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REGULATION OF THE INSTITUTE OF PRIVATE PROSECUTION IN THE LEGISLATION OF SOME ASIAN COUNTRIES

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ABSTRACT

The article comparatively analyzes the norms of the criminal procedure legislation of some Asian countries related to the procedure and features of private prosecution cases and sets out recommendations for improving the institution of private prosecution in the domestic criminal process.

KEYWORDS

Criminal procedure law, private prosecution, reconciliation, victim, features of the application of the institute of private prosecution, refusal to initiate criminal proceedings, termination of criminal proceedings, improvement of the institute of private prosecution.

INTRODUCTION

Dispositivity in criminal proceedings, including the essence of the institution of private prosecution, the procedure for its application and understanding of its specific aspects, as well as the study of positive experience of foreign countries in this regard for further improvement, serve to achieve effective

results. At the same time, studying the positive or negative aspects of the experience of countries that have recently or for many years used the institute of private prosecution, allows us to successfully introduce positive practices into national legislation without repeating the mistakes made there.

Many Asian countries also have a continental legal system. For example, China, South Korea, and Japan have adopted their criminal and criminal procedure laws based on French legislation and the legislation of other European countries that have taken a model from it¹.

The main sources of criminal procedure law of the People's Republic of China are the Constitution of the People's Republic of China of December 4, 1982, the Criminal Code of July 1, 1979 (as amended on March 14, 1997) and the Criminal Procedure Codes of July 1, 1997 (as amended on March 17, 1996)². The Chinese criminal process also consists of pre-trial proceedings, the trial stage, and the execution of the sentence. Pre-trial proceedings consist of the initiation of a criminal case, a preliminary investigation, and the presentation of charges. A special procedure for conducting private prosecution cases at trial stages is regulated (articles 170-173 of the Code of Criminal Procedure). According to it, the cases of private prosecution include: 1) cases that are considered only on complaints received, that is, cases related to crimes provided for in articles 246, 257 (Part 1), 260-1, 270 of the Criminal Code of China; 2) cases where the victim has evidence of a minor crime;

3) cases where the victim has evidence indicating that the defendant should be brought to criminal responsibility in accordance with the law, that is, his actions threatened the personal or property rights of the victim, while the public security body or the prosecutor's office did not conduct an investigation³.

The public insult specified in the articles of the Criminal Code of the People's Republic of China (Article 246), infringement of a citizen's right to freedom of marriage (Article 257-1), ill-treatment of family members if it entailed grave consequences (Article 260, Part 1), the crime of illegal possession of property transferred for storage or forgotten (Article 270), may entail responsibility only based on the victim's statement⁴.

According to Chinese law, in cases of private prosecution, the victim can file a complaint with the public security agency, the People's Prosecutor's Office or the court. If the victim's complaint is accepted by the public security body, the prosecutor's office and a criminal case is initiated in a general manner, an investigation is conducted, charges are brought based on its results and the case is sent to court. If the public security body, the prosecutor's office has not

¹ Criminal law of foreign countries. General part: textbook for undergraduate and graduate studies / Edited by A.V.Naumov, A.G.Kibalnik. – M.: Yurayt Publishing House, 2018. – pp.14-15; https://ru.qwe.wiki/wiki/Criminal_justice_system_of_Japan; Mishina E.A. Reform of the justice system in Japan // Law. Journal of the Higher School of Economics. –2011. №3. [Electronic resource]. Access mode: <https://cyberleninka.ru/article/n/reforma-sistemy-pravosudiya-v-yaponii> (Accessed June 29, 2020).

² Course Completed process / under order. Prof. L.V. Golovko. - 2nd ed. - M.: Statute, 2017. - S.208-210. [Electronic resource]. (Accessed June 29, 2020). Access mode: http://www.consultant.ru/edu/student/download_books/book/golovko_kurs_ugolovnogo_processa

³ Criminal Procedure Code of the PRC (adopted on July 1, 1979 at the 2nd session of the Assembly of people's representatives

of the fifth convocation, on March 17, 1996 with amendments to the decree on the introduction of amendments to the "Criminal Procedure Code of the PRC" adopted at the 4th session of the Assembly of people's representatives of the eighth convocation [Electronic resource]. Access mode: https://chinalawinfo.ru/procedural_law/law_criminal_procedure/ (Accessed June 29, 2020).

⁴ The Criminal Code of the PRC (adopted on July 1, 1979 at the 2nd session of the Assembly of people's representatives of the fifth convocation, on March 14, 1997 with amendments made in accordance with the decision made at the 5th Session of the Assembly of people's representatives of the eighth convocation) [Electronic resource]. Access mode: <https://asia-business.ru/law/law1/criminalcode/> (Accessed June 29, 2020).

investigated on the complaint of the victim, the victim has the right to apply directly to the court.

The court gets acquainted with the case of the private prosecution and proceeds to the trial, if the actual circumstances of the crime have been clarified, if the evidence available in the case is sufficient, if the evidence in the case of the private prosecution is insufficient and the victim cannot provide additional evidence, it invites the person who filed the complaint to withdraw his complaint or makes a ruling on refusal to satisfy the complaint. If the person who filed a private complaint fails to appear in court twice without valid reasons on summons in accordance with the law or withdraws from the courtroom without court permission, consideration of the complaint is canceled. During the trial, if some evidence causes doubt in the judge, a break is announced, and they can be investigated.

In cases of private prosecution, the court may take measures to reconcile the parties. The victim has the right to reconcile with the defendant or withdraw his complaint before sentencing. Reconciliation is not allowed if the victim has evidence that the defendant is subject to criminal prosecution in accordance with the law, that is, that his actions threatened the personal or property rights of the victim, as well as in cases where the public security body or the public prosecutor's office did not investigate (Part 3 of Article 170 of the CPC). In cases of private prosecution, the accused may file a counterstatement. This counter-statement will also be considered in the order of consideration of cases of private prosecution⁵.

China's criminal procedure legislation also provides for simplified judicial procedures. According to it, the

People's Court may apply a simplified review procedure, which is carried out by one judge alone in the following cases: 1) in cases initiated by the state prosecution, in which a person, in accordance with the law, may be sentenced to imprisonment for up to three years, arrest, supervision, fine, with clarity of factual circumstances, completeness of evidence and when the People's Prosecutor's Office proposes or agrees to apply a simplified procedure for consideration; 2) in cases that are being considered only by application; 3) in minor criminal cases in which the victim has evidence indicating the commission of a crime.

In simplified proceedings, the judge must complete the examination within 20 days from the date of receipt of the case in court. If it is established that it is impossible to consider the case in a simplified manner, the court re-examines the case in accordance with the established procedure.

The sources of South Korean criminal procedure law include the Constitution of the Republic of Korea of July 17, 1948 (as amended on October 29, 1987), the Criminal Code and the Criminal Procedure Code of September 18, 1953, and other laws. Korean criminal proceedings also consist of pre-trial proceedings and court proceedings. In pre-trial proceedings, there are processes before and after the initiation of a criminal case against a person. Criminal prosecution is initiated by the prosecutor, because of which the person is charged and acquires the status of the accused. After the indictment, the case is transferred to the court and preparations for the trial begin.

According to Korean law, for the crimes of "Disclosure of facts discrediting the name of the deceased" (Article 308 of the Criminal Code), "Slander" (Article 311),

⁵Same source. 171-173 articles.

"Disclosure of secrets" (Article 316), "Disclosure of secrets of other persons known in professional activities" (Article 317), criminal prosecution is carried out only if there is a complaint. For crimes related to the disclosure of facts discrediting the name of another person (Article 307 of the Criminal Code) and the disclosure of facts discrediting the name of another person (Article 309), criminal prosecution cannot be initiated if the victim objects. Resistance to the use of a person's rights (Article 323), theft, unauthorized use of someone else's transport (Articles 329-332), fraud and extortion (Articles 347-352), misappropriation of property by abuse of trust (Articles 355-360), theft of looted property (Articles 362-364) crimes if they are committed against close relatives of the accused, spouse, family members families, cohabiting relatives and their spouses, a person is not held liable, and when committing against other relatives – criminal prosecution can be carried out only if there is a complaint from the victim⁶.

Korean law also provides for a simplified judicial procedure. Cases in which a fine (recovery of money) may be imposed, as well as penalties in the form of confiscation applied at the request of the prosecutor, may be considered in a simplified manner⁷.

The main sources of Japanese criminal procedure legislation are the Constitution of Japan of May 3, 1947,

the Criminal Code of Japan of April 24, 1907 (currently amended on May 12, 1995⁸) and the Criminal Procedure Code of July 10, 1948⁹. Although the Japanese Criminal Procedure Code was developed based on the European continental legal system, it also includes positive aspects of Anglo-American law. Limitations on the admissibility of certain evidence, such as the system of contesting in court proceedings. Accordingly, the current Criminal Procedure Code of Japan can be characterized as a hybrid of continental and Anglo-Saxon legal systems¹⁰.

According to Japanese law, "Violation of the secrecy of correspondence" (Article 133 of the Criminal Code), "Disclosure of secrets" (Article 134), committing obscene acts with the use of force (Article 176), slander (Article 177)), committing obscene acts and actions equivalent to rape (Article 178) and attempted (179), causing bodily injury by negligence (Article 209), crimes related to kidnapping (Article 224, Article 225, part 1, 3 of Article 227) if they are not committed with malicious intent, crimes against honor (Article 230, Article 230-2, Article 231) theft between relatives (If committed by close (direct) relatives, spouse, cohabitant, they are not held accountable by Article 235), damage to personal documents (Article 259), damage to equipment (Article 261) and concealment of correspondence (Article 263) crimes are considered only on the basis of the victim's statement¹¹.

⁶ Same source 174-179 articles.

⁷ Criminal Code of the Republic of Korea with amendments and additions until February 6, 2020 [Electronic resource]. Access mode: <https://vseokoree.com/vse-o-koree/zakony-i-normativnye-pravovye-akty/ugolovnyj-kodeks-respubliki-koreya/> (Accessed June 29, 2020).

⁸ Legal Proceedings in South Korea [Electronic resource]. Access mode: <https://vseokoree.com/zhizn-v-koree/sudebnye-protsessy/sudoproizvodstvo-v-yuzhnojkoree-2> (Accessed June 29, 2020).

⁹ Criminal Law of Japan (with amendments and additions until January 7, 2018) [Electronic resource]. Access mode: <https://constitutions.ru/?p=407> (Accessed June 29, 2020).

¹⁰ Criminal Procedural Law of Japan (with amendments and additions until May 8, 2006) [Electronic resource]. Access mode: <https://www.oecd.org/site/adboecdanti-corruptioninitiative/46814489.pdf> (Accessed June 29, 2020).

¹¹ Mishina E.A. Reform of the justice system in Japan // Law. Journal of the Higher School of Economics. –2011. №3. [Electronic resource]. Access mode:

Articles 230-246 of the Criminal Procedure Code of Japan describe who can file a complaint in cases of private prosecution, the procedure for filing a complaint, the procedure for withdrawing a complaint and its consequences. Complaints about crimes initiated based on an application will not be accepted for production after six months after the commission of a crime against the victim and the identification of the person who committed it. However, these provisions do not apply to crimes committed against official representatives of foreign States provided for in articles 176-178, 225 and parts 1, 3 of Article 227 of the Criminal Code of Japan¹². At the same time, it is noted that the complaint can be withdrawn before a criminal case is initiated, and such a person will be deprived of the right to re-appeal for the same situation. It is established that representatives of legal entities can file a complaint, and complaints about private charges are submitted to the prosecutor or bailiff. A judicial police officer investigates and, if there are sufficient grounds, transfers the case to the prosecutor. The prosecutor may initiate criminal prosecution or refuse to initiate it after reviewing the case materials. After the initiation of criminal prosecution, the case is transferred to the court.

Japan also has an expedited judicial procedure. It may be considered cases of crimes punishable by imprisonment for up to one year¹³.

The criminal process in many Muslim countries is also based on the French legal system. At the same time, there are some features that have been formed under the influence of Sharia norms. Among Muslim

countries in Saudi Arabia and Iran, criminal proceedings are most consistent with sharia. But recently, elements of the European criminal process have been introduced in these countries as well. Given the widespread use of the institution of private prosecution in Sharia law, at this stage it is advisable to analyze the criminal procedure legislation of these countries.

The main sources of Saudi Arabia's criminal procedure law are the Holy Quran, Sunnah, Sharia, and the Basic Provision on the Government of March 1, 1992, as well as the Criminal Procedure Law of October 16, 2001, which is in force to ensure the implementation of the Holy Quran, Sunnah, Sharia, and the Basic Provision on the Government. Criminal Procedure (promulgated by Royal Decree No. M/39 of 28 Rajab 1422 (16 October 2001)), adopted on October 16, 2001, and promulgated on November 3, 2001, consists of article 225. The first article of this law states that "Judges are obliged to apply the principles (requirements) of Sharia law in the same way as they are contained in the Holy Quran and the Sunnah, when resolving cases submitted to them for consideration. They must also apply the laws established by the State in such a way that it does not contradict the Holy Quran and the Sunnah and comply with the rules established in accordance with this law". Article 3 states that "a person may not be subjected to any punishment, except in cases when he is found guilty of committing an act prohibited and punishable by the principles of Sharia or the laws of the State, rendered as a result of a court hearing held in accordance with the provisions of Sharia and a decision that has entered into legal force"¹⁴. Other provisions

<https://cyberleninka.ru/article/n/reforma-sistemy-pravosudiya-v-yaponii> (Accessed June 29, 2020).

¹² Criminal Law of Japan (with amendments and additions until January 7, 2018) [Electronic resource]. Access mode: <https://constitutions.ru/?p=407> (Accessed June 29, 2020).

¹³ Criminal Procedural Law of Japan (with amendments and additions until May 8, 2006) [Electronic resource]. Access mode: <https://www.oecd.org/site/adboecdanti-corruptioninitiative/46814489.pdf> (Accessed June 29, 2020).

¹⁴ Same source.

of this law also contain provisions of universal content. Saudi Arabia has introduced a criminal process like the French model of criminal procedure. In Saudi Arabia, for example, there are stages of pre-trial and judicial proceedings. If pre-trial proceedings consist of the initiation of a criminal case and a preliminary investigation, then the judicial stages consist of submission to the court, trial, proceedings in the appellate instance, proceedings related to the review of court decisions and the execution of the sentence¹⁵.

In particular, the direction of the indictment, drawn up by representatives of the Bureau of Investigation and the Prosecutor's Office implementing public prosecution (interest), the rules on serious crimes applied to publicly committed crimes, the rules on evidence, the rules on preventive measures and other norms, from the point of view of legal technology do not differ significantly from the norms of legislation of other countries¹⁶. According to the principles of Sharia in Saudi Arabia, the procedure for criminal prosecution is different, that is, private, private-public, and public, based on the classification of the system of crime and punishment in Muslim law (kasas, ta'zir, hadd). In Saudi Arabia, a private prosecution is based on a victim's complaint. The victim has a wide range of rights in

criminal prosecution, including the right to participate in all investigative actions, and the forgiveness of the accused by the victim is the basis for the termination of the case. In private-public cases, criminal prosecution is initiated only based on the victim's complaint, but the victim's forgiveness cannot be the basis for the termination of the case¹⁷.

Saudi Arabia also has a simplified procedure for legal proceedings. The absence of the Prosecutor's Office as an independent body of criminal prosecution in Saudi Arabia also contributes to the conduct of a simplified trial. Such proceedings may be applied only in relation to criminal cases in which a punishment in the form of a taser is applied. In this case, if the accused pleads guilty, the court issues a verdict without examining the evidence, even if the accused does not appear in court, the verdict may be pronounced after the case has been considered¹⁸.

Iran, like other neighboring countries, has developed its own criminal procedure code based on the model of French criminal procedure law. The first CPC of Iran was adopted in 1912. After the events of 1979, purely Muslim criminal procedural norms were introduced in Iran, as a result of which the prosecutor's office and

¹⁵ Saudi Arabia Law of Criminal Procedure (promulgated by Royal Decree No. M/39 of 28 Rajab 1422 (16 October 2001): (Saudi Arabia Law of Criminal Procedure) [Electronic resource]. Access mode: <https://wipolex.wipo.int/en/text/498395/> (Accessed June 29, 2020).

¹⁶ Husenova P.A. Islamic criminal procedure: religious and legal nature and characteristic features (on the example of the Islamic Republic of Iran and the Kingdom of Saudi Arabia): Diss. ... cand. of law sciences. – St. Petersburg, 2016. – pp.120-121. [Electronic resource]. Access mode: <https://www.dissercat.com/content/islamskii-ugolovnyi-protsess-religiozno-pravovaya-priroda-i-kharakternye-cherty-na-primere> (Accessed June 29, 2020).

¹⁷ The course of the criminal process / Edited by prof. L.V. Golovko. – 2nd ed., – M.: Statute, 2017. – pp.221-222. [Electronic resource]. Access mode: http://www.consultant.ru/edu/student/download_books/book/golovko_kurs_ugolovnogo_processa/ <https://pravo163.ru/osnovnye-modeli-ugolovnogo-processa-i-sovremennaya-ugolovno-processualnaya-karta-mira/> (Accessed June 29, 2020).

¹⁸ Saudi Arabia Law of Criminal Procedure (promulgated by Royal Decree No. M/39 of 28 Rajab 1422 (16 October 2001): (Саудия Арабистонининг Жиноят-процессуал қонуни) [Electronic resource]. Access mode: <https://wipolex.wipo.int/en/text/498395/> (Accessed: 02.07.2020)

the courts of general jurisdiction were abolished. After some time, the old order was reintroduced, and in 1982 the courts of general jurisdiction were reorganized. Since then, the general courts and the Revolutionary Tribunal have simultaneously functioned as courts dealing with criminal cases. In 1999, a new Iranian CPC was adopted. In 2002, the Prosecutor's Office was restored. In the Criminal Procedure Code of Iran, crimes are divided into three, respectively, and the procedure is different: 1) crimes punishable under Muslim law (Sharia) – public prosecution (prosecution) is carried out; 2) crimes against public interests and public order – public-private prosecution is carried out; 3) crimes violating the individual rights of individuals and legal entities – private prosecution is carried out¹⁹.

The peculiarity of the Iranian criminal process is that pre-trial proceedings are carried out under the control of the courts. Conducting a preliminary investigation is considered to be the responsibility of the chairman of the courts, who can carry out all activities personally or entrust the investigation to their assistants or the investigating judge. After the reorganization, the Prosecutor's office was completely subordinated to the judicial authorities. In the new Code of Criminal Procedure adopted in Iran in February 2014 and which came into force in June 2015, the structure of the current criminal process has not been seriously changed, but the former position of the prosecutor's office has been restored, the rights of the accused have been strengthened. Thanks to this, the criminal

process of Iran has become closer to the criminal process of Europe and other countries.

According to article 3 of the Criminal Procedure Code of Iran, cases of private and public-private prosecution are investigated on the initiative of an individual or legal entity. In cases of public-private prosecution, if the investigation is conducted only on the claim of individuals or legal entities, the case is not terminated even if the plaintiff (victim) forgives the defendant (accused). In cases of private prosecution, the forgiveness of the accused by the victims is the basis for the termination of the case. If the victim forgives the accused after sentencing, the punishment will not be carried out.

The criminal process of Iran, as in France, consists of the stages of inquiry, investigation and trial. In cases of private prosecution, the application is submitted directly to the court without an inquiry. The court is obliged to accept the application and begin an investigation. In general, there is no specific procedure for conducting cases related to private prosecution in Iran, although this category of cases is conducted according to the general procedure, the victim who filed the complaint has broad procedural rights. For example, he can submit the information he has collected, withdraw his claim at any stage of the proceedings or pardon the accused. In these cases, the production is terminated²⁰.

¹⁹ Husenova P.A. Islamic criminal procedure: religious and legal nature and characteristic features (on the example of the Islamic Republic of Iran and the Kingdom of Saudi Arabia): Diss. ... cand. of law sciences. – St. Petersburg, 2016. – pp.120-121. [Electronic resource]. Access mode: [https://www.dissercat.com/content/islamskii-ugolovnyi-](https://www.dissercat.com/content/islamskii-ugolovnyi-protsess-religiozno-pravovaya-priroda-i-kharakternye-cherty-na-primere)

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²⁰ Criminal Procedure Code of the Islamic Republic of Iran [Electronic resource]. Access mode: <https://www.dissercat.com/content/islamskii-ugolovnyi-protsess-religiozno-pravovaya-priroda-i-kharakternye-cherty-na-primere> (Accessed: 02.07.2020)

In general, the study of various experiences allows you to think about a particular issue in a comprehensive way, and then draw a conclusion. According to the analysis of the norms concerning the regulation of the institution of private prosecution in the legislation of the countries discussed above, it can be said that the institution of private prosecution is effectively used in these countries. And some of their positive aspects will be appropriately reflected in national legislation.

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