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LEGAL AND PSYCHOLOGICAL CHARACTERISTICS OF AN AGREEMENT ON RECONCILIATION IN THE CRIMINAL PROCEDURE LEGISLATION OF UKRAINE

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SUMMARY

In this article author researches the juridical-psychological as to the assembling of the agreements about reconciliation in the criminal procedure at Ukraine legislation between victim and suspicious or accusatory.

Key words: agreement, about, reconciliation, victim, suspicious, accusatory.

АННОТАЦИЯ

В статье автор исследует юридико-психологические особенности соглашений о примирении в уголовно-процессуальном законодательстве Украины между потерпевшим и подозреваемым или обвиняемым.

Ключевые слова: соглашение о примирении, потерпевший, подозреваемый, обвиняемый.

Problem statement. Securing new special order of criminal proceedings based on an agreement on reconciliation in the Criminal Procedure Code of Ukraine means creating a new ideology of criminal policy of the state: crime counteraction through a compromise, or agreement.

The relevance of the article is that the introduction of “agreements in criminal proceedings” became one of the most promising and controversial novels of the criminal procedure law and practice in Ukraine. A block of new rules under the Chapter 35 “The criminal proceedings on the basis of agreements”, introduced by the Criminal Procedure Code of Ukraine on May 14, 2012, laid the basis for the formation of a new legal institution and development of the competitive criminal proceedings in Ukraine [5]. This legal institution provides for two types of agreements concluded in criminal proceedings: plea agreement and agreement on reconciliation. Agreement on reconciliation is made between the victim, the suspect or the accused. Such an agreement can be also called “mediation agreement”.

The degree of scientific development of the problem. Research of legal and psychological characteristics of the problem was made in the works of many scientists, including D.O. Aleksandrov, V.H. Androsiuk, V.F. Boiko, V.V. Zemlianska, H. Zer, L.I. Kazmirenko, V.O. Konovalova, M.V. Kostytskyi, O.I. Kudermyna, V.T. Maliarenko, V.Ya. Marchak, D.M. Maksymenko, V.S. Medvediev, N.V. Nestor, I.M. Okhrimenko, M. Wright, O.K. Chernovskyi, Yu.V. Shepitko, O.M. Tsil'mak et al., however, the institution of agreements in criminal proceedings is unexplored from the standpoint of legal psychology, causing many disputes about its theoretical provisions among scientists and application among practitioners.

The purpose of the article is stipulated by the need to improve and develop the institute of agreements in criminal proceedings, which significantly contribute to the efficiency of its operation in the field of criminal justice.

Basic exposition. The institution of “reconciliation with the victim” within the criminal procedure rule has long been known in international legal doctrine. It was filled with substantive content, such as reconciliation for offenses against marriage, insulting officials as a priority of criminal protection.

However, the Criminal Procedure Act for the proper enforcement of the institute of criminal cases closure should include a definition of the term “reconciliation”.

Application of the institute of reconciliation is a step forward in the use of discretionary principle in the criminal law and procedure of Ukraine [8, p. 6]. The presence of this category of cases is associated with the existence of private tort theory, which dates back to the Roman law and is based on the crimes that are not important for the state and infringe on the rights of persons only, and therefore, supposedly a sign of social danger losing. Taking into account the legal definition of crime, which implies that there is no crime that impinges only on the personal interests of people, this concept as the basis of singling out the cases of private prosecution is unfounded. The presence of *corpus delicti* in the crimes of private prosecution, according to M.M. Polianskyi, depends on how it is perceived by the person himself against which it is directed [10, p. 59]. Therefore, in some cases there is a conflict between the interests of the society and the victim, who wants to avoid prosecution and publicity associated with it.

The essence of the relationship between society, government, person in criminal proceedings, where agreement on reconciliation is possible, is most visibly manifested in the theory of “pardon of offender by victim”, which states that the victim has the right to punish the offender by applying the investigator or prosecutor, therefore in legislation there are criminal proceedings in the form of private prosecution, which can be initiated only at the request of the victim, or forgive the offender by means of “pardon” – reconciliation. If the victim does not want it and at the same time any social interests do not suffer – it means, “that criminal justice acts formally for itself” [7, p. 69].

In modern literature, reconciliation is seen as an act of compromise between the state and the offender [1, p. 132], between the offender and the victim, or as the fact of removing claims to the perpetrator by the victim [2, p. 221]. In substantive terms reconciliation is a matter of legal fact, act of law stopping character, which is the basis for exemption from criminal responsibility of the person who has committed a criminal offense, if there is voluntary consent of both parties. The condition for its recognition as a legal fact is the existence of an actual content

as a system of legal facts necessary for the onset of legal consequences, such as termination of conflict relations. Of course, the elements of the actual structure are closely interrelated and interdependent, and the final result is a consequence of the actual structure as a whole. The presence of the actual structure already gives rise to some intermediate legal consequences that will guarantee interests of individuals, make it possible to consider the will of subjects. Thus, the committal of a non-grave criminal offense for the first time and reimbursement or removal of the caused damage or losses do not yet generate the occurrence of reconciliation relationship between the victim and the suspect or the accused, but these facts open the possibility for the activity of the parties to achieve this result. That is, such legal consequences are of intermediate value, serving dynamics of relationships, the effect of their internal mechanisms, yielding the final legal consequences arising from the actual structure as such; provide further occurrence of the facts and the real prospect of legal consequences. For example, the right to reconciliation will express one-way action of one of the parties, which is a prerequisite for the emergence of the legal structure of reconciliation.

In legal literature it is rightly noted that the criminal procedure law for the proper legal use of the institute of criminal proceedings closure should include a definition of the term “reconciliation”. It is proposed to be understood as moral contrition in the performing of a wrongful act by the person who committed it directly in front of the victim and forgiving by the latter his actions as well as achieving agreement between them relating to the procedure, the amount and term of compensation for inflicted damage [11, p. 164–166]. This characteristic reflects a more substantive aspect of the problem and ignores the criminal procedural reconciliation, which is reflected in the statutory procedure for approving the terms of reconciliation and procedural design of such consent.

In the correlation of functional criminal legal institution of reconciliation with the existing criminal procedure there should be highlighted the unity of their terminology. The norms of the former is an expression of the method of criminal legal regulation, by means of which the desired result for the parties is achieved, the positive behavior of the offender after the committal of a criminal offense is encouraged, and the norms of the latter reflect the consolidation of the legal procedure of such exercising.

Reconciliation as a functional institution has received its reflection in the exemption from criminal liability under the criminal law, although its occurrence order is of the substantive criminal nature and determines the appearance of the procedural status of a number of persons [3, p. 13]. Criminal proceedings cannot appear without material liability, and procedural order of the criminal proceedings termination because of signing agreement on reconciliation between the suspect or the accused and the victim seeks the implementation of criminal liability under the rules of substantive criminal law. Therefore we can say that the criminal procedural order of terminating criminal proceedings is derived from criminal-substantive foundations of exemption from criminal liability.

To have full legal and psychological characteristics of an agreement on reconciliation, we also analyze the legal basis and the terms of this agreement, its parties, their rights, duties and psychological characteristics.

Legal grounds for the conclusion of the agreement on reconciliation are also envisaged in Chapter 35 of the Criminal Procedure Code of Ukraine “Criminal proceedings on the basis of agreements”. The legislator has provided the possibility of

concluding such an agreement at the initiative of the victim or the suspect or accused. Arrangements for agreement on reconciliation may be carried out independently by the victim and the suspect or the accused, by the counsel and the representative or by another person agreed by the parties of the criminal proceedings (other than investigator, prosecutor or judge).

Agreement on reconciliation between the victim and the suspect or the accused may be concluded in the proceedings concerning criminal offenses, crimes of little or medium gravity and criminal proceedings in the form of private prosecution [5, art. 469]. The conclusion of the agreement on reconciliation in the criminal proceedings against an authorized person of the legal person who committed a criminal offense in respect of which proceeding is made as for the legal entity is not permitted. The conclusion of the agreement on reconciliation can be initiated at any time upon notifying the person about suspicion before court leaving for jury room for making a judgment.

The agreement on reconciliation concluded between the suspect or accused on the one hand and the injured on the other hand, must be regarded as result of reconciliation procedures as a way to terminate the criminal proceedings and as an independent procedure of reconciliation. Agreement on reconciliation is a complex phenomenon that simultaneously belongs to different spheres. The mechanism of overcoming criminal psychological confrontation between the victim and the offender for the purpose of reconciliation is a complex legal and psychological process that is in a causal connection with the psychological characteristics of the parties.

The concept of “agreement on reconciliation” encompasses:

1) a method of settlement of a dispute, disagreement. At the conclusion of the agreement on reconciliation, in fact, the court does not consider criminal proceedings as parties independently regulate the dispute on the basis of reconciliation;

2) a dispute settlement procedure as an order of actions aimed at resolving the dispute (presenting and negotiating the terms of reconciliation, agreement conclusion);

3) implementation of the parties’ procedural rights: agreement on reconciliation, applying to the court with a request for approval of this agreement are proceedings;

4) an agreement containing obligations of the parties. Accordingly, it regulates the relationship (establishes the rights and obligations of the parties: the suspect or the accused and the victim), establishes a legal fact, which has a procedural value (the agreement on reconciliation approved by the court, is a ground for terminating the criminal proceedings – legal fact in the procedure and substantive law), a document (the act of fixing the will of the parties).

Reciprocal concessions are the hallmark of the agreement on reconciliation. In this case, the victim may waive the civil claim fully or partially, the suspect or the accused may voluntarily compensate the inflicted pecuniary and non-pecuniary damage, to apologize to the victim, etc. The term “concession” can assume mitigating of any requirements or rejection of anything, making an additional obligation to carry out an action or transfer certain assets.

Investigator or prosecutor shall inform the suspect and the victim of their right to reconciliation, to clarify the mechanism of its implementation and not hinder an agreement on reconciliation. If criminal proceedings involve multiple victims of a single criminal offense, the agreement may be concluded and approved only with all the victims. If criminal proceedings involve several victims of various criminal offenses, agreement may be concluded with one (several) victims. Criminal proceedings against the person(s) who has reached an agreement,

is subject to be singled out in separate proceedings [5, art. 469].

Despite the positive dynamics of approved sentences on the basis of agreements, due to the fact that this institution is new to the criminal justice system, its mechanism has not been worked through in jurisprudence and has not sufficiently investigated by scientific doctrine, and taking into account the emergence of new formulations, approaches and evaluation categories in the new Criminal Procedure Code of Ukraine, it is relevant and necessary to study judicial practice of criminal proceedings on the basis of agreements.

According to the article 468 of the Criminal Procedure Code of Ukraine in the criminal proceedings there may be taken two types of agreements, one of which is an agreement on reconciliation between the victim and the suspect or accused. Taking into account the systematic analysis of articles 55 and 56 of the Criminal Procedure Code of Ukraine the victim of crime should be understood not only an individual, who was inflicted moral, physical or material damage by a criminal offense, but also legal person, if the latter was inflicted property damage by criminal offense.

Depending on the order of establishing the civil law envisages two types of legal entities: a legal entity of private law and legal entity of public law. The legal entity of private law is founded on the basis of the foundation documents that set forth in writing and signed by all participants (founders). The legal entity of public law is established by the administrative act of the President of Ukraine, bodies of state power, bodies of state power of the Autonomous Republic of Crimea or local authority [13, art. 81, 87]. Thus, in the case of damage infliction to a legal entity, regardless of its type, the agreement on reconciliation can be concluded with a representative of that person, in accordance with ch. 2, art. 58 of the Criminal Procedure Code of Ukraine, its head, a person authorized by law or the foundation documents, an employee of a legal person by proxy and a person who has a right to be a counsel in criminal proceedings. Accordingly, a plea agreement cannot be made in the criminal proceedings as for offenses which have caused damage to a legal entity, and in which its representative takes part.

The meeting of the victim with the suspect (accused), where the terms of the agreement on reconciliation are discussed, has a special psychological meaning. Without such contact the victim seems to be counted out, angry, humiliated, he needs understanding, the victim feels like an ineffectual character in the play of the criminal process [6, p. 173]. The offender is reincarnated from a listener in a real participant of interaction, as he also takes the opportunity to give his explanations to a person whose opinion is often important for him, and gets one of the most significant opportunities for him – to be forgiven.

It is possible that as a result of constructive communication of the victim and offender the amount of inflicted damage will be changed, psychological conflict will be overcome and contrition, compassion, apologies and forgiveness can easily arise victim's feeling of self-respect, reconciliation and moral satisfaction.

The agreement on reconciliation shall include its parties, the wording of suspicion or accusation and its legal qualification, indicating the article (part of the article) of Law of Ukraine on criminal responsibility, essential circumstances for proper criminal proceedings, the amount of damage caused by a criminal offense, the term of its reimbursement or list of actions not related to reimbursement of damage, which the suspect or the accused is obliged to make in favor of the victim, the term of their making, consistent punishment and the parties' consent to its imposing or release from its serving on probation, the consequences of signing and approval of the agreement, the consequences of the

agreement default. The agreement states the date of its conclusion and it is signed by the parties [5, art. 471].

The consequences of making and approval of the agreement on reconciliation are:

1) for the suspect or the accused – restricting of the right to appeal the verdict and denial of the right to a trial in which the prosecutor must prove each fact of a criminal offense, in committal of which he is accused, and he has the following rights: to keep silence, and the fact of silence has no evidentiary value to the court; have a counsel, including free legal assistance in the manner and cases provided by law, or to defend himself; to question the prosecution witnesses during the trial, submit a request to call witnesses and submit evidence to testify in his favor;

2) for the victim – restricting the right to appeal the sentence and disqualification to require further instituting of criminal proceedings against a person for the appropriate criminal and resize the claims for damages.

Before making a decision on approval of the agreement on reconciliation during the trial the court must ask the accused whether he fully understands:

1) he has the right to a fair trial at which the prosecution must prove every fact of criminal offense in the committal of which he is accused, and he has the following rights:

a) to keep silence, and the fact of silence will have no evidentiary value for the court;

b) to have a defence counsel, including free legal assistance in the manner and cases provided by law, or to defend himself;

c) to question the prosecution witnesses, submit a request to call witnesses and submit evidence to testify in his favor during the trial;

2) the consequences of making and approval of agreements;

3) the nature of each charge;

4) type of punishment and other measures that will be applied to him with the approval of the agreement by the court.

Moreover, before making a decision on approval of the agreement on reconciliation the court should ask the victim during the trial if he fully understands the consequences of approving the agreement.

As the victim and the suspect or the accused are usually not lawyers, one of the practical problems is the inconsistency of such agreement with the requirements of the criminal procedural law.

As for the psychological characteristics of an agreement on reconciliation, the reconciliation process belongs to the so-called summary procedures, where summary procedure in international instruments is considered a short statement, but a summary proceeding is fast. That is, it deals with the prompt resolution of the issue of overcoming the crime consequences. Of course, the priority in determining the amount of damage belongs to the victim, but often this leads to obvious misuse on his part, as a clear mechanism for reimbursement of damage does not still exist. However, reimbursement of damages in cases of private prosecution is not its basis, because the prerogative of the prosecution of the accused belongs to the victim.

In the legal literature the question of who is the final arbiter in this procedure led to many discussions, in general victim decides – to be a reconciliation or not, and the offender also has the right to the initiative to achieve it, guided by various subjective reasons. Proposals may come from both parties, but it is clear that the solution must be taken by the victim, although who initiated the reconciliation has no legal significance.

In the legislation it is important to settle guarantees to prevent outside influence of interested persons (including rela-

tives) on the decision of reconciliation, since while settling the question the free will of the parties that reconcile should be taken into account, because reconciliation of the parties is a bilateral act and the parties must express their will in it.

Psychologists define the conflict as hard solvable resistance associated with acute emotional experiences and the clash of actions, which includes signs of interaction between conflicting parties. Reconciliation in its essence is a consequence of conflict resolution, achieved by changing the familiar way of behavior of both the victim and the suspect or accused. It is characterized as the result of joint activity of the parties to terminate the confrontation and emotional confrontation.

On the stage of solution of the reconciliation issue T. Kilmen's concept is getting more topical: he identifies five possible behaviors in the conflict: avoidance, adaptation, competition, cooperation and compromise. In particular, while adaptation the victim and the offender smooth controversy due to the loss of the offender's interests and consent to do what the victim wants. Compromise is displayed in settling disagreements, confrontation through mutual concessions, cooperation of the parties, and the competition is characterized by open fight of each party, where there is always the party who won and the party who lost. Avoidance is the desire to get out of conflict situation, not to solve it, without compromising and insisting on its own.

In order to fulfill the tasks of the institute of reconciliation and overcome the psychological conflict parties do not have to expand its subject, the initiator has to offer positive solution without the use of categorical forms of communication, by leveling the offences of a personal nature. The efforts of the participants, adequate perception of the conflict, efficiency of communication, creating an atmosphere of mutual trust, change of habitual behavior strategies can solve the issue of overcoming the effects of crime in the form of psychological confrontation [14, p. 9–10].

Overcoming the psychological conflict between the victim and the offender may take place just during their meeting where the victim can ask all troubling questions, identify his feelings and make it clear to the criminal what he experienced as a result of the crime, how it changed his life; he has opportunity to understand what the offense means for the one who committed it. At this meeting the victim's dominant patterns of behavior and perception are reviewed, and his fear greatly reduces. He arranges to obtain the material and moral reimbursement; the conditions to identify his feelings, information exchange appear, and the confidence and sense of control over the situation return. On the other hand, the offender is able to see a real person in the victim, to learn about the consequences of his crime first hand, which contributing to the emergence of a new look at his own previous behavior, acts, attempts to stimulate his own correction. By his actions he is given a chance to restore justice, express contrition and ask for forgiveness.

You can not underestimate the role of communication in resolving psychological conflicts that arise between the victim and the offender based on the results of the crime. This is a multi-faceted, complex mechanism of establishment and development of relations between people, which arises from different needs and common activities, and includes exchange of information, perception and understanding of each other. But non-verbal communication is of great significance in this process; it often has more significant semantic than verbal load, and significant effect on the course of communication.

The factor of constructive solution of psychological conflict between the victim and the offender is the openness and effectiveness of their communication. Professional psychologists

pay attention to such important point as a public discussion of the problem in which the parties do not hesitate and do not restrain the emotions; they honestly express their attitude to the situation, which may contribute to laying the foundations of a trusting relationship to reach a compromise.

During communication the suspect or the accused and the victim are engaged in a number of communication and information actions, try to get to know each other through cognitive perception of emotions using creative function of communication to decide on reconciliation and display it in legal form. It is advisable to keep frank conversation in the designated time and in a room with no outsiders. It is desirable that the opponent should be aware of the intention of the other party concerning the conflict solution. The structural development of reconciliation reaching has three phases: introduction, which determines the subject matter, the actual reconciliation which deals with the bottom line, the conditions of an agreement, a way of reimbursement of the material and moral damage, indicating the timing and final stage on which the final decision as for reconciliation between the parties of the criminal and psychological conflict.

The activity of the victim in reaching a compromise with the offender presents a number of components, including: cognitive, which is focusing on specific details of the crime, intensification of memory on negative circumstances, unwillingness to understand the position of the offender and to recognize the correctness of different point of view, bias estimates. In the emotional component the victim activity manifests mutual aversion and inequity, irritability and aggression, rejection of the emotional state of another person, contempt. Volitional aspect of this activity is expressed by showing negativity, obstinacy, ardent imposing of his own views and unwillingness to understand the other side of the conflict.

From the psychological point of view, no meeting of the victim and the offender, and no communication between them can result in the transformation of all above negative emotions and states of the victim in internal personal conflict, therefore even if the compromise on reconciliation has not been reached, the parties need to communicate. It is useful to identify the possible type of mutual reactions of conflicting parties, to consider temperament, to master their own language and behavior, to be able to consciously concentrate willed efforts on the need to be calm, mellow, and friendly, get rid of inner restlessness and agitation.

Based on the foregoing, we conclude that making of the agreement on reconciliation intends to meet the private legal interests, assist victims, reimburse damage for the victims of the crime, restore social justice and correct persons who have committed criminal offenses. Such form of the conflict resolution contributes to restoration of the victim's rights, reimbursing damage for him, criminal's correction, depriving the latter of the negative consequences of conviction. Reconciliation improves the relationship between the parties to the conflict, allowing avoiding collisions in the future. This allows considering reconciliation as an effective way to improve the criminal procedural forms.

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