

SOME ISSUES ON DECIDING SENTENCES FOR USURY IN CIVIL TRANSACTIONS THROUGH PRACTICE IN THE SOUTHEAST PROVINCES

ALGUMAS QUESTÕES PARA A DECISÃO DE SENTENÇAS POR USURA EM TRANSAÇÕES CIVIS NA PRÁTICA NAS PROVÍNCIAS DO SUDESTE

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Received: 30 Jan 2023

Accepted: 21 Feb 2023

Published: 15 Mar 2023

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províncias do Sudeste no período de 2020 a 2022.

Palavras-chave: Decisões de julgamento. Lucros. Transações vis. Províncias do Sudeste. Vietnã.

Abstract: Penalty is the most severe coercive measure prescribed by the Criminal Code for offenders. The decision of sentences is made by the proceeding agency. However, the type and the level of sentences for each offense are regulated quite diversely and the decision on sentences that is based on relatively many bases, requires the comprehensive and careful consideration of the proceeding agency. For Usury in civil transactions, the decision of sentences by the competent authority in practice still faces some difficulties and obstacles, including the area of the Southeast provinces. Therefore, the authors chose to analyze the issue of deciding the sentences for Usury in civil transactions in the Southeast provinces in the period from 2020 to 2022.

Keywords: Judgment decisions. Profits. Civil transactions. Southeast provinces. Vietnam.

Resumo: A pena é a medida coercitiva mais severa prescrita pelo Código Penal para os infratores. A decisão das sentenças é feita pelo órgão responsável pelo processo. No entanto, o tipo e o nível das sentenças para cada crime são regulados de forma bastante diversa e a decisão sobre as sentenças que se baseia em relativamente muitas bases, requer a consideração abrangente e cuidadosa do órgão responsável pelo processo. Para a Usura nas transações cíveis, a decisão das sentenças pela autoridade competente na prática ainda enfrenta algumas dificuldades e obstáculos, inclusive na área das províncias do Sudeste. Portanto, os autores optaram por analisar a questão da decisão das sentenças por Usura em transações cíveis nas

Introduction

The Southeast which is a new land in the development history of the country with many urban centers located between the South Central provinces and the South Central Highlands, is the region with a lot of land, forest and mineral resources. The West and Southwest regions bordering the Mekong River Delta are places with great potential for agriculture and also are the largest granary of our country; The East and Southeast regions bordering the East Sea have a lot of seafood, oil and gas resources and are favorable for the construction of seaports creating a link in commercial economy between regional provinces and international countries; The Northwest region bordering Cambodia has Tay Ninh border gate creating wide exchanges with Cambodia, Thailand, Laos and Myanmar. With this position, the Southeast is an important exchange hub of the Southern provinces with the whole country and the world. The East borders the Central Highlands and the South Central Coast, the North borders Cambodia, the South borders the East Sea, the Southwest borders the Mekong River Delta. Scope of territory: the area is 23.6 thousand square kilometers including: Ho Chi Minh City, Binh Duong, Binh Phuoc, Tay Ninh, Dong Nai, Ba Ria - Vung Tau. With such a geographical position, it has created many conditions of the rapid economic development for the Southeast region. In addition to the advantages of geographical location, the crime situation in general and Usury in civil transactions in particular in the Southeast provinces have many complicated developments, sophisticated criminal tricks and methods of committing crimes are changed frequently creating a lot of difficulties for the functional forces in crime prevention and control.

1. Research methods

Within the scope of the paper, the author uses analytical and synthesis methods, statistical method, combining theory with practice.

2. Research results

Within the scope of the paper, the author has analyzed a number of theoretical issues deciding the sentences and sentences for Usury in civil transactions in Article 201 of the Criminal Code 2015 (amended and supplemented in 2017), the reality of deciding the sentences for Usury in civil transactions through practice in the Southeast provinces from 2020 to 2022.

Some theoretical issues on decision of the sentences

“Decision on sentences means that the Trial Chamber (Court) must choose a specific type of sentence (including the Primary sentence and possibly the Additional sentence), with a specific level and within the scope of the law to apply to individual/corporate legal entity when commits a crime” (Mien, 2021, p.190). This is an important job of the Court in adjudicating criminal cases and this activity is only conducted by the Court. On that basis, decision on sentences for offenders Usury in civil transactions is the Court based on the provisions of law to choose the type and level of sentence, the other criminal severe coercive measure to apply to the offender of Crime Usury in civil transactions. In the process of decision on sentences, the Court considers the nature and level of danger to society of this criminal act to decide the exemption from criminal liability, sentence or determine the sentence bracket and the type or level of sentence which is applied to the offender. In which, the Court needs to consider the grounds for deciding sentence:

The first base is the provisions of the Criminal Code 2015 (amended and supplemented in 2017): The Court bases its decision on the general sentence prescribed in Article 50 of the Criminal Code 2015 (amended and supplemented in 2017) and regulations on each type of sentence applied to the individual who commits the crime. That is the regulation on the sentence system, content, scope, and conditions for applying sentence including the Primary sentence and the Additional sentence (from Article 32 to Article 45 of the Criminal Code 2015 (amended and supplemented in 2017); regulations on sentence decision such as processing principle, purpose of sentence and regulations on deciding sentence in each specific case. In addition, the Court needs to base itself on the provisions of Article 201 of the Criminal Code 2015 (amended and supplemented in 2017) on the specific sentence, the sentence bracket, including the Primary sentence and the Additional sentence applied to offenders of Usury in civil transactions.

The second base is the nature and degree of danger to society of the offence: The court must consider the nature and degree of danger to society of the offense to determine the specific type and level of sentence to the convict. The nature of the social danger of each offense is different and requires a corresponding sentence. In which, the Court needs to base on the nature and extent of consequences that the criminal act has caused or threatens to cause; the extent and nature of the criminal act, the methods, tricks, the tools and means of the crime; criminal circumstances and so on.

The third base is the mitigating factors and aggravating factors. They are related to the behavior and record of the individual offender. It is a guide for properly assessing the basis of the record and the nature and level of danger to society. Those are the circumstances specified in Article 51 and Article 52 of the Criminal Code 2015 (amended and supplemented in 2017). Therefore, when deciding the sentence for each defendant who commits the crime of Usury in civil transactions, the Court must consider and evaluate fully and comprehensively to apply mitigating or aggravating factors to each specific defendant fully and correct to be able to decide the correct sentence for them.

The fourth base is the offender's records. the offender's records are understood as a collection of the individual characteristics of the offender, “those characteristics may be age, occupation, working attitude, attitude in relation to others, cultural level, lifestyle, family situation, economic life, political attitude, legal consciousness, religion, criminal record...” (Mien, 2021,p. 267). The court must consider the records of each offender of Usury in civil transactions to decide the correct sentence because the offender's records will affect the nature and degree of danger to society in the criminal act. This is also to ensure that the sentence pronounced is appropriate to the offender's educational and rehabilitation capabilities as well as his or her special circumstances.

Besides that, when deciding the sentence against the offender of Usury in civil transactions, in addition to complying with the basic principles of criminal law and criminal procedure, the proceeding agency also needs to comply with the handling principle for offenders of Usury in civil transactions specified in Article 3 of Resolution No. 01/2021/NQ-HDTP dated December 20, 2021 of the Supreme People's Court guiding the application of Article 201 of the Criminal Code 2015 (amended and supplemented in 2017) and the trial of a criminal case on the crime of Usury in civil transactions. In particular, carefully considered to apply the fine is the Primary sentence for the person committing the offence. In case the offense is committed in a professional manner, operating in an organized manner, the imprisonment will be considered as the Primary sentence. If in case, the Primary sentence to be applied is not the fine, it will be necessary to seriously consider applying the Additional sentence as the fine. This comes from the nature of this type of crime as a criminal act aimed at self-seeking purposes. Therefore, in order to be effective in prevention, it must be directed to deterrence and economic punishment for offenders.

Regulations of the Criminal Code 2015 (amended and supplemented in 2017) on sentences for crimes of Usury in civil transactions

When performing acts of Usury in civil transactions, the offenders have caused great harm to society, not only infringing upon the state's economic management order on credit activities (particularly order in the field of monetary business) and the financial interests of citizens, but also seriously affecting the social order and safety. Therefore, Article 201 of the Criminal Code 2015 (amended and supplemented in 2017) stipulated the behavior and sentence applicable to offenders of Usury in civil transactions. Depending on the nature, the seriousness of the offense and its consequences, the offender can be prosecuted for the criminal liability according to the two frames of the Primary sentence and the Additional sentences respectively.

For the Primary sentence: An offender of Usury in civil transactions may be subject to one of three Primary sentences: a fine, community sentence (non-custodial) or determinate imprisonment. The level of the Primary sentence is only specified in two sentence brackets: Committing the crime in Clause 1, Article 201 of the Criminal Code 2015 (amended and supplemented in 2017) may be subject to a fine or the community sentence (non-custodial); committing a crime under Clause 2, Article 201 of the Criminal Code 2015 (amended and supplemented in 2017) may be subject to a fine or determinate imprisonment. In particular, offenders of Usury in civil transactions as prescribed in Clause 1, Article 201 of the Criminal Code 2015 (amended and supplemented in 2017) may be subject to a fine from 50 million VND to 200 million VND as the Primary sentence or community sentence (non-custodial) with a minimum of 6 months and a maximum of 3 years. Offenders who commit acts that satisfy the provisions of Clause 2, Article 201 of the Criminal Code 2015 (amended and supplemented in 2017) may be subject to a fine ranging from VND 200 million to VND 1 billion or determinate imprisonment from 6 months to 3 years. Depending on the nature and degree of danger of the behaviors, the offender may be applied with different corresponding sentence levels in the direction of the more dangerous the behaviors and consequences, the more severe punishment. According to the provisions of the Criminal Code 2015 (amended and supplemented in 2017), Usury in civil transactions is classified as a less serious crime with a maximum sentence of only 3 years in prison.

For the Additional sentence: Besides the Primary sentence, offenders of Usury in civil transactions may also be subject to the Additional sentences such as: A fine from 30 million VND to 100 million VND (when it is not applied as the Primary sentence) , Prohibition from

holding certain positions or doing certain works from 01 year to 05 years. Thus, in addition to the illegal profits that are confiscated for public funds or returned to victims according to regulations, depending on the nature and level of danger of the criminal act, the offender's attitude and so on, the Court will may decide to apply the Additional sentence as a fine (when it is not applied as the Primary sentence). Or, offenders may be prohibited from holding certain positions or doing certain works when considering that offenders holding certain positions or doing such jobs may cause harm to society. In this case, they are usually occupations and jobs related to the assets of the agency or organization. The duration of prohibition is from 01 to 05 years from the end of the imprisonment or from the effective date of the judgment if the primary sentence is a fine or community sentence or the convict is given a suspended sentence.

Thus, the Criminal Code 2015 (amended and supplemented in 2017) stipulated various types of sentences that can be applied to offenders of Usury in civil transactions. There are three Primary sentences: a fine, community sentence and determinate imprisonment; the Additional sentences include: fine, Prohibition from holding certain positions or doing certain works. The variety of sentence types helps the proceeding agency in easily choosing the right sentence type when deciding on a sentence for a particular offender. On the other hand, most of the sentence types prescribed for this offender are setence without deprivation of liberty, imprisonment also has a maximum term of only 3 years. Thus, this is a type of crime that is considered a less serious crime. This shows the institutionalization of the policy of the Party and State in promoting the effectiveness of prevention and goodwill in dealing with offenders, limiting the application of imprisonment penalties and expanding the application of the setence without deprivation of liberty. However, recently, the crime situation is increasing in number, nature and the level of danger to society, this sentence level is being assessed as not really commensurate with the dangerous level of the violation. Therefore, it is necessary to consider and adjust the sentence level to ensure the purpose of deterrence and education for offenders.

Actual situation of decision on sentences for offenders of Usury in civil transactions in the Southeast provinces from 2020 to 2022

According to statistics, in the last 3 years, from 2020 to 2022, there are 174 cases with 300 defendants who have been tried for the crime of Usury in civil transactions in the Southeast provinces.

Year	The number of cases of Usury in civil transactions	The number of defendants tried for Usury in civil transactions
2020	64	115
2021	53	86
2022	57	99

Data source: People's Procuracy of the Southeast provinces

Thus, in the past 3 years, courts in the Southeast provinces have decided the sentences for 300 defendants. When deciding sentences for offenders of Usury in civil transactions, most of the courts in the Southeast provinces have complied with the general principles and decided the sentences that are appropriate and proportionate to the nature and seriousness of the offence. Besides applying the Primary sentence, the Additional sentence is a fine that is commonly prescribed and applied to Usury in civil transactions. Most judgments that apply the Primary sentence as imprisonment also apply a fine as the Additional sentence. This is typical in the State's criminal policy for this type of case, which is aimed at deterring the offender's consciousness of taking property for the purpose of committing a crime.

The number of cases is small and this crime is only prescribed two sentence brackets with a relatively clear distinction, the sentence level is low so the inaccuracy that occurs when deciding the sentence for the offender of Usury in civil transactions in the Southeastern province recently is not much. The decision on the sentence for Usury in civil transactions in the Southeastern provinces in the past three years has only limited in terms of sentence decision, which is that the sentence decision is too lenient for the offender. In some cases, the Court has applied a sentence too lenient, it is not enough to deter the offender and is not commensurate with the nature and seriousness of the offense committed. For example the following case:

C and T jointly organized usury activities by setting up web sites to advertise usury activities and provide instructions on how to lend money. When someone had wanted to borrow, they called T and C at the phone number listed on the Web then T verified the borrower's conditions and the ability to repay. When the borrower had ensured the ability to pay, T told C to give money to him to lend and got information about borrowing money for C to synthesize, make a list, monitor and collect the interest daily. The form of loan was making a receipt (the fake receipt) for the borrower to receive money to buy a motorbike for T. T collected interest before 10 days. By this trick, in about 06 months, T and C lent money to 54

people with interest rate from 24 to 90%/month. The total loan amount is 1.1 billion VND, the illegal profit is 543,050,000 VND. The trial panel applied Clause 2, Article 201 of the Criminal Code 2015 (amended and supplemented in 2017) to sentence T with 10 months in prison, C with 1 year in prison and applied the Additional sentence as a fine for each the defendant was 30 million VND.

Evaluation of the circumstances of the case and the provisions of the law on Usury in civil transactions shows that the above sentences are too lenient for the defendants. Because, the amount that the defendants lent up to more than 1 billion VND and the illegal profits is more than 500 million VND. On the other hand, the two defendants had bad records, had no occupation, engaged in criminal activities for a long time, used sophisticated tricks, and applied many aggravating circumstances: committed the crime in an organized manner, in a professional manner, recidivism. In Clause 2, Article 201 of the Criminal Code 2015 (amended and supplemented in 2017) stipulates the duration of imprisonment from 06 months to 3 years and the illegal profit that the defendants have obtained is more than 5 times the prescribed level in this clause. Considering comprehensively the grounds for deciding the sentences for the 02 defendants, especially the loan amount, the illegal profits and records of the defendants, the sentence level that applied to the 02 defendants - only 10 months and 1 year in prison and the Additional sentence as only 30 million VND, was too lenient, not commensurate with the dangerous level of the offender's behavior and not deterrent enough.

In addition, in terms of legal provisions, the sanctions prescribed in Usury in civil transactions are too lenient and not commensurate with the danger of this type of crime. Specifically, Clause 1, Article 201 of the Criminal Code 2015 (amended and supplemented in 2017) stipulates that the maximum sentence bracket for offenders prescribed in this Clause is community sentence (non-custodial) or 03 years in prison; Clause 2, Article 201 of the Criminal Code 2015 (amended and supplemented in 2017) stipulates that the maximum sentence bracket is a prison sentence of 6 months to 3 years, both sentence brackets are less serious crimes. However, the consequences of this type of crime for society are enormous. Crimes of Usury in civil transactions can exist in an organized manner with a scale of operation in many localities (such as financial service companies) or just as separate activities of individuals specializing in lending or pawn in certain areas. But regardless of the form of operation, the subjects participating in usury have the same method: when there is a dispute between the lender and the borrower, to ensure the recovery of the loan amounts, the interest and other illegal profits, the subjects are willing to use violence or threatens to use violence, arrest, damage property or use

many tricks to intimidate and terrorize the borrowers and their families, causing bad influence to the security situation, social order and safety, infringing upon the life, health, property of the borrower and even other people. Therefore, from the crime of Usury in civil transactions gave rise to a number of other crimes, such as: Disturbance of public order; Deliberate infliction of bodily harm upon another person; capturing people unknown; Home infringement, Extortion; Destroying property and so on.

On the other hand, subjects who commit acts of usury are often subjects with many criminal records and are very aggressive. They carry out their criminal activities in an organized manner and are very sophisticated. Criminal acts adversely affect social security and order, causing confusion and fear among the people. When consider those factors, this sentence is too lenient and is not deterrent and commensurate with the nature and social danger of the offence and the illegal profits that can be derived from usury. Therefore, the offenders are not afraid of being punished by the law. This is also one of the reasons why this type of crime is increasingly expanding in scale and scope of activities across the country in general and in the Southeast provinces in particular.

3. Conclusion

The Southeast provinces have a relatively large number of Usury in civil transactions cases compared to other localities across the country. The prosecution of criminal liability in general and the decision on the sentences in particular for this type of crime in the provinces of the Southeast region is carried out relatively more than in other localities by the Court. However, in fact, in some cases, the decision on sentences is made completely incorrect. The practice of deciding sentences for Usury in civil transactions in the Southeast provinces during the period from 2020 to 2022 also reveals certain limitations in deciding specific sentences in some cases that are not commensurate with the nature and seriousness of the defense. Besides that, before the situation of this type of crime is increasing in quantity, nature and level of danger to society, the provisions of law and sanctions that are prescribed for Usury in civil transactions of the Criminal Code 2015 (amended and supplemented in 2017), are considered too lenient and not commensurate with the danger of this type of crime.

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