

Roman SHAI

Lviv Polytechnic National University,
Educational and Research Institute of Law,
Psychology and Innovative Education,
Associate Professor of the International
and Criminal Law Department,
PhD in Law, Associate Professor
roman.y.shai@lpnu.ua

ORCID ID :<https://orcid.org/0000-0003-2788-6035>

THE CONCEPT AND LEGAL NATURE OF THE INSTITUTION OF EXEMPTION FROM PUNISHMENT AND ITS SERVING

<http://doi.org>

© *Shai R.*, 2024

The article reveals the concept and legal nature of the institution of exemption from punishment and its serving since this institution is closely related to both the purpose of punishment and the tasks of criminal responsibility in general. In this regard, exemption from serving a sentence requires a more detailed study.

Domestic criminal law policy is focused on creating and ensuring the effective functioning of the system of measures of legal influence on illegal human behavior. The main criminal-legal consequence in these relations is criminal responsibility, and the most common form of its implementation remains punishment.

According to the principle of inevitability of criminal responsibility and punishment, a person who has committed a criminal offense must be held criminally responsible, which, as a general rule, is implemented by imposing a punishment of a certain type and size. The imposition of punishment for a committed criminal offense is a legal consequence of finding a person guilty of a committed criminal offense.

At the same time, in accordance with other principles of criminal law - humanity and economy of criminal repression measures - if there are conditions and grounds provided for in the Criminal Code of Ukraine, a person can be released from criminal liability or from punishment and its serving. Despite the fact that these institutions are applied in the presence of certain positive post-criminal behavior of the subject of a criminal offense and are a manifestation of compromise on the part of the state, they also have differences that are not clearly defined by the legislator, so this issue requires additional research and legal argumentation.

The concept of exemption from criminal responsibility cannot be equated with exemption from responsibility in connection with the absence of a criminal element in the person's actions or in the presence of circumstances that exclude the criminality of the act. The law provides for the possibility or obligation to release from criminal responsibility a person whose actions contain a certain element of the crime. The absence of a criminal element in a person's actions excludes the possibility of release, because one cannot be released from criminal responsibility who did not commit the crime.

Keywords: punishment, parole, convicted, criminal law, corrections, criminal offense.

Formulation of the problem. The domestic criminal law policy is focused on creating and ensuring the effective functioning of the system of measures of legal influence on illegal human behaviour. The main criminal-legal consequence in these relations is criminal responsibility, and the most common form of its implementation remains punishment. At the same time, certain legal facts may arise at various stages of the implementation of criminal responsibility, which lead to the impracticality of punishing a convicted person, the actual or full execution of the prescribed punishment, the inability to achieve its goal by applying the punishment, the impossibility of the convicted person to fulfill the punishment assigned to him. Legal regulation of social relations arising in connection with such legal facts is ensured by the criminal law institution of exemption from punishment or its serving.

The institution of exemption from punishment is gaining more and more relevance, and this relates to the fact that the concept of a rational person, a person of education, is going into the past. In conditions that are constantly becoming more complicated, the irrational part of human nature manifests itself more and more. In such conditions, the only criterion for the effectiveness of the criminal legal system is the possibility of resocialization of the punished person, and his return to society, where he can function per the rules and norms established for the cohabitation of members of society.

The purpose of the article is, firstly, to consider the legal nature of exemption from punishment and its serving as a special form of the state's response to a criminal offense, and secondly, to determine the differences between the considered institutions.

Analysis of the study of the problem. Ukrainian and foreign scientists have always devoted attention to the study of problematic issues of criminal responsibility, punishment, exemption from punishment, and exemption from serving punishment – experts in criminal, criminal procedural, criminal executive law, criminology, in particular: P. S. Berzin, A. A. Berezovsky, E. M. Vecherova, O. P. Horokh, S. V. Danelyan, O. M. Dzhuzha, O. O. O. F. Kovitidi, M. Y. Korzhanskyi, O. M. Kostenko, I. V. Krasnytskyi, M. I. Melnyk, V. O. Navrotskyi, M. I. Panov, D. P. Pysmennyi, E. O. Pysmenskyi, V. Ya. Tatsii, M. I. Havronyuk, P. V. Khryapinskyi, M. E. Shumylo, I. S. Yakovets, O. G. Yanovska, S. S. Yatsenko, and others.

Presenting main material. Forms of implementation of criminal liability, by Art. 74, 75, 84 of the Criminal Code of Ukraine, there is the imposition of punishment, release from the imposed punishment, release from serving the punishment, application of coercive measures of an educational nature, application of coercive measures of a medical nature. The most common forms of implementation of criminal responsibility are punishment, release from the imposed punishment, and release from serving the punishment.

According to Art. 50 of the Criminal Code of Ukraine, punishment is a coercive measure applied on behalf of the state by a court verdict to a person found guilty of a criminal offense and consists of limiting the rights and freedoms of the convicted person as prescribed by law. The purpose of punishment is both punishment and correction of convicts, as well as prevention of committing new criminal offenses by both convicts and other persons. At the same time, punishment, according to the provisions of this article of the Criminal Code of Ukraine, is not intended to cause physical suffering or degrade human dignity [1].

Domestic legislation establishes that the purpose of punishment is not only punishment but also the correction of convicts, as well as the prevention of committing new crimes by both convicts and other persons. The Central Committee of Ukraine, among other things, also mentions corrections and resocialization.

Therefore, criminal legislation provides for the application of not only punishment but also other measures of criminal legal influence to persons who have committed a socially dangerous act. Following the provisions of Part 1 of Art. 74 of the Criminal Code of Ukraine, a convicted person may be released

from punishment or further serving it, he may be replaced by a milder punishment, as well as a possible mitigation of the imposed punishment based on the Law of Ukraine on amnesty or an act of pardon [1].

The institution of exemption from serving a sentence has an important social significance, as it is a manifestation of the state's humanism towards a person who has committed a criminal offense. With its help, it is possible to adjust the amount of punitive criminal-legal measures against a specific person, considering the purpose and task of punishment, as well as the degree of their achievement.

The problems of release from punishment and its serving are among the most complex in the theory of modern criminal law, even though their general or superficial perception creates the illusion of clarity of certain socio-legal aspects of the criminal-legal consequences of a committed criminal offense. These problems are directly related to today's key challenges: ensuring the rights and freedoms of a person and a citizen, implementing the principles of humanism and justice in criminal law, modifying the form and content of criminal liability, etc.

According to some scientists, exemption from punishment and serving it is a form of realization of criminal responsibility, which is used in cases where the purpose of the punishment has already been achieved without actually serving the punishment, or before the end of the term of serving it, thanks to the positive behaviour of the convicted person or for other reasons provided by the Criminal Code, or if the purpose cannot be achieved due to the convict's illness. In other words, exemption from punishment and its serving is determined by two reasons: 1) when the goals of the punishment have been achieved or can be achieved, primarily the goal of correction of the convicted person, without actual or full serving of the prescribed punishment; 2) when achieving this goal is impossible, and the release occurs precisely because of the objective inability (due to the convict's illness) to achieve the goals of punishment. Given this, exemption from punishment and its serving as a criminal law institution should be understood as a set of norms of the Criminal Code of Ukraine, according to which due to the possibility of achieving the goals of the punishment without its actual or complete serving and the impracticality of serving the punishment in the absence of an objective possibility of achieving the goals of the punishment a person found guilty by the court of committing a crime, to whom a punishment was imposed, is released from actually serving it or from further serving the remaining part of the punishment, or the punishment is replaced by a milder one or the imposed punishment is reduced [2, p. 881–882].

There is a group of scientists who understand exemption from punishment as the refusal of the state to apply punishment to a person who was found guilty of committing a crime by a court indictment [3, p. 423], or the Criminal Code provides for cases of non-applying by the court to a person guilty of a crime, punishment or termination of its further execution [4, p. 281].

A distinction should be made between punishment, the imposition of punishment, and the serving of punishment, since the task of correcting a person may be realized during the serving of punishment. Criminal responsibility has broader goals and objectives, which also include individual and general prevention, which is manifested in other forms of criminal responsibility, in addition to punishment. O. O. Knyzhenko points out, that criminal responsibility and punishment as one of the forms of its implementation are related as general and special, from which follows the commonality of their certain tasks [5, p. 64]. In our opinion, the retrospective aspect of criminal responsibility is embodied in the punishment, while the release from serving the punishment is its positive aspect.

The application of various measures of the institution of exemption from serving a sentence is one of the tools for solving criminal legal conflicts, which are used as a compromise between the person who committed a criminal offense, on the one hand, and the victim or the state, on the other. In recent years, problems of compromise in the field of combating crime have become the subject of close attention from the side of criminal law and criminal procedural science. A purely punitive approach to the resolution of a criminal-legal conflict does not contribute to the protection of the rights of the victims, the interests of society, and the state. With such an approach, victims are occasionally compensated for the damage caused, in addition, there are problems with the socialization of convicts after serving their sentence.

Therefore, compromise is a way of resolving a criminal legal conflict, which is achieved through mutually acceptable concessions on the part of the prosecution and defence parties, which ensures the fulfilment of the main tasks of criminal justice and consists of mutual concessions of the parties to criminal proceedings: the competent authorities release the person who committed the criminal offense from criminal responsibility or mitigates the punishment, and the person who committed the criminal offense takes the actions prescribed by law aimed at the disclosure of the criminal offense, the identification of the persons who committed the criminal offense, the collection of evidence and compensation damage caused.

Exemption from serving the punishment is applied when it is established that the imposition of the punishment is inappropriate, there are sufficient grounds to believe that the person can correct himself without serving the actual punishment or in the case of the impossibility of imposing or carrying out the prescribed punishment due to the reduction or loss of public danger by the person who committed the criminal act offenses because of a certain change in the situation, a person's state of health or other factors.

Scientist O. P. Horokh notes that the terminological phrase «exemption from punishment» is used by the legislator to describe various criminal law concepts: 1) conviction without punishment (parts 4, 5 of Article 74, part 1 of Articles 105, 106 of the Criminal Code); 2) conviction with the imposition of punishment, but exemption from punishment at the stage of passing the sentence (Part 2 of Article 84 of the Criminal Code); 3) exemption from the prescribed punishment after the end of the probationary period (Part 1 of Article 78, Part 4 of Article 79 of the Criminal Code); 4) release from the imposed punishment at the stage of execution of the sentence (Part 2 of Article 74, Parts 1–3 of Article 84 of the Criminal Code). In all these cases, the consequence of the application of the exemption from punishment by the court is the final refusal of the state to apply the punishment to the convicted person without any conditions and to review this issue in the future. In turn, the legislator also understands (describes) various criminal law concepts under exemption from serving a sentence. These are cases of the court passing a decision on temporary non-fulfillment of the prescribed punishment with a certain condition within a certain period (Articles 75, 79, 104 of the Criminal Code). These are also cases of non-application of the court-appointed punishment (Part 5 of Article 72, Article 80, 106, Article 86 of the Criminal Code). These are also cases of a decision on the release of a convicted person from further serving a sentence, which is already being served against him according to a court verdict (Articles 81, 107, 83, parts 1–2 of Article 84, Articles 86, 87 of the Criminal Code) [6, p. 64-65].

Therefore, exemption from punishment, according to the researcher, consists of based on the provisions of the criminal law and following the procedure provided for by the Code of Criminal Procedure and the Code of Criminal Procedure of Ukraine, the state refusal to punish a convicted person, applying punishment to him during the adoption of the sentence or its execution, further serving the prescribed punishment, as well as execution of the punishment in the form and limits determined by the court verdict.

We are inclined to support those scientists who point out that exemption from punishment consists in the exercise by the court of its authority, according to which it (the court), in the presence of the grounds and conditions provided for by the Criminal Code of Ukraine, terminates the full or partial execution of the punishment already assigned to a person by a guilty verdict.

Along with exemption from punishment, there is a waiver of punishment, which should be understood as the authority of the court, according to which it (the court), in the presence of grounds and conditions provided for by the Criminal Code of Ukraine, does not allow (excludes) the imposition of punishment in the guilty verdict on the person who committed the crime. At the legislative level, such a legal phenomenon is today called actual exemption from punishment. But such an exemption from punishment is nothing more than a conviction without punishment, that is a waiver of punishment. According to some domestic researchers, the term «release» cannot be defined through the concept of «rejection», because, unlike release, one can only reject what has not yet come [7, p. 158-160; 8, p.121-122].

In connection with the implementation of criminal liability, the convicted person receives a condemnation from the state (criminal record) and is subject to various restrictions. Most of these restrictions are legal. Such restrictions are based on the limitation of the convicted person's legal behaviour or a variant of behaviour and are inherent in all types of punishment, as well as some types of exemption from punishment. For example, in the case of applying the release of a person from serving a probationary sentence (Article 75 of the Criminal Code of Ukraine), the court may impose on the person obligations (Article 76 of the Criminal Code of Ukraine) to carry out measures provided for by the probation program, aimed at the correction of the person. Along with the limitations of the convicted person's rights, criminal responsibility is also realized in the forced performance of the duties assigned to the convicted person.

At the same time, the legislation, implementing the application of criminal legal measures other than punishment, essentially renounces the principle of inevitability of punishment but does not renounce the principle of inevitability of criminal responsibility for committing a criminal offense. In fact, in the case of applying criminal legal measures, other than punishment, for a committed offense, the legislator does not pursue the goal of punishment.

On the other hand, in the case of exemption from serving the sentence, the humanism of modern criminal legislation is more clearly revealed, and the main goal of criminal responsibility becomes more convincing: correction and re-education of persons who have committed a criminal offense. Achieving the goal of criminal liability without serving a sentence is a manifestation of one of the principles of criminal law - the principle of economy of repression. This principle manifests itself in achieving the same result that is achieved when serving a sentence, but with much less effort from society and using more humane means [9, p. 328].

The legal consequence of a person's conviction, even in the case of no punishment or exemption from serving a sentence, is a criminal record with all its legal and social restrictions.

Conclusions. Therefore, the application of exemption from serving a sentence is determined by the goal (objectives), which in turn are the means of ensuring the objectives of the criminal policy of the state.

The institution of exemption from serving a sentence is intended to achieve the goal of criminal liability in terms of general and special prevention, and correction of the convicted, but without the application of serving the sentence imposed by the person. According to the current criminal legislation, exemption from serving a sentence is one of the forms of realization of criminal responsibility on a par with punishment.

In our opinion, the main thing in the case of exemption from serving a sentence is the recognition of a person guilty of committing a criminal offense based on a guilty verdict of the court and the possibility of achieving the goal of criminal responsibility without serving the sentence.

REFERENCES

1. *Kryminalnyi kodeks Ukrainy* [Criminal Code of Ukraine]: Zakon Ukrainy vid 5 kvit. 2001 r. № 2341-III. URL: <https://zakon.rada.gov.ua/laws/show/2341-14>. [in Ukrainian].

2. *Kryminalne pravo. Zahalna chastyna* [Criminal law. General part]: pidruchnyk / za red. A. S. Benitskoho, V. S. Huslavskoho, O. O. Dudorova, B. H. Rozovskoho. Kyiv : Istyna, 2011. P. 881–882. [in Ukrainian].

3. *Kryminalne pravo Ukrainy: Zahalna chastyna* [Criminal law. General part]: pidruchnyk / V. I. Borysov, V. Ya. Tatsii, V. I. Tiutiuhin ta in. ; za red. V. Ya. Tatsiia, V. I. Borysova, V. I. Tiutiuhina. 5-te vyd., pererob. i dopovn. Kharkiv :Pravo, 2015. P. 423. [in Ukrainian].

4. *Kryminalne pravo Ukrainy. Zahalna chastyna* [Criminal law. General part]: pidruch. / Yu. V. Aleksandrov, V. I. Antypov, M. V. Volodko ta in. ; za red. M. I. Melnyka, V. A. Klymenka ; vyd. 3-tie, pererob. ta dopovn. Kyiv : Yurydychna dumka, 2004. P. 281. [in Ukrainian].

5. Knyzhenko O. O. (2003). *Zviltennia vid vidbuvannia pokarannia z vyprobuvanniam za kryminalnym pravom Ukrainy* [Exemption from serving a sentence with probation under the criminal law of Ukraine] : dys. ... kand. yuryd. nauk : 12.00.08. Kharkiv, 207 p. [in Ukrainian].

6. Horokh O. P. (2019). *Suchasni kryminalno-pravovi problemy zviltennia vid pokarannia ta yoho vidbuvannia* [Modern criminal law problems of release from punishment and its serving] : monohrafiia / za nauk. red. A. A. Muzyky. Kyiv : Dakor, P. 64–65. [in Ukrainian].

7. Yashchenko A. M., Briashchei R. I. (2013). *Zviltennia vid pokarannia ta yoho vidbuvannia: ziasuvannia pravovoi pryrody ta vyznachennia poniat* [Exemption from punishment and its serving: clarification of the legal nature and definition of concepts]. Visnyk Kharkivskoho natsionalnoho universytetu imeni V. N. Karazina. Seriia: Pravo. № 1082. P. 158–160. [in Ukrainian].

8. Kuts V. M., Yashchenko A. M. (2013). *Prymyrennia uchashnykiv kryminalno-pravovoho konfliktu (kryminalno-pravovyi aspekt)* [Reconciliation of participants in a criminal-legal conflict (criminal-legal aspect)] : monohrafiia. Kharkiv : Yurait, P. 121–122. [in Ukrainian].

9. Kryminalno-vykonavche pravo Ukrainy [Criminal law of Ukraine]: pidruchnyk / [V. M. Trubnykov, V. M. Kharchenko, O. V. Lysodid ta in.]; za red. V. M. Trubnykova. Kharkiv : Pravo, 2001. 384 p. [in Ukrainian].

Дата надходження: 12.03.2024

Роман ШАЙ

Національний університет «Львівська політехніка»,
Навчально-науковий інститут
права, психології та інноваційної освіти,
доцент кафедри міжнародного та кримінального права
кандидат юридичних наук, доцент
roman.y.shai@lpnu.ua
ORCID ID :<https://orcid.org/0000-0003-2788-6035>

ПОНЯТТЯ ТА ПРАВОВА ПРИРОДА ІНСТИТУТУ ЗВІЛЬНЕННЯ ВІД ПОКАРАННЯ ТА ЙОГО ВІДБУВАННЯ

У статті розкриваються поняття та правова природа інституту звільнення від покарання та його відбування покарання, оскільки цей інститут тісно пов'язаний як з метою покарання так і з завданнями кримінальної відповідальності загалом.

Вітчизняна кримінально-правова політика орієнтована на створення та забезпечення ефективного функціонування системи заходів правового впливу на протиправну поведінку людини. Основним кримінально-правовим наслідком у цих відносинах постає кримінальна відповідальність, а найпоширенішою формою її втілення залишається покарання.

Відповідно до принципу невідворотності кримінальної відповідальності та покарання особа, яка вчинила кримінальне правопорушення, повинна бути притягнута до кримінальної відповідальності, яка, за загальним правилом, реалізується за допомогою призначення покарання певного виду та розміру. Призначення покарання за вчинене кримінальне правопорушення є правовим наслідком визнання особи винною у вчиненому кримінальному правопорушенні. У той же час відповідно до інших принципів кримінального права – гуманності та економії заходів кримінальної репресії – за наявності умов та підстав, передбачених у Кримінальному кодексі України, особа може бути звільнена від кримінальної відповідальності або від покарання та його відбування. Незважаючи на те, що вказані інститути застосовуються за наявності певної позитивної посткримінальної поведінки

суб'єкту кримінального правопорушення та є проявом компромісу з боку держави, вони мають і відмінності, які чітко не визначені законодавцем, тому це питання потребує додаткового дослідження та правової аргументації.

Поняття звільнення від кримінальної відповідальності не можна ототожнювати з відстороненням від відповідальності у зв'язку з відсутністю в діях особи складу злочину чи за наявності обставин, які виключають злочинність діяння. Законом передбачається можливість або обов'язок звільнення від кримінальної відповідальності особи, в діях якої міститься певний склад злочину. Відсутність складу злочину в діях особи виключає можливість звільнення, бо не можна звільняти від кримінальної відповідальності того, хто злочину не вчинив.

Ключові слова: покарання, звільнення від покарання, звільнення від відбування покарання засуджений, кримінальне право, виправлення, кримінальне правопорушення.