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Conception of gender approach of criminal law

Abstract: The problem of definition of a role, the place and value of biological human nature as the factor determining criminal behavior is among the sharpest in criminal law and criminology. Gender approach has criminal law not only differentiation of criminals by gender (biological differentiation), but also a number of the socio-cultural, historical, psychological, social and many other factors which are directly connected with differentiation of people by gender. Therefore, using of gender approach in the analysis of criminal and legal problems achievement of fair social equality at obligatory accounting of gender features of the person has to pursue the aim.

It is substantiated an author's wording of Article 57.2 of Criminal Code of AR: "Lifelong imprisonment isn't appointed to pregnant women, minors and also the persons who have reached sixty-five-year age".

Keywords: gender examination; gender equality; gender inequality; gender distinction.

The term the gender meaning a sort in English is used for designation of the socio-cultural reason of intersexual distinctions [8, p. 18-19]. The gender problem is interpreted ambiguously from positions of sociological, psychological, biological and philosophical approaches. Certainly, it is impossible to ignore biological features of people, however it isn't necessary to attach them too great value, forgetting about other more important social factors and signs.

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The problem of definition of a role, the place and value of biological human nature as the factor determining criminal behavior is among the sharpest in criminal law and criminology. Scientists, who are experts in the field of criminology, the criminal and criminal and executive law indicate the need of accounting of genetic (biological) prerequisites when studying crime and developing measures of prevention of crime, structure of the identity of the criminal and also the mechanism of criminal behavior. As it is noted in literature, “inequality following from natural distinctions is the first form of inequality, in this or that look which is also manifested in some animal species” [12, p.282].

It is known that the first scientist who has developed the theory of the reasons of crime on the basis of a biological research of the personality was the founder of the bio-psychological direction in criminology C. Lombroso. In the work “Crime” he, based on results of experiments in biology and anthropological measurements, wrote about the criminogenic nature of women, unexpectedly drawing a conclusion that the low level of female crime is explained by “smaller number of the degenerative signs observed at her” [10, p.168]. It is necessary to specify that along with studying of biological and psychological properties and qualities of the personality, C. Lombroso researched social human nature. In particular, in relation to a gender perspective, the comparative analysis of male and female crime was carried out, at the same time the great value was given to identification of influence of the external environment, education, marital status, habits, labor employment and other factors [10, p.168]. Nevertheless, in spite of the fact that the scientist recognized importance of the public phenomena in formation of the reasons of crime, he considered them less important, than biological factors.

In the sixties of the 19th century the criminology tried to explain the reasons of female crime from psychoanalysis positions, operating in the spirit of Z. Freud with such concepts as passivity, emotionality, narcissism and cunning. It has developed into attempt to explain some types of economically motivated crimes



committed by women (for example, thefts) as well with sexual features of women. This approach though which is a little corrected finds reflection and today in books on criminology, which write men [9, p.73].

Gradually views of a problem of gender equality change and it is exclusive a merit of representatives of women's movement. Along with it the role and critical evaluation of social reconstruction of female crime increases. In the appearing works, the reasons of deviant behavior of women based on three approaches are analyzed: sociological, Marxist and feministic.

In criminology female crime is understood as set of the penal acts made by female persons including children and teenagers. Since 1980th years in legal statistics also the sex of the victims, and not just sex of the persons suspected of commission of crimes is considered.

The problem concerning the relations between the criminal and the victim is many years a subject of studying of a victimology and criminology. At least two persons are involved in crime: the person doing harm and the person to whom harm (the criminal and the victim) is done. This situation is violated only in those few cases, so far as concerns so-called crimes without the victims. At commission of many other crimes (for example, connected with drugs), the criminal is at the same time and the victim of the act. In this regard, there was a question and whether there are relations between the criminal and the victim and what? In relation to the matter in a victimology such terms as “the casual victim”, “tendency to falling a victim”, “the born victim” are used. It is established that become the victims from crimes of the woman much more than men. The brightest manifestation finds this situation in crimes against the personality – murders, injuries and rapes.

It is known that in the 19-20th centuries there were essential changes in a social status of women. Because of active feminist movements of the woman has achieved essential changes in the social status. Development of productive forces,



a scientific and technological revolution, industrialization and an urbanization, automation and growth of industrial production have led to increase in a role of the woman in relations of production. This circumstance was shown on growth rates of female crime, which in industrialized countries has begun to come nearer to men's [6, p.131-132]. The Constitution of the Azerbaijan Republic proclaims equality of citizens irrespective of their social status and biological signs. The fundamental law of the state does not provide any privileges of citizens on gender sign. At the same time, the specified legal equality in some cases is not observed. Such inequality is confirmed by the official statistics showing difference in male and female labor employment, the salary size, participation in political life of the country and public administration, etc. At the same time it is necessary to emphasize that in modern society the system of distribution of social roles by gender is significantly indistinct and deformed unlike earlier existing system where distribution of gender roles was characterized by rigidity of instructions. It is explained by the fact that in process of gradual political and economic democratic progress, the contradictions of floors based on inequality of women lose the sharpness, many psychological and social and role distinctions and features are erased. At the same time, they completely do not disappear. Distribution of social gender roles, a social status of people depending on sexual and other distinctions in many respects depend on social and economic development of society, his ethnic and cultural features that substantially affects crime rate. The gender inequality in society does not mean infringement of the rights only of women or only men as violations of the rights and that and others often take place. So, in particular, not only women, but also men are exposed to violence in family or the intersexual relations. According to many respondents us males – the conscription and an obligation of military service is violation of their rights and freedoms. Perhaps therefore in a number of the states military service can do also women (for example, in Israel, the USA). Many men are not happy with the existing prejudice



to concede in everything to women, to congratulate them on a female holiday, to give way in public transport, to pay for the companion at restaurant, to give gifts, etc. Often men are limited in the fatherly rights – in case of a divorce the child remains with mother and only in exceptional cases – with the father. According to some authors, in family law there is a discrimination of men as at a divorce it is extremely difficult for man to receive the child on education. Such practice is confirmed by geography of the complaints coming to Strasbourg Court on human rights [4, p.4]. The reproductive rights belong to women; the woman decides to have or not to have the child. If the woman wishes the child – she keeps him if is not present, then performs abortion. Men retire later (nowadays this violation is eliminated), longer measures sentences are imposed to them [11]. Nevertheless, the rights of women have been marked out in special category of human rights. Initially formation of all precepts of law was carried out as universal, calculated on all segments of the population, however subsequently it has turned out that they are focused on wealthy white men, and excluded representatives of other races, needy, children and women. Women needed nearly two centuries of fight against restrictions and public prejudices to acquire the right to admit full-fledged members of society and to have the rights, equal with men, applying for this purpose the most different ways and receptions. Under pressure of the women's collective movement, the international community recognized that the rights of women are an integral part of human rights. As not worldwide the ideas of gender equality have legislative registration, rules of international law developed and offered for the approval by such international structures as the UN, the ILO and others, have the unifying, special value.

The gender sign has the essential manifestation in sciences of a criminal cycle – the criminal, criminal and executive law, criminology. Therefore, appointment and execution of criminal penalties is differentiated mainly by gender, for example, the ban of application concerning women of lifelong imprisonment; serving of



imprisonment by women and men in various criminal and executive institutions. The list of the punishments applied to men is wider and the system of criminal and executive institutions on serving sentence in the form of imprisonment differs in a big variety, as well as. In legal literature there was a question of so-called "gender examination" as a method identification real ("I am right in practice") and formal ("I am right in books") existence of the precepts of law reflecting the concept of gender equality. According to this concept, which proceeds from international legal norms the real equality of women and men in all spheres of public life [4, p.13]. At the same time, it is difficult to agree with a possibility of absolute gender equality. Sense and the purpose of application of gender approach is not so much ensuring equality of men and women, how many fair legal differentiations of the existing gender features.

One of the reasons of lack of gender approach in criminal law is the lack of a mention of the public relations regulated by criminal law in the main international legal documents, and first of all in "The convention on elimination of all forms of discrimination against women" which orders to take all measures for elimination of discrimination in public and political life and also in the field of education, the matrimonial and labor relations [4, p.3]. It is natural that the international standards can't regulate in details all relations developing concerning gender features. At the same time, the small value given to gender aspects in criminal law is explained by most smaller specific weight of female crime in the lump of the crimes committed in the country and also slowness and commitment to the old, settled rules and traditions in the sphere of respect for the rights and freedoms of the persons who have committed crimes.

Thus, it is possible to draw a conclusion that gender approach has criminal law not only differentiation of criminals by gender (biological differentiation), but also a number of the socio-cultural, historical, psychological, social and many other factors which are directly connected with differentiation of people by gender.



Therefore, use of gender approach in the analysis of criminal and legal problems achievement of fair social equality at obligatory accounting of gender features of the person has to pursue the aim.

Depending on gender approach, crime in the criminological nature is historically subdivided into men's and female versions, each of which according to the criminological characteristics has essential distinctions and determinants causing them. Features of social legal status of subjects of a different floor were historically distinguished. However, this division was not proved in standard and legal documents, as well as was not carried out interpretation to this phenomenon. Perhaps this circumstance demonstrates to an equal legal status and criminal liability of all citizens of time during this period and the fact that some special corrective actions, which are not connected with criminal penalties, were applied. Moreover, having bright gender focus it is possible to refer infanticide to the crimes differing on status marital status, known to the criminal legislation for a long time. Murder of the child by mother was punished by the death penalty according to the Criminal Code of 1649 [16, p.142]. It should be noted that this crime in legislation of 1845 was recognized as the murder committed under the aggravating circumstances while the murder of the child who has appeared out of marriage committed by mother was regarded as murder under the softening circumstances [15, p.48]. In the criminal legislation of Azerbaijan, murder of the child by mother was always regarded as the murder committed under the softening circumstances. The operating Criminal Code of AR also considers this structure as exclusive [17]. Gender approach to a legislative regulation of questions of application of punishments for the committed crimes to subjects of criminal liability has found the obvious reflection in earlier operating CC of AR of 1961. According to Art. 22 of Criminal Code of AR the death penalty in the form of execution along with the persons, which have not reached 18 years, could not be applied to the women who are in a condition of pregnancy during the execution.



The law of the Azerbaijan Republic of May 29, 1996 the death penalty in the form of an exceptional measure of punishment couldn't be applied to women and also men who have reached 65-year age [14, p.592-593]. In the operating CC of AR application of punishment in the form of lifelong imprisonment to the women who have committed a crime, inadmissibly (Art. 57.2). According to a number of researchers, exceptions of this sort are obvious violation of the principle of equality before the law. It is possible to agree that admissible use of the principle of humanity only in connection with sex can be hardly recognized. In this situation humanity in connection with protection of motherhood and the childhood can be admissible and justified only a condition of pregnancy of the woman and desire to save life of yet not been born child. In this regard we suggest to state contents of Art. 57.2 of Criminal Code of AR as follows: "Lifelong imprisonment is not appointed to pregnant women, minors and also the persons who have reached sixty-five-year age".

It should be noted that (§ 3596 Execution of the death sentence) it is specified in the Code of laws of the USA that the death sentence concerning the woman isn't carried out until she is in a condition of pregnancy [18, p.96]. In educational and scientific and practical literature were never considered and those reasons and features on the basis of which the legislator provides to persons of various floor the corresponding privileges which are completely releasing or commuting criminal liability and a penalty weren't exposed to the deep analysis.

From a position of gender approach, also the Special part of the Criminal legislation contains interesting features of application and a regulation of criminal liability and punishment. So, Art. 141 of CC of AR provides responsibility for illegal production of abortion where the female person can only be the victim from crime. At the same time, if the pregnant woman becomes the subject of crime, then her responsibility is excluded. It is unlikely this situation can be recognized reasonable as all take place objective and subjective sign of structure of this crime.



Recently in theoretical literature the question of a possibility of commission of rape concerning males is brought up that nevertheless has not found the reflection in the existing criminal legislation [19, p.5]. The same way from a position of the gender analysis deserves attention of Art. 176-1 of Criminal Code "Compulsion of the Woman to Marriage". It is unconditional that similar crime can be quite directed also against the man and encroaches on his freedom. The woman – the chief is capable to make psychological impact on the victim - the man with the purpose to force him against the desire to enter the marriage relations. One more important problem, which is directly adjoining criminal law, is represented by the family conflicts or domestic violence. As estimates of experts testify, the conflicts take place in 80-85% of families. As for other 15-20%, in them the quarrels arising in the most various occasions [5] take place. The needs for redistribution of traditional male and female roles in public understanding act as the main reason for the gender conflicts. In any state has secret existence of a peculiar gender situation when the woman formally has rights to get any education, to work and hold any position, but nevertheless, the family in her life takes the main, main place. The changes happening in situation and a ratio of traditional female and male roles in society call either the gender contract, or a gender order. It is possible to claim that the transformations happening in society in recent years in the gender relations are result not only purposeful gender policy of public authorities though naturally they are important. The specified changes, at the same time act as a consequence of elaboration of strategy by various feministic organizations and movements and also process of spontaneous adaptation to promptly changing economic conditions.

The problem of violence and aggressive behavior which separates society and poses in itself threat for safety of life, health, tranquility and wellbeing of all people and, first of all, women and children acts as one more problem which is closely connected with the considered subject. According to WHO as a result of



violence more than one and a half million people annually perish, are wounded, or problems with mental, reproductive, sexual or physical health. About 70% of deaths among women and about 14% - among men fall to the share of violence [5]. Violence as military tactics is used during armed conflicts and wars, and it gets the ugliest, brutal ways and forms. Women and children test most such types of violence not to themselves. Violent crimes against the women appearing in territories of armed conflicts, in particular, application of tortures, compulsory pregnancy, sexual enslavement and others are bright violations of the rights of women and children. On the existing data, daily in Europe, at least 12 women perish because of gender violence. Statistical data for 2013 demonstrate that 134 women became the victims of domestic violence in Italy, Portugal – 37, France – 121, in Spain – 54, in the United Kingdom partners have killed 84 women. According to media in Turkey in 2013, about 214 women have died because of domestic violence. This tendency is characteristic also for the subsequent 2014 [1]. As results of the estimated research conducted by the Council of Europe, from 20 to 25% of women in the territory of all European states testify, at least time in life were exposed to physical abuse, and over 10% from them became the victims of sexual violence; about 45% of women in this or that form were exposed to violence, at the same time the most part of violent acts was made by males from their direct social environment; from 12 to 15% of women are more senior than 16 years maintained the relations, constantly being exposed to domestic violence [7]. The United Nations General Assembly in December, 1993 has adopted the Declaration on elimination of violence against women which became the first international document in the field of human rights, directly and to the questions of violence against women which are completely devoted only. Along with the majority of the countries of the world, the Azerbaijan Republic has signed this Declaration.



All types of discrimination against women are considered as gender violence. Any form of physical or psychological abuse exerts impact on restriction of opportunities of women. For this reason, fight against violence against women is considered as a part of the world program for elimination of all forms of discrimination against women. In this regard, the UN has announced day on November 25 in the International afternoon of fight against violence against women. As noted in the message devoted to this day the UN Secretary General, violence against women is the most shameful human rights violation and so far it will proceed it is impossible to speak about real progress in ensuring equality, development and the world [13].

The Law "About Measures for Prevention of Domestic Violence" adopted by Millie Majlis on June 22, 2010 belongs to one of the most effective measures of counteraction to domestic violence in Azerbaijan. Besides, the Cabinet of the Azerbaijan Republic has adopted on February 24, 2012 the Resolution No. 46 "About the approval of Rules of consideration of complaints in the absence of signs of corpus delicti in complaints to domestic violence".

In 2014 for increase in efficiency of fight against domestic violence in Azerbaijan by the State committee on problems of family, women and children has developed the plan of implementation of joint educational work on protection of the rights of women and children, education of youth in the spirit of respect universal and national cultural wealth for the purpose of strengthening of the institution of the family [2].

On December 19, 2011 the Resolution No. 207 which has approved "Rules of statement on preventive accounting of the persons who have committed domestic violence and carrying out with such persons of preventive educational work" which main objective is prevention and elimination of negative legal, medical and social consequences of domestic violence [3] was accepted by the Government of Azerbaijan.



That, not less, main and defining in our opinion, for regulation of the gender conflicts in family is the ability to operate the temperament and character, ability to concede, ability to respect and not to violate the rights and freedoms of each family member. The ability of the personality to operate the temperament and character demonstrates its development, achievement of the most advanced stage of social, spiritual and moral development. Achievement of this purpose is the long and very difficult process demanding time and persistence.

The analysis and the current criminal legislation leads earlier to a conclusion about existence of at least three features characterizing discrepancy and groundlessness of gender approach of the legislator to designing of criminal precepts of law. First, in some cases by gender, the privileged position of the woman is fixed; secondly, privileges reasonably follow from the social and physiological status of the woman; thirdly, the woman for the unclear reasons is eliminated subjects of criminal liability, despite existence of all objective and subjective signs of structure in perfect act.

The careful analysis of the criminal legislation from a position of gender approach will allow to reveal the specified discrepancies and to eliminate them taking into account restoration of gender equality.

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