

## ABOUT THE PROVISION OF CRIMINAL LIABILITY EXEMPTION IN THE 1999 CRIMINAL LAW CODE OF VIETNAM

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In order to improve the efficiency of the fight against crime and for the sake of fair and correct treatment policy, our lawmakers together with classifying types of crimes has divided the criminal law into different criminal cases and different criminal offences. Notably, the division of offences and types of criminals has reflected through a fact that not all crimes and offenders have to face criminal liability.

Rather, an offender shall be exempted from criminal liability under exclusive privileged conditions and legal foundations.

Exemption from criminal liability was not acknowledged in the Vietnam Criminal Law as an independent provision but it was realized and applied in reality and legal documents under such different names as "criminal liability exemption", "absolution", "defendant acquittal", etc.

It was in the Criminal Code of 1985 that the provision of criminal liability exemption was officially recognized by lawmakers and it was amended in the second codification in Criminal Code of 1999. However, reality shows that the provision has not been paid proper attention to and has not been comprehensively and intensively studied. Both Criminal Code of 1985 and that of 1999 have not given a legal definition of criminal liability exemption and its specific legal consequences. Rather, cases of exemption

from criminal liability are sporadically stipulated in articles and chapters in the General part and The crime parts, Criminal Liability. This, obviously, is scientifically incorrect and unqualified in terms of legislative techniques. Moreover, the application of Criminal law to trial and reality shows that quite a lot of inadequate regulations of exemption from criminal liability remain. Especially, there are many cases in which the provision could have been applied but unfortunately, it has not been stipulated in the criminal Code. Therefore, it is significant that the existing legal regulations of exemption from criminal liability should be further and fully studied for the sake of scientific clarity. Accordingly, proposals are expected to be given for the better norms of the provision, which is in match with theoretical-practical and social-legal reality.

### 1. The Concept of Exemption from Criminal Liability

Exemption from criminal liability is one of important provisions in the Vietnam Criminal Law, representing our party and State's humanity policy towards lawbreakers and their wrongdoings. It is at the same time aimed at encouraging lawbreakers to atone from their offence by their good deeds, showing the good impact of reeducation activity, helping them quickly fall in line with their community, becoming helpful to society. Much significant it is, the

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concept of exemption from criminal liability has not been recognized in realistic criminal law by lawmakers. Currently, there are divergent perceptions of this concept in our criminal law science as follows:

◆ “Criminal liability exemption is a humanity provision of the Vietnam Criminal Law and exercised by granting legal consequences absolution of a dangerous-to-society action which is prohibited in criminal law to the person who is responsible for that action.”(4, pg7)

◆ “To exempt someone from criminal liability is to acquit a crime stipulated by law of legal consequences”(22, pg293)

◆ “Criminal liability exemption is the acquittal of a crime and punishment granted to the man who commits that crime, and then he is not regarded as guilty. In other words, to exempt someone from criminal liability is to acquit him of legal consequences stipulated in criminal law.”

◆ “Criminal liability exemption is the acquittal of legal consequences granted to a man who commits a crime under some conditions stipulated by law.(10, Criminal liability ex.p.109).

◆ “To exempt someone from criminal liability is not to prosecute him for the crime he commits”(15, pg 324)

◆ “Criminal liability exemption is the acquittal of criminal liability granted to a man who commits a crime which is stipulated in criminal law, represented in a document of State’s competent agency.”

◆ “To exempt someone from criminal liability is not to force him to take responsibility for the crime he commits”(21, pg 166)

◆ “To exempt someone from criminal liability is not to prosecute him for committing a crime and subsequent consequences resulted from being subject to coercive measures of criminal liability and police record. In reality, in cases that the offenders are exempted from criminal liability right in trial period by the Court, Criminal liability exemption includes the exemption from coercive measures, criminal liability and police record”(19, pg 9-10)

◆ Exempting someone from criminal liability is not forcing a man to hold criminal liability for the crime he commits.

◆ “Criminal liability exemption is the exemption from disadvantageous legal consequences including being convicted. And of course, a man being entitled to criminal liability exemption is not regarded as guilty and subject to punishment and police record”(14, pg 97)

As such, in essence, all the above-mentioned perceptions of criminal liability exemption are relatively concise, appropriate but more important are consistent in emphasizing its legal content and nature. However, in our opinion, the concept of criminal liability exemption which has a comprehensive and correct content is legally concise and consistent and at the same time in match with appropriate to the State’s humanity policy is expected to answer such questions as what its legal nature (criminal liability exemption) is, how it works in practice; which competent agency is entitled to apply it; who are subject to it and which requirements and legal basis it is expected to be met. Therefore, on the basis of already-mentioned scientific views, the analysis of regulations of related criminal law, and criminal law science, we think criminal

liability exemption can be defined as follows: criminal liability exemption is a humanity provision of the Vietnam Criminal Law and is regulated in a legal document which acquits a man from disadvantageous legal consequences of committing dangerous-to-society crime. This provision is applied by investigation agency, Board of control and the Court depending on corresponding procedures on the basis of adequate evidence and stipulated conditions.

## **2. Basic Features of Criminal Liability Exemption**

Based on the above-mentioned definition of criminal liability exemption and the study on the regulations of the existing criminal law, some basic features of criminal liability exemption are coined as follows:

◆ Firstly, together with a series of other provisions like provision with cases excluded from criminal behaviors' characteristics, mitigating circumstances of criminal liability, the exemption from punishment, prescription (including prescription of criminal liability proceedings and that of the sentence execution), exemption from judicial execution, suspended sentence and police record. The provision of criminal liability exemption best reflects the humanity principle of criminal policy in general and Vietnam Criminal Law in particular.

◆ Secondly, criminal liability exemption is applicable only to the one who is subject to a given crime and he shall meet the requirements of legal foundations and conditions stipulated in current criminal law and depending on specific cases, that criminal liability exemption is optional or obligatory. If it is optional, even when all legal foundations and stipulated conditions

are met, whether criminal liability exemption is applied or not shall be decided by competent bodies.

◆ Thirdly, criminal liability exemption decided by State's competent bodies shall be represented in legal documents. Specifically, investigation agency shall make a decision of suspending an investigation (by written documents) when there are foundations stipulated in Article 19, 25 Clause 2, Article 69, Criminal Code and Article 164, Criminal Procedure Code of 2003. Board of Control shall make a decision of suspending a case if there is one of foundations stipulated in Article 19, 25, and Clause 2, Article 69, Criminal Code 9 Article 169, Criminal Procedure Code of 2003) or withdrawing a decision of prosecution and requesting the Court to suspend a case (Article 181, Criminal Procedure Code of 2003).

◆ Fourthly, depending on specific periods of criminal proceedings, criminal liability exemption shall be merely executed by a State's competent body. Specifically, it might be either Investigation agency, Board of Control or the Court (Articles 164, 169, 181, Criminal Procedure Code of 2003) and it is expected that all requirements of legal foundations and conditions stipulated in criminal law are fully met.

◆ Fifthly, criminal liability exemption shall always go in hands with the provision of criminal liability in Vietnam criminal law. The concept and basis of criminal liability exemption is derived from those of criminal liability. Accordingly, in a broad sense, criminal liability is the disadvantageous legal consequences that an offender is to take for committing a crime which is executed by the application of one or more

State's strict coercive measures stipulated in Criminal Law.

Exempting someone from criminal liability means not forcing him to face disadvantageous legal consequences of criminal behavior which would have been born by him under the stipulation of criminal law if legal foundations and conditions required by law entitled to the exemption from the crime had not been fully available. Besides, criminal liability exemption and criminal liability share the same basis, i.e. "the commitment of a dangerous-to-society crime which is regarded as guilty by criminal law" (6, pg133). In both of these cases, the subjects committing the dangerous-to-society crime which is regarded as guilty by criminal law are all offenders. To put it another way, subjects who commit a crime shall have necessary capacity of criminal responses and reach required age. However, the convict is to take the criminal liability while the offender has full legal foundations and conditions required to be entitled to the exemption from criminal liability stipulated by criminal law. This means if seeing that criminal liability is not really necessary to be applied in some given cases but the aim of the anti-crime fight can still be achieved, the competent bodies shall acquit the offenders of criminal liability. The same decision could be applied to cases that show the impact of reeducation programs on the offenders.

◆ Sixthly, one who is entitled to criminal liability exemption is obviously not subject to disadvantageous legal consequences of the crime (eg: being exempted from criminal liability investigation, punishments, other criminal coercive measures, police record and not being regarded as guilty. However,

whether or not the offenders are subject to one of more other criminal coercive measures has not been stipulated in our current Criminal Code. As for this issue, People's Supreme Court's Judge Council released Decree 02'HDTP dated June, 1<sup>st</sup>, 1986 on the instruction of applying some regulations of Criminal Code stipulated in Section VIII as "when exemption from criminal liability is executed, the Court shall not be permitted to decide whatever punishment but will still be able to make a decision on compensation for the victims and on matters related to material evidence". Nevertheless, trial reality shows that acquitter might be subject to one or more forcing measures in other corresponding law branches such as preventive measures under the regulation of the Criminal Procedure Code; being forced to make something return to its primary state or make compensation, etc. under the regulations of civil law; being fined, warned under regulations of administrative law; having labor-contract terminated under labor regulations or being disciplined, etc(4,pg 7)

◆ And finally, the introduction of the Provision of criminal liability exemption in the Vietnam Criminal Code is of great significance. It does not only encourage lawbreakers to atone for their offences by good deeds, showing the impact of reeducation activities on wrongdoers, facilitating their process of falling in line with the whole society but also create legal foundations for the combination of State's criminal coercive measures and society's influencing measures in re-educating lawbreakers, helping them become helpful citizens.

### **3. Cases of Criminal Liability Exemption Stipulated in the Vietnam Criminal Code of 1999**

A study on the norm of the provision of criminal liability exemption under the regulation of the Criminal Code of 1999 shows that in the current criminal law, there are altogether 9 cases, sporadically in the whole code including five cases in The General Part (Article 19, 25, Clause 2, Article 69), four cases in The Crime (Clause 3, Article 80; Section 2, Clause 6 Article 289, Clause 6 Article 290, Clause 3 Article 314). Each of these is considered as follows:

#### ***3.1 Criminal Liability Exemption Resulted from Stopping Committing Crime in Halfway on Self-will***

Article 19, Criminal Code of 1999 stipulates that stopping committing the crime in half way on self will is voluntarily not to commit the crime till the end although there is no obstacle. The offender in this case is entitled to be exempted from criminal liability for the crime he intends to commit; if the criminal behavior includes factors that are sufficient to continue another offence, the doer is to take criminal liability for this offence. Accordingly, criminal liability exemption is obligatory. However, it is applied only for cases in which the crime is committed in the period of preparation which has not been finished, not depending on the types of crime (not very serious, serious, very serious or extremely serious crimes) if one's criminal behavior includes factors that are sufficient to constitute an offence, one is to take responsibility for this offence. As such, this provision is a humanity regulation and at the same time reflects the legislative principle, the fairness

in treatment of our policy as well as in the fight against crime, protecting social relations from criminals. However, our Criminal Code of 1999 merely has regulations of applying criminal liability exemption to a sort of accomplice but there is no specific and clear regulation on applying it to three types of accomplice including organizer, stimulator and assistant (7,p.g 224). Of course this issue has been mentioned in Item I, Decree 01-89/HĐTP dated April, 19<sup>th</sup>, 1989 by Judge Council, people's Supreme Court on amending instruction of some regulations of criminal code. However, it is expected to be officially noted in the current Criminal Code of 1999.

#### ***3.2 Criminal Liability Exemption Thanks to Situational Progress***

Pursuant to Clause 1, Article 25, Criminal Code of 1999, the offender shall be exempted from criminal liability if in the process of the investigation, prosecution or trial, the criminal behavior or the offender is no longer dangerous to society thanks to situational progress. It was optional case in the Criminal Code of 1985. Therefore, this emerging feature has shown the humanitarian trend in the Criminal Code of 1999 towards lawbreakers and their criminal behaviors as well. Besides, some amendments in the prosecution phase (alongside with investigation and trial phase stipulated in Article 48, Criminal Code of 1985) have been made in the Item I. Once the offender has sufficient legal foundations and required conditions he is entitled to be exempted from criminal liability. Also in Clause 1, Article 48, that the provision of criminal liability exemption is applied to certain types of criminals is not stated.

Therefore, it is applicable to all types of criminals (Clause 3, Article 8) providing that sufficient common legal foundations (when investigation, prosecution or trial are underway or owing to situational changes); also one of the two above-mentioned conditions has to be met (Item 1)- criminal behaviors or criminal is no longer dangerous to society. However, it is not applicable if two cases are separated. This is because one can be exempted from criminal liability when in the investigation, prosecution or in trial, criminal behavior is not dangerous to society, but the criminal is.

### ***3.3 Criminal Liability Exemption to Offenders for Showing Repentance and Desire to Redeem Their Faults***

Pursuant to Clause 2, Article 25, the Vietnam Criminal Code of 1999, in the case which the offender confesses to the authority before the crime is known, declares everything, making a helpful contribution to the authority's work in realizing and solving the case, minimizing the damage caused by the crime, he can be exempted from criminal liability. The case is exempt only when the following requirements are met by the offender.

- ◆ He should confess to the authority before the crime is known.
- ◆ He should declare everything (his own activities and other accomplice's), contributing effectively to the authority's work to realize and solve the case.
- ◆ He should take an active role in preventing the consequences caused by the crime. In other words, he should actively prevent the consequences and keep to a minimum level damages to the State, organizations or people.

One noticeable thing is that confession and submission should be differentiated from each other. Confession means the offender confesses to the authority voluntarily after committing a crime. At the time, neither the crime itself nor the criminal has been known. Submission means the offender gives up to the authority after the crime or the criminal is realized although he may elude.

Apart from that, to be willing to surmount the damages means the offender willingly makes up for the damages (mostly to assets) caused by their offence. To be active in preventing consequences means to be active in preventing possible consequences or limiting the damage to the State, organization or to people. For this case, it is highly recommended that lawmakers should provide specific guidelines such as what being detected is, and who detects the offence, common people or the authority.

### ***3.4 Exemption from Criminal Liability When There is a General Pardon***

According to Clause 3, Article 15, Vietnam Criminal Code of 1999, one is exempt from criminal liability when he is given amnesty. This case is compulsory when there is some written amnesty documents. General pardon is exemption from criminal liability for given offenders or those who commit one type of crime.

It is ruled by the Vietnamese Constitution that only the National Assembly can give general pardon (Clause 10, Article 84). A general pardon is often given on some special historical occasions, which reveals the tolerance of the State to offenders. Amnesty documents, issued by the

National Assembly are applied to cases which are laid on.

One is quit from prosecution, and in-prosecution, the process should end immediately, if he has served the punishment, he is not considered as an ex-convict. For one who finds himself innocent, the case can be laid before the Court as his wish. If he is found not guilty it is the Court's responsibility to announce the truth, if he is found guilty, he can still be exempted from criminal liability thanks to the amnesty documents.

### **3.5 Exemption from Criminal Liability for Juvenile Offenders**

Clause 2, Article 69, Vietnam Criminal Code of 1999 rules that a juvenile criminal can be exempted from criminal liability in the case his crime is little serious or serious but causes little damage, and he is taken into supervision by his family or organization. Once some given conditions are met and there are some legal bases, this exemption is optional and can be decided by all jurisdictional bodies' depending on corresponding period of criminal procedure. This is different from the Criminal Code of 1985 (Clause 3 Article 59) in which the law stipulates that only the People's Board of Control can exempt juvenile offenders from criminal liability. Some requirements according to which one can be a subject of this tolerant policy are as follows:

- ◆ First, the offender is juvenile (Article 68, Criminal Code of 1999)

- ◆ Secondly, the crime he caused should be little serious or serious with little damage.

For this condition, unlike the Criminal Code of 1985, the Criminal Code of 1999 adds the case of which the offender commits serious crime into the list of those who can be exempted from criminal liability. By Criminal Code of 1985, a serious crime is one that causes great damages to the whole society and the maximum sentence for those who commit this kind of crime is more than five-year imprisonment, life sentence, even death penalty meanwhile by the Criminal Code of 1999, the maximum sentence for serious offences made by the juvenile is 7 years in prison. Obviously, the Criminal Code of 1999 brings more opportunities for young offenders to be exempted from criminal liability. This is the tolerance in Vietnamese criminal law.

- ◆ Thirdly, there are a lot of mitigating details which can be defined either in law (Clause 1, Article 46, Criminal Code of 1999 or out law (in documents guiding law application or in cases considered and marked by the Court).

- ◆ Fourthly, the offender is supervised and trained by his family or some organizations. This creates good conditions for young offenders to correct himself, develop healthily and become a good citizen. Also, it helps to socialize re-educating activities for offenders, putting them under the supervision of his family and community.

That the law, however, rules "Juvenile offenders can be exempted from criminal liability if they commit a crime which is not so serious or serious but with little damage." (Clause 2, Article 69) is easily misunderstood to be contradictory with the regulation which rules "A serious crime is one that causes great damages to the society

and the maximum sentence for this kind of crime is 7 years' imprisonment." This can be explained that there is no serious crime with no great damages, if there is, it is the case the crime of little seriousness, or the crime with little damage. As a result, to be more concise and adequate, it should be rewritten like this " ..serious crime with little damages...". Furthermore, the law does not stipulate clearly the cases in which the offenders are watched over and re-educated by his family, or by some given organizations.

### ***3.6. Exemption from Criminal Liability for Spies***

Espionage is a serious crime threatening national security. For this crime, the State applies strict and decisive punishment because maintaining national security stable is a matter of survival of any country. Nonetheless, in spite of its dangerous nature, the State still has some particular treatments for the offenders on the basis of the features and how dangerous the crime is in case there is inadequate legal evidence as well as some given conditions. It is therefore stipulated in Clause 3, Article 80 of the 1999 Criminal Law that "A spy who fails to do his given job but confesses it to the authorities or competent State bodies and declares with all sincerity is exempted from criminal liability." In case the offender intentionally acts as a spy, or maybe under some circumstances, he may be forced to do this job, or be bought over, be seduced to give information to foreign parties but after a time, on realizing that his deed is illegal and may harm national security and once known to jurisdictional organizations, he will be strictly punished, he comes to the authority and confesses everything, the offender is

exempt. The exemption should also be based on the nature of the offence. If he is realized as a repentant sinner who may need no prosecution, there may be exemption.

### ***3.7 Exemption from Criminal Liability for Bribers or Those Who Act as a Bribery Intermediary***

Section 2, Clause 6, Article 289 and Clause 6, Article 290 rule over the case of exemption of criminal liability for people who bribe or act as an intermediary in bribery. Pursuant to Section 2, Clause 6, Article 289, Criminal Code of 1999, if one actively declares his offence under no force before it is disclosed, he may be exempted from criminal liability and be given back part or whole of his bribe value. A briber is one who asks a person of important function to receive his money or accept the bribe request of the latter. If his offence has not been disclosed and despite of possibility of hiding the case, he confesses to the authority under no force, he can be exempt from criminal liability as he is a repentant briber who declares all his offence and other's sincerely. This represents the humanity in Vietnamese law, encouraging one to do good deeds after committing a crime.

The Criminal Code of 1985 does not grant criminal liability exemption to a bribery intermediary. This means anyone proved to be a intermediary for a bribery can be liable for the crime. Meanwhile, in the Criminal Code of 1999, bribery intermediary is a separate article and the offenders can be exempted from criminal liability. Clause 6, Article 290 of the 1999 Criminal Code says one who acts as an intermediary in a bribery can be exempted from criminal liability by actively declaring his offence before it is known."



Both the above cases of exemption are optional and can be applied on the basis of adequate evidence and corresponding conditions according to which one has to meet. This can be seen that our legal policy is to punish those who accept bribes strictly and at the same time to encourage those who actively declare to the authority, facilitating the competent bodies' activities in discovering early and fighting effectively this kind of crime.

### ***3.8. Exemption from Criminal Liability for Subjects who Does not Inform the Authority of the Crime***

Article 314, Criminal Code of 1999 says that not denouncing a criminal is considered as the kind of criminal. The criminal knows clearly of a crime but does not intentionally keep the authorities informed of it. This offence is regarded as crime only to some particular offences (which are defined in Article 314, and are referred to in Article 313, Criminal Code of 1999). However, according to Clause 3, Article 314, if the offender has tried to prevent the criminal or to limit the consequences of the crime, instead of being convicted, he will be exempted from criminal liability. If the offender meets one of the two following conditions (defined in Clause 3, Article 314), he will be exempted from criminal liability.

- ◆ The one who does not denounce the crime has prevented the criminal.

- ◆ The criminal limits consequences of the crime.

This case of exemption is optional. The offender is exempt when he has adequate evidence. Another feature that exists in the Criminal Code of 1999 is in Article 22, in which there is a clause about the exemption

from criminal liability for the criminal's grandparents, parents, siblings, and spouse who do not denounce him to the authorities except for some kinds of crime threatening national security or some specially serious crimes (similar to Clause 2, Article 314, Criminal Code of 1999)

### **4. Some Proposals**

Having studied the exemption from criminal liability both in theory and in practice, some proposals to perfect the norms and regulations of the Vietnam Criminal Code of 1999 are made as follows.

- ◆ Firstly, in each case of exemption from criminal liability (including the General part and the Crimes part) there should be guiding documents in details and there should be some uniform in conceptions on the basis of specific conditions which have been presented above.

- ◆ Secondly, the exemption of liability from criminal liability which is stipulated sporadically in different parts of the General part and the Crime part is unreasonable and unsuitable. So, immediate, concise and accurate adjustments should be made by law makers.

- ◆ Thirdly, exemption from criminal liability and exemption from punishments should be clearly differentiated. According to Article 54, the lawbreakers with crime of mitigating details as defined in Clause 1 Article 46 can be exempted from punishments if his offence is worth some tolerant treatment but not the exemption from criminal liability. Clause 3 Article 314 says: "one who tried to prevent the criminal or limit the consequences caused by the crime can be exempted from punishments or from criminal liability". It can be seen that

lawmakers have separated two definitions but not in corresponding stipulations, which makes the application seem to be harder. Exemption from punishment and exemption from criminal liability are different in nature, condition, competence and procedures of application. A person exempted from punishments is not exempted from criminal liability. Yet, one who is exempted from criminal liability can enjoy exemption from punishments. What's more, only the Court has the right to exempt someone from punishments after announcing a verdict meanwhile different bodies (Investigation Agency, Board of Control or the Court) can exempt a person from criminal liability.

◆ Fourthly, in the current Criminal Code of 1999, only juvenile offenders are ruled to be in watch and be re-educated by parents, or by the organization where they work and live. For other cases, there is no

corresponding stipulation. Thus, in order to prevent the one who is exempted from criminal liability from repeating the crime and to help him mixed up with the whole society, there should be stipulations for all cases. They should be watched over and re-educated. By that way, the effectiveness of the combination between coercive measures taken by the State and the influence of social education is promoted.

◆ Finally, in order to keep up with other countries' criminal law and the practicality as well as to humanize the State's criminal provisions in the period of constructing a law-ruled state, some more cases of exemption from criminal liability like exemption for the offender when the victim withdraws the request of prosecution; for captivity escapers or when there is a detente between the victim and the offender, the time of prosecution procedure is over should be added.

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## **VỀ CHẾ ĐỊNH MIỄN TRÁCH NHIỆM HÌNH SỰ TRONG BỘ LUẬT HÌNH SỰ VIỆT NAM 1999**

**Trịnh Tiến Việt**

*Khoa Luật, Đại học Quốc gia Hà Nội*

Miễn trách nhiệm hình sự là một điều khoản nhân đạo của Bộ luật hình sự Việt Nam, có liên hệ và có cùng cơ sở với trách nhiệm hình sự. Qua nghiên cứu về điều khoản miễn trách nhiệm hình sự và kết hợp với thực tế, tác giả đã phân tích và làm rõ một số vấn đề dưới đây:

- Quan niệm thế nào là miễn trách nhiệm hình sự
- Các đặc điểm của miễn trách nhiệm hình sự
- Các trường hợp miễn trách nhiệm hình sự trong Bộ luật hình sự Việt Nam 1999.

Trong khi phân tích tác giả đã kết luận và đã đưa ra một số đề xuất để hoàn thiện điều khoản về miễn trách nhiệm hình sự trong Bộ luật hình sự Việt Nam hiện hành.