

SCTMG 2020**International Scientific Conference «Social and Cultural Transformations in the
Context of Modern Globalism»****MEDIATION PROGRAMS USED FOR PROBATION IN COMMON
LAW COUNTRIES**

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Abstract

The article presents the results of a study of the institution of probation in the countries of common law, as well as mediation as one of the elements of restorative justice and a way to work with a person found guilty by a court, but in respect of which the punishment is replaced by probation. The peculiarities of the establishment and development of the probation institution in the countries of common law, the peculiarities of the application of this method of influence on persons guilty of committing crimes and the types of crimes that involve the use of probation to convicted persons are considered. The study of the peculiarities of the probation process itself, the analysis of scientific sources and statistical materials allow concluding that the participation of convicted persons in restorative justice programs and the ability of such programs to build social functioning skills. The orders of the highest executive body of state power can serve as legal prerequisites for legislative consolidation of the institution of probation (as well as some elements of restorative justice) in the Russian Federation, due to the fact that they have the force of mandatory execution in the Russian Federation and approve the concepts of socio-economic development and the development of the penal system of the Russian Federation and networks of mediation services. These acts presuppose subsequent legislative regulation of the various elements of restorative justice in criminal proceedings in the Russian Federation.

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Keywords: Mediation, probation, restorative justice, minors, criminal law.



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1. Introduction

The historical analysis of the development of the institution of probation should begin with the Middle Ages in England. The legislation of the time provided for the widespread use of harsh punishments, including not very significant acts from the point of view of public danger. The appearance in the XII century of prisons (Petrushevsky, 2010) and the formation of penitentiary system as a whole gave impetus to the development of English punishment system, in which the speed and publicity of punishments became especially important (Khatunov, 2003). The punishment system was very diverse and included a wide list of types of punishments, each of which could involve preliminary torture (Peters, 1998).

With the course of time, a gradual change in legislation takes place and cruel punishments are replaced by other means of influencing the perpetrators of crimes. This process was facilitated by the progressive part of English society, which advocated for the change in the punitive approach to the administration of justice and thus began to develop elements of restorative justice, one of which was the institution of probation.

The restorative practices in the United States where criminal proceedings were formed following the example of the criminal process in England emerged in the same way. In the process of the establishment of restorative justice, special attention is paid to juvenile courts, the law on the creation of which was first adopted in Massachusetts in 1874, the main idea of which was the need to ensure such care and custody of a juvenile offender, along with the punishment that he would receive in his family (Patton, 2013). First of all, when choosing the type of punishment, a court must take into account which punishment can contribute to the re-education of a particular juvenile convict, and not what type of punishment is usually prescribed for such crimes.

Along with the establishment of juvenile courts in Massachusetts, the establishment of a probation institution has been taking place since about 1878 (US Courts, 2017). Juvenile courts contributed to the development of probation as the most effective and optimal way of influencing a person found guilty. By the year of 1920, 21 states had borrowed the positive experience of using probation. Later, the borrowing of experience by other states followed. The agreement was concluded between some states, the meaning of which was to oversee conditionally convicted, as well as parole people who lived moving around the state. Currently, the probation institute operates throughout the United States (Table 01, Table 02).

Table 01. Summary statistics on adult convicts

Period (calendar year)	The number of persons whose cases are considered by the court on the merits	The number of convicted persons (% of the total number of persons whose cases are considered by the court on the merits)	The number of persons whose legal proceedings were terminated on non-rehabilitating grounds (% of the total number of convicted persons)	The number of convicted persons who previously had a criminal record (% of the total number of convicted persons)
2018	830994	681789 (82 %)	191192 (23 %)	210253 (31 %)
2017	872150	724702 (83 %)	193388 (22 %)	213373 (29 %)
2016	942130	767960 (82 %)	218869 (23 %)	218454 (28 %)

Table 02. Summary statistics on juvenile convicts

Period (calendar year)	the number of persons whose cases are considered by the court on the merits	The number of convicted persons (% of the total number of persons whose cases are considered by the court on the merits)	The number of persons whose legal proceedings were terminated on non-rehabilitating grounds (% of the total number of convicted persons)	The number of convicted persons who previously had a criminal record (% of the total number of convicted persons)
2018	27641	18924 (68 %)	15307 (55 %)	3568 (19 %)
2017	29876	20980 (70 %)	15582 (52 %)	3900 (19 %)
2016	35146	24420 (69 %)	18112 (52 %)	3865 (16 %)

2. Problem Statement

In the Russian Federation, neither probation nor mediation found legislative consolidation for various reasons. One of these reasons is probably the cautious attitude of society towards such methods of resolving legal relations arising as a result of a committed crime. According to the prevailing opinion in Russian society, criminals should bear the responsibility for their actions and the stricter it is the more they are effective. However, the experience of Western countries in using elements of restorative justice has proved long and successfully the opposite: not only the inevitability of the state reaction to criminal behavior, but also the resocialization has a positive effect in the fight against crime.

3. Research Questions

The meaning of the probation is that the service officers monitor and supervise the fulfillment by a person convicted of a crime of certain requirements and compliance with restrictions aimed at the facilitation of the rehabilitation of this person. The legal status and powers of the court in Common law countries are sufficient to apply probation to a person on their own initiative, including replacing probation with another type of mandatory minimum punishment.

For example, in the USA, according to the Code of Laws of the United States of America, probation can be assigned to any person convicted of a crime. Some exceptions are the crimes for which imprisonment is prescribed for a term of more than 25 years, including life imprisonment, in which case probation can be appointed only if an offender renders substantial assistance to the authorities in crime solution.

Depending on the degree of danger of a committed crime, probation may have a number of features. Sometimes it may completely replace punishment; sometimes it may be an addition to punishment. In some cases, it may present a compulsory supplement aimed at resocialization of a person. In other cases, it is an addition providing some privileges in another type of punishment, for example, reduction of prison sentence. An accused, who agreed to probation, voluntarily assumes obligations to perform the actions prescribed by the court. For example, an accused person systematically provides the results of drug tests, provides a monthly report on employment, contacts with other people and other things, performs community service, pays fines according to the established schedule, compensates the

victim of a crime in the established manner, etc.). In addition, he abstains from prohibited actions (visiting certain places, contacting with certain people, participating in criminal activities, etc.).

The important role in the implementation by probation service of its functions is played by sociological approach. The followers of the sociological school of law correctly point out the impossibility of investigating crime and preventing it by using exclusively legal methods (Teyvan-Treynovsky & Volov, 2012), among other followers of the sociology of law, von List emphasizes the special productivity of sociological methods of studying the problems of the fight against crime (Efimov, 1914). Probably, the success of probation is justified by the use of a sociological approach, which involves the analysis of social causes and motivating factors of crime, and the study of the socio-typological specifics of the personality of an offender, the criminal subculture as a nourishing ground for the formation of all kinds of new deviations, the problem of punishing a crime as a social phenomenon (Kasyanov & Nechipurenko, 2001)

However, it is necessary agree that the causes of crime are not always determined by social or economic problems. In a number of cases, a crime was committed by a person due to the lack of formation of social functioning skills or antisocial views of a particular person. In such cases, the actions of the state aimed at suppressing the development of such features during a sentence, as well as at creating the prerequisites for the moral improvement of a person, creating conditions for social rehabilitation and correcting behavior (Zahars, 2008), become especially important.

This is of particular importance in juvenile proceedings. Minors should not perceive the use of a loyal approach to minors and the use of alternative methods of influence as impunity, which is why it is extremely important to apply such methods of influence on minors that would contribute to the re-education, re-socialization, correction and prevention of recidivism.

Nowadays in the Russian Federation, the pilot projects are being implemented in order to introduce probation as a part of restorative justice into juvenile criminal proceedings. The main coordinating body in this work in relation to the institutions and services of the system for the prevention of neglect and delinquency is the commission for minors and the protection of their rights, however, after reaching the age of eighteen, a convicted person is automatically deregistered from the commission and individual preventive work with him is not conducted. In Russia, there are also penal inspections, which, unfortunately, are not able to ensure the well-being of a minor and his family, as prescribed by the Beijing Rules (Voronova, 2006).

It is obvious that the system of the institutions of preventive work needs to be improved. In this regard, the rich experience of the countries of common law is of particular interest. In these countries the development and use of a combination of psychological and social influence, the element of which is mediation, has led to the use of the term restorative justice in science and practice, and mediation itself is often used as a program for working with minors, to whom probation is applied.

Unfortunately, mediation is still not enshrined in criminal law and as a result, in practice it is not used everywhere. It is used only in places where pilot projects work. Russian law enforcement practice indicates that a number of regions do not use the possibilities of criminal justice to prevent recidivism among minors. Thus, when sentencing, the degree of public danger of a crime committed is not always taken into account. Often, in relation to individuals, including minors, who have committed several

crimes, the courts impose a conditional sentence. This definitely has a negative effect on the formation of a sense of impunity and permissiveness in persons prone to commit crimes (Gabaraev, 2017).

In foreign countries, many victim and offender mediation programs are developed. Depending on at what stage of the criminal proceedings they are used, three main models of the use of mediation in the criminal process can be distinguished.

In the first model, mediation is used as a part of a normal criminal process. Thus, at a certain stage of the proceedings, the case can be sent to a mediator, and if a conciliation agreement is reached, it will become the basis for the termination of the proceedings or commutation of punishment.

The second model is the embodiment of the alternative to criminal proceedings. Mediation takes place at the earliest possible stage of legal proceedings and involves the settlement of the conflict between a victim and an offender, which is private in nature.

In the third model, mediation acts as an additional means, as a rule, taking place after the end of criminal proceedings. (Batalin, Dvoryanskov, & Sergeeva, 2004) This very model of mediation is used in cases of the application of probation to a person.

There is no doubt that it would be a mistake to assert that probation will solve all pressing problems at once. However, its gradual implementation will allow over time achieving significant results in the fight against crime, in particular against recidivism. Mediation and other restorative justice programs can have a positive effect on the individuals to whom probation is applied.

In scientific community, the topic of liberalization is relevant, as well as the humanization of criminal and criminal procedure legislation of the Russian Federation. This direction of criminal policy is confirmed by the adoption of a number of development concepts of the Russian Federation. Thus, the “Concept for the Long-Term Socio-Economic Development of the Russian Federation for the Period until 2020”, one of the directions identified the formation of such a system of social support for people in difficult situations, as well as a system for the prevention of offenses in which mechanisms for restorative justice should be formed and probation services created.

According to the concept, the objectives of probation services are to conduct conciliation procedures, implement restorative justice programs, implement coercive educational measures, as well as provide social and psychological support for persons released from prison.

The “Concepts for the development of the penal system of the Russian Federation” also define the development of a system of measures as a development direction that will prepare a convicted person for release from prison and ensure subsequent adaptation in society with the help of a probation service.

“The concept of developing a network of mediation services by 2020 ...” in order to implement restorative justice for children also involves the creation and development of the institution of socio-psychological assistance to a minor on the basis of a network of mediation services for conscience and expiation to a victim.

4. Purpose of the Study

The purpose of the research was to study the legal regulation of the institution of probation, as well as the established practice of using probation and mediation as a restorative justice program applied to convicts in the countries of common law. It was necessary in order to subsequently identify positive

experiences of such work and justify the feasibility of the consolidation of restorative justice programs in Russian criminal law.

5. Research Methods

The methodological basis of the study was presented by the methods of scientific knowledge, which were used by the authors to achieve this goal. The general scientific method of communication made it possible to study scientific publications on probation and mediation in the countries of common law, including in a foreign language. Thus, in the future we would combine the data obtained by different scientists at different times. The deduction method, based on the general principles of restorative justice, made it possible to formulate some conclusions about the possibilities of mediation in the process of probation.

The analysis of the formation and development of probation institution and the tracing of the historical laws of this institution was carried out using historical method. The statistical method made it possible to summarize and group statistical materials and formulate the corresponding conclusions. A special place among the used methods is occupied by a comparative analysis, which allowed studying the similarities and differences in the ways how states respond (for example, the USA and Russia) to criminal behavior of a person and as a result formulate a conclusion on the advantages of borrowing a probation institution in Russian criminal law.

6. Findings

The results of scientific research of American scientists do not allow making unambiguous conclusion on how effective the punishment is in the form of prolonged imprisonment in matters of preventing recidivism (Clear, 2007). Isolation from society for a certain period is considered necessary in some cases (Lofton, 1975). However, such isolation does not contribute to the correction of a person unless additional methods of influence are used (Jewkes & Bennett, 2013; Roberts, 2004).

The study of officially published statistics of the judicial department of the Russian Federation allows drawing a conclusion about the stability of the level of recidivism. Therefore, annually about 30 % of previously convicted persons are repeatedly convicted. In the case of minors, the situation is better; annually about 20 % of previously convicted minors are repeatedly convicted.

We are convinced that this is the merit of bodies and organizations conducting preventive work and we believe that such bodies and organizations should be created for preventive work with adults. Such preventive work will be of particular importance in relation to persons whose proceedings on cases are terminating. Annually it is 22–23 % of persons whose cases are considered on the merits. In the case of minors, this percentage is significantly higher. In relation to more than half of minors, a trial court decides to terminate criminal proceedings on non-rehabilitating grounds.

Such grounds do not exclude the guilt of persons, In this regard, in order to prevent the formation of a sense of impunity and permissiveness among these persons, it is extremely important to create a system of probation services and compel a court to force such persons to participate in restorative justice programs, in particular mediation.

7. Conclusion

The research presented the historical analysis of probation institute in the countries of common law, the positive experience of the functioning of this institute and mediation programs in the framework of probation in relation to a convicted person. To sum up it seems reasonable to formulate the following conclusions:

Probation is an effective way of a state to respond to a person's illegal behavior, the guilt of which is established. It is generated by a criminal policy that has a vector of humanization and liberalization.

Mediation is one of the possible elements of restorative justice used in the implementation of probation, with the aim of resocialization of a convicted person.

It seems advisable to introduce comprehensively the institution of probation (with the stipulated possibility of prescriptions to participate in restorative justice programs, including mediation) in criminal and penal proceedings. In particular, it is recommended to make such additions that would provide the establishment and functioning of a system of probation and mediation services, legal status of mediation and probation officers, the principles and procedures for the implementation of the activities of these organizations and individuals, the list of requirements and restrictions which may be assigned by a court to a person in case of probation, as well as the responsibility of a convict and the consequences of noncompliance with probation rules.

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