread around the country, in various levels of courts, where they undergo their placement and therefore made a face-to-face survey with second-year judges logistically difficult. The potential loss is that second-year initial judges could have provided an account of the value of first-year initial training in light of the second-year court practice. This was compensated for by the participation of judges undergoing continuous training; from an experiential standpoint the exposure second-year judges get to court practice is of the same kind as the exposure appointed judges get after graduating the NIM.

Not a behavioural study

This is a study of judges' attitudes to and experiences of training and learning to judge. It is therefore not a causal study of how training objectively affects judicial behaviour. This study adopted an attitudinal methodology because, with experiential learning, the research studies and tools are by definition attitudinal. All the 1,004 studies that applied the LSI instrument, for instance, asked learners to

self-report their preferences, rather than observing those preferences in the learning behaviour. However, the inherent shortcomings of attitudinal studies are applicable here: How self-aware are judges of their own preferences and mental processes? How incentivised are they to be honest in answering the study questions? How do their attitudes translate into judicial behaviour? Although efforts were made to minimise these drawbacks (they are explained in the Research Design and background chapters), they should be kept in mind when drawing conclusions. For instance, is it true that legally-binding tools are significantly more important in sentencing decisions than non-binding tools, or does this reflect a limit of self-reporting by judges?

Despite these limitations, the research findings provide important and novel insights into judicial attitudes to training and these could have useful implications for those responsible for the development and implementation of judicial training policy in a wide range of jurisdictions.

Policy implications

This section explores the policy implications this research could have on judicial training in Romania and other jurisdictions, as well as on sentencing policy and data gathering practices.

The findings highlight two categories of findings related to judicial training – on **training evaluation** and on **training reform**. The research results have hopefully shown that training evaluation needs to go beyond post-training session smile-sheets, corresponding to Kirkpatrick level 1 of training evaluation. Because this study involved multiple age-groups of judges, with differing levels of experience, and with diverse attitudes, it was able to draw conclusions about (1) the value of judicial training for a judicial career more generally, not just the value of one unit of training; (2) how that value changes in time, with experience; (3) that, in fact, the appreciation for training *increases* as judges become more experienced. In addition, new recruits who have recently finished training might be unable to properly reflect

on how the training aids them in their role. The recommendation would be that judicial training institutes, in Romania and elsewhere, should conduct similar quantitative studies every now and then, to validate their strategic work.

The training reform implications are varied, and some might be considered strategic, while others are specific to the current offering in Romania. On the strategic level, the study validated the broader philosophical theory that judges at different levels of their career and coming with different backgrounds have different needs as learners. This was already known in the judicial training sector, as it underpins the already-existing distinction between initial or induction training for new recruits and continuous training for practicing judges. Hybrid jurisdictions such as Romania, which recruit both inexperienced and experienced candidates for judicial roles, took a step further in tailoring initial and induction training differently, based on assumptions about the candidates' legal and practical knowledge. But this is not enough. Even within these three main categories of training, there are still more granular differences that this study revealed and should be taken into account in reforming judicial training.

First and foremost, it revealed that Romanian judges also display different learning styles, which could explain why they evaluate certain methods poorly in the current training evaluations, as well as explaining why they might act disengaged during the sessions, or are struggling with integrating the information they receive. This was advocated before,

To be meaningfully effective, any formalized process of judicial education should facilitate individualized learning which is self-directed and critically reflective, and accommodate the distinctive styles in which judges prefer to learn and practice.⁸⁴³

But it is the first time this recommendation is supported by quantitative evidence. A specific recommendation would be to apply Kolb's LSI as a standardised tool to all judges undergoing training at least once per learning cycle (e.g. at the beginning of

⁸⁴³ Armytage, *Educating Judges* (n 769) 150–1.

initial/training, then during their first continuous training session post-appointment). This measure would

- (1) inform the judicial training institutes as to the distribution of learning styles in their cohorts;
- (2) help them design and deliver a variety of methods catering to all learning styles;
- (3) perhaps even enable institutes to experiment with splitting learners into LSI groups;
- (4) enable institutes to adapt their methods as they notice the learners' styles shift with experience.

Recommendation (4) is based on another important finding of this study – namely, that learning styles are not fixed personality measures, but shift in time, in accordance with the experiential learning cycle. For instance, if the new trainees are “hungry” for hands-on activities (the initial trainees – for supervised court practice, and the induction trainees – for job shadowing), then perhaps a larger component of their initial/induction training should be dedicated to this need, or intermingled with methods from the other quadrants. At the moment, in Romania for example, initial trainees do not get supervised court practice for an entire year.

Apart for the more strategic recommendations, the study is also able to produce more specific recommendations for the improvement and reform of judicial training. Given the particularities of delivery in each judicial training jurisdiction, the recommendations are particularly relevant for Romania although they could be considered by other jurisdictions:

- Induction training should include a job-shadowing experience, whereby the trainee would accompany a judge in their court for a few days, before starting his/her own court practice;
- Induction training should take into account the type of professional background of the trainees and experiment with tailoring it to better serve learning needs; for instance, induction trainees coming from the police

forces should receive a longer induction training than trainees coming from advocacy;

- It should be investigated why mock trials are rather unpopular, and ways to improve them – either by giving more participants active roles, splitting them into smaller groups, or bringing more realistic elements, such as running them into a law court, involving legal actors, or choosing more realistic scenarios;
- When communicating with trainees, the institutes should take into account their generational preferences for different communication media and adapt (e.g. social media);
- During continuous training, trainers should consider making available their contact details;
- All 6 types of content researched should be included on the e-learning training platforms, and more data needs to be gathered on its usage;
- More research should be conducted on the feasibility and usefulness of judgecraft sessions, in addition to skills already integrated in jurisdictional training.

The findings on sentencing practice are more descriptive in character and perhaps are most applicable to Romania, given the recent sentencing reforms. This research represents the first exploration of the sentencing practices of Romanian judges, and the implications of the findings depend very much on the target audience and the goal this audience is trying to pursue in sentencing policy and practice. It is very difficult for this research to draw any value judgments as to, for instance, whether it is right or wrong that more experienced judges say they pay more attention to the defendant-related factors than novice judges do. This study could nevertheless pinpoint some findings that are worth exploring by sentencing policymakers in Romania:

- The overwhelming importance judges give to legally-binding tools in sentencing should increase the responsibility the authorities have in

formulating clear and useful sentencing guidelines. Romania should increase the number and variety of landmark cases (RILs) applicable to sentencing decisions (only a handful so far), and perhaps take an active stance rather than waiting for ambiguities in case law to be brought to the High Court. Similarly, Romania could also consider instituting tailored sentencing guidelines for specific categories of offence, as it is done in other jurisdictions.

- It should be further explored how often and in what situations pre-sentence reports are requested, and how to better improve them so as to become a more useful tool in decision-making. The same effort should be done with prosecutor's recommendations.
- The research shows that sentences from other similar cases (from both a judge's own court and other courts) are valued sources of information for judges in Romania. This speaks to the importance of establishing and improving electronic Sentencing Information Systems (SIS) available to judges. Where SIS already exist, they should render it easier to look for the relevant keywords and variables to identify similar cases, and they should also display useful statistical data, such as average sentences, typical factors taken into account etc.
- Policymakers could use the empirical results pertaining to the prioritisation and clustering of sentencing factors to shape more specific sentencing guidelines, to help novice judges understand which factors to prioritise, and how their own background could bias them against, for instance, the offender.

Conclusion

This study has hopefully demonstrated that understanding judicial attitudes to and experiences of judicial training, whether on sentencing specifically or in general, needs to draw on an interdisciplinary framework – incorporating law, empirical legal studies, educational theory and psychology. Even though the research was

conducted only with judges in Romania, it points to the existence of some important underlying principles of judicial learning. They include: that judicial learning is “experiential”, that judges are not a monolithic group and that they have a variety of learning preferences, although some are more dominant than others. More importantly, these preferences change in time and this has to be accounted for in the design of judicial training.

Now that judicial training is universally recognised as an invaluable component of judicial independence and quality, it is important that such training begins to develop a more nuanced understanding of how judges learn and prefer to learn. As Kolb’s quote at the beginning of this chapter suggests, we need to acknowledge that our judges need a specialised learning environment, which shapes their learning experiences and their future expertise. It is hoped that this research provide an empirical basis to help in the development and assessment of judicial training not just in Romania but in other jurisdictions as well.

Moreover, judges, trainers, policymakers and researchers need to acknowledge that the learning process does not stop with the end of judicial training. In virtue of their key role in maintaining the rule of law and imparting justice, judges go through a constant expertise-building throughout their careers. This study demonstrates that they employ a variety of tools, resources and advice in their decision-making. These findings will hopefully inform future policymaking in sentencing, as well as inspire new generations of researchers to gain a deeper understanding of judicial behaviour.

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BIBLIOGRAPHY

'About the LSAT' <<http://www.lsac.org/jd/lsat/about-the-lsat/>> accessed 18 February 2017

American Bar Association, 'Black Letter Guidelines for the Evaluation of Judicial Performance'

<http://www.americanbar.org/content/dam/aba/publications/judicial_division/jp ec_final.authcheckdam.pdf> accessed 27 March 2016

Andrews DA and others, 'Some Psychometrics of Judicial Decision Making Toward a Sentencing Factors Inventory' (1987) 14 *Criminal Justice and Behavior* 62

Antoniou G (ed), *Noul Cod Penal Comentat: Volumul I (art. 1-56)*, vol 1 (CH Beck 2006)

— (ed), *Noul Cod Penal Comentat: Volumul II (art. 57-171)*, vol 2 (CH Beck 2008)

—, 'Critical Remarks on the New Criminal Code' [2010] *Analele Universitatii 'Constantin Brancusi'* 7

Arce R and others, 'Judges' Decision-Making from within' in Raymond R Corrado, Rebecca Dempster and Ronald Roesch (eds), *Psychology in the Courts* (Routledge 2001)

Arce R, Tortosa F and Alfaro E, 'Verdicts and Deliberation Content Analysis of Judges and Juries in the Spanish Legal Context' [2004] *Psychology in Spain* 28

Armytage L, 'Judicial Education on Equality' (1995) 58 *The Modern Law Review* 160

—, *Educating Judges: Towards a New Model of Continuing Judicial Learning* (Martinus Nijhoff Publishers 1996)

—, *Educating Judges: Towards Improving Justice. A Survey of Global Practice* (Updated edition, Brill | Nijhoff 2015)

Ashworth A, 'European Sentencing Traditions: Accepting Divergence or Aiming for Convergence?' in Neil Hutton and Cyrus Tata (eds), *Sentencing and Society: International Perspectives* (Routledge 2002)

—, *Sentencing and Criminal Justice* (Cambridge University Press 2010)

—, 'Re-Evaluating the Justifications for Aggravation and Mitigation at Sentencing' in Julian V Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011)

Beattie JM, 'Punishment, 1750-1800: The Emergence of Imprisonment', *Crime and the courts in England, 1660-1800* (Clarendon Press ; Princeton, NJ 1986)

Beccaria C, *On Crimes and Punishments* (Transaction Publishers 1764)

Bentham J, *An Introduction to the Principles of Morals and Legislation : Printed in the Year 1780, and Now First Published* (Printed for TPayne and Son, at the Mews Gate 1789)

Benton D and Sheldon-Sherman JA, 'What Judges Want and Need: User-Friendly Foundations for Effective Judicial Education' (2015) 2015 Journal of Dispute Resolution 3

Bergman P, Sherr A and Burrige R, 'Learning from Experience: Non-Legally-Specific Role Plays' (1987) 37 Journal of Legal Education 535

Beyens K, 'Straffen Als Sociale Praktijk' [2000] Een penologisch onderzoek naar straftoemeting

Blackstone SW, 'One the Nature of Crimes; and Their Punishment (Vol IV Chapter 1)', *The commentaries of Sir William Blackstone, Knt. on the laws and constitution of England; carefully abridged, in a new manner, and continued down to the present time: with notes, corrective and explanatory. By William Curry, of the Inner Temple*, vol 4 (printed for WClarke and Son 1796)

Bloom BS and others, 'Taxonomy of Educational Objectives. Vol. 1: Cognitive Domain', *New York: McKay* (1956)

Bohmer C, 'Judicial Attitudes toward Rape Victims' (1973) 57 Judicature 303

Bond RA and Lemon NF, 'Changes in Magistrates' Attitudes during the First Year on the Bench' [1979] *Psychology, Law and Legal Processes*. London: Macmillan

Bone RG, 'Judging as Judgment: Tying Judicial Education to Adjudication Theory' (2015) 2015 Journal of Dispute Resolution 8

Bradley T, 'Survey Finds Generation Gaps in Adoption of New Tech' *PCWorld* (16 September 2014) <<http://www.pcworld.com/article/2607111/survey-finds-generation-gaps-in-adoption-of-new-tech.html>> accessed 20 June 2016

Brooks CA, Nelson BM and Murrell PH, 'Personal and Professional Development for Judges: The Institute for Faculty Excellence' (2010) 18 Journal of Adult Development 135

Cady FC and Coe GE, 'Education of Judicial Personnel: Coals to Newcastle' (1974) 7 Conn. L. Rev. 423

Cameron J, 'Continuing Education Learning Preferences and Styles of Legal Clinic Lawyers' (Brock University 2006) <<http://hdl.handle.net/10464/2285>> accessed 7 April 2016

Campbell CM and Wiles P, 'The Study of Law in Society in Britain' (1976) 10 *Law & Society Review* 547

Carter RM and Wilkins LT, 'Some Factors in Sentencing Policy' (1967) 58 *Journal of Criminal Law, Criminology and Police Science* 503

'CEPEJ Report on "European Judicial Systems - Edition 2016 (2014 Data): Efficiency and Quality of Justice"' (2016) <<http://www.coe.int/T/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%2023%20report%20EN%20web.pdf>> accessed 10 October 2016

Chester S (ed), *Sentencing as a Human Process by John Hogarth: An International Review Symposium*, vol 10 (1972) <<http://heinonline.org/HOL/Page?handle=hein.journals/ohlj10&id=241&div=&collection=journals>>

Clarke D and others, 'A Study of the Adequacy of the Learning Environment for Business Students in Hawaii in the Fields of Accounting and Marketing' [1977] Unpublished paper, University of Hawaii

Consejo General del Poder Judicial, 'Escuela Judicial - Historia' (2015) <<http://www.poderjudicial.es/cgpj/es/Temas/Formacion-Judicial/La-Escuela-Judicial/Historia->> accessed 6 December 2015

Consiliul Superior al Magistraturii, 'Raport Privind Starea Justitiei 2011' (2012) <http://www.csm1909.ro/csm/linkuri/10_04_2012__48486_ro.pdf> accessed 10 June 2013

—, 'Raport Privind Starea Justitiei 2015' (2016) <<http://www.csm1909.ro/csm/index.php?cmd=24>> accessed 14 February 2017

—, 'Competentele CSM' <<http://www.csm1909.ro/csm/index.php?cmd=9202>> accessed 15 January 2015

—, 'Rapoarte Privind Activitatea Consiliului Superior Al Magistraturii' <<http://www.csm1909.ro/csm/index.php?cmd=24>> accessed 29 March 2016

—, 'Scurt Istoric Al Consiliului Superior Al Magistraturii' <<http://www.csm1909.ro/csm/index.php?cmd=9201>> accessed 15 January 2015

—, 'Statutul Membrilor CSM' <<http://www.csm1909.ro/csm/index.php?cmd=920301>> accessed 15 January 2015

'Constitution of Romania 1991 Version', , *Wikipedia, the free encyclopedia* (2015) <https://en.wikipedia.org/w/index.php?title=Constitution_of_Romania&oldid=694398203> accessed 29 December 2015

Consultative Council of European Judges (CCJE), 'Opinion No. 4 (2003) on Appropriate Initial and In-Service Training for Judges at National and European Levels'

—, 'Opinion No 4 of the Consultative Council of European Judges (CCJE) to the Attention of the Committee of Ministers of the Council of Europe on Appropriate Initial and in-Service Training for Judges at National and European Levels'

Conti GJ, 'Development of a User-Friendly Instrument for Identifying the Learning Strategy Preferences of Adults' (2009) 25 *Teaching and Teacher Education* 887

Coombs PH, *New Paths to Learning* (International Council for Educational Development 1973)

Cooper J, 'EC Study of the Best Practices in the Training of Judges and Prosecutors in EU Member States' (2015) 2015 *Judicial Education and Training* 47

Cross KP, *Adults as Learners. Increasing Participation and Facilitating Learning.* (Jossey-Bass 1981)

Danilet C, *Admiterea la INM și în magistratură 2012* (Wolters Kluwer 2012) <<http://www.wolterskluwer.ro/product--admiterea-la-inm-%EF%BF%BDi-%EF%BF%BDn-magistratur%EF%BF%BD-2012--362.html>> accessed 6 November 2012

—, 'Admiterea in Justitie' <http://admiterejustitie.ro/conditii_de_admitere.php> accessed 26 March 2016

—, 'Admiterea in Justitie: Probe de Concurs' <http://admiterejustitie.ro/probe_concurs2.php> accessed 27 March 2016

Darbyshire P, *Sitting in Judgment: The Working Lives of Judges* (Bloomsbury Publishing 2011)

Darkenwald GG and Merriam SB, *Adult Education: Foundations of Practice* (Ty Crowell Co 1982)

Dawson B, 'Judicial Education: Pedagogy for a Change' (2015) 2015 *Journal of Dispute Resolution*

DeGroff EA and McKee KA, 'Learning Like Lawyers: Addressing the Differences in Law Student Learning Styles' (2006) 2006 *Brigham Young University Education and Law Journal* 499

Devlin PB, *The Judge* (Oxford University Press 1979)

Devroye J, 'The Rise and Fall of the American Institute of Criminal Law and Criminology' (2010) 100 *Journal of Criminal Law and Criminology* 7

Dewey J, *Experience and Education* (Simon and Schuster 1938)

Di Federico G, 'Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, Germany, Netherlands and Spain' (2005) <<http://www.difederico-giustizia.it/wp-content/uploads/2010/09/recruitment-evaluation-and-career.pdf>> accessed 25 March 2016

Dimitrova-Grajzl VP and others, 'Judicial Incentives and Performance at Lower Courts: Evidence from Slovenian Judge-Level Data' (Social Science Research Network 2011) SSRN Scholarly Paper ID 1930466 <<http://papers.ssrn.com/abstract=1930466>> accessed 29 October 2014

Durkheim E, *The Rules of the Sociological Method* (Sarah A Solovay and John H Mueller trs, Free Press[DG] 1895)

Ecole Nationale de Magistrature (ENM), 'Ecole Nationale de La Magistrature : Historique' (2015) <<http://www.enm-justice.fr/presentation/historique.php>> accessed 18 November 2015

—, 'Profil de La Promotion 2015 Des Auditeurs de Justice Issus Des Trois Concours D'acces et Du Recrutement Sur Titres' (2015)

EJTN Sub-Working Group 'Training the Trainers' and European Judicial Training Network (EJTN), 'Handbook on Judicial Training Methodology in Europe' (European Judicial Training Network (EJTN) 2014) <http://www.ejtn.eu/PageFiles/6343/EJTN_TT_Handbook_Final.pdf> accessed 4 January 2015

Epley N and Norwick R, 'Confidence as Inference from Incidental Experience' [2006] Unpublished manuscript, University of Chicago

Epstein S, 'Cognitive-Experiential Self-Theory of Personality', *Handbook of Psychology* (John Wiley & Sons, Inc 2003)

Esmein A, *A History of Continental Criminal Procedure: With Special Reference to France* (The Lawbook Exchange, Ltd 2000)

European Commission for the Efficiency of Justice, 'CEPEJ Scheme for Evaluating Judicial Systems 2011: Romania' (2012) <http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Romania_en.pdf> accessed 10 June 2013

—, 'European Judicial Systems - Edition 2014 (2012 Data): Efficiency and Quality of Justice - Full Report' (2014) <http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf> accessed 15 January 2015

European Judicial Training Network (EJTN), 'Lot 1 "Study on Best Practices in Training of Judges and Prosecutors"' (European Commission 2014)

Evans J, 'Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition' (2008) 59 Annual Review of Psychology 255

Everson G, 'The Human Element in Justice' (1919) 10 Journal of the American Institute of Criminal Law and Criminology 90

Exner F, *Studien über die Strafzumessungspraxis der deutschen Gerichte* (Wiegandt 1931)

Eyben WE von, *Strafudmaling* (GEC Gads Forlag 1950)

Farina F, Arce R and Novo M, 'Anchoring in Judicial Decision-Making' [2003] Psychology in Spain 56

Faure E, Herrera F and Kaddoura A-R (eds), *Learning to Be: The World of Education Today and Tomorrow* (6 impr, UNESCO 1972)

Firoiu D and Marcu L (eds), *Istoria dreptului românesc*, vol 2 (Editura Academiei Republicii Socialiste România 1987)

Fleming ND and Mills C, 'Not Another Inventory, Rather a Catalyst for Reflection'

Flood-Page C and Mackie A, *Sentencing Practice: An Examination of Decisions in Magistrates' Courts and the Crown Court in the Mid-1990's* (Home Office 1998)

Forrester Research, 'The Technology Generation Gap Is Widening' *Business Wire* (22 September 2010)
<<http://www.businesswire.com/news/home/20100922005168/en/Forrester-Technology-Generation-Gap-Widening>> accessed 20 June 2016

Foucault M, *Discipline & Punish: The Birth of the Prison* (Alan Sheridan tr, 2nd edition, Vintage Books 1995)

Gardner H, *Frames of Mind: The Theory of Multiple Intelligences* (Basic Books 2011)

Gatrell VAC and Hadden TB, 'Criminal Statistics and Their Interpretation', *Nineteenth-century society* (Cambridge University Press 1972)
<<http://dx.doi.org/10.1017/CBO9780511896118.009>>

Gaudet FJ, Harris GS and John CWS, 'Individual Differences in the Sentencing Tendencies of Judges' (1933) 23 Journal of Criminal Law and Criminology (1931-1951) 811

Gheorghies S, 'Codul Penal Din 1865/ Codul Penal Din 1969. Principii Generale'
<<http://blog.wolterskluwer.ro/2013/01/codul-penal-din-1865-codul-penal-din-1969-principii-generale/>> accessed 10 June 2013

Gheorghiu LG, 'Recursul in Interesul Legii - Izvor de Drept. Aplicarea Deciziilor Interpretative in Timp' [2006] Revista Curentul "Juridic" <http://revcurentjur.ro/old/arhiva/attachments_200634/recjurid063_48F.pdf> accessed 8 April 2017

Ghigheci C, 'Noul Cod de Procedura Penala. Principii (I)' *JURIDICE.ro* (11 November 2011) <<http://www.juridice.ro/169053/noul-cod-de-procedura-penala-principii-i.html>> accessed 7 June 2013

Gibson JL, 'Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model' (1978) 72 *American Political Science Review* 911

Gigerenzer G and Brighton H, 'Can Hunches Be Rational' (2007) 4 *Journal of Law, Economics & Policy* 155

Gigerenzer G, Todd PM and Gerd Gigerenzer AR, *Simple Heuristics That Make Us Smart* (1st edn, Oxford University Press, USA 2000)

Gilchrist E and Blissett J, 'Magistrates' Attitudes to Domestic Violence and Sentencing Options' (2002) 41 *The Howard Journal of Criminal Justice* 348

Goldberg SL, 'Judicial Socialization: An Empirical Study' (1984) 11 *Journal of Contemporary Law* 423

Green E, *Judicial Attitudes in Sentencing; a Study of the Factors Underlying the Sentencing Practice of the Criminal Court of Philadelphia*. (Macmillan; St Martin's Press 1961)

Greenwald AG and Banaji MR, 'Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes' (1995) 102 *Psychological Review* 4

Griffin D and Tversky A, 'The Weighing of Evidence and the Determinants of Confidence' (1992) 24 *Cognitive Psychology* 411

Guarnieri C and Pederzoli P, *The Power of Judges: A Comparative Study of Courts and Democracy* (Cheryl Thomas ed, Oxford University Press 2002)

Guerry A-M, *A Translation of Andre-Michel Guerry's Essay on the Moral Statistics of France (1833): A Sociological Report to the French Academy of Science* (Hugh P Whitt and Victor W Reinking trs, Edwin Mellen Press 2002)

Gypen JLM, 'Learning-Style Adaptation in Professional Careers: The Case of Engineers and Social Workers' (1980)

Hailsham, Lord, 'Hamlyn Revisited: The British Legal System Today' (1983) <https://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/Hamlyn_Revisited_The_British_Legal_System_Today.pdf> accessed 22 December 2015

Hammergren L, *Judicial Training and Justice Reform*, vol 202 (USAID 1998)

Hanga V (ed), *Istoria dreptului românesc*, vol 1 (Editura Academiei Republicii Socialiste România 1987)

Hanganu S, 'Ideologies in Sentencing in Central and Eastern European Countries' (Third Conference of the European Forum for Victim-Offender Mediation and Restorative Justice, "Restorative Justice in Europe: Where are we heading?", 2005) <<http://www.justiciarestaurativa.org/mount/www.restorativejustice.org/articlesdb/articles/5935>> accessed 18 January 2017

Heath C and Tversky A, 'Preference and Belief: Ambiguity and Competence in Choice under Uncertainty' (1991) 4 *Journal of Risk and Uncertainty* 5

Heath J, *Eighteenth Century Penal Theory* (Oxford University Press 1963)

Henham R, 'The Importance of Background Variables in Sentencing Behavior' (1988) 15 *Criminal Justice and Behavior* 255

Hogarth J, *Sentencing as a Human Process* (University of Toronto Press in association with the Centre of Criminology, University of Toronto 1971)

'Hogarth: Sentencing as a Human Process - Google Scholar' <https://scholar.google.co.uk/scholar?cites=12134606504843301189&as_sdt=2005&sciodt=0,5&hl=en> accessed 26 April 2016

Hood R, *Sentencing in Magistrates' Courts: A Study in Variations of Policy* (Stevens 1962)

Howard J, 'IV. An Account of Foreign Prisons and Hospitals', *An Account of the Principal Lazarettos in Europe* (1789)

Hunter R, 'More than Just a Different Face? Judicial Diversity and Decision-Making' [2015] *Current Legal Problems* <<http://clp.oxfordjournals.org/content/early/2015/04/27/clp.cuv001>> accessed 2 January 2016

Hutcheson F, *A System of Moral Philosophy* (Millar 1755)

Hutcheson JCJ, 'Judgment Intuitive: The Function of the Hunch in Judicial Decision' (1929) 14 *Cornell Law Quarterly* 274

'ICVS - International Crime Victims Survey' <http://www.unicri.it/services/library_documentation/publications/icvs/> accessed 26 April 2016

'ICVS - List of Participating Countries' <http://www.unicri.it/services/library_documentation/publications/icvs/data/participating_20countries.pdf> accessed 26 April 2016

Institutul National al Magistraturii, 'Structura Caiet Practica Judecatori 2013-214' <inm-lex.ro/fisiere/d_208/Structura%20Caiet%20practica_judecatori_2013_2014%20-%202.doc> accessed 17 January 2015

—, 'Calendarul Seminarilor de Formare Continua Pentru Anul 2013 - Pe Domenii' <http://inm-lex.ro/fisiere/d_178/Calendarul%20pe%20domenii%20al%20actiunilor%20de%20formare%20continua%20%202013.pdf> accessed 13 October 2016

—, 'Tabel Rezultate Proba Eliminatorie de Verif. Cunostinte Jur. (30.08.13)' (2013) <http://www.inm-lex.ro/fisiere/d_198/Tabel%20rezultate%20proba%20eliminatorie%20de%20verif.cunostinte%20jur.(30.08.13).pdf> accessed 20 March 2015

—, 'Echipa de Formatori Implicati in Activitatea de Formare Initiala Aferenta Anului 2013-2014' <inm-lex.ro/fisiere/d_403/ECHIPA%20FORMATORI%20F.I.%202013-2014%20final.doc> accessed 15 January 2015

—, 'Calendarul Programelor de Formare Initiala 2013-2014' <inm-lex.ro/fisiere/d_208/Calendar%20PFI%202013_2014.doc.doc> accessed 17 January 2015

—, 'Program de Formare Initiala Pentru Anul I 2013-2014' <inm-lex.ro/fisiere/d_208/Program%20de%20formare%20initiala%20pentru%20anul%20I_2013_2014.doc> accessed 17 January 2015

—, 'Program de Stagiu Judecatori 2013-2014' <inm-lex.ro/fisiere/d_208/Program%20de%20stagiu_judecatori_2013_2014.doc> accessed 17 January 2015

—, 'Programul de Formare Continua 2014'

—, 'Calendarul Seminarilor de Formare Continua Pentru Anul 2014 - Pe Domenii' <http://inm-lex.ro/fisiere/d_424/Calendar%20seminarii%202014-%20domenii.pdf> accessed 6 January 2015

—, 'Calendarul Seminarilor de Formare Continua Pentru Anul 2015 - Pe Domenii' <http://inm-lex.ro/fisiere/d_814/Calendar%20pe%20domenii%20al%20seminariilor%202015.pdf> accessed 13 October 2016

—, 'Programul de Formare Continua 2015'

—, 'Calendarul Seminarilor de Formare Continua Pentru Anul 2016 - Pe Domenii' <http://inm-lex.ro/fisiere/d_1227/Calendar%20pe%20domenii%20al%20seminariilor%202016.pdf> accessed 13 October 2016

—, ‘Tematica Cursurilor de Formare Profesionala Prevazute de Art. 33 Alin 13 Din Legea Nr. 303/2004’ <http://inm-lex.ro/fisiere/d_1195/Curricula%20cursurilor%20de%20formare%20profesionala.pdf> accessed 29 March 2016

—, ‘Despre INM’ <<http://www.inm-lex.ro/>> accessed 25 March 2015

—, ‘Organizarea Institutului National Al Magistraturii’ <<http://www.inm-lex.ro/>> accessed 6 January 2015

—, ‘Planul de Invatamant, Formarea Initiala’ <<http://www.inm-lex.ro/index.php?MenuID=30>> accessed 10 June 2013

International Organisation for Judicial Training, ‘About Us’ <<http://www.iojt.org/About-Us.aspx>> accessed 9 March 2017

Jacobson J and Hough M, ‘Mitigation: The Role of Personal Factors in Sentencing’ (Prison Reform Trust 2007)

—, ‘Personal Mitigation: An Empirical Analysis in England and Wales’ in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011)

‘Judges Face Performance Appraisals’ [2013] *BBC News* <<http://www.bbc.co.uk/news/uk-25550587>> accessed 7 January 2016

Judicial College, ‘Judicial College Prospectus 2014-2015’ <<http://www.judiciary.gov.uk/Resources/JCO/Documents/judicial-college/judicial-college-prospectus-2014-15-v8.pdf>> accessed 9 March 2014

—, ‘Judicial College Prospectus, April 2014 - March 2015’ <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/judicial-college-prospectus-2014-15-v8.pdf>> accessed 7 December 2015

‘Judicial Studies Board Website’ (*British National Archives*, From 1999)

Jung CG, *Psychological Types / Translated [from the German] by H.G. Baynes*. (Routledge and KPaul 1971)

Kahane S, *Dreptul procesual penal în R.P.R.* (Editura Didactică și Pedagogică 1963)

Kahneman D, *Thinking, Fast and Slow* (1st edn, Farrar, Straus and Giroux 2011)

Kahneman D and Klein G, ‘Conditions for Intuitive Expertise: A Failure to Disagree’ (2009) 64 *American Psychologist* 515

Kapardis A, *A Psychological Study of Magistrates’ Decision Making* (University of Cambridge 1984)

—, *Sentencing by English Magistrates as a Human Process* (Asselia Publishers 1985)

Kapardis A and Farrington DP, 'An Experimental Study of Sentencing by Magistrates.' (1981) 5 *Law and Human Behavior* 107

Karlen D, 'Judicial Education' (1966) 52 *American Bar Association Journal* 1049

Kirby M, 'Modes of Appointment and Training of Judges - A Common Law Perspective' [1999] *Journal of the Indian Law Institute*

Kirkpatrick DL, *Evaluating Training Programs* (Tata McGraw-Hill Education 1975)

Klein G, *Sources of Power: How People Make Decisions* (MIT Press 1998)

—, *Intuition at Work: Why Developing Your Gut Instincts Will Make You Better at What You Do* (Currency/Doubleday 2003)

—, 'Jumping to Conclusions Can Make for Good Decisions' (2010) 177 *Science News* 32

Knowles M, 'The Adult Learner: A Neglected Species'

—, *Andragogy in Action* (Jossey-Bass 1984)

Kolb AY and Kolb DA, 'The Kolb Learning Style Inventory — Version 3.1 2005 Technical Specifications' (2005)

Kolb DA, *Experiential Learning: Experience as the Source of Learning and Development* (Prentice-Hall 1984)

Kolb DA and Plovnick MS, 'The Experiential Learning Theory of Career Development'

Konecni V and Ebbesen EB, 'The Mythology of Legal Decision Making' (1984) 7 *International Journal of Law and Psychiatry* 5

Kritzer HM, 'Empirical Legal Studies Before 1940: A Bibliographic Essay' (2009) 6 *Journal of Empirical Legal Studies* 925

Kuhn A, 'Public and Judicial Attitudes to Punishment in Switzerland' in Julian V Roberts and JM Hough, *Changing attitudes to punishment: public opinion, crime and justice / edited by Julian V. Roberts and Mike Hough.* (Willan 2002)

Kyvsgaard B, 'Forholdet Mellem Straffe for Personfarlige Forbrydelser Og for Formueforbrydelser' [2003] *Juristen* 161

Lemon N, 'Training, Personality and Attitudes as Determinants of Magistrates' Sentencing' (1974) 14 *British Journal of Criminology* 34

Lewin K, 'Field Theory and Learning', *The forty-first yearbook of the National Society for the Study of Education: Part II, The psychology of learning* (University of Chicago Press 1942)

Lombroso C, *L'uomo Delinquente* (1876)

Lovegrove A, 'Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community' [2007] *Criminal Law Review* 769

Mackenzie G, 'A Question of Balance: A Study of Judicial Methodology, Perceptions and Attitudes in Sentencing' (PhD, University of New South Wales (Australia) 2001) <<http://search.proquest.com/docview/304737747>> accessed 5 July 2015

—, *How Judges Sentence* (Federation Press 2005)

Magureanu F, *Organizarea Institutiiilor Judiciare* (3rd edn, Universul Juridic 2003) <<http://www.kubon-sagner.de/opac.html?record=9620092>> accessed 5 November 2012

Manheim H, Spencer J and Lynch G, 'Magisterial Policy in the London Juvenile Courts' (1957) 8 *The British Journal of Delinquency* 13

Matei A, 'Recrutarea in Magistratura. Orientari' *JURIDICE.ro* (23 November 2007) <<http://www.juridice.ro/32259/recrutarea-in-magistratura-orientari.html>> accessed 18 January 2015

Mayr G von, *Statistik der gerichtlichen Polizei im Königreiche Bayern und in einigen anderen Ländern* (J Gotteswinter & Mössl 1867)

'Members - EJTN Website' <<http://www.ejtn.eu/About-us/Members/>> accessed 9 March 2017

Menu for Justice, 'Menu for Justice: Training Needs Assessment Tool' (2012)

Montesquieu C de SB de, *The Spirit of the Laws* (Cambridge University Press 1748)

Munro C and Wasik M, *Sentencing, Judicial Discretion and Judicial Training* (Sweet & Maxwell 1992)

Muresan R, 'Perspective Filosofice Asupra Pedepsei. Teoriile Utilitariste'

Murrell PH, 'Continuing Judicial Education: Cognitive Development as Content, Process, and Outcome' (2004) 11 *Journal of Adult Development* 151

Murrell PH, Schneider GF and Gould PD, 'Courts as Learning Organizations: Towards a Unifying Vision' (2009) 93 *Judicature* 14

NASJE, 'Dr. Patricia H. Murrell Retires — Her Impact Reverberates' [2014] *NASJE* <<http://nasje.org/dr-patricia-h-murrell-retires-her-impact-reverberates/>> accessed 12 August 2017

'NATO Update: NATO Welcomes Seven New Members - 2 April 2004'
<<http://www.nato.int/docu/update/2004/04-april/e0402a.htm>> accessed 11 February 2017

Niedwiecki A, 'Lawyers and Learning: A Metacognitive Approach to Legal Education' (2013) 13 *Widener Law Review*

Nuttall C (ed), *Crime and Criminal Justice in Europe* (Council of Europe 2000)

Oettingen AK von, *Die Moralstatistik in ihrer Bedeutung für eine Sociolethik* (Erlangen, A Deichert 1868)
<<http://archive.org/details/diemoralstatist00oettgoog>> accessed 25 April 2016

Oprea M, 'Reforma in Materie Penală: Codul Penal Si Codul de Procedura Penală, Mai Aproape de Intrarea in Vigoare. Actele Normative Care "pregatesc Terenul", Aprobate de Senatori' *AvocatNet* (3 June 2013)
<http://www.avocatnet.ro/content/articles/id_30488/Codul-penal-si-Codul-de-procedura-penala-in-vigoare-de-la-1-februarie-2014.html#axzz2GBXLvzyw> accessed 7 June 2013

Ouimet M and Coyle EJ, 'Fear of Crime and Sentencing Punitiveness: Comparing the General Public and Court Practitioners' (1991) 33 *Canadian Journal of Criminology* 149

Pacurari O, Hirvonen J and Hornung R, 'Current Developments in Judicial Training Methodology in Europe—Looking for Good Practices' (2015) 2015 *Judicial Education and Training* 68

Parker HJ, Sumner M and Jarvis G, *Unmasking the Magistrates: The 'Custody or Not' Decision in Sentencing Young Offenders* (Open University Press 1989)

Petty RE and Cacioppo JT, *Attitudes And Persuasion: Classic And Contemporary Approaches* (Westview Press 1996)

Petty RE and Krosnick JA, *Attitude Strength: Antecedents and Consequences* (Psychology Press 2014)

Piaget J, *The Origins of Intelligence in Children* (Margaret Cook tr, International Universities Press 1952)

Piana D and Langbroek P (eds), *Legal Education and Judicial Training in Europe: The Menu for Justice Project Report* (Eleven International Pub 2013)

'Pivniceru: Sistemul Judiciar Este Pregătit Pentru Intrarea În Vigoare a Noul Cod de Procedură Civilă' *MonitorulSV* (21 December 2012)
<<http://www.monitorulsv.ro/Ultima-ora/2012-12-21/Pivniceru-Sistemul-judiciar-este-pregatit-pentru-intrarea-in-vigoare-a-noul-Cod-de-procedura-civila#ixzz2VXGqLRQk>>

Plugaru E, 'The Evolution of Romanian Law between 1700 and 1923' (2003) II Noema 159

Politowski B, 'Comparative Prison Sentences in the EU' (UK House of Commons 2015) <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7218>> accessed 3 March 2017

'Portalul Instanțelor de Judecată - Despre Portalul ECRIS' <<http://portal.just.ro/SitePages/despre.aspx>> accessed 5 March 2017

Pound R and others, *Cleveland Foundation Survey of Criminal Justice in Cleveland* (Cleveland Foundation 1922)

Quetelet A, *Recherches sur le penchant au crime aux différens âges* (Hayez 1833)

Rabl R, *Strafzumessungspraxis Und Kriminalitätsbewegung* (Wiegandt 1936)

Radu G and Pacurari O, 'Vocational and Continuous Training of Judges and Prosecutors: A Comparative Analysis' in Daniela Piana and Philip Langbroek (eds), *Legal education and judicial training in Europe: the menu for justice project report* (Eleven International Pub 2013)

Radzinowicz L, 'The Present Trends of English Penal Policy' (1939) 55 Law Quarterly Review 273

Reding V, 'Legal Training: An Essential Tool for European Judicial Excellence' (Workshop on the training of legal practitioners – Teaching EU law and judgecraft, Brussels, 28 November 2013) <http://europa.eu/rapid/press-release_SPEECH-13-994_en.htm> accessed 4 January 2015

Reese JH and Reese TH, 'Teaching Methods and Casebooks' (1999) 38 Brandeis Law Journal 169

Reiling D, 'Technology in Courts in Europe: Opinions, Practices and Innovations' (2012) 4 International Journal for Court Administration <<http://ijca.ubiquitypress.com/articles/10.18352/ijca.75/galley/57/download/>> accessed 20 June 2016

Renneville M, 'Exploring the History of French Criminology (1885-1939): The Case of the Archives de l'Anthropologie Criminelle' [2014] Criminocorpus. Revue d'Histoire de la justice, des crimes et des peines <<http://criminocorpus.revues.org/2753>> accessed 25 April 2016

'Research & Statistics | VARK' <<http://vark-learn.com/introduction-to-vark/research-statistics/>> accessed 2 May 2016

Resnik J, 'Managerial Judges' (1982) 96 Harvard Law Review 374

'Revolutions of 1989', , *Wikipedia* (2015) <https://en.wikipedia.org/w/index.php?title=Revolutions_of_1989&oldid=696732465> accessed 29 December 2015

Richards D, 'Current Models of Judicial Training: An Updated Review of Initial and Continuous Training Models across Western Democratic Jurisdictions' [2016] *International Organization for Judicial Training Journal* 41

—, 'When Judges Have a Hunch - Intuition and Experience in Judicial Decision-Making' (2016) 102 *Archiv für Rechts- und Sozialphilosophie* 245

Robbennolt JK, MacCoun R and Darley JM, 'Multiple Constraint Satisfaction in Judging' (Social Science Research Network 2008) SSRN Scholarly Paper ID 1133184 <<http://papers.ssrn.com/abstract=1133184>> accessed 23 September 2014

Roberts J (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011)

—, 'Punishing, More or Less' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011)

Roberts J and Cole DP, *Making Sense of Sentencing* (University of Toronto Press 1999)

Robinson PH and Spellman BA, 'Sentencing Decisions: Matching the Decisionmaker to the Decision Nature' [2005] *Columbia Law Review* 1124

Rose G, 'An Experimental Study of Sentencing' (1965) 5 *British Journal of Criminology* 314

Rush C and Robertson J, 'Presentence Reports: The Utility of Information to the Sentencing Decision' (1987) 11 *Law and Human Behavior* 147

Russell PH and Malleson K, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press 2006)

Samuels GJ, 'Judicial Competency: How Can It Be Maintained' (1980) 54 *Australian Law Journal* 581

Schild UJ, 'Statistical Information Systems for Sentencing: The Israeli Approach' (2000) 14 *International Review of Law, Computers & Technology* 317

Schön DA, *The Reflective Practitioner: How Professionals Think in Action*, vol 5126 (Basic books 1983)

Schünemann B and Bandilla W, 'Perseverance in Courtroom Decisions' in Hermann Wegener, Friedrich Lösel and Jochen Haisch (eds), *Criminal Behavior and the Justice System* (Springer Berlin Heidelberg 1989)

<http://link.springer.com/chapter/10.1007/978-3-642-86017-1_12> accessed 20 April 2016

Sentencing Commission for Scotland, 'Sentencing Guidelines Around the World' (2015) <<https://www.scottishsentencingcouncil.org.uk/media/1109/paper-31a-sentencing-guidelines-around-the-world.pdf>> accessed 28 November 2016

Sentencing Council, 'Sentencing Guidelines - Publications' (7 March 2017) <<https://www.sentencingcouncil.org.uk/publications/>> accessed 7 March 2017

Shapland J, *Between Conviction and Sentence: Process of Mitigation* (Routledge & Kegan Paul Books 1981)

Simmons JP and Nelson LD, 'Intuitive Confidence and the Prominence Effect: When Consumer Choices Are Sensitive to Matching Prices' [2006] Manuscript in preparation
<https://www.researchgate.net/profile/Joseph_Simmons2/publication/228960738_Intuitive_confidence_and_the_prominence_effect_When_consumer_choices_are_sensitive_to_matching_prices/links/09e4150f5ccd61d4aa000000.pdf> accessed 14 April 2016

—, 'Intuitive Confidence: Choosing between Intuitive and Nonintuitive Alternatives' (2006) 135 *Journal of Experimental Psychology: General* 409

Sinclair M, 'The Use of Intuition in Managerial Decision-Making: Determinants and Affective Moderators' (2003) <<https://espace.library.uq.edu.au/view/UQ:106258>> accessed 13 February 2017

—, 'Misconceptions About Intuition' (2010) 21 *Psychological Inquiry* 378

—, *Handbook of Intuition Research* (Edward Elgar Publishing 2011)

Sobral Fernandez J, 'Judges and Their Decisions' in Santiago Redondo, *Advances in Psychology and Law: International Contributions* (Walter de Gruyter 1997)

Studiecentrum Rechtspleging (SSR), 'SSR: Excellent Training for a Just Society' (2015) <https://ssr.nl/index.php?page=english-page&hl=nl_NL> accessed 5 December 2015

Susskind R and Susskind D, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (OUP Oxford 2015)

Tata C and others, 'Assisting and Advising The Sentencing Decision Process The Pursuit of "Quality" in Pre-Sentence Reports' (2008) 48 *British Journal of Criminology* 835

'The EU Justice Scoreboard: Towards More Effective Justice Systems in the EU' (9 March 2015) <http://ec.europa.eu/justice/newsroom/effective-justice/news/150309_en.htm> accessed 13 April 2015

'The Top eLearning Statistics and Facts For 2015 You Need To Know' <<http://elearningindustry.com/elearning-statistics-and-facts-for-2015>> accessed 19 July 2015

Thomas C, 'Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policies and Practices' (The Commission for Judicial Appointments 2005) <http://www.ucl.ac.uk/laws/socio-legal/docs/Review_of_Judicial_Diversity.pdf> accessed 10 June 2013

—, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) <http://www.ucl.ac.uk/laws/judicial-institute/docs/Judicial_Training_Report.pdf> accessed 20 February 2014

—, 'Understanding Judicial Diversity: Report to the Lord Chancellor's Advisory Panel on Judicial Diversity' (UCL Judicial Institute 2012)

—, *UCL Laws Inaugural Lecture: Purple Haze* (2012) <https://www.youtube.com/watch?v=oQahSDTvFvA&feature=youtube_gdata_player> accessed 29 December 2014

Tombs J, *A Unique Punishment: Sentencing and the Prison Population in Scotland* (Scottish Consortium on Crime and Criminal Justice 2004)

Tonry M, 'Punishment Policies and Patterns in Western Countries' in Richard S Frase and Michael Tonry (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press 2001)

Tough AM, Ontario Institute for Studies in Education and Department of Adult Education, *Why Adults Learn; a Study of the Major Reasons for Beginning and Continuing a Learning Project* (Dept of Adult Education Ontario Institute for Studies in Education 1968)

Travers M, 'Sociology of Law in Britain' (2001) 32 *The American Sociologist* 26

Travis NWA, 'Romania and Bulgaria to Enter - with a Warning' *The Guardian* (27 September 2006) <<https://www.theguardian.com/world/2006/sep/27/topstories3.immigrationandpublicservices>> accessed 11 February 2017

'Tribunalul Pentru Minori Şi Familie BRAŞOV - Prezentare' <<http://portal.just.ro/1372/SitePages/prezentare.aspx>> accessed 23 March 2016

Van Dijk JJM, Mayhew P and Killias M, *Experiences of Crime Across the World: Key Findings from the 1989 International Crime Survey* (Brill Archive 1990)

Van Gestel R, Micklitz H-W and Maduro MP, 'Methodology in the New Legal World' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2069872> accessed 24 April 2016

Vanderbilt AT, *Judges and Jurors: Their Functions, Qualifications, and Selection* (Boston University Press 1958)

Voltaire, 'Of Crimes and Punishments - Commentary' (1765)
<http://www.constitution.org/volt/cmt_beccaria.htm> accessed 17 February 2016

Walmsley R, 'World Prison Population List (11th Edition)' (World Prison Brief 2016)
<http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf> accessed 18 January 2017

Wandall RH, *Decisions to Imprison: Court Decision-Making inside and Outside the Law / Rasmus H. Wandall.* (Ashgate 2008)

Wänke M and Bless H, 'The Effects of Subjective Ease of Retrieval on Attitudinal Judgments: The Moderating Role of Processing Motivation' in H Bless and JP Forgas (eds), *The message within: The role of subjective experience in social cognition and behavior* (Psychology Press 2000)

Wetzell RF, *Inventing the Criminal: A History of German Criminology, 1880-1945* (Univ of North Carolina Press 2003)

White D and others, 'Study of UK Online Learning: Report to HEFCE by the Department for Continuing Education, University of Oxford' (HEFCE 2010)
<http://dera.ioe.ac.uk/11732/1/rd17_10.pdf> accessed 19 July 2015

Wunderlich R and Gjerde CL, 'Another Look at Learning Style Inventory and Medical Career Choice.' (1978) 53 *Academic Medicine* 45

Zehr H, *Crime and the Development of Modern Society: Patterns of Criminality in Nineteenth Century Germany and France* (Rowman and Littlefield 1976)

Zemlyanska V, 'Justice and Sentencing Traditions in Central and Eastern Europe'
<<http://restorativejustice.org/10fulltext/zemlyansha>> accessed 10 January 2017

R v Sussex Justices, ex p McCarthy [1924] KB 1 256

Recurs ICCJ Decizia nr IV din 26 septembrie 2005 cu privire la problema daca sunt aplicabile dispozitiile de agravare ale art 75 alin 1 lit b) teza a II-a din Codul penal in cazul infractiunii de omor calificat prevazute de art 175 alin 1 lit c) din Codul penal (Inalta Curte de Casatie si Justitie)

Recurs ICCJ Decizia nr V din 20 februarie 2006 cu privire la aplicarea dispozitiilor art 176 alin 1 lit b) din Codul penal in cazul actelor de violenta savarsite in aceeasi imprejurare, cu intentia de a ucide, asupra a doua persoane, dintre care una a decedat (Inalta Curte de Casatie si Justitie)

RIL Recurs ICCJ Decizia nr 1 din 19 ianuarie 2015

Carol II, Codul penal Carol al II-lea 1939

Codul Penal Actualizat 1997

Committee of Ministers, Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules 2010

Consiliul Superior al Magistraturii, Profilul magistratului in sistemul juridic din Romania 2005

—, Hotararea nr. 651/03.07.2008 2008 [651]

—, Hotarare CSM nr. 231/2012 referitoare la structura cursurilor de formare pentru magistratii numiti in cond. art. 33 alin. 1 din L303/2004 2012

—, Regulamentul privind organizarea și desfășurarea concursului de admitere în magistratură 2012 [279/2012]

Council of Europe, Recommendation R (92) 17 concerning consistency in sentencing 1992

Cuza AI, Codul Penal din 1865 1864

Guvernul Romaniei, Ordonanta de urgenta pentru modificarea si completarea unor acte normative in domeniul justitiei, OUG nr. 100/2007 2007 [100/2007]

—, OUG nr. 46/2008, ordonanta de urgenta pentru modificarea art. 33 din Legea nr. 303/2004 privind statutul judecatorilor si procurorilor 2008

Institutul National al Magistraturii, Statutul personalului de instruire al INM 2012

—, Strategia Institutului National al Magistraturii pentru perioada 2013-2016 2013

—, Regulament privind concursul de admitere si examenul de absolvire a INM 2013

Marea Adunare Nationala, Codul Penal din 1968 1969

National Association of State Judicial Educators, Principles and Standards of Judicial Branch Education 2001

Noul Cod de Procedura Penala 2014

Noul Cod Penal (v 1 Feb 2014) 2014

Noul Cod Penal (v. 2012) 2014

Parlamentul Romaniei, Codul Penal din 1968 actualizat in 1997 1997

—, Legea nr 143/2000 privind combaterea traficului si consumului ilicit de droguri 2000

—, Legea 303/2004 privind statutul magistratilor 2004

—, Legea 304/2004 privind organizarea judiciara 2004

—, Legea 252/2013 privind organizarea si functionarea sistemului de probatiune 2013

Republica Socialista Romania, Codul Penal din 1936 1948

The Romanian Constitution 2003 2003

Codul de Procedura Civila 2014

Decreto Legislativo 26/2006 'Istituzione della Scuola superiore della magistratura, nonche' disposizioni in tema di tirocinio e formazione degli uditori giudiziari, aggiornamento professionale e formazione dei magistrati'

List of annexes

Annex 1: Comparative judicial training tables

Annex 2: Romanian judicial training structure

Annex 3: Dewey, Lewin and Kolb learning cycles

Annex 4: Surveys applied

Annex 5: Statistical tables – training findings

Annex 6: Statistical tables – informal learning findings

ANNEX 1: COMPARATIVE JUDICIAL TRAINING TABLES

TABLE 1: INITIAL AND INDUCTION TRAINING OF NEWLY APPOINTED JUDGES (ADAPTED FROM THOMAS 2006)¹

Country	Qualification	Mandatory Training	Training period	Elements of training	Training evaluation
Austria	Law degree and exam	Yes	5 months leading to position of Candidate Judge	5 months court practice Trainee courses	Yes, feedback from supervising judge and training head
	Appointment as Candidate Judge	Yes	3.5 years (4 years including the 5 months court practice)	Min 1 year court practice + practice in other legal offices Training courses at court level	Yes, written and oral examination
Denmark	Postgraduate law degree and appointment as deputy judge	Yes	3 years	Court practice 10 courses, 2-4 days each in substantive law	Yes, annually by supervising judge (examination and interview)
	Section head in ministry then appointment as temporary judge	Yes	9 months		
Finland	Master's degree in law	Required	1 year	Court practice (1 year district court, or 6 months district + 6 months appellate/admin court)	No

¹ Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) <http://www.ucl.ac.uk/laws/judicial-institute/docs/Judicial_Training_Report.pdf> accessed 20 February 2014.

Country	Qualification	Mandatory Training	Training period	Elements of training	Training evaluation
	Professional competence demonstrated in court “or elsewhere”				
France	Professionals with no legal practical experience	Yes	2 years + 7 months	33 weeks internship in non-judicial settings (law firm, prosecutor’s office, prison) 34 weeks coursework 50 weeks court practice	Yes, 9 exams: 3 theoretical exams 3 judicial craft exams 3 final exams (incl interview)
	Professionals younger than 50 with at least 15 years of experience	Yes	8.5 months	1 month theoretical training 5 months probationary practical training 2.5 months pre-allocation training	
Germany	4-year legal degree 1 st state exam (theoretical) 2-year “preparatory service” (incl. 5-8 months court) 2 nd state exam	Only for some Laender	Various	Sitting on panels with more senior judges in ordinary courts 2-8 weeks shadowing judge in specialist courts Mandatory seminars in judicial skills training	No
Italy	Postgraduate law degree and exam	Yes	18 months	6 months centralised training at the Judicial School 12 months decentralised training (10 court practice + 2 prosecutor office practice)	Yes, from directors of Judicial School and from supervising courts
	Legal professionals, JPs, public officers 5+ years experience and exam				
	Law professors and lawyers with 15+ years experience, no exam	No			

Country	Qualification	Mandatory Training	Training period	Elements of training	Training evaluation
Netherlands	Law degree, 2-5 years professional experience (can include training) and admission as a trainee judge	Yes	4 years	Combination of practical work in court (work-training environment) and reflective learner discussions (work-team environment)	Yes, 2 portfolio assessments after 6 months and at the end Interviews every 3 months
	Law degree, 5+ professional experience (min 2 years in legal profession) and admission as a trainee judge		15 months – 3 years depending on experience		
Romania	Law degree and examination (no legal experience)	Yes	2 years	1 year theoretical modules 1 year court practice + practice in prosecutor's office and law firms	Yes, individual course examination and final exam at end of year 2
	Law degree, at least 5 years of legal experience and examination		6 months	4 weeks court induction 8 weeks theoretical training 12 weeks supervised court practice	
Spain	Law degree and examination (no legal experience)	Yes	21 months	12 months theoretical training 9 months practical training	Yes (but no failures)
	Law degree and examination (at least 10 years of experience)	Yes	4 months	1 month training 3 months court practice	
England and Wales	Legal qualification and a minimum number of years of experience depending on the position applied for	Yes		National seminars	No

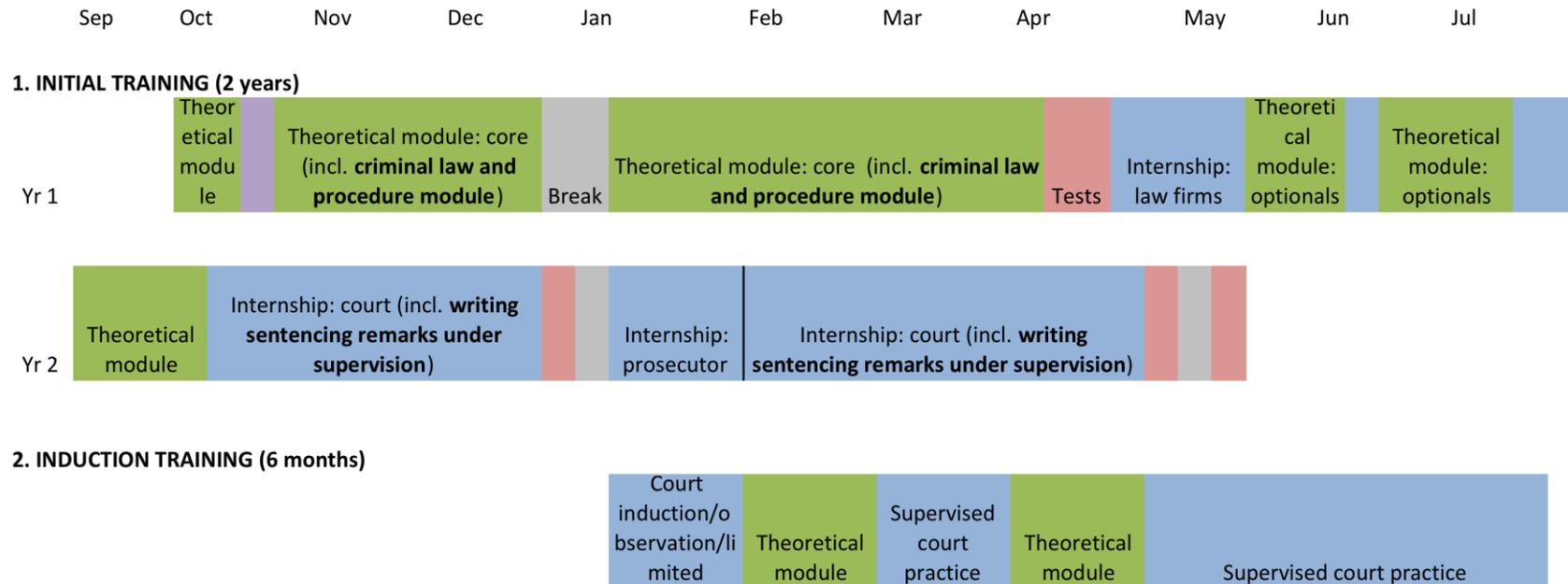
TABLE 2: IN-SERVICE TRAINING OF FULLY-APPOINTED JUDGES (ADAPTED FROM THOMAS 2006)²

Country	Type of organisation delivering training	Name of training body	Participants	Voluntary or compulsory	Training entitlement / requirement
Austria	Justice ministry department	Advisory Board for Continuous Training	Judges and prosecutors	Voluntary but requirement to develop skills	Judges 3-4 days per year
Canada	Multi-organisations and universities	National Judicial Institute (and others)	Judges only	Voluntary	New judges objective: 10-15 days per year for 4 years
Denmark	Judicial self-governing committee	Danish Court Administration	Judges and clerks	Voluntary	
Finland	Justice ministry department	The Training Unit, Department of Judicial Administration	Judges, prosecutors, court staff	Voluntary Compulsory in major law amendments*	
France	State judicial school	<i>Ecole Nationale de la Magistrature</i> (ENM)	Judges and prosecutors	Compulsory*	All judges required to 5 days per year minimum*
Germany	State judicial school	<i>Deutsche Richterakademie</i>	Judges and prosecutors	Compulsory only in some states and in specific circumstances (e.g. change of function)*	

² Countries that have made the training compulsory since 2006 are marked with an asterisk (*)

Country	Type of organisation delivering training	Name of training body	Participants	Voluntary or compulsory	Training entitlement / requirement
Italy	State judicial school	Superior School of the Judiciary	Judges and prosecutors	Compulsory*	At least one training every 4 years*
Netherlands	State judicial school	<i>Studiecentrum Rechtspleging (SSR)</i>	Judges and prosecutors	Voluntary	
Portugal	State judicial school	<i>Centro do Estudos Judiciarios</i>	Judges only	Voluntary	
Romania	State judicial school	<i>Institutul National al Magistraturii (INM)</i>	Judges and prosecutors	Compulsory	At least one training every 3 years
Spain	State judicial school	<i>Escuela Judicial del Consejo General del Poder Judicial</i>	Judges only	Compulsory when changing jurisdiction or specialty*	
England and Wales	State judicial school	Judicial College	Judges only	Compulsory	At least once every year (salaried), less often (fee-paid)
United States	Multi-organisations and universities	National Judicial College Federal Judicial Center National Center for State Courts	Judges and court staff	Voluntary (federal) Compulsory (state)	Requirements vary by state: avg. 7-15 hrs./year
Australia	Multi-organisations & universities	National Judicial College of Australia & others	Judges and magistrates	Voluntary	Developing entitlement statement

ANNEX 2: STRUCTURE OF INITIAL AND INDUCTION TRAINING IN ROMANIA

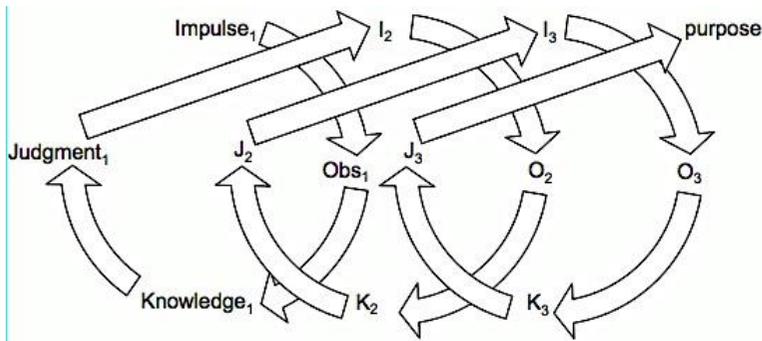


LEGEND

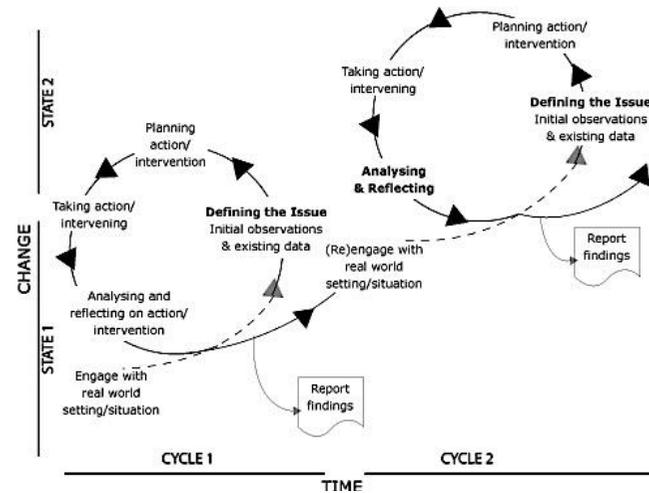
- Theoretical module (courses, seminars, moot courts)
- Practical module (internship, court observation, supervised court practice)
- Assessment
- Extra-curricular training
- Break

ANNEX 3: DIAGRAMS OF LEARNING CYCLES BY DEWEY AND LEWIN (BEFORE KOLB)

DEWEY'S LEARNING SPIRAL³



LEWIN'S ACTION RESEARCH CYCLE⁴



311

³ Mirjam S Glessmer, 'Dewey's Learning Spiral' <<http://mirjamglessmer.com/2014/10/08/kolbs-learning-cycle/>> accessed 28 August 2017.

⁴ Iris Tommelein, 'Lewin's Action Research Cycle' <<http://p2sl.berkeley.edu/glossary/a/>> accessed 28 August 2017.

ANNEX 4: SURVEYS

Survey 1 – continuous trainees (FCjv2)

Survey 2 – initial trainees (Fiv1)

Survey 3 – induction trainees (Fmrev1)

Annex 4 – continuous trainees survey

TRAINING AND PRACTICE IN SENTENCING

This questionnaire has been drafted by Diana Richards from *University College London*, a university recognised globally for its high quality studies in judicial behaviour. The questionnaire contains questions about your perception regarding the current training and practice in sentencing, given your current experience at the National Institute of Magistracy.

Filling in the survey takes 10 minutes at most and your answers will be *completely anonymous*. Your contribution is highly valuable for this research. If you have any questions, you can discuss them directly with Diana Richards, present at the conference, or by e-mail at diana.richards@ucl.ac.uk.

This questionnaire is dedicated to **judges**. If you are a prosecutor or have another profession, please ask the conference organisers for the appropriate questionnaire version. We apologise in advance for any inconvenience or errors caused.

PROFESSIONAL EXPERIENCE

1. What is your current profession?

- judge
- prosecutor
- other: _____

2. How many years of experience have you gained in your current profession?

_____ years

3. How many years of experience have you gained in criminal cases?

_____ years (*0 if not applicable*)

If in your past you have worked on criminal cases from a profession other than the one mentioned at question 1, which profession was that?

- prosecutor
- police officer
- lawyer
- other: _____

THE ROLE OF THE JUDGE IN CRIMINAL CASES

4. What is, in your opinion, the role of the criminal judge in society nowadays?

Mark your agreement for each answer choice in turn.

	Strongly agree	Agree	Disagree	Strongly disagree
to search for the truth				
to be an impartial referee between parties				
to punish the wrongdoers				
to protect the social values				
other: _____				



5. In your opinion, what are the important factors that ought to influence a judge in sentencing in a particular case?

Rank the importance of the following factors (1 – the most important, 7 – the least important). If you wish to add new factors, modify the ranking accordingly.

- harm to the victim
- social danger
- previous convictions
- defendant's behaviour in court
- declaration of the victim
- effect of sentence on defendant
- defendant's future prospects
- other factor: _____

6. How useful are the following elements in sentencing in a particular case?

For each choice mark the appropriate level of usefulness.

	Very useful	Relatively useful	Doesn't influence	Counterproductive
sentence ranges for that type of offence				
legal indications of aggravating and mitigating factors				
prosecutor's recommendations				
probation officer's recommendations				
judge's experience in similar cases				
relevant landmark cases				
similar sentences at the same court				
similar sentences at other courts				
other: _____				

7. In other jurisdictions, judges are recruited after gaining significant years of practical legal experience. Do you consider this policy:

- useful, because advocacy experience makes them more empathetic towards parties
- useful, because they have an increased understanding of how courts function
- useful, because they understand how lawyers formulate their arguments
- useful, because they have more life experience
- useless, because advocacy experience is irrelevant to judging
- useless, because judges with prior advocacy experience cannot be that impartial anymore
- useless, because prior advocacy experience makes judges more cynical
- irrelevant, there is no difference
- other opinion: _____



INITIAL TRAINING

8. Have you benefitted from initial training offered by the National Institute of Magistracy?

- yes, starting with year _____
- no (please skip to „CONTINUOUS TRAINING“)

9. Looking back, how useful do you now find the initial judicial training you received for your future judicial career?

Very useful	Relatively useful	Relatively useless	Absolutely useless

10. Which of the following initial training elements do you think had most influence on your practice?

Rank the importance of the following elements (1 – the most important, 8 – the least important). If you wish to add new elements, modify the ranking accordingly.

- NIM courses on criminal law/procedure
- NIM seminars on criminal law/procedure
- learning for the NIM entry exam
- learning for the NIM capacity exam
- practical advice given by the trainers
- discussions with/advice from the peers
- the court internship (year 2)
- other: _____

11. Have you kept in touch with your initial training peers?

- no, I didn't have a significant contact from the very beginning
- no, I lost contact with them in time, although I wished I would keep in touch
- yes, I kept contact with some of them but we only meet during the NIM training
- yes, I kept contact with some of them but we never meet
- yes, and we even met a few times

11.a. If so, how do you communicate?

- | | |
|--|--|
| <input type="checkbox"/> telephone | <input type="checkbox"/> e-learning platform |
| <input type="checkbox"/> e-mail | <input type="checkbox"/> other |
| <input type="checkbox"/> discussion groups | method: _____ |

CONTINUOUS TRAINING

12. Have you ever been to other continuous training sessions on criminal law at NIM?

- no, this is my first time
 - yes, to approximately:
 - 1-3 sessions
 - 5-10 sessions
 - over 10 sessions
- I've also undergone induction training



13. In a training session on sentencing, which of the following elements of method or content do you find most useful:

Rank the importance of the following elements (1 – the most important, 6 – the least important). If you wish to add new elements, modify the ranking accordingly.

- legal analysis and interpretation of current legal stipulations on sentencing
- discussing the legal procedures on sentencing
- discussing case studies where sentencing is problematic
- discussing landmark cases which affect sentencing
- discussing issues encountered by judges in real cases
- sentencing simulations/exercises
- other: _____

14. Have you ever kept in touch with your NIM trainer after a training session on criminal law/procedure?

- yes, and I am in constant contact with that trainer
- yes, and I get in touch with that trainer about 2-3 times a year
- yes, but I've only contacted him/her a few times since then
- I have his/her contact details but I never felt the need to get in touch
- I have his/her contact details but I didn't feel it is appropriate to get in touch
- I do not have his/her contact details but I would like to have them

Trainer(s)' name(s): _____

15. If the case, what type of contact do you have with the aforementioned trainer(s)?

- I ask him/her about new criminal legal stipulations
- I ask for a legal interpretation when there are differing opinions in my court
- I ask for his/her opinion on a sentencing decision when I have dilemmas in a particular case
- I ask about current NIM training opportunities I could participate in
- I send feedback on the NIM training I received
- other: _____

16. What should an e-learning session in criminal law contain so it could engage you all throughout?

	Essential	Useful but not essential	Indifferent	Counterproductive
direct access to the relevant legislation				
multimedia and visual explanations produced by trainers on various legal issues				
a forum where I could discuss practical issues with other magistrates				



live training sessions held by trainers where I could ask questions				
exercises and simulations through which I could verify my knowhow and intuitions				

17. Looking back to your university training, how useful do you now consider your past criminal law and procedure courses for your subsequent practice on the bench?

Very useful	Relatively useful	Relatively useless	Absolutely useless

18. Do you think you have enough opportunities to develop your “judicial craft” (eg. writing decisions, other documents, sentencing, dealing with expert witnesses)?

Please select only one answer.

- the training was sufficient in developing my judicial skills
- the training was not sufficient in developing my judicial skills, but I’ve developed them during my initial court practice
- judicial skills can only be cultivated through experience
- specific „judicial craft” sessions should exist
- other opinion: _____

THE PRACTICE

19. In your first few years of hearing criminal cases, which of the following were your top 3 mechanisms in learning how to sentence correctly?

Rank your top 3 options by importance (1 – the most important, 3 – the least important). You can select more than 3 options but you need to include them in the ranking.

- I looked at sentences given in similar cases in the past in my court
- I looked at sentences given in similar cases in other Romanian courts
- I asked the more experienced judges in my court what the typical sentence for my type of case is
- I computed the sentence strictly by looking at the legal stipulations on aggravating and mitigating circumstances
- I took on the suggestion given by the prosecutor in the case
- I took on suggestions from the pre-sentence report from the probation officer
- I looked at the sentence ranges for that particular type of offence
- I looked at the relevant Appeals in the Interest of Law for my type of case
- I took into account my instinct when hearing the defendant
- other: _____

20. Confronted with a difficult sentencing decision, would you welcome the advice of:

- an officially designated mentor



- a NIM trainer
- another judge with more experience
- other: _____
- I would not welcome any advice

21. Confronted with a case very similar to those in the past:

- I would immediately know what sentence to give
- I would have an immediate intuition regarding the correct sentence, but I would look at how this case differs from those in the past
- I would have a sentence range in mind, but I would manually calculate how aggravating and mitigating factors affect the sentence
- I would disregard any intuition and I would follow the official sentencing procedure step by step, as this is a new case
- other: _____

22. Other comments

Please write here any other comments. If you felt that some of the questions did not apply to you, or some of the answer choices are inappropriate, please indicate here.

We thank you very much for your contribution to this study.

If you would like to be invited to an interview which would develop the themes approached in this questionnaire, please leave here your contact details:

Name: _____

E-mail address: _____

Telephone: _____

Annex 4 – initial trainees survey

TRAINING AND PRACTICE IN SENTENCING

This questionnaire has been drafted by Diana Richards from *University College London*, a university recognised globally for its high quality studies in judicial behaviour. The questionnaire contains questions about your perception regarding the current training and practice in sentencing, given your current experience at the National Institute of Magistracy.

Filling in the survey takes 10 minutes at most and your answers will be *completely anonymous*. Your contribution is highly valuable for this research. If you have any questions, you can discuss them directly with Diana Richards, present in the room today, or by e-mail at diana.richards@ucl.ac.uk.

1. What were your initial reasons for applying for initial training at the National Institute of Magistracy?

- I wanted to become a judge
- I wanted to become a prosecutor
- I wanted to work in the judiciary, but didn't know if as a judge or as a prosecutor
- because being a lawyer does not fit me
- other _____

2. If marks would not be a problem, what would be the option you would make at the end of year one of training?

- judge
- prosecutor
- I don't know

2.a If you changed your initial option, what were the reasons?

3. What would be your desired specialty?

- civil law
- criminal law
- other: _____

4. What year did you graduate from law school?

Year _____



5. During law school, have you had the chance to do internships in the following offices:

If the case, mention the number of weeks of internship in each corresponding category.

court	
prosecutor's office	
bailiff's office	
lawyer's office	

law firm	
notary's office	
other: _____	

I had no internship during law school

6. Apart from the internship experience mentioned above, have you had any chance to practice law?

- yes, as _____ for _____ years
- no

6.a. If applicable, for how many years have you worked on criminal matters?

_____ years

7. In other jurisdictions, judges are selected after gaining significant practical experience as advocates. Do you consider this policy:

- useful, because advocacy experience makes them more empathetic towards parties
- useful, because they have an increased understanding of how courts function
- useful, because they understand how lawyers formulate their arguments
- useful, because they have more life experience
- useless, because advocacy experience is irrelevant to judging
- useless, because judges with prior advocacy experience cannot be that impartial anymore
- useless, because prior advocacy experience makes judges more cynical
- irrelevant, there is no difference
- other opinion: _____

THE ROLE OF THE JUDGE IN CRIMINAL CASES

8. What is, in your opinion, the role of the criminal judge in society nowadays?

Mark your agreement for each answer choice in turn.

	Strongly agree	Agree	Disagree	Strongly disagree
to search for the truth				
to be an impartial referee between parties				
to punish the wrongdoers				
to protect the social values				
other: _____				



9. In your opinion, what are the important factors which need to influence a judge in sentencing in a particular case?

Rank the importance of the following factors (1 – the most important, 7 – the least important). If you wish to add new factors, modify the ranking accordingly.

- harm to the victim
- social danger
- previous convictions
- defendant's behaviour in court
- declaration of the victim
- effect of sentence on defendant
- defendant's future prospects
- other: _____

10. How useful are the following elements in sentencing in a particular case?

For each choice mark the appropriate level of usefulness.

	Very useful	Relatively useful	Doesn't influence	Counterproductive
sentence ranges for that type of offence				
legal indications of aggravating and mitigating factors				
prosecutor's recommendations				
probation officer's recommendations				
judge's experience in similar cases				
relevant landmark cases				
similar sentences at the same court				
similar sentences at other courts				
other: _____				

INITIAL TRAINING IN SENTENCING

11. How useful do you find the initial judicial training you're undergoing for your future judicial career?

Very useful	Relatively useful	Relatively useless	Absolutely useless



12. Which of the following initial training elements do you think prepare you best for your future/potential career in criminal cases?

Rank the importance of the following factors (1 – the most important, 8 – the least important).

If you wish to add new factors, modify the ranking accordingly.

- learning for the NIM entry exam
- NIM courses on criminal law/procedure
- NIM seminars on criminal law/procedure
- practical exercises on writing court documents
- simulation/role-play exercises
- practical advice given by the trainers
- discussions with/advice from the peers
- the court internship (year 2)
- other: _____

13. In a training session on sentencing, which of the following elements of method or content do you find most useful:

Rank the importance of the following factors (1 – the most important, 6 – the least important).

If you wish to add new factors, modify the ranking accordingly.

- legal analysis and interpretation of current legal stipulations on sentencing
- discussing the legal procedures on sentencing
- discussing case studies where sentencing is problematic
- discussing landmark cases which affect sentencing
- discussing issues encountered by judges in real cases
- sentencing simulations/exercises
- other: _____

14. Imagine you will be in court tomorrow and you will have to sentence in a given case. Which of the following will be your top 3 mechanisms in learning how to sentence correctly?

Rank your top 3 options by importance (1 – the most important, 3 – the least important). You

can select more than 3 options but you need to include them in the ranking.

- I would look at sentences given in similar cases in the past in my court
- I would look at sentences given in similar cases in other Romanian courts
- I would ask the more experienced judges in my court what the typical sentence for my type of case is
- I would compute the sentence strictly by looking at the legal stipulations on aggravating and mitigating circumstances
- I would take on the suggestion given by the prosecutor in the case
- I would take on suggestions from the pre-sentence report from the probation officer
- I would look at the sentence ranges for that particular type of offence
- I would look at the relevant Appeals in the Interest of Law for my type of case
- I would take into account my instinct when hearing the defendant
- other: _____



15. Confronted with a difficult sentencing decision, would you welcome the advice of:

- an officially designated mentor
- a NIM trainer
- another judge with more experience
- other: _____
- I would not welcome any advice

16. Imagine that, after years of experience in court, you would be confronted with a case very similar to those in the past:

- I would immediately know what sentence to give
- I would have an immediate intuition regarding the correct sentence, but I would look at how this case differs from those in the past
- I would have a sentence range in mind, but I would manually calculate how aggravating and mitigating factors affect the sentence
- I would disregard any intuition and I would follow the official sentencing procedure step by step, as this is a new case
- other: _____

17. Do you keep in touch with your initial training peers?

- No, I didn't have a significant contact with my peers from the very beginning
- Yes, but just during the seminars
- Yes, I keep in touch mainly concerning our trainee duties
- Yes, I keep a frequent contact and we even met a few times in our spare time
- Yes, I think we became friends and we will keep in touch even after we graduate from NIM

17.a. If you keep in touch, how do you do that?

- | | |
|---|---|
| <input type="checkbox"/> by telephone | <input type="checkbox"/> on the e-learning platform |
| <input type="checkbox"/> by e-mail | <input type="checkbox"/> through meetings |
| <input type="checkbox"/> in discussion groups | <input type="checkbox"/> other method: _____ |
| <input type="checkbox"/> on social networks | |



18. Do you think you will stay in touch with your criminal law trainer even after you will graduate from the NIM?

- no
- yes

18.a. If you will, what would you contact him/her for?

- I will ask him/her about new criminal legal stipulations
- I will ask for a legal interpretation when there are differing opinions in my court
- I will ask for his/her opinion on a sentencing decision when I have dilemmas in a particular case
- I will ask about current NIM training opportunities I could participate in
- I will send feedback on the NIM training I received
- other: _____

19. What should an e-learning session in criminal law contain so it could engage you all throughout?

	Essential	Useful but not essential	Indifferent	Counterproductive
direct access to the relevant legislation				
multimedia and visual explanations produced by trainers on various legal issues				
a forum where I could discuss practical issues with other magistrates				
live training sessions held by trainers where I could ask questions				
exercises and simulations through which I could verify my knowhow and intuitions				

20. Looking back to your university training, how useful do you now consider your past criminal law and procedure courses for your NIM training?

Very useful	Relatively useful	Relatively useless	Absolutely useless

21. Other comments

Please write here any other comments. If you felt that some of the questions did not apply to you, or some of the answer choices are inappropriate, please indicate here.

We thank you very much for your contribution to this study.

Annex 4 – induction trainees survey

TRAINING AND PRACTICE IN SENTENCING

This questionnaire has been drafted by Diana Richards from *University College London*, a university recognised globally for its high quality studies in judicial behaviour. The questionnaire contains questions about your perception regarding the current training and practice in sentencing, given your current experience at the National Institute of Magistracy.

Filling in the survey takes 10 minutes at most and your answers will be *completely anonymous*. Your contribution is highly valuable for this research. If you have any questions, you can discuss them directly with Diana Richards, present at the conference, or by e-mail at diana.richards@ucl.ac.uk.

PROFESSIONAL EXPERIENCE

1. What is your current profession?

- judge
- prosecutor

2. What is your current specialty in your assigned court?

- civil law
- criminal law
- mixed specialty
- other _____

3. Before deciding to become a judge, in which other legal professions have you gained experience?

- as lawyer
- as police officer
- as legal advisor
- as court clerk
- as a notary
- other: _____

3.a. For how many years? _____ years

4. How many years of experience have you gained in criminal cases?

_____ years (0 if not applicable)

THE ROLE OF THE JUDGE IN CRIMINAL CASES

5. What is, in your opinion, the role of the criminal judge in society nowadays?

Mark your agreement for each answer choice in turn.

	Strongly agree	Agree	Disagree	Strongly disagree
to search for the truth				
to be an impartial referee between parties				
to punish the wrongdoers				
to protect the social values				
other: _____				



6. In your opinion, what are the important factors that ought to influence a judge in sentencing in a particular case?

Rank the importance of the following factors (1 – the most important, 7 – the least important). If you wish to add new factors, modify the ranking accordingly.

- harm to the victim
- social danger
- previous convictions
- defendant's behaviour in court
- declaration of the victim
- effect of sentence on defendant
- defendant's future prospects
- other factor: _____

7. How useful are the following elements in sentencing in a particular case?

For each choice mark the appropriate level of usefulness.

	Very useful	Relatively useful	Doesn't influence	Counterproductive
sentence ranges for that type of offence				
legal indications of aggravating and mitigating factors				
prosecutor's recommendations				
probation officer's recommendations				
judge's experience in similar cases				
relevant landmark cases				
similar sentences at the same court				
similar sentences at other courts				
other: _____				

8. In other jurisdictions, judges are selected after gaining significant practical experience as advocates. Do you consider this policy:

- useful, because advocacy experience makes them more empathetic towards parties
- useful, because they have an increased understanding of how courts function
- useful, because they understand how lawyers formulate their arguments
- useful, because they have more life experience
- useless, because advocacy experience is irrelevant to judging
- useless, because judges with prior advocacy experience cannot be that impartial anymore
- useless, because prior advocacy experience makes judges more cynical
- irrelevant, there is no difference
- other opinion: _____



9. How useful do you find the judicial training you currently receive for your judicial career?

Very useful	Relatively useful	Relatively useless	Absolutely useless

10. Which of the following induction training elements do you think will have most influence on your practice?

Select your top 3 options and rank them according to importance (1 – the most important, 3 – the least important). If you wish, you can indicate more than 3 options, but you need to include them in the ranking.

- learning for the NIM entry exam
- NIM seminars on criminal law/procedure
- document templates given by the trainers
- practical advice given by the trainers
- role-play exercises
- answers given by the trainers/peers at specific questions during the training
- discussions with/advice from the peers
- the court internship/practice
- other: _____

11. Are you keeping in touch with your training peers?

- no, I didn't have a significant contact from the very beginning
- yes, but only during the seminars
- yes, I keep in touch mainly concerning our trainee duties
- yes, I keep a frequent contact and we even met a few times in our spare time
- yes, I think we became friends and we will keep in touch after we finish our training

11.a. If so, how do you communicate?

- | | |
|--|--|
| <input type="checkbox"/> telephone | <input type="checkbox"/> e-learning platform |
| <input type="checkbox"/> e-mail | <input type="checkbox"/> meetings |
| <input type="checkbox"/> discussion groups | <input type="checkbox"/> other |
| <input type="checkbox"/> social networks | method: _____ |



12. Do you think you will stay in touch with your criminal law trainer even after you will graduate from the NIM?

- no
- yes

12.a. If yes, what would you contact him/her for?

- I will ask him/her about new criminal legal stipulations
- I will ask for a legal interpretation when there are differing opinions in my court
- I will ask for his/her opinion on a sentencing decision when I have dilemmas
- I will ask about current NIM training opportunities I could participate in
- I will send feedback on the NIM training I received
- other: _____

13. In a training session on sentencing, which of the following elements of method or content do you find most useful:

Select your top 3 options and rank them according to importance (1 – the most important, 3 – the least important). If you wish, you can indicate more than 3 options, but you need to include them in the ranking.

- legal analysis and interpretation of current legal stipulations on sentencing
- discussing the legal procedures on sentencing
- discussing case studies where sentencing is problematic
- discussing landmark cases which affect sentencing
- discussing issues encountered by judges in real cases
- sentencing simulations/exercises
- sentence writing exercises
- other: _____

14. What suggestions would you have for the improvement of the induction training?

- I think the induction training should be longer
- I would like to spend some time shadowing a judge in my court before beginning my own judicial activity
- I would like a wider gap between the two modules
- I would like to avoid having to sentence before undergoing the first module
- I would like more role-play exercises
- I would like more document writing exercises
- other suggestions:



15. What should an e-learning session in criminal law contain so it could engage you all throughout?

	Essential	Useful but not essential	Indifferent	Counterproductive
direct access to the relevant legislation				
multimedia and visual explanations produced by trainers on legal issues				
a forum where I could discuss practical issues with other magistrates				
live training sessions held by trainers where I could ask questions				
exercises and simulations through which I could verify my knowhow and intuitions				

16. Looking back to your university training, how useful do you now consider your past courses for your judicial career?

Very useful	Relatively useful	Relatively useless	Absolutely useless

17. In your first few months of hearing criminal cases, which of the following were your top 3 mechanisms in learning how to sentence correctly?

Rank your top 3 options by importance (1 – the most important, 3 – the least important). You can select more than 3 options but you need to include them in the ranking.

- I looked at sentences given in similar cases in the past in my court
- I looked at sentences given in similar cases in other Romanian courts
- I asked the more experienced judges in my court what the typical sentence for my type of case is
- I computed the sentence strictly by looking at the legal stipulations on aggravating and mitigating circumstances
- I took on the suggestion given by the prosecutor in the case
- I took on suggestions from the pre-sentence report from the probation officer
- I looked at the sentence ranges for that particular type of offence
- I looked at the relevant Appeals in the Interest of Law for my type of case
- I took into account my instinct when hearing the defendant
- other: _____



18. Confronted with a difficult sentencing decision, would you welcome the advice of:

- an officially designated mentor
- a NIM trainer
- another judge with more experience
- other: _____
- I would not welcome any advice

19. Confronted with a case very similar to those in the past:

- I would immediately know what sentence to give
- I would have an immediate intuition regarding the correct sentence, but I would look at how this case differs from those in the past
- I would have a sentence range in mind, but I would manually calculate how aggravating and mitigating factors affect the sentence
- I would disregard any intuition and I would follow the official sentencing procedure step by step, as this is a new case
- other: _____

We thank you very much for your contribution to this study.

ANNEX 5: STATISTICAL TABLES – TRAINING

Table 3: Ordinal regressions: overall appreciation of initial training (strong associations highlighted).....	332
Table 4: Ordinal regressions: appreciation of initial training methods per category of experience (strong associations highlighted)	333
Table 5: Grouping of initial training methods (bivariate analysis) (strong associations highlighted).....	334
Table 6: Ordinal regressions - appreciation for continuous training methods (strong associations highlighted).....	335
Table 7: Ordinal regressions – appreciation of continuous training methods by exposure to training	336
Table 8: Grouping of continuous training methods (bivariate analysis) (strong associations highlighted).....	337
Figure 1: Dendrogram displaying clustering of preferences for continuous training methods	338
Table 9: Correlations between use of communication methods and category of experience (asterisk shows significant correlation with each added year)	339
Table 10: Logistic regression model testing preference for longer induction training	340
Table 11: Regression models on preference for e-learning methods by category of experience or training exposure (strong associations highlighted).....	341

TABLE 3: ORDINAL REGRESSIONS: OVERALL APPRECIATION OF INITIAL TRAINING (STRONG ASSOCIATIONS HIGHLIGHTED)

Input variable	Est	Se	Wald	Sig	Ci lower	Ci upper	Same for prosecutors?
Existence of judicial experience	-0.867	0.324	7.137	0.008	-1.503	-0.231	Yes (Est -2.149 SE .368 Wald 34.170 Sig .0)
Amount of judicial experience							
Existence of sentencing experience	-1.087	0.324	11.238	0.001	-1.723	-0.452	Yes (Est -1.873 SE .383 Wald 23.947 Sig .0)
Amount of sentencing experience							
Existence of prior legal experience	-1.419	0.412	11.872	0.001	-2.226	-0.612	No (Sig .499)
Amount of prior legal experience							
Judicial specialty							
Legal experience type: advocacy/policing							
Year of beginning of initial training	-0.11	0.039	7.872	0.005	-0.187	-0.033	Yes (Est -.226 SE .062 Wald 13.315 Sig .0)
Appreciation of legal training	0.473	0.136	12.010	0.001	0.205	0.740	Yes (Est .478 SE .150 Wald 10.172 Sig .001)
Years since graduation of law school							

TABLE 4: ORDINAL REGRESSIONS: APPRECIATION OF INITIAL TRAINING METHODS PER CATEGORY OF EXPERIENCE

Preference for initial training method	Legal (advocacy) experience	Judicial experience	Criminal law experience	Life experience (year of beginning of initial training)
The 2nd year court internship		Est -1.044 SE .225 Wald 21.559 Sig .0 CI -1.485, -.603	Est -.605 SE .224 Wald 7.291 Sig .007 CI -1.045, -.166	Est -.060 SE .025 Wald 5.701 Sig .017 CI -.108, -.011
NIM seminars	Est -.349 SE .128 Wald 7.405 Sig .007	Est 1.269 SE .318 Wald 15.880 Sig .0 CI .645, 1.893 (same with prosecutors)	Est .890 SE .317 Wald 7.888 Sig .005 CI .269, 1.512 (same with prosecutors)	Est .084 SE .033 Wald 6.534 Sig .011 CI .020, .149 (same with prosecutors)
Learning for the NIM entry exam	Amount: Est -.419 SE .123 Wald 11.604 Sig .001 CI -.660, -.178	Amount: Est .069 SE .027 Wald 6.710 Sig .010 CI .017, .121 (same for prosecutors)	Est .423 SE .212 Wald 3.960 Sig .047 CI .006, .839	
Learning for the NIM capacity exam		Est -.125 SE .048 Wald 6.740 Sig .009 CI (-.219, -.031)		
NIM courses		Est 2.218 SE .441 Wald 25.249 Sig .0 CI 1.353, 3.083	Est 1.726 SE .445 Wald 15.031 Sig .0 CI .854, 2.599	Est .134 SE .036 Wald 13.631 Sig .0 CI .063, .205
Discussions with/advice from peers	Est 1.132 SE .481 Wald 5.531 Sig .019 CI .189, 2.075	Est .1078 SE .215 Wald 25.125 Sig .0 CI .656, 1.499	Est 1.016 SE .218 Wald 21.821 Sig .0 CI .590, 1.443 (+ each year Est .088 Sig .0)	Est .056 SE .024 Wald 5.587 Sig .018 CI .010, .103

TABLE 5: GROUPING OF INITIAL TRAINING METHODS (BIVARIATE ANALYSIS) (STRONG ASSOCIATIONS HIGHLIGHTED)

	Writing court docs	Supervised court practice	Seminars	Trainers insights	Entry exam	Mock trials	Graduation exam	Lectures	Discussions with peers
Writing court docs		Rho -.210 p .048							
Supervised court practice	Rho -.210 p .048				Rho -.225 p .01		Rho -.411 p .006	Rho -.204 p .023	
Seminars						Rho -.325 p .002		Rho .560 p .0	
Trainers insights								Rho -.218 p .012	Rho .237 p .005
Entry exam		Rho -.225 p .01				Rho -.305 p .004			
Mock trials			Rho -.325 p .002		Rho -.305 p .004			Rho -.336 p .002	
Graduation exam		Rho -.411 p .006							
Lectures		Rho -.204 p .023	Rho .560 p .0	Rho -.218 p .012		Rho -.336 p .002			
Discussions with peers				Rho .237 p .005					

TABLE 6: ORDINAL REGRESSIONS - APPRECIATION FOR CONTINUOUS TRAINING METHODS

Training method	Legal (advocacy) experience	Judicial experience	Criminal experience	Policing vs advocacy	Life experience (year of beginning of initial training)
Case studies problematic sentencing					
Issues from real judges		Est -.581 SE .245 Wald 5.649 p .017 (CI -1.061, -.102). For each year on the bench: Est .055 SE .025 Wald 4.981 p .026 CI (.007, .104)	Est -.790 SE .262 Wald 9.111 p .003 CI (-1.303, -.277)		Est -.083 SE .032 Wald 6.623 p .010 CI (-.147, -.202)
Sentencing procedure	Est .900 SE .356 Wald 6.382 p .012 CI (.202, 1.597)		Est -.046 SE .019 Wald 6.192 p .013 CI (-.083, -.010)		
Substantive law		For each year: Est -.041 SE .016 Wald 6.734 p .009 CI (-.073, -.010)			
Landmark cases			Sentencing: Est -.046 SE .019 Wald 6.192 p .013 CI (-.083, -.010)		
Sentencing exercises		For each year: Est .037 SE .016 Wald 5.318 p .021 CI (.006, .068)			

TABLE 7: ORDINAL REGRESSIONS – APPRECIATION OF CONTINUOUS TRAINING METHODS BY EXPOSURE TO TRAINING

Training method	Exposure to initial training	Exposure to continuous training
Case studies problematic sentencing		
Issues from real judges		Est -.950 SE .250 Wald 14.396 p .000 CI (-1.441, -.459)
Sentencing procedure		Est .588 SE .246 Wald 5.743 p .017 CI (.107, 1.070)
Substantive law		Est .593 SE .247 5.773 p .016 CI (.109, 1.076)
Landmark cases	Est -.740 SE .300 Wald 6.101 p .014 CI -1.328 -- -.153	
Sentencing exercises		

TABLE 8: GROUPING OF CONTINUOUS TRAINING METHODS (BIVARIATE ANALYSIS) (STRONG ASSOCIATIONS HIGHLIGHTED)

	Case studies problematic sentencing	Issues from real judges	Sentencing procedure	Substantive law	Landmark cases	Sentencing exercises
Case studies problematic sentencing		Rho .156 p .030	Rho -.356 p .0	Rho -.482 p .0	Rho .199 p .005	
Issues from real judges	Rho .156 p .030		Rho -.400 p .0	Rho -.516 p .0	Rho .147 p .042	
Sentencing procedure	Rho -.356 p .0	Rho -.400 p .0		Rho .512 p .0	Rho -.262 p .0	Rho -.307 p .0
Substantive law	Rho -.482 p .0	Rho -.516 p .0	Rho .512 p .0		Rho -.263 p .0	Rho -.376 p .0
Landmark cases	Rho .199 p .005	Rho .147 p .042	Rho -.262 p .0	Rho -.263 p .0		Rho -.155 p .0
Sentencing exercises			Rho -.307 p .0	Rho -.376 p .0	Rho -.155 p .0	

FIGURE 1: DENDROGRAM DISPLAYING CLUSTERING OF PREFERENCES FOR CONTINUOUS TRAINING METHODS

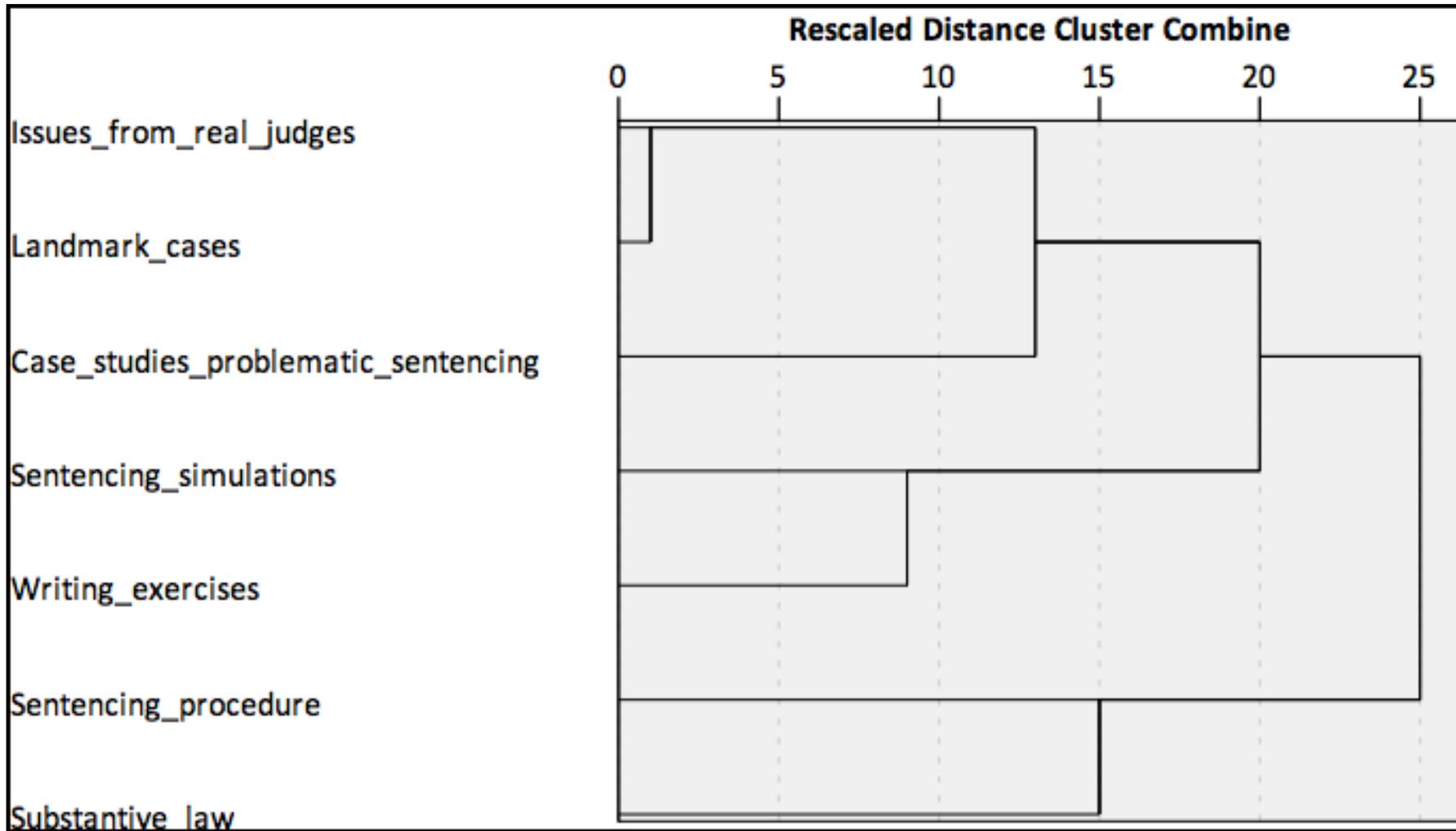


TABLE 9: CORRELATIONS BETWEEN USE OF COMMUNICATION METHODS AND CATEGORY OF EXPERIENCE (ASTERISK SHOWS SIGNIFICANT CORRELATION WITH EACH ADDED YEAR)

	An increase in this category is associated with			
	Judicial experience	Legal experience	Criminal experience	Recency of initial training
Telephone				
Email	less usage* (U=93 z=-2.4 p .016)			
Social networks				more usage* (U=457.5 z=-2.295 p .022)
Social groups	less usage * (U=1,536 z=-3.3 p .001)	less usage * (U=39 z=-2.140 p= .033)	less usage * (U=971 z=-4.412 p .000)	more usage * (U=1,727 z=3.304 p .001)
Meetings		less usage * (U=3 z=-2.623 p .003)	less usage (U=739.5 z=-2.410 p .016)	
E-learning platform				

TABLE 10: LOGISTIC REGRESSION MODEL TESTING PREFERENCE FOR LONGER INDUCTION TRAINING

	B	SE	Wald	Sig	Odds ratio	95% CI for odds ratio	
						<i>lower bound</i>	<i>upper bound</i>
Police officers vs advocates	2.43	1.068	5.182	0.023	11.362	1.402	92.091
Amount of legal experience	0.118	0.172	0.47	0.493	1.125	0.803	1.576

Note: model fit: chi-square 6.711, p .035. Increased correct prediction from 59% to 77% compared to the intercept-only model.

This model shows that judges who agree that the induction training should last longer are 11 times more likely to have been recruited from the police forces than from the legal profession.

TABLE 11: REGRESSION MODELS ON PREFERENCE FOR E-LEARNING METHODS BY CATEGORY OF EXPERIENCE OR TRAINING EXPOSURE (STRONG ASSOCIATIONS HIGHLIGHTED)

	Legal (advocacy) experience	Judicial experience	Criminal experience	Year of beginning of initial training	Exposure to initial training	Appreciation of initial training	Exposure to continuous training
Online access to legislation							
Multimedia guides and courses						Est .399 SE .196 Wald 4.161 p .041 CI .016 -- .783	
Live Q&A with trainers	Est -1.167 SE .413 Wald 7.997 p .005 CI -1.976 -- -.358	Est -.732 SE .301 Wald 5.908 p .015 CI -1.321 -- -.142	Est -.832 SE .303 Wald 7.537 p .006 CI -1.426 -- -.238		Est .808 SE .325 Wald 6.162 p .013 CI .170 -- 1.445	Est .515 SE .193 Wald 7.124 p .008 CI .137 -- .894	Est -1.069 SE .298 Wald 12.885 p .001 CI -1.653 -- -.485
Online forum	Model p .046 but Est .206 SE .110 Wald 3.491 p .062 CI -.010 -- .422						
Exercises and tests							

ANNEX 6: STATISTICAL TABLES – PRACTICE

Table 12: Ordinal regressions showing relationship between experience and preference for sentencing tools.....	343
Figure 2: Dendrogram displaying clustering of sentencing tools	344
Table 13: Ordinal regressions on the relationship between experience and attitudes towards sentencing factors	345
Figure 3: Dendrogram displaying clustering of sentencing factors	346
Table 14: Correlations between experience/exposure to training and attitudes towards advice-seeking.....	347

TABLE 12: ORDINAL REGRESSIONS SHOWING RELATIONSHIP BETWEEN EXPERIENCE AND PREFERENCE FOR SENTENCING TOOLS

	Legal (advocacy) experience	Judicial experience	Criminal experience
Sentence ranges			
Landmark cases	Est. .343 SE .160 Wald 4.576 p .032	Est. -.733 SE .340 Wald 4.656 p .031	Est. -.810 SE .341 Wald 5.644 p .018
Sentencing guidelines	Est. .467 SE .235 Wald 3.953 p .047		
Similar sentences own court	Est. .197 SE .098 Wald 4.073 p .044		Est. -.663 SE .306 Wald 4.680 p .031
Similar sentences other courts	Est. .210 SE .097 Wald 4.712 p .030		
Pre-sentence reports	Est. 1.428 SE .474 Wald 9.068 p .003		Est. .104 SE .035 Wald 8.669 p .003
Prosecutor's recommendations			Est. .622 SE .288 Wald 4.663 p .031

FIGURE 2: DENDROGRAM DISPLAYING CLUSTERING OF SENTENCING TOOLS

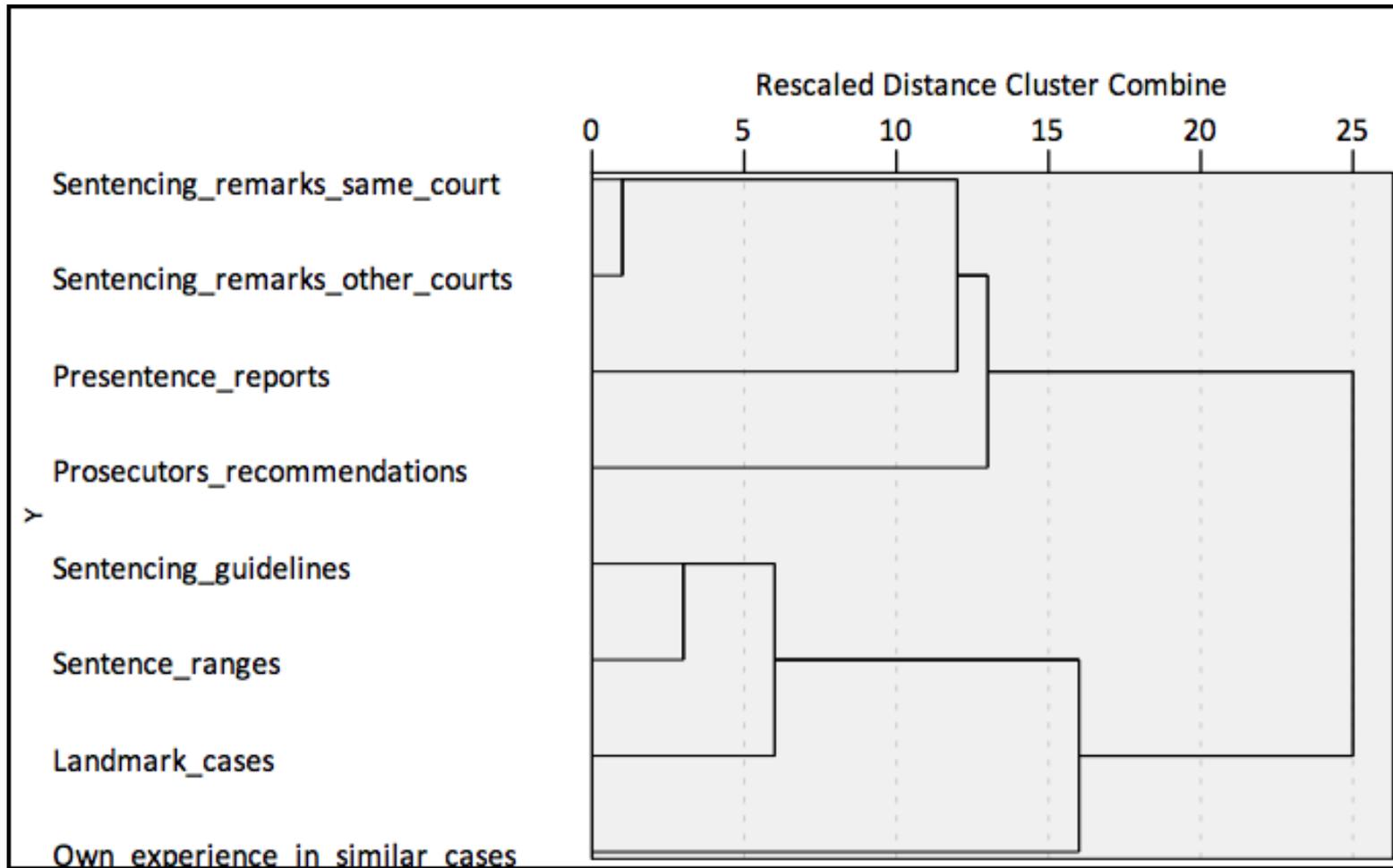


TABLE 13: ORDINAL REGRESSIONS ON THE RELATIONSHIP BETWEEN EXPERIENCE AND ATTITUDES TOWARDS SENTENCING FACTORS

	Judicial experience	Criminal legal experience	Legal experience
Harm ("social danger")			Est -.846 SE .436 Wald 3.765 Sig .052 (short of significance)
Harm to the victim	Est -.516 SE .245 Wald 4.444 Sig .035	Est -.826 SE .264 Wald 9.756 Sig .002	
Previous convictions		Est .608 SE .263 Wald 5.345 Sig .021 (Prosecutors: Est 1.186 SE .303 Wald 15.342 Sig .0)	
Effect of sentence on defendant			
Defendant's future prospects	Est .661 SE .245 Wald 7.301 Sig .007		
Defendant's behaviour in court			
Declaration of the victim			

FIGURE 3: DENDROGRAM DISPLAYING CLUSTERING OF SENTENCING FACTORS

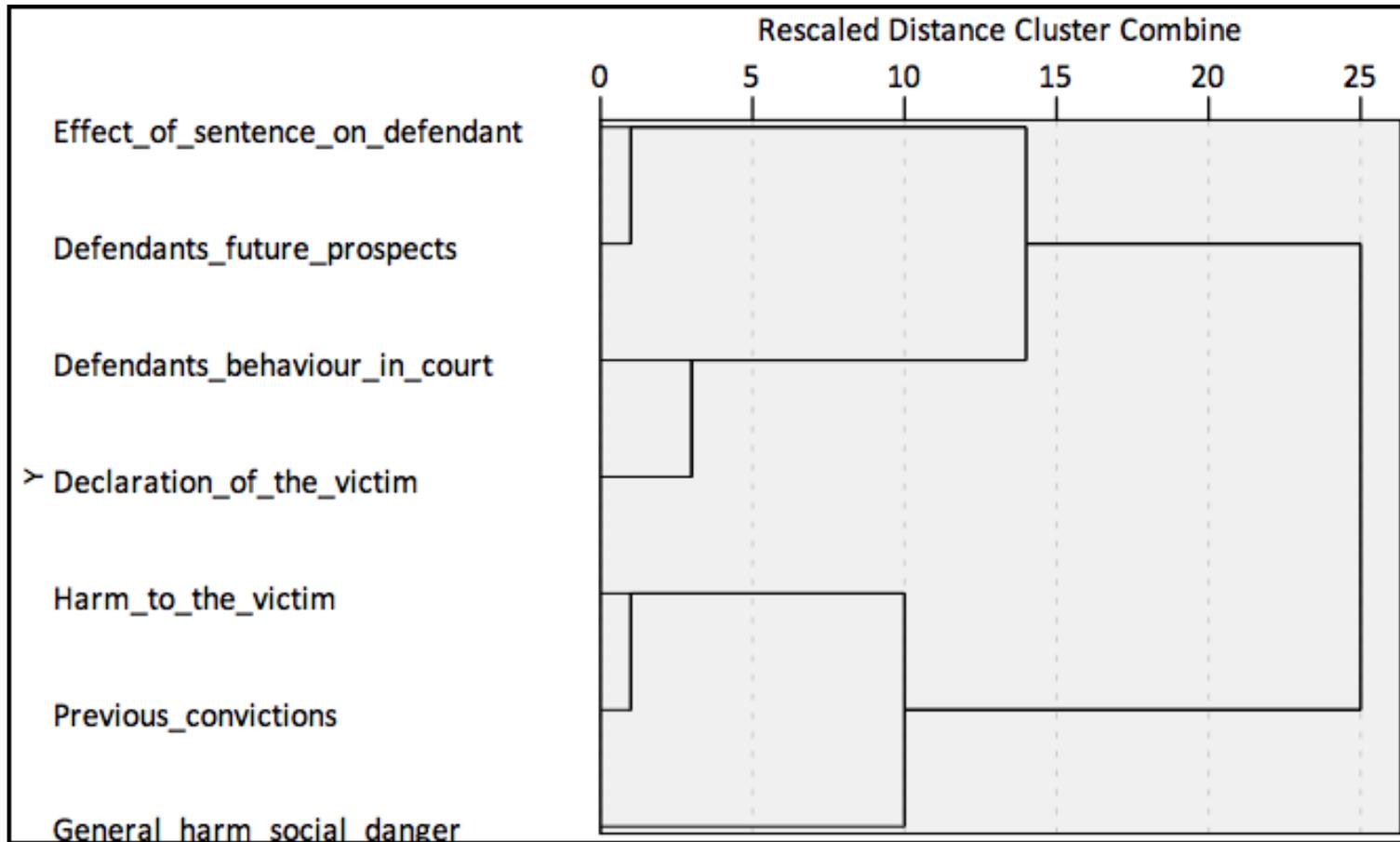


TABLE 14: CORRELATIONS BETWEEN EXPERIENCE/EXPOSURE TO TRAINING AND ATTITUDES TOWARDS ADVICE-SEEKING

	Judicial experience	Criminal experience	Recency of training	Amount of continuous training
No advice welcome	more likely (U=3,500 z=3.110 p .002)	more likely (U=3.011 z=2.325 p .020)	less likely (U=687 z=-2.454 p .014)	
More senior judge			more likely (U=2,428 z=2.065 p .039)	more likely (U=1,314 z=2.608 p .009)
NIM trainer	less likely (U=2,753 z=-2.634 p .008)	less likely (U=2,402 z=-2.080 p .038)		less likely (U=295 z=-2.223 p .026)
Assigned mentor	less likely (χ^2_1 4.597 p .025 z=-1.4)	less likely (U=1,596 z=-2.189 p .029)		less likely (χ^2_1 =7.787 p .005 z resid -1.8)
Other				less likely (U=16 z=-2.086 p .037)