Mandatory Sentencing Guidelines: The Case Of Macedonia

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Abstract

This study expresses the criticism of recently enacted Law in determining the type and in measuring the severity of sentence. There is flagrant restriction of the free judicial belief due to the necessity in overcoming identified inconsistency in sentencing policy. The judicial system is not resistant to both internal and external pressures and influences. However, those problems cannot be overcome by massive fragmentation of the Criminal Code of the Republic of Macedonia, wide ranges of the sanctions, and by administrative proceedings in the determination of the sanction. New Macedonian law has created mandatory guidelines for every criminal offence by emphasizing previous conviction as the most important circumstances. This is contrary to several Council of Europe recommendations. The authors emphasize that the binding character of the sentencing guidelines should be avoided. According to them, only free judicial belief within the statutory penal framework can ensure the rule of the law and equity.

Keywords: Sentencing guidelines, sentencing commission, sanctions, individualization, mitigating, aggravating

Introduction

Newly adopted Law for the determination of the type and duration of sentence had focused the attention of the scientific and judicial public towards challenges of the Macedonian penal policy. This is vis-à-vis steps taken by the legislator in accepting US methodology for mandatory sentencing guidelines. Those guidelines seriously affected the independence of judges regarding the implementation of the principle for individualization

of the sanction. The modest goal of the paper is to provide explanation about the problems that penal policy is facing in Macedonia as well as the criticism regarding the new law that is quite unknown to be a legislative solution on European soil. In addition, arguments for criticism can be found in comparative review presented in the paper. The US practice regarding mandatory sentencing guidelines should be taken into consideration as argument contra newly adopted law. The paper indicates the conclusion that there are *common law* countries where sentencing guidelines are not accepted. This is as a result of the arguments that the determination of the sanction by considering all relevant mitigating and aggravating circumstances is within the competences of the judges. The importance of the free judicial belief must not be underestimated and molded into tables with different points. This practice of determination of sanction is not acceptable for countries with *civil law* tradition. Aside the importance of the penal policy and comparative experiences with the sentencing guidelines in USA, England, and Wales, there is an overview of newly adopted law that encompasses explanations regarding the commission on harmonizing penal policies as well as provisions regarding the determination of the type and the duration of sentences. Subsequently, there were doubts that the prior criminal history and behavior of the offender is not in compliance with the Recommendation of the Council of Europe No. R(92)17. This can be seen in terms of the consistency in punishment since it recommends that previous convictions should not be mechanically used as a factor against the accused at any stage of the criminal proceedings. There is explanation of the sentencing methodology such that the judge should take into consideration the decision within the vertical and horizontal categorization determined by the law. Therefore, this paper offers arguments that newly adopted law has caused problems with domestic legal system. This is traceable to the fact that its provisions are in contrary with provisions from the Constitution, from the Criminal code as well as with provisions of the Code of criminal procedure.

The Importance of the Penal Policy

The penal policy is the point of interest of the scientific and expert public in the Republic of Macedonia especially in the last decade (Materials for VI Consultation, 2005. Retrieved from http://maclc.mk/). On the other hand, the court sentencing (Kambovski et al., 2008; Gruevska Drakulevski, 2011-2012) and analysis of the pronounced sanctions for certain criminal offences are subject to special analysis in order to study its effects (Bužarovska et al., 2008; Deanoska Trendafilova, 2011-2012). With the Recommendation No. R(92)1, the Council of Europe has recommended the consistency of the sentencing (from 19.10.1992), especially pointing out to the fact that the mitigating and aggravating circumstances should be

prescribed by law on the basis of the legal practice with significant contribution by the judges. Even when there is gradation, the judge must be free to individualise the sanction. If we agree that the penal policy has duality, policy of imposing sanctions, and the policy of pronouncing, the following question arises: what is the position of the newly adopted Law in the Determination of the Type and Duration of Sentences (hereinafter referred to as LDTDS) which became part of the Macedonian legislation on 30.12.2014, and which later came into force on 7 July 2015 (Official Gazette of the Republic of Macedonia, No.199/14)?

However, it is more than obvious that the policy of imposing sanctions is in the competence of the legislator who materializes and provides legislative expression of the right of the state to punish *(ius puniendi).* Thus, starting from the object of protection, it groups the criminal offences and it determines the type and frameworks of sanctions for each of them. By minding their specifics and the existence of premeditation or negligence at the perpetrator, the characteristics of the perpetrator and the victim, as well as realizing the goals of the general prevention and the abstract danger, which although immeasurable, represents part of the legislator's *ratio* when determining the offences and their sanctions. Furthermore, the legislator expresses this competence in the provisions of the Criminal Code (hereinafter referred to as CC). The second aspect of the penal policy refers to the court assessment of a concrete sanction according to the type and amount whereupon it is expected from the judge to adept it to the circumstances related to the characteristics of the perpetrators, victim's contribution, and the consequences suffered by the victim, *modus operandi*. Also, it takes into consideration the mitigating and aggravating circumstances prescribed by the CC for the purposes of their individualization. It is also due to successful realization of the objectives of the sentencing, emphasizing the special prevention as well as the consequences of the committed criminal offence. It seems that the newly adopted LDTDS touches exactly this second aspect of the penal policy – *sentencing.* The new law is actually the "framework" which the judges use in determining the sentence. It contains quite an unusual approach in sentencing on the territory of continental Europe.

The separation of powers of the legislative, executive, and judicial authority is one of the basic values determined in Art. 8, par.1, indent 4 of the Constitution of the Republic of Macedonia. When it comes to sanctions, all three powers have their competencies. The legislator prescribes the sanctions, the judges asses them, and the executive authority (Ministry of Justices) executes them. The separation of powers is endangered when the legislator oversteps its competences and enters into the area of sentencing by legislative texts. That is what has happened with the new law which blurred

the line that determines the separation of powers. Subsequently, the legislator oversteps its competences if, besides the legal prescription of sanctions, it expresses insistence to also control the court sentencing (Bužarovska, 2014). The legislator manifests distrust in judges and undermines the principle of individualization of the sentence. The court assessment is legal as long as the provisions of the CC are being applied correctly according to the court assessment of the particular circumstances of the criminal case. Every other intervention of the legislator means its intervention in the court competences.

This perception creates a problem from the aspect that the judge has free judicial belief when deciding upon the guilt and upon the sanction, depending on the evidence presented during the court procedure. On one hand, the court sentencing ranges between the flexibility related to the circumstances of the case and its perpetrator, and the rule of the law and legal security on the other hand (similar: Ashworth, 2005: 62). Is it acceptable for the free judicial belief to be molded into tables, templates, points, and worksheets? Hence, the free judicial belief is a "cornerstone" of the modern sentencing processes and an undeniable benefit of the law on evidence (Damaška, 2001: 9). It is an expression of the court independence while deciding. However, it is an important principle in the law of evidence, especially taking into account the fact that the freedom of judicial belief does not mean arbitrariness, but a matter of assessment within all the presented evidence on the basis of which the court reaches its decision (Krapac, 2010; Škulić, 2010; Matovski et al., 2011). The judge should have reasonable belief *(belief raisonée)* for the existence or non-existence of certain facts, whereupon there are no legal rules for the value of the evidence. The judge decides on the basis of the legal logic, psychology, and the experience with great help from the new technical and technological methods which significantly help in proving, understanding, and having a legal interpretation of evidence (Damaška, 2001: 23, 29). The free judicial belief is unknown category in the Anglo-Saxon law given the role of the jury. The legal reasoning is especially important as precursor of the adopting decision in certain direction (Veitch, et al., 2007; Meyerson, 2007; Dworkin, 2009).

The penal policy is subject to several regional conferences (Problems of courts penal policy, Materials for counseling in Zlatibor 7, 8 and 9 June 1973, Dusan Vujcic / Vladan Vasilijević; Current issues of the penal policy of the courts (IKSI), Herceg Novi, May 1986, Proceedings of the Institute for Criminological and Sociological Research, Belgrade; Vasilijević Vladan (ed.) Human rights and modern trends in crime policy - counselling, 18-19.05.1986, Budva, Institute for Criminological and Sociological Research; Proceedings: The penal policy as an instrument of state policy on crime, International Scientific Conference, 11-12.04.2014, Banja Luka; Charges and other criminal instruments as a state responses to crime, Proceedings

LIV Regular annual conference, Serbian Society for criminal theory and practice, Zlatibor, 18-20.09.2014). In 1979, the prominent Croatian professor Horvatić (1979) pointed out that the debate on the penal policy is inappropriate and pointless since the public, politicians, theoreticians, and practitioners have different views, understandings, arguments, and statements regarding some issues which cannot be avoided. The scientific and expert community in Croatia pays great attention to the penal policy (The legal and judicial penal policy in the Republic of Croatia, scientific project, Retrieved from: http://hrcak.srce.hr/ index.php? show= toc&id_ broj=7043); Turković, 2004). It can be noted that besides the significant, political, economic, and other changes which inevitably resulted in numerous amendments in the penal legislation and which have different effect on the judicial penal policy, there is, however, no visible deviation in the judicial penal policy (Bedrač, 2004). The justification why courts rarely used the determined legal maximum of sentence can be seen based on the fact that the maximum is only for exceptional cases and cannot be expected to be imposed too often (Horvatić, 2004). The prescribed penal frameworks are abstract rebuke, while the individualized criminal sanction is concrete rebuke imposed toward the perpetrator on the basis of the circumstances of the case (Kos, 2004). Some studies showed that the court sentences were commensurate with the performed criminal offences and the personality of their perpetrators, as well as the fact that decreasing the legal framework for some of the criminal offences did not have any significant influence in terms of pronouncing lenient penalties (Mrčela & Tripalo, 2004). Practitioners suggest to the possibility for the public prosecutor to influence the penal policy by filing complaints (Novosel, 2004; Novosel, Overview of proposed amendments to the Penal Code - special part (of the reasons for raising the legal minimum). Retrieved from www.dorh.hr/fgs.axd?id=1027).

The unevenness in pronouncing sanctions in the Republic of Macedonia comes out from certain systemic issues which cannot be overcome by the adopted law. The problems have dual nature. The first one is reflected in the bad substantive jurisdiction of the basic courts, which was established by the Law on Courts from 2006 (Official Gazette of the Republic of Macedonia, No.58/2006; 62/2006; 35/2008, 150/2010) when new appellate area was introduced. Thus, it was introduced not for the needs of the judiciary, but was solely inspired by political interests. The second problem addresses the inappropriate policy for the selection of judges by the Judicial Council whereupon the quality and the selection according to the *merit system* have not been taken into consideration. Furthermore, there were cases when a person becomes an appellate judge notwithstanding the fact that he was previously employed in the state administration, as well as promotion of judges from basic courts immediately after reaching an

"adequate" (politically acceptable) judgment etc. On several occasions in its reports on the progress of the country towards EU, the European Commission points out to the issues related to politization of the process for the selection of judges (EC Progress Report FYR Macedonia 2012, 2013, 2014).

These issues became more serious with the expansion of the sentence frames instead of their reduction. Namely, besides all indications that the sentencing frameworks that encompasses possible sanction of ten or even twenty years of imprisonment for a single criminal offence is too long, in one of the last amendments of CC, without any scientific or expert debate, the legal maximum of the imprisonment has been increased from 15 to 20 years. Also, a long-term imprisonment of 40 years has been introduced as a replacement for life imprisonment (Official Gazette of the Republic of Macedonia, No.27/2014). Also, there are criminal offences with too high legal minimum (at least 8, 10, 12, or 15 years of imprisonment) which also disable the individualization of the sentence according to the circumstances of the case. This legislative tendency is completely contrary to the Recommendation No R (92)17 on the consistency of the sentencing which explicitly indicates to the issues that may arise as a result of the too wide frame of the pronounced sentences. Also, an account should be taken about the legal minimum of the penalties preventing the court to take into consideration the special circumstances of the case (Recommendation No. R (92)17 concerning consistency in sentencing, 19.10.1992). Since its adoption in 1996 (Official Gazette of the Republic of Macedonia, No.37/1996), the CC has been subjected to constant amendments (Official Gazette of the Republic of Macedonia, No.80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 115/2014, 132/2014, 160/2014, 199/2014) and assessment by the Constitutional Court of the Republic of Macedonia (U. no. 220/2000 of 30 May 2001, published in the Official Gazette of the Republic of Macedonia no. 48/2001; U. no. 210/2001 of 6 February 2002, published in the Official Gazette of the Republic of Macedonia no. 16/2002; U. no. 206/2003 of 9 June 2004, published in the Official Gazette of the Republic of Macedonia no. 40/2004; and U. no. 228/2005 of 5 April 2006, published Official Gazette of the Republic of Macedonia). Additionally, it was subject to corrections of the text twice (Official Gazette of the Republic of Macedonia, No. 41/2014). With such frequent amendments of CC, the Republic of Macedonia is enlisted among countries with unstable text of CC. This fragmentation undermines the meaning of the criminal legislation and the function that the CC should have as a comprehensive text of legal provisions in the penal area.

On several occasions, the Macedonian scientific community indicated the issues related to the penal policy, especially regarding the absurdness of the above-mentioned approach of the Macedonian legislator with the purpose of overcoming its unevenness. Unfortunately, opinions of the academic community have not been considered to be relevant and they had no impact (Bužarovska, 2014a; Bužarovska, 2014b; Tupančeski & Kiprijanovska, 2014).

Having in mind the European orientation of the country, it is surprising how Macedonian legislator considers the fact that the penal policy issues might be solved by models taken from USA – grade-point expression of the circumstances related to the perpetrator, the seriousness of the criminal offence, and the circumstance of the case. It is even more surprisingly that the Sentencing Guidelines prepared by the prosecution office, which served as the basis for the LDTDS, were repeatedly interpreted by the legislator as "building a functional and efficient justice system based on the European legal standards", "European ground", and "European trends."

Review on the News from LDTDS
Commission on Harmonizing Penal Policies

The LDTDS prescribed the creation, composition, mandate, and competence of the Commission on Harmonizing Penal Policies. For the first time in the Republic of Macedonia, such a Commission has been established. It will take care of harmonizing penal policies in sentencing by proposing criteria for sentencing. According to the provided competence of the Commission (the Commission shall have the following competencies: to monitor and analyze the sentencing policies of the courts in the Republic of Macedonia, with respect to the aims of punishment; To propose measures that should provide for certainty and objectivity in the process of meeting the aims of punishment, in order to avoid any unwarranted disparity amongst perpetrators of criminal offences with similar characteristics, convicted of the same or similar crimes with respect for the disposition of the court in evaluating any aggravating and mitigating circumstances; To put forward proposals to the Ministry of Justice for changes and amendments of the Criminal Code and this Law; To deliver an annual report to the Parliament of the Republic of Macedonia; To deliver a six-months reports to the Ministry of Justice regarding issues under its authority, for which the Ministry notifies the Government of the Republic of Macedonia accordingly, and To send notifications to the Judicial Council of the Republic of Macedonia, the Council of Public Prosecutors, the Supreme Court of the Republic of Macedonia, and the Chief Public Prosecutor of the Republic of Macedonia about the implementation of this law in various courts and to provide suggestions and indications on possible ways of providing more uniform

sentencing policy) it is indisputable that it actually took over competences of the highest court in the country - the Supreme Court of the Republic of Macedonia, which has an obligation to ensure uniformity in the implementation of laws by courts in accordance with the Article 101 of the Constitution of the Republic of Macedonia. This competence has been further developed in the Law of Courts (Official Gazette of the Republic of Macedonia, No.58/2006; 62/2006; 35/2008 и 150/2010), where Article 37, inter alia, stipulates that at the general session of all judges, the Supreme Court determines the general positions and the principle legal opinions regarding issues of importance for consistency in the application of the laws by the courts. This competence could be exercised on its own initiative or on the initiative of the sessions of judges or judicial departments of the courts. The Supreme Court of the Republic of Macedonia submits an annual report to the Judicial Council regarding this issue as well. Also, it publishes it on the court's web site. Hence, it is surprising why the Commission was not established as a body that would help the Supreme Court in achieving its competences in this regard. In contrary, it is established to be an independent and advisory body within the Ministry of Justice. The separation of powers is an unknown category in our country. As a result, this legal solution blurs the line between the judiciary and the executive authority. The extent to which the Commission will be independent can be estimated from the fact that the funding for its work will be provided within the budget of the Ministry of Justice. Besides the scope of work, the independence also includes financial autonomy and can only exist if a body has its own means and resources.

The next serious objection refers to its composition where, unlike comparative experiences in USA and UK (available at: http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05_10/rr05_10.pdf and http://weblaw.haifa.ac.il/he/Events/Punishment/Documents/Julian%20Roberts.pdf), judges do not dominate. The Commission shall have seven members elected by the Parliament of the Republic of Macedonia with a four-year term: two members shall be elected upon proposal by the Chief Public Prosecutor, two members shall be elected upon proposal by the Judicial Council, one member shall be elected upon proposal by the Bar Chamber, and one member from among the ranks of regular or visiting professors teaching courses in criminal law. And while all the other members proposed by the body that elected or where you receive certificate remains quite unclear why professors are proposed by the Senate's two top-ranked universities in the country, but one professor is a proposal by the Minister of Justice, and the second on the Government proposal. In Macedonia, there is really strange and unusual coupling between politics and (counter) science!
However, the determination of the sentence and the assessment of the aggravating and mitigating circumstances are within court jurisdiction. The

US sentencing guidelines take into account the seriousness of the committed criminal act and the offender's previous convictions. Since the beginning of their implementation, there have been claims that they lead to disparity in sanctioning, legal uncertainty regarding the sanctioning and their unconstitutionality in terms of the right to jury trial, a violation of the separation of powers, and the penetration of the legislature in the judiciary (An Overview of the US Sentencing Commission, Retrieved from: www.ussc.gov/). Once we follow the American experiences, it is worthy to emphasize that in different USA states, the composition of the Sentencing Policy Commission has dominant participation of judges with long-term experience in the capacity of presidents and vice presidents of the Commissions. Consequently, the members (*commissioners*) are persons who have long-term involvement in the judiciary, probation services, execution of sanctions, and in the protection of victims. It is surprising that according to the LDTDS, the President of the Supreme Court of the Republic of Macedonia was not even included to be among the members of the Commission.

2.2. Provisions in Terms of the Selection of Sentences and Sentencing Criteria: The sentencing criteria are traditionally part of the CC provisions. However, in 2014, the Republic of Macedonia accepted legislative orientation towards the Anglo-Saxon system of sentencing. In addition, the general rules for the sentencing of Article 39 of the CC obtained status of a decor that has no practical application.

The first step toward this tendency was taken by introducing the Rulebook for the harmonization of sanctions (Official Gazette of the Republic of Macedonia, No.64/14) prepared by the President of the Supreme Court of the Republic of Macedonia. This was despite the fact that the determination of the sentence cannot be a subject of by-laws. Afterwards, the expectations were that the Rulebook will become the content of the law, but it did not happen. On the contrary, the LDTDS's text has the same content as the Guidelines prepared by the Public Prosecution Office of the Republic of Macedonia in July 2013. It seems that the legislator has forgotten that the sentencing is among competences of the judges. Therefore, it is rather unusual to make judges determine the sentences according to the instructions created by the prosecution office.

Following the content of the prosecution's Guideline, there are the same sentencing criteria prescribed by the LDTDS. They include:

- An objective categorization of the criminal offences and
- Prior criminal history and behavior of the offender.

The objective (horizontal) categorization of the criminal offence has been performed according the type and frameworks of the prescribed

criminal sanctions which are prescribed by the CC. A total of 55 horizontal categories of criminal offences that actually reflect the penal frameworks set out in the CC for various criminal offences have been identified. Thus, this is as shown in the table below:

Table 1

I. fine	XXIX. imprisonment from 1 to 5 years
II. fine or imprisonment of up to 3 months	XXX. imprisonment from 1 to 5 years and a fine
III. fine or imprisonment of up to 6 months	XXXI. imprisonment from 3 to 5 years
IV. imprisonment of up to 6 months	XXXII. imprisonment from 3 months to 6 years or a fine
V. fine or imprisonment of up to 1 year	XXXIII. imprisonment from 1 to 8 years
VI. imprisonment of up to 1 year and a fine	XXXIV. imprisonment from 1 to 8 years and a fine
VII. fine or imprisonment from 3 months to 1 year	XXXV. imprisonment from 3 to 8 years
VIII. imprisonment from 3 months to 1 year	XXXVI. imprisonment from 5 to 8 years
IX. fine or imprisonment from 6 months to 1 year	XXXVII. fine or imprisonment from 1 to 10 years
X. imprisonment from 6 months to 1 year	XXXVIII. imprisonment from 1 to 10 years
XI. fine or imprisonment of up to 3 year	XXXIX. imprisonment from 1 to 10 years and a fine
XII. imprisonment of up to 3 years and a fine	XL. imprisonment from 3 to 10 years
XIII. fine or imprisonment from 3 months to 3 years	XLI. imprisonment from 4 to 10 years
XIV. imprisonment from 3 months to 3 years	XLII. imprisonment from 5 to 10 years
XV. imprisonment from 6 months to 2 years and a fine	XLIII, at least 1 year imprisonment
XVI. fine or imprisonment from 6 months to 3 years	XLIV. at least 2 years imprisonment
XVIII. imprisonment from 6 months to 3 years	XLV. fine or imprisonment of at least 3 years
XVIII. imprisonment from 6 months to 3 years and a fine	XLVI. at least 3 years imprisonment
XIX. fine or imprisonment from 1 to 3 years	XLVII. at least 4 years imprisonment
XX. imprisonment from 1 to 3 years	XLVIII. imprisonment of at least 4 years and a fine
XXI. fine or imprisonment of up to 4 years	XLIX. at least 5 years imprisonment
XXII. fine or imprisonment of up to 5 years	I. at least 8 years imprisonment
XXIII. imprisonment of up to 5 years and a fine	LI. at least 10 years imprisonment
XXIV. imprisonment from 3 months to 5 years	LII. at least 12 years imprisonment
XXV. fine or imprisonment from 6 months to 5 years	LIII. at least 5 years of imprisonment or life imprisonment
XXVI. imprisonment from 6 months to 5 years	LIV. at least 10 years of imprisonment or life imprisonment
XXVII. imprisonment from 6 months to 5 years and fine	LV. at least 15 years of imprisonment or life imprisonment

XXVII. fine or imprisonment from 1 to 5 years	

The "***prior criminal history and behavior of the offender***" is the second objective criteria for determining the type and duration of the sentence. Namely, according to the LDTDS, the assessment of the former life of the offender of a criminal offence is determined on the basis of the following vertical categories:

Table 2

I.	No prior convictions
II.	Up to two convictions for crimes punishable by a fine or imprisonment of up to 5 years
III.	Up to two convictions with at least one for a crime punishable by imprisonment of at least 5 years
IV.	Three enforceable convictions or two convictions with an effective imprisonment of at least 6 months or one conviction with an effective imprisonment of at least 3 years
V.	Four enforceable convictions or two convictions with imprisonment of at least 2 years or one conviction with imprisonment of at least 5 years
VI.	Five or more enforceable convictions or two convictions with imprisonment of at least 5 years or one conviction with imprisonment of at least 8 years

From the prescribed categories, it becomes clear that the LDTDS operates with wrong term "*prior criminal history and behavior of the offender*." This is given the fact that the vertical categories contained data only on the effective judgments previously imposed to the defendant. Hence, it corrected these vertical categories to be arranged under the criteria "*previous convictions of the accused*." The confusion might occur because of double assessment of the previous life – first - as a prior convictions, and second - as a mitigating or aggravating circumstance. It is completely unacceptable for the same circumstance to be taken into consideration several times when determining the sentence. This criterion includes convictions which became obsolete during the execution phase. Therefore, only the erased convictions have been excluded, as well as the judgments of imprisonment of up to 3 years for which the conditions for their erase have been met according to the CC.

We can only guess why the legislator has avoided to use the appropriate term and to verify that the previous conviction is been overemphasized. This ground raises several dilemmas. Firstly, there is a question of its compliance with the Recommendation of the Council of Europe No. R(92)17 in terms of the consistency in punishment (Section D) which pays special attention to the previous convictions as a factor that should be evaluated during the determination of sanction. According to the Recommendation, previous convictions should not be mechanically used as a factor against the accused at any stage of the criminal proceedings. It is

justifiable for the previous convictions to be considered when determining the sentence, but the proportionality of the sentence should be in line with the seriousness of the offence. In addition, the Recommendation particularly emphasizes the fact that the impact of the previous convictions should be reduced or not at all taken into account in the following cases: a) when considerable time has elapsed since the previous criminal offence was committed; b) the committed offence is less serious, or the previously committed criminal offence was less serious; or c) when the offender is a young person. Furthermore, when determining sentence for committed offences in concurrence, there should be criteria for imposing more severe sanction while taking into consideration the proportionality of the sentence in regard to the total criminal activity of the perpetrator. The second dilemma is related to the relation between the previous convictions, as an objective criteria for sentencing regarding LDTDS. It also relates to the previous convictions within the meaning of Art. 39 par. 2 of the CC which can be considered either as mitigating or as aggravating circumstances, having in mind the fact that the same circumstance is not allowed to be taken into consideration twice in the same case.

Sentencing methodology: The methodology is set up in such a manner that the judge should firstly detect the vertical category connected to the lack of previous conviction or the previous convictions of the perpetrator, and then detect the horizontal categorization. Once the court establishes that the perpetrator has committed the criminal offence beyond a reasonable doubt, he is obliged to begin with the calculation of all mitigating and aggravating circumstances. The calculation is performed by adding or subtracting points where the starting point is the medium value of the determined duration of the sentence in each vertical category according to the table attached in the LDTDS. Therefore, there are nine categories of aggravating and mitigating circumstances in the LDTDS which influence the duration of the sentence, including:

I. II.	Degree of criminal liability Motivation for committing the crime
III. IV.	Strength of imperilment or violation of protected goods Circumstances under which the crime has been committed
V. VI.	Any blame on the victim for the crime Prior criminal record and behavior of the offender
VII.	Personal circumstances and behavior after the crime has been committed
VIII. IX.	Other circumstances related to the character of the offender Former crime is of the same kind like the latest one; the motivation for all crimes is the same; time period elapsed since the last conviction, i.e. since time served or pardon received

Each of the circumstances is subdivided into sub-circumstances bringing appropriate points and which are contained in Appendix 2 of the LDTDS. The American system of determining starting point is complemented by the work in the so-called *working sheets*. As such, Annex 3, 4, and 5 of the LDTDS contains worksheets that the judge is obliged to fulfill them, to express the calculated points, and the manner on how he/she determines the sentence.

Alternative Measures: Although the LDTDS refers to sentences, it also contains provisions for alternative measures. However, it is noticeable that the provision from Art. 16 significantly differ from the manner of determining the sentence in our practice so far. Namely, it is prescribed that if the court determines imprisonment with duration of up to 24 months, and during the evaluation mitigating circumstances are prevailing, whereupon the difference is at least 5 points in favor of mitigating circumstances, the court may impose suspended sentence with determined imprisonment or apply any alternative measure provided in Article 48-a of the CC. If the judges apply the provision from Art. 16 of the LDTDS, they can determine, for example, the conditional termination of the criminal proceedings (Art. 58-a of the CC) which is allowed for a criminal offence for which a fine or imprisonment of up to one year is prescribed according to the CC. According to the LDTDS, it can be determined for criminal offence for which a fine or imprisonment of up to five years is prescribed. This is a violation of the CC. We are facing the same problem regarding the community service, which is allowed for criminal offences for which a fine or imprisonment of up to three years (Art. 58 b of the CC) is prescribed. The court reprimand may be imposed for criminal offences for which a sentence of up to one year or a fine (art. 59 of the CC) is prescribed. In terms of house confinement, it can be determined against the perpetrator of the criminal offence for which a fine or imprisonment of up to one year is prescribed, especially when the person is old, seriously ill, or is a pregnant woman (Art. 59-a of the CC).

Sentences for Legal Entities: It is surprising that the identical provisions of the CC in terms of the sentences which may be imposed on a legal entity are undertaken in the LDTDS. The idea of the LDTDS is to help judges in determining the sentence. However, the purpose is lost if instead of further development of the provisions of the CC, they are completely overwritten. This is the case with Art. 17 (identical with Art. 96-a of the CC) and Art. 18 (identical with Art. 96-f of the CC). Also, the provision from Art. 19 of the LDTDS which violates the principle of *nullum crimen, nulla poena sine lege scripta* has become even more problematic. Namely, paragraphs 1, 2 and 4 of Art. 19 of the LDTDS are identical with Art. 96-e of the CC. Thus, there is a difference in terms of Art. 19 par. 3 where a sentence for a legal entity is provided for criminal offences punishable by imprisonment of

at least four years, whereupon it is stipulated that the legal entity shall be punished by a fine of at least 500,000 denars or, if the crime is motivated by cupidity or there is a huge damage, the amount of the fine is up to five times the amount of the caused damage or the gained benefits. With this provision, the LDTDS is forgetting its objective from Art. 2 (harmonization of the penal policy). As a result, it unlawfully entered into a matter that should be solely regulated by the CC. There should be no doubt in practice that the judges will have to follow frameworks defined in Art. 96-e of the CC instead of applying par. 3 of Article 19 of LDTDS.

Sentence Bargaining: The introduction of the sentence bargaining in the LCP (Official Gazette of the Republic of Macedonia, No.150/2010) has been abused for several legislative amendments of the CC (Official Gazette of the Republic of Macedonia, No.28/2014; Bužarovska, 2014b) whereby in the name of sentence bargaining, the CC has been amended so: a) it is in contradiction with the Constitution; b) there is internal contradiction between the general part of the CC (because of the limitation of the alleviation of punishment only in cases of sentence bargaining, some of the special provisions of the CC remain inapplicable); c) there is contradiction between the general and special part of the CC (some of the provisions of the special part of the CC remain inapplicable); d) there are contradiction between the general part of the CC and the LCP (any criminal sanction can be subject to the sentence bargaining according LCP; but in LDTDS, there are provisions only regarding punishments). It is unclear how Article 20 of the LDTDS instead of accepting the frameworks from Article 41, provides the opportunity for bargaining of a sentence up to 50% of the sentence that would be pronounced by applying the provisions of the LDTDS in regular court proceedings (when bargaining of the public prosecutor and the defendant takes place during the investigation and in the shortened procedure before the prosecution's proposal) or bargaining sentence of up to 60% of the sentence that would be pronounced by applying the provisions of the LDTDS in regular court proceedings (when bargaining takes place in the indictment assessment phase). The fact that the term "bargained sentence" is used in the LDTDS is actually based on the fact that the proposed sentence which is going to be assessed by the court is subject to a separate analysis. The same observations can also be addressed to the provision from Article 21 of the section IV of the LDTDS. During the main hearing, after the opening statements by the parties, if the defendant pleads guilty, the court cannot pronounce a sentence which is 70% lesser of the sentence that would be pronounced by applying the provisions of the Law on Regular Court Proceedings.

Starting from the provision from Article 40 of the CC, the judges will have a dilemma concerning what to do when the sentence should be reduced.

Given the fact that Article 39 of the CC expressly directs judges to the LDTDS, it is clear that the LDTDS will be applied in terms of sentencing. Consequently, the LDTDS cannot be applied in terms of the mitigation of the sentences because the provision from Article 40 of the CC expressly directs the judges to the provision from Article 41 of the CC, but not to the provisions from LDTDS. On the other hand, sentence bargaining in the LCP refers to the mitigation of the sentence provided regarding the provisions of the CC.

Conclusion

From the all abovementioned, we can easily conclude upon the meaning, application, and importance of sentencing guidelines in the states of the *common law* system. Furthermore, the differences between some of them are evident. As a result, the question remains why only the Republic of Macedonia decided to "import" the American model on European ground.

Compared with the practice in *common-law* states, the following substantive legislative differences could be found that reflect the pointless of the adoption of the LDTDS:

- In the Anglo-Saxon system, commissions for preparing sentencing guidelines were first established and then the guidelines were prepared; in Macedonia, firstly, the LDTDS was adopted and then a Commission was established;
- Instead of the penal frameworks and the circumstances taken into account in sentencing to be a result of analyzes which will be made by the Commission, it gets the role of the auditor of the decisions reached by the judges;
- Instead of free judicial belief, the judges got another body that will exercise control over their operations;
- Macedonian legislator is obviously not aware of US practitioners remarks related to the consideration that mandatory guidelines lead to judgment on the basis of preponderance of the evidence instead of on the basis that is proven beyond reasonable doubt that is a common standard provability in the criminal proceedings (Scott, 2011);
- The Macedonian legislator is insufficiently familiar with the views of the prominent Anglo-Saxon theorists who pay attention to the fact that the sentencing guidelines are only guidelines, and the final decision is made by the judge (Welch, 2009). As a result, the sentencing guidelines should be seen as a process, not as an act (Ashworth, 2005);
- Contrary to the recommendations of the Council of Europe, according LDTDS, the previous conviction is mechanically emphasised before all other criteria which are relevant for sentencing.

Subsequently, this is contrary to the reason for the existence of guidelines in the US and in England, which main goal was avoiding incarceration and emphasizing the non-custodial sanctions and measures, which is also the commitment of the United Nation (The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), 14 December 1990) and the Council of Europe Recommendation Rec (92)16 (on the European rules on community sanctions and measures), Rec(99)22 (concerning prison overcrowding and prison population inflation), and Rec(2000)22 (on improving the implementation of the European rules on community sanctions and measures). Also, the LDTDS is promoting incarceration;

- Unlike experience in England (Criminal Justice Act 2003, http://www.legislation.gov.uk/ukpga/2003/44/contents) prescribe only the maximum penalties (for a term not exceeding), where all the circumstances relevant in sentencing are left to the judge's assessment, Ashworth A., Sentencing and Criminal Justice, Fifth edition, Cambridge University Press, 2010, p. 25) in a system where the statutory minimum for each criminal offence is prescribed in the CC, it is unacceptable to have another law which stipulates a starting point for sentencing;
- One can get the wrong impression that the CC has secondary importance in relation to the LDTDS;
- In accordance with US experience, it was estimated that one of the unfortunate objectives of the Guidelines is to transfer the power from the judge to the prosecutor who determines the qualification of the criminal act for which the criminal proceedings will be initiated and for which charges will be pressed. In this context, there is a fear that with the Guidelines, the prosecution has incredibly great control over the penal framework where the considered criminal act will be "placed" (Bloom, 2005);
- Instead of sentencing guidelines only for certain criminal offence that cause problems in practice, the LDTDS refers to all criminal offences, and was adopted without any detailed analysis;
- There is a dilemma: Is it really the harmonization of the penal policy that the objective of the LDTDS or the objective is "molding" the free judicial belief by the legislative and executive authorities;
- Here, it is unnecessary rashness by the Macedonian legislator, given the fact that the Sentencing Guidelines in the USA are created gradually, accurately, and thoroughly by the Supreme Court and regional courts judges over several decades. Thus, this is with an analytical approach to the definition of the guidelines where the statistical data on pronounced sentences were the main point;
- This was according to the LDTDS free space for judicial discretion or judicial assessment outside the frames of the law (The judges expressed their

disagreement with the compulsory application of the Guidelines, Results of Survey of United States District Judges January 2010 through March 2010, United States Sentencing Commission, June 2010, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf (accessed 30.09.2015);

- The jurisprudence in Macedonian system is not a source of the law. It earlier reached judgments and do not serve as an example to other judges and courts. Thus, there is no *guideline judgments*. Hence, the overall impact of those judgments to the entire judicial system is smaller. This is one argument which is more the reason the penal policy should not be harmonized by the law.

Based on experiences, it is obvious that the sentencing guidelines should have a guiding effect. They should be a framework, which would leave the judge with the opportunity to individualize the sanction according to the circumstances of the case. Respecting the free judicial belief, the sentencing guidelines must not turn the judges into "*the mouth of the guidelines*", but into the subjects that will interpret the guidelines with the possibility for the judge to deviate from the sentencing guidelines whenever he believes it is in the interests of justice.

Ignoring the importance of the free judicial belief is completely in contrary to the rule of law and the fairness.

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