

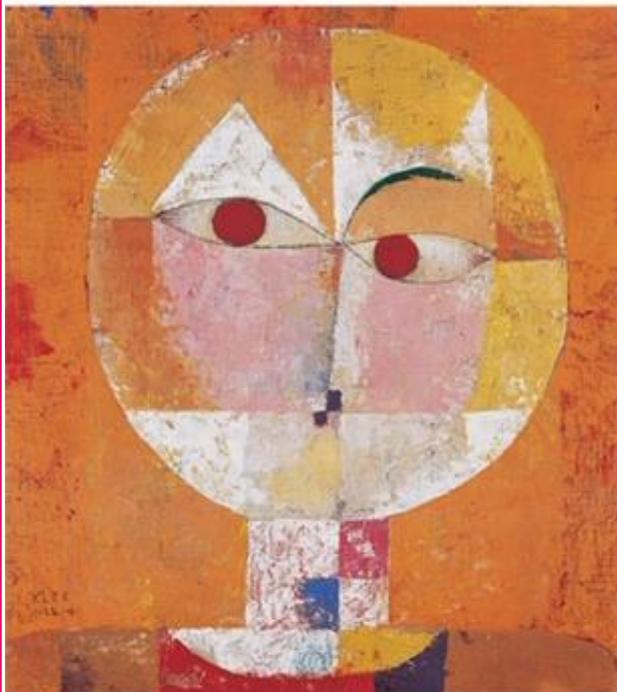
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Criteria for individualization of punishment under the criminal law USSR

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Abstract

The purpose of this study is to analyze and clarify the conceptual apparatus, identify and compare norms in the criminal legislation of Russia and some post-Soviet republics on regulation of individualization of punishment and its criteria via theoretical, doctrinal, socio-legal and comparative approaches. As a result, significant similarities in the related regulation are traced in Criminal Codes of a number of post-Soviet states. In conclusion, globalization, internationalization and diversification of crime and its environment only actualize the processes, causing governments, legislators and law enforcers to search for new ways to effectively and fairly impose penalties.

Keywords: Criminal, Law, Individualization, Punishment, Criteria.

Crterios para la individualización del castigo bajo el derecho penal de la URSS

Resumen

El propósito de este estudio es analizar y aclarar el aparato conceptual, identificar y comparar las normas en la legislación penal de Rusia y algunas repúblicas postsoviéticas sobre la regulación de la individualización del castigo y sus criterios a través de teorías, doctrinas, socio-legales y comparativas. enfoques. Como resultado, se siguen importantes similitudes en la regulación relacionada en los códigos penales de varios estados postsoviéticos. En conclusión, la globalización, la internacionalización y la diversificación del crimen y su entorno solo

actualizan los procesos, lo que hace que los gobiernos, los legisladores y los encargados de hacer cumplir la ley busquen nuevas formas de imponer sanciones de manera efectiva y justa.

Palabras clave: Penal, Derecho, Individualización, Castigo, Criterios.

1. INTRODUCTION

The Soviet Union, or the Union of Soviet Socialist Republics (USSR), ceased to exist on December 26, 1991, as a result of the Declaration No.142-H of its Supreme Soviet, which ultimately ended Mikhail Gorbachev's political career, acknowledged the independence of the former Soviet republics and gave birth to 15 new states. The collapse of the once superpower resembled a traumatic dissolution of a family. 15 republics had so much in common including such underlying values as nation and territory, history, language and culture, legal framework and ideology, education and upbringing, morals and mentality, economies and standards of living, defense and security, as well as a unified legal system with all its specific institutions, rules and regulations. On the emotional side, for people who were born, brought up and rose in the Soviet Union, its dissolution was never fully accepted and they have never fully adapted to the post-1991 reality. Not surprisingly, some of the former Soviet republics still maintain close ties with Russia, the latter being internationally recognized as the successor state to the USSR after the dramatic breakup.

While former Baltic republics (Estonia, Latvia, and Lithuania)

focused on the European Union, the eurozone and joined NATO membership in 2004, most of the other former republics still depend on the Russian armed support and financial aid and admit Russia's major influence and dominant position in the region. To enhance economic and security cooperation the former republics establish various multilateral intergovernmental organizations and cooperating blocs (CIS, CSTO, EAEU, etc.).

Along with other major economic and political changes, the 1990s saw a long-awaited humanization, liberalization and modernization of Russian criminal law as a clear attempt to break with the Soviet past. The 1996 Criminal Code brought a fundamental change of the top priorities of Russian criminal law, which since then emphasized on the protection of the individual rather than on the protection of the social structure of the USSR, its political and economic system...and socialist law and order. As other signals of intent to depart from the practices of the old Soviet legislation, legality, equality before the law, liability solely based on guilt, justice and humanism became the basic underlying principles of the new Criminal Code.

In line with these fundamental propositions, the idea of individualization of punishment, which actually serves as the principle of criminal liability, is at the heart of the modern Russian criminal policy. Individualization of punishment literally means the imposition of punishment in accordance with a specific individual situation, as well as certain individual circumstances of a crime and individual characteristics

of a person who has committed a crime. In a general sense, a concept implies a balance between the gravity of a crime and the identity of a criminal, on the one hand, and the punishment to be imposed, on the other. Individualization of punishment contributes not only to more consistent implementation of the principles of justice and humanism in criminal law, but also provides for its other important mission, that is the expediency of the impact of criminal law measures. From this point of view, individualization is an important and necessary prerequisite, a kind of key factor for the successful achievement of the main goals of punishment.

As evidenced by the study of multiple court practice, ignoring the requirement of individualization, inadequate consideration of the circumstances of a criminal case usually leads to the imposition of either excessively strict or unjustifiably lenient penalties. It is also important that the exhaustive individualization of punishment by the courts creates favorable conditions for achieving the goals of punishment in the process of its execution with the aim of deterring and correcting the criminals. However, the consistent individualization of punishment is primarily determined by the correct definition of its criteria in the law for further proper application in courts.

In our opinion, there are reasonable grounds to state that the theory of criminal law has not yet developed a sufficiently clear understanding of the termination criteria for individualization of punishment, their correlation with such criminal law phenomena as

general principles, criteria for sentencing, means, grounds for individualization of criminal liability, grounds for individualization of punishment, etc. Also, neither a concise nor precise definition has been developed so that the scholars, legislators and practitioners can avoid the ambiguity or misinterpretation of this phenomenon (JODAIRI PINEH, 2017).

2. METHODOLOGICAL FRAMEWORK

Based on theoretical, doctrinal, socio-legal and comparative approaches we analyzed huge masses of primary and secondary sources, including international legal documents, Constitutions, Criminal Codes and judicial practice of the countries under this study. We looked for reliable data confirming the need for a more comprehensive research of the problems associated with individualization of punishment and its criteria during its imposition by courts in order to serve the main functions and goals of criminal punishment, that is, retribution, prevention, correction and restoration of social justice. The purpose of this study is inter alia to analyze and clarify the conceptual apparatus, identify and compare legal norms in the criminal legislation of Russia. Some post-Soviet republics relating to regulation of individualization of punishment and proper definition of its criteria provide typology of relevant criteria, draw similarities and distinctions regarding the reported problem in different states from a comparative criminal law perspective.

3. RESULTS AND DISCUSSION

The problems of crime and punishment, as well as its sentencing, remain at the center of attention of both Russian and foreign scholars and lawmakers because of the extremely high level of crime in every part of the world today. It is obvious, that any crime should be punished without any reason, but the reason behind each crime must be carefully considered when punishment is imposed. The imposition of punishment decisively determines the social value of criminal law; its practical effect is primarily manifested in the sentencing of a criminal. Punishment, however, cannot fully implement its mission and achieve its goals unless it is adapted to a certain individual case. To this end, punishment must correspond to the degree of public danger of each crime and its perpetrator, and, equally, it must be imposed as a response to a certain crime in accordance with the real need for retribution, deterrence, incapacitation and rehabilitation of a particular convict (PENEOSAŞU, 2015).

If individualization of punishment shall cover all the available specific data characterizing the individual degree of public danger of a crime and identity of a criminal, then its main criteria shall denote the individual (but essential for criminal law) personal characteristics of a criminal and individual degree of public danger of a crime, which are further reflected in both mitigating and aggravating circumstances. Thus, criteria for individualization of punishment are circumstances that significantly affect the determination of a fair, reasonable and expedient

punishment of a person convicted of a crime, although lawmakers do not consider these circumstances as typical personal characteristics of a criminal and as such cannot determine the nature and type of public danger of a crime.

The analysis of the Criminal Code of Russia allowed singling out five substantive criteria for individualization of punishment: 1) individual degree of public danger of a crime; 2) individual personality characteristics of a guilty person; 3) mitigating and aggravating circumstances; 4) effects of punishment on correction of a convict; 5) effects on the living conditions of his family. The first two are the main criteria; the rest are complementary; they develop or detail the main criteria (NAUMOV, 2004).

The Russian Criminal Code has much in common with the criminal legislation of the CIS and Baltic states in the regulation of criteria for individualization of punishment on its sentencing due to the evident influence of the former Soviet legislation on them. Significant similarities in such regulation are traced in the Criminal Codes of Azerbaijan, Tajikistan, Uzbekistan and a number of other post-Soviet states. However, the Criminal Codes of these countries have their own specific features in such regulation. Thus, part 3 of Article 60 of the Criminal Code of Tajikistan devoted to the general principles of sentencing provides for more specific criteria for individualization. The Code sets out the general criteria for both sentencing and its individualization (MISHINA, 2017).

It provides that when sentencing the court shall take into account the nature and degree of public danger of a crime, motives of a crime, nature and amount of harm, the identity of a perpetrator, circumstances mitigating and aggravating the punishment. Part 3 of Article 57 attempts to disclose the content of exceptional circumstances as a criterion for individualization of punishment aiming at imposing a more lenient punishment, which is not provided for in the Special Part of the Code. The circumstances collectively characterizing an act, identity of a perpetrator, degree and form of his guilt, behavior of a person before and after the crime, causes of crime and conditions conducive to it shall be recognized to significantly reduce the degree of public danger of a crime. We think this norm gives a better interpretation of exceptional circumstances than provided for by Article 64 of the Russian Code; therefore, some of its provisions can be used to improve the regulation of individualization of punishment in Russian criminal law (HUNT, 2003).

The concept of individualization of punishment is also used in the Criminal Codes of Belarus and Moldova. The Code of Belarus has a rather developed system of criteria for sentencing and individualization of punishment, which favorably compares with similar provisions of the Russian Code. As mitigating circumstances for liability (not just punishment), their Code provides *inter alia* the presence of a minor child dependent on the offender (not minor children, as in the Russian Code), old age of a wrongdoer, etc. Also, the Code attaches relatively universal meaning to both mitigating and aggravating circumstances. Chapter VIII

of the Code of Moldova has eloquent name Individualization of punishment. Part 1 of Article 75 stipulates that on sentencing the type and term of punishment courts shall take into account the gravity of a crime, its motives, identity of a perpetrator, circumstances of a case that mitigate or aggravate liability, effects of punishment on the offender's correction, rehabilitation, and life of his family (GALUSHKO, 2016).

Provisions on sentencing in the Criminal Code of Kazakhstan are also of interest. A person who committed a crime shall be imposed on the punishment necessary and sufficient to correct him and prevent new crimes. This legal provision directs the court in a way that when it determines the punishment, it shall consider the possibility of correcting a convict and preventing new crimes based on this measure of punishment. The law establishes general criteria for sentencing and individualization of punishment differently than the Russian Code. The Kazakh lawmaker identifies the behavior of a perpetrator as a separate criterion for individualization of punishment before and after committing a crime, and orders the court to take into account the effects of the punishment on the living conditions of not only his family, but also those others dependent on him. This norm has a practical sense, as a perpetrator may not live with his family, but provides material support to his minor children, elderly parents, and others in need of help. In addition, the Code considers mitigating and aggravating circumstances as those influencing criminal liability in general and punishment in particular. Inclusion of such a provision in the Criminal Code of Russia

would remove all questions about the nature of these circumstances and their criminal law meaning (GERBNER, 1993).

Provision on sentencing punishment, necessary and sufficient to correct an offender and prevent new crimes, is also found in the Criminal Code of Ukraine. Among the unknown to us, mitigating circumstances for punishment the Ukrainian Code introduces a special task for prevention or disclosure of criminal activities of an organized group or criminal organization, involving the commission of a crime in cases provided by the Code. Regulation of exceptional circumstances as the basis for imposition of a more lenient punishment than provided by law is also quite specific. If there are several circumstances that mitigate the punishment and significantly reduce the gravity of a crime, the court then, in view of the identity of a perpetrator, may by its discretion impose any punishment below the lower limit for a felony, grave crime or misdemeanor, but, ironically, courts cannot apply this provision for commission of a minor offense (BERRY, 2019).

Sentencing and individualization of punishment are regulated by the Criminal Codes of the Baltic States similarly and on the same principles as in most of the post-Soviet countries. When imposing a sentence, the court shall consider the degree of danger of a crime, form and type of guilt, motives and goals of a crime, stage of a criminal act, identity of a perpetrator; form and type of participation of a person as an accomplice of a crime, circumstances mitigating or aggravating liability. The same Article gives such provision, that if the purpose of punishment

within its sanction clearly contradicts the principle of justice, the court, considering the purpose of punishment, may impose a grounded less severe punishment (AINOUTDINOVA, 2010).

Circumstances mitigating liability include committing a crime in a state of limited liability, or being intoxicated against one's will, or having failed to voluntarily refuse the commission of a crime, etc. The grounds, criteria and limits of individualization aiming at a more lenient punishment than provided by law are regulated in sufficient detail. Focus is on the behavior of a perpetrator after the crime, including his confession, sincere repentance, assistance in crime investigation, reimbursement or reparation of the damages, etc. As aggravating circumstances, the Code recognizes commission of an act under the influence of alcohol, narcotics, psychotropic or other psychoactive substances. Noteworthy, that the Lithuanian Code contains many provisions on the criteria for individualization of punishment similar to the norms of the Russian Code. The same applies to the regulation of punishment and its individualization in the Criminal Codes of Latvia and Estonia (BERAR, 2015; CHANG & ZHANG, 2019).

4. SUMMARY

This research confirmed our hypothesis of the need for a more comprehensive study of individualization of punishment and its due criteria because of their potential to fulfill the basic goals and functions

of criminal punishment including retribution, prevention, correction and restoration of social justice. It was found that there are gaps and no unity in understanding and interpretation of the concepts by scholars and lawmakers, which may lead to ambiguity or misinterpretation of these phenomena. No proofs of their correlation with other criminal law aspects as general principles, criteria for sentencing, means, grounds for individualization of criminal liability, grounds for individualization of punishment, etc. have been found in most of the sources. Also, neither a precise definition of the terms nor a criteria typology has been developed so far.

The dramatic 1991 collapse of the USSR gave birth to 15 new states and acknowledged their independence but common past of the former Soviet republics is traced in many spheres including mentality, attitudes to crime and punishment and other criminal law issues. A thorough analysis of Criminal Codes of some post-Soviet states indicated major similarities regarding individualization of punishment and its criteria when imposed by courts due to the evident influence of the former Soviet legislation on them. Significant similarities in the related regulation are traced in Criminal Codes of a number of post-Soviet states. However, Criminal Codes of these countries also have specific differing features in regulation of these criminal law aspects, some being recommended as amendments or supplement to the regulatory framework already existing in Russia.

5. CONCLUSIONS

Problems of crime and punishment, as well as its sentencing, will attract the attention of society for long. On the one hand, the evolutionary development of criminal law in Russia in the 1990s led to revolutionary changes in it, especially as regards the rejection of punishment as a purely universal means of combating crime in a form of retribution but in the absence of correctional or moral goals. On the other hand, a rapid increase in the level of crime rate in all countries including most of the post-Soviet states regardless of their socio-economic, political or cultural situation is observable. Globalization, internationalization and diversification of crime and its environment only actualize the processes, causing governments, legislators and law enforcers to search for new ways to effectively and fairly impose penalties, individualization of punishment and selection of its due criteria being the clue answers hereby. The article may be of interest to legal scholars, lawmakers and criminal law practitioners in terms of its specified conceptual apparatus, results of a comparative analysis on regulation of individualization of punishment and its criteria and concise criteria typology presented.

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