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Current State and Ways to Improve Mediation in Criminal Proceedings of the Kyrgyz Republic

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Abstract

Introduction: it has now been proven that the use of mediation procedures in various spheres of public life, as a rule, is characterized by a high degree of effectiveness in conflict resolution. The sphere of criminal proceedings is no exception, which also needs additional measures to reconcile representatives of the prosecution and defense sides, with mandatory respect for the rights and legitimate interests of each of them. The problem of regulation in the criminal procedure legislation of the Kyrgyz Republic of mediation as an alternative and restorative method of resolving a criminal case, as well as the specifics of its application in a specific criminal case, is the subject of this study. *Purpose*: based on the analysis of normative acts of Kyrgyzstan and Russia, the practice of using mediation in the criminal process of individual states, the works of legal scholars, official statistical data, to develop proposals aimed at improving the criminal procedure legislation of the Republic of Kyrgyzstan on the issues under study. *Methods*: dialectical, comparative-legal, system-structural, induction, deduction, analysis, synthesis, etc. The *results* of the study confirm the existence of shortcomings in the current legislation of Kyrgyzstan in terms of certain features of the regulation of mediation procedures in criminal proceedings. The identified shortcomings are of a private nature, and therefore can be eliminated without reviewing the system-forming institutions of criminal law and the process. *Conclusions*: 1) one of the conditions for confirming necessary qualifications of a mediator is the availability of higher legal education; 2) mediation functions, along with a professional mediator, may be performed by a law enforcement official and (or) judicial authorities conducting criminal proceedings; 3) the conclusion of a mediation agreement does not prevent the accused / defendant from refusing to recognize certain legally significant circumstances and facts established in the case.

Keywords: alternative method; restorative justice; defense; mediation; mediator; suspect; the accused; victim; conflict resolution; court.

5.1.4. Criminal law sciences.

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Introduction

Any civilized state strives to minimize negative consequences caused by the commission of a crime. This rule applies equally to both the victim of criminal activity and the person found guilty of committing a criminally punishable act. In the countries of the post-Soviet space, liberalization of criminal liability is mainly carried out by mitigating punishment. This is manifested, for example, in the form of the inclusion in criminal laws of new types of punishments alternative to imprisonment, the introduction of new types of exemption from criminal liability and punishment, the expansion of judicial discretion in choosing options for mitigating liability measures applied to the convicted. Examples of humanized conditions of the execution of sentences can also be found in current penal codes of the former USSR countries. They are usually associated with the creation of conditions for the execution of new types of punishments that do not involve isolation from society, a differentiated approach to determining the regime of serving imprisonment, etc. At the same time, the institutions of modern criminal procedure law contain a significant potential for saving criminal repression. Ensuring the proper resolution of a criminal conflict between the victim and the accused at the level of criminal proceedings seems to be a more effective solution in terms of respecting the rights and legitimate interests of the individual and ensuring the humanization of criminal liability measures without prejudice to achieving the goal of restoring social justice (correcting the convicted person, preventing the commission of new crimes). Therefore, mediation in criminal proceedings has quite great prospects, taking into account the existing social demand. Raising the issue of using mediation in criminal proceedings in Kyrgyzstan is relevant and timely, since this method of resolving cases is not used in law enforcement activities. The legislation of the Kyrgyz Republic lays the foundations for the use of mediation as an alternative method of conflict resolution, including in the field of criminal proceedings. At the same time, scientific literature proves significant social benefits of implementing mediation mechanisms in the framework of criminal proceedings [1, p. 122]. We believe that the introduction of mediation in criminal proceedings will reduce the production burden on law enforcement and judicial authorities. As part of the judicial reform, the Supreme Court of the Kyrgyz Republic has announced a sharp increase in the number of criminal cases to be considered in national courts of various instances. In 2020, the number of criminal cases amounted to 125,285 cases and court materials, at the end of 2024 – 251,620 cases. Also, according to the Supreme Court of Kyrgyzstan, the number of cases considered by a judge increased 2–2.5 times and up to 85 cases per month. For example, 23 judges administer justice in the Leninsky District Court of Bishkek. In 2022, this court considered 14,783 cases and court materials, in 2023 – 15,304, and in 2024 – 23,500. The average workload per judge ranges from 53 to 85 cases and court materials per month, which is 35-65 units higher than the established norm [2].

According to Part 3 of Article 61 of the Constitution of the Kyrgyz Republic, the state ensures the development of extrajudicial and pretrial methods, forms and methods of protecting human and civil rights and freedoms. The legal regulation of mediation is fixed in the Law of the Kyrgyz Republic No. 161 of July 28, 2017 (as of August 8, 2023) “On Mediation”. However, the institution of mediation in criminal proceedings still does not provide necessary reduction in the burden on the judicial system and the predicted effectiveness of resolving a criminal conflict in compliance with all the rights and legitimate in-

terests of its parties (the offender, the victim, etc.) without going through all the stages of the usual procedure of criminal proceedings. The removal of these barriers is currently another socially significant challenge for criminal law science.

Discussion

The assessment of criminal procedure mediation in the post-Soviet countries is ambiguous. If, for example, in the Russian Federation mediation procedures in the framework of criminal proceedings are still only the subject of scientific debate, then in the Republic of Kyrgyzstan mediation has already received official recognition and consolidation in the system of institutions of criminal procedure law. In general, this institution is quite positively perceived in the scientific community and, according to most researchers, mediation in criminal proceedings will contribute to improving the institution of reconciliation of the parties [3, p. 356].

However, based on the analysis of currently available research, it can be concluded that there is no common understanding among scientists of the essence of mediation in criminal proceedings. This conclusion is confirmed by ambiguous interpretations of the category in question. Thus, L.V. Golovko defines mediation as "any procedure in which the victim and the offender are given the opportunity, with the help of an impartial third party (mediator), to take an active part in solving problems that have arisen as a result of a crime" [4, p. 128].

According to V.N. Sizova, mediation is "an ordered set of certain methods used by special actors – mediators – in order to reach an agreement and resolve, by mutual expression of the conflicting parties, a criminal conflict that has arisen in relation to a strictly defined category of criminal cases of minor and moderate severity" [5, p. 158].

According to L.A. Voskobitova, mediation is "a law-based opportunity to resolve conflicts with the help of an intermediary in the most acceptable way for the parties, leading to the conclusion of an amicable agreement or termination of proceedings" [6, p. 65].

L.N. Simanovich defines mediation in criminal cases as an element of restorative justice, through which criminal proceedings are accelerated (de lege ferenda), financial economy and effective restoration of the violated rights of the victim are ensured [7, p. 47].

Mediation in criminal proceedings, according to A.A. Arutyunyan, is a type of special (simplified) procedure for considering a criminal case. Its application helps to simplify and, as a result, in some cases speed up criminal proceedings by refusing criminal prosecution under certain conditions or by introducing differentiated procedures aimed at resolving a criminal conflict without conducting an investigation and judicial proceedings in a general manner [8, p. 21].

Of the scientifically based decisions proposed by Russian scientists on the expediency of introducing mediation into the criminal process as one of the means of effectively resolving a criminal conflict, the legislator approved the use of this procedural institution only in civil, arbitration and administrative proceedings. In accordance with Article 1 of the Federal Law No. 193-FZ of July 27, 2010 "On an Alternative Dispute Settlement Procedure with the Participation of an Intermediary (Mediation Procedure)" mediation is used in disputes that arise within the framework of primarily private law relations. The exception to this rule is public legal relations implemented in the course of administrative proceedings.

This federal law is a regulatory act that defines the legal basis for the emergence and rules for the implementation of mediation procedures. Therefore, in cases not provided for by the said normative act, mediation becomes possible only if another federal law specifies the basis and procedure for its implementation (Part 1 of Article 3). Given that the current Criminal Procedure Code of the Russian Federation does not provide for the possibility of mediation, the latter cannot be used as an independent means of regulating criminal procedural relations.

But it would also be wrong to categorically state that there are no elements of mediation in

Russian criminal proceedings, since Article 76 of the Criminal Code of the Russian Federation provides for a separate type of exemption from criminal liability for a person who has committed a minor or moderate crime. The basis for such release is the loss of public danger by the person who has committed the crime, and the condition for such recognition is reduced to the fact of reconciliation with the victim. Mediation reconciliation procedures have not been regulated in detail either in the Criminal Code of the Russian Federation or in the Criminal Procedure Code of the Russian Federation, which can only be considered as a promising legislative activity in terms of mediation in criminal proceedings. In the meantime, representatives of all parties to the legal relationship can claim to be mediators: court, investigator, victim, defender, suspect, and the accused. The key importance is given to the fact of official reconciliation of the suspect / the accused / the defendant and the victim, accompanied by reparation of the harm caused as a result of the crime commission, that is, elements characteristic of mediation.

The Russian practice of rulemaking regarding mediation procedures in criminal proceedings has not accepted foreign experience yet: currently, many countries recognize mediation in criminal cases as an effective dispute resolution procedure. The institution of mediation is most developed in Japan, Korea, the USA, Great Britain, Germany, Australia, China, India, etc. [9, p. 90]. In the 1970s, various reconciliation programs in criminal proceedings began to appear in the United States as a result of the rehabilitation work with criminals practiced by public and religious organizations. The development and implementation of restorative justice programs boosted effectiveness of the applied criminal and criminal procedural coercive measures and ensured restoration of the rights and legitimate interests of the victim of a crime. For twenty years, mediation tools have been included in criminal procedure codes of most states [10, pp. 202-204].

In the early years, materials on minor crimes committed by juvenile offenders were sent to mediation. Recent years have witnessed another trend: cases of more serious crimes or those committed by adult criminals are more often sent to mediation. At the same time, it should be noted separately that the above norms apply to both minors and adult criminals. The specifics of the content of the American version of mediation is that it is considered as one of the types of justice procedures, rather than a means of reconciliation of the parties at any stage of criminal proceedings. This means that the implementation of procedural measures under the mediation program is possible only from the moment the criminal case is brought to court to make a decision on the merits [10, p. 203].

Taking into account the positive experience of using mediation at any stage of criminal proceedings, the Kyrgyz legislator decided on the benefits of introducing this institution into national legislation, as a result of which the Law of the Kyrgyz Republic “On Mediation” was adopted. The official content of mediation is defined as a dispute settlement procedure with the assistance of a mediator(s) by coordinating the interests of the disputing parties in order to reach a mutually acceptable agreement (Paragraph 1 of Article 2). The law defines key legally significant components of mediation as an interdisciplinary legal institution:

– principles of implementation;

– the legal status of the mediator as a participant in specific legal relations in the field of family, labor, criminal and other law;

– procedural rules for reconciliation of conflicting parties, including mediation features in certain categories of disputes.

The analysis of individual provisions of this law reveals some aspects of the legal regulation that are indisputable and/or need additional clarification. First of all, we are talking about requirements for the education level of a mediator. In accordance with Paragraph 2 of Part 1 of Article 9, one of the conditions for acquiring this status is the availability of higher education. We believe that such a provision requires clarification, since it is obvious that there is higher education in the field of jurisprudence,

whereas the condition formally established by law can be fulfilled if there is higher education in any specialty: humanities, natural sciences, technical, etc. According to the fair opinion of researchers, the lack of a professional mediator's deep knowledge in the field of jurisprudence can lead to negative results of the implementation of conciliation procedures, including violation of the rights and legitimate interests of participants in criminal proceedings [11, p. 393]. In this regard, we consider it appropriate to include higher legal education among the requirements for mediators as a condition for admission to professional activity.

The restrictions imposed by the official position of the person applying to mediate criminal procedural actions (Paragraph 1 of Part 2 of Article 9) are rather disputable. This prohibition is specified in Article 26 of the Law of the Kyrgyz Republic "On Mediation", which contains a description of criminal procedural statuses of the parties. In particular, the parties to mediation in the field of criminal law relations are the victim and the person suspected of committing a crime, or the person serving a sentence. The fact of participation in mediation in case of failure to reach agreement on the dispute cannot be considered as a waiver of the charge or as an admission of guilt. An investigator, a prosecutor, a judge, an employee of the penal enforcement system and probation, or a lawyer for one of the parties may not act as a mediator in the field of criminal law relations.

The legislator's logic regarding the establishment of such a prohibition is generally clear: the mediator must be independent, which implies that he/she does not have any obligations, including to authorities. His/her inclusion in the Republican Community of Mediators (Chapter 3) ensures (in the opinion of the legislator) such independence. This allows us to draw analogies with representatives of the legal profession who perform functions of professional defenders in criminal proceedings on a gratuitous or contractual basis. However, the application of the rules that apply to the lawyer' activities in criminal proceedings is hardly justified, as it does not meet the essence of mediation as a means of an out-of-court settlement of the conflict. Confirmation of the doubts expressed can be found in the content of basic principles on which mediation is based, one of which is the neutrality of the mediator (paragraphs 3 of Article 3, Article 6). The neutrality of the mediator presupposes:

– impartiality;

– independence from parties to mediation procedures, public authorities, local governments, organizations, individuals;

– ensuring equality of interests of the conflicting parties, excluding private preferences.

The provisions of articles 3 and 6 of the Law of the Kyrgyz Republic "On Mediation" exclude the possibility of initiation and implementation of mediation procedures by subjects of criminal proceedings (court, prosecutor, investigator, head of an investigative unit, body of inquiry) because of their affiliation to state (judicial and executive) authorities. In addition, the listed subjects, with the exception of the court, represent the prosecution, which formally indicates a lack of impartiality in the criminal process. The approach demonstrated by the legislator of the Kyrgyz Republic is purely formal and therefore creates unjustified obstacles to the effectiveness of mediation at any stage of the criminal process, as well as in the execution of the prescribed punishment. The listed subjects of the criminal process, unlike, for example, representatives of the defense, in accordance with the requirements of the Criminal Procedure Code of Kyrgyzstan, are required to ensure the comprehensiveness, completeness and objectivity of the investigation of all circumstances of the case (Article 19), and not only those that form the evidentiary basis of the guilt of the suspect and the accused (defendant) in committing a crime. The impartiality of the court cannot be questioned at all, since it does not belong to any party to criminal proceedings and its independence is determined by principles of the criminal procedure legislation (Article 9). In this part, it is appropriate to turn to Russian criminal proceedings that have no mediator as an inde-

pendent participant in procedural relations. The task characteristic of mediation, i.e. reconciliation with the victim, is implemented through the institutions of exemption from criminal liability (Article 76 of the Criminal Code of the Russian Federation) and termination of criminal proceedings in connection with the reconciliation of parties (Article 25 of the Criminal Procedure Code of the Russian Federation). The subjects of activity aimed at resolving the conflict that arose on the basis of the fact of committing a crime and violating the rights, freedoms and (or) legitimate interests of the victim are precisely the above-mentioned participants in the criminal process, although the objectivity and impartiality of their actions to reconcile the parties are not questioned [12, p. 52]. In addition, some researchers rightly point to the presence of a moral component in the initiation of conciliation procedures between the offender and the victim by the court or preliminary investigation subjects [13, p. 53]. For this reason, significant narrowing of the circle of persons entitled to implement conciliation procedures during criminal proceedings or punishment execution seems to us unjustified neither from a legal nor social point of view.

Unjustified conflicts occur in the norms of the Criminal Procedure Code of the Kyrgyz Republic and the Law of the Kyrgyz Republic "On Mediation", which determine the legal content of mediation. Thus, according to Part 3 of Article 26 of this law, in order to participate in mediation, the parties must agree with the circumstances established during the criminal proceedings. Mediation as a way to resolve a criminal case is aimed at achieving a mutually acceptable way for the parties to resolve the conflict. At the same time, the suspect (the accused), the victim may disagree with circumstances of the case, while fulfilling the obligations related to the mediation procedure (to compensate for the damage caused, etc.). In this part, we again observe the priority of creating a "formal purity" of criminal prosecution. The parties should abandon their claims to protect their rights and legitimate interests in favor of making a decision to terminate criminal proceedings in connection with the reconciliation of the parties. At the same time, the true task of mediation is to ensure that the accused and other persons restore all the violated rights and legitimate interests to the victim, as a result of which the latter does not insist on exercising criminal responsibility in full and does not see injustice in the decision being made in the case. Considering these circumstances, we believe that the establishment of conditions for implementing mediation procedures provided for in Part 3 of Article 26 of the said law does not correspond to the actual socio-legal content of mediation. On this basis, it is advisable to exclude this provision in order to boost effectiveness of reconciliation activities between the parties to criminal proceedings.

According to official statistics, mediation in criminal proceedings is not wide-spread. The latest scientific research shows that currently the number of mediation agreements concluded annually does not exceed one hundred, of which only one fifth (21%) is in criminal cases pending before the court. Approximately in one third (27%) of the mediation procedures, the parties do not agree on concluding mediation agreements with the subsequent refusal to continue criminal prosecution [14, p. 358]. Perhaps these circumstances are the main obstacles to the widespread use of mediation in criminal proceedings in Kyrgyzstan.

Conclusions

Mediation as an institution of criminal procedure law in the Kyrgyz Republic has significant prospects for development, primarily due to the economy of criminal repression and the effectiveness of solving socially significant tasks, such as restoration of the violated rights of the victim, proactive atonement on the part of the offender, a high degree of educational impact on society, etc.

To scale up the practice of successful implementation of mediation procedures, a number of amendments and additions should be made to the legislation of Kyrgyzstan aimed at creat-

ing additional conditions for the high-quality performance of mediator functions and including additional guarantees for the observance of the rights and legitimate interests of participants in criminal proceedings. It requires implementation of the following legislative decisions:

1. One of the requirements for a candidate to obtain the status of "mediator" must be to have a higher legal education. Education in other fields does not guarantee the availability of sufficient knowledge, skills and abilities necessary for qualified resolution of legal disputes.

2. The functions of a mediator in criminal proceedings may be performed not only by an official representative of the Republican Community of Mediators, but also by officials of law enforcement and judicial authorities conducting proceedings in the case. The necessary legal guarantees for the proper performance of these functions are the basis of their legal (criminal procedure) status.

3. The conclusion of a mediation agreement stating the fact of reconciliation with the victim may not create restrictions or obstacles for the accused to reject certain facts and circumstances of legal significance established in the case. The recognition of all the circumstances incriminated to the accused, obtained in the course of criminal prosecution, cannot be a condition for exemption from criminal liability and form the essence of the institution of criminal procedural mediation.

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