Anastasiia Khylchenko, PhD in Law
National University "Odesa Law Academy", Ukraine

SENTENCING IN UKRAINE: CONCEPTUAL ISSUES

The article investigates the doctrine of criminal law and legislation in the field of the theory of penalties. The author analyzes general principles of sentencing and the nature of the specific rules regarding the problem of judicial discretion. The article considers foreign legislation on ways of formalizing the rules of sentencing. The attention is given to the issue of typical sanctions and the possibility of its establishing in the legislation of Ukraine. The author proposes the idea of optimizing the domestic mechanism of legal regulation on the deviant acts in society as the result of prediction of certain patterns in criminal law.

Keywords: sentencing, judicial discretion, reconciliation agreement, optimization of legal regulation.

More and more criminal law scholars are paying attention to the fact that the core issue of our time is the problem of the quality and effectiveness of criminal law[1]. At the same time, the task of analyzing social conditionality and effectiveness of criminal law becomes acuter due to the need for in-depth knowledge of the processes of criminalization and penalization of society, the laws governing control over criminality, and forecasting the effectiveness of preventive functions of criminal law. All mentioned above results in an urgent need for academic, professional and practical understanding of the laws of criminalization and penalization.

A special contribution to the study of issues regarding the sentencing was made by such scholars as M.I. Bazhanov, Yu.V. Baulin, Ya.M. Brainin, L.L. Kruglikov, S.V. Poznyshev, Yu.A. Ponomarenko, L.A. Prokhorov, V.I. Tkachenko, V.A. Tuliakov, I.Ya. Foinitskyi, M.D. Shargorodskyi, and others. The scientific basis of this research is laid by works of domestic and foreign scientists – T.A. Lesnievski-Kostareva, E.Yu. Polianskyi, V.I. Tiutiugin, and others. Empirical basis of this research are decisions of the highest judicial bodies of Ukraine.

The methodology of this article is based on general and specific methods of cognition: the dialectical method was used to study the nature of common principles and special rules for sentencing; comparative legal method for the analysis of foreign legislation in the field of formalization of penalization; system-structural and functional methods, with which help decisions of higher courts on the issue of punishment were investigated to clarify the content of existing criminal legislation and its improvement; formal-legal method was used to study the norms of the institution of sentencing, as well as a universal way of substantiating the main conclusions of the study.

In general, throughout its development, Ukraine's criminal legislation was characterized by the primacy of the discretionary method of sentencing. Therefore, the formation of legislation on the principles of wide application of judicial discretions is a "genetic" feature for domestic legislation. At the same time, the lack of certainty of criminal rules, the ambiguity of certain terms and concepts, the variability of punishment, the lack of detailed and clear rules in the law, and the criteria for imposing punishment severely impede the law enforcement process. In this connection, for the legislator, it is necessary to develop a legal "optimum" of the correlation between formal and discretionary principles, which promotes the authority of the judicial decision, prevents the abuse of law, and also combats corruption. Moreover, the institution of sentencing in connection with the adoption of the Criminal Code of Ukraine (hereinafter – the CCU) in 2001, its amendment in a part of a course for formalization of penalization, the entry into force of the Criminal Procedure Code of Ukraine (hereinafter – the CPCU) in 2012, received a new normative consolidation, which challenges the doctrine of criminal law to solve new problems.

When in 2001 the Criminal Code of Ukraine reinforced the general principles of the sentencing system (part 1 of Article 65 of the CCU) it became an achievement of the criminal law, since those principles are now mandatory for courts in each specific case of sentencing a person guilty of committing a crime and determine the grounds for judicial discretion. In addition, on April 15, 2008, the Law of Ukraine No. 270-VI

[1] Тацій, В.Я., Борисов, В.І., Тютюгін, В.І. (2010). Актуальні проблеми сучасного розвитку національного права України. *Право України*, 5.

"On Amending the Criminal and Criminal Procedural Codes of Ukraine Concerning the Humanization of Criminal Responsibility" was adopted, which significantly specified the rules for sentencing. In this regard, it can be noted that the humanization of legislation, carried out by the said Law, regarding the purpose of sentencing was, firstly, manifested with respect to the procedure of sentencing and the rules for selecting a more severe punishment within the sanction of the article (Part 2, Article 65 of the CCU).

Thus, Part 2 of Art. 65 of the CCU was amended by a proposal according to which a more severe type of punishment is only appointed if the less severe punishment is insufficient to correct a person and prevent them from new crimes. In this regard, V.I. Tiutiugin notes that there are reasons to believe that the amendment of Part 2 of Art. 65 of the CCU, not only meets the principles of expediency and fairness of punishment, which should be followed by judicial practice, but also strengthens the importance of the principles formulated in Part 2 of Art. 65 of the CCU as a requirement to appoint only such punishment which is necessary and sufficient for correction of a person which committed a crime and prevent them from new crimes[1].

Secondly, the humanization of legislation is implemented with respect to rules for mitigating punishment. As a result, the legislator fixed cases in which mitigation of punishment is mandatory (Parts 2, 3 of Article 68 and Article 69^{1} of the CCU); the possibility of imposing a milder punishment than prescribed by law is not now limited by the severity of a crime (Article 69 of the CCU); one more circumstance, which mitigates the punishment, was implemented (par.2^{1}, Article 66 of the CCU), etc.

In modern law enforcement conditions, it is necessary to follow the idea of optimizing judicial discretion in sentencing – finding a reasonable optimum of the ratio between formal and discretionary origins under certain restrictions (concretization of the criminal law, clear differentiation of criminal responsibility and sometimes integration of the latter, formalization of the rules of sentencing, etc.). In this regard, the problem of disagreement in determining the minimum and maximum limits of sanctions remains urgent for domestic criminal legislation. It seems that legal construction of sanctions of the Special Part of the CCU should be directly linked with the categorization of crimes depending on the severity.

However, such correlation in the Criminal Code of Ukraine is not fully observed. O. Mikhal writes that the size of a sanction should reflect the true nature and degree of public danger of a crime. The upper and lower limit of a sanction in an article must correspond only to one category of crime. “Another order violates the logical rule of the construction of classification and, above all, the rule on the mutual exclusion of members of the classification”[2]. We support a differentiated approach and believe that for crimes of medium gravity, when the maximum term of punishment does not exceed 5 years, the gap between the minimum and maximum limits of punishment should not exceed 3 years, and for grave and especially serious crimes, when the maximum term of punishment reaches 10 and more years, the range of sanctions should be 5 years. Such a construction of sanctions will narrow the judicial discretion, facilitate the implementation of justice, predetermine a greater unity of judicial practice and thus increase the authority of law and court.

In order to optimize domestic theory and practice of penalization, it is advisable to study legislation of foreign countries. An analysis of such legislation, conducted by T.A. Lesnievski-Kostareva, made it possible to identify a number of countries for which “a sufficiently detailed differentiation of criminal responsibility and punishment in a criminal law and clear instructions for a judge in the sphere of individualizing punishment are historically inherent”[3]. Such countries, in her opinion, are the United States, France, Italy, Spain, and Brazil. E.Yu. Polianskyi, investigating the criminal legislation of the United States, notes that the difference between the systems of punishment in Ukraine and the United States primarily lies in the applied methods of sentencing. The domestic doctrine of punishment applies a method based on the use of judicial discretion, the federal system of the same punishment in the US is built on the principles of strict formalization of criminal sanctions[4]. Other countries apply a less formalized system

---

[1] Тютюгін, В.І. (2009). Питання гуманізації кримінальної відповідальності та їх реалізація в деяких законодавчих новелах. *Проблеми боротьби зі злочинністю*, 100, 315.

[2] Михаль, О. (2004). Судейское усмотрение при назначении наказания. *Уголовное право*, 4, 37.

[3] Лесниевски-Костарева Т. А. (2000). *Дифференциация уголовной ответственности. Теория и законодательная практика*. Москва: Норма, 155.

[4] Полянський, Є.Ю. (2007). Призначення покарання за кримінальним правом США: *Автореферат диссертации на получение научной степени кандидата юридических наук*. Одеса: Одеська національна юридична академія, 12.

of punishment, which, however, deserves attention. Thus, the Spanish criminal law provides for a multi-stage graded punishment system with the ranking of penal sanctions (the model for the application of standard sanctions) and clear, even to some extent, formalized rules for their appointment.

Foreign practice shows the possible degree of formalization of sentencing by applying "arithmetic" rules on the graded increase or decrease in the size of punishment, depending on the circumstances of the case. Such clearly defined rules are possible by fixing the scale of standard sanctions. The concept of a standard sanction is a relatively new issue in the domestic science of criminal law. There are two approaches to understanding it. Within the framework of the first approach, the standard sanction is implemented in the norm of the General Part of the CCU. In this case, the standard sanction defines strict limits of responsibility and does not allow to go beyond it in specific cases, i.e. sanctions for specific types of crimes should be within the framework of a standard sanction.

According to M.G. Kadnikov, the standard sanction is a formalized criterion for classification of crimes, expressing in a brief and concentrated form the severity of crimes of a certain type through the type and severity of punishment[1]. According to the second approach, the standard sanction represents the middle part of the sanction for a specific crime. Thus, N.A.Orlovskaya writes that the first approach understands sanction as a categorical phenomenon, i.e. it clearly fixes the marginal limits of the most severe form of abasic punishment, which corresponds to the nature and degree of public danger of that group of crimes; by the second approach of perception the standard sanction is brought closer to one aspect of the concept of the median sanction[2].

The idea to introduce standard sanctions into the Criminal Code of Ukraine is very attractive and, what is more important, corresponds to the needs of the day, connected with the need for more detailed differentiation of criminal responsibility, formalization of the rules for sentencing and limiting judicial discretion. For us, the idea of a multi-track system of standard sanctions by grading the types of punishment for degrees seems to be more acceptable. However, such an idea requires a fundamental scientific approbation, a rethinking of all, without exception, institutions of criminal justice. However, if the work on the introduction of standard sanctions is implemented, it will be possible to state that the criminal law of Ukraine has become a stage of a new conceptual development, having overcome the crisis of criminal law regulation.

Regarding the optimization of the general principles of sentencing provided for in Art. 65 of the CCU, it seems necessary to talk about the specification of such regulations, taking into account modern changes in the theory of criminal law, and the practice of its application. In this regard, A.V. Kozachenko notes that the prospects for the development of criminal law are related to the spread of the cultural-anthropological concept, which, in the context of the application of criminal law measures, requires concentration on the rights and freedoms of all participants, regardless their criminal law status (either an offender, a victim or third parties) and a personal interest in the context of the criminal law enforcement[3]. Therefore, we believe that the general origins of sentencing, along with the identity of a perpetrator, should contain an indication the mandatory recording of an identity of a victim.

The new Criminal Procedure Code of Ukraine introduced the institute of deals in criminal law. The Law of Ukraine No. 4652-VI “On Amendments to Certain Legislative Acts in Connection with the Adoption of the Criminal Procedural Code of Ukraine” amended Article 65 of the CCU with the following content: “In case of approval of a reconciliation agreement or a plea of guilt the court appoints a punishment agreed upon by the parties to the agreement”. In our opinion, the introduction of reconciliation agreements, in particular in the aspect of penalization practices, shifts the accentuation of criminal justice – from the punitive to the restorative compensation. As V. Tulyakov points out, when the state is not able to react to permanent violations of the law, it is not the law that works, but compensation mechanisms. Thus, in the theory of criminal law, appear references to criminal-legal deals[4].

[1] Кадников, Н.Г. (2005). *Категории преступлений и проблемы уголовной ответственности: Учебное пособие*. Москва: Книжный мир, 32-33.

[2] Орловская Н.А. (2010). *Уголовно-правовые санкции: проблемы определения, классификации и функционального анализа: монография*. Одесса: Юридична література, 212.

[3] Козаченко О.В. (2012). Кримінально-правові заходи в Україні: культуро-антропологічна концепція: *Автореферат диссертации на получение научной степени кандидата юридических наук*. Одеса: Національний Університет «Одеська юридична академія», 21.

[4] Туляков В.О. (2010). Кримінальне право у дискурсі змін: від доктрин до реалізації. *Актуальні проблеми держави і права,* 54, 27.

In this regard, the provision of Part 5 of Art. 65 of the CCU will serve to develop the institute of "consent" of the victim in criminal law, which is genetically related to the institute of reconciliation as removal of "victims' claims to the perpetrator of the crime".

According to the plan of the legislator, parties' right to agree on punishment should restrict the discretionary powers of judges, but does not put the penalization process itself within certain limits. There was a situation when law enforcement discretion changed its subject. Although private interest, being the predominant dominant in the concept of reconciliation agreements, in the end, did not eliminate discretionary powers of judges in choosing a measure of criminal law influence. The rule of part 5 of Art. 65 of the CCU is not an exception to the general principles of the appointment of punishment, it's within their framework, the placement of such a rule in Art. 65 of the CCU does not correspond to the content of the textual formulation of Part 5 of this article.

Thus, according to explanations provided in the information letter of the Supreme Specialized Court of Ukraine for the consideration of civil and criminal cases № 223-1679/0/4-12 of November 15, 2012 "On Some Issues of Implementation of Criminal Proceedings Based on Agreements", a court is obliged to appoint the punishment agreed upon by the parties only after checking an agreement for compliance with the current legislation, absence of certain grounds for refusal (e.g., par. 1-6, Part 7 of Article 474 of the CPCU), and making sure that a deal can be approved, etc. From this interpretation, it follows that if a punishment agreed by parties does not comply with the requirements of the law (first of all, it should be a question of the general principles of the appointment of punishment provided for by Part 1 of Art. 65 of the CCU), so a court does not appoint the type and measure of punishment specified in the reconciliation agreement. In this regard, it becomes clear that the rule on the mandatory nature of sentencing, specified in the reconciliation agreement, is refuted by the powers of judges to carry out a legal analysis of the consensual decision and the possibility to disapprove the agreement in the specified cases. It seems more rational to amend the law enforcement process with a specific legislative prescription that corresponds to the idea about the presumption of legal interest in penalization practice and legislative techniques.

It should be noted, that more and more scientists have recently pointed to the need to establish criteria for sentencing. Indeed, when appointing punishment with the aim of lawful implementation of discretion, the judge needs clear practical "instructions". Thus, according to R.M. Lastochkina, the court must have certain measures, evaluation criteria, in order to take into account those circumstances that really matter for the choice of an individually effective criminal legal effect[1]. Speaking about the criteria through the prism of general principles of sentencing, it would be useful to fix the criteria for assessing the severity of a crime, the criteria for assessing the identity of a perpetrator, as well as criteria for assessing the identity of a victim. First, the severity of a crime committed and the identity of a perpetrator, along with the circumstances that mitigate and aggravate the punishment, constitute an independent institution of criminal law; specific practical explanations as to what exactly needs to be taken into account under the gravity of the crime committed and the perpetrator's personality contained in the Supreme Court's Plenum Decision № 7 from October 24, 2003 "On the practice of appointing a criminal punishment by the courts". Thus, the legislative regulation of the above-proposed criteria appears to facilitate maximum individualization of criminal punishment and streamlining the law enforcement process.

When a court assigns a punishment, determining its type and size, it is guided first of all by the general principles of the sentencing. However, the theory of criminal law and the criminal legislation know the notion of special rules for sentencing, which provide for the existence of special circumstances affecting the appointment of a fair measure of the criminal law. An important feature of special norms is their manufacturability. They do not simply indicate the circumstances that must be taken into account by the court when imposing punishment, but determine the specific mechanism for their recording. The coefficient of concentration of the "formal charge", "degree" of limitation of the discretion within each special rule is different. The special rules of sentencing include, in particular, the rules for the imposition of a punishment for an uncompleted crime (Parts 2, 3, Article 68 of the CCU); the rules for imposing a punishment for a crime in complicity (Part 4, Article 68 of the CCU); the appointment of a more lenient punishment than provided by law (Article 69 of the CCU); the imposition of punishment in the presence of circumstances that mitigate punishment (Article 69[1] of the CCU); etc. Some scholars say that Article 69 of the CCU on the appointment of a more lenient punishment than prescribed by law, as well as Part 4 of Article 68

[1] Ласточкина, Р.М. (1980). О критериях индивидуализации наказания как гарантии интересов личности и правосудия. *Проблемы охраны прав граждан в сфере борьбы с преступностью*, 123.

of the CCU on the imposition of punishment in complicity, can be attributed to special rules only formally, as in these articles there are no clear limits to mitigation or toughening of punishment in appropriate situations[1]. This predetermines the need to improve the legislative prescriptions.

Summing up all mentioned above, after clarifying the modern vector of the development of criminal law doctrine in the field of the penalization theory and predicting certain regularities in the development of criminal law, it is necessary to adhere to the idea of optimizing the domestic mechanism of criminal regulation for deviant manifestations in society.

We suggested that such optimization in the sphere of sentencing should include the following measures: 1) modification of the algorithm of the construction of relatively-defined sanctions by narrowing their limits with reference to a specific category of crimes; 2) normative improvement of the prescriptions of Part 1 of Article 65 of the CCU in the aspect of more precise regulation of the grounds for judicial discretion; 3) fixation of the criteria for imposing punishment; 4) introduction of special rules for the imposition of punishment and the adjustment of existing rules.

References:

1. Tatsiy, V.Ya., Borisov, V.I., Tyutyuhin, V.I. (2010). Aktual'ni problemi suchasnogo rozvytku natsional'nogo prava Ukrayiny [Actual problems of modern development of the national law of Ukraine]. *Pravo Ukrayiny* [Law of Ukraine], 9, 4-15 [in Ukrainian].
2. Tyutyuhin, V.I (2009). Pytannya humanizatsiyi kryminal'noyi vidpovidal'nosti ta yikh realizatsiya v deyakykh zakonodavchykh novelakh [Issues of humanization of criminal responsibility and their implementation in some legislative acts. *Problemy borot'by zi zlochynnistyu* [Problems of combating crime], 100, 313-323 [in Ukrainian].
3. Mihal', O. (2004). Sudejskoe usmotrenie pri naznachenii nakazanija [Judicial discretion at sentencing process] *Ugolovnoe parvo* [Criminal Law], 4, 36-39 [in Russian].
4. Lesnievski-Kostareva, T.A. (2000). D*ifferenciacija ugolovnoj otvetstvennosti. Teorija i zakonodatel'naja praktika* [Differentiation of criminal responsibility. Theory and legislative practice]. Moscow: Norma. [in Russian].
5. Polyans'kyy, Ye.Yu. (2007). Pryznachennya pokarannya za kryminal'nym pravom SShA: *Avtoreferat dyseratatsyy na zdobuttya naukovoho stupenya kandydata yurydichnih nauk* [Sentencing process under the criminal legislation of the USA: The dissertation author's abstract for a PhD degree in legal science]. Odesa: Odes'ka natsional'na yurydychna akademiya [Odesa National Law Academy]. [in Ukrainian].
6. Kadnikov, N.G. (2005). *Kategorii prestuplenij i problemy ugolovnoj otvetstvennosti* [Categories of crimes and problems of criminal responsibility]. Moscow: Knizhnyj mir. [in Russian].
7. Orlovskaja, N.A. (2010). *Ugolovno-pravovye sankcii: problemy opredelenija, klassifikacii i funkcional'nogo analiza* [Criminal sanctions. The problems of definition, classification and functional analysis]. Odessa: Juridichna literatura. [in Russian].
8. Kozachenko, O.V. (2010). Kriminal'no-pravovi zakhodi v Ukraini: kul'turo-antropologichna kontseptsiya: *Avtoreferat dyseratatsyy na zdobuttya naukovoho stupenya kandydata yurydichnih nauk* [Criminal Law measures in Ukraine. Cultural-anthropological concept: The dissertation author's abstract for a PhD degree in legal science]. Odesa: National University Odessa Law Academy [in Ukrainian].
9. Tulyakov, V.O. (2010). Kryminal'ne pravo u dyskursi zmin: vid doktryn do realizatsiyi [Criminal law in the discourse of change: from doctrine to realization]. *Aktual'ni problemy derzhavy i prava* [Actual problems of state and law], 54-60. [in Ukrainian].
10. Lastochkina, R.M. (1980). O kriterijah individualizacii nakazanija kak garantii interesov lichnosti i pravosudija [About the criteria for individualizing punishment as a guarantee of the interests of the individual and justice]. *Problemy ohrany prav grazhdan v sfere bor'by s prestupnost'ju* [Problems of protection of the rights of citizens in the field of combating crime], 122-126 [in Russian].
11. Veselov, E. G. Praktika naznachenija nakazanija pri nalichii v sovershennom dejanii dvuh i bolee special'nyh pravil naznachenija nakazanija [The practice of imposing punishment in the presence in an act of two or more special rules for the imposition of punishment]. *Jurist – Pravoved [Lawyer-Jurist]*. 2008. № 2 (27). , 21 – 24 [in Russian].

[1] Веселов Е. Г. (2008). Практика назначения наказания при наличии в совершенном деянии двух и более специальных правил назначения наказания. *Юристъ – Правоведъ*. 2 (27), 21.