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Mediation in the Criminal Procedure of Western States: Comparative Legal Analysis

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Abstract

The purpose of this paper is to cover the theoretical component of the mediation mechanism, to determine its place in the criminal procedure, as well as to conduct a comparative analysis based on the practices of its functioning in various countries, namely the United States of America, Great Britain, Germany, France. The theoretical methodological approach, the formal legal methodological approach, the dogmatic methodological approach, the method of legal hermeneutics and others were used to conduct this study. The results of the study showed that at this stage the institution of mediation is quite young, but it is a fairly effective way of alternative dispute resolution; the study analysed the world practices of advanced states in the functioning of mediation, as well as their legislative norms that regulate this institution, considering the specific features of each of the legal systems.

Keywords: Restorative Justice; Criminal Procedural Legislation; Alternative Ways of Conflict Resolution; Criminal Law Conflict; World Practices.

Introduction

The development of the rule of law and the establishment of civil society require a sufficient level of legal culture, without which the fundamental values and principles of law cannot be realised. Such principles include the rule of law, democracy, recognition of a person as the highest social value, as well as the guarantee of their rights and freedoms (Berger et al., 2019). The problem of overcoming the current crisis in modern society lies not only in the resolution of economic and political aspects, but also in the achievement of social concordance, which will ensure stability, harmony, and constancy in the development of relations. The observance of moral principles serves not only as the foundation of

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law, but also as the basis of the legal culture of society (Golovko, 2009). On the one hand, conflict is one of the types of social relations that occurs between subjects. This institution can perform constructive and destructive functions (Lee et al., 2019). Constructively, conflict can manifest itself as a kind of catalyst that will contribute to the development of society and determine new options for its development, while destructively it will act as a factor that adversely affects the stability and integrity of modern society (Duursma, 2021).

Any type of conflict comprises opposing interests of the parties, which contributes to the creation of motivation for the subjects to make decisions and display behaviour that is directed against each other. The sources of the conflict are in all social relations and various forms of behaviour of subjects, based on which the behaviour of the participants in the conflict is subject to statutory regulation (Kipane et al., 2023; Zhomartkyzy, 2023). The state ensures the implementation of conflict resolution but cannot do so to a full extent. Therefore, the possibility of providing self-regulation, assessing one's personal interests, requirements, and their compatibility with the interests and requirements of the opponent determines the search for an alternative method to resolve conflict situations, which provides a compromise solution, reduces the confrontation of the parties and encourages them to mutual understanding (Deineha, 2022; Sharyi et al., 2023). In this case, all responsibility falls on the parties to the conflict and requires their critical understanding of both positions of the conflict (Golovko, 2017). One of these progressive ways of resolving conflict situations and resolving legal disputes is the mediation procedure. The world practices confirm the wide possibilities of mediation in resolving legal conflicts at the national and international levels. This institution, along with other alternative ways to resolve conflicts, constitutes a sign of a highly developed civil society, a level of legal culture, and one of the key signs of democracy (Martin and Roberts, 2021). This is an indicator of society's readiness for communication, search for compromise and interaction.

Based on the world practices of mediation, this institution represents a substantial change in social, political, and state development, and it strengthens the position of private law in international doctrine. On the other hand, there may also be problematic aspects that may reduce the effectiveness of the mediation procedure in resolving criminal procedural disputes, which manifests itself in the form of shortcomings of the state's judicial systems and congestion of judicial instances in alternative dispute resolution (Memon et al., 2018). Proceeding from the above, the issue of a more in-depth investigation of the mediation institution, its capabilities in dispute resolution, as well as the formulation of theoretical and practical aspects, which will allow evaluating the effectiveness of this alternative

method, is of particular importance. Therefore, important tasks in conducting this study are the analysis of the theoretical component of the mediation institution, which will provide an opportunity to understand the proper functioning of the mechanism. Next, a comparative legal analysis should be carried out, which includes the consideration of the implementation mechanism of mediation in the advanced countries of the world, namely the United States of America (USA), the United Kingdom (UK), Germany, and France. This provides an opportunity to highlight the features of the functioning of the institution under study in various states. In addition, one of the tasks is to highlight the comparison of the advantages and disadvantages of the development of alternative dispute resolution in criminal disputes in comparison with the conventional one.

Materials and Methods

The study of mediation in criminal proceedings and the analysis of the functioning of this industry in the practice of Western states was performed using various methodological approaches, which enabled a more detailed investigation of the subject under study. First, a theoretical methodological approach is of special importance, as it helps to cover the definition of "mediation", as well as to highlight its inherent attributes and features and principles of implementing this procedure in criminal proceedings. The deduction method allows describing the elements inherent in it based on a general idea of the mediation mechanism. In turn, the method of induction based on the provided axioms allows covering the general essence of the functioning of the mediation mechanism in criminal proceedings. Formally, the legal methodological approach allows determining the principles of mediation based on which this sphere can function and perform the tasks assigned to it. The dogmatic methodological approach allows defining the mechanism of mediation in criminal proceedings as a set of fundamental rules, regulations, means, and methods of legal regulation.

The method of legal hermeneutics provides an opportunity to break down the specific features of mediation in the criminal procedure of various states, namely the United States, the United Kingdom, and other states under study. Comparative legal analysis highlights the advantages and disadvantages in the functioning of the mechanism under study, based on the investigation of the international practices of advanced countries of the world. The synergetic methodological approach, in turn, will help to highlight the advantages of mediation in the criminal procedure as a whole and consider this institution as a promising method of alternative dispute resolution. The systematic method defines mediation as a system of interconnected elements that functions through the combination of principles and features of conducting this process in criminal

proceedings. The method of logical analysis helps in highlighting the advantages of mediation over conventional criminal proceedings, as well as the prospects for further development of the mediation procedure in criminal proceedings, based on the theoretical information obtained and its practical application in the Western states.

Thus, this study was carried out in several stages. The first stage of this study is theoretical, covering the definition of mediation, its inherent features and the principles of its functioning; this allows analysing the mechanism of mediation, which will help in establishing an idea of the proper functioning of this procedure. The second stage includes a comparative legal analysis, which is based on the study of mediation practices in the criminal procedure of various advanced states, such as the USA, Great Britain, Germany, and France. This comparative legal analysis can highlight the advantages and disadvantages of this procedure in different states and highlight which of the models operates according to the established principles of mediation. The third stage covers the benefits of further development of the mediation procedure and highlights the place of the latter in the criminal procedure.

Results and Discussion

The study of the issue of conflictology is quite relevant all over the world. Mediation occupies a special place among the forms of conflict resolution. As a term, "mediation" should be interpreted as a procedure for reconciliation of conflicting parties through their entry into negotiations involving a third party, namely a mediator, who helps resolve the dispute (Stobbe and Bagshaw, 2018). Proceeding from this interpretation, mediation constitutes a way to a meaningful dispute resolution, which is based on the search for consensus of the conflicting parties. Considering the approaches to the investigation of mediation in more detail, it can also be interpreted as an alternative way to resolve the conflict. An alternative method of conflict resolution should be understood as a procedure that aims to resolve the differences between the two parties to the conflict, and is based on equality and voluntariness, taking place outside the state judicial system (Baimukhametova, 2022). The legal culture of society and legal awareness, as well as the legal regulation of mediation, the system of mediation bodies and the training of mediation specialists are interrelated elements of the alternative dispute resolution system. The basis for the implementation of the mediation procedure is the general principles of alternative dispute resolution. In addition, there are also specific principles for ensuring the functioning of the mediation institution. In general, the principles of mediation can be divided into general legal, intersectoral, and special (Khan and Baimukhametova, 2022).

Characterising the general legal principles of mediation, they have the property of influencing all branches of law and its institutions, including the institution of mediation. Such principles should include social justice, humanism, democracy, legality, priority of human rights and freedoms, the rule of law (Tolomushov, 2021; Magauiya et al., 2023). These general legal principles form the moral basis for the development and functioning of any legal mechanisms. The intersectoral principles determine the basis of the mediation procedure and the specific features of the litigation within the framework of civil proceedings. The category of these principles includes the principles of equality, dispositivity, admissibility of evidence, and affiliation (Karibayeva et al., 2021; Shchukin and Pankina, 2021). As mentioned earlier, there are also characteristic special principles for the implementation of the mediation procedure, which should be opposed to the principles of some principles of civil procedure (Horislavska, 2023). This group of principles comprises voluntariness, neutrality of the mediator and its impartiality, cooperation of the parties, flexibility of the procedure and confidentiality. A distinctive feature of the principle of equality in the mediation procedure is that the powers of the mediator are of a different nature, since it must refrain from direct interference in the negotiation process (Lee and Greig, 2019). In general, the principle of equality implies equality of citizens before the law and the court. When implementing the mediation procedure, the principle of equality lies in the equality of the parties to take part in the procedure, to refuse it, when choosing a mediator, presenting it with doubts regarding its impartiality, as well as when providing an assessment of the mutual acceptability of the dispute resolution agreement.

When analysing the content of the dispositivity principle in the mediation procedure, it lies in the fact that participants have the right both to carry out all procedural actions at their discretion, and to identify several problematic issues to be discussed during the mediation procedure, to form or change the subject of the procedure without restrictions (Khan and Baimukhametova, 2022). The parties to the dispute choose a mediator who will help resolve the conflict and achieve mutual understanding between the parties at different stages of the procedure and have the right to decide on the involvement of third parties or experts who would help clarify the circumstances of the case (Lindsay et al., 2021). It is also important that the parties can influence the mediator to perform its functions according to the principles of impartiality and independence. It is possible to implement this through a statement of recusal or refusal of mediation when one of the parties has doubts regarding the mediator's objectivity. The principle of voluntariness is a kind of continuation of the dispositivity principle, which is inherent only in some types of alternative dispute resolution. The principle of

voluntariness is that a prerequisite for the initiation of mediation is the voluntary consent of the participants to conduct and take part in it. In addition, the consent of the participants serves as a prerequisite for performing the functions of a mediator (Mehrl and Bohmelt, 2021). Notably, the content of this principle includes the competence of the parties to the conflict to make any decisions contributing to the resolution of the conflict only by mutual consent. The implementation of this principle is the mediator's responsibility, and therefore, at the initial stage of the mediation procedure, the mediator must establish the fact of the participants' voluntary initiative and personal expression of will to take part in this procedure.

The principle of the mediator's neutrality requires it to be equal regarding the parties to the conflict, to provide them with opportunities to explain their position and take care of the interests of each of the parties. Impartiality constitutes the mediator's lack of interest in the subject matter of the dispute (Islamiyati et al., 2021). Thus, the principle of the mediator's neutrality and impartiality makes provision that only a disinterested subject has the right to take part in the dispute. The mediator can assist the parties to the dispute to reach consensus only in a way that ensures that there are no grounds for any doubts about its independence and tries to consider the interests of all parties to the dispute in the same mediation. One of the inherent elements for this is the inability of the mediator to express its opinion regarding the subject of the dispute, the legal or factual situation of the party. In addition, the principle of the mediator's neutrality and impartiality means that if the mediator realises that it cannot remain impartial for any reason, it must immediately refuse to take part in the further conduct of the mediation procedure (Khan and Baimukhametova, 2022). The mediator is also obliged to inform the parties about the circumstances that may become an obstacle to its participation as a mediator. Some states legislatively stipulate that if there are grounds to doubt the impartiality of the mediator or its neutrality, the parties have the right to request its recusal. However, in cases where the recusal procedure is not regulated by law, any of the parties has the right to express doubts about the mediator's neutrality or impartiality, and to refuse its involvement in the mediation procedure (Odilqoriev, 2022).

The principle of confidentiality is that the mediator has no right to transfer the information received from the parties to third parties or to the other party to the conflict if such information was received by the mediator during an individual conversation with one of the parties. The court has no right to involve a mediator as a witness to obtain information that has become known to the mediator during the mediation procedure. An important fact is that layers, who represented the parties to the dispute during the mediation procedure, if necessary, also have the

right to refuse to testify in court (Khan and Baimukhametova, 2022). No one except the mediation participants, their representatives, a lawyer, and a mediator has the right to be present during the mediation process, and the mediator's notes, which contain a statement of the positions of the participants, must be either subject to non-disclosure or destroyed. Before starting the mediation procedure, the mediator is obliged to explain to the parties the essence of this principle. The mediator must also notify the mediation participants that the protocol of the mediation procedure will not contain confidential information, and the document will be accessible to third parties only in the presence of respective consent given by the mediation participants to resolve this dispute, provided that such access is necessary (Lee et al., 2019).

It is also worth mentioning such principles as the principle of stimulation and cooperation. Even though they are not prescribed in international regulations, their observance allows realising the main purpose of the mediation procedure, namely mutually beneficial dispute resolution. The incentive principle is defined as a principle that implies encouraging the parties to resolve the dispute without the intervention of state bodies by providing benefits and compensations (Shariy, 2019; Duursma, 2021). Considering the practice of many states, the involvement of the parties in the mediation procedure depends on its prevalence at the national level. Measures that have a positive impact on this lie in obtaining benefits and subsidies through mediation; negative incentive measures in this case include imposing an obligation to pay all court costs on that party of the dispute which refused to take part in the mediation procedure and preferred to conduct the trial.

The importance of observing the principle of cooperation at all stages of the mediation procedure is to find and reach consensus for each of the parties, considering their interests and needs. It takes place even before the start of mediation, since this principle precedes the conclusion by the participants of an agreement on the conduct of this procedure, the choice of a mediator by the parties, the determination of the location of negotiations, the provision of materials to the mediator that will implement the correctness of understanding each of the positions of both sides and the essence of the subject of the dispute (Khan and Baimukhametova, 2022). At the stage of negotiations, this principle is characterised by the fact that each of the parties is obliged to behave ethically, remain calm, listen carefully to the position and proposals of the parties, express their proposals regarding the resolution of the dispute, etc. Cooperation continues even after the conclusion of an agreement on dispute resolution. This is explained by the fact that the mediation procedure is fully successful only if the parties fully perform all the terms and conditions of the agreement in good faith. The advantage of mediation also lies in the fact that, unlike conventional litigation, it

does not have a loser and a winner, since the parties have the opportunity to be on equal terms and reconcile (Golovko, 2017).

In general, some researchers distinguish other principles of mediation. They include the principle of respect for the dignity of all participants in the procedure, consideration of the interests of both parties, and the autonomy of the conflict, which means the private nature of the dispute and the fact that the resolution of the dispute is entrusted only to the parties to the conflict.Mediation as one of the ways of alternative dispute resolution has long been used to resolve a wide range of disputes. The concept of mediation is prescribed in the Recommendations of the Committee of Ministers of the Council of Europe No. R (99) 19 "On mediation in criminal cases" (1999). Mediation is interpreted as a procedure where the victim and the accusing party are offered the opportunity to resolve the dispute on a voluntary basis through a third party and eliminate its consequences that arose as a result of the commission of an illegal act. Mediation became especially popular in foreign practice in the 1970s and became firmly entrenched in the national legislation of many countries. Different types of this procedure allow conflicts to be resolved at any stage of the criminal procedure, i.e., both before the initiation of a criminal case, after its initiation, or after sentencing.

The practices of Great Britain are significant in the development of the mediation institution. Currently, there is an organisation called Mediation of Great Britain, whose main task is to coordinate the practice of alternative dispute resolution in criminal and civil disputes in all regions of the state. Currently, two types of mediation are being implemented in the UK, namely, police and judicial (Chochia et al., 2018; Mehrl and Bohmelt, 2021). Analysing the judicial mediation of the United Kingdom, it is used for all categories of disputes arising, it is applied after the initiation of a criminal case and before the transfer of a criminal case to a judicial instance, when information is collected on the identity of the accused. During such a period, probation becomes the arbitrator between the victim and the accused party. If the accused party admits its guilt and agrees to compensate for the damage caused, a corresponding agreement will be signed. Further, in court proceedings, authorised individuals will consider the results of mediation for sentencing.

Highlighting this type of mediation as a police officer, it was originally created to resolve disputes over criminal acts committed by minors. The essence of this mediation is that before a criminal case is initiated, police officers have the right to transfer materials to the mediation service (Lutsenko, 2017; Shapoval et al., 2018). The arbitrator negotiates with the victim and the accused party and seeks a mutually beneficial resolution of the situation for both parties (Lindsay et al., 2021). The mediator in this case tries to reconcile the parties and smooth out

the consequences of the dispute. Based on the results of this procedure, the accused party undertakes to compensate the injured party for the damage caused. The ways of correcting the damages are compensation for harm by one's labour, monetary compensation, or an apology in oral or written form. During the mediation procedure, a meeting of all three participants, that is, the victim, the accused, and the mediator in person is possible, but not mandatory. This has a positive aspect of influencing the victim and the accused parties, as it provides an opportunity to save them from a long trial and aggravation of the relationship between them. If the mediation procedure is successful, the police will provide a waiver of criminal prosecution, but otherwise the criminal case will be transferred to the court.

The mediation procedure in Germany is prescribed in the German Code of Criminal Procedure (1879) and the German law "On the support of mediation and other procedures for out-of-court settlement of conflicts" (2012). These legal norms regulate the conduct of the mediation procedure at any stage of criminal proceedings. The judicial instance and the prosecutor's office establish the necessary conditions for the accused and the injured parties and their availability for the implementation of this procedure, and then transfer the necessary materials to the mediation service. When conducting a criminal trial, mediation may become the basis for the termination of proceedings in a criminal case with the consent of the prosecutor, the court, and the injured party, or the basis for refusing criminal prosecution. Upon receipt of reconciliation of the parties during the mediation procedure, this agreement is entered into the protocol and transmitted further to the judicial authority that is considering the case, and in case of refusal, the materials will be returned to the judicial authority and the criminal case will be considered further. The practices of France in the establishment and development of the mediation institution is quite interesting. First, the inclusion of the regulation of the mediation procedure in the Code of Criminal Procedure of France (Golovko, 1996) has not been considered for a long time. This was because the legislator considered this procedure insufficiently suitable for criminal proceedings. At present, this process is implemented through the decision of the prosecutor when considering a criminal case on the initiation of mediation procedure. Subject to an agreement between the victim and the accused parties, the case is transferred to an authorised organisation for reconciliation of the parties, such as, for example, the Federal Law Association or the "National Federation for Victim Assistance" (Memon et al., 2018). Thus, the specific feature of mediation in France is that the mediator will be a specialised organisation.

One of the first attempts to conduct alternative dispute resolution with a conciliation procedure between the victim and the accused party were made in the late 1970s in the United States. Some programmes have been developed by public organisations. These include the Victim-Offender Mediation Programs (2000). The successful implementation of this programme led to the fact that these programmes later worked in half of the states. Notably, different states have their special programmes for the reconciliation of the parties to a criminal dispute involving a mediator. They are often similar, since they are guided by the Uniform Mediation Act (2001) as a model for creating a programme, but they have their individual, inherent features. For example, in Ohio, there are private mediation services controlled by the state judicial system and deal with criminal cases. Most of these criminal cases are handled by these services outside the judicial order, but there are cases when, at the request of a judge or lawyer, criminal cases are sent to private mediation services. The state of North Carolina has a district criminal court mediation programme. It makes provision for mediation in court and constitutes an alternative way of resolving disputes outside of court proceedings, but not criminal proceedings in general (Martin and Roberts, 2021). Mediation procedures are conducted in criminal cases of diverse categories, but subject to the discretion of the prosecutor or judge on the benefits of this procedure.

In modern conditions, the conventional criminal procedure does not always allow successfully resolving criminal law disputes. It has several disadvantages. Foremost, this is a strict framework of criminal proceedings, which are based on the comparison of the committed illegal act and its interpretation. Mediation considers the crime as a process that has a past, present, and future, and the admission of guilt by the accused party as a process that can be solved from the standpoint of society. It is further noted that, unlike conventional criminal proceedings, mediation is based on the necessary environment that allows both sides to express their position and represent interests, which allow achieving a mutually beneficial solution for both sides. The next difference between conventional legal proceedings and mediation procedure is that the latter provides such advantages as independent participation in the development of a decision, the voluntary nature of the procedure and the execution of its decision, the right to choose a mediator and minimum formalities in the implementation of mediation (Spytska, 2022).

According to Part 1, Article 10 of the Fundamental Decision of the Council of the European Union “On the place of crime victims in criminal proceedings” (2001), each member country should try to facilitate mediation in its implementation for those criminal disputes that it deems appropriate for the application of such measures. This procedure satisfies the interests of the parties

first, and ultimately – the interests of society since mediation allows restoring social relations. Mediation procedure can also be used after the end of the proceedings, even for particularly serious crimes and in prison conditions (Kubarieva, 2023). However, such a wide application of conciliation procedures can be fraught with consequences in terms of private and general prevention, as well as from the standpoint of protecting the rights of the victim with the manifestation of pressure on it and inclination to reconciliation (Tolomushov, 2021). In general, the mediation procedure, as practice shows, radically changes the criminal justice system. The possibility of real protection of the rights and legitimate interests of both parties is ensured, repressiveness in decision-making disappears, and restoration of the violated position of the injured party is achieved. Therewith, the classical model of conducting criminal proceedings will not be replaced, but improved in its effectiveness, provided that the principles of impartiality and neutrality of the mediator for conducting the mediation procedure are observed.

Conclusions

Having conducted a study on mediation and its comparative legal analysis, based on the foreign practices, it was established that the activities of this institution allow for the realisation of the interests of the victim and the accused parties to decide on a criminal dispute, which will be based on their positions. For the mediation institution to function effectively, the question of the principles that allow it to be implemented becomes of particular importance. Apart from intersectoral and general legal principles, the study considered the special principles of this institution. The category of this group of principles contains the principle of neutrality and impartiality of the mediator, the principle of dispositivity, the principle of voluntariness, the principle of stimulation and cooperation, as well as the principle of confidentiality. The implementation of all special principles allows the mediation procedure to implement its goals and objectives. The comparative legal analysis lied in investigating the practices of mediation in the leading countries of the world, namely, in studying the features of this procedure in the USA, the United Kingdom, France, and Germany.

The United States is characterised by the operation of various programmes for the reconciliation of the parties to a criminal dispute involving a mediator in different states; to create a separate programme, all states are guided by a Uniform Mediation Act. There are two types of mediation in the UK, namely judicial and police mediation, each of which is described by the specific features of such a procedure. The practices of Germany demonstrate that the prosecutor's office and the court establish the necessary conditions and availability for both parties to

conduct the mediation procedure, and then transfer the necessary materials to the mediation service; in case of unsuccessful mediation procedure, the criminal case is transferred back to the authorised bodies. France is distinguished by the fact that the mediation can only be initiated through the prosecutor's decision on the need for this procedure when considering a criminal case; it is also important that only a specialised organisation can act as a mediator. The result of mediation is a mediation agreement, which is concluded based on the results of this procedure and is aimed at resolving a criminal dispute based on the interests of both parties. Thus, both sides find the best option for resolving the dispute from the standpoint of the realisation of their interests, they are not limited in the scope of legal requirements and develop a mechanism for its execution. This allows realising not only the interests of the victim and the accused parties, but also the entire society in general.

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