



## MMEDIATION IN CRIMINAL CASES: COMPARATIVE LEGAL ANALYSIS

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**Abstract.** *The article is devoted to the comparative analysis of mediation in criminal cases in particular countries. The article analyzes the approaches of researchers to the understanding of mediation in criminal cases and restorative justice. The international standards in the field of mediation in criminal cases and restorative justice, which are applied by states and implemented in national legislation, are considered. It has been studied that mediation is a form of restorative justice. It was found that in most countries, mediation in criminal cases was introduced through the implementation of pilot projects, and over time, relevant laws on mediation were adopted or legislation was amended. The current state of development of mediation as a restorative justice in Ukraine is analyzed.*

**Keywords:** *mediation, restorative justice, mediation in criminal cases, victim-offender mediation*

*K10, K19, K49, D74*

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### Introduction

In European countries, such an alternative way of resolving disputes as mediation is becoming more and more developed, somewhere it is already quite developed, improved, and somewhere it is only developing. If we talk about civil, family, labor disputes, the approach to this phenomenon is more or less unambiguous in most countries. However, the issue of mediation in criminal cases deserves attention and is more problematic, as the understanding of this phenomenon is ambiguous. There are different concepts in the literature; mediation in criminal cases, mediation between the victim and the offender, criminal mediation, victim-offender mediation, mediation in penal matters etc. In addition, there are different views on the understanding of mediation. In our study, we will focus on mediation as a form of restorative justice, without distinguishing between these categories.

Mediation consider as a form of restorative justice that emerged in the late 1970s in Canada, the United States, and Europe in the early 1980s. It has become especially active in the field of justice for juveniles. The United Kingdom was the first European country to initiate such a form of restorative justice as mediation. To one degree or another, mediation in criminal cases exists in a large number of countries. In Belgium, Germany, Norway, Finland, Great Britain, France, Switzerland, and Austria, it functions as an effective component of the criminal process, which is enshrined in the national legislation of these countries. Relatively recently, mediation has found its normative consolidation in Italy, Sweden, Denmark, the Netherlands,

and Spain. Mediation as a form of restorative justice and a component of the criminal process was introduced by the countries of Central and Eastern Europe. This institution was enshrined, for example, in the legislation of the Czech Republic, Poland, Slovenia, Hungary, Romania, and Moldova [1, pp.373-374].

### Theoretical Basis

Tony Marshall regards restorative justice as a process in which the parties to a crime decide how to deal with the consequences of the crime and its consequences for the future [2, p.5]. Victim mediation is one of the most well-known and widespread modern rehabilitation programs. In its typical form, it combines the victim and the person who committed a criminal offense, who uses a trained mediator to coordinate the meeting. Both parties express their views and the mediator helps to consider their choices in order to choose the right one [3, p.31].

According to Zehr, both mediation programs and many restorative justice programs are designed around the possibility of meeting or meeting between victims, offenders, and possibly members of the community. He believes that first and foremost, restorative justice is an invitation to engage in dialogue so that everyone can support and learn from each other. It is a reminder that people are all truly interconnected [4]. Niels Christie has made an important contribution to the development of conflict resolution, restorative justice. He believes that the ability to resolve conflicts is not only a right practically usurped by the justice system today, but also an urgent need of both the parties to the conflict



and the community as a whole, as it allows to form an idea not only of order and morality. sensory understanding of what is good and what is not [5, pp.1–15]. According to V. Zemlyanska, mediation between victims and offenders is mainly aimed at achieving reconciliation through dialogue, emphasizing the restoration of the proper emotional and physical condition of the victim, the responsibility of the offender and compensation [6, p.28].

According to Anna Mestitz, mediation of victims of crime, is a very old strategy adopted in tribal or rural societies to resolve conflicts, compensate for damage and restore social peace. Technically, in the “mediation continuum”, the mediator is the ancestor of the judge [7].

Victim-offender mediation “allow for victims’ voices to be heard and for their humanity and worth to be recognized and realized by the offender and within the legal system and community, which serves to heal the trauma of the initial victimization” [8, pp. 1-5].

### **Aims**

Works have been devoted to the study of mediation in criminal cases and have been the subject of research by a large cohort of scientists. However, many aspects prevail debatable and need further research. Therefore, the aim of the article is to analyze mediation as a form of restorative justice, a comparative analysis of the institution of mediation in criminal cases in separate countries.

### **Results**

Mediation in criminal cases in Europe appeared in the 1980s. However, at first it developed slowly, despite the fact that the experiments were positive for victims and offenders. This approach was completely new for culture, so it took more than one year to develop it in the countries. But over time, mediation programs in criminal cases began to develop and became a good practice. In some countries, volunteers play a significant role, and in some countries there are high requirements for mediators in criminal cases. Until now, in some European countries, mediation in criminal cases is used between the victim and the juvenile offender, less often between the victim and the adult offender. However, the experience of mediation in criminal cases is growing [9].

In the late 1990s, criminal mediation reached a new level of development, as international organizations began to further promote criminal

mediation. One of the fundamental international acts in the field of mediation became Recommendation NR (99) 19 of the Committee of Ministers of the Council of Europe to member States concerning mediation in penal matters, adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers’ Deputies. This document considers mediation in criminal matters as flexible, comprehensive, aimed at solving the problems of supplementation, or as an alternative to traditional litigation [10].

Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters CEPEJ (2007) 13, approved by the European Commission for the Efficiency of Justice (CEPEJ) on 7 December 2007. According to this document judges, prosecutors and other criminal justice authorities play an important role in the development of mediation. They should be able to provide information, conduct special information activities on mediation and, where possible, invite victims and/or offenders to use mediation and/or refer cases to mediation. Member States are encouraged to establish and/or strengthen cooperation between criminal justice authorities and mediation services in order to better cover victims and offenders with mediation services. Mediation requires the free and conscious consent of both victims and offenders, and should never be used if there is a risk that mediation will put one party at a disadvantage. Not only the potential benefits but also the potential risks of mediation for both parties, in particular the victim, must be duly taken into account [11].

As stated in the Recommendation CM/Rec (2018)8 of the Committee of Ministers to member States concerning restorative justice in criminal matters, adopted by the Committee of Ministers on 3 October 2018 at the 1326th meeting of the Ministers’ Deputies “restorative justice may be referred to as victim-offender mediation, penal mediation, restorative conferencing, family group conferencing, sentencing circles or peacemaking circles, inter alia”. Restorative justice is a form of dialogue between the victim and the offender. This Recommendation enshrines the principles of restorative justice, which are similar to the principles of mediation. Restorative justice ensures neutrality, does not promote the interests of the victim or the offender, in order to keep the parties as satisfied as



possible. The recommendations also highlight such principles as: voluntariness, respect for dialogue, equal care for the needs and interests of each party, an agreement based on consensus. Discussions in restorative justice should be confidential. However, there is an exception: except with the agreement of the parties concerned [12].

According to the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) “mediation in criminal cases” shall be understood as the search, prior to or during criminal proceedings, for a negotiated solution between the victim and the author of the offence, mediated by a competent person. Article 10 of this Decision specifies that each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account” [13].

Recovery procedures can be applied at any stage of the criminal process. There is an opinion that the lower the stages of the criminal process, the more the case will be referred to mediation, the more likely it is that it will be resolved sooner. Mediation can be used in the following stages: regardless of the criminal justice system, when referred by the prosecutor's office or the police at the pre-trial stage or by a judge before the trial on the merits, in parallel with the prosecution, after conviction and before execution as part of or in addition to punishment not related to imprisonment [14, p.21].

The first mediation in criminal cases and compensation service for damages and offenders in the Western Hemisphere took place in Kitchener, Ontario, Canada in May 1974. The Mennonite probation service took two young men to apologize to the 22 victims whose homes they despoiled. This idea has been widely used in Canada and the United States, which has led to several reconciliation programs for victims and offenders.

In the UK, the number of mediator services began to grow in the 1990s, resulting in a cessation of the growth in the number of victims and offenders. Mediation in criminal cases is not part of the criminal justice system [15, p. 37,46]. One of the main reasons for the emergence of mediation

was the desire to fully involve the victim in solving criminal legal conflicts, because in the traditional system of criminal justice it is almost completely eliminated from the active participation in the process and his opinion is almost not taken into account when making criminal proceedings, including those which are related to compensation for damage and elimination damage [16, pp.61-71].

Mediation in criminal cases in Germany is an alternative to criminal prosecution. The goal of the victim-mediation program is to emphasize the process of dispute resolution and reconciliation, as well as to see restitution and compensation to the victim as a (symbolic) end to the conflict resolution process. Unlike restitution schemes, such a program has broader goals, making the mediation process itself as important as any concrete outcome. For juvenile offenders, the court may order mediation as part of educational measures. In the case of a successful resolution of a case of a minor crime committed by a juvenile, such a criminal case may be closed. The importance is that mediation between a juvenile offender and a victim can be conducted in the case of a crime of any gravity, even serious crimes. Instead, mediation between an adult offender and a victim can only take place if the crime is minor or moderate [17, p.28].

As for Poland, mediation was formally introduced into the Polish criminal system in 1997. The Polish Mediation Center is currently a key non-governmental organization in the field of mediation, restorative justice in Poland. Initially, mediation was conducted only at the stage of preparatory court proceedings within the stage of preliminary consideration of the case by the court. Every year the number of criminal cases referred to mediation increased. And already in 2003, the Code of Criminal Procedure was supplemented by an article that allowed mediation at each stage of a criminal case.

In France, the practice of using mediation in criminal cases is not standardized nationwide. There are two types of mediation by the subject of its conduct: “judicial” mediation (mediation retenue), according to which the prosecutor independently tries to take real measures to reconcile the parties without the help of third parties and “delegated” mediation (delegate mediation), according to which the prosecutor does not reconcile the parties independently, but only initiates the rel-



evant decision, delegating authority to a specially designated for this purpose competent person who provides such services. In France, there are no restrictions on mediation, so it can be applied to any case, regardless of the severity of the offense.

In Latvia, victim-offender mediation in criminal cases is regulated under the Criminal Procedure Law and State Probation Service Law. Mediation of the victim-offender in criminal cases is carried out by the State Probation Service. The Criminal Procedure Code stipulates that in the event of a settlement, a mediator trained by the State Probation Service may facilitate the reconciliation of the victim and those who have committed a criminal offense [18].

Regarding the development of restorative justice in the Netherlands, legislation, projects and pilot projects have been launched in that country; government experts, non-governmental organizations and experts on restorative justice in close cooperation, and restorative justice is gradually evolving in many regions. There are three main areas: restorative practices within civil society, restorative justice in criminal cases and restorative detention. As to the the national mediation policy in the Netherlands. then the current trend is to focus on one type of restorative justice - mediation in criminal proceedings [19, pp.117-133].

Victim-offender mediation is a process that provides an opportunity for the victim and the offender to meet safely and in a structured manner. Mediation can be direct or indirect. Indirect mediation, common in Flanders, is a process where information is transmitted by a mediator between the victim and the perpetrator. In direct mediation, the victim and the perpetrator meet in the presence of a mediator. When establishing adult mediation in Flanders, it was important that the initiators of these projects saw mediation as an introduction to a new paradigm of justice, the response to the crime should be focused on resolving the offense and supporting the victim. Importantly, adult mediation also involved serious crime in Flanders [20, pp.181-193].

If we discuss not only about European countries, but about Asian countries, then, for example, in Kazakhstan, the possibility is defined at the legislative level to use mediation in criminal cases. The Law "On Mediation" defines the features of mediation, which is conducted in the

course of criminal proceedings: the conclusion of a mediation agreement by the parties does not suspend the proceedings in a criminal case; the fact of participation in mediation cannot serve as proof of a guilty plea by a party to the proceedings who is a party to mediation; if one of the parties to the mediation is a minor, the participation of a teacher, psychologist or legal representative of such a person is mandatory; mediation in the course of criminal proceedings must be carried out within the time limits of pre-trial and court proceedings established by the criminal procedure law; refusal to sign an agreement on the settlement of the conflict may not worsen the position of the party to the proceedings who is a party to mediation; At the end of mediation conducted in the framework of criminal proceedings, the parties are obliged to immediately send to the body in charge of the criminal case, a signed agreement on the settlement of the conflict or a written notice of termination of mediation [16, pp.102-107].

The study of criminal mediation in African countries is also important for comparative analysis. The culture of African countries is unusual otherwise for European mentality. However, it is appropriate to note the phenomenon of restorative justice, mediation in this aspect. In African philosophy, there is the phenomenon of rebellion, which is combined with restorative justice and both aim to restore the victim and reintegrate the perpetrator into society. The African philosophy of ubuntu is about human dignity and respect for individual humanity. Dignity and respect are seen as central values of rebellion and restorative justice [21, pp.131-132].

### **Discussion**

If we analyze the experience of using mediation in criminal cases, we can see the dynamics that this kind of mediation originated in countries without a special law, primarily through pilot projects. And after years of practice, amendments to legislation or appropriate laws were passed. In addition, in the vast majority of countries, such pilot projects concerned juvenile offenders, and only then was mediation introduced between an adult offender and a victim. And this is expedient, because juvenile as a result of mediation have a chance to resocialize, to get on the right track, it also reduces the risk of recidivism.

According to research, offenders believe



that the following factors can prevent recidivism: the disclosure of a crime (for example, informing parents and the offence was reported to the authorities), the understanding that the crime is wrong, and the occurrence of police interrogation. Juvenile offenders mostly benefit from mediation, as it results in a sense of security, a sense of resolving the issue through discussion, and taking responsibility for the wrongdoing. In this way, mediation helps to prevent further crimes [7].

The study of foreign experience in the use of mediation as a form of restorative justice is important not only theoretically but also practically for countries that are just beginning to develop in this direction, such as Ukraine. Ukraine, like other European countries, is pursuing the implementation of mediation in criminal cases through the implementation of pilot projects in this area. A clear example is the pilot project "Recovery Program for Juveniles Suspected of Committing a Criminal Offense". The procedure for implementing the pilot project approved by joint order of the Ministry of Justice of Ukraine and the Prosecutor

General's Office of Ukraine (№172/5/10 of January 21, 2019), defines mediation in criminal cases is a voluntary, out-of-court procedure in which a juvenile suspected of committing a criminal offense and a victim, with the help of a mediator trying to resolve the conflict by concluding an agreement on the application of the Juvenile Recovery Program. in committing a criminal offense. The program is applied under four conditions: the presence of the injured party; committing a juvenile criminal offense or a felony for the first time; recognition of the fact of committing a criminal offense by a juvenile; consent of the juvenile and the victim to participate. If the juvenile compensates the damage and reconciles with the victim, he has a chance to be released from criminal liability. Such a decision is made by the court at the request of the prosecutor.

In Ukraine, mediators in the mediation pro-

cess between a juvenile offender and a victim are lawyers who is included in the Register of Advocates Providing Free Secondary Legal Aid and who has been trained. Lawyers were selected on a competitive basis. The lawyers who passed the competition were trained on the topic "Basic skills of a mediator in criminal cases". The mediator assists the parties in the so-called reconciliation and helps to find out what kind of compensation the victim wants. These lawyers must first be trained. The program is based on the principles of restorative justice and uses mediation to reconcile juvenile offenders with victims. An intermediary is involved. Initially, such a project was implemented in six regions, and from 2020 - throughout Ukraine, which will allow to bring thousands of children out of criminal prosecution.

### Conclusion

The implementation of comparative legal analysis is important for the study of world experience, knowledge of the phenomenon of mediation in criminal cases. The study of the development of mediation in criminal cases in a particular country provides an opportunity to learn from experience and develop recommendations for improving the legal regulation and practical application of mediation in dispute resolution. arising from the commission of a criminal offense. The dynamism and flexibility of the development of mediation in criminal cases in countries in the world makes it possible to understand that this institution is important, but its implementation depends on a number of factors: legal, cultural, political, etc.

From our analysis of mediation in criminal cases, it can be concluded that mediation in criminal cases operates where the state aims not only to punish the person who committed the crime without worrying about his human personality, but also to take into account the interests of individuals, who committed the criminal offense, and the victim, to promote resocialization, correction and prevention of repeated criminal offenses.

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