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TÍTULO: Criterios de justicia del castigo y su individualización.

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RESUMEN: Este artículo analiza criterios de justicia e individualización del castigo y destaca que las ideas de humanización del castigo penal son cada vez más reconocidas y predetermina la necesidad de reformar la ley penal en el contexto de la implementación consistente del requisito de proporcionalidad de un delito y el castigo, asegurando su imparcialidad y conveniencia. Los autores realizan un análisis comparativo de los criterios de imparcialidad e individualización, y señalan su no coincidencia. En su opinión, la individualización del castigo determina e implementa solo un aspecto de la justicia del castigo, determinándose que la legislación penal de la Federación Rusa tiene un cierto sesgo en la individualización del castigo en la dirección de su mitigación.

PALABRAS CLAVES: naturaleza y grado del peligro público, la identidad del perpetrador, diferenciación e individualización del castigo, criterios de individualización del castigo, propósito del castigo.

TITLE: Criteria of justice of punishment and its individualization.

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ABSTRACT: This article analyzes criteria of justice and individualization of punishment and highlights that the ideas of humanization of criminal punishment are increasingly recognized and predetermines the need to reform the criminal law in the context of the consistent implementation of the proportionality requirement of a crime and the punishment, assuring their impartiality and convenience. The authors perform a comparative analysis of the criteria of impartiality and individualization, and indicate their non-coincidence. In his opinion, the individualization of punishment determines and implements only one aspect of the justice of punishment, determining that the criminal legislation of the Russian Federation has a certain bias in the individualization of punishment in the direction of its mitigation.

KEY WORDS: nature and degree of public danger, the identity of the perpetrator, differentiation and individualization of punishment, criteria for individualization of punishment, purpose of punishment.

INTRODUCTION.

This paper examines one of the functional problems of modern criminal law, which is the imposition and individualization of punishment. This is one of the main institutions of criminal law. It mainly shows the practical effect of criminal law, its social and legal significance.

The lawfully imposed punishment combines the past, that is, the crime committed, the present; i.e., the attitude of the perpetrator to the crime committed, and the future in the form of a prediction of his behavior. This is a kind of quintessence of justice on the part of the state and the measure of reprimand and the guilty of its perpetration by the society.

DEVELOPMENT.

The imposition of punishment is a highly multifaceted problem. One of them is quite sensitive in terms of the social significance of criminal law, is the systemic interaction of the criteria of justice and the individualization of punishment when it is appointed.

If the criteria of justice punishment in the Criminal Code are marked, namely, art. 6, which recognize the nature and degree of public danger of a crime, the circumstances of its commission and the identity of the perpetrator, the criteria for individualization are not specifically indicated in the Criminal Code of the Russian Federation, but are regulated in the framework of the criteria for sentencing. Meanwhile, the allocation of the criteria of individualization into a separate and independent category is of fundamental importance for the appointment of a fair and expedient punishment [Osadcii Cornel, 2004].

Justice is largely determined by the implementation of the criteria for the individualization of punishment, although the latter, at the same time, should not undermine the requirement of proportionality of punishment to a crime. Not every individualized punishment can be recognized as fair.

Materials and Methods.

The materials for the research were the provisions of Articles 2, 5, 6, 7, 43, 44, 45, 73 of the Criminal Code of the Russian Federation, Articles 63, 64, 66 bis of the Criminal Code of Switzerland, §§ 33, 34, 41a, 42 of the Criminal Code of Austria.

The reliability of the results obtained is provided on the basis of an analysis of the relevant array of legal norms, as well as the use of modern methods of research of normative legal material: logical, system-structural, comparative legal, historical-legal methods.

Results and Discussion.

The ideas of humanization of criminal punishment are increasingly recognized by legislators, legal scholars, and society in general. They predetermine the need for reforming criminal legislation,

improving the quality of law-enforcement practice in the context of the consistent implementation of the requirement of proportionality of crime and punishment, ensuring equality and fairness in the field of justice in criminal cases.

The main directions of its modernization, along with the decriminalization of certain criminal acts, the wider use of alternative criminal liability and the punishment of criminal-law measures, are consistent differentiation in the law and the individualization of punishment in judicial practice.

However, this raises questions about the extent to which the practice of judicial depenalization through the application of other measures of a criminal law nature and the individualization of punishment to the detriment of its differentiation is consistent with the principle of justice, which in essence reflects the essence of modern criminal legislation.

The Criminal Code of the Russian Federation twice uses the concept of justice; Part 1 of Art. 60 requires the court to impose a fair punishment, and Art. 6 interprets it more broadly, that is, with regard to other measures of a criminal law nature.

In accordance with part 1 of this article, not only punishment, but also other measures of a criminal law nature must correspond to:

- 1) The nature and degree of public danger of the crime.
- 2) The circumstances of its commission.
- 3) The identity of the perpetrator.

From this position, we can draw some conclusions:

First, the requirements of justice are not only the law-enforcer, but also the legislator, their addressee. At the same time, when constructing the sanction of the norms of the Special Part of the Criminal Code, he should be guided by the requirement of compliance with the proportionality of punishments to the gravity of crimes.

Secondly, the principle of justice must be consistent with all measures of a criminal law nature.

Third, the criteria for equity are regulated in Part 1 of Art. 6 of the Criminal Code of the Russian

Federation as equivalent in terms of influence on the election of a punishment by the court or some other measure of criminal law.

Fourth, the question arises about a kind of proportion of the proportionality of the punishment or other measure of the criminal law nature of the crime and their proportionality of the person of the perpetrator.

Fifth, this rule indicates that the measures of criminal law are fair, it turns out that this requirement does not apply to other measures of criminal law influence, in particular, exemption from criminal liability, unconditional exemption from punishment, compulsory medical measures applied to insane persons.

Sixth, in terms of justice, not only sanctions of the regulations of the Special Part of the Criminal Code of the Russian Federation, but also other measures of a criminal law nature should be proportionate to crimes; for example, the original version of Art. 73 of the Criminal Code of the Russian Federation did not limit the possibility of imposing a conditional conviction to any circle of crimes. Therefore, there were doubts about its use in relation to persons who have committed crimes of a terrorist nature, criminal acts against the sexual inviolability of minors, etc.

It should be noted that the legislator is quite consistent in setting out the criteria for the imposition of a fair punishment in Part 3 of Art. 60 of the Criminal Code of the Russian Federation, which states that the court should consider:

- 1) The nature and degree of public danger of the crime.
- 2) The identity of the perpetrator.
- 3) Including the circumstances mitigating and aggravating the punishment. Here also, as in Part 1 of Art. 6 of the Criminal Code of the Russian Federation, the main criteria are the nature and degree of public danger of the crime and the identity of the perpetrator.

At the same time, there are discrepancies regarding the interpretation of the “circumstances of the crime” (part 1, article 6) and the “circumstances mitigating and aggravating the punishment”. The latter can characterize not only the crime and the circumstances of its commission, but also the

identity of the perpetrator, but at the same time, some circumstances of the crime cannot be recognized as circumstances mitigating or aggravating the punishment.

In addition, if Part 1 of Art. 6 of the Criminal Code of the Russian Federation recognizes circumstances only as an independent criterion that mate only with the commission of a crime, then the circumstances mitigating and aggravating the punishment are indicated as an additional criterion characterizing the main criteria for sentencing - the nature and degree of public danger of the crime and the identity of the perpetrator.

The circumstances of the crime are all those objective and subjective factors that characterize the mechanism of interaction of the perpetrator with the external environment, including the victim, before and during the commission of the criminal act. Among them, as we see it, the reasons and conditions for committing a crime are of significant criminal law importance. Without taking them into account, it is hardly possible to impose a fair punishment or the application of a particular criminal law measure.

Under the regulation in Part 3 of Art. 60 of the Criminal Code of the Russian Federation of the general principles of sentencing, in our opinion, should indicate the accounting of the causes and conditions of the crime by the court. It should be noted that the Criminal Codes of some states recognize the reasons for committing a crime and the promoting conditions to it as a criterion for sentencing [Criminal Code of the Republic of Uzbekistan. 2016].

The difference between the provisions under Part 1 of Art. 6 and Part 3 of Art. 60 of the Criminal Code of the Russian Federation lies in the fact that as the criterion for sentencing the legislator recognizes the effect of the imposed punishment on the correction of the convicted person and the living conditions of his family. He is likely to be considered in the plane of not justice, but the expediency of punishment. Therefore, this criterion is not indicated among the criteria of justice of punishment.

There is no single-line relationship between justice and the individualization of punishment, as well as between their criteria. According to L.L. Kruglikov, justice as a principle of sentencing has two requirements: equality of citizens before the law and individualization [Naumov A.V. 2016] A.V. Naumov notes in his turn that the principle of justice means maximum individualization of responsibility and punishment.

The possibility of his appointment is ensured by the regulation of relatively-specific and alternative sanctions. The broader limits of the individualization of the responsibility of the guilty, he stresses, are set in the articles of the General Part of the Criminal Code of the Russian Federation (for example, in Art. 60-85), which allow, in the presence of certain circumstances, to significantly mitigate the punishment of the guilty or exempt from punishment [Article-by-article comment on the Criminal Code of the Russian Federation / 2004].

I.E. Zvecharovsky essentially expresses the same idea. He, in particular, writes that the correspondence between crime and punishment is ensured by maximizing the individualization of the criminal law consequences of the offense [Stephen J.F. 1883].

It is noteworthy that many authors reduce the justice of punishment mainly to its individualization. And the difference between the punishment and its important component comes out. It is also not necessary to reduce the realization of individualization only to the mitigation of punishment; it also implies the aggravation of punishment to the same extent under appropriate conditions. However, there is a certain bias in the Criminal Code of the Russian Federation in favor of mitigating the criminal law burden, and, as we see it, it is not always justified from the point of view of the inevitability of criminal responsibility.

Western European literature views justice not in connection with individualization, but through the prism of public retribution [Ashworth A. 2003], an act of coercion [Pradel J. 1996], repression [Dine J., Gobert J. 2000] or a sanction determined by the court [The Criminal Code of Switzerland. <http://law.edu.ru/norm/norm.asp?normID=1241950>].

At the same time, it should be noted that the criminal legislation of many modern states of Eastern and Western Europe provides significant opportunities for the individualization of punishment and the application of other measures of criminal law influence. Art. 63 of the Criminal Code of Switzerland states that the judge determines the size of the punishment "in proportion to the fault of the person; he/she takes into account the motives, previous life and personal relations of the accused" [The Criminal Code of Austria. <http://crimpravo.ru/page/zar-uk>]. It regulates mitigating circumstances (art. 64), the replacement of punishment (art. 65), mitigation of punishment at its own discretion (art. 66), and also the refusal of further prosecution and release from punishment (art. 66 bis).

The Criminal Code of Austria provides for special criteria for mitigating circumstances (§ 33) and special aggravating circumstances (§ 34). This law is also known for exceptional mitigation of punishment with mitigating circumstances prevailing (§ 42) exceptional mitigation of punishment in the case of cooperation with the bodies conducting criminal prosecution (§ 41a), limiting the punishability of an act (§ 42) [11].

Such attention to the problem of individualization of punishment in modern criminal law should be considered positive. However, a question arises here - how well do these provisions of the law meet the requirements of fair punishment imposed on the perpetrator of a crime, since only individual characteristics of the crime committed and the identity of the perpetrator can be objectively determined by the criteria of individualization?

Specifying this conclusion, its criteria can be:

- 1) Individual signs of a crime.
- 2) The origins and characteristics of the situation of its commission.
- 3) The individual properties of the perpetrator's personality.
- 4) Features of his family.
- 5) Mitigating and aggravating circumstances.

If the first three criteria are basic and universal, then the criteria listed under numbers 4 and 5 are auxiliary.

When the court considers only these criteria of individualization, it is impossible to impose a fair punishment. Individualization is only one of the components of punishment justice, and the other is dominated by its differentiation, the criteria of which are:

- 1) The nature of the social danger of the crime.
- 2) Its typical properties, as reflected in the dispositions of the regulations of the Criminal Code of the Russian Federation.
- 3) Typical personality traits of the perpetrators, which are also reflected in the regulations of the General and Special parts of the Criminal Code of the Russian Federation.

These criteria are mainly taken into account by the legislator when establishing penalties for criminal law, in particular, when forming alternative, relatively-specific and cumulative sanctions. The legislator, determining these limits of sanctions, creates the prerequisites for the maximum specification of the punishment measure in each individual case of a crime.

A balanced accounting of typical and individual properties of a crime and the identity of the perpetrator is precisely intended to ensure the appointment of a fair punishment from the point of view of the interests of both the society, the victim and the perpetrator.

In summary, the basis of modern criminal law is the idea of justice. And the practical effect of its implementation is to establish and legislate its criteria. The dominant among them is the nature and degree of public danger of crime. Although justice of punishment cannot be measured only from the standpoint of the offender guilty.

Since the punishment is imposed on a specific person, and one of his goals is to correct the convicted person, the court must take into account all those features of his personality that are essential for achieving this goal. At the same time, one should not run to extremes, much less oppose crime and the identity of the perpetrator, justice and the individualization of punishment. The

latter is one of its components and can be taken into account only in the context of the crime committed.

CONCLUSIONS.

One of the most important functions of the criminal legislation of Russia, like many other legally developed states, is to ensure social justice, equality of citizens before the law, and their restoration in case of their violation.

Unilateral consideration when imposing a punishment, or a crime, or the identity of the perpetrator, makes it essentially impossible to choose its fair measure. Individualization reflects only the personality-subjective aspect of the problem of justice in criminal law, along with its objective criterion - character, and typical (that is, taken into account by the legislator when building dispositions and sanctions of the Criminal Code of the Russian Federation) degree of social danger of a crime.

Individualization performs a dual function, that is, ensures the appointment of a fair, and at the same time, expedient punishment. Therefore, one should not downplay or overestimate the criminal law value of individualization; in both cases, its implementation would be accompanied by a violation of justice as a fundamental principle of criminal law.

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