The Aims of Punishment

Theoretical, International and Law Comparative Approaches

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Constraints on Deciding Sentence Severity by the Judges in Greece*

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1. Introductory Remarks

The Greek Penal Code is an old one, being almost 70 years old. Certainly, during all these years many of its provisions have been amended, especially those concerning specific offences and penal sanctions. However, the provision on the assessment of punishment in article 79 as well as other provisions related to grounds for exhibiting leniency or imposing an aggravated sentence, have remained the same since the adoption of the Penal Code in 1950. Similarly, there are no significant changes in connection with the provisions of the Greek Code of Penal Procedure (art. 371.3) which regulate how judges in Greece make their decisions on sentence severity. Hence, the procedure that they are assumed to follow is the same since 1950.

Evidently, socio-economic conditions have changed radically in Greece and in the rest of the world since 1950. Nevertheless, this change does not necessarily create a need for changing a penal law, if a law is properly formulated and is duly adapted by the courts to the respective socio-economic conditions. This remark may explain why other European legal orders, such as the Italian, the Swiss and the Cypriot ones, still have Penal Codes which go back to 1930s and which are therefore even older than the Greek Penal Code.

Certainly, in the last ten years, important initiatives have been undertaken in Greece towards a complete reform of this Code. As a result, a number of legislative committees have been set up and equal drafts have been produced, of which the more recent was delivered to the Minister of Justice in August 2017. Respectively, a new formulation of the legal provision on the assessment of punishment appeared in a draft amendment to the Greek Penal Code. This proposed amendment has been put forward already in July 2013 and is accessible on the internet as article 61.[1]

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* Paper presented to an International Conference which took place at the University of Cyprus on 13-14.10.2017 on "Structuring Judicial Discretion at Sentencing: Current Perspectives and Future Directions" – cf. <https://conferenceslawdeptucy.com/>. The paper was sent to the editor for publication in October 2018. In the meantime a new Greek Penal Code was voted and put into force in July 2019. A more thorough analysis on this issue in French can be found in my essay: Courakis 2007: passim.

1 Cf. <http://www.c00.org/p/blog-page_28.html>.

Regardless of this provision, which is indeed a step in the right direction, the constraints which are associated with sentencing decision-making in Greece, still do create problems to the due course of justice. Yet, at the same time they can offer us some policy lessons of a broader significance.

I will try subsequently to highlight these constraints and to present some proposals aimed at improving the current interpretation of article 79 of Penal Code.

2. Problems arising by the legislation and its application

The problems arising from the above legal provision on assessment of punishment are connected, in my opinion, (a), with its wording and its way of interpretation, (b), with the penalties to be inflicted, (c), with the procedure which is followed when the Courts apply the provision on assessment of punishment and (d), with the way in which such a decision is justified by them. More precisely:

(a) In relation with the *wording*, it should be noted that for the judicial assessment of punishment in article 79 of the Greek Penal Code (PC), the Greek legislator uses expressly two *criteria*, that is a) the *seriousness of the offence* committed and b) the *personality of the offender*. Each one of these criteria is further specified by some sub-criteria.

Accordingly, to pass judgment on seriousness of the offence, the judge should take into consideration indications (sub-criteria), such as the harm or danger caused by the offence, the intensity of intent or the degree of negligence etc. (however, intent and negligence evidently belong not only to the notion of seriousness of the offence, but also to the one of the offender's personality!).

Furthermore, regarding the assessment of the offender's personality, the law offers to the judge some benchmarks (sub-criteria) which include the reasons that pushed the offender to act, his/her behavior during and after the act, etc.

However, these criteria and sub-criteria are not suitable to be used efficiently by the judge, because they are too vague or even, sometimes, as we said, not corresponding to only one criterion. Besides, there is no prioritization of how to use them, and in particular to know, primarily, if severity of the offence is more or less important than the personality of the offender. Under this aspect, the Austrian Penal Code is much more precise and could serve as an example on how a provision on the assessment of punishment might be formulated. Indeed, it stipulates in § 32.3 among others, that the penalty to an offender should be more severe to the extent: that the harm or danger created by the offender is great, or that the offender took his/her decisions with maturity, or that he prepared his/her act carefully, or that he/she executed it in a brutal manner. It is interesting that such an approach is adopted in a certain way by the

aforementioned Greek Draft of July 2013, which however until now (October 2018) still remains in the stage of elaboration.

(b) Another, more general problem related to the sentencing decision-making is the one about the *range of penalties to be inflicted*, that is, about the prescribed by the law minimum and maximum of penalties for the specific offences which each time must be assessed. This range of penalties is in Greece, as a general principle, very broad. For example the penalty in case of a usual theft according to art. 372 (1) PC is imprisonment from 3 months to 5 years. Besides if the theft has been committed under aggravated circumstances, for example by a person who commits thefts professionally or habitually, then, according to art. 374 PC, the penalty prescribed by the law ranges from 5 to 10 years. Certainly, in Greek judicial practice the range of application is not so broad. Besides, a tendency is obvious as concerns the so-called 'law in action' that the courts are rather lenient in their sentencing decision-making. Furthermore, most of these sentences in case of offences to be punished with imprisonment up to 5 years are converted into a pecuniary punishment or to a community service, according to art. 82 PC.

In practice, a crucial problem arises here in relation to the way in which a judge may be influenced in his/her decision-making by his/her temperament and personality as well as by his/her subsequent attitude towards the aims of punishment[2]. Usually,the judge who prosecutes an offence or passes a sentence either has, more or less, an authoritarian personality and gives priority to severe sentences which may exercise a deterrent effect; or, inversely, the judge has a mild personality and inflicts – as a rule - lenient sentences, which put the emphasis on the offender's problems and may thus lead to his/ her social reintegration. In the first case we have judges who decide giving priority to the ideas of retribution, promotion of public interest and reduction of crime through deterrence, whereas in the second case the accent is put on individualistic ideas such as offender's rehabilitation and victim's reparation of damages. Yet, whatever the motivation and the typr of personality, judges who decide mainly on the basis of their personal ideas and not pursuant to the criteria of law, evidently do violate the basic principles of due process, and the rule of law. Indeed, in such cases the defendants are not judged in an equitable manner nor according to the principle of proportionality existing between gravity of offence and severity of punishment, but are mistreated on the basis of other, extra-legal criteria[3], let alone if they are in a low socio-economic situation.

(c) Apart from the vague wording of the provision on assessment of punishment and the broad scale of penalties to be inflicted, there are also problems arising by the

2 Cf. Heinz 1992: passim, who conducted a relevant research and found out that most of the differentiations in the assessment of punishment are mainly depended on the ideas that each judge has about the aims of punishment. See similarly, Clancy et al. 1981: passim. Concerning the aims of punishment, see mainly, Walker 1991: passim.

3 Cf. Kapardis 2014: passim and Kapardis 2016: passim.

procedure which is followed by the judges in relation to the nature and quantum of the sentence. Indeed, if the defendant is found guilty by the Court, then no specific procedure is foreseen by the Code in order that the defendant presents (by means of witnesses and documents) the reasons for which (s)he could deserve a lower punishment. Hence, the defendant may be judged to be sent to prison after a procedure of only several minutes.

(d) Finally, another negative aspect of the way in which the assessment of punishment is applied in Greece is the following: The relevant decision does not encompass, as a general rule, an *evidenced justification* with the reasons for which the Court has passed a condemning judgment. Instead of giving such evidence, based on concrete facts which can explain the kind and the level of the punishment, the Courts solely repeat the wording of art. 79 PC and nothing more! And this is so, even though there is a concrete obligation for the judges, provided by the law (art. 74.4 PC, 319 b CPP) and by the Constitution (art. 93.3), that the justification of a sentencing decision must contain the particular reasons for which the decision was taken[4].

In *conclusion*, all the aspects of a decision on assessment of punishment, that is (a) interpretation of the law, (b) punishment to be inflicted, (c) procedure to be followed and (d) justification with the reasons which have led to the decision, in Greece, are all improperly regulated by the legislator and/or applied by the judges, who under these circumstances dispose of a broad power of discretion. As a result, there are many sentences which are characterized by an inconsistency connected with the temperament and personality of each judge.

3. Some ideas on how to deal with the problems (in addition, certain findings of a Greek relevant research)

A question arises as to *how the abovementioned problems could be dealt with*. Certainly, there is no need to search for improvised answers. The Council of Europe with its Recommendation No. R(92) 17 has since 1992, given important guidelines as to how each Member – State could regulate its legislation. According to it, judges should have at their disposal some so-called starting points and sentencing orientations, which in practice can conduce to a kind of 'usual punishments'.[5] Some similar measures have also been suggested or taken by the British Magistrates' Association, the British Sentencing Advisory Panel, the United States Sentencing Commission, etc.[6] Another relevant example in this direction is given by the States of Minnesota and

4 Cf. European Court of Human Rights (ECtHR), Case of *Van de Hurk v The Netherlands*, 19.4.1994, No 61, accessible on line: https://www.legal-tools.org/doc/852b0e/pdf/

5 Council of Europe 1993. See furthermore, Council of Europe 1989.

6 Cf. https://en.wikipedia.org/wiki/Sentencing_Council and Doob 1995: passim.

Michigan in the US, where Sentencing Guidelines Grids, based merely on the seriousness of the offence and on the offender's criminal record, have created an interesting model on the assessment of punishments.[7]

The main idea behind all these efforts is to offer to the judges an idea of what the *called normal punishments* for some main common offences are, so that there are no considerable deviations in jurisprudence when the cases are similar.

It should be noted on this occasion that the University of Athens conducted some years ago, under my scientific responsibility, a content analysis research of case-files at the First Instance Criminal Court of Athens, with the aim to find out what the usual punishments for certain ordinary offences are. The findings of this research were published in 2015 in a Greek legal review.[8] After examining 448 case-files and measuring the frequency of the sentences that were inflicted for each offence, the research team has been guided to the following results (here are given only some average punishment for offences whose punishment under the law is foreseen to be up to 5 years of imprisonment):

For defamation (363 PC) 7 – 10 months, for theft of a vehicle by a Greek (372 PC) 7 – 12 months or less, for forgery of documents (216 PC) 4 – 12 months or more, and for negligent homicide by a Greek (302 PC) in case of a car accident 15 – 24 months or less. All these offences concern similar and comparable cases. Besides, sentences were taken into consideration only under further specific prerequisites, i.e. if the perpetrator has no criminal record and has not committed the offence neither repeatedly, nor under mitigating circumstances (84 PC).

Evidently the above-mentioned sentences are impressive for their leniency, given that in all of these cases the defendant does not go to prison but (s)he is simply condemned to a suspension of sentence or, at the most, to a converted pecuniary punishment (in case that [s]he has a criminal record).

Certainly, these results can be helpful also to the elaboration of the new Greek Penal Code, which, as was suggested above, should comply with a more restricted range of penalties.

A next step to this research should be to create an internet site where all significant judgments on sentences could be uploaded by means of a questionnaire filled by the judges in collaboration with university research teams. Another step could be furthermore to create in Greece a Sentencing Committee which would give to the judges some non-binding guidelines, elaborated preferably by the Judiciary, on how to make their sentence decision, as is the case in the UK, the USA and elsewhere. Understandably, these guidelines could become binding in a later stage.

7 Cf. for example Brodeur 1985: 181 et seq. and Hudson 2003: 43 et seq. Concerning the efficiency of this system, see also: D' Alessio/Stolzenberg 1995: passim.

8 Courakis et al. 2015.

Last but not least, it should be essential for the Greek legislation to establish a separate stage of the penal process during which testimonies and other evidence might be presented by the defendant, so that the kind and quantum of the sentence be determined according to his/her real socio-economic and family situation. At the same time, the case records of this stage of process could be made part of the reasons for which the Court has reached its sentence decision. However, in order for a sentence decision to have a sufficient justification, it would be necessary to include there also references concerning the assessment of similar precedents in jurisprudence.[9]

Certainly, these ideas, addressed mainly to the Greek Legislator, can be helpful to a better Greek sentencing policy. However, an important role for the improvement of this policy is equally played by the judges, who will have to apply these new ideas.

At that occasion, it should be noted that *Greek judges'* role is important not only during the prosecution of an offence and its assessment by the Court, but also during the period after the conviction of the offender, that is when the latter serves his/her sentence. In such cases, the judges, according to the Penitentiary Code (1999) of Greece, art. 85 et seq., 87 supervise and assist the prisoners in a way similar to the French institution of the 'Cour' and 'juge de l' application des peines', but with judge's duties to be exercised by the so called Prison's Prosecutors.

4. Concluding remarks

As a conclusion: Greece has a long way to go ahead in matters of sentencing in order to comply with the needs of a 21st century modern Criminal Policy.

Hopefully, the above considerations may contribute to a better understanding of the problems involved and hence to a more thorough search for their appropriate solutions in view of what has not worked well until now and what lessons could be drawn thereof not only for Greece, but equally for other countries with similar problems.

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9 Cf. Ashworth 1984: passim.

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