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S. Rybak[1], N. Kukharenko[2]*

[1]BIP – University of Law and Socio-Information Technologies
[2]Republican Institute of Higher Education
[1,2] Minsk, 220007, Republic of Belarus
*e-mail: natalia.drozd@tut.by

MEDIATION AS A TOOL FOR EXPANDING DISPOSITIVE PRINCIPLES IN CRIMINAL PROCEEDINGS

Abstract.

In the article the institute of mediation is being investigated as one of the most progressive alternative methods of dispute resolution using the methods of comparison, scientific analysis, synthesis and comparison. The authors actualize the introduction of mediation into various spheres of law enforcement practice of the Republic of Belarus, focus on the possibility and expediency of integrating mediation with criminal procedural activities. Certain provisions of the Law of the Republic of Belarus "On Mediation" and certain norms of the Criminal Procedure Code of the Republic of Belarus regulating the use of mediation in criminal proceedings are analyzed in detail. At the same time, as a comparison, the similar legislation of Kazakhstan is studied, certain progressive aspects of its formation are indicated. The authors reveal a number of regulatory and law enforcement problems that do not allow the progressive changes introduced in the criminal procedure legislation of the Republic of Belarus in 2021 to be properly implemented. Individual problems are presented in a detailed form with a deep analysis of the essence of the problem. In conclusion, the author conceptually sets out his own vision of the further development of mediation in the criminal procedure sphere of the Republic of Belarus and formulates proposals for leveling some barriers. The authors emphasize the universality of the problematic issues raised, their existence in the relevant legislation of most post-Soviet countries.

Key words: Mediation, accused, victim, dispositive principles, investigator, criminal case.

Introduction.

Discussions about the importance of the institute of mediation in the life of the Belarusian society are still ongoing in the scientific literature. This is primarily due to the effectiveness, rationality and lack of formalization of the mediation procedure; the ability to reduce procedural costs both in time and monetary terms; worldwide recognition of its effectiveness compared to judicial methods of dispute resolution, as well as a number of other reasons.

The post-Soviet society, brought up on the ideology of family values, was not fully ready for a paradigm shift, both economic and social. If previously most of the conflicts that arise between people were resolved by themselves or with the help of institutions created by labor or household collectives, then with the advent of the "market" society inevitably borrowed a number of Western-style democratic foundations. One of these is the dominance of such a way of protecting human rights as the issuance of an imperative act of will by a specially created state body for this purpose – the court. It has become the norm to shift the burden of resolving most conflict situations to a third party. In this regard the judiciary has received a significant impetus to the development, improvement and increase of its importance in the state. To date the Belarusian courts have faced one of the most common problems in the world experience of the functioning of the judiciary - excessive workload of the judicial system, which predictably leads to a decrease in the quality of court decisions. This cannot but affect the professional and personal characteristics of the judges themselves. The increase in the

average workload of a judge in the last few years indicates the approaching exhaustion of the judicial system and the professional burnout of its employees [1]. The level of legal development of Belarusian society will reach a time when a child will file a lawsuit against his parents with a claim that they did not provide him with a proper education and profession in demand on the labor market; or, for example, a grandmother will demand a court decision against a daughter who allows herself to smoke a cigarette in the presence of her grandson. It is not difficult in this situation to predict the further trend in the number of court disputes and the timing and quality of their resolution by the courts of the Republic of Belarus. Similar problems of the judiciary arise in most post-Soviet countries. The way out of this situation is seen in the development of a system of alternative ways to resolve conflicts, where mediation is one of the most effective and promising [2].

Such Belarusian scientists as Radkovskaya, Dulub, Zdrok, Belskaya devoted their works to this issue. There are also well-known foreign authors who deal with this area of legal relations in their research. Thus, in Kazakhstan, Velitchenko S.N., Suleimenov M.K., Duisenova A.E. and others were actively engaged in the study of mediation issues [3]. In the framework of this study, while agreeing with the arguments of these authors, we do not aim to give a comparative description of mediation with judicial, as well as with other alternative methods of dispute resolution, to substantiate its advantages and focus on individual disadvantages. The purpose of this article is to analyze the prospects for the integration of mediation into the legislative space of the criminal-legal sphere of the Republic of Belarus, related issues and possible ways to resolve relevant problems of a normative and applied nature [4].

Materials and methods of research.

The object of this study is the social relations developing in the criminal procedure sphere of the Republic of Belarus through the implementation of the norms regulating the use of mediation in proceedings on materials and criminal cases.

The research methodology is based on a holistic complex-system approach based on modern concepts of dialectical scientific cognition of objective reality. Methods of logical, comparative-legal, concrete-sociological research based on it, general scientific methods of cognition were actively used: analysis and synthesis, comparison, induction and deduction, abstraction, modeling, etc.

The method of analysis was used in the development of a structural and logical scheme of research, the definition of a system of definitions included in its scientific apparatus, the study of existing legal norms governing the use of mediation in criminal proceedings of the Republic of Belarus and Kazakhstan.

The comparative legal method was used in the study of the regulatory regulation of mediation in the legislative space of Kazakhstan and the Republic of Belarus. Together with logical and a number of general scientific methods, it allowed us to form an idea of the features of the integration of the mediation method of dispute resolution into the criminal procedure sphere, to isolate negative and positive elements in the current legislation and law enforcement practice, to outline ways to improve the relevant areas of legal relations [5].

The application of the historical and logical method allowed us to form an idea of the general direction of the development of theoretical and legal views on the role of mediation in the implementation by competent state bodies and their officials of proceedings on materials and criminal cases.

Results and its discussion.

In 2013 the Law "On Mediation" (hereinafter referred to as the Law) was adopted in the Republic of Belarus according to which "mediation is negotiations between the parties with the

participation of a mediator in order to settle a dispute (disputes) the parties by working out a mutually acceptable agreement".

In accordance with part 1 of Article 2 of the Law the scope of its activities extends to relations related to the use of mediation in order to settle disputes arising from civil legal relations, including in connection with the implementation of entrepreneurial and other economic (economic) activities, as well as disputes arising from labor and family legal relations. However, in part 3 of the same article there is a reservation that the Law also applies to mediation, which is carried out within the framework of other types of legal proceedings in cases provided for by legislative acts. Thus, the legislator left the possibility of introducing the institution of mediation in areas in contact with law enforcement including criminal procedural activities.

In the Republic of Kazakhstan, the Law on Mediation was adopted in 2011. Unlike the Belarusian one, it initially specifies the scope of mediation "disputes (conflicts) arising from civil, labor, family, administrative legal relations and other public relations involving individuals and (or) legal entities, administrative bodies, officials, as well as those considered in the course of proceedings on administrative offenses, in the course of criminal proceedings in cases of criminal offenses, crimes of minor and medium gravity, as well as serious crimes" [6].

The main barrier, a deterrent to the introduction of mediation procedures in the criminal process of the Republic of Belarus is fixed in Part 2 of art. 15 of the Criminal Procedure Code of the Republic of Belarus (hereinafter referred to as the CPC) the principle of publicity, according to which state bodies, officials authorized to carry out criminal prosecution are obliged within their competence to take the necessary measures to detect crimes and identify the persons who committed them, initiate criminal proceedings, bring perpetrators to the responsibility provided by law and create conditions for the court to decide a lawful, reasonable and fair sentence. In fact this rule minimizes dispositive beginnings in criminal procedural activity but does not eliminate them altogether. For example, the institution of private prosecution existing in criminal proceedings is one of the most striking exceptions to the principle of publicity. In accordance with it State bodies cannot carry out criminal prosecution on a number of elements of criminally punishable acts without a corresponding request from a person who has suffered from a crime expressed in a statement. Moreover the victim in cases of private prosecution is entitled at any time of the criminal proceedings to declare a court-binding requirement to terminate the trial in connection with reconciliation with the accused.

There will be no sharp objections to the statement that the indicator of the democratization of the legal sphere of society is the gradual expansion of dispositive institutions. The same applies to the criminal process. Following this direction, the Belarusian legislator made appropriate amendments and additions to the Criminal Procedure Code in 2021 (dated 26.05.2021 № 112-З).

Thus, article 30-1 of the CPC "Reconciliation of the accused with the victim" appeared. Reconciliation in the context of this norm is a free and voluntary settlement of the conflict between the accused and the victim that has arisen in connection with the commission of a crime, as well as an appeal to the investigator (prosecutor) with a statement of reconciliation and a request to terminate the preliminary investigation of a criminal case.

Reconciliation of the accused with the victim is carried out voluntarily and personally, that is, on the basis of a voluntary expression of will to resolve the conflict (dispute) between them that has arisen in connection with the commission of a crime, including by concluding a mediation agreement. Applications for reconciliation from the accused and the victim may be submitted in writing and orally during the criminal proceedings. Written statements are attached to the criminal case, and oral statements are entered into the protocol of the investigative action in the general order. If the

reconciliation of the accused with the victim is achieved as a result of mediation, then the investigator (prosecutor) is presented with a mediation agreement for inclusion in the criminal case.

According to paragraphs 14-3 of article 6 of the CPC, mediation is a negotiation between the accused and the victim with the participation of a mediator in order to facilitate their reconciliation. To exercise their right to reconciliation, the accused and the victim, on their own initiative and by mutual consent, choose a mediator.

The analysis of the norms of the Law allows you to clearly distinguish the mediator from the psychologist and lawyer. First of all, a mediator is a specialist in the organization and management of negotiations, which are aimed at developing the most acceptable behavior or perception of the current situation or attitude to it for both sides. Unlike a psychologist, a mediator does not work with the subconscious level of a person. He differs from a lawyer in that he does not seek to find an optimal model of conflict resolution for the parties from the point of view of jurisprudence. The mediator, using special techniques and an algorithm for influencing the development of negotiations, directs both parties to an independent active search for the most acceptable way to resolve the conflict, eliminating the possibility of disrespectful attitude to each other and ensuring compliance with current legislation.

The basic principles and rules of mediation are largely defined in the Law. The Decree of the Ministry of Justice of the Republic of Belarus of 17.01.2014 approved the Instruction on the procedure for maintaining the Register of Mediators and the Register of organizations providing mediation. Persons entitled to carry out mediation activities are registered in the register of mediators. The register is posted on the website of the Ministry of Justice of the Republic of Belarus. A participant in the criminal process who wants to use the help of a mediator can contact any moderator personally (there are contacts of mediators in the Register of Mediators), or an organization representing an association of mediators (there are corresponding contacts in the Register of Organizations).

The regulation of the possibility of reconciliation of the victim with the accused through mediation in the criminal process has raised many questions to which the legislator does not give an answer. Firstly, the role of the criminal prosecution authority in the parties' choice of a mediator is not clear from the norms of the CPC. Can the same investigator impose a specific mediator on the parties, refuse to conduct mediation by the mediator chosen by the parties, or somehow influence this choice? At first glance, no. So in accordance with Part 3 of art. 30-1 of the CPC for mediation with the aim of reconciliation, "the accused and the victim, on their own initiative and by mutual consent, choose a mediator". However, in the same norm, the legislator regulates the rule according to which the communication of the mediator with the accused, in respect of whom a preventive measure in the form of detention, house arrest, is applied, occurs with the consent of the body conducting the criminal process. At the same time, the CPC does not provide grounds for giving or refusing consent by the investigator, which creates conditions for the investigator to exert pressure on the parties in choosing a specific mediator [7].

Secondly, the legislator did not clearly answer the question whether the investigator can provide the mediator with the materials of the criminal case at his request for mediation. It seems logical that there is no such authority of the mediator in relation to all materials. The investigator must independently determine which procedural documents can be provided to the mediator and whether it is necessary to do this at all. To make such a decision, the investigator, obviously, must collect information about the identity of the mediator, as well as obtain basic knowledge about the essence of the mediation procedure itself. The investigators are currently not engaged in either of these. The resolution of this issue becomes more complicated when the materials of a criminal case contain information constituting state secrets or other secrets protected by law. Even if there is no such data

in the criminal case, then the parties to mediation (the accused and the victim) may have this kind of information. There is a need to exclude this data from the negotiation process. The mechanism for implementing this task is not spelled out in the CPC.

The presence of the accused in custody or under house arrest restricts the mediator in choosing the premises, creating the environment and other preparatory actions for mediation. And here the question arises: who will control the behavior of the accused and ensure order during mediation? If the criminal prosecution body or special law enforcement officers are allowed to be present during the mediation, then the inviolable and fundamental principle of confidentiality of the procedure itself is violated. At the same time, the security of the mediator and the parties must be ensured!

There should answers to the questions from the Belarusian legislator:

1) Is the investigator authorized to get acquainted with the results of mediation, its documentary materials, etc. if the parties fail to reach reconciliation and there is no mediation agreement? The information that an investigator can obtain from these materials is capable of meeting the requirements for evidence: relevance, admissibility, reliability, and in combination with other evidence – sufficiency to make a decision on the materials and the criminal case. Thus, the documents that formalize the mediation procedure and its results may well become a new and essential source of evidence for the proof process. If this possibility is provided for, then it is necessary to fix in the criminal Procedure law the mechanism for the seizure and attachment of these documents to the criminal case.

2) Who, in what amount and in what way will pay for the services of a mediator in criminal proceedings in the absence of funds from one of the parties (both parties), but if they wish to participate in mediation? If we draw an analogy with the participation of a defender, then Part 1 of Article 45 of the CPC regulates cases of mandatory participation of a defender in proceedings on materials and a criminal case, which also includes the declared petition of the suspect or the accused. At the same time, if the defender is not invited by the suspect, the accused, their legal representatives, as well as other persons on their behalf, the criminal prosecution authorities and the court are obliged to ensure the participation of the defender in the criminal proceedings. In these cases, the decision of the body of inquiry, the person conducting the inquiry, the investigator, the prosecutor, the judge or the court ruling on the participation of the defender are mandatory for the territorial bar association. In fact, in the described situation, the defender is provided by the territorial bar association, regardless of the possibility of the suspect, the accused to pay for his participation in the proceedings. The remuneration of a lawyer participating as a defender by appointment (without concluding a contract with the client) is made at the expense of the local budget in accordance with the procedure determined by the Council of Ministers of the Republic of Belarus. The suspect or the accused has the right to refuse a defender at any time during the proceedings on the materials or criminal case, but the refusal should not be due to the lack of funds to pay for legal assistance. Such a refusal cannot be accepted [8]. Based on these provisions, it seems logical for the state to assume the costs of paying for the services of a mediator in criminal proceedings, provided that the suspect or the accused petitions for mediation, but does not have the funds to pay for it. It is also advisable to legislate this case as mandatory for mediation. At the same time, the proposed solution to the problem involves a significant increase in State spending on criminal procedural activities. The Belarusian state can hardly afford it at the moment due to increased sanctions pressure and permanent difficulties in economic development.

3) what is the specifics of the mediator's procedural status in criminal proceedings. Law enforcement officers would like specifics on the issue of assigning the mediator to the participants of the criminal process and endowing him with the rights and obligations common to all participants in

criminal procedural activity (to file petitions, use the services of an interpreter, etc.). At the same time, it is necessary to regulate the time of the mediator's entry into and exit from the criminal process, the material and procedural grounds for the beginning and termination of it status. The question of the need to formulate additional requirements at the legislative level for a person involved in the proceedings on materials and a criminal case as a mediator (no criminal record, legal education, etc.), his procedural duties and responsibility for their non-fulfillment will not remain aside.And if all these issues are more procedural in nature, then it is impossible not to identify the conceptual points that currently hinder the active development of mediation in the criminal process of the Republic of Belarus.

Mediation cannot be a tool that will directly allow the criminal prosecution authority to increase the effectiveness of solving the tasks of the criminal process. Mediation, first of all, aims to resolve the conflict between the parties through an active search for a solution that is most beneficial to both of them. At the same time, the parties sitting down at the negotiating table are the only source of finding a compromise. They do not care about the interests of society and the state. During mediation, they move from the position of mutual claims to the position of mutual personal interests, moving away from the process of accusing the opponent of violating their rights to the procedure of finding a way out of the situation that fully satisfies both sides. Mediation allows the parties, first of all, to understand themselves, to bring to the surface the true interests of both their own and their opponent, to conduct a dialogue around these interests, distracting from events in the past and looking exclusively into the future.

The procedure of classical mediation, reflected in the Law, excludes the possibility of interference in the conflict by a state body acting "from a position of strength" and making imperative decisions. But this is the advantage of mediation. It is difficult to find an example of a conflict in which the decision of a State body would fully satisfy even one side. So, when making a decision to bring the guilty party to legal responsibility (administrative, criminal, etc.), in the vast majority of cases, the injured party remains dissatisfied with the severity of the punishment of the guilty, not fully restored the right that the guilty violated, and the other side is dissatisfied with even more factors: impunity of the first party, not taking into account the individual circumstances of the event etc. The imperative decision of the state body will not contribute to the establishment of positive relations between the parties to the conflict even after its resolution. The parties at best stop any communication, and even more often - become irreconcilable enemies with a thirst for revenge.

Criminal justice in the Republic of Belarus is carried out only by state courts, which emphasizes the public nature of the legal relations that arise, i.e. relations of power and subordination, where one of the participants in these relations is always a state body or an official of a state body (a person conducting an inquiry, an investigator, a prosecutor, a court, a judge, etc.) and this participant occupies a dominant position. position – conducts criminal proceedings. The legal relations that develop during the application of mediation are characterized by joint actions between subjects of equal status, since they are based on a contractual beginning. They arise and may cease at any stage on the basis of an agreement of the parties. All procedural issues are pre-agreed between the parties and the mediator. Thus, the subject of legal relations in the field of mediation in the considered perspective is much broader, since it is not limited to the protection of the individual, her rights, freedoms and legitimate interests, the interests of society and the state as provided by art. 7 CPC. It also includes the settlement of disagreements between the parties based on the search for a mutually acceptable compromise [8].

The method of criminal procedure law as a way of influencing the relations regulated by this branch is based on the dominance of imperative principles over dispositive ones, as well as a strictly formalized procedure of legal proceedings. Mediation methods in turn are dispositive. At the same

time, dispositivity is their defining quality. The scope of the procedural rights of the parties, which they can independently dispose of, is limited only by compliance with the basic principles of mediation and a few legislative imperatives.

Conclusion.

Thus, within the framework of this article, we have conducted a study of the current norms of the legislation of the Republic of Belarus regulating the mediation procedure in general and its features in the criminal procedure sphere. The comparison of individual elements with the relevant legislation of Kazakhstan has been carried out. In the course of the study, the problems of a normative and applied nature in this area of legal relations are exposed. According to the results of the study, the authors come to the conclusion that the introduction of mediation in the criminal process of the Republic of Belarus, as well as most countries of the post-Soviet space, is seen as a progressive step towards expanding the dispositive principles of criminal procedural activity. However, the existence of a number of conceptual contradictions in the legal nature of the criminal process and mediation, as well as procedural problems of the implementation of the institution of mediation enshrined in the CPC as one of the ways to reconcile the victim and the accused, do not allow for the integration of mediation into criminal procedural activities more deeply and intensively. In our opinion, it is necessary for legislators and law enforcement officers, first of all, to determine the most progressive directions of such integration and gradually expand it, improving legislation and law enforcement practice as the law enforcement system and the whole society develop and are ready for these reforms. Taking into account these recommendations will make it possible to intensify the use of mediation in criminal proceedings, expand the cases of its use and avoid insurmountable barriers in this direction.

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МЕДИАЦИЯ ҚЫЛМЫСТЫҚ ПРОЦЕСТЕ ДИСПОЗИТИВТІ БАСТАМАЛАРДЫ КЕҢЕЙТУ ҚҰРАЛЫ РЕТІНДЕ

Аңдатпа.

Мақалада салыстыру, ғылыми талдау, синтез, сәйкестендіру және т.б. әдістерін қолдана отырып, медиация институты дауларды шешудің ең прогрессивті балама әдістерінің бірі ретінде зерттеледі. Авторлар Беларусь Республикасының құқық қолдану практикасының әртүрлі салаларына медиацияны енгізуді өзектендіреді, медиацияны қылмыстық іс жүргізу қызметімен интеграциялау мүмкіндігі мен орындылығына баса назар аударады. Беларусь Республикасының «Медиация туралы» Заңының жекелеген ережелері және қылмыстық процесте медиацияны пайдалануды реттейтін Беларусь Республикасының Қылмыстық іс жүргізу кодексінің жекелеген нормалары егжей-тегжейлі талдаудан өтеді. Сонымен қатар, салыстыру ретінде Қазақстанның ұқсас

заңнамасы зерттеледі, оның қалыптасуының жекелеген прогрессивті жақтары белгіленеді. Авторлар 2021 жылы Беларусь Республикасының қылмыстық іс жүргізу заңнамасында енгізілген прогрессивті өзгерістерді тиісті түрде жүзеге асыруға мүмкіндік бермейтін бірқатар нормативтік және құқық қолдану мәселелерін ашады. Жеке мәселелер тақырыптың мәнін терең талдай отырып, кеңейтілген түрде беріледі. Қорытындыда Беларусь Республикасының қылмыстық іс жүргізу саласындағы медиацияны одан әрі дамыту туралы өзінің көзқарасы тұжырымдамалық түрде баяндалады және кейбір кедергілерді жою бойынша ұсыныстар тұжырымдалады. Авторлар көтерілген проблемалық мәселелердің әмбебаптығына, олардың посткеңестік кеңістіктегі көптеген елдердің тиісті заңнамасында бар екендігіне баса назар аударады.

Негізгі сөздер: медиация, айыпталушы, жәбірленуші, диспозитивті бастамалар, тергеуші, қылмыстық іс.

МЕДИАЦИЯ КАК ИНСТРУМЕНТ РАСШИРЕНИЯ ДИСПОЗИТИВНЫХ НАЧАЛ В УГОЛОВНОМ ПРОЦЕССЕ

Аннотация.

В статье при помощи методов сравнения, научного анализа, синтеза, сопоставления и др. подвергается исследованию институт медиации как один из наиболее прогрессивных альтернативных способов разрешения споров. Авторами актуализируется внедрение медиации в различные сферы правоприменительной практики Республики Беларусь, делается акцент на возможности и целесообразности интеграции медиации с уголовно-процессуальной деятельностью. Детальному анализу подвергаются отдельные положения Закона Республики Беларусь «О медиации» и отдельные нормы Уголовно-процессуального кодекса Республики Беларусь, регламентирующие использование медиации в уголовном процессе. Параллельно, в качестве сравнения, исследуется аналогичное законодательство Казахстана, обозначаются отдельные прогрессивные стороны его формирования. Авторами обнажается ряд проблем нормативного и правоприменительного характера, не позволяющих должным образом реализовать внесенные в 2021 году уголовно-процессуальное законодательство Республики Беларусь прогрессивные изменения. Отдельные проблемы подаются в развернутом виде с глубоким анализом сути проблематики. В заключении концептуально излагается собственное видение дальнейшего развития медиации в уголовно-процессуальной сфере Республики Беларусь и формулируются предложения по нивелированию некоторых барьеров. Авторами подчеркивается универсальность поднятых проблемных вопросов, их существование в соответствующем законодательстве большинства стран постсоветского пространства.

Ключевые слова: медиация, обвиняемый, потерпевший, диспозитивные начала, следователь, уголовное дело.

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Information about authors:

Sergey Rybak – PhD, associate professor, mediator, head of the Department of “Criminal law and process” of the educational Institution BIP – University of Law and Socio-Information Technologies, Minsk, Republic of Belarus

E-mail: siarheirybak2022@gmail.com

ORCID: https://orcid.org/0000-0002-3883-775X
Nataliya Kukharenko – **corresponding author,** senior lecturer of the Department of "Youth policy and socio-cultural communications" of the state educational institution Republican institute of higher education, Minsk, Republic of Belarus
E-mail: natalia.drozd@tut.by
ORCID: https://orcid.org/0000-0001-5018-2103

Информация об авторах:

Сергей Рыбак – кандидат юридических наук, доцент, медиатор, заведующий кафедрой «Уголовного права и процесса» Учреждения образования БИП – Университет права и социально-информационных технологий, г. Минск, Республика Беларусь
E-mail: siarheirybak2022@gmail.com
ORCID: https://orcid.org/0000-0002-3883-775X
Наталия Кухаренко – **основной автор,** старший преподаватель кафедры «Молодежной политики и социокультурных коммуникаций» государственного учреждения образования Республиканский институт высшей школы, г. Минск, Республика Беларусь
E-mail: natalia.drozd@tut.by
ORCID: https://orcid.org/0000-0001-5018-2103

Авторлар туралы ақпарат:

Сергей Рыбак – заң ғылымдарының кандидаты, доцент, медиатор, БИП – құқық және әлеуметтік-ақпараттық технологиялар университеті, білім беру мекемесінің «Қылмыстық құқық және процесс» кафедрасының меңгерушісі, Минск қ., Беларусь Республикасы
E-mail: siarheirybak2022@gmail.com
ORCID: https://orcid.org/0000-0002-3883-775X
Наталья Кухаренко – **негізгі автор,** Республикалық жоғары мектеп институты мемлекеттік білім беру мекемесінің «Жастар саясаты және әлеуметтік-мәдени коммуникациялар» кафедрасының аға оқытушысы, Минск қ., Беларусь Республикасы
E-mail: natalia.drozd@tut.by
Orcid https://orcid.org/0000-0001-5018-2103

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А.У. Турдалиев*

Атырау инжинерлік-гуманитарлық институты
Атырау қ., 060011, Қазақстан Республикасы
*e-mail: adilbek_1963@mail.ru

АНТИКАЛЫҚ ГРЕЦИЯ ЖӘНЕ РИМ МЕМЛЕКЕТТЕРІНДЕГІ СОТ РИТОРИКАСЫНЫҢ ДАМУЫ

Аңдатпа.

Мақала антикалық Греция және Рим мемлекеттеріндегі сот риторикасының дамуы мәселелері қарастырылған. Ежелгі Антикалық заманда Греция және Рим мемлекетерінде сот риторикасы сот процедурасының маңызды дербес және қажетті элементі ретінде қарастырылды. Сот процесі ашық және жарыспалы нысанында өтуі айтылады. Антикалық Греция және Рим мемлекеттеріндегі риториктерді және олардың сот саласындағы қызметі мен шешендік қырлары жан-жақты зерттелді. Антикалық Грецияда сот процестері арқылы сот риторикасы дамыған. Оны мақала жазу барысындағы Антикалық Грецияда соттың іс жүргізу бірнеше кезеңдерден тұратындығынан көреміз, яғни айыптау шағымын жариялау, тараптарды тындау,