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Consideration of Petitions for Pardon in the Russian Federation: Novelties of 2020

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A b s t r a c t . *Introduction:* the paper analyzes the amendments made by the Decree of the President of the Russian Federation no. 797 of December 14, 2020 to the Decree of the President of the Russian Federation of December 28, 2001 no. 1500 "On commissions for pardon in the territories of constituent entities of the Russian Federation" and the norms of the new Regulation on the procedure for considering petitions for pardon in the Russian Federation. *Methods:* comparative legal method and method of interpretation of legal norms. *Results:* having analyzed legal documentation on the activities of the commissions and having considered convicts' petitions for pardon, we point out the following positive changes: an increase in the rotation period of members of the commissions for pardon; clarification of their analytical and control functions; inclusion of social adaptation in the number of circumstances taken into account when considering the issue of pardon; exclusion of personal data of individuals recommended for pardon by the highest official of a constituent entity of the Russian Federation from publication in the mass media; taking into account the opinions of the victims of the crime. We think that negative changes are those that have created new problems in the form of contradictions with the norms of criminal and penal legislation. These include the possibility of granting pardon to persons serving other criminal law measures, and applying for pardon directly to the commission on pardons, bypassing the administration of institutions and bodies that execute sentences. *Conclusion:* the current task to expand the practice of granting pardon cannot be solved by adopting a new Regulation on the procedure for considering petitions for pardon in the Russian Federation.

K e y w o r d s : criminal legislation; penal legislation; convict; pardon; criminal punishment; other measures of a criminal legal nature; President of the Russian Federation; commissions on pardons.

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Introduction

The Constitution of the Russian Federation provides for the right of every person to apply for pardon (Part 3 of Article 50) and the power of the Head of State to grant pardon (Article 89). Norms of criminal legislation (Article 85 of the RF Criminal Code) define forms of pardon in relation to the criminal law sphere, as well as the fundamental provisions that, first, pardon is possible only in relation to persons serving criminal sentences, and second, each case of pardon must be considered individually. The grounds for release, the procedure for filing a petition and release from serving a sentence under the act of pardon are provided for in the norms of penal legislation (Articles 172, 173 and 176 of the RF Penal Enforcement Code).

The legislative regulation of the application of pardons is supplemented by secondary regulation. So, in Russia, the Regulation on the Procedure for Considering Petitions for Pardon in the Russian Federation, approved by the Decree of the President of the Russian Federation no. 1500 of December 28, 2001, was in effect for nineteen years. It was repeatedly amended and supplemented; however, the practice of applying pardons based on it still received critical assessments of human rights defenders, who, through the Presidential Council for the Development of Civil Society and Human Rights and the Commissioner for Human Rights in the Russian Federation, annually raised the issue of adjusting this practice in the direction of expansion. As a result of one of the discussions,

in February 2019, the President of the Russian Federation ordered his administration, the Ministry of Justice of the Russian Federation, the Civic Chamber of the Russian Federation, the Federal Ombudsman and the regional authorities to develop proposals aimed at improving the procedure for the formation and operation of regional commissions on pardons and improving the efficiency of their functioning. As a result of this work, the Decree of the President of the Russian Federation no. 797 of December 14, 2020 amended and supplemented the Decree of the President of the Russian Federation no. 1500 of December 28, 2001 “On commissions for pardon in the territories of constituent entities of the Russian Federation” (hereinafter – the Decree) and approved a new Regulation on the procedure for considering petitions for pardon in the Russian Federation (hereinafter – the Regulation).

Novelties in the regulation of the activities of the commissions and the procedure for considering petitions for pardon in Russia, and the factors defining them

Let us analyze the provisions of the canceled and new regulations.

The first unit consists of changes and supplements aimed at improving the wording of the norms and partly at eliminating legal inaccuracies. These include the indication that the criminal record must be not only unexpunged, but also outstanding (Item 2 of the Decree and Items 1–3, 17 of the Regulations), as well as the fact that those convicted by the courts of a foreign state can serve their sentence on the territory of the Russian Federation not only on the basis of international treaties, but also on the terms of reciprocity (Item 3 of the Regulations).

The same unit includes the unification of the terms for sending:

a) the convict’s petition to the commission on pardons by the territorial body of the penal system (Item 12);

b) the responses to the request of the highest official of the constituent entity of the Russian Federation or the commission on pardons by the administration of the correctional institution and other state bodies (Item 20).

In our opinion, it is not of fundamental importance to exclude the obligation of the territorial body of the penal system to inform the Federal Penitentiary Service of Russia about the received petitions of convicts (Item 12 of the Regulation), since, if necessary, this aspect can be provided for in the administration standards of the penal system itself.

The second unit of changes concerned the formation and functioning of pardon commissions in constituent entities of the Russian Federation.

Thus, we have found that the composition of the commission is updated by one third once every five years. Previously, this period was two years. In practice, this provision on the change of one third of the commission’s composition concerned mainly the part of its members who were representatives of the public, since the third of the commission’s members, which was formed by officials, was usually more stable. The increase in the rotation period is quite understandable.

First, in recent decades, there has been a decrease in the number of petitions for pardon from convicts. The change of one-third of the commission’s membership once every two years in such circumstances did not allow the commission members to delve deeply into the mechanism of pardon, to understand its social and legal purpose, and to ensure the necessary degree of objectivity and professionalism in the implementation of this important state function.

Second, it was not convenient to change the composition of these commissions in a fairly short time, since there were not so many people willing to engage in this public activity in constituent entities of the Russian Federation. The same problem led to an increase in the term of office of non-governmental monitoring commissions from two to three years in 2010. As evidenced by foreign experience, for example, the practice of visitors in prisons in the UK, successful public work requires a sufficiently high level of material well-being of the population, at least there should be a full-fledged middle class, whose representatives can perform social work without fear of deterioration of their financial situation. Therefore, staffing the non-governmental sector of the commission on pardons in our country is associated with certain difficulties.

Third, the provision on rotation by one third once every two years was immediately negatively perceived by the chairmen of the pardon commissions, which was shown by the discussion of the practice of pardoning at the All-Russian meetings of these leaders in the Moscow Oblast (2002) and Nizhny Novgorod (2003).

The tasks of the pardon commissions were also adjusted. Previously, quite serious complaints were caused by the task contained in Decree no. 1500 to implement civic oversight of the timely and correct execution of presi-

dential decrees on pardons in the territory of the constituent entity of the Russian Federation, as well as of the conditions of detention of convicts [10, p. 94]. The fact is that there are no real legal mechanisms for the implementation of civic oversight by commissions on pardons in the legislation, which human rights defenders have repeatedly pointed out [1, p. 88–89]. No such mechanisms were mentioned in the earlier Regulation on the Procedure for Considering Petitions for Pardon in the Russian Federation, approved by Presidential Decree no. 1500. In the new version of the Decree, this task is formulated not so ambitiously, but more precisely: monitoring the observance of the right of a person to ask for pardon. When analyzing this novelty, we highlight the following two aspects.

First, it is the fact that the definition of oversight as being "civic" has disappeared from the formulation of the task. Apparently, it was taken into account that at least a third of the members of the commission are formed from among the officials of state authorities and local governments. However, from the history of the Soviet period of Russia's development, a similar procedure for the formation of supervisory commissions is known, which nevertheless, according to the norms of the Correctional Labor Code of the RSFSR, carried out civic oversight. In addition, the exclusion of the reference to civic oversight from the task did not contribute to the solution of the question of which type of control we are talking about – that performed by the state or by other agency. And many things depend on the answer to this question, including the choice of forms and methods of control.

The second aspect is that there again emerged a drawback that was typical of the previous regulatory documents in the field of pardons, namely: the decree and the regulation do not define the forms and methods of such control, do not specify the rights of oversight commissions and the duties of officials to assist the commissions on pardons in implementing oversight activities and responding to their results.

The new version of the Decree of the President of the Russian Federation of December 28, 2001 no. 1500 retains the task of the commissions on pardons related to analytical work. Until 2020, the relevant activity was to prepare proposals to improve the efficiency of the institutions and bodies of the penal system and other state bodies located on the territory of the constituent entity of the Russian Federation in the field of pardoning convicts, as well as the social adaptation of persons who have served their sentences. In accordance with the Decree of the President of the Russian Federation of December 14, 2020 no. 797, the commission on pardons is charged with the task of preparing proposals to improve the effectiveness of cooperation between institutions and bodies of the penal system, other state bodies, local governments located on the territory of the constituent entity of the Russian Federation, on pardoning convicts and on the social adaptation of persons who have served their sentences. At the same time, the regulation of pardons, as in the case of monitoring compliance with the right of a person to request pardon, does not contain organizational and legal guarantees for conducting such analytical work. In particular, the Regulation on the procedure for considering petitions for pardon in the Russian Federation provides for the right of the commission to request additional materials to the convict's petition person for pardon it has received, but there is no legally defined possibility to request data on the interaction of institutions and bodies of the penal system, other state bodies, local governments located on the territory of the constituent entity of the Russian Federation, on the issues of pardoning convicts and social adaptation of persons who have served their sentences. And without this, it is difficult to prepare reasonable proposals for improving the cooperation.

Analysis of the novelties contained in the new Regulation on the procedure for considering petitions for pardon in the Russian Federation

In Item 3 of the Regulation, it is established that in the Russian Federation, pardons are applied:

a) to persons convicted by courts in the Russian Federation to punishments provided for by criminal law and serving sentences on the territory of the Russian Federation;

b) in respect of persons convicted by the courts of a foreign state, serving a sentence on the territory of the Russian Federation in accordance with international treaties of the Russian Federation or on the terms of reciprocity;

c) in respect of persons released on parole, during the remaining unserved part of the sentence;

d) in respect of persons who were given a suspended sentence, as well as persons to whom the courts of the Russian Federation have deferred serving their sentences;

e) in respect of persons who have served a sentence imposed by the courts and have an

unexpunged or outstanding criminal record.

Thus, in comparison with the previously existing list, new categories of convicts have emerged who can apply for pardon and count on it being granted. The purpose of the emergence of the categories of convicts specified in Items "b" and "d" is quite clear: this is due to the intention to expand the practice of applying pardons. The fact is that, since 2001, there have been significant changes in this field. Thus, if in 2000 pardon was applied to 12,836 convicts, then in 2001 – only to 27 convicts, that is, there was a dramatic 475-fold reduction. From 2002 to 2012, the number of pardons ranged from 0 to 283, and from 2013 to 2019 – from two to seven per year (in 2013 – five, in 2014 – two, in 2015 – two, in 2016 – six, in 2017 – four, in 2018 – five, in 2019 – seven). In 2020, according to the official website of the President of the Russian Federation, five people were granted pardon [2].

However, despite the obvious factors that led to the expansion of the list of categories, the legal compliance of the proposed changes is not entirely clear.

In accordance with Part 2 of Article 85 of the RF Criminal Code, a person convicted of a crime may be released from further serving of the sentence by an act of pardon. At the same time, according to Article 79 of the RF Criminal Code, when a person is released on parole, he or she is already released from serving the sentence further. Is it allowed to release the convicted person from serving the sentence further twice (first by a court order, and then by an act of pardon)? We think this is legal nonsense. Apparently, with the introduction of new categories for pardons, it was supposed to release the convicted person from compliance with the conditions listed in Part 7 of Article 79 of the RF Criminal Code and from the performance of duties determined by the court on the basis of Part 2 of Article 79 of the RF Criminal Code. But then, when granted a pardon, the convicted person will be released from the application of another measure of a criminal legal nature, which is not a punishment.

Similar associations are also caused by the extension of pardons to persons who, on the basis of Article 73 of the RF Criminal Code, are put on probation. According to Part 1 of Article 73 of the RF Criminal Code, a convicted individual does not actually serve their sentence, so they cannot be released from doing this. Again, an act of pardon can release a convict from fulfilling the conditions and obligations imposed on them, but these conditions and obligations are implemented within the framework of a different measure of a criminal legal nature, rather than punishment. Release from serving another measure of a criminal-legal nature by granting a pardon is not provided for in Part 2 of Article 85 of the RF Criminal Code. Of course, it should be taken into account that in the science of criminal law there was a point of view that a suspended sentence should be classified as a criminal penalty [13, p. 102–105]. In the modern period, most scientists consider this institution as a different measure of a criminal-legal nature [4, p. 83–92]. However, even if there are controversial points of view on the legal nature of a suspended sentence, one should proceed from the list of punishments given in Article 44 of the RF Criminal Code. There is no suspended sentence in it.

Similar thoughts arise if we analyze the possibility of applying the act of pardon to persons who have been granted a suspended sentence provided for by the new Provision. This category of convicts includes, among others, persons with drug addiction. According to Part 3 of Article 82.1 of the RF Criminal Code, the court releases the convicted person recognized as a drug addict from serving the sentence or the remaining part of the sentence, after they have undergone a course of treatment for drug addiction, medical rehabilitation, social rehabilitation and in the presence of objectively confirmed remission, the duration of which after the end of treatment, medical rehabilitation and social rehabilitation is not less than two years. And here the same legal situation is repeated again. It is impossible to release the person from further serving of the sentence under the act of pardon, since the person has already been released by the court, and it is unwise to release them from treatment and medical rehabilitation ahead of time, to put it mildly. When handling this issue, it is necessary to obtain a medical opinion of specialists concerning the fact that the goals of such a postponement have been achieved, but the Regulation does not provide for its being granted. Again, the release on the basis of the act of pardon from other measures of a criminal-legal nature is not provided for by criminal law.

Item 4 of the new Regulation contains the categories of convicts to whom pardon, as a rule, does not apply. In our opinion, this norm is unnecessary. First, it is not clear to whom it is addressed. The subject of satisfaction of the convicted person's petition for pardon is ex-

clusively the President of the Russian Federation. In accordance with Items 23–25 of the new Regulation, he is also the subject of the rejection of the petition for pardon. At all stages of the passage of the petition (the commission on pardons, the highest official of the constituent entity of the Russian Federation), only advisory decisions are made, and the final decision remains with the President of the Russian Federation. At the same time, the President is not bound by a positive or negative recommendation of the commission and/or a top official. Based on this, it turns out that the norm in question is addressed to the President of the Russian Federation. It is hardly advisable for the President to remind themselves of which categories of convicts are not subject to pardon.

Second, the use of pardon is strictly individual, and to regulate it with such restrictions at the discretion of the President of the Russian Federation means not only unreasonably limiting the President's constitutional powers, but also reducing the effectiveness of the institution of pardons. Life situations are quite diverse, and they also affect convicts, which are listed in Item 4 of the Regulation. That is why the ban on the use of pardons provides for the possibility of exceptions (in the form of the phrase "as a rule"). In this case, the regulatory role of Item 4 of the Regulation is extremely reduced.

Taking into account the negative attitude toward Item 4 in general, we will analyze the few changes in the specified norm, which is set out in the following wording:

"Pardons, as a rule, do not apply to convicted persons:

a) who committed an intentional crime during the probation period of a suspended sentence appointed by the courts;

b) who maliciously violate the established procedure for serving a sentence;

c) previously released from serving a sentence on parole;

d) for whom the sentence has previously been replaced by a more lenient sentence imposed by the courts and who have committed a crime one again;

e) to whom acts of amnesty and (or) acts of pardon were previously applied".

The changes affected the sub-items "d" and "e". In the first case, by adding the words "and who committed a crime once again", the category of persons to whom it is not recommended to grant pardon is significantly narrowed; in the second case, on the contrary, there is an expansion: if previously it was not recommended to grant pardon to persons who were previously released from serving their sentence under an amnesty or an act of pardon, then now it is not recommended to grant pardon to those persons to whom other measures of clemency were applied, provided for in Articles 84 and 85 of the RF Criminal Code: exemption from criminal liability, replacement of the punishment with a milder one, reduction of the punishment, removal of a criminal record.

The previously effective Provision established that the petition for pardon in the form of removal of the criminal record is sent by the applicant independently to the commission at the place of their residence. In the new provision, the place of stay is quite reasonably added to the place of residence (Item 13 of the Regulation). In addition, this rule is extended to the submission of petitions for pardon by persons released on parole and by persons on whom a fine is imposed as the main type of punishment. Item 14 of the Regulation establishes a minimal set of documents that the applicants are to submit; besides, it provides for the possibility for the pardon commission to request additional documents and information necessary for the preparation and consideration of applications received from convicted persons. Comparison of this norm with other norms of the regulation leads to the conclusion that convicts serving other (besides a fine) sentences, as well as those convicted on probation or with a suspended sentence, submit their petitions for pardon through the administration of institutions and bodies that execute sentences (Item 6 of the Regulation), which ensures the collection and submission of the necessary documents, including the reference to the convicted person, containing information about their behavior, attitude toward study and work during their serving the sentence, and their attitude toward the committed act (Item 8 of the Resulation).

As for release on parole, apparently, it was taken into account that a specialized federal body, which according to Part 6 of Article 79 of the RF Criminal Code should control the conduct of the relevant category of persons, has not been created. However, the same norm states that control over a paroled serviceman is carried out by the command of a military unit and the institution. Such a command actually exists and is undoubtedly interested in describing the conduct of a serviceman who has been released on parole from a disciplinary military unit and has filed a petition for pardon.

The situation is similar with the filing of a petition by a convicted person who was punished with a fine. According to Part 1 of Article 6 of the RF Criminal Code, the penalty in the form of a fine is executed by bailiffs at the place of residence (work) of the convict. Why does the convicted person independently apply to the commission on pardons? This procedure will only increase the time for consideration of the petition, since the commission will have to request the necessary materials from bailiffs belonging to the Federal Bailiffs Service. In addition, the possibility of a person sentenced to a fine submit a petition for pardon directly to the commission contradicts Article 176 of the RF Criminal Code, which establishes that the convicted person submits a petition for pardon through the administration of the institution or body executing the sentence. No exceptions are provided for in this article of the law.

There have also been changes in the circumstances that should be taken into account when considering petitions for pardon In accordance with Sub-item "h" of Item 21 of the provision, they include not only data on the identity of the convicted person (state of health, number of convictions, marital status, age), but also the possibility of their re-socialization. This indicator is important for deciding on a pardon in the form of release from serving a sentence primarily related to isolation from society. It seems that when assessing the possibility of re-socialization, the degree of preservation and (or) restoration of socially useful connections of the convicted person should be evaluated, it is expressed as follows:

a) whether a person applying for a pardon has a permanent place of residence after release (leased or private residential area, in the rehabilitation center of the Russian Federation, religious institution, for example a monastery, etc.);

b) possibility of guaranteed employment after release, confirmed by documents of commercial and non-commercial organizations and (or) local authorities;

c) maintaining or restoring a spiritual connection with the family, children and close relatives (marriage, correspondence, telephone conversations, meetings and video meetings);

d) material support of the convicted person by the family or close relatives or, conversely, support of the convicted person's family or close relatives by the convicted person (receiving and sending money transfers, parcels, etc.);

e) obtaining a profession (advanced training), general education;

f) raising the cultural level, expanding the horizons, revealing the creative abilities that can become the basis for law-abiding conduct after release;

g) desire to get rid of bad habits and cure socially dangerous diseases (alcoholism, drug addiction, substance abuse, sexually transmitted diseases, pedophilia, tuberculosis and mental disorders);

h) proper care of the child by a convicted woman in the child's home at a correctional institution, etc. [15, p. 100].

These are exactly the values that can help to gain a foothold in society and lead a proper lifestyle after being released under the act of pardon.

In the legal literature, various opinions are presented on the issue of the subjects of initiating a pardon procedure. Some authors believe that only a convicted person can act as such a subject [12, p. 100; 5, p. 104]. Others suggest changing the procedure for pardoning, allowing consideration of petitions for pardon by not only the convicted person, but also family members, close relatives, representatives of non-governmental, primarily human rights, organizations, etc. [10, p. 67]. These proposals were taken into account in the regulation, but only partially. Thus, one of the novelties consists in the fact that petitions for clemency received from relatives, lawyers of convicted persons, representatives of public organizations, as well as from other persons are taken into account when considering a convicted person's petition for clemency (Sub-item 21), however, they do not constitute an independent basis for commencing the pardon procedure.

The same paragraph of the provision quite reasonably implements a proposal previously put forward by scientists [7, p.140] to take into account the opinions of victims or their relatives regarding the possibility of pardon. Currently, it is possible to make an appropriate request at all stages of the passage of the petition for pardon.

The professional [8, p. 37], scientific [14, p. 83] and human rights [3, p. 59] communities had great doubts about the norm of the previously existing provision that the list of persons recommended for pardon by the highest official of the constituent entity of the Russian Federation is published in the media of the relevant constituent entity of the Russian Federation within a month from the date of such a decision. In addition to indicating the surname and initials of the convicted person recommended for par-

don, reference is also made to the article of the criminal law under which they were convicted. At the same time, the highest official of the constituent entity of the Russian Federation could also disclose the motives that guided them in making the relevant decision. The ambiguous perception of this norm by some authors was explained by the fact that the media, which are distributed on the territory of the constituent entity of the Russian Federation, cannot convey information about candidates for pardon to the victims, so such lists must also be published in the media of the constituent entities of the Russian Federation at the permanent place of residence of the convicted person and the place of their conviction [6, p. 146]. Other authors saw the inferiority of this rule in the fact that the lists contain data of convicts recommended by the highest official for pardon, but do not contain similar data of those convicts whose petitions were not supported [9, p. 44–45].

The new Regulation contains no such rule; this fact should be considered as a positive change in the procedure for considering a convicted person's petition for pardon. First, the opinion of victims in our information age can be taken into account not by publishing an article of the RF Criminal Code and the personal data of those who received a positive recommendation from the highest official of the constituent entity of the Russian Federation, but by other methods. In addition, it is necessary to be done before the decision is made by the highest official, and not after that.

Second, the norm that existed before 2020 simply satisfied the public interest in the activities of the head of the constituent entity of the Russian Federation in the designated field. This interest is quite justified and deserves careful attention, but to satisfy it, it is enough to give the letter designation of the surname, as is done when placing court decisions on the Internet.

Third, such a publication contradicted the provisions of the legislation on the protection of personal data, since it allowed them to be communicated to an unlimited number of persons without the consent of the owner; it also contradicted Item 16A.3 of the European Prison Rules (amended on July 1, 2020), where it is established that all information about the convicted person should be kept confidential and be available only to those persons whose professional duties require it.

Conclusion

In conclusion we can point out the following. The amendments made by the Decree of the President of the Russian Federation of December 14, 2020 no. 797 to the Decree of the President of the Russian Federation of December 28, 2001 no. 1500 "On commissions for pardon in the territories of constituent entities of the Russian Federation" and the adoption of a new Regulation on the procedure for considering petitions for pardon in the Russian Federation have increased the level of regulation of the activities of the commissions and consideration of convicts' petitions for pardon. Among the positive changes are: an increase in the rotation period of the members of the pardon commissions; clarification of their analytical and oversight functions; inclusion of social adaptation in the number of circumstances taken into account when considering the issue of pardon; exclusion of publication in the media of personal data of those recommended for pardon by the highest official of the constituent entity of the Russian Federation; taking into account the opinions of victims of crime.

At the same time, these innovations have created problems in the form of contradictions to the norms of criminal and penal legislation. We are talking about the possibility of applying pardons to persons serving sentences in the form of other measures of a criminal-legal nature, and applying for pardon directly to the commission on pardons, bypassing the administration of institutions and bodies that execute sentences.

It seems that the initial task of increasing the number of persons to whom pardons are applied can hardly be solved as a result of the adoption of new regulations.

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