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THE IMPOSITION OF CRIMINAL PUNISHMENT IN ACCORDANCE
WITH THE EFFECTS OF MITIGATING AND AGGRAVATING CIRCUMSTANCES

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Summary

Judicial individualization involves establishing and applying a punishment that reflects the harm inflicted on social values by the person who committed the offense. This process entails the use of a complex set of mitigating and aggravating circumstances, alongside the general criteria for individualization, which serve as the starting point of this work. The paper constitutes an analytical material on the current legal provisions regarding the institution of punishment individualization in general and the institution of applying punishment in accordance with the effects of mitigating and aggravating circumstances in particular. The legal framework within which judicial individualization must occur is analyzed. The means and criteria for individualizing criminal punishment, as determined by law, are outlined. A distinction is made between general and special criteria for punishment individualization. The nature, role, and importance of mitigating and aggravating circumstances, which form part of the general criteria for punishment individualization, are assessed.

Essential doctrinal opinions regarding the classification, role, and significance of mitigating and aggravating circumstances are presented. The effects of mitigating and aggravating circumstances on determining the punishment of the accused are evaluated in three situations regulated by law: a) the court retains only mitigating circumstances and their effects; b) only aggravating circumstances exist in the commission of the act and their effects; c) the court retains a concurrence of aggravating and mitigating circumstances and their effects. Also, proposals for “lege ferenda” are made.

Keywords: *criminal punishment, punishment individualization, judicial individualization, general and special individualization criteria, mandatory nature of individualization criteria, mitigating and aggravating circumstances, nature and role of mitigating, effects of mitigating and aggravating circumstances.*

Introduction. Judicial individualization of punishment is the exclusive prerogative of the court when applying the legally prescribed punishment to the accused for the committed offense. This is achieved by evaluating the gravity of the specific crime and the dangerousness of the offender based on certain criteria established by law. In the same vein, judicial individualization of punishment represents one of the most important and sensitive legal operations, the accuracy of which directly determines the success of the convict’s rehabilitation and reintegration process. In other words, judicial individualization of punishment involves determining, for a specific person found guilty of committing a crime, the category, duration, or quantum of punishment necessary and sufficient to achieve the purposes of criminal punishment.

According to Article 21 of the Constitution of the Republic of Moldova, any person accused of a crime is presumed innocent until proven guilty in a public judicial process where all necessary guarantees for their defense are ensured. Additionally, under Article 114 of the Constitution, justice is administered in the name of the law solely by judicial authorities.

These constitutional provisions establish that only the court can determine a per-

son's guilt for committing a crime and only the court can impose a punishment for the committed offense. When issuing a conviction, the court determines which category and severity of punishment are sufficient to achieve the purposes of punishment and whether the punishment complies with all legal requirements and the circumstances of the case.

In this context, it is fundamental that a person found guilty of committing a crime, receives a fair punishment within the limits set by the corresponding article of the Special Part of the Criminal Code (CC). The court's application of a fair punishment is based on a comprehensive, objective evaluation of all case circumstances and a correct conclusion regarding the legal classification of the offense, citing the relevant article, paragraph, and section of the Criminal Code of the Republic of Moldova under which the person is convicted. It is also noted that courts are obligated to adhere to the principles of criminal liability: legality, equality before the law, humanism, culpability, and individualization of criminal liability and punishment (Articles 3-7 CC).

As a stage in the application of criminal law, judicial individualization is carried out based on the law, within the conditions and limits established by law. Criminal law sets the coordinates within which judges determine and apply specific punishments. These coordinates form the legal framework for judicial individualization, which includes the general framework of punishments applicable to natural persons (Article 62 CC) and legal entities (Article 63 CC), as well as the general limits for each type of punishment for natural and legal persons, the types of punishments prescribed by law for each offense, their specific limits, and various grounds for mitigating or aggravating punishment.

The requirements imposed by the principle of legality are not limited to the obligation that judicial individualization of punishment occurs within a legal framework. Additionally, judicial individualization must be achieved through the use of means and criteria for evaluation, also determined by law [1, p.408; 2, p.178].

In the process of selecting individualization means, judges are required to consider certain legal criteria, i.e., requirements that the court must follow when determining and applying punishment.

Thus, individualization criteria represent categories of data and elements that the court is legally obligated to consider in the judicial individualization of punishment [3, p.91].

Depending on their scope, doctrine distinguishes between general individualization criteria, which must be considered in any situation of punishment individualization, and special individualization criteria, which apply only in cases expressly provided by law [3, p.91; 4, p.522].

General criteria are those that must be considered without exception when individualizing any punishment. These criteria are mandatory for the court when individualizing any punishment, determining the category and term of the principal punishment, and establishing both principal and complementary punishments.

General individualization criteria cannot be used in isolation, but must be considered collectively, i.e., they are taken into account together when determining and applying punishment [5, p.9; 6, p.349].

Elaborating on the above, some authors argue that a distinction must be made between the valorization of criteria and their content: the combined use of retained criteria to individualize punishment does not mean merging them or assigning equal importance to each in practice. Depending on the case, some may prove more significant than others, and the court may establish a hierarchy of their relevance to the case at hand [3, p.100; 7, p.381].

To assist courts in better evaluating the gravity of the committed offense and the

dangerousness of the offender, current criminal legislation regulates the general criteria for punishment individualization. Article 75(1) of the Criminal Code of the Republic of Moldova stipulates that the law establishes certain requirements or criteria that courts must follow when applying punishment in a specific criminal case. According to these requirements, the punishment imposed on a person found guilty of committing a crime must be: a) fair; b) within the limits set in the Special Part of the Criminal Code; c) in strict compliance with the provisions of the General Part of the Criminal Code; d) proportionate to the gravity of the committed offense; e) considerate of the motive for committing the offense; f) considerate of the offender's personal circumstances; g) considerate of case circumstances that mitigate or aggravate liability; h) considerate of the punishment's influence on the correction and re-education of the offender; i) considerate of the offender's family living conditions.

Here, it is clarified that in legal doctrine, general individualization criteria are classified according to the principles of criminal liability: legality of punishment, fairness of punishment, and individualization of punishment [8, p.386; 5, p.10]. In this sense, it is evident that both the principle of legality and other principles are reflected in the general criteria for punishment individualization. However, the following general criteria most closely align with the principle of legality: punishment must be applied *within the limits set in the Special Part of the Criminal Code and in strict compliance with the provisions of the General Part of the Criminal Code*. Naturally, punishment individualization is organically linked to the principles of legality and fairness. If punishment is not individualized, it is evidently illegal, even if the formal provisions of the law are respected (i.e., the punishment is within the limits set in the Special Part of the CC). At the same time, such punishment would also be unfair. Although punishment individualization is not explicitly stated in Article 75(1) CC, it arises from the general criteria through which it is manifested. Thus, punishment individualization requires adherence to the following general requirements outlined in Article 75(1) CC: when determining punishment, the court must consider: a) the gravity of the committed offense; b) the motive for the offense; c) the offender's personal circumstances; d) case circumstances that mitigate or aggravate liability; e) the influence of the punishment on the correction and re-education of the offender; f) the offender's family living conditions.

It must also be noted that Article 75 of the current Criminal Code, compared to Article 36 of the 1961 Criminal Code, formulates the general criteria for punishment individualization more clearly and comprehensively. Thus, the current penal law retains provisions from the 1961 Code, such as: the court applies punishment within the limits set in the Special Part of the Criminal Code, in strict compliance with the General Part's provisions, and considers the nature and degree of social danger of the committed offense, the offender's personal circumstances, and case circumstances that mitigate or aggravate liability. At the same time, the current Criminal Code introduces new provisions limiting the judge's discretion, thereby restricting judicial subjectivity in punishment individualization. Notably, new provisions oblige the court to impose a fair punishment on a person found guilty of committing a crime, considering the motive for the offense, the punishment's influence on correction and re-education, and the offender's family living conditions.

Special criteria, as indicated, apply only in specific cases expressly provided by law. These criteria amplify or specify the general criteria and must be considered alongside them when determining and applying punishment.

Special individualization criteria, unlike general criteria, apply separately depending on the specific circumstances of the case. Additionally, judicial practice frequently encounters situations where two or more special criteria must be applied. Such situations

are not regulated by the legislator in the Criminal Code, leaving their resolution to the court's discretion [5, p.10].

The process of punishment individualization is specifically regulated by the provisions of Chapter VIII of the General Part of the Criminal Code (Articles 75-88). These provisions are supplemented by others on punishment individualization found in other chapters of the General Part (e.g., Article 23¹(2), Article 64(3), Article 70(3¹), etc.), as well as provisions in the Criminal Procedure Code regarding the reduction of punishment if the accused's detention conditions violate rights guaranteed under Article 3 of the European Convention on Human Rights, per the jurisprudence of the European Court of Human Rights (Article 385(5) of the Criminal Procedure Code).

This institution comprises a set of regulations that the court must follow. This framework includes, *firstly*, provisions independent of the specifics of the criminal case and applicable to the individualization of any punishment. As noted, these are termed general individualization criteria in criminal law and are outlined in Articles 75, 76, and 77 of the Criminal Code. The placement of mitigating circumstances (Article 76) and aggravating circumstances (Article 77), which form part of the general individualization criteria, in separate articles of the Criminal Code, is dictated by legislative drafting rules to avoid complicating the interpretation of Article 75.

Secondly, regulations that apply only when certain expressly provided circumstances exist, termed special criteria in criminal law theory. The Criminal Code of the Republic of Moldova provides special criteria for punishment individualization in cases such as: applying punishment according to the effects of mitigating and aggravating circumstances (Article 78), applying a more lenient punishment than prescribed by law (Article 79), applying punishment in cases of plea agreements and cooperation agreements (Article 80), applying punishment based on evidence obtained during the criminal investigation (Article 80¹), applying punishment for an unconsummated offense (Article 81), applying punishment for recidivism (Article 82), applying punishment for complicity (Article 83), applying punishment in cases of concurrent offenses (Article 84), applying punishment in cases of cumulative sentences (Article 85), applying punishment in cases of enforcing foreign judgments (Article 86), etc.

The general individualization criteria outlined above, aside from the gravity of the offense and the offender's personal circumstances, also emphasize the need to consider circumstances that mitigate or aggravate punishment. Mitigating and aggravating circumstances, though not part of the constitutive elements of the offense, relate either to the act itself, the offender, or both. These circumstances influence the degree of social danger of the act, the offender's dangerousness, and thus ensure punishment individualization in each specific case. Mitigating and aggravating circumstances are provided in Articles 76 and 77 of the Criminal Code. Notably, the list of aggravating circumstances is exhaustive, while the list of mitigating circumstances is approximate; thus, courts may consider other unlisted circumstances as mitigating.

In criminal law theory, there has long been a lack of consensus on the role of mitigating and aggravating circumstances. Some authors argued that these circumstances influence the degree of culpability [9, p.136], others held that they mitigate or aggravate the punishment imposed by the court [10, p.101], while some maintained that they mitigate or aggravate the social danger of the act [11, p.159; 12, p.68-69].

In the current Criminal Code, the legislator emphasized the role and importance of mitigating and aggravating circumstances, explicitly stating that they influence only the

determination of punishment, i.e., mitigating or aggravating it.

It must be clarified that the mitigating or aggravating circumstances outlined in Articles 76 and 77 of the Criminal Code of the Republic of Moldova should not be confused with qualifying or privileging signs that share the same terminology, but are included in the constitutive elements of certain offenses. If a circumstance is legally defined as a qualifying or privileging element of an offense, it cannot, as a general rule, be considered again by the court when determining punishment. Article 76(3) and Article 77(2) of the Criminal Code introduce provisions excluding the possibility of double-counting the same circumstance as both a mandatory element of the offense and a mitigating or aggravating factor.

Therefore, mitigating and aggravating circumstances are situations, attributes, qualities, or other factual data external to the offense's constitutive elements that directly or indirectly relate to the offense or the offender, increasing or diminishing the harmful degree of the act and the offender's dangerousness, thereby leading to mitigation or aggravation of punishment.

In specialized literature [2, p.182–183; 7, p.385–387; 13, p.390–394; 14, p.470–473; 15, p.427–428; 16, p.321; 17, p.262–263; 18, p.458; 19, p.38–103], multiple classifications of circumstances are proposed based on various criteria. At this point, we will briefly analyze those that lead to distinctions relevant to practical application:

a) Mitigating and aggravating circumstances – distinguished by their effect on punishment, the former reducing punishment and the latter increasing it.

b) Legal and judicial circumstances – legal circumstances are expressly provided by law, and once established, oblige judges to consider them. They always modify punishment in the same direction (either mitigating or aggravating). Judicial circumstances are not determined by law and are left to the court's discretion. Notably, the current Criminal Code regulates this distinction only for mitigating circumstances, as aggravating circumstances do not allow judicial discretion.

c) Circumstances related to objective or subjective elements of the offense – distinguished based on the offense's constitutive elements. For example, objective mitigating circumstances include committing the offense under severe personal or family conditions (Article 76(1)(c)), while objective aggravating circumstances include targeting a minor, pregnant woman, or someone in a vulnerable state (Article 77(1)(e)). Subjective mitigating circumstances include the offender being a minor or under 21 (Article 76(1)(b)), while subjective aggravating circumstances include committing the offense out of prejudice (Article 77(1)(d)). This classification aids courts in detailed analysis.

d) Circumstances antecedent, concomitant, or subsequent to the offense – distinguished by their timing relative to the offense. This distinction is relevant for punishment individualization.

In doctrine, circumstances are further classified into general and special, real and personal, and known or unknown to the offender.

As noted, the current Criminal Code emphasizes the role of mitigating and aggravating circumstances, explicitly stating that they influence only the determination of punishment.

Here, distinctions must be made between retaining circumstances and their effects. Once mitigating or aggravating circumstances are verified, their retention is mandatory for the court. Retained mitigating circumstances (legal or judicial) obligatorily reduce punishment, while aggravating circumstances increase it. The court must individualize punishment within the limits set for the offense in the Special Part and in accordance with Article 75 CC.

The effects of mitigating and aggravating circumstances are regulated by Article 78

CC. Three situations are outlined: a) only mitigating circumstances and their effects are retained; b) only aggravating circumstances and their effects exist; c) a concurrence of mitigating and aggravating circumstances and their effects.

Article 78(1) of the Criminal Code stipulates that mitigating circumstances identified by the court during the commission of the offense result in either a reduction or substitution of the principal punishment. The legislative wording, “the principal punishment shall be reduced or substituted”, imposes a mandatory obligation to mitigate the principal punishment. These effects apply solely to principal punishments and involve either reducing the statutory punishment limits or altering the nature of the principal punishment. It is important to note that the reduction of special punishment limits occurs only once, regardless of the number of mitigating circumstances identified. Therefore, the recognition of multiple mitigating circumstances in favor of the offender does not result in cumulative reductions, as the special punishment limits are reduced only once, though this may influence the extent of the reduction.

Under Article 78(1) letters a)-c) of the Criminal Code, cases involving the reduction of punishment limits or substitution of the principal punishment due to mitigating circumstances are regulated as follows, if the statutory minimum imprisonment term provided in the relevant article of the Special Part of the Criminal Code is less than 10 years, the punishment may be reduced to this minimum (Article 78(1)(a)), if the statutory minimum imprisonment term is 10 years or more, the extent of reduction is left to the court’s discretion, provided the imposed punishment exceeds the statutory minimum. If the principal punishment prescribed by law is a fine, it may be lowered to the statutory minimum specified in the relevant article of the Special Part (Article 78(1)(b)). The use of phrases such as “may be reduced” or “may lower” clarifies that the court is not obligated to reduce the punishment to the statutory minimum but retains the discretion to do so.

In point 10 of Supreme Court of Justice Plenary Decision No. 8 of November 11, 2013, it is emphasized that reductions under Article 78(1) letter a) or b) must correspond to the number of mitigating circumstances identified. A punishment reduced to the statutory minimum is deemed equitable only when multiple mitigating circumstances enumerated under Article 76 are established. Additionally, once mitigating circumstances are recognized and the punishment is reduced (e.g., to the minimum), these circumstances cannot serve as grounds for applying Article 90 of the Criminal Code, as this would grant dual legal weight to the same factual situation.

Article 78(1)(c) provides that if life imprisonment is prescribed for the offense, it must be replaced with imprisonment ranging from 15 to 25 years. The phrase “it shall be replaced with imprisonment” imposes a mandatory substitution. However, Moldovan criminal law does not prescribe life imprisonment as a standalone punishment, but as an alternative to imprisonment between 15 and 20 years. Consequently, when mitigating circumstances exist, the court must select imprisonment within these statutory limits. Once the type of punishment is determined, the court must then establish its duration or quantum.

In this context, legal scholars [5, p.37] have rightly noted that setting a maximum special limit of 25 years for imprisonment as a substitute for life imprisonment contradicts the sanctions outlined in the Special Part of the Criminal Code, which prescribe life imprisonment only as an alternative to imprisonment between 15 and 20 years. Therefore, when mitigating circumstances exist in cases where life imprisonment is prescribed as an alternative to imprisonment, life imprisonment is not “replaced”, but simply not applied; instead, the alternative punishment of imprisonment within the statutory limits is imposed.

Mitigating circumstances also affect complementary punishments: if the court identifies mitigating circumstances, it may remove non-mandatory complementary punishments (Article 78(2)). Unlike the mandatory reduction or substitution of the principal punishment, the removal of complementary punishments is discretionary, not obligatory.

Point 10 of the aforementioned Supreme Court Decision clarifies that non-mandatory complementary punishments (“with or without”) may be removed if mitigating circumstances are identified. Mandatory complementary punishments may only be removed under the conditions of Article 79(1) CC.

Under Article 78(5), if exceptional mitigating circumstances exist, the court may impose a punishment below the statutory minimum, a milder category of punishment, or waive mandatory complementary punishments (Article 79(1)).

The effects of aggravating circumstances are governed by Article 78(3), which succinctly states that the court may impose the maximum punishment prescribed in the relevant article of the Special Part. This establishes a rule of discretionary aggravation, leaving the decision to the court. Unlike mitigating circumstances, which mandate reduction or substitution, aggravating circumstances grant the court the right, but not the obligation, to impose the maximum punishment.

The term “maximum punishment” in Article 78(3) does not obligate the court to apply the harshest punishment among alternative sanctions, but refers to the statutory maximum of the chosen punishment category [5, p.38].

Aggravating circumstances affect only principal punishments [20, p. 10].

The legislator’s concern to establish the legal framework for applying punishment is evident not only in regulating the effects of mitigating or aggravating circumstances on punishment, but also when both mitigating and aggravating circumstances coexist in the same case [14, p.485]. In such situations, the question arises as to how to mitigate or aggravate the punishment imposed on the accused.

According to Article 78(4) of the Criminal Code, in cases of concurrence of aggravating and mitigating circumstances, reducing the punishment to the statutory minimum or increasing it to the maximum provided in the corresponding article of the Special Part of the Criminal Code is not mandatory. Thus, when aggravating or mitigating circumstances coexist, determining the duration and quantum of punishment within the limits prescribed by the Special Part of the Criminal Code for the committed offense is left to the court’s discretion. Additionally, reducing the punishment to the statutory minimum or increasing it to the maximum is not obligatory. In other words, in such cases, the court may prioritize either mitigating circumstances – thereby lowering the punishment toward the statutory minimum – or aggravating circumstances – raising it toward the statutory maximum. For example, if a criminal case involves exclusively aggravating circumstances or if these qualitatively outweigh mitigating ones, the imposed punishment must align closer to the statutory maximum prescribed for the offense. Conversely, if exclusively mitigating circumstances exist or they qualitatively outweigh aggravating ones, the punishment must align closer to the statutory minimum.

Furthermore, if the court identifies only one aggravating circumstance, the imposed punishment will be milder compared to cases with multiple aggravating circumstances. When only aggravating circumstances exist, the punishment imposed on the guilty person will be harsher than in cases where both aggravating and mitigating circumstances coexist. In all cases, however, the punishment must remain within the limits prescribed by the Special Part of the Criminal Code for the committed offense.

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