About the Question of Mediation Development in Criminal Science of Republic of Kazakhstan

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Abstract: For the present time, we can more often hear from the foreign and domestic theorists of the criminal law sciences, employees of law and order, public representatives about so-called "crisis of punishment." Many scientists of the developed western countries talk about the necessity of transition from the strategy of "war on crime" to the strategy of "harm reduction", from "retributive justice" to the "restorative justice". While in foreign countries (including England, Canada, USA, Belgium, the Netherlands, etc.) the non-punitive alternative methods of responding to the criminal act have been developed and spread widely already for a long time. These methods are intended to mitigate the penal conflict acting outside the traditional criminal justice system. In many respects this is the result of deliberation and quite successful humanization policy of the criminal justice in developed countries, which began in the 70's. For example, according to the practice, it led to that since the late 80's the police in Europe began to have more service character - its first task was to provide service to the public (defense and protection of taxpayers). The main focus of its work was to prevent (in particular, much attention was paid to the educational work with juveniles, effective solving of the problems related to the interpersonal relationships in order to prevent the conflict, etc.). The structure of the police started to change due to the increasing demand not in the power but in the management decisions.

Key words: Criminal law science • Penal conflict • Educational work

INTRODUCTION

The idea of the famous French sociologist Emile Durkheim became popular: "the punishment makes sense to restore the trampled sense of justice only among those who did not break the law." In general, the ideas of restorative justice became well spread and various social institutions as having been intended to realize them (reparation of damages to the victim, the protection of victim’s rights, restore mutual confidence of the conflicting parties).

The proposition of "non-repressive" overcoming of the consequences of the criminal act came to the basis of the criminal policy strategy of foreign countries and it affected to the activities of the entire system of law-enforcement authorities: the police, the judiciary and the penal system. Thus, at the first place in the fight against crime was put so-called doctrine of social protection, which means struggling with the crime must be considered first as a means to protect society, not exemplary punishment of the individual. Criminal policy based on social protection should focus more on the individual than on general crime prevention and also includes "... situational prevention (for example, thanks to measures aimed at reduction of the possibilities for committing the offence) and individualization of criminal demonstration"[1, 2].

In this approach, the priority is given to the social forms of influence on the offender, in particular, the institution of probation - and consequently, a number of social - legal tools to provide "situational” work. As one of the most frequently used method is mediation - conciliation of the offender and the victim. Quite deep reforms of national legislation of the various countries led to the adoption of conciliatory forms of resolution of criminal cases at all stages of the proceedings, thus created most developed institution of restorative justice in the legal sense.

It should be noted that the term "restorative justice" was introduced to the scientific and public usage of western countries to describe a range of social and psychological work, part of which is mediation. Mediation
is used in developed countries, not only in probation work, but often includes, for example, in the program of psychological and social work with juveniles, is used in the earliest stages of a criminal conflict, used during the negotiations with the hostage-taking and ethnic conflicts. It should be noted that courses about mediation are included in the schedule of the law schools in western countries. Today it is widely accepted alternative measure of the criminal nature, non-repressive manner which intended to resolve the criminal conflict and compensate the harm to the victim, without bringing a criminal case to trial. Thus, there is no sharpening of criminal conflict and social reintegration of the victim and / or the offender into society. This is fully consistent with the basic trends of the modern international criminal law field.

The wide distribution of mediation in criminal proceedings reflects not only a serious European practice, but having a considerable number of Recommendations, Declarations and Resolutions of the UN and the Council of Europe.

In contrast to developed countries, where the mediation confirmed its importance primarily in private legal conflicts, in Kazakhstan the institute of reconciliation first got its recognition mainly in the commercial sphere.

One of the most important steps in this area is the acceptance of the law "About Mediation" dated by January 28, 2011. The document have been intended to regulate the activities of the intermediary (mediator) in civil, labor, family and other legal relations, as well as in criminal cases of small and moderate severe. For now we can say that the courts are overloaded with such cases, it is obvious that after coming into effect of this law, such disputes and conflicts will be resolved through mediation, as a result - decreased load courts, reduced number of defendants, the improvement of the quality of justice, access to justice, particularly for vulnerable population and thereby reduced conflict in the society. In Kazakhstan there is an organization of mediators - NGO "United Center Mediation and Peacemaking" Mediation, created at the initiative of the National Consumers League of Kazakhstan, which has been working for already 12 years. It has been preparing mediators, mainly in the field of civil cases.

It seems that the most acute problem in the legal regulation of procedures is the usage of mediation in the resolution of criminal conflicts (as in the pre-trial and the trial stages of criminal cases). At the moment, Kazakhstan is taking a great positive experience of the developed countries in this field.

Taking in consideration the dynamics of changes in modern legal policy in Kazakhstan, it is possible to speak about appropriate availability of the political will to create the conditions for the accepting of alternative measures of criminal nature, including mediation procedures at different stages of the criminal process. So, as one of the main directions of social policy, enshrined in President decree of Republic of Kazakhstan dated by 24.08.2009 N 858 "About the Concept of the Legal Policy of Republic of Kazakhstan for the period from 2010 to 2020," which denotes the direction of "the wider acceptance of the institution of reconciliation by increasing the list of crimes subject to the possibility of exemption from criminal liability through the process of mediation by compensation to the victims of property, moral and health damage" [3].

This is a generic term in the development directions. For the full implementation of mediation in legal practice, the appropriate regulatory changes in criminal law, criminal procedure and penal laws are required.

As a prehistory of the legal regulation of mediation in criminal cases in Kazakhstan, it should be noted that the institution of reconciliation with the victim was not known to the criminal law of Republic of Kazakhstan. But in the modern Kazakh criminal law there are basic legal preconditions for mediation in criminal cases: art.67 of the Criminal Code (exemption from criminal liability due to reconciliation) [4].

However, despite the legislative fixing the conditions of conciliation and mediation, in practice, it often turns out that the investigator, the investigative officer treat mediation passively and does not use opportunities given by the legislator. All participants in criminal proceedings do not have either information or motivation for conciliation meetings, as the law does not always require to explain their rights for reconciliation in the criminal process to the parties [5].

In many respects it can be explained that the existing criteria for the evaluation of the investigating authorities enshrined in the relevant departmental acts, contrary to attempts to give the parties more opportunities for a full reconciliation procedure [6]. For example, at the moment, one of the main criteria for a negative assessment of the investigators and prosecutors is the number of cases they terminated. This blocks the way for the development of mediation in the pre-trial stage. In the attempts of making mediation at the preliminary inquiry stage, the successful cases of reconciliation will be followed by termination of the criminal case. It will automatically degrade the rates of the quality of the investigator. It seems necessary to
develop and implement appropriate systems of assessment of the preliminary investigation, which will not accept the development of the institution of reconciliation [7].

Also it seems necessary to allocate the responsibility for investigation and inquiry bodies to explain the rights of the victim to reconciliation, in cases when they correspond to the art.67 of the Criminal Code.

It should be noted that for the present time only evidence (documents), approving the reconciliation, is the statement of the victim or his legal representative. However, it seems more appropriate to dismiss the criminal case not only based on the victim-impact statement, but also by the conciliation agreement between the parties. The legal literature has repeatedly spoken about the need to offer such conciliatory act, according to the institution of reconciliation in the criminal process. This document should reflect circumstances indicating reconciliation of the parties, for example, voluntary conciliation of both sides, the information about the order, method, amount and terms of expiation, etc. Written documents of these circumstances may include a description of the actions that demonstrate the plea, repentance of the accused (suspect), his understanding of the consequences of the offense. It can have particular importance in the criminal cases of the minors [8].

In connect with it Germany legal practice has a particular interest, whose legal system is similar to ours. German experts have been working with the problems of reconciliation with the victim for a long time (Täter - Opfer-Ausgleich (TOA) - literally "offender-victim - reconciliation") in criminal law for juvenile offenders. Prerequisites eligibility conciliation with the victim were developed in Germany as a result of the practice at project work on various "pilot areas".

Summary of practice allowed selecting certain criteria, presumably representing optimum conditions of conciliation.

- The presence of careful investigation of the case and the confession of a suspect [9].
- The presence of the victim, which can be personalized. Those subjects may be an individuals or legal persons.
- Voluntary participation and consent of the parties, because the peaceful settlement of the dispute may be based only on the readiness for dialogue, forcing in this case is unacceptable [10].

- Compliance with the principle of gravity of offense (i.e. reconciliation with the victim would be too expensive in the case of, for example, a minor offense) [11].

Even with these new developments there is a question about the criminal procedural guarantees of fulfilling obligations of the institution of reconciliation. It seems that because of the need of real remedying of the damage, the Institute of reconciliation need to change the terms of the proceedings. In particular, it can be used by the Institute of suspension of proceedings.

However, for changes in the terms of procedure, not only the analysis of the legal prerequisite, but also the conditions of the legal practice in Kazakhstan is needed. It is required to have a monitoring of number of processes, including the study of the forms and methods of management within the executive bodies with competence in the field of criminal justice. It is required to create sufficiently high status coordinated areas.

The development model of mediation in criminal proceedings requires careful study, starting from the level of legislative control (elements of which are described in this paper) to its implementation in different regions of Kazakhstan, although it is not started yet.

The necessity of deliberate and active actions is obviously as an actuality of connection to promote the ideas and practices of mediation of the professional communities which are interested in the formulation of modern and effective criminal policy in Kazakhstan.

REFERENCES

3. The decree of the President of Republic of Kazakhstan dated by 24.08.200 N 858 "About the Concept of the Legal Policy of Republic of Kazakhstan for the period from 2010 to 2020."


