

AGGRAVATING CIRCUMSTANCES IN THE CRIMINAL CODE OF THE RUSSIAN FEDERATION

**Larisa V. Monakhova¹, Mikhail A. Smirnov^{2*}, Ekaterina V. Shagova³ &
Svenlana A. Yakovleva⁴**

¹As. Prof., Mari State University, Russia, laranka@mail.ru

^{2*}As. Prof., Mari State University, Russia, micsha.smi2015@yandex.ru

³As. Prof., Mari State University, Russia, korpusuris@bk.ru,

⁴As. Prof., Mari State University, Russia, 777pobeda@inbox.ru,

*Corresponding author

Abstract

The article explains the aggravating circumstances concept and essence. It shows the correlation between the aggravating circumstances and qualifying signs of crimes and examines the role of aggravating circumstances in sentencing under the Criminal Code of the Russian Federation. The analysis of the aggravating circumstance and qualifying signs of the crimes in this article has been done following the latest changes in the criminal legislation of the Russian Federation. The recommendations to improve judicial practice and criminal law were made in this paper based on an analysis of judicial practice.

Keywords: qualification of crimes, sentencing, aggravating circumstances, judicial errors.

1. INTRODUCTION

Many institutions of criminal law are significantly updated or changed in the Criminal Code of the Russian Federation. The changes have been made in the provisions relating to the aggravating circumstances. The titles of the examined cases and the wording of some aggravating circumstances are changed and the new species of them are added into the Criminal Code of the Russian Federation.

A list of aggravating circumstances is set in the paragraph 1 article 63 of the Criminal Code of the Russian Federation, 1996. The following circumstances are recognized as aggravating: a) recidivism; b) occurrence of serious consequences in a result of the crime; c) commission of a crime by a group of individuals, by a group of individuals by prior conspiracy, by an organized group or criminal community (criminal organization); d) a particularly active role in the commission of a crime; e) involvement in the crime of persons who suffer from severe mental disorders or are in a state of intoxication, as well as persons who have not attained the age at which criminal liability accrues; f) commission of a crime by reason of national, racial or religious hatred or enmity or hatred or hostility toward a social group; f.1) commission of crime in revenge for lawful actions of other persons as well as to conceal another crime or facilitate its commission; g) the commission

of a crime against a person or his relatives in connection with implementation of his professional or public duty; h) the commission of a crime against a pregnant woman when the pregnancy is known by the perpetrator, or against the child or another defenseless or helpless person, or a person who is dependent on the perpetrator; i) commission of a crime with particular cruelty, sadism, humiliation and torture of the victim; j) a crime involving weapons, ammunition, explosives, explosive or simulating them devices, specially manufactured technical means, narcotic drugs, psychotropic, strong, poisonous and radioactive substances, medicinal and other chemical and pharmaceutical products, as well as the use of physical or mental coercion; k) commission of a crime in case of emergency, natural or other public disaster, as well as the riots; l) commission of a crime with the use of trust granted to the perpetrator by virtue of his official position or contract; m) commission of a crime using a uniform or documents of a government representative; n) committing an intentional crime by the officer of the internal affairs department; o) commission of a crime against a child by a parent or other person legally responsible for the upbringing of a child, as well as pedagogical staff or other employee of an educational organization, medical organization, an organization that provides social service, or other organization, obligated to supervise the child; p) the commission of a crime in order to promote, justify and support terrorism. According to the paragraph 2 article 63 of the Criminal Code of the Russian Federation when the judge (the court) imposes the penalties depending on the nature and degree of social danger of the crime, the circumstances of its commission and the identity of the perpetrator, he may recognize the aggravating circumstances of the crime the fact that the person has committed a crime in the state of intoxication caused by alcohol, narcotics or other intoxicating substances.

In the theory of the criminal law and legislation the circumstances provided now in the part 1 article 63 of the Criminal Code of the Russian Federation were called in different ways for example "influencing the degree of guilt" (Bazhanov, 1974), "maximizing the guilt" (Isayev, 1948), "aggravating the offense" (Demidov, 1964), "aggravating the public danger" (Karpets, 1959), "aggravating the degree of responsibility" (Fatkulkin, 1974).

The term "aggravating circumstances" is used in the doctrine and the practice as the characteristic of the circumstances referred to in the article 63 of the Criminal Code of the Russian Federation, and the characteristic of certain qualifying circumstances of the offense.

Practitioners as well have no clear understanding of the difference between the qualifying circumstances (signs) and aggravating circumstance.

The aggravating circumstances provided in the part 1 of article 63 of the Criminal Code of the Russian Federation are inherently the circumstances which the legislator enforces to influence the sentence selected by the court making it more severe.

The comparison of the qualifying circumstances of the crimes which are set in the Special Part of the Criminal Code of the Russian Federation with the aggravating circumstances listed in part 1 of article 63 of the General Part of the Criminal Code of the Russian Federation allows us to specify a match of some of them by name (for example, such as a crime committed by a group of persons acting in collusion with the use of weapons, in a state of intoxication, and others). The use of the same wording in the Criminal Code of the Russian Federation, the coincidence describing the qualifying circumstances and aggravating circumstances gives a rise to the idea of the unity of their legal nature.

The influence of aggravating circumstances and qualifying signs on the type and size of the criminal punishment for the criminal actions are different. Qualifying sign (or some signs) of specific offenses is used in the law to construct the structure of the same crime, which is characterized with an increased danger to society and thereby entails the formulation of stricter sanctions in the relevant part of the article of the Russian Criminal Code. It constitutes a new ground of an increased criminal liability of the perpetrator. Committing a crime in the presence of qualifying signs does not form a new foundation of criminal responsibility and the court shall impose a sentence within the sanctions of the Criminal Code of the Russian Federation without aggravating circumstances.

2. OPINIONS AND DISCUSSION

For this purpose the main criteria that characterize the essence of aggravating circumstances, the totality of which expresses their distinctive features, should be identified.

There are four criteria in the literature: 1) typification, 2) commitment, 3) significance and 4) the well-defined orientation.

Thus, they can be defined based on the analysis of the main criteria for selection an aggravating circumstance. The aggravating circumstance are the facts, events, phenomena of objective and subjective nature, which characterize a fairly broad range of offenses and will certainly raise the degree of public

danger of the offense, and (or) the personality of the offender. The direction of their influence can vary depending on any other circumstances of the case and therefore determines the feasibility of a more severe punishment within the criminal law sanctions.

The part 3 of Article 60 of the Criminal Code prescribes to consider the nature and degree of social danger of the crime and the personality of the perpetrator, including the aggravating and mitigating circumstances, as well as the influence of the appointed punishment on correction of the convict, and the living conditions of his family while sentencing. The same general rules for sentencing are provided in the penal codes of a number of foreign countries.

The study of the part 1 of Article 63 of the Criminal Code of the Russian Federation leads to the following conclusions on the aggravating circumstances:

- a) the record of the aggravating circumstances, as well as the data on the personality of the perpetrator, the nature and degree of public danger of a crime is a mandatory element of individualization of the punishment and it is therefore the duty of the court (judge);
- b) the data on the personality of the offender, the nature and degree of social danger of the crime which are essential for the individualization of punishment are not confined to those aggravating circumstances listed in the criminal law;
- c) the aggravating circumstances do not characterize the offender's personality and the nature and degree of social danger of the crime, and the increase of social danger of the committed crime and the personality of the perpetrator and involve the appointment of a more severe punishment (Melnikova, 1989).

In the process of classification of the offense and at the first stage of individualization of punishment the role of aggravating circumstances is not shown.

Attributing a particular offense to a particular category of severity the legislator indicates its obligatory characteristics in the Criminal Code of the Russian Federation. Their volume cannot be increased by taking into account the aggravating circumstances otherwise an incorrect legal assessment of the act will be given. The differentiation of the criminal responsibility is usually processed by the qualification of the crime. The difference in punishment for the crime is defined not by the equal legal assessment act but those criteria which are set in Part 3 of Article 60 of the Criminal Code of the Russian Federation.

Aggravating circumstances are strictly defined by the law and their effects cannot be mixed with the influence of other circumstances affecting the assigned punishment. According to Paragraph 2 of Article 63 of the Criminal Code of the Russian Federation if an aggravating circumstance is provided by appropriate article of the Criminal Code as an offense in itself it cannot be re-considered in sentencing.

The Russian criminal law theory protects a judgment of a possibility to take into account the negative information on the perpetrator's personality in personalization of the punishment. Such information is not included in the list of aggravating circumstances (Melnikova, 1989).

This point of view is arguable. A broad interpretation of the list of aggravating circumstance results in a divergent jurisprudence in which some courts will consider an aggravating any specific circumstances of the case, while others will not.

The registration of other data, such as previous convictions, can be also identified as the means of individualization of punishment in addition to the aggravating circumstances. In its decision dated December 23, 2014 the Constitutional Court of the Russian Federation assigns that in its nature the institute of criminal record as a means of criminal law is aimed to ensure the constitutional principle that the law applies to everyone without discrimination in the field of criminal law and it is aimed to achieve a constitutionally significant goals of differentiation of criminal liability and punishment, enhancement its correctional impact on the convict, prevention of new crimes and thus it provides the protection of individuals, society and the state from criminal attacks. In the Criminal Code of the Russian Federation the penal consequences of the criminal record do not go beyond the means of the criminal law that the federal legislator may use to achieve these goals (Baskakova, Gabdrahmanov, Gorbunova, Smirnov, 2014).

Such circumstance as a crime committed in a state of intoxication caused by alcohol, drugs or other intoxicating substances is nowadays ambiguously estimated by the court due to the changes in Article 63 of the Criminal Code of the Russian Federation. Pursuant to Part 1.1 of the Article 63 of the Criminal Code of the Russian Federation, the court has the right according to the nature and degree of social danger of the crime to recognize the circumstances of its commission and the personality of the perpetrator as aggravating or not. This legislative innovation is the first step towards giving the list of aggravating circumstance an open

character and it is one of the latest example of the judicial discretion expansion.

There are indications registered as aggravating circumstance, such as "non-recognition of guilt and convicted uncompensated damage," "lack of remorse and regret about what happened from a convict" in the court verdicts. The Supreme Court of the Russian Federation recognized such guidance in courts' verdicts as unfounded since they are not included in the list of aggravating circumstances of paragraph 1 of Article 63 of the Criminal Code of the Russian Federation.

The reasons for sentencing should be specific and not formal or general in nature as it sometimes occurs in the jurisprudence (Ishchenko, 2002).

In motivation of selection of the type and size of penalties for aggravating circumstances the court must give the legal wording provided in the relevant paragraphs of Part 1 of Article 63 of the Criminal Code of the Russian Federation, with the concretization of the necessary reference to the case.

However, approximately in 7% of the investigated criminal cases the aggravating circumstances were cited in the court verdict in the wording that was not consistent with Article 63 of the Criminal Code of the Russian Federation (Gorbunova, 2004).

The need to define is more obvious in the fact that a number of aggravating circumstances are described in the law in the generalized form (for example, occurrence of serious consequences as a result of the crime).

The court is entitled to invoke in the verdict as a motive for the election of their specific penalties only such circumstances that are investigated and confirmed at the hearing. Under paragraph 6 of Part 1 of Article 73 of the Criminal Procedure Code of the Russian Federation each aggravating circumstance is a matter of proof at the hearing. And only on a condition that these circumstances will be substantiated, they can be the basis for sentencing and can be included in the motivation of the sentence.

The law directs the court on the need to consider all the circumstances in their totality that determines the location and value of each of them in a criminal case and the impact on the election of penalties. But the criminal law does not provide the accounting for the above-mentioned criteria. Meanwhile, it would be useful for the judges to know how each criterion assigns an impact on the punishment and how should their significance be assessed in relation to each other.

3. CONCLUSION

In order to avoid a broad interpretation of the aggravating circumstances circle, it is appropriate to legislate in Article 63 of the Criminal Code the provision stating that the list of aggravating circumstances is exhaustive. The court is not entitled in its sentence to refer to the facts or evidences which are not set in paragraph 1 of article 63 of the Criminal Code of the Russian Federation as to aggravating circumstances. Such provisions exist in the criminal codes of some countries of the Commonwealth of Independent States.

The court in sentencing should point out available aggravating circumstances for a specific criminal case provided in article 63 of the Criminal Code of the Russian Federation. And separately to consider their impact on the choice of the type and size of a criminal punishment. We have studied the 1000 convictions in which the court set the account of aggravating circumstances (Gorbunova, 2004). An analysis of the court practice revealed that judges mixed these circumstances with other means of individualization of punishment listed in part 3 of article 60 of the Criminal Code of the Russian Federation, giving any circumstances of the case an aggravating sign at their discretion.

With regard to the aggravating circumstance the legislator does not define the criteria for their influence on the assigned punishment that appear to be necessary to recognize the existing lack of Russian criminal law. For example, article 61 of the Italian Penal Code provides the general aggravating circumstances the list of which is exhaustive. The presence of one aggravating circumstance entails a mandatory increase in the sentence by one-third but the term of imprisonment cannot exceed 30 years (Gorbunova, Makarov, Matveev, 2015).

Adding to the Russian criminal law the provisions containing the criteria for the influence of aggravating circumstances on the assigned punishment balances the accounting rules of certain mitigating circumstances provided in article 62 of the Criminal Code of the Russian Federation. And will contribute to the purpose of fair punishment in accordance with article 6 of the Criminal Code of the Russian Federation.

REFERENCE LIST

- Bazhanov M.I. (1974). *Mitigating and aggravating circumstances in sentencing*. - In the book: *Questions of State and Law*. Moscow.
- Baskakova V.E., & Gabdrahmanov F.V., & Gorbunova L.V., & Smirnov M.A.(2015). Criteria for the Classification of the Common Legal Consequences of Criminal Conviction. *Review of European Studies (Special Issue)* Gorbunova L.V., & Kurtz A.V. *The circumstances aggravating the punishment under criminal law in Russia (theory and practice)*. Kazan, 2004.
- Gorbunova L.V., & Makarov R.V., & Matveev S.A. (2015). Aggravating Circumstances. Significance and Correlation with Qualifying Signs. *Mediterranean Journal of Social Sciences* (MCSEER Publishing, Rome-Italy, Vol. 6, No. 3, S.7, P. 169-178.
- Isaev M.M.(1948). *Criminal law. The general part*. Moscow.
- Ishchenko A.V. (2002). *Sentencing under the Criminal Code of the Russian Federation. Scientific and practical guide*. Moscow,
- Demidov Y. (1964). Imputation of aggravating circumstances of the crime. *Socialist legality* , № 6).
- Karpets I.I. (1959). *Aggravating and mitigating circumstances in the Soviet criminal law*. Moscow.
- Melnikova Y.B. (1989). *Differentiation of responsibility and individualization of punishment*. Krasnoyarsk.
- Fatkullin F.I.(1974). *Common problems of procedural evidence*. Kazan.