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Improving the Provisions of The Criminal Code on Optional Characteristics of The Offender

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Abstract

This article is devoted to a theoretical and comparative legal analysis of the optional characteristics of the offender in criminal law. The study examines in detail the legal nature of the offender's optional characteristics, their role in the qualification of crimes, and their significance in the process of sentencing. The author substantiates the distinctions between the optional characteristics of the offender and the characteristics of a special offender, revealing their informative function as well as their role in the individualization of criminal liability. Based on an analysis of the norms of national criminal legislation and the criminal laws of certain foreign states, as well as the views of leading foreign scholars, the article elucidates the theoretical foundations for taking into account the offender's personal traits, behavior before and after the commission of a crime, and the factors that led to the commission of the offense when imposing punishment. As a result of the research, a number of theoretical and practical proposals aimed at improving the provisions of the Criminal Code of the Republic of Uzbekistan relating to sentencing are put forward.

Keywords: Offender, optional characteristics, special offender, individualization of punishment, mitigating circumstances, aggravating circumstances, criminal liability, recidivism, state of intoxication, special victim.

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1. Introduction

The conducted research demonstrates the existence of shortcomings and controversial issues related to the identification of the offender's optional characteristics. By their substantive content, the optional characteristics of the offender are related to the concept of a special offender; however, the difference between them lies in the fact that the characteristics of a special offender are expressly stipulated in a specific provision of criminal law, whereas the offender's optional characteristics are not directly provided for in a particular article of the criminal law, but their presence is taken into account when imposing punishment.

M. Usmonaliev points out that the significance of the characteristics of a special offender is expressed in three aspects, namely:

"1) characteristics introduced into the corpus delicti as the main essential features of the offender as an element of the crime, serving as necessary elements for the legal qualification of the offense;

2) characteristics introduced into the corpus delicti as aggravating elements of criminal liability;

3) characteristics that are not included in the corpus delicti, but which the court may take into account as aggravating circumstances when imposing punishment" [1].

It is precisely this third category that represents the optional characteristics of the offender.

The optional characteristics of the offender perform two functions: an informative function and the function of forming the grounds of criminal liability and its differentiation. These functions manifest themselves in the relationship between form and content. The optional characteristics of the offender are not contained in the disposition of a legal norm, but in its hypothesis, which corresponds to their informative function [2].

The concept of the offender's optional characteristics and the problem of sentencing in such cases can be resolved only if the legal nature of this criminal law institution is correctly defined. This requires taking into account the place of this institution within the system of criminal law, in particular within the doctrine of crime and the corpus delicti.

In our view, the optional characteristics of the offender are directly or indirectly determined by the object of criminal law protection.

The optional characteristics of the offender were examined on the basis of proposals to develop the legal nature of the special offender as an independent institution of the subject of criminal law within the system of criminal law. This institution should be analyzed in close connection with the institution of the special offender in criminal law and should be aimed at studying the rights and obligations of subjects in the field of criminal law. We believe that the subject of criminal law should be studied within the doctrine of crime not only as a component of the corpus delicti, but also as an independent legal institution.

It should be noted that specialists in criminal law have not studied the optional characteristics of the offender as an independent object of research. This, in turn, leads to shortcomings in properly assessing the degree of social dangerousness of the person who committed the crime and in imposing an appropriate punishment, ultimately giving rise to questions as to why the objectives of punishment are not being achieved.

Although a number of scholars have examined the issue of special offenders, they have not paid due attention to the significance of the offender's optional characteristics in sentencing. In particular, while V. G. Pavlov attempted to study problematic aspects related to the special offender, his research was limited solely to identifying special offenders [3].

Similarly, I. O. Alikhadzhieva [4], N. Egorova [5], P. Mozhayskaya [6], and E. Muradov [7] mainly confined their research to issues concerning the identification of officials as special offenders and did not address sentencing issues in cases where official status appears as an optional characteristic. B. A. Spasennikov, while identifying age and sanity as characteristics of the offender and discussing states of affect and intoxication at the time of committing a crime, as well as even the possibility of holding animals criminally liable, nevertheless left aside the issue of the significance of the offender's optional characteristics [8].

There are several directions in the development of theoretical views on the special offender and the offender's optional characteristics. Debates concerning the offender and the special offender as elements of the corpus delicti – namely, whether the offender constitutes an independent and autonomous element of the corpus delicti or merely the basis of criminal liability, whether it is the act that should be punished or the offender – undoubtedly necessitate close attention to the offender's optional characteristics.

According to A. I. Boyko, the humanization of criminal legislation proceeds precisely through an increasing focus on analyses related to the personality of the offender. The expansion of the category of special offenders leads to the "humanization" of criminal law and, as a result, contributes to resolving one of the fundamental issues of criminal law – whether criminal liability (punishment) should be applied – by broadening the study of the individual characteristics of the person who committed the crime [9].

Indeed, at a time when specialists in criminal law and criminology around the world are increasingly expressing concerns about a crisis of punishment (the failure to achieve the goals of punishment), taking into account the individual characteristics of the offender may offer new solutions to this problem. At the same time,

scientific and technological progress, changes in social relations, and the decline of direct interpersonal interaction alongside the growth of virtual communication are causing significant changes in human psychology. These changes, in turn, require new approaches to understanding the actions of offenders and their psychological attitudes toward those actions. This underscores the necessity of an individualized approach to sentencing in respect of every person who has committed a crime.

In turn, the existence of a special offender also implies the existence of a special victim. Article 56 of the Criminal Code establishes as aggravating circumstances the commission of a crime against a woman whose pregnancy was known to the offender; against a young child, an elderly person, or a person in a helpless condition; against a person or their close relatives in connection with the performance of official duties or a civic obligation; or against a person who is materially, officially, or otherwise dependent on the offender. In this context, it is possible to speak of the existence of special victims. The commission of a crime against the specified categories of persons may be significant for sentencing as a qualifying element of the offense, as an aggravating circumstance, or as an optional characteristic.

Because committing a crime against a special victim increases the social dangerousness of both the offender and the act, this issue should also be taken into account when assessing the optional characteristics of the offender.

At the same time, it should be noted that there are alternative approaches to the offender in criminal law. In particular, reference should be made to the concept of Feindstrafrecht ("criminal law for enemies") proposed by the German scholar Günther Jakobs [10]. This concept represents the antithesis of general criminal law (criminal law for citizens) and is aimed not at citizens, but at protecting society from attacks by individuals regarded as enemies of society and sources of heightened danger (for example, terrorists). This theory contradicts the humanistic foundations of criminal law, as it is not intended to protect rights and freedoms, but rather to eliminate or neutralize persons deemed dangerous to society. By its very nature, this theory denies the presumption of innocence, the right to defense, and the principles of humanism. According to this approach, in exceptional situations – especially in cases of terrorism – it may be permissible to disregard certain restrictions provided for by law. Although this theory is regarded by many scholars as contrary to the essence of criminal law, in practice it is possible to observe instances where states have acted on the basis of this approach. An example is the treatment of persons considered terrorists by the United States at the Guantánamo detention facility.

While examining the issue of the offender in criminal law, Jeremy Horder pays particular attention to the question of intent. In his view, intent may not be clearly established in a state of intoxication; therefore, intoxication itself should not automatically be assessed as an aggravating circumstance, and this factor should be taken into account when imposing punishment [11].

Nadine Deslauriers-Varin, Patrick Lussier, and Stacy Tzoumakis focus special attention on the issues of specialization and professionalization (repetition, recidivism) when assessing offenders' conduct and determining punishment. They advance the rational choice and criminal specialization approach. From the perspective of rational choice, as age increases and time and experience accumulate, offenders tend to prioritize behaviors that are more satisfying or profitable for them – that is, actions associated with a lower probability of detection and that have been successful in the past. Consequently, after committing crimes sequentially and successfully, an offender increasingly selects signals associated with favorable opportunities or situations in which the likelihood of successfully committing a crime is higher.

Over time, these signals become part of a specific knowledge structure, which subsequently influences future unlawful behavior. The authors emphasize that precisely these circumstances should be taken into account when qualifying an act and imposing punishment for a crime [12]. In doing so, by specialization and professionalism they refer specifically to the commission of new crimes after a conviction, while not treating the commission of multiple crimes prior to conviction (repetition) as an aggravating circumstance.

In general, an analysis of the views of foreign scholars and foreign legislation shows that the repeated commission of crimes, as provided for in the criminal legislation of our country, is not regarded as an aggravating circumstance in many foreign jurisdictions. In particular, Article 60 of the Criminal Code of the Russian Federation provides that, when imposing

punishment, it is necessary to take into account the impact of the punishment on the offender's rehabilitation and on the living conditions of the offender's family. Furthermore, Article 61 designates the presence of the offender's minor children and the provision of medical or other assistance to the victim as mitigating circumstances, while Article 62 classifies as aggravating circumstances the commission of a crime by abusing official position or trust granted on the basis of an employment contract; the commission of a crime by a person responsible for the upbringing, education, and (or) care of the victim; the commission of a crime by an employee of an educational, upbringing, medical, or other institution who is legally entrusted with the duty of supervising the victim; as well as the intentional public demonstration of the process of committing a crime through telecommunication networks or the Internet. At the same time, the assessment of the offender's state of intoxication as an aggravating circumstance is left to the discretion of the judge [13].

The Criminal Code of Kazakhstan also provides that, when imposing punishment, it is necessary to take into account its impact on the offender's rehabilitation and on the living conditions of the offender's family. Article 53 of the Criminal Code designates the first-time commission of a minor or medium-gravity crime as a mitigating circumstance, while Article 54 provides that although intoxication constitutes an aggravating circumstance, the court is granted the right not to recognize this circumstance as aggravating [14].

Similarly, Article 63 of the Criminal Code of Belarus classifies the provision of medical or other assistance to the victim, as well as the commission of a crime by elderly persons, as mitigating circumstances, while Article 64 designates the negligent commission of a crime due to a conscious failure to comply with established requirements as an aggravating circumstance [15].

Taking into account that the optional characteristics of the offender are considered in sentencing, we believe that the following provisions should be reflected in the Criminal Code of our country.

First, given that punishment is applied for the purposes of the moral rehabilitation of the offender, preventing the continuation of criminal activity, and preventing the commission of new crimes by both the offender and other persons, Article 54 of the Criminal Code should establish a rule requiring consideration of the impact of the punishment on the offender's rehabilitation and on the living conditions of the offender's family.

Second, based on the fact that in all court judgments examined during the research the absence of prior convictions and the first-time commission of a crime were assessed as mitigating circumstances, as well as taking into account the experience of foreign states, the first-time commission of a crime of low social danger or a minor crime should be expressly designated as a mitigating circumstance in Article 55 of the Criminal Code.

Third, the commission of crimes by elderly persons and persons with disabilities should be designated as mitigating circumstances in Article 55 of the Criminal Code.

Fourth, in our country liability for sexual crimes committed against minors is being progressively strengthened. In particular, crimes committed by persons responsible for the upbringing, education, and (or) care of the victim, as well as by employees of educational, upbringing, medical, or other institutions who are legally entrusted with the duty of supervising the victim, have been included in the relevant articles of the Special Part of the Criminal Code as qualifying aggravating elements. At the same time, in recent years there has been an observed increase in crimes such as causing bodily harm and torture committed against children by such persons. In this regard, the commission of crimes by these persons should also be designated as an aggravating circumstance in Article 56 of the Criminal Code.

Fifth, the repeated commission of a crime indicates that the person has not yet been convicted, that is, that criminal law measures have not previously been applied to the person. Accordingly, subparagraph "n" of Article 56 of the Criminal Code should be limited exclusively to persons who have committed crimes in the form of recidivism.

Sixth, taking into account the views expressed in the scholarly works of foreign authors that, when a crime is committed in a state of intoxication, intent may not be clearly established and that such a condition may border on diminished sanity, as well as considering the legislative practices of certain states, it is proposed to grant the court discretion, under subparagraph "o" of Article 56 of the Criminal Code, to determine whether the commission of a crime in a state of intoxication or

under the influence of narcotic drugs, their analogues, psychotropic substances, or other substances affecting a person's consciousness should be recognized as an aggravating circumstance.

Seventh, Article 57 of the Criminal Code should establish restrictions or special approaches to the imposition of a more lenient punishment with respect to dangerous recidivists, especially dangerous recidivists, and persons who have committed especially grave crimes.

Eighth, in recent years liability for sexual crimes against children has been significantly strengthened, which undoubtedly plays an important role in preventing such offenses. At the same time, it should not be overlooked that there are cases in which the offender (the subject) in sexual crimes is also a minor (between 14 and 18 years of age). The legislation of Poland (Articles 197 and 200 of the Criminal Code), Moldova (Article 174), Lithuania (Article 151^1), Estonia (Article 145), and Romania (Article 218^1) provides that a close age difference between the offender and the victim in sexual crimes (where both are minors) may give rise to mitigated liability. It is therefore necessary to consider introducing similar provisions into the Criminal Code of our country.

Ninth, pursuant to Article 17 of the Criminal Code, setting the age of criminal liability at 16 years for the offense предусмотренный by Article 122^1 of the Criminal Code – leaving a child unattended in the territory of a foreign state – is not justified, since persons aged 16 to 18 are also considered children. In this regard, it is proposed to establish the age of the subject at 18 years for the purposes of Article 122^1 of the Criminal Code.

Tenth, in Article 148^1 of the Criminal Code, establishing the age of the subject at 16 years for the offense of violating requirements prohibiting the exploitation of the labor of minors is also unjustified, since such violations are typically committed by heads of enterprises, organizations, or institutions. Accordingly, the age of the subject under this article should be set at 18 years.

Eleventh, although subparagraph "a" of Part Two of Article 176 of the Criminal Code provides for the repeated commission of a crime as a qualifying aggravating circumstance, it does not specify such indicators of a higher degree of social dangerousness of the offender as a dangerous recidivist or an especially dangerous recidivist. A similar situation can be observed in Articles 178, 184, 192^1, 197^1, 214^1 and 214^2, 228^1 and 228^2, 229^4, 235, 251^1, and 255^2 of the Criminal Code. Therefore, it is proposed to analyze the above-mentioned articles and discuss the introduction of recidivism categories that reflect a higher level of social dangerousness of the offender.

Twelfth, Part Two of Article 247 of the Criminal Code provides for liability for the repeated commission of a crime, while Part Three establishes liability for the commission of a crime by an especially dangerous recidivist; however, the commission of a crime by a dangerous recidivist is not addressed. As a result, a person who has repeatedly committed a crime is held liable under Part Two of Article 247, whereas a dangerous recidivist is held liable under Part One of the same article. It is proposed to eliminate this inconsistency.

At the same time, the research revealed that in foreign countries sentencing for criminal offenses is based not only on the corpus delicti and the committed act, but also places significant emphasis on the personal characteristics of the offender (the subject), their behavior before and after the commission of the crime, and the factors that led to the offense.

In Germany, France, and Italy, the individualization of punishment is regarded as a fundamental principle. Courts take into account the offender's age, social status, prior convictions, intent (intent or negligence), remorse, and whether the damage has been compensated. In particular, Germany pays close attention to this issue, where the Schuldprinzip (the principle of guilt, punishment proportionate to guilt) is considered a key basis for sentencing. This, in turn, necessitates a detailed examination of the offender and their optional characteristics.

In the United States and the United Kingdom, sentencing is primarily determined on the basis of Sentencing Guidelines (guidelines established for judges that take into account ranges of punishment as well as mitigating and aggravating circumstances). In this context, the offender's prior criminal record and criminal intent (mens rea) play a central role. Punishments are increased for intentional crimes or for offenses involving the use of weapons. The defense may invoke the offender's personal and social circumstances as mitigating factors.

In Japan, when imposing punishment, courts take into account the offender's mental state, determination (resolve), or remorse. The practice of imposing

suspended or more lenient sentences on first-time offenders is widely applied.

In South Korea, recidivists are subject to severe punishment, while the performance of community service or the payment of compensation for damage caused plays an important role in mitigating punishment.

It is evident that the offender and their individual characteristics are of significant importance in sentencing for a crime. In our view, scholars in our country should pay special attention to the study of the offender by separately examining personal culpability and liability for guilt.

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