

Incentive Forms of Court Proceedings as an Element of the Transformation of the Criminal Process

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ABSTRACT

Criminal procedure is a complex type of legal relationship that is coercive in nature. At the same time, the trend of liberalization and humanization of criminal and criminal procedure law leads to a differentiation of the criminal procedure form, including through the expansion of incentive procedures.

At present, the law of criminal procedure in most States provides for certain types of proceedings which have the effect of encouraging a person accused of an offence by exempting him or her from criminal responsibility or by minimizing the amount of the criminal penalty. As a means of legal regulation, the rules on incentives impose legally binding obligations.

Being strictly regulated by its form the procedure of procedural actions of the court and other professional participants of the process, involves the implementation of incentive rules, provided by the legislation in force, in the framework of the incentive form of criminal proceedings. The study has shown that the incentive form of proceedings can be implemented in criminal proceedings under the general procedure of court proceedings (implementation of restorative justice, reconciliation of the parties, termination of the criminal case on other non-rehabilitative grounds). The incentive form of legal proceedings is implemented directly in the context of simplified or accelerated court proceedings (when considering a criminal case under a special procedure, when entering into a pre-trial cooperation agreement, etc.).

The analysis shows that encouragement in criminal proceedings is provided by the state in the form of relevant substantive rules providing grounds for exemption from punishment or grounds for preferential calculation of punishment. However, the state does not guarantee the implementation of such

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encouragement due to the discretionary powers of the authorized subjects and the plurality of persons involved in the incentive criminal procedure relations and their interests.

The author concludes that the current state of the institution of incentives in criminal proceedings indicates its dynamism and transformation into a more complex procedural form, which is widely spread and implemented in the criminal process of many states.

At the same time, we believe that the incentive form of legal proceedings in view of its mutual benefit acquires the features of universality, since the simplified and accelerated procedures for resolving criminal cases in most cases allow to consider the interests of all parties involved in the case. Therefore, the incentive form of criminal proceedings is characterized by such features as universality, mutual benefit, efficiency.

Under the current criminal procedural law, the incentive form of proceedings can include a special procedure for taking a judicial decision when the accused agrees to the charges, a special procedure for taking a judicial decision when the accused signs a pre-trial agreement on cooperation, the institution of release from criminal responsibility on assessable grounds (including restorative justice).

Keywords: criminal procedure incentives, restorative justice, differentiation of criminal procedure, simplified criminal procedure, exemption from criminal liability.

1. INTRODUCTION

The implementation of humanistic principles in criminal proceedings requires constant transformation of criminal procedural legislation. The criminal procedure law of each state contains norms enshrining the possibility of differentiation of the criminal procedure form, and thus individualization of criminal proceedings. This approach by the legislator enables the person accused of committing a crime to exercise the subjective right to encouragement if certain conditions are met, while the law enforcer exercises discretionary powers.

Encouragement enshrined in criminal law and criminal procedure law is a measure of legal influence applied by the State in relation to the person accused or suspected of committing a crime, in the case of approval of certain merits in achieving generally recognized socially significant results (fulfilment of the conditions of encouragement laid down in the law).

In the implementation of incentive rules in criminal proceedings, the state, represented by the authorized subjects and the victim expect from the person accused of committing a crime, active socially positive post-criminal behavior - repentance for the deed, compensation for damages, apology, and other positive activity, indicating the intention of the latter to minimize the negative consequences of criminal actions, reduce their negative assessment.

In this case, manifestation of free will is a necessary condition for encouragement in criminal proceedings, but the internal position of the subject of encouragement may differ from its external manifestation in specific circumstances.

Implementation of an incentive rule in criminal proceedings is aimed at a specific procedural and material result, the achievement of which is possible only if all the conditions enshrined in the rule are met. At the same time, the application of the norm of encouragement is wrapped in the final procedural decision (decision to terminate the criminal case on non-rehabilitative grounds, a sentence rendered in a special order if the defendant agrees with the charges).

Restorative justice and the conclusion of a pre-trial cooperation agreement are the most common types of proceedings of an incentive nature in the criminal procedural legislation of most countries. However, these are by no means all possible forms of incentives.

The aim of the study is to identify existing forms of incentives in criminal proceedings and determine the characteristics of criminal procedure incentives.

2. RESEARCH

In the course of research, a set of general scientific methods of research (logical analysis and synthesis, induction and deduction) and traditional methods (comparative legal, systematic) were used. The logical method and the method of comparative-legal analysis occupy a special place in the preparation of the article. In particular, these methods were used to analyze the theoretical and legal understanding of the differentiation of criminal proceedings, legal enshrining of incentive rules and their content, highlighting the features of incentive criminal procedure incentives. Using logical rules of deduction, the application of these methods made it possible to identify incentive forms of criminal proceedings.

3. RESULTS

Differentiation of the criminal procedure is seen as such a structure of legal proceedings, in which along with its regular order there are procedural forms that provide for both simplification of the procedure in simple cases of crimes of low public danger, and complication of it in cases of the most dangerous crimes or cases requiring special procedural protection of the legitimate interests of the accused or other participants of the proceedings (Smirnov & Kalinovsky, 2009, p. 272).

The differentiation of the criminal procedural form is not basic for the dualization of criminal proceedings, which are unified in their essence and significance. Despite the lack of reference to unity in part 2 of article 1 of the CPC of the RF, the latter is expressed in the current legislation as the totality of all mandatory conditions established for the order of the criminal proceedings (Tsyganenko, 2004, p. 7).

The concept of "differentiation of the criminal procedural form" is defined as a law-making process consisting in the activity of the legislator to separate from the system of criminal procedural rules a special group of rules regulating the necessary criminal procedural legal relations associated with certain features of the criminal case or the subject who committed the crime, to form a new criminal procedural form (Mischenko, 2014, p. 17).

Differentiation is considered as one of the directions of development of criminal procedural law, which is a specific method of legal expression in the criminal procedural form of substantive and procedural conditions of activity of its subjects, and its (differentiation) application leads to the structuring of procedural relations as a complex of different properties and position of procedural orders (criminal proceedings), including general order of criminal proceedings and differentiated orders.

Criminal procedural form is defined as a complex and detailed procedural category regulated at the legislative level, which creates mandatory for courts, prosecution, investigation and enquiry bodies, the order of proceedings in a criminal case, carried out to implement the purpose of criminal proceedings (Grigoryev, 2018, p. 38).

Criminal procedural form carries out organizational, technical, and legal support of law enforcement and its procedural design due to the content in its structure components (stages, procedural proceedings and procedural mode) of elementary means (attributes) of impact on the procedural activity, which build an expedient order of this activity, preventing possible obstacles to the implementation of procedural rights and obligations of subjects of criminal proceedings (Skobkareva, 2018, p. 8-9).

Criminal procedural form: 1) is not equated with the procedure and sequence of all actions by participants in the process; 2) is strictly defined by law and serves to regulate decision-making on special issues; 3) contributes to the decision-making secured by constitutional procedural guarantees of protection of rights and legitimate interests of participants in criminal proceedings (Mischenko, 2014, p. 15-16).

Some authors define the procedural form of criminal proceedings as the legal form of the activities of the court, investigation bodies and prosecutor's supervision in initiating criminal cases, their investigation and resolution, as well as other participants in the process, involved in the case in one capacity or another, and relations associated with this activity (Machikhin, 2006, p. 8); the procedure established by law for the production of individual procedural actions (or their totality), which may be performed with or without the participation of the accused (questioning of a witness by an investigator).

Along with the external image of the criminal procedural form, which means the form of application of criminal law norms, we also distinguish its internal image as a form of application of the norms of criminal law itself. These are different characteristics of the work of the criminal procedural mechanism and at the same time the result of its work, namely: justice and criminal legal protection of social relations, generally forming the legal order guaranteed by the criminal procedural system (Kesaeva, 2017, p. 9-10).

The internal criminal procedural form is a way of legal organization of criminal procedural activity, and it also structures criminal proceedings as a certain system of criminal procedural relations (Kesaeva, 2017, p. 10).

The main criterion for the classification of procedural forms of legal proceedings is the degree of differentiation of the functions of prosecution, defense, and resolution of the case by the circle of subjects implementing them (Prutchenkova, 1992, p. 6); agreement of the subjects of proof regarding the proof of the main fact (Alimerzaev, 2014, p. 9).

Incentives in the Russian criminal procedure include the possibility of exemption from criminal responsibility and mitigation of criminal punishment (up to complete exemption) provided by law for persons who have committed a crime, but who by their truthful testimony provide serious assistance in the investigation of this or another criminal offence (Novikov, 2008, p. 26).

On the basis of the current rules of criminal procedure law of the Russian Federation, the following classification of forms of trial is proposed: traditional, which includes the general procedure of trial (provided for in chapters 35-39 of the Code of Criminal Procedure of the Russian Federation); complicated forms, which include consideration of criminal cases by jury as well as in respect of juveniles (chapters 42 and 50 of the Code of Criminal Procedure of the Russian Federation); and simplified forms, i.e. enquiries and abbreviated enquiries (Chapters 32 and 32.1 of the Russian Federation Code of Criminal Procedure), a special procedure when the accused agrees to the charge (Chapter 40 of the Russian Federation Code of Criminal Procedure) and a special decision-making procedure when entering into a pre-trial cooperation agreement (Chapter 40.1 of the Russian Federation Code of Criminal Procedure) (Orlova, 2016, p. 8).

The legislation of most common law countries in the field of criminal proceedings contains forms of court proceedings similar to those mentioned above. Such forms should include: consideration of a criminal case in the general order; complicated forms related to the participation of a jury in court proceedings, proceedings against juveniles, application of compulsory measures of medical nature; special procedure of trial in case of pre-trial cooperation agreement; simplified forms of proceedings, in case the accused agrees with the charges (including some types of restorative justice).

Singling out the form of court proceedings, one cannot but mention the opinion of Ashworth A., who states that there are two interrelated paradigms of goal-setting in criminal proceedings: the «punishment paradigm», where the key goal of criminal proceedings is to apply punishment (repressive measures) and restore «peace» between the state and the offender; the goal of the «restorative paradigm» is not to punish the offender, but to restore the victim's rights and, ultimately, the rights of the state (Ashworth, 1994, p. 34-35).

Elements of restorative justice have been widely developed in international jurisprudence, both for adults and juveniles. Undoubtedly, the main aim of restorative justice is to restore justice, to ensure the peaceful resolution of criminal law conflicts. The positive practice of restorative justice programs demonstrates the limitations and negative side-effects of punitive approaches (punishment) (Zehr, 2002, p. 15).

Restorative justice programs are incentive-based in that the outcome is not strict punishment of the perpetrator, but rather relief from punishment or liability, through reconciliation of the offender with those affected by the crime, reparation for the harm caused, and restoration of social justice.

According to the report the Office of the SRSO on Violence against Children in 2013 «Promoting restorative justice for children», restorative processes are applied to juveniles, which may include mediation, conciliation with the victim, sentencing based on the socially positive behavior of the juvenile and the agreement reached on the results of restorative procedures. This report notes that restorative justice aims to rehabilitate and reintegrate the young offender, through a non-contentious and voluntary process based on dialogue, negotiation and problem solving, thereby helping to reconnect him or her with the community. This involves ensuring that the offender understands the harm caused to the victim and the community and accepts responsibility for criminal behavior and reparation².

One effective form of encouragement in criminal proceedings is the participation of an intermediary in the reconciliation of the offender with the victim, the implementation of mediation procedures. The result of such mediation is the termination of the criminal case or criminal prosecution against the accused or suspect if the statutory conditions aimed at reconciliation, making amends, compensation for the damage caused, and a formal admission of guilt are met. This model of restorative proceedings is particularly widely used in Canada, the United States of America, and some European countries.

The use of mediation in criminal proceedings as an effective incentive measure tends to expand in different states. For example, in the Republic of Kosovo, mediation is seen as an important aspect of the implementation of restorative justice, the purpose of which is to assist parties to criminal law conflicts. It is carried out through an extrajudicial procedure with the participation of a certified mediator, whose task is to achieve reconciliation of the parties, to achieve compensation for the damage caused to the victim. It

² Report of the Office of the SRSO on Violence against Children «Promoting restorative justice for children» // https://sustainabledevelopment.un.org/content/documents/2599Promoting_restorative_justice.pdf p. 28.

is worth noting that the use of «online mediation» is widespread in this country. As noted by Milot Krasniqi, online mediation is used in cases where the parties are geographically distant from each other. A great advantage of this form of mediation is that it enables mediation even when the parties are in different and distant locations, reduces procedural costs and saves time (Krasniqi, 2019, p. 195-196).

In Russian procedural science, the concepts of «simplified» or «expedited» proceedings are widely used (Boyarskaya, 2012, Dudina, 2011, Esenkulova, 2013, Kachalova, 2016, Kishchenkov, 2010, Plyasunova, 2008, Tenishev, 2018, Tisen, 2017, Trubnikova, 1997) as a criminal case review procedure designed to optimize procedural institutions and rules while retaining fundamental individual rights guarantees (Orlova, 2016).

One of the common simplified forms of criminal proceedings is the application of a special judicial procedure for the conclusion of a pre-trial cooperation agreement. Dneprovskaya M. and Abramitov S. point out that the essence of this procedure is to induce the guilty by his actions to assist the bodies of preliminary investigation in the detection and investigation of crimes in exchange for receiving certain benefits as a defendant who pleaded guilty. At the same time, the cooperation agreement contains instructions on the actions that the suspect (accused) agrees to perform to assist in the detection and investigation of the crime, to expose other accomplices to the crime, to search for property obtained by criminal means (Dneprovskaya & Abramitov, 2019, p. 162).

Simplified criminal procedure is not only characteristic of the Russian criminal procedure. They are widely used in many states. In criminal proceedings in the United States of America, both at the state and federal level, immunity and leniency agreements have gained importance when plea bargaining in exchange for cooperation. This form of litigation can arise in complex white collar crime cases, organized crime cases, drug cases and other major criminal cases. A cooperation agreement is quite different from a mundane plea bargain (Hughes, 1992, p. 2). In this case, as long as the defendant fulfils the terms of the agreement in good faith, the state provides security and, where necessary, financial support.

The main objectives of the implementation of this criminal procedure incentive measure are to save procedural resources (procedural time, financial savings, etc.) as well as to prevent and prevent crime, including professional and organized crime.

The incentive for the accused, the suspect who has concluded a pre-trial cooperation agreement is to receive the minimum possible punishment for the crimes he has committed, provided all the conditions

stipulated in the agreement are met, including providing the bodies carrying out the preliminary investigation with information that is essential for the detection of the crime.

Considering court proceedings as a strictly formalized order of procedural actions of the court and participants of the process, aimed at achieving the result - a reasonable, lawful (constitutional and legal) and fair decision by the court (Vitruk, 2009, p. 371), we believe that the implementation of incentive rules provided by the current legislation also occurs within a special procedure, which we call as an incentive form of criminal proceedings.

In this regard, we believe that incentive legal relations emerging within the framework of criminal procedure, including their initiation, implementation and enforcement are carried out within a special incentive form of criminal proceedings.

This incentive form of legal proceedings can be implemented as part of a criminal case considered under the general procedure of court proceedings (for example, when resolving the issue of termination of criminal proceedings in connection with reconciliation of the parties or a court fine, as well as active repentance). The incentive form of court proceedings is directly implemented in the context of simplified or accelerated, differentiated procedures of court proceedings (when the criminal case is considered in the order of special proceedings, reduced enquiry, conclusion of a pre-trial agreement on cooperation).

The previously identified nature of criminal-procedural incentive relations (as an element of the mechanism of legal regulation) as interdependent relationship of criminal law and procedural norm, is preserved and fully manifested in the incentive form of legal proceedings.

Procedural proceedings as an element of the incentive form, in turn, is defined as a totality of law enforcement actions aimed at the implementation and execution of the mechanism of incentives in the context of criminal procedure.

The current status of the institute of encouragement in the framework of criminal procedure shows its dynamism and evolution to a more complex procedural form, which is widely spread and implemented in the field of criminal procedure.

We believe that we should not be limited in the understanding of encouragement only as a material result in the form of a specific law enforcement act, we believe that encouragement in criminal proceedings should be considered in relation to its external form of implementation, starting from the moment when the subject becomes aware of the options for a favorable outcome of the case for him.

In this case, incentive form of criminal proceedings, as an external expression of incentive mechanism, has an essential feature that determines the mutual benefit of incentives - a simplified or reduced procedure for its application, in which the initiation, implementation and development of appropriate criminal procedure incentive legal relations, multifaceted not only in its subject composition, but also in the pursued interests of each party.

The conceptual model of incentive form of legal proceedings that we offer is due not only to certain prerequisites, but also the obvious usefulness from the law enforcement point of view, since the incentives provided in the law in the form of features of its legislative regulation, finds its ambiguous reflection in judicial practice, differently applying the same rules of law.

4. DISCUSSION AND CONCLUSION

Thus, encouragement in criminal proceedings is provided by the state in the form of relevant substantive legal norms, providing grounds for exemption from punishment or grounds for preferential calculation of punishment, along with the establishment of a procedural procedure for the application of these incentive rules. But at the same time, the state does not guarantee the implementation of such encouragement due to the plurality of persons involved in the incentive criminal procedure relations and their interests.

However, we believe that the incentive form of legal proceedings in view of its mutual benefit acquires the features of universality, since the simplified and expedited procedures for resolution of criminal cases allows to consider the interests of all persons involved in the case.

In turn, the simplified procedure for the implementation of the incentive form of legal proceedings ensures the effectiveness of the criminal procedure as a whole.

Encouragement in the substantive sense implies a specific result (exemption from criminal responsibility, reduced penalty), and in the procedural understanding, the "incentive form of proceedings" implies a procedural order of initiation, development, and implementation of incentive legal relations.

Taking into account this understanding, it should be noted that in a criminal procedural form of encouragement the question of merit and assessment of the actions of the accused or defendant is not always mandatory, and may have an optional value, for example, in cases where the accused has applied

to consider the criminal case in a special order of a court decision, but the court rejects it due to the objections of the victim or public prosecutor.

Accordingly, merit, as an integral element of substantive legal incentives, in the above example may not be established when deciding on the possibility of implementation of incentive form of legal proceedings, it is not decisive in this case, not essential for the launch of the criminal procedure mechanism of incentives.

It should be noted that, along with the above features of the incentive form of legal proceedings, application of the incentive norm in criminal proceedings entails negative procedural consequences, namely: when releasing a person from criminal responsibility with the use of incentives (for example, reconciliation with the victim, imposition of a criminal penalty, active repentance or in the presence of special grounds for termination of a criminal case) - absence of acquittal and information about criminal offence of a person with a criminal record. In case of application of the incentive norm connected with the verdict of guilty (simplified proceedings) the verdict itself is a negative legal consequence.

We believe that this peculiarity of the implementation of incentives is due to the public nature of criminal proceedings and the functions of the state in the fight against crime. On the other hand, a painless resolution of the resulting criminal law conflict associated with the commission of a crime can hardly be assumed.

Thus, this study proposes a model of incentive form of proceedings, characterized by such features as universality, mutual benefit, efficiency.

Within the framework of the current criminal procedural legislation of Russia, to the incentive form of legal proceedings should be included - a special procedure for taking a judicial decision upon consent of the accused to the charges (chapter 40 of the Criminal Procedural Code of the Russian Federation), reduced enquiry (chapter 32.1 of the Criminal Procedural Code of the Russian Federation), a special procedure for taking a judicial decision upon conclusion of a pre-trial agreement on cooperation by the accused (chapter 40.1 of the Criminal Procedural Code of the Russian Federation), as well as ins

It is worth noting that the development of the «special procedure» was facilitated by the idea of prioritizing the personal interests of the accused as a participant in criminal procedural relations who could influence the choice of form of trial and apply for a sentence under the rules of simplified proceedings.

The value of the institute of exemption from criminal liability in connection with reconciliation of the parties and active repentance lies in the creation by the state of conditions conducive to the voluntary positive behavior of the person after the crime, aimed at eliminating the negative consequences of his act.

Special grounds for the termination of a criminal case constitute a separate, independent area for the implementation of the rules on incentives in criminal proceedings.

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