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The legal status and rights of the victim in a plea bargain according to the criminal procedural legislation of the Republic of Kazakhstan

The article is devoted to the legal status of the victim (civil plaintiff) in the procedural agreement on the criminal procedural legislation of the Republic of Kazakhstan. The procedure for concluding procedural agreements in the form of a plea bargain and the role of the victim and civil plaintiff in concluding this procedural action are considered. Unfortunately, the rights of the victim and civil plaintiff were not regulated in detail in the Kazakhstani CPC until now, when they considered the request for a plea bargain, they were not warned about procedural and other problematic issues arising in the preparation of such agreements. And they are worried not only material, but also moral claims, and how they are resolved in the course of preliminary investigation and further in court. As you know, the developers at the stage of project development had a dilemma - to include the victim in the «transaction» orbit, or not. Now this problem is solved in the new Kazakhstani legislation. The role of the injured party in conciliation proceedings under the legislation of foreign countries is shown, where a civil claim for damages is also not included in the «deal» in most of the jurisdictions. The practice of considering criminal cases in conciliation proceedings in Kazakhstani courts is analyzed, procedural issues affecting the legality and validity of final decisions are emphasized. Arguments of imperfection of some procedural norms and difficulties in judicial consideration of this category of criminal cases are given.

Keywords: Criminal process, legal proceedings, procedural agreement, a plea bargain, victim, civil plaintiff.

The ongoing reform of the criminal process has entailed a significant transformation of its concept, the harmonization of the criminal procedure legislation with the norms of international law.

The main indicator reflecting compliance with the principles of criminal justice, enshrined in the Constitution of the Republic of Kazakhstan and the Criminal Procedure Code of the Republic of Kazakhstan, is the recognition of a person's guilt in committing a crime.

In law enforcement, there are often situations where a suspect or accused, feeling guilty, is in contact, trying to «agree» on mitigating punishment if he helps the investigation.

Previously, a Kazakhstani policeman could not give him any guarantees, except that the court, perhaps, will take into account a frank confession. But there was no legal basis for this in the law. Yes, and the mentality of Kazakhstanis, and in general the criminal situation in Kazakhstan did not have this, «where there are, as indicated not only Kazakhstani researchers, but also international experts, ill-conceived investigative methods and OIAs (torture[1], blackmail, provocations, etc.) [2], and corruption is, practically, an institutionalized practice, there can be no question of introducing such an institution [3].

Now there is such a possibility. It is described in detail in chapter 63 of the Criminal Procedure Codeand is called the «procedural agreement».

Kazakhstan legislator included in the Criminal Procedure Code two forms of procedural agreement: a plea bargain and an agreement on cooperation. The first, in accordance with the new Law, should be applied

and is already applied to all categories of crimes, except for particularly serious crimes, and is designed to speed up the process of investigation and provide reparation to the victim.

One of the important circumstances of this institution is that, in accordance with Article 612, Part 3 of the Criminal Procedure Code of the Republic of Kazakhstan, the conclusion of a procedural agreement is not a ground for releasing a person from civil liability in front of persons recognized as victims and a civil plaintiff. The legislator, therefore, in accordance with Art. 15 Part 2 of the Criminal Procedure Code of the Republic of Kazakhstan, as a matter of priority, protects the interests of victims and civil plaintiffs in criminal proceedings. In addition, the law explicitly states that one of the mandatory conditions for concluding a procedural agreement in the form of a plea bargain is the consent of the victim to conclude a procedural agreement (Clause 3, Article 613 of the Code of Criminal Procedure), even if the suspect, the accused dispute the suspicion, the charge and the evidence on the case in committing the crime, the nature and extent of the harm caused by them. The expression of the consent of the victim for the conclusion of the procedural agreement is drawn up in writing, which takes into account not only the positions of the proof of the suspect, the accused or the defendant, but also the arguments of the victim in respect of harm and his moral and material claims to the guilty persons.

It should be noted that the injured party does not play any role in the conciliation proceedings in most countries, which allows defendants to recognize or not to challenge the guilt and go directly to the verdict, although the victim's position in the case may influence the decision of the public prosecutor. A civil claim for damages is also not included in the «deal» in most of these jurisdictions. In Russia, however, a defendant, despite his desire to admit guilt and agree to a «special procedure», will not be able to use it if he does not agree to satisfy a civil claim. In a smaller part of jurisdictions, however, the injured party must give its consent to the application of the procedures. Some German theorists, in principle against the plea bargain, recognize their positive role only if the victims take an active part in them. They see this as a potential model for the reprivatization of the criminal process and its reconstruction as a model for resolving conflicts, rather than simply a means for unilateral determination of the truth, that is, «as a more humane procedural model of the future» [4; 165-187].

Despite the fact that in Art. 615 of the Code of Criminal Procedure do not detail the rights of the victim and civil plaintiff when considering an application for a procedural agreement in the form of a plea bargain, the body leading the criminal process is required to notify the above persons of the forthcoming procedure and warn them of all the problematic issues that may arise during preparation and conclusion of such an agreement. The victims and civil plaintiffs, above all, are concerned with their moral and material claims, as they are proved in the course of the preliminary investigation and documented. And, of course, they are interested in how they can be resolved in the future when the investigation is terminated, and they will not be able to somehow influence the resumption of the investigation in order to restore their unrealized property rights.

As follows from part 2 of Article 615 of the Code of Criminal Procedure of the Republic of Kazakhstan, the investigating body, having received a petition from the suspect, the accused or the defender to conclude a procedural agreement on proceedings in the form of a plea bargain, taking into account the grounds provided for in Article 693 of the Criminal Procedure Code of the Republic of Kazakhstan, within three days sends the petition together with the materials of the criminal case to the prosecutor for resolving the issue of concluding a procedural agreement. At the same time, for each victim, if there are several of them, and for the civil plaintiff, are to be specified their property issues, how far they are proved in the course of the investigation, and how far they are confirmed by documentary evidence, for example, audit certificates, independent assessments of movable or immovable property by evaluators, certificates from the CPSs and notarial office and so on. In addition to documentary evidence, material claims must be confirmed by witness testimony, clarified during the confrontation between participants in the criminal process, other investigative actions. Before the conclusion of the procedural agreement, the investigator, as well as in the future, the prosecutor and the court, should explain to the suspect the essence of the procedural agreement and whether he agrees with it. In addition, which is undoubtedly important, it is necessary to find out for how long it will be able to voluntarily compensate for the harm caused to the victim with the indication of specific terms, amounts or quantitative characteristics.

As is known, any verdict can be appealed and challenged both by the defendant, the lawyer and the prosecutor, and the victim. Unfortunately, with respect to victims, sentences passed in conciliation proceedings cannot be appealed. Even the prosecutor — he cannot protest. This is an exceptional feature of the verdicts imposed on the concluded procedural agreement.

During the plea bargain, the victim, first of all, wins, for which it is important to get compensation as quickly as possible for the damage caused to him by the crime. And, since the basis of the procedural agreement is the recognition by the accused of the nature and amount of the harm caused, the voluntary reimbursement of it within the time limits specified in the agreement and the court's sentence, the victim will not be required to prove the claims in the case, then expect for years a real enforcement of the judicial act in part of the decision on civil action. The legislator, having established the specified conditions of compensation of the harm caused by the crime, along with it limited the will of the victim, forbidding him to refuse his consent to conclude a deal and to handle this claim in the civil procedure [5].

Precisely because the victim is deprived of the right to appeal the conciliatory sentence, the investigating bodies in the course of preparing materials for the conclusion of procedural agreements and further prosecutors should more thoroughly explain to the victims that they will not be able to appeal the verdict and they will not be summoned to the court to clarify issues of compensation for the damage caused and unsatisfied claims of a material nature [6].

This, in our opinion, concerns the judicial stage when the case is in conciliation proceedings. Since the law does not oblige the court to call the victim, however, the victim may be summoned by the judge. We support the opinion of some judges that «the court must necessarily call the victim to clarify his position. Judges should not allow violation of the rights of the victim. He must be clarified once again about his rights, the consequences of consent to the conclusion of a procedural agreement between the prosecutor and the defendant. The court must make sure that the victim understood the essence of this institution and expressed his will voluntarily and consciously. If the court does not comply with this requirement or does it improperly, then in this case we will give rise to discontent of the citizens who have suffered from the crime, we will damage the authority of the judiciary» [7].

As mentioned above, the procedural agreement is not concluded if at least one of the victims does not agree with it. In practice, this often occurs in multi-episode cases. The main reason for the disagreement of the victims to conclude a procedural agreement is, in the majority, the superficial decision of investigators of questions about the demand for compensation of material harm caused during the crimes. Therefore, victims often turn to court after the conclusion of a procedural agreement, since the law does not directly prohibit the invitation of him, as well as the civil plaintiff.

When the case is withdrawn from the investigating body, the prosecutor, in accordance with article 615, part 3 of the Criminal Procedure Code of the Republic of Kazakhstan, along with clarifying the possibility of concluding a procedural agreement, invites the defense party of the suspect or accused to discuss the issue of his conclusion or informs in writing about the refusal to satisfy the petition.

At the same time, not only such questions are subject to mandatory verification: whether an act committed by a person under a procedural agreement on proceedings falls within the form of a plea bargain; voluntariness of the person's application for a procedural agreement and awareness of the consequences of his detention; The person does not challenge the evidence collected and the qualification of the act. But, and importantly, the person's agreement with the nature and extent of the harm caused to him and with a lawsuit.

To clarify these circumstances, the prosecutor summons the suspect, the accused (requires delivery, held in custody), his defender and the victim, who find out the opinion on the possibility of concluding a procedural agreement. To the person who submitted the petition, the prosecutor clarifies the consequences of the conclusion of the procedural agreement, the right to refuse his conclusion.

In accordance with part 4 of article 615 of the Code of Criminal Procedure of the Republic of Kazakhstan, in case of the disagreement of the victim, a procedural agreement is not concluded. If the victim agrees, in view of his opinion on the issue of compensation for the damage caused by the crime, the prosecutor and the defense party conclude a procedural agreement within a reasonable time, which is stated in writing and signed by the parties to the agreement.

The court, at the same time, is not connected with the terms of the concluded agreement and is entitled, in case of disagreement with the size and type of punishment, of having doubts about the guilt of the defendant, to return the criminal case to the prosecutor for drawing up a new agreement or to conduct proceedings on the case in the general order.

Among the undoubted features of the deal can be distinguished voluntariness from the suspect (the accused) and the fact that the victims do not object to the deal.

It should be noted that even at the stage of project development in preparing this chapter, the developers had a dilemma — to include the victim in the «deal» orbit, or not. But, considering that in the beginning of 2018 a new law on the creation of a fund for victims of crimes appeared in the new Criminal Procedure

Code, replenished by fines, confiscated and seized property, the institution of reconciliation of the parties and mediation will remain, the victim does not participate in the deal, but he has the right to declare in court your opinion or objection. For example, in Georgia, the victim does not have any rights when making a deal with justice [8].

That is, there was a danger of excluding the victim from the orbit of a plea bargain. Professor BersugurovaL.Sh. right at the drafting stage, raised the issue of «more specific status of the victim, understanding that with the introduction of the institution of the procedural deal, the rights of the victim will be substantially limited, especially in his ability to fully compensate for harm (in his understanding). Apparently, it will also be necessary to conduct negotiations with the injured party about the deal at some stage. Otherwise, the victims (with the help of lawyers) will appeal any deals and will always do. Perhaps, it is necessary to give the victims the right to object to the deal immediately. And after resolving this issue (still positive or not), we already have to raise the issue of approving the deal and thus disavow the position of the victim, again proceeding from the purpose and legal expediency of the deal» [9].

It should be noted that the positions of the victim in conciliation proceedings are fundamentally different in the legislation of different countries from categorical denial of their participation to an active influence on the conclusion of agreements and consideration of the opinion on punishment for the defendants.

For example, in only seven states of the United States, the victim has the right to participate in the proceeding on concluding a plea bargain. In Connecticut, the victim's lawyer can take part if serious bodily injuries or large losses are involved in the case. The victim does not play any role in the shortened procedures in the Argentine provinces of Buenos Aires, Formosa, Missones, as well as in the Federal Code of Argentina. In El Salvador, for example, a judge must hear the victim's position, but may order a «reduced proceeding», despite his / her objection. The injured party has the right to be heard in France, but this right is rarely used. The victim's opinion is heard, inter alia, in some Argentine provinces, in others the defendant and the victim can agree on including it in the judgment as part of it. Victims also have a veto according to Article 373 of the Code of Criminal Procedure of Bolivia, as well as Estonia, Art. 239(2)(4) of theCode of Criminal Procedure. In Chile, if a victim accuses of a more serious crime, in which the punishment exceeds five years, the procedimientoabreviado will not be applied [4; 165-187].

In the Kazakhstani version of the deal, the developers tried to strengthen the victim's participation in the court stage, if he does not agree with the deal. In the final version of the project, among other things, it was fixed that prior written notification by the prosecutor when sending a criminal case to the court about the victim's right to appeal the deal in court and to file a civil claim [8]. However, this norm, unfortunately, was not included in the final version, and further in the Law.

The comparatively short period of application of conciliation proceedings in courts by Kazakhstani judges shows some imperfection of the norms on procedural agreement and the procedural «lack of rights» of the victims. Thus, one of the prerequisites for concluding a procedural agreement in the form of a plea bargain is «the consent of the victim to conclude a procedural agreement», which is directly provided for in Section 3, Part 1, Cl. 613 of the Code of Criminal Procedure of the Republic of Kazakhstan. Further, in it, in point 2, part 2, it is pointed out that such an agreement cannot be concluded, «if at least one of the victims does not agree with the conclusion of a procedural agreement». However, throughout Ch. 63 of the Code of Criminal Procedure of the Republic of Kazakhstan, and none of its articles regulating the «special procedure for its conclusion» does not state a single word and does not expressly state in what form and in what way such consent of the victim should be documented. In procedural agreements that have entered the court, the judges complain, there is actually no consent of the victims, which subsequently makes it difficult to hear the case in conciliation proceedings. Moreover, the persons suspected of committing crimes, as well as the victims at the stage of pre-trial investigation, do not explain the essence of the procedural agreement, have the facts of people's delusion regarding the consequences of concluding such a deal. In this connection, courts are compelled to return criminal cases to the prosecutor for drafting a new procedural agreement [9].

Even more this issue is aggravated by the fact that in a special rule establishing the procedure for drafting a procedural agreement in the form of a plea bargain, i.e. in Art. 616 of the Criminal Procedure Code of the Republic of Kazakhstan Part 2 of the instructions that «the procedural agreement, along with the prosecutor, the suspect, the accused and his defender» is signed by the victim — no! Thus, the Kazakhstani legislator allegedly infringed on the victim, without providing for his legal right to sign the agreement.

Therefore, given the discrepancies in the new criminal procedure law and the difference in the enforcement of certain provisions of chapter 63 of the Criminal Procedure Code of the RK, the Supreme Court of the RK gave official explanations in its Regulatory Decree. In accordance with clause 10 of the Normative

Decision No. 4 of the Supreme Court of the Republic of Kazakhstan of July 7, 2016 «On the practice of considering courts of criminal cases in conciliation proceedings», the body conducting the criminal proceedings before sending the prosecutor's request for a plea bargain in accordance with the requirements of Clause 22, Paragraph six of Article 71 of the CCP, to explain to the victim that he has the right to know about the intention of the parties to conclude an agreement on pleading guilty, on his conditions and consequences, the right to offer their terms for compensation for damage caused by the crime, or to object to its conclusion. On the production of this action at the stage of pre-trial investigation in compliance with the requirements of Article 199 of the Code of Criminal Procedure, a protocol is drawn up, and in the judicial proceedings - recorded in the record of the court session.

The same resolution explained that in order to properly ensure the rights of the victim in the criminal process at the stage of concluding the agreement on confessing guilt and obtaining consent of the victim for his conclusion, the prosecutor should additionally explain to the victim the legal consequences stipulated in Article 614 of theCode of Criminal Procedure of giving consent to them to conclude an agreement on pleading guilty . On the production of this action by the prosecutor, in compliance with the requirements of Article 199 of the Code of Criminal Procedure, a protocol is drawn up.

Since the consent of the victim to conclude a plea agreement is a prerequisite for his conclusion, except when in the criminal case the victim (natural or legal person) is absent, such consent of the victim in writing should be attached to the materials of the criminal case together with the explanatory protocols to the victim his rights and the consequences of giving them consent for concluding an agreement on confessing guilt [10].

In terms of sentencing, it should be noted that as a result of the fact that the consideration of cases in conciliation proceedings is a novel for judges, there are not entirely correct formulations of sentences. Some courts do not touch at all on the verdicts of the prosecution, its proof, do not indicate the consent of the victims. Other courts fully reflect the essence of the prosecution, the available evidence base, give reasons for the decision [7].

Thus, some irrationality and inconsistency of the legislator in determining the role and place of the victim at the conclusion of the procedural agreement is still evident and to some extent amended by the abovementioned Normative Decision. Therefore, we agree with the view that for a more equitable resolution of this issue, we can use the Recommendations of the participants of the international seminar on the topic «Application of the norms of the new criminal and criminal procedural legislation» (September 25-27, 2014, Shchuchinsk), according to which «in order to ensure the rights of the victim at the conclusion of the procedural agreement, it is expedient to draw up (by the investigator or the prosecutor) a separate procedural document on granting consent to the victims for the use of this type of proceeding».

In practice, there are also cases when the defendants in court refuse the previously signed procedural agreements. So, the court № 2 of the city of Semey in the East Kazakhstan region considered a criminal case against Mr. M., who, when clarifying the issue, when he can voluntarily reimburse the damage done to the victim, said that he does not want to compensate for harm, that he agreed to a procedural agreement to get a small sentence. Therefore, it is logical for the judges to suggest that to successfully apply conciliation proceedings it is necessary that the penalties assigned in the plea bargain are on the average less strict than those prescribed for similar cases considered in the general order. Some lawyers believe that if the defendant refuses a procedural agreement previously signed with the prosecutor, the punishment imposed in the general proceedings must be stricter than the contractual one, which he refused [6].

Many scholars, and even practitioners, believe that not only the suspect, the accused or the defendant wins in the conclusion of a plea bargain, but also the victim, for whom, more importantly, first of all, getting compensation for the damage caused to him by the crime. Although, in the law (article 614, p.3 of the Criminal Procedure Code of the Republic of Kazakhstan), there is still an infringement of his right to change in the future the demand for compensation for damage.

Given that the basis of the procedural agreement is the recognition of the nature and amount of harm caused by the defendants, it is presumed that voluntary reimbursement is possible within the time specified in the procedural agreement and then in the conciliatory sentence. The victim will not be required to prove his property claims during long proceedings during the investigation, and then wait for an indefinite time for the execution of the judgment in the part of the claims.

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Қазақстан Республикасының қылмыстық-процессуалдық іс жүргізу заңнамасы бойынша кінәні мойындау туралы мәміледегі жәбірленушінің құқықтық мәртебесі мен құқықтары

Мақала Қазақстан Республикасының қылмыстық іс жүргізу заңнамасы бойынша процессуалдық келісімдегі жәбірленушінің (азаматтық талап қоюшының) құқықтық жағдайына арналған. Кінәні мойындау туралы мәміле нысанындағы процессуалдық келісім жасасу рәсімі және бұл процессуалдық әрекеттегі жәбірленуші мен азаматтық талап қоюшының рөлі қарастырылған. Қазақстандық Қылмыстық-процессуалдық кодексінде, өкінішке орай, қазірге дейін кінәні мойындау туралы мәміле жасасу туралы өтінішхатты қарастыру кезінде жәбірленуші мен азаматтық талап қоюшының құқықтары егжей-тегжейлі реттелмеген, олар мұндай келісімдерді дайындау барысында туындайтын іс жүргізу және өзге де проблемалық мәселелер туралы ескертілмеген. Оларды материалдық талаптар ғана емес, сонымен қатар моральдік талаптар және олар алдын ала тергеу барысында және одан кейінгі сотта қалай шешілетіні алаңдатады. Белгілі болғандай, жобаны әзірлеу сатысында әзірлеушілерде дилемма болды – жәбірленушіні «мәміле» орбитасына қосу немесе қоспау. Енді бұл мәселе жаңа қазақстандық заңнамада шешілген. Мақала авторлары юрисдикциялардың көпшілігінде залалды өтеу туралы азаматтық талап «мәмілеге» енгізілмеген шет мемлекеттердің заңнамасы бойынша келісім рәсімдеріндегі жәбірленушінің рөлін көрсеткен. Үзілді-кесілді шешімдердің заңдылығы мен негізділігін қозғайтын іс жүргізу және рәсімдік мәселелерге назар аудара отырып, қазақстандық соттардағы келісім өндірісінде қылмыстық істерді қарастыру практикасы талданған. Кейбір процессуалдық нормалардың кемшіліктері мен қылмыстық істердің осы санатын соттық қарау кезіндегі қиындықтарына дәлелдер келтірілген.

Кілт сөздер: қылмыстық процесс, сот ісін жүргізу, процессуалдық келісім, кінәні мойындау туралы мәміле, жәбірленуші, азаматтық талап қоюшы.

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Правовое положение и права потерпевшего в сделке о признании вины по уголовно-процессуальному законодательству Республики Казахстан

Статья посвящена правовому положению потерпевшего (гражданского истца) в процессуальном соглашении по уголовно-процессуальному законодательству Республики Казахстан. Рассматриваются процедура заключения процессуальных соглашений в форме сделки о признании вины и роль потерпевшего и гражданского истца при заключении этого процессуального действия. В казахстанском УПК, к сожалению, до настоящего времени подробно не были регламентированы права потерпевшего и гражданского истца при рассмотрении ходатайства о заключении сделки о признании вины. Они не предупреждались о процедурных и других проблемных вопросах, возникающих при подготовке такого рода соглашений. Их волнуют не только материальные, но и моральные претензии и то, как они решаются в ходе предварительного расследования и далее в суде. Как известно, у разработчиков еще на стадии разработки проекта была дилемма — включать потерпевшего в орбиту «сделки» или нет. Теперь эта проблема решена в новом казахстанском законодательстве. В работе показана роль потерпевшей стороны в согласительном производстве по законодательству зарубежных стран, где гражданский иск по поводу возмещения убытков также не включается в «сделку» в большинстве из юрисдикций. Проанализирована практика рассмотрения уголовных дел в согласительном производстве в казахстанских судах, акцентировано внимание как на процессуальных, так и на процедурных вопросах, влияющих на законность и обоснованность принятия окончательных решений. Приведены аргументы несовершенства некоторых процессуальных норм и трудности при судебном рассмотрении данной категории уголовных дел.

Ключевые слова: уголовный процесс, судопроизводство, процессуальное соглашение, сделка о признании вины, потерпевший, гражданский истец.

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