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COMPROMISE AT THE SIMPLIFIED KRIMINAL LEGAL PROCEEDINGS IN SOME FOREIGN COUNTRIES

In article types of simplification of criminal legal proceedings in some foreign countries are considered. The author traces the main tendencies of formation of the simplified criminal proceedings in the countries of Anglo-Saxon legal system and the countries of the European Union. Existing main approaches to compromise application in criminal proceedings of the certain countries are allocated.

Keywords: *simplification of criminal trial, a compromise, the simplified procedure.*

The simplified procedure of judicial proceedings of criminal production (the agreement on fault recognition, the agreement on reconciliation, a legal compromise in criminal legal proceedings) successfully and is used long ago in foreign countries [1].

Recently on the European continent there were rather big changes. The aspiration to avoid long and scrupulous trials affects. In 1984 in Germany the system of agreements on recognition of fault and reduction of judicial examination is entered. According to the new Criminal Procedure Code of Italy accepted in 1988 competitive criminal legal proceedings with a number of the simplified and reduced procedures, and also agreements on recognition of fault are entered. Also the Spanish procedure of «consent» thanks to the adopted law on the reduced legal proceedings became stronger [2].

Recognized international institutions among which – the United Nations, the Council of Europe, the European Union, recognized an important role and great opportunities for recovery justice. Practically all European countries, and also the USA, Canada, Australia at implementation of criminal legal proceedings provided possibility of application of recovery approach. It is characteristic, what even such countries as China and Thailand, also reformed national criminal process in the same direction. It is possible to talk about a significant amount of forms, manifestations of recovery justice. However the most widespread of them is mediation (from English mediation – mediation). According to the Decision of Council of the European Union of March 15 in 2001. «About a place of victims in criminal legal proceedings», mediation in criminal cases should be understood as search (even during criminal legal proceedings), the mutually acceptable decision between the victim and the offender with mediation of the competent person (mediator). According to Art. 1 of the bill «About Mediations (Mediation) in Criminal Cases» mediation procedure in criminal cases is a procedure which is directed on the decision by means of a conflict mediator between the victim and the offender for the purpose of conflict settlement, and also elimination of its causes and effects. This form of recovery justice

consists in the full solution of the conflict between the victim and the offender. Mediation as legal institute and the phenomenon is based on the principles of voluntariness, independence, confidentiality of the procedure, and also a neutrality and impartiality of a mediator. Mediation isn't always accurately fixed in the legislation of the foreign states through dispositivity of bases of criminal trial (especially in the states of a general law).

The world practice showed that introduction and mediation application in criminal cases is directed on the solution of numerous problems [3]:

1) humanization and democratization of legal system, criminal policy;

2) improvement and simplification of criminal trial;

3) access to justice;

4) increases of level of trust and respect to court and law enforcement agencies;

5) ensuring rights and legitimate interests of the victim and offender;

6) prevention of crime and avoiding of further criminalization of persons who committed a crime in imprisonment places;

7) renewal of the positive interpersonal relations in society and many others [4].

Experience of the countries which already certain time use mediation and other forms of manifestation of recovery justice, confirms that over 90% of the signed contracts by results of mediation were executed, and about 80% of offenders who participated in recovery procedures, didn't commit new crimes. Unfortunately, the traditional legal system can't brag of such results of performance of decisions of the courts and re-education of criminals [5].

Other type of simplification of criminal legal proceedings is the agreement on fault recognition. Agreements on recognition of fault is a written agreement accused both the defender, on the one hand, and charges, with another which essence is that at recognition by the defendant of the fault in commission of crime (as a rule, not heavy), the accuser refuses maintenance of charge of rather more serious crime, and also the arrangement in the concrete solution of criminal proceedings [6].

For today so-called «agreements on fault recognition» are recognized. They are applied in Germany at different stages of criminal implementation. Jurisprudence testifies that the greatest number of agreements consists during judicial proceedings.

Agreements on recognition of fault are considered unacceptable in cases when the accused force to admit the guilt by threats, applications of not resolved means, promises of certain advantages.

However the court isn't exempted from a duty to check reliability of recognition of the fault declared accused, and in case of need – to find other proofs which confirm it. Thus, the court has no right to agree with precisely established punishment on the basis of the agreement on fault recognition by the accused. The court can note only the top limit of punishment which it isn't capable to exceed at conclusion of agreement about fault recognition. «Agreement» isn't the classical civil agreement (the legal transaction) as it isn't obligatory for the parties and court. Its understanding as legal transaction would interfere with the valid free will of the parties, publicity and transparency of implementation of criminal justice.

To special value of the agreement on fault recognition in criminal trial of the foreign states points that about 90% of criminal proceedings in England and the USA are considered by its conclusion; it testifies to dependence of functioning of criminal justice systems in England and the USA from number of permission of affairs on the basis of the agreement. The agreement is important from the point of view of fast judicial permission of criminal cases with simultaneous ensuring the rights and legitimate interests of participants of process [7].

The prosecutor in France is allocated with large powers in the sphere of conclusion of agreement about recognition of fault, and it gives the chance to avoid an overload of judicial system. However process of conclusion of agreement about recognition of fault has the features. Procedure of recognition of fault can be applied to criminal offenses for which punishment in the form of a penalty or imprisonment for the term of no more than 5 years, and also serious crimes, perfect of imprudence is prescribed. Accused opportunity to conclude the agreement on recognition of fault or to refuse this procedure within 10 days is given. The order of conclusion of agreement provides two main conditions: obligatory maintaining protocol of negotiations and obligatory participation of the defender.

In the criminal procedure legislation of the USA such procedure on the following conditions too is provided:

– commission of less serious crime;

– existence of the written consent of judicial proceedings accused on carrying out on the simplified procedure [8].

The German criminal procedure doctrine provides that the agreement on recognition of fault can inure to advantage accused only in that case when signs of sincere repentance accused of perfect act instead of when it admits guilt only on the basis of the corresponding arrangement are revealed [9].

In this regard the accused assumes liability during open judicial proceedings of responsibility for the crime committed by it, gives in to criminal punishment which he expects, the same admitting the guilt then becomes on a repentance way.

The code of criminal procedure of the Czech Republic provides three types of the simplified judicial productions: 1) penitentiary order; 2) conditional stop of prosecution; 3) compromise agreement. Indispensable conditions for application of all types of the simplified procedures are recognition accused the fault, its consent to application of the simplified procedure, compensation put to the victim of harm. Possibility of application of this or that simplified procedure depends on weight of the committed crime and is limited to crimes punishment for which doesn't exceed 5 years of imprisonment.

The Italian criminal trial provides carrying out so-called negotiation procedure which essence is that during a pretrial investigation (by the time of the beginning of judicial hearings) the parties of protection and charge can agree among themselves and ask court to decide a sentence which they among themselves coordinated, the punishment measure for which can't exceed two years of imprisonment.

Besides the duty of control of that behind results of a pretrial investigation, despite of the arrangement of the parties, there were no bases for the justification accused is assigned to the judge that the offered measure of punishment was admissible, met the requirements of the law. The Italian legislation provides such incentives for accused which is the participant of the reduced judicial proceedings: reduction of term of punishment; lack of civil consequences after a sentence; a ban of collecting court costs from condemned which was condemned on this procedure.

Now in the criminal procedure legislation of Great Britain it is also provided that magistrate's courts can consider criminal cases on the simplified order.

At first it was special production – as an exception of the general rule therefore the legislator limited a circle of affairs that were jurisdictional to magistrates and were considered on the simplified order. It concerned acts for which such sentences were imposed as: public works for a certain term, conditional condemnation with supervision establishment, a penalty to 5 thousand pounds or

imprisonment till 6 months (behind set of crimes – till 12 months). Such situation works and now, and on the simplified order in this country the most part of criminal cases is considered [10].

Besides, in English criminal trial, unlike Ukrainian, the fact of recognition accused the fault (at classical procedure) excludes possibility of trial of business with participation of jurors. In this case the court finds accused guilty without check and an assessment of collected accusatory proofs. Exception is the situation when the judge has reasonable doubts of rather conscious and voluntary recognition accused the fault.

If the defendant pleads guilty, further implementation is connected only with purpose of punishment which takes 15–30 minutes (judicial examination isn't carried out as there is no dispute concerning charge). Defendants admit the guilt in 80–90% of cases on criminal cases which consider magistrates that significantly facilitates a task of the last. If the defendant denies the fault in commission of crime, judicial proceedings are carried out in full volume and, as a rule, last during three court sessions.

In the countries of the British Commonwealth recognition of fault (guiltyplea), as well as in the USA, traditionally was considered as refusal of dispute and a basis for process simplification, however here such refusal never contacted any agreement of the parties.

As for the countries of the continental right, it is obvious that in the criminal and criminal procedure legislation of the majority of them, considering a public orientation of their criminal legal proceedings, possibility of a compromise between charge and protection was historically allowed in much smaller measure, than in the countries with the Anglo-American organization of process; the reduced procedures appeared in criminal trials of the countries of Europe only in the last decades. In Germany where three stages of process are traditionally allocated: preliminary investigation, preliminary hearing and judicial proceedings, in the Criminal Procedure Code in 1974 there was so-called «an accelerated process» (Art. 153 and) at which doesn't become the previous hearing, and the prosecutor has the right directly in judicial proceedings orally to formulate charge which is fixed in the protocol of a court session before court. It is provided in insignificant affairs and the edition «the order on punishment» [11].

The application for an insignificant crime is thus submitted by the applicant to prosecutor's office, to bodies of police or to local court, however if bodies of police or court recognize necessary performance of procedural actions, the prosecutor is obliged to resolve an issue of initiation of legal proceedings. In this country, as well as in Denmark, and Norway, a basis of the simplified procedure is insignificance of act, recognitions of the fault from accused it isn't necessary, in the same countries, and also in Poland and Croatia there is a ban for prosecutors to offer any eases accused in exchange for recognition of the fault by it. Basis for reduction of preliminary investigation which is made in the general order, evidence of act is also, for example, if the person caught in the act, and also «convincing recognition» which doesn't raise doubts. In Germany evidence of fault («beschleunigtesVerfahren») allows to stop collecting further proofs and to bring the matters into court, in Norway it conducts to that case in court will be considered by one professional judge, instead of the mixed court or jurors, in Denmark recognition involves trial in the simplified order, without the need for performance of charge of court.

In the Russian Federation a special order of judicial proceedings in cases when the defendant pleads guilty (hl. 40 Criminal Procedure Code of the Russian Federation), isn't applied on criminal cases about crimes, for which possible purpose of punishment more than 10 years [12].

In Spain about one and a half centuries work situation that allows the defendant to admit the guilt by expression of a consent with performance of the party of charge and to ask to stop

research of proofs with appointment to it punishments (conformidad). Now possibility of such procedure for crimes punishment for which doesn't exceed 6 years, in some cases – 9 years, is fixed in Art. 655 of the Criminal Procedure Code of Spain.

After recommendations of the Council of Europe, tributes to the European states in 1987 one of which was a wish to provide the speed and efficiency of legal proceedings, in Italy the new criminal procedural code adopted in 1989 was developed. Two reduced procedures were fixed in the Criminal Procedure Code: «abbreviato» and «patteggiamento». «Abbreviato» fixed in the Art. of Art. 438-443 of the Criminal Procedure Code of Italy – the accelerated production which is carried out on request of accused for small weight within the previous hearing at which the court passes the decision on the basis of the proofs which are available in business. Within this procedure of any agreements between accused and protection doesn't consist, by results of hearings possibly a justification accused, and the conviction has to be one third less, than possible punishment in usual process. The court when carrying out hearings doesn't does research of proofs directly, studying only written case papers [13].

The second reduced procedure called by «patteggiamento» – «the petition for punishment at the request of the parties», put an order of trial and a measure of punishment depend on recognition of fault and agreement existence between protection and accused.

At first it was applied on crimes for which there could be an appointed punishment no more than 3 years, the judge thus could replace imprisonment till 2 years with a fine. In 2003 changes were made to the Criminal Procedure Code of Italy. So far applications of this procedure probably on cases of crimes, punishment for which doesn't exceed 5 years of imprisonment with punishment reduction in such affairs to 2\3. As a rule, this procedure can be connected with agreements which are concluded with so-called members of the organized criminal commonwealth who repented and violated the silence code, and also gave evidences against it is barefoot owls of the organization in exchange for decrease in punishment.

In Israel since recent time the simplified order of permission of criminal cases too is applied, in 2000 addition which provides the right to citizens is made to the criminal procedure law of this state, criminal case relative which is transferred to prosecutor's office or to department of charge of police, to appeal in these bodies not to take out against them the indictment. According to the Criminal Procedure Code of Israel police, having finished investigation on criminal case, submits the case to prosecutor's office or to department of charge of police which, having checked evidential base and expediency of prosecution, take out in case of need the indictment, and then hold charge of court. Under the law the accusatory body in case of receiving from police of criminal case has to notify on it the suspect and tell him that for thirty days it has the right to address with a motivated request for indictment not introduction against it. This right belongs only to category of criminal cases punishment for which doesn't exceed three years of imprisonment. The appeal to accusatory body gives the chance to the suspect to state the point of view that happened, to disprove known to it at this validation phase of police or the certificate of certain witnesses, to give legal assessment of the situation or to convince of insignificance of that happened. In practice rather large number of criminal cases doesn't reach judicial hearings and stops as a result of such requests.

The simplified procedure and practices in Poland, but in very limited form and also in cases of insignificant crimes which are punished by the conclusion for the term no more than three years. Procedure is called «voluntary submission to punishment» and allows court to issue the coordinated decree without verification of proofs that considerably reduces terms of judicial proceedings. Thus some conditions at the same time have to be satisfied: the client admits guilt, the defender

offers punishment, and the accuser agrees that is the initiative proceeds from protection; the victim agrees to application of the simplified order. However the court can deny conditions of the offered agreement, even if accused, the victim and the accuser already agreed, and to consider case in the general order. Irrespective of the agreement of the party (charge and protection) have the right for the appeal in higher judicial instance.

In the majority of the countries where criminal legal proceedings in one way or another become simpler, final instance which resolves an issue of that to apply or not to apply the simplified order, the court is, however there is also other approach when application of the simplified order is given to the discretion of body of charge. In such cases business on which the parties concluded the agreement, to judicial instance doesn't reach.

For example, into the Code of criminal investigation of Belgium in 1984 it was entered (in 1994 it was changed and added) Art. 216 according to which in order to avoid judicial proceedings in all cases of crimes for which punishment in the form of imprisonment for up to 5 years is prescribed, accused which doesn't deny the fault and the loss which completely compensated to the victim (if losses paid in treasury the sum determined in each case (if the crime caused losses only to interests of the state), and also, are caused to interests of the individual), is exempted from criminal liability with diversion in a pre-judicial stage of criminal trial. About a third of all criminal cases which arrive from police in prosecutor's office are solved exactly in such a way. Similar procedure which received the name «transaction», since 1983 exists and is widely applied in the Netherlands [14].

Thus jurists mark out that broad application of this institute led to self-accusation growth, in particular, in the Netherlands the question of cancellation of the simplified procedure as the persons detained by police, are suspected of implementation of acts which don't belong to heavy is raised, considers as the best even to admit the guilt in commission of crime to which they have no relation. It is easier for suspect to pay not too big, to measures of Europe, a penalty, and to be exempted from criminal liability within the simplified procedure, than to pay services of the lawyer and to prove the innocence during long judicial proceedings.

In the USA the prosecutor is the central figure in management of criminal legal proceedings as makes the most important decisions concerning its implementation. The prosecutor is faced by a problem of a legal assessment and qualification of the facts presented by police. Besides, in the course of charge of the person the prosecutor has to collect a wide range of proofs, to take degree of the harm done by a crime into account, to define the corresponding punishment of rather concrete crime or a face of the criminal. In an ideal any person accused of commission of crime, in the USA has the right for fair and fast court (day in court). Essence of instructions of the legislation such is that the state has to prove fault out of any doubts, accused has the right to be a judged jury of the one-years, and impartial judges have to weigh carefully all facts during adjudgement. However the reality considerably differs from this ideal of criminal legal proceedings. In most cases for accused «day in court» – some minutes which consist in recognition of the fault. That is in the USA the difficult system of a jury works, and only 10% accused acquire the right to use it. For the majority justice is carried out by the conclusion of contracts on fault recognition in exchange for the promise of decrease in the amount of punishment or application of softer punishment. The main function in this system is carried out by bodies of prosecutor's office. The most essential feature of public prosecutor's powers in the USA is existence of powers at the prosecutor which he applies on the discretion [15].

At their correct use such powers considerably promote justice implementation, however create also high potential for abuse of charge. The system of criminal legal proceedings in the USA gravitates

to the agreement on recognition of fault as to a way of permission of criminal cases more and more. Criminal prosecution and the agreement on recognition of fault is the cornerstone of the power of the prosecutor in the USA. The first formal duty of the prosecutor – to define, whether it is necessary to accuse the person of commission of crime and if yes, that what charge needs to be brought. However, powerless powers in the sphere of criminal prosecution do public prosecutor's system of the USA by the central element in legal proceedings implementation, and quicker powers of authority concerning release from prosecution, even under conditions of sufficiency of proofs for it.

So, in the USA «the agreement on recognition of fault» behind which nearly 90% of all criminal cases are solved, can't be applied by court by hearing of cases about violation of the rules of drunk traffic, about crimes of sexual character, and also about crimes which pose threat to the population or are made repeatedly, or entailed essential harm.

The American procedure of «the agreement on recognition of fault» has rather radical character. So, if accused and the accuser didn't come to the agreement at negotiations, then the accused has the right to enter such negotiations directly with the judge. In the course of negotiation the prosecutor, according to decisions of the highest courts of cassation of the USA, can suppress from protection that fact that it has insufficiently serious proofs or there are no necessary witnesses (without recognition of fault accused the prosecutor it will be compelled to close business). Such «deception» is possible because in the USA the accused has no right completely to examine materials of the business [16].

Therefore, summing up the result of the analysis of simplification of criminal justice in the countries of the abroad, it is possible to note that for today the international experience, despite of rather short period of introduction of the simplified procedures of criminal trial, is rather considerable and such which passed difficult stages of the formation and received accurately certain forms.

REFERENCES

1. Туркота С. Правовой компромисс в уголовном судопроизводстве / С. Туркота // Право Украины. – 2005. – № 12. – С. 70.

2. Свиридов Б. Сокращённая форма судопроизводства: которым путём пойдёт Украина? / Б. Свиридов, О. Пеклушенко // Юридический журнал. – 2004. – № 7. – С. 120.

3. Загурський О. Б. Европейский опыт применения упрощённого порядка судебного разбирательства уголовных дел / О. Б. Загурський // Университетские научные записки. – 2010. – № 1. – С. 191.

4. Тертишник В. Концептуальная модель УПК Украины и актуальные проблемы реализации идей правового государства в сфере правосудия / В. Тертишник // Право України. – 2006. – № 11. – С. 90.

5. Загурський О. Б. Европейский опыт применения упрощённого порядка судебного разбирательства уголовных дел О. Б. Загурський // Университетские научные записки. – 2010. – № 1. – С. 191.

6. Щелкин В. Признание вины подсудимым как способ упрощения уголовного процесса: «за и против» / В. Щелкин, О. Стулов. – Вестник прокуратуры. – 2003. – № 1. – С. 68.

7. Махов В. Н. Юристы США о сделке о признании вины / В. Н. Махов, М. А. Пешков // Право и политика. – 2003. – № 10. – С. 78.

8. Там же.

9. Гуценко К. Ф. Уголовный процесс западных государств / К. Ф. Гуценко, Л. В. Головко, Б. А. Филимонов. – М.: Зерцало. – 2002. – С. 480.

10. Гуценко К. Ф. Уголовный процесс западных государств / К. Ф. Гуценко, Л. В. Головко, Б. А. Филимонов. – М.: Зерцало. – 2002. – С. 395.

11. Гуценко К. Ф. Уголовный процесс западных государств / К. Ф. Гуценко, Л. В. Головко, Б. А. Филимонов. – М.: Зерцало. – 2002. – С. 384.

12. Дубовик Н. Сделка о признании вины и особый порядок: сравнительный анализ / Н. Дубовик // Российская юстиция. – 2004. – С. 52.

13. Головко Л. В. Альтернативы уголовному преследованию в современном праве / Л. В. Головко // Правоведение. – 2002. – С. 37.

14. Головко Л. В. Альтернативы уголовному преследованию в современном праве / Л. В. Головко // Правоведение. – 2002. – С. 37.

15. Бахин В. П. Преступная деятельность: понятие характеристика принципы изучение / В. П. Бахин, Н. С. Карпов, П. В. Цымбал. – Киев, 2004. – С. 94.

16 Загурський О. Б. Европейский опыт применения упрощённого порядка судебного разбирательства уголовных дел / О. Б. Загурський // Университетские научные записки. – 2010. – № 1. – С. 78.

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