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AGREEMENTS IN CRIMINAL PROCESSES: PROBLEMS OF APPLICATION AND DEVELOPMENT

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Abstract

Purpose of Study: In this paper, institutions of agreements (mediation) in criminal proceedings in various states were investigated regarding the history of their occurrence and development. The aspects under the study included features related to the use of institutions of agreement in individual countries (USA, Canada, Germany, Russia, Moldova, etc.); the regulatory framework of these countries, statistics on the use of institutions of agreements (mediation), as well as programs used as mediation.

Methodology: In the present study, general scientific, as well as special methods and provisions of dialectics were used. In the course of the study, private scientific methods were also used including historical-legal, formal-legal, formal-logical, systemic, and comparative.

Results: Currently, the new legal institution of agreement (mediation) is actively developing in the global legal system, contributing to resolving the conflict without holding a trial and just by holding peace negotiations and concluding an agreement with the accused. This institution was initially established in countries with the Anglo-Saxon legal system (USA, UK), and then was developed in countries with a continental legal system (RF, Moldavia, Kazakhstan).

Implications/Applications: The mediation is considered to be a convenient approach for resolving conflicts, since it is built on the mutual agreement of two confrontational parties, and it will continue to further develop worldwide and will be included in the legislation of those countries where it has not been fixed yet.

Keywords: *Institute Of Agreement (Mediation), Criminal Proceedings in the States, Reconciliation Between the Parties, Mediation Programs, Reconciliation Process.*

INTRODUCTION

There is a need for study on the institutions of agreement, since at the present stage of development in global criminal procedure system, the institutions of agreement has been actively developed parallel to the development of crimes (some authors call this mediation) (Smith, Amy L. 2008; Hojati, M., Rezaei, F., &Iravani, M. R. 2014, The Mediation Process. 1986), the agreement refers to a situation where instead of holding a trial, the accused concludes an agreement representing the end of the proceedings in a criminal case. In its modern sense, the institution of agreement (mediation) in criminal process established and began to develop in the second half of the 20th century, primarily in the states of the Anglo-Saxon legal system (USA, Canada), and continued to spread in Europe (United Kingdom, Germany, Italy, France). The European countries have included rules on the agreement (mediation) implemented in CIS member countries in their legislation.

RESEARCH METHOD

In the present study, general scientific, as well as special methods and provisions of dialectics were used. In the course of the study, private scientific methods were also used including historical-legal, formal-legal, formal-logical, systemic, and comparative.

RESULTS AND DISCUSSION

In June 1947, the Federal Mediation and Conciliation was established in the United States, still operating at the present time, and providing mediation services in the field of industry. Since its establishment, it gradually began to develop a new kind of conflict resolution through conciliation processes, although it was not in the form of an independent procedure, it was called as “mediation”.

Since the beginning of the civilization process and economic disputes, there was a need for mediation in the criminal process. In 1973, the Neighborhood Justice Center was founded still engaging in the provision of mediation services for criminal defense of the poor and the Negroid race.

In 1974, The Private Complaint Mediation Service, as a private center for the provision of mediation services, was established to deal with non-violent crimes. The purpose stimulated the creation of these two organizations was to offer low-income people a platform for resolving their disputes instead of going to the state court. Also, the development of mediation organizations was promoted due to the presence of the so-called American rule "attorney's fee", according to which the party is obliged to pay for services of a lawyer regardless of the outcome of the case.

Mediation is considered as one of the types of restorative justice and legislative regulation has been determined for it. However, in the United States, there is no uniform approach regarding the use of mediation, which is due to the federal structure of the state. Only a few common laws can be observed. The Uniform Mediation Act, in 2001 was issued and adopted by only 10 states including Washington DC, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, and Vermont (Uniform Mediation Act of the National Conference of Commissioners On Uniform State Laws.2001). The Federal Alternative Dispute Resolution Act, issued for all federal district courts, required them to implement local rules to allow and encourage the use of alternative dispute resolution programs (Federal Alternative Dispute Resolution Act. 2019).

The ratio regarding the use of mediation is as follows: at the early stages of criminal proceedings as an alternative accounted for 34% of the total number of mediation procedures, followed by 28% - after the sentencing, and 3% - in general, before the start of the criminal process. State programs are varied, but their goal is to make the reconciliation between the victim and the offender (Umbreit M.S., Div. M., Fercello C., Umbreit J. 2000; Manso, AlmudenaGarcía, and Artenira Silva. 2018).

The mediation process is as follows: first, the offender admits his guilt, and then he or the victim can search for and select a mediation program with the help of the police officer, a lawyer, or mediators in centers of mediation service on their own. Activity domain of a lawyer in the mediation procedure has also become widespread due to the rapid development of conciliation practices and restorative justice in Europe and America (The Mediation Process. 1986).

The state of Minnesota is considered to be the leader in terms of application and improvement of quality of mediation. Since 1995, family conferences held at police stations have been practiced as an alternative to criminal proceedings against minors, and since 1996 the Public Council of Restorative Justice has begun working with adult criminals (the task of the family conference is to come up with a plan to correct the offender).

Family conferences are considered as the main type of mediation. Another type of mediation is provided by the Canadian program "Circles of Support and Accountability" (COSA) (Vasilenko A.S. 2011). This program is used in Oregon, Ohio, Colorado, and Vermont in relation to particularly dangerous criminals who have committed crimes against sexual inviolability. Also, it is possible to use the so-called "Dialogue of criminal and victim" in which a dialogue is held between those who have committed serious crimes and were convicted and their surviving victims.

Currently, there are more than 300 mediation programs in the USA and Canada (Mosten F.S. 1997). An analysis of programs implemented in North America generally showed that 2/3 of the considered cases have been ended up through holding a meeting between the victim and the perpetrator by the use of mediation, and more than 95% of the cases have been ended up through submission of reparation contracts (Kozhanova, M. B., Svechnikova, N. V., Akhmetzyanova, G. N., Kondrashova, E. N., Maksimova, N. L., & Zakharova, Z. A. 2016; Ameen et al., 2018).

The institutions of agreement (mediation) began to spread in Europe in the late 20th and early 21st centuries. It is noteworthy that many countries included the legislative consolidation related to this institution by force, although such transactions speed up the judicial process, and sometimes allow avoiding litigation.

Thus, in France, institutions of agreement (mediation) have certain features, in particular, for example, the admission of guilt is regarded as only one of the evidence in the case, but is not taken into account as a decisive fact. The Criminal Procedure Code in this country is authorized to determine the categories of cases in which such a reduction is possible. These categories include violent crime or threats of violence, sexual assault, unintentional injury, unintentional homicide; crimes related to media activities, and political crimes (Code of Criminal Procedure. 2019; Soleymani et al., 2014).

Also, it is noteworthy that according to this code, the crimes are qualified as misconduct, i.e. a wrongful act, which is recognized by the court as less dangerous than a criminal offense (Large). Therefore, punishments determined for these offenses should not exceed 5 years.

The question asked for recognition of the transaction is possibly sufficient for solving the problem by the prosecutor. He offers terms of the agreement for the accused, the latter decides to accept it or not. Court and the defendant cannot make proposals in terms of the agreement. If the defendant accepts terms of the agreement, the court approves the transaction.

In Germany, the condition of the court's agreement to a conciliation agreement is related to the defendant's refusal to appeal the sentence. Also, it is understood that the accused must "prove" his guilt. This happens since, under German law, the court, in any case, is obliged to establish all the necessary facts. Accordingly, in order to find a specific person guilty, the court must provide a reliable description regarding the commission of the crime, facts including no doubts on behalf of the court with respect to the commission of the crime.

In Italy, the institution of the agreement is called "Patteggiamento". This concept includes a deal concerned only with punishment itself. The agreement must be obtained between the parties under the prosecution, and the defendant must fully admit his guilt (Okonosov I.A. 2018).

This type of deal is also applied to crimes for which the punishment does not exceed 5 years of imprisonment (Brusilovsky A.E. 1936). But, the peculiarity of this institution in Italy is that, when the punishment is reduced by one third, it is possible to apply this method, as well as for crimes with a much higher term of punishment.

In Poland, a list of categories of crimes for which the investigation authorities can offer such a deal is significantly reduced. This list, in contrast to the countries mentioned above, includes the acts for which the maximum term of imprisonment does not exceed 3 years. Also, it is peculiar in the sense that in the case of an agreement, the court does not establish the evidence.

It is difficult to apply the institution of agreement (mediation) in civil law countries. The role of the court in establishing the fact of guilt is enshrined in their legislation. So, despite the fact that the accused admits to his crime, the judge is obliged to find out all circumstances of the case. If there are no sufficient grounds for admitting guilt by the inner conviction of a judge, the judge is guilty, but he cannot be convicted. Recognition is only recorded in the file case or court record.

It should be noted that this position is considered to be more correct. Researchers showed that at the preliminary investigation of the truth, it cannot be established or may not be fully established. Accordingly, knowledge of the actual circumstances of the case may not be complete. And the accused may decide to admit his imperfect actions, assuming that this outcome is the most favorable for him (Die Strafprozeßordnung und das Gerichtsverfassungsgesetz.2008).

However, states belonging to continental "legal family" also use the institution of agreements (mediation) in the procedural practice. The study on the legislation of CIS member states showed that in the Republic of Moldova in 2007 a Law "On Mediation" was adopted in a separate sector from Criminal Procedure Code, consisting of provisions indicating that "the parties by mutual agreement and with the help of a third party, as well as using specific methods and communication and negotiation techniques, try to resolve the conflict." Also, this law provides the possibility for conduction of mediation not only on the initiative of parties themselves but also upon the decision of the bodies of preliminary investigation and the court. As a result, mediation cannot serve as a sufficient, unconditional basis for termination of a criminal case.

In the Republic of Kazakhstan, a law "On Mediation "adopted in a separate sector, which is applied in scriminal cases with small and medium gravity that do not entail serious bodily harm or death. In this procedure, the fact of association is not considered as evidence for a guilty plea. An agreement on mediation is referred to as a circumstance that excludes the conduction of criminal prosecution. If the agreement is concluded in cases of minor gravity, the court is obliged to discontinue the criminal case; if a serious crime has been committed, the court, at its own discretion, resolves the issue regarding the termination of the criminal case.

In the Russian Federation, the procedural regulation for the institution of mediation has more similarities with the legislation of the continental legal system than with the Anglo-Saxon legislation; this is because the Russian and European legal systems have common historical prerequisites of formation (Logvinets E.A., Lyakhova A.I., Katorgina N.P., Nifanov A.N., Stus N.V.2018). Russian Criminal Procedure Code provides two forms of termination for the criminal proceedings: the framework related to the criminal prosecution of private prosecution cases (part 2 of article 20 of the Criminal Procedure Code of the Russian Federation), and reconciliation of the parties (article 25 of the Criminal Procedure Code of the Russian Federation).

The CPC consists of such a category of cases in which both parties including the victim and the accused, enter into negotiations with the aim of reaching a general agreement. This category of cases is emerged due to the presence of the

mitigating circumstance in paragraph "K" in Part 1 of Article 61 of the Criminal Procedure Code of the Russian Federation. This circumstance plays a significant role for defense, but only under certain conditions (crime does not fall into the category of minor or moderate severity; the victim is present as a normal or legal person; the guilty plea of the accused). This position of the legislator is explained in details in Russian Acts for the interpretation of the norms of criminal law and criminal procedure issued by the Supreme Court of the country.

Interestingly, in Russian law, the court does not always agree with termination of a criminal case, which is according to the provisions of Article 76 of the Criminal Procedure Code and Article 75 of the Criminal Procedure Code of Russian Federation, although the law provides such a possibility.

FINDINGS

Briefly, the following conclusions are drawn. Currently, the new legal institution of agreement (mediation) is actively developing in the global legal system, contributing to resolving the conflict without holding a trial and just by holding peace negotiations and concluding an agreement with the accused. This institution was initially established in countries with the Anglo-Saxon legal system (USA, UK), and then was developed in countries with a continental legal system (RF, Moldavia, Kazakhstan). The mediation is considered to be a convenient approach for resolving conflicts, since it is built on the mutual agreement of two confrontational parties, and it will continue to further develop worldwide and will be included in the legislation of those countries where it has not been fixed yet.

The findings of the present study are in agreement with those of prior researches (Mironuk I.V., Burtsev A.S., Lyakhova A.I., Lukyanchikova E.F., Stepanyuk A.V. 2017) indicating that the use of differentiated forms of criminal proceedings, including various kinds of agreements, is allowed only with strict observance of all principles of criminal proceedings.

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