UDC 343.1

V. A. Shkelebey,
candidate of juridical sciences (Ph.D.), Associate Professor of Department of criminal law, process and criminalistics National University of the State Tax Service of Ukraine

CONCILIATION – AS AN INSTITUTION OF CRIMINAL PROCEDURAL LAW OF UKRAINE

In article the comparative analysis of standards of the criminal procedural legislation forming institute of agreements in criminal legal proceedings of Ukraine and other countries is carried out. The general signs of agreements on recognition of guilt and reconciliation of the parties, stages of their conclusion are allocated; appropriate authority of participants of process is estimated.

Keywords: *institute, criminal liability, crime, the offender, the victim, the court mediation.*

In criminal legal proceedings of Ukraine, as well as in many countries of the world, there is a problem of differentiation of a procedural form, acceleration and simplification of judicial proceedings at steady observance of the rights and legitimate interests of participants of process. Existing «illegibility» of justice especially becomes aggravated in that case when in court the sufficient evidence of fault of the person in commission of crime is produced and the defendant also doesn't deny the guilt and therefore it is possible to solve business without complete judicial review [1, p. 3].

The «simplified» order of criminal legal proceedings of the majority of the European countries and the USA provides institute of agreements which at the same time promotes realization of the principle of procedural economy, and also provides the rights of the victim for a fast and full recovery of the harm done to it. The special order of criminal proceedings is also fixed in the Criminal Procedure Code of Ukraine on the basis of two types of agreements 2012: 1) about reconciliation between the victim and the suspect or accused and 2) about guilt recognition between the prosecutor and the suspect or to accused (Art. 468). And if agreements of the first order are to some extent already known to the domestic legislation (for example, reconciliation of the parties for private charge), the agreement on guilt recognition – the absolute short story of criminal trial demanding the detailed scientific analysis.

The institute of agreements on recognition of guilt didn't receive sufficient coverage in domestic legal literature though possibility of its fixing in the criminal procedural legislation already long time is actively discussed at conferences and round tables, and also on pages of the scientific legal editions devoted to problems of reforming of criminal legal proceedings. And the range of views of this legal institute fluctuates from its complete negation to an unconditional recognition. As a rule, the term «agreement on guilt recognition» always caused earlier a negative image of the accuser and the defender which, despite office barriers and ethical principles, selfishly «bargain» about favorable outcome of the case in the majority of theorists, and then "impose" the decision to the defendant and

the judge on what production comes to an end. Considering features of application of this institute, scientists note that quite often the essence of such agreement is reduced to that the accused pleads himself serious crime, than made by it actually. In exchange for this person holding charge, demands purpose of softer punishment, than such on which could count accused of a case of basic approach to investigation of the crime committed by it. The conclusion of such «transaction» in practice of the European countries, as a rule, involves simplification of procedure of further legal proceedings, that is business isn't submitted to a jury, and the proofs collected on a pretrial investigation in court practically aren't investigated. Thus, opponents of agreements on guilt recognition, denying possibility of inclusion of this legal institute in the new criminal procedural legislation of the Post-Soviet countries, claim that this institute contradicts the principles of criminal trial, in particular, to the principle of an objective truth, increasing risk of a miscarriage of justice [2, p. 16-19].

Really, the institute of release from criminal liability, for example, by the federal criminal legislation of the USA, in comparison with the criminal legislation of Ukraine, has the specifics. Characteristic of pre-judicial production in the USA is that in it «distance» from the moment of commission of crime before adoption of the final proceeding decision on business is considerably reduced, and with the conclusion of agreements on recognition of guilt in this country comes to an end, by different estimates, from 80 to 90 percent of all pre-judicial productions. The similar agreement is quite often concluded and in that case when the accused pleads guilty to commission of less serious crime or not at all points the indictment and also when the accuser, doubting that jurors find accused guilty, brings charge of commission of crime of smaller severity. Therefore when the prosecutor isn't sure that will be able to prove, for example, commission by the person of a premeditated murder, he brings charge of causing death on imprudence [3; 4].

We consider that fixing in the domestic legislation of institute of agreements on guilt recognition in «the American interpretation» could lead to a situation when the innocent person, being afraid of punishment for serious crime, pleads guilty to commission of crime of smaller severity (in other words, known negative practice when the suspect «assumes» what I didn't make will repeat). At the same time, it is easy to notice that such circumstance extenuating fault as the repentance provided by the criminal legislation of Ukraine and other CIS countries still from Soviet period also contains elements guilt recognition. Close to fixed in the Criminal Procedure Code of Ukraine to production on the basis of agreements on recognition of guilt the special order of judicial proceedings provided by the Criminal Procedure Code of the Russian Federation (section X), and also the «simplified» order of judicial proceedings fixed by the Criminal Procedure Code of Ukraine in edition of 1960 (parts 3, 4 and 5 of Art. 299) is considered. Agreements on recognition of guilt are known to practice not only in the countries of Anglo-American type of criminal trial. Such procedures are fixed in the Criminal Procedure Code of Italy, Spain, Germany, Belgium, the Netherlands and other countries. For example, to agreements on guilt recognition in Ukraine the so-called patteggiamento procedure fixed in the Criminal Procedure Code of Italy is similar. According to this norm, at any time before judicial proceedings the prosecutor accused (his defender) can agree about qualification of a crime and a possible measure of punishment, having filed a lawsuit the corresponding petition.

According to the Criminal Procedure Code of Ukraine, the agreement on recognition of guilt is concluded between the prosecutor and the suspect or accused at the initiative of any of the parties. Such agreement can't be concluded in criminal proceedings in which the victim (the natural or legal entity), and also on especially serious crimes, irrespective of a circle of subjects to which the damage is caused participates.

The procedural order of the agreement on guilt recognition similar to reconciliation of the parties though has a number of features. First of all, such agreement can be concluded as within criminal offenses production, crimes of small weight, and on serious crimes owing to which the damage is caused to the state and public interests (h. 4 Art. 469 of the Criminal Procedure Code of Ukraine). The initiative of such agreement can proceed both from the prosecutor, and from the suspect or accused. For example, if accused before declaration of the last word as it reaches consent with the prosecutor or the victim, it can before the last word or even during the speech to declare desire to conclude one of possible agreements. Thus court, giving opportunity accused to finish the performance, according to h. 3 Art. 474 of the Criminal Procedure Code are stopped urgently by carrying out procedural actions and passes to agreement consideration in fact.

Conclusion of agreement with the prosecutor as a result assumes mitigation of punishment or liberation from criminal liability. Therefore the measure of punishment offered in the agreement is coordinated previously by the parties taking into account nature of charge and circumstances which have to be considered by the prosecutor (Art. 470 of the Criminal Procedure Code). About recognition of guilt restriction of the rights of the prosecutor and accused (defendant) on the judgment appeal in an appeal or cassation order is a consequence of conclusion of agreement.

In the Criminal Procedure Code of Ukraine situations when some suspects or accused (appear in criminal proceedings h are considered. The 8th Art. 469) as in case the criminal proceedings are carried out concerning several such persons, the agreement on recognition of guilt can be concluded with one (or several) from suspects or accused.

Unlike the agreement on guilt recognition, the victim or the suspect or accused has the right to initiate the agreement on reconciliation of the parties only. Thus to conduct negotiations can (agree) concerning the conclusion of such agreement, except these persons, the defender, the representative (the lawful representative), and also other person approved by the parties except for the investigator, the prosecutor or the judge as these participants of production can be objectively not interested production on the basis of the agreement allowing possibility of adoption of the judgment without waiting for completion of investigation in full. Professional experts (mediators) who will help consultations to both parties at achievement of the arrangement and designing of necessary documents can be intermediaries at the conclusion of agreements on reconciliation, in our opinion.

In criminal proceedings it is necessary to understand activities of the expert (mediator) for settlement of disputes which are carried out within negotiations of the parties of the criminal and legal conflict to the conclusion purpose between them of the settlement agreement as mediation [5; 6]. In the version of the bill of Ukraine offered by us «About mediation (mediation) in criminal legal proceedings» it is defined that the mediator is the natural person who is the independent intermediary in settlement by the parties of the criminal and legal conflict which arose between them. Mediation in criminal proceedings is the procedure of permission of the criminal conflicts by their parties based on the principles of voluntariness, and equality of the parties, confidentiality, independence and impartiality with attraction of a mediator, directed on independent achievement by the parties of decisions on settlement of the criminal conflict in the order provided by the Criminal Procedure Code of Ukraine. Introduction in a legal framework of institute of mediation, first of all, demands legislative definition of the status of «mediators», powers of the central body which purpose of activity would be coordination of work of such intermediaries, and also of fixing of a circle of productions in which mediation is possible (for example, in France there are no restrictions on its application, and in Poland possibility of mediation is allowed only on cases of not serious crimes).

The agreement on reconciliation can be concluded also if its parties or the party is the minor in this connection lawful representative and defenders of minors are attracted. Thus if the minor reached sixteen-year age, he has the right to reconcile independently, but at a consent of his lawful representative. If the minor didn't reach 16 years, the agreement on reconciliation from its consent is concluded by the lawful representative.

Reconciliation of the parties possibly on criminal offenses, crimes of small and average weight, and also in criminal proceedings in the form of private charge. On heavy and especially serious crimes reconciliation of the parties isn't allowed. If some victims on the same crime participate in criminal proceedings, the agreement can be concluded only with all victims without exception. If some victims on various crimes participate, the agreement is concluded with one or several victims. In the latter case materials on which the parties reached consent, are subject to allocation in separate production.

When the parties expressed desire on reconciliation and conclusion of agreement, discussed the main contents of such arrangement, at the direct conclusion of the transaction requirements concerning its contents have to be considered (p.1 Art. 471 of the Criminal Procedure Code of Ukraine). In order to avoid any procedural violations and pressure upon the victim from protection, the legislator obliges court to be convinced that conclusion of agreement is voluntary, excepting application of violence, coercion or threats in relation to it. For confirmation of voluntary will of the victim the court, in case of need, can claim documents, in particular complaints of the suspect or accused, served by them at different stages of criminal proceedings, and the decision on results of their consideration, to cause in court session of certain persons and to interrogate them.

It is necessary to allocate obligatory stages of the conclusion of agreements on recognition of guilt and reconciliation of the parties in criminal proceedings of Ukraine: 1) initial consent of the parties to enter negotiations; 2) procedural fixing of the actual facts of the case in materials of criminal proceedings; 3) qualification of a crime according to norms of the criminal (material) law; 4) recognition suspected or accused essences and contents of the suspicion (indictment) reported to him; 5) the two-way deal about release of the person from criminal liability or if it is impossible, achievement of the arrangement of rather smaller volume of charge, change of charge or purpose of softer punishment; 6) preparation of the project and agreement signing; 7) providing the signed agreement on the statement in court. After adoption of the relevant decision and the adoption of the agreement, in the presence of the bases for release of the person from criminal liability or mitigation of punishment, the court the definition stops criminal proceedings.

Thus, in the context of our research we come to a conclusion that in criminal legal proceedings of Ukraine a number of the general signs, in particular have the conclusion of agreements on recognition of guilt and reconciliation of the parties: their purpose is settlements of the criminal and legal conflict; these agreements assume system of reciprocal concessions (compromises), their conclusion happens under control of court, both models of agreements are based on voluntary will of the parties; consideration of agreements by court happens in the special order fixed by the Criminal Procedure Code; the conclusion of agreements can be initiated at any time, as at a stage of pre-judicial investigation (starting with the message to the person about suspicion), and during judicial proceedings; approved by court of such agreements attracts important legal consequences up to determination of proceedings and release of the person from criminal liability, and also can significantly influence the chosen punishment measure.

Taking into account the above, we consider fixing in the Criminal Procedure Code of Ukraine of institute of agreements as a positive step on a solution of the problems of modern criminal legal

proceedings relating as to a pretrial investigation, and judicial stages. At the same time, expansion of procedural independence of the party of protection in forms and methods of impact on the course of criminal proceedings doesn't deprive of the investigator and the prosecutor of a duty to prove properly, and court – objectively to investigate circumstances of a perfect offense.

REFERENCES

1. Пушкар П.В. Угода про визнання вини у сучасному кримінальному процесі: порівняльно-правове дослідження / П. В. Пушкар / Дисертація на здобуття наукового ступеня кандидата юридичних наук : спеціальність 12.00.09 – кримінальний процес і криміналістика; судова експертиза. – Київський національний університет імені Тараса Шевченка. – Київ, 2005.

2. Іваненко П. С. Примирення винного з потерпілим / П. С. Іваненко // Часопис Академії адвокатури України. – 2010. – № 8.

3. Козочкин И. Д. Преступление и наказание в Англии, США, Франции, ФРГ, Японии : [учебное пособие] / И. Д. Козочкин. – М. : Омега, 1992.

4. Прилуцький С. Інститут допустимості доказів у кримінальному судочинстві США та Англії : порівняльно-правовий аспект / С. Прилуцький // Право України. – 2006. – № 10. – С. 132–134.

5. Попаденко Е. В. Применение примирительных процедур (медиации) в уголовном судопроизводстве / Е. В. Попаденко. – М., 2010.

6. Айрестен И. Деятельность в области восстановительного правосудия в Европе / И. Айрестен // Восстановительный подход в работе с несовершеннолетними правонарушителями (зарубежный опыт). – М., 2005.

Подано до редакції 25 грудня 2014 р.