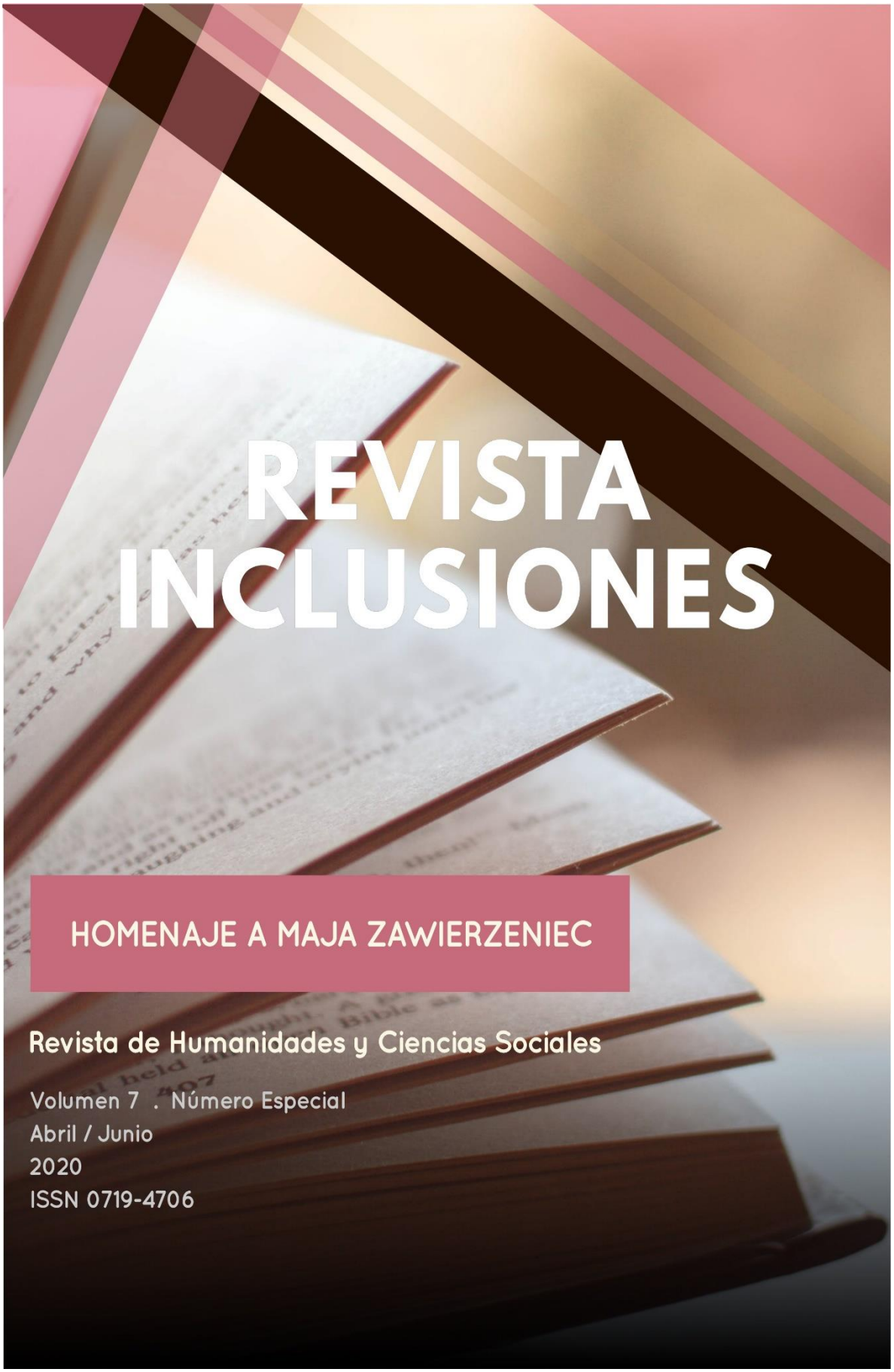

REVISTA INCLUSIONES

HOMENAJE A MAJA ZAWIERZENIEC

Revista de Humanidades y Ciencias Sociales

Volumen 7 . Número Especial
Abril / Junio
2020
ISSN 0719-4706

REVISTA
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REVISTA DE HUMANIDADES
Y CIENCIAS SOCIALES

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BIBLIOTECA UNIVERSIDAD DE CONCEPCIÓN

REVISTA INCLUSIONES
REVISTA DE HUMANIDADES Y CIENCIAS SOCIALES

CUADERNOS DE SOFÍA EDITORIAL

ISSN 0719-4706 - Volumen 7 / Número Especial / Abril – Junio 2020 pp. 423-431

ALTERNATIVE CONSIDERATION OF DISPUTES AS AN INDICATOR OF SOCIAL DEMOCRATIZATION

Dr. (C) Maria Alexandrovna Volkova
Russian State Social University (RSSU), Russian Federation
ORCID ID: 0000-0001-5928-6929
mvolkova2013@bk.ru
Dr. (C) Natalya Aleksandrovna Savtsova
Russian State Social University (RSSU), Russian Federation
ORCID ID: 0000-0002-2239-902X
SavtsovaNA@rgsu.net
Dr. (C) Renata Romanovna Lenkovskaya
Russian State Social University (RSSU), Russian Federation
ORCID ID: 0000-0001-9309-3602
pravo1000@mail.ru
Dr. (C) Alla Andreevna Neznamova
Russian State Social University (RSSU), Russian Federation
ORCID ID: 0000-0002-7534-6327
NeznamovaAA@rgsu.net
Lic. Tatiana Sergeevna Nesterova
Russian State Social University (RSSU), Russian Federation
ORCID ID: 0000-0002-4152-798X
nesterowa.tatiana2011@yandex.ru

Fecha de Recepción: 03 de enero de 2020 – **Fecha Revisión**: 14 de enero de 2020

Fecha de Aceptación: 08 de marzo de 2020 – **Fecha de Publicación**: 01 de abril de 2020

Abstract

The purpose of this article is to consider the role of alternative consideration of disputes as an indicator of social democratization. This study is carried out using historical and comparative-legal methods. This article examines the importance of conciliation in civil and arbitration proceedings for society. The authors briefly examine the history of the emergence of alternative ways to dispute resolution, as well as the views of representatives of the scientific community on the essence of conciliation and its role in the judicial process. As a result, it is concluded that at present, out-of-court dispute resolution is a legal means of implementing and simplifying justice. The authors conclude that it is necessary to distinguish between the concepts of out-of-court and pre-court methods of dispute resolution. It is also concluded that Russian law is moving towards expanding the scope of alternative dispute resolution. The Russian practice of applying alternative procedures gradually includes other technologies of peaceful dispute resolution that are known in foreign countries, such as facilitation, communication procedure, etc. As a result, this direction of legislation development and its application should contribute to the strengthening of civil society.

Keywords

Arbitration court – Claim procedure – Out-of-court dispute resolution

Para Citar este Artículo:

Volkova, Maria Alexandrovna; Savtsova, Natalya Aleksandrovna; Lenkovskaya, Renata Romanovna; Neznamova, Alla Andreevna y Nesterova, Tatiana Sergeevna. Alternative consideration of disputes as an indicator of social democratization. Revista Inclusiones Vol: 7 num Especial (2020): 423-431.

Introduction

More and more attention has been paid by academic experts to alternative forms of dispute resolution in recent years, including out-of-court dispute resolution[1].

The priority direction of the EU policy is the development of alternative ways to resolve legal conflicts. In fact, the appeal to such forms as a settlement agreement, judicial mediation and negotiation is positively perceived by the majority of subjects and the public, operating in the market. The undoubted advantages of conciliation include legality, as well as increasing the efficiency of resolving economic disputes, maintaining partnerships and minimizing costs for the entire process. The result is important here as well, in which both parties win to one degree or another.

As noted in the Resolution of the VI All-Russian Congress of Judges, the possibility of resorting to alternative methods of dispute resolution is a guarantee of the effectiveness of protecting rights[2]. The participants of civil circulation should have a choice of any convenient procedure that meets their requirements related to confidentiality, time, cost, imperativeness and consequences of the decision. According to I. Tsvetkov, who is one of the representatives of the Russian judicature, "providing such opportunities is more important in the current conditions since there is practically no capable system for alternative resolution of economic disagreements and conflicts in our country, acting on the basis of conciliation, arbitration, mediation and other legal procedures"[3].

Swiss experts compare legal disputes with an iceberg, consisting of a visible part – the top, including positions of the parties and legislation – and also an invisible part submerged underwater, to which scientists refer emotions, feelings, needs and misunderstandings. Thus, the use of the information related to the top of the iceberg alone is not possible for the effective dispute resolution[4].

The emergence of alternative conflict resolution procedures has helped to partially reveal the underwater part of the iceberg. As several authors indicate, alternative methods of resolving disputes (in particular, mediation) as a democratic method of resolving a conflict of private law character[5] can be used to resolve disputes between citizens or legal entities (or both)[6]. In addition, international law allows for the extension of alternative

[1] M. A. Volkova; A. L. Shilovskaya; P. V. Zhesterov & M. M. Turkin, “Mediation in Private and Public Law”, International Journal of Engineering and Advanced Technology, Vol: 9 num1 (2019): 3888-3892.

[2] Resolution of the VI All-Russian Congress of Judges. Bulletin of the Supreme Arbitration Court of the Russian Federation (2011): 5-17.

[3] I. Tsvetkov, Preddogovornye spory v arbitrazhnom protsesse. Arbitrazhnyi i grazhdanskii kodeks (Moscow, 2006).

[4] N. I. Gaidaenko Schaer, Alternative dispute resolution mechanisms as a tool for creating an enabling environment for business (the experience of Russia and foreign countries): monograph. (Moscow: INFRA-M, 2016).

[5] L. B. Sitdikova; A. L. Shilovskaya & I. N. Nadin, “Demokratizatsiya grazhdansko-protsessualnogo zakonodatelstva, putem aktivizatsii primiritelnykh protsedur. Biznes v zakone”, Ekonomiko-yuridicheskii zhurnal num 3 (2016): 84–87.

[6] A. L. Shilovskaya; S. J. Starodumova; M. A. Volkova & P. V. Zhesterov, “The judicial practice of the European Court in the sphere of non-material reputational harm”, Man in India, Vol: 96 num 12 (2016): 5635–5645.

dispute resolution techniques to public legal relations. In particular, the United Nations recognizes that mediation and alternative dispute resolution in meetings of offenders, victims and community members aimed to resolve issues subject to criminal investigation can change the outcome of a case that might otherwise lead to imprisonment, both before trial and after conviction[7]. UN experts believe that the police and prosecutors should take the initiative in conducting mediation aimed at withdrawing suspects from the criminal justice system[7]

However, it is important to emphasize that mediation between the victim and the accused differs significantly from mediation in civil cases since the responsibility for the crime is pre-established. The main condition for mediation between the victim and the offender is the fact that the offender accepts such responsibility[8].

Methods

The main method used in the study was the historical method, which allowed tracing the history of alternative dispute resolution and identifying several stages in them. We also used the comparative-legal method to analyze the existing procedures for alternative dispute resolution and concluded that they have common patterns.

Results

Analyzing the existing views on alternative dispute resolution, it can be stated that the concepts of out-of-court and pre-court methods of dispute resolution are used by scholars as synonymous and interchangeable in the theory of alternative dispute resolution. It seems to us more correct to separate these concepts. Out-of-court procedures involve the possibility of a full settlement of the conflict without the participation of the court (mediation, settlement agreement). Pre-court procedures are only a certain stage in dispute resolution, preceding the appeal to the court (claim settlement).

In practice, the list of alternative dispute resolution procedures has significantly expanded. Russian citizens currently know several types of out-of-court settlements, which include negotiation and mediation. Usually, the claim procedure for resolving entrepreneurial disputes is also referred to as an alternative dispute resolution method and treated as an out-of-court (pre-court) alternative legal means.

According to the results of the study, in modern conditions of the development of law and economy, out-of-court dispute resolution is regarded as a legal means of implementing programs of simplification and accessibility of justice. At the same time, there is a tendency in Russian law to liberalize and expand the scope of alternative procedures. In particular, their application to administrative relations. In this regard, the current legislation perceives the trends that existed in ancient Russian law. The article assumes the possibility of including in the Russian practice such institutions as facilitation,

[7] Handbook of basic principles and promising practices on Alternatives to Imprisonment. Criminal justice handbook series. United Nations (New York: United Nations, 2007). Available at: https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf

[8] Restorative justice in prisons: methods, approaches, and effectiveness. 2019. https://rm.coe.int/16806f9905

increasing the effectiveness of group work, as well as various kinds of communication technologies aimed to establish the desired direct or indirect contact with an opponent, negotiation and mediation technologies, etc.

Discussion

Out-of-court procedures, having a long history in Russian law, were significantly minimized for a long time in the Soviet Union. The whole process of the development of the institute of conciliation in pre-revolutionary Russia can be divided into two stages.

The first stage covered the period from ancient times to the judicial reform of 1864. Gradually, the rules of dispute resolution were formed as a result of repeated use of similar situations, on the basis of conciliation and treaties of peace, which became the core of customary law. Moreover, these rules found their consolidation in other sources of Russian law (contracts, acts, letters, statutes).

In the 18th-19th centuries, conciliation was legislated in the form of provincial courts created of conscience by the Decree of Empress Catherine II on November 7, 1775. According to the norms of Chapter 26 of the Decree "On the court of conscience and its justiceship", courts of conscience were an element of the system of institutions of the Russian Empire for the administration of provinces, which considered civil cases in the order of conciliation and some criminal cases (committed by the juvenile or insane), as well as disputes between parents and children.

The relations of conciliation, initially regulated by custom, were smoothly reflected and developed in the normative legal acts of the period of centralization and class-representative rule, the era of absolutism.

The second half of the 19th – beginning of the 20th century is the second stage in the development of conciliation in pre-revolutionary Russia. The legislation paid great attention to this institution, trying to regulate public relations arising during conciliation in more detail. The legal science of this period formed a certain system of views on conciliation.

The Charter of Civil Procedure of 1864, adopted in the course of judicial reform, contained a whole chapter "On conciliation proceedings". According to the Charter, disputing parties could terminate the process by mutual agreement. The agreement between the parties on the termination of the case could also take the form of a settlement transaction, the conclusion of which was allowed in every situation of the case. Art. 1366 of the Charter explicitly specifies that a case terminated by voluntary settlement shall be considered permanently completed and shall not be renewed. It should be noted that the scope of non-judicial procedures narrowed – they became applicable only to civil law disputes.

The stage of the rapid development of entrepreneurship in post-revolutionary Russia ended with the advent of Soviet power. Having eliminated the system of commercial litigation focused on the application of conciliation, the Soviet government, at the same time, abolished all democratic principles of substantive and procedural law. The principle of dispositiveness and the settlement agreement began to be applied with great restrictions.

There were no rules directly regulating the settlement agreement in the first Code of the Civil Procedure of the Russian Soviet Federative Socialist Republic (RSFSR) of 1923. Despite this, parties could reconcile in the course of the trial. This right was derived from Art. 18 of the Code. The court could take into account the settlement agreement when making a decision, along with other circumstances of the case. In any case, all out-of-court settlement agreements were subject to confirmation in court. When approving the settlement agreement, the court was obliged to protect the interests of the weakest party.

The possibilities for applying the settlement agreement were significantly expanded with the adoption of the Code of Civil Procedure of the RSFSR of 1964. The institution of the settlement agreement was regulated in it in more detail (Art. 34, 143, 164, 219, 293, 364). For the first time, according to paragraph 5 of Art. 129 of the Code, the approval of a settlement agreement by the court became an independent basis for terminating the proceedings. It should be emphasized that the claim procedure before applying to arbitration was mandatory at that time. This mandatory procedure for the pre-arbitration settlement of economic disputes lasted until 1995.

As amended by the Code of Civil Procedure of the RSFSR of 1995, parties could conclude the settlement agreement at the stage of preparing the case for trial (Art. 143), enforcement proceedings (Art. 364), as well as in the cassation instance (Art. 293).

The settlement agreement in a civil proceeding meant a procedural action agreed upon by the parties, which consisted in submitting a contract on the terms of dispute resolution to the court for approval, that is, mutual concessions were not a necessary condition of the settlement agreement. The right to enter into such contracts arose from civil, labor, family, kolkhoz and other legal relations. They were vested with both disputing parties themselves and third parties who had the right to declare independent claims in the process. A settlement agreement could also be concluded in a friendly or arbitration court, as well as state arbitration.

The current Arbitration Procedure Code of the Russian Federation of 2002 [9] not only provides parties with ample opportunity to resolve the dispute but also consolidates conciliation as one of the main tasks of arbitration proceedings. The possibility of applying another alternative procedure – mediation – to civil, administrative and other public legal relations, including those related to the implementation of business and other economic activities, as well as disputes arising from labor and family relations, is provided by the Federal Law of July 27, 2010 No. 193-FL "On alternative dispute resolution with the participation of a mediator (mediation)". An extension of the scope of the law to disputes arising from public relations can be considered a revolutionary breakthrough. In fact, this possibility appeared in Russian law for the first time since Russkaya Pravda (Rus' Justice).

The discussion about the nature and role of alternative dispute resolution in the academic community develops in two directions: within the functioning judicial system (in the public sphere) and outside of it (in the field of private legal regulation). E.N. Nosyreva, relying on this classification, proceeds from the advisability of dividing the alternative dispute resolution into private and public. She also argues that in this aspect, the term

[9] The Code of Arbitration Procedure of the Russian Federation: Federal Law of July 24, 2002 No. 95-FL (as amended on April 6, 2015). Collected Legislation of the Russian Federation No. 30. Article 3012, 2002.

"public" indicates the legal affiliation of these procedures with the public state judicial system and is, to a certain extent, conditional[10].

Previously, even considering the existence of a planned economy and the absence of private property, the extrajudicial (pre-court) procedure was aimed at freeing arbitration from consideration of uncontested cases. In the legal sources of the 1950s, it was considered that this work makes it possible to prevent the occurrence of economic disputes and the presentation of undisputed or unfounded claims to arbitration. R.F. Kallistratova claims that the obligatory preliminary appeal directly to the debtor with controversial issues is aimed at developing the initiative of economic bodies to eliminate conflicts between them without government intervention, which helped to strengthen cooperation and mutual understanding between economic bodies, quickly resolve disagreements that have arisen and accelerate the turnover of working capital at enterprises and organizations[11].

From the point of view of T.E. Abova, significantly more guarantees of actual performance are given by the adoption of necessary measures to restore the violated right, rather than resolving the conflict in a claim form[12].

The degree of effectiveness of the claim procedure is very high as it reduces the time for economic dispute resolution and the number of cases sent to the arbitration court and facilitates the preparation of cases by the court as the parties express their opinion and submit the necessary documents that they have.

According to the Chairman of the Supreme Arbitration Court of the Russian Federation A.A. Ivanov, out-of-court settlement, contributing to the acceleration and cheapening of justice for both the state and the parties, is widely used to reduce the workload of judges[13]. In fact, out-of-court settlement meets the requirements of procedural law, reduces the time spent by the parties on the dispute and makes it possible to settle the dispute voluntarily without state intervention.

It is also possible to agree with the opinion of A. Kuzbagarov, who approves the conciliation of the parties without going to court and considers the benefits of an out-of-court consideration to develop the economic independence of the disputing parties, strengthen partnerships and avoid lengthy and costly judicial procedure[14].

To a certain extent, a share of preventive work is inherent in any form of protection. The preventive function of the out-of-court (pre-court) settlement is to prevent the appearance of court cases, as well as provide educational impact on the subjects of economic turnover. According to V.F. Yakovlev, the pre-court settlement is the mildest and most civilized way to dispute resolution[15].

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[10] E. I. Nosyreva, Alternative Resolution of Civil Disputes (Voronezh, 2001).
[11] R. F. Kallistratova, Pretenzionnyi poryadok razresheniya sporov (Moscow: Gosyurzdat, 1963).
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[15] V. F. Yakovlev, "Samyi tsivilizovannyi sposob razresheniya konfliktov", Yuridicheskii mir num 4 (2004): 17.

Conclusions

The changes that have taken place in the legislation reflect the trend towards the democratization of Russian society. Alternative dispute resolution is less formal, unlike judicial protection. In particular, this is indicated by the absence of strict requirements for the participants of the procedure, their qualifications and legal status, as well as mandatory requirements for the rules of conduct.

Based on this, it is possible to conclude that the dispositive method has now become predominant in Russia and is more suitable for the regulation of civil legal relations, while the imperative method is minimized.

Further legislative and practical improvement of alternatives to dispute resolution and settlement may lead to the expansion of the list of types of the out-of-court settlement, using historical and foreign experience. For example, it can be assumed that world-famous institutions will enter into Russian practice, for example, facilitation, increasing the effectiveness of group work (meetings, negotiations), various kinds of communication technologies aimed to establish the desired direct or indirect contact with an opponent, negotiation and mediation technologies, etc.

In the future, such democratization of conflict resolution may lead to increased activity of citizens to protect their violated interests. In general, this will help to strengthen civil society in the Russian Federation.

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