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The emergence of sentence guidelines in the Balkans – should Albania follow the same model?

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ABSTRACT[1]

Different countries have established different models and mechanisms to assist the judge in the difficult task of determining the criminal sentence. These approaches are influenced by the criminal justice system model, the role of the judge in criminal proceedings and, not infrequently, by priority issues that are not related to the conceptualization of the criminal justice system: corruption, professionalism of judges, etc.

In countries that have a codified body of criminal law – as a rule, countries that belong to the civil law tradition, the criminal law sets the minimum and maximum ranges of the criminal punishment. Within these limits, it is up to the judge to determine the individualized sentence for each defendant, based on the principles and rules provided for by the criminal law.

Different types of mechanisms have been established in countries that belong to the common law tradition, as the criminal law is not so inflexible in setting the ranges of punishment and the judge has much more discretion in determining the sentence, based on the rules of precedent. In some of these countries, sentencing guidelines are used. These guidelines are usually approved by the judges themselves and are not legally binding, but they gain application as a result of the precedent rule.

In recent years, sentencing guidelines have been approved and applied in two of Albania's neighboring countries: Kosovo and North Macedonia. This paper will address the role of guidelines in criminal proceedings, the models they were based on, the reasons for introducing them, and how they were implemented in Kosovo and North Macedonia. Finally, we will argue whether the introduction of such a mechanism in Albania would be in harmony with the existing framework and beneficial, in general.

Keywords: sentencing guideline, criminal law, criminal punishment, Albania, Kosovo, North Macedonia

1. INTRODUCTION

In one of the most popular scenes in television, in "The Newsroom"[2], journalist Will McAvoy argues that the United States is not the greatest country in the world because, among other things, the United States leads the world only in three categories, one of which is the number of incarcerated citizens per capita. In 2021, Albania had 180 incarcerated persons per 100,000 inhabitants[3], a number that in the European Union is only exceeded by Lithuania with 190[4]. This number is higher than the number of prisoners per capita in all of the countries of the region[5] and 50% higher than the EU average[6].

The issue of prison overcrowding is closely related to the individualization of criminal punishment – its purpose and specific punishment imposed. In choosing between the three systems of determination of the criminal punishment[7], Albania has adopted the determinate system (the type of punishment, its minimum and maximum

[1] The authors would like to extend the deepest gratitude to Dr. Eugena Bisha for peer-editing this paper and for insights on several issues that enabled us to look at our work from a different perspective.

[2] The Newsroom - America is not the greatest country in the world anymore...(Restricted language) - YouTube
[3] Source: *INSTAT (The Albanian Institute of Statistics.)*
[4] Source: *statista.com.*
[5] Source: *EUROSTAT.*
[6] *Ibid,* at 3.
[7] The absolute, determinate and indeterminate systems. In absolute systems, the law determines the type and duration of the sentence for each specific criminal offence, while the court only imposes the sentence as determined by the law. In the determinate system, the law provides for the type, the minimum and the maximum range of punishment for each criminal offence, and the judge establishes the sentence within these limits. Indeterminate systems exist in two forms: 1) absolute indetermination, in which the law does not determine the type of punishment, allowing the court to determine the type and the length of punishment, 2) relative indetermination, in which the law might provide for minimum and maximum ranges and the court imposes an individualized sentence in complete discretion, but the actual sentence that is served is determined by other bodies, different from the court. (Pjeternikaj, 2019.)

range are specified in the law.) This system leaves little discretion to the court in selecting the type of punishment, but a fairly broad discretion in determining the duration of the sentence within the legal limits.

This paper will address one of the mechanisms implemented in several countries, mainly of the common law tradition, that is the adoption of mandatory or discretionary sentencing guidelines to assist the judge in the determination of the criminal sentence. A simple way to describe these guides is that they are similar to quasi-mathematical methods of determining a sentence with a set starting point, to which the aggravating elements are added and the mitigating elements are subtracted.

2. SENTENCING GUIDELINES IN THE US, ENGLAND AND OTHER COUNTRIES

Historically, sentences in the ***United States*** have been established based on determinate or indeterminate sentencing policies. Indeterminate sentencing policies[8] were dominant up until the reforms carried out in the 1970s and 1980s.

In 1984 a sentencing reform was passed, which abolished the indeterminate sentencing system at the federal level[9]. The reform consisted of the following main aspects:

1) The rehabilitative purpose of the sentence was abrogated and it was stated that the purpose of the criminal sentence is punishment, education, deterrence and incapacitation of the perpetrator.
2) The reform consolidated into one hand the power held up to that time by judges and parole boards, and established the US Sentencing Commission, which was tasked with drafting the sentencing guidelines.
3) All criminal convictions at the federal level were made determinate.
4) Appellate review was authorized for all sentences that deviated from the guideline, but also for several other reasons[10].

The discretion that was taken from the judges when Congress made the sentencing guideline binding was returned to them (Bloom, 2005) by the US Supreme Court in United States v. Booker[11]. Firstly, the court stated that the binding guideline violated the rights of the defendants under the 6th Amendment[12], as it gave the judge the power to draw factual conclusions that could increase the sentence above the maximum that could have been possible based on the jury's conclusions. Secondly, the court stated that this violation could have been avoided if the guideline had just been made discretionary or advisory. As a result, the court repealed the provisions that made the guideline binding and allowed the appellate review of sentences that deviated from it. Based on this decision, judges are not obliged to apply the guideline, but they do so on a discretionary basis.

Today, the federal government and several states have determinate sentencing systems, while other states continue to operate with indeterminate sentences. The federal sentencing guideline represents a two-dimensional chart: the offense level on the vertical dimension and the criminal history on the horizontal dimension. This model and several other models of sentencing guidelines are in use throughout the United States, it is widely believed that sentence ranges in the US are narrow and that the guidelines are very restrictive. (Reitz, 2013.) For this reason, the American model has not found popularity in other countries.

In ***Great Britain***, judges enjoyed full discretion in determining criminal punishment, with a few rare exceptions, and were guided only by the standards of appellate review. (Radziniwicz, 1985.) There were very few mandatory minimum sentences in English law. As a rule, the Parliament sets the maximum limits of sentences, while judges exercise their judgment in determining the sentence within these limits. The sentencing appellate system has existed since at least 1907 and the courts of appeal have established several sentencing principles. Starting in 1980, the Chief Justice of the Supreme Court has issued instructing opinions, in which he has suggested the levels from with the calculation of the sentence for certain offenses should begin. (Ashworth, 2005.) At the same time there were several initiatives of the magistrates themselves to draft non-binding sentencing guidelines. In 1998, the Sentencing Advisory Panel was established, which adopted a non-binding guideline that was applied in the majority of cases by appellate courts. In 2003, the Sentencing Guideline Council was established, a body composed of mainly judges that had the power to draft final sentencing guidelines to be applied by the courts. In 2009, the panel and the council were replaced by the Sentencing Council[13] and, thus, sentencing guidelines became an integral part of English criminal law. These guidelines do not contain tables; instead, they are narrative and not so strict. Great Britain has a higher number of prisoners compared to other EU countries, but

[8] Based on this system, the Congress determined the margins of the sentence, within which the court would specify the sentence for the case. Usually, after one-third of the sentence had been served, a parole board would decide whether the defendant might be released on parole.
[9] The Sentencing Reform Act of 1984 (Comprehensive Crime Control Act of 1984; P.L. 98-473), 28 U.S.C. §994(k), 18 U.S.C. §3553(a)92).
[10] This meant that the guideline was binding.
[11] 543 U.S. 220 (2005).
[12] The 6th Amendments provides for the right to jury trial.
[13] Coroners and Justice Act 2009.

that number is about ¼ of the number of prisoners in the United States[14].

In recent years, many other countries of the common law tradition have sought to establish mechanisms similar to US and British sentencing guidelines. These efforts reflect the desire for more consistency in sentencing policies to build a criminal process that is fair to all defendants, but also to predict as accurately as possible what the prison population will be. (Lord Carter, 2007.) The first objective, the differences in sentence type and duration for convicts in similar circumstances is supported by existing scientific research. (Ashworth, 2005.) But, recently, the planning of prison population has also become very important for different countries, for budgeting purposes and for the planification of social measures.

Sentencing guidelines are a tool to ensure greater consistency and, as a result, more predictability. Several countries, like Belgium, New Zealand, Australia, Israel, South Africa, South Korea (Ashworth, Roberts, 2013), have considered the adoption of sentencing guidelines of various types. The objections from the judiciary have been the strongest opposition these guidelines have encountered. Judges believe that the adoption of binding guidelines that create mandatory sentence margins has no benefits and have argued that their discretionary power and the instructions of higher courts are sufficient.

3. SENTENCING GUIDELINES IN KOSOVO

The penal policy in Kosovo has long been subject to criticism from both scholars and local organizations, as well as from international partners that monitor and support the justice system. Even the higher judicial and prosecutorial officials have publicly criticized the judicial case-law as far as it concerns the issue of sentencing policies. (IKD, 2019.)

To address these concerns, the work was begun for the adoption of the Kosovo sentencing guideline[15], based on an initiative of the US Embassy in Pristina. The guideline was approved by the Supreme Court of the Republic of Kosovo on February 15, 2018[16] during a general meeting of the court.

The guideline is based on the Criminal Code[17] and the Criminal Procedure Code of Kosovo[18], as well as on the recommendations of the Council of Europe and interpretations made by the Constitutional Court of Kosovo[19]. The guideline is presented as a method to address the relevant provisions of the Criminal Code and includes a suggested form for gathering evidence that are relevant for sentencing and a draft for final decisions. The guideline provides a list of circumstances that must be used by judges to mitigate and aggravate the sentence; together with the relevant explanation of the weight that these circumstances must have in the final sentence.

In two separate chapters, which constitute its core, the guideline deals in detail with mitigating and aggravating circumstances. In this regard, the guideline is very detailed, as, for each circumstance, it clarifies its meaning, the factors that must be taken into account in its application, as well as the issues that the court must clarify. Parallelly, the guideline explains how mitigating and aggravating circumstances are weighed in the same decision and how duplication of circumstances is avoided, in the sense that non-circumstantial evidence is not used and the same circumstances cannot be taken into account twice within the same decision.

The guideline also contains a chapter on the "Practical implementation of the guideline", which instructs the court on how to act in each case, giving detailed explanations on sentencing. The guideline also deals with the application of alternative sentences, supplementary sentences and the examination of cases on appeal.

Appendix 1 of the guideline contains the table to be used to calculate the sentence. The table sets the standards for each case and the sentence ranges that the court must take into account. In this sense, the Kosovo guideline is a tabular one.

Following the approval of the sentencing guideline, in February 2018, the General Session of the Supreme Court established the Penal Policy Advisory Commission tasked with monitoring the trends in penal policy in Kosovo. During 2018 this commission held 12 roundtables across the country, with the support of the US Embassy.

[14] Source: *statista.com.*
[15] Official name is: Guideline for Sentencing Policy.
[16] The Supreme Court of Kosovo, "Udhëzues për Politikën Ndëshkimore", 2018.
[17] The Criminal Code of the Republic of Kosovo, Kodi nr, 04/L-02, Official Gazette of the Republic of Kosovo Nr.19/13, July 2012, Pristina.
[18] The Criminal Procedure Code of the Republic of Kosovo, Kodi nr. 04/L-123, Official Gazette of the Republic of Kosovo Nr.37/28, December 2021, Pristina.
[19] The guideline cites an opinion of the Constitutional Court of Kosovo, which argues that the lack of coherence in judicial decision-making constitutes violation of the ECHR: "The decision-making of courts of regular jurisdiction in cases that are completely the same and the non-ability and lack of desire to establish a coherent case law seriously violates the principle of legal certainty as one of the basic principles of the rule of law. Therefore, there is no doubt as to the fact that the decision-making in these circumstances constitutes violation of Article 6 of the ECHR and of Article 31 of the Constitution". See also Beian v. Romania, 30658/05, 2007, ECHR.

A study conducted in 2019 (IDK, 2019) on the implementation of the guideline, showed that the judicial system of the Republic of Kosovo has not established a uniform sentencing case-law and that no part of the guideline has been implemented to a satisfactory level. (IDK, 2019.) Further, it was noted that there is no consistency in the way court decisions were justified, but pre-fabricated justifications were used, without care to adapting them to the specifics of each case. (IDK, 2019.)

Thus, despite the adoption of the guideline, in Kosovo the issue of judicial assessment of aggravating and mitigating circumstances, as well as the weighting process in specific cases remain completely unenforceable in practice. In addition, sentences continue to be low (Gjykata Supreme e Kosovës, 2019) and opinions unjustified when it comes to the selection of the type and extent of the sentence.

Despite these findings, in 2020 the Supreme Court adopted a specific guideline on the imposition of fines as criminal punishment[20].

4. THE GUIDELINE - THE CASE OF NORTHERN MACEDONIA

The overall goal of the justice system reform in Macedonia was to build a functional and efficient justice system, based on European standards. In the field of criminal sentences, the changes made to Article 39[21] of the Criminal Code are important to mention. Based on the need for more uniformity and predictability in sentencing (Brashear Tiede, 2012), this article was amended twice in 2014. Initially Article 39 was amended to stipulate that the court determines the sentence in accordance with the Book of Rules for the Determination of Sentence, which is approved by the President of the High Court based also on the prosecutors and lawyers' opinion.

The book was approved on 16.4.2014[22] by the President of the High Court Lidija Nedelkova. Nedelkova explained that the book was a mixture of legal institutes and criteria, on the one hand, and case-law and research, on the other, and constituted an innovative endeavor that should not be rejected, but further developed.

At the end of 2014, the government amended Article 39 again and replaced the book with a law on the determination of sentences. The law was passed on the same day[23]. The law was passed with the aim of overcoming weaknesses in criminal policy and establishing equality in sentencing, but was immediately opposed by scholars and practitioners as a law that interfered with judicial authority and insulted the role of the Supreme Court under the Constitution. (Buzarovska et al, 2016.)

The criteria for determining sentences were provided for strictly and objectively (with vertical and horizontal categories), which created an obligation for judges to impose a certain type and duration of criminal sentence. This manner of determining the sentence was deemed contrary to the previous efforts to select and train professional and independent judges. On the other hand, the determination of the category to which the crime belonged was a simple point calculation that anyone could do. (Bozhinovski, 2017.) It was also argued that this law would pave the way for greater abuse with alternatives to trial (especially plea agreements). Different scholars stated that the parliament had not been sufficiently familiar with the common law point of view, which was supposedly the inspiration for the law, because in these systems the guidelines only have a supplementary function, are not binding and do not replace the judges' free evaluation regarding the type and duration of the sentence.

In 2017, Hristijan Georgievski, a lawyer from Kumanovo, requested the repeal of this law in an application to the Constitutional Court. On 27.11.2017[24], the Constitutional Court repealed the law as contrary to the principles of judicial independence and free evaluation of evidence[25], based on which the judges create their inner conviction which leads to a decision. Given that North Macedonia belongs to the sentencing system with minimum and maximum margins provided for in the law, the determination of the sentence within these margins is a function of the judicial system. (MASA, 2014.) The decision of the Constitutional Court was welcomed by the European Union in its progress report on North Macedonia[26], which also emphasized that this decision was a step towards re-establishing the authority of the judiciary.

[20] The Supreme Court of Kosovo, "Udhëzues Specifik për Caktimin e gjobës si sanksion për veprat penale sipas Kodit penal të Republikës së Kosovës", 2020.
[21] The Criminal Code (1996, 1999, 2002, 2003, 2004, 2005, 2006, 2008, 2009, 2011, 2012, 2013, 2014, 2015, 2017). Official Gazette of the Republic of North Macedonia (37/96, 80/99, 04/02, 43/03, 19/04, 81/05, 60/06, 73/06, 07/08, 139/08, 114/09, 51/11, 135/11, 185/11, 142/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14, 196/15, 226/15, 97/17).
[22] Official Gazette of the Republic of Macedonia (64/14).
[23] Official Gazette of the Republic of Macedonia (199/14).
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[25] Law on courts (2006, 2008, 2010). Official Gazette of the Republic of Macedonia (58/06, 62/06, 35/08, 150/10). Law of the criminal procedure (2010, 2012, 2016). Official Gazette of the Republic of Macedonia (150/10, 100/12, 142/16).
[26] European Commission (2018), commission staff working document "The Former Yugoslav Republic of Macedonia 2018 report".

5. ON THE USEFULNESS OF A SENTENCING GUIDELINE IN ALBANIA

The statistics mentioned at the beginning of this paper on the number of prisoners in Albania should be of concern. Overcrowding in prisons can be attributed directly to the increased criminalization of new offenses, but also to the general increased severity of criminal sanctions[27], either though lowered minimum ranges or increased maximum ranges. (Nikolli, 2015.) These have generally been the ways in which penal policy has been applied in our country. It seems that the penal policy of the post-communist period in Albania has not been a process driven by the analysis of facts, statistics or scientific arguments, but a populist process without a scientific and moral basis. (Nikolli, 2015.)

The lack of a coherent penal policy is also suggested by the simultaneous increase in the crime rate in the country[28]. The increase of sentence limits for various crimes has not led to the desired reduction in crime. On the other hand, the application of non-individualized measures to reduce prison overcrowding, such as year-end amnesties (Nikolli, 2015), has exacerbated the lack of coherence and strategic planning in penal policy. Extensive amnesties have caused problems of other natures[29], obviously unimagined by the drafters and legislators, which is one more argument for the fact that they are not actually part of national penal policy (Nikolli, 2015), but only a reaction to emergency situations or populist needs.

The problems of the Criminal Code in determining the margins of sentences and the principles of individualization of criminal punishment were reiterated in the analytical document on the justice system, which preceded the justice reform[30]. It was stated there that the Criminal Code lacks concrete guidelines that should guide the court or prosecutor in the sentencing process. Further, the analysis reaches the conclusion that the adoption of margins of punishment has not followed a scientific methodology, but rather a momentary tendency to criminalize a certain behavior. In this sense, the analysis also finds problems in the fact that the above pave the way for broad judicial discretion, making the determination of the specific sentence an unpredictable act of judicial decision-making.

In the strategic conception of the justice reform[31], one of the defined objectives was the review and clarification of measures and criteria for criminal punishment for a large part of criminal offenses, as well as the harmonization of definitions of crimes and their respective sanctions with European standards. However, the Criminal Code was not taken into review until 2020[32]. A study focused on drug-related crimes (Zhilla et al, 2017) argued a lack of consistency in sentencing determined by court decisions, as well as a tendency to impose lenient measures. It was also found that some offenses had very narrow sentence limits, leaving no room for individualization of the sentence.

In the presentation of the work done for the new Criminal Code, the drafters reiterated once again the goal of resolving the ambiguities of the legal provisions, which have become a cause for abusive judicial interpretations and, at the same time, the goal of reducing the discretion of judges in the determination of sentences[33]. The new Criminal Code is still being drafted.

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[27] It is not within the scope of this paper, but it should be mentioned that the increased prison population must also be attributed to the increase in the backlog of cases awaiting trial. The backlog at first level increased by 28% at the end of 2021, where a total of 36,579 cases remains pending. Of these, 8,373 case are penal, but the backlog as a whole affects most courts in the country because they do not have separate penal and civil chambers. All six appellate courts combined had a total of 8,820 criminal cases pending at the end of 2021, while the Supreme Court had 35,822 pending cases. The backlog created is mainly a result of delays in the creation of new institutions and the inability to fill vacancies created by the dismissal of judges as a result of the vetting process. Sources: *The High Judicial Council and the Supreme Court*.

[28] From 2016, the criminality rate has steadily increased. Despite a decrease in 2020, in 2021 the rate increased again considerably compared to previous years. Source: *INSTAT.*

[29] In Pulfer v. Abania (application No. 31959/13, dated 20.2.2019), the ECtHR found violations of Article 3 of the ECHR, when it found, among others, that "in cases of torture or ill treatment, amnesties and pardons must not be tolerated… even though the legal framework might have had a sufficient deterrence effect… this later was erased by the law on amnesty." Source*: the Office of the State Advocate.*
In 2017, a judge was murdered by her ex-husband, who had been previously convicted for the violence and threats towards her, but had been released prior to serving all his sentence because of a general amnesty. This case started a debate on the negative effects on general amnesties, especially regarding the effects on the fight against domestic violence, which consists of crimes that receive lenient punishments (therefore, very likely to be included in every amnesty.

See, for example, https://www.reporter.al/vrasja-e-paralajmeruar-denoncimet-e-gjyqtares-u-injoruan-me-mbyllje-hetimesh-dhe-amnisti/

[30] The Assembly of Albania, The Ad-Hoc Parliamentary Commission on the Reform of the Judicial System, Group of High-Level Experts, "Analizë e Sistemit të Drejtësisë në Shqipëri", June 2015.

[31] The Assembly of Albania, The Ad-Hoc Parliamentary Commission on the Reform of the Judicial System, Group of High-Level Experts, "Strategjia e reformës në sistemin e drejtësisë", 2015.

[32] Since the presentation of the strategy, the Criminal Code has been amended several other times, following the same chaotic and non-coherent process.

[33] Prezantimi i Kodit të Ri Penal - Ministria e Drejtësisë (drejtesia.gov.al)

Can these problems be solved with the approval of a sentencing guideline? The experience of Kosovo and North Macedonia, but also the reluctance of other countries, suggests that it is unlikely that such a measure will be effective in Albania, and it may even become dangerous for the fragile independence of our judiciary.

Inequality in sentencing in Albania comes from some systemic problems. The organization of the justice system is complicated. The appellate process takes a long time and the backlog of cases is very large. Inadequate policies for the selection and promotion of judges, as well as the ongoing political influence on the judiciary have affected its independent functioning. In recent years, the pressure of the vetting process of judges is also apparent in their decision-making. The lack of judicial independence, mainly as a direct effect of the high politicization of judicial appointments and of the direct political interference have been addressed many times in reports concerning the state of the judiciary in Albania[34]. Therefore, as in the case of North Macedonia, the adoption of a mandatory sentencing guideline in Albania, while limiting judicial discretion, will be a further threat to judicial independence.

On the other hand, as frequently evidenced[35], the overall inefficiency of the judicial system creates incentives for judicial corruption. A mandatory sentencing guideline will create opportunities for abuse of alternative procedures, such as the abbreviated trial, plea agreements, etc. The same issue was evidenced in North Macedonia where similar issues exist.

The above problems must be considered in connection to the previously mentioned chaos in penal policy, as well as with the frequent amendments to the Criminal Code. It can be said that, due to so many changes, the Criminal Code has a fragmented text, which does not serve the role that this code should have in society and in the correct understanding of criminal law.

In the case of a discretionary guideline, Albania would run the same dangers as Kosovo, where the judges have not implemented the guideline at a satisfactory level. Because of the setup of both legal systems, it is very difficult to hold judges accountable or to compel them to follow a guideline that is not mandatory at law level.

Another danger of adopting a discretionary sentencing guideline is the fact that our legislators are not sufficiently familiar with the widely accepted views in common law systems. In these systems, it is considered inherent in their meaning that sentencing guidelines are only guides and that the final decision is made by the judge. In these countries, sentencing guidelines are seen as a process, not a conclusion. (Ashworth, 2005.) In these countries, guidelines have been gradually consolidated by Supreme Court judges and over several decades.

[34] European Commission, 2016, Albania 2016 Report, November 2016.
[35] See note 33.

6. CONCLUSION

In conclusion, it is believed that a binding criminal sentencing guideline would not be in line with the Albanian constitutional and criminal law framework, because it would threaten judicial independence and provide more incentives for corruption. On the other hand, a discretionary guideline would be, at the best case scenario, sporadically applied, thus, unlikely to be successful in unifying and predicting penal policy.

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