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**CONVICTION OF PERSON WITHOUT IMPOSITION OF
PUNISHMENT – ACCORDING TO THE CRIMINAL LEGISLATION
OF UKRAINE**

Abstract: The article deals with theoretical and practical aspects of the implementation of the state policy of Ukraine in relation to the application of encouraging standards of the current Criminal Code of Ukraine. It sets the criminal law nature of the phenomenon of conviction of a person without imposition of punishment and identifies the main types of such conviction. The authors discussed the problematic issues of application of the conviction without imposition of punishment in law enforcement practice. In addition, the paper outlines main directions of the development and legislative improvement of the concept of conviction of a person without imposition of punishment.

Keywords: criminal liability, impunity, conviction without imposition of punishment, sentence without imposition of punishment, criminal record

Formulas: 0, fig.: 0, tabl.: 0, bibl.: 12

Introduction. Choosing the way of European development by the Ukrainian civil society led to radical reforming of the state policy of the country and the need to improve the national legislation. Given the new objective realities, the content of Ukrainian criminal law policy is also changing. Among other matters, the native criminal law reflects the modern principle of combating crime – the inevitability of criminal law response to a committed criminal offense, replacing the principle of inevitability of punishment. This is particularly evidenced by the consolidation of a phenomenon of impunity in the current Criminal Code of Ukraine, to which Chapter XII of the General Part of the Criminal Code of Ukraine is dedicated along with the related phenomena of pardon and imposed penalty adjustment. It is known that the practice of impunity under the Criminal Code of Ukraine is unstable and contradictory, and the compliance of its legal definition with the nature and content of this phenomenon causes justified skepticism. By efforts of the commentators of Chapter XII of the General Part of the Criminal Code of Ukraine and the authors of other publications on this issue, the doctrine of impunity intertwined with related doctrines of pardon, substitution by light punishment and mitigation of punishment, therefore it is difficult for a law enforcer to puzzle out this cobweb.

Literature review and the problem statement. Currently, the scientific

community pays due attention only to the institute of pardon. Many publications of domestic researchers are devoted to its study, including P.P. Andrushko, V.P. Iemeljanov, D.V. Kaznacheieva, O.O. Kvasha, O.O. Knyzhenko, V.A. Lomako, V.T. Maliarenko, M.I. Melnyk, A.A. Muzyka, O.V. Naden, V.O. Navrotsky, V.P. Tykhyi, I.S. Yakovets etc. Scientists did not pay much attention to the impunity. This phenomenon has been mostly considered tangentially, as a part of other broader criminal law institutes. Some aspects of impunity are highlighted in scientific publications of such national experts as M.I. Bazhanov, Iu.V. Baulin, V.I. Borysov, O.P. Gorokh, O.O. Dudorov, O.O. Zhytnyi, V.M. Kuts, O.V. Kozachenko, I.I. Mitrofanov, E.O. Pysmenskyi, A.O. Pinaev, V.V. Skybytskyi, G.I. Usatyi, P.L. Fris, M.I. Khavroniuk, S.S. Iatsenko, A.M. Iashchenko etc. The above requires a scientific understanding of the situation developed. Some separate theoretical and applied research of each of the phenomena provided for in Chapter XII of the Criminal Code of Ukraine is required.

Object of the article (objective) is to examine theoretical and practical aspects of the state policy regarding the use of incentive standards of the Criminal Code of Ukraine, establishing criminal law nature of the conviction without punishment, formulating its legislative definition, establishing the main types of such conviction and outlining the prospects for the development and improvement of this phenomenon.

Research results. Current Ukrainian criminal legislation contains dozens of incentive standards that certainly corresponds to the contemporary global trends of using means in the mechanism of legal response to criminal offenses, which are based not on the punishment, but on encouraging (stimulating) positive behavior that is an objective process, caused not only by the complexity and heterogeneity of the subject of criminal law regulation, but also by the need to humanize all spheres of public life. Thus, the General Part of the Criminal Code of Ukraine contains Chapter IX "Exemption from Criminal Liability" and Chapter XII "Impunity and Pardon" governing such criminal law phenomena as exemption of a person from criminal liability, exemption from probation, conviction without imposition of punishment and other phenomena that have been recently summarized as "adjustment of punishment" in the science of criminal law [Kuts 2012, p. 60].

However, a positive effect of the consolidation of a number of incentive norms in the Criminal Code of Ukraine is smoothed out by the imperfection of their legal definition. The criminal liability is not determined in the national criminal law, which fact certainly creates difficulties in understanding the phenomenon of exemption from it, as well as the criticism in respect of legislative regulation of articles on the exemption from criminal liability and on their application in the lawyers' practice. But a massive outcry has been recently caused by a discussion on the need to determine the criminal law nature of phenomena provided for in Chapter XII of the General Part of the Criminal Code of Ukraine and the proper formulation of their legal differentiation. This situation hardly deserves positive evaluation, so we agree with the conviction of O.O. Dudorov that the Chapter XII of the General Part of the Criminal Code of Ukraine should be revised and improved so that the concepts enshrined in it could be interpreted more or less clear, but not like they are today [Benitsky, Guslavsky, Dudorov, & Rozovsky 2011, p. 721]. Inadequate legal definition of the phenomena set forth in this section of the Code creates uncertainty in understanding their legal nature and the conditions for their incorrect application

in practice.

Nowadays the least explored among the phenomena described in the publication is the phenomenon of conviction without imposition of punishment. A small number of publications devoted to this issue and poor practice of applying articles on such conviction creates a false impression about the absence of this phenomenon in the national criminal law in general. However, referring to the current Criminal Code of Ukraine, we can see that the possibility of rendition of a guilty verdict without imposition of punishment is actually provided for in p.3 Art. 88 of the Code, where the legislator determined by fixing legal consequences of conviction: "persons convicted by a court verdict without imposition of punishment or with exemption from punishment, or those who served their punishment for an act, the criminality and penalty of which is eliminated by law, shall be deemed to have no conviction". In addition to this, the new Criminal Procedure Code of Ukraine No. 4651-VI dated April 13, 2012 states the possibility of conviction without imposition of punishment. In particular, the following is stipulated in p.1 Art. 377 of this Code: "if the accused is held in custody, the court shall release him from custody in the courtroom in case of acquittal; pardon; non-custodial sentence; conviction without imposition of punishment".

In view of the presence of regulations in the legislation regarding the conviction without imposition of punishment, it is necessary to establish the circumstances, in which it is possible in practical terms, and to determine which criminal law standards should be followed. Referring to the clarification given by the Constitutional Court of Ukraine in the Part Two of the resolution in the case under the constitutional submission of the Ministry of Internal Affairs of Ukraine on the official interpretation of the provisions of the Part Three Article 80 of the Constitution of Ukraine (parliamentary immunity case) No.9-pn/99 dated October 27, 1999, it is clear that: "... the criminal liability may only have form of punishment, it can be limited only to the conviction of a perpetrator under a court sentence (Part Two Article 50 of the Criminal Code of Ukraine 1960) ..." [Resolution of the Constitutional Court of Ukraine]. It appears from the contents of Part Two Article 50 of the Criminal Code of Ukraine 1960 that "any perpetrator may be exempted from punishment by a court sentence when it is recognized that this person shall not be considered socially dangerous at the time of proceedings due to his/her subsequent irreproachable conduct and honorable attitude towards work". Introduction to the scientific practical commentary of the Criminal Code of Ukraine 1960 shed light on the procedure for applying p. 2 Art. 50. According to the clarification provided by the authors of the commentary: "Impunity under p. 2 Art. 50 of the Criminal Code of Ukraine shall be carried out only by the court (Art. 7 of the Criminal Procedure Code of Ukraine). The court of the first instance does so by means of a conviction without imposition of punishment, and the court of cassation or supervisory instance – by means of a corresponding change in the verdict without its cancellation and case dismissal... A person exempted from punishment under p. 2 Art. 50 shall be recognized as having no criminal record (cl. 1 p. 1 Art. 55)" [Boyko, Kondratiev, Iatsenko 1997, p. 201; Kondratiev, & Iatsenko 1994, pp. 162-163]. As you can see, the Criminal Code of Ukraine 1960 envisaged the possibility of conviction without imposition of punishment by adopting a guilty verdict with impunity in connection with the loss of his/her social danger. In view of the above, it appears reasonable to study the current Criminal Code of Ukraine for the presence in it of relevant articles on the impunity. After reading the content of the current Criminal Code

of Ukraine, we find Art. 74, Part Four of which contains a statute identical to Art. 50 of the Criminal Code of Ukraine 1960. In determining the legal succession of the current standard on impunity in connection with the loss of social danger (p. 4 Art. 74) with respect to the relevant standard of the Criminal Code of Ukraine (1960), one should use the explanations given in the scientific practical commentary of the Criminal Code of Ukraine edited by S.S. Iatsenko, stating that "when a person committed a crime before the enactment of the Criminal Code of Ukraine 2001, the issue of his/her impunity in connection with the loss of social danger should be solved on the basis of p. 2 Art. 50 of the Criminal Code of Ukraine (1960)" [Iatsenko 2002, p. 166].

According to the content of the current p. 4 Art. 74 of the Criminal Code of Ukraine: "A person who committed a misdemeanor or a crime of average gravity, except for corruption-related crimes, may be exempt from punishment under a court sentence, if it is found that, given the irreproachable conduct and honorable attitude towards work, that person shall not be considered socially dangerous at the time of proceedings". As you can see, the difference is only in the terminology applied by the legislator to determine the reasons of establishing the fact of losing the social danger and recent changes to the content of the article on the basis of the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine" No. 1698-VII dated October 14, 2014. Unfortunately, the commentators of the Criminal Code of Ukraine ignored the issue of regulating the procedure impunity due to the loss of social danger during the whole period of its application. In particular, in the various editions of scientific and practical commentaries, authors only described prerequisites for impunity and grounds for recognizing a person as having lost his/her social danger, basically repeating the content of the article, or misinformed law enforcers, pointing to the need for imposition of punishment with further exemption from it [Iatsenko 2002, p. 165; Boyko, Kondratiev, Iatsenko 1997, p. 224]. Only after the adoption of the new Criminal Procedure Code of Ukraine on April 13, 2012 by the Verkhovna Rada of Ukraine, interpretations on the procedure for applying impunity due to the loss of social danger appeared in the relevant scientific practical commentaries to the Criminal Code of Ukraine, which give a possibility to evaluate the content and nature of this phenomenon. In particular, the scientific practical commentary under the general editorship of V.Ia. Tatsiy, V.P. Pshonka, V.I. Borysov, V.I. Tiutiugin, states that "when establishing the preconditions and grounds for impunity, the court shall be entitled (but not obliged) to exempt a person from punishment. In this case, according to p. 2 Art. 373 of the Criminal Procedure Code, the court shall render a sentence by which it convicts an accused of a criminal offense (crime), but exempts him/her from punishment, which means that it does not specify a particular type and size of the punishment for the committed offense. According to p. 3 Art. 88 of the Criminal Code, "Persons convicted by a court without imposition of punishment... shall be recognized as having no criminal record" [Tatsiy, Pshonka, Borysov, & Tiutiugin 2013, p. 300]. The following commentary under the general editorship of O.M. Dzhuzha, A.V. Savchenko and V.V. Cherney on the procedure of impunity under p. 4 Art. 74 of the Criminal Code of Ukraine stipulates that "within the meaning of the Criminal Code (p. 3 Art. 88) and the Criminal Procedure Code (p. 2 Art. 373, p. 1 Art. 377), the court has to render a sentence to find the accused guilty of a crime and to exempt him/her from punishment without imposition of a certain type and measure of punishment" [Dzhuzha, Savchenko, & Cherney 2015, p. 188].

As you can see, although eventually the scientific community has managed

to change attitudes to the criminal law nature of the phenomenon of impunity, the unsuccessful legal definition of this phenomenon causes non-specific clarification stated in the previous commentary (to exempt him/her from punishment without imposition of a certain type and measure of punishment). Within this framework, we should pay attention to the conclusions of V.M. Kuts that the impunity is possible only after its assignment by the court. Therefore, the traditional idea of impunity as a waiver of its implementation is illogical, because you can only waive something that has not yet occurred [Kuts 2013]. In order to eliminate the confusion of terminology and to formulate a proper legal definition of the phenomenon of impunity, one should consider the very nature of criminal liability, the form of which is the impunity. According to the current criminal legislation and relevant interpretations given by the Constitutional Court of Ukraine, criminal liability may lie solely in the conviction of a criminal [Resolution of the Constitutional Court]. We found that in the case of the impunity due to the loss of social danger, the court renders a guilty verdict without imposition of punishment. Thus there is the incurrance of criminal liability in respect of that person in the form of conviction of him/her and a criminal act committed by him/her without imposing appropriate punishment. So in this case it is not about the impunity, because it is not imposed at all, but about the conviction without imposition of punishment. In view of the above, the legal definition of the phenomenon, embodied in p. 4 Art. 74 of the Criminal Code of Ukraine, may be formulated as a conviction without imposition of punishment due to the loss of social danger. This definition will contribute to the proper and clear understanding of the criminal law nature of this phenomenon, as well as the formation of a uniform law enforcement practice on such conviction.

Knowing the nature and content of the conviction without imposition of punishment, it is necessary to determine which standards of the Criminal Code of Ukraine present this phenomenon, and to classify it by types. According to S.V. Poznyshev, each of the researchers of any manifold has to resort to the classification, the first and extremely important step that needs to be done in the study of a diverse and large group of phenomena [Poznyshev 1904, p. 1]. Bearing in mind that the conviction without imposition of punishment in the current criminal legislation is presented as impunity, we conclude that provisions similar to the provisions of p. 4 Art. 74 of the Criminal Code of Ukraine are enshrined in p. 5 Art. 74 and p. 2 Art. 84 of the Code. Thus, there are reasons to claim the existence of three types of conviction without imposition of punishment:

- 1) conviction without imposition of punishment due to the loss of social danger (p. 4 Art. 74 of the Criminal Code of Ukraine);
- 2) conviction without imposition of punishment due to the termination of period of limitation for the institution of criminal proceedings on the grounds provided for by Art. 49 of the Criminal Code of Ukraine (p. 5 Art. 74 of the Criminal Code of Ukraine);
- 3) conviction without imposition of punishment through another serious illness that prevents the completion of sentence (p. 2 Art. 84 of the Criminal Code of Ukraine).

Two more cases of conviction without imposition of punishment are mentioned in the Criminal Code of Ukraine. These include the conviction without imposition of punishment with the application of compulsory measures of an educational nature (Art. 105 of the Criminal Code of Ukraine) and the application

of compulsory measures of a medical nature in respect of persons recognized partially sane (p. 2 Art. 20 of the Criminal Code of Ukraine). However, these cases of conviction without imposition of punishment are associated with the application of compulsory restrictive measures in respect of convicted persons instead of punishment, which fact does not conform to our views of the criminal law nature of this phenomenon. We believe that the criminal law definition of these phenomena should be formulated as a conviction with the application of compulsory restrictive measures, and not as a conviction without imposition of punishment.

In addition, there is one more case of conviction without imposition of punishment in judicial practice, which in the future may qualify for legislative confirmation and recognition as a separate type. Clause 8 of Resolution of the Plenum of Supreme Court of Ukraine No.7 dated October 24, 2003 "On the Practice of Criminal Sentencing by Courts" refers to a case where upon the assignment of a lighter punishment than provided by article of the Special Part of the Criminal Code of Ukraine (Art. 69 of the Criminal Code Ukraine), none of the lighter punishments provided for in Art. 51 of the Criminal Code of Ukraine is applicable, given the age of the accused person or his/her health condition. In this case, according to the Resolution of the Plenum: "the court having the bases should dismiss the case and release the person from criminal liability or render a guilty verdict and exempt the convicted person from punishment" [On the Practice of Criminal Sentencing by Courts]. In other words, the second decision option proposed to the courts in such cases results in the rendering of a guilty verdict in respect of the convicted person without imposition of punishment. So actually we can talk about the existence of a necessity of legislative consolidation of the fourth type of conviction without imposition of punishment in the Criminal Code of Ukraine.

Analyzing the implications of conviction without imposition of punishment, we come to the conclusion that they are common to all its kinds, namely persons sentenced by court without imposition of punishment, shall be recognized as having no criminal record according to p. 3 Art. 88 of the Criminal Code of Ukraine. In our view, this legal provision is not very justified. In the national criminal law, the concept of criminal record is largely seen as an element of criminal liability. Whereas, in terms of law, the criminal record is artificially, and therefore unnaturally "pegged" to the imposition of punishment. In this regard, V.V. Golina wrote that a person shall be considered as having a criminal record from the day when a verdict becomes final and until the expunction of record. Thus, the reason for its occurrence is the existence of legal relationships, which include the fact of committing a crime by a person, as well as the fact of his/her conviction for this crime before criminal penalty. The connection of a criminal record with a specific crime is mediated by punishment, as the important feature of criminal penalty is that a criminal record occurs upon its assignment by the court, as opposed to other measures of state coercion [Golina 2006, p. 10-11]. Therefore, all cases of legal "avoidance" of punishment result in the non-occurrence of a criminal record. These provisions of the current criminal legislation are not conducive to clarification of the legal nature of criminal liability and the legislative wording of its definition. An unnatural case of conviction without a criminal record is created in the Criminal Code of Ukraine. These phenomena are not only related in terms of content, they are also very similar phonetically, because the legislator's initiative as to their separate application causes justified skepticism. In our opinion, the meaning of criminal liability

should be supplemented by another compulsory element – a criminal record that will contribute to the perfection of its criminal law nature.

Conclusions. We established the criminal law nature of the phenomenon of conviction without imposition of punishment under the criminal legislation of Ukraine. It was found that such conviction is carried out by the court rendering a guilty verdict without imposition of punishment. It was determined that the current Criminal Code of Ukraine contains three types of conviction without imposition of punishment; their classification was given. In addition, we formulated the hypothesis on the need to include a criminal record as a mandatory element into the content of conviction without imposition of punishment.

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Data przesłania artykułu do Redakcji: 03.04.2016
Data akceptacji artykułu przez Redakcję: 04.05.2016