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SPECIFICS OF MEDIATION IN THE CRIMINAL PROCEEDINGS OF EUROPEAN STATES

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Abstract

The article presents results of the research conducted by authors of international legal recommendations and provisions of the national legislation of European countries that regulate restorative justice programs. It analyzes the practice of using conciliation programs that has developed in these states and studies sources that generalize the practice of using conciliation procedures. The authors identified and systematized differences in the reconciliation procedure in different European states. They attempted to identify positive experience, as well as to formulate conclusions about the advisability of taking into account certain provisions on the introduction of mediation into Russian sources of criminal procedure law. This study is relevant due to the lack of a nationwide approach to restorative justice. There is no doubt that a culture of peaceful resolution of disputes should be created, but this cannot be done without research and consideration of international norms and standards on restorative justice. As a result of the study, the authors came to the conclusion that it is necessary to take into account the features that minimize procedural contradictions and contribute to the popularization of mediation in the criminal procedure, such as cost of mediation services, creation of document templates required in the mediation procedure, and some others. As a result of summarizing the practice of European states, the authors formulated a proposal on the obligatory approval by the court of the agreement of parties, which fixes the agreements reached in order for such an agreement to become valid.

Keywords: Mediation, restorative justice, reconciliation, agreement, mediator

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1. Introduction

The experience of European countries indicates the advisability of involving qualified members of the public to participate in criminal proceedings to resolve conflicts of a criminal nature under the supervision of a court through reconciliation programs of restorative justice.

It is the restorative justice programs that are recommended by international legal documents, sources of European law for dissemination and development in criminal proceedings, which are especially useful in juvenile cases.

Attitudes towards restorative justice programs continue to be diverse in the Russian Federation. This kind of conciliation activity is not provided by the criminal procedure legislation. However, conciliation is used with the help of an intermediary and subsequently approved by the court. Court websites are filled with information about juvenile-friendly legal proceedings, but the procedure does not move further. Obviously, a theoretical study of foreign experience is needed to form a clear position on certain issues and prospects of restorative justice in Russia.

Mediation has appeared in the criminal procedure of European countries and has been developing for a long time. During the French criminal procedure, the prosecutor, before deciding on the need to initiate criminal proceedings, may direct the parties (subject to their consent) to mediation, if such a procedure will facilitate compensation for the victim and correction of the offender (Andreeva, 2012).

In Finland, mediation has been developing since 1983 and is now regulated by the Law on Conciliation in Criminal and Certain Civil Cases, which came into force on June 1, 2006 and is permissible at any stage of the procedure (Borisova, 2011).

In Austria, mediation has been developing since 1985 only as a way to respond to crimes committed by minors (Haider et al., 1998; Pelikan, 2011). Then, having received the recognition of practitioners, it began to be used as a way of responding to crimes committed also by adults as a pilot project, and in 2003 it received legislative consolidation (Groenheisen, 2003; Hofinger & Neumann, 2008).

In Portugal, mediation in criminal proceedings has been regulated since 2007 by the Law No. 21/2007 “On Mediation”. But its application is limited to cases of crimes for which imprisonment is provided for no more than 5 years (Bolshova, 2008). There are also restrictions on cases of crimes committed against minors and cases to which a simplified procedure is applied in criminal proceedings (Arutyunyan & Dobrolyubova, 2012). The successful achievement of a conciliatory agreement by the parties implies refusal of criminal proceedings. However, the law provides for the right of the victim to initiate the resumption of proceedings if the accused does not fulfill the terms of the agreement (Elchaninov, 2013).

In Germany, the prosecutor's office and the court are obliged to check the possibility of reconciliation with the victim at each stage of the procedure and influence the participants, stimulating them to reconciliate. They are also obliged to explain the nature of interaction between law enforcement agencies and reconciliation services.

Restorative juvenile justice programs have been particularly developed. Thus, with the consent of the prosecutor's office, the court may suspend or completely terminate criminal proceedings with the

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simultaneous "coercion" of the accused minor to take action to reconcile with the victim and make amends.

Moreover, even if real reconciliation cannot be achieved, the court is convinced of the obviousness of efforts of the accused to achieve this reconciliation (Amos, 2018; Ostendorf, 2007). Only in this case the court order will be considered fulfilled (Yurkov, 2009).

In Spain, mediation in relation to adult offenders is still not regulated by law, but in relation to minors it has been used successfully for a long time – from 15 to 20% of criminal cases against underage persons end in reconciliation.

Thus, in European countries, the interest in restorative justice programs gradually became apparent and at the end of 2002. With an initiative of the European Ministers of Justice, an innovative body was created to improve the quality and efficiency of European judicial systems – the European Commission for the Efficiency of Justice (hereinafter referred to as the "European Commission"), which has developed a set of recommendations and other documents in order to raise awareness of European judges about the possibilities of mediation in legal proceedings, including criminal proceedings. The Commission encourages specialists in other fields to use these documents.

2. Problem Statement

In the Russian Federation, ideas of restorative justice are being promoted spontaneously and fragmentarily, as indicated in the Concept for the development of the network of mediation services until 2020. The main initiative is shown by non-governmental organizations, sometimes regional programs, but the nation-wide approach is not clearly defined. As the Government sees it, the judicial system can and should be a key element in fostering a culture of peaceful settlement of disputes.

Russia is interested in active integration into the international legal field. In this regard, it is extremely important to study and take international norms and standards devoted to restorative justice into account.

3. Research Questions

The subject of the article identifies the following problems arising during application of the Law on mediation in the criminal proceedings of European states:

- problem of the cost of mediator services in criminal proceedings and the distribution of the burden of payment for these services;
- specifics of concluding an agreement on intermediary services;
- peculiarities that take place during the official recognition of the mediation agreement on conciliation and giving it legal force;
- features of the use of digital technologies in the procedure of reconciliation of the parties.

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4. Purpose of the Study

The purpose of the study is to study international legal recommendations and provisions of national legislation of European countries regarding restorative justice programs, as well as the established practice of using such programs in these states and sources that generalize the practice of using conciliation procedures to determine differences in the reconciliation procedure in different European states and identifying positive experience, as well as formulating conclusions about the advisability of taking into account the provisions, which will come into force when mediation will be introduced in Russian sources of criminal procedure law.

5. Research Methods

In the course of the study, the authors applied a dialectical method, general scientific methods (such as analysis, synthesis and abstraction), as well as special methods of scientific cognition (historical-legal and comparative-legal).

6. Findings

One of the most important ones is the problem of determining moments of the beginning, the end, and the period of the mediation procedure. This happens due to a combination of aspects, including the rules of confidentiality, as well as the possibility of suspension of criminal proceedings. The European Commission has repeatedly emphasized the need to allow conciliation procedures at any stage of the criminal procedure in its recommendations. Such recommendations were taken into account in Azerbaijan, Belgium, Poland, Serbia, France, Switzerland. However, in Finland mediation is allowed only until the case preparation for trial is completed, and in Ireland no later than 14 days before the first hearing.

As soon as parties agree to participate in the conciliation procedure and materials are transferred to the mediator, a document containing information on the date of these events must be created. It also must include an indication for suspension of the proceedings. In addition, it should indicate the mediator to whom the materials are sent and the date of the next procedural stage after mediation is terminated.

In most countries, reconciliation lasts to 3 months. This period can be extended at the request of the mediator (as provided in France) or at the request of the parties (this possibility is contained in the legislation of Cyprus, Poland and Turkey).

The start date of the period allotted for mediation is differently defined in European countries: in the Czech Republic it is signing of the mediation agreement, in Turkey – signing of the mediation agreement, drawn up at the initial meeting, in Croatia – acceptance of the offer to participate in the mediation. The establishment of a sanction for deliberately obscuring the procedure of conciliation to prevent possible abuse of the right to suspend proceedings or other procedural guarantees is recognized as effective.

Another equally important issue is payment for the mediator's services. In general, the European Commission perceives mediation as a labor-intensive activity to be absolutely free. It encourages states to

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create such conditions for mediators that will not lead to excessive commercialization of this activity. Therefore, it should be publicly available. This approach will increase the popularity of intermediary services. Lithuania, Poland, Slovenia have indicated the exact hourly cost. Setting maximum rates in litigation can make it available to parties. On the other hand, intermediaries should be paid adequately.

The European Commission encourages states to pay for the services of a mediator in court. A number of European countries have established a certain number of hours paid by the state. For example, in Lithuania the cost of the first 4 hours of work of an intermediary is reimbursed by the state, and if the judge himself acts as an intermediary, it is free of charge.

Both one of the parties and the person conducting the proceedings have the right to initiate an appeal to an intermediary. The European Commission recommends that states consider mandatory referral of parties to an initial meeting with a mediator, as this approach encourages parties to participate in mediation and increases the popularity of conciliation procedures. In addition, in support of this proposal, the European Commission argues that in some cases it is psychologically difficult for a victim or a criminal to make such a proposal, and it is easier to accept it from an official. Many European states have included a similar provision in their national legislation, according to which the court recommends the parties to take part in the conciliation procedure (for example, Belgium, Germany, Ireland, Lithuania, Turkey, France, Czech Republic, Switzerland). In some countries, the judge's duty to make such an offer to the parties, or at least to explain information about mediation, is found to be enshrined in national legislation.

The European Commission points out the importance of formalizing a mediation agreement – a document regulating the relationship between a mediator and participants in legal proceedings. Such a document is especially important in those countries where mediation is not sufficiently regulated by the norms of national legislation. It may specify the terms, confidential rules, distribution of costs and other conditions that are significant in each case. Such agreements are provided for by the national legislation of Azerbaijan, Belgium, Ireland, Spain, Cyprus, Poland, Czech Republic. The agreement minimizes disputes about costs; it can be an evidence of the participation of a specific mediator in a specific dispute, As a result, it is the basis for granting immunity to a witness. In addition, parties can negotiate conditions that are not imperatively prescribed by the law: choose the type of program, provide for the participation of third parties, determine the rules of confidentiality, distribute the burden of incurring costs, etc. For the most effective operation of such agreements, states are encouraged to develop a single application form.

Mediation in its classical sense implies a meeting of two parties “face to face” with the mediation of a mediator, who has the right to choose the most effective program for each specific case. The mediator must be guided by a quality standard, be impartial and remain neutral (Dutch scholars are encouraged to develop a code of ethics for this (Verbeecken & Deboeck, 2018). At the same time, the European Commission calls for taking into account interests of the parties and allows using electronic means and online tools (the practice is available in Italy, Cyprus, and Lithuania.) Electronic means of communication are effective when the parties are not yet ready for a face-to-face meeting, or, for various reasons, cannot physically take part in the meeting. The European Commission encourages the use of digital technologies, while drawing attention to the need to ensure compliance with procedural requirements for mediation and mediator behavior.

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Despite the fact that classical mediation implies negotiations only between a victim and an offender (a mediator does not participate in them, he only supervises the procedure), scholars express different points of view regarding the participation of lawyers in the reconciliation. This is especially important in disputes where there is an imbalance of power, such as in cases of domestic violence. A lawyer can take part in drawing up a conciliation agreement, which will contribute to the consolidation of provisions in it that do not contradict the law and will not entail subsequent difficulties in the implementation of these conditions.

At the same time, the European Commission urges that the participation of a lawyer in the conciliation procedure should not be enshrined, as this may lead to increased costs and reduce the availability of mediation.

In addition to lawyers, other people can also participate in reconciliation programs; the main condition is that everyone must comply with the rules of confidentiality.

In this regard, it is important to prevent a situation in which participation in the reconciliation program was aimed solely at obtaining specific information that could not be obtained in another way and was terminated immediately after taking possession of it. At the same time, it is necessary to maintain a balance and prevent another type of abuse of the right: a party using documents in the mediation procedure, deliberately giving them a confidential status and making it impossible for their subsequent use in legal proceedings. It is possible to solve such a problem by specifying a rule according to which evidence that is otherwise admissible in court proceedings does not become inadmissible just because it was used in the mediation procedure.

For the sake of confidentiality, participants in a conciliation procedure should be empowered to withhold testimony regarding information that has become known to them as a result of the conciliation. The prohibition of interrogation regarding such information is provided for in the legislation of individual countries, while in Belgium, Lithuania, Poland and Switzerland only the mediator is endowed with witness immunity. In Italy it is also endowed with the parties to the reconciliation procedure. In Slovenia, Croatia and Turkey these are everyone who took part in the reconciliation procedure.

Since the reconciliation procedure provokes the suspension of proceedings, the use of coercive measures is an important issue. This issue has not been resolved in the criminal procedure, but the position of the Court of the European Union is of interest, which in several of its acts emphasized the importance of providing the parties with the opportunity to request such interim measures even when using alternative dispute resolution methods.

Summarizing the legislation of European countries, we can distinguish three main points with the onset of which the mediation procedure can be considered completed. Firstly, it is when the parties entered a mediation agreement. Secondly, it happens when a conclusion was received from the mediator and it was impossible to achieve reconciliation between the parties. Thirdly, it is when a party announced its withdrawal from the reconciliation procedure. The mediator is usually given the responsibility to prepare a report on the results of mediation, which should indicate place and time of the reconciliation procedure, results, and reasons (both successful and unsuccessful) of the procedure.

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The most preferred way to give a conciliation agreement a significant legal force is its approval by the court. Since in this case it is subject to judicial control and acquires the force of a judicial act, it includes acquiring prejudicial significance.

The European Commission allows the approval of such an agreement by a notary or other government body, as it is in Italy: while signing an agreement, lawyers confirm and certify that the agreement is in accordance with the law. But this is more applicable to civil disputes. In criminal proceedings, only the court has the function of administering justice, and that is why such an important agreement, which is essential in deciding on the issue of guilt and punishment, should be approved only by the court.

7. Conclusion

1.When performing legislative regulation of mediation, a number of points that minimize procedural contradictions and contribute to the popularization of mediation in criminal proceedings should be taken into account: decide the cost of mediator services (mediation should not be too expensive); develop a template for an agreement on participation in the reconciliation program and cooperation with a mediator (this will resolve issues about the start and end dates of mediation and, as a consequence of preventing difficulties with procedural deadlines, about payment for services, about confidentiality features, about the possibility / obligation of participation of third parties, about the final documents).

2.The agreement reached by the parties must be additionally approved by the court, thereby acquiring the legal force of a judicial act.

3.The use of digital technologies is advisable both for solving logistic problems and for overcoming possible communication difficulties, which are typical especially for the initial stage of the reconciliation procedure.

References

Amos, M. (2018). *BGH zum Täter-Opfer-Ausgleich an Hinterbliebene: Zu spat für Reue.* https://www.lto.de/recht/hintergruende/h/bgh-4str144-18-taeter-opfer-ausgleich-toetung-hinterbliebene/

Andreeva, I. A. (2012). *Social Mediation in France.* https://www.sovremennoepravo.ru/

Arutyunyan, A. A., & Dobrolyubova, E. A. (2012). Mediation as a way of settling criminal and business disputes. *A comparative legal analysis Legislation, 7*, 28.

Bolshova, A. K. (2008). On the conciliation procedure with the participation of an intermediary. *J. of Russ. Law, 5*, 98–103.

Borisova, E. A. (2011). Russian mediation procedure: a development concept. *Bull. of Moscow Univer., 11*(5), 22.

Elchaninov, A. P. (2013). Foreign experience in the implementation of mediation procedures in the criminal law sphere Justice of the Peace. Iss. 2. Moscow: LLC Publ. Group Yurist, pp. 24–27.

Groenheisen, M. (2003). Victim and Offender Mediation: Legal and Procedural Safeguards. In *Experiments and legislation in some European countries Restorative justice* (p. 38). Moscow.

Haider, A., Leirer H., Pelikan, C., & Pilgram, A. (1998). Die “Erfolgsstatistik” des Modellversuchs. In *Konflikteregeln, stattstrafen! Übereinen Modellversuch in der österreichischen Jugendgerichtsbarkeit* (p. 77). Verein für Gesellschaftskritik.

Hofinger, V., & Neumann, A. (2008). *Legal bewährung nach Außergerichtlichem Tatausgleich, Gemeinnütziger Leistung und Bewährungshilfe*. https://www.irks.at/assets/irks/Publikationen/Forschungsbericht/Endbericht%20Legalbiografien.pdf

Ostendorf, H. (2007). J*ugendgerichtsgesetz.* 7. Paragraph 45. Rn. 13. Baden-Baden.

Pelikan, C. (2011). *Victim-offender mediation in domestic violence cases-a research report.* http://restorativejustice.org/10fulltext/pelikan-christa.-victim-offender-mediation-in-domestic-violence-cases-a-research-report.html

Verbeecken, P., & Deboeck, H. (2018). Beroepsrisico'sbijslachtoffer-daderbemiddeling: bescherming of kwaliteitsondersteuning?. *Tijdschriftvoor Herstelrecht, 18*(2), 10–24.

Yurkov, V. V. (2009). *Institute of Victim Reconciliation in Systems for the Treatment of Juvenile Offenders in Russia, Austria and Germany*. https://cyberleninka.ru/article/n/institut-primireniya-s-poterpevshim-v-sistemah-obrascheniya-s-nesovershennoletnimi-pravonarushitelyami-v-rossii-avstrii-i-germanii