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CONSIDERATION OF THE PERSONALITY OF THE OFFENDER IN THE APPLICATION OF CRIMINAL LAW MEASURES UNDER THE LEGISLATION OF CIS COUNTRIES AND EUROPE

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Abstract. *This article is concerned with the analysis of the problem of consideration in the imposition of criminal law measures of the circumstances characterizing the personality of the guilty, in accordance with the norms of criminal legislation of other states. Since the current legislation of Russia is largely based on the values of the Romano-Germanic system of criminal law and at the same time on the experience of Soviet law, the author analyzes the criminal codes of the countries of the near abroad, as well as of the states of Eastern and Western Europe. In addition, the study of the experience of regulation of criminal law measures other than punishment in the states with traditional democratic principles and established legal order is important also because they have tested various alternatives of punishment and even criminal liability, implemented in respect of certain categories of persons who have committed a crime for several centuries. The article highlights the most positive experience of regulation of individualization of criminal law measures taking into account the personality of the offender in such states as Belarus, Uzbekistan, Tajikistan, Kazakhstan, Lithuania, Latvia, Germany, Austria and many other countries.*

Keywords: *individualization of punishment; individualization of measures of criminal-law character; personality of the guilty; circumstances characterizing the personality of the guilty; punishment; measures of criminal-law character.*

A general trend in the regulation and individualization of criminal-legal measures in the legislation of foreign states is an aggravating influence of circumstances

characterizing the personality of the guilty person in the assignment of specific measures of criminal-legal impact. As indicated in the literature, there is a diversity of approaches to the regulation of the grounds, criteria, and limits of individualization of punishment and other criminal-legal measures in the legislation of foreign states. It is caused by historical, national, cultural and lawmaking traditions of different states, including the belonging of their legislation to a particular system of criminal law; for example, the Anglo-Saxon system is characterized by excessive formalization of the procedure for imposing punishment, extensive use of probation, a significant influence on criminal responsibility of the institute of cooperation of the guilty with law enforcement agencies, while the Romano-Germanic (continental) system is characterized by quite wide opportunities of individual. The common fate of the former countries of socialism to a large extent determined the unified approach of their legislation with the criminal law of Russia. Peculiarities can also be noted in the regulation of sentencing in the legislation of Eastern countries, which maintain stable national traditions (for example, Japan), in the currently preserved socialist system (PRC, Vietnam, Cuba), as well as in countries with a population practicing Islam¹.

Criminal legislation of the CIS countries in matters of regulation of punishment and other criminal law measures, the limits and criteria of their individualization have much in common with the criminal legislation of Russia; both of them reflect the specifics of European criminal law and the experience of domestic legislation, both pre-Soviet and Soviet socialist periods. Although in these states, there are significant differences in some aspects of criminal-legal regulation, including penalties and other measures.

Note that the Criminal Codes of all of these states have a Chapter dedicated to the imposition of punishment; it provides for the general principles of sentencing, the circumstances mitigating and aggravating punishment (or responsibility), the imposition of a milder punishment than is provided for a particular crime, a number of other special rules for sentencing and the application of probation, forced educational measures; and some Criminal Codes regulate the delay of serving (execution) of the sentence.

Characteristically, the Criminal Code of the Republic of Belarus not only indicates the criteria for imposing punishment, the court is required in this process based on the principle of its individualization. In particular, it is stated that in assigning punishment the court shall proceed from the principle of individualization of punishment, which implies taking into account the nature and degree of public

¹ Garaeva A. R. *Smiagchenie nakazaniia pri ego ispolnenii v rossiiskom ugolovnom prave*: Dis. ... kand. iurid. Nauk [Mitigation of Punishment in the Execution of Punishment in Russian Criminal Law: Dissertation of Candidate of Legal Sciences]. Kazan, 2007. Pp. 100–102.

danger of the crime, motives, and goals of the guilty person and the characteristics of his personality in general, the nature of the harm done and the amount of damage caused, the circumstances mitigating and aggravating responsibility, the victim's opinion in cases of private prosecution — forming an appropriate motivation for the chosen punishment¹.

As can be seen, the Criminal Code of Belarus among the circumstances characterizing the personality of the guilty person, which the court must consider when imposing punishment, highlights motives and goals; it also names circumstances that mitigate or aggravate responsibility (in general, not just punishment). This approach seems to deserve the attention of domestic doctrine and the legislator.

The Criminal Code of the Republic of Uzbekistan (Article 54)², the Republic of Tajikistan (Article 60)³ and a number of other states also recognize the motives of a crime as a criterion for assignment and, accordingly, for individualization of punishment.

The Criminal Code of the Republic of Azerbaijan indicates the degree of public danger of the personality of the offender as a personal criterion for imposing punishment (Article 58)⁴; in this case we are not talking about the personality of the offender in general, as we see it in the Criminal Code of the Russian Federation. This Code narrows the content of this criterion, since during the individualization of punishment this information about the personality of the guilty, which does not affect the degree of its public danger, and possibly is not related to the crime, is quite objective.

Under the Criminal Code of Kazakhstan the court is prescribed, in addition to the criteria known to the Criminal Code of the Russian Federation, to take into account the impact of the imposed punishment on the living conditions and the dependents of the guilty person (Part 3 Article 52)⁵; and in the Criminal Code of Moldova instead of the general principles of sentencing the notion of general criteria for individualization of punishment is used. Provisions of the Article 75⁶ of

¹ Ugolovnyi kodeks Respubliki Belarus [Criminal Code of the Republic of Belarus]. Minsk: Natsionalnyi tsentr pravovoi informatsii, 2022. P. 134.

² Ugolovnyi kodeks Respubliki Uzbekistan [Criminal Code of the Republic of Uzbekistan]. SPb: Iuridicheskii tsentr Press, 2001. P. 92.

³ Ugolovnyi kodeks Respubliki Tadjikistan [Criminal Code of the Republic of Tajikistan]. SPb: Iuridicheskii tsentr Press, 2001. P. 74.

⁴ Ugolovnyi kodeks Azerbaidzhanskoi Respubliki [Criminal Code of the Republic of Azerbaijan]. SPb: Iuridicheskii tsentr Press, 2001. P. 84.

⁵ Ugolovnyi kodeks Respubliki Kazakhstan [Criminal Code of the Republic of Kazakhstan]. Almaty: Iurist, 2022. P. 76.

⁶ Ugolovnyi kodeks Respubliki Moldova [Criminal Code of the Republic of Moldova]. SPb: Iuridicheskii tsentr Press, 2003. P. 162.

this Code on the content basically coincide with the requirements of paragraphs 1 and 3 of Article 60 of the Criminal Code of the Russian Federation, except that the Criminal Code of Moldova obliges the court to take into account the motives when individualizing the punishment, and the mitigating and aggravating circumstances are linked with the criminal liability in general.

In the Criminal Code of the Republic of Lithuania the circumstances, which the court is obliged to take into account when imposing punishment, are more specific than those that are enshrined in the Criminal Code of the Russian Federation. Part 2 of Article 54 provides for the following: 1) the degree of danger of the committed crime; 2) the form and type of crime; 3) motives and aims of the committed crime; 4) the stage of a criminal act; 5) the offender's personality; 6) the form and type of involvement of a person as an accomplice of a criminal act; 7) the circumstances softening or aggravating liability.

Within the framework of the sanction of the relevant article, choosing the type and measure of punishment, in some cases the court may see a contradiction with the principle of justice, so part 3 of the mentioned article allows it, based on its objectives (punishment), and having properly motivated, to impose a milder punishment, going beyond its limits. The Lithuanian Criminal Code is more successful in linking the goals of punishment and its fairness with the rules governing the imposition of a milder punishment by going beyond the limits of the sanction.

It is also noteworthy that in determining the penalty the Latvian court must take into account not only the nature of the offense, but also the harm inflicted (Part 2 Article 46)¹.

All the Criminal Codes of the CIS and Baltic States provide for mitigating and aggravating circumstances: in some of them as conditioning the responsibility, in others — only the punishment. The lists of these circumstances are similar to those enshrined in the Criminal Code of the Russian Federation, but in some of them there are special in nature. Thus, mitigating circumstances under the Criminal Code of Moldova are first-time commission of a minor or medium gravity crime, sincere repentance or confession (subparagraphs “a” and “e” of Article 76); In the Criminal Code of Latvia — contributing to the disclosure of a crime by another person, committing a crime while in a state of diminished responsibility (subparagraphs 3 and 10 of paragraph 1 of Article 47); in the Criminal Code of Tajikistan — committing a crime for the first time (paragraph “a” of paragraph 1 of Article 61); and in the Criminal Code of Uzbekistan — voluntary reparation for the damage caused (paragraph “b” of paragraph 1 of Article 55) and others.

¹ Ugolovnyi kodeks Latviiskoi Respubliki [Criminal Code of the Republic of Latvia]. SPb: Iuridicheskii tsentr Press, 2001. P. 82.

The Criminal Codes of these states also provide for aggravating circumstances unknown to the Russian Criminal Code. Such circumstances are recognized by the Criminal Code of Belarus as the commission of a crime under the influence of alcohol, narcotic, psychotropic, or other psychotropic substances, if this influenced the commission of the act (paragraph 10 part 1 of article 60); Criminal Code of Kazakhstan — committing a crime while under the influence of alcohol, narcotic or toxic intoxication, committing a crime by a person who thus violated his oath or professional oath (subparagraph “m” and “n” part 1 of Article 54) and others.

Some mitigating and aggravating circumstances provided for in the Criminal Codes of the named states deserve, in our opinion, the attention of the Russian legislator.

And special criteria for individualization of punishment in some Criminal Codes are set out as it is regulated by the Criminal Code of the Russian Federation, while others provide for their limited list, in particular, the Lithuanian Criminal Code regulates only the imposition of punishment in the presence of mitigating and/or aggravating circumstances (Article 61) and the appointment of a lighter punishment than provided for by law (Article 62); The Latvian Criminal Code only prescribes a milder penalty than prescribed by law (Article 49); in the Criminal Code of Belarus — sentencing in relapse (Article 65), for crimes committed in complicity (Article 66), for an un consummated crime (Article 67), for jury verdict of leniency (Article 68), in the presence of mitigating circumstances (Article 69), a lighter penalty than stipulated by the respective Article of the Criminal Code (Article 70), sentencing in case of recidivism of crimes which do not form a set (Article 71).

Special criteria basically coincide with the criteria of individualization of punishment under the Criminal Code of the Russian Federation. At the same time, there are some peculiarities in their regulation. Thus, the Criminal Code of Uzbekistan provides a fairly successful definition of the concept of exceptional circumstances; circumstances that significantly reduce the degree of public danger of a crime are recognized as circumstances that together characterize the act, the identity of the offender, the degree, and form of his guilt, the behavior of the person before and after the crime, the causes of the crime and the conditions that contributed to it. In the Criminal Code, a significant emphasis in the regulation of the assignment of a milder penalty is made on taking into account the circumstances characterizing the personality of the offender. This provision should be used when improving the wording of Article 64 of the Criminal Code of the Russian Federation.

Diversity is observed in the regulation of criteria for applying other (in addition to punishment) measures of criminal-legal nature. For example, under paragraph 1 of Article 77 of the Criminal Code of Belarus, when sentencing a person convicted for the first time to this type of punishment to imprisonment of up to five years, the

court may apply a delay of execution of the assigned penalty for a period of one to two years; in deciding this issue the court shall consider the nature and degree of public danger of the crime, the personality of the guilty and other circumstances, and shall proceed from the belief that the goals of criminal liability can be achieved without serving the appointed penalty by means of the deferred sentence. The criteria for individualization are also defined in relation to sentencing with conditional non-application of punishment (para. 1 art. 78).

The criteria for conditional sentencing in part 1 of article 72 of the Criminal Code of Uzbekistan, parts 1 and 2 of Article 70 of the Criminal Code of Azerbaijan, parts 1 and 2 of Article 71 of the Criminal Code of Tajikistan take into account the gravity of the crime, the personality of the guilty, other circumstances which allow the court to conclude that the convicted person can reform himself without really serving his sentence.

The Latvian Criminal Code stipulates that the criteria for imposition of suspended sentence in the form of imprisonment, forced labor, detention or a pecuniary punishment are the nature of the crime committed and the harm inflicted, the personality of the guilty and other circumstances; it is applied if the court comes to conviction that the guilty will not commit other offenses (para 1 art. 55). The emphasis in this case is put not on the conviction of the court on the possibility of correction of the convicted person, but on the fact that offender will not commit offenses — this seems preferable, since the latter indicator is more visible and reflects objectively one of the main tasks of the criminal legislation (prevention of crime).

This Criminal Code recognizes as the criteria for applying coercive measures of educational nature to minors the special circumstances of the criminal act and the data about the personality of the offender that mitigate responsibility (Part 1, Article 66).

The Latvian Criminal Code also establishes peculiarities in the regulation of the conditional sentence of a minor. According to Article 67, the court may apply to a juvenile all the coercive measures enumerated in Article 66 part 1 of this Code in order to conditionally sentence.

Among the criteria for imposing a suspended sentence, the Moldovan Criminal Code refers to the circumstances of the case and the personality of the offender (Part 1, Article 90). At the same time, the necessary prerequisite for its application is compensation for the damage caused as a result of the crime.

The Criminal Code of the Federal Republic of Germany provides not the general principles or criteria, but the grounds for imposing punishment. The guilt of the offender, the Code states, is the basis for the imposition of punishment; in choosing

its type and amount, it is prescribed to consider the expected impact, including on the future life of the person in society (§ 46)¹.

According to Part 2, in determining the punishment, the court evaluates the circumstances which testify for and against the person who committed the act. First, attention is paid to the motives and goals of the offender, the way of thinking revealed by the criminal act, the will manifested in the commission of the act, the degree of breach of duty, the manner of commission and the guilty consequences of the act, the previous life of the offender, his personal and material conditions, and his behavior after the act, including his efforts to compensate for the harm caused, to reach an agreement with the victim.

The criteria or grounds for suspending a suspended sentence with probation are set out in § 56, which states in Part One that particular consideration should be given to the convict's personality, previous life, circumstances of the act, conduct after the act, living conditions and the consequences that can be expected for him as a result of the suspension of the sentence. As can be seen, in this Code, when regulating the suspension of punishment with probation, special emphasis is placed on taking into account the personality of the offender, way of life and conduct.

The Austrian Criminal Code (Part 1 § 43) prescribes that in addition to the character of the act, the personality of the offender, the degree of guilt, previous life and behavior after the commission of the crime must be taken into account as criteria for conditional release from punishment².

The Code sets out quite comprehensively the lists of special aggravating circumstances and special mitigating circumstances (§ § 33, 34). However, the general principles (rules) are specified rather “blurred”.

Under the Criminal Code of Switzerland, in the provisions where the law regulates questions of mitigation of punishment, the judge has more discretion and is not linked to the type and amount of punishment that is prescribed for the commission of a crime or misdemeanor³.

This Criminal Code regulates the application of educational measures to juveniles (15–18 year olds). As is clear from Article 91 (Part 1), if a juvenile requires special educational measures, specifically when the juvenile is difficult to raise, neglected, or significantly endangered, the decision-making body will assign educational assistance, placement in a suitable family or in an educational home. And, when a juvenile is particularly spoiled or has committed a crime or serious misdemeanor that characterizes his high degree of danger, or he is ill-suited to

¹ Ugolovnyi kodeks Federativnoi Respubliki Germaniia [Criminal Code of the Federal Republic of Germany]. M.: Prospekt, 2010. Pp. 146–147.

² Ugolovnyi kodeks Avstrii [Criminal Code of Austria]. SPb: Iuridicheskii tsentr Press, 2004. P. 27.

³ Ugolovnyi kodeks Shveysarii [Criminal Code of Switzerland]. M.: Zertsalo, 2002. Pp. 30–31.

educational influence, he shall be sent to an educational home for a period of two years or more (Part 2, Article 91).

The individualization criteria for criminal law measures are also indicated in the Criminal Code of Switzerland in the case of young persons (18–25 years); if the person has significant disabilities or if the person is threatened, and also if the person is neglected, promiscuous or evades work and the criminal acts are directly related, a placement in an educational and labor institution may be imposed instead of a penalty, if this measure can prevent the commission of new crimes or misdemeanors (Article 100, Part 1).

Thus, in the Criminal Code of Switzerland, when individualizing criminal responsibility, especially for juveniles and persons of young age, the main emphasis is placed on taking into account the circumstances that characterize the personality of the offender.

The criteria for individualization of punishment are reflected in more detail in the Criminal Code of Denmark¹. According to § 80, the severity of the crime and information relating to the personality of the offender, including general personal and social circumstances, conditions before and after the crime, and motives for the crime must be taken into account when determining punishment.

It provides for the commission of a crime by several persons as an aggravating circumstance (Part 2 of § 80). Section 84 provides for nine circumstances “minimizing” the punishment, most of which characterize the personality of the offender. For example, the penalty may be mitigated if, after the act has been committed, the offender has “freely and voluntarily prevented the danger caused by the act” or has fully compensated for the damage caused by the act; has made attempts to prevent the punishable act or to repair the damage caused by it. And in the presence of certain mitigating circumstances, the punishment may be completely abolished (Part 2, § 84).

According to the Criminal Code of Sweden, in determining criminal significance, special attention must be paid to the harm, damage, or danger of the criminal act, the awareness of guilt, the purpose, and motives of the act².

Articles 2, 3 and 5 provide for mitigating and aggravating circumstances, although the latter are not named. For example, the court is instructed to consider, when individualizing the punishment, whether the accused committed a grave abuse of his position or otherwise abused a special position of trust or responsibility (Article 2, paragraph 4), whether the individual single offense formed part of a criminal activity that was particularly carefully planned or executed on a large scale and in which the accused played a significant role (Article 2, paragraph 6). And

¹ Ugolovnyi kodeks Danii [Criminal Code of Denmark]. SPb: Iuridicheskii tsentr Press, 2001. P. 75 et seq.

² Ugolovnyi kodeks Shvetsii [Criminal Code of Sweden]. M.: Zertsalo, 2012. P. 232.

mitigating circumstances include the commission of an act involving a pronounced delay in the defendant's development, lack of experience or capacity for evaluation, the commission of an offense if it was motivated by "strong human sympathy" (subparagraphs 3 and 4 of Article 3).

From the point of view of borrowing the positive experience of other states, in the process of further improving the regulation in the Criminal Code of the Russian Federation of the individualization of measures of a criminal law character, taking into account the personality of the offender of the crime, the most preferable is the regulation in the Criminal Code of the Republic of Belarus of the principle of individualization of punishment, and as its criteria for the motives and goals of the crime, the character of the harm done and the amount of damage caused — in the Criminal Code of the Republic of Uzbekistan, the Republic of Tajikistan — the motives of the crime committed, in the Criminal Code of Kazakhstan — the impact of the punishment imposed on the living conditions of persons dependent on the offender, in the Criminal Code of Lithuania — forms and types of guilt, motives, and goals of the deed, in the Criminal Code of Kazakhstan — such aggravating circumstances as the commission of a crime in a state of intoxication, as well as by a person who has violated an oath or professional law, in the Criminal Code of Latvia — as mitigating circumstances — the commission of a crime in a state of limited sanity, the character of the harm caused, in the Criminal Code of the Federal Republic of Germany — as criteria for individualizing the motives and goals of a person, the degree of violation of duties, the efforts of the offender to compensate for the harm caused and reaching an agreement with the victim, in the Austrian Criminal Code — as a criterion for applying conditional release from punishment of the degree of guilt, previous life and behavior of the person after the commission of the crime.

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