



## Problems of Ensuring a Lawful and Reasonable Judicial Decision to Replace the Unserved Part of a Sentence with a Milder Type of Punishment

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### Abstract

*Introduction:* the article is devoted to the study of the legislative regulation of the subject and limits of judicial proceedings when considering the issue of replacing the unserved part of a sentence with a milder type of punishment, which ensures the legality and validity of the court decision. *Purpose:* based on the analysis of the criminal and criminal procedure law, generalization of judicial practice, to develop key criteria for a comprehensive study of the circumstances for making a legitimate and reasoned decision in accordance with Article 80 of the Criminal Code of the Russian Federation. *Methods:* general scientific research methods, such as a dialectical method of cognition of phenomena and processes and a method of analysis and synthesis, as well as special legal methods such as a formal logical method of document analysis. *Results:* an analysis of legislative regulation and law enforcement practice has shown that when deciding on the replacement of a sentence with a milder type of punishment, the court should consider the issue of achieving criminal punishment goals. At the same time, in order to make a positive court decision on the basis of Article 80 of the Criminal Code of the Russian Federation, unlike parole, it is not necessary to achieve all the goals set out in Part 2 of Article 43 of the Criminal Code of the Russian Federation. *Conclusion:* in order to make a court decision that meets requirements of legality and reasonableness, it is necessary to have a clear legislative regulation of the circumstances investigated by the court in the implementation of the provisions of Article 80 of the Criminal Code of the Russian Federation, as well as the legislative consolidation of the period of actual serving of punishment by a convicted person to replace the unserved part of a sentence with a milder form, if the unserved part of the punishment had previously been replaced by a milder type of punishment.

**Key words:** punishment, judicial decision, legality, validity.

5.1.4. Criminal law sciences.

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### *Introduction*

The legality of criminal proceedings refers to basic provisions of the criminal process and implies not only strict compliance with the requirements of federal legislation during the investigation and consideration of a criminal case, but also the making of legitimate, reasoned and motivated decisions in the case. Among all the decisions of state officials and bodies, a special place is occupied by the enforcement acts of the court, regardless of at what stage of the process they were issued. This significance of the court decision is due to the special status of the criminal court, designed to guarantee the constitutional rights and legitimate interests of participants in criminal procedural relations, as well as the generally binding requirements and prescriptions contained in the court decision. Taking into account the social and legal significance of the judicial act, the issues of ensuring the legality and validity of the court decision are relevant at any stage of the criminal proceedings.

The legality of the court decision, first of all, is ensured by a reliable material and legal basis and detailed regulation of the procedural activities of the court. However, the legislator has not provided a reliable legal mechanism in all stages of criminal proceedings. Thus, at the stage of execution of the sentence, issues related to the resolution of the convicted person's petition to replace the unserved part of a sentence with a milder type of punishment (Article 80 of the Criminal Code of the Russian Federation) did not receive proper legislative elaboration, which leads to the issuance of an illegal and (or) unjustified resolution and (or) ruling. Considering that the share of materials considered in accordance with Article 80 of the Criminal Code of the Russian Federation (as well as in accordance with Article 79 of the Criminal Code of the Russian Federation) accounts for more than half of all issues considered by the court at the stage of the sentence execution, the stated problem has a pronounced practical significance. Authors mainly pay attention to certain issues of the procedural activity of the court at the stage of execution of the sentence. Thus, A.A. Krymov, studying the nature and content of issues being resolved at the stage of execution of the sentence, focusing on the specifics of the procedure, makes a conclusion

about the need for specialization of judges in this direction [1]. V.B. Shabanov and L.Yu. Budanova raise the problem of compliance with the procedural deadlines for consideration by the court of issues initiated by representatives of the authorities and institutions that execute certain types of punishments [2]. Analyzing the judicial practice of releasing a convicted person from punishment, N.V. Osodoeva pays attention to ensuring the rights of persons whose interests are affected by the resolution of this issue [3]. A similar study was conducted by V.V. Konin and L.I. Sukhankina [4]. Thus, the lack of relevant scientific developments and needs of law enforcement practice determined the relevance of the study.

### *Research*

It is worth mentioning that there is no legally defined subject matter and limits of judicial proceedings in the implementation of Article 80 of the Criminal Code of the Russian Federation. At the same time, the issue of the subject matter and the limits of the trial is key, affecting the comprehensiveness of the case, and, consequently, the legality and validity of the decision. The implementation of a number of fundamental provisions of criminal proceedings depends on a clear understanding of the range of issues being resolved [5; 6]. The analysis of parts 1 and 4 of Article 80 of the Criminal Code of the Russian Federation shows that it contains a list of circumstances to be considered in accordance with Article 80 of the Criminal Code of the Russian Federation. However, the list of such circumstances does not allow to consider an identity of the convicted person submitted a petition. According to parts 1 and 4 of Article 80 of the Criminal Code of the Russian Federation, the court must consider behavior of the convicted person for the entire period of serving the sentence, as well as find out whether he/she has compensated for the harm caused by the crime and to what extent. The condition for the court to accept a petition of the convicted person or his/her defender is the actual serving of the term of punishment specified in Part 2 of Article 80 of the Criminal Code of the Russian Federation, imposed by the court verdict.

The above list seems insufficient to address the issue under consideration. So, for example, when implementing another type of release from punishment – parole, the circumstances

taken into account by the court when deciding on the release of a convicted person from further punishment are regulated more fully (Part 4.1 of Article 79 of the Criminal Code of the Russian Federation).

Of particular importance for the adoption of a legitimate and reasoned court decision is the resolution of the question of the expediency of satisfying the petition filed by the convicted person or his/her defender. Contemplating on the expediency of parole, the court decides whether the measures taken have led to correction of the convicted person and achievement of other purposes of criminal punishment set out in Part 2 of Article 43 of the Criminal Code of the Russian Federation. The question arises whether the court should ask the same question when replacing one punishment with another? The ambiguity of the situation is due to the fact that in the case of a commutation of punishment, the convicted person is not released from punishment, but continues to serve it. Assuming that the court is obliged to resolve such an issue, then it should be determined whether all the goals of criminal punishment are achieved or in the situation under consideration it is sufficient to achieve any one (or two) of the goals specified in Part 2 of Article 43 of the Criminal Code of the Russian Federation.

The absence of a clear indication of the law on the subject and limits of the trial entails unjustified refusals to satisfy a petition of the convicted person. According to the Resolution of the Lomonosov District Court of Arkhangelsk on the case No. 4/16-27/2022 of January 13, 2023, two penalties imposed on the convicted person were recognized by the prosecutor as illegal. However, the court, when making the decision, took into account a single violation committed by the convict, which was expressed in the fact that when meeting with an employee of the administration of the correctional institution, he did not greet and did not have an identity document with him. This served as the basis for the refusal to satisfy the petition of the convicted person. The arguments that both penalties were recognized by the prosecutor as illegal were critically evaluated by the court, which pointed out that the illegality of one penalty established by the prosecutor referred only to its severity, inconsistency with the actual circumstances of the violation and did not deny the fact

that the violation had taken place. All other circumstances, such as remorse for what he had done, presence of social ties with family, a conscientious attitude to work, acquisition of a new profession while serving a sentence, repeated rewards for socially useful work could not “outweigh” the violation. The above case from judicial practice, contrary to the guiding explanations set out in the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 8 of April 21, 2009 (as amended of October 28, 2021) “On judicial practice of conditional early release from serving a sentence, replacement of the unserved part of the punishment with a milder type of punishment”, shows that the very fact of violation does not entail an unconditional refusal to satisfy the petition and the court must take into account the nature of the violation indicates that the replacement of punishment is possible only when the convicted person demonstrates an exceptionally positive behavior. There is a similar situation when the court decides on the application of parole. However, when implementing Article 79 of the Criminal Code of the Russian Federation, other legal consequences occur – the convicted person is released from further punishment. In this case, it is not entirely clear what acts as a criterion between a positive court decision on parole from serving a sentence, in which a person is released from punishment completely, fulfilling only certain duties (Part 2 of Article 79 of the Criminal Code of the Russian Federation) and replacing the unserved part of the punishment with a milder form, in which the convicted person continues to serve his/her sentence? Judicial practice shows that grounds for satisfying the petition of the convicted person are the same and consequences of the decision are completely different. Other authors also draw attention to the lack of clear legally fixed criteria for “correcting a convicted person” when commuting punishment, noting that the existing gap negatively affects the formation of law enforcement practice [7].

Based on the essence of the issue being resolved, it seems that with the implementation of Article 80 of the Criminal Code of the Russian Federation, a complete correction of the convicted person may not be achieved, but the court needs to establish that the convicted person has embarked on the path of correc-

tion and a stable positive dynamic is found in his behavior. It seems that in the above example, the court unreasonably refused to replace the punishment with a milder one. In such circumstances, when the court concludes that the goals of criminal punishment have been partially realized, it is quite possible to commute the punishment, but not grant a parole, which requires the achievement of all the goals specified in Part 2 of Article 43 of the Criminal Code of the Russian Federation. Thus, applying Article 80 of the Criminal Code of the Russian Federation, the court must necessarily investigate the issue of achieving goals of criminal punishment. This follows from the logic of the criminal law, which establishes a system of punishments, where each of them is aimed at achieving the same goals. This is also indicated by the legal nature of commutation. Considering that the implementation of Article 80 of the Criminal Code of the Russian Federation resolves the issue related to punishment, the court should pay attention to achieving the purpose of punishment imposed by the court verdict, as well as the possibility of achieving the goals specified in Part 2 of Article 43 of the Criminal Code when replacing punishment with a more lenient one. Materials of judicial practice of case No. 22-1274 of the Pechora City Court and Ruling of the First Court of Cassation of General Jurisdiction No. 77-3511/ 2021 of September 28, 2021 confirms this conclusion. The Constitutional Court of the Russian Federation adheres to a similar position, as stated in the Ruling of the Constitutional Court of the Russian Federation No. 2186-O of September 28, 2017 "On refusal to accept for consideration the complaint of citizen Bogdanov Eduard Stanislavovich for violation of his constitutional rights by parts one and four of Article 80 of the Criminal Code of the Russian Federation, part two of Article 257 and Part three of Article 399 of the Criminal Procedural Code of the Russian Federation". Based on this, the list of circumstances that the court should consider when resolving the issue in accordance with Article 80 of the Criminal Code of the Russian Federation should be supplemented with an indication of the possibility of achieving the goals of punishment, first of all, the possibility of correcting a convicted person. Justifying the decision, the

court may be guided by the provisions of Part 1 of Article 9 of the Criminal Code of the Russian Federation, which sets out the main criteria for correcting a convicted person. Thus, the possibility of achieving the goals of criminal punishment relates to the subject of the issue being resolved and should be reflected in the law as a circumstance being investigated by the court.

Part 4.1 of Article 79 of the Criminal Code of the Russian Federation specifies the circumstances the court should study when deciding on granting parole, such as the existence of incentives and penalties for the entire period of serving the sentence. A similar circumstance is not fixed in parts 1 and 4 of Article 80 of the Criminal Code of the Russian Federation. It should be recognized that judicial practice as a whole has developed criteria for considering cases in accordance with Article 80 of the Criminal Code of the Russian Federation and takes into account all forms of active positive behavior of the convicted person, as well as the opinion of the institution's administration on the issue under study. At the same time, the analysis of law enforcement practice demonstrates that the convict's admission of guilt, remorse for what he/she has done, presence of incentives, fulfillment of the convict's direct duties provided for by the penal legislation are not unconditional grounds for satisfying the petition (Appeal Decision of the Murmansk Regional Court No. 22-1605/2021 of November 30, 2021). In each specific case, the court is obliged to justify and motivate the decision. Thus, according to results of the trial, the court concludes that the materials submitted by the administration of the correctional institution cannot indicate that T. had corrected himself and his petition could be granted. At the same time, the court, considering the petition to replace the unserved part of the sentence with a milder type of punishment, did not give a proper, objective assessment of the data characterizing the personality and did not take into account the arguments presented by representative of the correctional institution (Ruling of the First Court of Cassation of General Jurisdiction No. 77-3511/ 2021 of September 28, 2021, Appeal Decision of the Krasnodar Regional Court of January 14, 2020 in case No. 22-282/2020, Ruling of the Second Cassation Court of General Jurisdiction No. 77-2150/2021 of July 14, 2021).

At the same time, the court had the right to take into account only those circumstances that are established by law (Ruling of the Second Cassation Court of General Jurisdiction No. 77-1862/2021 of July 8, 2021, Ruling of the First Court of Cassation of General Jurisdiction No. 77-3511/2021 of September 28, 2021). For example, in order to make a decision in accordance with Article 80 of the Criminal Code of the Russian Federation, the criminal law does not require the person to achieve complete loss of public danger, complete repentance for what he/she has done, proportionality of compensation for harm to the nature of socially dangerous consequences resulting from the commission of a crime (Resolution of the First Court of Cassation of General Jurisdiction No. 77-710/2023 of February 8, 2023), and any special, exceptional merits of the convicted person (Ruling of the Sixth Court of Cassation of General Jurisdiction No. 77-2537/2021 of June 22, 2021). In accordance with the explanatory statement of the Supreme Court of the Russian Federation (Paragraph 6 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 8 of April 21, 2009 (as amended of October 28, 2021) "On judicial practice of conditional early release from serving a sentence, replacement of the unserved part of the punishment with a milder type of punishment"), refusal to satisfy the petition of the convicted person for circumstances not specified in the law is not allowed [8]. At the same time, it is important to note that the court should take into account only those circumstances related to the personality of the convicted person that characterize him/her during the period of serving a sentence (Ruling of the Second Cassation Court of General Jurisdiction No. 77-1862/2021 of July 8, 2021, Ruling of the Second Cassation Court of General Jurisdiction No. 77-2150/2021 of July 14, 2021). The court is not entitled to assess circumstances related to a high public danger of the committed crime and the identity of a perpetrator, since they are taken into account when passing a sentence. Depending on the nature and category of the crime, the legislator established time limits for the actual serving of the sentence, under which mitigation of punishment is allowed (Ruling of the Second Cassation Court of General Jurisdiction No. 77-2150/2021 of July 14, 2021). The circumstances

on which the court bases its decision should be thoroughly analyzed and their analysis is set out in the resolution and (or ruling) (Ruling of the Second Cassation Court of General Jurisdiction No. 77-1862/2021 of July 8, 2021). Conclusions based on the assumptions and information not verified at the court hearing are not allowed (Ruling of the Sixth Court of Cassation of General Jurisdiction No. 77-2537/2021 of June 22, 2021). At the same time, a personalized approach should be implemented in each case of the petition consideration by the court. In accordance with the position of the Constitutional Court of the Russian Federation, the application of Article 80 of the Criminal Code of the Russian Federation is aimed at saving criminal repression and applying necessary and sufficient coercive measures of criminal law response to achieve its goals (Ruling of the Constitutional Court of the Russian Federation No. 2186-O of September 28, 2017 "On refusal to accept for consideration the complaint of citizen Bogdanov Eduard Stanislavovich for violation of his constitutional rights by parts one and four of Article 80 of the Criminal Code of the Russian Federation, part two of Article 257 and Part three of Article 399 of the Criminal Procedural Code of the Russian Federation"). The opinion of the prosecutor and representative of the institution's administration should be taken into account, but cannot be decisive for the court's decision (Appeal Decision of the Krasnodar Regional Court of 14.01.2020 in case No. 22-282/2020).

Considering the problem of ensuring a lawful judicial decision adopted in accordance with Article 80 of the Criminal Code of the Russian Federation, we should note another drawback of legal regulation, such as a lack of indication in the criminal law of the period of actual punishment for persons to whom an unserved part of the sentence has already been replaced by a milder type of punishment. In law enforcement practice, cases of repeated treatment of a convicted person with such petitions are common. For example, initially the deprivation of liberty was replaced by forced labor, and then the convicted person initiated a petition to replace forced labor with punishment in the form of restriction of freedom. The lack of a clear legislative consolidation of the period of actual serving of punishment in the situation under

consideration confuses convicts and generates judicial errors (Appeal Decision of the Saratov Regional Court No. 22-1333/2021 of July 6, 2021). Thus, in one of the court decisions, the court, refusing to satisfy the petition of the convicted person, indicated that it was not allowed to replace forced labor with a milder type of punishment, since the previous punishment in the form of imprisonment had already been replaced by forced labor. Meanwhile, parts 1 and 2 of Article 80 of the Criminal Code of the Russian Federation do not contain such restrictions (Ruling of the First Court of Cassation of General Jurisdiction No. 77-1936/2020 of October 15, 2020). The answer to this question is given by the Supreme Court of the Russian Federation, explaining that in the case when the punishment of a convicted person was commuted by replacing the unserved part of the punishment with a milder form, the court should calculate the actually served sentence based on the term of punishment established by a court order (Paragraph 2 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 8 of April 21, 2009 (as amended of October 28, 2021) "On judicial practice of conditional early release from serving a sentence, replacement of the unserved part of the punishment with a milder type of punishment"). However, this practice does not seem quite logical, contradicting provisions of Part 4 of Article 80 of the Criminal Code of the Russian Federation, which states that the court takes into account convict's behavior during the entire period of serving the sentence, and not only during the period of serving a new, more lenient sentence. In addition, criminal law establishes the same period of actual serving of a sentence by a convicted person for the onset of the right to parole and for replacing the unserved part of the punishment with a milder form. At the same time, resolving the issue in accordance with Article 79 of the Criminal Code of the Russian Federation is the most preferable for a convicted person. Why would a convicted person apply for a more lenient form of punishment if, under similar circumstances, he/she could count on parole? Issues related to the application of Article 80 of the Criminal Code of the Russian Federation are also discussed among law enforcement officers who believe that improper legal regulation can lead to unfairness of decisions. Part 1

of Article 80 of the Criminal Code of the Russian Federation allows for the substitution of punishment with any milder form. At the same time, the absence of an indication of the actual term of service may lead to the fact that convicts will find themselves in unequal conditions. Thus, in the case of replacing deprivation of liberty with restriction of liberty, the convicted person finds himself in a more advantageous situation before the one to whom the deprivation of liberty is initially replaced by forced labor, since such a convicted person is forced to serve a certain part of the term again from the moment the deprivation of liberty is replaced by forced labor in order to obtain the right to the substitution of the punishment by restriction of freedom.

#### *Conclusion*

The analysis of the legislative regulation of commutation, opinions of various authors, and law enforcement practice allowed us to formulate the following conclusions.

The legality and validity of a court decision made in accordance with Article 80 of the Criminal Code of the Russian Federation depends on a number of factors. First, it seems justified to clearly define the subject and limits of the court's investigation of the circumstances that serve as the basis for replacing the punishment imposed by the court's verdict with a milder type of punishment. The circumstances influencing the decision-making in accordance with Article 80 of the Criminal Code of the Russian Federation includes the expediency of applying a more lenient punishment in terms of achieving the goals specified in Part 2 of Article 43 of the Criminal Code of the Russian Federation. At the same time, considering that the court resolves the issue of commutation of punishment, rather than release from further serving of punishment, it is sufficient to establish circumstances indicating that the convicted person has embarked on the path of correction and his/her behavior shows positive dynamics.

Judicial practice in general has developed approaches to considering the petition of a convicted person in accordance with Article 80 of the Criminal Code of the Russian Federation. The criteria for making a lawful and reasoned decision based on Article 80 of the Criminal Code of the Russian Federation are the following: first, the court is not entitled to take into account circumstances not established by law;

second, the court is not entitled to base its decision on the circumstances to be investigated when passing a sentence; third, the court is obliged to check and analyze all the circumstances on which it bases its decision, to reflect specific information that prevents satisfaction of the convicted person's petition.

Certain difficulties in law enforcement practice are due to the lack of indication in Article 80 of the Criminal Code of the Russian Federation of the period of actual serving of punishment to persons for whom the unserved part of the punishment has previously been replaced by a milder punishment. A lack of legislative regulation of this issue confuses convicts when filing a petition in accordance with Article 80 of the Criminal Code of the Russian Federation, generates judicial errors, creates condi-

tions for making an unfair decision. In order to eliminate the identified shortcomings, it seems necessary to make appropriate amendments to Article 80 of the Criminal Code of the Russian Federation.

We suggest the following wording of the norm: "Persons to whom the unserved part of the punishment has been previously replaced by a milder type of punishment are entitled to apply for the replacement of the unserved part of the punishment with another, milder type, after the convict has actually served his/her sentence for committing a crime of small and medium gravity for at least three months, for committing a serious crime for at least six months, and especially serious crimes – for at least nine months".

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