

Some Questions of Parole in the Criminal Law of the Russian Federation

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Ildar A. Tarhanov *
Ramil R. Gayfutdinov **
Karimov M. Karimov ***
Ilnur A. Muzafarov ****

Abstract

The article examined fundamental issues of parole in the criminal law of the Russian Federation and, at the same time, aspects of the negative deloscope impact on the identity of the inso, from various points of view on the “social elevators” programme. All these social problems cause a low level of voluntary softening of the damage caused to the victim. During the analysis, we found that the legislature did not formulate well the model that it behaves encouraging to compensate for the damage caused, as set out in the standard text. An indication of the possibility of using incentives in the event of damages the possibility of an ambiguous interpretation of the standard text, leading to difficulties in law enforcement. In the conclusions, we express our position on the need for legal regulation other than this issue. Particular attention was paid to the victim’s role in determining the amount of damage. The input of the article focused on discussing various approaches to this issue and establishing the need to clarify the criminal legal status of the victim at the level of the plenary session of the Supreme Court of the Russian Federation.

Keywords: repair of the damage caused; parole; criminal law of the Russian ferdecaon punishment; role model; victim.

* Doctor of Law, Professor, Scientific Director of the Law Faculty of Kazan (Volga) Federal University Kazan Federal University, Kazan, Russian Federation. ORCID: <https://orcid.org/0000-0003-3896-6874>. Email: itarhanov@mail.ru

** Candidate of Law, Associate Professor, Department of Criminal Law, Faculty of Law, Kazan (Volga) Federal University, (t.: 88432337103), Kazan Federal University, Kazan, Russian Federation. ORCID ID: <https://orcid.org/0000-0002-3508-9450>. Email: rargajfutdinov@kpfu.ru

*** Senior Lecturer, Department of Economics of Financial Law, Kazan Law Institute of the Ministry of Internal Affairs of Russia, (t.: 89272444355). Kazan Law Institute, Kazan, Russian Federation. ORCID ID: <https://orcid.org/0000-0003-4634-7037>. Email: Karimov485@mail.ru

**** Lecturer, Department of Administrative Law and Administrative Activities, Kazan Law Institute of the Ministry of Internal Affairs of the Russian Federation, (t.: 89655951938). ORCID ID: <https://orcid.org/0000-0003-3185-3834>. Email: Ilnurmuzaf@mail.ru

Algunas cuestiones de libertad condicional en el derecho penal de la Federación de Rusia

Resumen

El artículo estudió algunas cuestiones fundamentales de libertad condicional en el derecho penal de la Federación de Rusia y, al mismo tiempo, discute los aspectos del impacto negativo del encarcelamiento en la identidad del reo, desde varios puntos de vista sobre el programa de “ascensores sociales”. Todos estos problemas sociales provocan un bajo nivel de suavización voluntaria del daño causado a la víctima. Durante el análisis, encontramos que el legislador no formuló bien el modelo de comportamiento alentado para resarcir el daño causado, como se establece en el texto estándar. Una indicación de la posibilidad de utilizar incentivos en caso de indemnización incompleta por daños crea la posibilidad de una interpretación ambigua del texto estándar, lo que conduce a dificultades en la aplicación de la ley. En las conclusiones, manifestamos nuestra posición sobre la necesidad de una regulación legal diferente de este tema. Se prestó especial atención al papel de la víctima en la determinación del monto de los daños. El aporte del artículo radicó en la discusión de varios enfoques sobre esta cuestión y en establecer la necesidad de aclarar la situación jurídica penal de la víctima a nivel del Pleno del Tribunal Supremo de la Federación de Rusia.

Palabras clave: reparación del daño causado; libertad condicional; derecho penal de la Federación de Rusia; castigo; modelo de conducta; víctima.

Introduction

The Criminal Code of the Russian Federation is based on the Constitution of the Russian Federation and generally recognized principles and norms of international law (Part 2 of Article 1 of the Criminal Code of the Russian Federation) (The Criminal Code of the Russian Federation No. 63-ФЗ dated 13.06, 1996). According to Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ETS No. 005 dated November 3, 1950, ratified by the Russian Federation, the states should provide everyone with the rights and freedoms, payment of compensation under their jurisdiction (Article 8) (European Convention for the Protection of Human Rights and Fundamental Freedoms ETS No. 005, 2001).

The Recommendations of the Committee of Ministers of the Council of Europe “On the Victim’s Status within the Framework of Criminal Law and Process” No. R (85) dated June 28, 1985 indicate in the reasoning that the main function of criminal justice should mean satisfaction of requests and protection of the victim’s interests. The document recommends the governments of the member states “to improve the procedure for submitting to court all information about injuries and damage suffered by victims, including any compensation or restitution by the offender or any sincere action in this regard”. The offender should be exempted from criminal liability only after compensation to the victim (Recommendations of the Committee of Ministers of the Council of Europe “On the Victim’s Status within the Framework of Criminal Law and Process” No. R (85), 1998).

The Vienna Declaration on Crime and Justice: Answers to the Challenges of the 21st Century (adopted by the UN General Assembly on 04.12.2000) emphasizes the need to promote an environment conducive to mediation and restorative justice among the judiciary and social authorities, as well as local communities (clause 47.d) (Collection of the United Nations Standards and Norms in Crime Prevention and Criminal Justice, 2016).

The Directive of the European Parliament and the Council of the European Union No. 2012/29/EC dated October 25, 2012 “On the Establishment of Minimum Standards for the Rights, Support and Protection of Crime Victims, as well as Replacement of the EU Council Framework Decision No. 2001/220/PIBД” defines that EU members should take measures to encourage offenders to provide victims with appropriate compensation (Official Journal of the European Union NL 315, 2012).

According to foreign researchers, violent victimization has a significant detrimental effect on safety perception by the crime victim and society as a whole, and its recovery requires a minimum of 18 months (Janssen *et al.*, 2020). *It seems that an essential element of such recovery is the compensation for damage caused by the crime.*

The above provisions of the international instruments recommend for the member states of the international treaties and agreements to take measures to stimulate convicts to voluntarily compensate for damage or otherwise reimburse for criminal harm. These references are reflected in a number of articles of the General and Special Parts of the Criminal Code of the Russian Federation (Articles 61.75, 76, 76.1, 76.2, 79, 80, etc.) (The Criminal Code of the Russian Federation No. 63-Ф3 dated 13.06, 1996). All of these norms are encouraging and have significant stimulating potential by their legal nature. However, some of them can be applied to persons already convicted of a crime and serving a sentence, which is important, because the Russian Federation takes 10th place in the world in the number of prisoners per 100 thousand population according to official figures (Website russian newspaper, 2016).

Some aspects of parole were considered in the works of A.A. Piontkovsky (1900), F.R. Sundurov (2016), I.A. Tarkhanov (2001), (Sundurov and Talan, 2015), A.I. Rarog (2004).

The article is devoted to some issues of applying parole, in particular related to the compensation for harm caused by crime, which is one of the elements of applying the criminal law incentive norm.

1.Methods

The methodological basis of this study includes combination of general scientific and special scientific methods of cognition: dialectical, dogmatic, semantic, formal-logical, analysis and synthesis methods.

2.Results and discussion

In the broad sense, exemption from punishment is the final refusal of the court to use criminal punishment based on criminal law, which is a criminal liability individualization means. In this sense, exemption from punishment is traditionally divided into: 1) exemption from punishment, its non-application (exemption from punishment in the narrow sense); 2) exemption from serving a sentence imposed by court (Sundurov, 2016).

Parole is an element of the domestic theory of punishment and foreign doctrine about prisoners or former prisoners, their prison experience, which is sometimes referred to as criminology of convicts (Earle, 2018).

In the theory of criminal law, it is considered that the general basis for exemption from punishment is the inappropriateness or impossibility of the appointment and execution of punishment due to the complete loss or significant reduction of the public danger of guilty person, deterioration of his/her health and other legal grounds (Rarog, 2004). Sometimes, as a basis for exemption from punishment, the re-socialization of guilty person, formation of his/her respectful attitude to society, as well as generally binding norms are applied (Esakov, 2017).

According to Part 1 of Article 79 of the Criminal Code of the Russian Federation, a person serving a sentence in a disciplinary military unit, subjected to forced labor or imprisonment is subject to parole, if the court finds that he/she does not need to complete the sentence prescribed by the court for his/her correction, as well as compensated for harm (in whole or in part) caused by crime, in the amount determined by a court decision. At

the same time, a person may be fully or partially exempted from serving an additional type of punishment (The Criminal Code of the Russian Federation No. 63-Φ3, 1996). Article 175 of the Penal Code of the Russian Federation establishes that a convicted person to whom a parole can be applied, as well as his/her lawyer, has the right to apply to the court with a particular request. The administration of the penitentiary institution sends the specified appeal to the court along with the convict's description (The Penal Code of the Russian Federation No. 1-FZ, 1997).

Foreign criminal and criminal executive legislation stipulated the right of the authorized officials to refuse parole, if a convict violates a number of rules. Thus, the list of prohibited acts contains 46 offenses, which are divided into three hierarchical groups, in the USA. For example, the first group includes such misconduct as an attack. The second group prohibits tattooing, and the third one - tobacco smoking. An offense severity depends on the period for which the possibility of parole is delayed. According to the act of the first group, the term is up to two years, the second group - up to three years, the third group - up to two months (Steiner and Cain, 2019).

It is generally accepted in the science of criminal law that England is considered the birthplace of parole. "Parole grew out of an Australian exile on English soil" A.A. Piontkovsky writes about the origins of parole. The history of parole in Russia began with the publication of the Charter on Deportees (1857) (as amended in 1890 and 1909) that regulated serving sentences by exiled settlers and convicts who were sent to Siberia and Sakhalin (Piontkovsky, 1900).

As of August 1, 2019, the institutions of the penal system of the Russian Federation contained 540,657 prisoners with various types of sentences (including detention in a disciplinary military unit). Within 12 months of 2018, about 47 thousand convicts (7.8%) were released on parole. In relation to 6 thousand convicts (1%), it was decided to replace deprivation of liberty with a milder type of punishment (Brief Description of the Penitentiary System, 2019). The above statistics indicate a fairly high level of applying parole. Meanwhile, according to the data of the Supreme Court of the Republic of Tatarstan, there has been a downward tendency in the number of received, considered applications of convicts on parole and the level of their satisfaction both in the whole of the Russian Federation and in the Republic of Tatarstan since 2012. If 51.4% of the parole requests were granted in 2012, then there was only 45.9% in 2013, 41% - in 2014, and about 40% - in 2015 and 2016. According to the Supreme Court of the Republic of Bashkortostan, the percentage of satisfied parole applications was 50% in 2013, and 48% - in 2014. 35% and 27% were satisfied for the punishment replace with a milder one, respectively (Supreme court of the republic of Tatarstan, 2019).

In the legal literature it is considered that the parole is based on the

court's conclusion that the convict does not need to serve full sentence for his/her correction (Tarkhanov, 2001). Consequently, parole does not require full correction of the convicted person and is allowed when the correction process is incomplete.

In the foreign doctrine, the need for the parole institution is justified by the fact that isolation and other legal restrictions related to deprivation of liberty adversely affect the convict's worldview, both during the sentence and after release. The studies made by scientists have shown that imprisonment reorient the convict, weakening traditional social values in his/her mind, but strengthening others that arise in the criminal subculture (Rengifo and DeWitt, 2019).

It is worth noting that it was planned to supplement the reward system for convicts with other incentives for active resocialization, including improvement of procedure concerning replacement of the unserved part of a sentence with a milder type of punishment, as well as update of parole mechanism in the "Justice" Development Concept for the Penal System of the Russian Federation until 2020 No. 1772-p dated October 14, 2010 (Development Concept for the Penal System of the Russian Federation until 2020. Order of the Government of the Russian Federation No. 1772, 2010).

The quintessence of these ideas was the program of the so-called "social elevators", which make it possible to distinguish between convicts according to the correction degree. Achievement of the highest "level" according to the document text by the person serving a sentence increases the possibility of exemption from punishment.

An analysis of the application of this program conducted by a number of researchers at the same time shows mixed results. Thus, A.A. Ashyn positively assesses the effectiveness of this measure, indicating that the presence of clear evaluation criteria prompted 76.8% of subjects to take the path of correction (Ashyn et al., 2014). Other scientists were skeptical of the progressive system of serving sentences and indicated that this approach did not bring anything new to the criminal-executive practice of the correctional institutions of the Republic of Tatarstan, and the "social elevator" program missed the expectations in general (Usmanov, 2014).

According to scientists, a significant element in parole is post-criminal behavior, which involves significant positive changes in the convicted person's personality, namely compensation for harm (in whole or in part) (Sundurov and Talan, 2015). In other criminal law incentive norms (except for Article 80 of the Criminal Code of the Russian Federation), the amount of compensation is not indicated by the legislator.

Currently, the criminal law does not contain any clarifications on the issue of establishing a minimum amount of compensation sufficient for parole. Clause 7 of the Decision of the Plenum of the Supreme Court of

the Russian Federation No. 8 dated April 21, 2009 “On Judicial Practice of Parole, Replacement of Unserved Part of the Sentence with a Milder Type of Punishment” establishes that “if it is established at the court session that the convicted person took measures to compensation for harm caused by crime (pecuniary and non-pecuniary damage), but the harm was compensated only in a small amount due to objective reasons, the court does not have the right to refuse parole or to replace the unserved part of the sentence with a milder type of punishment only on this ground” (Resolution of the Plenum of the Supreme Court of the Russian Federation No. 8, 2009).

This allowed E.N. Karabanova, K.V. Tsepelev conclude that “compensation for damage to a small extent (without objective reasons) is not a basis for applying parole in accordance with Articles 79 and 80 of the Criminal Code of the Russian Federation” (Karabanova and Tsepelev, 2016). Neither the law, nor the decision of the Plenum of the Supreme Court of the Russian Federation clarifies what is meant by objective reasons. It seems that one can consider the convict’s incapacity or the lack of jobs in the institution in which he/she is serving a sentence as such.

Statistical data, as well as the results of individual studies, revealed that more than 60% of the total number of convicts were able-bodied people without a specific occupation in 2018. According to the report of the Federal Penitentiary Service of the Russian Federation on the labor adaptation of convicts for the fourth quarter of 2018, about 36% of people serving sentences were employed in correctional institutions. As of December 30, 2018, the institutions of the Federal Penitentiary Service of the Russian Federation contained 133 thousand convicts with executive documents totaling more than 117 billion roubles, of which only 53 million roubles were reimbursed (less than 4% of the total amount), including 43 million roubles from salary (less than 3% of the total amount). The average monthly income of people serving sentences in prisons in the Russian Federation is only 3,845 roubles (Brief Description of the Penitentiary System, 2019). Thus, the main source of satisfaction of the claims for compensation for criminal damage is the salaries of convicted persons.

The statistical data provided allow stating the following: even if there are jobs in the institution where the able-bodied person is serving a sentence with an income level of 4 thousand roubles, almost totally withheld for the maintenance of the convicted person, payment of his/her alimony, then not everyone can compensate for the damage caused by crime. Although this task is feasible, it can take a long period of time that goes beyond the time of service a sentence.

However, this does not indicate that the convict can compensate for the remainder of damage after parole. The decision of the Plenum of the Supreme Court of the Russian Federation No. 8 dated April 21, 2009, recommends the courts, when applying parole to a convicted person,

to consider the possibility of lawfully entrusting the convict with the performance of duties stipulated by clause 5 of Article 73 of the Criminal Code of the Russian Federation (Resolution of the Plenum of the Supreme Court of the Russian Federation No. 8, 2009). The list of obligations listed in clause 5 of Article 73 of the Criminal Code is open, but the legislator did not explicitly indicate the obligation to compensate for damage in it.

Similar mechanisms exist in foreign criminal law. American criminologist A. Kimchi writes that parole in the USA includes a number of rehabilitation and financial conditions, which are sometimes discriminatory in her opinion. Thus, one group of parolees is only required to abstain from the commission of new crimes and periodic contacts with probation authorities. And another category of persons is imposed with a wide range of requirements, including those related to financial obligations to the victim. Parole commissions often resort to restitution and community service. According to the author, a large number of conditions for early release from punishment impose an almost impossible and not always justified burden on the guilty. This situation leads to the fact that offenders prefer a short term of imprisonment when choosing a milder alternative to punishment in the form of parole (Kimchi, 2019).

It seems that such an ambiguous choice may be due to difficulties faced by parolees in finding a job. According to foreign studies, a criminal record significantly reduces not only the prospects of successful employment, but also rental, basic and additional education, financial independence, which are necessary for a full-fledged life and adaptation of a convicted person after release (Evans, 2019).

In foreign science, it is generally accepted that convicts do not always have professional ethics, skills, and education for successful employment after their release. These factors are necessary for the successful parole reintegration into society. According to the convicts, it is the lack of jobs that is the main cause of repeated offense. Employment is recognized by researchers as the starting point for the integration of those released on parole into society, since salaries are often the only income source, which gives them the opportunity to support their families, pay fines and taxes, or compensate for the damage caused by crime (Weisburd et al., 2017).

The issues of admissibility of exemption from punishment of a person who partially compensated for criminal harm is resolved ambiguously both in literature and in law enforcement practice. In our opinion, the legislator's uncertainty in the field of the necessary amount of compensation may become a factor that impedes the adequate perception by the convicts of the specific nature of the appeal to socially desirable behavior. This leads to a situation where an erroneous idea is formed that it is possible to receive parole by paying compensation for the damage only in some insignificant part.

As noted by A.I. Drozdov, the practice of recognizing partial compensation for damage in the amount of more than 50% has actually developed in a number of regions of the Russian Federation (for example, in the Sverdlovsk region) (Drozdov and Orlov, 2018).

However, according to various judicial decisions, not everything is so simple. For example, the convict V. disagreed in his appeal with the court decision on the refusal of parole, indicating that the court did not take into account the fact that he voluntarily paid the claim in the amount of 700 roubles. The court of first instance, refusing to satisfy V.'s parole appeal, in support of the decision made, referred to the fact that there were claims against the convicted person, of which only a small part was partially paid (The Appeal Decision of the Tambov Regional Court in the case No. 22-1247, 2017).

When making this decision, the court did not take into account the victim's objections regarding the insufficient amount of compensation. Is it correct? The question is not simple. On the one hand, the victim's opinion is subjective and may not always reflect the real degree of correction of the convicted person, but it is not also correct to take into account his opinion in a situation where the damage is partially compensated.

The provisions of Articles 175 of the Penal Code of the Russian Federation (The Penal Code of the Russian Federation No. 1-FZ, 1997), 42 and 399 of the Criminal Procedure Code of the Russian Federation (The Penal Code of the Russian Federation No. 174-ΦЗ, 2001), clause 14 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 8 dated April 21, 2009 (Resolution of the Plenum of the Supreme Court of the Russian Federation No. 8, 2009) regulate the need to provide information on partial or full compensation for damage, the notification procedure and the possibility of the victim's participation in consideration of the convict's request for exemption from criminal punishment. However, the victim's opinion is not decisive according to the law.

This is indicated by the legal position of the Constitutional Court of the Russian Federation, set out in its decision No. 110-O-II dated February 20, 2007. It is noted that "when resolving the issues arising with execution of final sentence, including parole of a convicted person, the court, being under obligation to ensure the rights of proceedings participants to substantiate their positions in the case, is not bound by their opinion" (Criminal Code of the Russian Federation: decision of the Constitutional Court of the Russian Federation No. 110-O-II, 2007).

The Decree of the Constitutional Court of the Russian Federation No. 5-II dated March 18, 2014 states that "the constitutional and legal, as well as procedural status of a victim in a criminal case, presupposes his/her right to bring his/her position to the court on the issue of parole under such

criminal case, which, without prejudging the decision on the merits, will allow taking into account, within the framework of the judicial procedure, the constitutionally justified interests of the victim related to ensuring his/her personal safety, protecting his/her family and those close to threats from the guilty person, or obtaining real compensation for the harm caused by this crime” (clause 3.2.) (Resolution of the Constitutional Court of the Russian Federation No. 5-П, 2014).

According to S.A. Sinenko, the victim does not play an active role in the matter of satisfying motions on applying incentives to the convict, and his/her position does not have legal significance in resolving these issues by the court (Sinenko, 2014).

In our opinion, the issue of providing incentive measures in the form of parole of a convicted person, who partially compensated for the damage caused, should be resolved with an active participation of the victim. His opinion is subjective, but should nevertheless matter, if the damage caused is not compensated or partially compensated for objective reasons.

3. Summary

In our opinion, O.A. Vladimirova rightly indicates that: “as the crime consequences cannot be completely mitigated, the law cannot indicate how much harm needs to be compensated for” (Vladimirova, 2015: 228). It seems that not any type of criminal harm can be partially compensated. It is impossible to apologize in part, to provide any assistance to the victim in part, since moral or physical harm is objectively not measurable and not divisible. However, non-pecuniary damage can be compensated not only by apologizing, but also by compensation. The amount of compensation is determined in monetary terms and, accordingly, can be divided into parts. Thus, not only compensation for damage, but also compensation for non-pecuniary damage, which the legislator does not specify in Article 79, may be partial. And this fact indicates the inconsistency of the encouraged behavior model set forth in this norm.

Conclusions

1. Criminal consequences are a general concept that includes physical, property, moral, reputational, environmental harm. Not all of these criminal consequences can be objectively measured. They cannot be valued and, accordingly, cannot be partially compensated. In

this regard, it seems appropriate to exclude the phrase “partially or completely” from the text of Part 1 of Article 79 and Part 1 of Article 80 of the Criminal Code of the Russian Federation.

2. If the consequences of a crime are expressed in pecuniary or non-pecuniary damage and are partially compensated by convict, the victim’s opinion is essential in deciding on the application of incentive measure. Only he/she can unequivocally affirm the completeness and adequacy of compensation. This provision requires appropriate clarification at the level of the decision of the Plenum of the Supreme Court of the Russian Federation. Such concretization can contribute to a more active manifestation of positive post-criminal behavior of the convicted person in the form of compensation for damage or smoothing criminal harm in another way.

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