

Research on the Prospects of Introducing Mediation in the Criminal Process of Russia

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ABSTRACT

Mediation is a fundamentally new institute for criminal proceedings of the Russian Federation. Despite a number of scientific works on mediation it should be admitted that Russian researchers have just begun to create a theoretical model of this institution. Are there objective prerequisites for the introduction of criminal procedure mediation in Russia? What prevents such an implementation? What is this legal phenomenon? The proposed article is devoted to the presented questions. In this research the authors turn to the works of domestic and foreign scientists, analyze the current Russian legislation and practice of its application, support their reasoning with the data of court statistics. According to the results of the study the authors conclude that the institution of mediation in Russian criminal proceedings has a right to exist and awaits deep theoretical development.

Keywords: *criminal proceedings, conciliation procedures, mediation, public interest, private interests, defendant, victim*

1. INTRODUCTION

The methodological basis of this study devoted to the consideration of the prospects of introducing the institute of mediation into the criminal procedure of Russia was a set of regulatory, formal-legal, comparative-legal, historical and other scientific methods. The materials of the research were certain norms and institutions of Russian legislation, scientific publications of domestic and foreign scientists, practice of criminal cases in courts, official data of court statistics.

The synthesis of the results of the studies of legal scholars who have studied the legal institution, that is under consideration, makes it possible to formulate several important provisions which we turn to.

The first application of mediation in criminal proceedings was recorded in 1974 in the Canadian province of Ontario. In foreign countries, restorative justice research was conducted by Robert B. Coates, Mark Umbright, Betty Voe, Steward Bary, etc. In Russia the discussion of the prospects for the development of this procedure in the scientific community began with considerable delay. The first works devoted to mediation issues include the works of scientists such as I.L. Petrukin, L.V. Golko and V.V. Lunev. At the state level the mediation procedure was announced only in 2005 at an international conference held by the Office of the Plenipotentiary Representative of the President of the Russian Federation to the Central Federal District. We believe, that the adoption on 27 July 2010 of the Federal Law "On Alternative Procedure for Dispute Settlement with the Participation of an Intermediary (Mediation Procedure)" №. 193-FL was the impetus for the development of mediation as an institution.

2. MATERIALS AND METHODS

Nowadays, there is no procedure for mediation in domestic criminal proceedings, but there is an objective need for its legislative consolidation, in our opinion, which is confirmed by the existence in society and the current legislation of preconditions for the establishment of a mechanism for reconciliation of the parties in criminal proceedings. These prerequisites should be divided into several groups.

First of all, the general social prerequisites are expressed in:

- the existing need of society to humanize the law enforcement system which implies the central position of the interests of the individual and his/her rights and freedoms as it is reflected in article 2 of the Constitution of the Russian Federation. In our view, nothing meets the requirement of taking into account and protecting the rights of the individual as a conciliation procedure, since the main purpose of mediation is to satisfy the interests of both parties of a conflict;
- the need to reduce the time and material costs of proceedings, overcoming the delay in criminal proceedings, the application of mediation, in some forms, implies the rejection of judicial proceedings, which become impractical in the course of conciliation proceedings;

- the need for compensation for the harm caused by the defendant (social justice), as well as the reduction of the general repressive and economic costs of criminal policy.

General legal prerequisites relate to:

- Re-evaluation of the possibilities of a punitive method of criminal law regulation where a phenomenon, which has been called the "punishment crisis" in the literature, is manifested. The essence of this phenomenon is that it is not appropriate to impose punishment as the only way to resolve conflicts. E.E. Zabuga writes about the criminal justice crisis and rightly notes that the repressive nature of criminal policy needs to be changed to restorative;
- presence of the corresponding installations in the international legal documents, in particular recommendations of Committee of ministers of the Council of Europe No. R (99) 19 of September 15, 1999 "About mediation on criminal cases" devoted to mediation and the Resolution of Economic and social council of the UN of 24.07.2002 No. 2002/12 "On the basic principles of application of programs of restorative justice", directed to improvement of criminal proceedings in the national legislation of the countries;
- Combating stigmatization (social stigma) of the offender, which facilitates the task of re-socialization and, as a result, reduces the risk of recidivism;
- Increasing the role of the victim; Lack of mediation in criminal proceedings reduces the activity of this participant and prevents the restoration of his or her violated rights and freedoms. Allowing the victim to participate actively in the mediation process will allow him or her to discuss the conditions for ameliorating the harm caused to receive explanations and apologies from his "offender," which will restore both property losses and the moral condition of the victim.

3. RESULTS

The offender, participating in the mediation, will have the opportunity to hear the victim's arguments, apologize and fully feel the harm caused by him or her.

We will return to the above-mentioned Federal Law of July 27, 2010 "On Alternative Procedure for Dispute Settlement with the Participation of an Intermediary (Mediation Procedure)" No. 193-Φ3. This law establishes basic concepts and principles, the mechanism of work of

juvenile justice in Russia. An analysis of the law concludes that it only regulates the resolution of civil, family and labour disputes and does not provide the application of mediation in criminal proceedings. It should be noted, however, that the federal law does not explicitly prohibit similar actions in other areas of law including criminal procedure. These circumstances indicate that there is another prerequisite for the introduction of mediation procedure in other branches of law.

In addition, in the legislation of the Russian Federation there are criminal procedural (special) prerequisites for the development of alternative forms of conducting criminal proceedings, in particular, mediation.

Firstly, the existing legislation provides for exemption from criminal liability in cases of minor and moderate crimes terminated for conciliation in accordance with Art. 76 of the Criminal Code of the Russian Federation (hereinafter - the Criminal Code) and Art. 25 of the Code of Criminal Procedure of the Russian Federation (hereinafter - the Code of Criminal Procedure), as well as in connection with active repentance in accordance with Art. 75 of the Criminal Code and Art. 28 Code of Criminal Procedure. Consequently, alternatives to criminal liability exist.

A vivid example of such a procedure is the decision of the Zvenigovsky District Court of the Mari El Republic in case 1-63 / 2019 of April 16, 2019. A criminal case was initiated against K. according to part 1 of Art. 264 of the Criminal Code. This act is characterized by infliction of serious bodily injury to the victim as a result of traffic violation and is classified as a minor offense. In the given example the criminal case was examined in a special order. In the preparatory stage of judicial proceedings, the victim R. filed a motion to dismiss in connection with the reconciliation of the parties. The court's decision reflected the positive characteristics of K., certified full property compensation for the harm caused, as well as the absence of claims from the victim. The court decided to terminate the criminal case and released K. from criminal liability. Secondly, the law requires, when sentencing, to take into account a number of circumstances characterizing the behavior of the criminally prosecuted person including the post-criminal. These circumstances are reflected in Part 1 of Art. 61 of the Criminal Code:

- Commission of a first minor or moderate offence owing to a chance concurrence of circumstances;
- Voluntary compensation for property damage and moral damage caused as a result of the crime and other actions aimed at remedy the harm caused to the victim;
- Active assistance in the investigation of the offence, the exposure of other persons involved and the recovery of property obtained as a result of the offence.

The practice on the above-mentioned grounds is controversial. However, one certain vector can be

identified. It is aimed at significantly reduction in the severity of punishment in cases where mitigating circumstances exist and are applied together in these cases. So, in the Volgograd Regional Court the complaint of R., convicted under part 4 of Art. 264 of the Criminal Code, was heard on appeal. The court of appeal found that the convicted person was sentenced to unfair (severe) punishment. The trial court did not take into account the totality of mitigating circumstances: the convicted person committed crimes for the first time, fully pleaded guilty, repents of his deed, he has a dependent child whom he provides material support to, positive characteristics of the data from the place of work, full compensation for the harm caused by the crime, and the opinion of the victim G.A., who did not want to bring R. to criminal responsibility. A change of sentence with a reduction in punishment allowed the convicted to continue to do his professional activities (truck driver) and travel to distant regions due to the exclusion from the sentence of imposing an additional sentence in the form of deprivation of the right to drive vehicles for a period of 1 year. This decision seems to be quite adequate and fair.

Returning to the assumptions, it should be noted that the Code of Criminal Procedure of the Russian Federation does not contain provisions directly regulating the obligation to resort to mediation, however, in part 2 of Art. 268 of the Code of Criminal Procedure of the Russian Federation, there is the duty of a judge to explain the right of the parties to conciliation according to Article 25 of the Code of Criminal Procedure. This action is performed in the preparatory part of the hearing.

Further, it is necessary to mention the special procedure for making a court decision if the defendant admits the charges against him (Chapter 40 of the Code of Criminal Procedure of the Russian Federation). Such proceedings are special, since the accused and the victim to a considerable extent independently regulate the claims against each other. A prerequisite for this proceedings is the consent of the accused with the charge against him and consent to the special procedure of the victim (part 1 of article 314 of the Code of Criminal Procedure of the Russian Federation).

Revealing in that respect are the statistics of the work of federal courts of general jurisdiction and magistrates to terminate criminal cases and their consideration in a special manner. The number of criminal cases that were dismissed by the courts on non-rehabilitating grounds is increasing annually. In 2017, criminal cases were terminated in respect of 79.6 thousand people, or 15.4% of the number of persons in criminal cases completed in production (in 2016 - 77.7 thousand, 14.2%). In 2018, criminal cases against 188.1 thousand people were terminated (the share in the overall structure is 22.8%). In the first half of 2019, a total of 425 806 cases were filed, 231 904 (54.4%) of them were considered in accordance with Chapter 40 of the Code of Criminal Procedure of the Russian Federation. These figures confirm the presence of those trends that were previously noted in the article as prerequisites for the implementation of the mediation procedure.

Despite the presence of the listed prerequisites for the implementation of the mediation procedure, at the moment such a procedure is not applicable in Russia. What are the reasons? Here it is necessary to note several fundamentally important aspects.

According to A.A. Davletov, the problem of mediation in modern Russian criminal proceedings is primarily in determining what this procedure is in criminal procedure activities. What is mediation? The obvious need for a preliminary theoretical development of a model of this procedure, understanding of its legal nature, as applied to Russian criminal procedure law. At the moment, there are several definitions of the concept under consideration, however, many of them are mainly related to civil proceedings.

A.A. Kudryashov points out that mediation is an out-of-court way of regulating a dispute between the parties with the participation and under the guidance of a third neutral person without the right to make a decision binding on the parties.

According to I. Reshetnikova, mediation is negotiations between the disputing parties with the participation and under the guidance of a neutral third party - an intermediary who does not have the right to make a decision binding on the parties.

R.R. Maksudov believes that the term "mediation" refers to the procedure for reconciling the conflicting parties by entering into voluntary negotiations with the help of an intermediary that provides assistance.

A comprehensive definition of mediation in criminal proceedings is given by A.P. Guskova and D.V. Matkina. Ment by mediation, they understand the out-of-court settlement of disputes between entities with the participation of an uninterested party. The process in which the parties choose one of the informal methods of resolving the conflict through a neutral specialist - a mediator in order to develop a viable solution.

We, in turn, consider mediation as a procedure designed to resolve criminal law conflicts, during which an independent and impartial third party - mediator is involved in finding a compromise between the person who committed the crime and the victim in order to reconcile the parties and find a mutually acceptable decision on compensation for harm caused by an unlawful act, as well as the settlement of other issues related to ensuring the rights and legitimate interests of these persons in a criminal proceeding.

Another important issue. What place can the mediation mechanism take in criminal proceedings? Let us turn to the classification of promising models of mediation proposed by one of the foreign authors. This classification includes three possible options:

1. Mediation as an alternative to criminal proceedings. A criminal case is either not instituted at all, or is withdrawn from the criminal process at the earliest stages. That is, mediation becomes an extra-procedural way to resolve the conflict.

2. Mediation as a part of the criminal process.
Mediation is an integral part of justice and a kind of extra-procedural element of it, when at the next stage of the process the results of the restoration program are taken into account.
3. Mediation as a complement to the criminal process - this is the mediation carried out after a court decision in prisons.

The second option seems preferable, since in our opinion it is more consistent with the essence of mediation. A similar interpretation of mediation is enshrined in the Code of Civil Procedure of the Russian Federation. According to paragraph 5 part 1 of Article 150 of this code the court takes measures to conclude a settlement agreement by the parties including the results of the mediation procedure which the parties are entitled to carry out at any stage of the trial, in accordance with the procedure established by federal law. Of course, this rule in relation to the criminal process needs certain adjustments due to the outlined features of this conciliation procedure and the use of their results in criminal cases.

One of the reasons that impede the introduction of the institution in question in criminal proceedings is the unpreparedness of society in general, of the participants in criminal proceedings themselves for a conciliation procedure. In those countries, where this institution is progressively developing, clauses are added to the relevant agreements where it is indicated that in case of various kinds of disputes participants are obliged to initially refer to the mediation procedure. In the USA up to 90% of cases do not reach the court, in Europe - 80%, in Russia - only 3%. The most successful mediation is developing in those states where the principle of expediency is fixed as one of the principles of the criminal process. For example, in France in 28% of cases the prosecutor's office refuses to initiate criminal prosecution on the grounds of inappropriateness. In Germany ending of a criminal prosecution due to inexpediency is becoming common practice with respect to every second juvenile accused. Such indicators can be explained by the fact that the emergence of mediation occurred precisely in the Anglo-Saxon legal family, where the principle of expediency, which often prevails over the principle of legality, operates. This situation cannot be imagined in the legislation of the Russian Federation, since the principle of legality plays a dominant role. Therefore, there are many difficulties in building the mechanism for the implementation of the institution in question in the legal field of our country.

In our opinion, we substantiated that the prerequisites, listed in the study, for introducing the institution of mediation into Russian criminal proceedings (we systematized them and divided them into three groups) are objective. At the same time, the existing obstacles are objective. It is necessary (taking into account the gained practice of foreign countries) to find a balanced consideration of existing factors, to search for new

mechanisms to build a balance of private interests and public interest, to revise the procedural status of key subjects of criminal procedural activity, to develop the status of a participant (mediator) that is fundamentally new for domestic criminal proceedings.

4. CONCLUSION

Turning to the conclusions, we note that today the institution of mediation is not spread in the criminal procedure legislation of the Russian Federation due to the above-mentioned reasons. However, in domestic criminal proceedings there are serious prerequisites for introducing the mechanism of this procedure. Further development of the concept of criminal law mediation as a progressive alternative to criminal prosecution is seen not only theoretically promising, but also productive in its applied meaning.

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