

## DEFINITION OF MINIMUM AND MAXIMUM PUNISHMENTS FOR CONVICTS WHO HAVE COMMITTED THE TOTALITY OF CRIMINAL OFFENSES: COMPARATIVE ANALYSIS OF LEGISLATION

BY

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### Abstract

The problem of the definition of the minimum and the maximum punishments for people who are convicted of the totality of criminal offenses has the important social and legal meaning. This scientific article is aimed at the study and the comparison of the legislation of the different countries and jurisdictions, which relate to the criminal responsibility in such situations.

The purpose of the research is the detection of the common approaches and the differences in the definition of punishments, and also the estimation of their impact on the effectiveness of justice and fairness. The authors use the comparative analysis where the key aspects of the criminal law have been considered, including the criteria of the definition of minimum and maximum punishments, taking into account the circumstances of the case and the impact on the totality of criminal offenses.

The results of this research can contribute to the improvement of legislation and policy as for punishments in the situations of the totality of criminal offenses, contributing to more fair and effective approaches to the criminal responsibility.

**Keywords:** totality of criminal offenses, minimum and maximum punishment, individual aspects, criminal offense.

## INTRODUCTION

### Setting of the problem

In today's world, the criminal responsibility of people who have committed totality of criminal offenses is becoming the subject of growing interest and discussion in legal and academic circles. However, there is the significant divergence in the legislation of the different countries and jurisdictions as for the definition of minimum and maximum punishment for this category of convicts. This divergence raises the questions about the fairness and the effectiveness of criminal justice and its compliance with the modern societal values.

This article aims to study and to compare the different approaches to the definition of punishment for people who commit the criminal offence in different jurisdictions. The research will focus on the analysis of the structure of punishments, the principles of their

definition, taking into account the totality of the criminal offenses and sociocultural factors affecting this process.

Obviously, the index of the joined committing of criminal offenses is one of the problems of today in the judicial practice of Ukraine, which requires the gradual, the planned, the effective reduction. Based on the regulations and the norms of the national legislation, we propose to consider the general and the specific features of the totality of criminal offenses, to outline the limits (minimum-maximum) of the destination of punishments by totality of verdict, to analyze the judicial practice of Ukraine and the countries of the European Union, the United States of America for the further comparison of law-making and the separation of the factors affecting the percentage indicator of the level of cumulatively committed criminal offenses.

## The analysis of the recent research and the publications

Turning to the topic of the definition of the minimum and maximum punishments for convicts who have committed the totality of criminal offenses, it should be noted that many scientists have paid attention to this issue, namely: T. I. Sozanskyi "The qualification of the totality of crimes" [1], N. I. Ustrytska "The criminal-legal content of the totality of crimes: separate considerations" [2], E. Takhtai "The totality of crimes: history of the development and the problems of the correlation of real and ideal totality" [3] and others.

## The presentation of main material

Usually, when the person commits several illegal actions, he can be passed charges by totality of crimes, each of which is subject to the qualification according to the corresponding article or the part of the article of the Special Part of the Criminal Code of Ukraine. In accordance with Part 1 of Article 33 of this Code, totality of crimes is defined as the committing by the person of two or more criminal offenses which are foreseen with the different articles or the different parts of one article of the Special Part of the Criminal Code of Ukraine, for none of which he has not been convicted [4]. E. M. Takhtai notes: "...the totality of crimes is one of the important and the complex problems, which has one of the primary meaning, both for the science of criminal law and for the practical activities of law enforcement agencies" [3, p. 320]. Taking into account the definition of the concept of "totality of crimes" in the criminal-legal literature, its specific features have been formulated as

- 1) Criminal offenses can be qualified with the different articles of the Special Part of the Criminal Code of Ukraine, for example, one crime is by Article 152 (rape), another illegal act that has become the consequence of the previous criminal offense is by Article 115 (intentional murder), etc.;
- 2) Criminal offenses for which the person has been exempted from the criminal responsibility on the grounds which are foreseen with law (generally Articles 44-49 of the Criminal Code are regulated) cannot be included in the order of illegal acts forming totality of criminal offenses;
- 3) Each illegal act forming totality of criminal offenses is subject to the separate qualification (Part 2 of Article 33 of the Criminal Code) [5, p. 248; 4].

In this context, it is worth noting that criminal offenses which are foreseen with the same article or the part of the article of the Special Part of the Criminal Code of Ukraine can form totality if:

- 1) They have been committed at different times, and for the next illegal act, the norm and the composition of the criminal offense (according to the content) is foreseen with the new edition of the relevant article or the part of the article of the Special Part of the Criminal Code;
- 2) Committed illegal actions have different stages of the offense;

- 3) The crime has been committed more than once, and the new version of the relevant article or the part of the article of the Special Part of the Criminal Code is characterized with the strengthening of criminal responsibility;
- 4) The person has committed one or more criminal offenses independently or as the executor (co-executor), and others as the organizer, the accomplice, or the instigator;
- 5) Completed attempt on the criminal offense and the incomplete attempt on the criminal offense have been committed;
- 6) The citizen has committed one illegal act as the organizer, the instigator or the accomplice, and in another, he has been as the accomplice [6, p. 2-3].

The authors note that the definition of the totality of criminal offenses helps to understand the tendency and the patterns of crime. Depending on the number of illegal actions committed by the person at the basis of committing the crime, the totality of criminal offenses is divided into: 1) real; 2) ideal [7, p. 250];

First of all, it will be considered the real totality of criminal offenses. The peculiarity of this category is the committing of criminal offenses with the independent, the separate act. For example, the citizen, at first, expresses threats as for the destruction of someone else's property by arson, explosion or other generally dangerous means (Article 195 of the Criminal Code), and then carries out what he has said by intentionally destroying or damaging someone else's property (Article 194 of the Criminal Code). Or, it will be said, there is the illegal deprivation of liberty or kidnapping (Article 146 of the Criminal Code), which becomes the prerequisite for the further forced donation (Article 144 of the Criminal Code).

On the other hand, the ideal totality of criminal offenses is defined only when all criminal offenses that make up the totality of crimes, the person commits one action or inaction. Conventionally, we can divide the composition of the criminal offense into two or more independent ones, but in fact all of them are committed at the same time. It can be supposed that the person has committed intentional (before that systematic) physical violence as for the spouse or ex-spouse or another person with whom he is (was) in a family or close relationship (Article 126-1 of the Criminal Code), which becomes the main reason of premeditated murder during the committing of the act of physical violence (Article 115 of the Criminal Code). It has been considered the situational variant, when the person, setting fire to someone else's property, it can be supported that the house, with the aim of the purposeful murder, simultaneously commits the illegal act as for someone else's property by arson (Article 194 of the Criminal Code) and the premeditated murder (Article 115 of the Criminal Code).

It will be paid attention to the legal aspect of the definition of the minimum and maximum limits of punishment for people who have committed totality of criminal offenses, as he plays the important role during the final sentencing by the court.

According to Part 1 of Article 70 of the Criminal Code of Ukraine, in cases when the several criminal offenses cross, the court

determines the final punishment by means of appointment of the separate punishment (main and additional) for each illegal act, and then adds less severe punishment to more severe one or fully or partially attaches the prescribed punishment to the previous one.

In accordance with Part 2 of Article 70 of the Criminal Code of Ukraine, the sanctions of the article (sanctions of part of the article) of the Special part of the given Code foresee the appointment of more severe punishment by the totality of criminal offenses. So, if at least one of the criminal offenses is known as serious or particularly serious criminal offense, the court can impose the punishment within the maximum term established for this type of punishment in the General Part of the Criminal Code of Ukraine. Or we take into account illegal acts for which life imprisonment is prescribed. In this case, the final punishment for the totality of criminal offenses is determined with the deepening method any less severe punishments with life imprisonment.

According to Part 3 of Article 70 of the Criminal Code of Ukraine, the additional punishments imposed with the court for criminal offenses of which the person has been found guilty can be added to the main punishment imposed for the totality of crimes.

In accordance with Part 4 of Article 70 of the Criminal Code of Ukraine, according to the rules which are foreseen in parts one to three of this article, punishment is imposed if, after the verdict in the case, it is established that the convicted person is also guilty of another criminal offense committed by him before the previous verdict has been passed. In this case, in the term of the punishment finally, as appointed for the totality of the criminal offenses, punishment will be counted, he will serve in full or partly by previous sentence according to the rules which are foreseen for in Article 72 of this Code.

The identical phenomenon is the establishment of the minimum limit of punishment. Predicting Article 44 of the Criminal Code of Ukraine, the transition to more softer type of punishment is possible only in the presence of exceptional circumstances of the case or exceptional data about the guilt of person (the presence of minor for maintenance children or elderly people, their state of physical and psychological health, etc.), but the minimum limit of the corresponding type of punishment cannot be lower than that established by law (at least two months of the correctional labor, three months of imprisonment, etc.).

We trace the certain connection in the national legislation, so, for example, the legislation of the Republic of Slovenia, it is a country of the European Union, where the appropriate limits of punishment for the commission of plurality of criminal offenses (totality is one of the types of plurality of crimes along with the repetition and recidivism) have been foreseen. On the basis of legislative acts and judicial practice, we will characterize the common and the distinctive features of the totality of criminal offenses and the definition of punishments.

Firstly, let's distinguish and analyze part 1 of Article 53 of the Criminal Code of the Republic of Slovenia from November 1, 2008 [8]: "If the offender is judged for two or more criminal offenses at the same time, the court will, firstly, recognize the

punishment for each relevant offense and then will appoint the general punishment for all plural criminal offenses." The given part can be equated with the previously indicated Part 1 of Article 70 of the Criminal Code of Ukraine. This is confirmed with carrying out the certain parallel between the definition of the main and the additional punishment (in national legislation) and the initial destination of punishment for each relevant illegal act (in the legislation of the specified country of the European Union).

Secondly, let's analyze the dependence of part 1 of Article 46 of the Criminal Code of the Republic of Slovenia and point 2 of Part 2 of Article 53 of the Criminal Code of the Republic of Slovenia. In accordance with Part 1 of Article 46 of the Criminal Code of the Republic of Slovenia, punishment in the form of imprisonment can be imposed for the period of not less than fifteen days and not more than thirty years, at the same time, point 2 of part 2 of Article 53 of the Criminal Code of the Republic of Slovenia indicates that if the combined punishment in the term of imprisonment has been imposed for all plural criminal offenses subject to subordination under Article 46 of the given Code, the total amount of punishment must exceed each punishment assigned for the specific criminal offense, but cannot exceed the total amount of all punishments assigned for crimes. In national legislation on the basis of Part 2 of Article 70 of the Criminal Code of Ukraine, such aspect is characterized with the absorption of any less severe punishments by the most severe.

It should be noted that the difference is traced to the use of the principle of retroactivity of less severe criminal punishment for people who have committed plurality of criminal offenses, in particular, in the case "Koprivnikar against Slovenia" [9]. The court determined the possibility of the use of the principle. In the national legislation of Article 58 of the Constitution of Ukraine, it is determined that laws and other normative-legal acts do not have reverse effect in time, except for the cases when they mitigate or cancel the responsibility of the person [10]. But this applies to those cases in criminal law when, for example, the content of qualifying features is specified or the alternative social-dangerous consequences are excluded from the composition of the criminal offense, etc. Accordingly, the implementation of the principle of retroactivity of less severe criminal punishment for the citizens who have committed the totality of criminal offenses is impossible without the given requirements.

With the aim of the further normative-legal comparison of legislation of the different countries as for the definition of the minimum and maximum limits of punishment for people who have committed the totality of criminal offenses, the authors use the legislative base of the system of legal regulation of the North American state. In the jurisprudence of the United States of America, the sentencing practice of people who have committed the totality of crimes is based, in particular, on the "Three strikes laws", which were firstly adopted in the referendum in the state of Washington in 1993. The essence of the legislation established at the state level in the USA is that the person is subject to criminal responsibility in the form of life imprisonment or 25 years in prison for the committing of three serious criminal offenses. However, this principle also has its drawbacks. It is essential that

the punishment determined on the basis of the "Laws of three mistakes" can be excessively severe and unfair. For example, in California, small theft qualifies as the serious criminal offense if the offender has prior conviction for robbery, plunder, or theft. In accordance with part 1 of section 16 of Article 667 (a) of Criminal Code of the State of California, the citizen convicted of the serious criminal offense in this state or of any crime committed in another jurisdiction that includes all the elements of any serious criminal offense will, in addition, receive the sentence imposed with the court for this criminal offense, five-year term of punishment for each such previous conviction according to the charges which are brought and considered separately [11]. So, the presence of punishment for committing any serious criminal offense related to the possession of narcotic and/or psychotropic substances, violence, theft is the basis for appointment of the maximum limit of criminal responsibility for the totality of criminal offenses. It should be noted that criminal responsibility for possession of narcotic substances can be changed to forced treatment from drug addiction. This concept is based on the postulate that "drug addiction is corrected by the medical intervention, not by imprisonment". In national legislation, the appointment of punishment of the person who has committed the totality of crimes can also be based on the individual characteristics of the citizen. According to Article 94 of the Criminal Code of Ukraine, taking into account the psychological state of the person (manifestation of arbitrary mental illnesses that could be caused by drug addiction), one of the versions of the change of the decision of imprisonment of the person can be the use of coercive measures of the medical nature. If the defendant is convicted of the serious criminal act and has the criminal record for the serious or particularly serious criminal offenses, so, the duration of time between the previous and current offense does not affect the indictment of the defendant; the guilty person is not granted probation for the current criminal offense; the limitation for the sentences of any subsequent conviction for felony doesn't carry out. According to the Part 1 of Section 16 of Article 667 (b), Criminal Code of California, the intent of the legislature is to provide for longer prison terms and severe sentences for those who commit the totality of criminal offenses. At the same time, in Criminal Code of the State of New York, the repeated and the multiple felonies and general guidelines for sentencing have been determined [12]. Thus, for committing the violent criminal offense "A", where "A" is the most serious crime, "E" is a non-violent offense, the person is subject to criminal responsibility in the form of life imprisonment or 25 years in prison, and for committing the violent crime "D" is from 2 to 7 years of imprisonment. The number of the factors affect the appointment of the punishment by the court, such as

- 1) Absence/presence of the previous convictions;
- 2) Fact of criminal record for non-violent crime during last 10 years; it is a non-violent predicate;
- 3) Existence of two or more convictions for serious crimes (persistent criminal);
- 4) Fact of criminal record for violent crime during last 10 years; it is a violent predicate;

It should be noted that bringing to criminal responsibility of minors suspected of committing the totality of criminal offenses is based on part 4 of section 18 of Code of the United States of America, which establishes the possibility of the exemption from criminal responsibility based on demonstrated maturity and rehabilitation, and mandatory life imprisonment without parole which violates the Eighth Amendment to the Constitution of the USA as for minor offenders. In this way, the Resolution of the Plenum of the Supreme Court of Ukraine "On the practice of the use legislation by courts of Ukraine in cases on crimes by minors" also works, which contains the regulation as for the impossibility of the use life imprisonment to the person who has committed the criminal offense under the age of 18. And also in accordance with the Part 2 of Article 103 of the Criminal Code of Ukraine, the final punishment of minor for the totality of criminal offenses or sentences cannot exceed 15 years. The comparison proves the presence of the common signs of establishing criminal responsibility for committing the totality of criminal offenses for people of certain social categories.

The essence of the above-mentioned is reduced to the fact that the "Laws of Three Errors" de facto has changed the court's definition of the limit of criminal responsibility of the individual offender with the uniformity of punishment of people who have committed the totality of criminal offenses, with the purpose of ensuring the appointment of the effective and at the same time severe punishment.

## Conclusion

The obtained results indicate the presence in the criminal-legal content of the totality of criminal offenses of the general and the specific features that provide grounds for the qualification of collectively committed thefts, the demarcation of the totality of criminal offenses from related concepts (competition of the norms, the compound illegal acts), the definition of the degree of social danger, real and ideal totality of criminal offenses. The authors emphasize that the lack of the effective rehabilitation programs for convicts who have committed the totality of criminal offenses can lead to their return to the criminal environment and the illegal lifestyle, and the minimum and the maximum limits of punishment for cumulatively committed criminal offenses should be determined taking into account the norms and the prescriptions of the law of Ukraine and the individual peculiarities of the person who has committed the illegal act. The conducted research has given the opportunity to assess the theoretical and the practical advantages and disadvantages of countries representative of the different legal families. And that is why it is necessary to analyze and to use the effective methods of the Republic of Slovenia (countries-representative of the European Union) and the United States of America (states of the Anglo-Saxon legal family) in matters of the definition of the limits of criminal responsibility for committing the totality of criminal offenses of the different categories of people. The court must take into account all the circumstances of the case, the degree of guilt of the individual, and the public danger of each criminal offense in order to pass the fair sentence. The authors consider that the use of operational strategies of the support of the citizens who have committed cumulative

illegal actions, for example, employment assistance for people who have been convicted of the totality of criminal offenses; the creation and the coordination of rehabilitation groups of socio-legal meaning; the providing of free medical care or hospitalization in case of need, which will lead to the decrease in the percentage of committing of the totality of criminal offenses. In addition, it is necessary regularly to investigate and to analyze problematic aspects of sentencing in order to be able to make the necessary correlation to the current legislation. The primary task of the state in this sphere is the creation of the appropriate conditions of opposition of the development of crime, ensuring the necessary level of security in society in order to prevent the manifestation of illegal behavior or discrimination against citizens who have served their sentences in places of deprivation of liberty for committing of the totality of criminal offenses.

## REFERENCES

1. Sozanskyi T. (2009). Qualification of the totality of crimes. Lviv State University of Internal Affairs, 8-20. <https://dspace.lvduvs.edu.ua/bitstream/1234567890/128/1/cozancnui.pdf> (access date: 09/20/2023).
2. Ustrytska N. (2018). Criminal-legal content of the totality of crimes: separate considerations. *Comparative and analytical law*, 6, 395-397.
3. Takhtai, E. (April 25-27, 2014, Uzhgorod). The totality of crimes: the history of development and problems of the correlation between the real and ideal totality. *Transcarpathian legal readings: materials of the VI International scientific and practical conference of young scientists and students / for general*, 2, 320-325.
4. Criminal Code of Ukraine. Information of the Supreme court of Ukraine (VVR), 2001, 25-26, Art. 131. <https://zakon.rada.gov.ua/laws/show/2341-14#Text> (access date: 09/19/2023).
5. Dudorov O., Khavronyuk M. (2014). Criminal law: academic. Manual, 248 p.
6. Kuzembayev O. (10-11 June 2011). The Criminal Code of Ukraine of 1960 as the source of criminal law of Ukraine: influence on the qualification of the plurality of crimes. *Searching of the conceptual foundations of the development of the legal system of Ukraine: All-Ukrainian Conference*, 100-102.
7. Stashis V., Tatsii V. (2010). Criminal law of Ukraine: textbook, 250.
8. Criminal Code (KZ-1) of the Republic of Slovenia. 2008. P. 15-18. <https://www.wipo.int/wipolex/ru/text/180880> (access date: 09/20/2023).
9. Case of KOPRIVNIKAR v. SLOVENIA. Application no. 67503/13. <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%5B%5D%22%5D%7D> [%22001-170456%22]} (date of access: 20.09.2023).
10. Constitution of Ukraine. Information of the Supreme Court of Ukraine (VVR), 1996, 30, Art. 141. <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> (access date: 19.09.2023).
11. California Penal Code. PART 1 - OF CRIMES AND PUNISHMENTS. TITLE 16 - GENERAL PROVISIONS. Section 66. <https://law.justia.com/codes/california/2022/code-pen/part-1/title-16/section-66/> (accessed 10/05/2023).
12. Consolidated Laws of New York's Penal code. Penal Law FELONY CLASSES — Felony classes with general sentencing guidelines. [https://ypdcrime.com/penal.law/felony\\_sentences.php](https://ypdcrime.com/penal.law/felony_sentences.php) (access date: 05.10.2023).