

Research article

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On Taking into Account the Victim's View in The Process of Differentiation and Individualization of Criminal Punishment

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Abstract

Introduction: the article analyzes the legal position of the Supreme Court of the Russian Federation on the question of the permissibility (inadmissibility) of taking into account the victim's view (his/her legal representative) when sentencing by the court. *Purpose:* based on the analysis of Articles 61 and 63 of the Criminal Code of the Russian Federation and identification of features of their practical application, to show the need to take into account views of the parties when imposing punishment. *Methods:* comparative legal, interpretation, as well as private scientific – legal-dogmatic and method of interpretation of legal norms. *Results:* it is doubtful when the court takes into account the victim's view (his/her legal representative) as either an aggravating or only mitigating circumstance, since the criminal law (articles 61, 63 of the Criminal Code of the Russian Federation) does not classify it as either aggravating or mitigating. At the same time, the list of aggravating circumstances to date is exhaustive and cannot be interpreted broadly. At the same time, judicial practice knows cases of considering other circumstances not provided for in Article 63 of the Criminal Code of the Russian Federation for strengthening punishment, and Part 2 of Article 61 of the Criminal Code of the Russian Federation stipulates that other mitigating circumstances may be taken into account when imposing punishment. *Conclusion:* the court should always take into account the position of the parties in the criminal process, including when imposing a more or less severe punishment. In this regard, there is a need for clarification by the Plenum of the Supreme Court of the Russian Federation of the corresponding duty of courts when they make decisions on criminal cases.

Key words: criminal punishment; differentiation and individualization of punishment; position of the Supreme Court of the Russian Federation; opinion of the victim; mitigating and aggravating circumstances.

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In recent years, and especially in 2021, the Supreme Court of the Russian Federation has persistently drawn the courts' attention to the inadmissibility of their references to the position of the victim when assigning punishment to persons guilty of committing a crime. Thus, reducing the punishment of K., convicted under Part 1 of Article 105 of the Criminal Code of the Russian Federation, the Judicial Board for Criminal Cases of the Cassation Court of General Jurisdiction referred, in particular, to the fact that the victim's opinion about the type and size of the sentence in terms of stiffening the latter cannot be taken into account by the court [1, p. 47]. In another case, the verdict was also changed by the appeal decision: the descriptive and motivational part excluded the indication that the victims' opinions about strict punishment of P. were taken into account when imposing punishment [3, p. 29]. A similar position was taken by the Presidium of the Supreme Court of the Russian Federation in the case of L., D. and Sh.: changing the verdict and the appellate definition, it excluded the mention "on taking into account victims' opinion about strict punishment of the defendants" [2, p. 10].

At first glance, such an explanation is based on a misunderstanding and should be rejected immediately. Indeed, the victim is a party in the criminal process, endowed with a wide range of rights, since physical, property and (or) moral harm was caused to him/her. It is no coincidence that the decision to recognize as victim is taken immediately from the moment of criminal case initiation (Part 1 of Article 42 of the Criminal Procedural Code of the Russian Federation). The victim, his/her legal representative is entitled to participate in criminal prosecution of the accused, and in cases of private prosecution – to put forward and support the charge (Article 22 of the Criminal Procedural Code of the Russian Federation). The victim has the right to file petitions and challenges, speak in court debates, appeal the verdict, and file objections to complaints and submissions in the criminal case (Part 2 of Article 42 of the Criminal Procedural Code of the Russian Federation). When considering the possibility of making a decision on a verdict without a trial, it should be established whether there criminal case has all necessary conditions (Chapter 40 of the Criminal

Procedural Code of the Russian Federation), in particular, the victim does not object to consideration of the case in a special order. If it turns out that the victim expresses disagreement in this part, the criminal case is considered by the court in a general manner (Part 4 of Article 314 of the Criminal Procedural Code of the Russian Federation).

Criminal legislation also takes similar positions on the issue under consideration. In particular, Article 76 of the Criminal Code of the Russian Federation provides for the possibility of exemption from criminal liability on non-rehabilitating grounds in connection with reconciliation with the victim only when the harm caused to the latter is smoothed out. If the victim does not agree to release the perpetrator, if he/she insists on bringing him/her to criminal liability, the application of this benefit to the offender is impossible in principle. Hence, not taking into account the opinion of the victim as party of the criminal process when solving relevant issues, including regarding the scope of criminal liability (its admissibility, type and size), looks inappropriate.

It is important in this regard to identify motives of the Supreme Court's prohibition to consider the victim's position when imposing punishment. According to the Decree of the Presidium of the Supreme Court of the Russian Federation of February 3, 2001 in the case of L. and others, the "victim's opinion on the appointment of strict punishment to the defendant is not attributed by the legislator to the circumstances aggravating punishment, the list of which is established by Article 63 of the Criminal Code of the Russian Federation, and reference to this circumstance when choosing punishment is inappropriate [2, p. 10].

It becomes clear that it is inadmissible to take into account such an opinion a) precisely when punishment is aggravated, b) on the grounds that there is no mention of this circumstance in the list of aggravating circumstances.

Does this mean that the victim's opinion on the application of less severe punishment is a mitigating circumstance and it cannot be ignored by the court, and not establishing it and not mentioning it in the sentence is unacceptable? And is the victim's opinion about severe punishment really an aggravating circumstance?

To answer these questions, it is necessary to consider mitigating and aggravating circumstances, their legal nature, and then criteria for their selection for inclusion in the lists of Articles 61 and 63 of the Criminal Code of the Russian Federation, reasons for the inadmissibility of recognizing the victims' opinion about punishment as an aggravating circumstance.

The first complication arises due to the fact that the criminal legislation of Russia has never contained definitions of mitigating and aggravating circumstances. To clarify their specifics, we might correlate them with related concepts, but this is not that simple. Thus, by virtue of Part 3 of Article 63 of the Criminal Code of the Russian Federation, the imposition of punishment involves taking into account the nature and degree of public danger of the crime and the identity of the perpetrator, including mitigating and aggravating circumstances. Thus, the close connection of such circumstances – in terms of content, origins – with the data on the crime and the identity of the perpetrator is emphasized. However, the ratio of the mentioned criteria in Part 1 of Article 6 of the Criminal Code is interpreted differently: punishment imposed by the court should correspond to the nature and degree of public danger of the crime, circumstances of its (crime) commission and the identity of the perpetrator; there is a different understanding of the nature of mitigating and aggravating circumstances; their connection, as well as other circumstances, only with the crime is shaded.

Not dwelling on the mentioned inconsistencies in the issues of normative interpretation of the circumstances under consideration, we can identify crucial features of the latter, such as their origin and the identity of the perpetrator. There are circumstances: a) manifested in the crime; b) not manifested in the crime, but closely related to subsequent behavior of the offender (for example, active repentance); c) unrelated to the crime, but characterizing a danger degree of the individual (for example, a positive household characteristic of the defendant); d) not characterizing a danger degree of the individual (for example, presence of young children, disability).

The first two varieties can be recognized as mitigating, the other two can be recognized by the court as mitigating under Part 2 of Article

61 of the Criminal Code of the Russian Federation (currently it is pregnancy and presence of young children of the perpetrator – paragraphs “v” and “g” of Part 1 of Article 61). Aggravating circumstances are those of the first type (manifested in the crime).

Hence, the attribution of the victim's opinion, that is, the data not manifested in the crime, to the category of aggravating and mitigating circumstances is rather doubtful. They can be taken into account by the court only as a characteristic of the danger of the crime and the identity of the perpetrator (under Part 1 of Article 6 and Part 3 of Article 60 of the Criminal Code of the Russian Federation), but, according to law, not as mitigating and aggravating circumstances.

It is noteworthy that the circumstances mentioned in the headings of Article 61 and 63 of the Criminal Code of the Russian Federation are endowed with the function of influencing punishment in a mitigating or aggravating manner; other circumstances are also endowed with this function (for example, characterizing a form of guilt, degree of implementation of criminal intent, role in complicity, etc.). A distinctive property of the circumstances referred to in the law as mitigating and aggravating, in addition to their attribution to the data on the crime and the identity of the perpetrator is significance of their impact on the punishment imposed by the court and liability in general.

Hence, the circumstances under consideration can be defined as data that are derived from the content of the crime and the identity of the perpetrator and able to significantly mitigate or enhance liability and punishment due to their significant impact on the degree of public danger of this crime, and are also able to reflect essential features of the personality of the perpetrator of the crime.

Specific types of mitigating and aggravating circumstances are given in the lists of Articles 61 and 63 of the Criminal Code of the Russian Federation.

Any circumstances referred to as mitigating and aggravating (both named in the lists and taken into account by the court on the grounds of Part 2 of Article 61) are endowed with two mandatory features: significance of influence and their non-characteristic for most crimes. So, the circumstance that is common for en-

croachments cannot act as aggravating or mitigating (for example, the fact of committing a crime for the first time).

The mentioned features are minimally necessary for any mitigating or aggravating circumstance. But these features are not enough to include a specific type of circumstance in the list – it is required to identify a number of additional features, namely: a) typicality; b) unconditionality (mandatory influence); c) strictly defined direction of influence; d) non-derivation from other mitigating and aggravating circumstances.

Typicality of the circumstances included in the law is understood as the possibility of their presence in a more or less extensive range of crimes. For example, the circumstance described in paragraph “k” of Part 1 of Article 63, in particular the use of primarily generally dangerous means, is conceivable in more than 60 types of crimes. On the contrary, the range of attacks committed in perverted forms or with penetration into the home is insignificant, and therefore such circumstances cannot claim to be included in the list.

Mandatory influence (unconditionality) means that the circumstances described in the list will certainly affect a level (degree) of public danger of the crime, identity of the culprit and particularly punishment. Hence, it is controversial to include commission of the crime against a person “dependent on the perpetrator” (paragraph “z” of Part 1) in the list of Article 63 as an aggravating circumstance, since only substantial, and not any other, dependence is criminally significant.

A strictly defined direction of influence is a feature that underlies the separate existence of two lists (Articles 61 and 63). It means that the circumstances applying for inclusion in one or another list are capable of either increasing or reducing punishment in all cases of crimes. Hence, the law should not include circumstances of a “variable” nature (close relationship, state of intoxication, etc.). The Plenum of the Supreme Court (Paragraph 10 of the Resolution No. 2 of January 11, 2007) emphasized in 2007 that the commission of a crime in a state of intoxication is not attributed to circumstances aggravating punishment, is not included in the list of Article 63 of the Criminal Code of the Russian Federation. Now, in connection with

the inclusion of this circumstance in Article 63 of the Criminal Code (Part 1.1), the situation regarding this circumstance has changed: on the one hand, as it does not have the property of a strictly defined orientation and binding influence, it is legitimately not included in the list of aggravating factors; on the other hand, the court is granted the right to recognize the commission of a crime in a state of intoxication as aggravating “depending on the nature and degree of public danger of the crime, circumstances of its commission and the identity of the perpetrator” (Part 1.1).

Finally, the list should not include circumstances derived from others that have already been included there, that is, reflected in the law (for example, when there is minority as a mitigating circumstance – an additional indication of the juvenile age of the culprit).

The lists of Articles 61 and 63 of the Criminal Code of the Russian Federation should reflect only the circumstances endowed with the totality of the mentioned features.

As mentioned above, unlike Article 61, Article 63 of the Criminal Code of the Russian Federation does not contain a provision according to which the court could recognize other circumstances other than those mentioned in the list as significantly affecting punishment. This gave the Plenum of the Supreme Court of the Russian Federation [4, p. 4] the basis for the conclusion that the “list of circumstances aggravating punishment is exhaustive and cannot be interpreted extensively” (paragraph 28 of the Resolution No. 58 of December 22, 2015). The reason for closing the list is obvious: the legislator sought to limit judicial discretion, prevent the imposition of undeservedly harsh punishment and show humanism towards a person who has violated the law. Ninety-three percent of 477 practitioners (judges, prosecutors, lawyers) interviewed by us mentioned the same motives.

It should be noted, however, that the legislator has not achieved its goals: judicial practice steadily bypasses the list of Article 63, taking into account numerous circumstances that are not considered as aggravating to stiffen punishment. And this is not accidental, because with the closure of the list, a conflict of laws situation arose: Part 3 of Article 60 obliges the court to take into account aggravating (as well as mitigating) circumstances “among other things”,

that is, it is assumed that there are other circumstances to be taken into account that characterize the identity of the perpetrator and the degree of public danger of the crime. The court has no right to ignore them, which the Plenum of the Supreme Court of the Russian Federation is forced to recognize.

If the court takes into account only those mitigating circumstances that are named in the list, ignoring other data aggravating punishment, it will violate the requirement of Part 3 of Article 60 on full consideration of the nature and degree of danger of the crime and the identity of

the perpetrator. If the court takes into account the circumstances not mentioned in the list when strengthening punishment, it will violate regulations on the exhaustive nature of the list.

The way out, taking into account all of the above, is seen in the explanation by the Plenum of the Supreme Court of the Russian Federation of the courts' obligation to take into account the opinion of the parties on the issue under consideration each time when making decisions on a criminal case. To take into account means to consider, evaluate the proposed solution, and include it in the list of issues to be discussed.

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