

PROBLEMS OF MEDICAL PAROLE LEGAL REGULATION IN RUSSIA AND IN CERTAIN FOREIGN COUNTRIES

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ABSTRACT

The article aims to identify gaps and collisions in the legislation of the Russian Federation and some foreign countries in the regulation of social relations associated with medical parole. The features of the studied legal institute are determined. The key characteristics of law enforcement practice in the studied area are substantiated. The article presents the results of a comparative legal study of the use of medical parole in the Russian Federation and in other countries. Common and distinctive features of the Russian legislation, as well as the legislation of the post-Soviet countries, Switzerland and the United States in the field of law enforcement are revealed. The directions of further research development in the field of penitentiary practice humanization in respect to convicts are proposed.

Keywords: Medical Parole, Legal Collisions, Gaps in Legislation, Comparative Legal Study, Russian Federation, Switzerland, United States.

INTRODUCTION

The institution of medical parole is an important component of modern Penal law. At the same time, certain norms of this institution are contained in codified sources of criminal and criminal procedure law. Effective protection of human rights and legitimate interests of the state and society requires the improvement of certain rules of the legal institution under study. In this case, it is necessary to take into account the processes of humanization of modern criminal and penitentiary policy, which are observed not only in Russia but also in other countries. It should also be taken into account that the rule-making, as well as law enforcement practice in the analyzed area should take into account the changing nature of modern social relations, advances in medicine, the dynamics and structure of morbidity and mortality. The level and parameters of development of national penitentiary systems are also a significant factor. This branch of medical practice is characterized by a number of specific features that differ in the used schemes and

methods of treatment, objective restrictions (regime, resource, personnel, etc.). In these circumstances, we should talk about the interdisciplinary nature of the studied problem, which determines the need to use a wide information base, as well as comparative legal and historical and legal research. Thus, the high dynamics of social relations requires a detailed study of the legal institution of medical parole. Among the unsolved problems should be identified the need to take into account foreign experience in the field of rule-making and law enforcement. Special attention should be paid to the analysis of existing legal conflicts in Russian and foreign legislation.

RESEARCH METHODOLOGY

The information base of the research is Russian and foreign legal acts regulating relations in the sphere of execution of criminal penalties and penitentiary practice. Comparative legal research was carried out on the basis of the analysis of the legislation of the Russian Federation, the Republic of Azerbaijan, the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Republic of Tajikistan, the Republic of Uzbekistan and Estonia. This part of the comparative legal study was aimed at testing the hypothesis of General conflicts and gaps in the legislation of post-Soviet countries. There was also a comparison of certain provisions of the Penal law of the Russian Federation, the USA and Switzerland. This part of the study was aimed at taking into account the positive experience of developed countries-representatives of the Romano-German and Anglo-Saxon legal families. The hypothesis of this part of the study suggested the existence of such legal norms in foreign legislation, the implementation of which in the Russian legal system will significantly improve the protection of the rights and legitimate interests of citizens, society and the state in the field of social relations. The methodological basis of the study was determined by the works of Russian and foreign scientists on the subject of application of the norms of the criminal Executive legislation in relation to patients with convicts. From the point of view of the subject of this study are noteworthy works of the following scientists: Krymov, et al. (2018), Kurgansky (2007), Kurchenko (2014), Malikov (2017), Seliverstov (2017), Skiba & Yuldoshev (2016) & Mikhlin & Yakovleva (2001). It should be noted the significant contribution of these scientists to the solution of a wide range of issues of criminal Executive, criminal law and criminal procedure arising in the field of study. In world science, this problem remains insufficiently studied. The execution of punishments against sick convicts, as well as issues of exemption from criminal penalties in connection with the disease were determined by the subject of research of such representatives of legal and medical science as Pro and Marzell (2017), Ethridge & White (2015), Bateman (2012), Latham (2011) & Kendig et al. (1996). Representatives of foreign science sent their research in the field of studying the features of early release of sick (Pro & Marzell, 2017; Ethridge & White, 2015; Teremetsky et al., 2018) and elderly convicts (Bateman, 2012; Geiger & Fischer, 2017), as well as HIV-infected persons (Latham, 2011; Betteridge, 2006; Lewy, 2012). Worth to be mentioned works, devoted to history-law researches in the studied field (Kendig et al., 1996; Khabriev et al., 2017).

RESULTS & DISCUSSION

Medical parole Legal institute has an interbranch nature and is regulated by the provisions of Criminal, Penal and Criminal procedure Codes of the Russian Federation and of other countries. The same triad of legal acts govern the norms of the researched legal institute in Republic of Azerbaijan, Republic of Armenia, Republic of Belarus, Republic of Kazakhstan, Republic of Tajikistan, Republic of Uzbekistan (legal systems of these countries were used as a basis for contemporary-legal research). In the USA (an example of the Anglo-Saxon legal family representative) Medical parole Legal institute is a part of Code of Federal Regulations (an interbranch act, that governs 49 spheres of social relations). However, a brief analysis the Post-Soviet counties' Codes indicate that there are shortcomings in the interbranch regulation of the studied legal institution in the above countries (Kurgansky, 2007; Kurchenko, 2014; Malikov, 2017; Seliverstov, 2017). With regard to convicted to various criminal penalties (both related and unrelated with deprivation of liberty) are applied the General rules of Art. 81 of the Criminal Code (hereinafter-CC) of the Russian Federation (hereinafter – RF): a person who, after committing a crime, has a mental disorder that deprives him of the opportunity to realize the actual nature and social danger of his actions (inaction) or to lead them, is released from punishment, and the person serving the sentence is released from further serving it (part 1), a person who has become ill after committing a crime with another serious illness that prevents the serving of punishment may be released by the court from serving the sentence (part 2), and the military personnel shall be released from further serving the sentence in case of a disease that makes them unfit for military service, while the unserved part of the punishment may be replaced by a milder form of punishment (part 3). In part 1 and 2 of Art. 81 of the RF CC there is no mention of the list of punishments during the serving of which convicts have the opportunity to get a medical parole; it turns out that theoretically this type of parole can be applied to convicts, who were sentenced to fine, correctional labor, imprisonment for a certain period, life imprisonment and other penalties.

However, the Decree of the RF Government #54 from 06.02.2004 «About the medical examination of convicts commended for medical parole» establishes the appropriate procedure only for persons deprived of their liberty, who serve their sentence in medical institutions of the penitentiary system (although this normative legal act does not reflect some important issues, in particular, the legal status of the convict in this area). In this Decree of the RF Government is a list of more than fifty diseases that prevent the serving of punishment: tuberculosis of the respiratory system, chronic course, the cure of which can't be achieved by any methods; progressive destructive tuberculosis of the spine, large bones and joints with persistent dysfunction; various forms of malignant tumors regardless of their location in the presence of locally advanced tumors, compressing the surrounding organs and structures or growing into the surrounding organs and structures that are not subject to radical treatment, or in the presence of distant metastases (disseminated process); diabetes, severe form, with multiple complications; chronic and prolonged mental disorder with severe persistent or often exacerbating painful manifestations that do not allow the patient to realize the actual nature and social danger of his actions (inaction) or to lead them; complete blindness; acute and chronic radiation illness of an extremely severe degree, local radiation injuries (radiation burns) of a severe and extremely severe degree; etc. In this case, arises the issue about the possibility (or impossibility) of sending

to the medical institution of the penitentiary system the persons convicted to penalties not related with deprivation of liberty (for example: compulsory work, correctional labor, restriction of freedom, etc.), and their detention in these institutions. In addition, in accordance with p.p. 132-133 of Internal regulations of correctional institutions, approved by the Order of the RF Ministry of Justice # 295 from 16.12.2016, medical and preventive institutions perform the functions of correctional institutions in respect of prisoners in them, and isolated from other categories of convicts are, among other things, only sentenced to life imprisonment (but not to other punishments).

It is not clear what to do, for example, with women serving deprivation of liberty and detained with their young children, if the mother or child is diagnosed with a serious disease. In the first case – medical and preventive institutions of the penitentiary system as a whole are not adapted for the maintenance of young children (at the same time, the convict must be examined for a certain time – approx. auth.), and in the second case – a serious illness of the child is not a legal basis for early release of his mother. Thus, article 81 of the RF CC provides three grounds for the release of convicts from various punishments for health reasons – due to mental or other serious diseases, as well as diseases that make soldiers unfit for military service. At the same time, according to part 3 of this provision of the Russian criminal law, the possibility of assigning a milder punishment to a person who already has a disease, in principle, preventing the serving of punishment, looks doubtful. Apparently, in this type of early release from serving the sentence is not achieved any of the goals of the penal legislation, as under art. 81 of the RF CC, the court should not investigate the degree of correction of the convict or the possibility of committing a new crime (meanwhile, after being released from punishment due to illness, some persons, despite the state of health, again commit crimes (Mikhlin & Yakovleva, 2001). Moreover, part 1 of Art. 81 of the RF CC establish only one form of post-penitentiary control – court can prescribe compulsory measures of a medical treatment to such convicts. As we can see it is the right (but not a duty) of the court, which considers the case.

However, it is worth to consider the meaning loss of that use of treatment for the convicted person, who after the crime occurred a mental disorder which deprives his possibility to realize the actual nature and social danger of his actions (inaction) or control them (p. 1 of art. 81 of the RF CC). Parole due to mental or other illness implies that the person will not return to the places of deprivation of liberty (if he does not commit a new crime and his health does not improve). But such a situation can take place when a person who had a mental disorder that deprived him of the opportunity to realize the actual nature and social danger of his actions or to lead them, or other serious illness after release and the course of treatment recovers. For example, the person was sentenced to 12 years in prison, after serving 4 years he was granted a parole under art. 81 of the RF CC, and after another 2 years – successfully completed the course of treatment. In this case, such a person who has begun to adequately understand the surrounding reality (if there was a mental disorder), in the case of return to the correctional institution could be subjected to the remaining time of the sentence corrective action (in our example, another 6 years – approx. auth.). However, the mandatory return of persons who previously had a serious illness, but later recovered, back to the correctional institution to continue the sentence serving (to provide them with corrective action), the law does not provide (this is the right of the court, in accordance with part 4 of art. 81 of the RF CC), which does not seem justified. Perhaps, in this regard, it is advisable to propose by adjusting the legislation not to release, but to suspend the

serving of punishment in respect of convicted persons with serious diseases (both associated with deprivation of liberty, and without it); this kind of suspension of imprisonment (instead of parole) it is advisable to carry out only when they are in medical and preventive institutions of the penitentiary system. The reason for the continuation of the suspension of the punishment of such a person will be an appropriate attitude to the state of his health, the full implementation of the recommendations of the attending physician, etc., and in relation to the convicted woman-mother – also an appropriate attitude to the state of health and education of her underage child.

In addition, according to art. 399 of the RF CPC, a representative of the institution or body of the penitentiary system is summoned to the court session, to make a report, and then can give appropriate explanations. Meanwhile, attention is drawn to the fact that in the RF CPC there is no consolidation of the relevant rights of the above-mentioned participant of the court session. This does not seem to be justified, because it is the administration of the institution or body of the penitentiary system, which has a corrective effect on the convicted person for a certain time, can more or less objectively assess the degree of its correction. Meanwhile, in the event that a convicted person, the victim, his legal representative and (or) representative participate in the court session, they have the right to get acquainted with the materials submitted to the court, participate in their consideration, file petitions and challenges, give explanations, submit documents (part 3 of art. 399 of the RF CPC). At the same time, art. 399 of the RF CPC do not provide the summons to the court of other persons who (in some extent) take part in the activities of the execution of deprivation of liberty in general, and in relation to a particular convict, in particular. Thus, doctors who have made a conclusion about a serious illness of a convicted person, prison psychologists, representatives of the guardianship and guardianship authorities, relatives of the convicted person, as well as other persons could be subject to a call (such problems are discussed in the legal literature (Krymov, 2015; Nikolyuk, 2015)). There are also conflicts of Russian criminal, penal and criminal procedure legislation in the studied field.

First, in contrast to part 1 and 2 of art. 81 of the RF CC, which defines three grounds for exemption from punishment due to illness (1 – a person who, after committing a crime, has a mental disorder that deprives him of the opportunity to realize the actual nature and social danger of his actions (inaction) or to lead them, shall be released from punishment, and the person serving the sentence shall be released from further serving it; 2 – a person who has become ill after committing a crime with another serious illness that prevents the serving of punishment may be released from serving the sentence by the court; 3 – the military personnel serving arrest or the maintenance in disciplinary military unit are exempted from further serving of punishment in case of the disease making them unfit for military service), in part 4 art. 42 of the RF PC additionally stated that in cases of serious illness of the convicted person, preventing the serving of correctional labor, or recognition of his disability of the first group, he has the right to apply to the court for his parole (this basis for parole for a person in connection with the disease is not in article 81 of the RF CC). A similar collision is between part 1 and part 2 of article 81 of the RF CC and part 3 of article 26 of the RF PC, according to which in cases of serious illness of the convict, preventing the serving of punishment in the form of mandatory work, or recognition of his disability of the first group, the convict has the right to apply to the court for his release from the remaining part of incarceration. Otherwise, the convict has the right to apply for medical parole.

Secondly, article 81 of the RF CC describes the above conditions of release from punishment or from his further serving of a person with a serious illness, while part 1 of article 398 of the criminal code refers to the possibility of postponing the execution of sentences on this basis. Given the fact that the criminal procedure legislation defines the procedural issues of the use of material institutions of criminal law, it seems strange enough to provide them in the RF CPC without a corresponding fixing in the RF CC.

Third, part 5 of Art. 175 of the RF PC states three types of entities that can apply to the court for the release of a convicted person from further serving of punishment in accordance with art. 81 of the RF CC: 1) the convicted person who has a mental disorder that prevents the serving of punishment; 2) his legal representative; 3) the head of the institution or body executing the punishment. However, according to art. 399 of the RF CPC, only a convicted person has this right. In this case the RF CPC actually ignores other subjects of submission of the corresponding petition — convict's legal representative and the head of penitentiary body or facility.

The following contradiction also takes place in the Russian legislation. In part 1 of Art. 81 of the RF CC the basis of medical parole is defined as follows – the mental disorder depriving him of opportunity to realize the actual character and public danger of his actions (inaction). However, in paragraph 27 of the List of diseases preventing the serving of criminal sentence, fixed by the Decree of the RF Government # 54 from 06.02.2004 «About the medical examination of convicts commended for medical parole», the radix is specified otherwise – chronic and prolonged mental disorder with severe persistent or frequently escalating painful manifestations, not allowing the sick to understand the actual nature and social danger of his actions (inaction) or to govern them. In this case, according to the mentioned Decree of the RF Government, a person should have not just a mental disorder that deprives him / her of the opportunity to realize the actual nature and social danger of his / her actions (inaction), but a chronic and prolonged mental disorder. Moreover, there is a collision in Russian legislation, which forms a fundamental problem, including the issues of medical parole due to the illness of the convicted person. Thus, in accordance with part 1 of article 2 of the RF PC, the penal legislation of the RF consists of this Code and other Federal laws. However, Penal legislation are and other normative-legal acts (in addition to Federal laws): the decrees of the RF President, decisions and decrees of the RF Government, orders of the Ministry of justice etc. In relation to the studied area, it is worth to mention the Decree of the RF Government # 54 from 06.02.2004 «About the medical examination of convicts commended for medical parole», which is also not a Federal law, but is important in regulating and implementing the institution of medical parole. It seems that it is possible to correct this conflict by approving the new version of part 1 of article 2 of the RF PC that penal legislation consists of this Code, other Federal laws and other normative legal acts (Krymov et al., 2018). Thus, it is obvious that there are problems of Russian legislation in the field of medical parole in connection with the disease of the convict.

Post-Soviet Countries

Meanwhile, certain provisions of other countries' legislation could be taken into account in the improvement of Russian criminal, penal and criminal-procedural legislation:

In article 511.3 of the Republic of Azerbaijan CPC, part 2 of article 92 of the Republic of Belarus CC, part 2 of article 75 of the Republic of Kazakhstan CC, part 2 of article 79 of the

Republic of Tajikistan CC, part 3 of article 391 of the Republic of Tajikistan CPC, article 534 of the Republic of Uzbekistan CPC and article 79 of Estonian PC are provided criteria for medical parole of convicts with serious illnesses: severity of the crime committed, personality of the convict, the nature of the disease and other circumstances. Moreover, the court in some countries may take into account other circumstances for granting a medical parole for such a convict, which, apparently, aims at a foreign law enforcement officer to a more objective approach in this type of release and the need to achieve the goals of penal legislation. Thus, in accordance with part 2 of article 92 of the Republic of Belarus CC, a person suffering from another serious disease that prevents the serving of punishment may be released from serving the sentence by the court or this punishment may be replaced by a milder one; this takes into account the severity of the crime, the identity of the convict, the nature of the disease and other circumstances;

part 2 of article 391 of the Republic of Tajikistan CPC, article 511.3 of the Republic of Azerbaijan CPC and article 534 of the Republic of Uzbekistan CPC enshrines the right of the court, in addition to prescribing compulsory medical measures, to apply other forms of post-penitentiary control over the behavior of a seriously ill person – to transfer him to healthcare authorities or relatives. Thus, in accordance with art. 511.3 of the Republic of Azerbaijan CPC, in case of parole of a convicted person who has a mental illness, the court has the right to apply compulsory medical measures against him or her, or to transfer him or her to the care of a health authority or relatives;

The decision to release a convicted person suffering from a mental disorder from further punishment is made by the court collectively (part 1 of article 401 of the Republic of Tajikistan CPC), which, apparently, may give greater objectivity in making such a decision, including on the application to the person released from measures of post-penitentiary control over his/her behavior;

According to art. 170.5 of the Republic of Azerbaijan PK, article 511.2 of the Republic of Azerbaijan CPC, part 6 of article 162 of the Republic of Kazakhstan PK, part 3 of article 478 of the Republic of Kazakhstan CPC, part 7 of article 208 of the Republic of Tajikistan PC, part 1 of article 391 of the Republic of Tajikistan CPC, article 165 of the Republic of Uzbekistan PK, article 534 of the Republic of Uzbekistan CPC, p. 5-6 of article 187 of the Republic of Belarus PK, article 116 of the Code of Latvia on the execution of sanctions and part 3 of article 33, part 4 of article 43, part 7 of article 113 of the Republic of Armenia PC the considered type of release is carried out on the recommendation of the facility or body of the penitentiary system;

According to part 4 of article 92 of the Republic of Belarus CC, a person who became sick after sentencing with a mental disorder (disease), depriving him of the opportunity to realize the actual nature and significance of his actions or to lead them, in the case of recovery is punishable (it is the duty of the court, and not his right), if the Statute of limitations on the execution of the sentence has not expired; a similar rule for persons with a mental disorder or other serious illness is available in part 2 of article 75 of the Republic of Kazakhstan CC, article 67 of the Republic of Uzbekistan CC and part 3 of article 79 of the Estonian Penal code;

According to article 41.2 of the Republic of Azerbaijan PC, convicts with serious illness or their legal representatives may apply to the court to replace this type of punishment with a milder type of punishment; before the court permits this appeal, these convicts shall not be involved in the serving of correctional labor;

When the court decides on the release of a convicted person from serving a sentence for the disease, the presence of the Chairman or a member of the medical Advisory Commission who gave an opinion is mandatory (part 4 of article 402-2 of the Republic of Belarus CC).

Switzerland and the USA

Swiss law contains virtually no legal grounds for medical parole. The exception is the execution of punishment in respect of persons guilty for crimes against sexual integrity and sexual freedom of the person, as well as crimes committed with special cruelty, recognized as particularly dangerous and mental disorders which cannot be treated (corrected) by modern methods. In respect of this category of convicts of the penitentiary are not in the period of time determined by the verdict, and throughout the process of treatment of the convicted person from mental disorders.

According to Art. 123A of the Constitution of Switzerland (this article was adopted as an amendment to the Constitution on the referendum on 08.02.2004) guilty in a crime against sexual integrity and sexual freedom of the person, as well as in crimes committed with particular cruelty, recognized as particularly dangerous and mental disorders which cannot be treated (corrected) by modern methods – must be in prison for life. The only reason for the release of the convict in this case will be the emergence of new scientifically-based means of correction (and/or treatment), with which it will be possible to ensure that the offender will cease to be socially dangerous. At the same time, officials taking the decision to release such criminals – bear personal responsibility for the potential recurrence of a paroled offender, previously recognized as a particularly socially dangerous. Assessment of the degree of correction (recovery) of particularly dangerous criminals, characterized by special cruelty and/or involved in crimes against sexual integrity and sexual freedom of the person, should be carried out at least two experienced professionals independent from each other, and their reports should take into account all the essential circumstances and fundamentally important facts that determine the possibility of early release of the convict. Norms that regulate issues of medical parole applying in the USA legislation are presented in the US Code of Federal Regulations (Title 28. Judicial Administration – Chapter I. Department of Justice – Part 2. Parole, release, supervision and recommitment of prisoners, youth offenders, and juvenile delinquents – Section 2.77. Medical parole).

According to the USA legislation upon receipt of a report from the institution in which the prisoner is confined that the prisoner is terminally ill, or is permanently and irreversibly incapacitated by a physical or medical condition that is not terminal, the Commission shall determine whether or not to release the prisoner on medical parole. Release on medical parole may be ordered by the Commission at any time, whether or not the prisoner has completed his or her minimum sentence. Consideration for medical parole shall be in addition to any other parole for which a prisoner may be eligible.

A prisoner may be granted a medical parole on the basis of terminal illness if the institution's medical staff has provided the Commission with a reasonable medical judgment that the prisoner is within six months of death due to an incurable illness or disease and The Commission finds that:

1. The prisoner will not be a danger to himself or others;
2. Release on parole will not be incompatible with the welfare of society.
3. A prisoner may be granted a medical parole on the basis of permanent and irreversible incapacitation only if the Commission finds that:
4. The prisoner will not be a danger to himself or others because his condition renders him incapable of continued criminal activity;
5. Release on parole will not be incompatible with the welfare of society.

The seriousness of the prisoner's crime shall be considered in determining whether or not a medical parole should be granted prior to completion of the prisoner's minimum sentence. A prisoner, or the prisoner's representative, may apply for a medical parole by submitting an application to the institution case management staff, who shall forward the application, accompanied by a medical report and any recommendations, within 15 days. The Commission shall render a decision within 15 days of receiving the application and report. A prisoner, the prisoner's representative, or the institution may request the Commission to reconsider its decision on the basis of changed circumstances.

Notwithstanding any other provision of this section:

1. A prisoner who has been convicted of first-degree murder or who has been sentenced for a crime committed while armed under, shall not be eligible for medical parole;
2. A prisoner shall not be eligible for medical parole on the basis of a physical or medical condition that existed at the time the prisoner was sentenced.

CONCLUSION

Thus, taking into account foreign experience, it is obvious that there is untapped potential in the Russian Federation to improve the regulation of the institution of medical parole. It is obvious that the experience of Switzerland is valuable. It provides for the consideration of modern medical achievements as a basis for the decision on the release of convicts as a result of their mental recovery. However, the concept of the use of compulsory medical measures against all those convicts, sentenced for crimes against sexual integrity and sexual freedom of person deserves obvious criticism. It should also take into account the positive experience of American legislators in determining a rather narrow but specific list of grounds for the release of convicts from serving various sentences in connection with their illness. Further comparative legal studies aimed at finding successful legal structures that regulate the studied sphere of social relations are an important component of solving the problem of increasing the level of effectiveness of protection of the legitimate interests of citizens, society and the state not only in Russia but also in other countries of the world.

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