УГОЛОВНОЕ ПРАВО, УГОЛОВНО-ИСПОЛНИТЕЛЬНОЕ ПРАВО

УДК 343.241

HOW TO ACHIEVE CONSISTENCY IN SENTENCING: UKRAINIAN POINT OF VIEW

Rasim BABANLY,
PhD in law, deputy chief administrator –
Head of scientific-expert department
of High specialized court of Ukraine
for Civil and Criminal Cases

SUMMARY

The article deals with the issues of inconsistency in sentencing on the example of Ukraine. It is proved that the problem of inconsistent sentencing should be solved by correlated theoretical and practical approaches, which are based on the science of penology. Thus, the usage of scientific methods of analysis of court decisions in the part of sentencing would let to formulate abstract recommendations about the proper mere of punishment, which should be sentenced to an offender in concrete circumstances. This, in turn, would provide narrowing the judicial discretion and overcoming unduly significant differences in intended under the same circumstances, punishment.

Key words: sentencing, punishment, penalties, penology, criminal liability.

АННОТАЦИЯ

В статье рассматриваются вопросы неоднородности наказаний на примере Украины. Доказано, что проблема неодинаковых наказаний должна решаться с помощью соотнесенных теоретических и практических подходов, основанных на науке – пенологии. Использование научных методов анализа судебных решений в части назначения наказания позволило бы сформулировать абстрактные рекомендации о надлежащей мере наказаний, которые должны быть назначены правонарушителю в конкретных обстоятельствах. Это, в свою очередь, обеспечит сужение судебного усмотрения и преодоление неоправданно значительных различий в назначенных при одинаковых обстоятельствах наказаниях.

Ключевые слова: назначение наказания, наказание, пенология, уголовная ответственность.

Formulation of the problem. At the present stage of development of criminal law science unjustifiably less attention is paid to the questions, related to the institute of punishment, especially with the sentencing. Herewith, even superficial analysis of legislative provisions, which should be taken into account by the court in the process of sentencing, gives the ground for assumption of existence of numerous questions, which require scientific analysis. In particular, this assumption is based on the fact that many rules, which are being applied on the stage of sentencing, consist evaluation concepts, are undetermined, and hence their application only depends on judicial discretion. At the same time sufficient role of subjectivism in solving the question of mere of punishment prerequisite different court practice and lack of legal certainty in this area of public relations.

Relevance of the topic. The topicality of solving the problem of inconsistent sentencing can be hardly overemphasized, because inconsistent punishment, which is sentenced for similar offences, is the feature that negatively characterizes law system of certain state. Moreover, the stated question is not less important, if it is considered from the point of view of person, which is sentenced more severe than other person, which was sentenced for crime, committed in similar circumstances. We should also not leave without attention the public interest, which is represented by the attorney, because sentencing, comparing to other, unjustifiably lenient punishment, does not contribute the achievement of the goal of punishment. That is why we should not object the need of searching for theoretical and practical ways of creation the system, which could provide the absence of sufficient difference between the punishments which are sentences for different offender, who committed crimes in similar circumstances, which is the **aim of this article.**

In turn, the analysis of certain aspects which characterize the current state of sentencing, confirmed the assumption that the essential features of judicial discretion, which are caused by the lack of clear criteria that are taken into account in sentencing process, improper determination of correlation of different sentencing components in the Criminal Code of Ukraine, leads to enforcement, which is debatable in terms of criminal justice problems.

The main material. In Ukraine, unlike other states, which for decades are searching for effective methods to overcome the problem of inconsistency in sentencing, neither of such conceptions, which is devoted for such questions, is realized. For example, in Netherlands [1], Wales [2] it is searched for optimal way of implementation of sentencing guidelines, in some states, for example in the United States of America [3], Australia [4] the work of its improvement continues in order to find the more effective way to use punishment for deterrence.

Herewith should be noted that Ukrainian criminal procedural legislation provides the mechanism of reviewing court decision because of not similar application of certain Criminal Code article in similar circumstances. According to the p. 1 art. 445 of Criminal Procedural Code of Ukraine the grounds of reviewing of court decisions by the Supreme Court of Ukraine is not similar application by the court of cassation of the same law rule, provided by Criminal Code

Of Ukraine, in similar law relationships, which caused the adoption of different court decisions (except questions of not similar application of sanctions of the Criminal Code articles, release of criminal liability or punishment). Thus, the questions of application of sanctions of the Criminal Code articles and sentencing are the exceptions from stated mechanism and that's why the difference of court practice in such issues does not prerequisite review of court decisions in extraordinary order in the Supreme Court of Ukraine.

Motives of providing such an exception are quite obvious, because if application of the material law rule mostly depends on interpretation, which is made in the process of enforcement, which may be not similar, and such a difference, in turn is a lack of law system because it violates the principle of legal certainty, the application of sanction, sentencing mostly depend on court discretion and not on law interpretation. Thus, the key aim of existence of analyzed legal basis is the providence of similar law evaluation, because its difference means that one of its options in not correct, and therefore it does not meet the law requirements. In return, taking into account that the articles of Criminal Code of Ukraine provide sanctions with alternative types of punishments, each of different punishments provided by the courts in similar circumstances, may meet the law requirements.

But, herewith we face the question: the similar application of punishment is an exception only from the existed mechanism of review of court decisions by the Supreme Court of Ukraine, or solving the named questions is not referred to the obligations of the legal system.

The negative reply on such a question will obviously eliminate the value of the law influence of punishment on the subjects of social relations, to whom it was applied, reducing this value actually to «zero». In our point of view such an approach is unacceptable because of such reasons. For example, one of the most difficult questions in application of Criminal Code of Ukraine is distinguishing homicide from serious bodily harm that caused the death. Let's consider the situation in terms of application of these rules in accordance with the provisions of Art. 445 CPC, the appropriate question is considered by the Supreme Court of Ukraine. Conventionally, the court of cassation evaluated an offence as homicide, but a lawyer insists that an offender committed serious bodily harm that caused the death and applies with this issue to the Supreme Court of Ukraine. Let's suppose that the Supreme Court accepts the arguments of a lawyer, cancels a judgment in terms of qualification for Part. 1 Art. 115 CC (as a homicide) and sends the case for a new trial to the court of cassation. Thus, according to the sentence, which was reviewed, the person under Part. 1, Art. 115 of the Criminal Code was sentenced with the minimum possible sentence – seven years imprisonment. The same penalty, let's suppose, was sentenced to an offender after review of decision and after a change of an offence evaluation to serious bodily harm that caused the death. It is possible, because sanction of an p. 2 art. 121 CC of Ukraine provides imprisonment from 7 to 10 years. Thus, the results of review caused only the change of law evaluation of an offence from homicide to serious bodily harm that caused the death.

However, in our point of view, not less important and maybe even more important is the question what kind of punishment was provided for a person, but not the question for what article (part of article) of Criminal Code the person is condemned for committed crime. This issue is connected with the issue of fairness of punishment if it would be compared with other ones. To justify the said thesis consider it appropriate to simulate an example. A person committed a murder because of her sudden intent of personal animosity grounds while intoxicated.

As a result of the proceedings at first instance actions of such a person qualified under Part. 1, Art. 115 of the Criminal Code and caused to imprisonment for 7 years. Our analysis of judicial practice leads to the conclusion of the high prevalence of these cases. The relevant sentence upheld by the courts of appeal and cassation instances after seeing it.

In turn, in another case of murder, in similar circumstances in the legal sense, identical legal characteristics, similar mitigating and aggravating circumstances a person was sentenced to imprisonment for 14 years. This sentence, like the previous one, was upheld by the courts of appeal and cassation instances. In such circumstances given the above legal provisions, enshrined in Art. 445 CCP, there are no grounds for review of relevant cases due to uneven enforcement if the Supreme Court of Ukraine. Thus, in the options of formally right and similarly evaluated offences of each person, none of them may raise the question of not similar state reaction on committed crimes, which (reaction) in your opinion, may be a prerequisite for the conclusion of disparity, and in some sense of unfair state relation to a person.

Given the above, we believe that providing of similar sentencing, as the function of justice may be given to the court of cassation. Thus, according to our point of view the court of cassation, due to the aim of creation of mechanism of providing similar sentencing, should be given a power of extraordinary review of verdicts in part of sentenced punishment from the grounds of its difference comparing with the punishments, sentenced in similar circumstances.

Herewith, in the considered context it is worth noting that the term "similar (different) punishment" should not been interpreted narrowly, because despite their legal similarities, it is obvious that totally identical criminal cases do not exist. Any crime, a person, who committed such a crime, has their own features which distinguish them among other similar crimes. That's why the main aim of proposed mechanism should be overcoming of significant «glaring» differences, which are caused by subjectivism or by inappropriate judge attention to the question of sentencing.

The bullet point of such an idea is based on a thought that, for example, with the existence of similar for their circumstances offences, such an offences may have some differences, which prerequisite the difference in sentencing which may be evaluated in 1-2 years custody, if the provided punishment is from 5 to 10 years custody. However, if such a difference reaches 5 years, with all confidence we may make an assumption that such a difference is not conditioned by objective circumstances and, in our point of view, would not have a logical explanation. The same situation would take place in case, when, for example, the sanction of the article of Special Part of Criminal Code of Ukraine (or criminal code of any other country) provides four alternative types of punishment: fine, community service, corrective labor and imprisonment and one person in sentenced for the minimum amount of fine, but the other person – for maximum size of imprisonment in the circumstances of offence. It also should be taken into account that a person may be sentenced by too lenient and by unreasonably severe punishment. That's why the right to initiate the analyzed type of review of court decision should be given to the both sides of criminal procedure.

Realization of such a mechanism would provide review not only of the type and size of punishment but all of the rules, which should be applied in the process of sentencing. It concerns also the rules, which regulate the mitigating and aggravating circumstances as far as the rules, which regulate sentencing for attempted crime, more lenient punishment, than provided by law, sentencing for multiple offenses.

It should be noted that creation of such a mechanism would provide at least two positive consequences: firstly, fair determination of the type of state coercion to the offender comparatively with similar offenders, and, secondly, the

quality change of state of sentencing, because the decisions, which would be adopted as the result of such a review will become a quite clear guide for the judges from lower courts in the process of sentencing and application of named above elements of sentencing.

At the same time, it is obvious that the certain mechanism of review of sentenced punishment and moreover of their abstract analysis should be based on significant scientific basis. The success of named instrument depends on the theoretical achievements in the sphere of criminal law influence, including the choice of concrete mere of liability or punishment, in other words the theory of punishment. For today we may affirm that certain aspects of theoretical principles of punishment are the objective for general theory of law, criminal law, criminology, penitentiary law.

We believe that such state of law science doesn't allow in proper way to realize the theoretical potential of doctrine of criminal punishment. In our point of view, all of named questions should be considered by one certain branch of science. The list of such issues should, in our opinion, contain:

• the creation of conception, which should become the basis for determination of ways of state reaction on the cases of criminal law prohibitions violation;

1) determination of the concept and the aim of punishment. Determination of the priority of each aim dependently on the type of offense;

2) determination of the types of punishment, which could be sentenced for the violation of criminal law prohibitions;

3) determination of criteria, dependently to which the types and size of punishment in criminal law are establishing. Development of specific types and amounts of penalties for certain offenses;

4) determination of mitigating and aggravating factors;

5) determination of correlation between the institute of sentencing and institute of punishment dismissal;

6) determination of the rules, which should be taken into account in the process of sentencing, specification of these rules to the special displays of offenses;

7) analysis of state of sentencing and creation on the basis of such an analysis the ways of improvement of legislation and the practice of its application;

8) analysis of the influence of punishment on the criminality;

9) creation of the basic principle, which should be taken into account by the court in the process of sentencing for certain offenses;

10) all questions, related with the penalty executions (penitentiary aspect);

11) analysis of the realization of certain conception in the state in short-term (1 year, 2 years), mid-term (5 years) and long-term (10 years) periods;

12) scientific analysis of legislative amendments, connected with different questions of penological policy.

Only in condition of mutual solution study of named questions, in our point of view, the quality change of penological state policy, its constant improvement and scientific validity may be provided.

Given that the basic concept of that science is the concept of «punishment», it should be used to determine the name of science, namely the science of punishment – penology.

We must admit that such a term for today is partly used in Ukrainian law science and got comparatively wide usage in law doctrine of other foreign countries. However, analysis of scientific sources, gives the grounds to affirm that the objective of penology in Ukrainian [5] and in foreign law science [6] is interpreted narrowly, only concerning to the questions, which appear on the stage of execution of penalties, namely through the lens of penitentiary, rarely criminological [7], function of penalty.

In return, in our point of view, only coherent, mutually agreed research of problems, related with the institute of criminal punishment (considering the questions, which are the objective for general theory of law, criminal law, criminology, penitentiary law), will let not only to formulate, but also to provide the realization of single conception, which will gain it's through-implementation in all parts of the institute of punishment, beginning from clarification the nature of punishment, its aim on contemporary stage of law system development, determination of general types of penalties, finishing with the questions, related with punishment execution.

Conclusion. Such an approach, among other, could provide the ties between theory and practice of sentencing. Thus, the usage of scientific methods of analysis of court decisions in the part of sentencing would let to formulate abstract recommendations about the proper mere of punishment, which should be sentenced to an offender in concrete circumstances. This, in turn, would provide narrowing the judicial discretion and overcoming unduly significant differences in intended under the same circumstances, punishment.

Finally it is worth noting that the idea proposed in this article contains only one of the approaches, which could be used for improvement the state of realization of penological policy, but it is obvious that an analysis of present approach of scientific and practical realization of institute of sentencing, allows undeniably assert about its inefficiency. Thus, achieving consistency in sentencing requires implementation of an integrated concept and, in our opinion, is not possible by implementation of some fragmentary ways.

References:

1. Kooijmans T. L'harmonisation des sanctions pénales en Europe. Netherlands. – https://halshs.archives-ouvertes.fr/halshs-00419159v2/file/RAPPORTS_NATIONAUX_-_The_Netherlands_-_Tijs_KOOIJMANS.pdf. – 2009. – P. 205.

2. O'Connell F. Comparative Research into Sentencing Guidelines Mechanisms. – http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2011/justice/6611.pdf. – 2011. – P. 3.

3. Crow M. S. Florida`s Evolving Sentencing Policy: An Analysis of the Impact of Sentencing Guidelines Transformations. – http://diginole.lib.fsu.edu/islandora/object/fsu:181204/datastream/PDF/view/. – 2005.

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

5. Ягунов Д.В. Сучасна пенологія: альтернативний курс. – Одеса: Фенікс. – 176 р.

6. Harm in American Penology: Offenders, Victims, and Their Communities. Front Cover. Todd R. Clear. SUNY Press, Nov 22, 1994 – Social Science – 242 p.

7. Feeley M.M., Simon J. The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications. –http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1717&context=facpubs.