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EXEMPTION FROM CRIMINAL LIABILITY AS A CRIMINAL MEASURE

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Abstract: The relevance of the problem and the ongoing scientific debate are due to the fact that the study of the issue of the legal nature of the criminal institute involves analysis of various aspects of its legislative regulation and law enforcement. The philosophical law stating that the essence is reflected in the manifestations (content) fully applies to the law as well; it is it (the legal essence) that determines the features of this or that block of legal provisions and their place in the system of the Criminal Code of the Russian Federation, and its identification is a condition of optimal legal regulation. Criminal law is, above all, a social tool; it is a specific way of implementing social norms and protection of social relations. The author proposes an original approach that allows revealing the nature of the said institute, considering the peculiarities of its regulation through the prism of social and legal prerequisites, as well as their respective grounds for enshrining provisions on exemption from criminal responsibility on non-rehabilitation grounds in the criminal legislation. In the discussion, the tone of which is set by scientists of Kazan University, different versions are proposed and scientific positions are substantiated; in general, as follows from the work, the question are non-repressive and non-punitive, specific measures of criminal impact.

Keywords: criminal law, liability, exemption from liability, criminal punishment, rehabilitation

The rules governing the grounds and conditions for exemption from criminal liability are contained in chapters 11, 13, 14 and 152 of the General Part, as well as in the notes to the articles of the Special Part of the Criminal Code of the Russian

Federation. This is a rather large in volume and content, and if such an expression can be considered correct, a “pervasive” institution evading the criminal law, which is currently showing a tendency towards further expansion both in terms of grounds and in terms of statistics of application.

In contrast to this assertion (on the tendency to expand the grounds for exemption from criminal responsibility and the relevant practice), there is a very strong view in the criminal literature that exemption should be regarded as an exception rather than the rule, not the usual reaction of the government to the commission of a crime¹.

This position is based on universally recognised classic ideas that assume criminal liability as the only natural consequence of an offence and a natural and logical form of government response. The legislative regulation of all criminal provisions is generally sets out imposing criminal liability on the perpetrator of the crime. The institute of exemption from criminal liability contains the opposite legal consequences of a crime and consequently reveals certain inconsistency with a number of rules and provisions as well as principles of criminal law. This circumstance indirectly supports the conclusion that exemption from criminal liability is the exception rather than the rule.

Obviously, in order to resolve questions about the correlation between the institute of exemption from criminal liability and the criminal principles and other basic fundamentals of the Criminal Code of the Russian Federation and the Russian Federation Code of Criminal Procedure, to ensure proper efficiency both in regulation and in law enforcement, it is first necessary to properly understand the social and legal nature of this institute.

Undoubtedly, exemption from criminal liability is a specific legal consequence of a crime. It contains a certain impact on the perpetrator, while the government reaction regulated in the norms of this institution, does not come within the framework of criminal liability; the law provides for it in another form, also provided for in the Criminal Code of the Russian Federation.

In its social content, exemption from criminal liability is a transfer of the criminal impact on a person beyond the “negative” responsibility, a form of implementation of criminal matter in a different, positive way. At the same time, the social and legal expediency of such a transfer of the interaction of the parties (subjects of legal relations) in a positive direction, although it is a prerequisite for the enshrinement of this institution in the criminal law, this idea cannot serve as an explanation of its legal nature.

The criminal regulations are generally retrospective and the measures are negative, and the positive transfer takes place within the same framework, within this retrospective sphere, with a derogation of negative law restrictions.

¹ See: *Kelina S.G., Kudryavtsev V.N.* [Printsipy sovetskogo ugolovnogo prava] Principles of Soviet Criminal Law. M.: Nauka, 1988. P. 131; *Naumov A.V.* [Ugolovnoe pravo. Obshchaya chast'] Criminal law. The general part. Course of lectures. M., 1996. P. 605.

However, such versions are not discussed in the doctrine, it is usual refers only to the negative sphere of legal relations. A.I. Chuchaev and A.P. Firsova do not see impact in the content of the analyzed criminal institute, based on the position that such (criminal impact), being the response of the government to illegal behavior, should have the character of *coercion*¹. According to A.I. Chuchaev, only separate, specific types of release, which imply imposing other obligations as a substitute for the basic, negative ones, for example, release from criminal responsibility of minors, application of coercive measures of educational influence and some others, have coercive influence². A similar view is seen in the position of T.G. Pioniatovskaya³. T.A. Lesniewski-Kostareva believes that exemption from criminal responsibility represents a further differentiation of *criminal responsibility*. “All types of exemption from criminal responsibility are designed to create different measures of responsibility in the law”, the author writes. These types differentiate responsibility depending on the characteristics of public danger of the crime and the personality of the perpetrator (his age, positive post-criminal behaviour, etc.)⁴. Such position is also held by other authors⁵. V. P. Korobov writes, “The essence of the differentiation of criminal responsibility is the obligation of the person who has committed a crime to undergo conviction, punishment and criminal record,” in the “division” of responsibility measures imposed on the person, depending on the various circumstances of criminal significance⁶. In his view, one of the components of such a division (i.e. a means of differentiation) is exemption from criminal liability.

I. A. Tarkhanov in general agreeing that the institution of exemption from criminal liability represents a further division, a gradation of criminal measures in the law, rightly emphasises: “...differentiation of criminal responsibility im-

¹ Chuchaev A.I., Firsova A.P. [Ugolovno-pravovoe vozdeystvie: ponyatie, ob'ekt, mekhanizm, klassifikatsiya] Criminal law impact: concept, object, mechanism, classification: monograph. M.: Prospekt, 2015. P. 17, 27, etc.

² See: Esakov G.A., Pioniatovskaya T.G., Rarog A.I., Chuchaev A.I. [Ugolovno-pravovoe vozdeystvie] Criminal Impact: monograph / Edited by A. I. Rarog. M.: Prospekt, 2015. P. 7.

³ See: Ibid. P. 220 et al.

⁴ Lesniewski-Kostareva T.A. Op. cit. P. 129.

⁵ Knyazkov A.A. [Osvobozhdenie ot ugovnoy otvetstvennosti po delam ob ekonomicheskikh prestupleniyakh: tekhniko-yuridicheskie aspekty zakonodatel'noy i pravoprimenitel'noy praktiki] Exemption from criminal liability in cases of economic crimes: technical and legal aspects of legislative and law-enforcement practice: Thesis. Candidate of Juridical Sciences. Saratov, 2015. P. 14.

⁶ Korobov V.P. [Ponyatie differentsiatsii ugovnoy otvetstvennosti] Notion of differentiation of criminal responsibility // [Differentsiatsiya formy i sodержaniya v ugovnom sudoproizvodstve] Differentiation of form and content in criminal proceedings. Yaroslavl: Yaroslavl University Press, 1995. P. 46.

plies a division into parts of *this* (present, actual) responsibility. Therefore, exemption from criminal liability cannot be regarded as *its* same differentiation”¹. The author believes that the categories of criminal responsibility and responsibility in criminal law should be distinguished. In this case, this refers to the differentiation of *responsibility in criminal law*. In its legal essence, I.A. Tarkhanov considers exemption from criminal liability to be a measure to encourage positive behaviour².

I. A. Tarkhanov’s idea that exemption from criminal liability is a measure of encouragement has found broad support among scholars who study this institution. In one way or another, this view is expressed in the works of Yu.V. Golik³, V.A. Gritskov⁴, V.A. Novikov⁵, T.R. Sabitov⁶, F.R. Sundurov⁷, M.A. Skryabin and H.S. Shakirov⁸, S.P. Shcherba and A.V. Savkin⁹, etc.

Indeed, exemption from criminal responsibility represents a further differentiation of responsibility in criminal law, as well as a result (and means) of criminal law unification, as L.E. Smirnova points out¹⁰. These circumstances reflect one or

¹ Tarkhanov I.A. [Yuridicheskaya priroda differentsiatsii otvetstvennosti v ugovnom prave] Legal nature of differentiation of responsibility in criminal law // Kazan State University transactions. Kazan, 2003. P. 304, 306.

² Tarkhanov I.A. [Pooshchrenie pozitivnogo povedeniya v ugovnom prave] Encouragement of positive behaviour in criminal law. Ch. 5, §§ 2, 3, 4 etc.

³ Golik Yu.V. [Ugolovno-pravovoe stimulirovanie pozitivnogo povedeniya: voprosy teorii] Criminal stimulation of positive behaviour: issues of theory. Novosibirsk: Novosibirsk University Press. 1992. P. 23, 28, 47, etc.

⁴ See: Gritskov V.A. [K voprosu ob osnovaniyakh osvobozhdeniya ot ugovnoy otvetstvennosti] To a question on the bases of release from criminal liability // [Nauchnye osnovy podgotovki spetsialistov dlya sotsial’no-pravovoy sfery] Scientific bases of preparation of experts for social and legal sphere. Collection of scientific works. Issue 2. Kazan: ISSPO RAO, 2001. P. 154.

⁵ Novikov V.A. [Osvobozhdenie ot ugovnoy otvetstvennosti] Exemption from Criminal Liability: Thesis. Candidate of Juridical Sciences. Krasnodar, 2003. P. 11.

⁶ Sabitov T.R. [Printsipy pooshchreniya v ugovnom prave] Principles of encouragement in criminal law // [Ugolovnoe pravo] Criminal Law. 2006. No.1. P. 54.

⁷ Sundurov F.R. [Nakazanie i al’ternativnye mery v ugovnom prave] Punishment and Alternative Measures in Criminal Law. Kazan: Kazan University Press, 2005. P. 242, 243, etc.

⁸ M.A. Skryabin, H.S. Shakirov. Op. cit. P. 4.

⁹ See: Shcherba S.P., Savkin A.V. [Institut deyatel’nogo raskaniya v ugovnom zakonodatel’sve] Institute of active repentance in criminal legislation // [Zhurnal rossiyskogo prava] Journal of Russian Law. 1997. No. 2. P. 73.

¹⁰ See: Smirnova L.E. [Unifikatsiya v ugovnom prave] Unification in Criminal Law: Thesis paper. Candidate of Juridical Sciences. Yaroslavl, 2006. P. 143.

another aspect of the phenomenon, but it is hardly correct to assume that the above statement reveals the essence of the institution under study.

Kh. D. Alikperov has opposing opinion, considering exemption from criminal liability as a means (a legal instrument) of reaching a compromise between the government and the perpetrator of the crime. He writes that the rules that are inherently incentive and the rules providing for compromise, despite their common features, are different in nature, i.e. the specifics of tasks, the motivation of the offender to a certain behavior, etc.¹ The legislator, in his opinion, abandoned the not-terribly-practical uncompromising fight against crime declared earlier. The norms of both the General and Special parts of the Criminal Code of the Russian Federation, providing for exemption from criminal responsibility, represent “...normative reflection of the idea of compromise in the concept of modern criminal fight against crime in the Russian Federation”, writes Kh. D. Alikperov². This position is supported by many scholars³. “In a situation where the government cannot ensure objective equality in the process and real adversarial nature”, writes Ya.Yu. Yanina “compromise makes it possible to remove acute contradictions and resolve criminal cases in a way acceptable to the parties on the basis of mutual concessions”⁴.

V. Maltsev criticises the idea of compromise as the social and legal nature of exemption from criminal responsibility. This approach, in his opinion, oversimplifies the essence and leads to a lower level of requirements to the bodies of enquiry and investigation, as it is associated with the difficulty of proving, revealing the

¹ See: *Alikperov H.D.* [Prestupnost' i kompromiss] Crime and compromise. Baku: Elm Press, 1992. P. 62.

² *Alikperov H.D.* [Novy UK: Problemy osvobozhdeniya ot ugovolnoy otvetstvennosti] New Criminal Code: Problems of exemption from criminal liability // [Zakonnost'] Legality. 1999. No. 4. P. 12.

³ See, e.g.: *Kelina S.G.* [Osvobozhdenie ot ugovolnoy otvetstvenosti kak pravovoe posledstvie soversheniya prestupleniya] Exemption from criminal liability as a legal consequence of committing a crime // [Ugolovnoe pravo: novye idei] Criminal law: new ideas. M.: Publishing house of IGIP RAS, 1994. P. 68 et al; *Naumov A.V.* [Ugolovnoe pravo. Obshchaya chast'] Criminal law. The general part. Course of lectures. M., 1996. P. 442; *Sverchkov V.V.* [Osnovaniya osvobozhdeniya ot ugovolnoy otvetstvennosti i (ili) nakazaniya: Sistema, zakonodatel'naya reglamentatsiya, effektivnost' primeneniya] Grounds for exemption from criminal responsibility and (or) punishment: system, legislative regulation, effectiveness of application. P. 4; *Sokolov A.F.* [O problemakh osvobozhdeniya ot ugovolnoy otvetstvennosti v sootvetstvii s primechaniyami k stat'yam 222 i 223 UK RF] On the problems of exemption from criminal responsibility in accordance with the notes to articles 222 and 223 of the Criminal Code // [Differentsiatsiya otvetstvennosti i problem yuridicheskoy tekhniki v ugovolnom prave i protsesse] Differentiation of responsibility and problems of legal technique in criminal law and procedure. Yaroslavl: Yaroslavl University Press, 2002. P. 133.

⁴ *Yanina Ya.Yu.* [Teoreticheskie i prakticheskie aspekty primeneniya kompromissov dlya razresheniya konfliktov predvaritel'nogo sledstviya] Theoretical and practical aspects of the use of compromises to resolve preliminary investigation conflicts: Thesis paper. Candidate of Juridical Sciences. Kaliningrad, 2007. P. 14.

crime, is fraught with the weakening of the criminal protection of the individual, society and the government. "Among other things, compromise does not restore social justice, hardly contributes to correction, and reduces the effectiveness of general prevention"¹.

The Russian society has always been favourably disposed towards criminals and their forgiveness by the government over the years. However, it will hardly take as kindly to the behind-the-scenes agreements between the criminal and the government, which, as it turns out, are the result of the government's weakness in the fight against crime². Another author, I.L. Marogulova³ explains the legal nature of exemption from criminal responsibility, discussing, in particular, amnesty, by the mercy to the offender, forgiveness on behalf of the state and society.

Certainly, the element of forgiveness, leniency is present (in varying degrees) in almost every type of exemption from criminal responsibility. On the other part, if we consider that forgiveness is the essence of exemption from criminal responsibility⁴, it must be recognised that by forgiving the perpetrator of the crime (given that he does not need criminal measures), the government in such cases does not set goals neither for the person who committed the crime, nor for the victim, nor for the interests of society and the government. Therefore, the legal nature of exemption from criminal liability is not reducible to forgiveness. For example, M.N. Kaplin believes that exemption from criminal responsibility is release from the need to undergo the *impact* provided for in the law as a *measure*. In this case, the necessary goal has already been achieved, therefore it results in the no-action decision, no-use of the means, measures⁵.

Exemption from criminal liability is not a complete and absolute forgiveness of a person who has committed a crime, according to F.R. Sundurov, it is a manifestation of certain leniency towards a person in cases where public danger (its degree) *allows* not to apply to him the law restrictions included in the content of criminal

¹ Maltsev V. [Osvobozhdenie ot ugovnoy otvetstvennosti v svyazi s istecheniem srokov davnosti] Release from criminal liability due to expiry of statute of limitations // [Ugolovnoe pravo] Criminal Law. 2006. No. 1. P. 46.

² Ibid.

³ Marogulova I.L. [Zakonodatel'nye problem amnistii i pomilovaniya] Legislative Problems of Amnesty and Pardon // [Zhurnal rossiyskogo prava] Journal of Russian Law. 1998. No. 1. P. 44.

⁴ See: [Ugolovnoe pravo. Obshchaya chast': uchebnik] Criminal law. General part: textbook / Edited by A.N. Tarbagayev. M.: Prospekt, 2015. P. 387.

⁵ Kaplin M.N. [K voprosu o ponyatii ugovnoy otvetstvennosti] On the concept of criminal responsibility // [Differentsiatsiya otvetstvennosti i voprosy yuridicheskoy tekhniki v ugovnom prave i protsesse] Differentiation of responsibility and issues of legal technique in criminal law and procedure: Collection of scientific articles. Yaroslavl: Yaroslavl University Press, 2001. P. 77.

liability, it demonstrates the negative attitude of the legislator to the formal approach in the matter of grounds and limits of criminal liability¹.

The government cannot refuse to prosecute a person who has committed a crime,” stresses V.K. Duyunov, “the legal relationship that has arisen between these subjects cannot fail to reach its logical conclusion, ending in ‘nothing’ – the refusal to prosecute the perpetrator”². He considers the exemption from criminal liability as a measure of criminal influence. F.R. Sundurov³ comes to the same conclusion – exemption from criminal liability is a measure of criminal influence, but justifying it in a slightly different way.

Of the views expressed in the literature on the legal nature of the institute of exemption from criminal liability, the latter seems more in line with the nature of the institute in question. Indeed, if the government does not refuse, but on the contrary, assumes certain goals and objectives (in relation to the person who committed the crime, the victim, the interests of society and the state, etc.), then, accordingly, any type of release from criminal responsibility represents a measure (*measure* means implementation of something; action, a set of actions defined by socially significant task⁴). Since the institution under study is regulated by the norms of criminal law, focused on the goals and objectives defined precisely by criminal law and in the sphere of criminal law, this measure is certainly of criminal nature. And since this measure is an incentive, encouraging the perpetrator of the crime to show positive behaviour (actions for the benefit of the victim, assistance in solving the crime and special prevention, as well as many other things), therefore, it is a measure of criminal incentive. A proper understanding of the legal nature of the institute of exemption from criminal liability, in our opinion, is the basic, key condition allowing for a significant increase in its potential.

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¹ [Ugolovnoe pravo Rossii. Obshchaya chast'] Criminal Law of Russia. General part / Edited by F.R. Sundurov, I.A. Tarkhanov. Kazan: Kazan University Press, 2009. P. 587, 588.

² Duyunov V.K. [Ugolovno-pravovoe vozdeystvie. Teoriya i praktika] Criminal law impact. Theory and practice. P. 310.

³ See: [Ugolovnoe pravo Rossii. Obshchaya chast'] Criminal Law of Russia. General part / Ed. by F.R. Sundurov, I.A. Tarkhanov. P. 587–595.

⁴ Ozhegov S.I., Shvedova N.Y. [Tolkovyy slovar' russkogo yazyka] The Explanatory Dictionary of the Russian Language / V. V. Vinogradov Russian Language Institute of the Russian Academy of Sciences. 4th ed. M.: Azbukovnik Publisher, 1999 (2001). P. 350, 351.

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