

The active position of the court is the basis for the successful application of alternative measures in criminal proceedings

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Abstract: The institution of encouragement in criminal proceedings is an alternative form of making a final decision on a criminal case. The resolution of a criminal case through the use of incentive forms entailing the release from criminal liability of the defendant involves active actions of participants in procedural relations: the will and desire of the parties to terminate the criminal case in one of the alternative ways to the court verdict; negotiating to determine the main mutually beneficial conditions and their coordination; the fulfillment of these conditions and the final confirmation of such agreements by a single «conventional» petition for the termination of the criminal case on the appropriate grounds. The parties exercise active procedural powers within the framework of the principles of disposability and adversarial criminal proceedings. This indicates the universality of the incentive norm. It is possible to effectively apply alternative measures in criminal proceedings with the mandatory explanation by the court to the persons participating in the case of the procedural possibilities of these measures. The conducted analysis indicates the need for legislative consolidation of the procedural obligation of the court when considering criminal cases against persons brought to criminal responsibility for the first time on charges of committing a crime of small or medium gravity, to explain to the participants of the process the non-rehabilitating grounds for termination of criminal prosecution provided by the current legislation. The author believes that this duty of the court will allow to resolve the issue of initiating the procedure for the application of incentive norms by the parties, as well as the court to understand the procedural perspective of this procedure for resolving a criminal case.

Keywords: Alternative measures in criminal proceedings; Incentive forms; Termination of a criminal case; Reconciliation of the parties; Exemption from criminal liability; Court duty; Court decision

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1 Introduction

A person, his rights and freedoms are the highest value, and the recognition, observance and protection of human and civil rights and freedoms is the duty of the state.

This fundamental provision is of fundamental importance within the framework of the social and legal activities of each state and is enshrined in the sectoral legislative norms regulating all spheres of public life.

This obligation of the State acquires particularly high importance in the framework of criminal proceedings. In this area, the protection of human rights and freedoms is connected with the mechanism of their significant restriction due to the measures of procedural coercion established by law, ensuring the criminal procedural function of the state. In this regard, the direction of legal thought associated with the search for a balance between the protection of human and civil rights within the framework of compulsory criminal procedure and the implementation by the State of its public function to combat crime, does not lose its relevance.

Theoretical development of concepts, doctrines, scientific and practical provisions in the field of criminal proceedings allows us to form a broad scientific basis for identifying existing problems not only of a scientific nature, but also for improving law enforcement practice, eliminating collisions and gaps in legislative technology regulating legal relations in the field of criminal procedure.¹

The role of criminal justice as a social institution that meets the needs of society (a system of a higher level of organization) is to provide society with tools that ensure justice.² It is important to investigate the issue of exemption from criminal liability as a form of encouragement of the accused from the point of view of a fair resolution of the criminal law conflict.

According to the provisions of part 1 of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, everyone, in the event of a dispute about his civil rights and obligations or when any criminal charge is brought against him, has the right to a fair and public hearing of the case within a reasonable time by an independent and impartial court established by law.

By virtue of article 14 of the International Covenant on Civil and Political Rights, 1966, everyone has the right to a fair and public hearing by a competent, independent and impartial court established by law when considering any criminal charge against him or when determining his rights and obligations in any civil process.

The above regulations enshrine the fundamental principles of the criminal procedure of the Russian Federation, such as fairness, publicity of the criminal process, independence and impartiality of the court, compliance with a reasonable

¹ FERREIRA, D. B.; GIOVANNINI, C.; GROMOVA, E.; DA ROCHA, Schmidt G. Arbitration chambers and trust to technology provider: Impacts of trust technology intermediated dispute resolution proceedings. *Technology in Society*, v. 68, 101872, 2022.

² VOLODINA, L. M. Purpose and principles of criminal proceedings – the basis of moral principles of criminal procedural activity. *Bulletin of the O.E. Kutafin University (MSLA)*, v. 2, p. 18, 2018.

period of trial. Nevertheless, there is an ambiguity of legislative formulations, the lack of precise definitions and a uniform legal mechanism for their implementation. This leads to a broad scientific and law enforcement discussion, including regarding the active position of the court in the application of alternative criminal liability measures.

2 The concept of incentive forms of criminal proceedings

Ashworth A. notes the existence of two interrelated paradigms of goal-setting of criminal proceedings: the «paradigm of punishment», where the key goal of the criminal process is the application of punishment (repressive measures) and the restoration of “peace” between the state and the criminal; the goal of the «restorative paradigm» is not to punish the person who committed the crime, but to restore the rights of the victim and, ultimately, the rights of the state.³

Elements of restorative justice are widely developed in the world judicial practice. Its essence is the exemption from criminal liability of a person who has committed a crime of small or medium gravity, provided that socially useful actions are performed. The main purpose of restorative justice is to restore justice, to ensure the peaceful resolution of the criminal law conflict. The positive practice of using restorative justice programs shows what limitations and negative side effects the use of punitive approaches (punishments) leads to.⁴

The spread of the institution of encouragement in criminal proceedings upon termination of a criminal case and the release of a person from criminal liability, fully allows achieving the goals of the criminal process. This is expressed in the active socially positive behavior of the defendant, compensation for damage to the victim, the implementation of the educational function of the criminal process. The educational function assumes that a person who has committed a crime of minor public danger for the first time, getting into the state mechanism of legal proceedings, takes measures to neutralize negative legal consequences and restore the rights of the victim. At the same time, the victim also wishes to complete all the prescribed procedures in a short period of time and no longer be involved in criminal procedural activities.

Incentive forms of criminal proceedings allow the use of alternative measures.⁵ In the Russian Federation, alternative measures are the termination of a criminal case with exemption from criminal liability on the basis of reconciliation of the

³ ASHWORTH, A. *The criminal process. An evaluative study*. Oxford: Clarendon Press, p. 34-35, 1994.

⁴ HOWARD, Z. *The Little Book of Restorative Justice*, 2002.

⁵ DE NAZARETH, Serpa M. Multi-Door Mediation: Processo composto de Resolução de Conflitos. *Revista Brasileira de ADR*, v. 4, p. 103-131, 2020.

accused with the victim, with the appointment of a criminal law measure in the form of a court fine and active repentance.

At the same time, under the incentive forms of criminal proceedings, we understand the system of criminal procedural relations arising from the implementation of the incentive norms provided for by the criminal and criminal procedure law, entailing the termination of criminal prosecution or criminal case with the release of the accused (suspect, defendant) from criminal liability in connection with his positive post-criminal actions of a restorative nature aimed at compensating for damage, making amends for harm and reducing his public danger.

When implementing incentive norms in criminal proceedings, the state, represented by authorized entities and the victim, expect from the person accused of committing a crime, active socially positive post-criminal behavior – repentance for what he did, compensation for damages, apologies and other positive activity indicating the intention of the latter to minimize the negative consequences of criminal actions, reduce their negative assessment. In this case, the manifestation of free will is a prerequisite for encouragement in criminal proceedings, but the internal position of the subject of encouragement may differ from its external manifestation under specific circumstances.⁶

3 The legislator's view on the duty of the court to clarify the right to encouragement in criminal proceedings

Along with the positive results of the application of incentive norms, the termination of a criminal case on the grounds provided for by the Criminal Procedure Law in its procedural and legal form fully meets the requirements of justice and humanity. These requirements are integral criteria of a civilized society and fair justice.

At the same time, in judicial practice there are cases when, in the presence of all the necessary legal conditions for the termination of a criminal case, the court passes a sentence. At the same time, the parties are not explained the possibility of exercising the subjective right to file a petition for termination of a criminal case in connection with reconciliation of the parties or active repentance, as well as the possibility of applying a court fine.

Neither the defender, nor the public prosecutor, nor the court, without explaining to the defendant these procedural possibilities, in the absence of petitions from the parties to terminate the criminal case on the non-rehabilitating grounds indicated above, do not take possible actions to resolve the criminal

⁶ RUSMAN, G. S. Incentive forms or court proceedings as an element of the transformation of the criminal process. *International Journal of Law in Changing World*, v. 1, p. 3-16, 2022.

case in any other way, in connection with which the court passes a sentence that worsens the defendant's situation and generates the relevant criminal law and the procedural consequences for him.

It should be recognized that in the realities of the existing criminal process, which tends to be adversarial, there is a lack of professionalism of both the judicial staff and the participants of the defense and prosecution, who often formally perform their powers and do not delve into or carefully study criminal cases.

The professionalism of a judge is defined as a systematic education consisting of a combination of such elements as: intelligence, culture, moral and psychological qualities that are necessary for a judge to fully exercise his official duties. Intelligence implies a deep knowledge of substantive and procedural law, the ability to legal analytical thinking; culture includes legal, personal and aesthetic aspects; moral and psychological qualities include such as honesty, courage, truthfulness, etc.⁷

For example, when the court does not explain to the parties during the court session (if there are procedural conditions for that) the right to terminate the criminal case in connection with the reconciliation of the parties or does not explain the legal grounds for the application of a court fine.

Perhaps such procedural amorphousness of the court can be justified by the presence of professional participants in the proceedings – a defender and a public prosecutor.

Indeed, the function of the defender is to provide competent qualified legal assistance to the suspect, the accused (the defendant), which implies the development and coordination of a position, the development of tactics, discussion of legal possibilities for a successful outcome of the case. Realizing his professional functions, the defender must explain to his principal the conditions of possible exemption from criminal liability and the use of alternative measures.

The question arises, is the court obliged in this case to explain to the persons involved in the case about the procedural and legal possibilities of applying incentive norms, or is the court limited only by the right to consider the relevant petition of the parties for their application?

By virtue of Article 11 of the Criminal Procedure Code of the Russian Federation, the court, the prosecutor, the investigator, the inquirer are obliged to explain to the suspect, the accused, the victim, the civil plaintiff, the civil defendant, as well as other participants in criminal proceedings their rights, duties and responsibilities and to ensure the possibility of exercising these rights.

⁷ BEREZHKO, E. V. *Moral foundations of criminal proceedings*, p. 108.

The Criminal Procedure Law of Russia prescribes the court, the prosecutor, the investigator and the inquirer to explain to the suspect and the accused their rights and to provide them with the opportunity to defend themselves in all ways and means not prohibited by the criminal procedure law.

Within the framework of judicial proceedings in a criminal case, the presiding officers, in accordance with article 267 of the Criminal Procedure Code of Russia, explain to the defendant the rights and obligations provided for by law, including the right of the defendant to file petitions and challenges, to object to the termination of the criminal case on non-rehabilitating grounds (provided for in part 2 of Article 27 of the Criminal Procedure Code of Russia).

The supreme judicial instance of the Russian Federation has repeatedly paid attention to the issues of the court's activity in its rulings. Thus, in paragraph 3 of the resolution of the Plenum of the Supreme Court of the Russian Federation dated December 19, 2017 No. 51 "On the practice of applying legislation when considering criminal cases in the court of First instance (general procedure of legal proceedings)" indicated that the presiding judge in the preparatory part of the court session explains to all participants in the trial the rights, obligations and the procedure for their implementation, as well as introduces the rules of the court session established by article 257 of the Criminal Procedure Code of Russia and explains the responsibility for violating the order in the court session.

At the same time, the defendant in the trial, along with his basic rights, is explained his other rights, including the right to participate in the debate of the parties and the right to the last word.

In turn, the provisions of paragraph 21 of the above-mentioned resolution of the Plenum of the Supreme Court of the Russian Federation provide for the obligation of the court, if there are grounds for termination of a criminal case on non-rehabilitating grounds, to explain to the defendant the legal consequences of a court decision to terminate a criminal case, including the possibility of confiscation of property belonging to him, recognized as material evidence, filing a civil claim against him for compensation the harm caused by the crime.

A similar provision is also established by paragraph 21 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 19 dated June 27, 2013 "On the application by courts of legislation regulating the grounds and procedure for exemption from criminal liability". In particular, the Plenum of the Supreme Court of Russia obliges the court to explain to the person brought to criminal responsibility his right to object to the termination of the criminal case on non-rehabilitating grounds and the legal consequences of the termination of the criminal case, as well as to find out whether it agrees to the termination of the criminal case. In its position, the Plenum of the Supreme Court of the Russian

Federation also emphasizes the need to reflect the consent (disagreement) of a person in a court decision.

In addition, the position of the Plenum of the Supreme Court of Russia establishes, based on the interrelated provisions of part 1 of Article 11 and part 2 of Article 16 of the Criminal Procedure Law, the obligation to explain to the accused his rights and obligations. At the same time, the obligation to ensure the possibility of exercising these rights is imposed on persons carrying out the verification of a crime report and a preliminary investigation of the case: on the inquirer, the body of inquiry, the head of the body or unit of inquiry, the investigator, the head of the investigative body, the prosecutor, and in the course of judicial proceedings – on the court.

In continuation of its position, the Plenum of the Supreme Court of Russia indicates that the rights provided for by the norms of the criminal procedure law should be clarified to the extent determined by the procedural status of the person against whom the proceedings are being conducted, taking into account the stages and features of various forms of legal proceedings. In particular, when considering the case on the merits by the court of first instance, not only the rights specified in article 47 of the Criminal Procedure Code of Russia are subject to explanation to the accused, but also his other rights in court proceedings, including the right to petition for participation in the debate of the parties along with the defender, and in the absence of a defender - to participate in the debate of the parties, the right to the last word.

As can be seen from the above legal positions of the Highest Judicial Instance, the current legislation does not directly fix the obligation of the court to explain to the defendant the right to apply incentive measures provided for by the current legislation (in this case, the right to file a petition for the termination of a criminal case, criminal prosecution on non-rehabilitating grounds stipulated by law).

At the same time, according to article 268 of the Criminal Procedure Code of Russia, the presiding judge, along with the rights provided for in articles 42, 44, 45, 54 and 55, also explains to the victim his right to reconciliation with the defendant in cases provided for in article 25 of the Criminal Procedure Law.

We believe that the indicated procedural uncertainty indicates, on the one hand, the need for mandatory clarification to the participants of the process of the incentive norms provided for by the current legislation and the possibility of an alternative to the verdict of the final court decision. On the other hand, such an explanation should encourage the parties to initiate the issue of the application of incentive norms in criminal proceedings.

It seems that the court, if there are grounds provided by law for the application of incentive norms, should provide the parties with an opportunity to discuss and resolve the issue of exemption from criminal liability on one or another non-rehabilitating basis, which were explained to them during the court session.

The legislator has defined the procedure for initiating the issue of the application of incentive norms in different ways. Thus, when reconciling the parties, the law establishes the right of the court to terminate a criminal case on the basis of a statement by the victim or his legal representative.

At the same time, a judicial fine as a measure of a criminal nature may be applied by the court on its own initiative or based on the results of consideration of the investigator's petition filed with the consent of the head of the investigative body.

Termination of criminal prosecution in connection with active repentance is also allowed by the court, the investigator or the inquirer with the consent of the investigating authority and the prosecutor, respectively.

A similar procedure is provided for when releasing a person from criminal liability in connection with compensation for damage.

Thus, the declarative nature of actions aimed at terminating a criminal case, criminal prosecution is provided by the current procedural legislation for participants in the process within the framework of reconciliation of the parties, as well as for officials authorized to investigate upon termination of a criminal case in connection with the imposition of a court fine, active repentance or in connection with compensation for economic crimes.

At the same time, neither the defender nor the defendant (accused, suspect) are directly specified in the law as initiators of the procedure for applying incentive norms. Whereas, it is the defense side that is primarily interested in the possibility of resolving a criminal case with an alternative verdict by a final court decision.

The question arises whether a statement by the participants in the petition process is required to terminate the criminal case on the grounds under consideration and is it the only reason to discuss the application of incentive norms?

Based on the provisions of article 25 of the Criminal Procedure Law of Russia, for reconciliation of the parties as a form of implementation of incentive norms, a victim's statement to terminate the criminal case is required.

In the remaining cases under consideration of the application of incentive norms when considering a criminal case by a court, the legislator indicates the procedural possibilities of the court to terminate the criminal case. At the same time, the law does not provide for the corresponding duty of the court to explain to the parties such options for resolving a criminal case, as well as the duty of the court to satisfy such petitions when establishing the required legal and procedural conditions.

It is worth noting that the use of incentive forms in criminal proceedings gives the state the opportunity to save its own efforts and funds to solve a crime, compensate for damage and neutralize its negative consequences due to the active post-criminal actions of the person who committed it.

As a result of the cooperation of the State, the victim and the accused (defendant), a mutually beneficial exchange takes place, in which the person who committed the crime atones for his guilt with positive post-criminal actions, thereby reducing the public danger of a criminal conflict.

Thus, the relations that develop between the state and the person brought to criminal responsibility and the victim can be designated as a “procedural compromise”, within which each of the participants in the legal relations that arose after the crime committed, through mutual concessions stipulated in the law, find a way to resolve the criminal-legal conflict and smooth out its consequences.

This compromise has a procedural nature, since it is associated with the implementation of the procedural form of criminal proceedings, in which it is possible to identify and consolidate the agreement reached by the parties.

At the moment when the crime occurs, any compromise between the offender and the victim will be of a substantive nature, since it is associated with the legal qualification of the deed and the circumstances of the commission of a specific crime (for example, an attempted crime or voluntary termination of an illegal act).

Only after the State becomes aware of the criminal law conflict that has taken place, expressed in a specific crime, in the person of its authorized bodies, public criminal procedural legal relations arise.

Publicity in the formation of agreements between the parties is also manifested in the fact that the parties are limited by the minimum conditions and requirements stipulated in the law, the fulfillment of which is necessary for the termination of a criminal case. This state of affairs characterizes a special connection that arises between the principle of publicity on the one hand and the principle of disposability on the other. The principle of disposability is limited by the scope of publicity, expressed both in the legislative requirements for exemption from criminal liability, and the existence of a special procedural order for this. Also, one of the manifestations of publicity, limiting the principle of disposability, should be considered the discretionary powers of an official or court, mistakenly believing about their right, and not the obligation to terminate a criminal case if there are legal and factual grounds for that.

4 The importance of the active position of the court in the implementation of incentive forms in criminal proceedings

It is the court, not being a body of criminal prosecution, not acting on the side of the prosecution or defense, that creates the necessary conditions for the parties to fulfill their procedural duties, exercise the rights granted to them.

The specified purpose of the court within the framework of the existing public-adversarial process⁸ is fully subject to implementation within the framework of the institution of exemption from criminal liability in the application of incentive norms. The creation of the necessary conditions for the use and application by the parties of the rights and procedural opportunities provided by law for the resolution of a criminal case ensures effective judicial proceedings in a criminal case.

Accessibility of information and adaptability of legislative formulations for participants in the process, including on the rights provided by law and existing incentive procedures, is provided primarily by the court, whose communicative competence⁹ is one of the important elements of its professionalism.

We believe that the initiation of the procedure for the application of incentive norms at the trial stage should be provided by the court, thereby reducing the risk of missing the procedural possibility of a successful resolution of the criminal case due to the inaction of professional participants in the process or with their subsidiary participation¹⁰ in the judicial investigation.

In other words, without relying on the principle of competitiveness and independence of the parties, the court, exercising its powers to direct the judicial proceedings, explaining to the parties in an accessible and understandable form the options provided by law for resolving the criminal case, thereby excludes the hypothetical neglect by the parties of these procedural possibilities and creates conditions for their implementation.

Making up for the insufficient activity of the parties by the court is not so much a manifestation of a public function as ensuring the adversarial beginnings of the process, including the possibility of the manifestation of the dispositive will of the persons involved in the case. The administrative manifestations of the presiding judge, explaining to the parties the forms of resolution of the criminal case provided for by law, allow to maintain the balance and procedural balance of the parties in the framework of the criminal case, and at the same time exclude the adoption of an unfair judicial decision.

Such procedural transparency provided to the participants of the process allows initiating the issue of termination of the criminal case not by the court, but by the parties. In other words, it is an impetus to the manifestation of dispositive principles within the framework of an adversarial process. The court, explaining to the parties the rules on the existing accelerated procedures and simplified

⁸ SHAGIEVA, Z. H. The function of the prosecution in the modern model of the Russian criminal process. Abstract of the dissertation for the degree of Candidate of Legal Sciences, 2007, p. 8.

⁹ KARNOZOVA, L. M. Humanitarian principles in the activity of a judge in criminal proceedings: textbook, 2004, p. 57.

¹⁰ MASHOVETS, O. A. Judicial investigation in the criminal process of Russia: theoretical and doctrinal, regulatory and applied aspects: monograph, 2016, p. 147.

procedure for resolving a criminal case (for a crime of small and medium severity), thereby gives the parties the opportunity to independently determine the prospects for their implementation and the conditions for the termination of the criminal case.

At the same time, such assistance to the parties in finding the optimal procedural resource for resolving the criminal case is expressed in the appropriate procedural form: what is happening at the court session is recorded in the protocol, including the actions of the presiding judge and the parties, their positions and objections; written explanations of the rights of the participants in the process, their petitions and written statements may also be attached to the case materials, documents confirming positions or objections; the procedural decision itself is formalized by the appropriate court order.

This procedural form fully complies with the requirements of expediency and rationality, which together ensure the effectiveness of legal proceedings, since it does not involve additional or auxiliary actions and procedural decisions.

5 Conclusion

The resolution of a criminal case by the use of incentive norms entailing the release from criminal liability of the defendant (reconciliation with the victim, the appointment of a criminal law measure in the form of a court fine, active repentance, compensation for economic crimes, etc.) involves active actions of participants in procedural relations: the will and desire of the parties to terminate the criminal case by one of the alternative court verdict in a manner; negotiating to determine the main mutually beneficial conditions and their coordination; the fulfillment of these conditions and the final confirmation of such agreements by a single «conventional» petition for the termination of the criminal case on the appropriate grounds. These active procedural powers of the parties are implemented within the framework of the principle of disposability on the one hand, and the principle of adversarial criminal proceedings on the other, which indicates the universality of the incentive norm.

Accepting the above, we believe that the successful result of the interactive interaction of the court and the participants in the process can be: the parties' request for a break in the court session to agree on the terms and procedure for compensation for damage or for the defendant to carry out socially positive actions and measures indicating a reduction in the degree of public danger of the crime and neutralizing its harmful consequences; a statement by the parties of petitions for the termination of a criminal case in connection with the reconciliation of the parties or for the appointment of a criminal law measure in the form of a court fine, active repentance.

We believe that it is possible to avoid unjustified criminal prosecution and sentencing, if there are legal and factual grounds for the application of incentive norms, with mandatory clarification by the court to the persons involved in the case of the procedural possibilities of applying alternative measures (exemption from criminal liability in connection with active repentance, in connection with reconciliation with the victim, in connection with compensation for damages, with the appointment of a court fine).

We consider it necessary to legislatively fix the procedural obligation of the court when considering criminal cases against persons who are brought to criminal responsibility for the first time on charges of committing a crime of small or medium gravity, to explain to the participants of the process the non-rehabilitating grounds for termination of criminal prosecution provided for by the current legislation.

These actions of the court will allow to resolve the issue of initiating the procedure for the application of incentive norms by the parties, as well as the court to decide on the procedural perspective of this procedure for resolving a criminal case.

The court, having previously familiarized itself with the materials of the criminal case, having established that the defendant is being brought to criminal responsibility for the first time, and the crime belongs to the category of small or medium gravity, explaining in the presence of the parties the procedure for releasing a person from criminal liability provided for by the current legislation, thereby puts this issue up for discussion, motivating the parties to the process to be active and show independence in resolution of a criminal case.

In this form, the procedural interaction of the court and the parties takes place, within the framework of which the result is a discussion of the possibility of terminating a criminal case, criminal prosecution on non-rehabilitating grounds provided for by law. In turn, the specified duty of the court is an additional procedural guarantee for the lawful resolution of the criminal case.

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