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AN ACCOUNT OF THE GRAVITY OF THE CRIME WHEN SENTENCING WITH USE OF ARTICLE 69 OF THE CRIMINAL CODE OF UKRAINE (as a result of judicial practice)

Paper presents a study of the legal practice of imposing more lenient punishment than it is recommended by the law, with a focus on the problems of defining the gravity of the crime.

Key words: *gravity of the crime; punishment; circumstances mitigating the punishment.*

In the Criminal Code of Ukraine (hereinafter – CC) the term “the gravity” of the crime" is used mostly in the context of the designation of one or several categories of socially dangerous encroachments foreseen by the parts 2–5 of the art. 12 of the CC (articles 8, 12, 14, 28, 43, 45, 46, 47, 48, 49, 53, 54, 59, 64, 70, 71.74, 79, 80, 81, 82, 83, 89, 97, 102, 105, 106, 107, 108, 254, 378, 383, 384, 396 CC). In these articles it is specified the typical gravity, which is characterized by all the crimes covered by the corresponding category. In the specific cases (art. 53, 65, 68, 71, 75, 84, 94, 99 of CC) the legislator requires the Court to take into consideration the gravity of a crime (or acts – article 68, 94 of CC), which is characterized by a particular gravity of encroachment upon the individual, i.e. the reality of crime, not just the default specified in the law of the gravity of the crimes of individual categories. In this way it is revealed a wide field for forensic arbitry in the individualization of a criminal responsibility (election of penalties within the criminal law sanctions beyond, exemption from punishment and serving) and the application of other measures of criminal-legal character (definition of the kind of coercive measures of a medical character).

It’s needed the definition of accessories perfect crime to a certain category of severity with simultaneous consideration of the gravity of the infringement of an individual mentioned in many contemporary writings dedicated to the issues of sentencing [see, for example: 1, pp. 38–39; 2, p. 203; 3, p. 6; 4, p. 10; 5, pp. 51–52]

and in article 3 of the plenum of the Supreme Court of Ukraine on the practice of designating the courts of criminal punishment, according to which "defining the degree of gravity of the committed offence, courts must proceed with the classification of crimes" (article 12 of the CC), as well as the specific features of the crime and the circumstances of its commitment (form fault, motive and objective way, stage committing the number of episodes of criminal activity, the role of each of the partners, if the crime is perpetrated by a group of persons, the nature and severity of the consequences that occurred, etc., [6]. In practice, courts do not normally consider to the points made above reasons, considering the factors that determine individual severity committed a crime, it is almost always limited to indicating the default severity of encroachment. In this regard, "good" help is the Criminal Procedural Code of Ukraine (hereafter CPC). Requirements to the declaration (part 3 of article 374 CCP) does not contain dispositions that oblige the courts at least briefly describe how it accounted for the gravity of the crime.

In practice, courts do not normally refer to the points made above reasons, considering the verdicts the factors that determine individual severity committed a crime, it is almost always limited to indicating the default severity of encroachment. In this regard, the "good" help is the criminal procedural code of Ukraine (hereafter CCP). Requirements to the declaration (part 3 of article 374 CCP) does not contain provisions that oblige the courts at least briefly describe how it accounted for the gravity of the crime.

Such practices particularly negatively affect the validity of sentences, which is a more lenient punishment than that provided by law, that is burdened vagueness prescriptions provided in art. 69 of the CC. They are formulated in a way that to a certain extent provokes the disparate and sometimes is blatantly distorted application of the relevant rules. Study of the problems of individualization of criminal responsibility and the personal experience of advocacy gives grounds for nomination of hypotheses about what the present status of domestic judicial appointments more soft punishment than that provided by law, not always legally and reasonably. To test the hypothesis has been studied 120 convictions local courts from all regions of Ukraine, the Autonomous Republic of Crimea and Kyiv,

approved the use of art. 69 of the CC for 2013 and referenced in the unified State Register of court decisions. The verdicts of the offices in the registry by accident (not examined sentences in cases of the totality of the crimes and offences committed in complicity.

Obtained as a result of judicial sentences of general information (about the number of crimes of different degrees of severity, the ways of assigning more mild punishment than that provided by law, the number of cases, approval of the agreements on the recognition of culpability and conciliation agreements, as well as the number of cases of exemption from serving with the test) are presented in Table 1. These numbers by themselves have little to say. At the same time attracting attention disproportionate number of sentences for serious crimes (68.3%), a significant number of cases, approval of the agreements on the recognition of culpability and agreements on reconciliation (22.5%), as well as dismissals from serving the punishment of test (26.7%). almost always released from serving the punishment of test were to the person was convicted for serious or especially serious crime only in two cases (6.25%) It was about the crime of medium severity, provided the part 2 of article. 191 and part 2 art. 367 of the CC. While both times softening is manifested in the fact that the Court has not appointed an additional punishment in the form of disqualification of certain posts or engage in certain activities, which provided an opportunity to work on the same post, in conjunction with the finding on which perpetrated the crime. Analyzing indicators generate rack suspicion that often the Court applies article. 69 of the CC only to assign such a punishment, that gives the opportunity to release a convict from his serving with the test.

Study of judicial practice was carried out through the prism of "weaknesses" in the text of the art. 69 of the CC. There is only one clear criterion, if any sentenced can be assigned a more lenient sentence than that provided by law is the existence of multiple (i.e., two or more) circumstances that mitigate punishment. The remaining conditions of use. of art. 69 of the CC defined quite vague, they leave too much space for judicial diskrecìï. In particular, the legislator did not specify which particular mitigate circumstances that should be considered such that

significantly reduce the severity of the crime committed, how the Court should take into account the identity of the wine (for example, allowed the application of article 69 of the CC for the persons who are negatively characterized by having a criminal record, had committed several crimes) as essentially a court has the right to mitigate the punishment, which is a kind of the main punishment is not specified in the code of criminal legal sanctions, has the right to go to court.

In 2004 the Supreme Court of Ukraine appealed to the Constitutional Court of Ukraine with the request to resolve questions about the constitutionality of the provisions of art. 69 of the CC in the part that prevents the designation of persons who have committed crimes of a small gravity, more mild punishment than that provided by law. Together with a. music and with a. Trostûk, we participated in the preparation of the scientific conclusion regarding the issues raised in the constitutional appeal. In this report we substantiated the feasibility of declaring unconstitutional disposition of art. 69 of the CC. Among others, we tried to convince the Constitutional Court of Ukraine is that it is only the spread of norms provided in art. 69 of the CC, persons who have committed crimes of a small gravity, without improving the wording of this article may be a prerequisite, too formal approach to the application of relevant criminal legal prescriptions, their indiscriminate use and abuse. Thus, in addition to the conclusion about the appropriateness of recognition of unconstitutional provisions. 69 of the CC, which rendered impossible its application to persons who have committed crimes of a small gravity, we substantiated need to give an official interpretation of the dispositions of this article (in particular, regarding the reasons for the appointment of more mild punishment than that provided by law; the way the definition of Court of other, more mild form the main punishment than the sanction articles Special part of the CC). In fact, in our opinion, the use of the courts the dispositions of art. 69 of the CC should be exceptional and extremely balanced, since this method of individualization of sentences requires the presence of special circumstances which substantially reduce the social danger of the committed act.

Sorry, but the Constitutional Court of Ukraine is not fully embraced our offer. In the decision of November 2, 2004 № 15-RP/2004 in the case of appointment by

the Court more mild punishment only casually mentioned in the article. 69 of the CC of Ukraine "of specific grounds that soften the punishment and significantly reduce the severity of the perfect crime" (abz. 12 clause 4.1 of the Decision). It's a very concise position not attracted the attention of the courts of general jurisdiction. Tribute to apply art. 69 of the CC requires a proper understanding of the "functional" assignment of appropriate criminal-law regulations and determination of their place in the algorithm of individualization of punishment. It appears that analyzing norms reflected in order to provide the Court able to assign a fair punishment in the event of a situation where individual severity of encroachment lower than its typical rate. In such cases, the punishment should be designed with the use of art. 69 of the CC. Significant difference between the individual and the default degree of gravity, according to the lawmaker, can exist only in the presence of at least two circumstances that mitigate punishment. Obviously, this must be some kind of exceptional, and not any circumstances that mitigate punishment.

In addition to the gravity of the offence, used previously the norm obliges the Court to take into account the characteristics of individual wine, in order to properly fulfill the requirements provided for in § 2 art. 65 CC and assign such a punishment that will be necessary and sufficient for correcting the convicted and the prevention of new crimes. The law defined, albeit with insufficient degree of concrete, quantitative and qualitative evidence of circumstances which mitigate the punishment, the presence of which allows to apply art. 69 of the CC. The requirement to take into account the identity of the culprit in no way specified in law absolutely does not define how the Court should take into account the personal characteristics of the offender, as a certain trait should affect the decision on the application or denial of the application of the art. 69 of the CC. Proceeding from the above, a key notion in the context of the analyzed norms there are circumstances which mitigate the punishment and significantly reduce the gravity of the crime committed.

Apparently prevailing is a thought extenuating circumstances may characterize the offense and (or) a person guilty [9, p. 204]. However, in the art. 69 of the CC is

not about all of these circumstances, and only on those relating to crime, significantly reduce the degree of its severity, which is determined by the nature and degree of social danger of infringement. Just so you can describe in general terms the most common in the literature of understanding correlation of concepts of "individual gravity of crime" and "social danger of the crime". Range of factors that affect the nature, and especially on the degree of public danger (individual gravity) crime in literature is defined differently [see, for example: 1, s. 39; 2, pp. 211–212; 8, p. 39–41; 9, p. 61]. The most reasonable position seems to be, according to which the social danger of the crime is defined by all the signs of its composition, both objective and subjective. This can take up to a ridge only those signs face criminal, that is covered by the corresponding element of the crime. Characteristics of the persons criminal – his social and psychological characteristics – does not affect the degree of public danger of the crime and could not be taken into account when determining his individual severity. The opposite of the meaning of constitutional decisions would contradict the principle of equality of all before the law [10, pp. 64, 65]. The public danger of the crime does not cover the public danger of the criminal, these characteristics may significantly differ [8, p. 41]. Differentiation of these two notions is enshrined in texts. 48, item 3 of part 1. 65, art. 69, ch. 4, art. 74, part 1 article. 75 of the CC, as well as in acts of judicial interpretation of criminal law regulations (see, in particular, item 3 of the plenum of the Supreme Court of Ukraine on the practice of designating the courts of criminal punishment» [6]).

In analìzed aspect seems to be useful to compare the text of art. 69 of the CC in 2001 with a similar within the meaning of art. 44 of the CC of 1960, according to which the Court had the right to appoint a more lenient punishment than that provided by law, taking into account the exceptional circumstances of the case and the identity of the culprit. In the CC 2001 circle "exceptional circumstances of the case" interpretation to multiple circumstances that mitigate punishment and significantly reduce the severity of the crime committed". The doctrinal and statutory provisions, in our opinion, determine such conclusion: the range of circumstances that mitigate punishment and significantly reduce the gravity of perfect crime, you cannot place any characterization of the defendant, any

circumstance of the case. These may include only those that are directly related to the featured part of the offense and greatly reduce the level of public insecurity a reality upon infringement in comparison with typical, pictured in criminal law. Analysis of practice certifies that the courts take the opposite position.

Local courts in most cases (or 69%) 57.5 sentences take into account only the default gravity of crimes, that is considered sufficient to state the obvious fact of belonging a specific offence to one of the categories stipulated by art. 12 of the CC. Another 23 verdicts (19.2%) courts limit ourselves to the consideration of the gravity of the offense in general, without reference to the art. 12 of the CC 24 verdicts (20.1%) referred to the character and (or) the degree of social danger of the crime, the contents of which were not disclosed. What exactly gives the court like that, "taking into account" the gravity of the crime? What inferences can make the judgment based on this "unique"? Especially the acute lack of rational responses to the questions when the sanction of the criminal law provisions "overlaps" two or even three degrees of severity – small, medium, hard, and especially hard. In the context of the analysis of the social danger of the courts mentioned only two signs of crimes: the consequences – in 9 verdicts (7.5%) and shape of the fault in 2 verdicts (1,7%). Especially it should be noted that in the 11 verdicts (9.2%) the gravity of the crimes is generally not mentioned. In 8 of the last 11 cases was approving the agreement on the recognition of culpability (6 convictions) or the agreement on reconciliation (2 sentences).

Foregoing gives grounds to assert that in general the courts with the highest possible formality appropriate to fulfill legislative requirements taking into account the gravity of the crime committed when prescribing punishment. By and large this practice may indicate the existence of one of the two opposite the essence of situations: either all too simple and obvious or quite difficult and have no desire to, and lack of theoretical training in order to properly fulfil the requirements of the law. In the analyzed verdicts found 30 different circumstances admitted by the courts such that soften the punishment and significantly reduce the gravity of the crime committed. In table 2 are those that do not belong to clearly casuistical and there are at least two virokah. We believe, in this publication should not go into a

detailed analysis of the circumstances. Quite obvious that almost all they in no way affect the degree of severity of the committed crime. Instead, they mainly characterize the personality of the offender and, in addition, can not always be emollient circumstances. This conclusion is confirmed by the fact that individual factors (see, in particular, lines 5, 6, 9, 13, 15, 16 table 2) courts are increasingly taking into consideration in the context of the characteristics of a person accused or being mentioned among the other circumstances, mitigating the case.

The courts often refer to (1) true remorse, (2) the active promotion of disclosure offence (3) recognition of revaluation of its fault. Only a single verdict describes the specific actions of the defendant, that indicate the presence of these circumstances. These three factors together are referred to in 17 verdicts (17.2%), the first and the second circumstance – 40 verdicts (33.3%), the first and third in the 18 verdicts (15%), the second and the third is only 1 sentence (0.83%) On one of these three circumstances courts refer in 26 cases (under 19 sentences (15.8%), 2 sentences (1.7%) and 5 sentences (4.2%). None of these circumstances is mentioned in only 18 verdicts (15%). to our beliefs, none of these circumstances, separately, as well as all of them together do not give sufficient grounds for the appointment of more mild punishment than that provided by law.

Harshly there are the cases when the sentence indicates only one circumstance that mitigates the punishment (in both of these cases were sincere remorse or recognition of fault), or there is none. It is noteworthy that the instructions on mitigating circumstances are absent only in the verdicts, which approved the agreement on the recognition of culpability (14 sentences) or the agreement on reconciliation (1st sentence). Article 471 and 472 do not stipulate that the parties have the right to negotiate agreements assigning more mild punishment than that provided by law. The principle of dispositionness (art. 26 of the CPC), criminal proceedings are free to use their rights within and in the way stipulated by this Code. Therefore, the legislator did not hand criminal proceedings the right to negotiate the application of art. 69 of the CC Otherwise, the QC and the CPC would contain the dispositions of relevant content (so, as it provides for the possibility of applying article 75 of the CC). Despite the above mentioned, the

specialized Supreme Court of Ukraine with consideration of civil and criminal cases gave the "green light" to the practice of the concluding agreements on the application of art. 69 of the CC"[12]. The facts seem to be talking, and their value is self-evident. In verdicts are not displayed the results on the gravity of the crime, and therefore the courts do not carry out such assessment, leaving a neglected material sign of offense, uncanny theoretical and practical significance of which is the subject of many studies. Apparently, it is time to reconsider the position that almost indefinitely extend the possibility of individualization of criminal responsibility. Probably, these provisions should specify and formalise the largely. At the same time you cannot leave out of consideration the existence of not singled situations where, despite the absence of objective circumstances which mitigate the punishment and significantly reduce the gravity of the committed crime, we have to admit much lower individual gravity of a real assault compared to typical levels.

Proceeding from the above mentioned, it seems advisable to hold at the level of generalization of large-scale practices. Art. 69 of the CC, according to which you want to perform these steps: to adopt a resolution of the Plenum, which details clarify the content of the concept of "few circumstances that mitigate punishment and significantly reduce the severity of the crime committed". Pay attention to the fact that such circumstances may not be particularly the sincere remorse and (or) recognition of revaluation of the fault, active promotion of crime, lack of serious consequences, thought of the victim, lack of criminal record, other characteristics of the person guilty. It should also be described what traits a person the perpetrator can testify about inadmissibility of the application of art. 69 of the CC; outline the range of gravity of the crimes, whose individual often turns out to be significantly lower than typical gravity as well as install signs warehouses of these crimes that cause such a distinction. Several proposals for legislation were made, aimed at the differentiation of criminal liability with regard to the content of the signs of the syllables of the crimes; to formulate proposals on the concrete requirements of CPC about putting the motives of exemption from criminal responsibility, the choice of the type and size of the punishments, exemption from punishment and its serving. In particular, it seems advisable to oblige the courts when applying art. 69

of the CC provided arguments, given that recognized the fact that softens punishment and significantly reduces the degree of the gravity of the committed crime; offer legal acts in the text of articles 471, 472 CPC clearly identify eligible parties agreement on the reconciliation and agreement on the recognition of culpability to reach agreement on the appointment of more mild punishment than that provided by law.

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