

Mediation in Private and Public Law



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Abstract: *The article aims to analyze certain participants in the mediation process and, therefore, increase its effectiveness. In this regard, the article considers the feasible participation of non-professional intermediaries in mediation. The authors of the article have concluded that their participation in civil legal relations through mediation is ineffective. To increase the effectiveness of mediation technologies, the authors have proposed to introduce the mandatory membership of mediators in self-regulatory organizations and prohibit the mediation provided by non-professional mediators. The authors have proved that mediation technologies should be used as a means of protecting law and order in society instead of a demonstrative punishment of some members.*

The authors highlight the importance of mediation in criminal justice with due regard to criminal repression. They highly evaluate the potential of mediation in resolving disputes regarding crime-caused indemnification. After analyzing the Russian and international legislation and theoretical works, the authors have concluded that there is a need for wider use of mediation to resolve both private and public conflicts. The authors have determined specific directions for applying mediation in the criminal process.

Keywords: *mediation, mediator, non-professional mediator, professional mediator, self-regulatory organization of mediators, mediation of legal relations, criminal repression, criminal policy, criminal infraction, indemnification.*

I. INTRODUCTION

The procedure of mediation is used by legal systems of many states but is of a dual nature since it is positioned at the junction of two sciences – legal studies and conflict resolution studies. The study of the relations arising during the mediation process enables to determine their role in the legal system and the significance of mediation with regard to other areas of law. The main regulatory act among other documents governing this procedure is the Federal Law of the Russian Federation of July 27, 2010 No. 193-FZ "On the alternative procedure for the settlement of disputes with the participation of a mediator (mediation procedure)" [1].

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One of the problems in modern Russia is the lack of information about mediators. In many cases, citizens and even courts are not well informed about mediators working in some region of the Russian Federation. The Federal Institute of Mediation [2] notes that "Russia does not have a unified registry of practicing mediators". This problem is partially solved by self-regulatory organizations of mediators and other professional communities but their huge number does not let an ordinary citizen evaluate professional qualities of their participants and, accordingly, reduces their chances to receive qualified assistance.

The Federal Law of July 27, 2010 No. 193-FZ [1] regulates the procedure of mediation fragmentarily and defines only general rules for this process. While studying the relevant literature, one can come across the opinion that this fact cannot be regarded as a disadvantage because excessive regulation would interfere with the mediator's activities [3]. However, we believe that this approach is unacceptable for legal proceedings since the legislator's consistency in regulating mediation procedures can build trust and respect for them in society.

While considering the possible use of mediation in public legal relations, we should highlight that the current version of the Federal Law No. 193-FZ [1] stipulates the impossibility of using mediation in collective labor disputes and other disputes that "affect, or may affect, the interests of third persons, who do not participate in the mediation procedure, or public interests" (Part 5, Article 1). In other words, the use of mediation in the sphere of public law has been banned at the legislative level. However, the global criminological community consistently promotes the introduction of mediation into criminal law [4]. This indicates a growing concern of criminologists caused by the inefficiency of traditional methods of combating crime [5].

P.N. Kobets and K.A. Krasnova [4] studied mediation as a means of resolving criminal conflicts. At the international level, the United Nations systematized the participation of mediators in criminal proceedings in 2007 [6].

L.B. Sitdikova [7], A. Shilovskaya [8], [9] and T. Shamlikashvili [10] paid special attention to the development of mediation in Russia.

II. PROPOSED METHODOLOGY

The methodological basis of the study comprises such a general scientific method as analysis which allows considering the elements of legal relations forming in private and public law during mediation. We have also classified the features identified and reached a conclusion that mediation can be extended to the sphere of public legal relations.



The comparative-legal method serves as the basis for studying Russian, foreign and international legislation. As a result, we have revealed that foreign and international legislation in the field of mediation can be applied to a wider range of legal relations.

A. Algorithm

The study of mediation technologies in private and public law is based on a branching algorithm (Figure 1).

Throughout the study, we analyze the norms of civil and criminal law common to the Russian and international legislative systems.

The analysis of the existing legislative framework regarding mediation technologies proves the need to specify a range of people who can act as mediators and change criminological paradigms on mediation.

To exclude the unresolved issues of implementing mediation, we propose certain mechanisms to improve the existing legislation.

B. Flow Chart

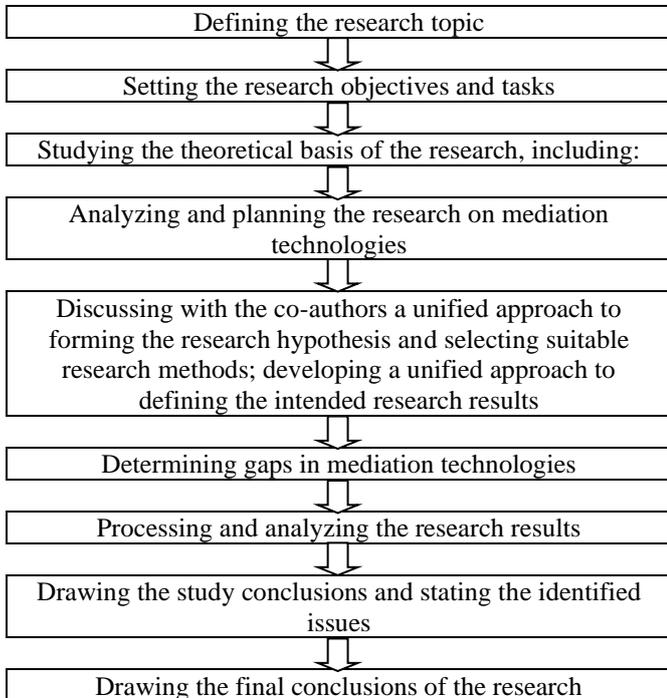


Fig. 1: Scheme of the research algorithm.

III. RESULTS

Based on the study results, we have drawn a number of conclusions. The prospects for using mediation in procedural relations are directly connected with the maximum legitimization of mediators. We believe the exclusion of non-professional mediators from potential participants in mediation relations will make these relations more professional. Consequently, these relations might become obligatory for resolving conflicts at the initiative of third parties (for example, a lawyer). The Russian criminal policy faces the urgent task of overcoming the consequences of a criminal act in a non-repressive manner. Mediation mechanisms should form the basis of the Russian criminal policy strategy. In the future, it will have a positive impact on the entire law enforcement system. Thus, there is a strong need to change the existing criminological paradigms, in

particular, their priorities, i.e. methods of combating crimes should be considered primarily as a means of protecting the rule of law in society rather than a demonstrative punishment of its individual members.

IV. DISCUSSION

The distrust of citizens in mediation as a procedure for resolving disputes can be explained by several factors. Some of them are subjective and do not belong to the sphere of legal regulation (the insufficient development of legal consciousness and legal culture among the Russian population, inability to resolve disputes in amicable ways, peculiar mindset, the high level of conflict proneness in society). However, there are also objective reasons, the main of which are gaps in the current legal regulation of mediation.

Professional mediators share this viewpoint. For instance, T. Shamlikashvili, S. Tyulkanov and I. Nikitina indicate that "the quality of the legal framework on which the procedure of mediation is based is among the most significant factors for its development" [10].

The Supreme Court of the Russian Federation adheres to the same position since it sent a bill to the State Duma of the Russian Federation aimed at the procedural regulation of mediation procedures [11].

In particular, the legislators try to provide mediators with an intermediate status and bring them on a par with officials involved in the process. As the Supreme Court of the Russian Federation suggests, not only civil mediators but also judicial mediators will be able to resolve disputes. Judicial mediators can be retired judges, as well as other court staff with a degree in legal sciences and at least five years of experience in the field of jurisprudence. However, this attempt cannot be considered successful. First, it concerns only procedural relations arising in court and does not address a large sphere of mediation that has nothing to do with judicial proceedings. Second, this bill regards judicial mediation as an alternative to mediation rather than its synonym.

One of the problems experienced by anyone who wants to resort to the mediator's services is the lack of a unified registry. According to representatives of the Federal Institute of Mediation [2], it is necessary to form a unified federal resource containing reliable and relevant information about mediators, organizations providing mediation services and educational organizations training mediators. In addition, the Federal Institute of Mediation proposed to develop a normative legal act obliging mediators and organizations to report about themselves to the above-mentioned institution so that courts, state bodies and other persons could use this public information. At the same time, we believe it is more appropriate to regulate activities in the field of mediation and give legislators the principle of mandatory membership in self-regulatory organizations as a basis. Since there are specific mediation technologies depending on the conflict that needs to be resolved, we propose to form a self-regulatory organization dealing with certain types of conflicts (for example, economic, family, social, etc.). It is necessary to maintain a unified federal registry of mediators.

This function can be assigned to the Supreme Court of the Russian Federation by adding the relevant data into the Justice state information system.

The Ministry of Justice of the Russian Federation could provide the information explaining the procedure for training professional mediators (hereinafter referred to as certification).

This approach will help attain the following goals: to systematize the market for professional mediators' services; to ensure the implementation of Article 17 of the Law on Mediation (which stipulates the mediator's liability for damages caused by mediation activities); to guarantee the quality of mediation by establishing professional standards and requirements for participants in self-regulatory organizations [12], [13].

One more issue that is being actively discussed is the qualification of mediators. The Law on Mediation provides only general requirements for a mediator, namely, the age of 18, full legal capacity and no criminal record. In addition, the law distinguishes between professional (those engaged in this activity on a professional basis) and non-professional mediators. On the one hand, there are some clarifying requirements for professional mediators: they should be at least 25 years old, have a university degree and additional professional education in the field of mediation. On the other hand, there are no specific requirements for non-professional mediators, except for general ones. Therefore, we can conclude that a citizen without a university degree and special knowledge is capable of resolving disputes on an unprofessional basis. It seems that general requirements for a mediator should comprise a university degree regardless of the professional or non-professional character of mediation services. This addition to the law will increase the mediator's credibility as citizens will be assisted in resolving disputes by qualified specialists. In our opinion, the activity of non-professional mediators should be strictly limited and excluded from the Law on Mediation. If mediation is implemented on a non-professional basis, it can lead to the fact that the general concept of mediation includes procedures that cannot be classified as such. This conclusion is based on the following data. Chapter 39 of the Civil Code of the Russian Federation governing the provision of paid services can be applied to the mediation services provided free of charge. In case of professional mediators (working only on a paid basis), it is possible to develop effective mechanisms ensuring the quality of the services provided and the possibility of holding such mediators liable for providing low-quality services. These measures can comprise the suspension or termination of certification or accreditation, as well as the exclusion from the registry of mediators.

Gratuitous services are excluded from the legal regulation of civil law. If a party to the conflict appeals to a non-professional mediator acting free of charge, they practically do not have the opportunity to protect their interests in case of receiving low-quality services.

It is a slightly different situation when a non-professional mediator acts on a paid basis but the possibility of holding them liable for the improper performance of their contract is much lower. Non-professional mediators are not bound by the requirements of the Code of Professional Conduct and do not meet the high requirements for the level of education.

They are not members of self-regulatory organizations and are liable for the full extent of their own property.

Nowadays, the leading European countries (Great Britain, Germany, France and Sweden) have gained positive experience in applying a variety of mediation practices for resolving commercial disputes [14], sports disputes [8], consumer protection disputes [7] and lending disputes (including mortgage) [15]. In this case, we are talking about mediation as a democratic method of resolving conflicts of private law [16] which can be used to resolve disputes between citizens and legal entities (or between mixed participants) [17].

Regarding the sphere of criminal proceedings, we should mention that the Criminal Procedure Code of the Russian Federation does not directly establish the possibility of resorting to mediation in criminal proceedings. At first glance, the application of mediation in criminal proceedings in Russia seems to be impossible [18].

At the same time, there is a reason to claim that non-repressive ways of overcoming the consequences of a criminal conflict (in contrast to imprisonment) have enormous potential and can positively affect activities of the entire law enforcement system (police, justice and the execution of punishment). According to experts, the progressive use of mediation in criminal justice would emphasize the desire of state and society to develop a legal culture [15], support voluntary participation in extrajudicial proceedings and enhance cooperation for the needs of overcoming conflict situations in the sphere of criminal law and resolving conflicts in society [19].

We believe that the potential of mediation technologies should be used in criminal proceedings. Participants in criminal proceedings continue to be in conflict even if a criminal case is already initiated. In case a conflict is clearly antisocial and causes a special public outcry, the mediator's participation is more than welcome. In this regard, mediation can act as an element that restrains the "provocative use of criminal law".

It should be noted that the United Nations recognizes that mediation and alternative dispute settlement at meetings with offenders, victims and community members aimed at resolving issues subject to criminal investigation can change the outcome of any case; otherwise, the offender can be imprisoned either before trial or after conviction. The UN experts believe that police and prosecutors should take the lead in implementing mediation technologies to "exclude" suspects from the criminal justice system [6]. To facilitate these processes, an individual administrative structure is required and should be provided by either by state or by non-governmental organizations cooperating with law enforcement agencies.

Mediation can be also used as a modern technology of "alternative conflict settlement (between the accused and the victim, between the prisoner and the administration of some penitentiary institution, etc.) with the participation of a third neutral party not involved into this conflict, i.e. a mediator who can help the parties reach an agreement" [5].

For example, experts from the European Committee on Crime Problems (CDPC) and the Council for Penological Co-operation (PC-CP) propose the following scheme for conducting the procedure of mediation. First of all, the victim and the accused (several victims and accused if several persons are involved in a criminal case) meet to discuss how the crime affected the victim and try to reach an agreement on reimbursing the damage caused by the offender. The mediator assumes the role of an intermediary and uses their communication skills to ensure constructive dialogue and achieve such an agreement. However, we should emphasize that mediation between the victim and the accused significantly differs from mediation in civil matters by the fact that criminal liability is predetermined. The main condition for mediation between the victim and the offender is the fact that the offender assumes such responsibility [20].

In modern Russia, pecuniary and non-pecuniary damages to victims (individuals, legal entities or state) caused by crimes are not of the highest priority. The analysis of statistical data has demonstrated that voluntary compensation for material damages caused by crime is not used in Russia. There have been no cases of voluntary compensation for certain types of crimes for years (for example, terrorist attacks which, as a rule, are characterized by significant amounts of damage – lost property, essential costs for the treatment, burial and maintenance of dependents of the persons subject to the above-mentioned terrorist attacks) [21].

V. CONCLUSION

After analyzing the Russian legal literature, we have revealed the following areas of applying mediation in criminal proceedings:

First, it is necessary to clarify the range of mandatory mediation cases taking into account the voluntary nature of an amicable agreement and its subsequent execution to increase the legal protection of certain categories of victims. Mediation can be gradually introduced for certain categories of criminal cases and their list can be subsequently expanded.

Second, we have promoted the idea of raising the awareness of participants in criminal proceedings about the nature of mediation, its advantages and consequences. In some way, this problem can be solved if the relevant decree clarifies the possibility of using mediation upon initiating a criminal case. Furthermore, it is advisable to send the parties (the victim and the accused) a call for a conversation with the mediator together with a copy order on the institution of criminal proceedings. In the process, the mediator should explain the advantages of concluding an amicable agreement and offer to resort to the mediation procedure.

Third, intensive mass media propaganda is required to promote a new way of resolving conflicts in criminal law. In the future, the dissemination of mediation practices will lessen the load of magistrate and district courts. At the same time, the citizens involved (legal experts) should be encouraged to retrain and undergo certification procedures as professional mediators, which will increase the credibility and significance of mediation activity.

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