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GENERAL PRINCIPLES OF SENTENCING UNDER THE CRIMINAL CODES OF CENTRAL ASIAN COUNTRIES

Rights and freedoms of a person shall be restricted by the criminal code only in the case and to the extent required for criminal and legal protection of defended values. For these purposes, criminal legislation of Central Asian countries sets a number of tools, among which there are general principles of sentencing. General principles of sentencing are a system of obligatory initial general rules of sentencing that ensure a court identifies appropriate type and term of criminal punishment among possible measures stipulated by a corresponding criminal sanction. Moreover, as of today the system of general rules to determine lawful, fair, and humane punitive measure, required and sufficient to achieve its goals, has not been developed. This article states writers' conclusions and recommendations developed as a result of comparative and legal analysis of criminal legislation of Central Asian countries, which can positively affect law enforcement practice.

Key words: *sentencing, general principles of sentencing, criminal legislation of Central Asian countries.*

Formulation of the problem. Criminal laws of the Central Asian countries were adopted as a result of economic, political changes in 1990's due to the dissolution of the Union of Soviet Socialist Republics based on the Model Criminal Code for the Member States of the Commonwealth of Independent States on 17 February 1996. Adoption of these laws was a constituent part of the process of establishing by each state of their own law system and defining its main features. It should be noted that public, political, economic processes at that time were the reason that in general the methodological basis of these laws did not differ significantly.

Analysis of recent research. Considerable attention was paid to the general principles of the appointment of punishment by M.I. Bazhanov, V.A. Glushkov, T.A. Denisova, A.O. Pinaev, V.V. Poltavets, T.V. Sakharuk, V.I. Tyutyugin, V.L. Chubarev, M.I. Khavronuk, S.S. Yatsenko and others. However, the available

theoretical development of the general principles of the appointment of punishment did not exhaust this problem. Until now, there has been no unity in understanding the essence of the general principles of the appointment of punishment, the definition of their scope and system remains unresolved, there is no unified position on the legal nature of individual criteria for the imposition of punishment, and controversial judgments are made about the impact of these criteria on the individualization of punishment.

The foregoing necessitates the study of the nature and content of the general principles of the appointment of punishment in the case of Central Asian countries and the establishment of limits on the registration of certain criteria in the imposition of punishment.

The purpose of the article is to carry out a comparative analysis of the norms of the criminal law of the countries of Central Asia to determine the general principles of the appointment of punishment, the identification of the shortcomings and advantages of legislation on this issue.

Results. Consequently, as the time showed the issues of reforms in criminal, criminal and procedural legislations became topical in the countries under consideration: the need to reject from all-round regulation of social and economic, public and political life of the society by criminal and legal tools, to reject from the primacy of punitive and repressive methods in the criminal process, prosecutorial bias in legal proceedings and many others. Therefore some Central Asian countries, in particular the Republic of Kazakhstan (2014), the Kyrgyz Republic (2017), have adopted new Criminal Codes which significantly differ from the previous ones. These trends in criminal laws should be accompanied, first and foremost, with proper definition of conceptual frameworks, tools, and institutions of criminal law. Moreover, the adoption of these laws was supposed to influence, first of all, the situation with fair trial on criminal cases.

Criminal and legal statistics of the Republic of Kazakhstan show that year after year number of sentences by first instance courts reviewed by higher courts is not decreased: annually convicts appeal against about 25% of sentences [1]. Thus, criminal statistics show that almost a quarter of defendants for different reasons do not agree with sentences passed on them. Cases specified doubt exercise of defendants' right to fair, lawful, and humane sentence. Almost in all

cases defendants do not agree with the term and type of sentence identified by first instance courts.

As practically proven, one of the reasons for such situations is that courts insufficiently execute general principles of sentencing. Studies of sentencing practice show that the Supreme Court of the Republic of Kazakhstan has, for different reasons, changed about 50% of judicial acts of lower courts (49 judgements) from 100 randomly chosen judgements.It means that sentencing practice of first instance, appeal, and cassation courts allows frequent gross miscarriages of justice in non-observance and/or insufficient regard to sentencing rules. Thus, there is no quite sufficient practical execution of general principles of sentencing stipulated by a number of reasons. From our point of view the main reasons for such situation are a lack of specific and common definition of "general principles of sentencing" and ambiguity of existing fundamental theoretical recommendations. Thereupon, general principles of sentencing as a core categorical framework of the present criminal law shall be studied.

In general, separation of criminal legal category of "general principles of sentencing" is typical for criminal laws of the Soviet and subsequent post-Soviet countries, particularly for the CC of Central Asian countries. Their first forms could be found in Art. 30 of 1924 General Principles of Criminal Legislation of the USSR and Union Republics. They provided courts with some guiding rules required to determine measures of social protection with account of danger level and nature of a perpetrator and perpetrated crime, perpetrator's personality, motive of a crime, and level a crime itself, in the specific location and time, is publically dangerous [2].

At the same time, many people note that the notion under consideration appeared in the Soviet criminal law in 1958. It should be noted that "criminal law till 1958 had not used any definitions of those criteria and rules guiding courts to individualize penalty" [3, p. 73]; or "during the first years of the Soviet criminal law formation, there were almost no definitions of institutions ofgeneral part and at that time they could not exist in principle" [4, p. 14]. I.S. Noi fairly noted that such opinions "did not match the actual situation with legislative definitions of institutions of the General Part of the Soviet criminal law during that period characterized generally by quite high level of sophistication" [5, p. 9]. Despite the fact that during this period classical general principles

were tried to be fully rejected, it should be noted that provisions of the first Soviet criminal laws paved the way forsubsequentcurrent understanding of general principles of sentencing.

M.I. Bazhanov noted (and we agree) on this matter that "if general principles in 1919 Guiding Principles, 1922 CC and even in 1924 General Principles had been defined broadly, 1926 CC of the RSFSR had provided them in such extensive and specific form that in fact they with some editorial elaborations were incorporated into 1958 Principles of Criminal Legislation and existing CC of all Union Republics" [6, p. 25].

Then, 1958 Principles of Criminal Legislation of the USSR and Union Republics acknowledged and secured the notion of "general principles of sentencing" (Art. 32 of the Principles). Alongside, a legislator did not define meaning of the notion, but listed general principles of sentencing, i.e. court obligations to follow sentencing as per corresponding articles, provisions of the Principles and criminal laws of the Union Republics, to take account of public danger of a perpetrated crime, perpetrator's personality and mitigating and aggravating circumstances of a case, governance of socialist legal consciousness. The CC of Central Asian countries contained similar norms [7, 8, 9].

Just during this period, criminal and legal science proposed different definitions of general principles. Thus, I.I. Karpets understood them to be as "a system of rules (recommendations) aimed at maximum full and unbiased assessment of circumstances of a case as part of sentencing" [10, p. 13-25].L.A. Prokhorov deemed that every general rule included in the system of general principles is "a clearly stated in criminal law general rule to determine punitive measures as per actus reus, mens rea and perpetrator's personality" [11, p. 7]. A.P. Chugayev understood general principles as "general and special criteria to weigh liability and penalty against a perpetrated crime" [12, p. 24]. As a whole, general principles of sentencing are defined as "requirements specifying penalty" [13, p. 8], "specific criteria elaborated by law and legal science" [6, p. 23-24; 14, p. 8-9], or "guiding requirements" [15, p. 7].

Moreover, at this development stage the law enforcement practice was guided by the Special Resolution of the Plenum of the Supreme Court of the USSR on Practical Application of General Principles of Sentencing by Courts dated 29 June1979 No. 3 setting forth issues on

substance of the criminal and legal framework considered. For example, general principles of sentencing were deemed as case-by-case requirements for identifying a type and term of penalty based on nature and level of public danger of a perpetrated crime, perpetrator's personality, and mitigating and aggravating circumstances of a case [16].

Currently the theory of criminal law of Central Asian countries does not state conceptual new provisions, and concepts of general principles are based on the Soviet criminal legal developments. For example, Kazakhstani scientists present general principles of sentencing in two directions: broad (fundamental guiding ideas and principles to be followed when determining perpetrator's liability to the society) [17, p. 134] or narrow (requirements as means to execute criminal law principles and binding on courts when sentencing a perpetrator) [18, p. 478-484].

Alongside, it should be noted that the CC of each country at the legislative level approach differently a definition of the system of general principles of sentencing.

Thus, Art. 52 of the CC of the Republic of Kazakhstan sets the system of general rules as follows: a) sentencing as per the CC and exceptional cases of exceeding prescribed limits; b) considering provisions of the General Part of the CC (including mitigating and aggravating circumstances); c) imposing required, sufficient and fair penalty; d) considering nature and level of public danger of a criminal offence; e)considering perpetrator's personality, his/her behavior before and after an offence; f) impact of sentence on correction of a convictand on living conditions of his/her family or dependents [19].

The CC of the Republic of Tajikistan similarly defines the system of general principles of sentencing. In addition, the CC of Tajikistan provides the rules on considering opinions of a victim and law-protected values (Art. 60 of the CC of the Republic of Tajikistan) [20].

From our point of view the system of general principles of sentencing does not need law-protected values as a general principle of sentencing. First of all, all values, legal relations protected by criminal law constitute it since they represent state value and this is seen when drafting each article of a Special Part of CC.

It should be mentioned that opinions of victims as a general principle as per the CC of Tajikistan is a positive example for other countries. If there is a victim in the case (victim of a crime), his/her

situation significantly affects making a fair and unbiased decision by a court. For this case, a legislator uses various phrases: “made amends, settled with a victim, paid for damages”, etc. First of all, opinions of victims show perpetrator’s attitude towards an offence and its consequences. Despite this, nowadays not all the criminal laws of Central Asian countries acknowledge situation of a victim as a criterion to make criminal and legal decisions, it is not uncommon when courts impose penalty in the form of property seizure with no compensation for material damages to a victim.

It should be noted that the Soviet criminal law did not consider opinions, situations of victims since it had no aim of satisfying a victim. It was noted that “the Soviet criminal law proceeded on the basis that penalty was used to solve state issues of correcting and re-educating convicts” [21, p. 102]. Currently values of criminal laws of Central Asian countries have been significantly changed: function of criminal law on protection of national interests is not paramount, and the core value of criminal law is rights and interests of a victim (person, organization, and state). Therefore, victim’s situation in criminal procedure legislation is a criterion to make numerous decisions (e.g.initiation of a criminal case, investigation form, impossibility of plea bargaining with no victim’s consent, impact of full compensationof damages to a victim, etc.).

Thus, impact of victim’s situation on sentencing is beyond question. In this regard, taking into account real and significant impact of a victim on sentencing, as well as to achieve the purpose of punishment - a rectification of justice, the system of general principles of the CC of all Central Asian countries should provide for obligatory consideration of victims’ situations.

Then, general principles of sentencing under the CC of Turkmenistan features more extensive approach to characteristics of perpetrator’s personality, and in our opinion this is very much right. In accordance with Art. 56 of the CC of Turkmenistan a court investigates the reasons a person perpetrated a crime (intent and motives of a crime), opportunities a person has to acquire new skills and values to replace the ones leading to a crime (impact of a penalty on perpetrator’s re-socialization) [22]. Such approach to personality research first of all highlights a function of sentencing on crime

prevention and features of the Turkmen criminal lawwith perpetrator's characteristics as a corner stone of sentencing.

The CC of Uzbekistan quite briefly and clearly defines general principles of sentencing. In accordance with Art. 54 of the CC of Uzbekistan general principles are: a) guilt of a person in a crime; b) sentencing as per articles of the Special Part; c) consideration of the General Part provisions; d) nature and level of public dangerof a crime, motives of a crime; e) nature and extent of damage; f) perpetrator's personality; g) mitigating and aggravating circumstances [23].

As is evident from above, a feature of the CC of Uzbekistan is that a legislator outlines nature and extent of damage when sentencing. From our point of view this rule is not fully appropriate and hardly relevant to the principle of legality. First of all, when drafting almost all norms under the articles of the Special Part of the CC of Uzbekistan, a criterion of *differentiation of extent of consequences* (damage, loss) of a crime (large and especially large scales, loss) is used. Then corresponding scales of consequences are used as a criterion to differentiate criminal liability. In this regard, consideration of extent of damage by a court within general principles of sentencing is unnecessary. Second of all, a legislator defines nowhere assessment notion of "nature of damage". In its turn, this provides for wide limits of judicial discretion. This notion is not used in other legislative laws of Central Asian countries. Herewith, it should be noted that criminal laws of Central Asian countries are based on the Model Criminal Code for CIS State Members dated 17 February 1996 that also does not provide for fundamental categories of criminal law.

In general, nature as a criminal and legal notion is used when determining a specific element of a crime – public danger. In this regard, it is unclear what nature of damage is and how it affects sentencing. Therefore and to prevent arbitrary sentencing, we deem it expedient to designate clear semantic bounds for each rule or to minimize their use in the system of general principles.

The criminal law of the Kyrgyz Republic is of great interest to the research. If the CC of the Kyrgyz Republic dated 1 October 1997 was little different in defining the system of general principles of sentencing [24], then new 2017 CC of the Kyrgyz Republic stipulates basically new provisions [25]. Thus, Art. 72 of the CC of the Kyrgyz Republic sets the following system of general principles of sentencing:

a) sentencing as per corresponding articles of the Special Part securing liability for a crime and following provisions of the General Part; b) conformity ofpenalty as per degree of guilt and extent of damage with preventive purposes of punishment; c) identification of penalty based on“from less severe to more severe” principle; d) prohibition on consideration of mitigating and aggravating circumstances, if such are included incrime components. As we can see, as per new CC of Kirgizia, when sentencing, an enforcer is not obliged to consider one of the bases of any criminal law – perpetrator’s personality.

Crime is not something abstract, only juridical, lacking vital specific content. It is an act of behavior, publically dangerous action perpetrated by the individual with own personal traits. Sentencing is always based on the idea of fundamental (actual) possibility of (every) a person to consciously and freely choose legitimate behavior forms from numerous forms, among which criminal behavior is only one of potential forms. From this point of view (freedom of behavior), personal traits of a human preferring criminal behavior are special. They reflect his/her specific danger to citizens, society, and state and shall be a subject of judicial assessment when sentencing.

As for importance of consideration of perpetrator’s personality, it is fairly noted that all objective circumstances of a crime and all factors in mechanism of a crime interrelate with a personality [26, p. 14-15]. In this regard, a court shall thoroughly study perpetrator’s personality. In fact, the whole system of general principles serves to define that specific liability a person holds for his/her actions. In such case and with regard to fair and humane law enforcement, lack of it in the system of general principles of sentencing under the CC of Kirgizia is not justified from our point of view.

Conclusions. In general, analyzing criminal legislation of Central Asian countries in regard to the systemof general principles of sentencing, it is noted that there is a number of features and trends described below.

First of all, general principles of sentencing under the CC of Central Asian countries, notwithstanding common methodological basis (1996 Model Criminal Code for CIS countries) and historical and geographic factors, do not provide for similar system of general principles of sentencing. The reasons for such trend, from our point of view, are different determination of criminal liability grounds (for

example, in Kazakhstan the ground is criminal offence differentiated as a misdeed and crime), different system of penalties (for example, in Kirgizia the system of penaltiesis divided into types and categories), and other circumstances. From our point of view, presence of such conceptual differences shall be rationally evaluated since currently the states under consideration deepen economic, social and other relations that leads to the need of comparative research of their criminal laws and unification of criminal and legal norms – bases of criminal liability.

Second of all, as it has been already mentioned, general principles of sentencing in reviewed criminal laws are developed a bit poorly. Every CC, determining them solely by a list of specific rules, "keeps a court within the frames clearly fixed by law, but at the same time provides it with certain freedom to individualize penalty" [27, p. 6], this brings up the questions: are general principles of mandatory or discretionary nature, are the courts obliged to consider them? In this regard, there is a need to study the system of general principles as a core categorical framework of current criminal law of Central Asian countries to increase the quality of adopted judicial acts.

In our turn, we assume that general rules of sentencing implicate a system of obligatory initial general rules of sentencing that ensure a court identifies appropriate type and term of criminal punishment among possible measures stipulated by a corresponding criminal sanction.

In the third place, from our point of view general principles of sentencing provided for in current criminal laws of Central Asian countries have a number of common features: a) they are a start point in court sentencing process in each criminal case; b) they compose the system of general rules formed and certified when developing the institution of punishment; c) they secure identification of appropriate type and term of criminal liability among possible measures stipulated by a corresponding criminal sanction; d) their presence is stipulated by the need to achieve purposes of punishment and tasks of criminal law; e) systems of general principles of sentencing provided for by corresponding articles of the CC of Central Asian countries link the institution of punishment with other institutions of the General Part of the CC.

In general, we think that structures of norms setting general principles of sentencing are consistent. Moreover, there is a number of

shortfalls, elimination of which can significantly increase quality of adopted judicial acts. They include (as already mentioned) a lack of category of "perpetrator's personality" in the system of general principles under the CC of Kirgizia, ambiguity of definition of "nature of damage" under the CC of Uzbekistan, and insufficient consideration of people whose living conditions are affected by potential penal consequences, particularly victims (except for the CC of Tajikistan).

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Денисов С., Суюндикова Н.

ЗАГАЛЬНІ ПРИНЦИПИ ВИНЕСЕННЯ ВИРОКУ ЗГІДНО З КРИМІНАЛЬНИМИ КОДЕКСАМИ КРАЇН ЦЕНТРАЛЬНОЇ АЗІЇ

Права і свободи особистості повинні обмежуватися кримінальним законом лише в тому випадку і в тій мірі, в якій це необхідно для кримінально-правового захисту охоронюваних ними цінностей. З цією метою кримінальне законодавство країн Центральної Азії встановлює низку механізмів, в числі яких загальні засади призначення покарання. Загальні засади призначення покарання являють собою систему обов'язкових вихідних загальних правил призначення покарання, що забезпечують законний вибір судом конкретного виду і розміру кримінального покарання серед можливих заходів, встановлених відповідною санкцією кримінального закону. Разом з тим на сьогодні день система загальних правил визначення законної, справедливої й гуманної міри покарання, необхідної і достатньої для досягнення його цілей, не вироблена. Автори в цій статті викладають рекомендації і висновки, що зроблені внаслідок проведеного порівняльно-правового аналізу кримінального законодавства країн Центральної Азії, які можуть позитивно впливати на правозастосовну практику.

Ключові слова: *призначення покарання, загальні засади призначення покарання, кримінальне законодавство країн Центральної Азії.*

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ОБЩИЕ ПРИНЦИПЫ ВЫНЕСЕНИЯ ПРИГОВОРА СОГЛАСНО УГОЛОВНЫМ КОДЕКСАМ СТРАН ЦЕНТРАЛЬНОЙ АЗИИ

Права и свободы личности должны ограничиваться уголовным законом только в том случае и в той мере, в какой это необходимо для уголовно-правовой защиты охраняемых им ценностей. В этих целях уголовное законодательство стран Центральной Азии устанавливают ряд механизмов, в числе которых общие начала назначения наказания. Общие начала назначения наказания подразумевают собой систему обязательных исходных общих правил назначения наказания, обеспечивающих законный выбор судом конкретного вида и размера уголовного наказания среди возможных мер, установленных соответствующей санкцией уголовного закона. Вместе с тем на сегодняшний день система общих правил определения законной, справедливой и гуманной меры наказания, необходимой и достаточной для достижения его целей, не выработана. Авторы в данной статье излагают выводы и рекомендации, что сделаны вследствие проведенного сравнительно-правового анализа уголовного законодательства стран Центральной Азии, которые могут положительно влиять на правоприменительную практику.

Ключевые слова: *назначение наказания, общие начала назначения наказания, уголовное законодательство стран Центральной Азии.*