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**Volodymyr KANTSIR**
Lviv Polytechnic National University,
Educatinoal and Rasearch Institute of Law,
Psychology and Innovative Education,
Professor of the International
and Criminal Law Department,
Doctor of Law, Professor
volodymyr.s.kantsir@lpnu.ua
ORCID iD: https://orcid.org/0000-0002-3689-4697

**Maria KOVAL**
Lviv Polytechnic National University,
Educatinoal and Rasearch Institute of Law,
Psychology and Innovative Education,
Associate Professor of the International
and Criminal Law Department,
PhD in Law, Associate Professor
mariia.m.koval@lpnu.ua
ORCID iD: https://orcid.org/0000-0003-1830-7003

# INTERNATIONAL EXPERIENCE IN THE APPLICATION OF AGREEMENTS IN CRIMINAL PROCEEDINGS

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**Further study of the institution of «agreements in criminal proceedings» is appropriate taking into account three main factors: analysis of historical experience, generalization of the practice of applying current legislation and study of foreign experience: criminal procedural legislation and the practice of its application.**

**The institution of criminal proceedings based on agreements is a successful «borrowing» of the legislative experience of other states and belongs to special judicial procedures. Perceived positively by society, as the possibility of an agreement between the suspect or the accused and the prosecutor or the victim provided by law has become a common alternative way of resolving criminal legal conflicts.**

**In the legislation of the European Union, the procedures for making a court decision on the basis of a plea agreement are not completely identical to the practice in the legislation of the United States: the initiative of the parties in resolving the issues of prosecution is transformed by the impossibility of changing the accusation by agreement, and the «passive position» of the court in deciding the procedure for resolving the criminal case proceedings is its limited activity. The special procedure for passing a court decision on the basis of a plea agreement has a procedural legal nature, similar to continental conciliation procedures: they are based on the consent of the parties, but are not related to the conclusion of the agreement by the parties as a process of negotiations regarding its terms, formalization of the agreements reached in a certain way. The subject of agreements is agreement with the charges presented, or the punishment proposed by the prosecutor, or the simplification of the court procedure for consideration of criminal proceedings.**

**Under the influence of the European procedural culture and practice, the agreement in the US legislation on the recognition of guilt acquires new characteristics: the court often shows wide boundaries for consideration (discretion) in imposing punishment; takes an active part in the discussion of the terms of the conclusion of the agreement by the parties; as a result of the prosecutor's unlimited powers to make decisions regarding the conclusion of the agreement, the latter becomes similar not to a bilateral agreement between the accused and the prosecutor after adversarial negotiations, but to a unilateral determination by the prosecutor of the degree of guilt of the accused and the appropriate punishment for him.**

**Keywords: plea agreement, conciliation agreement, simplified procedure, compromise, legislative experience of foreign countries.**

**Formulation of the problem.** Reforming the national criminal proceedings is associated with the optimization of the criminal procedural form which contributes to the effective realization of the individual's right to free access to justice, economical and rational use of resources, optimization and reasonableness of the timeframes for consideration of criminal proceedings and reduction of the burden on the judicial system.

The institute of criminal proceedings based on agreements is a successful, justified «borrowing» of the legislative experience of other states and belongs to special procedures of the judicial system. It is perceived positively by the society, since the possibility of agreement between the suspect or accused and the prosecutor or the victim, as provided by law, has become a widespread alternative way to resolve criminal legal conflicts.

**Analysis of the study of the problem.** The issues of application of simplified procedures for consideration of criminal cases, including with the use of an agreement, have been studied/are being studied by foreign scholars, in particular: A. Alschuler, A. Goldstein, M. Feeley, L. Friedman, M. Heymann, R. Wenniger, D. Dressler, D. Langbein, W. MacDonald, C. Mirsky and R. Scott, D. Baldwin, E. Doub, S. Cohen, M. McConville, L. Winreb, D. Rawls, E. Sanders and E. Ashworth, A.J. Arnaud and R. David, Berthel, B. Zwart, K. Wingaert and N. Jorg, S. Trexell and others.

However, the issues of the essence of agreements in criminal proceedings in Ukraine, the peculiarities of the procedure for their conclusion and execution, the possibility of using foreign legislative experience in their application, etc. require systematic study and new rethinking.

**The purpose of the article.** Article is to provide a fragmentary analysis of the provisions of criminal procedure legislation of certain foreign countries with regard to the procedure for concluding agreements during court proceedings and reconciliation in law enforcement criminal procedure practice.

**Presenting main material.**Continuation of the study of the institute of «agreements in criminal proceedings» is appropriate with due regard for three main factors: analysis of historical experience, generalization of the practice of application of current legislation, and study of foreign experience (criminal procedure legislation and practice of its application).

The problem of effective administration of justice in the United States has been solved for many decades through the use of plea bargaining. It is believed that the institution of «agreements in criminal proceedings» originated in the United States. There are two types of plea agreements in American criminal proceedings: plea bargains and cooperation with the investigation. The procedure for their conclusion is regulated by the Federal Rules of Criminal Procedure in the U.S. District Courts (Rule 11), the U.S. Code (Article 3553(3)18), the U.S. Sentencing Guidelines (Article 5K 1.1), and the laws of many states [1].

The obligations of the parties under these two types of agreements differ. In the first case, three types of agreements can be concluded: 1) plea bargain in exchange for reduced charges; 2) plea bargain in exchange for reduced sentence; 3) plea bargain in exchange for reduced charges and sentence.

In addition, the American criminal procedure knows the procedure for resolving criminal proceedings without a trial if the accused files a motion not to contest the charges (nolo contendere).

A study of scientific sources and court practice has shown that the vast majority of criminal proceedings in the US courts are resolved on the basis of plea agreements [2].

The role of the court in American adversarial procedures is traditionally «passive». The court is «bound» by the charges brought against a particular person. Therefore, if the prosecutor and the defendant reach an agreement, the court usually recognizes this particular charge as proven, limiting itself to the evidence that the parties deemed necessary. At the same time, the court has broad discretion in exercising its primary power to approve or reject a plea agreement. The legislation establishes a minimum set of rules that must be followed by the judge when making a decision. For example, the court is obliged to reject the defendant's plea if it is convinced in an open court hearing, having personally questioned the defendant, that: 1) the request is the result of threats, violence, fraud, deception, suggestion, other coercion or promise of any benefits other than those provided for in the agreement (section (c) of Rule 11); 2) the defendant is not aware of the consequences of the agreement and his procedural rights; 3) the defendant is not provided with the right to defense. The main requirement is that the court has the right to enter judgment on the basis of the defendant's guilty plea without examining the evidence if it is satisfied that there is a factual basis for such a plea (Rule 11 of the Federal Rules of Criminal Procedure for the United States District Courts). Opponents «accuse» the institution of plea bargaining of violating the principle of presumption of innocence, the right to defense, and the right to refuse to testify against oneself. A person who has the right to plead guilty and thereby exclude the official investigation of the charges is deprived of the absolute right to withdraw his or her plea. In any case, this is a matter of discretionary power of the court. In addition, the procedure does not guarantee that the judge will satisfy the prosecutor's request for a certain punishment for the accused: he or she can impose any punishment, including a more severe one than the prosecutor recommended. The agreement lowers the standards of proof in criminal proceedings, as it eliminates the need for conscientious collection, comprehensive verification and objective assessment of evidence. If law enforcement agencies realize that a person's plea of guilty and the conclusion of a plea agreement automatically entails his or her conviction, this may lead to abuse on their part. There are cases when prosecutors bring «overstated» charges, promising that they will be mitigated if the person pleads guilty in court. The defendant agrees to plead guilty to a lesser crime out of fear that he or she will be convicted of a more serious crime. As a result, the risk of convicting the innocent increases. When the prosecution's case is weak, prosecutors use plea bargaining as a way to avoid acquittals. In this situation, people who could be acquitted due to insufficient evidence are convicted. In one of its decisions, the US Supreme Court stated that plea bargains are intended to be used in criminal proceedings where «the guilt of the defendant is in serious question or where there is substantial doubt that the prosecution will be able to prove the defendant's guilt» [3].

In the United States, the court has the right to impose any legal penalty despite the parties' agreement. The court, in verifying compliance with the terms of the agreement, is obliged to ask the defendant whether he understands that neither his defense counsel nor the court can inform him of the exact limits of the possible punishment before the trial. The court also explains that it may not accept the prosecutor's recommendation or the lawyer's request for a specific punishment, in which case the defendant who enters a not guilty plea will not have the right to withdraw it in the future. The uncertainty of sentencing practice often leads to the sentencing of individuals to a more severe punishment than the one agreed upon by the prosecutor during the plea bargaining process. However, in most cases, the prosecutor's mitigation of the charges underlying the agreement results in a reduction of criminal liability. But even in this case, the accused does not always benefit greatly, as the practice of adding up punishments for

multiple crimes, the wide gap between the lower and higher sentence limits for most crimes, and the inclusion of information about the actual circumstances of the crime in the report on the accused, which are examined by the judge before imposing punishment, reduce the significance of the fact that some of the charges are dropped or that the accused is punished for only some of the crimes committed by him [1].

In the criminal proceedings of Western European countries, the conciliation procedures «conformidad» and «juicios rápidos» are used in the Kingdom of Spain, the «abbreviato» and «patteggiamento» models in the Italian Republic, «absprachen» in the Federal Republic of Germany, and «reconnaisance 41 prelable de coupabilité» in the French Republic. This is due to the considerable similarity of the types of judicial proceedings in Western European countries [4].

The European Criminal Procedure Law does not provide for negotiations between the parties on the terms of the accused's liability in criminal proceedings on plea bargaining. The limits of compromise between the state and a person are strictly defined by law: a person who has agreed to the charges against him or her, subject to a number of additional conditions, is guaranteed a sentence not exceeding the limit established by law. The conclusion and approval of such criminal proceedings have certain peculiarities:

1. The agreement may be concluded at the initiative of the accused. In some cases, a statement by the accused of agreement with the prosecution is required, in others - a request by the prosecutor to enter into an agreement with the accused. For example, in the Italian «abbreviato» system, the resolution of criminal proceedings on the basis of an agreement is possible at a preliminary hearing only at the request of the accused (Article 438 of the Italian CPC). For consideration of criminal proceedings under the Spanish «conformidad», the accused must express his/her consent to the qualification of the crime and the penalty proposed in the prosecutor's motion (Articles 655, 689.2 of the Spanish CPC).

2. In most cases, the defendant must express his or her desire to use the agreement before the trial begins. For example, in the Italian «abbreviato» procedure, the accused is obliged to file a motion for summary judgment five days before the start of the preparatory hearing; the Italian «patteggiamento» procedure is applied if the prosecution and the defense during the pre-trial investigation or preparatory hearing of criminal proceedings have concluded an agreement on the imposition of a certain punishment on the accused and have filed a motion with the court for its approval before the start of the trial. At the same time, according to the criminal procedure legislation of some European countries, the accused may consent to the consideration of criminal proceedings under the simplified procedure already at the court hearing.

In Spanish «juicios rápidos», the accused has the right to enter a plea of guilty at the stage of acceptance of the case for hearing; «conformidad» - the accused has the right to enter into a plea agreement with the prosecution not only at the end of the pre-trial investigation, but also at the preparatory hearing and even after the examination of evidence in a trial conducted with the participation of jurors; German «absprachen» aims to reach an agreement between the parties to conclude a plea in court and under its control.

3. Conclusion of a plea agreement results in a reduced sentence. For example, in the Italian «ratteggiamento» and French «reconnaisance prelabo de coupabilité» special proceedings, when a court makes a judgment on the basis of a plea agreement, the court is obliged to reduce the punishment by two-thirds compared to the punishment provided by the criminal law for such a crime. The Spanish «juicios rápidos» provides for a reduction of the punishment by one third of the maximum. At the same time, the procedural legislation of a number of Western European countries provides for additional benefits in resolving criminal proceedings under a simplified procedure. For example, in the Italian «patteggiamento» procedure, the accused is not charged with court costs, the criminal record is expunged in a shorter time, no additional punishment (except for confiscation) is applied, and the plea agreement approved by the court has no prejudicial effect on civil and administrative proceedings. At the same time, some Western European models do not provide for a reduction in the amount of punishment, but simply simplify the procedure (elimination of the trial stage, examination of evidence, etc. For example, Italian «abbreviato», Spanish «conformidad»).

4. The court is assigned the role of an active participant in the criminal process, which independently makes decisions on key issues of criminal proceedings - prosecution and punishment, determines to what extent the fact of concluding a plea agreement with the prosecution may allow it to reduce or exclude the examination of criminal proceedings and proceed to the choice of punishment. In doing so, the judge is guided solely by his or her inner conviction and the law. Based on this, a judge in criminal proceedings considered under a plea agreement shall render a guilty verdict if there is evidence to prove the guilt of the accused. Hence, the court has the right to refuse or terminate consideration of criminal proceedings in the form of a plea agreement and resolve it in a regular court hearing if the court has doubts about the guilt of the accused. For example, the Spanish «conformidad» procedure provides for a verdict to be passed only on the basis of the judge's examination of the prosecution's evidence. In the Italian «patteggiamento» procedure, the judge, having received the parties' agreement on plea and sentence, checks compliance with procedural requirements and, if no violations of the law are found, approves it. At the same time, the judge also has the right to evaluate the evidence in criminal proceedings, refusing to approve the agreement if he or she believes that the proposed punishment is clearly not appropriate to the offense or doubts the guilt of the accused.

5. Full recognition by the accused of a civil claim for compensation for damage caused by the crime is not a prerequisite for concluding a plea agreement. Thus, in Spanish criminal proceedings under the «conformidad» procedure, the defendant, when entering into a plea agreement, has the right to fully or partially object to the civil claim for compensation for the damage caused by the crime filed by the victim. The court considers the criminal proceedings under a simplified procedure regarding the commission of the crime, but fully examines the evidence relating to the civil claim and discusses issues related to the claims for damages.

Thus, the criminal procedure legislation of certain states leads to the use of compromise models of justice not by way of pleading guilty to a crime, but by formal agreement with the prosecution. It should also be borne in mind that, unlike the American criminal process, in which a plea agreement is more likely to be reached the weaker the prosecution's evidence, European procedures approve plea agreements if the prosecution's case is strong. The court, having reviewed the prosecution's evidence, concludes that the defendant's sentence may be reduced not because he or she pleaded guilty, but because the defendant's guilt is fully confirmed in the commission of the crime and he or she has complied with the terms of the agreement.

It is worth noting that in criminal proceedings in continental Europe, there is a tendency to develop a contractual basis in compromise procedures similar to the American plea agreement. In Spain, in order to facilitate the achievement of «conformidad», the prosecutor and defense counsel negotiate to limit the charges to the extent that would allow the criminal proceedings to be resolved under this procedure. The Italian «patteggiamento» may well be considered analogous to the «American plea bargain», as the court, by approving the agreement, gives legal force to the consent of the parties. The German «absprachen» procedure allows the parties to reach an agreement between themselves. At the same time, this procedure differs significantly from the plea agreement in US law. Its basic rules are set out in the decisions of the German Constitutional and Supreme Courts. Thus, the German «absprachen» procedure is possible if the statutory grounds for mitigation of the accused's liability are met. If they are not, the agreement cannot be approved.

**Conclusions.** In the legislation of the European Union, the procedures for making a court decision on the basis of a plea agreement are not entirely similar to the practice in the legislation of the United States: the initiative of the parties in resolving the issues of prosecution is transformed by the inability to change the charges under the agreement, and the «passive position» of the court in deciding on the procedure for resolving criminal proceedings is transformed by its limited activity. The special procedure for making a court decision on the basis of a plea agreement has a procedural legal nature similar to

continental conciliation procedures: it is based on the consent of the parties, but is not related to the parties' entering into an agreement as a process of negotiating its terms, formalizing the agreements reached in a certain way. The subject matter of the conciliation is agreement with the charges or punishment proposed by the prosecutor, or simplification of the judicial procedure for criminal proceedings.

The plea bargain in the U.S. legislation under the influence of the European procedural culture and practice acquires new characteristics: the court often shows wide scope for discretion in sentencing; it actively participates in the discussion of the terms of the agreement by the parties; due to the unlimited powers of the prosecutor to decide on the agreement, the latter becomes similar not to a bilateral agreement between the accused and the prosecutor after adversarial negotiations, but to the unilateral determination by the prosecutor of the degree of guilt of the accused and the

## *REFERENCES*


1. ***Federal Rules of Criminal Procedure USA***. URL: https://www.law.cornell.edu/rules/frcrmp. [in English].

2. ***Federal rules of criminal procedure. Printed for the use of The Committee on the judiciary of the House of Representatives U.S.*** Government publishing office Washington: 2021. URL: https://www.uscourts.gov/sites/default/files/federal_rules_of_criminal_procedure__december_2021_0.pdf[ in English].

3. Weinreb L. ***Denial of justice - criminal process in The United States.*** URL: An official website of the United States government, Department of Justice [in English].

4. Stanich V.S. ***Criminal Code of the Kingdom of Spain*** [Criminal Code of the Kingdom of Spain] / edited by V.L. Menchynskyi. Translation into Ukrainian by O. V. Lishevska. K.: DEC. 2016. [in English].

5. ***Spanish criminal procedure examined: successes, opportunities and failures in the adaptation to EU requirements***. URL: https://link.springer.com/article/10.1007/s12027-022-00698-6 [in English].

6. ***Criminal procedure act. Ministerio de Justicia.*** URL: https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal%20Procedure%20Act%202016.pdf [in English].

7. ***Criminal procedural code of Italy.*** URL: https://canestrinilex.com/assets/Uploads/pdf/cf70b10e21/Italian-Code-of-Criminal-Procedure-canestriniLex.pdf; German Code of Criminal Procedure (Strafprozeßordnung - StPO). URL: https://www.gesetze-im-internet.de/englisch_stpo; [in English].

8. ***France. Criminal Procedure Code*** (consolidated as of March 2, 2015). URL: https://www.wipo.int/wipolex/en/legislation/details/14295. [in English].



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**Володимир КАНЦІР**
Національний університет «Львівська політехніка»,
Навчально-наукового інституту
права, психології та інноваційної освіти
професор кафедри міжнародного та кримінального права
доктор юридичних наук, професор
volodymyr.s.kantsir@lpnu.ua
ORCID ID: https://orcid.org/0000-0002-3689-4697

**Марія КОВАЛЬ**
Національний університет «Львівська політехніка»,
Навчально-науковий інститут
права, психології та інноваційної освіти,
доцент кафедри міжнародного та кримінального права
кандидат юридичних наук, доцент
mariia.m.koval@lpnu.ua
ORCID ID: https://orcid.org/0000-0003-1830-7003

# МІЖНАРОДНИЙ ДОСВІД ЗАСТОСУВАННЯ УГОД У КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ

**Подальше вивчення інституту «угод у кримінальному провадженні» доречне з урахуванням трьох основних чинників: аналізу історичного досвіду, узагальнення практики застосування чинного законодавства та вивчення іноземного досвіду: кримінального процесуального законодавства та практики його застосування.**

**Інститут кримінального провадження на підставі угод є вдалим «запозиченням» законодавчого досвіду інших держав і належить до особливих судових процедур. Сприйнятий суспільством позитивно, оскільки передбачена законом можливість укладення угоди між підозрюваним чи обвинуваченим та прокурором або потерпілим стала поширеним альтернативним способом вирішення кримінально-правових конфліктів.**

**У законодавстві Європейського Союзу процедури ухвалення судового рішення на підставі угоди про визнання винуватості не є повністю ідентичними практиці в законодавстві США: ініціатива сторін у вирішенні питань обвинувачення трансформується неможливістю зміни обвинувачення за угодою, а «пасивна позиція» суду у вирішенні порядку вирішення провадження у кримінальній справі - його обмеженою активністю. Особливий порядок ухвалення судового рішення на підставі угоди про визнання винуватості має процесуально-правову природу, подібну до континентальних примирних процедур: він ґрунтується на згоді сторін, але не пов'язаний з укладенням угоди сторонами як процесом переговорів щодо її умов, формалізацією досягнутих домовленостей у певний спосіб.**

**Предметом угод є згода з пред'явленим обвинуваченням, або запропонованим прокурором покаранням, або спрощення судової процедури розгляду кримінального провадження.**

**Під впливом європейської процесуальної культури та практики угода в законодавстві США про визнання винуватості набуває нових характеристик: суд часто демонструє широкі межі для розсуду (дискреції) при призначенні покарання; бере активну участь в обговоренні сторонами умов укладення угоди; внаслідок необмежених повноважень прокурора щодо прийняття рішень стосовно укладення угоди остання стає схожою не на двосторонню угоду між обвинуваченим і прокурором після змагальних переговорів, а на одноосібне визначення прокурором ступеня вини обвинуваченого та відповідного покарання для нього.**

**Ключові слова: угода про визнання винуватості, угода про примирення, спрощена процедура, компроміс, законодавчий досвід іноземних держав.**