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# Current problems of improvement criminal legislation taking into account gender approach

**Abstract:** For ensuring real gender equality, the corresponding procedures allowing realizing the provisions provided by the Constitution in practice are necessary. Declaration of equality in the rights and freedoms is only the first step in achievement of real gender equality. The second and main step of achievement of such equality fixing of equal opportunities in implementation of the rights and freedoms granted by the Constitution of the state for all citizens, irrespective of a floor, race is represented, to national identity, etc.

Various approaches on gender sign take place both in the General, and in the Special part of Criminal Code of the Azerbaijan Republic (furthermore, the CC of AR). So, Article 141 of the CC of AR provides responsibility for illegal production of abortion where the pregnant woman can't be the subject of crime, despite existence of all objective and subjective signs of structure of this crime.

Existence of Article 121 in Criminal Code of Azerbaijan Republic violates gender equality as commission of infanticide by the father of the born or been born child is qualified according to Art. 120.2.11 in the CC of AR as premeditated murder under the aggravating circumstances whereas for the woman responsibility is softened.

**Keywords:** the gender equality; criminal liability; softening circumstances; violence; coercion.

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The subjects protected by criminal precepts of law, their relationship and hierarchy and also ways of the description change in the history of mankind according to cultural development and changes in conditions of social being. Changes in a social order inevitably cause corresponding changes of precepts of law. What during one era was legal in another becomes forbidden and vice versa [11, p. 47]. Sometimes the acts admitting before socially dangerous and penal, were recognized later lost the public danger and became non-punishable, the measures and the amount of punishment provided for their commission often changed. So, for example, such types of crimes as were known to the criminal legislation of Azerbaijan of the 60th years: hindrance to the woman to take part in political and cultural activity; bigamy and polygamy, kidnapping of the woman for the purpose of marriage; receiving bride wealth (remuneration) for the bride and some other.

As it is noted regarding 1 Article 71 of the Constitution of the Azerbaijan Republic, observance and protection of the rights and freedoms of the person and citizen reflected in the Constitution is an obligation of bodies of legislative, executive and judicial authority [1]. The principles of criminal law as starting, basic provisions, the ideas and the organizational beginnings on which all system of the right is under construction find the reflection in the legislation in three main forms: 1 – norms of the General part of the CC of AR; 2 – norms of the Special part of the CC of AR; 3 – norms, specially to them devoted. Need of the specified forms of reflection of criminal legal principles is explained by increase of value during the modern period of development of society of universal values and respectively an obligation of the state in the maximum degree to provide respect for the rights and freedoms of the person and citizen. As M.B. Akhmedov has fairly noted, the right without human rights is as impossible as human rights beyond the law [3, p. 32].

It should be noted that special attention is paid by the state to care and protection of the rights of children. Article 17 of the Constitution of the Azerbaijan Republic specially underlines a duty of parents to take care of children and to be engaged in their education [1]. The Country constitution has imposed control over the implementation of this duty on the state. According to article 4 of the Law of the Azerbaijan Republic No. 499 – IQ "About the Rights of the Child" adopted on May 19, 1998 the obligation for ensuring protection of the rights of children is assigned to appropriate authorities of executive power, bodies of court and prosecutor's office, municipalities and also public associations and the trade-union organizations [8].

It should be noted that the gender asymmetry in criminal law took place always during the different periods of his existence and in different degree of expressiveness. At the same time she is shown as a rule in two forms: 1) at establishment of criminal liability, that is when determining crime and the legislative description of signs of corpus delicti and 2) at establishment of conditions of realization of criminal liability, that is the description of conditions of application of these or those types of punishments and also other criminal and legal institutes.

Various approaches on gender sign take place both in the General, and in the Special part of the CC of Azerbaijan Republic. As we believe, consisting in appointment prohibition to women of punishment in the form of lifelong imprisonment, gender criterion of assignment of punishment, has under itself no objective, reasonable and sufficient grounds. Moreover, in jurisprudence there are almost no cases of commission by women of crimes for which the legislator has prescribed punishment in the form of lifelong imprisonment. If such acts are also made, then the law enforcement official has a possibility of the choice between lifelong imprisonment and imprisonment for long term. As repeatedly noted the European Court of Human Rights, the prevailing social views, the general

assumptions and traditions shouldn't serve as sufficient justification for various address, and a statement that women possess a special social role in education of children, represents manifestation of gender stereotypes [7, p. 6].

About need to reconsider the legislative ban to apply to women punishment in the form of lifelong imprisonment and the death penalty as violating the principle of gender equality and also limiting court other authors whose arguments to us are adduced rather convincing also write to realization of the principle of individualization of responsibility [4, p. 31-34]. 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 offer possible to state contents of Art. 57.2 of the 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”.

For comparison we will note 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 is not carried out until she is in a condition of pregnancy [13, 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. In legal literature it is noted that the features of criminal liability and punishment of women which are available in modern criminal law, in particular, refusal of application of punishments to them in the form of the death penalty and lifelong imprisonment, a serving sentence delay concerning pregnant women, preferential terms of serving sentence and some other don't mean violations of

gender equality at all, and facilitate to women use of the rights and freedoms rather [5, p.127].

From a position of gender approach, also the Special part of the Criminal Code contains interesting features of application and a regulation of criminal liability and punishment. According to the norms of the CC of Azerbaijan, along with some others a murder of the newborn child by mother belongs to socially dangerous acts made against minors (Art. 121 of the CC of AR).

Murder of the newborn child by mother is known to the legislation of many states as in the past, and now. In Azerbaijan responsibility for infanticide was provided in the criminal legislation of the Islamic period under laws of Sharia, and after accession to imperial Russia – the Code about punishments criminal and corrective 1845 and the Criminal code of 1903, which article 461 provided responsibility for murder by mother of the child begot out of marriage at his birth. In the legislation of the Soviet period criminal liability for premeditated murder by mother of the newborn child for the first time as independent structure has been provided in the CC of the Azerbaijani SSR of 1961 while the Criminal Code of the Russian Federation of 1960 did not allocate this crime in special article. Qualification of this act in the Criminal Code of the Russian Federation was carried out under Article 103 about premeditated murder.

Criminal Code of Azerbaijan Republic of 1999 has also established responsibility for murder of the newborn child (Art. 121) by mother. However, this norm both in the past and in the present comprises numerous problematic issues and ambiguously interpreted definitions. At the same time, the operating CC and the leading explanations of the Plenum of the Supreme Court of the Azerbaijan Republic "About jurisprudence on cases of premeditated murder" do not contain accurate explanations on these questions in the resolution of December 12, 2002. So, paragraph 4 of the above-stated resolution of the Plenum of the Supreme Court of Azerbaijan Republic establishes that if in crimes about premeditated murder

there are no qualifying signs provided by Article 120.2. of the CC and the softening circumstances specified in Articles 121-123 and 134 of the CC, that act has to be qualified according to Article 120.1 of the CC of AR.

If Article 122 of the CC of AR as the circumstance softening responsibility for premeditated murder says about a condition of suddenly arisen strong sincere nervousness, Article 123 – about excess of limits of necessary defense or excess of measures necessary for detention of the person who has committed a crime, then Article 121 does not provide any circumstances commuting a penalty. The only circumstance considered as softening responsibility, the subject of this crime – mother (woman in labor) who is deliberately killing the child in time or at once after the delivery admits.

The sense of definition "the right for life", in our opinion consists that, first, the woman has the right for abortion and sterilization. Reserving the right of motherhood for the woman, the law nevertheless doesn't assign to her such duty. Reproductive freedom and, respectively, a possibility of the reproductive choice is provided to the woman. Secondly, realization by the woman of the right for termination of pregnancy inevitably leads to infringement of the right of the conceived child for life. There is an irresolvable conflict as respect for the rights and mother and the child is impossible – the right of mother for termination of pregnancy limits the right of the child for life. Proceeding from this situation the criminal legislation doesn't recognize termination of pregnancy as penal act, giving to the woman an opportunity most to define - to have or not to have the child.

In relation to a subject of our research it is necessary to take into account the fact that many women don't wish the child's birth on a number of the circumstances or which were available at the time of conception of the child, or arisen after this event owing to what they use various receptions and ways to get rid of him. We will note that intention to get rid of the child can't spontaneously arise as suddenly arisen intention, it is formed and ripens long before the beginning

of patrimonial process and the woman in advance wait and prepare for commission of this murder. It is necessary to agree with a statement that "precepts of law have to lean on the real bases. If to consider precepts of law out of communication with their true bases and to draw conclusions on this basis, then the fair and scientific solution of legal questions will be problematic" [9, p. 48-49]. From this point of view, we believe that existence of Article 121 in the CC of AR violates the gender equality as commission of infanticide by the father of the born or been born child is qualified according to Article 120.2.11 of the CC of AR as premeditated murder under the aggravating circumstances whereas for the woman responsibility is softened. Considering stated we believe possible to decriminalize the norm provided in Article 121 the CC of AR.

In a direct connection with murder of the newborn child there is a corpus delicti provided in Article 141 of the CC of AR (illegal production of abortion). A doctor or person who does not have vocational higher medical education is recognized as a subject of this crime that is only the gynecologist, the surgeon-gynecologist has rights to make abortion [10, p.77]. Therefore, a subject of crime is also the person with the higher medical education of the corresponding profile making abortion with disturbance of terms and other circumstances of carrying out operation on abortion. According to Article 141.1 a doctor who carried out such operation with disturbance of terms of its production is punished. Such terms are established by the legislation and are the period up to 12 weeks, and according to special indications – up to 22 weeks of pregnancy. In those cases if operation on a removing the fetus is carried out at the time of the beginning of physiological labors, such actions, according to us, have to be regarded as murder of the newborn child as on medical indications such fetus is teleorgánic. According to it, production of illegal operation on an expulsion of the fetus after seven months of pregnancy has to be regarded as attempted murder of the newborn child according to Art. 120.2. of the CC of AR.

Article 141 of the 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.

It is also necessary to carry out differentiation of murder of the newborn child and leaving is in danger, the CC of AR provided by Article 143. Differentiation of murder of the newborn child by its leaving in a life-threatening state and tossing of the child to any place for his detection should be distinguished on a number of objective and subjective signs. The difference should be made not only in a form of the mental relation guilty to consequences of the act, but also on signs of the objective party – places, time, a situation and other circumstances of commission of crime. The main distinctive sign, according to us, is that mother throwing up the child, seeks to get rid of him, but not to deprive of life and therefore wishes his fast detection. It is necessary to agree with a statement that the orientation of intention of guilty is characterized mainly on what probability of his rescue, and how fast after leaving it could be picked up [6, p.30].

Actions of the perpetrator will be qualified depending on whether was caused by leaving the death of the child is in danger or not. If leaving of the child in obviously dangerous situation was way of causing to him death, then the deeds are qualified as premeditated murder. If mother, leaving the child is in danger, didn't expect, but had to and could expect approach of his death, then the deeds have to be qualified on set of Articles 143 and 124 of the CC of AR as leaving is in danger also careless murder.

One more socially dangerous act which is of interest from a position of gender asymmetry is the rape provided in article 149 of the CC of AR. Female persons were recognized traditionally injured from this crime [12, p.168-169]. However, recently in theoretical literature the question of a possibility of

commission of rape concerning males is brought up that nevertheless hasn't found the reflection in the existing criminal legislation [15, p.5]. Other scientists have expressed opinion according to which with adoption of the new criminal legislation, which has provided responsibility for violent acts of sexual nature, the matter has lost the relevance [5, p.130].

In our opinion, the probability of commission of this crime by the woman is extremely small, but is quite possible. Not casually therefore the legislator hasn't specified in this norm that injured can be only the female person, being limited to the term "victim".

From the point of view of gender approach the article 176-1 which is also located in chapter 22 about crimes against the minor and family relations providing responsibility for compulsion of the woman to marriage is of great interest. In earlier existing criminal legislation of ARE this norm was considered as one of socially dangerous acts breaking equality of women, and making a remnant of local customs. At the same time, this crime is considered as various forms of infringement of the right of the woman most at discretion to resolve an issue of marital status. In the Criminal code AR of 1961 unlike current responsibility for four various crimes was established: compulsion of the woman to marriage; coercion to continuation of the marriage relations; to the woman to marry hindrance; kidnapping of the woman for the purpose of marriage. At the same time didn't matter, the marriage registered by bodies of a registry office religious, or the actual marriage relations (civil marriage) means. It should be noted that the CC of the Azerbaijani SSR of 1923 became the first Criminal Code which have established criminal liability for socially dangerous acts making remnants of local customs. Were recognized as criminal marriage with the person which hasn't reached age of consent, bigamy and polygamy, kidnapping of the woman for the purpose of marriage, murder of the woman in connection with liberation, kidnapping of the woman for sale or the room in brothels, sale or purchase of

women and to that similar acts [14] this Criminal Code. Thus, the CC of Azerbaijan SSR in 1922-1925 in comparison with Criminal Code of other federal republics most fully considered socially dangerous acts directed against liberation of women [5, p.121].

The operating CC of AR in Article 176-1 says only about compulsion of the woman to marriage, therefore, the objective party of this crime significantly has changed and expressed in coercion which is understood as both physical, and mental impact on the victim. Physical impact represents not only infliction of bodily injury of varying severity, but also a beating, tortures, imprisonment, etc. As mental influence it is understood any kinds of threat – murder, infliction of harm not only the victim, but also to other persons close to her, destruction of property, deprivation of her living space, blackmail, that is a promise to divulge data which the woman wishes to keep in secret, etc. At the same time, it is not necessary to consider as coercion arrangements, deception, and promise of material benefits in the future, presentation of gifts, threats to disinherit, etc.

At the same time, according to us, injured from coercion to marriage or hindrances to marriage can be not only women, but also men. It is unconditional that similar crime can be quite directed also against the man and encroaches on his freedom. So, in particular, the woman – the chief is capable to make psychological impact on the injured man with the purpose to force him against the desire to enter the marriage relations. Cases when parents or other relatives make impact up to use of violence and threats of its application to young faces with the purpose to force them to enter the marriage relations with any person are frequent. Considering the aforesaid, we believe possible to change a disposition of this article, having stated her in the following edition: “Compulsion of the person to the introduction or refusal of marriage; hindrance to marriage or divorce; coercion to continuation of the marriage relations, made with use of violence or threats of its application …”.

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