

The property issues in the criminal proceeding of the Republic of Azerbaijan arising from illegal or erroneous actions of the authorities conducting criminal procedure

Abstract: It is considered the issues of repaying the harm (property, moral, and physical) and restoring other broken rights of individual, by the mistake or abusing acts of authorities realizing the criminal procedure. There is given the determination of the rehabilitation institute in criminal procedure and is studied the subjects of this institute, the problems of establishing the side, the duty of which is repaying the discussed kind of harm.

Keywords: justification; compensation of the harm; criminal procedure; rehabilitation; authorities conducting criminal procedure.

In addition to the administration of justice to punish those accused of a crime, and expose the guilty, one of the areas of criminal procedure is also justification and rehabilitation of those innocent, which found its legislative basis in the Criminal Procedure Code of the Republic of Azerbaijan, entered into force on 1 September, 2000 (*hereinafter – CPC of RA*). The right to claim compensation for the damage caused by unlawful actions of state bodies is constitutionally enshrined right of a person in the Republic of Azerbaijan (*hereinafter - RA*), in particular Article 68 of Constitution of RA declares that everyone has the right to compensation by a state for the damages caused by unlawful actions or omissions by public authorities or their officials.

In relation to criminal proceedings, referring to the compensation of damage as a result of unlawful actions of public authorities we should bear in mind property, moral, and physical damage, as well as a violation of the rights (those labor, housing, etc.) of other persons, resulting in errors or abuse by the authority conducting the

♦**Abbasova Maleyka Nazim** – a doctorate of Philosophy and Law Institute of Azerbaijan National Academy of Science (Azerbaijan). E-mail: abbasovamaleyka@yahoo.com

criminal proceedings.

In the cases where a person on the verdict or by a decision of the prosecuting during prosecution in respect of which a criminal case was dismissed on rehabilitating grounds, there is a need to address a number of important procedural issues, which quite rightly Professor M.A. Jafarguliyev includes determining the persons entitled to compensation, determining the characteristics of compensation for damage, compensation issues due to damages, recovery of other rights violated as a result of damage, definition of the circle of persons entitled to claim compensation for damage, recognition of the right to claim for damage, explanation of the right of claim of damage, the rules of redress after the prosecution and other issues [1, p. 164].

The discussed institution was reflected in Chapter V of CPC of RA and devoted to the justification of those innocent of a crime, as well as the issues with redress, and titled as ‘Justification (Rehabilitation). Compensation for damages’.

This chapter focuses primarily on the issues of redress to the person who suffered loss as a result of certain illegal acts or omissions of the authority conducting the criminal proceedings, and therefore was liable to prosecution or punishment.

Acquitting judgment in respect of a person by a court or termination of prosecuting based rehabilitating grounds in respect of a person during pre-trial proceedings is the basis for the restoration of all his/her rights violated as a result of criminal prosecution and compensation of property, moral, and physical damage resulting from wrongful or erroneous criminal procedure against the person.

The right in question of claiming for injuries incurred during the criminal proceedings is recognized in acquitting decision which came into force or in a decision to discontinue the criminal prosecution, but in the case if the issue of compensation for damage suffered as a result of an error or abuse by the authority conducting the criminal trial was not reflected in an acquittal or a decision to discontinue the prosecution, the resolution of this issue is carried out after the termination of the criminal prosecution [1, p. 168]. Thus, there should be an indication of an innocent person for the rights to claim for compensation of damages.

On this occasion, L.A. Prokudina expressed quite a correct opinion that neither proceedings nor any statement of illegal actions of officials in terms of specific rules of law is required to address the issue of damages, because it will be refunded both in the case of official crime, misconduct, and in case of error – there is a need just for a statement of citizen's innocence [14, p.19].

After recognizing a person guilty (or as a result of the termination of criminal prosecution on exculpatory grounds), a mechanism for compensation of damage by public authorities comes into force. Although, our legislator pointed to synonymy of justification and rehabilitation in the title of Chapter (it is stated in CPC of RA – 'Vindication (rehabilitation)'), in our opinion, rehabilitation should be included not to justification, but directly to reparation, as the essence of the term is in this exactly.

Thus, the term 'rehabilitation', as a term of Latin origin, derived from the word 'rehabilitation', forming from the merger of prefix 're' – 'renewal', and the word 'habilitas', which translated as 'ability, fitness' [18, p. 738], that is literally translated as 'recovery ability'. In a legal sense, the rehabilitation should be referred to as reinstatement, restoration of the reputation of innocent victims, combined with compensation of their material and moral damages [2, p. 532].

With respect to criminal and procedural nature of rehabilitation, the opinions of processualist scholars differ somewhat.

Thus, according to M.I. Pastuhova, rehabilitation is recognition in the prescribed manner of innocence of a citizen prosecuted without sufficient grounds, followed by restoration of his/her rights and good name [13, p.19].

B.T. Bezlepkin assumes as the rehabilitation the defendant's acquittal or termination of criminal proceedings against the convicted, accused person, as well as a suspect due to lack of evidence of a crime, corpus delicti or participation of these persons in the commission of a crime [3, p.13].

As can be seen, the two scientists refer to rehabilitation a justification itself in addition to redress, which, in our opinion, is somewhat misleading.

A number of processualist scientists combine two elements in rehabilitation - the act of recognition of a person not guilty, and the process of direct compensation for

his/her injury. Ch.S. Gasimov defines the essence of rehabilitation quite broadly, establishing the following: 'Rehabilitation is the official establishment of innocence of a person for a crime that: 1) set forth in a special legal act - acquittal or a decision to discontinue a criminal case, rendered in the absence of evidence of a crime or absence of corpus delicti, or for lack of participation of a person in the commission of a crime; 2) gives rise to the right of that person to compensate for property damage, restoration of labour, pension, housing and other rights, compensation of a damage caused by unlawful conviction, unlawful criminal prosecution, unlawful use as a measure of preventive detention, and implemented by a state completely, regardless of the guilt of officials of bodies of inquiry, preliminary investigation, prosecution and trial [8, p. 23-24].

M.V. Orlova also points to the dual nature of rehabilitation, and sees it as a concept which includes an action associated with the imposition of procedural act on the innocence of a person, as well as recovery and compensatory measures to return to the victim illegally damaged in criminal proceedings the lost property, lost revenue, restore his/her reputation, housing, labour and other rights [12, p. 11].

S.A. Rogachev also sees the duality in rehabilitation, stating that rehabilitation consists of two stages: 1) the act of justification due to lack of evidence, absence of corpus delicti or the non-participation of a person in committing a crime; 2) compensation for the damage caused to that person, restoration his/her violated rights - and only after implementation of these two groups of actions in the extent to which a victim wishes we can say that a citizen was rehabilitated [16, p. 22].

However, it should be noted that the justification for a person and his/her rehabilitation, ie remedy of violated rights of a person lie in different planes, and we should not understand 'excuse' under 'rehabilitation' too.

A.A. Orlova also sees rehabilitation as a competent official recognition of the fact of refusal from criminal prosecution against a specific person on the grounds and in the manner prescribed by law, the consequence of which is to restore his/her good name, former reputation, and compensation associated with the prosecution of damage [11, p. 3].

According to A.N. Glybina and Y.K. Yakimovich, the concept of rehabilitation includes two elements: 1) official recognition of a person not guilty of a crime; 2) recovery of damages and restoration of other rights violated as a result of illegal and/or unjustified criminal prosecution and/or conviction [6, p. 42].

V.M. Savitsky, whose opinion we are in solidarity with, sees rehabilitation in immediate restoration of rights and reputation of innocent citizens subjected to unfounded criminal prosecution [17, p. 48].

We consider wrong the view of N.Y. Shilo, who reveals rehabilitation as a recognition an innocence of a person by the law enforcement agencies in proper normative act, stating the lack of events or an offense, or lack of evidence of participation in a crime of wrongly convicted and/or accused person, and as restoration of his/her rights and reputation [21, p.16].

Thus, examined the variety of the opinions regarding the criminal procedural nature of rehabilitation, as well as considered the essence of ‘rehabilitation’ as a specific term, in our opinion, rehabilitation should not be ranked as justification, or act of recognition of a person not guilty, but should be treated as a direct mechanism for recovery of such a person in all of his/her rights violated and reparation of damage. The act of recognition of a person not guilty, whether the acquittal by court or the decision to discontinue the criminal proceedings against a person should be considered as a basis for rehabilitation, since it is the presence of such an act gives a person the right to compensation.

Therefore, we propose the following definition to rehabilitation in the criminal proceedings: *rehabilitation is a certain mechanism within the criminal process to compensate for damage and restoration of other violated rights of any person as a result of error or misuse by the authority conducting the criminal proceedings on the basis of an acquittal or the decision to dismiss the criminal persecution against a person, with the use of criminal procedures and norms of other branches of law.*

In this regard, we offer to change a few the title of Chapter V of CPC of RA ‘Justification (Rehabilitation). Compensation for damages’ to ‘Justification. Compensation for damages (rehabilitation).

With respect to the subjects entitled to rehabilitation, there is a divergence of opinions of processualist scientists, each of them offers his/her own classification of subjects of rehabilitation. Thus, A.N. Glybina distinguishes two groups of subjects in this issue: the subject of right to rehabilitation and subject of the right to compensation by way of rehabilitation. The author includes in the first group - the subjects entitled to rehabilitation - the persons who in the presence of statutory grounds are entitled to recognition of their innocence of the crimes imputed to them with making appropriate decisions, which is particularly true for defendant, suspect, accused, convicted, person in respect of whom compulsory medical measures were applied [6, p.60-61]. As a next group of rehabilitation subjects, A.N. Glybina considers the subjects entitled to compensation by way of rehabilitation - it is a person against whom the acquittal decision which entered into force is made. The author argues that, since the issuance of justifying decision a person becomes rehabilitated, and since its entry into force he/she also becomes subject entitled to compensation. Thus, in her opinion, there is a time interval between these subjects established by law to challenge the decisions of the preliminary investigation or trial, and a subject entitled to compensation is a person in respect of which a decision of innocence came into force for the action, in respect of which the person has been drawn to participate in criminal proceedings [6, p. 65-66].

In his turn, S.A. Rogachev proposes to include in the content of rehabilitation subjects not only those innocently convicted or prosecuted by mistake or due to abuse by the authority conducting the criminal proceedings, but also the victim, and civil plaintiff and proposes to include in the chapter on rehabilitation of CCP of RF the issues of redress, occurred as a result of a crime to a victim, the issues of redress in a civil lawsuit for the return of stolen property to the victim, which is real evidence as well [16, p. 26].

In our opinion, this view is fundamentally wrong. We do not deny the right of a victim and civil plaintiff to damages caused as a result of crime, but do not confuse this process with the process of rehabilitation, the essence of which is to restore the rights and interests, as well as compensation for damage directly to persons who have

suffered damage from the actions of the bodies conducting the criminal process.

V.V. Vladimirova partly adheres the same opinion as S.A. Rogachev and based on the essence of the concept of 'rehabilitation' as 'restoration the lost state and former rights', to use the term in the characterization of procedural mechanism to protect the rights and legitimate interests of victim in criminal proceedings, which she believes should include victims of crime, as well as persons who have been subjected to illegal and unjustified criminal prosecution and who have suffered physical, moral and material damage. In addition, V.V. Vladimirova indicates that the elimination of the consequences of any type of damage caused to victim is a rehabilitation measure in fact being implemented by the preliminary investigation, prosecutor and court in criminal proceedings, and the rehabilitation process as the restoration of violated rights and legitimate interests of person being the purpose of criminal proceedings should be carried out in relation to victim of crime, and in respect of a person illegally or unreasonably subjected to criminal prosecution [4; 5, p.11-12].

A distinctive feature of the rehabilitation process as a restoration of the rights and interests of person in criminal proceedings is precisely the implementation of the process in relation to those illegally prosecuted, the whole nature of the institution of criminal proceedings is expressed in this. Remedy to victim of crime is a very different process with other base occurrence, other goals and other implementation mechanisms.

Therefore, in our opinion, in determining the *subject composition of rehabilitation institute we should be limited to persons whose rights and interests have been violated as a result of errors or misuse by the authority conducting the criminal proceedings, the recovery process in respect of which begins on the basis of acquittal or criminal proceedings against whom terminated on rehabilitating grounds during the pre-trial proceedings on the basis of an act of the relevant body conducting the criminal proceedings.*

An important issue when considering the problem of compensation for damage suffered as a result of mistake or abuse by the authority conducting the criminal

proceedings is the issue of who should compensate this damage which has long remained quite controversial in the scientific literature. If we turn to CPC of RF, there is established that ‘the damage caused to a citizen as a result of criminal prosecution shall be reimbursed by a *state* in full, regardless of the guilt of the inquiry body, investigator, prosecutor and court’ [Article 133 CPC of RF].

CPC of RA establishing the right of those justified and those in respect of whom the prosecution dismissed for rehabilitating grounds during the pre-trial proceedings, for compensation of damage and recovery in all other rights violated does not establish at the same time who should carry out this function. For example, Article 57.1 of CPC of RA states: ‘The moral, physical and material damage caused to the persons provided for in Article 56 of this Code, by the error or wrongdoing of the authority conducting the criminal proceedings shall be compensated’ - as you can see, there is no indication who should reimburse the damage. Act of RA ‘On compensation for damage caused to individuals by unlawful actions of bodies of inquiry, preliminary investigation, prosecution and trial’, however, sets the following definition: ‘This act is aimed at ensuring the right of redress by a *government* to individuals caused by unlawful actions of the bodies of inquiry, preliminary investigation, prosecution, court or their officials’ [7].

In our opinion, the lack of indication in CPC of RA to anyone who should compensate the damage caused by illegal actions of the prosecuting is a significant omission, and this gap needs to be filled by setting in particular in Article 57.1 of CPC of RA ‘Moral, physical and material damage caused to persons provided for in Article 56 of this Code by the error or wrongdoing of the authority conducting the criminal proceedings shall be reimbursed by a state’.

The issue of who should compensate the damage in this case is quite controversial in the criminal procedural literature - some argue that this duty should be imposed on a state, and other part of scientists incline to believe that the compensation of damages should be by those who directly caused this damage that is the officials of the body conducting the criminal process.

In particular, the proponents of imposing the duty to compensate damage to a

state condition their opinion by the fact that certain officials, who speak on behalf of a state, carry out its will, thus, this obligation should be assigned automatically to a state. For example, Rogachev reveals his opinion as follows: 'It is a state that obliged to reimburse from the funds of corresponding budget a rehabilitated damage caused as a result of illegal or unjustified activity of law enforcement on disclosure and investigation of crimes. This situation is due to the fact that the staff of these bodies is involved in the legal relationship for person's criminal liability on behalf of a state, but a state gives them appropriate powers to restrict rights and freedoms of citizens, cause damage in order to identify the person who committed the crime, expose him/her, and assign a fair punishment' [16, p. 99].

A.A. Podoprigora, whose opinion we are in solidarity with establishes that the imposition of a state with the duty to compensate the damage caused both by utilitarian considerations (a state has a greater capacity than any of its bodies for a quick and complete recovery of the rights of citizens; difficulties are occurred in determining the degree of culpability of certain law enforcement in illegal criminal prosecution of a person) and principal tasks of state-legal policy (the interests of justice; restoration of respect of a citizen to a state and its organs; guaranteed security of all violated interests of innocent victims of unjust acts of state agencies [15, p. 65-71].

P.I. Lublinsky, who was a supporter of the theory of state responsibility, believed that the damage caused by unlawful criminal prosecution harms not only private but also public interests because a person participating in the economic life of society takes a certain place and a sudden break in the activities of such a person carries the breaking of these bonds, which, in turn, affects the economy of a state, and, above all, a person embittered against a state, which threw him/her on the street, can easily go down the road of crimes under the influence of a desperate need [10, p. 593-610].

There are many theories proposed by various scholars with respect to this issue, but just assigning responsibility directly to a state have been accepted and established in the legislation of many countries to date. We are also supporters of the idea of the

duties of a state namely to compensate for damage suffered as a result of the actions of prosecuting authorities, as a state being a holistic legal body carries out its activities, in other words implements all of its goals and objectives directly through its bodies, which are thus the messengers of a state which put into practice its will, and being the provider of the rights and freedoms of an individual, the guarantor of both private and public interests, a state exactly should be responsible to a person in case of damage as a result of an error of state bodies.

Institute of justification and further rehabilitation of the persons wrongly prosecuted and punished is important in determining the priority of individual rights and freedoms within criminal proceedings, at the same time there are many questions about this institution to be considered for further effective implementation of the activities in question in practice. In this article we have tried to uncover the fundamental and most controversial issues regarding this institution, in particular, we have considered the following issues:

- Grounds for the right to claim compensation for damage suffered as a result of mistake or abuse by the authority conducting the criminal proceedings, and consistent with the current views of Professor M.A. Jafarguliyev we have established that such a base is verdict and/or decision entered into force to terminate criminal prosecution on exculpatory ground;

- Terminological essence of 'rehabilitation' concept and its criminal procedure content in the light of the opinions of various scholars, resulting that rehabilitation institute in criminal proceedings has been defined as follows: *rehabilitation is a certain mechanism in the framework of criminal proceedings relating to compensation and rehabilitation of other violated rights of a person as a result of errors or misuse by the authority conducting the criminal proceedings on the basis of an acquittal or the decision to discontinue the criminal proceedings against the person using the rules of criminal procedure and norms of other branches of law;*

- Subjective part of the process of compensation for damage suffered as a result of the error or abuse by the authority conducting the criminal proceedings, so we have come to the believe to *restrict by persons whose rights and interests have been*

violated as a result of mistake or misuse by the authority conducting the criminal proceedings, the recovery process for which begins on the basis of acquittal or prosecution in respect of which terminated on rehabilitating grounds during the pre-trial proceedings on the basis of the act of the relevant prosecuting authority process;

- There was considered such a controversial issue in the scientific literature as whose duty is to redress the damage - a state or official by the fault of which given direct damage had been done, in consequence of which we have come to the conclusion that because a state being a holistic legal body carries out its activity, in other words implements all of its goals and objectives directly through its bodies, which are thus messengers of a state putting into practice its will, and being the provider of the rights and freedoms of an individual, the guarantor of both private and public interests, just a state should be responsible before a person in case of damage as a result of an error of state bodies;

- There was drawn attention to the absence in CPC of RA of the indication that who should compensate the damage caused by illegal actions of the prosecuting that is an important omission, and this gap needs to be filled by setting in particular Article 57.1 of CPC of RA – ‘The moral, physical and material damage caused to the persons provided for in Article 56 of this Code, the error or wrongdoing of the authority conducting the criminal proceedings shall be reimbursed *by a state*.

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