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# PERSPECTIVE OF SENTENCING GUIDELINES IMPLEMENTATION IN CONTINENTAL LAW SYSTEM

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ABSTRACT

The article examines the positive and negative aspects of the existence of sentencing guidelines in different legal systems, as well as the reasons and purpose of implementing the relevant guidelines. Analyzed aspects that lead to the conclusion of feasibility or unreasonableness implementation of sentencing guidelines in continental law system and it is proved the absence of obstacles for the implementation of the said sentencing guidelines in such a legal system for.

**Key words**: sentencing, sentencing guidelines, scale of punishment, inconsistency in punishment, equality of citizens before the law and the courts.

Sentencing offender with a certain type and scale of punishment is one of the most difficult issues, which characterize the contemporary conditions of criminal law science`s and legislation`s development. Despite the remoteness of this law institute, today we may state for sure that none of states in the world could achieve the ideal in its aspiration in providing the proper state reaction on cases of criminal law violations. Moreover, it is obvious that the law institute of sentencing is dynamic, constantly changing in accordance to the ruling in the certain period law ideology (philosophy) and in accordance to the aim of punishment, which prevail in certain society. Such circumstances make the achievement of mentioned aim more difficult.

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The results of current scientific papers analysis allow to confirm the absence of only generally recognized approach of providing the general principles of sentencing. Thus, for the states of Anglo-Saxon law system (such as USA, Great Britain, Australia) it is typical to provide more or less detailed sentencing guidelines, which are taking into account by the courts while sentencing and which co-exist with the general provision, which regulate principles of sentencing, stipulated by the criminal codes. In return such approach is not typical for the states with continental law systems, in which, while sentencing, the court is guided by the sanctions of the criminal code article, which determines the lower and upper, or lower and upper limits of punishment. In general we may consider that each of such approaches has its advantages and disadvantages: thus, contained Anglo-Saxon approach largely eliminates the problem of inconsistency in sentencing, but in return the existence of such approach prerequisites inappropriate individualization of punishment; in turn the approach of continental law system is characterized by the inconsistency in sentencing, while its advantage is that its existence prerequisites appropriate individualization of punishment.

Today, discovering the stages of sentencing guidelines implementation in certain states we may clearly deduce the ruling motives of such implementation and to reveal its influence on the law system, how it was perceived by the judges, which were its practical advantages and disadvantages. For example, the first formal guideline judgment in Australia was issued by the New South Wales Court of Criminal Appeals in 1998. Herewith, in the context of such sentencing guidelines the Chief Justice of New South Wales (NSW) advocated for the use of such judgments and stated that: "Sentencing guidelines as promulgated by the NSW Court of Criminal Appeal are not binding in a formal sense. They are not precedents that must be followed. They represent a relevant indicator for the sentencing judge. They are not intended to be applied to every case as if they were binding rules. The sentencing judge retains his or her discretion both within the guidelines as expressed, but also the discretion to depart from them if the particular circumstances of the case justify such departure"[1].

[1] Sentencing Guidelines: Australia – https://www.loc.gov/law/help/sentencing- guidelines/australia.php.

The issue of the sentencing guidelines conception implementation has transboundary nature, because both in Europe, Northern America, Australia publications, which deals with the different scientific problems of sentencing are overflowing with argumentation about expediency of certain clarification's existence, which could provide certainty or on the contrary expansion of judges discretion in the question of sentencing. If above we mentioned the scientific position of understanding the nature of sentencing guidelines, namely they are not binding for judges, we may note that in some states, such as USA and Great Britain the analysis of such questions is made by official authorities, for example, Supreme Court of the United States of America and the parliament of Great Britain. Thus, the analyzed question was the subject of discussion Supreme Court of the USA, which in case Blakely v. Washington dealt with the issue do the sentencing guidelines violate the individual right to review and resolve a person's case by jury. On the applicant`s point of view the sentenced punishment on the basis of sentencing guidelines deprives the jury`s right of resolving his cases, which is provided by the Constitution of the USA. Upon review of this case, in January of 2005 the Supreme Court of the USA returned the judge discretion to the federal judges, noting that federal sentencing guidelines could be taken into account while they are not binding[2].

Thereby the key point, which accompanies the development and implementation of sentencing guidelines is the correlation of such conception with the limits of judge`s discretion.

The issue of the limits of judge`s discretion cause sufficient scientific attention especially when it concerns the sphere of sentencing. Herewith, relevant issues are the subject of scientific interest in different states, on the example of which we may track the success or failure of an approach (namely enhancement or limitation of such limits). On the different stages of state`s development the certain question raises with particular acuteness, when it becomes obvious that the change of approaches which are used to provide a reaction on the cases of criminal law violations is sufficiently necessary. Thus, dealing with the corresponding aspects on the example of

[2] Blakely v. Washington/ - http://www.casebriefs.com/blog/law/criminal-procedure/criminal-procedure-keyed-to-israel/sentencing-procedures/blakely-v-washington/2/.

the USA, M. Crow singles out such arguments for clarified or on the contrary not clarified limits of punishment, which are provided by law. The uncertainty of punishment is the precondition of disparity in sentencing which may cause to the discrimination and unjust law system. In return, as an objection to the above statement it is used a thesis that uncertain sanctions, on the contrary, prerequisite objective and adequate sentencing which considers all sufficient case circumstances. In other word, the absence of possibility to violate the provided limits may eliminate the actual needs of justice and may lead to the inadequate reaction on the offence[3].

In turn, in some scientific exploration we may face the thesis that the comprehensive legal regulation of the sentencing process is impossible and even harmful. Such thought is based on the opinion that if sentencing would be "overregulated", despite compliance of legality principle in such case, it would make harm for such principles as justice and humanism and the general aim of punishment would hardly be achieved[4]. It is difficult to agree with such a position, because conformity of sentenced punishment with the law provisions doesn't mean that in case of such conformity it would be achieved only the legality principle, because the law itself, providing the certain type and scale of punishment provides also the principles of humanism, justice etc. Besides, it is worth noting that the situation is contrary, namely in case of absence of clear regulation it may cause the violation of the just principle, in particular in cases, if one person for certain offence is sentenced conditionally for seven years custody, but another person in identical circumstances is sentenced for ten years custody. We should emphasize, that the court is not the only subject, who provides the realization of the criminal law principles whereas such principles firstly should be provided be the legislator while determining the certain type and scale of punishment for offenses, determining mitigating and aggravating factors, etc.

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[3] Crow, Matthew S., *Florida's Evolving Sentencing Policy: An Analysis of the Impact of Sentencing Guidelines Transformations* (2005). Electronic Theses, Treatises and Dissertations, p. 10.

[4] Шайхутдинова А.С. Понятие общих начал назначения наказания // Ученые записки Казанского государственного университета, Том 150, кн. 5, 2008. – С. 229 – 236.

Returning to the argumentation for certainty of sentencing we may note that determining the system of punishment and principles of sentencing in Netherlands the researcher of this country focuses on that the absence of obligatory rules of sentencing could lead to the huge disparity. Disparity is named as one of the most sufficient problems, which characterize the current condition of sentencing in Netherlands. The appeal and the Supreme Court of this state, reviewing verdicts may abolish the most egregious cases of unjust sentencing. But neither appeal courts, nor Supreme Court have no possibility to provide complete equality in the activity of the courts of lower levels. Tijs KOOIJMANS noting that different points of view to solve the problem were discussed. These proposals varied from creation of special Sentencing Court to the creation of sentencing databases, sentencing guidelines, but none of such proposal was accepted as viable approach of solving the disparity problem. However, for some special types of offences, for example, drunk driving, social security fraud, taxes fraud, drug offences the disparity is minor, because of existence of special guidelines for prosecutor which provides type and scale of certain punishment, which should be asked by the prosecutor for such delicts[5].

Analyzing the process of sentencing guidelines formation in Florida, USA Matthew S. Crow notes, that this process or idea had its supporters and opponents. However, in view of the successful experiment, the process of sentencing guidelines formation first for sentencing for committing certain crimes, list of which constantly expanded, continued. Its obvious disadvantage was the absence of some philosophy or conception of sentencing guidelines. Thus, it was noted that the prior aim of sentencing is retribution. Rehabilitation and other traditional aims remain as the desired result of criminal justice, but must be considered as the secondary one`s. Herewith as one of the main reasons of absence sentencing guidelines conception (philosophy) were the discussions because of such philosophy, which should be used as the basis for guidelines, that were emotional and

[5] Tijs KOOIJMANS *L'harmonisation des sanctions pénales en Europe*. Netherlands. C. 205 https://halshs.archives-ouvertes.fr/halshs-00419159v2/file/RAPPORTS_NATIONAUX_-_The_Netherlands_-_Tijs_KOOIJMANS.pdf.

for such reasons didn`t let to find consensus in this question. Thus, the formation of certain guidelines was made without any basis philosophy[6].

It is worth noting that an American scientist Savelsberg views sentencing guidelines as a neoclassical strategy designed to reinstate formal rationality in the law, he asserts that the attempt is doomed to failure. Problems associated with the design and implementation of sentencing guidelines leaves them unable to completely abandon substantive rationality. The design of sentencing guidelines makes them unable to achieve formal rationalization. The construction of guidelines occurs in a complex and highly political process. This situation leads to competing interests relying upon compromises in the construction of guidelines. Therefore, instead of recognizing the formally-rational purpose of retribution as the sole objective of sentencing, most guidelines (Floridas among them) include the conflicting goals of retribution, incapacitation, deterrence, and rehabilitation as rationales of sentencing[7].

Agreeing with the statement that the achievement of clear formal rationality in the process of adopting compromise solutions is almost impossible, we should note that such a statement doesn't refute the reasonableness of the idea of sentencing guidelines itself as the way to achieve the formal rationality in the process of sentencing, in which the court decision would meet the legislator`s will of state reaction on the cases of criminal law violations. However in view of reasonableness of given remark of American scientist, we may formulate the hypothesis that the reducing of political factor in consideration and implementation of sentencing guidelines has the straight influence on the achievement of fundamental aim of punishment: the less is the political factor the more is the likelihood of achievement of the formal rationality in sentencing.

In this context it is worth paying attention to the purpose of the approval of the relevant guidelines in Sentencing Act 1991, Victoria, Aus-

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[6] Crow, Matthew S., *Florida's Evolving Sentencing Policy: An Analysis of the Impact of Sentencing Guidelines Transformations* (2005). Electronic Theses, Treatises and Dissertations, P. 13.

[7] Savelsberg, J. J. (1992). *Law that does not fit society: Sentencing guidelines as a neoclassical reaction to the dilemmas of substantivized law*, American Journal of Sociology, 97, 1346-1381.

tralia, which is not limited by only solving the problems of justice, but provides also achievement of other more general aims, such as to promote consistency of approach in the sentencing of offenders, providing for sentences that are intended to deter the offender or other persons from committing offences of the same or a similar character, promoting public understanding of sentencing practices and procedures, to ensure that victims of crime receive adequate compensation and restitution[8].

Certainly, the need of providing the certain guidelines is more evident in states, which legislation determines wide limits of court discretion in the issues of sentencing, which may embody in existence of two or more types of alternative punishment provided for certain offense, absence of clear provisions of the order to consider aggravating and mitigating factors, existence of general unclear provisions, which determine condition of sentencing the more lenient punishment than stipulated by the law, unclear rules, which should be taken into account while sentencing for more than one offence etc. Most clearly the named problem is evident in the cases when nebulosity of one sentencing rule (for example, sentencing the more lenient punishment than stipulated by the law) imposed on nebulosity of the other sentencing rule (for example, sentencing for more than one offence), both of which should be taken into account in one certain court case.

On the example of the current state of sentencing in Ukraine we may confirm the existence of each stated above legislative issues, and ascertain that its existence doesn't let to provide the proper sentencing process, which could meet the aim of punishment.

For example, we may research sentencing for such offence as theft. The analysis of court statistics data in 2014[9] allows determine such percentage of conditional custody for person, who committed such a crime (in brackets noted the data of 2008[10]).

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[8] SentencingAct1991/-http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/LTObject_Store/LTObjSt4.nsf/DDE300B846EED9C7CA257616000A3571/95ED2C503A94034DCA2577610032C1F0/$FILE/91-49a110.pdf.

[9] Official court statistics in Ukraine for 2014 - http://court.gov.ua/sudova_statystyka/lkflghkjlh/.

[10] Official court statistics in Ukraine for 2008 - http://court.gov.ua/sudova_statystyka/ 12013/.

| Article of Criminal Code of Ukraine (Theft) | Amount of sentenced person in 2014 | Amount of persons, which were conditionally sentenced | Percent |
|---|---|---|---|
| p. 1 art. 185 | 13618 (7551) | 2936 (3284) | 22 % (43) |
| p. 2 art. 185 | 12352 (7135) | 6261 (3808) | 50 % (53) |
| p. 3 art. 185 | 12501 (13888) | 7503 (8527) | 60 % (61) |
| p. 4 art. 185 | 43 (178) | 24 (79) | 55 % (44) |
| p. 5 art. 185 | 122 (206) | 19 (94) | 15 % (45) |
| Total | 38636 | 16743 | 43 % |

On the basis of analysis of such indicators we may resume that the offenders, who committed more serious offences are more often conditionally sentenced than the offenders, who committed less serious offences (for example, see comparative analysis of data for p. 3 art. 185 (more serious) and p. 1 art. 185 (less serious).

Besides that, for example we`ll make an analysis of statistic data of sentencing for theft in first half 2015[11], provided by p. 3 art. 185 CC of Ukraine, for which provided a punishment of 3-6 years custody. At the same time, the official data testifies that such punishment was sentenced only in 20 percent cases, namely to 1289 person of 6536, who were sentenced for this offence. The rest 80 percent were conditionally sentenced (63 percent) or they were sentenced by more lenient punishment than provided by law (for example 1-2 years custody) or other more lenient types of punishment etc.

The analysis of given data gives the basis for conclusion that the legislator`s will, who stated in CC that a person, which committed an offense, provided by p. 3 art. 185 has to face a punishment of 3-6 years custody is realized only in each fifth case. Such a factor prerequisites violation of equality principle in terms of sentenced punishment, because such a sufficient withdrawal from the sanction limits makes the criminal law less predicted not only for persons to which it applies but also for judges. Thus,

[11] Official court statistics in Ukraine for I half 2015 - http://court.gov.ua/sudova_statystyka/Sud_statustuka_Zvit_2015/.

the existence of criminal sanctions with determined lower and upper limits should, obviously, guarantee that the prevailing percent of punishment, which are sentenced for certain offense, are in such limits and only in exceptional cases such punishments would be out of them. A similar problem of inconsistency of sentenced punishment is typical for other offenses.

Such signs of criminal justice, which lead to sufficient ignorance of legislator`s will, provided in CC not remain without attention of the legislator. Thus, for example, considerable percent of conditional sentencing of corruption offenders, led to the CC`s amendments, be the means of which such offenders are assigned to the category of offenders, to whom the conditional sentenced cannot be provided. Due to the named amendments the more lenient punishment than stipulated by law for such offenders also cannot be provided. However, on our point of view this approach responding to the shortcomings of judicial practice is fragmentary and only partly solves the problem, which is systematical and typical for other offenses and its reason is not the state of sentencing regulation only of corruption offenses but the general state of sentencing regulation for all offenses. Thereby, such an approach of the analyzed problem overcoming is unacceptable for needs of its system solving, namely for achieving the aim in sentencing the offenders with proper punishment.

In turn, in our opinion, the only way of qualitative improvement of the state of sentencing is implementation, considering the peculiarities of certain law system, of the other countries' experience, where the sentencing guidelines are adopted. Conducted within this article research leads to the conclusion that despite the fact that the implementation of these guidelines was made mostly in countries of Anglo-Saxon law system, it doesn't preclude the possibility, and even more feasibility of its adoption in the countries of continental law system. The priority in this respect, in our point of view, is the question of aim which urges the adoption of sentencing guidelines, namely providing the consistency in sentencing, sentencing the proper type and scale of punishment, the realization of the main aims of punishment, etc. It is obvious that such an aim is typical for any countries, which face the problems of sentencing, independently of its type of law system.

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