



On Sub-Institutions of Exemption from Criminal Liability and Punishment Applicable to Military Personnel

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Abstract

Introduction: In light of recent legislative changes, the theoretical understanding of legal norms on exemption from criminal liability and punishment for military personnel has gained greater significance. These norms have acquired new specific features, the study of which will help to better understand the current state of military criminal law and identify trends in its development, which is important in the context of the growing militarization of society. *Purpose:* to identify the key characteristics that consolidate the provisions on exemption for military personnel into distinct sub-institutions. *Methods:* the author has used materials from judicial practice and theoretical sources and relies on the following methods of scientific cognition: comparative-legal (to compare the provisions devoted to exemption from criminal liability and punishment of military personnel in domestic criminal law); formal-legal (to interpret the norms under study); systematization (to classify the features that unite the specified norms into sub-institutions); analysis (to study individual elements of legal norms); synthesis (to combine the data into a coherent picture of the research subject). *Results:* the author has determined 3 specific features of the rules on exemption from criminal liability and punishment for military personnel; the emergence of a legal basis for exemption during the period of military service; the dependence of the conditions for exemption on the occurrence of special periods; and the socio-legal prerequisites related to ensuring the armed defense of the state. *Conclusions:* encouraging people to enlist in military service, providing legal guarantees, motivating them to fulfil their military duty, and granting exemption from service in the event of loss of fitness have not only criminal-legal but also military-political significance. Practical significance: the substantiation of the new intra-institutional specifics of the norms on the exemption of military personnel can be taken into account in law-making and scientific activities.

Key words: military personnel; sub-institutions; performance of military service; special periods; formal grounds for exemption; criminal liability; punishment; incentive norms; armed protection of the state.

5.1.4. Criminal law sciences.

For citation: Sipyagin N.A. On sub-institutions of exemption from criminal liability and punishment applicable to military personnel. *Penitentiary Science*, 2026, vol. 20, no. 3 (75), pp. 288–295. doi 10.46741/2713-2811.2026.75.3.007.

Introduction

Over the past few years, the conditions and grounds for exemption from criminal liability and punishment for military personnel have noticeably evolved (federal laws No. 365-FZ of September 24, 2022; No. 64-FZ of March 23, 2024; No. 340-FZ of October 2, 2024). A theoretical understanding of this area of legal regulation is therefore essential. This necessity stems from both the expanding volume of relevant legal norms and the emergence of qualitatively new characteristics that have not yet received adequate scholarly attention. The purpose of this study is to fill the existing gap: to determine the place occupied by the provisions concerning military personnel in the system of institutions for exemption from criminal liability and punishment, as well as to reveal their specific features. To begin with, the basic concepts related to the structure of criminal law, in particular an institution, should be specified.

Yu. E. Pudovochkin proposes understanding an institution of criminal law as an ordered set of legal norms that are dispersed throughout the provisions of the Criminal Code of the Russian Federation, as well as in other sources of criminal law, and can be used to regulate a specific type (a certain area) of criminal legal relations or to perform a special function in criminal legal regulation [1, p. 83].

The set of norms on exemption from criminal liability, as well as the set of norms on exemption from punishment, corresponds to the proposed definition, which explains the tradition that has developed in domestic and foreign doctrine to divide them into two independent institutions [2, p. 56; 3, p. 124; 7, 4. 12]. At the same time, within each of these institutions, it is possible to identify separate structural elements in the form of so-called sub-institutions. In science, it is commonly believed that sub-institutions occupy an intermediate position between the institution of criminal law itself and the general and special norms that are part of it. A.V. Denisova believes it is correct to define sub-institutions based on the purpose-related characteristics of the norms intended to provide a detailed solution to tasks of the generic criminal-law institution [5, p. 208]. She proves the thesis that sub-institutions emphasize the presence of intra-institutional specificity in a specific sub-type of regulated relations [5, p. 184]. At the same time, as S.P. Usenko emphasizes that the uniqueness of the legal fact that gives rise to these relations is of particular importance for distinguishing norms into sub-institutions [6, p. 98].

The legal facts that serve as the basis for the emergence of legal relations concerning the exemp-

tion from criminal liability and punishment of military personnel are characterized by such uniqueness. This can be inferred from the fact that they arise only during the period when the person (the convicted individual) is performing military service.

Military service as an attribute of the sub-institutions of exemption from criminal liability and punishment of military personnel

For further analysis, it is necessary to make a brief digression and clarify the meaning of the terminology used.

Let us start with the term “military service.” It is defined in Paragraph 2 of Article 1 of the Regulations on the procedure for performing military service approved by the decree of the President of the Russian Federation No. 1,237 of September 16, 1999, “On issues of military service” (together with the Regulations on the procedure for military service) and includes circumstances that formally determine the service and legal status of military personnel.

The term “grounds for exemption” can be understood in a broad sense as a general material basis inherent in all provisions on exemption from criminal liability and punishment and in a narrow sense as a set of conditions specified in the article of the Criminal Code of the Russian Federation, upon the existence of which a perpetrator may or must be exempted from negative legal consequences of the act (formal grounds for exemption) [7, p. 19].

As a general material basis for exemption from criminal liability, A.V. Brilliantov identifies the inadvisability of bringing a person to trial and applying criminal legal measures against him [8, p. 17]. He also proves that exemption from punishment is applied in cases where the application of criminal legal measures becomes inadvisable or their scope needs to be reduced [9, p. 4]. Based on these considerations, the material bases of both institutions are very similar in legal nature, which justifies theoretical comparison of the formal bases for the exemption of military personnel, in which they are specified.

The formal grounds for such types of release as conditional release from further serving of punishment under Part 1 of Article 80.2 of the Criminal Code of the Russian Federation, early release from serving a sentence under Part 2 of Article 80.2 of the Criminal Code of the Russian Federation, and release from criminal liability under Part 1 of Article 78.1 of the Criminal Code of the Russian Federation arise under circumstances involving the person's enlistment in military service, performance of military service, or dismissal from service. These cir-

cumstances determine the service-legal status of military personnel, so each of them is equally covered by the concept of “performance of military service”.

The same can be said about the formal grounds for release from further serving of the sentence under Part 3 of Article 81 of the Criminal Code of the Russian Federation and Part 2 of Article 174 of the Penal Code of the Russian Federation: the convict's illness or other circumstances that deprive him of the ability to perform military service become a reason for release from a special military punishment only when these circumstances are established during the execution of the sentence (the provisions of Part 3 of Article 81 of the Criminal Code of the Russian Federation and Part 2 of Article 174 of the Penal Code of the Russian Federation are not applied in the procedure for release from the imposition of a military punishment or from its actual execution).

The situation is similar with regard to the formal grounds for exemption from criminal liability under the notes to articles 337 and 238 of the Criminal Code of the Russian Federation. They arise simultaneously with the moment when a person first leaves a military unit or commits desertion while under the influence of difficult circumstances. The Plenum of the Supreme Court of the Russian Federation in its resolution No. 11 of May 18, 2023, “On the practice of courts considering criminal cases involving crimes against military service” specifically emphasizes that such circumstances must objectively exist and affect the person precisely at the moment the act is committed. Otherwise, they will not have criminal legal significance for the application of the relevant provisions.

These crimes encroach on the order of military service. Consequently, the person committing them is still serving at the time of the act (otherwise, they could not have caused harm to the protected object). Since the moment when the grounds for exemption from criminal liability arise coincides with the commission of the crime, it can be stated that the grounds for exemption under the notes to articles 237 and 238 of the Criminal Code of the Russian Federation necessarily arise during the period when the person is serving in the military (this specifics was also pointed out by Yu.M. Tkachevskii [10, p. 35]).

Another new type of exemption from criminal liability is enshrined in the note to Article 352.1 of the Criminal Code of the Russian Federation. Its essence is as follows: a servicemember who voluntarily surrenders and thereby violates the rules governing service during a special period, indepen-

dently, at the risk of his life, restores the possibility of continuing to serve, without committing any other crimes. As a result of such activity, he loses the previously existing public danger, and the imposition of criminal liability against him ceases to be justified, which serves as the material basis for applying the incentive provision.

Paragraph 3 of Article 23 of the Charter of internal service of the armed forces of the Russian Federation approved by the decree of the President of the Russian Federation No. 1,495 of November 10, 2007 “On the approval of the General military regulations of the armed forces of the Russian Federation” (together with the Internal service regulations of the armed forces of the Russian Federation, the Disciplinary regulations of the armed forces of the Russian Federation, and the Regulations for garrison and guard services of the armed forces of the Russian Federation) stipulates that military personnel captured in captivity retain their special status. The same act also defines the service and legal status of such military personnel. Thus, according to Paragraph 2 of the said article, prisoners of war have the right to disclose during interrogation only their last name, first name, patronymic, military rank, date of birth, and personal number. At the same time, they are assigned certain duties, including the requirement to seek and take advantage of any opportunity to free themselves and their comrades from captivity and return to their military unit.

A servicemember who voluntarily surrenders and is taken prisoner formally continues to perform military service not only because he has the corresponding rights and obligations, but also because, under the provisions of subparagraphs 11 and 12 of Article 38 of the federal law No. 53-FZ of March 28, 1998 “On military duty and military service”, he cannot be removed from the lists of personnel of the military unit during the period of being held captive (the legislator does not differentiate between the circumstances of a person's capture); the time spent in captivity is counted towards the duration of military service.

Significance of the application of special periods for the use of sub-institutions of exemption from criminal liability and punishment for military personnel

Another characteristic feature of most formal grounds for exemption from criminal liability and punishment for military personnel is the dependence of certain conditions for exemption on the application of special periods (exceptions are the grounds for release from serving a sentence under Part 3 of Article 81 of the Criminal Code of the Rus-

sian Federation and Part 2 of Article 174 of the Penal Code of the Russian Federation)..

This dependence can be either positive (allowing the conditions to arise) or negative (excluding their occurrence).

The term “special periods” is introduced into legal usage by the resolution of the Plenum of the Supreme Court of the Russian Federation No. 11 of May 18, 2023 “On the practice of courts considering criminal cases involving crimes against military service”. According to this resolution, “crimes against military service committed during a period of mobilization or martial law, in wartime, or in conditions of an armed conflict or combat operations (hereinafter referred to as special periods) are characterized by increased public danger”.

A positive dependence on the occurrence of special periods is characteristic of the conditions for release provided for in Part 1 of Article 78.1, parts 1 and 2 of Article 80.2, as well as the note to Article 352.1 of the Criminal Code of the Russian Federation.

In Part 1 of Article 78.1 and parts 1 and 2 of Article 80.2 of the Criminal Code of the Russian Federation, special periods are presented in a truncated form: the provisions apply only to those circumstances that have arisen during the period of mobilization, martial law, or wartime. However, as S.N. Bychkov rightly notes, these periods are of decisive importance for the implementation of these types of release [11, p. 20]. The status of individuals (convicts) who receive the relevant opportunity is determined by reference to them: 1) individuals conscripted for military service during the special periods; 2) individuals who have entered into a contract for military service during these periods; 3) individuals serving in the Armed Forces of the Russian Federation during the same periods.

One of the special grounds for dismissing a person from military service is also related to the operation of special periods, which entails release under paragraph “b” of Part 1 of Article 78.1 of the Criminal Code of the Russian Federation and paragraph “b” of Part 2 of Article 80.2 of the Criminal Code of the Russian Federation. Thus, according to subparagraph “o” of Paragraph 1 of Article 51 of the law “On military duty and military service”, the termination of a previously in effect special period may serve as an independent ground for dismissing a person from service.

As A.G. Antonov notes, the note to Article 352.1 of the Criminal Code of the Russian Federation is designed for situations where the perpetrator, having shown cowardice and voluntarily surrendering,

later, while in captivity, realizes the gravity of the act and decides to free himself in order to continue participating in combat operations [12, p. 26]. Achieving this goal is impossible outside the context of special periods, as it presupposes the presence of a combat situation, which is inherent in such periods.

Furthermore, V.V. Vlasenko highlights that the very term “captivity” implies that it arises exclusively in the context of an armed conflict or combat operations [13, p. 40]. It follows from this that the grounds for exemption under the note to Article 352 of the Criminal Code of the Russian Federation cannot arise in peacetime, being inextricably linked to the facts of a person’s captivity and detention specifically in a combat situation.

A negative dependence of the conditions for exemption from criminal liability for military personnel on the occurrence of special periods is evident in the notes to Articles 337 and 338 of the Criminal Code of the Russian Federation. In this case, special periods, as circumstances increasing public danger, serve as qualifying factors for related crime elements that are not covered by the notes (parts 2.1, 2.2, 3.1, 3.2, 5, and 6 of Article 337 and parts 3, 4 of Article 338 of the Criminal Code of the Russian Federation). However, the basis for exemption under the specified notes is accompanied by the fact of unauthorized departure from the place of service or desertion, which leads to the conclusion that the presence of special periods simultaneously acts as a restrictive condition that blocks the emergence of formal prerequisites for special types of exemption. In other words, in the absence of such periods, a person could theoretically expect to be exempted under the notes for a similar crime.

Socio-legal prerequisites for sub-institutions of exemption from criminal liability and punishment for military personnel

The most significant distinguishing feature of the grounds for exemption from criminal liability and punishment for military personnel is their social conditioning (which goes beyond the scope of purely criminal legal expediency). In particular, the provisions in question contribute to the implementation of the provisions of the Military doctrine of the Russian Federation approved by the decree of the President of the Russian Federation No. Pr-2976 of December 25, 2014, which is a system of officially adopted views regarding the preparation for armed defense.

Thus, subparagraph “n” of Paragraph 35 of the Military doctrine of the Russian Federation provides for the improvement of methods for staffing and training mobilization human reserves and resources.

One of the ways to implement this provision is the inclusion in criminal legislation of norms on exemption from criminal liability and punishment in connection with military service during special periods. Initially, these provisions were enshrined not in the Criminal Code of the Russian Federation, but in articles 3 and 5 of the federal law No. 270-FZ of June 24, 2023 "On the specifics of criminal liability of persons involved in the special military operation". As noted in the explanatory note to the draft law No. 378326-8 "On the specifics of criminal liability of persons involved in the special military operation," the proposed mechanism of exemption "will provide additional opportunities for staffing the Armed Forces of the Russian Federation." Therefore, even today, when addressing criminal law issues, these norms contribute to achieving the doctrine's objectives and therefore to strengthening the armed defense of the state.

D.R. Sverdlov comes to a similar conclusion, "the emergence and existence of subinstitutions for exemption from criminal liability or punishment in connection with military service during the period of mobilization, martial law or wartime is not so much a consequence of abstract legal principles as a direct reflection of the exceptional needs of the state conditioned by geopolitical and military-political determinants. We are referring to maintaining the state's authority on the international stage, securing strong negotiating positions in diplomatic efforts, sustaining a high level of combat readiness, forming and replenishing combat-capable reserves, and ensuring the ability to rotate military personnel" [14, p. 71, 72].

The situation is somewhat different in case of exemption from punishment due to illness or other circumstances that deprive a servicemember serving a sentence of arrest or detention in a disciplinary military unit of the opportunity to continue performing military service. It should be emphasized that these types of exemption, unlike other elements of the subinstitution under analysis, do not have a stimulating effect on the servicemember. One of them (Part 3 of Article 81 of the Criminal Code of the Russian Federation) is a special case of exemption from punishment due to illness. According to A.V. Brilliantov, when applying this provision, the predominant factor should not be the convict's behavior during the period of serving the sentence, but the presence of a disease that hinders this process and makes the punishment inadvisable [15, p. 87]. Furthermore, scholars see such an exemption as an implementation of the principle of humanism to a convict who is in a sickly state [16, p. 149].

The appropriateness of punishments in the form

of arrest and confinement in a disciplinary military unit is determined not only by the punishment of the offender but also by his character training [17, p. 225]. V.V. Sivov writes that the analysis of the development of domestic military criminal legislation and the system of punishments for military personnel demonstrates that it is impossible for the military organization of the state to function effectively without establishing a special procedure for performing military service [18, p. 23]. Performing military service during the period of serving military punishments is a form of implementing such a procedure.

In accordance with the order No. 680 of the Minister of defense of the Russian Federation of October 20, 2016 "On the approval of the rules for convicted military personnel to serve criminal penalties", educational work with convicted military personnel is aimed at fostering in them the qualities necessary for the honest fulfillment of their military duty: discipline, strict adherence to the legislation and other legal acts of the Russian Federation, the requirements of the military oath, and a respectful attitude towards commanders (superiors) and military camaraderie. Only a comprehensive approach combining the means of penal enforcement with measures of military discipline can lead to the specified results. That is why the effectiveness of arrest with service in the guardhouse or detention in a disciplinary military unit directly depends on the convict's real ability to perform military service and participate in ensuring the armed protection of the state's interests (to support the functioning of the military organization). Lacking this prerequisite, a special military sentence is not an option for the defendant; nonetheless, alternative forms of criminal liability are entirely viable. The overarching theory of punishment encompasses aims that go well beyond those specific to military sentencing.

We back the idea of O.V. Zhdanova that "the possibility of unconditional release from further serving of punishment for military personnel in the event of an illness that renders them unfit for military service (Part 3 of Article 81 of the Criminal Code of the Russian Federation) contradicts the existing fundamental ideas of criminal law and the goals of criminal punishment" [19, p. 11]. That is why, in our view, the legislator reserves for the court the right, if necessary, to assign a more lenient type of punishment to a convict being released from a special punishment, the application of which will not be hindered by his/her health condition or other reasons. In the end, neither society nor the state needs the military personnel who, being unable to fulfill the duties related to preparing for and carrying out the armed defense

of the Russian Federation, will be subjected to formal criminal law deprivations due to their special status.

The duties related to preparing for and carrying out the armed defense of the Russian Federation are assigned to military personnel (Part 2 of Article 1 of the federal law No. 76-FZ of May 27, 1998 "On the status of military personnel"). To successfully fulfill these duties, servicemembers are provided with special socio-legal guarantees, including protection of their life and health, as well as other measures designed to ensure conditions appropriate to the nature of military service and its role in society. The notes to articles 237 and 238 of the Criminal Code of the Russian Federation can be regarded as criminal legal means of ensuring these guarantees. After all, one of the prerequisites for their application is an unsatisfactory, and sometimes even dangerous, environment in which military service is carried out. V.E. Sudenko believes that under these conditions, it would be unfair to link the release of a military servicemember from criminal liability to the mandatory performance of any positive actions. The author writes, "It is hardly reasonable to expect that a person, for example, who is escaping from the abuse by "senior servicemembers," will voluntarily return to their place of service" [20, p. 122]. Therefore, to apply the exemption, it is sufficient to have severe circumstances that violate the guarantees of the servicemember's safety, and no additional positive post-criminal activity on the part of the person being exempted is required. The exemption provided by the notes to articles 337 and 338 of the Criminal Code of the Russian Federation takes effect by virtue of the circumstances themselves, rather than as a reward for the servicemember's subsequent post-crime conduct.

Along with service-related factors, other conditions (for example, family-related problems) may also be considered severe circumstances. However, this does not negate the main point: the legal possibility of taking into account excusable circumstances for leaving a unit or desertion is aimed at ensuring guarantees related to the special status of a military servicemember (a person engaged in the organization and conduct of the armed defense of the Russian Federation).

Voluntary surrender is not only a violation of military law and order but can also lead to serious socially negative consequences that reduce Russia's defense capability and security [21, p. 355]. By giving a former prisoner of war the chance to return to military service and exempting him from criminal liability, the state minimizes the damage caused.

However, the potential of the incentive provision in the note to Article 352 of the Criminal Code of the Russian Federation is not limited to restoring the violated order. Along with this, the provision addresses another important task of encouraging a military servicemember who has committed a crime to take decisive action in the interests of the armed defense of the state.

The motivational impact of the note to Article 352.1 of the Criminal Code of the Russian Federation is essentially similar to the social effect of the provisions set out in articles 781 and 802 of the Criminal Code of the Russian Federation, which is why it seems reasonable to compare these types of exemption from criminal liability and punishment in this regard. It is significant that they not only encourage the person who has committed a crime to conscientiously fulfill their military duties, but also guide them towards exceptional self-sacrificing behavior, which is particularly required during special periods (it is only natural that the conditions for applying the compared norms are positively dependent on such periods, as mentioned above). A.G. Antonov emphasizes that the return of the offender as a positive post-criminal act is possible only after the offender has been released from captivity on his own initiative, and not, for example, as a result of a prisoner exchange [12, p. 26]. This means that the law makes the application of the note to Article 352.1 of the Criminal Code of the Russian Federation dependent not on the mere fact of a person's return, but on the nature of the actions that contributed to that return. Although such actions are part of the legal duties of any military personnel who find themselves in captivity (Article 23 of the Charter of internal service of the armed forces of the Russian Federation), they still involve an extremely high risk to the life and health of the prisoner of war – the risk that not everyone is willing to take. That is why the note allows for exemption from liability for a crime classified as a grave one.

Conclusion

Thus, the exemption from criminal liability and punishment for military personnel can be considered as sub-institutions of criminal law that are part of the institutions of exemption from criminal liability and punishment. These sub-institutions represent a set of norms on exemption from criminal liability and punishment, the characteristic specific features (characteristics) of which are:

- the emergence of a legal basis for exemption exclusively during the period when the person is undergoing military service;
- a positive or negative dependence of the con-

ditions for exemption from the application of special periods (exceptions are the conditions provided for in Part 3 of Article 81 of the Criminal Code of the Russian Federation and Part 2 of Article 174 of the Penal Code of the Russian Federation);

– socio-legal prerequisites related to ensuring the armed protection of the state due to: 1) encouraging persons who have committed a crime (convicted) to enter military service and create additional recruitment opportunities for the Armed Forces of the Russian Federation (Part 1 of Article 78.1, parts 1 and 2 of Article 80.2 of the Criminal Code of the Russian Federation); 2) providing legal guarantees for active military personnel (notes to articles 337

and 338 of the Criminal Code of the Russian Federation); 3) motivation and encouragement of military personnel for performing their military duties during military service (Part 1 of Article 78.1; parts 1 and 2 of Article 80.2; note to Article 352.1 of the Criminal Code of the Russian Federation); 4) exemption from further military service of convicts who are unable to participate in the preparation and execution of the armed defense of the Russian Federation due to diseases or other legitimate reasons (Part 3 of Article 81 of the Criminal Code of the Russian Federation and Part 2 of Article 174 of the Penal Code of the Russian Federation).

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Received May 22, 2026