



## Problematic Issues when Granting a Pardon

**SERGEI N. PONOMAREV**

Academy of the FPS of Russia, Ryazan, Russia, sergey\_ponomariov@mail.ru

**VALERIYA V. SKOPINTSEVA**

Academy of the FPS of Russia, Ryazan, Russia, kucher22v@mail.ru, <https://orcid.org/0009-0005-9530-2574>

### Abstract

*Introduction:* this article considers problematic issues of granting a pardon and proposes practice-oriented recommendations that boost effectiveness of the pardon institution. *Purpose:* to analyze problematic issues of granting a pardon in Russian criminal and penal legislation and to develop recommendations that contribute to improving this institution effectiveness. *Subject:* problematic issues arising in the implementation of pardon in practice. *Methods:* general scientific methods, as well as comparative, comparative legal, statistical methods. *Results:* the stated above indicates the need to resolve the issue of the legal nature of the institution. It seems advisable to formulate its goals more clearly, which should fully correlate with the norms of criminal and penal legislation. *Conclusion:* it is reasonable to expand a circle of persons entitled to apply for a pardon, develop detailed instructions for the work of territorial pardon commissions, elaborate special pardon rules for military personnel and prisoners wishing to participate in the special military operation, and work out additional guarantees to protect the crime victims' rights in case a pardon is granted. The conclusions obtained in the article can be used in educational and law enforcement practice, as well as when assessing effectiveness of the implementation of the pardon institution.

**Key words:** humanism; pardon institution; correction of convicts; legal nature; prevention of repeat crime; crime; penal policy.

5.1.4. Criminal law sciences.

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### Introduction

The pardon institution is justified by the fact that it is a legally guaranteed way to change the fate of people who have committed a crime and are punished. Its application should be consistent with justice and humanism principles, as well as with criminal and penal legislation goals.

This problem can be studied from various positions, but, in our opinion, the main attention should be paid to achieving key goals set out in national legislation on the appointment and execution of criminal penalties. Granting a pardon is not regulated by criminal law. It depends entirely on the decision of a competent official,

the President of the Russian Federation, and is carried out outside the framework of the judicial system.

#### *Research*

Many scientists, including A.Ya. Grishko, A.V. Popov, Yu.V. Sazhenkov, and V.I. Selivestrov, studied a legal nature of the pardon institution and its application. They made a significant contribution to the disclosure of this problem. Nevertheless, issues related to the application of this institution in Russia are discussable.

In Russia, convicts are pardoned as prescribed by the Constitution of the Russian Federation, the Criminal Code of Russia, and some additional bylaws. The President issues decrees on pardoning certain persons regularly. All these normative acts define a procedure and a general content of the concept of pardoning convicts in its practical application.

After conducting a brief analysis of the legal essence of this mechanism and assessing its compliance with penal purposes, we will consider possible ways and directions for its improvement.

Article 50 of the Constitution of the Russian Federation provides an opportunity for every convicted person to apply for a pardon. According to Article 89 of the Constitution of the Russian Federation, the prerogative to resolve this important issue belongs entirely to the President of the Russian Federation.

In 2001, significant changes were made to the process of considering pardon petitions. The Presidential Decree No. 1,500 of December 28, 2001 (as amended of December 14, 2020) "On Pardon Commissions in the Territories of the Subjects of the Russian Federation" was adopted. The previous system approved by the Presidential Decree No. 17 of January 12, 1992 had been headed by Soviet and Russian writer and public figure Anatolii I. Pristavkin for 10 years. It included prominent lawyers and public figures of the country. During its existence, it satisfied about 70 thousand petitions submitted by convicts. It was opposed by the penitentiary service leadership.

The changes made to the Regulation on the procedure for considering applications for pardon in 2020–2021 led to the expansion of the circle of persons influencing the decision on the merits of applications. According to the current Regulation, a pardon can be granted to those

released on parole (during the remaining part of the sentence not served), probationers and persons who have a deferred sentence. Thus, the list of persons in respect of whom the President of the Russian Federation is entitled to issue a decree on pardon has been expanded [1, p. 224].

In accordance with the Regulation on the procedure for considering applications for a pardon in the Russian Federation, approved by the Decree of the President of the Russian Federation No. 787 of December 14, 2020 (as amended of November 15, 2021) "On Certain Issues of Activities of Pardon Commissions in the Territories of Subjects of the Russian Federation", a pardon is granted to the following categories of persons:

- persons who have been convicted by Russian courts and are serving their sentences in the country in accordance with criminal law.
- persons who have been convicted by foreign courts, but are serving their sentences on the territory of the Russian Federation in accordance with international treaties of the Russian Federation or on conditions of reciprocity.
- persons who have been released on parole, but must serve the remaining unserved part of the sentence.
- persons who have been conditionally sentenced or have received a suspended sentence by Russian courts.
- persons who have served their sentences imposed by the court, but have unexpunged or outstanding conviction.

The same normative legal act establishes the procedure for preliminary consideration of petitions for a pardon by commissions operating in the territories of various subjects of the Russian Federation. The essence of a pardon is that the Russian President can issue the relevant decree on the basis of an appropriate petition submitted by the convicted person himself or by a person who has already served his/her sentence, but has unexpunged or outstanding conviction.

Nowadays, a list of circumstances that the commission can take into account when making its decision includes not only petitions for pardon received from convicts themselves, but also from any other persons, including their relatives, lawyers and representatives of public

associations. At the same time, it is considered important for the commission to consider victims and their relatives' stance, which may be of a positive or negative nature. At the same time, if necessary, the commission assesses rehabilitation possibilities for the convicted person. In this case, the pardon institution will be more consistent with the goals and tasks of criminal legislation.

When considering a petition for a pardon, the following is taken into account:

- nature and degree of public danger of the crime committed;
- behavior of the convicted person during serving or execution of the sentence;
- term of the served (executed) punishment;
- commission of the crime by a convicted person during the probation period of a suspended sentence appointed by the court;
- previous application of an amnesty act, an act of pardon or conditional early release from serving a sentence in relation to a convicted person;
- compensation for material damage caused by the crime;
- data on the identity of the convicted person: state of health, number of convictions, marital status, age, possibility of resocialization;
- submissions for a pardon received from relatives, lawyers of convicts, representatives of public organizations, as well as from other persons;
- opinions of the victims or their relatives regarding the possibility of a pardon;
- other circumstances essential for consideration of the petition for a pardon.

Studying this problem, many researchers support the idea of expanding the circle of people who are entitled to apply for a pardon [2]. For example, L.P. Dubrovitskii offers a logical approach, which consists in giving convicts the opportunity to contact the President of the Russian Federation through the administration of a correctional institution, not only personally, but also with the help of a lawyer or their legal representative [3, p. 64]. He argues that convicts are not always able to independently and competently draft a petition for a pardon, presenting all the necessary circumstances for their consideration.

In practice, the pardon commission, as well as the Presidential Administration, often receives pardon petitions from relatives, friends and colleagues of convicts. This can happen even when convicts themselves may not admit their guilt, which is why they do not make their own request for pardon. This can lead to a situation where the preventive function of punishment is reduced or even eliminated. Despite this, there are cases when the President of the Russian Federation pardoned convicts at the request of other persons [4].

Many researchers support the idea of limiting the number of people who can apply for a pardon [5, p. 284]. For example, according to V.A. Orlov, a pardon implies submission of a pardon petition, therefore, a pardon petition should be sent on behalf of the person who is asking for it [6, p. 48]. At the same time, appeals from relatives, lawyers and others for a pardon are taken into account when it comes to considering a pardon for a person who has committed a crime and is in the process of serving or has already served his sentence. But it is worth emphasizing once again that the commission does not consider such appeals without an explicit request for a pardon from the convict him/herself.

It should be mentioned that the pardon procedure is multi-stage and complex: a petition for pardon is first considered by the commission at the regional level, then by the highest official in the region, and only after that it can be submitted to the President of the Russian Federation for consideration.

A pardon can be rejected for legal reasons, for example, if half of the time set by the court in the sentence has not passed, if the convicted person has already been conditionally released or if he/she has negative characteristics from the place of imprisonment. This process also shows how the convict's ability to correct and his/her ability to fully return to society are assessed. In practice, it often happens that commissions dealing with pardons consider cases where the punishment imposed by the court clearly does not correspond to the severity of the crime and its public danger. However, the pardon institution should not correct mistakes of the courts. When imposing sentences, courts must strictly observe criminal law prin-

ciples fixed in articles 3–7 of the Criminal Code of the Russian Federation. If courts follow them, convicts will not have to apply for pardon because of the discrepancy between the punishment and the severity of the crime committed [7, p. 98].

The practice of recent years indicates a significant reduction in the use of this institution in our country. This phenomenon is explained by some authors by the loss of its role, importance and significance at the present time [8, p. 72]. However, its role seems to increase if the legal status and goals of the institution in question are more clearly defined, based on the value of human and civil rights enshrined in the Constitution of Russia [9, p. 31]. A pardon is a part of criminal law and related legal fields, including penal law.

Historically, pardon is the prerogative of the sole ruler. As Cesare Beccaria pointed out, “charity is a virtue that sometimes complements the duties assumed by the throne. However, in legislation where punishments are moderate and the judicial process is fair and fast, there may be no place for mercy” [10, p. 155]. So, in case of a developed criminal legislation, such extrajudicial means of resolving issues are not required.

According to A.Ya. Grishko, there may emerge the circumstances that will lead to increased use of this institution, in particular, various transitional periods in society, revolutions, and wars. The authorities, as a rule, actively use such extrajudicial tools [11, p. 15].

O.G. Donskaya (Kavelina) notes that the pardon process in Russia has become increasingly politicized in recent years. This means that the decision to pardon is made taking into account political motives, including the possibility of exchanging prisoners between countries. For example, Russian prisoners are released for exchange for foreign convicts, such as Ukrainians Yurii Soloshenko, Gennadii Afanas’ev and Nadezhda Savchenko, Lithuanians Aristidas Tamosaitis and Yevgenii Mataitis, as well as Estonians Susi Raivo and Eston Kohver [12, p. 199].

This trend seems to be confirmed by the recent pardon of the American citizen Brittney Griner [13]. Such a decision involves many aspects, including legal, political and humanitarian considerations. This confirms that the

pardon institution in Russia is used for political purposes, in addition to its traditional one.

In recent months, the media have been actively covering convicts’ participation in the special military operation. Convicted persons act as mercenaries and receive a chance for pardon after completing six months of combat service [14]. Though these materials are not official or scientific sources, they emphasize the importance of reviewing and improving legislation governing pardon procedures.

Historically, a pardon is an act of mercy on the part of the head of state in relation to a specific person who has been convicted of committing criminally punishable acts. In Russia, in the post-Soviet period, this institution found its consolidation, first of all, in constitutional norms, namely in articles 50 and 89 of the Constitution of the Russian Federation. In accordance with Article 89 of the Constitution of the Russian Federation, the right to pardon belongs to the President of the Russian Federation. Every convicted person in Russia has the right to appeal to the President of the Russian Federation for a pardon, regardless of the severity of the crime and circumstances of its commission.

In Russian criminal law, the right to a pardon, which is guaranteed by the Constitution, is enshrined in Article 85 of the Criminal Code of the Russian Federation. The Penal Code of the Russian Federation fixes grounds for release from punishment, including the possibility of a pardon (Article 172), the procedure for release through a pardon (Article 173), and the procedure for convicts to apply for a pardon (Article 176). A person sentenced to actual imprisonment may exercise his/her right to a pardon by submitting an appropriate petition through the administration of the institution where he/she is serving his/her sentence.

Every citizen sentenced to criminal punishment is constitutionally guaranteed the right to ask for forgiveness. However, there are certain limitations to this right. They are fixed in the decrees of the President of Russia No. 1,500 of December 28, 2001 and No. 787 of December 14, 2020, establishing rules for the consideration of such submissions. This document specifies categories of persons unentitled for a pardon, in particular:

- a) who have committed an intentional crime during the probation period imposed by courts;
- b) maliciously violating the established procedure for serving a sentence;
- c) previously released from serving their sentence on parole;
- d) previously released from serving their sentence under amnesty;
- e) previously released from serving their sentence by an act of pardon;
- f) in relation to whom the punishment has been commuted.

However, this rule is not mandatory, it has no legal force, but simply indicates the possibility of refusal of a pardon on these grounds.

The above-mentioned list of convicts indicates that persons who have committed more than one crime experience serious difficulties in correcting themselves. In this regard, it is difficult for law enforcement agencies to achieve criminal punishment goals. A detailed process for considering applications for a pardon is set out in the Instructions on the organization of the work of institutions and bodies of the penal system on the petitions of convicts for pardon”, approved by the Ministry of Justice of the Russian Federation No. 83 of April 8, 2015.

When the President of the Russian Federation considers a convicted person’s petition for a pardon, he decides whether this petition will be granted or rejected. It is worth mentioning that the petition acceptance does not always entail complete release of the convicted person from punishment; sometimes the penalty is commuted. This more lenient punishment, which is considered in the context of pardon, should not be considered as a sanction for the crime committed, but rather as an act of mercy towards the convicted person.

In this regard, courts usually refuse to satisfy complaints against decrees of the President of the Russian Federation, which replace the death penalty with life imprisonment, when convicts refer to the fact that such punishment does not comply with previously valid norms of criminal law [15, 16].

It should also be noted that in Russia, the modern penal system is being actively improved in accordance with international standards, despite difficult political conditions and differences in legal approaches between Rus-

sia and some European countries. Russia’s criminal policy is striving for high standards of humanization of prison conditions and resocialization of convicted persons, which is the result of constitutional recognition of the priority of human rights [15, p. 42].

Humanization and partial liberalization of criminal and penal policies should take into account potential negative consequences of changes in the crime rate in the country. It is necessary to maintain a balance between respect for the rights of convicted persons and safety of the law-abiding population. This will reduce the crime rate in Russian society solely through measures aimed at reducing criminalization.

The right to pardon, which is exercised by the head of state, is not an unambiguous legal institution, despite the fact that it is enshrined in the Constitution of the Russian Federation and exists in the legislation of many democratic countries. An act of pardon represents the highest expression of humanism among all forms of early release of convicts. Humanism seeks to reveal in a person his/her best qualities and recognizes that life and well-being of every human being are of the highest priority, and a person is ready to fight for them, even if there is only the slightest chance of improving the situation.

The study of data on repeat crimes shows that the recidivism rate in Russia is quite high and is increasing (ranging from 25% to 40% in various regions). This indicates that the prevention system is not working effectively enough. In addition, the statistics published by the Federal Penitentiary Service of Russia show that at least 45% of those sentenced were previously convicted, and up to 84% of those released from prison commit offenses again (secondary and subsequent) [17].

In addition, the analysis of generalized data on repeat crimes shows that in 85% of the cases, recidivism occurs in the first 3 years after release [17]. These statistics clearly indicate that there are certain problems, especially in the area of social support for former prisoners after their release. Nowadays, society as a whole cannot effectively cope with this problem. Positive results are expected from the adoption of legislation on probation and the



achievement of effective work by all involved structures.

Hence, specific standards are required to determine effectiveness of punishment in criminal law. These standards can be taken into account when using various methods of release from punishment, including pardon.

The society is actively discussing issues connected with changing detention methods, reorganizing custodial institutions, expanding a list of criminal penalties that exclude isolation of convicts from society, and reducing their number.

We back the point of view of Yu.V. Golik, who state that the use of the pardon institution can encourage criminals to behave themselves [18, p. 51].

It is important to effectively apply the pardon institution to achieve goals of criminal and penal legislation. Part 1 of Article 1 of the Penal Code of the Russian fixes the goal of punishment as correction of convicts and prevention of new crime commission by both convicts themselves and others.

The set goals are achieved through the fulfillment of the following tasks:

- regulation of the procedure and conditions for executing sentences and serving of criminal sentences imposed by the court;
- determination of the means contributing to correction of convicted persons;
- protection of the rights, freedoms and legitimate interests of convicted persons;
- provision of assistance to convicts in their social adaptation.

The essence of a socio-moral aspect of a pardon is that the state, when it reduces punishment for persons who are found guilty of crimes, shows faith in their ability to comply with the law in the future.

Actions of the employees responsible for the law application in the field of punishment are aimed at achieving the above-mentioned tasks and goals. It is important to note that regardless of the uncertainty of the purpose of the pardon process and the absence of restrictions on motivation when applying for pardon, this is the constitutional right of every convicted person.

We believe that proving the need to forgive a person who has been given a fair sentence according to the law is a difficult task. The issue

of pardons should be considered and evaluated in the context of general criminal policy, as an important component of it, as well as an instrument for the development of democracy and respect for the rule of law. Nevertheless, the point of view of Professor Yu.M. Antonyan is worth considering. He emphasizes the impossibility of pardoning persons who may commit new crimes [19, p. 14].

A moral side of its use is questionable: whether criminals deserve such an act of leniency. One of the key arguments is that prisons, for example, contain very different categories of convicts, including those who need medical care, have sick parents or children, poor financial situation, the elderly, etc. It is advisable to pardon some of them, especially if there are grounds to believe that criminal punishment goals have already been largely achieved, and their further imprisonment is not expedient.

And if, despite practical expediency of this argument, there is little doubt, then from a theoretical point of view the situation becomes less obvious. This is mainly due to a lack of explicit criteria to grant pardons in the legislation, and the issue is entirely at the discretion of a competent official.

#### *Conclusion*

The study results show that processing pardon petitions becomes more advanced over time. However, despite this, the system is still inefficient. Most petitions of convicted persons are rejected by making a submission about the inexpediency of applying an act of pardon even at the stage of the work of regional commissions. In addition, this process is not completely transparent, which means that real decision-making mechanisms for pardon cases are not available for research.

In addition, in conditions of overloaded court and prison system, pardons can be applied to alleviate the prison overcrowding problem by releasing some convicts. Pardons can also be used as a tool for managing the criminal process, allowing law enforcement agencies to focus their efforts on more serious crimes or on convicts who require special attention.

Sometimes pardons can be used to achieve political or social goals, such as consolidating peace and promoting reconciliation in society.

In order to achieve goals of the pardon institution, it seems necessary to improve regulation in the following areas:

- to expand a circle of persons entitled to apply for a pardon, including not only the convicted person him/herself, but also his/her legal representative, close relatives, bodies responsible for punishment, labor teams, public organizations, as well as federal and regional ombudsmen. If a reasoned pardon petition is received from any of the listed entities, it is necessary to obtain written consent from the convict him/herself;
- to work out detailed instructions for the work of territorial pardon commissions;
- to develop special pardon rules for military personnel and prisoners who wish to take part in the special military operation;
- elaborate additional guarantees to protect victims' rights, in case a pardon is granted.

A legal framework for the pardon procedure should be discussed at a new level [20, p. 38].

The institution under consideration obviously needs a more detailed regulation and measures aimed at improving the practice of realizing the opportunities that it provides. The measures proposed based on the results of this study to regulate its certain aspects will make this institution more transparent, thus boosting effectiveness of criminal punishment.

It would not be an exaggeration to say that in penal legislation, pardons are considered as a means to achieve certain goals for several reasons. First, pardons convey humanitarian

principles. Individual circumstances of the case can be taken into account; in case the punishment seems disproportionate or unfair regarding the nature of the crime or the personality of the convicted person. Second, pardons can be used to encourage rehabilitation of convicts, including commutation of punishment or providing a second chance for persons who have demonstrated positive changes or a clear desire and willingness to reform.

Thus, a pardon is a multifaceted legal phenomenon that encompasses various forms of state-sanctioned mercy and forgiveness [21, p. 125].

This act of humanism is a kind of manifestation of forgiveness from the state in relation to people who have committed crimes, and it indicates that society, represented at least by state bodies, is ready to accept those who have committed socially dangerous acts, but then repented and seeks to return to law-abiding and full-fledged citizen status. It also provides an opportunity for effective rehabilitation of such persons in society.

All these factors together help to understand why pardons are considered as a tool to achieve goals of criminal legislation of the criminal law complex. This tool, used competently and thoughtfully, makes it more optimistic and easier to both execute and serve a criminal sentence, while taking into account various life circumstances, which can contribute to a more effective and fair procedure for its execution.

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#### INFORMATION ABOUT THE AUTHORS

**SERGEI N. PONOMAREV** – Candidate of Sciences (Law), Professor, professor at the Penal Law Department of the Academy of the FPS of Russia, Ryazan, Russia, sergey\_ponomariov@mail.ru

**VALERIYA V. SKOPINTSEVA** – Adjunct at the Academy of the FPS of Russia, Ryazan, Russia, kucher22v@mail.ru, <https://orcid.org/0009-0005-9530-2574>

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