



Mammadov N.I.♦

DOI: 10.25108/2304-1730-1749.iolr.2017.51.218-236

Consent of a victim in criminal law

Abstract: It is analyzed a victim's consent in criminal law. Author considers a victim's consent as the circumstance, which excludes illegality of act, determines the grounds and conditions of the circumstance.

There is given the proposal on inclusion of the special norm concerning victim's consent in Criminal Code of Azerbaijan Republic.

Keywords: circumstances excluding illegality of misconduct; a consent of person; conditions; reasons; legitimacy of harm.

The problem of person's consent as the circumstance that excludes the criminal nature of misconduct arose in theory of criminal law a long ago. As early as the beginning of 20th century a famous Russian jurispudent N.S. Tagantsev believed that consent of person in certain conditions would exclude criminal responsibility for harm caused.

As interests, to which with consent of person might be caused harm, he called property relationships, dignity and freedom of man, and chastity.

N.S. Tagantsev considered that if infringement directed to the interest in respect to whom only the right a person to possess, dispose and use this interest had been protecting then on common rule, waiver of the person of his right had eliminated a criminal nature of infringement. He did only two exceptions from this provision:

♦ **Mammadov Nail Ibayat oğlu** – PhD in Law, a senior researcher of the Institute for Law and Human Rights of the National Academy of Sciences of Azerbaijan Republic (Azerbaijan). E-mail: nail.mamedov72@mail.ru



a) an owner of this right (interest) is a person who can demonstrate his will through representation. This case an issue of consent depends on a volume of the rights, which provided to the representative by law and agreement;

b) in cases, when on cultural, economic or religious grounds the state unable to recognize as lawful a person's consent on infliction of the harm his property interests.

N.S. Tagantsev had explained how might be used person's consent on causing of the harm of his property interests. Whole issue came down to exact establishment, whether the right on conceded interest belongs to person and in what volume. If the person has the property right then in his consent this property, for instance home, "might be destroyed to the ground", but it cannot be burned if there are other buildings around the home that can be damaged in result of the fire.

Thus, infliction of the harm to property interests of an owner with his consent might be recognized lawful if this consent does not inflict the harm to other legally-protected interests. In opinion of N.S. Tagantsev, the same provision should be also applied to criminal-legal assessment of attack on honour, which is manifested in humiliating manner to other person with his/her consent.

More careful N.S. Tagantsev approached to evaluation of lawfulness of the harm causing of body immunity other person with his/her consent. He believed that a violence over personality exempted from criminal liability when a main role plays the moral suffering but not physical one.

Concerning a person's consent on deprivation of his life, N.S. Tagantsev believed that waiver on right to life might be considered as act of "sinful, immoral like a suicide; but it is difficult to find firm grounds to recognize legal insignificance of this concession, and the same time also for punishability for murder with consent, in particular on request or demand of killed person". He supposed that if with such "alienation the right to life are violated any police interests or through this is manifested harmful social prejudice, in this case,



certainly, it is possible to assume a punishability not only for murders at consent, but also for murders at the urging of killed person”.

N.S. Tagantsev considered that if a murder with person’s consent is recognized punishable by law then this consent should be taken into account when is inflicted a punishment and “to impact in reducing of liability”.

Being substantiated his opinion, N.S. Tagantsev wrote: “It cannot be treated in the same way a soldier who killed his fatally wounded comrade on his request in a battle field in order to save him from further torment or a doctor who stopped an excruciating agony of the dying, etc. with a common killer for mercenary or revenge motives” [1, p. 400-402].

In soviet period A.A. Piontkovsky believed that a victim’s consent was an obligation that would eliminate a public danger of an act when infringing those rights and interests, which were in free disposal of the victim. When is available a victim’s consent, then the actions committed by him cannot be recognized as socially danger; they should be considered as lawful. A.A. Piontkovsky described the conditions, when infliction of the harm of victim on his consent eliminates social danger of an act. They were the following:

a) Person’s consent to infringement only those interests, which are in free disposal of this person. Such interests are considered to be property relationships and interests of the person. As sample, he provided a case, when on consent of an item’s owner and his/her absence, a person seizes this item;

b) This consent should be only within free disposal by the person with his/her personal or property rights and interests. According to A.A. Piontkovsky, in an area of personal benefits a victim’s consent to deprive his/her life cannot be recognized as “circumstances that eliminates social danger of committed act, contradicts interests whole our society. It violates consciousness of immunity of other individual life”. A.A. Piontkovsky said nothing concerning lawfulness of infringement to a person’s health on his consent, when he characterized mentioned



condition, but at the same time he did not deny such possibility. With regard to infringement to property that are in disposal of separate person then a victim's consent on infliction the harm to him is lawfully only in frames property rights that belong to the person;

c) The consent must not have any socially harmful purposes. A.A. Piontkovsky believed that absence of socially harmful purposes might be established on common nature of committed actions or in force of special resolution of criminal law, and as samples of absence of mentioned purposes he provided a damage to person's health during scientific experiment or expelling the fetus in improper conditions that committed with consent of mother;

d) Consent should be real. It might be given only by sane and capable person or his/her legal representative and only in interests of presented person and expressed voluntarily.

If consent was received in result of deception or application of physical either mental violence then it might not be recognized voluntary.

A.A. Piontkovsky understood under reality of consent also the time of consent's expression to causing the harm. It should be expressed before infliction of the harm or in process of commission of the actions that inflict the harm, but not after its infliction [2, p. 416, 472-474].

A.I. Santalov considered that under victim's consent should be understood the act infringing an interest (right) that protected with law if it carried out on consent of those person, to whom belong this interest and who can dispose with it on his discretion. According to him, property relationships are concerned such interest and he believed that on an owner's consent a person may possess, use and dispose by his property (sale, exchange, as gift) and even to destroy it. At the same time he supposed that it is inadmissible to encroach with person's consent on his life and health. The opinion was substantiated by him with that fact that "socialistic moral and soviet state" recognized human health not only "as individual good, but also



consider of it as social value”, and on this base he concluded that “criminal liability for infliction of harm (intentional or non-intentional, serious or less serious body injuries) comes independently of the fact whether a victim desires of it or not” [1, p. 460-465].

Presented in juridical literature arguments of necessity to distinguish person’s consent on infliction of harm in criminal law and developed by the doctrine the definitions of this kind of circumstances, which exclude criminality of an act, allow us distinguishing the grounds and conditions of lawfulness of causing harm on victim’s consent.

The ground for infliction of harm in considered case is a presence of a person’s consent, to whose interests are inflicted the harm.

His/her consent to inflict harm is an affirmative permission to suggestion of other person to cause harm to social goods (rights) or interests of the first person that protected by criminal law. This consent may have a form of mutual verbal or written agreement with tortfeasor or other person to commit harmful actions (inactions).

The common requirements to such consent are their reality and actuality. Reality of consent means that a person expresses it consciously and is not under the influence of delusion or deception.

Subjective signs of consent are availability person’s conscience and will, when he expresses of it. Expressing his/her consent on infliction him/her material, physical the harm, a person is aware a dangerous nature of committed against him/her actions (inactions), predicts a possibility or inevitability of coming for himself the harmful consequences and desires of coming these consequences either consciously allows of it or concerns indifferently to them.

This subjective sign is disseminated only to the cases of consent’s expressions by physical person. Legal entities cannot express any mental attitude to possible negative consequences of the certain actions.



Actuality of consent is expressed in the fact that it must be clear and understandable for a tortfeasor and in certain cases also for third persons. On its form it should have a written nature. On this reason it is necessary on legislative level to fix an obligatoriness of written form of agreement on infliction of harm.

It might be supposed the following list of the conditions, which are necessary to resolve an issue on lawfulness of harm, causing on person's consent.

The first condition is a presence of capability of physical person who gave consent on infliction of harm. Apart from absence of the signs of mental disorder (evidences of insanity) the notion of capability presupposes the reaching by person a certain age.

Speaking on an age, of which a person may give consent on infliction him of harm, criminal legal doctrine is said about obligatory reaching by a person the age of 18 or 16. It seems that this matter should be solved differentially, in dependence on sphere of relationships, in which are carried out actions on infliction of harm, and character of harm, in which consent is given. So, consent on infliction of harm to health during transplantation of organs (except for the cases of bone marrow transplantation) may be only given by person of full age. Consent on destroying a property that belongs to citizen, in most cases, might be also given by persons reached the age of 18.

The second condition is an existence of a special situation, in which person acts, inflicting harm. In its content are included both the objective circumstances, in which are committed harmful actions and the way of committing such actions, place and time of infliction of harm.

First of all, significance of circumstances' establishing, in which is caused harm, depends on the fact to what social values is caused harm.

Content of relationships, in which are realized mutual rights and obligations of the parties that associated with examined circumstances of infliction of harm have also significance to characterize an environment of commission of harmful



actions. So, for instance, an area of medical relationships has a lot of distinguishing particularities associated with this complex branch of viability, including its especial variety like an area of aesthetic medicine, including a plastic surgery. Interests in such public relationships have a positive nature linked with recovery or other benefits to people.

It should be noted that lawfully caused harm, which linked with achievement of socially useful target, might be on level of danger for person, who gives his consent, higher than danger of harm that not linked with named aim. It is especially manifested, when in achievement of socially useful target exists an objective need (for instance, urgent medical surgery to save human life).

Way of infliction of harm has also significance for assessment of an environment's content that associated with availability of consent on infliction of harm. Absence of danger for third persons should be common requirement to it. In those cases, when causing harm requires an observance of especial procedure (e.g. in medical surgeries), a way of infliction of harm must be strictly regulated and based on the latest scientific and practical development in order not to minimize an infliction of harm.

Signs of place and time of infliction of harm are included in an environment's content. Place has optional meaning. For instance, training sessions of sports games might be held in a gym or on an open air; infection with a dangerous disease can be happened in the conditions of any place. In other side, surgical operations must be carried out in strictly regulated medical room that assigned only for that.

Establishing of time of causing harm has an important legal significance. Infliction of harm on person's consent might be caused only after this consent will be informed to addressee.

The third condition is concluded in the fact that harm might be caused only to rights and interests of person who gives consent. This condition means that it is



impossible to consider as lawful consent of person on infliction of harm to social values, which concern the rights and interests of the third persons.

The fourth condition is expressed in that action (inaction) of a tortfeasor of harm allowed with normative legal acts.

This condition reflects a content of actions of a tortfeasor of harm that based on the provisions of current legislation either by-law normative acts. It means that commission of illegal actions on person's consent, causing harm to interests of this person, in all cases might not be recognized the circumstance that excludes illegality.

So, for example, a request of woman to produce an abortion by person, who has no higher medical education of corresponding profile with simultaneous consent of the woman on possible negative consequences for her health, does not release of a tortfeasor of harm from criminal responsibility for illegal production of an abortion.

At last, the fifth condition is expressed in that action (inaction) a tortfeasor of harm not directed to achievement of illegal aim.

On the basis of foregoing we may suggest to supplement the Criminal Code of Azerbaijan Republic with special norm "Consent of victim" and state it in the following wording:

"Consent of victim is not illegal infliction of physical or material harm to the interest of person, which committed on his consent, expressed in established with normative legal act form before commission of harmful actions (inactions), when infliction of harm was not associated with achievement of illegal purpose".



References

1. Kurs sovetskogo ugovnogo prava. Chast' Obschaya [Course of soviet criminal law. General Part]. Leningrad, 1968, vol.1, 624 p.
2. Piontkovsky A.A. Kurs sovetskogo ugovnogo prava. Obschaya chast': uchenie o prestupleniyakh [Course of soviet criminal law. General Part: doctrine on crimes]. Moscow, 1961, 666 p.
3. Tagantsev N.S. Russkoe ugovnoe pravo: lektsii [Russian criminal law: lectures]. S. Petersburg, 1902, vol. 1, 823 p.